

Suing Goliath

An analysis of civil proceedings brought against EU companies for human rights abuses and environmental harm in their global operations and value chains, and key recommendations to improve access to judicial remedy



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Introduction

European-based business enterprises, and multinational corporations in particular, are often found to cause, contribute to, or be directly linked to appalling human rights abuses and environmental harm throughout their global value chains.

With a few honourable exceptions, companies continually fail to effectively prevent abuses perpetuated by subsidiaries, suppliers, subcontractors and other business partners over whom they have considerable influence in their global value chains.

A clear regulatory gap has been identified in this context. The absence of adequate regulations, and the lack of consequences for the negligent management of human rights and environmental impacts in global value chains, means there is little incentive for companies to address those impacts.

This has started to change recently. In 2017, France adopted the Duty of Vigilance Law, which for the first time established a legal obligation for companies to conduct human rights and environmental due diligence, and provided for civil liability in the event of failure to do so. Germany and Norway adopted similar laws in 2021, and the European Commission is currently drafting a proposal for a directive on corporate due diligence to incorporate these requirements into EU law.

However, the directive should not merely enshrine a corporate due diligence duty, but should also establish consequences for non-compliant companies and ensure access to judicial remedy for victims when businesses fail to take adequate action.

For this reason, it is crucial that the legislation addresses a number of barriers to justice which are currently preventing victims of business-related human rights abuses and environmental harm from accessing judicial remedy in European courts.

This report maps out all relevant civil (not criminal) cases filed in EU Member States on the basis of alleged business-related human rights abuses and environmental harm in third countries, and identifies the key obstacles faced by claimants when attempting to hold corporations to account in the courts of the company's home country and access judicial remedy.

On the basis of these findings, this report includes a number of recommendations to the EU on how to remove the identified obstacles to judicial remedy and thereby enable private enforcement of corporate due diligence requirements.

It is worth noting that, of all civil proceedings identified, only two have resulted in judgments favourable to the claimants (*Oguru and others v Royal Dutch Shell PLC* and others; and *Milieudefensie and others v Royal Dutch Shell PLC*). No final judgment has ever ordered an EU company to pay compensation for damages.

This report aims to serve as a partial follow-up to the European Parliament's study on 'Access to legal remedies for victims of corporate human rights abuses in third countries', requested by the DROI committee and published in February 2019.¹

1. Civil proceedings: Actions for damages

Summary table

	Shell case	Boliden case	KiK case	RWE case	ENI case	Perenco case	Hydro case*	Casino case*
Home company country	NL	SE	DE	DE	IT	FR	NL	FR
Host company country	Nigeria	Chile	Pakistan	Peru	Nigeria	Democratic Republic of Congo	Brazil	Brazil, Colombia
Relationship home/host company								
Parent / Subsidiary	X				X		X	
Buyer / Supplier			X					X
Contractee / Contractor		X				X		
Impacts								
Human rights	X	X	X	X	X	X	X	X
Labour rights			X					
Environment	X	X		X	X	X	X	X
Barriers to justice								
Applicable law	X	X	X		X	X		
Competent jurisdiction					X			
Scope of application						X		
Normative standards	X	X		X	X			
Liability regime	X	X	X	X	X			
Time limit		X	X					
Burden of proof	X	X	X	X		X		
Legal standing	X		X	X	X			
Costs		X		X	X			

* For Hydro and Casino cases, it is too early to assess the barriers.

Disclaimer: Most of these barriers actually apply to all cases, but we have selected the most salient ones for each case. Some barriers might not have been identified yet but might arise at a later stage of the proceedings.

1.1 Oguru and others v Royal Dutch Shell PLC and others

Home company

Royal Dutch Shell PLC (UK/Netherlands)

Host company

Shell Petroleum Development Company of Nigeria Ltd (Nigeria)

Business relationship

Parent/subsidiary

Impacts

Livelihood of local communities, environment

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights;² African Charter on Human and Peoples' Rights;^{3, 4} International Convention for the Prevention of Pollution of the Sea by Oil⁵

Plaintiff

Nigerian farmers Fidelis Ayoro Oguru, Alali Efanga, Eric Barizaa Doooh and Friday Alfred Akpan; Milieudedefensie (Friends of the Earth Netherlands)

Defendant

Royal Dutch Shell PLC ("RDS"), Shell Petroleum Development Company of Nigeria Ltd ("SPDC"), Shell Petroleum NV, Shell Transport and Trading Company Ltd



← Hearing of Milieudedefensie and four Nigerian farmers and fishermen against Shell in The Hague in 2012. Photo by [Milieudedefensie](#).

Description

- SPDC is the operator of a joint venture agreement involving the Nigerian National Petroleum Corporation (NNPC), which holds 55%, RDS with 30%, Total Exploration and Production Nigeria Limited (TEPNG) with 10% and Nigerian Agip Oil Company limited (NAOC) with 5%.
- SPDC has been extracting oil from the Niger Delta for more than half a century. Over the decades, oil spills and gas flaring have had a severe impact on vegetation, crops and fisheries, as well as on the health and livelihoods of citizens, who are exposed to elevated concentrations of petroleum hydrocarbons in the air, soil, ground and water.
- In 2008, four Nigerian fish farmers, who had lost land and fish ponds due to oil spills, filed a lawsuit along with Milieudefensie against RDS and SPDC before the Dutch civil courts. They argued that the defendants failed to maintain the infrastructures, respond to the oil spills and clean up the affected area.
- The lawsuit concerns three separate oil spills: one from an underground pipeline near Oruma in 2005; one from an underground pipeline near Goi in 2004; and another one from a wellhead near Ikot Ada Udo in 2006 and 2007.
- In January 2013, the district court dismissed the claims for the first two oil spills, accepting Shell's defence that they were likely caused by sabotage. The court rejected liability of RDS on the grounds that, under Nigerian law, there was no duty of care on the parent companies toward their subsidiaries. The court did rule that SPDC was liable for the third oil spill (even if it was caused by sabotage) and ordered it to pay compensation. SPDC and Milieudefensie appealed the decision of the rejected claims.
- In December 2015, the court of appeal rendered an interim judgment, stating that it could not be totally ruled out that the parent company may owe a duty of care to the claimants and be liable for the impacts.^{6,7}

Outcome

- In January 2021, the court of appeal reversed the judgment of the district court. It held SPDC liable for damage caused by the first two oil spills and ordered payment of damages to the claimants. It ordered both SPDC and RDS to install a leak detection system in the pipeline central to the first oil spill.
- The court of appeal found that, under English precedent (a persuasive authority in Nigeria's common law system), the parent company owed a duty of care to the communities affected by its subsidiary's operations. However, the court argued that for RDS to be liable for the spills, SPDC would have had to have acted wrongfully, which was not proved in this case (instead, SPDC was held liable only because Nigerian law imposed strict liability, despite sabotage being a likely cause of the spills).^{8,9}

Oguru and others v Royal Dutch Shell PLC and others

Barriers to remedy

● Lack of recognition of relevant international standards

There is no internationally recognised human right to a safe, clean, healthy and sustainable environment. The central UN human rights instruments – the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights – do not include such a right explicitly. While oil spills and gas flaring could be considered an abuse against the right to health, the absence of a specific international standard makes it harder for victims to obtain remedy in cases like this one.

● Applicable law is foreign to the court

The district court ruled (and the court of appeal confirmed) that Nigerian law applied, as that is where the harm occurred.¹³ The difficulty of interpreting and applying the substantive law of a foreign jurisdiction generally constitutes a barrier to remedy, as courts have to interpret it based on information from experts, without having any previous background. Moreover, foreign law often provides for lower standards of protection, and the obligation to apply it prevents victims of corporate abuse abroad from holding EU corporations liable on the basis of future EU due diligence legislation.

● No parent company liability

Claimants would have foreseeably faced many obstacles in holding SPDC liable before the Nigerian courts, as a result of the underdevelopment and reported lack of autonomy of the justice system.¹⁵

The victims' best chance was to seek remedy from the parent company before European courts.¹⁶ Despite the fact that the court considered that, under common law, the parent company owes a duty of care to the communities where its subsidiary operates, RDS was found not liable. According to the court, SPDC's strict liability for the damages does not trigger the liability of its parent company. It is yet to be seen whether SPDC will pay the damages and when.

How to address them

● Broad normative scope

"Human beings are wholly dependent on a healthy environment in order to lead dignified, healthy and fulfilling lives."¹⁰ The right to a healthy environment is widely recognised in national constitutions, legislation and regional agreements.

Due diligence legislation should safeguard the human right to a safe, clean, healthy and sustainable environment. In the absence of specific international standards, applicable national standards should be considered.^{11,12}

● Choice of law

Due diligence legislation should be explicitly qualified as overriding mandatory, and therefore apply regardless of where the damage occurred. Ideally, Regulation (EC) No 864/2007 (Rome II) should be revised to allow claimants to choose the applicable law in cases of damage arising out of human rights abuses.

In this case, the district court found that under Nigerian law there was no general duty of care on parent companies to prevent their subsidiaries from inflicting damage. The court of appeal reversed the ruling and concluded that, under Nigerian law, the parent company did owe a duty of care to the communities. However, such conclusion was drawn strictly with reference to English law (common law).¹⁴

● Parent company liability

Due diligence legislation must provide for the civil liability of parent/lead companies for harm they could have reasonably prevented. Otherwise, victims will be left without compensation, and parent/lead companies that failed to prevent – and ultimately profited from – the abuses that led to the harm will remain unpunished.

● **Current legal framework actually discourages responsible conduct**

The court of appeal's ruling suggests that the duty of care of the parent company only started when RDS began to intervene in SPDC's operations after 2010,¹⁷ and also considers the codes of conduct voluntarily adopted by RDS. This approach, in the absence of mandatory due diligence legislation, may discourage companies from conducting due diligence and rather encourage them to distance themselves from their subsidiaries and business partners, in order to avoid liability.

● **Mandatory requirements and civil liability to encourage compliance**

Due diligence legislation must provide for the civil liability of parent/lead companies for harm they could have reasonably prevented. Civil liability must apply whether the parent/lead company decided to take action and exert leverage over their subsidiaries and business partners to ensure respect for human rights or not. A rule like this would encourage compliance and hold companies accountable.

● **Disproportionate burden of proof on the claimants**

Limited access to evidence, such as internal documents, made it hard for claimants to substantiate their claim. Shell really made an effort not to disclose relevant information that would have helped the claimants' case (e.g. on oil leaks' prevention, the role of the parent company, etc). Under Dutch discovery rules, claimants can only ask for specific documents if they know exactly what they are looking for and how it may help their case.

● **Fair distribution of the burden of proof**

To provide victims with meaningful access to remedy, courts should accept reasonably available evidence (if any) presented by the claimant that an entity is under the control of, or is economic dependent on, the defendant; that the defendant failed to act with all due care; and that there is a causal link between such failure and the occurrence of harm. It should then be the defendant's burden to clarify the nature of its relationship with the subsidiary or value chain partner, to prove whether it took all reasonable measures to prevent the harm, and to rebut the presumption of the causal link.

● **Barriers to collective representation**

Legal standing was a major issue in this case. Milieudefensie had standing in a representative capacity based on Dutch law, but Shell argued this was not applicable under Nigerian law and individual claims represented by Milieudefensie were time-barred.

● **Improved availability of collective representation**

EU legislation should provide for effective representative action beyond consumer protection to cases of business-related human rights abuses or environmental harm. Legislation should allow for legal standing of civil society organisations acting in the public interest.¹⁸

1.2 Arica Victims KB v. Boliden Mineral AB

Home company

Boliden Mineral AB (Sweden)

Host company

Promel (Chile)

Business relationship

Contractee/contractor

Impacts

Human health, environment

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights²

Plaintiff

Arica Victims KB, a group representing 796 Chilean citizens

Defendant

Boliden Mineral AB



← Rodrigo Pino Vargas (left), representative of affected people in Arica, taking Sergio Micco (right), Director of the National Institute of Human Rights, on a tour of the waste site behind Cerro Chuno. Photo by [INDH](#) in 2019.

Description

- Between 1984 and 1985, Boliden subcontracted Promel to export 20,000 tons of mining waste to Arica, a port city in northern Chile.
- Promel failed to reprocess the sludge and extract the arsenic, and the mining waste was dumped, unprocessed and unprotected.
- In 1994, many families moved to newly built social housing on the outskirts of Arica.
- In 1997, an analysis of the sludge showed that the waste contained high levels of arsenic, lead, cadmium, mercury, copper and zinc.
- In 1998, a wave of serious diseases including cancer, skin diseases and neurological disorders were observed in about 3,000 people. Children were severely affected. Chilean authorities moved the waste about a kilometre away, to the desert east of Arica.
- In 2007, after 374 residents filed civil proceedings against Promel, the Chilean Supreme Court ordered it to clean the contaminated area. However, Promel was declared bankrupt and did not comply with the order.
- In 2009, Arica authorities established a Plan Maestro, which entailed the evacuation of 8,000 individuals and the demolition of 1,880 houses in the affected area.
- In 2013, Arica Victims KB, a group representing 796 Chilean citizens, filed a lawsuit before a Swedish court arguing that Boliden had breached a duty to ensure that Promel processed the sludge appropriately.
- The district court applied Chilean law and dismissed the action. With regard to certain areas, the court concluded that causation could not be established as there were several possible explanations for the heightened arsenic levels, including contaminated food and water, and waste from other mining actors. With regard to the other areas, the court did find Boliden's toxic waste to be a more likely cause, but argued that Boliden could not have reasonably foreseen the outcome, as the affected area was an unpopulated desert area at the time of the transfer.³ However, the court found Boliden was negligent in continuing its relationship with Promel. Boliden has not faced legal consequences for this.

Outcome

- In March 2019, the court of appeal decided to apply Swedish law instead, but dismissed the claimants' appeal on a new basis: that the cause of action was time-barred.^{4,5} As a consequence, the claimants were required to pay €3.2 million in litigation costs.

Arica Victims KB v. Boliden Mineral AB

Barriers to remedy

● Lack of recognition of relevant international standards

There is no internationally recognised human right to a safe, clean, healthy and sustainable environment. The central UN human rights instruments – the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights – do not include such a right explicitly. While dumping toxic waste could be considered an abuse against the right to health, the absence of a specific international standard makes it harder for victims to obtain remedy in cases like this one.

● Applicable law is foreign to the court and may not provide for remedy

In this case, the district court applied Chilean law, reasoning that the harmful events took place before European choice of law rules entered into force.⁷ The difficulty in interpreting and applying the substantive law of a foreign jurisdiction constituted a barrier to remedy. Since the Swedish court had no obligation to investigate Chilean law, it was the parties who had to present their own interpretation of the law, based on information from experts with divergent opinions. The Swedish court had to deduce the most accurate one without having any background in Chilean law.⁸ In the end, the court of appeal decided to apply Swedish law instead.

● Restrictive rules on time limits

Under Swedish law, a claim is time-limited to ten years after the occurrence of the claim. However, the law does not define when the limitation period should begin to run. While the claimants argued that it should not begin to run until the harm is apparent, the court of appeal followed the general view in Swedish jurisprudence that it starts at the time of the harmful act.⁹ Therefore, the court dismissed the appeal on the basis that the cause of action was time-limited, despite the fact that medical tests on the inhabitants only revealed the existence of an excessive level of arsenic in their blood stream in 2009 - that is, four years before the lawsuit against Boliden was filed.

How to address them

● Broad normative scope

“Human beings are wholly dependent on a healthy environment in order to lead dignified, healthy and fulfilling lives.”⁶ The right to a healthy environment is widely recognised in national constitutions, legislation and regional agreements.

Due diligence legislation should safeguard the human right to a safe, clean, healthy and sustainable environment.

● Choice of law

According to Article 7 of Regulation (EC) No 864/2007 (Rome II), the person seeking compensation for environmental damage may choose to base his or her claim on (a) the law of the country in which the damage occurs, or (b) the law of the country in which the event giving rise to the damage occurred. This rule should apply today to a case like this one. However, where the damage is not environmental, the general rule (Article 4(1)) applies, where the claim is based on the law of the country where the damage occurs. However, this would prevent victims of corporate abuse abroad from holding EU corporations liable on the basis of future EU due diligence legislation. For this reason, due diligence legislation should be explicitly qualified as overriding mandatory, and therefore apply regardless of where the damage occurred. Ideally, Regulation (EC) No 864/2007 (Rome II) should be revised to allow claimants to choose the applicable law in cases of damage caused by human rights abuses.

● Reasonable and sufficient time limits

The limitation period for bringing legal actions should be reasonable and sufficient, taking into special account the complexities of transnational litigation. The limitation period should be long enough to account for this, and should not begin running until the abuse has ceased and the plaintiff knows, or can reasonably be expected to know of the corporate behaviour and the fact that it constitutes an abuse; of the fact that the abuse caused or contributed to the harm; and the identity of the company potentially liable for the harm.

● No value chain liability

Without civil liability for the breach of the duty to prevent and mitigate harm caused or contributed to by subsidiaries and value chain partners, victims cannot seek remedy from the parent/lead company that failed to prevent – and ultimately profited from – the abuses that led to the harm.

● Value chain liability

Due diligence legislation must provide for the civil liability of parent/lead companies for harm they could have reasonably prevented (including where harm is caused or contributed to by subcontractors in the value chain beyond the supply chain, as is the case here). Otherwise, victims will often be left without compensation and parent/lead companies failing to prevent – and ultimately profiting from – the abuses that led to the harm will remain unpunished.

● Disproportionate burden of proof on the claimants

Claimants found it hard to provide adequate proof of causation between Boliden's conduct and the injury they suffered. The district court rejected causation between the heightened levels of arsenic and the transfer of the toxic waste as there were several potential explanations for the former (e.g. food and water, and waste from other mining actors).

● Fair distribution of the burden of proof

To provide victims with meaningful access to remedy, courts should accept reasonably available evidence (if any) presented by the claimant to show that the defendant failed to act with all due care and that there is a causal link between such failure and the occurrence of harm. It should then be on the defendant to prove whether it took all reasonable measures to prevent the harm, and to rebut the presumption of a causal link.

● Exorbitant legal costs

In addition to their own costs, Arica Victims were required to pay Boliden's legal costs: a sum of SEK 32.5 million (approx. EUR 3.2 million)¹⁰ to the defendant at first instance and an additional sum of SEK 3.7 million¹¹ after the appeal judgment. Moreover, in Sweden, legal expenses insurance is only available to residents and public legal aid can only be granted to foreign claimants under "special circumstances" (e.g. humanitarian reasons).¹²

Costs are a major barrier to bringing civil proceedings before EU courts. Particularly in transnational cases, in addition to attorney fees, victims have to bear the costs of sourcing and producing evidence, translation, travel, expert opinions, expenses for witnesses, etc. Moreover, due to the "loser pays" principle, if the defendant is found not liable, victims have to bear the opposing party's costs too. This strongly discourages victims from pursuing a lawsuit, and restricts the possibility of appeal.¹³

● Financial risk mitigation

Procedural rules should allow, where a claimant wins, for legal costs to be fully recoverable from a defendant company. Where a claimant loses, it should allow courts to balance the costs incurred considering the disparity of resources.¹⁴

Moreover, rules on legal aid should take into account the very high costs that may be incurred in business and human rights transnational cases. Other measures should be explored, including allowing conditional fee arrangements,^{15,16} introducing a rapid claims mechanism¹⁷ or facilitating public legal aid, third-party funding and legal expenses insurance.

1.3 Jabir and others v KiK Textilien und Non-Food GmbH

Home company

KiK Textilien und Non-Food GmbH (Germany)

Host company

Ali Enterprises (Pakistan)

Business relationship

Buyer/supplier

Impacts

Human life, workers' health and safety

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights;² ILO Occupational Safety and Health Convention (No. 155);³ ILO Prevention of Major Industrial Accidents Convention (No. 174);⁴ ILO Promotional Framework for Occupational Safety and Health Convention (No. 187)⁵

Plaintiff

Four Pakistani citizens

Defendant

KiK Textilien und Non-Food GmbH



← Bystanders look on outside the burnt-out Ali Enterprises clothing factory in Karachi. Photo by Rehan Khan.

Description

- On 11 September 2012, 258 workers died and hundreds were seriously injured when a fire broke out in the Ali Enterprise garment factory in Karachi, Pakistan.
- Due to inadequate health and safety measures, workers were trapped by the fire. “Many of the windows were barred, emergency exits were locked and the building had only one unobstructed exit, impeding the exit of employees who suffocated or were burned alive inside.”⁶
- At the time, the factory was producing jeans for its main client, German retailer KiK.
- KiK had been buying up at least 70% of the factory’s production for several years.
- A few weeks before the fire, the factory had managed to get an SA8000 certificate, certifying that it meets basic health and safety requirements. This assessment was made by auditors who reportedly had not even visited the building.
- After the Ali Enterprise fire, KiK immediately agreed to pay US\$1 million (approximately €900,000) in compensation to the victims and survivors. Negotiations for further compensation to cover the victims’ redress did not materialise.
- In March 2015, four of the victims initiated a civil claim against the company at the Regional Court in Dortmund, Germany, where the company is incorporated.

Ali Enterprises Factory Fire Affectees Association v RINA S.p.A.

The auditing company RINA awarded the Ali Enterprises factory in Pakistan a safety certificate three weeks before the fire.

In September 2018, the affectees association and several unions and NGOs filed a complaint against RINA Services S.p.A. at the Italian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises.¹³ The complainants alleged that RINA should have identified child labour, forced overtime, and deficient fire systems at the factory, and failed to use its leverage to request remedial actions before awarding the certification.¹⁴

After lengthy negotiations, RINA refused to sign the OECD mediation process agreement. In December 2020, the Italian NCP published its final statement,¹⁵ recommending that the company carry out effective due diligence and improve the certification mechanism.

Outcome

- The court applied Pakistani law, as this is where the harm occurred.
- In January 2019, the court dismissed the action, deciding that according to Pakistani law, the statute of limitation had expired.⁷
- As a result of public pressure surrounding the legal proceedings, KiK agreed to a negotiated compensation settlement, and committed to an additional US\$5.15 million (approximately €4.69 million) in compensation.

Jabir and others v KiK Textilien und Non-Food GmbH

Barriers to remedy

How to address them

● **Applicable law is foreign to the court and may not provide for remedy**

In this case, the court applied Pakistani law, based on Article 4(1) of Regulation (EC) No 864/2007 (Rome II), according to which, the law applicable is that of the country in which the damage occurs.

Such rule would prevent victims of corporate abuse abroad from holding EU corporations liable on the basis of future EU due diligence legislation. Moreover, the law of countries where production takes place generally provides for lower standards of protection (Pakistani law has lower health and safety standards than German law). The difficulty of interpreting and applying the substantive law of a foreign jurisdiction is an additional barrier to remedy.

● **Choice of law**

Due diligence legislation should be explicitly qualified as overriding mandatory, and therefore apply regardless of where the damage occurred. Ideally, Regulation (EC) No 864/2007 (Rome II) should be revised to allow claimants to choose the applicable law in cases of damage caused by human rights abuses.

