



TOO TOXIC TO TOUCH?

The UK's response to Amnesty International's call for a criminal investigation into Trafigura Ltd.

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“[I]nvestigating the events properly and from the beginning would be a highly onerous, lengthy, labour intensive and expensive task ... Trafigura will take any and every available procedural opportunity to challenge steps taken in a further investigation, thus contributing to the anticipated expensive costs ... The Agency has limited experience in conducting complex significant investigations ... [It] would not have the appropriately skilled and experienced staff to undertake such an investigation.”

– The Environment Agency’s explanation to Amnesty International of their decision not to investigate Trafigura over the illegal dumping of toxic waste in Côte d’Ivoire in August 2006

Two high-profile criminal investigations have hit UK headlines in recent months. The FIFA corruption and HSBC “Swiss Leaks” allegations have revealed a web of illegal activities touching various countries around the world including the UK. They have also raised concerns about why UK law enforcement agencies have apparently been sluggish in taking action despite clear grounds to investigate and growing public calls for companies to be held to account when they break the law.¹ Amnesty International’s interaction with UK authorities over a horrific human rights case indicates that these concerns are indicative of wider failings in the UK’s system for tackling corporate crime.

Over the last year, Amnesty International has pressed UK authorities to launch a criminal investigation into London-based multinational Trafigura Ltd. The case centres on allegations that Trafigura conspired in the UK to dump toxic waste in Côte d’Ivoire (the Ivory Coast) in August 2006 – an event that had a devastating impact on the human rights of a community already rocked by conflict and suffering endemic poverty. Amnesty International has hit brick wall after brick wall in its call for an investigation, with authorities only finally agreeing to even review its evidence under threat of legal proceedings.

Ultimately, the UK refused to investigate the case. The reasons provided for making that decision throw

light on how legal, political and systemic issues combine to create a justice system that is woefully under-equipped to tackle corporate crime. They also throw light on a system that is effectively giving UK-based multinationals *carte blanche* to commit crimes abroad.

This briefing details those failures and makes recommendations to the UK government on how to address them. Amnesty International is [making public](#) its correspondence with UK authorities on the case as well as the evidence as to Trafigura’s role in the disaster.



Akouédo dump site, February 2009. People live and work close to the site.
© Amnesty International

1. Owen Boycott, ‘HSBC should face UK criminal charges, says former public prosecutor’, The Guardian, 22 February 2015, available at www.theguardian.com/politics/2015/feb/22/hsbc-uk-criminal-charges-former-public-prosecutor-hmrc; BBC News, ‘Fifa scandal: UK prosecutors’ ‘eye off the ball’’, 1 June 2015, available at www.bbc.co.uk/news/uk-wales-politics-32958076

THE DISASTER

“On arriving in the city that day I smelled an overpowering odour. I live in Riviera Palmeraie, an area located near one of the dumpsites. My immediate concern was for my children, which is why I went home first. When I arrived, I noticed that my children were suffering from ocular irritation, cough and thoracic pain. The odours were quite simply oppressive. They burned my throat and caused abdominal pain. My eyes itched, and I very quickly began to suffer the same symptoms as my family”. – Dr A

On 19 August 2006, toxic waste was dumped at about 18 locations in and around the city of Abidjan, Côte d'Ivoire. Multinational commodities trader Trafigura produced that waste by using caustic soda to “wash” on board a vessel at sea an extremely sulphurous petroleum product called coker naphtha. Trafigura intended to mix the cleaned naphtha with gasoline and sell it to the West African market for a profit of around US\$7 million per cargo.

This cleaning process, which had never been attempted at sea before, produces a hazardous and highly-odorous waste product that is generically referred to as “spent caustic”. The waste on-board the ship included this spent caustic as well as the remains of the coker naphtha. Trafigura generated this waste knowing it was hazardous if not disposed of safely but without having figured out exactly how to dispose of it.

Trafigura tried and failed to dispose of the waste in Malta, Italy, Gibraltar, The Netherlands and Nigeria. Its attempt to dispose of the waste in Amsterdam sparked an environmental incident after residents complained of the smell and experienced nausea, dizziness and headaches. Trafigura rejected an offer to dispose of the waste safely in The Netherlands for €544,000.

