

Suing Goliath

The struggle for justice in cases of corporate abuse abroad



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Foreign legal liability of multinational corporations

Litigation in the Netherlands

Channa Samkalden

- **Milieudefensie & others v Royal Dutch Shell PLC & Shell Petroleum Development Company Ltd (SPDC)**
 - Re: Oil pollution Nigeria
 - State: Court of Appeal The Hague, judgment 2021
- **Kiobel & ors v Royal Dutch Shell & SPDC**
 - Re: liability for (enabling) human rights violations in Ogoniland, Nigeria
 - State: pending, interim judgment District Court of The Hague, 2019
- **Caceres & ors v Dutch Development Bank FMO**
 - Re: liability for (enabling) human rights violations in Honduras
 - Pending
- **Both ENDS v Boskalis**
 - Re: Duty to disclose information on dredging activities & negative impacts in Indonesia
 - Summary judgment District Court of Rotterdam 2020 (denied)

- Judgment Court of Appeal The Hague of 29 January 2021
 - <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2021:133>
 - <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2021:132>
(in Dutch, English translation expected)
- Parties:
 - Claimants: 4 individual Nigerian claimants & Milieudefensie (FoE The Netherlands) on behalf of all other local victims of 3 oil spills in the Niger Delta (representative action)
 - Defendants: Dutch parent company + previous parent companies & Nigerian subsidiary
- Claims:
 - Declaration of law on liability // compensation for individual farmers
 - Injunction for precautionary measures and remediation
- Result:
 - Nigerian subsidiary held liable for oil spills
 - Subsidiary & parent company ordered to install a leak detection system on local pipeline

Complications / potential barriers to justice

- Jurisdiction
- Applicability of foreign law & concurrence of legal systems
- Standing (& representative action)
- Time limitations
- (Lack of) disclosure & burden of proof
- Funding

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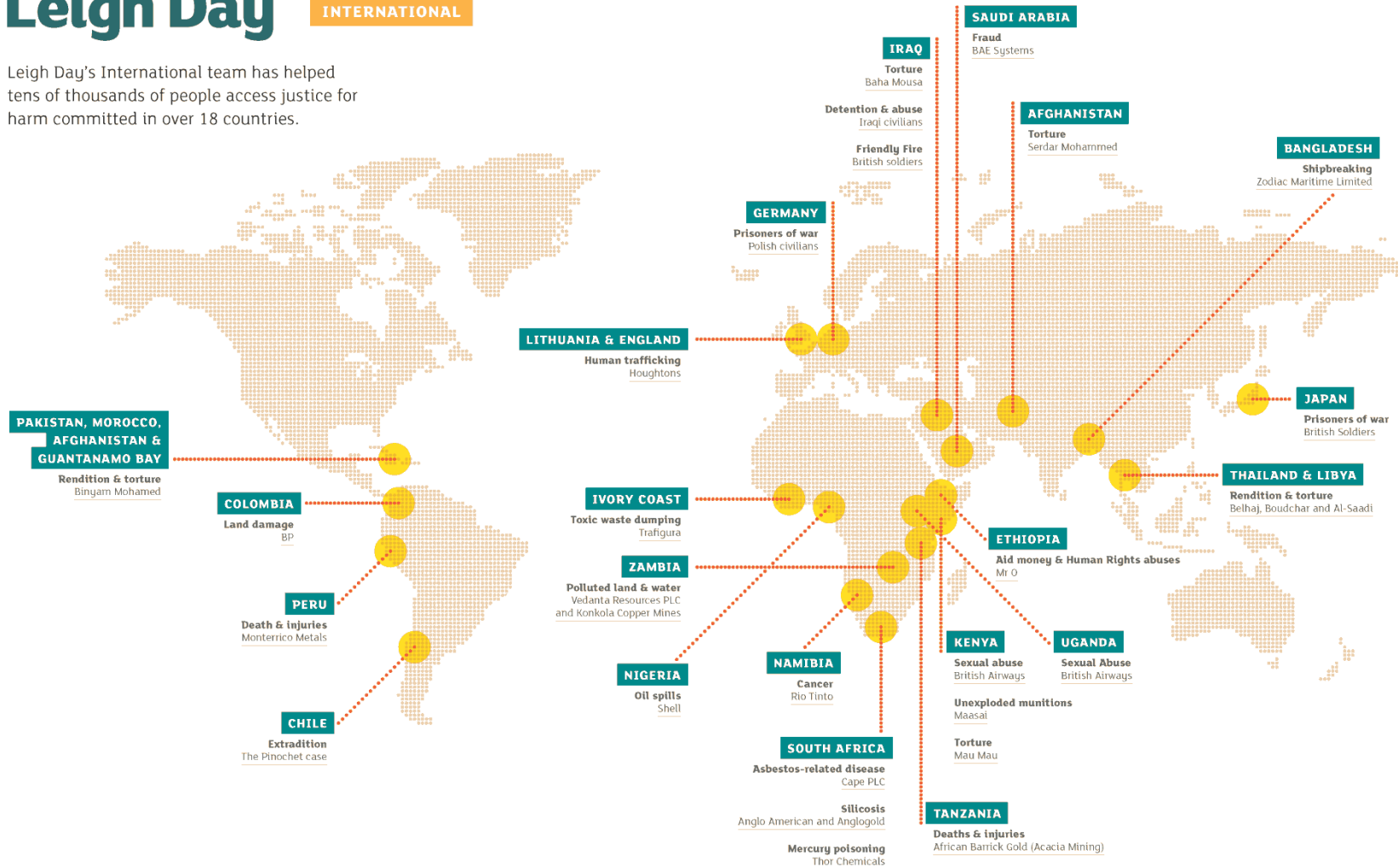
Leigh Day

