

Business and Armed Non-State Groups: Challenging the Landscape of Corporate (Un)accountability in Armed Conflicts

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I. INTRODUCTION

The involvement of corporations in armed conflicts, and their contribution towards international crimes, have been recognized since the Nuremberg tribunals and have been addressed by various United Nations (UN) bodies. However, there have been few judicial attempts to ensure corporate accountability for international crimes. When realized, these attempts usually raise the issue of possible corporate complicity by a state, while setting aside potential corporate contribution to crimes committed by armed non-state groups (ANSG). Yet economic and armed non-state actors increasingly operate through their transnational activities. International Public Law (IPL) excludes them from any international regulation or accountability process. International Humanitarian Law (IHL), the law of war, as a branch of IPL is an exception to this because it also regulates the behaviour of non-state actors. Recent developments pertaining to the potential liability of business entities for involvement in international crimes, particularly when related to the activities of ANSGs, challenge the traditional doctrine of international law and demonstrate the need for its norms to adapt to an evolving reality.

II. BUSINESS AND ARMED GROUPS IN THE CONTEXT OF THE *LAFARGE* CASE

On 7 November 2019, the French Court of Appeals in Paris dropped charges of crimes against humanity against the cement company, Lafarge.¹ The company was accused of buying raw materials in Syria from various ANSGs – including presumed terrorist groups

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¹ Official documents of the French Court of Appeals are not made public.

such as the Islamic State of Iraq and the Levant (ISIL) – between 2011 and 2014.² The case was originally brought before the specialized War Crimes and Crimes Against Humanity Unit of the Paris *Tribunal de Grande Instance* (Office of the Public Prosecutor³), which has several other cases related to corporate criminal liability for international crimes ongoing. While the creation of this specialized unit is part of the French strategy to cooperate with the International Criminal Court (ICC) and international criminal justice mechanisms in general,⁴ its main objective is not to prosecute corporations for their alleged contributions to international crimes, but rather to focus on prosecuting persons accused of participating in the 1994 Rwandan genocide and other places where prosecutions are unlikely to take place.⁵ The *Lafarge* case, although currently awaiting appeal in the French Supreme Court, highlights the realities of business relationships with ANSG as well as the difficulties in investigating and prosecuting them.⁶ The case opened in 2017 with an investigation of Lafarge on charges of financing terrorism. In 2018, the French investigative judge added new charges of complicity in crimes against humanity that were then dropped by the Paris Appeal Court, maintaining only charges of financing terrorism.

Under French law there is an important difference in establishing the link between Lafarge and the two crimes: financing of terrorism and crimes against humanity, which are at the heart of the *Lafarge* proceedings. The criminalization of the financing of terrorism is particularly extensive and allows for the prosecution of all persons (natural and legal) who in some way participate in the financing of terrorism, as long as they are aware of the intended use of the funds for that purpose. To constitute the offence of terrorist financing, it is not necessary that the funds raised were used; it is sufficient that they were raised for the purpose of committing a terrorist act, which also allows prosecution of attempt as an offence.⁷ To constitute a crime against humanity, the funds provided – to different groups in Syria in this specific case – needed to be attached to specific underlining crime of a crime against humanity that was committed in a specific context, which is extremely challenging to prove.

From a logistical point of view, the specialized unit of the *Tribunal de grand instance* exercises quasi-universal jurisdiction⁸ and must comply with the principle

² 'Lafarge lawsuit (re complicity in crimes against humanity in Syria)', *Business & Human Rights Resource Centre*, <https://www.business-humanrights.org/en/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria> (accessed 13 February 2020).

³ French Code of Criminal Procedure, French Law No. 2011–1862 (13 December 2011, establishing the 5th Division), art 682.

⁴ French law no. 2002–268 (26 January 2002) and no. 2010-930 (9 August 2010).

