

Terrorism – Terrorist financing – Intention –  
Provision of funds in the knowledge that they are  
to be used for a terrorist act – aiding and  
abetting crime against humanity

07/09/2021



Ruling of 7 September 2021, appeal no. 19-87.367

**Ruling from the Criminal Chamber of 7 September 2021, appeal no.°19-87.367**

**TERRORISM**

### 1. On the financing of a terrorist undertaking

It follows from Article 421-2-2 of the Criminal Code that the offense of financing of a terrorist undertaking can be established if the author of the financing knows that the funds provided are intended to be used by the terrorist undertaking to commit a terrorist act, whether or not this act occurs, regardless of whether he or she intends to see the funds used for this purpose.

The investigating chamber must be approved for concluding that there were sufficient charges for a company to stand trial if its reasoning and legal findings, based on its assessment of the facts, to which the Cour de cassation must defer, shows that the company under investigation and its subsidiary in Syria paid, through intermediaries, several million dollars to the organisation known as the Islamic State and to other terrorist groups in order to secure the transportation of employees employed locally, whereas it was clear from its findings that the company could not have been unaware of the terrorist nature of this organisation.

### 2. On the endangerment of the lives of others

In order to determine whether the offence of endangerment of the lives of others, incriminated by Article 223-1 of the Criminal Code, can be imputed to a parent company due to the dangers to which the employees of a subsidiary under foreign law may have been exposed, the judges are allowed to establish either the existence of a link of subordination of these employees to the parent company, or, beyond the necessary coordination of economic actions between the parent company and its subsidiary and the state of economic domination that this affiliation may engender, a permanent interference by the parent company in the economic and social management of the employing company, leading to the total loss of autonomy of action by the latter.

However, it is still up to them, first of all, to determine, in particular with regard to EC Regulation No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), including Articles 8 and 9, and, where applicable, other international treaties, which provisions are applicable to the employment relationship between the parent company and the employees of its foreign-law subsidiary.

It is then up to them to determine which of these provisions may contain a particular duty of care, within the meaning of Article 223-1 of the Criminal Code, which may have been disregarded.

In confirming the charges against the parent company for endangering the lives of its subsidiary's employees, the investigating chamber ruled when it held that there had been a manifestly deliberate violation of the employer's specific obligations set out in Articles R. 4121-1 and 2 and R. 4141-13 of the Labour Code, without making sufficient findings regarding the applicability of the French Labour Code.

### 3. On aiding and abetting crimes against humanity

In view of the first paragraph of Article 121-7 of the Criminal Code, a person is an accomplice to a crime or offence if he or she knowingly, by aid or assistance, facilitated its preparation or commission.

Aiding and abetting should not be defined differently from ordinary law when crimes against humanity are involved.

The characterisation of such a crime, which must relate to each of its constituent elements, implies, in the case of Article 212-1 of the Criminal Code, in particular, the demonstration of the existence, in the person of the perpetrator, of a concerted plan against a group of the civilian population within the framework of a widespread or systematic attack, this crime not being reduced to the ordinary law crimes that it implies.

On the other hand, Article 121-7 of the Criminal Code does not require the accomplice to a crime against humanity to belong to the organisation, if any, guilty of this crime, nor does it require that he or she participate in the design or execution of such a concerted plan, nor does it require that he or she approve the commission of ordinary law crimes constituting the crime against humanity.

It is sufficient that he or she has knowledge that the principal perpetrators are committing or about to commit such a crime against humanity and that by his or her aid or assistance, he or she facilitates its preparation or commission.

Consequently, the investigating chamber erred when, in order to set aside the charges against a company for aiding and abetting crimes against humanity, it held that the company's financing of an organisation likely to be in the process of committing crimes against humanity was intended to allow it to continue its own activities in a zone in the throes of civil war and then controlled by the said organisation, and therefore did not manifest the intention of the company charged to associate itself with crimes against humanity perpetrated by this entity, whereas the payment of several million dollars with full knowledge of the facts to an organisation whose purpose is only criminal is sufficient to characterise being an accessory after the fact, regardless of whether the accomplice is acting in pursuit of a commercial activity, a circumstance that is part of the motive and not of the intentional element.

Partial Quashing

Dismissal

Non-admission

Inadmissibility

MR SOULARD, President,

F R E N C H R E P U B L I C

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IN THE NAME OF THE FRENCH PEOPLE

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**RULING OF THE *COUR DE CASSATION* (COURT OF CASSATION), CRIMINAL CHAMBER, OF 7 SEPTEMBER 2021**

The associations, European Center for Constitutional and Human Rights and Sherpa, Mr [YJ] [G], Mr [RM] [XC] [E], Mr [O] [U], Mr [BQ] [W], Mr [T] [NK] [Z], Mr [JT] [CW] [K], Mr [Y] [GC], Mr [QQ] [M] [RB], Mr [MZ] [UH], Mr [Q] [DH], Mr [BG] [N], Mr [P] [KE], Mr [YJ] [I], Ms [C] [J], Ms [X] [AG], as civil parties, and Lafarge SA have lodged *appeals* against ruling no. 8 of the investigating chamber of the *cour d'appel* (Court of Appeal) of Paris, 2nd section, dated 7 November 2019, which, in the investigation against Lafarge SA on charges including aiding and abetting crimes against humanity, financing of a terrorist undertaking and endangering the lives of others, declared inadmissible the pleadings of the European Center for Constitutional and Human Rights and Sherpa associations, and ruled on Lafarge SA's application to have the charges against the company quashed.

