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Madeline Young

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LAFARGE’S CASE CEMENTED: HOLDING CORPORATIONS LIABLE FOR CRIMES AGAINST HUMANITY

*Madeline Young**

The LaFarge case highlights two key issues: accountability of multinational actors operating in conflict areas for contributing financially to the commission of atrocities by terrorist groups or other entities;¹ and the responsibility of parent companies for the illegal activities of their subsidiaries abroad.² At present, the criminal case against LaFarge for complicity in crimes against humanity and other violations is before the French Supreme Court, with hearings continuing through 2021.³

In 2017, France introduced the first “duty of vigilance” law in Europe, which obligates companies to prevent human rights abuses in their supply chains worldwide, and requires them to pay damages if they fail to do so.⁴ Ahead of the curve in pioneering laws for protecting individuals from, and imposing accountability for, human rights abuses stemming from multinational companies’ activities,⁵ France offers a ripe environment to pursue what is, until now, an unprecedented criminal complaint.

I. BACKGROUND

Lafarge, a French cement company, currently faces criminal prosecution for alleged crimes committed in Syria by its subsidiary, Lafarge Cement Syria (“LCS”), during the Syrian Civil War.⁶ Between 2013 and 2014, LCS allegedly bought raw materials from jihadi groups, including ISIS, and negotiated safe passage for its workers and products in exchange for 13 million Euros paid to

* J.D., Emory University School of Law (2021).

¹ Claire Tixeire *et al.*, *Holding Transnational Corporations Accountable for International Crimes in Syria: Update on the Developments in the Lafarge Case (Part II)*, OPINIO JURIS (July 27, 2020), <http://opiniojuris.org/2020/07/27/holding-transnational-corporations-accountable-for-international-crimes-in-syria-update-on-the-developments-in-the-lafarge-case-part-ii/>.

² *Sherpa and ECCHR to Appeal Decision in Lafarge/Syria Case at French Supreme Court*, ECCHR (Nov. 7, 2019), <https://www.ecchr.eu/en/press-release/sherpa-and-ecchr-to-appeal-decision-in-lafargesyria-case-at-french-supreme-court/>.

³ *Id.*

⁴ Tixeire *et al.*, *supra* note 1.

⁵ *Id.*

⁶ *Lafarge lawsuit (re complicity in crimes against humanity in Syria)*, BUS. & HUM. RTS. RES. CENTRE (Nov. 7, 2019), <https://www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria/>.

the jihadi groups.⁷ Lafarge also faces charges for violation of the 2012 EU embargo against Syria.⁸

Unlike the American and British common law systems, France implements a Civil Law system, which is based on a code of law rather than precedent.⁹ France's Code Pénal defines criminal law charges, and provides the basis for interpreting the criminal complaint brought by civil parties in this case.¹⁰ Under this system, individual victims and non-government organizations (“NGOs”) can trigger the opening of investigations into a criminal complaint by filing a petition with an investigating judge.¹¹ Individuals can file a criminal complaint if they have personally suffered a harm directly caused by an offense.¹² NGOs can file a complaint in their own right under Article 2-4 of the French Criminal Code of Procedure, which allows an association fighting against crimes against humanity and genocide to apply for civil party status.¹³

Once a civil party files a petition to an investigating judge, the judge has a duty to investigate unless the facts do not give rise to a criminal act or the public action itself is extinguished (*i.e.* through a statute of limitations).¹⁴ At the end of the investigation, the investigating judge can order the indictment of the accused.¹⁵ After indicting the accused, the investigating judge orders a referral to a criminal Court of Assizes, who then may conduct a trial.¹⁶ Both the accused and the civil parties have the right to appeal the Court of Assize's findings to a criminal court of appeal, which is nominated by the criminal division of the French Supreme Court (*Cour de Cassation*).¹⁷ Parties can appeal a decision by

⁷ *Id.*

⁸ In September 2016, the French Minister of Finance filed a complaint before the Paris Prosecutor against Lafarge for alleged illegal purchase of oil in Syria, in violation of the EU embargo issued in 2012. *Id.*

⁹ INTERNATIONAL BUSINESS PUBLICATIONS, FRANCE BUSINESS LAW HANDBOOK VOL 1 STRATEGIC INFORMATION AND BASIC LAWS 29 (2013).