● **Restrictive rules on time limits**

In this case, the court dismissed the action, deciding that according to Pakistani law, the statute of limitation had expired, and the claimants were too late to seek justice. Under Pakistani law, a claim for damages must be made within one year of the event - an impossible period for normal torts, let alone transnational tort cases. Moreover, the court did not consider the statute of limitation to be interrupted by out-of-court negotiations under Pakistani law.

● **Reasonable and sufficient time limits**

The limitation period for bringing legal actions should be reasonable and sufficient, taking into special account the complexities of transnational litigation. The limitation period should be long enough and should not begin running before the abuse has ceased and the plaintiff knows, or can reasonably be expected to know, of the corporate behaviour and the fact that it constitutes an abuse; of the fact that the abuse caused or contributed to the harm; and the identity of the company potentially liable for the harm.

● **No value chain liability**

Under Pakistani law, based on common law, KiK might have been considered to be in breach of its duty of care and held liable for damages. Under German law, however, KiK would not have been able to be held liable. Without civil liability for the breach of the duty to prevent and mitigate harm caused or contributed to by subsidiaries and value chain partners, victims cannot seek remedy from the parent/lead company that failed to prevent – and ultimately profited from – the abuses that led to the harm.

● **Value chain liability**

Due diligence legislation must provide for the civil liability of parent/lead companies for harm they could have reasonably prevented (especially where the value chain partner concerned is controlled by or economically dependent on the lead company, as is the case here).

● Social auditing failed

In August 2012, just three weeks before the fire, Ali Enterprises received the SA8000 certification, meant for companies upholding ‘a safe and healthy environment’. The certification was awarded by the Italian auditing company RINA, who subcontracted the inspection to a Pakistani company, which reportedly never set foot in the factory.^{8,9}

● Auditors and certifiers must be subject to due diligence obligations

Due diligence legislation should cover auditors, certifiers and compliance regimes, independent of their legal form. Liability should also apply to them, in order to incentivise certification quality and ensure accountability. States must implement effective monitoring and liability of auditors and certifiers to ensure that human rights, social and environmental audits are reliable.¹⁰

● Disproportionate burden of proof on the claimants

Limited access to evidence, such as internal documents, made it hard for claimants to substantiate their claim.

● Fair distribution of the burden of proof

To provide victims with meaningful access to remedy, courts should accept reasonably available evidence (if any) presented by the claimant that an entity is under the control of, or is economic dependent on, the defendant; that the defendant failed to act with all due care; and that there is a causal link between such failure and the occurrence of harm. It should then be the defendant’s burden to clarify the nature of its relationship with the subsidiary or value chain partner, to prove whether it took all reasonable measures to prevent the harm, and to rebut the presumption of the causal link.

● Barriers to collective redress

The proceedings against Kik were filed on behalf of four claimants, even though a much greater number of people were affected by the factory fire. German law does not allow for a large number of claimants to seek compensation collectively. Instead, each claimant is considered as an individual party. Each claim must be treated as a separate lawsuit, which might discourage law firms from filing claims on behalf of large groups of victims.¹¹

● Improved availability of collective redress

EU legislation should provide for effective collective redress and representative action beyond consumer protection to cases of business-related human rights abuses or environmental harm. Affected persons should be automatically eligible to join a claim unless they specifically choose not to be (‘opt-out’), avoiding complex registration procedures. Legislation should allow for legal standing of civil society organisations acting in the public interest.¹²

1.4 Luciano Lliuya v RWE AG GmbH

Home company

RWE AG¹ (Germany)

Host company

The case refers to the home company's global operations

Business relationship

The case refers to the home company's global operations

Impacts

Livelihood of local communities, property, environment, climate

Relevant international standards

Paris Agreement under the United Nations Framework Convention on Climate Change

Plaintiff

Peruvian citizen Saúl Luciano Lliuya

Defendant

RWE AG



← Saúl Luciano Lliuya with the lawyer Dr. Roda Verheyen and parts of the Germanwatch team at the Higher Regional Court of Hamm on the climate lawsuit against RWE. Photo by Alexander Luna / [Germanwatch](https://www.germanwatch.org/) e.V.

Description

- Due to climate change induced glacial retreat, a glacial lake above the Andean city of Huaraz has grown and threatens to overflow or even break its dam.
- The house of the Peruvian farmer and mountain guide Saúl Luciano Lliuya, along with parts of the city where up to 50,000 people live, is at risk of a devastating flood.
- In March 2015, Mr. Luciano Lliuya filed a letter of complaint against RWE, a Germany energy company and one of Europe's largest CO2 emitters, over the impact of its activities on climate change.
- In November 2015, Mr. Lliuya filed a lawsuit against RWE in German courts. The plaintiff asks RWE to pay around €17,000, that is, 0.47% of the estimated repair cost. This percentage corresponds to the Institute of Climate Responsibility's estimation that RWE is responsible for 0.47% of global warming emissions from 1751 to 2010.
- The compensation would be invested in installing a glacial flood outburst early warning system, draining the lake and building new dams or improving existing ones, in order to prevent the risk of flooding in the area.
- In December 2016, the lawsuit was dismissed because the judge found that the plaintiff had not established that RWE was legally responsible for protecting Huaraz from flooding. The plaintiff appealed.
- In November 2017, the court of appeal confirmed that it would hear the case.
- In March 2018, the court of appeal stated that climate damages can trigger corporate liability. The court said it would consult experts to determine whether or not there is a serious threat of impairment to the plaintiff's property. Collecting evidence has been delayed due to Covid-related restrictions.^{2,3,4,5}

Outcome

- The case is ongoing.

Luciano Lliuya v RWE AG GmbH

Barriers to remedy

● Lack of clear business obligations with regard to climate change

Unlike other cases documented in this report, the objective of this lawsuit is not just to get individual compensation but to clarify who is responsible for climate change and what the consequences are; to incite polluters like RWE to shift to less damaging business models; to support people affected by climate change, like the citizens of Huaraz,⁶ by establishing a precedent to refer to in similar cases; and, ultimately, to serve as an example of the need for political solutions against climate change.

RWE is arguing that the claim lacks a legal basis. While environmental standards, like those provided for in the Paris Agreement, can still be translated into concrete obligations for companies,⁷ they are often addressed to states and not as straight-forward as human rights standards. Without clear environmental obligations for companies, victims may find it hard to hold them liable for failure to respect the environment.

● Lack of adequate mechanisms to bring climate-related claims

Unlike other cases documented in this report, RWE is not being sued for a harm linked to the failure to act with due care with regard to its subsidiaries or business partners, but for a harm it directly contributed to. However, RWE maintains that a single company cannot be held responsible for the consequences of climate change. The absence of a specific liability regime for the failure to respect the environment, and, in particular, for driving climate change, complicates victims' claims.

● Disproportionate burden of proof on the claimant

Claimants would have foreseeably faced many obstacles. The claimant is finding it challenging to prove adequate causality between the actions of RWE, climate change and the potential damages arising out of the glacial retreat. The court of appeal said it would consult experts to determine whether or not there is a serious threat of impairment to the plaintiff's property. Evidence regarding the development of the glacier is difficult to gather as there is no relevant databank, and relevant data regarding the actual CO₂ emissions of RWE are not easily accessible under German law.⁹

How to address them

● Climate due diligence requirements

In the absence of a comprehensive and conclusive body of internationally recognised environmental standards, due diligence legislation should specify the protected environmental goods and the expected standard of business conduct in this regard. This would guide companies when conducting due diligence, and administrative and judicial authorities when determining liability.⁸

Due diligence should include climate change risk assessments and mitigation and adaptation measures. EU legislation should require that companies measure their total carbon footprint, set targets for reducing direct and indirect greenhouse gas emissions to align with the 1.5 degrees goal of the Paris Agreement, steer their business activities to effectively reduce emissions, and publicly communicate on their progress towards meeting these targets.

● Liability for damages resulting from environmental harm

While judicial proceedings might not be the ideal means for remedy in this case, mechanisms must be designed to ensure shared corporate liability for climate change. Even if multiple actors contributed to the harm, companies should respond for damages, at a minimum, in proportion to their own contribution.

● Fair distribution of the burden of proof

To ensure that victims have meaningful access to remedy, courts should accept reasonably available evidence (if any) presented by the claimant that the defendant failed to act with all due care and that there is a causal link between such failure and the (potential) occurrence of harm. It should then be on the defendant to disclose all relevant information in its control, to prove whether it took all reasonable measures to prevent the (potential) harm, and to rebut the presumption of said causal link.

● Barriers to collective redress

The proceedings against RWE were filed on behalf of one claimant, even though a much greater number of people are potentially affected by the glacial retreat in Huaraz. German law does not allow for a large number of claimants to seek compensation collectively. Instead, each claimant is considered as an individual party. Each claim must be treated as a separate lawsuit, which might discourage law firms from filing claims on behalf of large groups of victims.

● Exorbitant legal costs

The amount of resources required to bring forward a lawsuit like this one is a major barrier to justice. Particularly in transnational cases, in addition to attorney fees, victims have to bear the costs of sourcing and producing evidence, translation, travel, expert opinions, expenses for witnesses, etc. Moreover, due to the “loser pays” principle, if the defendant is found not liable, victims have to bear the opposing party’s costs, too. This strongly discourages victims from pursuing a lawsuit, and restricts the possibility of appeal.¹¹ In this case, the plaintiff had to pay an advance of €120,000 to cover the costs of the court-appointed experts examining evidence. While this would be reimbursed if the plaintiff wins, it shows how prohibitively high the costs can be for potential litigators. Without the help of a foundation, it would not have been possible for Mr. Luciano Lliuya to bring this case to the German courts.¹²

● Improved availability of collective redress

EU legislation should provide for effective collective redress and representative action beyond consumer protection to cases of business-related human rights abuse or environmental harm. Affected persons should be automatically eligible to join a claim unless they specifically choose not to be (‘opt-out’), avoiding complex registration procedures. Legislation should allow for legal standing of civil society organisations acting in the public interest.¹⁰

● Financial risk mitigation

Procedural rules should allow, where a claimant wins, for legal costs to be fully recoverable from a defendant company, and, where a claimant loses, allow courts to balance the costs incurred considering the disparity of resources.¹³

Moreover, rules on legal aid should consider the very high costs that may be incurred in business and human rights transnational cases.

Other measures should be explored, including allowing conditional fee arrangements,^{14, 15} introducing a rapid claims mechanism¹⁶ or facilitating public legal aid, third-party funding and legal expenses insurance.

1.5 Francis Timi v Eni SpA and Nigerian Agip Oil Company

Home company

Eni SpA (Italy)

Host company

Nigerian Agip Oil Company Ltd (Nigeria)

Business relationship

Parent/subsidiary

Impacts

Livelihood of local communities, environment

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights;² African Charter on Human and Peoples' Rights;^{3, 4} International Convention for the Prevention of Pollution of the Sea by Oil⁵

Plaintiff

Ododo Francis Timi, legal representative of the Nigerian Ikebiri community

Defendant

Eni SpA, Nigerian Agip Oil Company Ltd (NAOC)



Description⁶

- In April 2010, an oil pipeline operated by Eni's wholly owned Nigerian subsidiary,⁷ the NAOC, burst 250 metres from a creek north of the Ikebiri community.⁸ The spill caused an environmental disaster that polluted water and land, affecting the creek, fishing ponds and trees essential to the local community, and damaging their livelihoods.⁹
- A joint inspection visit led by NAOC cited "equipment failure" as the cause of the spill. The leak was closed, and the surrounding polluted area of bush was burnt without the consent of the local community, a dangerous and polluting method for cleaning up oil. According to Friends of the Earth, no other clean-up has taken place since.
- The community engaged with Eni and NAOC in good faith. However, despite repeated requests for compensation and clean-up, no satisfactory offers were made.
- Some members of the community started legal proceedings at the relevant Nigerian court but faced lack of effective access to justice and poor enforcement.¹⁰ This encouraged others to bring their legal proceedings in Italy, where Eni is headquartered.
- In May 2017, the community, represented by Francis Timi, filed a lawsuit in Milan against Eni and NAOC. They asked for around €2 million¹¹ for the damages, along with a commitment to clean up the area.
- Claimants argued that the parent company should be directly liable for breach of the duty of care that it owed them, and invoked Italian domestic law as a basis for adding the Nigerian subsidiary as a co-defendant.
- The defendants contested the jurisdiction of the Italian courts and contended that the proceedings against Eni were strategically filed solely to bring the subsidiary under Italian jurisdiction. They also filed a motion against the claimants' standing, but this was not considered by the judge.

Outcome

- In October 2018, after months of negotiations, NAOC reached an out-of-court and confidential settlement agreement with the community. The agreement addressed some of the community's needs¹² but did not include cleaning the pollution from the spill.¹³

Francis Timi v Eni SpA and Nigerian Agip Oil Company

Barriers to remedy

● Lack of recognition of relevant international standards

There is no internationally recognised human right to a safe, clean, healthy and sustainable environment. The central UN human rights instruments – the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights – do not include such a right explicitly. While oil spills could be considered an abuse against the right to health, the absence of a specific international standard makes it harder for victims to obtain remedy in cases like this one.

● No jurisdiction over the supplier

Claimants sued both the parent company, Eni, and its subsidiary, NAOC. However, the defendants contested the jurisdiction of the Italian courts over foreign entities. The scope of application of Regulation (EU) No 1215/2012 (Brussels I Recast Regulation) is limited to defendants domiciled in the EU and does not apply to non-EU legal or natural persons, and, under Italian private international law rules, Italian courts cannot normally exercise jurisdiction over foreign entities.

● Applicable law is foreign to the court

In this case, Nigerian law would have applied, as that is where the harm occurred.²⁰ The difficulty of interpreting and applying the substantive law of a foreign jurisdiction generally constitutes a barrier to remedy, as courts have to interpret it based on information from experts, without having any previous background. Moreover, foreign law often provides for lower standards of protection and the obligation to apply it prevents victims of corporate abuse abroad from holding EU corporations liable on the basis of future EU due diligence legislation.

How to address them

● Broad normative scope

“Human beings are wholly dependent on a healthy environment in order to lead dignified, healthy and fulfilling lives.”¹⁴ The right to a healthy environment is widely recognised in national constitutions, legislation and regional agreements.

Due diligence legislation should safeguard the human right to a safe, clean, healthy and sustainable environment. In the absence of specific international standards, applicable national standards should be considered.^{15, 16}

● Forum necessitatis

The Brussels I Recast Regulation should be revised to include a provision establishing a forum necessitatis (“forum of necessity”) on the basis of which EU courts may, on an exceptional basis, hear a case brought before them when the right to a fair trial or access to justice so requires, and the dispute has sufficient connection with the Member State of the court seized.^{17, 18} These two requirements need to be broadly defined in order to avoid restrictive interpretations.

● Extended jurisdiction

The Brussels I Recast Regulation should be revised to include a provision extending the jurisdiction of EU courts where the EU parent/lead company is domiciled to the claims over its foreign subsidiary or value chain partners when the claims are so closely connected that it is expedient to hear and determine them together.¹⁹

● Choice of law

Due diligence legislation should be explicitly qualified as overriding mandatory, and therefore apply regardless of where the damage occurred. Ideally, Regulation (EC) No 864/2007 (Rome II) should be revised to allow claimants to choose the applicable law in cases of damage arising out of human rights abuses.

● No parent company liability

Members of the community started legal proceedings at the relevant Nigerian court but faced lack of effective access to justice and poor enforcement. The victims' last chance was to seek remedy from the parent company before European courts. However, it is not clear whether the European court would have considered that, under applicable law, the parent company owed a duty of care to the communities where its subsidiary operated.

● Parent company liability

Due diligence legislation must provide for the civil liability of parent/lead companies for harm they could have reasonably prevented. Otherwise, victims will often be left without compensation and parent/lead companies failing to prevent – and ultimately profiting from – the abuses that led to the harm will remain unpunished.

● Current legal framework actually discourages responsible conduct

As in the Shell case, under Nigerian law, the existence of a parent company duty of care could stem from the parent company's interventions in its subsidiary's operations. This approach may discourage companies from conducting due diligence and rather encourage them to distance themselves from their subsidiaries and business partners, in order to avoid liability.

● Mandatory requirements and civil liability to encourage compliance

Due diligence legislation must provide for the civil liability of parent/lead companies for harm they could have reasonably prevented. Civil liability must apply whether the parent/lead company decided to take action and exert leverage over their subsidiaries and business partners to ensure respect for human rights or not. Only a regime like this would encourage compliance and hold companies accountable.

● Barriers to collective redress

The proceedings against ENI were filed by Ododo Francis Timi on behalf of the Nigerian Ikebiri community. Defendants filed a motion to dismiss the claimants' standing.

● Improved availability of collective redress

EU legislation should provide for effective collective redress and representative action beyond consumer protection to cases of business-related human rights abuses or environmental harm, ensuring generous legal standing both for individuals and civil society organisations.

● Exorbitant legal costs

The amount of resources required to bring forward a lawsuit like this one is a major barrier to justice. Particularly in transnational cases, in addition to attorney fees, victims have to bear the court costs for filing a case, the costs of sourcing and producing evidence, translation, travel, expert opinions, expenses for witnesses, etc.

● Financial risk mitigation

Rules on legal aid should consider the very high costs that may be incurred in business and human rights and environment transnational cases.

Other measures should be explored, including allowing conditional fee arrangements, introducing a rapid claims mechanism or facilitating public legal aid, third-party funding and legal expenses insurance.

1.6 Sherpa and Friends of the Earth France v Perenco SA

Home company

Perenco SA (France)

Host company

Perenco REP (Democratic Republic of Congo) and others

Business relationship

Home and host companies belong to the same corporate group but the links are unclear

Impacts

Livelihood of local communities, environment

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights;² African Charter on Human and Peoples' Rights;^{3, 4}

Plaintiff

Sherpa, Friends of the Earth France

Defendant

Perenco SA



← Photo by the [Environmental Justice Atlas](#).

Description^{5, 6}

- Perenco is an Anglo-French oil and gas group that operates, amongst other countries, in the Democratic Republic of Congo (“DRC”), where it extracts 25,000 barrels a day.
- Perenco, which operates in the DRC through four different entities, is well-connected to political power in the country^{7, 8} and is a major contributor to the government budget.
- The Perenco group has been repeatedly accused of causing severe environmental damage.⁹ Several reports denounce the devastating consequences of crude oil spills, discharge of toxic products and gas flaring in unsafe conditions.^{10, 11, 12}
- In 2019, French NGOs Sherpa and Friends of the Earth France initiated legal actions against Perenco SA (“Perenco France”) before the French courts to clarify Perenco’s role in this environmental harm.
- The claimants requested that the judge grant them access to the documents that would prove the French company’s role in the management of the oil operations in the DRC.
- In August 2019, the Paris court authorised a bailiff to seize the relevant documents in the Parisian headquarters of Perenco France. However, the company opposed the execution of the judicial decision and denied them access to their premises.
- In October 2019, the claimants filed a new request, asking that the compliance order be accompanied by a financial penalty on the company. The request was dismissed. The claimants appealed the decision.
- In September 2020, the court of appeal dismissed their request again. The claimants have referred the case to the French Supreme Court, and it is now pending.
- Thanks to the cooperation of Congolese civil society, the claimants have gathered some preliminary evidence that indicates the control and direct involvement of Perenco France in the activities of its subsidiary in the DRC – a pre-condition for the liability of Perenco France for the environmental damages.
- The goal of this legal proceeding is to obtain additional evidence to corroborate such control and involvement in order to satisfy the heavy burden of proof borne by the claimants.

Outcome

- The case is ongoing.

Sherpa and Friends of the Earth France v Perenco SA

Barriers to remedy

● **Narrow scope of due diligence legislation**

Perenco France does not fall within the scope of the French Duty of Vigilance Law, which only applies to very large companies above certain thresholds.¹³

● **Disproportionate burden of proof on the claimants**

Limited access to evidence like internal documents makes it hard for claimants to substantiate their claim.

Perenco entities in the DRC are not subsidiaries of Perenco France. Instead, both are owned by holding companies registered in The Bahamas. Perenco France has always denied any control over the other group companies.

Lack of transparency makes it extremely difficult to determine the group's organisation and, in particular, the links between Perenco France and the entities operating in the DRC.

Claimants' legal action aim at obtaining further evidence that would prove the factual control by Perenco France over the Perenco entities in the DRC.

● **Applicable law is foreign to the court and may not provide for remedy**

According to Article 7 of Regulation (EC) No 864/2007 (Rome II), the person seeking compensation for environmental damage may choose to base his or her claim on (a) the law of the country in which the damage occurs, or (b) the law of the country in which the event giving rise to the damage occurred.

However, even in cases of environmental harm, where such choice of law is provided, defendant companies try to assimilate both available fora (the country in which the damage occurs and the country in which the event giving rise to the damage occurred) in order to prevent the applicability of the law of the country where the parent/lead company is domiciled. This would prevent victims of corporate abuse abroad from holding EU corporations liable on the basis of future EU due diligence legislation.

How to address them

● **Broad scope of due diligence legislation**

Due diligence legislation should apply to all companies, regardless of size. According to international standards (e.g. UN Guiding Principles on Business and Human Rights, OECD Guidelines for Multinational Enterprises), due diligence is an obligation of all companies – irrelevant to the level of the risks that a business generates or encounters. Small and medium enterprises (SMEs) should also be subject to due diligence requirements, especially if they operate in high-risk sectors like oil.

● **Fair distribution of the burden of proof**

To give victims meaningful access to remedy, courts should accept reasonably available evidence (if any) presented by the claimant that an entity is under the control of, or is economically dependent on, the defendant; that the defendant failed to act with all due care; and that there is a causal link between such failure and the occurrence of harm. It should then be on the defendant to clarify the nature of its relationship with the subsidiary or value chain partner, to prove whether it took all reasonable measures to prevent the harm, and to rebut the presumption of the causal link.

● **Choice of law**

Due diligence legislation should be explicitly qualified as overriding mandatory, and therefore apply regardless of where the damage occurred. Ideally, Regulation (EC) No 864/2007 (Rome II) should be revised to fully allow claimants to choose the applicable law in cases of environmental harm or damage caused by human rights abuses.

1.7 Cainquiama and others v Norsk Hydro ASA and others

Home company

Norsk Hydro ASA (Norway); Norsk Hydro Holland BV, Hydro Aluminium Netherlands BV, Hydro Aluminium Brasil Investment BV, Hydro Alunorte BV, Hydro Albras BV, and Hydro Paragominas BV (the Netherlands), referred to from now on as “the Dutch companies”

Host company

Alunorte – Alumina do Norte do Brasil S.A. (“Alunorte”), Albras – Alumínio Brasileiro S.A. (“Albras”) and Mineração Paragominas S.A. (“MPSA”) (Brazil)

Business relationship

Parent/subsidiary

Impacts

Human health, livelihood of local communities, indigenous people’s rights, environment

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights;² UN Declaration on the Rights of Indigenous Peoples;³ ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries;⁴ UN Convention on Biological Diversity

Plaintiff

Cainquiama⁵ and nine individuals

Defendant

Norsk Hydro ASA; Norwegian Government’s Pension Fund Folketrygdfondet (shareholder of Norsk Hydro ASA), hereinafter referred to as “the Fund”; the Dutch companies



← Hydro Alunorte tailings basin in Barcarena, February 2018. Photo by Pedrosa Neto / [Amazônia Real](#).

