Funding Conflict

Heightened human rights due diligence in conflict-affected areas, with a case study on Lafarge and its investors

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EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS

About the authors

This report was written by Eva Gerritse and Cor Oudes from PAX' humanitarian disarmament and business, conflict & human rights team, and Cannelle Lavite and Claire Tixeire from the European Center for Constitutional and Human Rights (ECCHR), with input from Joris van de Sandt, Egbert Wesselink, Benoite Martin (PAX), Ben Vanpeperstraete (ECCHR) and Samuel Jones and Mallory Miller (Heartland Initiative). The financial research was carried out by Profundo. The report was edited by Dorothy van Schooneveld and designed by Ondergrond.

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Table of Contents

Executive summary

Under the international normative framework for business and human rights -the United Nations Guiding Principles (UNGPs) and the OECD Guidelines for Multinational Enterprises- companies as well as their investors have the responsibility to respect human rights by conducting 'human rights due diligence' on their own activities, those of their subsidiaries as well as the activities of business relations across their value chains. In conflict-affected and high-risk areas, companies face a particularly high risk of getting involved in severe human rights abuses as well as violations of international humanitarian law (IHL): violent conflict is a major cause of human rights abuses; the management of risks is harder due to the complex operational environment; business relations can be active parties to the conflict and the government is often unable or unwilling to protect human rights, or is also an active party to the conflict. To address the heightened risks for human rights as well as the risks of facilitating or exacerbating conflict, companies need to conduct conflict-sensitive or 'heightened' human rights due diligence. This means that companies need to take extra care and complement standard human rights due diligence with a conflict analysis aimed at the identification, assessment and appropriate prevention and mitigation of the risks of contributing to conflict, in addition to human rights violations and violations of IHL in conflict-affected areas. The responsibility to conduct heightened human rights due diligence also goes for the financial sector, e.g. the banks providing loans to and the institutional investors owning shares and bonds in companies active in these settings. For investors, heightened human rights due diligence includes, among other actions, integrating conflict-sensitivity in screening and prioritization procedures, enhancing their assessments of their clients' and investee companies' own due diligence and actively use, or where necessary increase, their leverage on the company for it to take the appropriate measures.

This report aims to unpack the concept and practice of heightened human rights due diligence in conflict-affected and high-risk areas and what is expected from companies and their investors. It does so by zooming in on a specific case: the case of the French cement company Lafarge and its activities in Syria. Lafarge became active in Syria via its subsidiary Lafarge Cement Syria in 2007 and remained active during the civil war.* Based on publicly available information, the report describes how the company and its investors should have identified the risks that were at play in a context like Syria, what actions they could and should have taken while the situation evolved, and what responsibilities remain for the company as well as its investors up until today, in particular the responsibility to ensure that affected stakeholders, starting with Lafarge's former Syrian employees, get access to effective remedy.

The Lafarge case has been chosen to illustrate the risks that companies and their investors can run into in conflict-affected and high-risk areas and what heightened human rights due diligence in these situations entails. However, any company can -in various ways and on various levels- get involved with abuses in conflict-affected and high-risk areas and will have to deal appropriately with the heightened and specific risks inherent to operating and/or having business relationships

here. In practice however, conducting effective due diligence in conflict-affected and high-risk settings is still far from common practice, leading to severe impacts for people. In the last section, the report lists a number of other recent or notable past cases where companies failed to identify and address the heightened risks, and ongoing cases where companies should still be doing so.

The main argument put forward in the report is therefore that all companies active or having business relations in conflict-affected or high-risk areas, including financial institutions, need to conduct heightened human rights due diligence in order to effectively prevent contributing to conflicts as well as human rights and IHL violations. This requirement needs to be incorporated in mandatory human rights due diligence legislation like the upcoming *Corporate Sustainability Due Diligence Directive* in the European Union.

**At the moment of publication, Lafarge's activities in Syria are the subject of legal proceedings in France and in the United States. The report describes these legal proceedings in the section on the company's activities in Syria. However, the aim of the report is to unpack what effective human rights due diligence in conflict-affected and high-risk areas looks like for companies and financial institutions. None of the arguments made in the report should be read as a legal analysis of the criminal or civil responsibilities of Lafarge or its investors.*

Introduction

The responsibility of companies to respect human rights has been well clarified and laid out at international level. The United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD) provide key normative instruments at the international level on business and human rights, providing for a corporate responsibility to respect human rights. These standards require companies to conduct 'human rights due diligence' to identify, prevent and stop human rights violations in their own operations, those of their subsidiaries and in their value chains. Some countries already have legislation in place that codifies this responsibility, and new legislative initiatives are well underway in individual states, the European Union (EU) and the UN.[1]

Such due diligence implies additional care when doing business in conflict zones. In what is commonly referred to in policy circles as 'conflict affected and high-risk areas' (CAHRA), the risk of severe human rights violations is high and acute, and the people living in these areas lack the state-based protection that is self-evident in other countries.[2]

Recent reports by the UN Working Group on Business and Human Rights and guides developed by the United Nations Development Program (UNDP)[3] as well as, for example, the Voluntary Principles Initiative[4] outline the concept of heightened human rights due diligence in conflict-affected and high-risk areas and have started to explore what that should look like in practice. However, conducting effective due diligence in conflict-affected and high risk settings is still far from common practice among companies, as well as -importantly- financial institutions investing in these companies.

The financial sector[5] is crucial for many other economic sectors, as capital is often a prerequisite for doing business. Because of this role, the financial sector can influence many other actors across economic sectors. The sector, therefore, has a responsibility as well as an opportunity to ensure that its investments do not enable corporate abuses and fuel human rights violations. Financial institutions are crucial in addressing the gaps in the due diligence of their clients or investee companies. This paper explores what heightened due diligence means for the financial sector and provides recommendations on how to conduct such due diligence. The paper does this by looking at a specific case: the activities of cement company Lafarge in Syria.

The paper first describes the activities of Lafarge in Syria. These are also the subject of a judicial investigations in France and in the United States. We then describe what the corporate responsibility to respect human rights means and zoom in on heightened due diligence in relation to the financial sector in general. We further expand on heightened due diligence by looking more in-depth at Lafarge's activities in Syria. We split the activities of Lafarge in three phases: the phase before the Syrian war started (2007-2011), the phase of operations during the Syrian war (2011-2014), and the phase since Lafarge has stopped operations in Syria in 2014, which also covers the responsibilities that remain for the company and its investors up to the present. We then draw conclusions on what heightened due diligence in conflict affected and high-risk areas means for financial institutions, based on what can (and should) be learned from the Lafarge case.

Lafarge's operations in Syria

Lafarge is a French multinational company that merged with the Swiss company Holcim in 2015 (becoming "LafargeHolcim", which was then again renamed to "Holcim" in 2021) to become the world leader in cement and construction materials. Eight years earlier, in 2007, Lafarge acquired Orascom Building Materials Holding, an Egyptian cement company. As part of this acquisition, Lafarge built, modernized and extended the Jalabiya cement factory in northeastern Syria at a cost of approximately $680 million, representing the largest foreign investment in the country outside of the oil sector[6]. Lafarge's subsidiary Lafarge Cement Syria (LCS) started running the plant, one of the most modern cement factories in the Middle East, in 2010.

At this time, Syria was already known to be a high-risk area, where human rights violations were systematic and widely reported.[7] The national state of emergency declared and enforced since 1963 was commonly used to suppress and punish even peaceful dissent.[8]

In March 2011, the situation took a drastic turn as the first significant wave of peaceful protests broke out, which were violently repressed by the Assad regime. This rapidly escalated into a brutal civil war. In the following years, and to this day, Syria has been subjected to immense violence, volatility and chaos.[9]

While all major multinational actors active in Syria like Shell, Total, or Schneider Electrics closed their activities from 2011 onwards because of the flaring war, Lafarge took the decision to remain operational. In June 2012, on account of the deteriorating security and political situation, LCS expatriate employees were evacuated from Syria, and the French executives directing the Syrian company relocated to Cairo and Jordan from where they oversaw operations remotely. Over the next two years, the plant was effectively run by local, Syrian employees, in critical and life-threatening situations. In September 2014, the plant was attacked and taken over by the Islamic State, which marked the official end of LCS running of the factory.

