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Anna Oriolo

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OVERVIEW

The Journal of International Criminal Law (*JICL)* is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and pubblication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and

- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about "ecocide" is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

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Corporate Criminal Liability and Complicity in Crimes Against Humanity: Case Note on Recent French Jurisprudential Developments

by Kane Abry[*]*, Allison Clozel*[**]*& Hester Kroeze*[***]

ABSTRACT: This article provides insight into corporate criminal liability as construed in French criminal law. It discusses specifically the history and contingency of the development of corporate criminal liability in French law and its legacy considering the decision of the *Cour de cassation* in the *Lafarge* cases. These landmark decisions are the first of their kind rendered by a supreme court anywhere in the world. They acknowledge that corporations, and no longer only directors of companies or corporations, may be found guilty of aiding and abetting terrorism if they have funded known terrorist organisations for business purposes. The decisions also clarify the limited circumstances where interest groups may be founded to bring private prosecutions to this effect. Given the foregoing, this paper outlines in detail the decisions of the *Cour de cassation* in *Lafarge*, analyses and contextualises their significance, and offers a long view that considers possible international developments.

KEYWORDS: Alien Tort Claims Act (ATCA); Corporate Criminal Liability; Crimes Against Humanity; International Criminal Court (ICC); Lafarge; Terrorist Organisations.

I. Introduction

Corporate criminal liability denotes the vicarious liability of a legal person for the acts of its stakeholders (i.e., directors, officers, employees, and agents) if they commit an illegal act within the scope of their duties with an intention to benefit the undertaking.

Before the reform of the French Penal Code of 1810 in 1994 known as *Code pénalancien*, French law allowed undertakings to ride roughshod over prescribed rules of conduct sanctioning criminal behaviour. The reason was the terseness of *Code pénalancien* regarding the criminal liability of corporations and the lack of clear statutes enshrining corporate criminal liability in positive law. Therefore, the criminal division of the *Cour de cassation* emphasised a *jurisprudence constante* whereby:

> On principle, a legal person cannot incur penal liability; nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision…given the lack of provisions allowing judges to uphold a presumption of penal liability against businesses, corporate criminal liability cannot be sustained. Hence, it follows that [the stakeholders of the company, even acting within the scope of their duties, cannot invoke the corporate veil to elude their liability. They are sole] liable for the criminal acts they commit, not the corporation.[1]

The decision of the Court relied on implicit and explicit justification. The first was the lack of statutory provisions sanctioning corporate criminal liability overtly or implicitly. It

[*]Law School, University of Edinburgh (UK).
[**]Autorité de la concurrence (France).
[***]University of Ghent (Belgium).

[1] Cour de Cassation, 72-90.424, Chambre criminelle, Judgment (Mar. 15, 1973); Cour de Cassation, 73-92.815, Chambre criminelle, Judgment (Feb. 6, 1975), https://www.legifrance.gouv.fr/juri/id/JURITEXT000007059502/.

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relied on arts. 111-114 of *Code pénalancien* whereby criminal law must be interpreted strictly when the law is clear and absolute. As a result, the criminal courts could not exercise discretion unlike their civil counterparts which are required to do so even if there is no statute providing for the situation brought before them.[2] For criminal cases, French law only allows judicial discretion in certain restricted cases where the law is unclear, convoluted, inaccurate, or erroneous.[3]

Until the reform of French criminal law in 1994, French statutory law acknowledged corporate criminal liability only in restricted cases. Instances included the sanction of undertakings that had actively engaged into collaboration with the Nazi occupant during World War II (WWII). In this instance, the law ordered their immediate liquidation and the forfeiture of their assets to the French Republic after the war.[4] Another instance includes the imposition of criminal fines on companies that paid dividends to their shareholders exceeding the dividend pay-out ratio formula provided under art. 3 of *Law no.82-660 of 30 July 1982 on prices and revenues*.[5] Otherwise, scarce were the statutory provisions that held companies accountable for the illegal acts of their representatives committed within the scope of their duties.

French doctrinal writers emphasised the untenability of this jurisprudence, especially given the avowal of the criminal division of the *Cour de cassation* - the French Supreme Civil and Criminal Court - that undertakings have legal personality. They should, therefore, be held accountable for the acts that are undertaken on their behalf, even criminal ones. Many stressed the unfairness of the refusal of imputing criminal liability to legal persons who engage more and more in criminal acts sometimes without their directors even knowing about the offences alleged against them, especially where liability is strict and incurred for negligence or omission. It is how the French legislative assembly undertook to reform French criminal law in 1994, thus modernising French criminal law, increasing accessibility to the law, and improving the coherency and instrumental efficiency of French criminal policies.[6]

Ever since, French criminal law sanctions corporate liability under art. 121-2 *et seq.*, of the French Penal Code (*Code pénal nouveau*).[7] Art. 121-2 et seq. apply not only to natural

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[2] French Civil Code, art. 4:"*Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice*". My own translation: "*A judge who refuses to render a judgment under the premiss that the law is terse, obscure, or does not provide sufficiently for the case presented before them may be prosecuted for being guilty of denial of justice*".

[3] Cour de cassation, Chambre criminelle (Feb. 24, 1809), 14(41) BULLETIN DES ARRETS DE LA COUR DE CASSATION RENDUS EN MATIERE CRIMINELLE. ANNEE 1809 (1810), at 83-85, especially 84. *Code pénal ancien,* arts. 111-3 to 111-5; Jean-Christophe Saint-Pau, *L'interprétation des lois. Beccaria et la jurisprudence moderne*, 2 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARE 272 (2015), at 273-285.

[4] *Loi no. 46-994, portant transfert et dévolution de biens et d'éléments d'actifs d'entreprises de presse et d'information* (May 11, 1946).

[5] *Loi no. 82-660 du 30 juillet 1982 sur les prix et les revenus*.

[6] JAQUES-HENRI ROBERT, DROIT PENAL GENERAL (2005), at 376; Corinne Mascala, Marie-Cécile Amauger-Lattes, *Les évolutions de la responsabilité pénale des personnes morales en droit de l'entreprise*, in LA PERSONNALITE JURIDIQUE (Bioy Xavier ed., 2013), at 291-304.

[7] French Criminal Code, art. 121-2*: "Les personnes morales, à l'exclusion de l'Etat, sont responsables pénalement, selon les distinctions des articles 121-4 à 121-7, des infractions commises, pour leur compte, par leurs organes ou représentants. Toutefois, les collectivités territoriales et leurs groupements ne sont responsables pénalement que des infractions commises dans l'exercice d'activités susceptibles de faire l'objet de conventions de délégation de service public. La responsabilité pénale des personnes morales n'exclut pas celle des personnes physiques auteurs ou complices des mêmes faits, sous réserve des dispositions du quatrième alinéa de l'article 121-3*". [Translation] Legal persons, apart from the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out under articles 121-4 and 121-7. However, local public authorities and their interest groups incur criminal liability only for offences committed during their activities which may be exercised through public service delegation conventions. The criminal liability of legal

persons but also to legal persons except for the French state. Although French administrative bodies such as councils and local authorities can be held criminally liable, they can only be held criminally liable for the offences committed by their representatives within the scope of their duties if these duties are subject to public service delegation conventions. Examples include the situations where a *municipal* police officer (i.e., local authority law enforcement agent) commits an offence that engages the vicarious criminal liability of the local authority for which they work.