Litigating business and human rights in the UK

*Parent Company Liability –
the emerging Supreme
Court jurisprudence*

Leigh Day INTERNATIONAL

Leigh Day's International team has helped tens of thousands of people access justice for harm committed in over 18 countries.



Recent Parent Company Cases.

AAA v. Unilever plc [2018] – Kenyan Tea Plantations

Lungowe v Vedanta plc [2019] – Zambia Copper Mine

Rihan v Ernst & Young [2021] – conflict minerals audit.

Okbapi v Royal Dutch Shell plc [2021] – Oil spill clean-up

The 4 Routes to Parent Company liability at common law

1. Taking over the **management** or joint management of the relevant activity.
2. Providing defective **advice** and/or promulgating **defective group-wide policies**.
3. Taking steps to **implement** group-wide policies.
4. **Holding out** that it exercises a particular degree of supervision and control of a subsidiary (liability by omission).



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The Barcarena Case

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Who are the Claimants and the Defendants?

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Why are the Claimants suing?

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Why was the claim filed in the Netherlands?

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What are the Claimants seeking?



WHO ARE THE CLAIMANTS?

❖ **Cainquiama**

a Brazilian association founded in 2015 by members of the traditional communities, with 11,356 members who represent the interests and rights of over 40,000 people (the members' families).

❖ **9 individuals**

who are part of the indigenous and *quilombola* communities and are residents to the area affected by the activities of the Norsk's Brazilian subsidiaries.

WHO ARE THE DEFENDANTS?

- ❖ Norsk Hydro ASA
- ❖ Norwegian Government's Pension Fund – The Folketrygdfondet
- ❖ Norsk Hydro Holland BV
- ❖ Hydro Aluminium Netherlands BV
- ❖ Hydro Aluminium Brasil Investment BV
- ❖ Hydro Alunorte BV
- ❖ Hydro Albras BV
- ❖ Hydro Paragominas BV



WHY ARE THE CLAIMANTS SUING?

- ❖ The Defendants are liable under Brazilian environmental law as "indirect polluters". This definition leads to a direct, joint and several liability for the damage caused in Brazil by the Brazilian subsidiaries of the Norsk Hydro Group. In addition, they are liable under Brazilian Corporate law for breaching their fiduciary duties as controlling shareholders of the Brazilian subsidiaries
- ❖ The industrial activities of the Brazilian subsidiaries of the Norsk Hydro Group were subject to the condition that an ecological reserve would be created. The companies did not comply with this condition and built two reservoirs for residues resulting from the aluminium production instead, causing forest degradation and water contamination
- ❖ The companies also laid clandestine pipelines, discharging toxic waste (without filtering) directly into the environment, causing various diseases that can be attributed to intoxication by heavy metals such as lead, manganese and aluminium - particularly skin and stomach conditions, chronic pain, hair loss and loss of sight; damaging the environment in a way that prevents the traditional communities and people that live in the area to use it for their livelihood



WHY WAS THE CLAIM FILED IN THE NETHERLANDS?