⁵ 'Qu'est-ce que le pôle "crimes de guerre" saisi dans l'affaire Ahmed H., cadre présumé de Daesh?', *BFMTV* (8 June 2018), <https://www.bfmtv.com/police-justice/qu-est-ce-que-le-pole-crimes-de-guerre-saisi-dans-l-affaire-ahmed-h-cadre-presume-de-daesh-1466964.html> (accessed 10 February 2020).

⁶ Special Court for Sierra Leone, Trial Chamber II, *The Prosecutor v Charles Ghankay Taylor*, 'Judgment', SCSL-03-1-T (18 May 2012). UN Security Council, 'Resolution 2127', S/RES/2127 (5 December 2013), para 16.

⁷ French Criminal Code, art 421-2-2.

⁸ The unit has jurisdiction over crimes against humanity, war crimes, torture and forced disappearances committed in application of the classic criteria of jurisdiction of French courts, but also extraterritorial jurisdiction, when crimes are committed abroad on foreign victims by one or more foreign perpetrators who are present in France or have their residence there. Devos Aurélie, 'Juger le passé au présent: une promesse pour l'avenir?' (2014), 4 *Les Cahiers de la Justice* 553.

of complementarity of the ICC.⁹ In order to fulfil their task, the magistrates are granted broad powers under the 2011 law which created the Unit, allowing them to conduct investigations and interviews abroad.¹⁰ However, in order to investigate crimes against humanity on Syrian territory, the magistrates must request authorization from the Syrian government through diplomatic channels. This part of the procedure is confidential, but it seems safe to conclude that the current Syrian government has not been cooperative given that the same specialized unit has several other ongoing investigations directly implicating the Syrian regime (based for the most part on the ‘César Report’¹¹). Without direct access to the places of alleged crimes, it will be difficult to prove that Lafarge committed a crime against humanity, with the threshold being higher than the financing of terrorism, as explained above.

Finally, there is a political argument. Although less known than Dassault or Total, Lafarge is a strategic corporation in the French economic system. It is therefore unsurprising that Lafarge attempted to implicate the French government as part of its defence.¹² Not only did Lafarge claim that France was informed of its activities in Syria, but also that the government encouraged it to continue operating in Syria, particularly because ending cement production and reopening it again is very costly. It would not be surprising if the complex web of relationships involved does not affect the scope of investigations and eventual prosecutions that may be necessary.¹³

III. THE TRANSFORMATION OF CONTEMPORARY ARMED CONFLICTS AND NEW BUSINESS RELATIONSHIPS

Shortly after the French Court of Appeal’s decision, the ICRC submitted its fifth report on ‘International humanitarian law and the challenges of contemporary armed conflicts’ to the 33rd International Conference of the Red Cross and Red Crescent (ICRC). The ICRC report highlights the transformation of modern warfare and notes the multiplication of ANSGs in contemporary armed conflicts. As the report states, ‘[a] central feature of the changing geopolitical landscape of the last decade has been the proliferation of non-state armed groups. In some of the most complex recent conflicts, analysts observed hundreds,

⁹ Florence Bellivier and Marina Eudes, ‘Le pôle “crimes internationaux” du TGI de Paris: une prometteuse spécialisation de la justice française dans la lutte contre l’impunité des crimes les plus graves’ (2014), 21 *Revue de droit pénal et de criminologie* 19.

¹⁰ French Code of Criminal Procedure, art 93-1.

¹¹ ‘Crimes contre l’humanité: bilan du pôle du TGI de Paris’, *French Ministry of Justice* (17 October 2018), <http://www.justice.gouv.fr/justice-penale-11330/crimes-contre-lhumanite-bilan-du-pole-du-tgi-de-paris-31897.html> (accessed 10 February 2020). See also, ‘Crimes contre l’humanité en Syrie: une cellule spécialisée enquête en France’, *BFMTV* (2 October 2015), <https://www.bfmtv.com/international/crimes-contre-l-humanite-en-syrie-une-cellule-specialisee-enquete-en-france-919463.html> (accessed 10 February 2020).

