

27 April 2020

The Registrar of the Supreme Court
The Supreme Court of the United Kingdom
Parliament Square
London,
SW1P 3BD

Via Email

Dear Lord and Lady Justices,

Re: Rule 15 submission in support of application for permission to appeal in *Kadie Kalma & others v. African Minerals Ltd and others*, [2020] EWCA Civ 144, Case No: UKSC 2020/0073

The Corporate Responsibility (CORE) Coalition is a UK based civil society coalition that works with its partner organisations, including Amnesty International, Oxfam and UNICEF UK, to promote a more effective regulatory framework governing UK companies' global operations. Rights and Accountability in Development (RAID) is a UK based non-governmental organization that documents corporate human rights abuses in Africa and works with those harmed to hold companies to account. We have, respectively, previously been granted permission by the Supreme Court to submit an intervention in *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20, and participated in a joint amicus brief to the US Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108.

We make this submission together under Rule 15 of the Rules of the Supreme Court in support of the Claimants' application for permission to appeal in *Kadie Kalma & others v. African Minerals and others*, [2020] EWCA Civ 144. We are concerned that, if it stands, the Court of Appeal judgment, particularly in its highly restrictive approach to principles of common design and analysis of the law of negligence, will severely undermine efforts to hold British companies to account for serious human rights abuses and to prevent commission of such abuses in the future. For reasons set out below, we also believe that the judgment raises issues of general public importance and engages the Court's role as leader of the common law world.

A. Public importance of the case

The facts underlying this case occur far too frequently, as demonstrated by RAID's field research. The harmful impacts of extractive companies' reliance on and support for private and/or public security forces known to engage in serious human rights abuses without taking meaningful or any steps to prevent such abuses have been well documented, including in reports by United Nations experts, some of which are referenced below. Concerns regarding these impacts helped lead to the development of important international standards for companies in their global operations. These include the Voluntary Principles on Security and Human Rights, developed and

promoted by the British government and others, which specifically address risks to human rights arising from the use of public and private security by the extractive sector.

Despite these standards, many of the most serious human rights abuses that RAID has documented were perpetrated against local residents by public security forces paid and/or otherwise supported by mining companies based in the UK and other countries in the Global North. Our relevant research includes (i) a massacre in 2004 of over 70 people in the town of Kilwa, in the Democratic Republic of Congo, by Congolese government forces assisted by the Australian-Canadian company Anvil Mining,¹ as well as (ii) the killing of dozens of local residents over the past 10 years, and serious injuries to many more, by Tanzanian police who were paid, accommodated, and equipped by the British company, Acacia Mining, at its North Mara gold mine.²

Our research findings fit within a broader pattern of violence against local communities in Africa and other lower-income regions by security forces protecting the interests of multinational companies. United Nations Special Rapporteurs reporting to the UN Human Rights Council describe a “global crisis” of such violence, highlighting the nexus between companies operating in the extractive sector and state security forces in perpetrating human rights violations.³

In our experience, victims can face significant barriers to justice for corporate violations in host States, for example due to lack of access to legal representation or intimidation. These barriers can be prohibitive when the interests of host States and companies are aligned.⁴ For instance, the UN Working Group studying the use of mercenaries found in its 2019 report to the UN Human Rights Council that “the close association between State security forces and extractive companies raises questions about whose interest the public forces are defending”.⁵ Police are expected to deliver the security a company has paid for, but this vested interest frequently runs contrary to, and can override, protection of human rights and local community policing. RAID’s research at the North Mara gold mine in Tanzania confirms this dynamic. Victims have faced threats and even charges by the police, with no action taken against the company. As a result of the relationship, many victims do not report incidents or the true causes of their injuries to the police.