That notwithstanding, *Law no. 2004-204 of 9 March 2004 adapting justice to the evolutions of criminality* systematised the criminal liability of public authorities other than the state. It purports to align the regime applicable to non-state legal persons with that of devolved state legal persons. Accordingly, the criminal liability of legal persons – whatever their nature – depends on the demonstration that the offence committed by a representative of the legal person was done with an intention to benefit the legal person in and of itself rather than the personal interests of the representative(s). Though, it does not exclude the personal criminal liability of the representative of the legal person according to art. 121-2 of the French Penal Code *in fine*; whether the representative committed the criminal act themselves or merely aided and abetted it.[8]

In this context, in a decision dated 7 September 2021, the criminal division of the *Cour de cassation* partially annulled two decisions of the *Chambre de l'Instruction*[9] of 24 October 2019 (case no. 19-87.031) and 7 November 2019 (case no. 19-87.367) exonerating the French industrial company Lafarge for aiding and abetting crimes against humanity through the illegal financing of the Islamic State in Iraq and the Levant (ISIL).[10] It is the first time that a criminal court, more so a supreme court, acknowledges that a legal person can be held criminally liable for crimes against humanity anywhere in the world. It sets a *precedent* whereby a legal person financing a terrorist organisation can be subject to prosecution even though its representatives did not condone expressly or participate directly in the acts of the terrorist organisation it financed.

In addition, the *Cour de cassation* argued that complicity in the perpetration of crimes against humanity is characterised when the legal person and its representatives committed or intended to commit such a crime whether through aid, assistance, or facilitation. It is irrelevant whether the legal person and its representatives supported or condoned the acts perpetrated by the organisation it financed. More so, since the wilful payment of monies to an entity whose sole and known purpose is to commit crimes suffices in and of itself to characterise the offence.

Against this background, the present case note discusses, analyses, and critiques the implications of the decisions of the *Cour de cassation* of 7 September 2021. It focuses on the acceptableness of its foundations, how it features in the general academic jurisprudence surrounding corporate criminal liability in France, and its global impact as it sets up a unique

persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of art. 121-3.

[8] French Criminal Code, art. 121-2 cited above.

[9] The Chambre de l'Instruction (Prosecution Chamber) – formerly the Chambre de l'Accusation (Accusation Chamber) – is a criminal division of the French Courts of Appeals. It is the only second-degree prosecution juridisction in the French legal system. It hears appeals against the decisions made by *procureurs d'instruction* (public prosecutors) and *juges des libertés et de la détention* (liberty and custody judges) to prosecute or incarcerate individuals. French Penal Code, Chapitre II : *De la chambre de l'instruction: juridiction d'instruction du second degré,* arts. 191-230.

[10] Cour de cassation, 19-87.367 and 19-87.03, Chambre criminelle - Formation de section, Judgment (Sept. 9, 2021).

precedent capable of influencing international developments in other jurisdictions as seen by the recent conviction of Lafarge in the US on the same charges.[11]

II. Facts

Lafarge SA is an industrial company registered in France that specialises in cement production, construction aggregates, and concrete. It built cement works in Jalabiya (Aleppo, Syria) worth hundreds of millions of Euros. The plant became operative in 2010. The cement plant was owned and operated by one of its sister companies, Lafarge Cement Syria (LCS) registered under Syrian law and owner of the plant to the tune of 98%.

Between 2012 and 2015, the land on which the plant was built experiencedfighting and was occupied by several armed groups including ISIL. During this period, the Syrian employees of LCS carried on their work while foreign senior leadership was evacuated to Egypt in 2012 from where it continued to run the subsidiary undertaking. Housed in employer-provided accommodation, Lafarge's Syrian staff faced several risks including extortion and kidnapping by various armed groups including ISIL.

LCS paid monies, through intermediaries, to the various persons and factional forces that successively controlled the region and could compromise the undertaking's activities. An emergency evacuation of the plant took place in September 2014, shortly before ISIL took hold of it.

On 15 November 2016, Sherpa – a French law interest group – and the European Centre for Constitutional and Human Rights (ECCHR) – an independent, non-profit legal and educational organisation – as well as eleven Syrian employees of LCS initiated private criminal and indemnification prosecutions against Lafarge before the Paris Examining Magistrate for:

- the financing of a terrorist undertaking;
- complicity in crimes against humanity;
- the abusive exploitation of someone else's work, and;
- recklessness.

III. Procedure

On 9 June 2017, the French Public Prosecutor's Office requested of the Paris Examining Magistrate that they launch an open investigation into allegations of endangerment, financing of a terrorist undertaking, and the subjection of several persons to work conditions that are incompatible with human dignity.

Bruno Lafont, Lafarge's general director between 2007 and 2015, was indicted on 8 December 2017. He petitioned the Examining Magistrate to dismiss Sherpa and ECCHR's private prosecution. Conversely, the Examining Judge ascertained the validity of the prosecutions by order on 18 April 2018 which Lafont appealed. Likewise, Jean-Claude

[11] Office of Public Affairs, *Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations,* UNITED STATES DEPARTMENT OF JUSTICE (Oct. 18, 2022), https://www.justice.gov/opa/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist-organizations.

Veillard, Lafarge's Director for Security between 2008 and 2015 was indicted on 1 December 2017 on the same charges. Similarly, for Frédéric Jolibois, LCS's director between 2008 and 2015. In turn, Lafarge was indicted on 28 June 2018 for complicity in crimes against humanity, the financing of a terrorist undertaking, and endangerment per the recommendation of Paris' Public Prosecutor's Office.

On 31 May 2018, Jean-Claude Veillard brought a formal petition before the *Chambre de l'Instruction* to declare the proceedings null. Likewise, Frédéric Jolibois brought a formal petition before the same jurisdiction on 1 June 2018 to declare the procedure null including his indictment.

Following, two Yazidis victims of ISIL lodged applications to join the parties to the proceedings on the same charges on 30 November 2018 which prompted Lafarge to lay another formal petition before the *Chambre de l'Instruction* on 27 December 2018 to declare the proceedings invalid and nullify its indictment.

In turn, the *Chambre de l'Instruction* of Paris' Appellate Court rendered three judgments on 24 October 2019 declaring invalid the criminal indemnification proceedings launched by Sherpa and ECCHR, which they appealed.

IV. Decisions and *Ratio Decidendi*

A. Case no. 19-87.031 (*Lafarge I*)

1. Grounds for Appeal

Sherpa and ECCHR argued the unlawfulness of the dismissal of their private prosecutions according to arts. 2, 2-4, 2-9, 2-22, 121-7, 212-1, 591, and 593[12] of the French Code of Penal Procedure (FCPP). They allow collective private prosecutions initiated by interest groups if they demonstrate all of the following:

- causality between the facts supporting the petition and the damage they have incurred,
- the damage incurred is an offence sanctioned in the French Penal Code (FPC), including where they act on behalf of natural persons who are alleged victims.

Sherpa and ECCHR contended that an offence may prejudice an interest group directly and personally depending on its purposes, functions, and the collective interests that they represent per their articles of association according to art. 2 FCPP. As a result, they challenged the decision of the Court of Appeal that relied on two earlier decisions of the criminal division of the *Cour de Cassation*[13] to assert that they had no *locus standi*. They argued that the *Chambre* misapplied arts. 2-23 and 2 FCPP which empower collective entities to initiate private

[12] French Code of Penal Procedure, art. 2-9: "Any interest group lawfully registered for at least five years on the date of offence proposing through its constitution to assist the victims of offences may exercise the rights granted to the civil party in respect of the offences falling within the scope of article 706-16, where a prosecution has been initiated by the public prosecutor or by the injured party".

[13] Cour de Cassation, 16-86.868, Criminal Division, Judgment (Oct. 11, 2017); and Cour de Cassation, 17-80.659, Criminal Division, Judgment (Oct. 11, 2017).

prosecutions based only on the fulfilment of a functional test, including where they obtain the express consent of the persons they represent to act on their behalf per art. 2-22 FCPP. More so, when the interest group represents parties to the proceedings whose individual claims have been declared admissible.