By the end of 2011, employees at the Syrian Lafarge plant reported a significant deterioration of the security situation.[10] Employees reported that they voiced concerns to management that they were risking their lives to come to work having to cross several armed checkpoints. They also reported that they were facing death and kidnapping threats at and around the factory and being targeted specifically as employees of Lafarge. They were reportedly told by the company that they would be fired without compensation should they not show up for work. Kidnappings of LCS staff occurred on and off from August 2012 until the takeover of the plant in 2014. In the fall of 2012 already, nine employees were abducted while commuting together to work and held captive for an entire month before Lafarge finally paid a ransom. Despite regular kidnappings, death threats, the presence of armed checkpoints, the war raging on the factory's doorstep, and IS gradually gaining control of the region, the company decided to continue the cement production and keep the plant running.

Even when the battle between Kurdish militias and IS in Kobanî, only 50 km from the plant, caused hundreds of deaths in July 2014, the workers were called to continue to come to work.

When IS launched a violent armed attack to take over the plant on September 19, 2014, the employees, without any managing personnel present, were left to realize that there was no evacuation plan in place for them. As most employees used commuter buses to come to the factory, the absence of an evacuation bus left them stranded. They ended up having to flee in panic, packed in a handful of small private cars. One of them told journalists, "If I had run away one hour later I would not be able to play with my daughter today. Daesh would have cut our heads. … I cannot believe that I worked six years for Lafarge and they could not give us cars to leave the plant."[11]

In 2016, Syrian news outlet Zaman al Wasl and French journalist Dorothée Myriam Kellou published a series of investigative reports indicating at what costs Lafarge had maintained its factory running. Lafarge was said to have, from 2012-2014, transferred large sums of money through intermediaries to IS, the Al Nusra Front (Al Qaida's branch in Syria) and other armed groups like the Free Syrian Army and Kurdish militias, in order to secure access to relevant sites, to the factory and to raw materials.[12] A year later, in March 2017, in light of the findings and conclusions of an company-commissioned internal investigation into the scandal, LafargeHolcim acknowledged that its subsidiary LCS had "provided funds to third parties to work out arrangements with a number of armed groups", including some internationally blacklisted as terrorist organizations.[13] The judicial inquiry that has since been opened in France has identified that these "arrangements" amounted to at least 13 million euros transferred o several armed and terrorist groups, including IS.[14]

In its March 2017 official statement, LafargeHolcim also affirmed that at the time "chaos reigned and it was the task of local management to ensure that the intermediaries did whatever was necessary to secure its supply chain and the free movement of its employees".[15]

In the same statement Lafarge SA admitted to having been well-informed of developments and security-related concerns by their local management. They also stated that in hindsight, the combination of the war zone chaos and the "can-do" approach to maintain operations in these circumstances may have caused those involved to seriously misjudge the situation and pay insufficient attention to the legal and reputational implications of their conduct.[16]

The criminal case before French courts

In November 2016, eleven former Syrian Lafarge employees, supported by the Paris-based organization Sherpa and the European Center for Constitutional and Human Rights (ECCHR), filed a criminal complaint in Paris against the multinational. In 2017 and 2018, criminal charges were issued against the company and eight of its former executives, including the group's two former CEOs, and the two former French directors of LCS. In June 2018, three investigative judges formally charged the mother company Lafarge, in its legal entity capacity, for complicity in crimes against humanity, for financing a terrorist enterprise, for deliberately endangering the lives of its Syrian workers, and for violating an embargo. Against these serious charges, the company was asked to provide the court with a 30-million-euro deposit, ahead of a possible trial. This represents one of the first cases in France where a parent company is criminally charged for alleged illegal activities that took place abroad through its subsidiary and through the executive leadership of its then French headquarters.

Although the LafargeHolcim recognized in its internal investigation that "unacceptable practices had been employed to maintain the activity and security of its plant"[17], it has contested before the courts the charges launched against it, arguing that "this indictment does not fairly reflect the responsibility of Lafarge SA."[18]

As Lafarge appealed to the Paris Court of Appeal against these charges, the Court upheld three of them in November 2019[19] stating that the Lafarge Group, through the directors of the parent company, gave permission and even may have instructed its subsidiary to carry out the alleged financial transactions; that Lafarge could not have ignored the terrorist nature of IS at the time; and that Lafarge had effective authority over the Syrian employees of its subsidiary. The Court however dropped the charge of complicity in crimes against humanity committed in Syria and Iraq by IS and other terrorist groups in 2013-2014, by arguing that Lafarge's decisions to finance terrorist and armed groups was not taken with the intention to facilitate the commission of crimes against humanity, but only with the objective of maintaining its factory running.

This aspect of the decision was reversed less than a year later, in September 2021, when France's highest jurisdiction, the Supreme Court (Cour de cassation) sent back the case to the Appeals Court. After recognizing that there is serious evidence that the crimes committed by IS in this period and region did amount to crimes against humanity, the Supreme Court stated that "knowingly paying several million dollars to an organization whose purpose is exclusively criminal suffices to constitute complicity, regardless of whether the party concerned was acting to pursue a commercial activity".[20]

In May 2022, the Appeals Court in Paris again confirmed all charges pending against Lafarge, including complicity in crimes against humanity.[21] While the proceedings in this case are still at the level of the judicial inquiry, at the time of writing of this report Lafarge has again appealed to the Supreme Court as the company continues to legally challenge the charges last upheld in May 2022.

The case before US American courts

In separate court proceedings before the federal court for the Eastern District of New York in Brooklyn, United States, Lafarge and LCS jointly pleaded guilty to conspiracy to provide material support to foreign terrorist organizations.[22]

As a result of this plea agreement, made public on October 18, 2022, Lafarge agreed to pay USD 778 million in fines and forfeiture, which is the first time that a company is prosecuted on this charge in the United States.

In court, Lafarge's chair said that from August 2013 until November 2014, former executives of the company "knowingly and willfully agreed to participate in a conspiracy to make and authorize payments intended for the benefit of various armed groups in Syria."[23]
The court's press release exposed that "[t]he charges arose out of the defendants' scheme to pay ISIS and ANF [Al Nusra Front] in exchange for permission to operate a cement plant in Syria from August 2013 to October 2014, which enabled LCS to obtain approximately $70.30 million in revenue."[24]

MAXAR via Google earth V 7.3.6.9345. (July 2014). Lafarge Syria Cement Factory. 36°32'34.91"N, 38°35'33.24". (https://earth.google.com).

Deputy Attorney General Monaco in this case stated "[t]his case sends the clear message to all companies, but especially those operating in high-risk environments, to invest in robust compliance programs, pay vigilant attention to national security compliance risks, and conduct careful due diligence in mergers and acquisitions."[25]

Lafarge's investors

During the period described above, which began with the acquisition of Orascom Building Materials Holding and included the construction, modernization and operation of the Jalabiya cement factory, the cessation of the operations and the period to date, Lafarge (subsequently LafargeHolcim, and today Holcim) has been financed by financial institutions.

Even before the civil war broke out in 2011, there were significant risks to human rights under the country's dictatorship. These risks should already have been identified and closely monitored by Lafarge's investors when the company became active in Syria in 2007. From 2011 onwards, the fact that the company they invested in was and remained operational in an active war zone should have prompted investors to actively monitor and engage with Lafarge on mitigating the serious risks for the company's employees and the legal and human rights risks inherent in its presence and activity in an area controlled by armed groups. Finally, investors have a responsibility to ensure that their client or investee company fulfills its duty to remedy the adverse impacts to which it has contributed.

METHODOLOGY

For this report, we have analyzed which financial institutions have been involved in Lafarge and its operations in Syria. We limit this report to the European banks with the largest loans to Lafarge during the timeframe 2007-2019. This is based on two considerations:

1. We focus on banks because the client-creditor relation is in many cases long term, meaning that it would be possible to select lenders that had a financial business relation with Lafarge during various stages of the negative human rights impact.
2. We focus on the banks with the largest loans only, for reasons of practicability.

