

The Lafarge case: tackling corporate impunity in the battlefield

O caso “Lafarge”: responsabilizar as empresas no campo de batalha

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ABSTRACT: The Lafarge case, brought before French criminal justice against parent company Lafarge, incorporated in France, and its Syrian subsidiary, Lafarge Cement Syria, for the actions of the latter in the context of the Syrian Civil War, is an important milestone in the tackling of corporate human rights and international humanitarian law harms in the battlefield context. The company stands accused of complicity in war crimes, crimes against humanity, the crime of financing terrorism and deliberate endangerment of people's lives. The case under analysis, which awaits a decision from the French Supreme Court, sheds light on the difficulties in accessing justice and establishing corporate criminal responsibility. Throughout this paper we will explore these challenges, namely by analysing: the norms which regulate corporate conduct with regard to respect for human rights and international humanitarian law, corporate criminal liability under international criminal law, the difficulties in proving complicity in the commission of these crimes and in holding the parent company liable for acts carried out by its subsidiary.

KEY WORDS: Lafarge; corporate criminal liability; business and human rights; international humanitarian law; international criminal law; corporate responsibility.

RESUMO: O caso "Lafarge", movido junto da justiça francesa, contra a empresa-mãe "Lafarge", sediada em França, e contra a subsidiária "Lafarge Cement Syria", sediada na Síria, pelos atos causados pela última no decurso da Guerra Civil na Síria é um importante marco quanto à responsabilização das empresas pelas violações de direitos humanos e de direito internacional humanitário levadas a cabo em contexto de conflito armado. A empresa encontra-se acusada de cumplicidade na comissão de crimes de guerra e de crimes contra a humanidade, do crime de financiamento de terrorismo e do crime de deliberadamente colocar em perigo a vida dos trabalhadores da empresa síria. O caso sob análise, que aguarda decisão do Supremo Tribunal de Justiça francês, ilustra as dificuldades de acesso à justiça e de criminalização da conduta empresarial atentatória dos direitos humanos, tema que exploraremos neste artigo. Analisaremos, nomeadamente: as normas que regulam a conduta empresarial no que toca ao respeito pelos direitos humanos e pelo direito internacional humanitário, a criminalização da conduta empresarial à luz do direito internacional penal, as dificuldades em estabelecer a cumplicidade da empresa na comissão de crimes e ainda as dificuldades em imputar atos praticados pela empresa subsidiária à empresa-mãe.

PALAVRAS-CHAVE: Lafarge; responsabilidade criminal das empresas; direitos humanos e empresas; direito internacional humanitário; direito internacional penal; responsabilidade empresarial.

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"Companies have the means to fuel armed conflicts by doing business with regimes or armed groups who commit war crimes and crimes against humanity. The fight against multinationals' impunity will necessarily imply holding them to account, in particular in countries where parent companies operate and control their subsidiaries' activities worldwide. Access to justice for thousands of victims of armed conflicts depends on it."

SANDRA COSSART (Sherpa's director)¹

1. Introduction

In the context of global value chains, where businesses act through a complex web of interconnected but separately incorporated companies, corporations are more and more often finding themselves operating in conflict areas, where they "can fuel armed conflicts and contribute to grave human rights violations".²

The potential impact of businesses in the battlefield is manifest in the *Lafarge case*, where the company stands criminally charged, before French Justice, for the illegal actions taking place in Syria, "under executive leadership of the company's Parisian headquarters".³ The multinational corporation is being trialled for its complicity in the commission international crimes, for committing the offence of financing terrorism, the crimes of deliberate endangerment of people' lives and of having working conditions incompatible with human dignity.

The criminal liability charges were brought by Sherpa, the European Centre for Constitutional and Human Rights (ECCHR) and eleven Syrian employees, against parent company Lafarge and the Syrian subsidiary, alongside several company executives⁴ and constitute an important step towards tackling the corporate responsibility to respect human rights and international criminal law standards, especially when "operating in armed conflict zones".⁵

The *Lafarge case* is a "milestone in the fight against corporate impunity"⁶, and this paper will look at the legal obstacles posed when seeking remedy through criminal action against multinational corporations.

¹ ECCHR/ SHERPA, *Submission from Sherpa and ECCHR on an indictment of Lafarge for complicity in crimes against humanity*, Paris: ECCHR/ Sherpa, 2018.

² ECCHR, *Lafarge in Syria – Accusations of complicity in grave human rights violations*, Paris: ECCHR, 2018.

³ CLAIRE TIXEIRE, *Holding Transnational Corporations Accountable for International Crimes in Syria: Update on the Developments in the Lafarge Case*, *Opinio Juris*, 2020.

⁴ ECCHR, *Lafarge in Syria (...)*, 2018.

⁵ ECCHR/ SHERPA, *Landmark Decision in Lafarge Case*, Business & Human Rights Resource Centre, 2018.

⁶ ECCHR, *Lafarge in Syria (...)*, 2018.

2. The facts

Lafarge is a multinational company, incorporated in France, and engaged in the production of cement, carrying out activities in Syria through a subsidiary company, *Lafarge Cement Syria*⁷.

In November 2016, legal proceedings were filed against both the parent and the subsidiary company in France for “complicity in war crimes, crimes against humanity, financing of a terrorist enterprise, deliberate endangerment of people’s lives and forced labour”, based on a series of events taking place between 2011 and 2014⁸, in the course of the Syrian Civil War⁹.

During this time, where the escalation of violence prompted several corporations, such as *Total* to leave the region due to security concerns¹⁰, *Lafarge* decided to maintain its operations in the battlefield territory. In order to do so, it allegedly entered into negotiations with the terrorist group Islamic State in Iraq and Syria (ISIS), part of the hostilities, in order to purchase large amounts of raw materials, such as oil and pozzolan¹¹, and to secure the crossing of checkpoints for the workers. Furthermore, *Lafarge* allegedly pressured the employees of the Syrian factory to continue working, “despite the increasing security threats”¹².