B. The Court of Appeal judgment develops tort law in ways that will deprive communities of necessary protection and individuals of the right to seek redress against British domiciled companies

1. The judgment sets an impossibly high bar to establish corporate intent: the Court of Appeal held that the High Court’s finding that the Respondents’ senior management did not expressly intend Sierra Leonean police to use excessive force precluded an inference of conditional intent

¹ In December 2017, the African Commission on Human and Peoples’ Rights issued a letter requesting that Anvil Mining “acknowledge responsibility for breaching its duty of care” and contribute to reparations to victims, which it has refused to do (available at: <https://www.achpr.org/pressrelease/detail?id=65>).

² In 2015, Acacia settled an action in British courts by victims of human rights abuses at North Mara (<https://www.leighday.co.uk/International/Corporate-accountability/Security-human-rights/Tanzania>). A new case was commenced by victims against the mine’s current owner earlier this year (<https://www.raid-uk.org/blog/tanzanian-victims-commence-legal-action-uk-against-barrick>).

³ Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/71/281, 3 August 2016, [26]-[29]; Report of the Special Rapporteur on the rights of indigenous peoples, UN Doc. A/HRC/39/17, 10 August 2018, [41], [61].

⁴ See, e.g., *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39, noting the risk of “difficulty in receiving a fair trial [in Guatemala] against a powerful international company whose mining interests...align with the political interests of the Guatemalan state”: [130].

⁵ Relationship between private military and security companies and the extractive industry from a human rights perspective, UN Doc. A/HRC/42/42, 29 July 2019, [31].

for the purposes of common design: [101]. As we understand it, the Court applied this reasoning to hold that the Respondents were not civilly liable under the principles of common design despite findings that they provided unconditioned support in the form of cash, accommodation and transportation (amongst other things) to the police, knowing that the police had engaged, and at some points were engaging, in acts of extreme violence, and taking no steps to seek to prevent or even mitigate that violence.

The Court of Appeal's approach to the question of conditional intent places an unreasonable evidential burden on victims. In our experience documenting and exposing corporate human rights abuses, actual evidence of an intent by companies, as in the form of a "single act" or "unequivocal document" ([101]), that security forces use excessive force is exceedingly rare. Yet the evidence, if considered as a whole, can lead clearly to the inference of such intent.

This inference, and the importance that it not be precluded absent express intent, is particularly apparent where abuses are perpetrated as a normalised, ongoing feature of the security services spread out over many years.⁶ When the use of excessive force is ingrained and unquestioned, it is improbable in the extreme that victims will be able to show in a given instance that a member of senior management gave direct orders or advice as to when to use such force (High Court judgment: [266]; Court of Appeal judgment: [89]), precisely because personnel have been conditioned to act without the need for such explicit directions. Companies have frequently been shown to pay and equip public and/or private security to quash opposition to their projects and pacify local communities, using violence as necessary.⁷ By precluding an inference of conditional intent absent senior management's express intent, the judgment will make it impossible for victims to establish corporate intent in all but the most exceptional circumstances.

2. The judgment's denial of a corporate duty enhances risks of harm to communities: the Respondents' mine was located in a remote area. The relevant communities comprised three villages and one small town. If, even where harm is foreseeable, a mining company owes no duty of care to local residents in these circumstances because it would mean "an indeterminate liability to an indeterminate class of people" ([145]), it is difficult to conceive when such a duty would be owed. Yet extractive projects' impacts on local residents can be extensive. A first aspect is the pervasive, daily encroachment of a large mine in a remote area on many aspects of community life, for example, from control over rights of way, water supply and its quality, access to land and proximate land use.⁸ A second is the more sporadic, but often devastating impacts, exemplified by the recent collapse of a tailings dam in Brazil, owned by the mining company Vale, which killed nearly 300 people.⁹ Denying a corporate duty to directly affected communities permits companies to act without care regarding matters central to communities' well-being and leaves those consequently harmed without legal recourse.

⁶ This is in fact the situation that has obtained at the North Mara mine referred to in note 2 above.