That this selection is made for this report does not mean that other kinds of investors, for instance the share- and bondholders, or investors with smaller exposure, have less responsibility to take action. Although lenders might have other measures to their avail which can give them more leverage towards companies (as they have a direct contractual relationship with their client), the responsibility to act is the same for all financial institutions directly linked to violations in their value chains. In this report we outline the due diligence procedures for financial institutions in general, specifying actions for lenders where appropriate.

Economic research and advice agency Profundo retrieved data from the Thomson Reuters database and IJGlobal. Data was retrieved for the timeframe 2007 and 2019. We have filtered out data on investments in Lafarge SA (the Lafarge holding company), and Lafarge Cement Syria (Lafarge's subsidiary company in Syria). One significant loan to Lafarge Cement Syria was found, of $150 million by the European Investment Bank (EIB). Table 1 shows which 6 banks are included for further analysis in this report and how much they lent to Lafarge SA or Lafarge Syria. The table is organized according to the maturity date of the loans. This date is the date at which the loan expires. This means that until that moment, the bank had an ongoing relationship with Lafarge SA or Lafarge Cement Syria. This is the case unless the loan was paid back before the end date, for which no data is available.

LOANS PER BANK TO LAFARGE SA AND LAFARGE CEMENT SYRIA (IN MLN US$)

BANK	LAFARGE CEMENT SYRIA	LAFARGE SA						
	2009	2009	2010	2011	2013	2015	2017	TOTAL LAFARGE SA
BNP Paribas (France)		46,38	355,55	208,83	479,23	64,98	102,21	**1.257,18**
Crédit Agricole (France)		33,85	259,53	208,83	349,80	64,98	102,21	**1.019,20**
European Investment Bank (EU)	150,00							
HSBC (UK)		12,53	96,03	208,83	129,43	64,98	102,21	**614,01**
Banco Santander (Spain)		25,05	192,06		258,86	64,98	74,33	**615,28**
Société Générale (France)		12,53	96,03	208,83	129,43	64,98	102,21	**614,01**
TOTAL	**150,00**	**130,33**	**999,19**	**835,33**	**1.346,74**	**324,90**	**483,17**	**4.119,67**

DUE HEARING

The six banks included in the table were sent a draft copy of this report and given the opportunity to react. The following three questions were asked:

1. Could you place any actions your bank has taken towards Lafarge (SA) over the three timeframes as described in the context of the analysis presented here and in particular actions related to your responsibility to pressure the company to contribute to remedy in the broad sense?
2. Have your policy and practice towards companies with activities in conflict-affected and high-risk areas changed since 2014?
3. Can you comment on the way the report describes the responsibility to conduct heightened human rights due diligence if it is involved (through financing or otherwise) in activities in conflict affected and high-risk areas?

See Annex 1 for responses received from the banks.

Responsible business conduct in conflict-affected and high-risk areas

The international standards on business and human rights

Since the unanimous adoption of the United Nations Guiding Principles on Business and Human Rights (UNGPs) by the UN Human Rights Council, these principles have been considered the leading normative framework on business' responsibility to respect human rights.[26] As stated in the UNGPs, the responsibility to respect human rights requires companies to:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[27]

To implement this responsibility, the UN introduced the concept of 'human rights due diligence', which was also incorporated in the OECD Guidelines for Multinational Companies. Human rights due diligence contains the following five steps:

1. Embedding a commitment to human rights due diligence and responsible business conduct into policies and management systems.
2. Identifying and assessing actual and potential adverse impacts that the company may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services through its business relationships.[28]
3. Acting on the findings by preventing, ceasing or mitigating (potential) adverse impacts.
4. Tracking the effectiveness of the measures.
5. Communicating on how (potential) impacts are addressed;

In addition, companies need to provide for or cooperate in the provision of remedy.

Heightened human rights due diligence

As laid out both in the UNGPs and the OECD Guidelines, a company's human rights due diligence process will vary in complexity with the size of the business enterprise, the severity of the (potential) impacts and the nature and context of its operations.[29]

In conflict-affected areas, businesses face a high and acute risk of involvement in severe human rights abuses and violations of international humanitarian law.[30] Violent conflict is a major cause of severe human rights abuses, while at the same time the management of risks is harder due to the complex operational environment: in these contexts, the government can often be unable or unwilling to protect human rights or is itself involved in human rights abuses or party to the conflict. Value chain relationships (e.g. state agencies, state-owned or affiliated companies, non-state armed groups de facto governing an area, private security providers), may be active participants in the conflict. As the UN Working Group on Business and Human Rights states in its July 2020 report on business in conflict-affected areas, "Businesses are not neutral actors, their presence is not without impact. Even if a business does not take a side in the conflict, the impact of their operations will necessarily influence conflict dynamics."[31] To prevent and address the heightened risks, businesses operating in conflict-affected and high-risk areas should therefore conduct conflict-sensitive, "heightened" human rights due diligence.

Activities through which companies may facilitate or exacerbate conflict do not necessarily fully overlap with salient human rights issues and therefore risk being overlooked or underprioritized in standard human rights impact assessments.[32] A similar oversight can occur for violations of IHL, the body of international law that protects civilians and civilian property and regulates the conduct of individuals and entities (including corporate actors) in situations of armed conflict and occupation. In standard human rights due diligence, the risk of contributing to violations of IHL (as distinct from human rights law) is often overlooked.[33] Heightened human rights due diligence in conflict-affected areas is aimed at identifying these extra sets of risks, by analyzing the conflict causes, drivers, dynamics and actors, as well as the way in which the company's activities and business relationships impact on the conflict and vice-versa and what the company's capacity is to prevent or mitigate negative impacts in this context.

Based on these findings, the company should take appropriate measures to ensure that its activities do not contribute to conflict, in addition to adverse human rights impacts or violations of IHL.

Importantly, this conflict analysis as well as the corresponding prevention and mitigation measures need to be updated on a regular and ongoing basis, as the context and associated risks can change rapidly, and at all stages of a business activity or relationship.

Moreover, all steps in the process need to be based on ongoing, in-depth consultation with a broad group of stakeholders – both potentially affected stakeholders, as well as civil society actors in the area and relevant national and international organizations. The company should also take care that all steps taken as part of its due diligence process (e.g. stakeholder engagement, monitoring and communication) or as part of a process of remediation, are conflict-sensitive in themselves, meaning that they do not facilitate or exacerbate conflict. 'Do no harm' should of course be ensured in all contexts but is especially important in conflict-affected areas where levels of distrust, polarization, and insecurity are often already high.

In addition, the international normative framework expects companies to also have robust operational-level grievance mechanisms in place that follow the effectiveness criteria established by the same international standards. In conflict-affected and high-risk areas, meeting the criteria for effectiveness might be more challenging, so the design and operation of the grievance mechanism require extra attention, for example by guaranteeing full confidentiality and the safety of the people using them.[34]

RESPONSIBLE EXIT

In situations where a company determines that it cannot conduct proper due diligence due to the complexity of the situation or that it doesn't have the capacity or leverage (and is not able to sufficiently increase its leverage) to prevent or mitigate the identified potential adverse impacts, it should disengage (terminate or suspend the activities), or in case its activities have not yet started, refrain from the project. The international normative framework, and especially the OECD Guidelines, advance several parameters helping to clarify the need for such disengagement. When considering disengagement from a business relationship these standards indicate that companies should consider several factors, including the severity of the potential or actual adverse impact; the results of previous attempts to address adverse impacts; the likelihood of preventing and remediating impacts in the future; the consequences of not disengaging and the potential adverse impacts of the resulting from disengagement itself.[35]

In conflict-affected and high-risk areas especially, a hasty exit may be as damaging as a late exit.[36] By constantly assessing the risks, a company should prevent both, by ensuring that it has a sound contingency plan, based on extensive stakeholder engagement, which includes an exit strategy that is constantly updated according to the changing circumstances. The exit strategy should take into account the potential adverse impacts of disengagement on human rights as well as the conflict dynamics, and include specific measures to prevent or at least minimize as well as remediate those adverse impacts.[37]

In situations where the risk of severe abuses is especially high, like conflict-affected and high-risk areas, prevention however should be key. A key element of due diligence in these situations is ensuring a 'responsible entry' - which in some situations can mean no entry at all.