Lafarge is deemed to have been complicit to war crimes and crimes against humanity committed by ISIS in Syria “by maintaining its business activities there, by neglectfully managing its employees’ security, and by financing ISIS in various ways with up to several million euro”¹³. Aside from the alleged complicity in international crimes and the offence of financing terrorism, the criminal complaint takes into account the ISIS’s attack to the company’s plant in September 2014, and the fact that, despite the imminent security risks, the company failed to implement emergency safety procedures and an evacuation plan¹⁴.

In 2019, the Paris Court of Appeals dropped the charges against *Lafarge* with regard to complicity in crimes against humanity. Sherpa and the ECCHR appealed the Court’s decision, which is yet to be decided by the French Supreme Court¹⁵. However, the Court of Appeals’ ruling potentially sets an important precedent, through the confirmation of the accusations with regard to the deliberate endangerment of the cement plant workers’ lives, and for the crime of financing terrorism¹⁶. The Court recognizes *Lafarge’s* actions as “positive acts of complicity, insofar as they could have played a collaborative role in the commission of crimes”,

⁷ ECCHR, *Lafarge in Syria (...)*, 2018.

⁸ BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, *Lafarge lawsuit (re complicity in crimes against humanity in Syria)*, Business & Human Rights Resource Centre, 2016.

⁹ THE GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, *The War Report: armed conflicts in 2018*. Lausanne: The Geneva Academy of International Humanitarian Law and Human Rights, 2019, p. 123.

¹⁰ ECCHR, *Lafarge in Syria – Accusations of complicity in grave human rights violations*, Paris: ECCHR, 2018.

¹¹ CLAIRE TIXEIRE, *Holding Transnational Corporations Accountable (...)*, 2020.

¹² ECCHR, *Case report: Lafarge in Syria: accusations of complicity in war crimes and crimes against humanity*, Paris: ECCHR, 2016.

¹³ ECCHR/ SHERPA, *Submission (...)*, 2018.

¹⁴ ECCHR, *Lafarge in Syria (...)*, 2018.

¹⁵ SHERPA, *La justice française maintient la mise en examen de Lafarge mais annule le chef de complicité de crimes contre l’humanité*, Business & Human Rights Resource Centre, 2019.

¹⁶ ECCHR, *Lafarge in Syria (...)*, 2018.

given that the decision to maintain the factory operations exposed its employees to life-threatening risks¹⁷.

3. Legal challenges posed in the *Lafarge* case

The impact of business enterprises on armed conflict has never been greater¹⁸, especially considering the rise of decentralized chains of production in a globalized world. This “transformation of the models of organization of production” has led multinational corporations to relocate production sites and subsidiaries¹⁹ in order to reap the benefits of conducting their business and commercial activities in third countries with less stringent legal standards. In light of this, businesses are more and more often operating in conflict zones, and “should use extreme caution and be aware that their actions may be considered to be closely linked to the conflict, even though they do not take place in the fighting”²⁰.

The potential business impact on armed conflict is undeniable, as, for instance the wealth created by corporate activity is attractive for parties to the conflict, as they might have to enter into security arrangements with some or several parties to the conflict, as they pay taxes, possibly financing one of the parties to the conflict, etc²¹.

Nonetheless, accessing remedy for corporate criminal abuses, especially when caused by a multi-national corporate structure, may be challenging due to a series of factors, namely: due to the complexity of corporate structures and the privileges of the corporate form, as corporations may act through a network of separate entities, separately incorporated but interconnected companies, often located in different countries and, therefore, subject to different jurisdictions and governing rules²². This intricacy may lead to difficulties in holding the parent company liable for acts carried out by its subsidiary - as the fragmentation of the legal personality of companies allows them to dissociate their economic power from their legal responsibility²³ -, difficulties in accessing corporate information, relevant, namely, in order to establish the *means rea* for complicity. This also poses jurisdictional and choice of law challenges.

Another common hurdle is seeking legal representation, in order to ensure equity of arms, as “even if lawyers are willing in principle to represent plaintiffs, the complexity, duration and uncertainty typical of this sort of case often makes financial risks too high”, and public funding

¹⁷ CLAIRE TIXEIRE, *Holding Transnational Corporations Accountable (...)*, 2020.

¹⁸ VICENT BERNARD, “Editorial: Globalisation will only mean progress if it is responsible”. *International Review of the Red Cross*, Vol. 94 n.º 887, 2012, pp. 881-890, p. 881.

¹⁹ CLAIRE BRIGHT [et al.], “Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?”, *Business and Politics*, Vol. 22, n.º 4, 2020, pp. 667-697, p. 667.

²⁰ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Business and International Humanitarian Law: an introduction to the rights and obligations of business enterprises under international humanitarian law*. Geneva: ICRC, 2006, p. 14.

²¹ ANGELO GNAEDINGER, “War and business enterprises”, *Journal of Financial Transformation*, 2006, p. 14.

²² AMNESTY INTERNATIONAL, *Injustice Incorporated: corporate abuses and the human right to remedy*. London: Amnesty International, 2014, pp. 117 ss.

²³ BÉATRICE PARENCE/ ELISE GROULX, “Regards Croisés sur le devoir de vigilance et le duty of care”, *Journal du droit international*, n.º 1, 2018, pp. 21-53, p. 23.

is most often unavailable²⁴. In addition, litigation, especially where transnational, is extremely costly, due to the added expenses of gathering evidence in a foreign State, the costs of technical legal experts, ensuring the transport of victims and witnesses, the duration of the litigation, etc²⁵.