¹⁰ *Id.*

¹¹ *Universal Jurisdiction Law and Practice in France*, OPEN SOCIETY JUSTICE INITIATIVE at 19, 23 (2019), <https://trialinternational.org/wp-content/uploads/2019/05/Universal-Jurisdiction-Law-and-Practice-in-France.pdf>; see also Jacqueline Hogson, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform*, Vol. 51, No. 4 INT'L & COMPAR. L. Q. 781, 792 (2002).

¹² Code de procédure pénale, art. 1-2, accessible at https://www.legislationline.org/download/id/6381/file/France_CPC_am2006_en.pdf.

¹³ *Id.* art. 2-4 (in English “Any association lawfully registered for at least five years proposing in its constitution to combat crimes against humanity or war crimes, or to defend the moral interests and the honour of the Resistance or of those of deported persons, may exercise the rights granted to the civil party in respect of war crimes and crimes against humanity”).

¹⁴ *Universal Jurisdiction Law and Practice in France*, *supra* note 11, at 23.

¹⁵ Code de procédure pénale, art. 80-1.

¹⁶ *Id.* art.181.

¹⁷ *Id.* arts. 380-1 and 380-2; see also *Universal Jurisdiction Law and Practice in France*, *supra* note 11, at 30.

the Court of Appeal to the criminal division of the French Supreme Court.¹⁸ Similar to the American Common Law system, French appellate courts hear appeals on a point of law rather than retrying the case.¹⁹

On November 15, 2016, eleven former LCS employees and two NGOs, Sherpa²⁰ and the European Center for Constitutional and Human Rights (“ECCHR”)²¹, filed a criminal complaint as civil parties with the Dean of Investigating Judges at the Paris Court against Lafarge, LCS, and their current and former CEOs for financing terrorism, complicity in crimes against humanity committed in Syria, and labor law violations.²² Complicity in crimes against humanity was one of the main allegations in Sherpa and ECCHR’s initial complaints.²³

II. ISIS CRIMES AGAINST HUMANITY DURING SYRIAN CIVIL WAR

To understand why Lafarge was charged for complicity in crimes against humanity, it is relevant to consider ISIS’s actions in Syria during this time, and how financing ISIS and other terrorist organizations enables those organizations to commit heinous crimes.

Between 2012 and 2015, Lafarge owned 98.7% of a cement plant located in Syria, which was managed by LCS.²⁴ LCS made arrangements with ISIS and other jihadists groups to maintain production of the cement plant.²⁵ The arrangements included paying for safe passage of LCS’s employees and materials and buying raw materials for cement production in areas under ISIS’s

¹⁸ *Universal Jurisdiction Law and Practice in France*, *supra* note 11, at 30.

¹⁹ Hogson *supra* note 11, at 783, n. 14.

²⁰ Sherpa, an NGO started in 2001, has the stated objective, “To pursue the establishment of a binding legal framework to make economic actors, and transnational companies in particular violating human rights and causing environmental damages, accountable for their impacts.” *About Us*, SHERPA, <https://www.asso-sherpa.org/mandate#:~:text=Sherpa%2C%20founded%20in%202001%2C%20has,of%20a%20more%20mindful%20globalization> (last visited July, 4, 2021).

²¹ ECCHR, an NGO started in 2007, has the stated mission of, “[using] legal means to end impunity for those responsible for torture, war crimes, sexual and gender-based violence, corporate exploitation and fortified borders.” *About Us*, ECCHR, <https://www.ecchr.eu/en/about-us/> (last visited July 4, 2021).

²² *French company Lafarge sued for Financing ISIS and Complicity in War Crimes and Crimes Against Humanity in Syria*, SHERPA (Nov 2018), <https://www.asso-sherpa.org/french-company-lafarge-sued-for-financing-isis-and-complicity-in-war-crimes-and-crimes-against-humanity-in-syria>.

²³ *Sherpa and ECCHR to Appeal Decision in Lafarge/Syria Case at French Supreme Court*, *supra* note 2.

²⁴ *French company Lafarge sued for Financing ISIS and Complicity in War Crimes and Crimes Against Humanity in Syria*, *supra* note 22.