The European Center for Constitutional and Human Rights and Sherpa associations, civil parties, have lodged an appeal against ruling no. 5 of the investigating chamber of the *cour d'appel* (Court of Appeal) of Paris, 2nd section, dated 7 November 2019, which, in the investigation against Mr [F] [KP] on charges of financing a terrorist undertaking and endangering the lives of others, declared inadmissible the written submissions of the said associations and ruled on Mr [KP]'s application for the setting aside of the charges against him and documents of the proceedings.

Mr [B] [R] lodged an appeal against ruling no. 7 of the investigating chamber of the *cour d'appel* (Court of Appeal) of Paris, 2nd section, dated 7 November 2019, which, in the investigation against him for, inter alia, financing of a terrorist undertaking, endangering the lives of others and customs offences, declared the pleadings of the European Center for Constitutional and Human Rights and Sherpa associations inadmissible and ruled on his application to have the charges

against him and documents of the proceedings quashed.

By an order of 9 December 2019, the President of the Criminal Chamber ordered that the *appeals* against ruling no. 8 be joined under no. 19-87.367 and ordered that they be examined by the Criminal Chamber.

By an order on the same day, the President of the Criminal Chamber ordered that the *appeal* lodged against ruling no. 5, under no. 19-87.376, be submitted to the Criminal Chamber and joined to the *appeals* lodged under no. 19-87.367.

By an order of 11 December 2019, the President of the Criminal Chamber ordered that the *appeal* lodged against ruling no. 7, under no. 19-87.662, be joined to the *appeals* lodged under no. 19-87.367 and be submitted to the Criminal Chamber.

Statements of claim and defence and additional observations were submitted.

On the report of Mr Barbier, Judge Referee (*conseiller référendaire*), the observations of SCP Bauer-Violas, Feschotte-Desbois and Sebagh, lawyers for the European Center for Constitutional and Human Rights and Sherpa associations, of Ms [C] [J], Ms [X] [AG], civil parties, the observations of SCP Zribi et Texier, lawyers for Mr [Y] [G], Mr [RM] [XC] [E], Mr [O] [U], Mr [BQ] [W], Mr [T] [NK] [Z], Mr [JT] [CW] [K], Mr [Y] [GC], Mr [QQ] [M] [RB], Mr [MZ] [UH], Mr [Q] [DH], Mr [BG] [N], Mr [P] [KE], Mr [Y] [I], civil parties, the observations of SCP Spinosi, lawyer for Lafarge SA, the observations of SCP Lyon-Caen et Thiriez, lawyer for Mr [V] [GN], the observations of Cabinet Munier-Apaire, lawyer for Mr [B] [R], the observations of SCP Célice, Texidor, Pérrier, lawyer for Mr [D] [A], and the conclusions of Mr Desportes, First Advocate-General, the lawyers having spoken last, after the arguments in the public hearing of 8 June 2021, at which were present Mr Soulard, President, Mr Barbier, Reporting Judge, Mr Bonnal, Ms Ménotti, Mr Maziau, Ms Labrousse, Mr Seys, Mr Dary, Ms Thomas, Judges of the Chamber, Ms de Lamarzelle, Mr Violeau, Reporting Judges, Mr Desportes, First Advocate-General, and Ms Boudalia, Chamber Registrar the Criminal Chamber of the *Cour de cassation* (Court of cassation), composed of the above-mentioned President and Judges of the Chamber, having deliberated in accordance with the law, has delivered the present ruling.

## Facts and procedure

1. The following results from the ruling under appeal and the documents of the proceedings.
2. Lafarge SA (Lafarge), a French company with its headquarters in [Location 2], built a cement plant near Jalabiya, Syria, at a cost of several hundred million euros, which was commissioned in 2010. This cement plant is owned and operated by one of its subsidiaries, Lafarge Cement Syria (LCS), which is incorporated under Syrian law and is more than 98% owned by the parent company.
3. Between 2012 and 2015, the territory on which the cement plant is located was subject to fighting and occupation by various armed groups, including the Islamic State (IS).
4. During this period, the Syrian employees of LCS continued to work, allowing the cement plant to operate, while the foreign management was evacuated to Egypt starting in 2012, from where they continued to organise the plant's activities. Housed in [Location 1] by their employer, the Syrian workers were exposed to various risks, including extortion and kidnapping by different armed groups, including the IS.
5. At the same time, LCS paid money, through various individuals, to different armed factions that successively controlled the region and were in a position to jeopardize the cement plant's operations.
6. It was evacuated as a matter of urgency in September 2014, shortly before the IS seized it.

7. On 15 November 2016, the Sherpa and European Center for Constitutional and Human Rights (ECCHR) non-governmental organizations, as well as eleven Syrian employees of the company LCS, filed a complaint and a civil action with the investigating judge on charges including financing of a terrorist enterprise, aiding and abetting war crimes and crimes against humanity, abusive exploitation of the labour of others and endangering the lives of others.
8. On 9 June 2017, the public prosecution asked the investigating judge to investigate the acts of financing a terrorist enterprise, subjecting several people to working conditions incompatible with human dignity and endangering the lives of others.
9. Mr [KP], Security Director of the Lafarge Group from 2008 to 2015, was charged on 1 December 2017 with the above-mentioned counts.
10. Mr [R], Managing Director of LCS from July 2014 to August 2016, was charged on the same day, also with the above-mentioned counts.
11. Lafarge was charged on 28 June 2018 with counts including aiding and abetting crimes against humanity, financing of a terrorist enterprise, and endangering the lives of others, following the prosecution's request of 27 June 2018.
12. By application dated 31 May 2018, Mr [KP] applied to the investigating chamber to have, inter alia, the charges against him voided.
13. By application dated 1 June 2018, Mr [R] also applied to the investigating chamber, challenging the regularity of some parts of the investigation and of the charges against him.
14. Ms [J] and Ms [AG], Yazidi victims of the IS, filed a civil claim in the criminal proceedings on 30 November 2018.
15. By application dated 27 December 2018, Lafarge referred the matter to the investigating chamber for a ruling on the validity of the charges against the company.
16. The investigating chamber of the *cour d'appel* (Court of Appeal) of Paris, in three rulings of 24 October 2019, declared the civil party constitution of the Sherpa and ECCHR associations inadmissible. *Appeals* were lodged against these decisions.