¹² ‘Lafarge en Syrie: Le Rôle de la Diplomatie Française en Question’, *Novethic* (2 February 2018), <https://www.novethic.fr/actualite/gouvernance-dentreprise/entreprises-controversees/isr-rse/lafarge-en-syrie-le-role-de-la-diplomatie-francaise-en-question-145397.html> (accessed 10 February 2020).

¹³ Human Rights Council, *Relationship Between Private Military and Security Companies and the Extractive Industry from a Human Rights Perspective*, A/HRC/42/42 (29 July 2019).

if not thousands, of groups engaging in armed violence'.¹⁴ The ICRC is tasked with monitoring armed conflicts around the world and has authority in the field of international humanitarian law (IHL). The organization's findings thus merit consideration in the context of business and human rights.

States are no longer the sole participants in armed conflicts. The changing nature of conflicts and the increase in asymmetric warfare raise concerns about how to hold accountable non-state actors not formally bound by international law. While several bodies of law apply in armed conflict, IHL is the predominant legal regime specifically tailored for the exceptional circumstances of both international and non-international armed conflict. IHL applies to state and non-state actors, regardless of extraneous considerations such as the objective of the former or the ideology of the latter. It constitutes an exception to the normative approach of public international law; by not requiring that non-state actors have recognized international legal personality as a precondition to the imposition of direct international obligations on them.¹⁵

In order to sustain operations, ANSGs often rely on financial¹⁶ and military means¹⁷ that are provided by or involve engagement with business entities. In some places, like Libya,¹⁸ where certain ANSGs exercise state-like functions or *de facto* authority,¹⁹ or in Somaliland or Sahara Occidental²⁰ where ANSGs act like a state entity, such groups depend heavily on business relationships in order to exercise authority and control over the territory. However, corporations and businesses can support ANSGs even in cases where the groups are fragmented and do not exercise any particular state-like functions.²¹ Due to lack of ANSGs' recognized legal personality, business relationships between them and corporations are most likely implemented through opaque and non-transparent arrangements. These factors contribute to the difficulty in investigating and proving corporate complicity and assistance to armed groups.

Finally, violations of IHL raise questions regarding the applicability of International Criminal Law (ICL). Regardless of their level of control over or authority in a given territory, armed groups are obliged to 'respect and ensure respect for international

¹⁴ ICRC, *International humanitarian law and the challenges of contemporary armed conflicts: recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions*, 33IC/19/9.7 (Geneva: ICRC, 2019), 39.

¹⁵ Geneva Conventions of 12 August 1949, 75 UNTS 970, common art 3. *US v Alfred Krupp et al*, United States Military Tribunal III (1948), 1352–1353.

¹⁶ UN Security Council, 'Letter dated 6 December 2019 from the Panel of Experts on the Central African Republic extended pursuant to resolution 2454 (2019) addressed to the President of the Security Council', S/2019/930 (14 December 2019), paras 144, 151–152, 156–157.

¹⁷ *Ibid*, paras 72–78, 141.

¹⁸ UN Security Council, 'Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council', S/2019/914 (9 December 2019).

¹⁹ Annyssa Bellal, 'What are Armed Groups? Focus on State-like Entities and De Facto Authorities', *Geneva Academy* (2018).

²⁰ Court of Justice of the European Union, Grand Chamber, *Council of the European Union v Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario) and European Commission*, 'Appeals Judgement', C-104/16 P (21 December 2016).

²¹ UN Security Council, note 16. TRIAL International, Open Society Justice Initiative, 'Pillage: Swiss Businessman Under Criminal Investigation for War Crimes in the DRC' (12 December 2019), https://trialinternational.org/wp-content/uploads/2019/12/press-kit_EN_LowRes__12.12.pdf.

humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.²² According to interpretation of Rule 139 of customary IHL, armed groups also have the ‘obligation to ensure respect for international humanitarian law’²³ which could technically apply to its business relationships as long as armed groups can exercise some control over companies. War crimes may be committed in non-international armed conflicts²⁴ and perpetrators of war crimes can also be civilians, a definition which should include corporations.²⁵ Thus whenever corporations commit a crime or contribute to crimes committed by ANSGs, including war crimes, they should be able to be held criminally liable. The question arises of *how* corporations can be held liable for involvement in international crimes, together with ANSGs, when the complicity of corporations in *state* crimes are confronted with so many legal and political obstacles?