- ❖ Brazilian law provides for a direct cause of action against indirect polluters for damage caused because of environmental wrongdoings and/or controlling shareholders for a breach of its fiduciary duties whilst controlling the company
- ❖ It is a prerogative of the Claimants to choose who they wish to sue
- ❖ Most of the Defendants are domiciled in the NL and for those who are not, it's expedient that they are sued in the NL
- ❖ Access to justice in Brazil is hindered because of the length that judicial proceedings may take



WHAT ARE THE CLAIMANTS SEEKING?

- ❖ Declaratory relief recognising that the Defendants acted unlawfully towards the Claimants
- ❖ Compensation for the damage caused to the Claimants

Thank you!



Pedro Martins

Partner at PGMBM

Changing the world one case at a time!

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The case of *Arica Victims v Boliden Mineral* in Swedish courts 2013-2019

**“Suing Goliath:
The Struggle for Justice in
Corporate Abuse Abroad”
Webinar, 3 June 2021**

Jonas Ebbesson
Professor Stockholm University
Counsel for *Arica Victims*



Boliden Mineral's shipment of toxic mining wastes to Arica – I

- Shipped from Rönnskärsverken in northern Sweden to Arica in northern Chile 1984-85
- Three shipments
- In all > 20,000 metric tonnes, containing 17.5 percent arsenic, 4.5 percent lead, mercury, cadmium...
- Without any approval from any Swedish authority



Boliden Mineral's shipment of toxic mining wastes to Arica – II

- From Boliden's plant at Rönnskärsverken in northern Sweden – where today the same kind of waste is put in a 350 m deep repository.