[...]

## Reviewing pleas

[...]

On the second plea submitted on behalf of Lafarge against the ruling of investigating chamber no. 8 of 7 November 2019

## Statement of plea

36. The plea objects to the ruling insofar as it rejected the request to set aside the charges against Lafarge of financing terrorism, whereas:

"1°/ It follows from Article 421-2-2 of the Criminal Code that the material element of the offence of financing a terrorist undertaking consists in "the act of financing a terrorist undertaking by providing, collecting or managing funds, securities or property of any kind or by giving advice to that end". By merely stating, in order to refuse to set aside the charges against the exhibitor on this count, that the payments made from LCS's treasury appear to have been made "with the

agreement, or even the instructions, of Mr [A]", when a simple agreement cannot be analysed as a provision of advice within the meaning of this text, the investigating chamber, which did not set out serious or concordant evidence making it likely that Mr [A] would have provided instructions, but merely hypothesised, did not justify its decision under Articles 80-1 of the Criminal Procedure Code and 421-2-2 of the Criminal Code;

2°/ In basing its decision, in order to declare that there were no grounds for setting aside the charges against Lafarge of financing terrorism, on the fact that Mr [L] was aware that LCS had made the disputed payments, when Article 421-2-2 of the Criminal Code does not punish knowledge of terrorist financing acts but rather the acts themselves, the investigating chamber did not justify its decision under Article 80-1 of the Criminal Procedure Code and Article 421-2-2 of the Criminal Code;

3°/ Finally, Lafarge was charged with financing terrorism for, firstly, having paid intermediaries in order to be supplied with raw materials by the "Islamic State" organisation, secondly, having paid commissions and taxes to the "Islamic State" organisation in order to guarantee the movement of employees and goods from the Jalabiyaplant (Syria) and, thirdly, for having sold the cement manufactured by the Jalabiya plant to the "Islamic State" terrorist organisation. In refusing to set aside the charges against Lafarge on this count, even in part, the Court held only that Lafarge was involved in the payment of transit fees to this terrorist organisation in order to secure the transport of employees and goods from the Jalabiya plant, while refraining from responding to the essential points in the written submission duly filed by Lafarge, which argued that it was materially impossible for its indirect subsidiary Lafarge Cement Syria to have obtained raw materials from a terrorist group and to have sold cement to it, the investigating chamber did not justify its decision under Articles 80-1 of the Criminal Procedure Code and 421-2-2 of the Criminal Code."

## Court's response

37. In refusing to set aside the charges against Lafarge for financing a terrorist undertaking, the ruling held, firstly, that an internal investigation and report, carried out at the request of the Lafarge-Holcim group, had revealed that payments of USD 15,562,261 had been made from the LCS's treasury through intermediaries, including in particular Mr [S] [EX], a Syrian businessman, to the armed groups that had successively taken control of the region where LCS operated (Free Syrian Army, Kurds and then the Islamic State), and secondly, that LCS's treasury was supplied with USD 86,000,000 by funds from Lafarge Cement Holding, a company incorporated under the laws of Cyprus, which is itself controlled by Lafarge.

38. The judges noted that these transactions were recorded manually, not in the usual electronic way, and that a dedicated account was created for the payments to Mr [EX], under the heading "representation expenses".

39. They add that the successive operational directors of LCS, Mr [GN] and then Mr [R], allowed the payments to Mr [EX] in order to secure the transportation of the employees of the plant through the various routes leading from their homes to their workplace, some of which were controlled by members of the IS. These payments were allowed with the agreement and even the instructions of their supervisor and hierarchical superior – working for Lafarge - Mr [A], of whom Mr [L], Chairman and CEO, was the direct superior.

40. The investigating chamber also noted that the terrorist nature of the IS could not be ignored by Lafarge, which was informed of the situation in Syria through the minutes of the weekly meetings of the Security Committee for Syria. It specified that during the meeting of 12 September 2013, it was stated that "since July, the logistical flows and the movement of personnel have been disrupted, and sometimes even blocked by the Islamists, AN and ISIS (...), that the presence of these Islamist groups constitutes a threat for us (...), that it is becoming increasingly difficult to operate without having to negotiate directly or indirectly with these networks classified as terrorists by international organisations and the United States".

41. Finally, it notes that Resolution 2170/2014 of the United Nations Security Council includes the IS, in addition to the Al Nosra Front, among the terrorist organisations to which it prohibits all financial support and commercial exchanges.

42. In the light of these statements, which are the result of its sovereign assessment of the facts, and which show that Lafarge and its local subsidiary may have been led to negotiate, even indirectly, with the IS or other terrorist groups with a view to maintaining logistical flows, so that the applicant cannot criticise the judges for not having positively established the factual impossibility for LCS to have obtained raw materials from IS or to have sold cement to it, the investigating chamber decided on grounds that were free of both insufficiency and contradiction.

43. Indeed, it follows from the provisions of Article 421-2-2 of the Criminal Code that it is sufficient for the facts to be established that the author of the financing knows that the funds provided are intended to be used by the terrorist undertaking to commit a terrorist act, whether or not this act occurs, regardless of whether he or she intends to see the funds used for this purpose.