Moreover, the lack of legally enforceable instruments on the business responsibility to respect internationally recognized human rights and humanitarian law, a responsibility mainly set forth under international soft-law instruments, imparts the possibilities of bringing forward claims against corporations. Over and above, in the field of International Criminal Law, the lack of jurisdiction of the International Criminal Court (ICC) over legal persons is also an obstacle in accessing remedy.

Adding to this, the “power or influence of multinational companies”²⁶, in line with the “dangerous liaisons” and the pervasive corporate ascendancy over States, renders access to remedy extremely difficult²⁷. Issues such as corruption, lobbying, the high dependence of developing countries on foreign investment and external pressures has a pernicious effect on access to justice. One may also add to these hurdles, the lack of “capacity and willingness of law enforcement agencies to investigate extraterritorial cases”²⁸.

For the purposes of this paper we will focus on: (i) the lack of legally enforceable instruments on the business responsibility to respect internationally recognized human rights and humanitarian law standards; (ii) the fact that the International Criminal Court lacks jurisdiction with regard to legal persons; (iii) difficulties in proving complicity in the commission of international crimes and, furthermore (iv) the difficulties in holding the parent company liable for acts carried out by its subsidiary.

3.1. What obligations for companies operating in an armed conflict context?

a) The Corporate Responsibility to Respect Human Rights

In the so-called *new era of global production*, a “permissive environment for adverse human rights impacts to take place in supply chains”²⁹ is in place. In fact, there is a *regulatory gap*, that allows for corporate abuses to be carried out in third countries, and this problem is

²⁴ AMNESTY INTERNATIONAL, *Injustice Incorporated (...)*, 2014, p. 139.

²⁵ GWYNNE SKINNER/ ROBERT MCCORQUODALE/ OLIVIER DE SCHUTTER, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, ICAR, CORE and ECCJ, 2013, p. 64.

²⁶ AXEL MARX [et al.], *Access to legal remedies for victims of corporate human rights abuses in third countries*. Belgium: European Parliament's Sub-Committee on Human Rights, 2019, p. 15.

²⁷ AMNESTY INTERNATIONAL, *Injustice Incorporated (...)*, 2014, p. 175.

²⁸ WOLFGANG KALECK/ MIRIAM SAAGE-MAAB, “Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges”, *Journal of International Criminal Justice*, Vol. 8, n.º 3, 2010, pp. 699–724, p. 716.

²⁹ CLAIRE BRIGHT [et al.], “Toward a Corporate Duty (...)", 2020, p. 668.

particularly pressing in the context of armed conflicts³⁰. This gap is the result of the lack of international authoritative norms concerning the “overseas conduct of corporations”³¹, and of the standards governing the corporate conduct in the battlefield being “vague, piecemeal and fragmented”³².

However, a growing awareness of the business impact in unstable environments, such as conflict zones³³, has led to the adoption of a series of self-regulatory measures – e.g.: UN Global Compact³⁴ and the Statement Business Roundtable³⁵ -, and soft law instruments, bringing the concerns of stakeholders affected by business activity into greater prominence in corporate decision-making, and entailing that companies conduct human rights due diligence³⁶, namely: the OECD Guidelines for Multinational Enterprises³⁷, endorsed in 1976 and revised in 2011, aiming at “promot[ing] positive contributions by enterprises to economic, environmental and social progress worldwide”³⁸; and the U.N. Guiding Principles on Business and Human Rights (UNGP’s)³⁹, proposed by John Ruggie and unanimously endorsed in 2011, setting out a clear aspirational standard for ethical business practice. They are based on three pillars: (i) the State duty to protect, (ii) the corporate responsibility to respect human rights, and (iii) access to effective remedy⁴⁰.

Under pillar two, the UNGP’s establish that business enterprises should respect human rights, i.e., that “they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”⁴¹. This responsibility refers to “all internationally recognized human rights”, as “enterprises can virtually impact the entire spectrum of internationally recognized human rights”⁴².

In order to meet their responsibility, businesses should have in place a human rights due diligence process, which should be carried out in close dialogue with the relevant stakeholders, and can be characterized as the ongoing process through which a company can “identify, prevent, mitigate and account for actual and potential human rights impacts that they might cause or contribute to through their activities or business relations”⁴³. This being a

³⁰ JOANNA KYRIAKAKIS, “Developments in international criminal law and the case of business involvement in international crimes”, *International Review of the Red Cross*, Vol. 94, n.º 887, 2012, pp. 981-1005, p. 985.

³¹ BERTHOLD BEITZ, “Interview with John G. Ruggie”, *International Review of the Red Cross*, Vol. 94, n.º 887, 2012, pp. 891-902, p. 892.

³² VICENT BERNARD, “Editorial: Globalisation (...)”, 2012, p. 883.

³³ *Ibid.*, p. 884.

³⁴ United Nations Global Compact, at: <https://www.unglobalcompact.org/>

³⁵ Statement Business Roundtable, at: <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>

³⁶ JOHN GERARD RUGGIE/ CAROLINE REES/ RACHEL DAVIS, “Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations”, *Business and Human Rights Journal*, Vol. 6, n.º 2, 2021, pp. 179-197, pp. 188 ss.

³⁷ OECD Guidelines for Multinational Enterprises, 2011, at: <http://dx.doi.org/10.1787/9789264115415-en>

³⁸ OECD Guidelines for multinational enterprises 2011, foreword.

³⁹ United Nations *Guiding principles on business and human rights: Implementing the United Nations “Protect, Respect and Remedy” framework*, 2011, at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

⁴⁰ U.N. Guiding Principles on Business and Human rights, 2011, general principles.

⁴¹ U.N. Guiding Principles on Business and Human rights, 2011, IIA 11.