Boliden Mineral's shipment of toxic mining wastes to Arica – III

- To Promel's plant in Arica in northern Chile



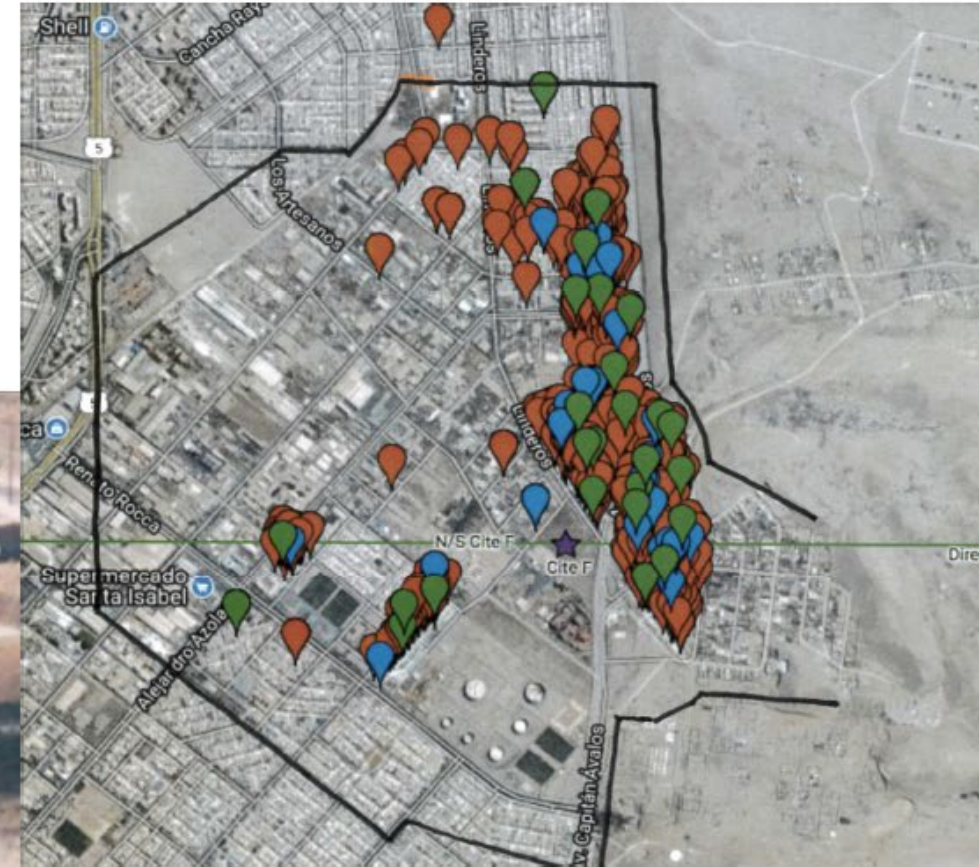
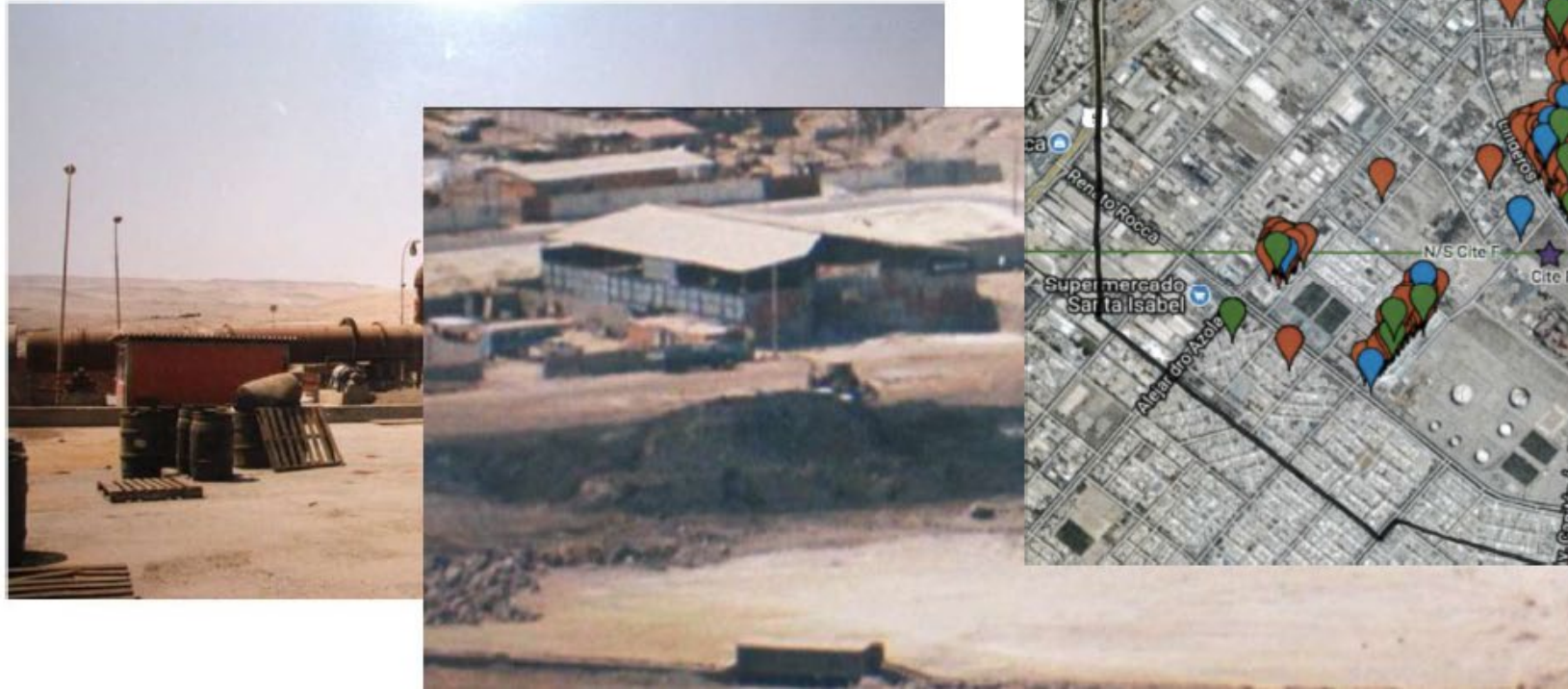
Boliden Mineral's shipment of toxic mining wastes to Arica – III

- To Promel's plant in Arica in northern Chile



Boliden Mineral's shipment of toxic mining wastes to Arica – III

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Boliden Mineral's shipment of toxic mining wastes to Arica – III

- To Promel's plant in Arica in northern Chile



But: the toxic waste is still there.

