



YEMEN
ACCOUNTABILITY
PROJECT

AIDING & ABETTING

HOLDING STATES, CORPORATIONS,
AND INDIVIDUALS ACCOUNTABLE
FOR WAR CRIMES IN YEMEN



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EXECUTIVE SUMMARY

Yemen has reached its fifth year of protracted civil war, with no end in sight. The death toll has reached a staggering 100,000 people. Tens of thousands more have starved to death due to famine caused by the conflict. While the conflict reflects deeply rooted tensions within the country, it is also the product of centuries of friction within the Arabian Peninsula and decades of continuous Western interference in the region.

This report explores a prevalent question amid the ongoing strife: How can civilian victims of the war in Yemen seek justice for the grave crimes perpetrated against them? The report takes a broad perspective, pointing to instances that occurred before the violence, when the weapons and systems used to devastate the region were sold, gifted, and traded to perpetrators of the violence. This perspective implicates actors who aided and abetted the crimes against the Yemeni civilian population and provides a mode of liability for future parties seeking to bring the perpetrators to justice.

The report begins with a brief history of the conflict, moving then to a discussion on war crimes, crimes against humanity, and the crucial distinction between the two. The report then outlines conduct by relevant actors in the fray, including both state and corporate actors. The report later explores avenues of accountability for bringing relevant actors to justice for aiding and abetting war crimes and crimes against humanity, and finally, puts forth proposals for policy actions that can make an impact now and in the future resolution and reckoning of this humanitarian crisis.



The old quarter of Sana, Yemen, in August. The house in the foreground was destroyed by an airstrike. *Credit: Khaled Abdullah/Reuters.*

I. INTRODUCTION

After more than a decade of rising and subsiding tensions, Yemen has been consumed by an open civil war since 2015. In the nearly five-year conflict, over 100,000 Yemeni people have lost their lives, including over 12,000 civilians killed as a direct result of fighting.¹ This conflict represents far more than internal tensions. It reflects centuries of sectarian strife on the Arabian Peninsula as well as the disastrous results of external interference in the region over the past century.

While external interference is not the sole driver of the violence in Yemen, repeated interventions in the Arabian Peninsula over the last century have had a debilitating effect on local nations. This has often led to the view in many Western Nations, where political realities complicate the situation, that further intervention is viewed as necessary to prevent an even greater harm. Meanwhile, defense industries continue to exert enormous influence on policy makers in all of these nations, and the lack of a cohesive foreign policy by the United States and the United Kingdom have resulted in a lack of political will to extract forces from the region.

¹ Samy Magdy, "Report: Death Toll from Yemen's War Hit 100,000 Since 2015," The Associated Press (Oct. 31, 2019), available at: <https://apnews.com/b7f039269a394b7aa2b46430e3d9b6bc>.

In this geopolitical context, the Yemeni Civil War is unlikely to end in the near future, with the Arabian Peninsula unlikely to see stability as long as the war pervades. One question that remains at the forefront of the violence in Yemen is whether and how civilian victims of the violence in Yemen may seek justice for the crimes perpetrated against them. Importantly, crimes against Yemeni citizens did not begin with airstrikes or indiscriminate uses of artillery. Rather, the crimes began when weapons, guidance systems, and intelligence were sold, gifted, and traded to perpetrators of the atrocities seen in Yemen today. This wider perspective on criminality in Yemen implicates those who assisted, aided, and abetted heinous acts against Yemeni civilians. Who can be considered aiders and abettors, and how might they be held accountable? This white paper addresses this question and presents the avenues of accountability for those who have aided and abetted crimes against civilians in Yemen.

II. HISTORICAL OVERVIEW OF CIVIL WAR AND CONFLICT IN YEMEN

Historical roots of the current conflict

The current civil war ravaging Yemen has its immediate roots in the country's troubled political transition emanating from the 2011 Arab Spring. However, the dynamics of the conflict and the grievances at its center can be traced to the aftermath of the republican rebellion in the 1960s as well as the harsh politics of Ali Abdullah Saleh, who served as the President of Yemen from 1978 to 2012.² The extractive political and economic system put in place by the Saleh regime had, for decades, benefited northwestern highland tribal sheikhs at the expense of formerly dominant Shi'a religious leadership, their allies, and citizens in the northern and midlands regions.³ In 1984, the discovery of oil in the midland Marib Governorate provided enhanced incentives for the Saleh regime and highland elites to further exploit the marginalized North and midland populations.⁴

While the discovery of oil prompted tense unification between the formerly divided North and South and the creation of the Republic of Yemen in 1990, satisfaction with unification quickly dissipated. The North, led by Saleh, began to implement its system of economic exploitation in the South, and eroded benefits such as subsidized basic commodities and services such as health care and education in the region.⁵ Southern civil servants and military officers were dismissed from what were previously guaranteed positions in state enterprises.⁶ Highland tribal elites began to extend their economic domination to the South, plundering the South's

² Gerald M. Feierstein, "Yemen: The 60-Year War," Middle East Institute, (February 2019), pg. 3, available at: <https://www.mei.edu/sites/default/files/2019-02/Yemen%20The%2060%20Year%20War.pdf>.

³ *Id.*

⁴ *Id.* at 5.

⁵ "Middle East Report No. 114: Breaking Point? Yemen's Southern Question." International Crisis Group (October 20, 2011), pg. 5, available at: <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/breaking-point-yemen-s-southern-question>.

⁶ *Id.* at 6.

energy, mineral, and fish resources.⁷ Southerners in the Republic increasingly openly rejected unification and called for a return to an independent state.⁸



A brief civil war in 1994 failed to quash the emerging al-Hirak movement, a large-scale group of southern civilian and military officials who had been forced to retire.⁹ The Saleh regime struggled to dilute the southern al-Hirak movement when a

series of protests began in 2006.¹⁰ The movement demanded equitable access to government jobs, public benefits, and resource-sharing, particularly in the energy sector.¹¹ This struggle intensified as the Saleh government failed to cope with an emerging threat from the Houthis, an armed Zaydi (Shia) insurgency.¹²

The Houthi rebellion, a series of six wars between June 2004 and February 2010, grew from discontentment with the Saleh regime's political and economic systems that extracted wealth from northern resources at the expense of the northern Zaydi population.¹³ Zaydism is a branch of Shiism, with its religious elites ruling northern Yemen under the imamate system until the 1962 republican revolution.¹⁴ Approximately one-third of Yemenis are Zaydi, based largely in the northern highlands in the Sad'dah, Hajja, and Dammar governorates as well as the capital city of Sana'a.¹⁵ The Zaydi revivalist movement from which the Houthis grew began in the 1980s to counter the political and economic exploitation and marginalization of the Zaydi population and inequitable government support for Sunni and Salafist communities.¹⁶

⁷ Feierstein, *supra* note 2, at 7.

⁸ *Id.*

⁹ Middle East Report No. 114, *supra* note 5, at 6.

¹⁰ Feierstein, *supra* note 2, at 7.

¹¹ Middle East Report No. 114, *supra* note 5, at 6.

¹² Feierstein, *supra* note 2, at 8-9.

¹³ *Id.* at 9-12.

¹⁴ *Id.* at 4.

¹⁵ "A Look at Zaydi Shiites and Houthi Rebels in Yemen," Washington Examiner (October 4, 2014), available at: <https://www.washingtonexaminer.com/a-look-at-zaydi-shiites-and-houthi-rebels-in-yemen>.

¹⁶ Marieke Brandt, "Tribes and Politics in Yemen: A History of the Houthi Conflict" Oxford University Press (2017), pg. 135.

The government's inability to defeat the Houthis in a series of rebellions during the 2000s resulted in a severely divided northern population along government-Houthi lines.¹⁷ Destructive cycles of violence and counter violence in the northern Sad'dah region saw increasing numbers of Sad'dah citizenry joining the Houthi's ranks.¹⁸ Indeed, the movement succeeded considerably in channeling popular frustration with the Saleh government.¹⁹ Saleh's divide and conquer strategy stoked conflict between northwestern tribal sheikhs and non-tribal sayyids who established themselves as religious scholars and tribal mediators.²⁰ This further pushed many citizens towards the Houthi movement, as many grew discontent with the failure of influential sheikhs to use their power under Saleh's tribal patronage system to benefit ordinary tribal members.²¹ By the 2011 Arab Spring, the Houthis had put together one of the most effective military forces in the country, taking control of all of northern Sad'dah Governorate and large portions of the northern cities of Amran and al-Jawf.²²

A Failed Political Transition

In 2011, following uprisings in Tunisia and Egypt, activists in Yemen began protesting the decades-long autocratic rule of the Saleh regime.²³ The young urban protesters were soon joined by mainstream political parties such as Islah – a Sunni Islamist party constituted, in part, by the Yemeni chapter of the Muslim Brotherhood – and key players in the Saleh regime, including the prominent Ahmar family from northern Yemen and General Ali Mohsen al-Ahmar, a powerful military commander under the Saleh regime.²⁴ After defecting in March 2011, Mohsen brought his close political ties with Islah, a Sunni Islamist party, as well as significant portions of the army.²⁵ By July 2011, the Saleh government had effectively split into two camps: one supporting Saleh and another calling for his resignation.²⁶ Marginalized populations from both the North and South, including the Houthis and the midland Shafi'i population too joined the demonstrations, calling for not only Saleh's removal but also political, economic, and social transformation.²⁷

While Yemen was on the brink of civil war in 2011, a Saudi-led initiative, the Gulf Cooperation Council ("GCC"), supported by the US, UK, European Union, and the United Nations, helped avert the widespread violence witnessed in other Arab Spring states such as Syria and Libya.²⁸ The GCC afforded Saleh immunity from domestic prosecution in exchange

¹⁷ Feierstein, *supra* note 2, at 12.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Brandt, *supra* note 16, at 346.