The waste was finally dumped illegally in Côte d'Ivoire by a local company that Trafigura hired to dispose of it for just US\$17,000. After Dutch police began investigating what had happened to the waste, Trafigura asked the local company to create a false, revised invoice quoting a much higher disposal price of over US\$100,000.

The disaster had a devastating impact on the health of the local community and their environment. As a result of the dumping, over 100,000 people sought medical assistance and extensive clean-up and decontamination was required. Côte d'Ivoire authorities also recorded about 15 deaths.

While there have been some related civil and criminal proceedings and some compensation paid to victims, Trafigura has never been properly held to account for its role in the actual dumping of the waste and many of those affected are still waiting for an adequate remedy and a feeling that justice has been served.

The extent of ongoing pollution and the long-term health impacts of the dumping remain unclear. When Amnesty International revisited the main dumpsites in December 2013, residents said they could still smell the toxic waste after heavy rains and complained that there had not been an adequate clean-up operation. People were still growing vegetables next to areas where toxic waste was dumped without knowing if it was safe. Doctors in Abidjan told Amnesty International they are deeply concerned that ongoing pollution is causing respiratory problems in children.

The United Nations Environment Programme is due to carry out an environmental audit of the dumpsites later this year to assess if they are still contaminated. Depending on the results of that audit, UNEP will make recommendations on long-term health monitoring together with the World Health Organization and other public health experts.

Trafigura denies responsibility for the toxic waste dumping and maintains that it believed the local company would dispose of the waste safely and lawfully.²

2. For full details of Trafigura's position and its response to The Toxic Truth, see www.trafigura.com/media-centre/probo-koala/ and www.amnesty.org/en/documents/AFR31/002/2012/en/, Annex II.

THE CALL FOR A CRIMINAL INVESTIGATION IN THE UK

In September 2012, Amnesty International and Greenpeace published *The Toxic Truth*, a report that documented the role of Trafigura in the generation and dumping of hazardous waste in Abidjan. The report outlined how various UK-based directors and employees of Trafigura coordinated the operations that led to the dumping. The report recommended that the UK government investigate options for initiating a criminal prosecution against Trafigura and others involved. Amnesty International sent a copy of the report to the Director of Public Prosecutions (DPP) urging a criminal investigation.

In March 2014, Amnesty International sent a detailed legal brief to the DPP and the Metropolitan Police, calling on them to launch a criminal investigation into Trafigura's role in the dumping. The brief included substantial evidence that the actions of Trafigura's directors and employees may have amounted to a corporate conspiracy to dump waste abroad under section 1A of the UK Criminal Law Act 1977. That evidence included a trail of incriminating emails between various UK-based staff members as well as Trafigura's founder and CEO. The brief also outlined the public interest in such an investigation, including the chequered history of Trafigura's business practices both before and after the dumping.

Prompted by a follow-up call by Amnesty International to the DPP nearly a month later, the Crown Prosecution Service (CPS) advised in writing that the matters we raised were "not for the Crown Prosecution Service" and passed the file to the Environment Agency. The Environment Agency refused to even consider



Greenpeace activists blockade the Probo Koala at the Estonian port of Paldiski. Activists branded the cargo vessel an EU Toxic Crime Scene and called for an investigation of the ship by the Estonian authorities, September 2006. © Aslund/Greenpeace

investigating the case. The Metropolitan Police never responded despite voicemails and further correspondence.

In November 2014, under threat of legal proceedings by Amnesty International, the Environment Agency finally agreed to look at the evidence.

In March 2015, the Environment Agency issued Amnesty International with its final decision not to investigate. The Agency acknowledged that, if the allegations were true:

“a serious offence was committed with a relevant aspect of the conduct taking place within the jurisdiction”.

Despite this, it decided not to investigate based purely on what it believed would be the likely costs and benefits of undertaking that investigation. This means that its decision never at any point took into account whether Amnesty International's allegations were credible and the implications in deterring future harm of refusing to investigate the case. In

any event, Amnesty International considers that the Environment Agency overstated the likely costs and complexities of an investigation and understated the likely benefits.

See “Timeline of our call for an investigation” below for details of Amnesty International's interaction with authorities on the case.