⁴² U.N. Guiding Principles on Business and Human rights, 2011, IIA 12.

⁴³ UN GENERAL ASSEMBLY, *Working Group on the issue of human rights and transnational corporations and other business enterprises*, General Assembly seventy-third session, 2018, p. 4.

responsibility of “all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure”⁴⁴.

From conducting appropriate and proportionate human rights due diligence, companies should be able to identify whether and how they are involved with a human rights actual or potential impact. It is important to note that companies can either cause, contribute or be directly linked to a human rights harm.

- (i) Causing entails that the companies’ “activities (its actions or omissions) *on their own* ‘remove or reduce’ a person’s (or group of persons’) ability to enjoy a human right”⁴⁵.
- (ii) Contributing to, under the UNGPs, encompasses both a legal definition of complicity, i.e., “knowingly providing practical assistance or encouragement that has substantial effect on the commission of the violation”, and a non-legal one, which entails that the company’s actions influenced the perpetrator in such a way as to make the adverse impact more likely⁴⁶.
- (iii) Direct linkage entails that “the company has not caused or contributed to an adverse human rights impact but that the impact is directly linked to it by its business relationship with another entity”⁴⁷.

We are dealing with an obligation of means and not with an obligation of results, and, therefore, conducting appropriate human rights due diligence “should help enterprises address the risk of legal claims, by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse”⁴⁸. It shouldn’t, however, exempt or absolve them automatically from liability for causing or contributing to human rights abuses⁴⁹. In fact, ensuring the legal accountability of companies and access to remedy for victims of human rights abuses is a vital part of the State’s duty to protect human rights, as set out under pillar three of the UNGPs.

Soft law requirements, which are grounded on social expectations, and function as “a social licence to operate”⁵⁰, have “intrinsic persuasive power”, they “inspire or justify prescribed conduct, engender shared expectations of ends and means”⁵¹. Therefore, the need for companies to undertake due diligence has become a “global norm reflecting social expectations” for all business enterprises, wherever they operate”⁵². However, the lack of enforceability of these frameworks has led to widespread issues of non-compliance, as is evident from the results of studies such as the 2020 Corporate Human Rights Benchmark⁵³

⁴⁴ U.N. Guiding Principles on Business and Human rights, 2011, general principles.

⁴⁵ UN HIGH COMMISSIONER FOR HUMAN RIGHTS, *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector*, OHCHR, 2017, p. 5.

⁴⁶ ESSEX BUSINESS AND HUMAN RIGHTS PROJECT, *Investor Obligations in Occupied Territories: A Report on the Norwegian Government Pension Fund – Global*, University of Essex, 2019, p. 9.

⁴⁷ UN HIGH COMMISSIONER FOR HUMAN RIGHTS, *OHCHR response (...)*, 2017, p. 5.

⁴⁸ U.N. Guiding Principles on Business and Human rights, 2011, IIA 18.

⁴⁹ *Ibid.*

⁵⁰ U.N. Guiding Principles on Business and Human rights, 2011, IIA 11.

⁵¹ JOHN GERARD RUGGIE/ CAROLINE REES/ RACHEL DAVIS, “Ten Years After (...)”, p. 178.

⁵² UN HUMAN RIGHTS COUNCIL, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, Human Rights Council Seventeenth session, 2011, p. 13.

⁵³ Corporate Human Rights Benchmark, 2020, at: <https://www.worldbenchmarkingalliance.org/publication/chr/b/>

and the 2020 Study for the European Commission on Due Diligence Requirements Through the Supply Chains⁵⁴.

In casu, it seems as though *Lafarge* allegedly breached its corporate responsibility to respect human rights, under the UNGPs and the OECD Guidelines for Multinational Enterprises by contributing to the adverse human rights impacts caused by ISIS, as its actions assisted and increased the likelihood of the impacts. Nevertheless, we are dealing with soft law instruments, meaning that no legal consequence can derive from non-compliance with the duty of care standards set forth in these business and human rights frameworks. This meaning that the company cannot be held criminally liable for the harms caused on these grounds.

This *status quo* has led to the incorporation of human rights due diligence into domestic or regional hard-law regulations, such as the French Duty of Vigilance Law⁵⁵, adopted in 2017, the UK Modern Slavery Act⁵⁶, adopted in 2015 or the Dutch Child Labour Due Diligence Law⁵⁷, due to come into effect in 2022. Several other legislative initiatives aiming to impose a duty to conduct human rights due diligence have started to emerge, namely in Norway, the Netherlands, Switzerland and Germany⁵⁸.

In particular, the French duty of vigilance law is described as a “historic step forward for the corporate accountability movement”⁵⁹, as it establishes a duty of care or *devoir de vigilance* for companies falling within its scope of application, i.e., companies that employ “at least five thousand five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located in French territory, or that has at least ten thousand employees in its service and in its direct and indirect subsidiaries whose head office is located on French territory or abroad” (Article 1). These companies are required to “establish, effectively implement and publish an annual vigilance plan”⁶⁰, and a failure to do so could result in the filing of a court injunction – *astreinte* –, under Article 1. Furthermore, civil law tort claims can be brought forth under Articles 1240 and 1241 of the French Civil Code in accordance with Article 2 of the *Loi de vigilance*.

At the E.U. level, several Regulations have been adopted in order to enforce human rights due diligence in certain sectors, namely, the Timber Regulation⁶¹ and the Conflict Minerals

⁵⁴ LISE SMIT [et al.], *Study on due diligence requirements through the supply chain: Final Report*. Luxembourg: European Union, 2020.