²⁵ *Id.*

control.²⁶ In exchange for payment by LCS, ISIS provided a document to LCS that enabled cement trucks to cross through their checkpoints.²⁷

LCS's payments occurred during a time where ISIS and other jihadist groups were ramping up operations and seizing entire cities. In March 2013, the city of Raqqa in Syria fell to ISIS.²⁸ During the jihadist campaign to conquer Raqqa, Lafarge signed agreements with ISIS to buy raw materials for cement production.²⁹ In 2014, Lafarge purchased an informal movement pass and then an official movement pass, both issued by ISIS.³⁰

In 2014, the UN's Independent International Commission of Inquiry on the Syrian Arab Republic published a report stating that ISIS systematically targeted sources of dissent, detaining and threatening them with death.³¹ ISIS obstructed the exercise of religious freedom, and freedom of expression, and assembly and association in areas under its control.³² During this time, ISIS also prevented the supply of humanitarian aid to the people in ISIS-controlled Dayr Az-Zaqr and Ar-Raqqah.³³

ISIS's regime further targeted racial minorities and culturally important locales.³⁴ ISIS forcibly displaced Kurdish civilians, causing thousands of civilians to flee from towns in Ar-Raqqah, Tel Arab and Tel Hassel.³⁵ The UN report stated that this widespread and systematic attack against the Kurdish civilian population amounted to the crime against humanity of forcible displacement.³⁶ ISIS also frequently attacked churches, historic monuments and buildings dedicated to religion and culture, which had no military advantage, in violation of international humanitarian law.³⁷

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Raqqah: Syrian capital of the IS 'caliphate'*, BBC NEWS (July 4, 2017), <https://www.bbc.com/news/world-middle-east-40495039>.

²⁹ *Id.*

³⁰ *French company Lafarge sued for Financing ISIS and Complicity in War Crimes and Crimes Against Humanity in Syria*, *supra* note 22.

³¹ U.N. Hum. Rts. Council, Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic Rule of Terror: living under ISIS in Syria, ¶ 19 U.N. Doc. A/HRC/27/CRP3 (Nov 14, 2014), available at <https://www.refworld.org/pdfid/5469b2e14.pdf>.

³² *Id.* at 20.

³³ *Id.* at 22.

³⁴ *Id.*

³⁵ *Id.* at 28.

³⁶ *Id.* at 29.

³⁷ *Id.* at 30.

In addition to these systematic attacks on civilian populations, ISIS also beheaded, shot and stoned men, women and children accused of being affiliated with other armed groups in public spaces across Syria.³⁸ The mutilated bodies were often put on display after the murder as a warning to the local population.³⁹ For civilians who were detained, many reported being beaten, whipped, electrocuted and otherwise tortured.⁴⁰ As an organized armed group exercising control over territory, ISIS had an obligation to ensure humane treatment, which it consistently failed to do by using violence, torture, mutilation, and cruel treatment in violation of international humanitarian law.⁴¹

The UN report concluded that ISIS perpetrated both war crimes and crimes against humanity with the “clear intent of attacking persons with awareness of their civilian or *hors de combat* status.”⁴² The crimes against humanity noted in the report include murder, torture, enslavement, rape and sexual violence.⁴³

III. INVESTIGATING JUDGES' LANDMARK INDICTMENTS OF LAFARGE LEADERS AND LAFARGE

On June 9, 2017, three investigating judges of the Paris High Court started judicial investigations against both leaders of Lafarge and Lafarge as an entity.⁴⁴ In December 2017, the investigating judges indicted six former CEOs and directors of Lafarge and LCS on charges of financing terrorism and deliberate endangerment of people's lives. Some were also charged with breaching the EU embargo on Syrian oil.⁴⁵ In March and May 2018, the investigating judges indicted two additional Lafarge leaders on similar charges.⁴⁶

On May 9, 2018, Sherpa and ECCHR filed a legal note with the investigating judges requesting them to extend the indictments against the Lafarge leaders to include complicity in crimes against humanity, and to indict Lafarge, the entity,

³⁸ *Id.* at 32.

³⁹ *Id.* at 33.

⁴⁰ *Id.* at 38.

⁴¹ *Id.* at 43.

⁴² *Id.* at 74.

⁴³ *Id.* at 52, 57.