Akouédo dump site. This is the location where Trafigura contracted with a small Ivorian company to dispose of large amounts of toxic waste without treatment. © Amnesty International

THE KEY ACTORS

CPS – The Crown Prosecution Service, the principal prosecuting authority for England and Wales.

DPP – The Director of Public Prosecutions, the head of the CPS. The current DPP is Alison Saunders.

Environment Agency – The agency tasked with protecting and improving the environment, including regulating environmental crime. It is an executive, non-departmental public body, sponsored by the Department for Environment, Food & Rural Affairs (DEFRA).

Attorney General – A government-appointed minister who is chief legal adviser to the government and oversees, among other things, the CPS and the DPP. The consent of the Attorney General is required to prosecute certain serious offences, including under section 1A of the Criminal Law Act 1977. The current Attorney General is Jeremy Wright QC, MP.

Metropolitan Police – The force responsible for law enforcement in Greater London (excluding the City of London). Amnesty International sent its documents to the Metropolitan Police as Trafigura Ltd is based in London. As there is no unit within the Metropolitan Police with specific responsibility for investigating this type of crime, Amnesty International sent its legal brief and evidence to the Specialist, Organised & Economic Crime Command.

WHAT THE DECISION REVEALS ABOUT THE UK JUSTICE SYSTEM

“An investigation into Tráficora’s conduct would send a strong message that multinational companies are not above the law. A decision not to investigate sends the contrary message that multinational companies are too powerful...”

– Amnesty International letter to the Environment Agency of 13 February 2015.

Amnesty International’s interaction with the DPP, CPS, Environment Agency and Metropolitan Police indicates a reluctance to take action to hold multinationals to account. But the issue goes deeper than that and demonstrates that, even if there was enthusiasm for tackling corporate crime, UK authorities may lack the capability to do so. Amnesty International’s work on the Tráficora case, together with the Environment Agency’s final decision not to investigate, has revealed the following key issues:

- **UK authorities lack the resources to tackle corporate crime:** There have been widespread budget cuts across investigating and prosecuting services that are already under-staffed and under-resourced.³ In its decision not to investigate, the Environment Agency said:

“[R]ecent financial cuts in relation to its non flood related activities...has had an impact on its regulatory capabilities...The Agency has enforcement priorities (including waste

crime) which have, of necessity, become increasingly more sophisticated over time as it has had to manage competing demands with limited resources. Although it has small dedicated teams of environmental investigators, an in-house intelligence team and accredited financial investigators, this is still a very minor part of overall regulatory activity.”

- **UK authorities lack the knowledge, expertise and capacity to tackle corporate crime especially abroad:** The UK does have some specialized agencies and units that deal with serious or complex cross-border corporate crime like bribery and corruption. In general, however, there is a lack of knowledge and expertise about how to effectively investigate and prosecute corporate crime particularly across borders and a lack of capacity to investigate this type of crime.⁴ In its decision not to investigate, the Environment Agency said:

“[The Agency] is not set up to undertake lengthy and complex investigations involving these areas ... The Agency has limited experience in conducting complex significant investigations, especially where the vast majority of the evidence would appear to be abroad ... [It] would not have the appropriately skilled and experienced staff to undertake such an investigation.”

- **The more powerful the company, the less likely authorities are to investigate:** Multinational companies wield enormous political and economic power and their resources may in many cases dwarf those of investigating and prosecuting services. When an already under-resourced agency is faced with a choice between prosecuting a case against a powerful multinational and

3. For example see: Crown Prosecution Service, ‘CPS Business Plan 2010-2011’, available at www.cps.gov.uk/publications/reports/corpbizplan10-11.html (“The budget for the CPS will decrease by 25% by 2015”); Tim Donovan, ‘Drastic cuts to Met Police budget says deputy mayor’, BBC News, 6 January 2015, available at www.bbc.co.uk/news/uk-england-london-30696052

4. Amnesty International, International Corporate Accountability Roundtable and Office of the High Commissioner for Human Rights, Consultation with UK lawyers on 20 May 2015.

a case against a less powerful individual, the resources of the potential defendant are likely to be a major factor in their decision. In reaching its decision not to investigate, the Environment Agency took into account Trafigura's ability to challenge the investigation:

"[It] is highly likely that Trafigura will take any and every available procedural opportunity to challenge steps taken in a further investigation, thus contributing to the anticipated extensive costs."