Therefore, Sherpa and ECCHR contended that the Court violated arts. 2, 3, 4, 5, 6, and 9 of the European Convention on Human Rights (ECHR), especially Article 6§1, by depriving them disproportionately of their right of access to a judge and right to take part in proceedings on the ground that they had to demonstrate a singular prejudice *distinct* from the collective interests that they represent.

2.Decision

The *Cour de Cassation* affirmed the decision of *Chambre de l'Instruction* to dismiss Sherpa and ECHR's private prosecutions on the ground that art. 2 FCPP was of strict interpretation and neither Sherpa nor ECHR had personally and directly incurred any prejudice other than indirectly through the collective interests that they represent. The *Chambre de l'Instruction* did not engage Article 6§1 ECHR, especially given that the European Court of Human Rights (ECHR) ruled that the ECHR neither warrants a right to 'private revenge' nor a right to private prosecutions by third parties in the interest of public order (i.e., *actiopopularis*).[14]

The Court ascertained that an interest group may only exercise *actio popularis* in the limited circumstances provided for under arts. 2-1 et seq. FCC whereby:

> Any interest group lawfully registered for at least five years on the date of offence, proposing through its constitution to combat racism or to assist the victims of discrimination grounded on their national, ethnic, racial or religious origin, may exercise the rights granted to the civil party in respect of, first, discrimination punished by arts. 225-2 and 432-7 of the Criminal Code and the creation or the possession of the files prohibited under art. 226-19 of the same code, and, secondly, the intentional offences against the life or physical integrity of persons, threats, theft, extortion, and destruction, defacement and damage, committed to the prejudice of a person because of his national origin, or his membership or non-membership, real or supposed, to any given ethnic group, race or religion.
>
> However, where the offence has been committed against a person as an individual, the interest group's action will only be admissible if it proves it has obtained the consent of the person concerned or, where the latter is a minor, the consent of the person holding parental authority him or that of his legal representative, where such consent may be given.[15]

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[14] ECtHR, Perez v France, Application 47287/99, Grand Chamber, Judgment (Feb. 12, 2004), para. 70; and ECtHR, Sigalas v Greece, Application no. 19754/02, Grand Chamber, Judgment (Sept. 22, 2005), para. 28.

[15] French Code of Penal Procedure, art. 2-1: "*Toute interest group régulièrement déclarée depuis au moins cinq ans à la date des faits, se proposant par ses statuts de combattre le racisme ou d'assister les victimes de discrimination fondée sur leur origine nationale, ethnique, raciale ou religieuse, peut exercer les droits reconnus à la partie civile en ce qui concerne, d'une part, les discriminations réprimées par les articles 225-2 et 432-7 du code pénal et l'établissement ou la conservation de fichiers réprimés par l'article 226-19 du même code, d'autre part, les atteintes volontaires à la vie et à l'intégrité de la personne, les menaces, les vols, les extorsions et les destructions, dégradations et détériorations qui ont été commis au préjudice d'une personne à raison de son origine nationale, de son appartenance ou de sa non-appartenance, vraie ou supposée, à une ethnie, une race ou une religion déterminée. Toutefois, lorsque l'infraction aura été commise envers une personne considérée individuellement, l'intérêts group ne sera recevable dans son action que si elle justifie avoir reçu l'accord de la personne intéressée ou, si celle-ci est mineure, l'accord du titulaire de l'autorité parentale ou du représentant légal, lorsque cet accord peut être recueilli. Toute fondation reconnue d'utilité publique peut exercer les droits*

At the same time, the *Cour de cassation* emphasised that in principle, art. 2-9 FCPP prevents neither Sherpa nor ECCHR from initiating a civil action in respect of the offences provided under art. 706-16 where the prosecution has been initiated by the public prosecutor or by the injured party.

However, the Court also added that the *Chambre de l'Instruction* erred on the side of procedure when it dismissed Sherpa and ECCHR's claim on the ground that the inadmissibility of Sherpa and ECCHR's proceedings before the Paris Examining Magistrate per art. 85 FCPP also invalidated the public prosecution launched by the Public Prosecutor's Office on two grounds. First, the invalidity of the private prosecution may only also invalidate the public prosecution where criminal proceedings may only be initiated on the complaint of the victim, their legal representative, or assignee. Second, art. 2-9, 1 FCPP does not subject the admissibility of the proceedings to the prior complaint of the victim but merely requires that the articles of association of the entity representing them meet a functional test.

Howbeit, the *Cour de cassation* partially overturned the decision of the *Chambre de l'Instruction* per art. L411-3 of the French Code on Judicial Organisation on the ground that: 1) while an interest group may represent victims and launch private prosecution on their behalf, 2) they may only do so *by intervention* with permission of the court and with the express consent of the victim or that of their legal representatives if they are a minor per arts. 2-9, 1 and 2-22 FCPP. Sherpa and ECCHR failed to meet these requirements.

B. Case no. 19-87.367 (*Lafarge II*)

1. Grounds for appeal

Now turning to the indictment of Lafarge and its directors. The *Cour de Cassation* heard an appeal from ECCHR against the decision of the *Chambre de l'Instruction* of 7 November 2010 annulling the indictment of Frédéric Jolibois and Jean-Claude Veillard for endangerment and declaring that they had no *locus standi*.

ECCHR contended that art. 80-1 CFPP provides that the Examining Magistrate may place, under judicial examination, only those persons against whom there is *strong and concordant evidence* making it probable that they may have participated, as a perpetrator or accomplice, in the commission of the offences they are investigating. It does not require that the alleged perpetrator has participated in the full realisation of the crime that is being prosecuted.

ECCHR further based their appeal on arts. L. 4121-3, R. 4121-1 et seq., and R4141-13 of the French Labour Code. They contended that the duty of prudence that these articles enshrine impose a duty of care on employers to provide a safe environment to their staff which Lafarge's director failed to do. The evidence submitted reveals that Veillard, as Director for Security, did not observe his duty to protect the health and safety of his staff while he had power and authority over them and the necessary means to do so *de facto* by delegation. Therefore, the interest groups contended that the *Chambre de l'instruction* violated arts. 80-1, 591, 593 FCPP, and arts. 121-6, 121-7, and 223-1 FPC.

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reconnus à la partie civile dans les mêmes conditions et sous les mêmes réserves que l'interest group mentionnée ++au présent article. En cas d'atteinte volontaire à la vie, si la victime est décédée, l'interest group doit justifier avoir reçu l'accord de ses ayant-droits''.

In addition, Sherpa and ECCHR appealed the decision of the *Chambre de l'Instruction* that declared their plea inadmissible and annulled the indictment of Lafarge for aiding and abetting crimes against humanity. They argued that the quashing of decisions no. 2018/05060 and 2019/02572 of 24 October 2019 in decisions no. 19-87.031 and no. 19-87.040 had for its effect to annul the decision of the *Chambre* declaring that Sherpa and ECCHR had no *locus standi*.

More so, ECCHR appealed the decision of the *Chambre de l'instruction* annulling Lafarge's indictment for aiding and abetting terrorism on the ground that art. 421-2-2 FCP provides that terrorism is characterised by the mere act of financing a terrorist organisation by providing it with, collecting, or managing funds, securities or property of any kind or by giving it advice for this purpose or knowing that they were intended to be used for the perpetration of an act of terrorism irrespective of whether it actually takes place.[16] Hence, it follows that the decision of the *Chambre* violated arts. 80-1 FCCP and 421-2-2 FPC and misinterpreted art. 421-2-2 FPC by holding that LCS could not be prosecuted unless a terror act had actually taken place although it knew that the monies it paid ISIL could be used to commit a terror act.