⁴⁴ *Lafarge/Eric Olsen and Others*, TRIAL INTERNATIONAL (last modified Apr. 3, 2021), <https://trialinternational.org/latest-post/lafarge-eric-olsen-and-others/>.

⁴⁵ The following CEOs and directors were charged: Former CEOs of Lafarge: Eric Olsen and Bruno Lafont; CEO of Lafarge Cement Syria between 2008-2014: Bruno Pescheux; Successor of Lafarge Cement Syria: Frédéric Jolibois; Lafarge's Director of Security: Jean-Claude Veillard; and Vice Director at Lafarge: Christian Herrault. *Id.*

⁴⁶ Lafarge Human Resources Director, Sonia Artinian, and former Safety Director at Lafarge Cement Syria, Jacob Waerness, were charged in March and May 2018 respectively. *Id.*

itself.⁴⁷ One month later, on June 28, 2018, the three investigating judges of the Paris Court charged Lafarge with complicity in crimes against humanity, financing a terrorist enterprise, breaching the EU embargo, and endangering the lives of others.⁴⁸ The court was the first domestic court to find serious and consistent evidence that the atrocities committed by ISIS in Syria between 2013-2014 amounted to crimes against humanity.⁴⁹

The complicity in crimes against humanity charge is particularly notable, because the charge directly addresses the question of whether multinational corporations operating in areas of armed conflict can be held criminally liable for financing armed entities that commit crimes against humanity.⁵⁰ Lafarge is the first multinational company worldwide to be indicted on such charges.⁵¹

IV. PARIS COURT OF APPEALS REVOKES COMPLICITY INDICTMENT

On October 24, 2019, the Investigation Chamber of the Paris Court of Appeals denied civil party status to the two NGOs, leaving only the eleven former Syrian employees in the case.⁵² The court's decision was based on Article 2 of the French Procedural Code, which states that non-profit organizations may only join a relevant case as civil parties when their organizational statutes provide specifically for combating crimes against humanity.⁵³ Neither Sherpa nor ECCHR's organizational statutes mandate explicitly provide for combating crimes against humanity, although both organization's statutes provide for defense of international human rights.⁵⁴

On November 7, 2019, the Investigation Chamber of the Paris Court of Appeals confirmed the indictment of the eight Lafarge executives and the Lafarge company itself for financing a terrorist enterprise, breaching an EU embargo, and endangering the lives of others.⁵⁵ The Paris Court recognized that the decision to maintain LCS's factory operation in Syria and to compel its Syrian employees to continue working without an evacuation plan exposed its

⁴⁷ *Submission From Sherpa and ECCHR on an Indictment of Lafarge for Complicity in Crimes Against Humanity*, ECCHR (May 15, 2018), <https://www.ecchr.eu/en/press-release/submission-from-sherpa-and-ecchr-on-an-indictment-of-lafarge-for-complicity-in-crimes-against-humanity/>.

⁴⁸ *Lafarge/Eric Olsen and Others*, *supra* note 44.

⁴⁹ *Tixeire et al.*, *supra* note 1.

⁵⁰ *Sherpa and ECCHR to Appeal Decision in Lafarge/Syria Case at French Supreme Court* *supra* note 2.

⁵¹ *Id.*

⁵² *Lafarge/Eric Olsen and Others*, *supra* note 44.

⁵³ *Tixeire et al.*, *supra* note 1.

⁵⁴ *Id.*

⁵⁵ *Sherpa and ECCHR to Appeal Decision in Lafarge/Syria Case at French Supreme Court*, *supra* note 2.

employees directly to life-threatening risks.⁵⁶ The Paris Court's unprecedented decision to recognize Lafarge as having "effective authority" over its subsidiary was central to the confirmation of the indictment for endangering the lives of its employees.⁵⁷ At the same time, however, the Paris Court revoked the charge against LaFarge for complicity in crimes against humanity committed by ISIS.⁵⁸ However, Lafarge was not "let off the hook" for its actions in Syria; although the criminal charge of complicity was dropped, the financing terrorism charge stood.