²² Feierstein, *supra* note 2, at 12.

²³ "Middle East Report No. 167: Yemen: Is Peace Possible?" International Crisis Group (February 9, 2016), pg.1, available at: <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/yemen-peace-possible>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Feierstein, *supra* note 2, at 12.

²⁸ Middle East Report No. 167, *supra* note 23, at 1.

for his resignation and transfer of power to Vice President Abed-Rabbo Mansour Hadi in February 2012.²⁹ The GCC was accompanied by a UN-brokered transition plan, including the National Dialogue Conference (“NDC”), an implementation mechanism that was meant to assist Yemen in constitutional reform and socioeconomic and political transformation efforts prior to the February 2014 elections.³⁰

From the beginning, the initiative faced an uphill battle in garnering support from Yemen’s various factions. The agreement’s strength – its protection and bolstering of traditional power centers in the country to prevent widespread violence and civil war – proved to be its weakness as well.³¹ Many anti-Saleh protestors from the South dismissed the initiative as a North-centric arrangement that relegated southern demands for autonomy and independence to the past.³² Critical anti-Saleh factions such as the Houthis also rejected the transition initiative, seeing it as a mechanism for protecting Yemen’s status quo, with existing elite backers propping up establishment political parties. As the protests developed, attacks on critical infrastructure, including electrical facilities, ensued. The capital city was left without power for weeks at a time. Road access and water supplies were restricted as the Houthis resumed their conflict with Salafists in the North, breaking a two-year ceasefire with their siege of the Salafist Dar al-Hadith madrassa in Dammaj.³³ By 2014, it became clear that Saleh had formed a tacit alliance with the

Houthis in order to stay alive politically and seek revenge on common foes, namely, President Hadi, Ali Mohsen, the al-Ahmars, and the Islah party.³⁴ It was this increasingly unstable environment that the political transition agreement was embedded and ultimately failed.

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Emboldened by early battle successes and increasing populist sentiments in the capital city, the Houthis captured Sana’a in September 2014, a move that they alleged targeted the corrupt political elite and sought to restore order and security to the city.³⁵ Rejecting the introduction of a new UN-backed Peace and National Partnership Agreement (“PNPA”), the Houthis placed Hadi under house arrest, forcing his resignation in January 2015, and dissolved parliament, creating a revolutionary

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 2.

³² “Middle East Report No. 125: Yemen: Enduring Conflicts, Threatened Transition,” International Crisis Group (July 3, 2012), available at: <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/yemen-enduring-conflicts-threatened-transition>.

³³ Ginny Hill, “Yemen Endures: Civil War, Saudi Adventurism, and the Future of Arabia,” Oxford University Press (2017), pg. 261.

³⁴ Middle East Report No. 167, *supra* note 23, at 7.

³⁵ *Id.* at 2.

committee and shadow ministries in its place.³⁶ The Houthi-Saleh coalition then turned south, continuing their expansion to Aden with the professed goal of combating the rise of al-Qaeda in the Arabian Peninsula (“AQAP”) and the Islamic State (“IS”), both of which have benefited from the security vacuum plaguing the country.³⁷ In effect, however, the Houthi-Saleh coalition confronted Hadi, who had fled to Aden in February and then to Saudi Arabia in March 2015.³⁸

Regional Intervention, Conflict Escalation, and Potential Violations of International Law

In March 2015, at the request of Hadi, the UN Security Council issued a Chapter VII resolution (S.C. Res. 2216), which recognized the Hadi regime as Yemen’s legitimate government.³⁹ Hadi’s further appeals for international intervention prompted the assembly of an international, Saudi-led coalition, made up of nine largely other Sunni-Arab states.⁴⁰ The coalition, with varying degrees of military contribution, launched a major air campaign against the Houthis in March 2015 with the goal of reestablishing the Hadi government and pushing back against Houthi advances.⁴¹ Saudi Arabia’s leadership in the coalition had largely been driven by regional and domestic political calculations, including the Saudi perception that Iran’s support for the Houthis demanded action to prevent a Hezbollah-like organization from terrorizing its southern border.⁴² From March to June 2015, a debilitating air campaign and naval and air blockade rolled back Houthi advances at the expense of the general public, with food supply lines strained and desperately needed fuel blocked.⁴³

The current situation in Yemen

Since the Saudi-led escalation of the Yemen conflict in late March 2015, the war has progressed with ferocity.⁴⁴ The UN Office of the High Commissioner for Human Rights (“UNHCR”) documented a total of 17,640 civilian casualties in the country between 26 March 2015 and 8 November 2018.⁴⁵ The Armed Conflict Location & Event Data Project (“ACLED”)

³⁶ *Id.*

³⁷ *Id.* at 3.

³⁸ *Id.*

³⁹ Security Council Resolution 2216, United Nations (April 14, 2015).

⁴⁰ “Identical Letters Dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations Addressed to the Secretary-General and the President of Security Council,” United Nations (March 27, 2015), available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_217.pdf.

⁴¹ *Id.*

⁴² “Yemen: Coalition Blocking Desperately Needed Fuel,” Human Rights Watch (May 10, 2015), available at: <https://www.hrw.org/news/2015/05/10/yemen-coalition-blocking-desperately-needed-fuel#>; Stephanie Nebehay, “Half a million Yemeni children face malnutrition: UN,” Reuters (October 16, 2015), available at: <https://www.reuters.com/article/us-yemen-security-children/half-a-million-yemen-children-face-severe-malnutrition-u-n-idUSKCN0SA28W20151016>.

⁴³ Human Rights Watch, *supra* note 42.

⁴⁴ “Bachelet urges States with the power and influence to end starvation, killing, of civilians in Yemen,” United Nations Office of the High Commissioner of Human Rights, (November 10, 2018), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23855&LangID=E>, last accessed 25 December 2019.

⁴⁵ *Id.*

estimates that as of June 2019, over 90,000 Yemeni civilians and fighters have been killed since the conflict escalated in 2015.⁴⁶ Both UN and ACLED data suggest that the Saudi-led coalition's ("SLC") airstrikes are responsible for approximately two-thirds of civilian deaths.⁴⁷

The US became a contributor to the Yemen conflict in late March 2015 under the Obama administration.⁴⁸ Providing direct logistical, intelligence, and targeting support as well as thousands of weapons, munitions, and airborne fuel tankers to the Saudi-led coalition, US assistance has been complemented by similar support by the UK.⁴⁹ While both the US and UK have claimed its participation in coalition activities have been driven, in part, by the goal of improved targeting and a reduction of civilian casualties,⁵⁰ Human Rights Watch has documented over 90 unlawful coalition airstrikes since 2015, with airstrikes hitting homes, hospitals, markets, and school buses.⁵¹ The coalition is also alleged to have used at least six types of widely banned cluster munitions that were manufactured in Brazil, the US, and the UK.⁵² Allegations of war crimes have not only been lodged against the SLC but non-state forces as well.⁵³ Houthi forces have been accused of indiscriminate artillery attacks and landmine use, and United Arab Emirates ("UAE"), UAE proxies, and Yemeni government forces have engaged in enforced disappearances, torture, and arbitrary detentions of civilians.⁵⁴

With the US, UK, and France as the largest weapons suppliers to Saudi Arabia and other SLC parties, officials and corporations in these countries risk complicity in the violations of international law in Yemen.⁵⁵ Similarly, while the exact extent of Iranian support for the Houthis is unclear, the armed group likely receives some kind of military support and training from Iran

⁴⁶ "Yemen Snapshots: 2015-2019," Armed Conflict Location & Event Data Project, available at: <https://www.acleddata.com/2019/06/18/yemen-snapshots-2015-2019/>.

⁴⁷ United Nations Office of the High Commissioner of Human Rights, *supra* note 44.

⁴⁸ "Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen," The White House: Office of the Press Secretary (March, 25 2015), available at: <https://obamawhitehouse.archives.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen>.

⁴⁹ "Hiding Behind the Coalition: Failure to Credibly Investigate and Provide Redress for Unlawful Attacks in Yemen," Human Rights Watch (August 2018), available at: https://www.hrw.org/sites/default/files/report_pdf/yemen0818_web2.pdf.

⁵⁰ *Id.* at 58.

⁵¹ "Yemen: Hiding Behind Coalition's Unlawful Attacks," Human Rights Watch (September 8, 2017), available at: <https://www.hrw.org/news/2017/09/08/yemen-hiding-behind-coalitions-unlawful-attacks>.

⁵² "Yemen: Cluster Munitions Wound Children," Human Rights Watch (March 17, 2017), available at: <https://www.hrw.org/news/2017/03/17/yemen-cluster-munitions-wound-children>.