44. As a result, the pleas must be dismissed.

But on the third plea, in its first, second, third, fifth and sixth parts, and on the fourth plea, in its second part, put forward on behalf of Lafarge against the ruling of investigating chamber no. 8 of 7 November 2019.

## Statement of plea

45. The third plea objects to the ruling under appeal insofar as it rejected the request to set aside the charges against Lafarge of endangering the lives of others, whereas:

“1°/ The relationship of subordination, which is necessary for the existence of an employment contract, is characterised by the performance of work under the authority of an employer who has the power to give orders and directives, to control their execution and to sanction the failures of their subordinate. In the present case, by limiting itself to retaining the existence of an “effective authority” of Lafarge exercised over the Syrian plant, without determining its content and, above all, without specifying whether or not there was a subordinate relationship characterised by the performance of work under the authority of an employer who has the power to give orders and directives, to control their execution and to sanction the failings of its subordinates, the investigating chamber deprived its decision of a legal basis under Articles L. 1221-1, R. 4121-1, R. 4121-2 and R. 4141-13 of the Labour Code, and 223-1 of the Criminal Code.

2°/ An employee working for a subsidiary company, to which they deploy their work force and from which he or she receives orders and requests instructions, is subordinate to the subsidiary, regardless of the capital and group links existing between the subsidiary and its parent company. In the present case, by relying solely on the circumstances of capital links, characterised by indirect control of 98.7% (sic), and an integrated group structure between Lafarge and its subsidiary LCS, to impose on the parent company obligations that are incumbent on the employer, without showing how this system goes beyond the relations that can exist within a group of companies, and without specifying on what basis the parent company should be considered as the employer of the employees of its Syrian subsidiary, the investigating chamber deprived its decision of a legal basis under Articles L. 1221-1, R. 4121-1, R. 4121-2, R. 4141-13 of the Labour Code, L. 225-1 of the Commercial Code and 223-1 of the Criminal Code.

3°/ In the presence of an apparent employment contract, its existence is presumed, unless proof of its fictitious nature is provided. In the present case, by merely stating that the employees of the Syrian factory had been “employed under the cover of contracts under Syrian law” concluded with LCS and concluding that it was Lafarge that would be bound, with regard to them, by the obligations incumbent on the employer, bringing out neither the allegedly fictitious nature of these contracts under Syrian law, nor the existence of a body of evidence capable of establishing the presence of a relationship of subordination, characteristic of the existence of employment contracts, between Lafarge and these same employees of the Syrian plant, the investigating chamber deprived its decision of a legal basis under Articles L. 1221-1, R.

4121-1, R. 4121-2, R. 4141-13 of the Labour Code and 223-1 of the Criminal Code.

5°/ No one is criminally liable except for his or her own actions. In the present case, by refusing to set aside the charges against Lafarge of endangering the lives of others by infringing the safety obligations provided for in Articles R. 4121-1, R. 4121-2, and R. 4141-13 of the Labour Code, which are only incumbent on the employer, whereas the employees allegedly put in danger were not employed by Lafarge, but by its Syrian subsidiary, LCS, the investigating chamber, which disregarded the principle of criminal liability for personal acts, infringed Articles 121-1 and 223-1 of the Criminal Code.

6°/ The existence of capital and group links between two companies cannot, as such, give rise to criminal liability on the part of the parent company for its subsidiary, in particular when the latter is only indirectly controlled. In this case, by basing itself solely on the existence of such links, marked by an indirect participation of Lafarge in the capital of LCS and by the existence of a strong decision-making power of the parent company on the policy of its subsidiaries, particularly in terms of employee safety, in order to hold that Lafarge could have incurred criminal liability as a result of acts committed by its subsidiary, the investigating chamber disregarded the principle of criminal liability for personal acts and infringed Articles 121-1 and 223-1 of the Criminal Code.

46. The fourth plea objects to the ruling under appeal on the same grounds, whereas:

“2°/ The investigating chamber rejected the request to set aside the charges against Lafarge of endangering the lives of others to the detriment of several employees of its indirect subsidiary, LCS. It was held that the personnel of the factory operated by the latter had not received adequate training in the event of an attack, and that the single safety document did not appear to have been updated in accordance with the development of military operations in the zone where the factory was located. However, LCS, a company under Syrian law operating in Syria and bound to its employees by contracts under Syrian law, was not subject to the specific safety obligations provided for under French law, and in particular those set out in Articles R. 4121-1, R. 4121-2 and R. 4141-13 of the Labour Code. The investigating chamber, in so doing, did not justify its decision under Articles 223-1 of the Criminal Code and 80-1 of the Criminal Procedure Code.”

## Court's response

47. The pleas are joined.

In view of Articles 223-1 of the Criminal Code and 593 of the Criminal Procedure Code:

48. The first of these texts punishes the fact of directly exposing others to an immediate risk of death or injury likely to result in permanent mutilation or disability through the manifestly deliberate infringement of a particular obligation of safety or caution provided for by law or regulation.

49. According to the second of these texts, any judgment or ruling must include the reasons for the decision. Insufficient or contradictory reasons are tantamount to their absence.

50. The ruling upheld the order of the investigating judge and the charges against Lafarge of endangering the lives of others through the manifestly deliberate infringement of the employer's specific obligations set out in Articles R. 4121-1 and R. 4121-2 and R. 4141-13 of the Labour Code, arising from the general safety obligation imposed on all employers with regard to their employees, as set out in Articles L. 4121-1 to L. 4121-3 of the Labour Code. In so doing, the ruling noted that although the personnel concerned at the plant operated by LCS had been employed under Syrian law, they had not received adequate training in the event of an attack and that their evacuation, when the site was taken over by IS fighters on 19 September 2014, had only been made possible by the use of suppliers' vehicles, as those made available by the company had proved insufficient in number.