RED FLAGS

'Conflict-affected and high-risk areas' include a variety of contexts: situations of armed conflict or military occupation as well as situations (or risks) of large-scale violence (including by non-State actors), widespread human rights abuses or severe political and social unrest or instability. It also includes post-conflict settings, where the risk of recurrence of violence may be high, and situations involving transitional justice.

Most complex situations requiring heightened due diligence cannot be explained as isolated or spontaneous events; there is always a build-up over time.[38] Businesses should therefore be aware of early signs, or red flags, which should prompt them to initiate heightened human rights due diligence. Examples include strict control of media or non-governmental organization, the imposition of emergency laws or the amassing of weapons.

Recently published guides and practical toolkits for companies, for example by UNDP, have been outlining when and how companies should conduct heightened human rights due diligence. However, the concept of conflict-sensitive business conduct was introduced already much earlier, and toolkits for businesses on how to conduct due diligence in complex environments (including

guidance on how to identify conflict triggers) have been developed from the early 2000s onwards.[39] In 2010, the UN Global Compact and the UN Principles for Responsible Investment (PRI) network jointly developed a guidance for companies and investors on responsible business in conflict-affected and high-risk areas, in which they encourage companies to "adapt existing due diligence measures to the specific needs of conflict-affected and high risk contexts" and describe factors that make a future outbreak of violence more likely.[40] Likewise, in its 2011 Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, the OECD introduced the concept of 'red flags' which should trigger specific due diligence standards.[41]

HIGH-RISK PRODUCTS AND SERVICES

Conflict-sensitive due diligence also entails identifying and assessing the risks inherent to the production process as well as the use of the company's product or services in the context of a conflict-affected or high-risk area. One could think of products like arms and ammunition and surveillance tools and services like private security provision. But the construction sector, including cement producers, could also be considered a strategic, and therefore high-risk, sector in conflict-affected areas, with potentially high-risk customers as cement can be used to build detention facilities, separation walls, protective bunkers and underground tunnels.

Companies supplying materials like cement to regimes that are known to be violating human rights, or in conflict-affected areas, should be aware of (and address) the risk that their products can be used to facilitate human rights abuses or violations of international humanitarian law.

Legal liability

Operating in conflict-affected areas may increase the risks of enterprises becoming complicit in gross human rights abuses or violations of IHL committed by other actors (for example security forces). The UNGPs stipulate that business enterprises should therefore treat this risk as a legal compliance issue, "given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses".[42] This description in the commentary to UNGP 23 seems to accurately describe how the legal risk Lafarge took by starting and -when the war broke out- continuing operations in Syria could have materialized.

The Financial Sector

Just as other companies, financial institutions have the responsibility to respect human rights. They need to avoid causing or contributing to adverse impacts and must prevent or mitigate adverse impacts to which they are directly linked via their business relationships, notably their clients and investee companies. They need to do this by conducting the six steps of human rights due diligence outlined above.

Degrees of involvement with adverse impacts

In order to determine the responsibilities of companies (in this case financial institutions) and the appropriate response to an adverse impact, the UNGPs, and OECD Guidelines differentiate between three degrees of involvement: a company can *cause* an adverse impact, *contribute* to it, or be *directly linked* to the impact. The company causes an adverse impact if there is a direct connection between the company's actions or omissions and the adverse impact. In this case, the company need to cease or prevent the action causing the impact and remediate the harm. 'Contributing to' entails a substantial contribution, meaning an activity that causes, facilitates or incentivizes another entity to cause an adverse impact. In this case, the company needs to end its contribution and contribute to remediation while using its leverage to influence other actors contributing to the harm to prevent and mitigate the harm and equally contribute to remedy. Finally, a company's activities, products or services may be directly linked to an adverse impact through a business relationship. In this case, the company needs to use its leverage on the business relationship causing or contributing to the impact, to prevent, mitigate and address the harm. So in situations of direct linkage there is currently no expectation to provide or contribute to remedy, however, a company may voluntarily choose to do so.

Financial institutions, just like any other companies, can cause, contribute or be directly linked to adverse impacts. In their role of finance providers or (usually minority) shareholders, they are most often 'directly linked' to adverse impact caused or contributed to by their business relationship (their client or investee company).

In these cases, the financial institution should use its leverage to influence its client or investee company to prevent, cease, mitigate and, in the case of contribution or causation, remediate the adverse impact.[43]

Heightened due diligence in the financial sector

The requirement to conduct heightened due diligence in contexts characterized by heightened risks is also applicable to financial institutions. Financial institutions are expected to conduct heightened due diligence on clients and investee companies "associated with high-risk sectors, activities or contexts".[44] The first step for financial institutions is to anchor heightened due diligence in their investment policies and integrate it in their standard operating procedures as well as ensure that they have in-house expertise on conflict risks and dynamics. This includes integrating conflict-sensitivity in screening and prioritization procedures. Financial institutions often have thousands of clients or investee companies in their portfolios. As it might be unfeasible to address the adverse impacts of all clients or investee companies at the same time, the UNGPs and OECD Guidelines allow for the prioritization of actions: priority should be given to the (potential) impacts that are most severe or 'salient' in terms of scale and scope, or where a delayed response would make the impact irremediable.[45] The risk indicators used in a financial institution's screening procedure can be related to geography, sector, business model, or enterprise-specific risks (i.e. known instances of misconduct related to a specific company).

Integrating conflict-sensitivity in the screening process means screening specifically for activities and links to conflict-affected and high-risk areas, as well as sectors that pose specific risks in these areas, like raw materials extraction, arms production, private security, surveillance, or, as explained above, the supply of construction material like cement. Integrating conflict sensitivity is important not only because of the heightened risks for human rights as well as violations of IHL, but also because in some cases, a risk may be categorized as less severe by the scale-scope-irremediability criteria for human rights impacts (and may therefore be underprioritized) but could still be likely to drive conflict. The risk of facilitating or exacerbating conflict always needs to be prioritized, as the ultimate impact of conflict is usually very severe.[46]

If an investee company or client is found to pose a heightened risk (through the periodic risk screening of the existing client or investment portfolio, or, more specifically for banks, at the initiation of a new client relationship), the second step for financial institutions is to enhance their assessment and carry out more detailed investigations. For lenders that provide project finance this also means assessing risks on project specific basis. Financial institutions need to engage with the company and ask for clarification of certain issues or for additional information to be provided. They also need to conduct in-depth reviews of the company's operations, based on the company's own impact assessments.

Integrating conflict-sensitivity into this phase means assessing whether the company has carried out heightened due diligence itself, and if so, reviewing the conflict analysis that should be an integral part of the company's impact assessment: which potential adverse impacts were identified by the company and how are these being addressed? Has the company properly engaged with all relevant stakeholders in carrying out the assessment? In assessing risks and impacts, the financial institution also needs to complement the information provided by the company with its own research, for instance, based on reports from national authorities, international organizations, NGOs, independent experts, academia, and media. The financial institution could also engage directly with potentially affected stakeholders.

If the financial institution finds that despite high-risk indicators the company is not carrying out heightened due diligence, it should ask the company to do so and monitor these efforts. The financial

institution should also ask the company to have proper in-house knowledge -on management level- on conflict risks and dynamics. Financial institutions should also strongly consider carrying out a conflict analysis themselves if they find the company lacking in this regard. Alternatively, the financial institution could decide not to invest in, or divest from and/or to exclude, the company.

Adequacy of due diligence and shifting responsibilities

Heightened due diligence can take many forms. Ultimately, the question -for any due diligence process- is whether the measures are adequately addressing the high-risk situation. The adequacy of the due diligence process plays an important role in determining the degree of responsibility an enterprise (in this case a financial institution) carries for an adverse impact.[47] As described above, financial institutions, in their role of finance provider or (minority) shareholder, are most often 'directly linked' to adverse impacts caused or contributed to by their business relationship (their client or investee company). However, financial institutions may also contribute to adverse impacts if their activities somehow cause, facilitate, or incentivize the client or investee company to cause harm.