⁵³ "Yemen/UAE: Aden Hunger Strike Highlights Detainee Abuse," Human Rights Watch (October 26, 2017), available at: <https://www.hrw.org/news/2017/10/26/yemen/uae-aden-hunger-strike-highlights-detainee-abuse>.

⁵⁴ *Id.*

⁵⁵ "Final Report of the Panel of Experts Established Pursuant to Resolution 1929 (2010)" UN Security Council (June 2, 2015), available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_401.pdf.

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and Hezbollah, exposing Iran to legal liability for war crimes as well.⁵⁶ Over 3 million Yemenis have been internally displaced, almost 200,000 Yemeni refugees are in neighboring countries, and currently 8.4 million Yemenis are at risk of famine.⁵⁷ Logistical and military support to actors engaged in potential war crimes has been increasingly viewed by legal scholars and lawmakers through the lens of aiding and abetting.⁵⁸ For example, refueling a plane that eventually bombs a funeral procession constitutes aiding and abetting the bombing itself.⁵⁹

III. LEGAL DEFINITIONS AND INTERNATIONAL HUMANITARIAN LAW

International Humanitarian Law (“IHL”), sometimes referred to as the Law of Armed Conflict (“LOAC”), is primarily derived from the four Geneva Conventions of 1949 and is supplemented by the Additional Protocols of 1977 relating to the protection of victims of armed conflicts.⁶⁰ Many provisions of IHL, such as prohibitions against enforced disappearances and torture, are now accepted as customary international law.⁶¹ IHL provides protections for persons who have not or are no longer participating in armed conflict and seeks to limit the means of warfare and the effects of armed conflict.⁶² It has long been held that states are obliged to take all reasonable measures to ensure respect for IHL by other states.⁶³

Importantly, IHL only applies to armed conflicts. For a conflict to be recognized under IHL, there must be a sufficient degree of intensity in hostilities between the different parties with

⁵⁶ *Id.*

⁵⁷ Ryan Goodman & Miles Jackson, “State Responsibility for Assistance to Foreign Forces (aka How to Assess US-UK Support for Saudi Ops in Yemen,” *Just Security* (August 31, 2016), available at: <https://www.justsecurity.org/32628/state-responsibility-assistance-foreign-forces-a-k-a-assess-us-uk-support-saudi-military-ops-yemen/>; Kristine Beckerle, “US Officials Risk Complicity in War Crimes in Yemen,” *Human Rights Watch* (May 4, 2017), available at: <https://www.hrw.org/news/2017/05/04/us-officials-risk-complicity-war-crimes-yemen>; Noah Feldman, “US Lawyers Fret as the Saudis Bomb,” *Bloomberg* (October 11, 2016), available at: <https://www.bloomberg.com/opinion/articles/2016-10-11/u-s-lawyers-fret-as-the-saudis-bomb>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ “What is International Humanitarian Law?,” International Committee of the Red Cross (July 2004), available at: https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf; “Rule 98. Enforced Disappearance,” International Committee of the Red Cross, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule98

⁶¹ *Id.*

⁶² *Id.*

⁶³ “Yemen: Western powers may be held responsible for war crimes – UN,” *BBC* (September 4, 2019), available at: <https://www.bbc.com/news/world-middle-east-49563073>.

regards to both the weapons deployed and the duration of the conflict.⁶⁴ IHL distinguishes between international armed conflicts, (i.e. conflicts involving at least two States) and non-international armed conflicts (i.e. conflicts that are confined to the territory of a single state and involve conflict between two or more different armed groups).⁶⁵ The Yemeni conflict is best characterized as a non-international armed conflict because the war is internal, has been ongoing since 2015, and has involved the deployment of sufficient weapons by both state and non-state conflict actors to elevate the internal fighting to the level of an active conflict.⁶⁶ Under such classification, the Yemen conflict is governed by Common Article 3 of the Geneva Conventions and Additional Protocol II.⁶⁷ Common Article 3 prohibits any violence to the life of the person as well as mutilation, cruel treatment, torture, hostage taking, outrages to personal dignity, including humiliating and degrading treatment, and extrajudicial sentencing or executions.⁶⁸ Additional Protocol II further codified and expanded the scope of Common Article 3.⁶⁹ Acts such as pillaging, slavery, and terrorism are prohibited under Additional Protocol II, which also protects cultural objects, places of worship, and project works such as dams and nuclear electrical generating stations as well as prohibits the forced movement of civilians.⁷⁰

A. WAR CRIMES

War crimes refer to grave or other serious breaches of IHL, that is, crimes committed against civilians and/or enemy combatants during an international or non-international armed

⁶⁴ “Q & A on The Conflict in Yemen and International Law,” Human Rights Watch (April 6, 2015), available at: <https://www.hrw.org/news/2015/04/06/q-conflict-yemen-and-international-law>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* It is important to note that while the most accurate characterization of the Yemeni conflict seems to be a non-international armed conflict, the circumstances make it possible that it could morph into an international armed conflict. According to Dinstein, a non-international armed conflict can segue into an international one “through the military intervention of a foreign state on the side of the insurgents against the incumbent government. Once there are two states locked in combat with one another, the armed conflict becomes an [International Armed Conflict]IAC.” Thus, if Iran’s involvement on behalf of the Houthis is shown to rise to the level of active hostilities against Hadi’s internationally recognized government, then the conflict may be more accurately characterized as an international armed conflict. Yoram Dinstein, “The Conduct of Hostilities Under the Law of International Armed Conflict,” Cambridge University Press (2016), pg. 36. If the conflict is characterized as an international one, then the four 1949 Geneva Conventions and the 1977 Additional Protocol I govern the conduct of hostilities. “The Geneva Conventions of 1949 and their Additional Protocols,” International Committee of the Red Cross (October 29, 2010), available at: <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

⁶⁸ “Convention (III) relative to the Treatment of Prisoners of War: Geneva, August 1949: Conflicts not of an International Character,” International Committee of the Red Cross, available at: <https://ihl-databases.icrc.org/ihl/WebART/375-590006>.

⁶⁹ “The Geneva Conventions of 1949 and their Additional Protocols,” *supra* note 68.

⁷⁰ “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),” Office of the High Commissioner on Human Rights (June 8, 1977), available at: <https://www.ohchr.org/Documents/ProfessionalInterest/protocol2.pdf>.

conflict and where the perpetrators may be held individually criminally liable.⁷¹ War crimes contain two main elements:⁷²

- (1) a *contextual* element, whereby the conduct occurred within the context of and related to an international or non-international armed conflict; and
- (2) a *mental* element whereby the alleged perpetrator has committed the act with intent and knowledge both with regards to the individual act and its contextual element.⁷³

Grave breaches of IHL, enumerated first and foremost in the Geneva Conventions, include *inter alia*, inhuman treatment, hostage taking, torture, and conduct related to the substantial destruction of property.⁷⁴ Isolated attacks are sufficient to amount to a war crime.⁷⁵ To charge a perpetrator with a war crime, the *chapeau* elements must be satisfied – i.e. that the conduct took place in the context of and was associated with an armed conflict, and the perpetrator was aware of the existence of an armed conflict.⁷⁶

The Rome Statute of the International Criminal Court has codified the provisions of Common Article 3 as war crimes.⁷⁷ Article 8 of the Rome Statute codifies and enumerates war crimes that the International Criminal Court has competence to prosecute. Rome Statute Article 8(2)(c), which concerns non-international armed conflicts,⁷⁸ is a codification of Common Article 3 to the Geneva Conventions.

B. CRIMES AGAINST HUMANITY

Crimes against humanity (“CAH”) may occur during international or non-international conflicts, but they are only instances of violence against civilians.⁷⁹ CAH cannot be isolated events, but must be committed as part of a widespread or systematic attack upon a civilian population.⁸⁰ An attack is widespread if it is large-scale in nature or if there is a large number of

⁷¹ “Info Note 2: Democratic Republic of the Congo 1993-2003,” Office of the High Commissioner on Human Rights, available at: https://www.ohchr.org/Documents/Countries/CD/FS-2_Crimes_Final.pdf.

⁷² There are violations of IHL that are not considered to be war crimes, but rather grave breaches of IHL. These are specific acts that connote a lesser standard in comparison to war crimes.

⁷³ “War Crimes,” United Nations Office on Genocide and the Responsibility to Protect, available at: <https://www.un.org/en/genocideprevention/war-crimes.shtml>. Importantly, variation exists as to the nature of the mental element across international tribunals. For example, the ICTY, using the language of the Additional Protocols, uses the language of “willful” as its mental element, which includes both intentional and highly reckless conduct. See W. J. Fenrick, “Crimes in Combat: The Relationship Between Crimes Against Humanity and War Crimes,” The Hague (March 5, 2003), pg. 3, available at: <https://www.icc-cpi.int/NR/rdonlyres/E7C759C8-C5A4-4AD3-8AB5-EF6ED68AC1D4/0/Fenrick.pdf>.

⁷⁴ Article 50 of Geneva Convention I, Article 51 of Geneva Convention II, Article 130 of Geneva Convention III, article 147 of the Geneva Convention IV

⁷⁵ Case Matrix Network, *Crimes Against Humanity*, <https://www.casematrixnetwork.org/cmn-knowledge-hub/elements-digest/art-7/common-elements/1/>.