⁵⁵ The French Duty of Vigilance Law, 27 March 2017 (Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre), Available at: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000034290626/>

⁵⁶ UK Modern Slavery Act, 2015, Available at: <https://www.legislation.gov.uk/ukpga/2015/30/contents>

⁵⁷ Dutch Child Labour Due Diligence Act, 14 May 2019 (“Wet Zorgplicht Kinderarbeid”). Available at: <https://zoek.officielebekendmakingen.nl/stb-2019-401.html>

⁵⁸ Read more at: NOVA BHRE, *Human Rights and Environmental Due Diligence Legal Brief*, IMVF: Our Food. Our Future Project, 2021.

⁵⁹ SANDRA COSSART/ JÉRÔME CHAPLIER/ TIPHAINE BEAU DE LOMENIE, “The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All”, *Business and Human Rights Journal*, Vol. 2, n.º 2, 2017, pp. 317-323, p. 320.

⁶⁰ LAURA NASSE, “The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences”, *Nova Centre on Business, Human Rights and the Environment Blog*, 2021.

⁶¹ Regulation (EU) 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance. At: <http://data.europa.eu/eli/req/2010/995/oj>

Regulation⁶². Taking into account the findings of the 2020 Study for the European Commission on Due Diligence Requirements Through the Supply Chains, on the 29th of April 2020, the EU Commissioner for Justice Didier Reynders announced a legislative initiative on mandatory human rights and environmental due diligence at the EU level in 2021. A draft report⁶³ from the European Parliament with recommendations to the European Commission was recently made public and a revised version adopted by the European Parliament⁶⁴.

For the purposes of the *Lafarge* case, referring to harms carried out between 2011 and 2014, the French duty of vigilance law, having been adopted in 2017, is not applicable, nor are any of the sector-specific mandatory due diligence EU-Regulations, as we are dealing with the cement production sector. However, the possible adoption of an EU-wide legislative initiative on mandatory human rights due diligence could have tremendous impact on cases such as this.

b) The Corporate Responsibility to Respect International Humanitarian Law

Under the UNGPs, “businesses will need to respect additional standards, including international humanitarian law, in situations of conflict”⁶⁵. Evidently, operating in these contexts substantially increases the risk of causing, contributing or being linked to gross human rights harms, including the severe risk of being held liable for breaches of international humanitarian law.⁶⁶ The field of humanitarian law comprises the set of norms that regulate situations of armed conflict and war crimes, as well as crimes against humanity “represent a core of the most egregious violations of international humanitarian law”⁶⁷.

The traditional doctrine sustaining that public international law and international humanitarian law exclude businesses from any regulation or accountability, imposing obligations exclusively on States, is being increasingly challenged in light of the “potential liability of business entities for involvement in international crimes”⁶⁸. For instance, according to the International Committee of the Red Cross, international humanitarian law applies to “both States and non-State actors whose activities are closely related to the armed conflict”, and therefore, can be

⁶² Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. At: <http://data.europa.eu/eli/reg/2017/821/oj>

⁶³ European Parliament, Committee on Legal Affairs, Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). Available at: https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf

⁶⁴ NOVA BHRE, *Human Rights (...)*, 2021.

⁶⁵ RACHEL DAVIS, “The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities”, *International Review of the Red Cross*, Vol. 94, n.º 887, 2012, pp. 961-979, p. 970.

⁶⁶ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Business (...)*, 2006, p. 14.

⁶⁷ *Ibid.*, p. 15.

⁶⁸ JELENA APARAC, “Business and Armed Non-State Groups: Challenging the Landscape of Corporate (Un)accountability in Armed Conflicts”, *Business and Human Rights Journal*, Vol. 5, n.º 2, 2020, pp. 270-275, p. 270.

binding on companies, so long as they are “carrying out activities that are closely linked to an armed conflict”⁶⁹.

Moreover, there is a growing consensus that corporations are under the obligation to comply with the legal standards that specifically refer to its activity and influence, namely, they are “prohibited from engaging directly or indirectly in the violation of *jus cogens* principles”, such as committing or being complicit in the commission of crimes against humanity and war crimes⁷⁰.

Notwithstanding, States are under the obligation to criminalise grave breaches of international humanitarian law in their national legislation, as well as to investigate and prosecute such offences, under the Geneva Conventions⁷¹ and Additional Protocol I⁷² and, thus, corporate perpetrators or accomplices may be held liable under the domestic jurisdiction for failing to comply with these standards⁷³, even if we don’t adhere to the above-mentioned more progressive doctrine.

Moreover, under the UNGPs, States should take measures to address the increased risk of business activity in the battlefield, and this may “include criminal liability for enterprises that commit or contribute to gross human rights abuses”⁷⁴.

3.2. Business responsibility under International Criminal Law

International Criminal Law criminalizes “the most serious crimes of concern to the international community”⁷⁵, thus encompassing war crimes and crimes against humanity, included under Articles 7 and 8 of the International Criminal Court (ICC) Statute⁷⁶.

Indeed, companies may find themselves involved in international criminal law violations in several ways, namely by directly perpetrating crimes (*e.g.*: forced labour, torture), by conducting business relations with armed groups or through investments in conflict environments, thus facilitating criminal activity⁷⁷.

In the case under analysis, parent company *Lafarge* and its Syrian subsidiary were allegedly complicit in the commission of international crimes committed by ISIS, and furthermore,

⁶⁹ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Business (...)*, 2006, p. 14.

⁷⁰ MENNO T KAMMINGA/ SAMAN ZIA-ZARIFI, *Liability of multinational corporations under international law*, The Hague: Kluwer Law International, 2000, p. 8.

⁷¹ Geneva Conventions, 1949, At: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>

⁷² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. At: <https://ihl-databases.icrc.org/ihl/INTRO/470>

⁷³ VICENT BERNARD, “Editorial: Globalisation (...)”, 2012, p. 884.

⁷⁴ U.N. Guiding Principles on Business and Human rights, 2011, IIA 7.