51. The judges added that LCS is a subsidiary indirectly controlled to the tune of 98.7% by Lafarge, while the statements of Mr [R], operational director of LCS, suggest that decisions on employee safety were taken at the level of the parent company's management.
52. The investigating chamber concluded that there appeared to be serious or corroborating evidence to suggest that the employees of the Syrian plant were under the effective authority of Lafarge.
53. The judges were right to point to serious or corroborating evidence, either of the existence of a link of subordination between the Syrian employees and Lafarge, or, beyond the necessary coordination of economic actions between Lafarge, the parent company, and LCS, its subsidiary, and the state of economic domination that this affiliation may engender, of permanent interference by the parent company in the economic and social management of the employer company, leading to the total loss of autonomy of action by the latter (Soc., 6 July 2016, *appeal* no. 15-15.493, Bull. 2016, V, no. 147; Soc., 25 November 2020, *appeal* no. 18-13.769, in the process of being published).
54. However, the investigating chamber could not deduce the applicability of the French Labour Code from these findings alone.
55. It had to investigate, first of all, with regard to EC Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), including Articles 8 and 9, and, if necessary, other international treaties, which provisions were applicable to the employment relationship between Lafarge and the Syrian employees.
56. It was then up to the investigating chamber to determine which of these provisions were likely to contain a particular duty of care, within the meaning of Article 223-1 of the Criminal Code, which may have been disregarded (Crim., 13 November 2019, *appeal* no. 18-82.718, published)
57. The decision must therefore be quashed on this count.

And on the second plea put forward on behalf of the ECCHR association and of Ms [C] [J] and Ms [X] [AG] against the ruling of investigating chamber no. 8 of 7 November 2019

And on the single plea put forward on behalf of Mr [YJ] [G], Mr [RM] [XC] [E], Mr [O] [U], Mr [BQ] [W], Mr [T] [NK] [Z], Mr [JT] [CW] [K], Mr [Y] [GC], Mr [QQ] [M] [RB], Mr [MZ] [UH], Mr [Q] [DH], Mr [YJ] [I], Mr [P] [KE], and Mr [BG] [N], against the ruling of investigating chamber no. 8 of 7 November 2019

## Statement of pleas

58. The second plea, submitted on behalf of the ECCHR association, Ms [C] [J] and Ms [X][AG], criticises the ruling under appeal insofar as it declared the charges against Lafarge of aiding and abetting crimes against humanity null and void, whereas:

"1°/ The investigating judge may investigate persons against whom there is serious or corroborating evidence making it likely that they may have participated, as perpetrator or accomplice, in the commission of the offences referred to him or her. Article 80-1 of the Criminal Procedure Code does not require that the constituent elements of the offence be established, but only that the possibility of the participation of the person concerned in the offence be likely. The investigating chamber maintained that there was no evidence of guilty intent on the part of Lafarge, in order to quash its charges of aiding and abetting crimes against humanity. It did however note that the necessity of the existence, at the time the charges were made, of serious or corroborating evidence required by Article 80-1 could not be confused with the requirement to have gathered evidence of the constituent elements of proof of the offence charged. It continued that this concerned, at this stage of the proceedings, only the gathering of material evidence that could lead to the presumption that the person may have participated in the acts under investigation, and noted that there was sufficient material evidence to believe on the one hand, that the IS committed crimes against humanity in the Iraqi-Syrian zone and in the area near the cement plant during 2013 and 2014 and, on the other hand, that Lafarge regularly financed the IS

during the same period. From this it noted that it was possible to gather serious or corroborating evidence making it likely that the company had been an accomplice to the crimes against humanity perpetrated by the IS. As such, the investigating chamber did not draw the legal conclusions from its own findings, and infringed Article 80-1 of the Criminal Procedure Code and the above-mentioned principle, as well as Articles 591 and 593 of the same code.

2°/ The investigating judge may investigate persons against whom there is serious or corroborating evidence making it likely that they may have participated, as perpetrator or accomplice, in the commission of the offences referred to him or her. The guilty intent of the accomplice lies in the act of knowingly providing aid or assistance to the principal perpetrator in the acts that facilitated the preparation or completion of the offence. The investigating chamber maintained that it cannot be claimed that the financing of the IS by Lafarge, in that it was intended to allow the continuation of the cement plant's activity in an area in the throes of civil war and then controlled by the IS, would show Lafarge's intention to be associated with crimes against humanity perpetrated by this entity, when the economic goal pursued by Lafarge cannot constitute the slightest justification for the commission of the offence of aiding and abetting crimes against humanity. The investigating chamber did not investigate if Lafarge, which it found had voluntarily financed the Islamic State criminal organisation over several months in 2013 and 2014, had not acted with the knowledge of that organisation's intention to commit crimes against humanity. In so doing, the investigating chamber did not legally justify its decision under Articles 80-1 of the Criminal Procedure Code, 121-3, 121-6, 121-7 and 212-1 of the Criminal Code, together with Articles 591 and 593 of the Criminal Procedure Code.