⁷⁶ Rome Statute of the International Criminal Court, Art. 8(2)(b)(xxv) (1998).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Case Matrix Network, *Crimes Against Humanity*, <https://www.casematrixnetwork.org/cmn-knowledge-hub/elements-digest/art-7/common-elements/1/>.

⁸⁰ *Id.*

victims.⁸¹ A systematic attack is part of an organized effort to harm or destabilize a civilian population.⁸²

Crimes against humanity are codified in Article 7 of the Rome Statute. These include, “murder, extermination, rape, persecution, and all other inhumane acts of a similar character” committed willfully and as part of widespread or systematic attack directed against a civilian population, with knowledge of the attack.⁸³ Crimes against humanity require three main elements:

- (1) a *physical* element, which includes the commission of the aforementioned crimes,
 - (2) a *contextual* element, whereby the act is committed as part of a “widespread and systematic attack directed against any civilian population,” and
 - (3) a *mental* element, in which the alleged perpetrator had knowledge of the attack.⁸⁴
- The contextual element encompasses large-scale violence in terms of number of victims or the conflicts extension over a broad geographic area or include methodical violence.⁸⁵

These elements are meant to exclude accidental or isolated acts of violence from the category of crimes against humanity, as CAH must typically be committed in furtherance of a state policy,⁸⁶ which can be inferred from circumstantial evidence.⁸⁷

C. DISTINCTIONS BETWEEN WAR CRIMES AND CRIMES AGAINST HUMANITY

There are three key distinctions between war crimes and crimes against humanity. First, crimes against humanity may occur both in times of armed conflict and in times of peace, whereas war crimes can only occur during times of war. Second, a single isolated act may constitute a war crime but not a crime against humanity, as the latter requires being part of a widespread or systematic attack.⁸⁸ Third, most of the underlying offenses that constitute a crime against humanity also constitute a war crime; however, not all conduct that constitutes a war crime necessarily amounts to a crime against humanity.⁸⁹

⁸¹ David Marcus, “Famine Crimes in International Law,” *American Journal of International Law* (2003), pg. 272.

⁸² *Id.*

⁸³ Democratic Republic of the Congo, *supra* note 72.

⁸⁴ “Crimes Against Humanity,” United Nations Office on Genocide and the Responsibility to Protect, available at: <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>.

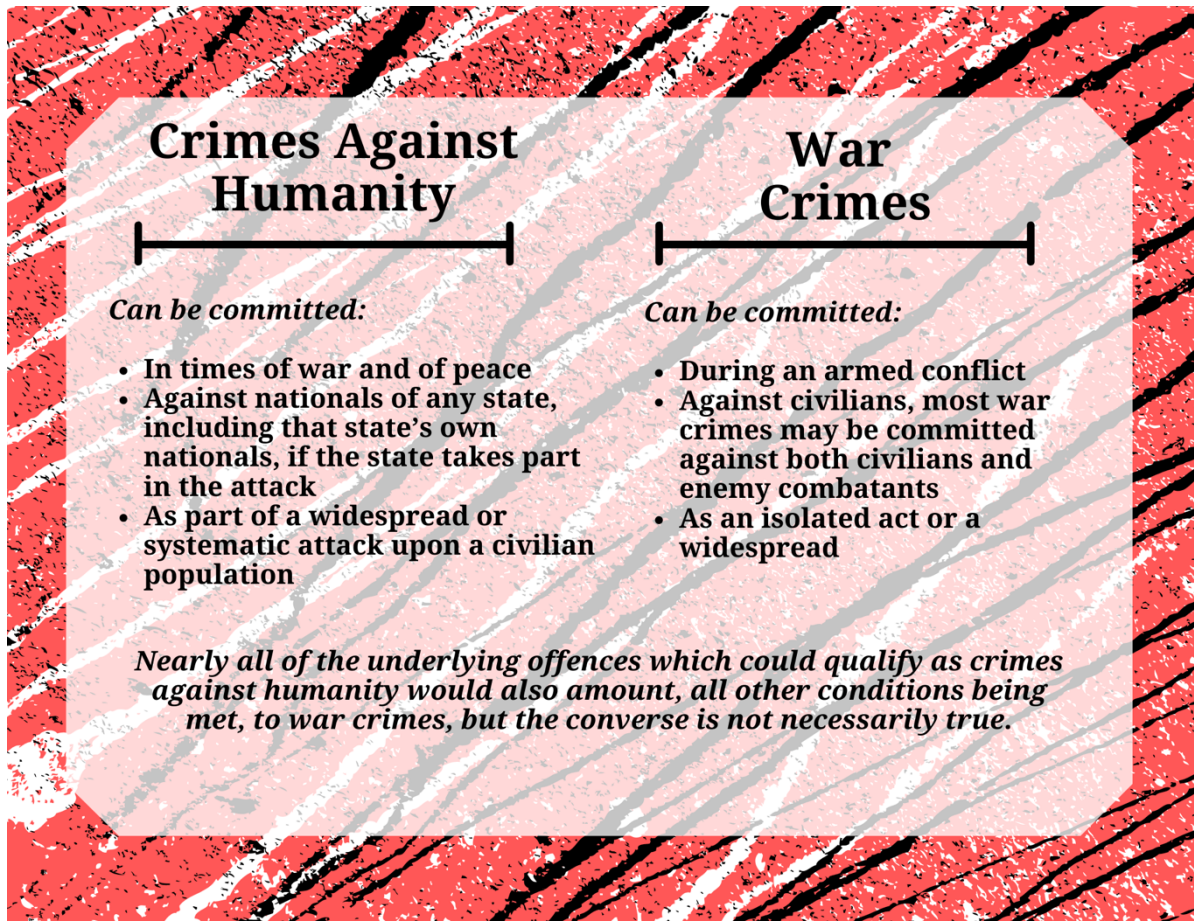
⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Guénaél Mettraux, “International Crimes and the Ad-hoc Tribunals: War Crimes and Crimes Against Humanity,” *Oxford Scholarship Online* (January 2010), available at: <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199207541.001.0001/acprof-9780199207541-chapter-24>.



D. MODES OF LIABILITY

Assigning individual responsibility for war crimes or CAH requires a determination of what role the individual played in committing the crime. The modes of liability for war crimes and CAH come in three forms: individual criminal responsibility, command responsibility, or State responsibility.

Individual criminal responsibility arises when an individual planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime.⁹⁰ Forms of individual criminal responsibility include: planning; instigating; ordering; committing (direct perpetration); aiding and abetting in the planning, preparation or execution of a crime; joint criminal enterprise (“JCE”); Co-perpetration (joint perpetration); indirect perpetration; and indirect co-perpetration.⁹¹ Thus, if an individual commits the war crime of murder, anyone who aided or abetted the murder could be held liable for the murder individually or jointly through JCE.

⁹⁰ Rome Statute, *supra* note 76, at Art. 25(3) Individual Criminal Responsibility; *See also* ICTY/ICTR Statutes, Article 7(1)/Article 6(1), <https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-9-modes-of-liability.pdf>.

⁹¹ *Id.*

Command responsibility “assigns criminal responsibility to high-ranking members of military as well as militia for the crimes committed by their subordinates.”⁹² It requires that the charged individual holds a “superior subordinate relationship with the direct perpetrators and that they knew or should have known that the crimes were being or had been committed.”⁹³ Command responsibility is outlined in Article 28 of the Rome Statute.⁹⁴

A final mode of liability is State responsibility. According to the law of State responsibility, States are prohibited from committing internationally wrongful acts.⁹⁵ Internationally wrongful acts are violations of the principles of IHL, including proportionality, distinction, superfluous injury, and humanity.⁹⁶ States that commit any of these violations may under certain circumstances be subject to suit before the International Court of Justice (“ICJ”). If a State is found to have committed a violation constituting an internationally wrongful act, it must cease the act, make assurances of non-repetition, and issue reparations for injuries if appropriate.⁹⁷

⁹² Case Matrix Network, *International Criminal Law Guidelines: Command Responsibility*, 16 (2016), available at: <https://www.legal-tools.org/doc/7441a2/pdf/>.