⁷⁵ INTERNATIONAL COMMISSION OF JURISTS, *Corporate Complicity & Legal Accountability vol. 2: Criminal Law and International Crimes*. Geneva: International Commission of Jurists, 2008, p. 3.

⁷⁶ Rome Statute of the International Criminal Court, 1998. At: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

⁷⁷ CARSTEN STAHN, “Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law”, *Case Western Reserve Journal of International Law*, Vol. 50, n.º 1, 2018, pp. 91-125, pp. 114 ss.

allegedly guilty of financing the terrorist group as well as deliberately endangering the workers' lives.

Under international criminal law, however, corporations are not subject to criminal liability, and this "impunity gap"⁷⁸ is due to the failed attempt to include legal persons in the jurisdiction of the ICC, during the negotiations of the Rome Statute⁷⁹.

Natural persons are the only possible defendants before international criminal tribunals⁸⁰, according to the principle of *societas delinquere non potest*. This meaning that even though legal persons cannot be held accountable by the ICC, unless a complex revision of its Statute, which is highly unlikely, were to take place⁸¹, the corporate agents and employees can. The jurisdiction over individuals dates back to the Nuremberg trials, "strongly centred on individual agency", and where the statement that "crimes against international law are committed by men, not by abstract entities" was made⁸².

Nonetheless, this *status quo* doesn't "result from a hypothetical conceptual impossibility around corporate liability under international law"⁸³, and there is "a strong moral case to provide greater attention to the contribution of businesses to conflict and crime"⁸⁴.

There is, indeed, a growing ambition to expand criminal liability to legal persons for the commission or complicity in international crimes, as can be seen in recent developments, such as the Malabo Protocol⁸⁵, which revises the Statute of the African Court of Justice and Human Rights establishing jurisdiction over corporations *ratione materiae* for a number of international and transnational crimes, and the Draft Articles on the Prevention and Punishment of Crimes Against Humanity⁸⁶, currently under revision by the UN International Law Commission, and which could include corporate liability⁸⁷.

3.3. Corporate Criminal Liability under the French Legal System

In spite of the fact that legal persons cannot be prosecuted by international criminal tribunals, they may be held accountable at the domestic level, through criminal proceedings.

⁷⁸ NADIA BERNAZ, "Corporate Criminal Liability under International Law: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon", *Journal of International Criminal Justice*, Vol. 13, n.º 2, 2015, pp. 313-330, p. 319.

⁷⁹ ALESSANDRA DE TOMMASO/ KINGSLEY NAPLEY, *Corporate criminal liability under international law*, Business & Human Rights Resource Centre, 2018.

⁸⁰ Rome Statute of the International Criminal Court, 1998, article 1.

⁸¹ DAVID SCHEFFER, "Corporate Liability under the Rome Statute", *Harvard International Law Journal*, Vol. 57, online symposium, 2016, pp. 35-39, p. 38.

⁸² CARSTEN STAHN, "Liberals vs Romantics (...)", 2018, p. 99.

⁸³ NADIA BERNAZ, "Corporate Criminal Liability (...)", 2015, p. 319.

⁸⁴ CARSTEN STAHN, "Liberals vs Romantics (...)", 2018, p. 92.

⁸⁵ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014. At: <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>

⁸⁶ Draft articles on Prevention and Punishment of Crimes Against Humanity, 2019: at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf

⁸⁷ ALESSANDRA DE TOMMASO/ KINGSLEY NAPLEY, *Corporate criminal (...)*, 2018.

In reality, as mentioned, the Geneva Conventions⁸⁸ and Additional Protocol I⁸⁹ mandate States to “criminalize grave breaches of international humanitarian law in their national legislation”⁹⁰ and to investigate and prosecute such offences. Thus, most States include in their domestic criminal law war crimes and crimes against humanity.

Adding to this, globalization and the need to tackle corporate impunity, in particular in the financial crime sector, has led more and more States recognize corporate criminal responsibility, based on several different liability-attribution schemes, e.g.: through vicarious liability or through the theory of identification⁹¹.

The lawsuit against *Lafarge* was brought in France on the basis of Articles 121(2) and 113(6) of the French Criminal Code, which entail that business enterprises can be criminally liable and judged by French tribunals when “perpetrators of crimes act on the company’s behalf”⁹². The charges against the company for complicity in international crimes can be prosecuted in national courts under the principle of universal jurisdiction, as is clear from Article 689 of the Criminal Procedure Code⁹³.

3.4. Complicity in the crimes perpetrated by ISIS

Companies, in the very same way as natural persons, can be involved in the commission of an offence either as “principal perpetrators or as accomplices, depending on their acts and roles in the commission of a crime”⁹⁴.

For the most part, allegations against business entities do not imply that there was the commission of an abuse in its own right, but rather that the business “provided support to those who actually committed the abuses, either by encouraging them and/or by providing some form of assistance”⁹⁵.

Complicity is intrinsically linked to the concept of aiding and abetting, occurring “when a person knowingly helps another to commit a crime”, and requires the mental element of *means rea*, i.e., “knowledge of the that the acts performed assist the commission of the crime of the principal perpetrator.” The accomplice doesn’t need to know the exact crime that was intended or perpetrated, only that offences ought to be committed and that its conduct might, in some way, facilitate or foster the criminal activity⁹⁶.

⁸⁸ Geneva Conventions, 1949.

⁸⁹ Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I).

⁹⁰ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Business (...)*, 2006, p. 15.

⁹¹ ARMINA TANJA SAVANOVIC, *Corporate Criminal Liability in International Criminal Law*, Lund: Faculty of Law Lund University, 2017, p. 53 ss.

⁹² ECCHR, *Case report: Lafarge in Syria (...)*, 2016.