Article 422-5 of the French Penal Code states that corporate bodies can be held legally responsible for terrorist acts based on the conditions set for in Article 121.⁵⁹ Article 121-7 relates to complicity, which is the charged offense in this case.⁶⁰ In a strict interpretation of Article 121-7 of the French Criminal Code, the Court of Appeals found that there was no intention to be associated with the crime and therefore a crucial element to establish the crime of complicity was missing.⁶¹ Article 121-7 of the French Criminal Code reads in relevant part, "a person who knowingly, by aid or assistance, has facilitated its preparation or consumption is an accomplice to a crime or an offense."⁶²

The plaintiffs argued that jurisprudence on complicity under Article 121-7 only requires that the accomplice have knowledge of the perpetrator's intent to commit a crime, but does not require the accomplice to share the intent to commit the crime.⁶³ It is questionable whether the Court of Appeals made the correct finding when reading intent to commit the crime into the elements of complicity. If, as plaintiffs argue, knowledge that aid will be used to commit crimes is sufficient, Lafarge is complicit in ISIS's crimes. ISIS's illegal acts directly impacted LCS employees. On two separate occasions, LCS employees were kidnapped.⁶⁴ On the first occasion, LCS acknowledged the kidnapping by paying for the employees' return.⁶⁵ Lafarge's direct knowledge of ISIS's crimes, in addition to what can be implied knowledge based on the heavily reported and

⁵⁶ Tixeire *et al.* *supra* note 1.

⁵⁷ *Id.*

⁵⁸ *Sherpa and ECCHR to Appeal Decision in Lafarge/Syria Case at French Supreme Court*, *supra* note 2.

⁵⁹ Code Pénal art. 422-5, accessible at <http://www.codes-et-lois.fr/code-penal/>.

⁶⁰ *Id.* art. 121-7.

⁶¹ Tixeire *et al.*, *supra* note 1.

⁶² Code Pénal art. 121-7.

⁶³ Tixeire *et al.*, *supra* note 1.

⁶⁴ In October 2012, nine LCS employees were kidnapped, and in August 2014, one LCS employee was kidnapped. *French company Lafarge sued for Financing ISIS and Complicity in War Crimes and Crimes Against Humanity in Syria*, *supra* note 22.

⁶⁵ In October 2012, Lafarge negotiated and paid for the release of the nine kidnapped employees. *Id.*

publicized crimes committed by ISIS, lead to an inference that Lafarge “knowingly” provided finances to an organization which would use those finances to commit crimes.⁶⁶

The NGOs appealed both the October 24 and November 7 decisions to the French Supreme Court.⁶⁷ The Supreme Court has yet to hear the issue; a decision is expected within the year.⁶⁸

V. ISSUES WITH HOLDING CORPORATIONS LIABLE FOR COMPLICITY IN CRIMES AGAINST HUMANITY

Holding corporations liable for complicity in crimes against humanity is far from a novel legal issue.⁶⁹ The traditional model of corporate complicity holds individual leaders responsible under international criminal law for the crimes their companies committed. One such example after World War II was the *Zyklon B* case, which involved the conviction of businessmen Bruno Tesch and Karl Wienbacher, the owner and general manager respectively of Tesch & Stabenow, for aiding and abetting murder.⁷⁰ Tesch & Stabenow supplied the pesticide, Zyklon B, to Nazi death camps, where it was used in the gas chambers.⁷¹ The British Military Tribunal convicted both men even though they did not directly participate in the murders.⁷²

More challenging to convict, however, is a charge of complicity against a company itself. There are two general categories in which courts have found complicity for corporations: 1) corporations that cooperate with military regimes, and 2) corporations involved in conflict areas.⁷³ Corporations that cooperate with military regimes may do so by directly profiting from the state violence, by providing necessary means for the regimes to commit human rights abuses or by directly supporting the military regime.⁷⁴ In this case, Lafarge clearly did not directly support the ISIS regime nor did it profit directly from

⁶⁶ At the core of ISIS’s propaganda strategy is the use of widespread social media to self-report its crimes. See Rule of Terror: living under ISIS in Syria, *supra* note 31, at 18.

⁶⁷ *Sherpa and ECCHR to Appeal Decision in Lafarge/Syria Case at French Supreme Court*, *supra* note 2.

⁶⁸ Tixeire *et al.*, *supra* note 1.

⁶⁹ See HARV. L. SCH. LIBR., NUREMBERG TRIALS PROJECT (2020), <https://nuremberg.law.harvard.edu/>.