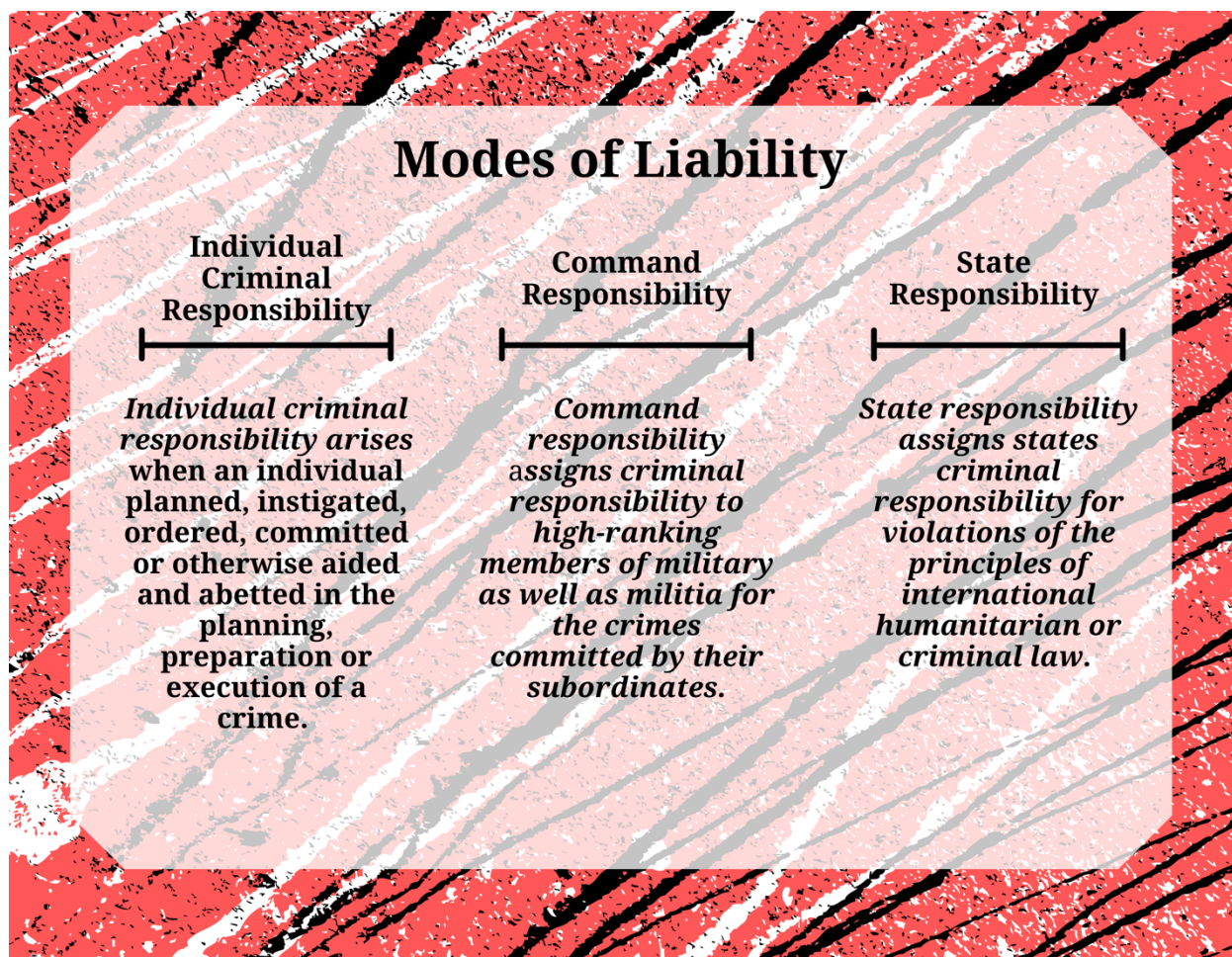
⁹³ *Id.*

⁹⁴ Rome Statute, *supra* note 76, at Art. 28.

⁹⁵ “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” International Law Commission, (2001), Art. 2, with commentaries [hereinafter ARSIWA].

⁹⁶ *Id.*

⁹⁷ ARSIWA, *supra* note 95, at Art. 30; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), ICJ (July 9, 2004) ¶ 151 [hereinafter *Wall AO*].



E. AIDING AND ABETTING LIABILITY

I. CRIMINAL LIABILITY FOR AIDING AND ABETTING

Aiding and abetting crimes, whether perpetrated individually or jointly, have been prosecuted under the individual criminal accountability regimes of ad-hoc tribunals and the International Criminal Court (“ICC”). Article 7 of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and Article 6 of the International Criminal Tribunal for Rwanda (“ICTR”) Statutes provide for individual criminal responsibility for aiding and abetting violations of international law. Accordingly, “a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of crimes enumerated in the statutes could be held individually liable.⁹⁸ Additionally, the tribunals held superior officers responsible for their subordinates “if he or she . . . failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”⁹⁹ The hybrid courts, like the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) and the Special Tribunal for Lebanon (“STL”) provide general guidance on aiding and abetting, thus ad-hoc

⁹⁸ ICTY Statute, Art. 7(1); ICTR Statute, Art. 6(1).

⁹⁹ ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3).

tribunals and hybrid courts rely on jurisprudence, rather than statutes, in prosecuting aiding and abetting crimes.¹⁰⁰

In contrast, the contours of aiding and abetting liability under the ICC are explicitly defined by Article 25(3)(c) (the relevant aiding and abetting sub-section).¹⁰¹ Both the ICC and the ad-hoc tribunals have further clarified the *actus reus* and *mens rea* requirements of aiding and abetting as a mode of secondary (i.e., accessorial) responsibility.

A. ACTUS REUS OF AIDING AND ABETTING

1. Ad-Hoc Tribunals

Ad-hoc tribunals have generally conceptualized aiding and abetting as a form of accessorial liability, considering secondary participation in the perpetration of a crime.¹⁰² Thus, aiding and abetting has been applied to atrocities in which the *actus reus* of the crime is carried out by individuals other than the alleged aider. If the principal perpetrator engages in the *actus reus* of the crime, the aider is also treated as a perpetrator of the crime at hand.¹⁰³

Some discrepancy exists as to the precise definition of aiding and abetting applied by ad-hoc tribunals. ICTR case law has disaggregated the term into two distinct legal concepts, with aiding defined generally as the “provision of assistance to another in the commission of a crime, whereas abetting is the facilitation of, or the provision of advice in relation to, the commission of an act.”¹⁰⁴ The *Semanza* Trial Chamber, for example, defined abetting specifically as concerning abetting in particular, the *Semanza* Trial Chamber refers to it as “encouraging, advising or instigating the commission of a crime.”¹⁰⁵ In contrast, ICTY case law treats aiding and abetting as a broad, unitary legal concept, with definitions of aiding and abetting ranging from “rendering a substantial contribution to the commission of a crime” to “acts of practical assistance, encouragement, or moral support.”¹⁰⁶

“
IF THE PRINCIPAL
PERPETRATOR
ENGAGES IN THE
ACTUS REUS OF THE
CRIME, THE AIDER IS
ALSO TREATED AS A
PERPETRATOR OF
THE CRIME AT HAND.
”

¹⁰⁰ Oona A. Hathaway, et al., “Aiding and Abetting in International Criminal Law,” Cornell Law Review (2019), pg. 1606.

¹⁰¹ *Id.*

¹⁰² *Kunarac et al.* (Judgment), ICTY (2001), ¶ 391.

¹⁰³ Mohamed Elwa Badar, “Participation in Crimes in the Jurisprudence of the ICTY and ICTR,” Routledge Handbook of International Criminal Law (August 21, 2012), pg. 249, available at: <https://bura.brunel.ac.uk/bitstream/2438/6370/2/Badar.Chap16%5B1%5D.pdf>.

¹⁰⁴ *Akayesu* (Judgment), ICTR (1998), ¶ 484; *Kayishema et al.* (Judgment), ICTR (2001), ¶ 196; *Ntakirutimana et al.* (Indictment), ICTR (2000), Section 5; *Ntakirutimana et al.* (Judgment & Sentence) ICTR (2003), ¶ 787.

¹⁰⁵ *Semanza* (Judgment & Sentence), ICTR (2003), ¶ 384.

¹⁰⁶ *Orić* (Judgments) ICTY (2006), ¶ 280.

The ICTY also held the crime that the offender is accused of aiding and abetting must have actually been carried out.¹⁰⁷ The Court further explained that the *actus reus* need not serve as a condition precedent for the crime and may occur before, during, or after the principal crime has been committed.¹⁰⁸ International tribunals have held that there is no requirement that the acts that give rise to aiding and abetting liability be carried out within close proximity to where the principal crime was committed. In *Karadžić*, the ICTY court said the actor’s “conduct may occur in a location remote from the scene of the crime.”¹⁰⁹ The Special Court for Sierra Leone’s (“SCSL”) *Taylor* case reaffirmed that the actor need not be physically present at the scene of the crime, nor must the act of aiding and abetting be temporally close to the actual crime.¹¹⁰

“THE ACTUS REUS NEED NOT SERVE AS A CONDITION PRECEDENT FOR THE CRIME AND MAY OCCUR BEFORE, DURING, OR AFTER THE PRINCIPAL CRIME HAS BEEN COMMITTED.”

Thus, an individual may be held liable for aiding and abetting even if they aided or abetted long before or after the commission of the crime.

The ICTY also noted that an individual may be held criminally responsible for aiding and abetting the direct commission of a crime through affirmative actions, tacit permission, or omissions.¹¹¹ In *Karadžić*, the ICTY ruled that to trigger aiding and abetting liability, the offender must commit “acts or omissions specifically directed to assist, encourage or lend moral support to the perpetration of a certain crime...”¹¹² Aiding and abetting by omission has been interpreted to mean that had the accused taken action, the principle

perpetrator’s commission of the crime would have been “substantially less likely.”¹¹³

The ICTY Appeals Chamber further determined that for the *actus reus* of aiding and abetting by omission to be fulfilled, “the failure to discharge a legal duty assisted, encouraged or lent moral support to the perpetration of a crime and had a substantial effect on the realization of that crime.”¹¹⁴ The Chamber noted that implicit in this understanding of aiding and abetting by omission is a requirement that the accused had the capacity to act, with the means available to

¹⁰⁷ *Akayesu*, *supra* note 104, at ¶ 473-475; *Aleksovski* (Appeal Judgment), ICTY (2000), ¶ 165; *Blagojević & Jokić* (Judgment), ICTY (2005), ¶ 726; *Brđanin* (Judgment), ICTY (2004), ¶ 271.