Arica Victims v Boliden Mineral – I

- Arica Victims sued Boliden Mineral for damage for about 800 individuals in Skellefteå District Court, Sweden, in 2013
- Claims based on Supreme Court Ruling in Chile
- Medical records on arsenic for each individual
- The trial:
 - District Court 2013-17
 - Court of Appeal 2018-19
 - Supreme Court 2019

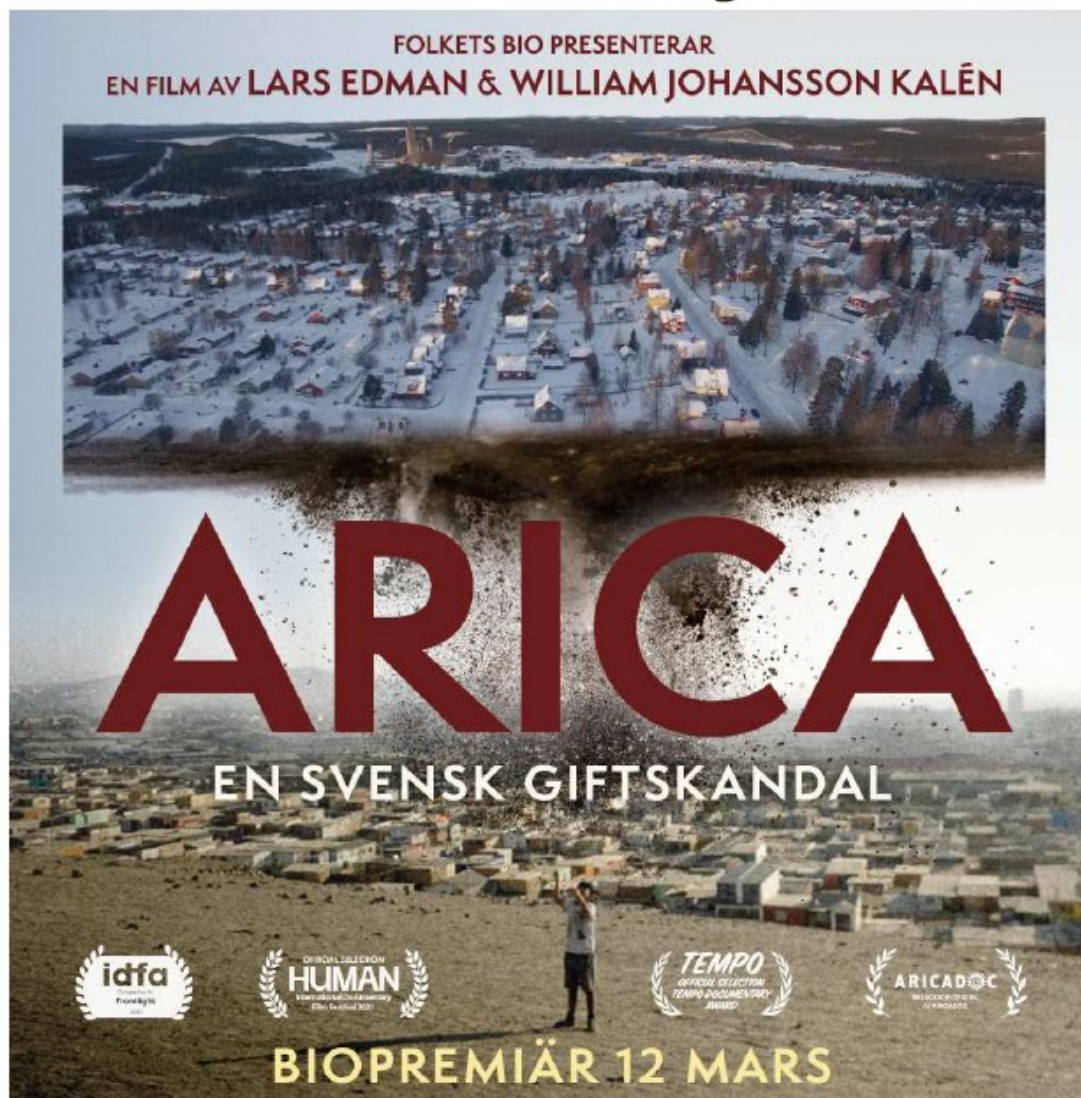


Arica Victims v Boliden Mineral – II

- *Jurisdiction*: Why Swedish Court? Boliden had no assets in Chile, and not possible to enforce Chilean ruling in Sweden
- *Choice of law*: Arica Victims requested Chilean law mainly due to time limits under Swedish law
- *The final ruling*:
 - Swedish law was applied
 - Claims were ***time-barred***
- Thus, Arica Victims lost the case
- Yet, the court *never* concluded that Boliden did not cause the harm