3°/ The investigating judge may investigate persons against whom there is serious or corroborating evidence making it likely that they may have participated, as perpetrator or accomplice, in the commission of the offences referred to him or her. The guilty intent of the accomplice lies in the act of knowingly providing aid or assistance to the principal perpetrator in the acts that facilitated the preparation or completion of the offence. The investigating chamber maintained that the financing of the IS by Lafarge did not show the intention of the company to associate itself with the crimes against humanity perpetrated by the IS when it was inferred from its findings that Lafarge was informed of the situation in Syria through the minutes of the weekly meetings of the security committee for Syria. These meetings were carried out by telephone. During the period of the acts several reports of the Independent International Commission of Inquiry on the Syrian Arab Republic mandated by the United Nations Human Rights Council were circulated in July 2013, August 2013, February 2014 and August 2014 referring to "crimes against humanity" in Raqqa with an upsurge in these acts of executions, abductions, imprisonment and torture. The investigating chamber recognised this, as well as IS propaganda videos of mass executions and beheadings on the basis of the civilian victims' membership in a particular group, as sufficient to render likely the commission of such crimes by the IS, and as serious or concordant evidence suggesting that Lafarge repeatedly financed the criminal organisation Islamic State over several months in 2013 and 2014, knowing that this organisation had already committed crimes against humanity and intended to commit them. In so doing, the investigating chamber did not draw the legal conclusions from its own findings and infringed Articles 80-1 of the Criminal Procedure Code, 121-3, 121-6, 121-7 and 212-1 of the Criminal Code, together with Articles 591 and 593 of the Criminal Procedure Code.

4°/ The investigating judge may investigate persons against whom there is serious or corroborating evidence making it likely that they may have participated, as perpetrator or accomplice, in the commission of the offences referred to him or her. The guilty intent of the accomplice lies in the act of knowingly providing aid or assistance to the principal perpetrator in the acts that facilitated the preparation or completion of the offence. The investigating chamber maintained that the financing of the IS by Lafarge did not show the intention of Lafarge to associate itself with the crimes against humanity perpetrated by the IS. It did not investigate, as it was invited to do by the written submission of Ms [C] [J] and Ms [X] [AG], whether the official statements and publications of the IS itself during the period of the acts did not reveal the existence of serious or corroborating evidence suggesting that Lafarge had repeatedly financed the Islamic State criminal organisation over several months in 2013 and 2014 with the knowledge that this organisation had already committed crimes against humanity and intended to commit them. In so doing, the investigating chamber did not legally justify its decision under Articles 80-1 of the Criminal Procedure Code, 121-3, 121-6, 121-7 and 212-1 of the Criminal Code, together with Articles 591 and 593 of the Criminal Procedure Code.

5°/ The investigating judge may investigate persons against whom there is serious or corroborating evidence making it likely that they may have participated, as perpetrator or accomplice, in the commission of the offences referred to him or her. The guilty intent of the accomplice lies in the act of knowingly providing aid or assistance to the principal perpetrator in the acts that facilitated the preparation or completion of the offence. The investigating chamber maintained that the financing of the IS by Lafarge, intended to allow the continuation of the cement plant's activity in a zone in the throes of civil war and then controlled by the IS, did not show the intention of Lafarge to associate itself with the crimes against humanity perpetrated by this criminal entity. It did not investigate, as it was invited and required to do, whether it did not result from the size of the sums remitted for the benefit of Mr [S] [EX] and suppliers linked to the IS in the amount of 15,562,261 USD, and the necessary allocation of the funds constituting the budget of the IS, a criminal organisation, to criminal attacks against populations constituting crimes against humanity, of which Lafarge was aware. In so doing, the investigating chamber did not legally justify its decision under Articles 80-1 of the Criminal Procedure Code, 121-3, 121-6, 121-7 and 212-1 of the Criminal Code, as well as Articles 591 and 593 of the Criminal Procedure Code, since Lafarge had financed the IS knowing that the funds it had provided were to be used for the commission of crimes against humanity by the IS.

6°/ The investigating judge may investigate persons against whom there is serious or corroborating evidence making it likely that they may have participated, as perpetrator or accomplice, in the commission of the offences referred to him or her. The guilty intent of the accomplice lies in the act of knowingly providing aid or assistance to the principal perpetrator in the acts that facilitated the preparation or completion of the offence. The mental state requirement (*mens rea*) element of aiding and abetting does not require that the accomplice shared the principal perpetrator's intention to commit the principal offence. Even if the investigating chamber had held that the guilty intent of the accomplice lies in the desire to be associated with the commission of the principal offence, the investigating chamber added a condition to the law and infringed Articles 80-1 of the Criminal Procedure Code, 121-7 and 121-3 of the Criminal Code, together with Articles 591 and 593 of the Criminal Procedure Code.

7°/ The investigating judge may investigate persons against whom there is serious or corroborating evidence making it likely that they may have participated, as perpetrator or accomplice, in the commission of the offences referred to him or her. The guilty intent of the accomplice lies in the act of knowingly providing aid or assistance to the principal perpetrator in the acts that facilitated the preparation or completion of the offence, the accomplice having to foresee all the qualifications and aggravations of which the principal act is susceptible. While crimes of terrorism and crimes against humanity are distinct, crimes against humanity may result from the intensification of terrorist acts of attacks on life targeting specific populations, constituting a widespread or systematic attack. The investigating chamber maintained that the financing of the IS by Lafarge did not show the intention of Lafarge to associate itself with the crimes against humanity perpetrated by the IS, and it maintained that Lafarge knew that the funds provided were intended to be used for the commission of acts of terrorism and that it qualified the same acts of attacks on life appearing on the IS propaganda videos relating to executions and mass beheadings of civilian populations according to a discriminatory motive as "acts of terrorism" and "crimes against humanity", so that the accomplice that knew the intentions of the perpetrator to commit these acts had to consider them under all qualifications, including those of crimes against humanity. In so doing, the investigating chamber did not legally justify its decision under Articles 80-1 of the Criminal Procedure Code, 121-3, 121-6, 121-7, 212-1 of the Criminal Code, together with Articles 591 and 593 of the Criminal Procedure Code.