The degree of involvement is therefore not only dependent on the initial link to the impact but, also, over time, on the adequacy of the financial institution's action to address that impact. In other words, the degree of involvement is not static. The failure of a financial institution to act upon its due diligence obligations (i.e. by continuing to provide financing without addressing negative impacts) can, over time, facilitate or enable the continuance of the adverse impact. As such, a financial institution 'directly linked' to an adverse impact can, over time, be found as 'contributing' to it.[48] The more severe the impact, the higher the standard for measuring the effectiveness and adequacy of the due diligence activities must be. Severe impacts must be addressed quickly and demand a higher degree of effectiveness for the company to avoid being considered as contributing to the impact.[49]

Some of the factors that help identify the adequacy of a financial institution's due diligence are (1) *Initial Knowledge*: What the financial institution knew or reasonably should have known about the client, country context, industry, specific risks and impacts, planned mitigation measures. (2) *Engagement on Risks:* What conversations did the financial institution have with the client and/ or other stakeholders as part of its due diligence process? (3) *Incorporating Binding Expectations in Contracts*: To what extent did the financial institution communicate expectations and build leverage by including applicable environmental and social or human rights standards, monitoring mechanisms, and other expectations in pre-commitment and/or final (loan) agreements?[50]

Human Rights Due Diligence in the Lafarge Case

To examine the due diligence responsibilities of financial institutions towards a company like Lafarge in relation to its activities in Syria, we distinguish three different periods:

- 2007-2011: in this period, Lafarge started its activities in Syria, which at that time was best characterized as an authoritarian state that systematically violated various human rights.
- 2011-2014: in this period, Lafarge continued operations in Syria in a situation of active armed conflict, with a shifting power balance in the region where its factory was located.
- 2014-now: in this period Lafarge halted its operations in Syria and the judicial inquiry into its dealings with terrorist organizations and alleged complicity in crimes against humanity was opened in France and in the United States.

The responsibility to prevent, mitigate and remedy any negative impact in accordance with the UNGPs and OECD Guidelines applies to Lafarge and to its investors in all three timeframes. The circumstances in the different periods may necessitate an emphasis on one of these three elements.

2007-2011

After construction was completed in 2010, Lafarge started operating its cement plant in northeastern Syria. The country was considered an authoritarian state with a track record of very serious human rights violations. The single party-rule of the Baath Party severely restricted freedom of expression, association, and assembly. The state of emergency declared and enforced since 1963 gave security services full powers to arrest and detain political opponents. Thousands of political prisoners disappeared and were tortured in jail without fair trials in what Amnesty International has qualified as crimes against humanity[51].

As described above, operating in a country characterized by widespread human rights abuses directly exposes a company to the high and acute risk of contributing to or causing adverse human rights impacts. For instance: how can a company avoid contributing to human rights violations if the government of its host country orders a supply of cement to build detention facilities? Starting

operations in Syria, even before the eruption of the armed conflict, should have led Lafarge to conduct heightened human rights due diligence on all its intended operations in the country.

In general, and at a minimum, Lafarge should have identified the following human rights risks linked to its business operations in Syria:

- the risk of violation of labor rights;
- the risk of involvement in corruption, given the prevalence of corruption in the country;
- the risk of engaging with political factions in Syria in ways that would benefit an oppressive regime known for its systematic violation of basic human rights;
- the risk of becoming caught up in violence, which would jeopardize the physical safety of its employees.

Due diligence, especially heightened due diligence, should have resulted in the clear identification of these risks. Given the severity of these risks, but also of the fact that measures to mitigate them might be highly complex, the company could well have decided not to become active in Syria. However, in deciding to start operations in Syria, the company should at least have prepared a thorough contingency plan, including a responsible exit strategy, should the situation or context escalate. It should have identified and implemented extra measures to protect employees' rights and safety, as well as to prevent any participation in corruption. It should also have conducted frequent and thorough assessments of their business relations, to ensure that these were not causing, contributing or otherwise linked to actual or potential adverse human rights and environmental impacts.

FINANCIAL INSTITUTIONS' DUE DILIGENCE RESPONSIBILITY 2007-2011

All five banks had Lafarge SA as a client in this timeframe. In any proper risk screening process, Lafarge would have been identified as a high-risk sector company operating in a high-risk area, with potentially high-risk customers. This obviously applies to Lafarge Cement Syria, the subsidiary, but also for Lafarge, the corporate parent company. As Lafarge started operations in Syria, financial institutions should have required the company to provide additional information on their due diligence assessment and mitigation plan to check whether the company was conducting heightened due diligence. They also should have sought their own external advice on possible risks the company was taking to compare the company's assessment against it.

Based on public information, it appears that the company may not have made assessments of the human rights risks when becoming active in Syria. Financial institutions should have checked, and in the absence of assessments, flagged this and urged Lafarge to do so. At the very least, they should have urged Lafarge to have a sound contingency plan with a responsible exit strategy. Considering the severity of the risks, the difficulty of mitigating them and the possible lack of proper impact assessments by the company itself, financial institutions could have considered not investing in, or divesting from, Lafarge at this time.

2011-2014

As protests and their violent suppression began in 2011, the issues at play in the previous period significantly worsened and rapidly escalated into an armed conflict. The unfolding events were widely reported in the global media and received attention from European governments. From mid-2012 onwards, instability was exacerbated by the involvement of jihadists in the conflict, and Syria unquestionably turned into an active war zone. Media attention for the conflict was ubiquitous, in part because of the actions of IS which included killing journalists in publicly shared videos.

In the spring of 2013, the jihadist presence intensified further through the Islamic State, which moved into the central-eastern part of the country. In June of the same year, the Islamic State controlled the city of Raqqa located 90 km from Lafarge's factory. This growing territorial control of IS in Syria, and more specifically in the north of the country, inevitably brought jihadist violence closer to the Jalabiya factory.

In June 2013, IS proclaimed the creation of a caliphate over the Iraqi and Syrian territories they controlled, including (during the month of January 2014) the city of Manbij located 60 kilometers from the cement factory, where Lafarge's employees had been asked to live since 2012.

In 2013 and 2014, the security situation in the area where the factory was located deteriorated. Fighting intensified between the Kurdish front and the troops of IS in particular, roads were blocked, and suicide bombings and shelling increased just a few kilometers from the factory. Starting in the late summer 2012, kidnappings of the factory's employees started and increased. Since employees could no longer travel safely to Manbij, they repeatedly had to stay at the factory site for days at a time, until the plant was finally attacked by ISIS in September 2014.

These events should have raised red flags with Lafarge, as well as with its investors. Operating in the context of an active armed conflict presents significant risks, first and foremost for employees. In addition, the fact that Lafarge was producing a strategic product, as described above, should have further alarmed the company and its investors. The red flags and alerts, carefully and expertly considered, would most likely have led to the decision to close the plant and suspend its operations until the armed conflict was over, and perhaps even to disable the plant in order to avoid its use by parties to the conflict.

After 2011, ongoing due diligence should have revealed the following risks:

- The risk of having to stop operations abruptly, putting employees at risk of sudden loss of income;
- The risk of operations falling into the hands of one party to the conflict, and/or being exploited for strategic advantage;
- The risk that actors with whom business relationships had been developed for sustaining the operations would contribute to human rights violations and/or IHL violations;
- The security risk to national and international employees.

What happened is that some of these risks materialized. Media reports about the on-going judicial inquiry in the Lafarge case in France have uncovered more detailed information about Lafarge's

actions. Despite having identified the escalation of violence in the region, the company appeared to ignore international human rights standards and failed to take adequate measures to mitigate these risks. In particular, the following facts are of significant concern:

- Between 2012 and 2014 several employees of Lafarge were abducted by various armed groups. In some cases, Lafarge paid ransoms to secure their release. The employees were subject to daily threats to their life as they went through the checkpoints on their way to the factory. Despite the kidnappings, however, the company continued to operate the factory. This means that even after the security risk for its employees was unquestionable, the company continued to knowingly expose its employees to such risks.