Conversely, Lafarge appealed the decision of the *Chambre de l'instruction* refusing to overturn its indictment for endangerment on the ground that it had no power, authority, and direction over LCS' staff. They further contended that the mere fact that the two companies were linked through their capital shares, even to the tune of 98.7%, and the fact that Lafarge had strong decision-making powers over the corporation do not, in themselves, establish a relationship akin to employment between Lafarge and LCS' staff. More so, since the *Chambre de l'instruction* failed to establish that the employment contracts between LCS and its staff were a sham; that is, an attempt to disguise an alleged employment contract between Lafarge and the Syrian staff hired under Syrian law and employed by LCS. But also given the fact that Syrian employment law does not contain similar stringent requirements for security and safety befalling employers. Hence, Lafarge cannot be vicariously liable for LCS' staff, thereby contending that the *Chambre*:

- misapplied arts. L. 1221-1, R. 4121-1, R. 4121-2, R. 4121, and R. 4141-13 FLC, art. L. 225-1 of the French Commercial Code (FCC) and art. 223-1 FPC,
- failed to substantiate its decision per arts. 223-1 FPC and 80-1 FCPP.

In addition, ECCHR and the civil parties appealed the decision of the *Chambre de l'instruction* to annul the indictment of Lafarge for aiding and abetting crimes against humanity on the ground that the *Chambre* failed to draw all the conclusions from the evidence which showed that Lafarge wilfully and repeatedly financed ISIL irrespective of whether that financing was only intended to ensure business contingency in war-torn Syria. They contended that the *Chambre de l'instruction* failed to draw all the conclusions from its own observations, thus violating arts. 80-1, 591, and 593 FCPP, and arts. 121-3, 121-6,121-7, and 212-1 FPC. More so, since the evidence submitted showed that Lafarge had probable cause to know that ISIL would inevitably avail itself of the aid provided to perpetrate terror acts and that it would, thereby, be participating, as a perpetrator, in the realisation of such acts whether they happened.

[16] French Criminal Code, art. 421-2-2: "*Constitue également un acte de terrorisme le fait de financer une entreprise terroriste en fournissant, en réunissant ou en gérant des fonds, des valeurs ou des biens quelconques ou en donnant des conseils à cette fin, dans l'intention de voir ces fonds, valeurs ou biens utilisés ou en sachant qu'ils sont destinés à être utilisés, en tout ou partie, en vue de commettre l'un quelconque des actes de terrorisme prévus au présent chapitre, indépendamment de la survenance éventuelle d'un tel acte".*

It appears so from the minutes of the weekly meetings of the Comity for Safety in Syria in which Lafarge's senior leadership took part and the many reports published during the same period by the Independent International Commission of Inquiry on the Syrian Arab Republic appointed by UNHRC which investigated ISIL's actions. Moreover, complicity does not require that the accomplice shared the same intent as the main perpetrator. The test is realised by aiding and abetting the realisation of a crime wilfully, especially when the accomplice could have foreseen the realisation of such a crime or the aggravation that their aid would cause, especially considering the propaganda video released by ISIL showing beheadings of civilians and other atrocities.

2.Decision

The *Cour de cassation* held that the criminal division of the same Court wrongly declared ECCHR's plea inadmissible in its decision of 7 September 2021 no. 19-87.031, thus wrongly overturning the decision of the Paris Appellate Court of 24 October 2019. The Court, however, asserted that the decision could not be quashed on the ground that the annulment of Veillard's indictment was justified given there was insufficient evidence that his role as Director for Security – which entailed assessing potential threats to Lafarge's operating plants – also entailed safeguarding the health and safety of Lafarge's staff. The Court ascertained that the duty of safety sanctioned under arts. L. 4121-3, R. 4121-1 et seq. of the French Labour Code applies only to employers. Since Veillard had not been entrusted whether in writing or orally with the performance of those duties on behalf of Lafarge, he could not be found guilty.

In addition, the Court acknowledged the *sovereign* discretion of the *Chambre de l'Instruction* in considering that Lafarge and LCS could have been coaxed into negotiating, even indirectly, with ISIL and the Al Nusrah Front (ANF) without intending or knowing that such funds, security, or property would be used, in whole or in part, for the commission of acts of terrorism.

Further, turning to whether Lafarge or LCS had endangered the lives of LCS's employees, the Court held that Lafarge controlled 98.7% of LCS' capital. The Court noted that the *Chambre de l'Instruction* was right to consider that it was serious evidence of Lafarge's direct control over LCS and its employees given LCS' lack of autonomy and Lafarge's constant interference with LCS' social and economic management per the *jurisprudence constante* of its Social Affairs Division.[17] However, the Court considered that it was insufficient to deduce from that that French Labour Law was the applicable law. The *Chambre* should have first determined the *lex fori* in the context of the alleged employment relationship between Lafarge and the Syrian employees per art. 8 and 9 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and other international provisions. Then, the *Chambre* should have determined whether the applicable law contained any duty as to security or prudence akin to art. 223-1 FPC and the *jurisprudence constante* that it warrants in this regard.[18] Hence, the Court quashed the decision of the *Chambre* on the ground of its erroneous choice of law.

Finally, considering whether Lafarge had been an accomplice to crimes against humanity, the Court questioned whether complicity in the perpetration of crimes against humanity should be construed specially (*lex specialis*) or generally per the general rules provided under art. 121-

[17] Cour de Cassation, 15-15.493, Social Affairs Division, Judgment (Nov. 6, 2016), especially Bull. 2016, 147; also, Cour de Cassation, 18-13.769, Social Affairs Division, Judgment (Nov. 25, 2020).
[18] Cour de Cassation, 18-82.718, Criminal Division, Judgment (Nov. 13, 2019).

7 FPC (*lex generalis*). Noting that crimes against humanity are the most serious of crimes, the Court ruled that the finding of complicity cannot be limited strictly to aiding and abetting or facilitating their preparation or realisation knowingly. It should also cover knowledge that the main perpetrators will commit or intends to abet such a crime and that its perpetration or realisation is facilitated through the aid or assistance provided according to art. 6 of the Charter of the International Military Tribunal.[19] More so since art. 121-7 FPC neither requires that the accomplice of crimes against humanity belongs to the organisation that commits it nor that they condone the concerted plan to attack a civil group. It does not minimise the offence of crimes against humanity which is subject to strict conditions. It merely broadens the scope of complicity in relation to crimes against humanity. Otherwise, the Court argued, many acts of complicity would remain unsanctioned whereas it is often the multiplication of such acts of complicity that permits the characterisation of a crime against humanity.

Given that art. 121-7 FPC does not limit complicity to a specific crime or require that the accomplice has a particular character, the Court ruled that it applies indiscriminately to both legal and natural persons. Hence, by contending that ISIL had committed crimes against humanity known by Lafarge,[20] the *Chambre de l'Instruction* failed to draw all relevant conclusions from its own observations whereby Lafarge was guilty of aiding and abetting terrorism. It is so, even if Larfarge's intention was only to safeguard its operations. Such acts underpin Lafarge's complicity, especially as it knew of ISIL's actions and had probable cause to believe that the monies paid to ISIL were likely to be used, in whole or in part, for the commission of any of the acts of terrorism listed in art. 212-1 FPC whatever the mobiles and whether such an act took place.

Therefore, the Court declared Lafarge to be an accomplice in the perpetration of crimes against humanity and quashed the decision of the *Chambre de l'Instruction* on the other grounds, thereby referring the case to the Paris Appellate Court for a different panel of judges to render a final decision consistent with its ruling.