⁷⁰ Wolfgang Kaleck and Mariam Saage-Maaß, *Corporate Accountability for Human Rights Violations Amounting to International Crimes*, 8 J. OF INT’L CRIM. JUST. 699, 702 (2010), <https://www.corteidh.or.cr/tablas/r26652.pdf>.

⁷¹ *Id.* at 702.

⁷² *Id.*

⁷³ *Id.* at 703.

⁷⁴ *Id.*

ISIS's violence (e.g. such as hiring ISIS to work in its factory).⁷⁵ On its face, Lafarge may be supporting necessary means for ISIS to commit its human rights abuses, but cases that have supported this theory are predominantly concerned with physical means, not financial contributions.⁷⁶ For example, in *Public Prosecutor v. Van Anraat*, a Dutch criminal court convicted a businessman of aiding and abetting war crimes because he supplied the Iraqi government with chemicals needed to produce mustard gas, which was then used against the Kurds.⁷⁷ In contrast, the U.S. District Court for the Southern District of New York dismissed allegations in *In re South African Apartheid Litigation* because it found that a bank providing financial means via loans was not sufficiently connected to the human rights abuses in apartheid to fulfill the *actus reus* requirement present in the Alien Tort Claims Act.⁷⁸

Although Lafarge making payments to ISIS may not be considered cooperating with a military regime, it could potentially implicate the second category of corporations involved in conflict areas. The standard for complicity in this second category is a less exacting standard. Rather than providing necessary means for the human rights violations, a corporation may be found complicit by simply fueling the conflict through provisions of goods or illicit funds.⁷⁹ Because Lafarge did not provide goods to ISIS, provision of illicit funds is the only potentially relevant form of complicity. The landmark nature of the Lafarge decision comes down to a decision regarding the provision of illicit funds in ongoing conflict areas.

No court has yet held a corporation liable for complicity on these grounds. The United States, interpreting Colombian law, currently has a case with similar facts to the Lafarge case, which likewise implicates the question of fueling a conflict through issuance of illicit funds. In *Doe v. Chiquita Brands International*, the plaintiffs allege that “Chiquita is liable to Plaintiffs because it aided and abetted, facilitated, condoned, paid, was reckless in dealing with, participated in a joint criminal enterprise with the [United Self-Defense Forces

⁷⁵ Such was the case in *Doe I v. Unocal*, where Unocal hired the Myanmar military to construct a pipeline. The Myanmar military used forced labor from local villagers to complete the pipeline. The California District Court found Unocal liable for aiding and abetting the forced labor and introduced a standard of “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.” *Doe I v. Unocal*, 395 F.3d 932, 954 (9th Cir. 2002); see also Kaleck, *supra* note 69, at 704.

⁷⁶ See e.g. Kaleck, *supra* note 69, at 705 (discussing supplying weapons, vehicles with military equipment and computer systems designed to implement racist passport systems).

⁷⁷ *Public Prosecutor v. Van Anraat*, LJN AU8685, The Hague District Court, 23 December 2005 at 13 (note that this is also a case of individual criminal liability rather than corporate complicity).

⁷⁸ *In re South African Apartheid Litigation*, 02 MDL 1499 (SAS), at 70 (S.D.N.Y. Oct. 19, 2009).

⁷⁹ Kaleck, *supra* note 69, at 709.

of Columbia] in bringing the crimes against humanity committed against Plaintiffs.”⁸⁰ The Plaintiffs further allege that there is a customary international law prohibition against the “illegal provision of material support to terrorist organizations in that they (1) provided assets (2) to a terrorist organization (3) with the knowledge *or* intent that they would be used to carry out attacks on civilians (4) for the purpose of intimidating or coercing civilian population” (emphasis added).⁸¹ Similar to Lafarge, it is likely the outcome of the *Chiquita* case will rely on whether knowledge or intent is required when financing a terrorist organization.

In addition to these conceptual issues with finding corporate complicity, there are also issues regarding State law requirements for criminal charges.⁸² Questions of *actus reus* and *mens rea* arise as basic staples of a criminal charge. Jurisprudence has traditionally required direct and substantial contribution.⁸³ The appeals chamber of the ICTY held in 2007 that “where the accused knowingly participated in the commission of an offense and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her ‘routine duties’ will not exculpate the excused.”⁸⁴ It is not clear that Lafarge has met this stated requirement for *actus reus*. In 2014, ISIS had reportedly \$2 billion in assets.⁸⁵ Lafarge’s \$13 million payment would account for only .65% of ISIS’s assets. However, the Paris Court of Appeals did not appear to take issue with the *actus reus* requirement, but instead focused on *mens rea*.