- **There is a lack of laws to tackle corporate crime:** Trafigura coordinated from the UK the operations that led to the dumping in Côte d'Ivoire. Despite this, Amnesty International had to rely on a relatively obscure piece of legislation to find a legal basis for a criminal investigation (section 1A of the Criminal Law Act 1977). That legislation covers UK-based conspiracies to commit crimes abroad, an offence that is notoriously hard to prosecute.⁵ UK criminal laws are also mostly territorial in scope – meaning they generally do not apply if a UK-based multinational commits a crime abroad. While in theory the country where the crime was committed may be able to prosecute the company, in reality its likely political and economic influence in that country means this rarely happens.⁶ Additionally, the UK criminal justice system was historically designed to tackle crime by individuals. For a company to be held criminally liable, the conduct of an individual usually needs to be attributed to the company. The tests for doing so are antiquated and often impossible to meet in practice.⁷

All of these factors, combined with a lack of support and direction to UK law enforcement agencies to investigate this type of crime, seem to have given rise

to a reluctance to tackle corporate crime particularly across borders, making the prosecution of corporate actors in the UK for crimes committed abroad rare and unlikely. Amnesty International's legal brief and evidence was passed from one authority to another with each denying they had any ability to act or (in the case of the police) not even responding. Even in its final decision, the Environment Agency suggested that Amnesty International contact the Metropolitan Police or other agency with experience in pursuing these types of offences:

"[T]he Agency is not the correct authority to pursue an investigation of Trafigura".

Amnesty International has put these concerns in full in a letter to the Minister for Policing, Crime and Criminal Justice and Victims, a position that falls under both the Home Office and the Ministry of Justice.



The Central Criminal Court of England and Wales (The Old Bailey)
© Amnesty International

5. The Law Commission, *Consultation Paper No 183: Conspiracy and Attempts: A Consultation Paper*, 17 September 2007, paras 1.18-1.69, available at www.lawcom.gov.uk/wp-content/uploads/2015/03/cp183_Conspiracy_and_Attempts_Consultation.pdf

6. Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (Index: POL 30/001/2014), Ch 4 (Sec 3), available at www.amnesty.org/en/documents/POL30/001/2014/en/

7. Berwin Leighton Paisner, 'DPAs and the inevitable reform of corporate criminal liability', 18 March 2014, available at www.blplaw.com/expert-legal-insights/articles/financial-crime-column-march-2014/

CARTE BLANCHE TO COMMIT HUMAN RIGHTS-RELATED CRIMES ABROAD?

“[If] the Agency tasked with addressing environmental crime is unable to do so, this risks encouraging a culture of impunity that gives UK companies a green light to commit crimes both at home and abroad.”

– Amnesty International letter to the Environment Agency of 13 February 2015.

The Trafigura case exposes worrying gaps in the UK legal and justice systems. But this is not a one-off occurrence. Amnesty International's research on corporate-related human rights abuses around the world points to a disturbing trend – as multinationals become more powerful, governments are becoming less willing and able to hold them to account.⁸

This can have devastating impacts on the human rights of people and communities both in the UK and abroad. In recent years, there have been multiple allegations implicating UK-based multinationals and their overseas operations in serious human rights abuses abroad that may violate UK criminal law:

- **Rio Tinto:** In February and April 2015, Amnesty International urged UK authorities to investigate Rio Tinto's role in potential breaches of EU economic sanctions on Myanmar, a criminal offence under UK law. The allegations relate to the sale by a company in which Rio Tinto held a significant interest (and subsequently took management

control), of a 50% stake in the controversial Monywa copper mine, a project characterised by serious human rights abuses including widespread forced evictions, substantial environmental and social impacts and the repression, sometimes brutal, of those who try to protest.⁹