Description

- MPSA focuses on the extraction of bauxite (the raw material of aluminium). The extracted bauxite is then treated by ‘beneficiation’, which consists of crushing, grinding and classification. The beneficiated ore is mixed with water, forming a pulp that is pumped through a pipeline to the company Alunorte. Alunorte, in turn, refines the bauxite into alumina, the processed material which can become aluminium. Lastly, Albras turns the alumina into aluminium.
- Since the 1980s, the host companies have been exploiting an aluminium refinery in the middle of the fragile Amazonian region of Brazil, in the state of Pará.
- 450 families from traditional communities used to live where Alunorte and Albras now conduct their industrial activities, including the quilombola community,⁶ which rely heavily on nature for their livelihood (small-scale agriculture and artisanal fishing) and are dependent on rivers, creeks and wells, as they do not have a connection to the water network.
- Claimants argue that the industrial activities of Alunorte and Albras in the municipality of Barcarena were subject to the unfulfilled condition that the companies would create an ecological reserve to protect the local population’s livelihood.
- Alunorte built two reservoirs for the residues from the aluminium production in the protected area. According to claimants, the residues caused significant environmental damage including forest degradation and water contamination, and could cause health problems to the local communities, including cancer, Alzheimer’s and skin diseases. In the area, complaints of sudden deaths, miscarriages and diseases that can be attributed to pollution by heavy metals have been reported.
- The area suffered at least ten environmental disasters allegedly attributable to the industrial activities of Alunorte and Albras between 2002 and 2020.⁷ Alunorte has been fined many times by the authorities.
- Community members claim to have suffered a financial toll as the environmental degradation also prevents them from using nature as a source of income. The medical costs incurred by the pollution add another financial burden, they argue.
- The association Cainquiama has initiated a number of proceedings in Brazil. None of the claims filed by Cainquiama have reached a final judgment yet. It will take many years before a definitive decision is reached in the Brazilian proceedings.
- In February 2021, Cainquiama filed a lawsuit in the Netherlands seeking compensation from the Dutch companies, Norsk Hydro ASA and the Fund.
- Cainquiama argue that the defendants not only failed to supervise their subsidiaries sufficiently to ensure respect for the environment as required under Brazilian law, but also failed to act after the first disasters occurred.
- Under Brazilian law, any indirect polluter, that is, any natural or legal person who (i) causes damage by omission, tolerance or permission; (ii) funds others to pollute/ cause damage; or (iii) financially benefits from the pollution/damage, is liable in the same way as the natural or legal person who directly causes the damage.

The lawsuit was filed in early 2021. It is too early to assess the barriers to justice that claimants will be facing in this proceeding before Dutch courts. However, this case already shows how necessary it is that corporate due diligence rules:

1. Require companies to take all necessary, adequate and effective measures in order to ensure respect for human rights and the environment throughout their value chains.
2. Extend beyond direct suppliers and subcontractors, and throughout global value chains.
3. Establish specific requirements for environmental protection and cover all potential or actual adverse impacts on the environment, including air, soil and water pollution.
4. Include a parent company and value chain civil liability regime.
5. Provide for collective redress, as well as for representative actions by civil society organisations and trade unions, in cases of corporate abuse.

Outcome

- The case is ongoing.

1.8 Canopée and others v Casino Guichard- Perrachon

Home company

Casino Guichard-Perrachon (France)

Host company

Companhia Brasileira de Distribuição and its subsidiaries (Brazil), Éxito and its subsidiaries (Colombia)

Business relationship

Parent/subsidiaries, buyers/suppliers

Impacts

(Land) property, indigenous people's rights, environment, forests

Relevant international standards

UN Convention on Biological Diversity,^{1,2} Paris Agreement,³ Universal Declaration of Human Rights,^{4,5} International Covenant on Economic, Social and Cultural Rights,⁶ International Covenant on Civil and Political Rights,⁷ ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, American Convention on Human Rights⁸

Plaintiff

Canopée, Comissão Pastoral da Terra (CPT), Envol Vert, Mighty Earth, Notre Affaire à Tous, France Nature Environnement, Sherpa, Coordenação das Organizações Indígenas da Amazônia Brasileira (COIAB), Federação dos Povos Indígenas do Pará (FEPIPA), Federação das Organizações e Povos Indígenas de Mato Grosso (FEPOIMT), Organización Nacional de los Pueblos Indígenas de la Amazonia Colombiana (OPIAC)

Defendant

Casino Guichard-Perrachon



← Cattle pasture in livestock farm in the Amazon rainforest. Location: Para, Brazil. Photo by Shutterstock / PARALAXIS.

Description

- In June 2020, the NGO Envol Vert published a field investigation⁹ that found that Casino's suppliers regularly purchased meat from slaughterhouses involved in illegal deforestation and land grabbing practices in Brazil and Colombia. Fifty-two products sold in Casino's subsidiaries were linked to these farms.¹⁰
- In September 2020, the claimants served a letter of formal notice¹¹ to Casino under the French Duty of Vigilance Law. They demanded that Casino adopt adequate and effective vigilance measures to identify risks and prevent environmental and human rights abuses in its beef supply chains in Brazil and Colombia, including risk-mapping and traceability throughout its supply chains, and introduce an alert system to protect the rights of peoples affected by land grabbing.¹²
- In March 2021, the claimants filed a lawsuit against Casino in the Saint-Etienne court, requesting a judicial injunction to comply with the legal requirements.¹³ Indigenous groups are also demanding compensation for damages done to their customary lands and the impact on their livelihoods.¹⁴

Outcome

- The case is ongoing.

The lawsuit was filed in early 2021. It is too early to assess the barriers to justice that claimants will be facing in this proceeding before French courts. However, this case already shows how necessary it is that corporate due diligence rules:

1. Require companies to take all necessary, adequate and effective measures in order to ensure respect for human rights and the environment throughout their value chains.
2. Extend beyond direct suppliers and subcontractors, and throughout global value chains.
3. Establish specific requirements for environmental protection and cover all potential or actual adverse impacts on the environment, including deforestation.
4. Include a parent company and value chain civil liability regime.
5. Provide for collective redress, as well as for representative actions by civil society organisations and trade unions, in cases of corporate abuse.

2. Civil proceedings: Actions for injunctive relief

2.1 Association France Palestine Solidarité and others v Alstom SA and others

Home company

Alstom SA (France), Alstom Transport SA (France), Veolia Transport SA (France)

Host company

City-Pass Consortium (Israel)

Business relationship

Members/consortium

Impacts

Aiding and abetting Israel's occupation and commission of war crimes

Relevant international standards

1949 Geneva Conventions and their Additional Protocols;¹ the 1907 Hague Regulations; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict²

Plaintiff

Association France Palestine Solidarité (AFPS),
Palestinian Liberation Organization (PLO)

Defendant

Alstom SA, Alstom Transport SA, Veolia Transport SA



← The light rail project by Alstom SA, Alstom Transport SA, Veolia Transport SA in downtown Jerusalem in 2018. Photo by Shutterstock / Roman Yanushevsky.

Description³

- In July 2005, Alstom, Alstom Transport and Veolia Transport were contracted by the Israeli Government to construct and operate a light rail project in Jerusalem, as members of the City-Pass Consortium. The consortium was made up of these three French companies and four Israeli ones.
- In February 2007, AFPS and PLO filed a lawsuit against the French companies before the Nanterre court requesting the annulment of the contract between the Israeli authorities and the French companies.⁴
- The claimants alleged that the contract facilitated the establishment of Israel's illegal settlements in occupied territory, and that the movement of Israeli Jewish settlers between Israel and their residences in occupied territory violated international humanitarian law and the French Civil Code.
- The claimants sought an injunction to cancel the contract and halt construction of the light rail project. The companies argued that such requests were outside the scope of French jurisdiction.
- In April 2009, the Nanterre court ruled that it was within its jurisdiction to hear the case. Alstom and Alstom Transport appealed the decision, but the court of appeal and the Supreme Court (Cour de Cassation) upheld the ruling of the Nanterre court on the jurisdiction of the French courts in December 2009 and February 2011 respectively.
- Following public pressure, Veolia sold its shares in the City-Pass Consortium to Dan Bus Company and withdrew from the railway project.

Outcome

- In May 2011, the Nanterre court rejected the arguments to cancel the contract. The court held that the international law invoked by the claimants did not create obligations “directly applicable” to private companies, and that violations by the Israeli state did not invalidate the contract. Moreover, according to the court, the claimants failed to prove the causal link between the companies’ actions and the Israeli authorities’ conduct. AFPS and PLO appealed the decision.
- In March 2013, the court of appeal confirmed the first ruling,⁵ stating that relevant international agreements create obligations between states and could not serve as grounds for holding companies liable. The court ordered AFPS and PLO to pay €30,000 to each of the three defendant companies to cover their legal expenses.

This case shows how necessary it is that corporate due diligence rules:

1. Require companies to take all necessary, adequate and effective measures in order to ensure respect for human rights and the environment in their global operations.

French courts determined that international humanitarian law invoked by the claimants does not create direct obligations upon private companies. The courts refused to consider them as subjects of international law, in clear opposition to the growing recognition of the international legal personality of transnational corporations.

Due diligence legislation needs to clarify the corporate responsibility towards internationally recognised human rights and environmental standards, and recognise their status as subjects of international law.

2. Acknowledge that in conflict-affected areas, there is a particularly salient need for companies to conduct due diligence to ensure respect for humanitarian law obligations, in line with existing international standards and guidance including the Geneva Conventions and its additional protocols.

3. Provide for injunctive relief, which means courts can order companies to act or to refrain from acting in a certain way with the aim of preventing or mitigating human rights abuses or environmental harm in their value chains.

4. Provide for representative actions by civil society organisations and trade unions, in cases of corporate abuse.

2.2 Milieudefensie and others v Royal Dutch Shell PLC

Home company

Royal Dutch Shell PLC (Netherlands)

Host company

The case refers to the home company's global operations

Business relationship

The case refers to the home company's global operations

Impacts

Climate, human life

Relevant international standards

European Convention for the Protection of Human Rights and Fundamental Freedoms,¹ International Covenant on Civil and Political Rights,² UN Guiding Principles on Business and Human Rights, Paris Agreement under the United Nations Framework Convention on Climate Change

Plaintiff

Milieudefensie (Friends of the Earth Netherlands), ActionAid, Both ENDS, Fossilvrij, Greenpeace, Young Friends of the Earth Netherlands, Waddenvereniging

Defendant

Royal Dutch Shell PLC



← Donald Pols, Director of Milieudefensie (centre) speaking to journalists following the landmark ruling that by 2030 the oil giant Shell must reduce its CO₂ global emissions by 45% compared to 2019 levels. Photo by [Milieudefensie](#) in 2021.

Description^{3, 4, 5}

- Shell, a British-Dutch multinational headquartered in The Hague, is Europe's largest public company, the largest polluter in the Netherlands and one of the ten most polluting companies in the world. The company is historically responsible for one-fiftieth of the world's total emissions of CO₂ and methane in the period 1854 to 2018.
- Despite claiming to live up to the Paris Agreement, Shell invests approximately 95% of its funds in oil and gas, even though a large part of the known reserves must remain in the ground to avert disastrous climate change.⁶
- In April 2018, the Dutch NGO Milieudefensie sent a letter to Shell, demanding it to align its business activities and investments with the Paris Agreement, phase out its oil and gas activities and reduce its greenhouse gas emissions to zero by 2050.⁷ In May 2018, Shell released a letter where it rejected Milieudefensie's demands without going into detail and pointed to its current climate ambition.⁸
- In April 2019, the claimants, along with 17,379 co-plaintiffs, served Shell a court summons. They asked the judge to force Shell to stop driving climate change through its business practices and commit to reducing its CO₂ emissions by 45% by the year 2030. Court hearings took place in December 2020.

Outcome

- On 26 May 2021, the court ruled that the Shell must reduce its CO₂ global emissions by 45% compared to 2019 levels, by 2030. This was the first time in history a judge held a corporation accountable for its contribution to climate change.⁹
- The judgment was ground-breaking in two fundamental ways:¹⁰ (1) it obliged the defendant company to align its policies and comply with the emission targets set by the Paris Agreement, resorting to the Intergovernmental Panel on Climate Change reports to measure the reduction obligation, and (2) it extended the company's responsibility to prevent human rights impacts linked to climate change beyond the perimeter of the company's own activities, covering its entire global value chain, as prescribed by the UN Guiding Principles on Business and Human Rights.
- The court distinguished between the CO₂ emissions of (1) the Shell group (Royal Dutch Shell and the other Shell companies) and (2) the business relations of the Shell group, including suppliers and customers.
- The court considered that it is internationally endorsed, as enshrined in the UNGPs, that companies bear responsibilities for Scope 3 emissions (emissions that occur in the value chain different from those from the generation of purchased energy), which represent approximately 85% of Shell's emissions.
- The court concluded that Shell is obliged to reduce all of them, but noted that the level of responsibility depends on its control and influence over the emissions: (1) the reduction obligation is an obligation of results for the activities of the Shell group, given the far-reaching control and influence of the parent company over its subsidiaries, while (2) the reduction obligation is an obligation of "significant best-efforts" for the business relations of the Shell group, including suppliers¹¹ and customers¹² (i.e. Shell is expected to use its influence to limit their CO₂ emissions as much as possible).
- The court, like the claimants, agreed that the energy transition cannot be left to the market, and Shell alone cannot stop climate change, but argued that this does not absolve Shell of its individual partial responsibility.

Milieudefensie and others v Royal Dutch Shell PLC

Barriers to remedy

● **Contested corporate climate responsibility**

Even though its objectives can be translated into concrete obligations for companies,¹³ the Paris Agreement is only addressed to states, not companies. Shell argued that, in order to facilitate the energy transition, the EU must create a policy framework with clear and binding legislative targets.

In this case, the absence of a regulatory framework with clear and binding legislative targets for companies was not an impediment for holding Shell accountable for its climate impacts, as dangerous climate change due to CO₂ emissions induced global warming threaten the human rights to life and to respect for private and family life.

According to the court, Shell has an obligation, based on the unwritten standard of care pursuant to the Dutch Civil Code,¹⁴ to identify, prevent, mitigate and account for its adverse impacts on these human rights, as prescribed by the corporate due diligence standards provided for in the UN Guiding Principles on Business and Human Rights (UNGPs).¹⁵

However, while the court was right to hold Shell accountable against the non-binding yet universally-endorsed UNGPs, there's no guarantee the next court will do the same.¹⁶

● **Unclear parent company and value chain liability**

Dutch law does not explicitly hold parent companies accountable for human rights and environmental harms caused by their subsidiaries, or lead companies' accountability for harms caused by their business partners.

In this case, Shell used this to argue that there was no legal obligation for energy companies to reduce value chain emissions.

While the court was right to hold Shell accountable not only for the emissions linked to the own activities of the Shell group, but also for those of their business relationships in its global value chain, both upstream (e.g. suppliers) and downstream (e.g. customers), there's no guarantee a different court would have done the same.

How to address them

● **Enforceable corporate climate obligations**

Whether companies address their human rights and environmental impacts and are held accountable for abuses – including climate change – should not be left to interpretation.

Due diligence legislation should specify criteria for science-based emissions reduction targets for companies, in line with the 1.5-degree target scenario of the Paris Agreement, and should enforce obligations on companies to reduce and account for their climate impacts.¹⁷

● **Parent company and value chain liability**

Due diligence legislation must clearly provide for the liability of parent/lead companies for harm they could have reasonably prevented throughout their global value chains, as concluded by the court when interpreting the unwritten standard of care in the Dutch Civil Code, in line with the UNGPs.

2.3 Sherpa and others v Bolloré SA

Home company

Bolloré SA (France)

Host company

SOCAPALM (Société Camerounaise de Palmeraiess)
(Cameroon)

Business relationship

Parent/subsidiary

Impacts

Human health, livelihood of local communities, workers' rights, workers' health and safety, environment

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights;^{2,3} ILO Occupational Safety and Health Convention (No. 155);⁴ ILO Promotional Framework for Occupational Safety and Health Convention (No. 187);⁵ ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise

Plaintiff

Sherpa, ReAct, GRAIN, FIAN-Belgium, Pain pour le prochain, SYNAPARCAM, FODER, SNJP, l'Amicale des Riverains d'Edéa, SATAM

Defendant

Bolloré SA



← Subcontracted workers in the SOCAPALM plantation in Kienké, Cameroon, in 2009. Photo by Isabelle Ricq.

Description

- SOCAPALM produces palm oil and cultivates rubber trees in Cameroon. It is the country's most important palm oil producer.⁶
- In 2010, NGOs Sherpa, CED, FOCARFE, and MISEREOR filed a complaint against four holding companies of SOCAPALM at the French, Belgian, and Luxembourg National Contact Points (NCP) for the OECD Guidelines for Multinational Enterprises.⁸
- The four holding companies – Bolloré (France), Socfin (Belgium), SOCFINAL (Luxembourg) and Intercultures (Luxembourg) – have joint control over SOCAPALM's operations in Cameroon through complex financial investments.
- The complaint alleged that these holding companies breached the OECD Guidelines⁷ by failing to take action to prevent or address SOCAPALM's adverse impacts on the environment, local communities, and workers. These impacts include:⁹ the expansion of palm operations, which diminished the physical territory of local communities and the availability of public services and natural resources; failure to adequately treat water and air pollution; inadequate health and safety measures, with workers lacking sufficient personal protective equipment and health infrastructures; precarious working conditions, including poor remuneration; contempt for employee representation bodies and their demands; overcrowded housing facilities for workers in deplorable conditions; and hiring of security agent Africa Security, whose employees physically abused local villagers.
- In November 2011, after refusing to participate in the proceedings for two years, Bolloré finally agreed to engage. In February 2013, Bolloré (representing Socfin and SOCAPALM) and Sherpa accepted the NCP's offer of mediation.
- In June 2013, the NCP issued a final statement concluding that SOCAPALM had breached certain guidelines and recommended that the companies find a remedy.
- In September 2013, the NCP validated an action plan developed by the parties to remedy the violations. Bolloré committed to exerting its influence to reduce SOCAPALM's environmental damages, compensate local communities for loss of resources and land and improve labour conditions, among other things.
- In November 2014, Socfin backed out of the action plan and Bolloré stopped implementing it. Subsequent procedures through the NCPs were unsuccessful and neither Bolloré nor Socfin implemented the action plan.
- In May 2019, Sherpa and others filed a contract law claim against Bolloré in the French courts arguing that Bolloré's refusal to implement the action plan placed it in breach of a legally binding contract under French law.¹⁰
- Bolloré claimed that the agreement resulting from mediation was confidential and could not be used in court. But in March 2021, the judge declared that confidentiality did not apply, otherwise such agreements could never be judicially enforced. Bolloré appealed this decision. A ruling on this procedural issue is expected in early 2022.

This case shows how necessary it is that corporate due diligence rules:

1. Require companies to take all necessary, adequate and effective measures in order to ensure respect for human rights and the environment throughout their value chains.
2. Establish specific requirements for environmental protection and cover all potential or actual adverse impacts on the environment, including air and water pollution.
3. Include a parent company and value chain civil liability regime.
4. Provide for injunctive relief, which means courts can order companies to act or to refrain from acting in a certain way with the aim of preventing or mitigating human rights abuses or environmental harm in their value chains (which NCPs don't have the power to do).
5. Provide for collective redress, as well as for representative actions by civil society organisations and trade unions, in cases of corporate abuse.

Outcome

- The case is ongoing.

Sherpa and others v Bolloré SA

Barriers to remedy

● Lack of recognition of relevant international standards

It is unclear whether internationally recognised human rights and environmental standards would provide full protection against all adverse impacts identified in this case.

To start with, it is not clear that the current fragmented patchwork of international environmental standards provide for sufficient coverage of relevant impacts on air and water.¹¹ Moreover, there is no internationally recognised human right to a safe, clean, healthy and sustainable environment. While water and air pollution could be considered an abuse against the right to health, the absence of a specific international standard makes it harder for victims to obtain remedy in cases like this one.

Furthermore, there is no internationally recognised definition for a living wage or income. Considering living wages and incomes as internationally recognised human rights depends on the content and interpretation of relevant conventions.¹²

In this particular case, this should not constitute a barrier since the claimants are not asking the court to hold the company liable for breaching the standards above, but for breaching its commitments to implement specific measures, which were meant to uphold such standards in practice.

● NCPs' lack of power to order remediation

NCPs are meant to play a role in helping victims of corporate abuse by acknowledging and helping raise awareness of corporate breaches, providing recommendations to companies on how to remediate their impacts, and encouraging companies to provide redress.

However, they have often proven inadequate in facilitating remedy. NCPs cannot order any remediation measure or compel a company to participate in a specific proceeding. Their core mandate is to contribute to the resolution of issues through non-adversarial, dialogue-based procedures.¹⁴

As OECD Guidelines are non-binding and NCP resolutions are, in principle, non-enforceable, companies have little incentive to comply. Effective prevention, remediation and compensation ultimately depend on their will to act.

How to address them

● Broad normative scope

This regulatory gap should be filled in due diligence legislation by recognising a wide range of impacts companies should prevent and mitigate, beyond the limited range of international conventions in the field of environmental protection. Moreover, legislation should safeguard the human right to a safe, clean, healthy and sustainable environment.

Regarding remuneration, due diligence legislation should explicitly address living wages and incomes throughout the value chain, and include a definition of living wage and income, with a reference to a decent standard of living.¹³

● Value chain liability and judicial enforcement

Only binding laws provide an effective tool for holding corporations accountable, and only judicial authorities with sufficient enforcement powers can order damage remediation and compensation, and sanction companies that violate human rights and environmental due diligence standards.¹⁵

Due diligence legislation must provide for the civil liability of parent/lead companies for harm they could have reasonably prevented. Otherwise, victims will often be left without compensation and the parent/lead companies that failed to prevent – and ultimately profited from – the abuses that led to the harm will remain unpunished.

● **Corporate threats to advocacy and free speech¹⁶**

Since 2009, Bolloré and its partners have launched a long list of defamation actions against many journalists, media, lawyers and NGOs over articles on their activities in Africa. The targets of these SLAPP (Strategic Lawsuit Against Public Participation) suits included the claimants in this case: In 2011, Bolloré sued Sherpa for defamation regarding the subject matter of the NCP proceedings. In June 2013, Bolloré withdrew the suit, as it was incompatible with the mediation procedure. In 2016, Socfin and SOCAPALM sued three media outlets (Mediapart, L'Obs, Le Point) and two NGOs (Sherpa, ReAct) for defamation, over articles about protests by rural residents and farmers who live near plantations run by these two companies in Cameroon. Defendants were discharged by the court in March 2018. The companies decided to appeal but eventually withdrew their suit.¹⁷

SLAPPs like these ones aim to silence journalists and NGOs that participate to the public debate and highlight corporate misconducts by draining their financial and psychological resources, in the hope that costly and lengthy procedures will discourage them from investigating and denouncing corporate abuse.