¹⁰⁸ *Blagojević & Jokić* (Appeal Judgment), ICTY (2007) ¶ 127; *Mrkšić & Šljivančanin*, (Appeal Judgment), ICTY (2009) ¶ 49.

¹⁰⁹ *Karadžić*, (Judgment), ICTY (2016) ¶¶ 574-77.

¹¹⁰ *Taylor* (Appeal Judgment), SCSL (2013), ¶ 385.

¹¹¹ *Tadić* (Appeal Judgment), ICTY (1999), ¶ 188; *Delalić et al.* (Appeal Judgment) ICTY (2001), ¶¶ 215-268; *Kordić & Čerkez* (Judgment), ICTY (2001), ¶ 364; *Aleksovski* (Judgment) ICTY (1999), ¶¶ 69-81.

¹¹² *Karadžić*, *supra* note 109, at ¶ 575.

¹¹³ *Popović et al.* (Appeal Judgment), ICTY (2015), ¶ 1741.

¹¹⁴ *Mrkšić & Šljivančanin*, *supra* note 108, at ¶ 49.

fulfill his or her legal duty.¹¹⁵ In addition, with regards to aiding and abetting by omission, an offender's presence at the scene of a crime without taking action to prevent the commission of the crime does not give rise to aiding and abetting liability, if there is an "approving spectator" or superior present at the crime.¹¹⁶

A final important element of aiding and abetting's *actus reus* established by ad-hoc jurisprudence is that of substantial contribution. The *Karadzic* Court noted that an accomplice's contribution "must have a substantial effect upon the perpetration of the crime."¹¹⁷ The SCSL reaffirmed the substantial contribution element in the *Taylor* case, requiring that the accomplice's "practical assistance, encouragement, or moral support had a substantial effect upon the commission of a crime of underlying offence" for aiding and abetting to be found.¹¹⁸ In *Taylor*, the Court found that Liberian President Charles Taylor was liable for aiding and abetting war crimes by providing included rifles, ammunition, grenades, anti-tank mines, anti-personnel mines, RPGs and RPG rockets to groups that committed atrocities in Sierra Leone,¹¹⁹ with such aid considered practical assistance that had a substantial effect on the commission of the crimes.¹²⁰

2. The ICC

Criminal liability for aiding and abetting is established in Article 25(3)(c) of the ICC's Rome Statute. The sub-section says an individual will be liable for aiding and abetting if the person:

For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;¹²¹

A textual reading of Article 25(3)(c) and its use of the disjunctive "or" between "aids," "abets," and "otherwise assists" suggests that these terms are endowed with separate meanings. The *Bemba* case noted that each term falls within a broader category of assisting in the perpetration of a crime.¹²² While the *Bemba* trial chamber held that "aiding" refers to helping or supporting the principal perpetrator in the (attempted) commission of a crime, and in particular, the provision of practical or material assistance, the Court further noted that the term overlaps with Article 25(3)(c)'s phrase "otherwise assists."¹²³ Abetting, in contrast, refers to "moral or

¹¹⁵ *Id.*

¹¹⁶ *Brđanin*, *supra* note 107, at ¶ 271. *Orić*, *supra* note 105, at ¶ 277; *Aleksovski* (Judgement), *supra* note 111, ¶ 87; *Kayishema et al.* (Appeal Judgement), ICTR (2001), ¶¶ 201-02; *Akayesu*, *supra* note 104, at ¶ 706; *Bagilishema* (Judgement), ICTR (2001) ¶. 36; *Furundžija* (Judgement), ICTY (1998), ¶ 207.

¹¹⁷ *Karadžić*, *supra* note 109, at ¶ 575.

¹¹⁸ *Taylor* (Appeals Judgment), SCSL (2013) ¶ 353.

¹¹⁹ *Taylor* (Judgment), SCSL (2012) ¶ 6908.

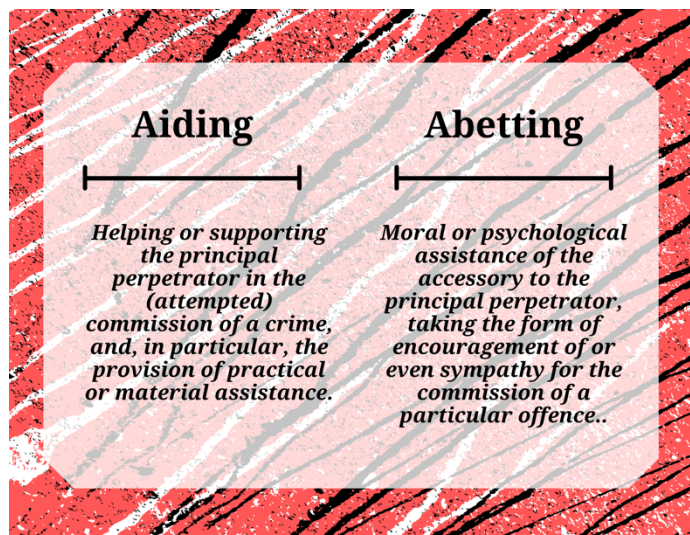
¹²⁰ *Id.* at ¶ 6915.

¹²¹ Rome Statute, *supra* note 76, at Art. 25(3)(c).

¹²² *Bemba Gombo et al.* (Judgment), ICC (2016) ¶ 87

¹²³ *Id.* at ¶ 88.

psychological assistance of the accessory to the principal perpetrator, taking the form of encouragement of or even sympathy for the commission of a particular offence.”¹²⁴



With regards to both aiding and abetting’s *actus reus*, the ICC has held that the principal crime must have been committed, or at least attempted, in order for criminal responsibility to attach to the accessory. Importantly, however, the principal perpetrator need not be identified, charged, or convicted to establish aiding and abetting liability.¹²⁵ Following ad-hoc tribunal jurisprudence, the ICC similarly requires a causal link between the accused’s acts and the commission of the principal crime,¹²⁶ although the threshold for assistance at the ICC remains unclear. On the one

hand, the ICC in the *Bemba* case held that there is no minimal threshold requirement: as long as the provision of aid had an effect on the commission of the principal crime, the significance of its contribution is irrelevant. All that is required to trigger aiding and abetting liability is that the accessory provided assistance to the principal perpetrator.¹²⁷ On the other hand, the Pre-Trial Chamber I in the *Mbarushimana* case found that “a substantial contribution to the crime may be contemplated,”¹²⁸ with the *Lubanga* Trial Chamber I requiring “substantial” contribution on behalf of the accessory to make accessorial liability possible.¹²⁹ Notably, an accessory’s contribution – substantial or otherwise – does not include *ex post facto* aiding and abetting, as no explicit provision in the Rome Statute establishes individual criminal responsibility for aiding and abetting covering up crimes already committed.¹³⁰

B. MENS REA OF AIDING AND ABETTING

1. *Ad-hoc Tribunals*

While ad-hoc tribunal case law has clearly established that aiding and abetting crimes require some form of intent,¹³¹ tribunals have described the nature and requirements of this *mens rea* in different manners. Divergent approaches to the *mens rea* of aiding and abetting by ad-hoc

¹²⁴ *Id.* at ¶ 89.

¹²⁵ *Id.* at ¶ 84.

¹²⁶ *Id.* at ¶ 94.

¹²⁷ *Id.* at ¶ 35.

¹²⁸ *Mbarushimana* (Decision on the Confirmation of the Charges), ICC (2011) ¶ 280.

¹²⁹ *Lubanga Dyilo* (Judgment) ICC (2012), ¶ 997.

¹³⁰ *Mbarushimana*, *supra* note 128, ¶ 286.

¹³¹ *Tadić* (Judgment), ICTY (1997), ¶ 689.

tribunals reflect diverse treatment of the cognitive and volitional elements of the accomplice's *mens rea*.¹³²

With regards to the cognitive element, both the ICTY and ICTR have, at times, required that the aider and abettor must have had knowledge or awareness that his or her actions or omissions assisted in or helped facilitate the perpetration of the principal crime.¹³³ In *Furundžija*, the ICTY Trial Chamber Judgement held “it is not necessary that the aider and abettor...know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.”¹³⁴

The *Furundžija* Trial Chamber cited the post WWII prosecution of the *Zyklon B* case, in which the allied military tribunal was not required to prove that the accused acted with the specific intent to kill concentration camp victims. Rather, it sufficed that the aider intended to sell poison for profit, with the knowledge it would be used to kill civilians.¹³⁵ In *Karadžić*, the ICTY reaffirmed this construction of aiding and abetting's *mens rea*, stating, “there is no requirement of a showing that the acts of the Accused were specifically directed to assist . . . the commission of the crimes.”¹³⁶ For specific intent crimes, such as genocide, all that is required is knowledge on the part of the aider and abettor that the acts performed will assist or facilitate in the commission of the crime.¹³⁷ The ICTY Appeals Chamber further clarified that it is not necessary to prove the existence of a common plan between the accessory and principal perpetrator, and that knowledge by the principal offender of the accomplice's contribution is not necessary to trigger liability for aiding and abetting.¹³⁸

Importantly, a subset of ICTY case law has held that while those accused of aiding and abetting are not required to have knowledge or awareness of the exact offense committed by the principal perpetrator, the accused must have awareness of the essential elements of the principal crime,¹³⁹ which includes the principal perpetrator's *mens rea*.¹⁴⁰

Direct evidence is not required to prove that an actor had knowledge that their actions were likely facilitating the commission of a crime. Rather, the *mens rea* of knowledge may be

¹³² Badar, *supra* note 103, at p.249.

