

August 2, 2023

## **"Lafarge and ISIS – the dos and don'ts of Business and Human Rights"**

### Client Updates

#### **Introduction:**

In the latest twist related to the international human rights violations allegedly committed by the French cement giant Lafarge SA ("**Lafarge**"), a French court handed [an opinion](#) (the "**opinion**", in French) on the company's indictment for endangering the life of others. This opinion follows a number of claims, which have been filed against Lafarge since 2016, both in France and in the United States, for acts committed by the company during its activities in Syria between 2012 and 2015, and in particular in areas controlled at the time by various armed factions within Syria. These claims relate to alleged crimes of endangering the life of others, crimes against humanity and terrorism financing. 1

This client update first summarizes the opinion of the French Chamber of labor law and social affairs and provides an overview of the various legal proceedings against Lafarge around the world, focusing in particular on the plea deal it entered in the United States for terrorism financing, (together, the "**Lafarge case**") before providing some general concluding words on the international human rights responsibilities of corporations.

#### **The background**

A case was filed in 2016 by Sherpa, the European Center for Constitutional and Human Rights (ECCHR) and a dozen former Syrian Lafarge employees against Lafarge for alleged crimes committed after the construction of a cement plant factory in Jalabiya, North Syria, in 2010.

Lafarge SA holds over 98% of the shares in the company Lafarge Cement Syria S.A. ("**LCS**"), headquartered in Damascus, Syria, which owned the factory.

Various armed groups, including the Islamic State of Iraq and al-Sham ("**ISIS**") and the al-Nusrah Front ("**ANF**"), were fighting in the surrounding areas of the plant between 2012 and 2015.

In 2012, foreign workers were evacuated from the factory to Egypt, and Syrian employees managed the factory until 2014, constituting an alleged threat to their lives. According to the [fact sheet](#) provided by the US Attorney's Office in the plea agreement case, Lafarge S.A., headquartered in Paris, France, and Lafarge Cement Syria (LCS) S.A., headquartered in Damascus, Syria, plotted to pay ISIS and ANF in exchange for permission to operate the plant, which enabled LCS to obtain approximately \$70.3 million in revenue from

the plant. The investigation by the French authorities estimated that the payments could have reached between 4.8 and 10 million Euros to ISIS alone.

Lafarge fully evacuated the factory in September 2014, a few months before ISIS took control of it.

The indictment in France of the French giant dates back to June 28, 2018, and, since then, charges of terrorist financing and crimes against humanity were confirmed in September 2021 and May 2022 respectively

In June 2023, the criminal investigations into the terrorism financing aspect of the case were completed though an investigation into crimes against humanity continues.

As of today, in France, there are pending charges for endangering the life of others, indictments for terrorism financing and crimes against humanity against the company.

In addition, the company was also charged with terrorism financing in the United States after an investigation by the FBI's New York Joint Terrorism Task Force. On 18 October 2022, Lafarge and LCS pleaded guilty before a federal court to conspiring to provide material support to foreign terrorist organizations and agreed to pay 778 million US dollars in fines and forfeiture. 2

### **The Opinion on endangering the life of others**

In the French case of the indictment for endangering the life of others, the criminal chamber of the Paris Court of Appeal asked the social chamber of the court to determine whether the provisions of the French labor code protecting the safety of workers constitute public interest rules under EU law regulating contractual obligations ("**Rome I**")<sup>3</sup>, and would therefore be binding on all employees, including those without "close ties" with France. As a rule, workers in France, **as well as those abroad whose contract has close ties with France**, benefit from the conflict rules of these protections. On the other hand, employees of French multinationals who fail to prove such links with France would not benefit from them.

At stake in the Lafarge case was whether the protection of French and EU labor rights extended to Syrian employees of Lafarge, who might not be considered to have a sufficient link to France.

The investigation in the case had concluded that the Syrian employees had a sufficient link to France because of the nature of the control exercised by the parent company and the criminal chamber asked for the social chamber's opinion.

The social chamber examined the applicability of French law to the contracts of employees of the Syrian subsidiary and, on 4th July 2023, it handed down its opinion, holding that these provisions are of public

interest, but **do not** constitute mandatory rules within the meaning of the Rome I regulation, meaning that the Syrian employees of Lafarge would not be afforded the protection of French and EU labor law.