- **BP:** In May 2015, a trade unionist from Colombia filed a civil claim in the UK courts for damages against BP over allegations that it was complicit in his 2002 kidnapping and torture by a paramilitary group.¹⁰
- **African Barrick Gold (ABG, now Acacia):** In July 2013, 12 people filed a civil claim in the UK courts against ABG and its subsidiary North Mara Gold Mine Limited (NMGML) alleging complicity in the killing by police of six villagers at the North Mara Mine in Tanzania in 2011. In early 2015, ABG and NMGML settled the case out of court.¹¹
- **Monterrico Metals:** In 2009, various Peruvian nationals filed a civil claim in the UK courts against Monterrico Metals alleging complicity in their torture and mistreatment during a 2005 protest against its Rio Blanco copper mine. In July 2011, Monterrico settled the case out-of-court with no admission of liability.¹²
- **Hussar:** In 2013, Stop Pillage Campaign provided UK and Jersey authorities with the results of their investigation into Hussar Services Limited and one of its affiliates in connection with pillaging of gold from the Democratic Republic of Congo (DRC), a potential war crime under UK law.¹³ The trade in minerals such as gold has fuelled conflict and human rights abuses in the eastern DRC for 15 years.

In each of these cases it is the victims themselves or NGOs that have taken action to seek justice, not the UK government.

8. Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (Index: POL 30/001/2014), Ch 3-4, available at www.amnesty.org/en/documents/POL30/001/2014/en/

9. Amnesty International, 'UK: Investigate Rio Tinto's Role in potential Burma sanctions busting', 16 April 2015, available at www.amnesty.org.uk/press-releases/uk-investigate-rio-tintos-role-potential-burma-sanctions-busting; Amnesty International, *Open for Business? Corporate Crimes and Human Rights Abuses at Myanmar Copper Mine* (Index: ASA 16/003/2015), available at www.amnesty.org/en/documents/ASA16/0003/2015/en/

10. Business & Human Rights Resource Centre, 'BP lawsuits (re Casanare, Colombia)', available at www.business-humanrights.org/en/bp-lawsuits-re-casanare-colombia

11. Business & Human Rights Resource Centre, 'African Barrick Gold lawsuit (re Tanzania)', available at www.business-humanrights.org/en/african-barrick-gold-lawsuit-re-tanzania

12. Leigh Day & Co, 'Peruvian torture claimants compensated by UK mining company', available at www.business-humanrights.org/sites/default/files/media/documents/monterrico-metals-20-july-2011.pdf

13. Stop-Pillage, 'UK investigation', available at www.stop-pillage.org/uk-investigation

RECOMMENDATIONS

Ensuring that the UK justice system is capable of tackling corporate crime will require legal and systemic changes. Below are five key recommendations to start that process:

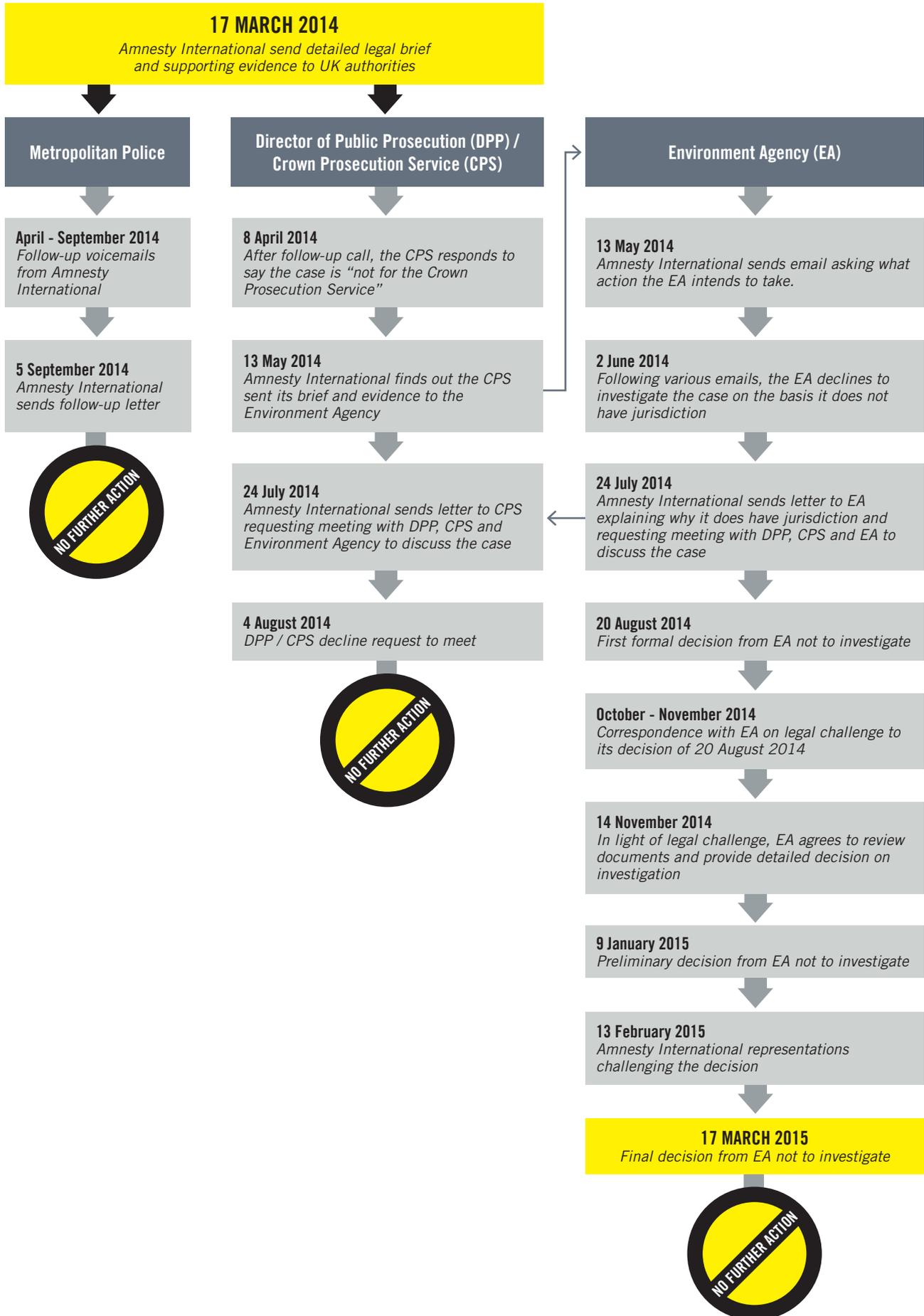
1. Develop and adopt into law a consistent and coherent concept of corporate criminal liability that would enable authorities to investigate and prosecute UK companies involved in serious crime overseas (whether human rights-related or otherwise and whether through their subsidiaries, associates or otherwise). One option to consider is strict liability for serious crimes committed in the context of a company's global operations with a due diligence (adequate procedures) defence, similar to section 7 of the UK Bribery Act 2010.
2. Give strong support and direction to UK authorities to investigate and prosecute corporate crime as a matter of priority, including when UK-based companies (through their subsidiaries or otherwise) commit crime abroad.
3. Ensure investigators and prosecutors understand the link between corporate crime and human rights abuse and build networks and communication lines with people and organizations working on these issues.
4. Ensure investigators and prosecutors have the resources, knowledge, expertise and capacity needed to successfully investigate and prosecute corporate crime. While it is clear these services require more financial resources, steps can also be taken to ensure better allocation of existing resources. For example:
 - By improving evidence gathering techniques for corporate crime: Investigators should be provided with specific training on evidence gathering in corporate crime cases, including training on corporate structures and decision-making processes as well as effective methods for gathering evidence against companies.
 - By ensuring investigators have, from the beginning of an investigation, the legal, practical and technical support needed to ensure its success: Teams investigating corporate crimes could be supplemented on an ad hoc or permanent basis with prosecutors specialised in tackling such crimes as well as individuals with relevant expertise in areas such as extra-territorial crime, financial crime or technology.
5. Encourage international cooperation and assistance directly with police and judiciary in relevant jurisdictions, including those where crimes are alleged to have been committed.

THE COMMERCE, CRIME & HUMAN RIGHTS PROJECT

In February 2014, Amnesty International and the International Corporate Accountability Roundtable launched the Commerce, Crime & Human Rights Project, which seeks to develop recommendations for States in addressing challenges in investigating and prosecuting corporate crime. The project will result in a set of Principles for State Action endorsed by leading jurists and prosecutors.