⁷ See, e.g., reports of UN Special Rapporteurs referred to in note 3 above; and *Garcia*, note 4 above. *Garcia* concerned claims by local residents who were shot by mine security when protesting the project and was settled in 2019 by the purchaser of the defendant company, which issued an apology to the victims: <https://www.business-humanrights.org/en/pan-american-silver-announces-resolution-of-garcia-v-tahoe-case>. Acacia Mining put in place a memorandum of understanding with local police, pursuant to which they paid, equipped and accommodated officers, despite evidence of ongoing and serious police violence against local communities: http://www.raid-uk.org/sites/default/files/raid_report_on_private_grievance_mechanisms_final_12_june_2019.pdf.

⁸ The North Mara mine, in the midst of local villages, cuts across traditional access routes, bringing people into conflict with mine security, pollutes local water supplies, and impacts family homes and children at school through blasting and dust. For more, see: <https://www.theguardian.com/environment/series/green-blood/2019/jun/18/all>. On the contamination of water supply, see: https://www.raid-uk.org/sites/default/files/raid_report_glencore_chad.pdf.

⁹ For more on the dam's collapse, see: <https://www.bbc.co.uk/news/world-latin-america-51220373>.

Further, in our experience, concerns regarding an indeterminate class of people in this context are unjustified. Especially as mines are typically located in remote areas, there is generally a well-defined group of people impacted by mining companies' decisions regarding security. The group is usually comprised of surrounding villages or other settlements, with many residents whose families have lived in the area for generations, and those who make their living from the mine and its economic activities.

Denying a corporate duty of care contradicts, and confuses the meaning of, international standards that recognise corporate responsibility to respect human rights, including in the use of security.¹⁰ The Court Appeal rejected the relevance of such standards, embodied by the Voluntary Principles on Security and Human Rights (Voluntary Principles), to the existence of a duty. The Voluntary Principles are a globally recognised standard to which the Respondent claimed to have adhered. They were developed as a multi stakeholder initiative amongst governments, companies and non-governmental organisations in recognition of the risks of public and private security forces violating human rights. The UK government is a member of the initiative. The Voluntary Principles are not general in nature nor primarily concerned with the need to liaise with the local community ([150]), but detail corporate terms of engagement with public security, including the need to screen and train security personnel and ensure proportionate use of force. The initiative further provides model clauses for use in agreements by companies using public security forces specifically addressing matters such as compliance with human rights standards and transparency.¹¹ Ontario's Superior Court considered the Voluntary Principles relevant to establishing a *prima facie* duty of care owed by the defendant parent company to residents assaulted by security forces around its Guatemalan mine in *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414: [67]-[68].¹²

By rejecting their relevance, the Court of Appeal judgment reduces the Voluntary Principles to little more than corporate public relations material. Similar concerns have been expressed by those representing business, who have observed that the judgment's dismissal of international standards will contribute to a "state of policy incoherence" and undermine legal certainty for British companies.¹³

Further, in their public-facing materials, companies and industry organisations widely acknowledge responsibilities to local communities.¹⁴ A corporate duty would simply give legal significance to these commitments.

¹⁰ United Nations. (2011). *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework*, commentary to principles 15 and 23, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

¹¹ The Model Clauses may be found here: <http://www.voluntaryprinciples.org/wp-content/uploads/2019/12/ModelClausesforAgreementsbetweenGovernmentSecurityForcesandCompanies.pdf>.

¹² The test for establishing a novel duty of care applied in that case: (1) the harm complained of is a reasonably foreseeable consequence of the alleged breach; (2) there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty; (3) there exist no policy reasons to negative or restrict the duty: [57]. It was confirmed in *Caal Caal v. Hudbay Minerals Inc.*, 2020 ONSC 415, that some of the claims addressed in that decision included corporate liability for human rights abuses by Guatemalan police and military.

¹³ Available at: <https://www.ejiltalk.org/kalma-v-african-minerals-court-of-appeal-judgment-cuts-against-the-grain-of-common-law-cases-on-the-responsibility-of-businesses-for-overseas-human-rights-impacts/>.