The Court of Cassation will now have to decide at the next hearing scheduled for 19th September whether to follow the opinion of the social chamber or consider that the Syrian employees did have a sufficient link to Lafarge, in line with the investigation's findings.

Applying French and EU labor law to the employees of the Syrian subsidiary in relation to their work in Syria would show a strong signal on the applicability of human rights norms to global corporations. This would also be in line with the UN Guiding Principles on Business and Human Rights, which hold that companies should "comply with all applicable laws and respect internationally recognized human rights, wherever they operate".

### **Settlement in the United States for terrorism financing.**

Across the pond and in an unprecedented case on corporate liability, Lafarge pled guilty to one count of conspiring to provide material support to foreign terrorist organizations and agreed to pay a total of \$777.78 million in financial penalties, including criminal fines of 90.78 million US dollars and forfeiture of 687 million dollars. The [Statement of Facts](#) in the American case, noted that, in addition to the facts already detailed here, "in or about late 2013, LCS began to use [intermediaries] to engage directly with ISIS-connected suppliers for the purchase of raw materials and supplies."

Though the actions committed in Syria by the Syrian subsidiary of a French company did not directly involve the US, payment in US dollars is sufficient for the case to fall under US jurisdiction, according to US anti-terrorism (and country embargo) laws.

The case is groundbreaking and raises several issues related to corporate responsibility, which are too complex to cover here. However, this marks the first time in the U.S. that a corporation has been charged with providing material support and resources to foreign terrorist organizations, under the 18 U.S.C. § 2339B of the Antiterrorism Act ("**ATA**"). Until now, the U.S. government had only used the ATA to bring charges for material support to terrorism against individuals, making Lafarge the first company prosecuted under the "material support" provision of the ATA.

It is interesting to note that Lafarge merged in 2015 with Swiss cement maker Holcim Ltd ("**Holcim**"). According to the factsheet, Holcim was not involved in the wrongdoing, the companies said. Holcim "**did not conduct post-acquisition due diligence of the defendants' operations in Syria,**" but investigated the conduct when it came to light, court documents say. Notably, Lafarge did not voluntarily disclose the conduct to government authorities, nor did it fully cooperate with the DOJ's investigation.

The Swiss group stresses that this affair “does not involve Holcim, which has never operated in Syria, nor any operation or employee of Lafarge in the United States”, and had been hidden from it. The group also notes that it continues to cooperate fully with the investigation by the French authorities on the same subject, but also says it is ready to “defend itself against any legal action that it considers unjustified”.

## Conclusions

Based on the Lafarge case study, it is evident that corporations face risks relating to their human rights conduct and obligations that extend beyond their own actions to those of their subsidiaries in third countries. Such risks also extend across jurisdictions. Companies face the risk of ramifications for their activities and should take action to ensure they do not risk violating human rights.

It is therefore crucial for businesses to proactively identify potential human rights violations and take swift action to prevent them. Failure to do so can result in severe consequences, criminal and civil alike, as well as damage to the company's reputation. Overall, the Lafarge case serves as a reminder that corporations must identify their human rights obligations, in particular in complex cross-border situations, and work to implement them effectively, for both themselves and other companies in their group.

It is therefore desirable for companies to assess their compliance programs and due diligence practices when it comes to both new business ventures and current clients.

Our practice can support this assessment by advising on the applicable regulatory human rights framework applicable to companies and devising internal policies to ensure compliance with this framework and avoid liability risks.

\* This update is designed to provide general information only, it is not a full or complete analysis of the matters presented, and may not be relied upon as legal advice.

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1 U.S. v. Lafarge et al., case number 1:22-cr-00444, in the U.S. District Court for the Eastern District of New York.

2 A copy of the plea agreement – and other relevant documents – can be found here: <https://www.justice.gov/usao-edny/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist>.

3 Article 9 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17th June, 2008 on the law applicable to contractual obligations.

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## Key Contacts



**Nir Keidar**  
Partner



**Dr. Myriam Feinberg**  
Senior Associate