● **Anti-SLAPP rules**

EU-wide rules are needed to protect against SLAPPs and make sure that they are dismissed at an early stage of proceedings. EU rules must also make sure that SLAPP litigants pay for abusing the law and the courts, and that SLAPP targets are given means and assistance to defend themselves.

A model EU anti-SLAPP legislation¹⁸ has recently been developed by a coalition of NGOs.¹⁹

2.4 Friends of the Earth France and others v TotalEnergies SE

Home company

TotalEnergies SE (France) (formerly, Total SE)

Host company

Total Exploration & Production Uganda B.V. (Tepu) (Uganda) and Total East Africa Midstream B. V. (Team) (Uganda); several subcontractors including Atacama Consulting Ltd, subcontractor of Tepu, operator of project Tilenga, and Newplan Ltd, subcontractor of Team, operator of project Eacop

Business relationship

Parent/subsidiaries; contractee/contractors

Impacts

Livelihood of local communities, environment, climate, physical integrity of human rights defenders

Relevant international standards

Universal Declaration of Human Rights;^{1,2} International Covenant on Economic, Social and Cultural Rights;³ African Charter on Human and Peoples' Rights;^{4,5} UN Convention on Biological Diversity; Paris Agreement under the United Nations Framework Convention on Climate Change

Plaintiff

Friends of the Earth France, Survie, AFIEGO, CRED, NAPE/Friends of the Earth Uganda and NAVODA

Defendant

TotalEnergies SE



← Two members of communities affected by Total's Tilenga project in Uganda who attended the first court hearing. Photo by: Sandra Imbault/ Les Amis de la Terre.

Description

- In 2006, large oil reserves were discovered in the heart of Murchison Falls, a protected natural park in Uganda. Total (66.6%), along with the Chinese National Offshore Oil Corporation (33.3%), are all set to develop an oil megaproject.
 - Total is planning to drill more than 400 wells, including one third within the Murchison Falls national park, which will enable the extraction of around 200,000 barrels of oil per day. Total is planning to build a 1,445 km long giant pipeline across Uganda and Tanzania to transport the oil (EACOP, the East Africa Crude Oil Pipeline), an industrial area including a central processing plant, and other related infrastructures, including a water abstraction system, waste management facilities, pipelines and roads.
 - The construction of this megaproject threatens the livelihoods of local communities, which depend primarily on agriculture and fishing. Ugandan families are being forced to abandon their lands. The few of them who have already received compensation claim that it is not enough to buy land and crops of equivalent value to those lost.⁶ The project also threatens the fragile biodiversity in the natural park, home to endangered species. It also risks polluting the river Nile, as one of the river's sources, Lake Albert, falls in the very zone where Total plans to drill. On top of all this, the CO₂ emissions from the combustion of the fuel is estimated at around 34 million metric tons per year during the peak of the operations,⁷ more than the combined emissions of Uganda and Tanzania.
 - In June 2019, French NGOs Friends of the Earth France and Survie, and Ugandan NGOs AFIEGO, CRED, NAPE/Friends of the Earth Uganda and NAVODA sent a formal notice to Total, in accordance with the French Duty of Vigilance Law, giving the company three months to meet its obligations to develop, publish and implement adequate vigilance measures to prevent abuses in its project in Uganda.⁸
 - In October 2019, after Total responded to the notice denying any problems in its vigilance plan and practices in Uganda,⁹ the claimants filed a lawsuit before the Nanterre civil court, the first one ever under the French Duty of Vigilance Law.
 - In January 2020, the civil court declared itself unfit to rule on the case, in favour of commercial courts.¹⁰ The claimants appealed the decision. In December 2020, the Versailles court of appeal declined jurisdiction and confirmed that the case should be judged by a commercial court.¹¹ The claimants have appealed before the French Supreme Court, which is expected to issue a ruling by the end of 2021.¹²
- Claimants have criticised the decision, arguing that it is not commercial but civil courts that should hear the case, as this is not about the company's internal management but about its external impacts on people and the environment.¹³ They have also expressed legitimate concerns about the potential bias of commercial courts, which are composed of judges elected by and from the business world.
- Local community members, human rights and environmental defenders, and journalists who criticise the project allegedly experience harassment, intimidation, threats, and unlawful arrests.¹⁴ Two community members suffered repeated acts of intimidation, including arbitrary arrest,¹⁵ after travelling to France to testify before the Nanterre court in the ongoing proceedings against Total.¹⁶ UN Special Rapporteurs have written to Total and the French and Ugandan governments denouncing this.¹⁷

This case shows how necessary it is that corporate due diligence rules:

1. Require companies to take all necessary, adequate and effective measures to ensure respect for human rights and the environment throughout their global operations and value chains.
2. Define the due diligence duty not as a narrow and superficial compliance-orientated process, but as a standard of conduct which include effectively implementing concrete measures to prevent and mitigate risks of human rights violations and environmental harm.
3. Establish specific requirements to address negative impacts on human rights and environmental defenders. This must guarantee that defenders are not subjected to direct or indirect reprisals from a company's subsidiaries and business partners, and from local authorities and security forces.¹⁸
4. Establish specific requirements for climate action. New legislation should enforce obligations on companies to reduce and account for their climate change impacts, including their own emissions and their indirect greenhouse gas emissions through their global value chains. Legislation should specify criteria for corporate climate targets and ensure that companies set and pursue concrete goals to bring them in line with the 1.5-degree target scenario of the Paris Agreement.
5. Provide for injunctive relief, which means courts can order companies to act or to refrain from acting in a certain way with the aim of preventing or mitigating human rights abuses or environmental harm in their value chains.
6. Ensure that, at the request of a claimant that has presented reasonably available evidence, the court shall order that further evidence be presented by the defendant to prove whether it took all reasonable measures to prevent the harm, and to rebut the presumption of a causal link.
7. Provide for representative actions by civil society organisations and trade unions, in cases of corporate abuse.

Outcome

- The case is ongoing.

2.5 Local authorities and NGOs v TotalEnergies SE

Home company

TotalEnergies SE (France) (formerly, Total SE)

Host company

The case refers to the home company's global operations

Business relationship

The case refers to the home company's global operations

Impacts

Climate, human life

Relevant international standards

European Convention for the Protection of Human Rights and Fundamental Freedoms,¹ International Covenant on Civil and Political Rights,² UN Guiding Principles on Business and Human Rights, Paris Agreement under the United Nations Framework Convention on Climate Change

Plaintiff

14 local authorities³ and NGOs Notre Affaire à Tous, Sherpa, France Nature Environnement, Eco Maires and ZEA

Defendant

TotalEnergies SE



← Protesters block the Total tower at the central business district in Paris in 2019. Photo by Shutterstock / Frederic Legrand - COMEO.

Description

- Total, a French multinational headquartered in Paris, is one of the 20 biggest contributors to worldwide greenhouse gas emissions from 1988-2015.⁴
- In October 2018, local authorities and NGOs sent a letter to Total's CEO reminding him of the company's climate obligations under the French Duty of Vigilance Law.
- In June 2019, Total's CEO, Patrick Pouyanné, met with them, but the talks did not result in substantial change. The local authorities and NGOs sent a formal notice⁵ to Total, in accordance with the Duty of Vigilance Law, giving Total three months to include adequate emissions reduction targets in its vigilance plan, to avoid a lawsuit. The authorities and NGOs argued that Total's vigilance plan is not sufficient to meet its legal obligations and that their climate ambitions are clearly out of step with the 1.5°C trajectory.
- In January 2020, the local authorities and NGOs filed a lawsuit⁶ before the Nanterre court, requesting that Total be ordered to take the necessary measures to drastically reduce its emissions,⁷ on the basis of the Duty of Vigilance Law, Article 1252 of the Civil Code on the prevention of environmental harm, and the Environmental Charter.⁸
- The claimants allege that, despite pledges, Total is not doing enough to help mitigate climate change, and their vigilance plan does not include detailed actions⁹ to be taken to curb emissions. In fact, Total allegedly plans to grow rather than decrease its oil and gas operations.
- The lawsuit seeks a court order forcing Total to issue a corporate strategy that (1) identifies the risks resulting from emissions resulting from the use of goods and services that Total produces, (2) identifies the risks of serious climate-related harms, and (3) undertakes action to ensure the company's activities align with a trajectory compatible with the climate goals of the Paris Agreement.
- Total challenged the tribunal's jurisdiction and requested that the case be heard by a commercial court, an exceptional court composed of company directors.
- In February 2021, the pre-trial judge rejected Total's objection and ruled that a judicial tribunal, as opposed to a commercial court, should have jurisdiction and hear the merits of the case.¹⁰
 - The judge considered that claimants, as "non-traders", have "a right of option, which they can exercise at their convenience, between the judicial court and the commercial court".¹¹
 - The judge recalled the French legislator's intention to allow "society as a whole" to control, via judicial review, the vigilance measures implemented by companies.¹²
 - Contrary to many companies' restrictive interpretation of the duty of vigilance as a compliance exercise limited to internal risk management processes, the judge interpreted the content and consequences of this duty broadly, arguing that "the development and implementation of the vigilance plan directly and significantly affect the activity of Total SE" and that "the strategic choices of Total SE [...] can no longer be made according to a strict economic logic but by integrating elements previously conceived as exogenous: [...] the risks of human rights and environmental infringements."¹³
- This decision on competent jurisdiction contradicted previous decisions in the case concerning Total's projects in Uganda.

This case shows how necessary it is that corporate due diligence rules:

1. Require companies to take all necessary, adequate and effective measures in order to ensure respect for human rights and the environment throughout their value chains.
2. Extend throughout global value chains.
3. Establish specific requirements for climate action. New legislation should enforce obligations on companies to reduce and account for their climate change impacts, including their own emissions and their indirect greenhouse gas emissions through their global value chains. Legislation should specify criteria for corporate climate targets and ensure that companies set and pursue concrete goals to bring them in line with the 1.5-degree target scenario of the Paris Agreement.
4. Provide for injunctive relief, which means courts can order companies to act or to refrain from acting in a certain way with the aim of preventing or mitigating human rights abuses or environmental harm in their value chains.
5. Provide for representative actions by civil society organisations and trade unions, in cases of corporate abuse.

Outcome

- The case is ongoing.

2.6 ProDESC, ECCHR and others v Électricité de France SA

Home company

Électricité de France SA (France)

Host company

Eólica de Oaxaca SAPI de CV (Mexico)

Business relationship

Parent/subsidiary

Impacts

Livelihood of local communities, indigenous people's rights, physical integrity of human rights defenders

Relevant international standards

UN Declaration on The Rights of Indigenous Peoples;¹
ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries²

Plaintiff

Unión Hidalgo community members, ProDESC, ECCHR

Defendant

Électricité de France SA ("EDF")



← Piedra Larga wind farm from the neighborhoods of the Unión Hidalgo community in Oaxaca, Mexico. Photo by ProDESC.

Description³

- Since 2015, EDF, the largest French energy company, has sought to build the Gunaa Sicarú wind farm in Oaxaca, Mexico. The wind power stations are planned on the territory of the indigenous Zapotec community Unión Hidalgo.
 - In 2015, EDF's Mexican subsidiary, Eólica de Oaxaca, negotiated and concluded contracts to use the land with individuals who declared themselves "landholders." Despite the fact that this land is subject to collective property under Mexican law, the community was never properly consulted about these contracts.
 - In 2017, Eólica de Oaxaca signed energy supply contracts with the Mexican authorities and requested the permit to generate electricity, still without prior consultation with the Unión Hidalgo community.
 - In February 2018, community representatives filed a complaint against EDF with the French French National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises.⁴ They alleged that EDF and its subsidiaries had violated the community's right to Free, Prior and Informed Consent (FPIC).⁵
- FPIC, as recognised in ILO Convention No. 169, allows indigenous peoples to give or withhold consent to a project that may affect them or their territories, and enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated.
- In October 2018, a Mexican court ordered the public authorities to undertake a consultation as per international law. So far, the decision has not been implemented.
 - In July 2019, the complainants withdrew from the process with the NCP,⁶ claiming the procedure was opaque, unpredictable, inequitable and unduly strict in its confidentiality requirements.⁷
 - In October 2019, complainants served a letter of formal notice to EDF, demanding that the company comply with the French Duty of Vigilance Law and improve its preventative measures. EDF replied that its vigilance plan was sufficient.
 - In October 2020, community representatives and NGOs ProDESC and ECCHR filed a civil lawsuit against EDF at the Paris civil court, under the French Duty of Vigilance Law. They demanded that the company halt the project until abuses are mitigated.
 - While the Mexican state is to blame for failing to guarantee local communities' rights, EDF has likewise allegedly failed to do its part to properly address its operations' risks and to respect indigenous peoples' rights. The company moved forward with the project despite the lack of adequate consultation with affected communities.
 - Moreover, EDF representatives have been accused of offering benefits to persuade community members to support the project. This has allegedly contributed to an escalation of divisions and violence within the community, resulting in serious threats to human rights defenders⁸ and critics of the project.
 - In February 2021, the claimants requested the French judge to grant them interim measures and suspend the project until a final decision is made.

The lawsuit was filed in late 2020. It is too early to assess the barriers to justice claimants will be facing in this proceeding before French courts. However, this case already shows how necessary it is that corporate due diligence rules:

1. Require companies to take all necessary, adequate and effective measures in order to ensure respect for human rights and the environment throughout their global operations and value chains.
2. Establish specific requirements to address negative impacts on indigenous peoples. This must entail operating only where the company has received Free, Prior and Informed Consent granted by any affected indigenous peoples or community, where applicable.⁹
3. Establish specific requirements to address negative impacts on human rights and environmental defenders. This must guarantee that defenders are not subjected to direct or indirect reprisals from a company's subsidiaries and business partners.^{10,11}
4. Establish specific requirements to conduct effective, meaningful and informed consultations with affected rightsholders, including but not limited to indigenous peoples, communities and human rights defenders (currently not a clear obligation under the French Duty of Vigilance Law).
5. Provide for injunctive relief, meaning that courts can order companies to act or to refrain from acting in a certain way with the aim of preventing or mitigating human rights abuses or environmental harm in their value chains (which NCPs don't have the power to do).
6. Provide for collective redress, as well as for representative actions by civil society organisations and trade unions, in cases of corporate abuse.

Outcome

- The case is ongoing.

2.7 Fédération Internationale pour les Droits Humains and others v Suez SA

Home company

Suez SA (France)

Host company

Aguas Andinas SA (Chile), Empresa de Servicios Sanitarios de Los Lagos SA ("ESSAL") (Chile)

Business relationship

Parent/subsidiary

Impacts

Human health, environment

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights^{2,3,4}

Plaintiff

Fédération Internationale pour les Droits Humains ("FIDH"), Ligue des Droits de l'Homme ("LDH"), Observatorio Ciudadano, Red Ambiental Ciudadana de Osorno

Defendant

Suez SA



← Demonstration in Osorno. Photo by Observatorio Ciudadano.

Description^{5, 6}

- ESSAL is a Chilean water and wastewater utility company controlled by Aguas Andinas, Chilean subsidiary of the French multinational Suez. 43.8% of the Chilean urban population is supplied by companies controlled by the Suez Group.
- On 10 July 2019, some 2,000 litres of oil were released from the Caipulli drinking-water treatment plant managed by ESSAL, which is responsible for the sanitation network in the Chilean city of Osorno.
- The leak affected the entire water supply for 49,000 households and reached the Rahue and Damas rivers.
- The water supply was cut off for more than ten days, prompting a major health crisis, which grew worse because of the delayed and incomplete installation of alternative water-supply points by ESSAL. Water-supply services were not fully restored until 21 July 2019.
- The contamination had serious health impacts, due to the high risk of gastro-intestinal diseases and Hepatitis A from poor water quality, and the fact that vital healthcare services had no potable water for ten days.
- The leak is deemed to be due to ESSAL's negligence in the plant's maintenance and management. Public authorities had already warned about the many irregularities in the infrastructure back in 2018, but ESSAL failed to remedy them.
- The Chilean health and judicial authorities have sanctioned ESSAL multiple times after regular incidents,⁷ but the situation has not substantially improved.
- In July 2020, the claimants served a letter of formal notice⁸ to the Suez Group under the French Duty of Vigilance Law. The claimants demand that Suez address the failings and illegalities in the provision of a water supply to Osorno and that it publish a new vigilance plan that includes detailed and adequate risk prevention measures and a mechanism for monitoring implementation.
- In April 2021, the company published a new vigilance plan⁹ that still does not meet its vigilance obligations.
- In June 2021, faced with the company's inaction, the claimants decided to bring a lawsuit before the French courts, which could order the company to put in place corrective and preventive measures.¹⁰

The lawsuit was filed in June 2021. It is too early to assess the barriers to justice claimants will be facing in this proceeding before French courts. However, this case already shows how necessary it is that corporate due diligence rules:

1. Require companies to take all necessary, adequate and effective measures in order to ensure respect for human rights and the environment throughout their value chains.
2. Establish specific requirements for environmental protection and cover all potential or actual adverse impacts on the environment, including air, soil and water pollution.
3. Provide for injunctive relief, allowing courts to order companies to act or to refrain from acting in a certain way with the aim of preventing or mitigating human rights abuses or environmental harm in their value chains.
4. Provide for representative actions by civil society organisations and trade unions, in cases of corporate abuse.

Outcome

- The case is ongoing.

3. Other proceedings

- Labour law proceedings
- Social protection law proceedings
- Consumer law proceedings
- Duty of vigilance law proceedings (pre-judicial)

3.1 Former employees v COMILOG and others

Home company

Eramet (France)

Host company

Compagnie Minière de l'Ogouée (COMILOG) (Gabon)

Business relationship

Parent/subsidiary

Impacts

Workers' rights

Relevant international standards

ILO Termination of Employment Convention, 1982 (No. 158)^{1,2}

Plaintiff

857 former COMILOG workers

Defendant

COMILOG, COMILOG France, COMILOG International, COMILOG Holding



← A COMILOG train after colliding with a passenger train in Congo Brazzaville. Photo by [Sherpa](#).

Description

- In September 1991, a COMILOG train transporting manganese from Gabon collided with a passenger train in Congo Brazzaville. More than 100 people died.
- Following this accident, COMILOG stopped the transport of raw materials by train, filed for bankruptcy and laid off 955 workers without notice or compensation.
- In July 2003, COMILOG came to an agreement with the governments of Congo and Gabon to give over €1 million as compensation. Workers claim they never received the money.
- In 2008, after the French group Eramet became a majority owner of COMILOG (63.71%), 857 former COMILOG workers brought individual complaints before a French employment tribunal. The workers alleged that the dismissal was unfair and requested €65 million as compensation.
- In 2011, the court dismissed the case on the grounds of not having jurisdiction over the matter. The workers appealed.
- In September 2015, the court of appeal ruled that France was the appropriate jurisdiction to hear the case for those claimants that had filed a lawsuit in 1992 before the employment court of Pointe Noire in the Congo, on the basis of the situation of denial of justice, given:
 - The denial of access to courts, as no judicial decision had been made in over twenty years; and
 - The sufficient link between the dispute and France, given the French nationality of COMILOG's parent company, Eramet, at the time of the filing of the case.³
- The court of appeal ruled that COMILOG should compensate workers €25,000 to €30,000 each, for terminating their employment contracts in 1992.^{4, 5, 6, 7}

Outcome

- In September 2017, the Supreme Court overruled the judgment of the court of appeal. It made a restrictive interpretation of the conditions for denial of justice and refused the jurisdiction of French courts over the case, on the grounds that:
 - Excessive delays in judicial proceedings do not constitute a denial of access to courts. The Supreme Court found that the impossibility for the employees to access the competent judge was not established, since their case was still formally pending before the Congolese courts.
 - The mere acquisition of the foreign employer by a French company does not represent a sufficient link between the dispute and France.

Former employees v COMILOG and others

Barriers to remedy

● **Doubtful jurisdiction over the subsidiary company**

Employees filed proceedings against both French entities and the Gabonese subsidiary. The scope of application of Regulation (EU) No 1215/2012 (Brussels I Recast Regulation) is limited to employers domiciled in the EU (article 21(1)(a)) and does not normally apply to non-EU employers.

Under French private international law rules, French courts cannot normally exercise jurisdiction over foreign entities. To exercise jurisdiction over the Gabonese company, the court of appeal resorted to an exceptional legal basis: the situation of denial of justice. However, this rarely accepted legal basis was finally rejected by the Supreme Court.

● **Lack of recognition of relevant international standards**

The ILO Termination of Employment Convention, 1982 (No. 158) has only been ratified by 10 EU Member States (Cyprus, Finland, France, Latvia, Luxembourg, Portugal, Slovakia, Slovenia, Spain, Sweden). If due diligence legislation restricted parent/lead company accountability only to adverse impacts against human rights and environmental standards that have been ratified by all EU Member States, the right of workers whose employment is terminated without a valid reason to “adequate compensation or other appropriate relief” would risk falling outside the scope.

How to address them

● **Forum necessitatis**

The Brussels I Recast Regulation should be revised to include a provision establishing a forum necessitatis (“forum of necessity”) on the basis of which EU courts may, on an exceptional basis, hear a case brought before them when the right to a fair trial or access to justice so requires, and the dispute has sufficient connection with the Member State of the court ruling on the matter.^{8,9}

These two requirements need to be broadly defined, to avoid restrictive interpretations like that of the French Supreme Court in the COMILOG case.

In particular, excessive delays in judicial proceedings should be considered as a denial of justice, and ownership or control by a local company over the foreign defendant should be considered as a sufficient connection.

● **Extended jurisdiction**

The Brussels I Recast Regulation should be revised to include a provision extending the jurisdiction of EU courts where the EU parent/lead company is domiciled to the claims over its foreign subsidiary or value chain partners when the claims are so closely connected that it is expedient to hear and determine them together.¹⁰

● **Broad normative scope**

Due diligence legislation should cover all internationally recognised human rights, including labour rights and environmental standards. This includes the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work, the ILO core conventions, as well as any other rights recognised in relevant ILO conventions, such as freedom of association, occupational safety and health, living wages and compensation for unfair dismissal.

● No parent company liability

In this case, no judicial decision had been made by the domestic court in over twenty years. Claimants frequently face many obstacles in holding local companies liable, because of the under-development and sometimes lack of independence of the local justice system. It is also often the case that damages cannot be recovered from subsidiaries or value chain partners in countries where production takes place because they are underfunded, go bankrupt or cease to exist.

● Parent company liability

Due diligence legislation must provide for the civil liability of parent/lead companies for harm they could have reasonably prevented. Otherwise, victims will be left without compensation from the parent/lead company that failed to prevent – and ultimately profited from – the abuses that led to the harm.