- Lafarge allegedly transferred up to USD 15 million to IS, the Al Nusra front (ANF - Al Qaida in Syria) and other armed groups such as the Free Syrian Army and Kurdish factions. Transfers were made through intermediaries, primarily through Syrian businessman Firas Tlass. These payments aimed to secure access to the factory area and to sites for raw materials and resources.[52] This allegedly enabled armed groups, including two listed internationally as terrorist organizations, to further sustain and / or expand their operations, thus putting the company at a high risk of contributing to the gross violations of human rights and IHL perpetrated by some of these armed groups.

Lafarge's actions must be considered in the context of the war economy[53] that developed in the political and rule of law crisis in Syria, including the porosity between legitimate commercial actors in Syria, armed groups that were part of the conflict, and the grave crimes committed by some of these groups. Research on IS shows that the terrorist organization's main sources of income stemmed from the control and exploitation of oil, in particular in Syria where local market and short-term distribution circuits were common, as well as extortion through hostage-taking and taxes.[54] Various investigations[55] also shed light on the particularly institutionalized and hierarchized internal structure of IS, with secret services at various levels in charge of planning, recruiting "fighters" and organizing logistics for terrorist attacks. In particular, investigations describe the "EMNI", a Syria-based secret service that acted as the "external operations branch" of IS, dedicated to exporting "terror" abroad by planning attacks in the Middle East but also in Europe.

These elements show that despite the fungible character of money transfers, Lafarge could not ignore the fact that these funds, by fueling IS's financial circuits, would contribute to the commission of the crimes perpetrated by ISIS along its ascension to power in Syria, in the region, and around the world.

Besides the fact that these actions by Lafarge are now being treated in court as potential criminal offenses, the company should have identified and addressed the situation in which these facts took place in a much earlier stage as situations that might very well lead to contributions to negative impact as defined under the UNGPs.

Based on the information presented above, we would conclude that due diligence, in particular heightened due diligence, should have led Lafarge to conclude that a (temporary) exit from Syria was the only appropriate measure in this situation to avoid contributing to or causing adverse impacts on its employees and the civilians targeted by the armed groups financed to keep the plant running. According to the UNGPs and OECD Guidelines, this exit must be done responsibly, which means that

the company must have identified and mitigated any negative impacts of that exit prior to it, i.e. by ensuring that employees continue to receive income, that strategic assets cannot fall into the wrong hands, that the security of remaining staff who cannot be evacuated is taken care of and that any negative impacts the company has already caused or contributed to are remediated.

"Imagine the journey," said Nidal Wahbi, a former Lafarge human resources manager in Syria who is part of the lawsuit. "You could be stopped at any time, and either they let you go, or they could take you from the car for questioning." When sniper bullets grazed his vehicle one morning, "I realized for the first time how unsafe it was," he said. "But the next day, you had to go through the same road, because Lafarge would ask why you didn't go to work."[56]

FINANCIAL INSTITUTIONS' DUE DILIGENCE RESPONSIBILITY 2011-2014

The escalation of events in Syria during 2011 into a full-blown civil war should have triggered financial institutions to update and deepen their own conflict analysis in the first place, to be able to properly assess the risks of their own investment and client portfolios, as well as to be able to properly assess the conflict risk assessments of the companies involved.

In their risk mitigation procedures, financial institutions should then have prioritized all investments in companies active in an ongoing armed conflict, as was the case in Syria. The thorough assessment that financial institutions should have carried out on its clients and investee companies active in Syria, including Lafarge, would likely have shown that the risks Lafarge was taking by staying active in the area could not be effectively mitigated in the current armed conflict, especially since the region where the plant is located was under control of successive different armed groups.

The financial institutions should have urged Lafarge to suspend its operations and responsibly exit from the area. On the other hand, the financial institutions should have disengaged from Lafarge or divested from it in order to avoid being directly linked to or even contributing to the adverse impacts in which Lafarge was involved.

2014-now

In September 2014, the plant was attacked by IS and operations abruptly ended. Employees were left to flee the plant without any evacuation plan in place. Although operations are understood to have ended from that point on, the exact end of the sale of cement left in the plant's silos is yet to be clarified.

In the period from 2014 to the present, Lafarge had, and has, two main responsibilities. First, Lafarge has a continuing responsibility to its (former) Syrian subsidiary employees. The company was responsible for a proper and responsible winding down of its operations and ultimately an exit, which should have been carried out with a heightened duty of care to ensure the respect of labor rights, and the safety of its employees in terms of physical and psychological integrity. A responsible exit strategy should have included not only an effective evacuation plan and security measures

but also appropriate compensation for all employees. The company should also have ensured that potentially strategic assets left behind could not fall into the wrong hands.

To this day, Lafarge remains responsible for providing or cooperating in remedy for the adverse impacts it has caused or contributed to. Part of that responsibility is to cooperate with judicial mechanisms with the aim of achieving full remedy for all victims of human rights violations to which it has contributed through its activities. However, media have reported that Lafarge may not have properly cooperated with police investigations in 2017 as part the judicial inquiry the company is facing in France. Lafarge was sued on that matter for obstruction of justice, a case that to the authors' knowledge, is still pending at the moment of writing.[57] Moreover, the criminal complaint, even if it results in a conviction and compensation, may only partially cover the actual damages suffered by a limited number of affected individuals – those who have had the ability and support to file applications for civil parties in the French proceedings.

The responsibility of Lafarge to remediate adverse impacts therefore goes beyond cooperation with the criminal case. Remedy can take all kinds of forms, the so-called bouquet of remedies, depending on varied circumstances. The commentary to UN Guiding Principle 25 notes that remedy "may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition".[58] They postulate that different remedies are effective in different situations. In a conflict-affected context, such remedies will always have to contain elements of the four core 'pillars': truth, justice, reparations, and guarantees of non-recurrence. In the case of Lafarge, in addition to full cooperation with the judicial investigation, symbolic reparations (acknowledgement of wrongdoing, issuing of public apologies), active participation by the company in future transitional justice or memorialization processes, financial reparations to its former employees and participation in reparation funds for victims of terrorism are to be considered. Importantly, remediation must be victim-centered: their needs and priorities should shape the evolution of any remedy to the human rights violations they suffered.[59]

FINANCIAL INSTITUTIONS' DUE DILIGENCE RESPONSIBILITY 2014-NOW

During this period, financial institutions had and have a responsibility to require Lafarge to meet its obligations responsibly and effectively. Due diligence by financial institutions should have ensured that when Lafarge closed a facility in a war zone, it exited responsibly including by providing appropriate compensation to its former employees and to those who had to leave due to the security situation between 2011 and 2014 when Lafarge made the decision to continue operations in a war situation.

Even when it became clear that a lawsuit could be brought against Lafarge, financial institutions should have used -and if needed sufficiently increased, e.g. by working together with other investors- their leverage on Lafarge to urge the company to constructively cooperate with the investigative authorities and proactively seek full remedy for those adversely affected by the activities to which it contributed, in first place its former workers. Even with the criminal case in France still ongoing, financial institutions should be exercising their leverage over Lafarge to pressure the company to make provisions to remedy the broader adverse impacts which it contributed to.

CORPORATE INVOLVEMENT IN CONFLICT

Companies can get involved with conflict in many ways and on many levels. Examples include companies that deliver weapons to regimes that commit war crimes; supply materials that are used in the construction of illegal settlements in occupied territories; extract minerals in areas where they have to interact with armed groups; or simply be present in a country that is invaded by a foreign regime and be responsible both for the physical safety of its employees as well as for dealing with the negative effects of a hasty exit. In all of these cases, companies and their investors need to conduct heightened human rights due diligence in order to adequately deal with the heightened and specific risks at play in these situations.