8°/ The investigating judge may investigate persons against whom there is serious or corroborating evidence making it likely that they may have participated, as perpetrator or accomplice, in the commission of the offences referred to him or her. The guilty intent of the accomplice lies in the act of knowingly providing aid or assistance to the principal perpetrator in the acts that facilitated the preparation or completion of the offence. The investigating chamber maintained that if the continuation of the plant's activity clearly exposed the employees to a risk to their physical integrity, or even their lives, it cannot be argued that Lafarge's intention was to associate itself with the crimes against humanity that may have been committed against some of them. The investigating chamber did not investigate, as it was invited to do by the written submissions of the Sherpa and ECCHR associations - which claimed acts of aiding and abetting other than financing - whether all the acts of Lafarge, the employees of the Syrian plant being under Lafarge's authority, consisted in deciding

to continue the plant's activity despite the evacuation of its expatriates in 2012. This forced the plant's employees to be housed near the plant in an area controlled by the IS and in particular in [Locality 1], having to withdraw their salaries in Aleppo. This resulted in one employee being kidnapped and having to pass through IS-controlled checkpoints on a daily basis, as well as negligently managing employee abductions and instructing employees to remain in the plant despite the absence of any adequate evacuation plan until the attack on the plant by the IS on 19 September 2014. Lafarge's management had been informed of the imminent nature of this attack, which forced the employees to improvise an evacuation plan in a state of panic. Even though Lafarge was aware of the situation in Syria and international reports and propaganda videos reported on the crimes against humanity committed by the IS in 2013 and 2014, particularly near the plant, these did not establish the existence of serious or corroborating evidence suggesting that Lafarge knowingly aided or assisted the IS in the acts that facilitated the preparation or completion of crimes against humanity against the plant's employees. In so doing, the investigating chamber did not legally justify its decision under Articles 80-1 of the Criminal Procedure Code, 121-3, 121-6, 121-7 and 212-1 of the Criminal Code, together with Articles 591 and 593 of the Criminal Procedure Code.

59. The other plea objects to the ruling under appeal insofar as it declared the charges against Lafarge of aiding and abetting crimes against humanity null and void and ordered certain statements to be deleted in Exhibit D1338/2, whereas:

"1°/ The investigating judge may investigate a person if he or she finds serious or corroborating evidence making it likely that he or she may have participated, as author or accomplice, in the commission of the offences referred to him or her. After having noted the existence of sufficient evidence to believe that the IS and other affiliated groups committed crimes against humanity in the area comprising the provinces of Raqqa and Aleppo in the vicinity of the cement plant operated by Lafarge Cement Syria and the existence of evidence to believe that Lafarge may have financed this terrorist enterprise, with the aim of ensuring the continuity of the cement plant's activities in this area, from which it was clear that there was serious or corroborating evidence making it likely that the persons under investigation had participated, as accomplices, in the commission of the offence of crimes against humanity referred to the investigating judge, the investigating chamber could not, without disregarding Article 80-1 of the Criminal Procedure Code, maintain, in order to rule as it did, that it cannot be claimed that this financing would demonstrate the intention of the Lafarge company to associate itself with the crimes against humanity perpetrated by the IS;

2°/ The punishment for aiding and abetting crimes against humanity does not require that the accomplice had the intention to associate or contribute to such crimes. It is sufficient that the accomplice knowingly supported the perpetrator of these crimes. By stating the contrary, the investigating chamber misinterpreted Articles 80-1 of the Criminal Procedure Code, 121-7 and 212-1 of the Criminal Code."

## Court's response

60. The pleas are joined.

In view of Article 121-7 of the Criminal Procedure Code:

61. According to the first paragraph of this text, a person is an accomplice to a *crime* (offence punishable by imprisonment for a term exceeding ten (10) years) or *délit* (offence punishable by fine or imprisonment of no more than ten (10) years) if he or she knowingly, by aid or assistance, facilitated its preparation or completion.

62. The question arises as to whether aiding and abetting should be defined differently from ordinary law when crimes against humanity are involved.

63. It follows from Article 212-1 of the Criminal Code that, when committed in execution of a concerted plan against a civilian population group as part of a widespread or systematic attack, the wilful taking of life, enslavement, forcible

transfer of population, torture, rape, enforced prostitution, or persecution of any identifiable group or community for reasons including religion, constitute a crime against humanity.

64. Crimes against humanity are the most serious of crimes because beyond the attack on the individual, which it transcends, it is humanity that it targets and injures.

65. Its characterisation, which must relate to each of its constituent elements, consequently implies, in particular, the demonstration of the existence, in the person of its perpetrator, of the concerted plan defined by the aforementioned text, such a crime not being reduced to the common law crimes that it implies.

66. On the other hand, Article 121-7 of the Criminal Code does not require that the accomplice to a crime against humanity belong to the organisation, if any, guilty of that crime, nor that he or she participate in the conception or execution of a concerted plan against a civilian population group as part of a widespread or systematic attack, nor does it require that he or she approve the commission of the ordinary law crimes constituting the crime against humanity.

67. It is sufficient that he or she has knowledge that the principal perpetrators are committing or about to commit such a crime against humanity and that by his or her aid or assistance he or she facilitates its preparation or commission.

68. This analysis is in line with the case law of the *Cour de cassation* (Court of Cassation) on the application of Article 6 of the Charter of the International Military Tribunal of Nuremberg (Crim., 23 January 1997, *appeal* no. 96-84.822, Bull. crim., 1997, no. 32).

69. Since it only deals with the concept of aiding and abetting, it does not have the effect of trivialising the crime against humanity itself, the characterisation of which remains subject to the strict conditions noted in paragraphs 63 and 65.