¹⁴ See, e.g., the International Council on Mining and Metals' Mining Principles, which include "[r]espect [for] human rights and the interests...[of] communities affected by our activities" (available at <https://www.icmm.com/website/publications/pdfs/mining-principles/mining-principles.pdf>); Glencore's 2019 annual report, stating "local communities living near our assets are part of the ecosystem of our operations" (available at <https://www.glencore.com/dam/jcr/79fd3300-ee50-4ee1-870d-6372274c71b5/glen-2019-annual-report-interactive.pdf>, p. 27);

3. The judgment sets an unreasonably low corporate standard of care: the Respondents neither refrained from providing assistance to the police knowing that the police were perpetrating human rights abuses, nor took steps to ensure that the assistance was not used in furtherance of the abuses. In finding no breach of a duty, the Court of Appeal judgment effectively licenses companies to pay and equip under-resourced police with a known proclivity for violence, thereby aligning their interests against local communities, without measures to ensure that the assistance is not used to commit human rights abuses. In our experience, such practices can have devastating results, exposing local residents to assaults and killings when they threaten production or other corporate interests while ensuring corporate impunity in the host State.¹⁵

The Court of Appeal judgment on this issue contradicts, and thus again casts confusion on the relevance of, widely recognised and relied upon international standards. These standards include not only the Voluntary Principles, but the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights,¹⁶ which direct companies to seek to prevent adverse human rights impacts to which they are directly linked.

The judgment's holding on this point also carries problematic implications. To find no breach, the Court of Appeal relied on the High Court's finding that the provision of money and other support was "part and parcel of the regular relationship between the respondents and the [police]": [161]. Yet while the High Court characterised the Respondents' payments to police officers as "pragmatic incentives not bribes", it held that they were "alien to what would be expected in the UK" ([333]) and unlawful under Sierra Leonean law: [293]. Considerable progress, including through enactment of the Bribery Act, 2010, has been made in clarifying British companies' anti-corruption responsibilities abroad. Such clarity is crucial. Even on a comparatively small scale unlawful payments to local authorities and/or police officers can significantly harm communities, exposing them to deprivation of land and resources, intimidation and retaliation.¹⁷

The Court of Appeal judgment undermines the clarity that has been achieved. It means that the more regularised the unlawful conduct, the less probable a breach will be found. It condones unlawful behaviour (referring to the assistance, which included unlawful payments, as the company's only "sensible option": [107]) and establishes lower standards for British business in relation to the people of Sierra Leone than those applied for citizens of other states.

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This case concerns matters at the forefront of international developments on corporate responsibility for human rights abuses. It also gives rise to important questions relating to how key principles of English tort law apply in the human rights context. The Court of Appeal judgment places such principles in conflict with the important progress that has been made in the area, and introduces considerable legal and policy confusion that benefits neither British business nor

and, BHP's 2019 annual report, stating that "performance of our assets is crucial to protect our people, the environment and communities in which we operate from incidents" (available at: <https://www.bhp.com/-/media/documents/investors/annual-reports/2019/bhpannualreport2019.pdf>, p. 32).

¹⁵ This has been the case, for example, at the North Mara mine, referenced in note 2 above. For more, see: http://www.raid-uk.org/sites/default/files/raid_report_on_private_grievance_mechanisms_final_12_june_2019.pdf.

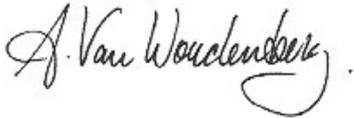
¹⁶ Available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf>; and note 10 above.

¹⁷ This has been the case, for example, at the North Mara mine; Report of the Special Rapporteur on the situation of human rights defenders, referenced in note 3 above, [49]-[50].

those whose lives it directly affects. In these circumstances, we believe that there are strong grounds to grant permission to appeal.

We look forward to being notified in accordance with practice direction 3 (3.3.18) should permission be granted. We can be contacted at woudena@raid-uk.org and Marilyn.Croser@corporate-responsibility.org.

Yours sincerely,



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