Lafarge is far from the only case where a company failed to take appropriate action and ended up contributing to violence or severe abuses of human rights or international humanitarian law. The examples listed below are a few recent or notable cases where companies (and investors) failed to adequately identify, assess and address the heightened risks, and ongoing cases where companies and investors should still be doing so.

KIRIN, MYANMAR

Japanese brewery Kirin invested in Myanmar in 2015, entering a joint venture brewery with a Myanmarese company owned by the military. Amnesty revealed in 2018 that the joint venture company had made donations to the military, amidst the violence in Rakhine state in Myanmar, perpetrated by the Myanmar army.[60] In February 2021, the military stage a violent coup and suppressed protests with extensive use of force. Shortly after the coup, Kirin announced it would cut its ties with the joint venture in Myanmar. In June 2022, Kirin sold its share in the joint venture to the brewery. The move was criticized as 'irresponsible exit', as the military would profit considerably.[61]

LUNDIN, SUDAN

Swedish oil company Lundin was active in what is now South Sudan, between 1997 and 2003. Sudan was already in civil war, and its government had signed a contract with a consortium led by Lundin for oil exploration in Sudan. Between 1997 and 2003, international crimes were committed on a large scale in what was essentially a military campaign by the government of Sudan to secure and take control of the oil fields Lundin was exploring. Over 200,000 people were displaced, thousands were killed. Infrastructure such as roads and airports installed by Lundin facilitated the military campaign. Lundin sold its activities in Sudan in 2003. Two executives of Lundin were indicted in 2021 for complicity in international atrocity crimes. According to the Swedish Prosecution Authority, Lundin intentionally and repeatedly requested government military interventions that involved systematic attacks of civilians, recruitment and use of child soldiers, pillage, the use of hunger as a weapon of war and other war crimes. [62]

GLENCORE, COLOMBIA

In the mid-1990s, the multinational commodity and mining company Glencore started operations in the Colombian region of César, effectively war zone at that time.

Paramilitaries waged a terror campaign in this region, killing more than 3,100 and displacing over 55,000 people. Glencore and other mining companies obtained land in zones where communities had previously been forcibly displaced. Yet, these companies have so far failed to address the human rights impact in the mining zone.[63]

ARMS PRODUCERS, SAUDI ARABIA

In 2015, civil war broke out in Yemen. A coalition led by the Kingdom of Saudi Arabia intervened, and started a military campaign against Houthi rebels, combined with a naval blockade of the country. Saudi Arabia and the United Arab Emirates, another member of this coalition, relied heavily on aerial campaigns. The bombings killed large numbers of civilians: the UN Group of Eminent Experts counted 23,000 airstrikes in 7 years (10 per day), which killed or injured over 18,000 civilians. The Group speaks of 'failures in specific airstrikes to respect the principles of distinction, proportionality and precautions in attack as required by international humanitarian law'. Yet, both Saudi Arabia and the UAE have been able to purchase weaponry, including of the types used in Yemen, from arms producers like BAE, Boeing, General Dynamics, General Electric, Leonardo, Lockheed Martin and others.[64]

COMPANIES OPERATING IN RUSSIA

From 2014 onwards, Russia illegally annexed parts of Ukraine, culminating in a full blown invasion in February 2022. Companies with activities in Russia contribute, through taxes and economic revenue, to the Russian war effort. Some companies may even contribute to the Russian war effort by supplying systems needed for the production of weapons. Sectors like oil and gas and mining sector are especially at risk of contributing to Russia's ability to continue its war in Ukraine. After the invasion, many companies hastily decreased activities in or withdrew completely from Russia. Other companies stayed active in Russia.[65]

Conclusion & Recommendations

According to global authoritative standards on business and human rights, companies have the responsibility to conduct heightened due diligence when operating or maintaining business relationships in conflict-affected and high-risk areas.

Companies and investors alike should have policies in place, either stand-alone or as part of a broader human rights policy, that acknowledge the heightened human rights risks across conflict-affected and high-risk areas and outline the criteria, practices and governance measures that guide operations (or investments) in these areas and establish the process of heightened human rights due diligence. While there is a growing number of reports and toolkits for companies outlining what heightened human rights due diligence should look like in practice, it is inherently highly context-specific. What ultimately matters is the result: the effective prevention, mitigation and/or remediation of negative impacts. As noted above, the adequacy of the due diligence process plays an important role in determining the degree of responsibility a company and its investors, bear for an adverse impact.

In Lafarge's case, it appears that the occurrence of negative impacts was foreseeable. Their prevention should have been prioritized based on the likelihood and severity of the adverse impacts. Any investor providing finance to Lafarge without making the necessary efforts to use and if needed increase its leverage on the company to prevent or mitigate harm may have made it easier for the company to contribute or cause human rights violations, and consequently may have facilitated the adverse impacts.

In the case of Lafarge, the negative impacts cannot be undone. What remains is the responsibility of the company and its investors to ensure that all affected stakeholders have access to effective remedy. Lafarge must not only fully cooperate with the judicial investigations in pursuit of one of the core elements of remedy, namely justice, but should consider its responsibility to contribute to remedy in its broadest sense, as laid out above.

While the responsibility to contribute to remedy lies with the company, investors have, at a minimum, the responsibility to continue to pressure the company to do so. However, considering that an impact that remains unremediated can be classified as ongoing negative impact -and considering the fact that the failure to take action can facilitate the continuance of a negative impact- investors who choose to continue their financial exposure could see their responsibilities shift towards contribution. To avoid such a shift, investors should increase pressure on the company, including through divestment. Such divestment should not sever all links with the affected individuals and communities.

A meaningful commitment to international standards would have investors remain committed to ensuring access to remedy. This could include continued pressure on the company, but also separate actions to provide remedy. Investors now have a unique opportunity to show such a commitment. If they do so, they have the chance to make cases like Lafarge, but also Lundin, emblematic not only because of the severity of their impact and unique judicial characteristics, but because these cases would be the first cases where investors act in order to make a difference in the lives of victims of gross human rights abuses in conflict-affected areas.

RECOMMENDATIONS TO LAFARGE

- Comply and cooperate with ongoing judicial processes.
- Ensure meaningful remedy of all adverse human rights impacts Lafarge caused and contributed to in the context of its activities in Syria.

RECOMMENDATIONS TO LAFARGE'S INVESTORS (PAST AND PRESENT)

- Present investors: Use and increase your leverage on Lafarge to pressure it to cooperate in the provision of full remedy of all adverse human rights impacts the company caused or contributed to in the context of its activities in Syria.
- Past and present investors: If Lafarge fails to deliver full remedy consider contributing to remedy yourself.

GENERAL RECOMMENDATIONS

To companies operating in conflict-affected and high-risk areas:

- Conduct heightened human rights due diligence on all operations and business relations in those areas by complementing the standard human rights due diligence steps with a conflict analysis aimed at the identification and assessment of the risks of contributing to conflict as well as human rights violations and violations on IHL in conflict-affected areas.
- Have in place an operational-level grievance mechanism that guarantees confidentiality and protection for the people using it.
- Ensure meaningful, in-depth and conflict-sensitive engagement with a broad, representative group of stakeholders as central part of all steps of the due diligence process.
- Have in place an updated contingency plan, including a responsible exit strategy. This includes identifying and addressing all potential negative impacts of an exit prior to that exit and remedying any negative impacts that the company has already caused or contributed to.
- Ensure full remedy of all negative impacts that the company has caused or contributed to, including, but not limited to, cooperating with judicial investigations. Ensure that both the substantive and the procedural elements of the remedy are designed to be conflict-sensitive.

To financial institutions:

- Have in-house knowledge on conflict-risks and dynamics, conflict-sensitivity and IHL, in addition to human rights.
- Conduct heightened, conflict-sensitive due diligence on all investments in companies operating or having business relationships in conflict-affected and high-risk areas, by:
  - Integrating conflict-sensitivity into risk screening procedures and screening for conflict-risky (combinations of) geographies, sectors, business models and company-specific risks.
  - Prioritizing in-depth screening of all investments in companies operating in conflict-affected areas or with specific risks in these areas.
  - Actively engaging with those companies to ensure that they subject their operations and business relations to heightened due diligence.
- Take action to address identified (potential) links to human rights abuses and violations of international humanitarian law by exercising leverage on companies that (potentially) cause or contribute to these violations or, ultimately, by divesting from these companies.
- Exercise leverage on companies that have caused or contributed to adverse impacts to ensure full remediation of these impacts.