70. A different interpretation of Articles 121-7 and 212-1 of the Criminal Code, taken together, which would require that the accomplice to a crime against humanity participate in the design or execution of a concerted plan, would result in many acts of aiding and abetting going unpunished, whereas it is the multiplication of such acts that makes the crime against humanity possible.

71. Since Article 121-7 of the Criminal Code makes no distinction according to the nature of the principal offence or the status of the accomplice, this analysis is intended to apply to both legal persons and natural persons.

72. In order to set aside the charges against Lafarge of aiding and abetting crimes against humanity, the ruling first states that there is sufficient evidence to believe that the IS and other affiliated groups committed crimes against humanity in the area comprising the provinces of Raqqa and Aleppo, in the vicinity of which the cement plant operated by LCS was located.

73. The judges mention as examples of acts attributable to the IS, including the execution of a 15-year-old boy accused of blasphemy, kidnapping and hostage-taking, murder and execution without due process, abuse and torture, the execution of four hundred young men in Taqba, eighty kilometres south of the plant, on 2 September 2014, the beheading of Chaaitat tribal youth on 30 August 2014 for refusing to pledge allegiance, and arrests of Kurds in [Locality 1].

74. They add that the objective of the IS, as well as other groups associated with it, was to impose “sharia” on the territory controlled, and that it is likely that these acts were part of a concerted plan to force the populations concerned to respect the religious principles propagated by this entity.

75. They further state that the upsurge in these acts observed over the period from 15 July 2013 to 20 January 2014 in the Raqqa area allows them to be considered a widespread and systematic attack on the civilian population.

76. The investigating chamber notes that Lafarge was informed of the situation in Syria through the weekly minutes of the Syria safety committee meetings, which were conducted by telephone, and specifies that at the meeting of 12

September 2013, it was stated that “since July, the flow of logistics and the movement of personnel have been disrupted, and sometimes even blocked, by the Islamists, AN and ISIS”, “the presence of these Islamist groups is for us the main threat to be taken into account. It is becoming increasingly difficult to operate without having to negotiate directly or indirectly with these networks classified as terrorists by international organisations and the United States.”

77. It adds that UN Security Council Resolution 2170/2014 includes the IS, in addition to the Al Nosra Front, among the terrorist organisations to which it prohibits all financial support and trade.

78. The investigating chamber then noted that payments of USD 15,562,261 were made to Mr [EX] and suppliers linked to the IS using LCS’s cash, which itself received USD 86,000,000 from Lafarge Cement Holding, a subsidiary controlled by the Lafarge group.

79. It concludes that the financing of the IS by Lafarge was intended to allow the continuation of the cement plant’s activity in an area in the throes of civil war and then controlled by the IS, and that it cannot be claimed, even though, in this context, the continuation of the plant’s activity clearly exposed the employees to a risk to their physical integrity, or even their lives, that the said financing manifested Lafarge’s intention to associate itself with the crimes against humanity perpetrated by this entity.

80. In so ruling, when it could be deduced from its findings, firstly, that Lafarge had financed, via its subsidiaries, the activities of the IS to the tune of several million dollars, and secondly, that it had precise knowledge of the actions of this organisation, which were likely to constitute crimes against humanity, the investigating chamber disregarded the above-mentioned texts and the above principles.

81. Firstly, the knowing payment of several million dollars to an organisation with a purely criminal purpose is sufficient to constitute being an accessory after the fact.

82. Secondly, it is irrelevant that the accomplice acts with a view to pursuing a commercial activity, a circumstance that is part of the motive and not the intentional element.

83. The decision must therefore also be quashed on this minutes.

## **ON THESE GROUNDS, the Court:**

On the *appeal* against ruling no. 7 of the investigating chamber of 7 November 2019:

DECLARES Mr [R]’s *appeal* NOT ADMITTED;

On the *appeal* against ruling no. 5 of the investigating chamber of 7 November 2019:

DECLARES the *appeal* insofar as it is lodged by the Sherpa association INADMISSIBLE;

DISMISSES the *appeal* insofar as it is lodged by the European Center for Constitutional and Human Rights association;

On the *appeals* lodged against ruling no. 8 of the investigating chamber of 7 November 2019:

DECLARES the *appeal* insofar as it is lodged by the Sherpa association to be INADMISSIBLE;

QUASHES AND SETS ASIDE the above-mentioned ruling, but only in its provisions declaring the written submission of the European Center for Constitutional and Human Rights inadmissible, setting aside the charges against Lafarge of aiding and abetting crimes against humanity and ordering a cancellation of Exhibit D 1338/2, and rejecting the plea for setting aside the charges against the said company of endangering the lives of others;

And in order that a new ruling be given, in accordance with the law, within the limits of the quashing thus pronounced,

REFERS the case and the parties to the investigating chamber of the *cour d'appel* (Court of Appeal) of Paris, otherwise composed, to be designated by special decision taken in chambers;

DECLARES that there is no need to apply Article 618-1 of the Criminal Procedure Code;

ORDERS the printing of this ruling, its transcription in the registry of the investigating chamber of the *cour d'appel* (Court of Appeal) of Paris and its mention in the margin or following the ruling that was partially set aside;

Thus carried out and ruled by the *Cour de cassation* (Court of cassation), Criminal Chamber, and pronounced by the President on the seventh of September, two thousand and twenty-one.

**President : Mr Soulard**  
**Reporting Judge : Mr Barbier, Judge Referee**  
**First Advocate- General : Mr Desportes**  
**Lawyer(s) : SCP Bauer-Violas, Feschotte-Desbois and Sebagh -SCP Spinosi - SCP Lyon-Caen et Thiriez - Cabinet Munier-Apaire - SCP Célice, Texidor, Périer**

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