“Arica” – the film



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**EUROPEAN CENTER FOR
CONSTITUTIONAL AND
HUMAN RIGHTS**



Jabbir et al v. KiK
Supply Chain Liability Claim

Miriam Saage-Maaß

EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



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Background

- On 11 September 2012 a textile factory Ali Enterprise in Karachi caught fire
- 258 dead and 32 injured
- Deadliest factory fire in Pakistan's history
- The main buyer was German textile retailer KiK Textil- und Non-Food GmbH
- KiK has acknowledged purchasing 70% of the total goods produced at the factory
- Experts and investigators believe KiK purchased up to 90% of the production at Ali Enterprise

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Fire Safety

- No working fire alarms
 - Emergency exits were locked or useless – no outside staircase
 - Windows were barred with metal
 - Stairways were blocked
 - Lack of fire extinguishers
-
- An architectural analysis of the fire uncovers the many ways in which building design and management decisions not only failed to prevent injury and casualties, but in fact augmented the death toll.

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Lawsuit filed in March 2015

- The case was filed on behalf of four affectees at Landgericht Dortmund
- Each plaintiff claimed 30,000 Euro for pain and suffering

August 2016

- Court declared it had jurisdiction over the case
- Court granted legal aid to the claimants to cover the costs

January 2019

- case is dismissed on the ground that statute of limitations had run out

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Admissibility of the case:

Article 4 of the Brussels I Regulation + § 17 ZPO (German Civil Procedural Code)

Applicable Law:

Rome II Art. 4 – Pakistani Tort Law

Negligence Claim:

From English Case Law (Chandler case and others)

Duty of Care of KiK towards the workers employed by Ali Enterprises

- Duty of care is established in the following circumstances
 - i. The harm that occurred was foreseeable
 - ii. There was sufficient proximity between parties
 - iii. The imposition of duty can be seen as fair, just, and reasonable
- Breach of duty
 - Unsafe working conditions
- Harm
 - Causality between the breach of duty and the harm – sine qua non

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Challenges

Statute of Limitations

Legal Standing: No Group or Class Action

Supply Chain Liability Unclear

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*Sherpa

Holding Casino to account for deforestation and human rights violations in the Amazon



Lucie Chatelain
Advocacy and Litigation Officer
Sherpa

Suing Goliath: The struggle for justice in cases of corporate abuse abroad
3 June 2021

Facts

- Cattle ranching in Brazil and Colombia linked to deforestation, violations of indigenous peoples' rights and forced labour
- Complexity of Casino's beef supply chain in Brazil: indirect and direct farms supplying slaughterhouses, which in turn supply GPA (Casino's subsidiary)
- Casino does not disclose the names of its 39 direct suppliers
- Research based on a sample of beef products sold in GPA supermarket enabled us to identify 14 slaughterhouses supplying GPA
- Investigations conducted by the Centre for Climate Crime Analysis (CCCA) for the case found that 3 of these slaughterhouses sourced beef from at least **592 farms** responsible with deforestation and/or encroaching on protected indigenous territories, as well as cases of forced labour

Legal proceedings

- **Claimants**

- 7 civil society organisations
- 4 indigenous representative organisations from Brazilian and Colombian Amazon (COIAB, FEPIPA, FEPOIMT, OPIAC)

- **Legal basis**

- Law on the duty of vigilance (Articles L. 225-102-4 and L. 225-102-5 of the French Commercial Code)

- **Proceedings**

- 21 September 2020: Formal notice sent to Casino
- December 2020: Casino's answer to the formal notice
- 3 March 2021: Lawsuit filed with Saint-Etienne Civil Court

- **Claims**

- Compel Casino to comply with its duty of vigilance, i.e. to exclude from its supply chain beef sourced from farms responsible with deforestation, indigenous rights violations and forced labour (judicial injunction)
- Damages

Potential lessons for a European duty of vigilance

- Including both human rights and the environment
- Defining the duty of vigilance (effective prevention measures, as opposed to internal risk-management processes)
- Defining the scope of the duty of vigilance: addressing the realities of global value chains
- Including specific civil liability provisions