IV. IS THE ICC THE MOST REALISTIC SOLUTION FOR CORPORATE CRIMES?

Twenty years after excluding corporate liability from the Rome Statute and sixteen years after the first press release on the issue of businesses contributing to crimes in armed conflicts,²⁶ the ICC’s Prosecutor, Fatou Bensouda, stated on November 2019 that the ‘ICC may exercise jurisdiction over persons who, through business activities, either contribute or directly commit international crimes under the Rome Statute.’²⁷

The efforts undertaken by UN bodies and through soft law initiatives have proven to be insufficient to prevent corporations from contributing to armed conflicts and international crimes. Yet, because the nature of international crimes affects humanity, corporate contributions should be prosecuted. It would be timely for the ICC to investigate the socio-economic aspects, the root causes and the role of external actors to the conflict, which could help to correct the neo-colonial narrative that violence is specific to third world countries while reiterating the legitimacy of the ICC.

Furthermore, because no single state alone can deal with such crimes, ICL and the ICC present the best avenues for prosecuting complex crimes conducted by a web of national and multinational actors through obscure, transnational relationships. While the traditional doctrine of international law approaches the corporate responsibility through the state responsibility (for a company’s prohibited conduct), ICL can encompass corporate liability, including when corporations contribute to international

²² Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Geneva: ICRC, 2005), rule 139.

²³ *Ibid.*

²⁴ *Ibid.*, rule 156.

²⁵ *Ibid.*

²⁶ International Criminal Court, ‘*Communications Received by the Office of the Prosecutor of the ICC*’ (The Hague: ICC, 2003). It should be noted that, to this day, only one businessman was indicted. ICC, Trial Chamber V (A), *The Prosecutor v William Samoei Ruto et al.*, ‘Public redacted version of Decision on Defence Applications for Judgments of Acquittal’, ICC-01/09-01/11-2027 (5 April 2016).

²⁷ XXth International Congress of Penal Law (4 November 2019) (discourse pronounced via video).

crimes committed by ANSGs.²⁸ International criminal justice mechanisms can bypass the debate on the legal personality of companies and address the responsibility of a complex multinational structure through the notion of command responsibility whether they are civilian or military. By deploying tools such as the positive complementarity, the Court could work with all states affected by the prohibited conduct of the same company.

Nevertheless, the statement pronounced by Prosecutor Bensouda involves the Office of the Prosecutor under her mandate. The incoming Prosecutor will not be bound by this strategy and could determine their own prosecutorial strategies in accordance with their vision of case priorities.

V. THE WAY FORWARD

Although it is the most delicate task during a conflict or immediately *ex post*, gathering data concerning abuses remains essential. There cannot be effective accountability of corporations, if at start of the procedure, investigations are limited. At a national level, the *Lafarge* case demonstrates the limits of conducting technical investigations of complex relationships across borders. At an international level, the state-centred approach limits official investigative bodies to examine the role of corporate actors in international crimes. Different fact-finding missions and investigative mechanisms, by documenting corporate crimes and their impacts on society, could directly relate their wrongdoing to the protection of international peace and security and contribute to establishing truth.

In addition, non-state actors and their inter-relationships should be seriously taken into consideration by ongoing negotiations on an international legal framework for corporate liability, within the Office of the High Commissioner for Human Rights or in the context of the Rome Statute. Now is a good opportunity to reflect on the most suitable solution to fight against corporate impunity and ensure corporate accountability for the international crimes.

²⁸ Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Utrecht: Intersentia, 2010). Sandra Wisner, 'Criminalizing Corporate Actors for Exploitation of Natural Resources in Armed Conflict: UN Natural Resources Sanctions Committees and the International Criminal Court', *Journal of International Criminal Justice* (2018) 963.