● Barriers to collective redress

All individuals suffered the same damage, which demonstrates the need for improved rules on collective action beyond consumer law. In the absence of a provision on collective redress in French law at the time, 857 different individual lawsuits had to be filed. The courts had to proceed on an ad hoc basis, first deciding on six of the claimants' cases.¹¹ Since then, collective actions have been introduced in French procedural law, but only in limited areas (namely, consumer law, data protection, discrimination, and certain environmental and health damages). Collective redress would still not be possible in this case today.

● Improved availability of collective redress

EU legislation should provide for effective collective redress and representative action beyond consumer protection, to cases of business-related human rights abuse or environmental harm. Affected persons should be automatically eligible to join a claim unless they specifically choose not to be ('opt-out'), avoiding complex registration procedures. Legislation should allow for legal standing of civil society organisations acting in the public interest.¹²

3.2 Venel v AREVA SA

Home company

AREVA SA (France)

Host company

COMUF (Gabon), SOMAÏR (Niger), COMINAK (Niger)

Business relationship

Parent/subsidiary

Impacts

Workers' rights, workers' health and safety

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights;² ILO Radiation Protection Convention (No. 115);³ ILO Occupational Cancer Convention (No. 139);⁴ ILO Occupational Safety and Health Convention (No. 155);⁵ ILO Safety and Health in Mines Convention (No. 176);⁶ ILO Promotional Framework for Occupational Safety and Health Convention (No. 187)⁷

Plaintiff

Family of Serge Venel, former COMINAK worker

Defendant

AREVA SA



← The main office of Areva in Paris.
Photo by Shutterstock / BalkansCat.

Description

- Since 1968, AREVA, 85% owned by the French state, has mined in Niger through its subsidiaries SOMAÏR and COMINAK.
- From 1978 to 1984, Serge Venel worked for COMINAK, which operated the group's uranium mines in the north-west of Niger. AREVA was the largest shareholder of COMINAK (34% of shares) but did not hold the majority of the shares.⁸
- In July 2009, Serge Venel died at the age of 59 from lung cancer. According to a medical certificate, his cancer was caused by inhaling uranium dust and cobalt, and was recognised as an occupational disease by the French Social Security.

Outcome

- In May 2012, the French court for social affairs of Melun found AREVA guilty of negligence as a “co-employer”,⁹ since the group had expressed interest in protecting the health of workers employed by its subsidiaries and had behaved as an employer on matters relating to health and safety.¹⁰ As a consequence, the widow of Serge Venel would see her pension double.¹¹
- In 2013, the court of appeal overruled the previous judgement and ruled that AREVA could not be held liable as an employer, but only COMINAK could be held liable, as it operates the site and is the company with which the employee had signed his employment contract.
- In 2015, the French Court of Cassation confirmed¹² the court of appeal's judgment by ruling that AREVA could not be held responsible as Serge Venel worked exclusively under the subordination of COMINAK, which paid him, controlled his activity, and dismissed him in 1984. It is not disputed that this company has a legal personality of its own. According to the court, the unilateral commitment of Areva concerning all the mining activities that it carries out either directly or through foreign subsidiaries cannot entail its recognition as a co-employer of the claimant.

Venel v AREVA SA

Barriers to remedy

How to address them

● **Current legal framework actually discourages responsible conduct**

The final decision rejected the parent company's liability. If the ruling of the court for social affairs of Melun, which found AREVA guilty of negligence as a "co-employer", had been upheld, liability would have applied on the basis of the parent company's involvement in the health and safety matters relating to its subsidiaries. This approach, in the absence of mandatory due diligence legislation, may discourage companies from conducting due diligence and rather encourage them to distance themselves from their subsidiaries and business partners, in order to avoid liability.

● **Mandatory requirements and civil liability to encourage compliance**

Due diligence legislation must provide for the civil liability of parent/lead companies for harm they could have reasonably prevented. Civil liability must apply whether the parent/lead company decided to take action and exert leverage over their subsidiaries and business partners to ensure respect for human rights or not. Only a regime like this would encourage compliance and hold companies accountable.

● **No parent company liability**

Without civil liability for the breach of the duty to prevent and mitigate harm caused or contributed to by subsidiaries and value chain partners, victims cannot seek remedy from the parent/lead company that failed to prevent – and ultimately profited from – the abuses that led to the harm.

● **Parent company liability**

Due diligence legislation must provide for the civil liability of parent/lead companies for harm they could have reasonably prevented. Otherwise, victims will often be left without compensation and parent/lead companies will remain unpunished.

● **Absence of majority owner**

In this case, AREVA was the largest shareholder of COMINAK (34% of shares) but did not hold the majority of the shares. The fact that a parent company does not hold a majority of the shares of a subsidiary may prevent victims from obtaining remedy from it.

● **Joint and several liability**

Where there is more than one parent company, they must all be considered jointly and severally liable for harm caused or contributed to by their subsidiaries, irrespective of the percentage of their shareholdings – especially where there is no majority shareholder (over 50% of shares) with decisive influence over the subsidiary.

Joint and several liability means victims can claim full compensation from any parent or lead company that failed to act with due care. Companies can privately sort out their respective proportions of liability and payment.

3.3 Hamburg Consumer Protection Agency v Lidl Stiftung & Co. KG

Home company

Lidl Stiftung & Co. KG (Germany)

Host company

Textile suppliers (Bangladesh)

Business relationship

Buyer/supplier

Impacts

Workers' rights

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights;² ILO Convention No. 1 concerning Hours of Work (Industry); ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise; ILO Convention No. 190 concerning Violence and Harassment

Plaintiff

Hamburg Consumer Protection Agency, on the initiative of ECCHR and the Clean Clothes Campaign

Defendant

Lidl Stiftung & Co. KG



← Lidl flyers. Photo by Shutterstock / Walter Cicchetti.

Description^{3, 4}

- On 6 April 2010, on the initiative of ECCHR and the Clean Clothes Campaign, the Hamburg Consumer Protection Agency filed an unfair competition complaint in the Heilbronn district court against Lidl for claims made in the company's advertisements about fair working conditions in their supplier chain.
- The advertising campaign claimed that the company advocated for fair working conditions and contracted its non-food orders only from selected suppliers. Lidl also claimed that it opposed child labour as well as human and labour rights abuses in its supply chain.
- The Consumer Protection Agency alleged that, as shown by a study by ECCHR and the Clean Clothes Campaign, the working conditions in Bangladeshi textile plants in Lidl's supply chain did not comply with international labour standards.
- Employees of many of Lidl's suppliers had reported harsh working conditions: excessive working hours with no payment for overtime, wage deductions as a punitive measure, obstruction of trade union activity and discrimination against female employees.
- The complaint demanded that Lidl stop deceiving customers about fair working conditions in its supply chain.

This proceeding did not aim to provide compensation for affected workers, but to expose the gap between the company's public statements and the reality of its supply chain, and to prevent and punish 'greenwashing' or 'socialwashing' – efforts to make a company look more environmentally-friendly and ethical than it is, through misleading advertising.

Outcome

- On 14 April 2010, Lidl agreed to withdraw the public claims made in the advertisements regarding fair working conditions.

3.4 Sherpa and others v Samsung Electronics France

Home company

Samsung Electronics France (France)

Host company

Several suppliers (China and others)

Business relationship

Buyer/supplier

Impacts

Workers' rights, workers' health and safety

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights;² ILO Occupational Safety and Health Convention (No. 155); ILO Promotional Framework for Occupational Safety and Health Convention (No. 187);³ ILO Occupational Cancer Convention (No. 139); ILO Chemicals Convention (No. 170); ILO Benzene Convention (No. 136); ILO Minimum Age Convention (No. 138);⁴ ILO Hours of Work (Industry) Convention (No. 1)

Plaintiff

Sherpa, ActionAid France - Peuples Solidaires

Defendant

Samsung Electronics France



← At the main entrance of the Samsung building in Seoul, South Korea in 2017. Photo by Marco Bicci / Shutterstock.

Description⁵

- From August to December 2012, the Chinese NGO China Labour Watch reported employment of children under the age of sixteen, abusive working hours, and working and living conditions incompatible with human dignity on the premises of Samsung's suppliers in China.⁶
- At the same time, Samsung declared on its website that it “aim[ed] to become one of the most ethical companies in the world” and included detailed commitments on workers' rights.⁷
- In February 2013, NGOs Sherpa and ActionAid France submitted a complaint against Samsung France for misleading commercial practices, based on the incompatibility between the company's ethical commitment and reports of labour abuses in Samsung's subcontractors' factories in China. The complaint was dismissed by the public prosecutor after a preliminary investigation.
- In December 2015, the claimants filed a civil party lawsuit (which enables the designation of an investigative judge) against the South Korean parent company and its French subsidiary before the Court of Bobigny, based on new evidence of labour abuses.⁸ In November 2017, they withdrew from the proceedings.
- In January 2018, the claimants filed a new lawsuit against parent and subsidiary before the court of Paris, based on new evidence of labour abuses in China, South Korea and Vietnam. In June 2018, the claimants filed a civil party lawsuit before the Paris court.⁹
- In November 2018, following a mediation procedure, Samsung admitted to exposing its South Korean factory workers to toxic chemicals and agreed to pay compensation for each employee suffering from work-related diseases.
- In April 2019, after several unsuccessful complaints, an investigating judge of a Paris Tribunal finally indicted Samsung Electronics France for misleading advertising.¹⁰ In April 2021, the Tribunal's Investigating Chamber annulled the indictment. It accepted Samsung's arguments that the civil parties were not admissible as they lacked the approval of the Ministry of Justice supposedly required to file consumer claims and had not suffered any harm as a result of the alleged offence. Sherpa and ActionAid France lodged an appeal before the French Supreme Court.¹¹
- In September 2020, French consumer defence organisation UFC-Que Choisir filed a separate criminal complaint against Samsung for deceptive marketing practices, alleging that the group had not kept its commitments on working conditions in its suppliers' factories.

This proceeding did not aim to provide compensation for affected workers, but to expose the gap between the company's public statements and the reality of its supply chain, and to prevent and punish 'greenwashing' or 'socialwashing' – efforts to make the company seem more environmentally-friendly or ethical than it is, through misleading advertising.

Outcome

- The case is ongoing.

3.5 Collectif Éthique sur l'étiquette and others v Auchan

Home company

Auchan (France)

Host company

Several suppliers (Bangladesh)

Business relationship

Buyer/supplier

Impacts

Human life, workers' health and safety

Relevant international standards

Universal Declaration of Human Rights;¹ International Covenant on Economic, Social and Cultural Rights;² ILO Occupational Safety and Health Convention (No. 155);³ ILO Prevention of Major Industrial Accidents Convention (No. 174);⁴ ILO Promotional Framework for Occupational Safety and Health Convention (No. 187)⁵

Plaintiff

Collectif Éthique sur l'étiquette, ActionAid France - Peuples Solidaires, Sherpa

Defendant

Auchan



← The aftermath of the Rana Plaza collapse. Photo by Shutterstock / Bayazid Akter.

Description⁶

- In April 2013, the collapse of the Rana Plaza building in Bangladesh killed 1,138 people. The building contained clothing factories manufacturing for major Western brands. Labels belonging to a brand sold by the French supermarket Auchan were found in the rubble.⁷
- Auchan had made several public statements highlighting the company's commitments to social and environment standards, including within its supply chain.⁸
- In April 2014, the NGOs Collectif Éthique sur l'étiquette, Peuples Solidaires and Sherpa filed a complaint in France against Auchan alleging the company used misleading advertisements regarding the working conditions in which its clothing was produced by its suppliers abroad.
- In May 2014, the prosecutor's office launched a preliminary investigation.
- In January 2015, the case was dismissed by the prosecutor without further action.⁹
- In June 2015, the three NGOs submitted a *plainte avec constitution de partie civile* (criminal complaint with a civil action).¹⁰ This meant an investigating judge could be appointed, open an investigation and send a request for cooperation to the Bangladeshi authorities.¹¹

In order to succeed, this action requires an efficient cooperation system to ensure access to evidence abroad, which has proven extremely difficult in practice.

This proceeding does not aim to provide compensation for affected workers, but to expose the gap between the company's public statements and the reality of its supply chain, and to prevent and punish 'greenwashing' or 'socialwashing' – efforts to make the company seem more environmentally-friendly or ethical than it is, through misleading advertising.

Outcome

- The request for cooperation remains not acted upon, and the investigation appears to be at a standstill.

Duty of vigilance law proceedings (pre-judicial)

3.6 UNI Global Union and Sherpa v Teleperformance

Home company

Teleperformance (France)

Host company

All foreign subsidiaries

Business relationship

Parent/subsidiaries

Impacts

Workers' rights

Relevant international standards

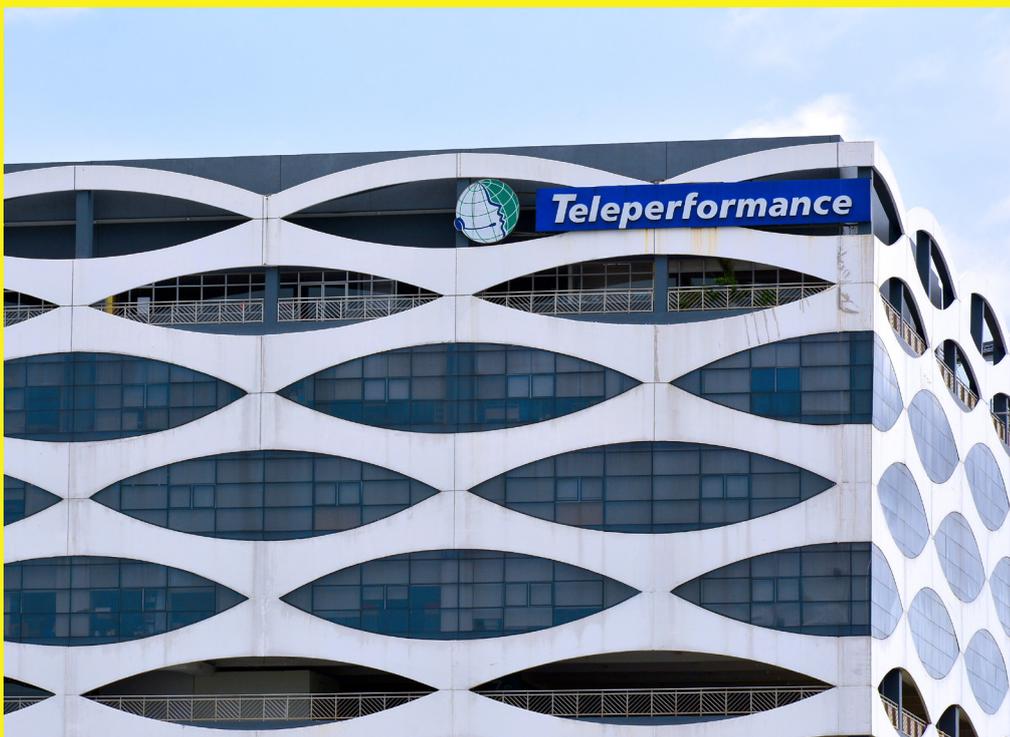
Internationally recognised workers' rights

Plaintiff

Sherpa, UNI Global Union

Defendant

Teleperformance



← The Teleperformance office in Pasay, Manila. Photo by Shutterstock / By Walter Eric Sy.

Description

- In 2018, French contact centre giant Teleperformance did not publish a vigilance plan in its annual report and only published a two-page plan in 2019, without involving trade unions as stakeholders.¹ No efforts had been made to identify and prevent specific risks of violations to workers' rights in its foreign facilities,² despite the fact that two-thirds of the company's global workforce are in countries with systematic labour violations³ and despite the violations to workers' rights denounced in Teleperformance subsidiaries in Colombia,⁴ Mexico and the Philippines, which had not been addressed in the vigilance plan.⁵
- On 18 July 2019, Sherpa and UNI Global Union served a letter of formal notice to Teleperformance under the French Duty of Vigilance Law, calling on Teleperformance to strengthen their workers' rights.
- On 29 July 2019, Teleperformance responded to the formal letter and said that it was working closely with all its internal and external stakeholders to publish an enhanced and detailed vigilance plan in September 2019.⁶ Teleperformance then released its updated vigilance plan.⁷
- The updated vigilance plan still fails to identify risks to rightsholders; fails to meaningfully engage stakeholders in the process, including trade union representatives; and fails to take specific steps to mitigate the risks identified.
- In April 2020, UNI Global Union, together with four of its French affiliates, CFDT, CGT-FAPT, CGT and FO-FEC, submitted a complaint to the French National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises,⁸ alleging that Teleperformance did not observe the Guidelines in ten countries where it operates call centres during the COVID-19 pandemic, after numerous issues raised concerns about freedom of association, collective bargaining and health and safety during the COVID-19 pandemic, and retaliation against workers.
- No judicial action has yet been taken.

3.7 ITF and others v XPO Logistics Europe

Home company

XPO Logistics Europe (France)¹

Host company

The case refers to the home company's global operations and supply chain

Business relationship

The case refers to the home company's global operations and supply chain

Impacts

Claimants identified inadequate mapping and lack of transparency of its complex and extensive supply chain as the first failure towards the identification of human rights risks and prevention of human rights abuses² - a major hurdle in an industry rife with abuse and a company that relies so heavily on subcontracting³

Relevant international standards

Internationally recognised human rights, including fundamental labour rights and gender equality

Plaintiff

International Transport Workers' Federation (ITF), European Transport Workers' Federation (ETF), XPO Global Union Family of trade unions

Defendant

XPO Logistics Europe ("XPO")



← XPO Logistics in the Netherlands. Photo by Shutterstock / BYonkruud.

Description⁴

- On 1 October 2019, the claimants served a letter of formal notice⁵ to XPO under the French Duty of Vigilance Law. Using a detailed Vigilance Plans Reference Guidance produced by Sherpa on implementing the law, an analysis by ITF revealed that XPO's vigilance plan did not fulfil the mandatory requirements set out by the law, and unions had not been consulted on the vigilance plan.
- The XPO group's parent company, XPO Inc, headquartered in the US, issued a short response claiming that the company was doing all it was required to do under the law. It failed to respond to any of the requests for information, transparent sharing or offers of assistance from the union group to collaborate to improve the vigilance plan.
- Despite further correspondence with the company, there has been no satisfactory engagement so far. XPO has refused to engage with the global network of unions, even on the most basic superficial level.
- The XPO Global Union Family is prepared to bring this matter before the relevant jurisdiction in France if XPO ultimately refuses to fulfil its responsibilities under the law. Investigations continue into practices along the XPO supply chain.
- No judicial action has yet been taken.

4. Common law

Jurisprudence advancing civil liability of UK multinational companies has evolved slowly over the past decades in the Common Law. Now it represents the most advanced jurisprudence for corporate value chain liability in the world, clearly covering harm by overseas subsidiaries and potentially also other actors such as suppliers.

Common Law rules on value chain liability have evolved from numerous extraterritorial cases brought against UK-domiciled companies in UK courts by victims from other Common Law jurisdictions, such as Nigeria, Zambia, Kenya and Bangladesh. In these cases, senior UK courts have, using the judicial discretion afforded under the Common Law, extended the reach and potential reach of civil liability for UK-based multinationals to harm occurring in their overseas operations.

The cause of action central to such cases has been the tort of negligence (legal wrong suffered by someone as a result of negligence). It is the application of basic tort of negligence principles to these novel overseas cases (rather than the creation of any new or novel cause of action) which has led to the expansion of corporate civil liability to harm by subsidiaries and potentially business partners. The Common Law tort of negligence allows for novel duties of care to be developed; this means it is not exclusively limited to those affected by the operations of a subsidiary.

This evolving jurisprudence is now persuasive if not directly applicable in all Common Law countries by virtue of the Doctrine of Precedent; as well as other courts applying Common Law to civil disputes (see, for example, *Oguru and others v Royal Dutch Shell PLC and others*).

Significant parent company liability judgments

- **Chandler v Cape plc [2012] EWCA Civ 525** was the first trial verdict imposing liability on a UK multinational company for breach of a parent company duty, albeit involving a UK subsidiary and UK claimant. Liability was imposed on the parent company based on its negligent omission to advise on precautionary measures to protect the health of workers at its subsidiary from asbestos poisoning. A duty of care to provide such advice stemmed from the parent company's awareness of the risks to the workers; its superior knowledge of health and safety measures; and its awareness that the subsidiary was relying on the parent to provide that knowledge.
- **Vedanta Resources plc & Another v Lungowe & Others [2019] UKSC 20** was a UK Supreme Court judgment affirming and clarifying the doctrine of parent company liability; rejecting the defendant's appeal and returning the case to lower courts for trial. The claim was brought by Zambian villagers against UK company Vedanta for harms caused by chronic environmental pollution by its Zambian subsidiary, Konkola Copper Mines. In its judgment the Supreme Court declared a non-exhaustive list of scenarios where a duty of care can be imposed on a parent company:
 - 'Where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of or jointly with the subsidiary's own management';
 - Where a parent has given defective advice or provided defective group-wide environmental/safety policies which the subsidiaries have implemented as a matter of course;
 - Where the parent has taken active steps to ensure that group-wide policies are implemented by subsidiaries;
 - Where the parent holds itself out publicly as exercising a degree of control or supervision of its subsidiaries even if it does not in fact do so.
- **Okpabi & Others v Royal Dutch Shell plc & Anor [2021] UKSC 3** was another UK Supreme Court judgment affirming and clarifying the doctrine of parent company liability on appeal. The claim was based, among other things, on an alleged duty of care on the part of Royal Dutch Shell arising from its significant control over its Nigerian subsidiary and its assumption of responsibility of subsidiary operations through RDS' group-wide mandatory policies. The Court of Appeal rejected the case for insufficient evidence of parent company duty of care. However, consistent with its judgment in Vedanta, the UK Supreme Court reversed the decision of the Court of Appeal. The UK Supreme Court ruled that the lower court: had applied too much focus to the issue of control of the subsidiary rather than management of aspects of its activities; was wrong to decide that group-wide policies could not give rise to a duty of care; and should not have treated the issue of parent company liability as a special category. Importantly, the Supreme Court was critical of the lower court for imposing too high a bar for proving jurisdiction, in circumstances in which the claimants had not had the legal benefit of discovery/disclosure of documents.
- **Rihan v Ernst & Young Global Ltd & Others [2020] EWHC 901** was the first multinational corporation case relating to overseas activities to succeed following a full trial. Applying the principles laid down in Vedanta, the High Court held that the UK parent company of the auditors were not merely global service companies as they argued, but had taken responsibility for risk management and compliance across the corporate group, including for foreign subsidiaries.

- **Begum v Maran [2021] EWCA Civ 326** was a case where the Court of Appeal ruled that a UK company that had sold a defective ship to a third party, which had arranged for the ship to be dismantled in Bangladesh in a well-known hazardous industry, could argue a duty of care to a worker who suffered fatal injuries breaking up the ship. In doing so, it applied an established exception to the principle that a defendant is not liable for the acts of a third party, in circumstances where the defendant has created the danger. The ruling means that a shipping company in England selling a vessel for dismantling in South Asia could owe a duty of care to shipbreaking workers in Bangladesh even where there are multiple third parties involved in the transaction and where the English company no longer owns the defective ship.