V. Critique

In *Lafarge I***,** as detailed above, the criminal division of the *Cour de cassation* ruled on the admissibility of Sherpa's and ECCHR's applications filed as civil parties during the judicial investigation.

The admissibility of Sherpa and ECCHR's civil party applications represents a major issue as far as it both determines the extent of the formal indictment of Lafarge for financing a terrorist enterprise and complicity in crimes against humanity. The issue of admissibility also conditions the participation of Sherpa and ECCHR in the investigation (i.e., access to the file, contestation of the orders made by the investigating judge, request for instruments) as well as the outcome of their appeals before the *Cour de cassation*.[21]

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[19] Cour de Cassation, 96-84.822, Criminal Division, Judgment (Jan. 23, 1997), Bull. crim. (1997), para. 32.

[20] E.g., the execution of a 15-year-old boy for blasphemy, abductions, hostage-taking, murders and executions without trial, mistreatments and torture, the execution of hundreds of men in Tabqa 80km away from the plant on 2 September 2014, the beheading of young members of the *al-Cha'aitat* tribe on 30 August 2014 for refusing to swear allegiance to ISIL, the arrestation of Kurds, and the publication of multiple reports attesting to ISIL's perpetration of crimes against humanity such as by the Independent International Commission of Inquiry on the Syrian Arab Republic appointed by UNHRC or UN Security Council Resolution 2170/2014.

[21] Jean-Patrick Capdeville, *Affaire Lafarge: précisions sur l'information judiciaire ouverte pour complicité de crime contre l'humanité,* 10 ACTUALITÉ JURIDIQUE 149 (Oct. 2021).

Under French law, art. 2 FCCP allows anyone who has *personally suffered a prejudice directly caused by the alleged infringement* to claim damages before civil courts. Article 3 FCCP provides that the claimant may bring a civil action at the same time as criminal proceedings, before the same court. A civil action is admissible for all types of damage, whether material, physical or moral, resulting from the alleged infringement. However, the *Cour de cassation* regularly holds that bringing a civil action is a qualified right. Therefore, lower courts must exercise strict scrutiny when ascertaining whether the conditions set out in articles 2 and 3 FCCP are fulfilled.[22]

Interest groups may also institute a civil action before criminal courts.[23] However, the lawmaker does not recognise a general right for interest groups to bring proceedings before courts. By exception, art. 2-4 FCCP provides that any interest group that has been established for at least five years and aims to *combat crimes against humanity and war crimes* may exercise the rights recognised to civil parties. Art. 2-9 FCCP makes similar provisions for interest groups that have been established for at least five years and aim *to assist the victims* of the offences provided for in art. 706-16 FCCP.[24] However, this provision also requires that either the prosecutor, or the victim, initiates prosecution before criminal courts while interest groups may only join the proceedings and institute a civil action by way of intervention (i.e., *ex parte*). The differences between these provisions, therefore, justify why the criminal division achieved distinct results when assessing the admissibility of Sherpa's and ECCHR's applications.

Regarding the civil party application about the indictment of Lafarge for complicity in crimes against humanity, the central question is that relating to Sherpa's and ECCHR's articles of association. Pursuant to the principle of strict interpretation of criminal law,[25] trial courts must refer to the terms of the articles of association and interpret their meaning.[26] According to case law, the admissibility of an interest group's civil party application depends on its purpose and object[27]. First Advocate General Desportes[28] asserts that the statutory object cannot be too broad. It must also be clear enough so there is no ambiguity as to its scope of action.

The *Cour de cassation* assessed the motives that the investigation chamber invoked when ruling on the admissibility of Sherpa's and ECCHR's application both in the light of the principle of strict interpretation and the observations of the First Advocate General. In this context, Sherpa's statutes indicate that its objective is "to prevent and combat economic crimes"[29] while ECCHR's is "sustainably [to] promote international humanitarian law and human rights as well as to assist persons or groups of persons who have been affected by human rights violations."[30] If the criminal division did not consider Sherpa's statutory object to fall

[22] Cour de cassation, 92-81.432, Criminal Division, Judgment (9 Nov., 1992).
[23] French Code of Penal Procedure, art. 2-1. *Supra* note *15*.
[24] This includes inter alia the offence of individual terrorist enterprise; financing à terrorist enterprise and public glorification of terrorism.
[25] French Criminal Code, art. 111-4: *"La loi pénale est d'interprétation stricte".*
[26] Capdeville, *supra* note 21.
[27] Cour de cassation, 70-90.558 P, Criminal Division, Judgment (14 Jan., 1971).
[28] Cour de cassation, 19-870.31, 19-870.36, 19-870.40, 19-873.62, 19-87.367,19-873.76, Criminal Division, opinion of first Advocate General Desportes, Judgment (Sept. 7, 2021).
[29] Sherpa's Statutes, art. 3: *"Sherpa a pour objet de prévenir et combattre les crimes économiques. Sont entendus par crimes économiques : Les atteintes aux droits humains (droits civils, politiques, économiques, sociaux ou culturels), à l'environnement et à la santé publique perpétrées par les acteurs économiques ; les atteintes sous toutes leurs formes à l'intégrité des Etats, des collectivités publiques, des établissements publics ou du service public, notamment la corruption et les flux financiers illicites, qui aggravent les écarts de développement et mettent en péril la stabilité des Etats (...)".*
[30] ECCHR statutes, art. 2: *"L'objet de l'association est de promouvoir durablement le droit international humanitaire et les droits humains ainsi que d'aider les personnes ou les groupes de personnes qui ont été affectées*

within the scope of art. 2-4 FCCP, such was the case for ECCHR. This is how the *Cour de cassation* declared Sherpa's civil action inadmissible, but ECCHR's application admissible.

This solution is consistent with European case law concerning the role of civil parties in criminal proceedings. Indeed, in *Perez v. France*,[31] the European Court of Human Rights restated that "the civil party cannot be considered as the adversary of the public prosecutor, nor moreover necessarily as its ally, their role and their objectives being clearly distinct". It is, therefore, to avoid *action popularis* that both FCCP provisions and case law frame the right for interest groups to institute a civil action during criminal proceedings. Their action is supposed to draw attention to an attack on the collective interests they are defending and not to pursue repressive purposes. Construing the articles of association of an interest group in an extensive manner would have the effect of distorting the provisions of the law by admitting that any interest group with a vague statutory object may exercise civil action.

Regarding the admissibility of the civil party application about the indictment for financing a terrorist enterprise, the *Cour de cassation* invoked both procedural and substantive arguments. On the procedural side, Sherpa's and ECCHR's applications were inadmissible because art. 2-9 FCCP requires interest groups to become civil parties by way of intervention only. Under this provision, only the public prosecutor or the victim (natural person) may initiate public action. In this case, the eleven former Lafarge employees should have filed a complaint in which they demonstrated a direct and personal prejudice resulting from the payment of funds by Lafarge to ISIL armed groups. Unless the public prosecutor initiates public action themselves with a view of prosecuting Lafarge for financing a terrorist enterprise, persons alleging direct and personal prejudice resulting from Lafarge's financing of a terrorist enterprise must prove and aver it.

However, it is not an easy task as the financing of a terrorist enterprise is an autonomous offence which exists regardless of any terrorist act being committed. Due to the remote, or even non-existent, causal link between the financing of the terrorist enterprise and the prejudice suffered by former employees, it would have been impossible to demonstrate the direct nature of the prejudice. Such a pitfall can only compromise the admissibility of a civil party's application.

Differently, the decision of the *Cour de cassation* in *Lafarge II* is one of a kind. It is the first time that the *Cour de cassation*, more so a supreme court, has ruled on the intentional element of complicity in crimes against humanity regarding legal persons.