⁹³ *Ibid.*

⁹⁴ INTERNATIONAL COMMISSION OF JURISTS, *Corporate Complicity (...)* vol. 2, 2008, p. 2.

⁹⁵ JONAHATAN CLOUGH, “Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses”, *Brooklyn Journal of International Law*, Vol. 33, n.º 3, 2008, pp. 899-934, p. 916.

⁹⁶ INTERNATIONAL COMMISSION OF JURISTS, *Corporate Complicity (...)* vol. 2, 2008, p. 17.

This poses several problems with regard to corporate criminal accountability, as, in order to prove knowledge to a criminal standard, the sole carrying out of business operations in a conflict area, or profiting from a criminal activity will not be sufficient⁹⁷. The legal person that is aiding or abetting the commission of a crime needs to give assistance, encouragement or moral support to the offence with knowledge, and this knowledge “can be inferred from all relevant circumstances, including both direct and circumstantial evidence”⁹⁸.

The UN Experts Panel has, with regard to this issue, established that companies financing armed groups can be held liable for the complicity of the crimes committed by them⁹⁹, if they “knew or should have known that its conduct was likely to help cause such abuses”¹⁰⁰.

In the context of the “information revolution”, where the knowledge of the crimes perpetrated by the terrorist group is ubiquitous, we believe that *Lafarge* should have known that its conduct, through financing and conducting business with ISIS, would be likely to contribute to such abuses¹⁰¹. In fact, the war crimes and crimes against humanity perpetrated by the terrorist group in Syria, including mass slaughter, sexual violence and summary executions, were publicly reported and also widespread and systematic in nature and, therefore, *Lafarge* couldn’t have ignored them¹⁰².

Therefore, while *Lafarge* could argue that there was never an intention to contribute or assist the terrorist group in the commission of these war crimes and crimes against humanity, “this does not have to be a decisive factor in the proceedings”, as it is shown in the case *Papon* (1997)¹⁰³, whereby the French Supreme Court establishes that “complicity in crimes against humanity does not require supporting the ideology of the principal perpetrators, nor is it necessary for the accomplice to know the specific crime was being planned and actually perpetrated”¹⁰⁴. What matters is that the aiding or abetting takes place alongside the mental element of *means rea*.

Under French criminal law, in order to hold a legal person accountable for financing terrorism, there is the sole need for the mental element of *dolus generalis*, that is, the general intent, limited to the knowledge that the recipient of the funds will allocate them to the possible commission of a terrorist activity. In this sense, the fact that *Lafarge* knew that the funds could, at least in part, be allocated to terrorist activities is sufficient to establish the *means rea*¹⁰⁵. Even though the company didn’t share the intention to commit the crimes in question,

⁹⁷ INTERNATIONAL COMMISSION OF JURISTS, *Corporate Complicity (...)* vol. 2, 2008, p. 21.

⁹⁸ INTERNATIONAL COMMISSION OF JURISTS, *Corporate Complicity (...)* vol. 2, 2008, p. 22.

⁹⁹ REINHOLD GALLMETZER, “Prosecuting Persons Doing Business with Armed Groups in Conflict Areas: The Strategy of the Office of the Prosecutor of the International Criminal Court”, *Journal of International Criminal Justice*, Vol. 8, n.º 3, 2010, pp. 947–956, p. 948.

¹⁰⁰ INTERNATIONAL COMMISSION OF JURISTS, *Corporate Complicity & Legal Accountability vol. 1: Facing the Facts and Charting a Legal Path*. Geneva: International Commission of Jurists, 2008, p. 18.

¹⁰¹ INTERNATIONAL COMMISSION OF JURISTS, *Corporate Complicity (...)* vol. 2, 2008, p. 23.

¹⁰² ECCHR, *Case report: Lafarge in Syria (...)*, 2016.

¹⁰³ Decision of the Judicial Assembly, Council of State, France of 12.04.2002 (*Papon v. France*), case n.º 238689.

¹⁰⁴ CLAIRE TIXEIRE, *Can the Lafarge case be a game changer? French multinational company indicted for international crimes in Syria*, Business & Human Rights Resource Centre, 2018.

¹⁰⁵ CLAIRE TIXEIRE, *Holding Transnational Corporations Accountable (...)*, 2020.

it still couldn't ignore that offences were being carried out and that its conduct would contribute to these crimes being committed¹⁰⁶.

As to what concerns the crime of endangerment of the Syrian workers' lives, the Paris Court of Appeals recognized *Lafarge's* actions as "positive acts of complicity"¹⁰⁷, given the decision to maintain the factory operations, forcing the workers exposure to life-threatening risks, and having no safety measures implemented.

However, the strict interpretation of Article 121(7) of the French Criminal Code, with regard to the complicity in war crimes and crimes against humanity claim, led the Court of Appeals to drop the charges on the grounds of "*Lafarge's* lack of intent to contribute to the crimes"¹⁰⁸.

3.5. Holding the parent company liable

The extraordinary diffusion of transnational corporate groups gave rise to the emergence of the new business creature of modern times – the corporate group – and, with it, the crisis in the legal foundations of corporate law, namely in the liability field¹⁰⁹.

According to the corporate veil doctrine, in a multi-tiered corporate group, there are "multiple layers of limited liability, with each upper-tier company insulated from liability for its lower-tier subsidiaries"¹¹⁰. This meaning that the parent company won't be held automatically liable for the acts and omissions of its subsidiary.

Piercing the corporate veil, i.e., the separate personalities of the corporations¹¹¹, is a complex process, that can be carried out in several ways. For instance, by "establishing the liability of the parent company on the basis of its own negligence in the way the subsidiary was managed"¹¹², that is, holding it liable for failing to exercise properly its due diligence obligations. This exercise can only be successful if effective control over the activities of the subsidiary is proved (e.g.: it administrates, supervises or controls its subsidiary). The corporate veil can also be pierced on the basis of *group-wide policies*, as long as the parent company fails to act in circumstances where it publicly "holds itself out as acting"¹¹³.