Summary of other transnational parent company liability cases brought before UK courts, indexed by category of harm

Cases below have either been settled, or their judgments have developed or clarified various other points of law relevant to transnational human rights claims against corporations.

– Occupational injury and disease claims:

- Mercury poisoning claims of 42 South African workers.
Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley
- Throat cancer in a worker at the Rossing Uranium Mine, Namibia.
Connelly v RTZ Corporation Plc [1998] A.C 854
- Asbestos-related diseases suffered by 7,500 South African asbestos miners and local residents.
Lubbe & Ors v Cape plc [2000] 1WLR 1545
- Death caused by breaking a ship dumped in Bangladesh.
Begum v Maran [2021] EWCA Civ 326

– Environmental damage claims:

- Injuries allegedly caused by toxic waste dumping in Côte D'Ivoire, brought by 30,000 residents.
Motto and others v Trafigura Ltd [2011] EWCA Civ 1150
- Oil pollution of waterways in Nigeria, brought by 15,000 fishermen.
Bodo Community v Shell & SPDC
- Damage to land allegedly caused by construction of an oil pipeline, brought by 109 Colombian farmers.
Pedro Emiro Florez Arroyo and others v Equion Energia Limited [2016] EWHC 1699 (TCC)
- Land damage allegedly caused by a copper mine in Zambia, brought by 2,577 Zambian villagers.
Lungowe & Others v Vedanta & Another [2019] UKSC 20

- Oil pollution damage, brought by 270 Colombian peasant farmers.
Bravo & Others v Amerisur Resources plc [2020] EWHC 125 (QB)
- Fundao Dam collapse, brought by 200,000 Brazilian victims
Município De Mariana v BHP Billiton plc & others [2020] EWHC 2930 (TCC)
- Oil pollution, brought by 40,000 members of Nigerian fishing and farming communities.
Okpabi & others v Royal Dutch Shell plc & Anor [2021] UKSC 3
- Damage arising from an oil spill in Nigeria.
Harrison Jalla & Ors v Shell International Trading & Shipping Co & Anor [2021] EWCA Civ 63

– **Security and human rights claims:**

- Alleged complicity with state security in the torture and unlawful detention of 33 indigenous environmental protesters at a copper mine in Peru.
Guerrero & Others v Monterrico Metals plc [2009] EWHC 247
- Alleged complicity in human rights violations, brought by Peruvian environmental protesters.
Vilca & Others v Xstrata Ltd & Another [2017] Med LR Plus 32
- Alleged complicity with state security in the shooting and killing of 12 villagers stealing rock from a gold mine in Tanzania.
Kesabo v African Barrick Gold Plc & NMGML [2013] EWHC 4045
- Alleged complicity in human rights violations, brought by 142 villagers near a mine in Sierra Leone.
Kalma & Others v African Minerals Ltd & Anor [2018] EWHC 3506
- Alleged failure to prevent election-related killings, rapes and serious injuries, brought by 218 Kenyan tea pickers.
AAA & Others v Unilever plc & Anor [2018] EWCA Civ 1532
- Alleged human rights abuses by security guards and operatives of Gemfields Ltd at a ruby mine in Mozambique, brought by 273 community members.
AAA & Others v Gemfields Limited
- Alleged complicity in human rights violations, brought by 85 members of a community living around a plantation in Kenya.
AAA v (1) Camelia plc (2) Linton Park plc and Robertson Bois Dickson Anderson Ltd
- Constructive dismissal relating to serious deficiencies in an audit in Dubai, brought by a whistle-blower.
Rihan v Ernst & Young Global Ltd & Others [2020] EWHC 901

Implications for the European Union: the need for a harmonised EU framework of advanced civil liability rules

According to the Rome II Regulation, EU courts must apply the law of where the harm occurred in civil claims brought by non-EU citizens against EU companies. This will entail the application of the above Common Law liability rules where harm occurred in a Common Law jurisdiction, but not where harm occurred in other jurisdictions. It is the EU's responsibility to ensure a level playing field and to improve access to justice for victims harmed by all of its companies, not only those with operations and value chains in Common Law countries.

Recommendations

The future due diligence directive should not be limited to enshrining a corporate due diligence duty, but should also establish consequences for non-compliant companies and ensure access to judicial remedy for victims when businesses fail to take action to identify, prevent and mitigate human rights abuses and environmental harms.

The cases in this report lay bare a number of barriers to justice that the EU needs to remove to enable private enforcement of future corporate due diligence requirements, the crucial ones being:

1. Parent company and value chain civil liability

Most national legal systems do not provide for parent company and value chain liability for human rights abuses and environmental harms. This has prevented victims down the value chain from obtaining redress from the parent or lead company who are ultimately responsible for the abuses.

However, this has started to change. The French Duty of Vigilance Law¹ established a liability regime in 2017. A Dutch court recently ruled in favour of legal liability for human rights harms arising from the emissions by subsidiaries and value chain partners, on the basis of the Dutch Civil Code.² And European courts, when applying Common Law, are beginning to acknowledge corporate liability for the breach of a duty of care for human rights and the environment, which extends to the activities of subsidiaries and other business partners.³

- The future directive must, in line with these developments, include a parent company and value chain liability regime that allows victims to claim damages as well as injunctive relief before EU courts, thus ensuring upward harmonisation in this field, as recommended by the European Parliament,⁴ the European Economic and Social Committee,⁵ and the EU Fundamental Rights Agency.⁶

For the purpose of an effective liability regime, it is crucial that the due diligence duty is defined not as a narrow and superficial compliance-orientated process, but as a standard of conduct which include taking all necessary, adequate and effective measures to ensure respect for human rights and the environment throughout value chains. This would prevent companies from escaping liability on the basis of a tick-box exercise.

The scope of the due diligence duty must be sufficiently comprehensive and (1) apply to all business enterprises, both public and private, including financial institutions, of all sizes and across all sectors, domiciled or operating in the EU; (2) cover all internationally recognised human rights and environmental standards, as well as any potential adverse impacts on the environment beyond those enshrined in the limited range of international conventions in the field; and (3) extend beyond direct suppliers and subcontractors to cover all types of business relationships all along global value chains.

2. Barriers to justice

Even where accountability standards can hold corporations liable for harms they caused or negligently failed to prevent, claimants often face insurmountable barriers to justice.

2. a) Applicable law

Under the Rome II Regulation, it is generally the law of the State where the harm occurred that applies to the case.⁷ Foreign law rarely addresses the responsibility of parent or lead companies, which makes it impossible to obtain a positive verdict. Moreover, interpreting and applying foreign law creates serious complications and legal uncertainty, as courts need to rely on the often-contradictory information provided by foreign experts brought by both parties to the case.

- The future directive must clarify that its provisions shall be considered overriding mandatory and therefore apply in any case, as recommended by the European Parliament.⁸ Ideally, in the future the Rome II Regulation should be modified so that choice of applicable law is possible for all types of business-related human rights abuses, as recommended by the EU Fundamental Rights Agency.⁹

2. b) Competent jurisdiction

Under the Brussels I Regulation, national courts of EU Member States must accept jurisdiction in civil liability cases filed against a defendant domiciled in that State, regardless of where the damage occurred. However, where the business is not domiciled in the EU, jurisdiction will depend on domestic law. EU Member States' approaches to this vary.

- Even though competent jurisdiction rules have so far allowed victims to file claims against EU-domiciled business before Member States' courts, ideally in the future the Brussels I Regulation should be modified to allow these courts to (1) assert jurisdiction to decide a claim where there is no alternative available forum able to guarantee the right to a fair trial ('forum of necessity'), (2) hear a claim against an EU-domiciled parent/lead company's foreign subsidiary or value chain partner, where both defendants are necessary party to the claim, and (3) hear a claim against the non-EU parent company of a corporate group with a strong presence in the EU.

2. c) Legal standing

In most cases brought to EU courts so far, whether it relates to the collapse of the factory or the pollution of a river, harm is suffered by a collective of people. However, national legal systems do not always allow for a large number of claimants to seek compensation collectively. Instead, each claimant is considered as an individual party and each claim must be treated as a separate lawsuit, which increases the costs for all parties and overburdens judicial administrations.

- The future directive must provide for collective redress in cases of business-related human rights abuses or environmental harm, making affected people automatically eligible to join a claim without complex registration procedures. It must also provide for representative actions by civil society organisations and trade unions, as recommended by the EU Fundamental Rights Agency.¹⁰

2. d) Statute of limitations

Some of the cases brought to EU courts so far have been dismissed due to the expiration of the statute of limitations under foreign law. In some EU countries, the time limit for a party to bring a tort claim is as short as one year, which makes it virtually impossible to bring transnational cases on time. Not only is it important that the time period is sufficient, but also that it does not begin to run before the impact has ceased and the claimants know or reasonably could have known that the defendant's conduct was causally relevant to their losses. This is especially relevant in cases of environmental harm, where impacts manifest only after a long delay.

- The future directive must establish a harmonised statute of limitations that is reasonable and appropriate to the challenges claimants face in transnational cases of business-related human rights abuses or environmental harm, as recommended by the European Parliament.¹¹

2. e) Burden of proof

At an early stage of the proceedings, claimants often already need to demonstrate the defendant's breach, the harm, and the causal link between the two. Limited access to evidence, such as companies' internal documents, makes it extremely hard for claimants to substantiate their claims. It is particularly challenging for victims to demonstrate a foreign company's failure to act with due care and the causal relationship between such failure and the harm suffered.

- The future directive must ensure that, at the request of a claimant that has presented reasonably available evidence, the court shall order that further evidence be presented by the defendant to determine the breach and the causal link, as recommended by the EU Fundamental Rights Agency.¹²

2. f) Financial risk

In cases of business-related human rights abuses or environmental harm, victims bear high costs (e.g. attorney fees, sourcing and producing evidence, translation, travel, expert opinions, witnesses' expenses) and face a massive imbalance between their resources and those of defendant companies. Limited use of third-party litigation funding in the EU,¹³ the prohibition of lawyers from charging results-based fees in some Member States, and the lack of access for foreign claimants to legal expenses insurance or public legal aid schemes exacerbate this problem.

- The future directive must provide, where a claimant wins, for legal costs to be fully recoverable from a defendant company. And where a claimant loses, for costs incurred to be balanced by the court in light of the disparity of resources between the parties, as recommended by the EU Fundamental Rights Agency.¹⁴ Funds should also be established to allow victims to take EU-based companies to court. Rules on legal aid and litigation funding should also consider the financial barriers victims face in these cases.

Access to courts is a fundamental right for EU citizens. When rights of non-EU citizens are harmed by EU-based companies, they should have equal access to EU courts. Such fundamental right cannot be limited based on fears of frivolous litigation.

In fact, contrary to the claims of certain interest groups, ensuring liability and improving access to justice will not trigger abusive litigation. The available evidence dismisses such claims: since its adoption in 2017, only five court cases against four multinationals have been brought under the French Duty of Vigilance Law.¹⁵ Judicial proceedings are lengthy and costly, even more in transnational tort cases, and the usual disincentives against frivolous litigation will continue to apply, importantly including the loser-pays principle.

It is crucial that the EU addresses the major barriers to justice outlined above, to enable private enforcement of corporate due diligence rules, so that affected people are given a last-resort avenue for remedy and companies have an incentive to comply with their human rights and environmental due diligence obligations.

Without a real possibility to seek redress before EU courts, businesses will have little incentive to engage with victims and provide any sort of remedy to them, and the EU will continue failing to deliver on our commitment to the third pillar of the UN Guiding Principles on Business and Human Rights.¹⁶

Endnotes

Introduction

1. Marx, A., Bright, C. and Wouters, J., 2019. Access To Legal Remedies For Victims Of Corporate Human Rights Abuses In Third Countries. Belgium: European Parliament. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf).

1.1 Oguru and others v Royal Dutch Shell PLC and others

1. Article 3 enshrines the right to life; article 25(1) enshrines the right to “a standard of living adequate for the health and well-being of himself and of his family.”
2. Article 11(1) enshrines the right of everyone to “an adequate standard of living for himself and his family”; article 12 enshrines the right of everyone to “the enjoyment of the highest attainable standard of physical and mental health.”
3. Article 16(1) enshrines the right to “enjoy the best attainable state of physical and mental health”; article 24 enshrines the right of all peoples to “a general satisfactory environment favourable to their development.”
4. Nigeria is a party to the African Charter on Human and Peoples’ Rights, an international convention that provides for equitable use of natural resources.
5. “The Oil in Navigable Waters Act implements in Nigeria the International Convention for the Prevention of Pollution of the Sea by Oil. The Act provides for the prevention and control of oil pollution in navigable waters of Nigeria, including all sea areas within fifty miles from and outside the waters of Nigeria. Persons affected by oil pollution may be awarded damages under the Act. Liability for oil pollution may also arise under the common law in Nigeria, assuming the polluter is not found liable under the provisions of the above legislation.” Faga, H. P. and Uchechukwu, U., Oil Exploration, Environmental Degradation, and Future Generations in the Niger Delta: Options for Enforcement of Intergenerational Rights and Sustainable Development Through Legal and Judicial Activism. Available at <https://core.ac.uk/download/pdf/212402454.pdf>.
6. “[...] the more so if it has made the prevention of environmental damage by the activities of group companies a spearhead and is, to a certain degree, actively involved in and managing the business operations of such companies.”
7. Court of Appeal of The Hague, Eric Barizaa Dooh of Goi and others v. Royal Dutch Shell Plc and Others, 200.126.843 (case c) + 200.126.848 (case d), December 18, 2015, at para. 6.9.
8. Roorda, L., Wading through the (polluted) mud: the Hague Court of Appeals rules on Shell in Nigeria, 2 February 2021. Available at <https://rightsasusual.com/?p=1388>.
9. The full judgments issued by the court of appeal are available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:132&showbutton=true> (cases A and B, Oruma oil spill), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:133&showbutton=true> (cases C and D, Goi oil spill) and <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:134&showbutton=true> (cases E and F, Ikot Ada Udo oil spill).
10. See section 37 of the Report of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 19 July 2018. Available at <https://undocs.org/A/73/188>.
11. See footnote 35.
12. Cara-Sophie Scherf et al., 2019, Umweltbezogene und menschenrechtliche Sorgfaltspflichten als Ansatz zur Stärkung einer nachhaltigen Unternehmensführung. Germany: Umweltbundesamt.

Available at <https://www.umweltbundesamt.de/publikationen/umweltbezogene-menschenrechtliche>.

13. According to Article 4(1) of Regulation (EC) No 864/2007 (Rome II), the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs.
14. In fact, “[t]he way the court then applies that precedent is arguably problematic, specifically where it sides with Shell in holding that the subsidiary must itself have committed a tort before the parent can incur a duty of care. This does not follow directly from the English cases cited by the court, nor does the court clarify why finding that SPDC was subject to strict liability with regard to oil spills precludes a duty of care for RDS.” Roorda, L., Wading through the (polluted) mud: the Hague Court of Appeals rules on Shell in Nigeria, 2 February 2021. Available at <https://rightsasusual.com/?p=1388>.
15. The fact that the Nigerian state owns one of the parent companies of SPDC cannot be neglected.
16. In fact, the only occasions where plaintiffs have been able to get limited compensation were settlements resulting from lawsuits in European courts (the Bodo case against Shell in England and the Ikebiri case against ENI in Italy). Friends of the Earth Europe, Do No Harm: The case for an EU law to hold business liable for human rights violations and environmental harm, October 2020. Available at https://foeeurope.org/sites/default/files/corporate_accountability/2020/foee_human_rights_report_english.pdf.
17. See footnote 38.
18. EU Fundamental Rights Agency, Business and human rights – access to remedy, October 2020. Opinion 2. Available at <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies#TabPubFRAopinions2>.

1.2 Arica Victims KB v Boliden Mineral AB

1. Article 3 enshrines the right to life; article 25(1) enshrines the right to “a standard of living adequate for the health and well-being of himself and of his family.”
2. Article 12 enshrines the right of everyone to “the enjoyment of the highest attainable standard of physical and mental health.”
3. The full judgment is available at http://toxicjustice.org/wp-content/uploads/2021/03/O%CC%88vre_HR_T_294-18_Dom_2019-03-27.pdf.
4. In Swedish law, a claim for damages must be made within 10 years of the harmful act.
5. The full judgment is available at http://toxicjustice.org/wp-content/uploads/2021/03/O%CC%88vre_HR_T_294-18_Dom_2019-03-27.pdf.
6. See section 37 of the Report of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 19 July 2018. Available at <https://undocs.org/A/73/188>.
7. Marx, A., Bright, C. and Wouters, J., 2019. Access To Legal Remedies For Victims Of Corporate Human Rights Abuses In Third Countries. Belgium: European Parliament. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf).
8. Ibid.
9. Arguably contrary to the jurisprudence of the European Court of Human Rights in the proceedings Howald Moor et al. against Switzerland dated 11 March 2014. The Court considered that in cases where it was scientifically proven that an individual could not know that he or she was suffering from a particular disease (which, like asbestos-related diseases, could not be diagnosed until many years after the events), that fact should be taken into account in calculating the limitation period.
10. See footnote 7.
11. Sveriges Domstolar, Arica Victims förlorar även i hovrätten, 27 March 2019. Available at <https://www.domstol.se/nyheter/2019/03/arica-victims-forlorar-aven-i-hovratten>.
12. See footnote 7.
13. For instance, in this case, Boliden had the right to demand payment of their litigation costs before the matter was tried in the court of appeal.
14. EU Fundamental Rights Agency, Business and human rights – access to remedy, October 2020. Opinion 5. Available at <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies#TabPubFRAopinions2>.
15. The hourly fee system to pay lawyers has a strong restrictive effect on access to justice as it places the entire litigation risk on the client.

Contingency fees are an effective option to make it possible to bring business-related human rights cases possible, whilst - coupled with loser pays rules- providing a safeguard against unmeritorious litigation by assigning the risks to lawyers. In such an arrangement, lawyers tend to assess the prospects of a case better and more effectively and reject claims of low merit and unlikely to succeed.

16. ECCJ, 2017. EU Law for Collective Redress. Available at https://corporatejustice.org/eccj_eu_law_for_collective_redress_position-paper2017.1.pdf.
17. Faure, M., 2020. Environmental liability of companies. Belgium: European Parliament. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651698/IPOL_STU\(2020\)651698_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651698/IPOL_STU(2020)651698_EN.pdf).

1.3 Jabir and others v KiK Textilien und Non-Food GmbH

1. Article 3 enshrines the right to life; article 23 enshrines the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Article 7(b) enshrines the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (b) Safe and healthy working conditions;”
3. Ratified by 16 EU Member States.
4. Ratified by 7 EU Member States.
5. Ratified by 13 EU Member States.
6. European Center for Constitutional and Human Rights (ECCHR), “Case report: Pakistan – cheap clothes, perilous conditions”, April 2017, p. 1. Available at https://www.ecchr.eu/fileadmin/Fallbeschreibung/CaseReport_KiK_Pakistan_August2019.pdf.
7. The full judgment is available at https://www.justiz.nrw.de/nrwe/lgs/dortmund/lg_dortmund/j2019/7_O_95_15_Urteil_20190110.html.
8. See footnote 7.
9. In 2014, the lawyers of 180 affected families submitted a report on the factory fire and the role of RINA to the Italian State prosecutor in Turin. The case was transferred to the prosecutor in Genoa and is still pending. So far, RINA has rejected the possibility of compensation. In parallel to the criminal proceedings, in 2018, a coalition of NGOs filed an OECD complaint with the Italian National Contact Point for the OECD Guidelines for Multinational Enterprises against RINA for failing to detect and act upon safety and labour abuses.
10. ECCHR, Brot für die Welt, Misereor, The human rights fitness of audits and certifiers – A position paper, September 2020. Available at https://www.ecchr.eu/fileadmin/Publikationen/ECCHR_BfdW_MIS_HRDD_AUDITS_PREVIEW_EN.pdf.
11. P. Wesche, M. Saage-Maaß, 'Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK', Human Rights Law Review, Volume 16, Issue 2, June 2016, Pages 370–385, p. 382. Available at <https://academic.oup.com/hrlr/article-abstract/16/2/370/2356211>.
12. EU Fundamental Rights Agency, Business and human rights – access to remedy, October 2020. Opinion 2. Available at <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies#TabPubFRAopinions2>.
13. The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. Governments adhering to the Guidelines are required to set up a National Contact Point (NCP) whose main role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that may arise from the alleged non-observance of the guidelines in specific instances.
14. OECD Watch, “Ali Enterprises Factory Fire Affectees Assoc. v. RINA S.p.A.” Available at: <https://www.oecdwatch.org/complaint/ali-enterprises-factory-fire-affectees-assoc-v-rina-s-p-a/>.
15. The final statement (9 December 2020) is available at: https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/05/Final-Statement-RINA-09-11-December-2020.pdf.

1.4 Luciano Lliuya v RWE AG

1. RWE recently sparked outrage after claiming €1.4 billion euros in compensation from the Netherlands for banning the use of coal in electricity generation from 2030. The claim is being made using the controversial Energy Charter Treaty, which gives investors the right to challenge governments through parallel private courts, or ISDS (investor state dispute settlement) mechanisms. Read more in <https://friendsoftheearth.eu/press-release/coal-company-sues-netherlands-for-1-4-billion>.
2. Germanwatch, Stiftung Zukunftsfähigkeit, The Huaraz Case: Saúl vs. RWE, October 2019. Available at <https://www.germanwatch.org/sites/germanwatch.org/files/Factsheet-Huaraz-web.pdf>.
3. Germanwatch, Court documents of the 'Huaraz Case', December 2017. Available at <https://germanwatch.org/en/14198>.
4. Germanwatch, QUESTIONS and ANSWERS regarding the CASE OF HUARAZ, November 2017. Available at <https://germanwatch.org/en/14783>.
5. Germanwatch, Interesting facts: Background information on the decision of the higher regional court Hamm, December 2017. Available at <https://germanwatch.org/en/14831>.
6. Even if RWE was sentenced to pay, 99.5% of the necessary funds for reparation would still be missing. However, RWE's money could be the impulse needed to finally begin overdue construction. A competent Peruvian authority has confirmed that RWE's money would be used as a contribution to take the necessary protective measures.
7. As a recent final statement by the Dutch National Contact Point for the OECD Guidelines for Multinational Enterprises argued with regard to a bank's duties under the Paris Agreement, in Oxfam Novib u.a. v ING, 19 April 2019. Available at <https://www.oecdguidelines.nl/binaries/oecd-guidelines/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing/20190419+NGOs+vs+ING+--+FS+%28WCAG%29.pdf>.
8. Cara-Sophie Scherf et al., 2019, Umweltbezogene und menschenrechtliche Sorgfaltspflichten als Ansatz zur Stärkung einer nachhaltigen Unternehmensführung. Germany: Umweltbundesamt. Available at <https://www.umweltbundesamt.de/publikationen/umweltbezogene-menschenrechtliche>.
9. Marx, A., Bright, C. and Wouters, J., 2019. Access To Legal Remedies For Victims Of Corporate Human Rights Abuses In Third Countries. Belgium: European Parliament. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf).
10. EU Fundamental Rights Agency, Business and human rights – access to remedy, October 2020. Opinion 2. Available at <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies#TabPubFRAopinions2>.
11. For instance, in this case, Boliden Mineral had the right to demand payment of their litigation costs before the matter was tried in the court of appeal.
12. See footnote 9.
13. EU Fundamental Rights Agency, Business and human rights – access to remedy, October 2020. Opinion 5. Available at <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies#TabPubFRAopinions2>.
14. The hourly fee system to pay lawyers has a strong restrictive effect on access to justice as it places the entire litigation risk on the client. Contingency fees are an effective option to make it possible to bring business-related human rights cases possible, whilst - coupled with loser pays rules- providing a safeguard against unmeritorious litigation by assigning the risks to lawyers. In such an arrangement, lawyers tend to assess the prospects of a case better and more effectively and reject claims of low merit and unlikely to succeed.
15. ECCJ, 2017. EU Law for Collective Redress. Available at https://corporatejustice.org/eccj_eu_law_for_collective_redress_position-paper2017.1.pdf.
16. Faure, M., 2020. Environmental liability of companies. Belgium: European Parliament. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651698/IPOL_STU\(2020\)651698_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651698/IPOL_STU(2020)651698_EN.pdf).