To governments:

- Include responsible business conduct in conflict-affected areas in the business and human rights frameworks that are being developed at national, European and UN levels (i.e. National Action Plans, due diligence legislation and within the Legally Binding Instrument at the UN) and ensure that companies operating from or within their jurisdiction exercise heightened human rights due diligence to avoid involvement in gross human rights abuses and violations of international humanitarian law in conflict-affected areas.
- Ensure full and effective alignment of national and EU due diligence legislation with the UNGPs and OECD Guidelines and:
  - Establish a heightened, conflict-sensitive due diligence obligation for all companies operating or having business relationships in conflict-affected and high-risk areas.
  - Include international humanitarian law in the normative scope of the legislation.
  - Fully include the financial sector and all its activities in the scope of the due diligence obligations under the legislation.
  - Improve access to justice for victims of corporate abuses, by incorporating a civil liability regime that ensures a reasonable limitation period for bringing liability claims, that civil society organizations are entitled to bring representative action on behalf of victims and that accompanying measures are put in place to support claimants.

Annex: responses received from the banks

No responses were received from Crédit Agricole, HSBC and the European Investment Bank.

BNP PARIBAS

BNP Paribas has a long-time commitment towards human rights, as expressed in its Statement on Human Rights (2012). This commitment has been translated into BNP Paribas Code of Conduct and Responsible Business Principles, and the Group expects its clients to uphold the highest ethical standards.

BNP Paribas maintains a global risk-based compliance program designed to comply with rules on anti-money laundering, anti-corruption, countering the financing of terrorism, and sanctions such as those which were imposed on Syria a soon as 2011. This program includes enhanced due diligence for high-risk clients, and situations of increased risks.

Moreover, the Group's ESG-risk management framework has been continually strengthened in the last decade. Notably, BNP Paribas has embedded ESG criteria into its "Know Your Client" process, calling for regular reviews of the ESG performance of its counterparts, and allowing the Group to closely monitor the development and handling of controversial events such as those discussed in the present report.

BNP Paribas is also subject to the French law on the Duty of Vigilance (2017) and annually publishes its plan to prevent in particular the risks of serious violations of human rights. In June 2021, the Group started deploying its new ESG assessment framework, notably covering business ethics and human rights, through sector-specific questionnaires (including construction), and a controversies screening. It is complemented by ad hoc monitoring and regular dialogue with clients especially when their activities or place of business are deemed particularly risky for human rights.

In the event of suspected serious abuses of human rights, the Group conducts an in-depth due diligence review and initiates a dialogue with its client company. It may decide to place the company on its monitoring list, or if the dialogue is unsuccessful on its exclusion list.

SOCIÉTÉ GENERALE

We first want to specify that we do not comment on specific situations or figures, whether or not these are related to a client. Nevertheless, we can inform you that the Group's E&S risk management system was developed using international and national standards as well as initiatives supported by the banking and financial industry, such as UN Guiding Principles on

Human Rights and OECD Guidelines for Multinational Companies as well as the OECD Due Diligence Guidance for Responsible Business Conduct, the IFC performance standards (PS2 on Labor and Working Conditions) or the Equator Principles.[1]

Societe Generale has enshrined the respect and protection of human rights in its Code of Conduct and in its Environmental and Social General Principles. The Group has developed several Environmental and Social Sector Policies, processes and operational procedures to implement its commitment on human rights both at client and transaction levels. They are reviewed regularly with a view of continuous improvement. When relevant, our sector policies integrate the specificity of Conflict-Affected and High-Risk Areas. For instance, the Mining[2] and Oil & Gas sector policies include an evaluation of measures ensuring a responsible management of the relationships with public and private security forces.

In the Group's Transversal Statement on Human Rights, Societe Generale confirms that it is "also aware of its role in preventing serious human rights breaches, both in its activities and for the risks directly associated to its purchases or its products and services". Where local laws and regulations are considered insufficient, the Group refers to the previously mentioned international standards of respect and protection of human rights.

We also invite you to read Societe Generale's annual plan on the Duty of Care (included in the Group's Universal Registration Document – next version published in March) established and implemented pursuant to the French Duty of Care Act. This plan aims at identifying risks and preventing serious breaches in respect of human rights, fundamental freedoms, health, safety and security of people and the environment as a result of the Group's activities. It also contains measures to assess and mitigate the risk of serious breach and monitoring of their implementation.

Finally, Societe Generale is committed to keeping a constant and open dialogue with its stakeholders, such as issues and questions raised by NGOs related to its E&S activities. We would like to thank you for your request and remain available for any follow-up question

[1] a risk management framework adopted by financial institutions for determining, assessing and managing E&S risks in projects financing.
[2] Our Mining sector policy refers, among others, to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas.

SANTANDER

Without commenting on any of the aspects highlighted on the report, Santander has several socio-environmental tools to assess human rights criteria. We are committed to continuously strengthening our procedures and broadening their scope. We have reported our sustainability progress for the last 20 years and we have set sustainability policies since 2011. These policies are disclosed in our website and policies on Environmental, Social and Climate change risk and Responsible Banking and Sustainability will be updated in the next weeks. They include our approach to human rights.

Endnotes

1 In 2017, France adopted the 'Loi de Vigilance', which requires France's largest companies to conduct human rights due diligence across their value chains and publish 'vigilance plans'. The German supply chain law ('LieferkettenSorgfalplichtengezetz') was adopted in 2021 and has entered into force in 2023. In the Netherlands a coalition of parliamentary parties submitted a legislative proposal, the 'Initatiefwet Duurzaam en Verantwoord Ondernemen', which introduces a broad duty of care for all companies and obliges large companies to carry out due diligence across the value chain. This legislative proposal is now under parliamentary review. In February 2022, the European Commission published its proposal for a corporate sustainability due diligence directive (CSDDD). At the moment of publication of this report, the Council has already adopted its General Approach and the European Parliament is determining their position. Trialogues will likely start in the second half of 2023. All legislation described above foresees mechanisms of accountability and monitoring of compliance, albeit in different forms.

2 The OECD definition of conflict-affected and high-risk areas: 'Conflict-affected and high-risk areas are identified by the presence of armed conflict, widespread violence, or other risks of harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses and violations of national or international law.' See: OECD (2013), *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, Second Edition, p.66. Available at: https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf

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39 I.e. by the Voluntary Principles on Security and Human Rights established in 2000 and International Alert's 2005 Guidance on Conflict-Sensitive Business Practice.

40 UN Global Compact and PRI (2010). *Guidance on Responsible Business in Conflict-Affected and High -Risk Areas: A Resource for Companies and Investors*, p.10. Available at: https://www.unpri.org/download?ac=1724

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42 UN Guiding Principle 23 Commentary. See OHCHR (2011), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Project, Respect and Remedy" Framework*. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

43 Exercising leverage by investors can include integrating human rights criteria into contracts, engaging in dialogue with a company, filing shareholder resolutions, proxy voting, engaging with other stakeholders such as civil society organizations. Ultimately, giving (public) notice of the decision to divest by referring to the reasons for that decision is also a form of exercising leverage.

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files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf ; Dutch Banking Sector Agreement (2019), *Discussion Paper Enabling Remediation*. Working Group on Enabling Mediation, p.10. Available at: https://www.imvoconvenanten.nl/-/media/imvo/files/banking/paper-enabling-remediation.pdf

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Sint Jacobsstraat 12
3511 BS Utrecht
The Netherlands

www.paxforpeace.nl
info@paxforpeace.nl
+31 (0)30 233 33 46

P.O. Box 19318
3501 DH Utrecht
The Netherlands

Zossener Straße 55-58
10961 Berlin
Germany

www.ecchr.eu
info@ecchr.eu
+49 (0)30 – 400 485 90