In French criminal law, art. 121-7 FPC defines the mechanism of complicity by providing that:

> The accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or realisation. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence, or gives instructions to commit it, is also an accomplice.

Applicable to crimes and misdemeanours, complicity is an autonomous offence based on a logic of assimilation to the main offence. Before ascertaining the conditions for complicity,

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par les violations des droits humains (...) Cela peut prendre la forme d'un soutien aux victimes ou aux organisations de victimes de violations des droits humains dans le besoin, mais aussi d'une mobilisation de l'opinion publique pour les besoins des victimes, que ce soit dans un cas particulier [ou] dans un cas plus général (...)".

[31] ECtHR, Perez v. France, Application 47287/99, Grand Chamber, Judgment (Dec. 2, 2004); ECtHR, Sigalas v Greece (preliminary objections), Application 19754/02, Grand Chamber, Judgment (May 22, 2005); ECtHR, Berger v. France, Application 48221/99, Grand Chamber, Judgment (Dec. 3, 2002), para. 38.

judges must find "a primary punishable act"[32] on which the accomplice's actions are going to graft on to. As remote as the act of complicity might be, when judges find complicity, the accomplice incurs the same penalties as the main perpetrator of the offence.[33]

In *Lafarge II*, the debate concerns the approach trial judges shall adopt when assessing the intentional element of complicity. While art. 121-7 FPC sanctions the support given to the perpetrator of the main offence, it is still necessary to determine the degree of intentionality necessary to characterise complicity.[34] Should judges adopt an objective approach according to which knowingly supporting a criminal plan suffices to retain complicity? Or should it be determined whether the accomplice takes part in the concerted plan implemented by the perpetrator? In practice, this question arises as far as there are different degrees of support for perpetrating the offence. The accomplice may as well intend for the criminal plan to succeed just as they can be indifferent to its realization.[35]

First Advocate General Desportes[36] considers that the link between the payment of funds to criminal organisations and their actions is too indirect to characterise, from the outset and on its own, complicity by aid or assistance within the meaning of art. 121-7 FPC. He adds that it is because the financing of a terrorist enterprise cannot be analysed on its own as an act of complicity because the lawmaker created a distinct offence in art. 421-2- 2 FCP.[37]

Appreciating the reasons given by the investigating chamber, the *Cour de cassation* ruled, nevertheless, in favour of an objective approach. It specifies that the knowledge that Lafarge's executives had of the abuses committed by ISIL is sufficient to characterise the intentional element of complicity. Whether Lafarge's executives condoned ISIL's ideology is irrelevant. Therefore, the disbursement of funds to ISIL factions with the sole purpose of preserving the continuity of commercial activity is not such as to exclude Lafarge's complicity in crimes against humanity.[38]

This decision is in line with previous case law regarding the application of art. 6 of the Charter of the International Military Tribunal.[39] In the *Papon* case, the criminal division of the *Cour de cassation* already considered it was neither necessary for the accomplice to have belonged to the organisation nor for the accomplice to adhere to the concerted plan to find complicity in crimes against humanity.[40] This interpretation of the intentional element of complicity calls for a couple of remarks.

On the one hand, the decision of the criminal division ensures the full effectiveness of the sanction of crimes against humanity by ensuring that legal persons cannot invoke business reasons to elude complicity. It is now clear that legal persons shall increase their vigilance towards entities with whom they enter into business to avoid the risk of becoming complicit in

[32] French translation: "*fait principal punissable*".
[33] French Criminal Code, art. 121-6: *"Sera puni comme auteur le complice de l'infraction, au sens de l'article 121-7"*.
[34] Laurent Saenko, *L'affaire Lafarge ou le risque de la complicité objective de crime contre l'humanité*, RECUEIL DALLOZ 45 (2022).
[35] Yves Mayaud, *L'affaire Lafarge dans sa dimension attentatoire aux personnes*, RSC-JOURNAL OF CRIMINAL SCIENCE AND COMPARATIVE CRIMINAL LAW 827 (2021), at 828-833.
[36] Cour de cassation, 19-870.31, 19-870.36, 19-870.40, 19-873.62, 19-87.367, 19-873.76, Criminal Division, Opinion of first Advocate General Desportes (Sept. 7, 2021).
[37] Financing a terrorist enterprise.
[38] Cour de cassation, 19-87.367, Criminal Division, Judgment (Sept. 7, 2021), para 79.
[39] Cour de cassation, 19-87.367, Criminal Division, Judgment (Sept. 7, 2021), para 68.
[40] Cour de cassation, 96-84.822, Criminal Division, Judgment (Jan. 23, 1997).

crimes against humanity. This precedent should encourage legal persons operating in conflict zones to refrain from dealing with entities whose criminal acts are notorious.[41]

On the other hand, lower courts shall remain cautious when referring to this precedent. The assessment of Lafarge's knowledge of the criminal acts must proceed from serious and consistent evidence[42] to justify a formal accusation. It is, therefore, necessary to ascertain that the facts characterising the main offence rely on sufficient evidence to demonstrate the "criminal imprint" of the accomplice. However, it is sometimes difficult to determine how informed the accomplice is at the investigation stage.[43] In any case, the control of the *Cour de cassation* is restricted. As a supreme court, it can only assess whether the reasons trial judges invoked are sufficient and without contradiction; in principle, it cannot substitute its assessment for theirs save in rare instances.[44]

VI. European and International Perspectives: Looking Back and Forward

The absolute ban on States committing crimes against humanity, genocide, and war crimes is secured by numerous instruments of international law as well as *ius cogens*.[45] Thanks to the establishment of the International Criminal Court, individuals can be found guilty of committing, or being complicit in, these crimes as well.[46] The absentees in this legal landscape are corporations.

The possibility that the behaviour of a corporation can indeed contribute to crimes against humanity has been readily acknowledged.[47] Yet, until the *Lafarge* case, compensation for these

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[41] Mayaud, s*upra* note 35.

[42] French Code of Penal Procedure, art. 144: *"La détention provisoire ne peut être ordonnée ou prolongée que si elle constitue l'unique moyen : 1. De conserver les preuves ou les indices matériels ou d'empêcher soit une pression sur les témoins ou les victimes, soit une concertation frauduleuse entre personnes mises en examen et complices ; 2. De protéger la personne mise en examen, de garantir son maintien à la disposition de la justice, de mettre fin à l'infraction ou de prévenir son renouvellement ;3° De mettre fin à un trouble exceptionnel et persistant à l'ordre public provoqué par la gravité de l'infraction, les circonstances de sa commission ou l'importance du préjudice qu'elle a causé. Toutefois, ce motif ne peut justifier la prolongation de la détention provisoire, sauf en matière criminelle ou lorsque la peine correctionnelle encourue est supérieure ou égale à dix ans d'emprisonnement."*

[43] Saenko, *supra* note 34.

[44] Except in limited circumstances where it can substitute its assessment for theirs but only in civil cases. See art. 411-3 of the French Code of judicial organisation: "The Court of Cassation may quash without referral when the cassation does not imply a new ruling on the merits. It may also, in civil matters, rule on the merits when the interest of a good administration of justice justifies it."

[45] Rome Statute, arts. 5-8; Kenneth S. Gallant, *Corporate Criminal Responsibility for Human Rights Violations: Jurisdiction and Reparations,* in PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW: JURISDICTIONAL ISSUES (Sabine Gless, Sarah Emdin eds., 2017), at 47-78.

[46] Rome Statute, art. 25(1).