In this instance, the French Court of Appeals pierced the corporate veil by acknowledging that parent company *Lafarge* effectively controlled the operations of its subsidiary in Syria, having

¹⁰⁶ CLAIRE TIXEIRE, *Can the Lafarge case be a game changer? (...)*, 2018.

¹⁰⁷ CLAIRE TIXEIRE, *Holding Transnational Corporations Accountable (...)*, 2020.

¹⁰⁸ CLAIRE TIXEIRE, *Holding Transnational Corporations Accountable (...)*, 2020.

¹⁰⁹ JOSÉ ENGRÁCIA ANTUNES, *Liability of corporate groups: autonomy and control in parent-subsidiary relationships in US, German and EU law: an international and comparative perspective*. Deventer: Kluwer, 1994, p. 109.

¹¹⁰ JONAHTAN CLOUGH, "Punishing the Parent (...)", 2008, p. 916.

¹¹¹ RACHEL CHAMBERS, "Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court", *University of Pennsylvania Journal of International Law*, Forthcoming, 2020, p. 7.

¹¹² AXEL MARX [et al.], *Access to legal remedies (...)*, 2019, p. 15.

¹¹³ RACHEL CHAMBERS, "Parent Company Direct Liability (...)", 2020, p. 30.

also financial control over it¹¹⁴. Therefore, it owed a duty of care to the employees of the Syrian subsidiary and surrounding communities affected by the terrorist acts carried out by ISIS.

4. Conclusion

Business enterprises, while competing for the best conditions for production in a globalized world, are more and more often relocating their production sites to the Global South in search for cheaper labour and less rigid human rights protection standards and enforcement. There is, thus, no surprise that they are more frequently finding themselves operating in conflict zones and, therefore, involved in armed conflict related issues, through their activities or business relationships, namely by aiding or abetting armed groups or State-parties to the conflict.

However, holding corporations accountable for causing, contributing or being linked to international criminal law violations remains a challenge:

First of all, impairing the right to access justice for corporate abuses in the battlefield is the lack of hard law standards on the business responsibility to respect human rights and international humanitarian law. Without a solid legal ground for bringing criminal charges against a multinational corporate group, and with each jurisdiction having to resort to its own domestic legislation to establish corporate responsibility, access to effective remedy remains highly unpredictable. Nonetheless, the adoption of hard-law frameworks such as the French Duty of Vigilance Law, and the foreseeable adoption of an EU Directive on mandatory human rights due diligence could have a vast impact on this landscape of corporate impunity, by setting out clear duties for companies, as well as providing victims and authorities with a sound basis for corporate conviction.

From an international criminal law perspective, the *Lafarge* case also prompts important debates. Namely, with regard to the expansion of the jurisdiction of the ICC towards legal persons, ensuring corporate observance of international criminal law standards, in order to better “capture criminal behaviour within complex corporate structures”, and to ensure access to remedy¹¹⁵.

Having straightforward legislation, setting out clearly what is expected from companies with regard to the corporate duty to respect human rights and international criminal law would, in fact, help solve problems such as proving the mental state of *means rea* for complicity and holding the parent company liable for acts carried out by its subsidiary.

¹¹⁴ CLAIRE TIXEIRE, *Holding Transnational Corporations Accountable (...)*, 2020.

¹¹⁵ CLAIRE TIXEIRE, *Holding Transnational Corporations Accountable (...)*, 2020.

The *Lafarge* case, brought forth in France, sheds new light on the possibility of holding multinational corporations accountable for the international crimes they are involved with. And, while the legal hurdles discussed beforehand lead the Court of Appeals to rescind the charges of complicity in crimes against humanity, due to the “*Lafarge’s* lack of intent to contribute to the crimes”¹¹⁶, it still confirmed the charges against the company for “deliberately endangering the lives of its Syrian subsidiary workers and for financing terrorism in relation to large amounts of money transfers allegedly made to the Islamic State”¹¹⁷.

With the appeal having been filed to the Supreme Court, French justice has the means to play a critical role in the recognition of a corporate responsibility to respect human rights and international humanitarian law standards, setting a path towards greater accountability. Herewith, we believe that if the outcome of this case is positive, it could have tremendous impact on the “effective deterrence of collective actions”¹¹⁸, especially since “impunity for human rights violations by corporate actors is a profound a pervasive injustice in the globalized world”¹¹⁹.

We would end with a note that “with great power comes great responsibility, and in the context of multinational business, with great responsibility comes a great risk of criminal liability”¹²⁰. The growing recognition of this reality brings with it further responsibilities for companies conducting operations in conflict areas, so that proper accountability for overseas conduct is established and international human rights and humanitarian law violations properly addressed.

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¹¹⁶ *Ibid.*

¹¹⁷ ECCHR, *Lafarge in Syria (...)*, 2018.

¹¹⁸ RONALD C. SLYE, “Corporations, Veils, and International Criminal Liability”, *Brooklyn Journal of International Law*, Vol. 33, n.º 3, 2008, C. Slye, Ronald, “*Corporations, Veils, and International Criminal Liability*”, *Brooklyn Journal of International Law*, Vol. 33, n.º 3, 2008, pp. 955-974, p. 960.

¹¹⁹ *Ibid.*, p. 963.

¹²⁰ DANIELLE OLSON, “Corporate Complicity in Human Rights Violations Under International Criminal Law,” *International Human Rights Law Journal*: Vol. 1, n.º 1, 2015, pp. 102-115, p. 102.

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