Mens rea requires that the aider or abettor know his contribution facilitates the commission of the crime in question.⁸⁶ The basic standard for aiding and abetting is “awareness that the principal will be using, is using, or has used the assistance for the purpose of engaging in criminal conduct.”⁸⁷ However, some academics suggest a higher threshold requiring the intent to further the underlying crime.⁸⁸ The French Court of Appeals adopted this higher threshold

⁸⁰ Plaintiff’s Complaint and Demand for Jury Trial, at ¶ 1051 (Mar 25, 2020), *Jane Doe 8, et al. v. Chiquita Brands International, Inc.*, No. 2:20-cv-03244 (D. N.J.), available at <https://earthrights.org/wp-content/uploads/Jane-Doe-8-v.-Chiquita-Complaint-New-Claims-March-2020.pdf>.

⁸¹ *Id.* at ¶ 1064.

⁸² Hans Vest, *Business Leaders and the Modes of Individual Criminal Responsibility under International Law*, 8 J. OF INT’L CRIM. JUST. 851, 857 (2010).

⁸³ *Id.*

⁸⁴ *Blagojević v. Jokić* (IT-02-60-A), § 189, Appeals Chamber, 9 May 2007.

⁸⁵ Martin Chulov, *How an arrest in Iraq revealed Isis’s \$2bn jihadist network*, THE GUARDIAN (Jul 15, 2014), <https://www.theguardian.com/world/2014/jun/15/iraq-isis-arrest-jihadists-wealth-power>.

⁸⁶ Vest, *supra* note 82, at 859.

⁸⁷ *Id.* at 859.

⁸⁸ *Id.*

for a finding of complicity in the Lafarge case, as discussed above.⁸⁹ Other jurisprudence offers support for the plaintiff's appeal, however, such as the ICTY's *Krstić* case, where the Appeals Chamber held that the defendant's knowledge of the Bosnian Serb Army's intention to commit genocide was sufficient without an additional finding that he himself shared that intent.⁹⁰

VI. GOING FORWARD: POTENTIAL STATUTORY INTERPRETATIONS OF ARTICLE 121-7

Because France uses a civil law system, judicial interpretation of statutes is frequently needed.⁹¹ The major methods of interpretation are exegetic (use of legislative history) and teleological (considering the social objective of the statute).⁹² As discussed above, the Court of Appeals interpreted Article 121-7, regarding the crime of complicity, to include a *scienter* (intent) requirement.⁹³ There are conflicting views on whether complicity does or should include this requirement and the result of the case against Lafarge will likely turn on which threshold the Supreme Court elects to adopt. France has the opportunity to lead the charge against corporations who fund conflicts in the international community with a decision against Lafarge. However, since Lafarge is charged under France's Penal Code, the Supreme Court is beholden to the language of its domestic code rather than to any alternate standards under international jurisprudence.

The Supreme Court's decision may well rest on a policy determination, given that the relevant provisions of the Penal Code are susceptible to two or more possible interpretations. Even if "intent" is required for complicity, as the Court of Appeals found, interpretation of the crime of financing terrorism (Article 421-2-2) may provide insight for how to interpret the elements of complicity in situations of terrorism and heinous crimes against humanity. Included in Article 421-2-2's definition of "terrorist act" is the act of financing a terrorist organization "intending that such funds, security or property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in the present chapter..."⁹⁴ The

⁸⁹ Tixeire *et al.*, *supra* note 1.

⁹⁰ *Krstić* (IT-98-33-A), § 140, Appeals Chamber, 19 April 2004.

⁹¹ Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. OF COMPAR. & INT'L L., 195, 196 (2003), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1143&context=djCIL>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Code Pénal art. 421-2-2, *accessible at* <http://www.codes-et-lois.fr/code-penal/>.

crime of financing terrorism therefore can rest on either intent or knowledge. Although financing terrorism was not inserted into the Penal Code until November 2001, long after the crime of complicity was written, it is possible the French Supreme Court will interpret the crime of complicity in light of the legislative intent behind creating the crime of financing terrorism.