¹³³ *Vasiljević* (Appeal Judgment), ICTY (2004), ¶ 102; *Blaškić* (Appeal Judgment), ICTY (2004), ¶¶ 46, 49–50; *Tadić*, *supra* note 111, at ¶ 229; *Bagilishema*, *supra* note 116, at ¶ 32.

¹³⁴ *Blaškić* (Judgment), ICTY (2000), ¶ 287 (quoting *Furundžija*, *supra* note 116, at ¶ 246).

¹³⁵ *Furundžija*, *supra* note 116, at ¶ 238.

¹³⁶ *Karadžić*, *supra* note 109, at ¶ 576.

¹³⁷ *Id.* at ¶ 577.

¹³⁸ *Tadić*, *supra* note 130, at ¶ 229; *Aleksovski*, *supra* note 103, at ¶ 163(iv).

¹³⁹ *Kajelijeli* (Judgment and Sentence), ICTR (2003), ¶ 768, (citing *Kayishema et al*, *supra* note 116, at ¶¶ 186-87); *Semanza*, *supra* note 11, at ¶ 387; *Bagilishema*, *supra* note 25, at ¶ 32; *Kayishema et al.*, *supra* note 104, at ¶ 201.

¹⁴⁰ *Aleksovski*, *supra* note 103, at ¶ 162; *Blagojević & Jokić*, *supra* note 107, at ¶ 727; *Furundžija*, *supra* note 116, at ¶ 245.

inferred through circumstantial evidence.¹⁴¹ For example, in *Ntawukulilyahyo*, the ICTR Appeals Chamber held that it was reasonable to conclude, based on circumstantial evidence, that the accused had knowledge that, by instructing Tutsi refugees to move to Kabuye hill, where they would not be protected, and by subsequently moving soldiers there who possessed genocidal intent, the refugees would be killed. Thus, on the basis of circumstantial evidence suggesting the aider and abettor knew of the principle perpetrators' specific intent, the accused was found guilty of aiding and abetting.¹⁴²

A final element of ad-hoc case law on aiding and abetting international crimes concerns a volitional aspect of the *mens rea*. In *Orić*, the Trial Chamber held that to satisfy the *mens rea* of aiding and abetting, knowledge by the aider and abettor of his own intent and that of the principal perpetrator must be accompanied by a volitional element of acceptance, "whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not."¹⁴³ The volitional element is, thus, intrinsically linked to the substantial effect element of aiding and abetting's *actus reus*, with the aider and abettor's degree of contribution to the commission of a crime related to his or her acceptance of the consequence of his or her contribution.

2. The ICC

The ICC's conceptualization of aiding and abetting departs from the jurisprudence of ad-hoc tribunals via Article 25(3)(c)'s phrase "for the purpose of facilitating the commission of such a crime." This standard is purposive in nature, requiring prosecutors at the ICC to satisfy a stricter *mens rea* standard for aiding and abetting liability than those at ad-hoc tribunals. The court in *Mbarushimana* affirmed the purposive requirement, with mere knowledge by part the aider and abettor that their actions would facilitate the commission of a crime insufficient for liability to attach.¹⁴⁴

However, subsequent ICC decisions have shown that not all trial courts have interpreted Article 25(3)(c) as creating a stricter *mens rea* standard. For example, the court in *Bemba* held that the aider and abettor must have purpose only as to their own accessory conduct, and that knowledge of the principal offence is all that is required for accessorial liability to attach. That is, it is sufficient if the accessory know that the principal crime will likely occur, with knowledge of the principal crime creating the inference that the accessory intended to facilitate its commission.¹⁴⁵ It is not clear whether future ICC decisions will interpret Article 25(3)(c)'s *mens rea* requirement in accordance with the *Mbarushimana* case (i.e. a purposive standard) or *Bemba* ruling (i.e. a knowledge standard).¹⁴⁶ The choice will be a significant one, as it will determine whether or not corporate officers or state actors can realistically be held criminally liable for aiding and abetting crimes at the ICC.

¹⁴¹ *Taylor*, *supra* note 118, at ¶ 497; *Tadić*, *supra* note 131, at ¶¶ 675-76; *Akayesu*, *supra* note 118, at ¶ 548; *Aleksovski*, *supra* note 116, at ¶ 65; *Fofana & Kondewa* (Judgment), SCSL (2007), ¶ 231.

¹⁴² *Ntawukulilyayo* (Appeal Judgment), ICTR (2011), ¶ 222, 227.

¹⁴³ *Orić*, *supra* note 106, at ¶ 288.

¹⁴⁴ *Mbarushimana*, *supra* note 128, ¶ 274.

¹⁴⁵ *Bemba*, *supra* note 122, ¶ 35.

¹⁴⁶ *Id.* at ¶¶ 84-86.

Aiding & Abetting *Mens Rea*

Ad-Hoc Tribunals:

Knowledge is sufficient. Zyklon B case

- ***If aider is aware that one of a number of crimes could occur, and one does in fact occur, then aider has intended to facilitated the commission of that crime and is guilty. Furundžija case***
- ***Direct evidence is not required, but may be inferred through circumstantial evidence. Ntawukulilyahyo case***
- ***Knowledge that the principle crime is more likely to occur with the aider's conduct than without. Orić case.***

ICC:

Purpose is generally required

- ***Knowledge of their actions facilitating the commission of a crime is insufficient. Mbarushimana case***
- ***The aider must have purpose only as to their own accessory conduct, knowledge of the principal offense is sufficient***

II. STATE LIABILITY FOR AIDING AND ABETTING

Aiding and Abetting liability under the ICJ jurisdiction is derived from Articles 2 and 16 of the Draft Articles of State Responsibility for Internationally Wrongful Acts (“ARSIWA”).¹⁴⁷ Article 2 holds that a State has committed an internationally wrongful act when the State has engaged in conduct “consisting of an action or omission” that is (1) attributable to the State, and (2) breaches and international obligation.¹⁴⁸ Article 16 affirms that:

A state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: that state does so with knowledge of the circumstances of the internationally wrongful act; and the act would be internationally wrongful if committed by that state.¹⁴⁹

Article 16 is a general rule formulated by the International Law Commission (“ILC”) in 2001, but the General Assembly has yet to officially adopt ARSIWA. Nonetheless, in the 2007

¹⁴⁷ ARSIWA, *supra* note 95, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 2, 16.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

Bosnia Genocide case,¹⁵⁰ the ICJ explicitly held that Article 16 had achieved the position of customary international law. The court expressed that “customary rules constituting the law of State responsibility, [included] that of the ‘aid or assistance’ furnished by one State for the commission of a wrongful act by another State”.¹⁵¹

If a State acts in a manner that is incompatible with rules of IHL, the secondary rules of State responsibility are then invoked. This would also include individual liability for State agents under international criminal law. The distinction between primary and secondary liability is blurred with regard to Article 16.¹⁵² Article 16 has components of a primary and secondary rule because it expands responsibility of a wrongful act to an assisting State.¹⁵³ Due to its supplementary nature, responsibility under Article 16 relies on the substance of the primary obligation infringed by one state and on the particular context of the situation involved.¹⁵⁴

The ILC’s guiding commentary on Article 16 explains that the State culpable of providing aid and assistance must do so voluntarily and that act violates the acting State’s international obligations. Thus, the acting State is primarily responsible, and the assisting State occupies a subsidiary function. This demonstrates the difference between aiding and assisting and co-perpetration or co-participation attracting equal responsibility to both parties. Further, the assisting State is only responsible insofar as its actions impact and influence any internationally wrongful act, described by Article 2 of the Draft Articles. Where an internationally wrongful act would undoubtedly have transpired in any event, the responsibility of the assisting State will not entail compensating for that particular act.¹⁵⁵

Article 16 restricts the extent of responsibility for aid or assistance in three ways. First, the appropriate State organ or agency affording aid or assistance must be conscious of the conditions making the actions of the assisted State internationally wrongful. Second, the State must provide aid or assistance with the expectation of enabling the performance of that act and that act must happen. Third, the concluded act must be an act which would have been wrongful if it was perpetrated by the assisting State itself.¹⁵⁶

However, if a State provides financial or material assistance to another State and has *no* knowledge that the State plans to use that assistance for an internationally wrongful act, then it cannot be held internationally responsible.¹⁵⁷ It is not necessary that the aid or assistance is

¹⁵⁰ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment), ICJ Report (2007), pg. 43.

¹⁵¹ *Id.*, para 419.