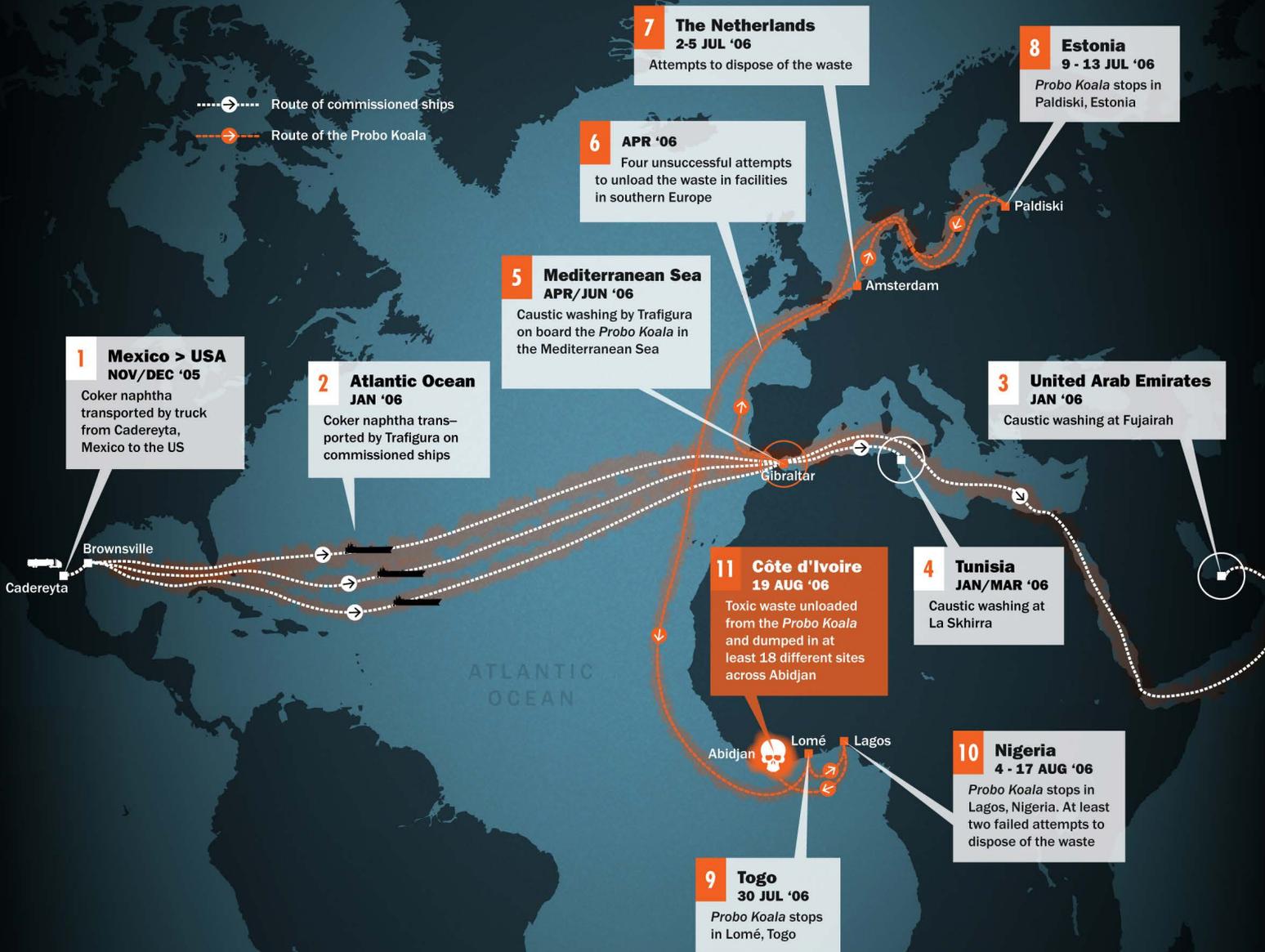
For more information about the Project and how you can help, see the Project [website](http://www.commercecrimehumanrights.org) (www.commercecrimehumanrights.org).

TIMELINE OF OUR CALL FOR AN INVESTIGATION



THE JOURNEY

Journey of the coker naphtha and toxic waste on board the *Probo Koala*





Victims of the toxic waste dumping around Abidjan wait to consult doctors at the main hospital of Cocody in Abidjan, 7 September 2006. © Greenpeace

Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

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(COVER IMAGE) Women protesting about the toxic waste dumping. Photo taken on the day the trial started, 29 September 2008 (© ANP/EPA/Legnan Koula)

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Index: EUR 45 / 2101 / 2015, July 2015

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