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Suing Goliath

**Testing the French law
on duty of vigilance:
the Total Uganda case**

*Juliette Renaud
Friends of the Earth France*

The Total Uganda case: facts

- **Total is developing a mega-oil project in Uganda and Tanzania**, in the heart of the Murchison Falls National Park. Two projects: Tilenga (400 oils wells and related infrastructures) and EACOP (giant pipeline). Total is the main operator.
- **These projects are implemented by two subsidiaries** - Total EP Uganda and Total East Africa Midstream – **and their subcontractors** – including Atacama Consulting and Newplan.
- These projects present **huge environmental and climate risks**, and imply the **eviction of more than 100 000 people**. They are intimidated into signing for low compensation (for their lands and crops), and the company is stopping them from using their land before they receive the compensation.



The court case



- Led by Friends of the Earth France, Survie and 4 Ugandan CSOs : AFIEGO, CRED, NAPE/Friends of the Earth Uganda and NAVODA
- **Legal case filed in October 2019**, under summary proceedings.
- **2021: Appeal before the Cour de Cassation** (Supreme court), on jurisdiction issues (civil vs commercial court)
- Objective: **stop ongoing violations, and prevent new violations and environmental damages**
- **Total vigilance plan does not comply with the law (content)**
- **The vigilance measures are insufficient and/or not effectively implemented**

Main obstacles

Two defenders who testified in the trial against Total are at risk in Uganda

26/12/2019

PRESS RELEASE

Human Rights Defenders

FR

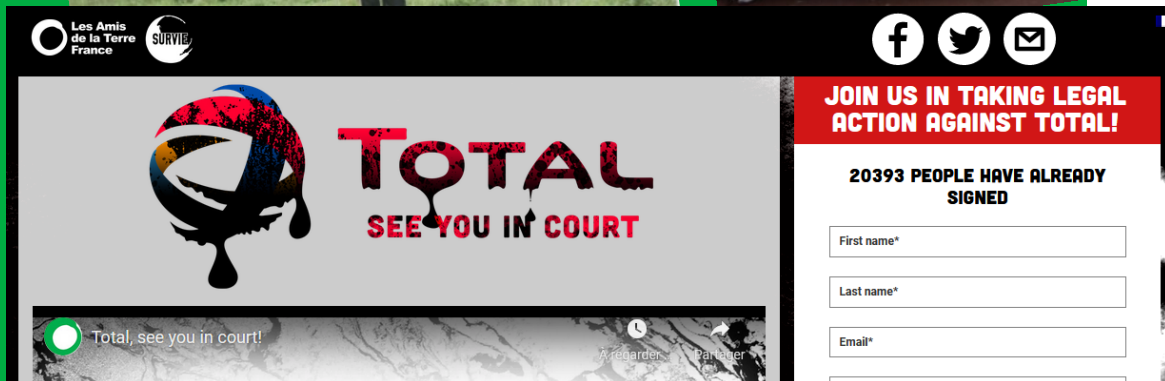
| Uganda |

Tribunal de grande ins



- The heavy burden of the proof on victims
- Threats to local partners and communities
- Focus on the vigilance plan
 - Debates on the standards and not on the existing human right violations or imminent risks of violations
- Delays
 - 2 years after the formal notice, no ruling on the merits of the case, despite the summary proceedings
- Challenge: guarantee the execution of the court order

More info



→ **Contact :**
juliette.renaud@amisdela terre.org

→ **Reports on www.amisdela terre.org**
2020

A nightmare named Total
An alarming rise in human rights violations
in Uganda and Tanzania

Total Uganda - A first lawsuit under the duty of
vigilance law: An update

2019

Serious breaches of the duty of vigilance law:
the case of Total in Uganda

→ **Website www.totalincourt.org**

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The French loi de vigilance and the Union Hidalgo v. EDF case



- Windpark project is generating violations of free, prior and informed consent (FPIC) and collective property in the Union Hidalgo indigenous community
- Corporate tactics of division & lobbying fuelled the escalation of violence against human rights and land defenders
- Lawsuit on the basis of the french loi de Vigilance (2017) filed in October 2020 by four members of the community, Mexican based organization ProDESC and ECCHR

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Seeking a wide interpretation of the duty of vigilance



- Human rights due diligence and collective rights : implementation and compensation challenges?
- Definition of supply chain : inclusion of natural and non-commercial persons?
- Interim relief and human rights due diligence