One potential interpretation is that the legislature intended the crime of financing terrorism to have a broader reach, such that Article 421-2-2 is the sole applicable criminal charge for those who aid terrorist organizations, but do not intend to commit the crimes themselves. Here, Lafarge would only be liable for financing terrorism, and not for complicity in committing crimes against humanity because it is unlikely Lafarge itself intended the crimes perpetrated by ISIS.

A second potential interpretation is that the crime of complicity should be read in light of the policy considerations behind the crime of financing terrorism, which aims to criminally punish those who finance terrorist organizations. Under this theory, Lafarge's knowledge that ISIS intended to use funds to commit crimes would be sufficient to impute the knowledge *or* intent requirement from the crime of financing terrorism onto the crime of complicity. Lafarge would thus be complicit in ISIS's crimes against humanity by virtue of the finding that Lafarge committed the crime of financing terrorism — in essence, a charge of financing terrorism when those terrorist organizations commit crimes against humanity would *per se* lead to a charge of complicity in crimes against humanity.

As discussed above, the criminal elements of *actus reus* and *mens rea* act as common bars to finding complicity in international law violations when the case involves only financing the principal violator. Although the Rome Statute explicitly states that mere knowledge is sufficient for complicity,⁹⁵ neither the French Penal Code nor many other domestic penal codes explicitly provide for knowledge as a sufficient basis for a finding of complicity.⁹⁶ Without lessening the bar for *mens rea* (from intent to knowledge), there is no practicable mechanism for holding corporations liable for this type of complicity charge. Since corporations may only be charged in state courts due a lack of jurisdiction

⁹⁵ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, U.N. Doc. A/ Conf. 183/9, 17 July 1998, available at <https://www.refworld.org/docid/3ae6b3a84.html>.

⁹⁶ See e.g. 18 U.S.C. § 2 (United States); *Accessories and Abettors Act of 1861*, c. 94, s. 8 (United Kingdom); Criminal Code, RSC 1985, c C-46, s 21.

in international courts, domestic statutes are the only source of recourse in these cases.⁹⁷

The civil case against Lafarge provides the French Supreme Court with the first opportunity to engage in a statutory interpretation of Article 121-7 in the context of punishing and preventing crimes against humanity. Although the French Supreme Court may not necessarily pursue one of the interpretations explored here, its decision will necessarily engage the relationship between the charge of financing terrorism and the charge of complicity in crimes against humanity committed by terrorist regimes and will serve as guidance for other National courts facing this issue.

While a company not charged for complicity may still be charged with financing terrorism, domestic law provides significantly less remedy for financing terrorism than it does aiding and abetting crimes against humanity.⁹⁸ In France, the charge of financing terrorism is punishable to ten years imprisonment, and a charge of 225,000 euros.⁹⁹ In contrast, the crime of aiding and abetting is punishable by penalties such as dissolution of the corporation, prohibition on operating business, and permanent closure.¹⁰⁰ If the French Supreme Court elects to treat complicity and financing terrorism separately by requiring intent for the former but only knowledge for the latter, the question arises whether Nations are doing enough to prevent multinational companies in their jurisdictions from contributing to terrorist regimes. As it currently stands after the Court of Appeals' decision (and before the United States decides on the *Chiquita* case), the answer to this question is emphatically no. The result in this case would be releasing Lafarge, a company who paid millions of euros to the most heinous international terror organization in the midst of a wide-spread humanitarian crisis, of all responsibility for the crimes ISIS committed on Lafarge's dime in exchange for a simple slap on the wrist.

⁹⁷ Corporations are not subject to criminal liability before the ICC, nor are corporations subject to the jurisdiction of the ICJ. See Kaleck, *supra* note 69, at 710; United Nations, *Statute of the International Court of Justice*, 18 Apr. 1946.

⁹⁸ See e.g. Code Pénal art. 421-5 (Financing terrorism is punished by ten years imprisonment and a fine of 225,000 euros); 18 U.S.C. § 2339C (Financing terrorism is punished by no more than twenty years and a fine of at least \$10,000).

⁹⁹ *Id.*

¹⁰⁰ Code Pénal art. 131-39.