[47] Gallant, *supra* note 45, at 48-49; Madeline Young, *Lafarge's Case Cemented: Holding Corporations Liable for Crimes Against Humanity,* 36 EMORY INTERNATIONAL LAW REVIEW 1 (2021), at 8; Jelena Aparac, *Business and Armed Non-State Groups: Challenging the Landscape of Corporate (Un)accountability in Armed Conflict,* 5(2) BUSINESS AND HUMAN RIGHTS JOURNAL 270 (2020), at 273; Jan Wouters, Hendrik Vandekerckhove, *A Different Type of Aid: Funders of Wars as Aiders and Abettors under International Criminal Law*, 213 LEUVEN UNIVERSITY WORKING PAPER 1 (2019), at 8, 15; Danielle Olson, *Corporate Complicity in Human Rights Violations under International Criminal Law*, 1 INTERNATIONAL HUMAN RIGHTS LAW JOURNAL 2 (2015), at 2-4; Wolfgang Kaleck, Miriam Saage-Maaß, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges*, 8 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 699 (2010), at 701; UN High Commissioner for Human Rights, Res. 26/22, Guidance to Improve Corporate Accountability and Access to Judicial Remedy for Business-Related Human Rights Abuse (May 10, 2016), at 13-21.

international crimes had been limited to the criminal liability of directors or other high-ranking staff of the devious corporation and civil liability claims.[48] The corporation itself could not be found guilty under international treaties between State actors, and the proposal to subject them to the jurisdiction of the ICC was rejected.[49] This means that the responsibility for introducing enforceable norms and trying corporations for committing or being complicit in crimes against humanity lies with individual States and their domestic courts. This complementary role of national criminal jurisdictions in the prosecution of the most serious crimes of international concern is enshrined under Article 1 of the Rome Statute.[50]

In domestic jurisdictions, the concept of corporate criminal liability is said to have originated in the early 1900s in the USA, but its practical relevance remained limited to crimes that took place within the territory of a jurisdiction.[51] Corporate criminal liability for international crimes has a much shorter history of only a few decades, the reason being that liability for international crimes brings the complexity of establishing jurisdiction and proving corporate involvement in another territory, which is often convoluted.[52]

Therefore, it was not until the 21st century that corporate criminal liability for international crimes was introduced in national jurisdictions. Since then, some jurisdictions, including Switzerland and the Netherlands, have attempted to prosecute corporations for their involvement in crimes against humanity.[53] Due to the practical difficulties of prosecution, including obtaining and evaluating evidence, however, none of these authorities have proceeded with bringing any actual cases to court, so the cases did not result in corporate criminal liability for the actors involved.

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[48] Kaleck, Saage-Maaß, *supra* note 47, at 700; Olson, *supra* note 47, at 4-5, 8-10; Hendrick Van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, 12 *CHINESE JOURNAL OF INTERNATIONAL LAW* 43 (2013).

[49] International Commission of Jurists, *Report of the International Commission of Jurists Expert Legal Panel on Corporate complicity in International Crimes*, CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY (2006); Clapham Andrew, *The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL (Menno Kamminga, Saman Zia-Zarifi eds., 2000) at 139-195; Olson, *supra* note 47.

[50] Olson, *supra* note 47, at 6; Wouters, Vandekerckhove, *supra* note 47, at 15-19;

[51] Olson, *supra* note 47, at 4; Wouters, Vandekerckhove, *supra* note 47, at 15; Susanne Beck, *Corporate Criminal Liability*, in OXFORD HANDBOOK OF CRIMINAL LAW (Markus D. Dubber, Tatjana Hörnle eds., 2014), at 560-582; James G. Stewart, *The Turn to Corporate Criminal Liability*, 47 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 121 (2014), at 132.

[52] Although an increasing number of countries, including France, claims universal jurisdiction for the most severe crimes, including crimes against humanity; Gallant, *supra* note 45, at 53, 70; Bruce Zagaris, *Crimes against Humanity*, 37 INTERNATIONAL ENFORCEMENT LAW REPORTER 356 (2021), at 357-358; Emma M. Van Gelder, Cedric M.J. Ryngaert, *Vervolging van ondernemingen voor schendingen van de mensenrechten: mogelijkheden naar Nederlands strafrecht,* 3 TIJDSCHRIFTVOOR BIJZONDER STRAFRECHTEN HANDHAVING 118 (2017), at 119-123.

[53] Jan Wouters, Hendrik Vandekerckhove, *supra* note 47, at 15-18; Beck, *supra* note 51, at 566; Stewart, *supra* note 51, at 123-125; Kathi L. Austen, *The Pillage of Eastern Congo Gold: A Case for the Prosecution of War Crimes,* 16(5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 963 (2013): Bénédict de Moerloose, *Challenging the Pillage Process: Argor-Heraeus and Gold from Ituri*, LEGAL REMEDIES FOR GRAND CORRUPTION (Nov. 7, 2016): "In November 2013, the Swiss federal prosecutor's office investigated a complaint against the Swiss gold refining company, Argor-Heraeus, that accused the company of laundering the proceeds of Congolese gold that was pillaged during the Congolese war in 2004 and 2005" and "In 2009 and 2010, the Dutch authorities investigated a criminal complaint which accused the company Lima Holding B.V. of complicity in the construction of the Wall between Israel and Palestine". Adriana E. González, Marta S. Navarro*, Corporate Liability and Human Rights: Access to Criminal Judicial Remedies in Europe,* in BUSINESS AND HUMAN RIGHTS IN EUROPE (Angelica Boninfanti ed., 2018), at 223-233.

In several jurisdictions, corporate complicity in crimes against humanity is predominantly dealt with through civil liability cases. The best example is the possibility to claim compensation under the Alien Tort Claims Act (ATCA) in the USA. This act establishes federal jurisdiction when '(1) an alien sues (2) for a tort that is (3) committed in violation of the law of nations, or of a treaty of which the United States is a signatory'.[54] If an American court establishes that a corporation aided or abetted these wrongful doings, it will be liable to pay punitive damages to the claimant. Examples include an action against the Union Oil Company of California (UNOCAL) which was found liable to pay damages because they relied on the Myanmar military to protect their pipelines,[55] and a case against Shell which was accused of colluding with the Nigerian authorities to torture and kill activists who opposed the company's operations because of the environmental damages it caused in the Niger Delta which led to a significant settlement between the parties.[56]

Under the ATCA procedure, US courts can establish corporate liability for international wrongdoings, but this does not lead to criminal sanction. Action under the ATCA is also rarely successful. In a case against Chevron (i.e., *Chevron Lawsuit*), for instance, the District Court for the Northern District of California ruled that it is not unreasonable to rely on local (Nigerian) authorities to break up a (peaceful) demonstration on business premises, thus dismissing the lawsuit.[57] In *In re South African Apartheid Litigation*, several major European banks were accused of financing the Argentinian junta and the South African apartheid regimes. Here, the United States District Court for the Southern District of New York did not accept causality between the funds that were paid and the crimes that were committed by the receiving regimes, so the requirement of aiding and abetting was not fulfilled.[58] The latter two cases are demonstrative of the difficulty of establishing corporate criminal liability globally. The first case shows that it must be accepted that corporations pursue their own commercial activities within the public domain, which also includes a right to rely on public authorities to protect those activities. The second case shows that the contribution to criminal activities must be substantial. In each instance, the relevant district court, as a federal court of the United States, eventually decided that there was insufficient causality between the provision of funds and the crimes committed by the respective regimes.