1.5 Francis Timi v Eni SpA and Nigerian Agip Oil Company

1. Article 3 enshrines the right to life; article 25(1) enshrines the right to “a standard of living adequate for the health and well-being of himself and of

- his family.”
2. Article 11(1) enshrines the right of everyone to “an adequate standard of living for himself and his family”; article 12 enshrines the right of everyone to “the enjoyment of the highest attainable standard of physical and mental health.”
 3. Article 16(1) enshrines the right to “enjoy the best attainable state of physical and mental health”; article 24 enshrines the right of all peoples to “a general satisfactory environment favourable to their development.”
 4. Nigeria is a party to the African Charter on Human and Peoples’ Rights, an international convention that provides for equitable use of natural resources.
 5. The Oil in Navigable Waters Act implements in Nigeria the International Convention for the Prevention of Pollution of the Sea by Oil. The Act provides for the prevention and control of oil pollution in navigable waters of Nigeria, including all sea areas within fifty miles from and outside the waters of Nigeria. Persons affected by oil pollution may be awarded damages under the Act. Liability for oil pollution may also arise under the common law in Nigeria, assuming the polluter is not found liable under the provisions of the above legislation. Faga, H. P. and Uchechukwu, U., Oil Exploration, Environmental Degradation, and Future Generations in the Niger Delta: Options for Enforcement of Intergenerational Rights and Sustainable Development Through Legal and Judicial Activism. Available at <https://core.ac.uk/download/pdf/212402454.pdf>.
 6. Reuters, Nigerian village sues Eni for damages from pipe explosion (4 May 2017). Available at <https://www.reuters.com/article/us-eni-nigeria-court-idUSKBN1802JX>.
 7. NAOC, Who we are. Available at https://www.eni.com/en_NG/who-we-are/eni-in-nigeria.page.
 8. The Ikebiri community comprises several villages in the State of Bayelsa, Nigeria. The community’s main economic activities include palm-wine tapping, canoe carving, fishing, farming, animal trapping and traditional medical practices.
 9. Friends of the Earth Europe, ENI and the Nigerian Ikebiri case, 4 May 2017. Available at http://www.foeeurope.org/sites/default/files/extractive_industries/2017/foee-eni-ikebiri-case-briefing-040517.pdf.
 10. For instance, on the 14th November 2005, the Benin Judicial Division of the Federal Court of Nigeria issued a judgment confirming that gas flaring violates the right to life and dignity of the human person. The court ordered the defendants, Shell and NNPC, to take immediate steps to stop gas flaring in the community. To date this judgement has still not been enforced.
 11. The damages being pursued take as the Agbara vs Shell case as a benchmark, where the court decided the community were entitled to compensation of 39,159,000 Naira per hectare.
 12. Friends of the Earth Europe, Ikebiri reach settlement with company, Niger Delta still awaits justice, 27 May 2019. Available at: <https://friendsoftheearth.eu/news/ikebiri-reach-settlement-with-company-niger-delta-still-awaits-justice>.
 13. Mind The Gap, CASE STUDY: ENI SETTLEMENT WITH A NIGERIAN COMMUNITY, 8 July 2020. Available at <https://www.mindthegap.ngo/harmful-strategies/avoiding-liability-through-judicial-strategies/settling-cases/eni-settlement-with-a-nigerian-community>.
 14. See section 37 of the Report of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 19 July 2018. Available at <https://undocs.org/A/73/188>.
 15. See footnote 5.
 16. Cara-Sophie Scherf et al., 2019, Umweltbezogene und menschenrechtliche Sorgfaltspflichten als Ansatz zur Stärkung einer nachhaltigen Unternehmensführung. Germany: Umweltbundesamt. Available at <https://www.umweltbundesamt.de/publikationen/umweltbezogene-menschenrechtliche>.
 17. In accordance with Article 6 of the European Convention of Human Rights.
 18. Marx, A., Bright, C. and Wouters, J., 2019. Access To Legal Remedies For Victims Of Corporate Human Rights Abuses In Third Countries. Belgium: European Parliament. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf).
 19. Ibid.
 20. According to Article 4(1) of Regulation (EC) No 864/2007 (Rome II), the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs.

1.6 Sherpa and Friends of the Earth France v Perenco SA

1. Article 3 enshrines the right to life; article 25(1) enshrines the right to “a standard of living adequate for the health and well-being of himself and of his family.”
2. Article 11(1) enshrines the right of everyone to “an adequate standard of living for himself and his family”; article 12 enshrines the right of everyone to “the enjoyment of the highest attainable standard of physical and mental health.”
3. Article 16(1) enshrines the right to “enjoy the best attainable state of physical and mental health”; article 24 enshrines the right of all peoples to “a general satisfactory environment favourable to their development.”
4. The RDC is a party to the African Charter on Human and Peoples’ Rights, an international convention that provides for equitable use of natural resources.
5. Sherpa, PERENCO: POLLUTION ET OPACITÉ. Available at <https://www.asso-sherpa.org/perenco-pollution-et-opacite>.
6. CCFD-Terre Solidaire, Régulation des multinationales - Pétrole à Muanda : la justice au rabais, November 2013. Available at https://ccfd-terresolidaire.org/IMG/pdf/petrole_muanda_201113.pdf.
7. AfricaNews, Juriste spécialiste du pétrole, Célestin Tunda Ya Kasende nommé vice-Premier ministre en charge de la Justice, 30 August 2019. Available at <https://www.africanewsrdc.net/nation/juriste-specialiste-du-petrole-celestin-tunda-ya-kasende-nomme-vice-premierministre-en-charge-de-la-justice>.
8. Africa Intelligence, Le système Perenco emporte tout à Kinshasa, 2 October 2018. Available at <https://www.africaintelligence.fr/petrole-et-gaz/2018/10/02/le-systeme-perenco-emporte-tout-a-kinshasa.108326155-eve>.
9. Le Monde, Perenco, boîte noire pétrolière et toxique en RDC, 9 October 2019. Available at https://www.lemonde.fr/afrique/article/2019/10/09/perenco-boite-noire-petroliere-et-toxique-en-rdc_6014880_3212.html.
10. Observatoire des Multinationales, Perenco, la petite entreprise pétrolière accusée de faire de gros dégâts, 21 October 2014. Available at <https://multinationales.org/Perenco-la-petite-entreprise>.
11. Observatoire des Multinationales, Perenco en RDC: quand le pétrole rend les pauvres encore plus pauvres, 23 January 2014. Available at <https://multinationales.org/Perenco-en-RDC-quand-le-petrole>.
12. Radio Okapi, Le sénat accuse Perenco de polluer l’eau, l’air et le sol de Moanda au Bas-Congo, 26 November 2013. Available at <https://www.radiookapi.net/emissions-2/dialogue-entre-congolais/2013/11/26/ce-soir-le-senat-accuse-perenco-de-polluer-leau-lair-le-sol-de-moanda-au-bas-congo>.
13. The French law only applies to companies who: (a) at the end of two consecutive financial years employ at least 5 000 employees within the company head office and its direct and indirect subsidiaries, whose head office is located in France; or (b) employ at least 10 000 employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory or abroad.

1.7 Cainquiama and others v Norsk Hydro ASA and others

1. Article 3 enshrines the right to life; article 25(1) enshrines the right to “a standard of living adequate for the health and well-being of himself and of his family.”
2. Article 11(1) enshrines the right of everyone to “an adequate standard of living for himself and his family”; article 12 enshrines the right of everyone to “the enjoyment of the highest attainable standard of physical and mental health.”
3. The UN Declaration on The Rights of Indigenous Peoples recognises that indigenous people have the right to live with physical and mental integrity, freedom and security. It states that indigenous peoples have the right not to be necessarily assimilated or deprived of their cultures. The Declaration has been ratified by Brazil, Norway and the Netherlands.
4. The ILO Convention No. 169 has been ratified by Brazil, Norway and the Netherlands.
5. Cainquiama is an association created under the Brazilian law by members of Brazilian traditional communities. Cainquiama represents a specific

group of individuals residing in the municipalities directly impacted by the activities of the Norsk Hydro group. Cainquiama currently has 11,356 members, who represent the interest of over 40,000 people.

6. Quilombolas are Afro-Brazilian groups directly descended from escaped slaves, who have organised themselves into communities.
7. Dutch documentary about one of the disasters, which took place in 2018: 'The disaster in the rainforest' (De ramp in het regenwoud – deel 1 - Zembla - BNNVARA). In the wake of this disaster, the local government discovered that Alunorte had laid clandestine pipelines, discharging toxic waste directly into nature.

1.8 Canopée and others v Casino Guichard-Perrachon

1. There is currently no comprehensive legally binding instrument on forests, but many existing international treaties contain provisions that aim to regulate certain activities related to forests. Ruis, Barbara M.G.S., 'An overview of the treatment of forests in ten existing global agreements suggests that fostering synergies among them may not be sufficient to cover the gaps that remain'. Available at <http://www.fao.org/3/y1237e/y1237e03.htm>.
2. The CBD has expanded its horizon to include forests within its purview.
3. Article 5 states that parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases, including forests.
4. International human rights law does not recognise a human right to land as such, but multiple human rights are relevant to the protection of land rights.
5. Article 17 enshrines the right to property, which protects land rights from adverse interference, including in the context of 'land grabbing'. International jurisprudence has consistently recognised the collective right to property of indigenous and tribal peoples over their ancestral lands. Cotula, Lorenzo, 'Addressing the human rights impacts of 'land grabbing'', December 2014. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2014/534984/EXPO_STU\(2014\)534984_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2014/534984/EXPO_STU(2014)534984_EN.pdf). Article 25 enshrines the right to an adequate standard of living, which comprises the right to food and to adequate housing, closely connected to land rights.
6. Article 11 enshrines the right to an adequate standard of living.
7. Article 27 enshrines the right of minorities to enjoy their own culture, also potentially violated by land grabbing.
8. Article 21 enshrines the right to property.
9. Envol Vert, Groupe Casino: 'Eco responsable de la déforestation', June 2014. Available at <http://envol-vert.org/wp-content/uploads/2020/06/Rapport-Casino%C3%A9coresponsable-de-la-d%C3%A9forestation.pdf>.
10. RFI, French supermarket giant Casino 'put on notice' over illegal logging in Amazon, 21 September 2020. Available at <https://www.rfi.fr/en/france/20200921-french-supermarket-giant-casino-put-on-notice-over-illegal-logging-in-amazon-envol-vert-brazil-colombia-deforestation>.
11. Mise en demeure, 21 September 2020. Available at https://media.business-humanrights.org/media/documents/210920_Courrier_mise_en_demeure_Casino12.pdf.
12. Sherpa, Indigenous organisations and NGO coalition warn top French supermarket Casino: do not sell beef from deforestation in Brazil and Colombia – or face French law, 21 September 2020. Available at <https://www.asso-sherpa.org/indigenous-organisations-and-ngo-coalition-warn-top-french-supermarket-casino-do-not-sell-beef-from-deforestation-in-brazil-and-colombia-or-face-french-law-stop-gambling-with-our-forests>.
13. Envol Vert, Campaign #DOUBLEDEALING: CASINO GROUP. Available at <https://envol-vert.org/en/campaign/dobledealing-casino>.
14. Evidence submitted in this lawsuit also shows violations of indigenous rights. In one of the documented cases, customary land owned and managed by the Uru Eu Wau Wau community in the State of Rondônia, Brazil was invaded and put into production by cattle farms supplying beef to Casino's Pão de Açúcar.

2.1 Association France Palestine Solidarité and others v Alstom SA and others

1. Article 49(6) and article 53 of the Fourth Geneva Convention; article 53 of Additional Protocol no. 1 to the Geneva Conventions.
2. Article 4 of the 1954 Hague Convention.
3. Business & Human Rights Resource Centre, "Veolia & Alstom lawsuit (re Jerusalem rail project)". Available at: <https://www.business-humanrights.org/en/latest-news/veolia-alstom-lawsuit-re-jerusalem-rail-project>.
4. Azarov, Valentina, "Backtracking on Responsibility: French Court Absolves Veolia for Unlawful Railway Construction in Occupied Territory", 1 May 2013. Available at: <http://rightsasusual.com/?p=414>.
5. Full judgement of the court of appeal is available at: http://www.france-palestine.org/IMG/pdf/decision_de_la_cour_d_appel.pdf.

2.2 Milieudéfensie and others v Royal Dutch Shell PLC

1. Articles 2 enshrines the right to life; article 8 enshrines the right to "respect for his private and family life, his home and his correspondence." From the Dutch Supreme Court's Urgenda ruling it can be deduced that articles 2 and 8 offer protection against the consequences of dangerous climate change due to CO2 emissions induced global warming (Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006, legal ground 5.6.2).
2. Articles 6 enshrines the right to life; article 17 enshrines the right to the protection of the law against "arbitrary or unlawful interference with his privacy, family, home or correspondence." The UN Human Rights Committee determined that articles 6 and 17 likewise offer protection against climate impacts. In a recent case, it recalled that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life" (HRC 23 September 2020, CCPR/C/127/D/2728/2016 (Ioane Teitiota - New Zealand), section 9.4).
3. Milieudéfensie, "The Climate Case against Shell". Available at: <https://en.milieudéfensie.nl/climate-case-shell/climate-case-against-shell>.
4. Milieudéfensie, "Timeline climate case Shell". Available at: <https://en.milieudéfensie.nl/climate-case-shell/timeline>.
5. Milieudéfensie, "Frequently Asked Questions about the climate lawsuit against Shell". Available at: <https://en.milieudéfensie.nl/climate-case-shell/frequently-asked-questions-about-the-climate-lawsuit-against-shell>
6. McGlade, C., Ekins, P. "The geographical distribution of fossil fuels unused when limiting global warming to 2 °C." Nature 517, 187-190 (2015). Available at: <https://doi.org/10.1038/nature14016>
7. The letter is available at <https://en.milieudéfensie.nl/news/noticeletter-shell.pdf>.
8. Milieudéfensie, "Milieudéfensie zet klimaatzaak tegen Shell door", 28 May 2020. Available at: <https://milieudéfensie.nl/actueel/milieudéfensie-start-definitief-klimaatzaak-tegen-shell>.
9. The full judgment is available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>.
10. European Coalition for Corporate Justice, "Landmark ruling: Shell ordered to slash CO2 emissions throughout its global value chain", 28 May 2021. Available at: <https://corporatejustice.org/news/landmark-ruling-shell-ordered-to-slash-co2-emissions-throughout-its-global-value-chain/>
11. The court stressed that, through its purchase policy, the Shell group is able to exercise control and influence over its suppliers' emissions (i.e., Shell group's Scope 2 emissions).
12. The court concluded that Royal Dutch Shell can also exert control and influence over the Shell group's Scope 3 emissions released by customers, through the energy package produced and sold by the Shell group. Royal Dutch Shell is free to change it in accordance with its reduction obligation.
13. The Dutch National Contact Point for the OECD Guidelines for Multinational Enterprises has argued that the Paris Agreement can and should translate into business obligations (Oxfam Novib u.a. versus ING, final statement, 19 April 2019; available at: <https://www.oecdguidelines.nl/binaries/oecd-guidelines/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing/20190419+NGOs+vs+ING+-+FS+%28WCAG%29.pdf>), making it clear that banks must formulate

concrete climate goals for their financial services, in line with the Paris Agreement.

14. European Coalition for Corporate Justice et al., "Putting the Environment in Human Rights and Environmental Due Diligence", May 2021. Available at: <https://corporatejustice.org/wp-content/uploads/2021/05/Putting-the-Environment-in-Human-Rights-and-Environmental-Due-Diligence.pdf>.
15. Book 6, Section 162. The Dutch Civil Code provides that a person must repair the damage arising from acts or omissions that violate a rule of unwritten law pertaining to proper social conduct.
16. In July 2021, Shell announced its appeal against the district court's ruling. "Shell in beroep tegen uitspraak in historische klimaatzaak Milieudefensie," 20 July 2021. Available at: <https://www.nu.nl/economie/6146663/shell-in-beroep-tegen-uitspraak-in-historische-klimaatzaak-milieudefensie.html?redirect=1>.
17. A set of guidelines for States and companies to identify, prevent, address and remediate human rights abuses in the context of business operations, endorsed by consensus by the UN Human Rights Council in June 2011.

2.3 Sherpa and others v Bolloré SA

1. Article 3 enshrines the right to life; article 23 enshrines the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; article 25(1) enshrines the right to "a standard of living adequate for the health and well-being of himself and of his family", including housing.
2. Article 7(a) enshrines the right of everyone to fair wages and a decent living for themselves and their families, while article 7(b) enshrines the right of everyone to safe and healthy working conditions; article 11(1) enshrines the right of everyone to "an adequate standard of living for himself and his family," including housing; article 12 enshrines the right of everyone to "the enjoyment of the highest attainable standard of physical and mental health."
3. In addition to the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, 37 ILO conventions and recommendations mention in one respect or another the subject of housing.
4. Ratified by 16 EU Member States.
5. Ratified by 13 EU Member States.
6. SOCAPALM held 42% of the market share for crude palm oil in Cameroon, according to SNJP's 2016 SOCAPALM Status Report. See Sherpa's dossier de presse "Huile de palme au Cameroun : assignation du Groupe Bolloré dans l'affaire Socapalm," 27 May 2019: <https://www.asso-sherpa.org/wp-content/uploads/2019/05/SOCAPALM-Dossier-presse.pdf>.
7. The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.
8. OECD Watch, "Sherpa et al. vs Bolloré". Available at: <https://www.oecdwatch.org/complaint/sherpa-et-al-vs-bollore>.
9. Governments adhering to the Guidelines are required to set up a National Contact Point (NCP) whose main role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that may arise from the alleged non-observance of the guidelines in specific instances.
10. Sherpa, "Le Groupe Bolloré attire en justice par des ONG : une action judiciaire inédite," 27 May 2019. Available at: <https://www.asso-sherpa.org/huile-de-palme-cameroun-groupe-bollore-attraire-justice>.
11. The claimants' complaint before the OECD NCP uses article Article 4 and 6 (1) of Cameroonian Law No. 98/005 of April 14, 1998 on water, and Article 21 of Cameroonian Law No. 96/12 of August 5, 1996 on environmental management, as a legal basis. However, it does not mention any international standards in the field of water and air pollution.
12. Living wages may be considered as part of the human rights recognised in article 7 of the ICESCR and article 23 of the UDHR, as well as a precondition to the realisation of the human right to an adequate standard of living recognised in article 11 of the ICESCR and article 25 of the UDHR. However, living wages are neither mentioned in the ILO Declaration on Fundamental Principles and Rights at Work, nor covered by any of the

eight core ILO conventions, nor guaranteed by Conventions 131 and 135 on minimum wages.

13. Fair Trade Advocacy Office, Brot für die Welt, "Making human rights due diligence frameworks work for small farmers and workers", June 2020. Available at: <https://fairtrade-advocacy.org/wp-content/uploads/2020/06/UoG-HRDD-Full-Report-60pp-FINALSECURED.pdf>.
14. OECD, "Providing access to remedy 20 years and the road ahead," 2020. Available at: <http://mneguidelines.oecd.org/NCPs-for-RBC-providing-access-to-remedy-20-years-and-the-road-ahead.pdf>.
15. OECD Watch, "Closing gaps in the OECD Guidelines to make them fit for purpose," June 2021. Available at: <https://www.oecdwatch.org/wp-content/uploads/sites/8/2021/06/OECD-Watch-Get-Fit-Closing-gaps-in-the-OECD-Guidelines-to-make-them-fit-for-purpose-1.pdf>.
16. Sherpa, "Tribune – Face aux poursuites-bâillons de Bolloré : nous ne nous tairons pas !," 24 January 2018. Available at: <https://www.asso-sherpa.org/face-aux-poursuites-baillons-ne-tairons>.
17. Sherpa, "Bolloré SLAPP suits: Socfin and Socapalm withdrew their appeal in the defamation proceedings against Sherpa, ReAct and Mediapart," 14 February 2019. Available at: <https://www.asso-sherpa.org/bollore-slapp-suits-socfin-and-socapalm-withdrew-their-appeal-in-the-defamation-proceedings-against-sherpa-react-and-mediapart>.
18. Protecting Public Watchdogs Across The EU: A proposal For An EU Anti-SLAPP Law. Available at: https://www.article19.org/wp-content/uploads/2020/12/Anti_SLAPP_Model_Directive-2-1.pdf.
19. Borg-Barthet, J., Lobina, B. and Zabrocka, M., 2021. The Use of SLAPPs to Silence Journalists, NGOs and Civil Society. Belgium: European Parliament. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU\(2021\)694782_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf).