In this international context with increasing scrutiny of corporate complicity in international crimes and crimes against humanity and an increasing willingness to hold them criminally liable, the *Lafarge* case is a welcome development. In this respect, the judgment of the *Cour de cassation* is definitely a milestone in at least three ways. First, because it establishes corporate criminal liability in crimes against humanity rather than merely individual criminal

[54] Kaleck, Saage-Maaß, *supra* note 47, at 703.
[55] According to the US court, this cooperation included practical assistance, including providing forced labour for the construction and maintenance of the pipeline, which was a direct consequence of relying on the Myanmar military. There was thus a causality between petitioning protection and the occurrence of forced labour among the local people; United State District Court, Case of Doe v. Unocal, Judgement (June 8, 2009); Kaleck, Saage-Maaß, *supra* note 47, at 704.
[56] United State District Court, Wiwa v. Royal Dutch Petroleum, Anderson and Shell Petroleum, Southern District of New York, Settlement Agreement (June 8, 2009); Kaleck, Saage-Maaß, *supra* note 47, at 704.
[57] United State District Court, Bowoto v. Chevron C 99-02506 SI, Northern District of California, Judgment (Dec. 1, 2008); Kaleck, Saag-Maaß, *supra* note 47, at 705.
[58] Kaleck, Saag-Maaß, *supra* note 47, at 706; Young, *supra* note 47, at 9; Tery Nemeroff, *Untying the Khulumani Knot: Corporate Aiding and Abetting Liability under the Alien Tort Claims Act after Sosa*, 40 COLUMBIAN HUMAN RIGHTS LAW REVIEW 231 (2008), at 232-239; Juan Pablo Bohoslavsky, Veerle Opgenhaffen, *The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship*, 23 HARVARD HUMAN RIGHTS JOURNAL 157 (2010), at 158-203.

liability or civil liability.[59] Secondly, because it adopted a novel approach to the meaning of intention to establish *mens rea* and culpability.[60] Thirdly, because contrary to the US federal courts, it accepted financing of a terrorist organisation as sufficient to establish *actus reus*.[61]

The French example soon got a follow-up when the United States Department of Justice indicted Lafarge for conspiring to provide material support to foreign terrorist organisations. Lafarge pleaded guilty to conspiring to provide material support to foreign terrorist organisations and was sentenced to pay $778 million in fines and forfeiture.[62] As in France, this was the first time that the US sanctioned corporate entities for aiding and abetting a foreign terrorist group.

The increased willingness of domestic courts to try these cases to establish corporate criminal liability for complicity in crimes against humanity is also illustrated by another pending case. In the case of *Doe v. Chiquita Brands International*, Chiquita is accused of 'funding, arming, and otherwise supporting terrorist organizations in Colombia in their campaign of terror against the population […] to maintain its profitable control of Colombia's banana growing regions'.[63] It allegedly aided and abetted, condoned, and even participated in this joint criminal enterprise with the United Self-Defense Forces of Columbia (AUC) and other paramilitary groups.[64] The criminal procedure follows upon a settlement that was reached in a tort case that was based on the Alien Tort Claims Act, where the company admitted to financing the AUC, which is responsible for widespread killings, torture, forced disappearances and crimes against humanity.[65]

The comparison with the case of Nicaragua against the USA is easily made. The International Court of Justice found that the American support for the anti-Sadinista "Contras" in the rebellion against the Nicaraguan government violated the obligation of customary international law not to intervene in the affairs of another State or use force against another State.[66] The difference is, of course, that Chiquita is not a State, but a corporation. Furthermore, it only admitted to financing the AUC, which the ATCA had earlier found insufficient to establish causality between the corporation's behaviour and the crimes against humanity that were committed by the Argentinian junta and the South-African apartheid regime.[67] The

[59] Zagaris, *supra* note 47 at 356-358; Aparac, *supra* note 47, at 270-275; Benedita Sequeira, *The Lafarge Case: Tackling Corporate Impunity in the Battlefield,* 26(3) REVISTA ELECTRÓNICA DE DIREIT (2021), at 87-107.

[60] See previous Section and Olson, *supra* note 47, at 8; Van der Wilt, *supra* note 48, at 70; Wouters, Vandekerckhove, *supra* note 47, at 11-15.

[61] Young, *supra* note 47, at 11-13 discusses the relationship between complicity to crimes against humanity through the provision of funds and the act of financing a terrorist organisation as a separate crime. An important difference between the two is that the allegation of financing a terrorist organisation only requires knowledge, whereas complicity in crimes against humanity requires intent. The broad interpretation of the concept of 'intention' provided by the court de cassation in the current case might render this distinction obsolete, which leaves the question if there are any situations of financing terrorism that do not establish complicity to crimes against humanity as well. Also see Aparac, *supra* note 47, at 271.

[62] United States District Court, United States of America v. Lafarge S.A. and Lafarge Cement Syria S.A., 22-CR-444 (WFK), Southern District of New York, Plea Agreement (Oct 18, 2022); Bruce Zagaris, Michael Plachta, Alex Mostaghimi, *Counterterrorism and International Human Rights*, 38(1) INTERNATIONAL ENFORCEMENT LAW REPORTER 442 (2022), at 443-449.

[63] United States District Court, Jane Doe and others v. Chiquita Brand International District, 20-3244, Court of New Jersey, Complaint and Demand for Jury Trial (Mar. 25, 2020), para. 2.

[64] Young, *supra* note 48, at 9-10.

[65] Kaleck, Saage-Maaß, *supra* note *47.*, at 708-709. Also see pts. 140-166 of the complaint. A total of fifteen claims for relief were submitted.

[66] ICJ, Nicaragua v. the USA, Order on provisional measures (10 May, 1984); ICJ, Nicaragua v. the USA, Judgment (June 27, 1986).

[67] Kaleck, Saage-Maaß, *supra* note 48, 706; Young, *supra* note 48, at 9.

question is whether US criminal courts will consider the French judgment in *Lafarge* greatly persuasive to decide differently and find Chiquita liable for its complicity in these crimes.

Closer to Europe, the French judgment could have consequences for corporations that trade with or fund the Russian government or companies directly involved in the war against Ukraine, whose actions have been formerly qualified as terrorist attacks by the UN General Assembly.[68] Aiding and abetting crimes against humanity committed by the Russian regime could thus lead to further developments in corporate criminal accountability. Following *Lafarge* and maybe *Doe v. Chiquita Brands International*, even mere financial support could be sufficient to hold corporations accountable, thus underlying the importance of the French judgment in the wider development of corporate criminal liability and pursuing justice.

VII. Conclusion

The decision of the *Cour de cassation* in *Lafarge I* and *II* establishes an important new legal development in the construction of corporate criminal liability. It departs from previous legal interpretation whereby corporate entities cannot be found guilty of or liable for committing crimes against humanity, an offence befalling only natural persons heretofore. While the decision of the court limits the role of interest groups to that of an interested outside party, the decisions, read as a whole, establish a welcome development buttressing corporate ethical behaviour. It places the onus on transnational corporations to set up prevention programmes to limit criminal risks when operating in conflict areas[69]. Reading between the lines, companies have a moral duty not to lend their support to acts of crimes against humanity. Should any doubt remain, they must deploy all the necessary means to be fully informed of actions conducted by the entities with whom they have business relations. Failing that, *Lafarge* and the developing case law opens the door to corporate criminal liability for crimes against humanity and willful or negligent violations of human rights.

[68] UNGA, Res. 2463, Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations, recalling the obligation of States under art. 2 of the UN Chart to refrain from the threat or use of force against the territorial integrity of a State (Oct. 12, 2022); Zagaris, Plachta, Mostaghimi, *supra* note 62.

[69] Emmanuel Daoud, Gabriel Sebbah, *La Cour de cassation ouvre la voie à une mise en examen de Lafarge pour complicité de crime contre l'humanité,* DALLOZACTUALITÉ (Sept. 13, 2021).