2.4 Friends of the Earth France and others v TotalEnergies SE

1. International human rights law does not recognise a human right to land as such, but multiple human rights are relevant to the protection of land rights.
2. Article 17 enshrines the right to property, which protects land rights from adverse interference, including in the context of 'land grabbing'. Article 25 enshrines the right to an adequate standard of living, which comprises the right to food and to adequate housing, closely connected to land rights.
3. Article 11(1) enshrines the right of everyone to "an adequate standard of living for himself and his family"; article 12 enshrines the right of everyone to "the enjoyment of the highest attainable standard of physical and mental health."
4. Article 16(1) enshrines the right to "enjoy the best attainable state of physical and mental health"; article 24 enshrines the right of all peoples to "a general satisfactory environment favourable to their development."
5. Uganda and Tanzania are parties to the African Charter on Human and Peoples' Rights, an international convention that provides for equitable use of natural resources.
6. Les Amis de la Terre, Survie, "A nightmare named Total," October 2020. Available at: <https://www.amisdelaterre.org/wp-content/uploads/2020/11/a-nightmare-named-total-oct2020-foe-france-survie.pdf>.
7. ELAW Evaluation of the ESIA for the East Africa Crude Oil Pipeline Tanzanian Span, at p. 1. More info available in the #StopEACOP Alliance Statement in Response to Total's Recent Disclosures, 21 April 2021: <https://static1.squarespace.com/static/5fc078e1ab79f442f27752e/t/60747d5f8c9215400d342e/1618247008385/StopEACOP+Response+to+TOTAL+%28April+12%2C+2021%29.pdf>.
8. See "Total in court": <https://www.totalincourt.org>.
9. TotalEnergies, Total Responds to Questions from NGOs About Its Projects in Uganda, 30 September 2019. Available at: <https://totalenergies.com/info/statement-09302019>.
10. Friends of the Earth International, "Total abuses in Uganda: French High Court of Justice declares itself incompetent in favour of the Commercial Court," 30 January 2020. Available at: <https://www.foei.org/no-category/total-abuses-uganda-french-high-court-of-justice-declares-itself-incompetent-duty-vigilance-law>.
11. The full judgment is available at: <https://survie.org/IMG/pdf/decision-ca-versailles-total-ouganda.pdf>.
12. Les Amis de la Terre France, "Total Ouganda : les associations se pouvoient en Cassation alors que le projet s'accélére," 12 April 2021.

Available at: <https://www.amisdela terre.org/communiqu e-presse/total-uganda-les-associations-se-pourvoient-en-cassation-alors-que-le-projet-saccele re>.

13. Les Amis de la Terre, "Total Uganda case in France: the Court of Appeal of Versailles remands the case to the commercial court," 10 December 2020. Available at: <https://www.amisdela terre.org/communiqu e-presse/total-uganda-case-in-france-the-court-of-appeal-of-versailles-refers-to-the-commercial-court>.
14. Les Amis de la Terre France, "Our Ugandan partner finally released, but on police bond," 27 May 2021. Available at: <https://www.amisdela terre.org/communiqu e-presse/our-ugandan-partner-finally-released-but-on-police-bond>.
15. FIDH, "Uganda: Arbitrary detention and release of Mr. Jealousy Mugisha following his testimony in France in a case against Total," 17 December 2019. Available at: <https://www.fidh.org/en/issues/human-rights-defenders/uganda-arbitrary-detention-and-release-of-mr-jealousy-mugisha>.
16. FIDH, "Two defenders who testified in the trial against Total are at risk in Uganda," 26 December 2019. Available at: <https://www.fidh.org/en/issues/human-rights-defenders/two-defenders-who-testified-in-the-trial-against-total-are-at-risk-in>.
17. The letter is available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25137>.
18. Joint civil society statement, "France must ensure implementation of Duty of Vigilance Law to protect human rights defenders," 27 January 2021. Available at: <https://www.amisdela terre.org/wp-content/uploads/2021/02/statement-duty-of-vigilance-hrdefenders.pdf>.

2.5 Local authorities and NGOs v Total Énergies SE

1. Articles 2 enshrines the right to life; article 8 enshrines the right to "respect for his private and family life, his home and his correspondence."
2. Articles 6 enshrines the right to life; article 17 enshrines the right to the protection of the law against "arbitrary or unlawful interference with his privacy, family, home or correspondence." The UN Human Rights Committee determined that articles 6 and 17 likewise offer protection against climate impacts. In a recent case, it recalled that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life" (HRC 23 September 2020, CCPR/C/127/D/2728/2016 (Ioane Teitiota - New Zealand), section 9.4).
3. Arcueil, Bayonne, Bègles, Bize-Minervois, Centre Val de Loire, Champneuville, Correns, Est-Ensemble Grand Paris, Grenoble, La Possession, Mouans-Sartoux, Nanterre, Sevran et Vitry-le-François.
4. Tess Riley (The Guardian), "Just 100 companies responsible for 71% of global emissions, study says", 10 July 2017. Available at: <https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change>.
5. The formal notice is available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190719_NA_na.pdf
6. The lawsuit is available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200128_NA_complaint-1.pdf
7. Sherpa, "First climate change litigation against TOTAL in France: 14 local authorities and 5 NGOs take Total to court", 28 January 2020. Available at: <https://www.asso-sherpa.org/first-climate-change-litigation-against-total-in-france-14-local-authorities-and-5-ngos-take-total-to-court>.
8. Total's response to the lawsuit is available at: https://media.business-humanrights.org/media/documents/files/documents/20200128_Position_of_Total_EN.pdf
9. Total's 2019 Vigilance Plan, pp. 93-109, 20 March 2019. Available at: <https://totalenergies.com/sites/g/files/nytnzq121/files/atoms/files/ldr2018-en.pdf>
10. The full resolution is available here: <https://www.asso-sherpa.org/wp-content/uploads/2021/02/110221-MINUTE-Total-climat-compe%CC%81tence.pdf>
11. Sherpa, "Climate change litigation against Total: a first victory for the NGOs and local authorities", 11 February 2021. Available at: <https://www.asso-sherpa.org/climate-change-litigation-against-total-a-first-victory-for-the-ngos-and-local-authorities>.

12. "The letter of Article L 225-102-4 of the Commercial Code reveals that the preservation of human rights and Nature in general cannot be satisfied with the market-based regulation (...) that the presentation of the vigilance plan at the shareholders' meeting brings about, but requires judicial control. And this can only be achieved through strong social control made possible by the publicity of the vigilance plan and by a broad definition of legal standing." Lucie Chatelain (Sherpa), "First court decision in the climate litigation against Total: a promising interpretation of the French Duty of Vigilance Law", 25 March 2021. Available at: <https://www.business-humanrights.org/en/blog/first-court-decision-in-the-climate-litigation-against-total-a-promising-interpretation-of-the-french-duty-of-vigilance-law>.
13. See 2.5 Les Amis de la Terre France and others v TotalEnergies SE.

2.6 ProDESC, ECCHR and others v Électricité de France SA

1. The UN Declaration on The Rights of Indigenous Peoples recognises that indigenous people have the right to live with physical and mental integrity, freedom and security. It states that indigenous peoples have the right not to be necessarily assimilated or deprived of their cultures.
2. ILO Convention No. 169 has been ratified by Mexico, but not by France.
3. ECCHR, "Wind park in Mexico: French firm disregards indigenous rights." Available at: https://www.ecchr.eu/en/case/wind-park-in-mexico-french-firm-disregards-indigenous-rights/#case_case.
4. Governments adhering to the Guidelines are required to set up a National Contact Point (NCP) whose main role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that may arise from the alleged non-observance of the guidelines in specific instances.
5. OECD Watch, "Union Hidalgo vs EDF Group." Available at: <https://www.oecdwatch.org/complaint/union-hidalgo-vs-edf-group>.
6. On 29 July 2019, the claimants published a statement explaining their withdrawal. The statement is available at: https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/03/ProDESC%20vs.%20EDF%20Press%20Release%20at%20Withdrawal%2029-07-2019.pdf.
7. ECCHR, "Civil society space in renewable energy projects: A case study of the Unión Hidalgo community in Mexico," December 2019. Available at: https://www.ecchr.eu/fileadmin/Publikationen/ECCHR_PP_WINDPARK.pdf.
8. As highlighted by the UN Working Group on Business and Human Rights following a visit to Mexico.
9. Forest Peoples Programme, "Stepping up: Protecting collective land rights through corporate due diligence," 10 June 2021. Available at: <https://www.forestpeoples.org/en/stepping-up-due-diligence>.
10. UN Special Rapporteur on Human Rights Defenders, "Golden opportunity for EU to take global lead on human rights in business (Press Release)," 6 September 2021. Available at: <https://srdefenders.org/golden-opportunity-for-eu-to-take-global-lead-on-human-rights-in-business-press-release>
11. UN Working Group on business and human rights, "Report on human rights defenders and civic space – the business and human rights dimension," 22 June 2021. Available at: <https://www.ohchr.org/en/issues/business/pages/hrdefenderscivicspace.aspx>.

2.7 Fédération Internationale pour les Droits Humains and others v Suez SA

1. Article 3 enshrines the right to life; article 25(1) enshrines the right to "a standard of living adequate for the health and well-being of himself and of his family."
2. The human right to water can be derived from Article 11.1. Article 11.1 enshrines the right of everyone to "an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."
3. Article 12 enshrines the right of everyone to "the enjoyment of the highest attainable standard of physical and mental health."
4. The Convention on the Elimination of All Forms of Discrimination Against Women (Article 14.2), the Convention on the Rights of the Child (Article 24), and the Convention on the Rights of Persons with Disabilities (Article

- 28) explicitly recognise the human right to water and sanitation.
- Business & Human Rights Resource Centre, NGOs file complaint against Suez for alleged failure to respect French duty of vigilance law following sanitary crisis in Chile. Available at: <https://www.business-humanrights.org/en/latest-news/suez-sent-formal-request-to-comply-with-its-duty-of-vigilance-under-french-law-or-face-potential-litigation-following-sanitary-crisis-in-chile>.
 - FIDH, Questions & Answers: SUEZ is served notice to amend its vigilance plan, 9 July 2020. Available at: <https://www.fidh.org/en/issues/globalisation-human-rights/questions-answers-suez-is-served-notice-to-amend-its-vigilance-plan>.
 - The management of the water supply, suddenly privatized during the Augusto Pinochet dictatorship, is now being seriously questioned because of major disruptions. In a recent consultation, the population in Osorno voted 90% in favour of terminating the current ESSAL concession agreement. As a reaction, the Suez Group has threatened to turn to the private arbitration courts.
 - FIDH, In wake of Osorno health emergency in Chile, SUEZ is served notice to amend vigilance plan, 9 July 2020. Available at: <https://www.fidh.org/en/issues/globalisation-human-rights/in-the-wake-of-the-osorno-health-emergency-in-chile-suez-is-served>.
 - Suez Vigilance Plan, April 2021. Available at: <https://www.suez.com/-/media/suez-global/files/publication-docs/pdf-english/suez-vigilance-plan-april-2021-en.pdf>.
 - FIDH, Chile: In wake of Osorno health crisis, water giant SUEZ is summoned on the basis of duty of vigilance law, 7 June 2021. Available at: <https://www.fidh.org/en/issues/globalisation-human-rights/chile-in-wake-of-osorno-health-crisis-water-giant-suez-is-sum-moned>.

3.1 Former employees v COMILOG and others

- ILO Convention no. 158 has only been ratified by 10 EU Member States (Cyprus, Finland, France, Latvia, Luxembourg, Portugal, Slovakia, Slovenia, Spain, Sweden).
- Article 24(b) of the European Social Charter (Revised) provides for the right of workers whose employment is terminated without a valid reason to “adequate compensation or other appropriate relief”. Article 30 of the Charter of Fundamental Rights of the European Union enshrines protection in the event of unjustified dismissal.
- Le Monde, Comilog - Eramet : Justice, libre entreprise et compétitivité, 11 September 2015. Available at https://www.lemonde.fr/economie/article/2015/09/11/comilog-eramet-justice-libre-entreprise-et-competitivite_4753022_3234.html.
- Sherpa, COMILOG Faces a Group of Former Employees. Available at <https://www.asso-sherpa.org/comilog-faces-group-of-former-employees>.
- Sherpa, COMILOG: 20 years for victims' voices to be heard and it's still a matter of uncertainty. Available at <https://www.asso-sherpa.org/comilog-20-years-victims-voices-heard-still-matter-uncertainty>.
- Sherpa, Affaire COMILOG : Victoire pour les 857 travailleurs victimes d'un déni de justice. Available at <https://www.asso-sherpa.org/affaire-comilog-victoire-pour-les-857-travailleurs-victimes-dun-deni-de-justice>.
- Business & Human Rights Resource Centre, COMILOG lawsuit (re Gabon, filed in France). Available at <https://www.business-humanrights.org/en/latest-news/comilog-lawsuit-re-gabon>.
- In accordance with Article 6 of the European Convention of Human Rights.
- Marx, A., Bright, C. and Wouters, J., 2019. Access To Legal Remedies For Victims Of Corporate Human Rights Abuses In Third Countries. Belgium: European Parliament. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf).
- Ibid.
- This approach has been compared to the European Court of Human Rights pilot-judgement procedure. Etienne Pataut. “Le contentieux collectif des travailleurs face à la mondialisation : Réflexions à partir de l’affaire Comilog”. Droit Social, Dalloz, 2016, pp.554.
- EU Fundamental Rights Agency, Business and human rights – access to remedy, October 2020. Opinion 2. Available at <https://fra.europa.eu/en/publication/2020/business-human-rights-remedies#TabPubFRAopinions2>.

3.2 Venel v AREVA SA

- Article 3 enshrines the right to life; article 23 enshrines the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- Article 7(b) enshrines the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (b) Safe and healthy working conditions”
- Ratified by 18 EU Member States.
- Ratified by 16 EU Member States.
- Ratified by 16 EU Member States.
- Ratified by 12 EU Member States.
- Ratified by 13 EU Member States.
- BFM TV, URANIUM: AREVA GAGNE EN APPEL CONTRE LA FAMILLE D'UN SALARIÉ MORT D'UN CANCER, 25 October 2013. Available at: https://www.bfmtv.com/police-justice/uranium-areva-gagne-en-appel-contre-la-famille-d-un-salarie-mort-d-un-cancer_AN-201310250051.html.
- Le Monde, Areva condamné après la mort par cancer d'un ex-salarié d'une mine d'uranium, 11 May 2012. Available at https://www.lemonde.fr/planete/article/2012/05/11/areva-condamne-apres-la-mort-par-cancer-d-un-ex-salarie-d-une-mine-d-uranium_1699804_3244.html.
- Sherpa, Health of uranium miners at AREVA sites in Gabon and Niger. Available at <https://www.asso-sherpa.org/health-of-uranium-miners-at-areva-sites-in-gabon-and-niger>.
- Multinationals Observatory, How Areva lets its workers die in Niger, 3 February 2014. Available at <https://multinationales.org/How-Areva-lets-its-workers-die-in>.
- The full judgment is available at <https://www.legifrance.gouv.fr/juri/id/JURITEXT000030143156>.

3.3 Hamburg Consumer Protection Agency v Lidl Stiftung & Co. KG

- Article 23 enshrines the right to just and favourable conditions of work and to form and to join trade unions for the protection of his interests. Article 24 enshrines the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.
- Article 7 enshrines the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: fair wages; safe and healthy working conditions; and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. Article 8 enshrines the right to form and join trade unions.
- Business & Human Rights Resource Centre, Lidl lawsuit (re working conditions in Bangladesh). Available at <https://www.business-humanrights.org/en/latest-news/lidl-lawsuit-re-working-conditions-in-bangladesh>.
- ECCHR, Complaint re fair working conditions in Bangladesh: Lidl forced to back down. Available at <https://www.ecchr.eu/en/case/complaint-re-fair-working-conditions-in-bangladesh-lidl-forced-to-back-down>.

3.4 Sherpa and others v Samsung Electronics France

- Article 3 enshrines the right to life; article 23 enshrines the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Article 24 enshrines the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.
- Article 7 enshrines the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (b) Safe and healthy working conditions and (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. Article 10(3) establishes that “Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.”
- Ratified by 13 EU Member States.

4. According to Article 3, the minimum age for admission to any type of employment or work shall not be less than 18 years, although national laws may authorise employment or work as from the age of 16 years on certain conditions.
 5. Business & Human Rights Resource Centre, Samsung lawsuit (re misleading advertising & labour rights abuses). Available at <https://www.business-humanrights.org/en/latest-news/samsung-lawsuit-re-misleading-advertising-labour-rights-abuses>.
 6. China Labor Watch, 'Samsung's Supplier Factory Exploiting Child Labor' (2012); 'An Investigation of Eight Samsung Factories in China' (2012); 'Follow-up Investigations of Five Samsung Factories' (2012). Those violations have been noticed all through Samsung's supply chains, including in China, Vietnam, and Korea, and more recently in India, Indonesia and Vietnam.
 7. Samsung, 'Business Principles'. Available at www.samsung.com/levant/aboutsamsung/vision/philosophy/business-principles.
 8. New reports by China Labor Watch documented child labour, unpaid overtime, absence of adapted security measures for employees performing dangerous tasks, use of carcinogenic substances, and the exercise of moral pressure and physical violence by employers in Samsung subcontractors.
 9. New reports by China Labor Watch documented the exploitation of children under 16, excessive working hours, dangerous working conditions due to lack of proper equipment, working conditions and accommodation incompatible with human dignity, and the presence of benzene and methanol in Korean factories, which presents a health hazard for employees.
 10. Song Jung-a, 'Samsung faces charges in France over alleged labour violations' Financial Times (Seoul, July 4 2019). Available at <https://www.ft.com/content/8a7adbe0-9e19-11e9-9c06-a4640c9feebb>.
 11. Sherpa, Violation of workers' rights at Samsung: NGOs barred from court, 8 April 2021. Available at <https://www.asso-sherpa.org/violation-of-workers-rights-at-samsung-ngos-barred-from-court>.
- its vigilance plan. The report is available at https://www.uniglobalunion.org/sites/default/files/files/news/syndex_report_on_tp_due_diligence_plan.pdf.
2. UNI Global Union, UNI Global Union and Sherpa send formal notice to Teleperformance—calling on the world leader in call centres to strengthen workers' rights, 18 July 2019. Available at <https://www.uniglobalunion.org/news/uni-global-union-and-sherpa-send-formal-notice-teleperformance-calling-world-leader-call>.
 3. Four of the company's biggest labour markets (India, the Philippines, Mexico and Colombia) have “no guarantee” of the implementation of fundamental labour rights, according to the International Trade Union Confederation (ITUC).
 4. In July 2019, UNI Global Union released a report on working conditions in Colombia that details insufficient protections for employee rights, including obstacles to freedom of association, alleged wage theft, extreme invasion of privacy, and pregnancy tests for female workers. The report is available at https://www.uniglobalunion.org/sites/default/files/files/news/uni_tp_colombiareport_english.pdf.
 5. See footnote 1.
 6. Teleperformance's response re compliance with Duty of Vigilance Law, 29 July 2019. Available at https://media.business-humanrights.org/media/documents/files/documents/Teleperformance_response_English.pdf.
 7. Teleperformance Vigilance Plan – Last update March 2020. Available at <https://www.teleperformanceinvestorrelations.com/media/5462847/2019-Vigilance-Plan-Teleperformance-SE-032020.pdf>.
 8. OECD Guidelines for Multinational Enterprises, UNI Global Union & Teleperformance. Available at <https://mneguidelines.oecd.org/database/instances/fr0030.htm>.

3.5 Collectif Éthique sur l'étiquette and others v Auchan

1. Article 3 enshrines the right to life; article 23 enshrines the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Article 7(b) enshrines the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (b) Safe and healthy working conditions;”
3. Ratified by 16 EU Member States.
4. Ratified by 7 EU Member States.
5. Ratified by 13 EU Member States.
6. Business & Human Rights Resource Centre, Auchan lawsuit (re garment factories in Bangladesh). Available at <https://www.business-humanrights.org/en/latest-news/auchan-lawsuit-re-garment-factories-in-bangladesh>.
7. Auchan has denied placing orders at the Rana Plaza factory and said it was the victim of “concealed subcontracting”.
8. Auchan Group, 'Ethical Charter' (2017).
9. Sherpa, 'Auchan et le Rana Plaza : plainte pour pratiques commerciales trompeuses', Available at <https://www.asso-sherpa.org/auchan-le-rana-plaza-des-pratiques-commerciales-trompeuses>.
10. In France, prosecutions are initiated and conducted by the prosecutor. However, victims may trigger the appointment of an independent investigating judge in case the prosecutor decides not to proceed. Victims may therefore access the investigation files and claim compensation during the criminal trial.
11. Sherpa, 'Rana Plaza / Auchan : 5 ans après, le silence règne', April 2018. Available at <https://www.asso-sherpa.org/rana-plaza-auchan-5-ans-apres-silence-regne>.

3.6 UNI Global Union and Sherpa v Teleperformance

1. In April 2019, independent research firm Syndex released a report that found that Teleperformance had made no serious attempt to map and mitigate risks of human rights abuses throughout its operations and had not done the necessary stakeholder engagement in the development of

3.7 ITF and others v XPO Logistics Europe

1. XPO Logistics Europe has historically been the umbrella parent company for XPO's operations across Europe (i.e. for its operations outside of the US).
2. Some of these impacts are documented in the plaintiffs' joint Global Report published in October 2020, available at <https://www.xpoexposed.org>. XPO has dismissed and refused to engage with the serious contents of the report.
3. In 2018, it subcontracted 54.8% of its operations.
4. The XPO Global Union Family: Formal Notice to XPO Logistics Europe under the French Corporate Duty of Vigilance Law. Available at <https://www.itfglobal.org/sites/default/files/node/news/files/XPO%20letter%202%20page%20summary%20in%20English.pdf>.
5. XPO Logistics Europe - Formal Notice to Comply with the French Corporate Duty of Vigilance Law, 1 October 2019. Available at <https://www.etf-europe.org/wp-content/uploads/2019/10/Letter-XPO-Devoir-de-Vigilance-EN-final.pdf>.

Recommendations

1. Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.
2. Judgment of 26 May 2021 in the case of Milieudefensie et al. v. Royal Dutch Shell plc (ECLI:NL:RBDHA:2021:5339).
3. Judgment of 29 January 2021 in the case of Fidelis Ayoro Oguru et al. v. Shell Petroleum NV et al. (Case A) and v. Royal Dutch Shell plc et al. (Case B) (ECLI:NL:GHDHA:2021:132).
4. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). See Article 19 of the annex to the resolution.
5. EESC opinion on 'Mandatory due diligence' (September 2020).
6. Opinion 7 in EU Fundamental Rights Agency report on 'Business and human rights – access to remedy' (October 2020).
7. Article 4(1) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).
8. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). See Article 20 of the annex to the resolution.

9. Opinion 6 in EU Fundamental Rights Agency report on 'Business and human rights – access to remedy' (October 2020).
10. Opinion 2 in EU Fundamental Rights Agency report on 'Business and human rights – access to remedy' (October 2020).
11. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). See recital 54 of the annex to the resolution.
12. Opinion 1 in EU Fundamental Rights Agency report on 'Business and human rights – access to remedy' (October 2020).
13. See EPRS European added value assessment on 'Responsible private funding of litigation' (March 2021). The European Parliament's Committee on Legal Affairs (JURI) is currently preparing a legislative-initiative report with recommendations to the European Commission on responsible private funding of litigation.
14. Opinion 5 in EU Fundamental Rights Agency report on 'Business and human rights – access to remedy' (October 2020).
15. As of this letter, lawsuits have been filed, on the basis of the French Duty of Vigilance Law, against TotalEnergies (October 2019, January 2020), Électricité de France (October 2020), Casino (March 2021) and Suez (June 2021).
16. Under UN Guiding Principle 26, "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy."

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