¹⁵² ARSIWA, *supra* note 95, Commentary on Art. 16, ¶ 7.

¹⁵³ Helmut Philipp Aust, “Complicity and the Law of State Responsibility,” Cambridge University Press (2011), pg. 188.

¹⁵⁴ *Id.* at 230.

¹⁵⁵ ARSIWA, *supra* note 95, Commentary to Art. 16, ¶ 1.

¹⁵⁶ *Id.* ¶ 3.

¹⁵⁷ *Id.* ¶ 4.

fundamental to the commission of an internationally wrongful act as it adequate if it supported the act.¹⁵⁸

The Four Requirements of State Liability

Responsibility under Article 16 is for assisting another State in the perpetration of an internationally wrongful act. Responsibility arises under Article 16 if each of the following four requirements are met:

- (1) The assisting State must give aid or assistance.
- (2) There must be a satisfactory nexus between the assistance and the fundamental wrong.
- (3) The assisting State must hold the necessary *mens rea*.
- (4) The act perpetrated by the assisted State must also be wrongful if perpetrated by the assisting State.¹⁵⁹

The “aid or assistance” specified in condition (1) above is not outlined in Article 16, but is commonly recognized as comprising a comprehensive scope of activity and is not restricted to acts of a certain severity.¹⁶⁰ This might consist of the provision of material aid, including weapons, but also logistical and technical assistance, and financial backing.¹⁶¹ In the context of armed conflict, it might consist of the conveyance of land (i.e. military bases for launching airstrikes),¹⁶² of intelligence (i.e. to pinpoint targets for assault by armed drone, or for capture and imprisonment), and of equipment like satellite phones.

The second requirement necessitates a connection between the assistance and the internationally wrongful act. The connection need not be direct, but a causal link must exist. The ILC’s commentary is inconsistent on whether or not the aid or assistance needs to be a “minor degree” or a “significant

“
IN THE CONTEXT OF
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”

¹⁵⁸ *Id.* ¶ 5.

¹⁵⁹ “Aiding and Assisting: The Mental Element under Article 16 of the International Law Commission’s Articles on State Responsibility” International and Comparative Law Quarterly (2018), pgs. 457-458.

¹⁶⁰ Miles Jackson, “Complicity in International Law,” Oxford University Press (2015), pg. 153; James Crawford, “State Responsibility: The General Part,” Cambridge University Press, (2013), pg. 402.

¹⁶¹ Vladyslav Lanovoy “Complicity in an Internationally Wrongful Act,” in “Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art” (Andre Nollkaemper and Ilias Plakokefalos eds. 2014), pg. 142.

¹⁶² ARSIWA, *supra* note 95, Commentary to Art. 16, ¶ 8.

contribution”.¹⁶³ However, the prevailing commentary appears to signify a need for a “significant contribution” which means a “substantial involvement on the part of the complicit State”¹⁶⁴ which appears to be greater than a mere material facilitation.

The main consideration concerning the third requirement is what comprises the necessary mental element. Article 16 obliges the assisting State to have ‘knowledge’ of the circumstances surrounding the internationally wrongful act. However, the ILC commentary avers that the aid or assistance must be provided “with a view to”¹⁶⁵ enabling the commission of the internationally wrongful act while simultaneously describing the requirement for the assisting State to have “intended”,¹⁶⁶ by the aid or assistance provided, to enable the internationally wrongful conduct to occur. There is undoubtedly a conflict between the wording of Article 16 and the ILC commentary and which *mens rea* is necessary to implicate the assisting State.

The fourth requirement stems from Article 16(b), which entails that “the act would be internationally wrongful if committed by [the assisting] State.”¹⁶⁷ As a consequence of this condition, responsibility will only attach when an act performed by the benefitted State would also be illegal for the assisting State. If this restriction was not present, an assisting State could be held separately responsible for the violation of a bilateral treaty which it was not a party to.¹⁶⁸ If this was not the case it would constitute a violation of the *pacta tertiis* rule, which stipulates that a treaty does not bestow obligations or rights upon a third State without its consent.¹⁶⁹ Where the rule is customary international law, the obligation is binding on both States. However, under treaty law, this stipulation could restrict the function of Article 16, for instance, in circumstances of collaboration where one state is a party to a human rights treaty, and another is not.¹⁷⁰

IV. CONDUCT BY RELEVANT STATE ACTORS

A. THE UNITED STATES

The US is the largest supplier of arms, intelligence and logistical support to both Saudi Arabia and the UAE.¹⁷¹ Since 2015, Saudi Arabia has utilized American-made weapons to support a campaign to restore the Yemeni government, but this campaign has deteriorated into

¹⁶³ International Law Commission “Draft Articles on the Responsibility of International Organizations,” Art. 16, commentary ¶ 4, quoting from ¶ 5 of the Commentary to Article 16 (2011); Crawford, *supra* note 160, at 403.

¹⁶⁴ Crawford, *supra* note 160, at 405.

¹⁶⁵ ARSIWA, *supra* note 95, at Commentary to Art. 16, ¶ 3.

¹⁶⁶ ARSIWA, *supra* note 95, at Commentary to Art. 16, ¶ 5.

¹⁶⁷ ARSIWA, *supra* note 95, Article 16(b).

¹⁶⁸ Crawford, *supra* note 160, at 409.

¹⁶⁹ International Law Commission, *supra* note 164, at Art. 16 commentary, ¶ 6. The *pacta tertiis* rule is replicated in Articles 34 and 35 of the Vienna Convention on the Law of Treaties.

¹⁷⁰ Jackson, *supra* note 160, at 162.

¹⁷¹ Nima Elbagir, Salma Abdelaziz, Mohamed Abo El Gheit & Laura Smith-Spark, “Sold to an Ally, Lost to an Enemy,” CNN (February 2019), available at: <https://edition.cnn.com/interactive/2019/02/middleeast/yemen-lost-us-arms/>.

one of the most devastating humanitarian crises in the world.¹⁷² CNN investigations have found that both the Saudi and UAE governments have transferred US weapons bought under arms contract agreements to the different warring factions in Yemen.¹⁷³ The investigations also found that the Saudi-led coalition (“SLC”) uses these weapons as a form of currency to buy loyalties of militias and tribes, to support their chosen armed actors, and to influence discord between warring parties.¹⁷⁴ However, the US argues that the use of weapons in this way is a violation of the terms of the arms sales.¹⁷⁵ All sales of US military technology are limited by end-user requirements that prohibit use by any third party without US authorization, including use by these militias and tribes.¹⁷⁶ By absorbing militias into Yemeni forces, the use of the weaponry is technically under the direct supervision of the UAE, to which the weapons were legally sold by the US.¹⁷⁷ The transfers to the absorbed militias constitute a legitimate transfer from state to state.¹⁷⁸ As such, the UAE denies breach of end-user agreements, but the US claims that neither Saudi Arabia nor the UAE have been authorized to transfer weapons to factions on the ground in Yemen.¹⁷⁹ Further, all US arms manufacturers formally stated that they follow all US laws and regulations governing export control.¹⁸⁰

In March 2015, the US announced that it would provide logistical and intelligence support to the SLC forces against the Houthi rebels in the form of mid-air refueling, targeting assistance and training, and further arms sales.¹⁸¹ The majority of refueling support ceased in November 2018.¹⁸² As part of its logistical support, the US would review Saudi-selected targets and advise on the risk of civilian casualties but, according to US officials, the US would not provide advice on where exactly to target.¹⁸³ Nearly five years after announcing support for the SLC’s efforts, the US continues to authorize substantial arms sales to Saudi Arabia.¹⁸⁴ According to the US Bureau of Political-Military Affairs, the US struck a ten-year \$110 billion agreement to modernize Saudi Armed Forces, which included \$750 million in training programs intended to help limit civilian casualties.¹⁸⁵ As of May 2019, the US has sold Saudi Arabia more than \$129

¹⁷² Zoe Todd, “US Weapons, Saudi Airstrikes, Yemeni Deaths: What a U.N. Report on War Crimes in Yemen Means for US-Saudi Weapons Sales,” PBS: Frontline (October 1, 2019), available at: <https://www.pbs.org/wgbh/frontline/article/u-s-weapon-saudi-airstrikes-yemen/>.

¹⁷³ Elbagir at. al., *supra* note 171.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Oona A. Hathaway, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa T. Yamamoto, “Yemen: Is the US Breaking the Law?,” Harvard National Security Journal (2018), pg. 5, available at: <https://advance.lexis.com/document/searchwithindocument/?pdmfid=1000516&crid=cba0f41a-660d-48de-ae36-4e55b3513565&pdsearchwithinterm=%22targeting+assistance%22&comp=9s39k&prid=21b17e45-5776-4cb6-8a96-baf37d6eb591>.

¹⁸² *Id.* at 12.

¹⁸³ *Id.* at 12.

¹⁸⁴ *Id.* at 26.

¹⁸⁵ *Id.* at 13-14.

billion in active foreign military sales.¹⁸⁶ Aware of the controversial air campaign in Yemen by Saudi Arabia and their negative human rights record, Congress has made several attempts to curb these arms deals and instead tried to support immediate relief for the most vulnerable and suffering in Yemen.¹⁸⁷ Congress blocked a vote to approve the sale and tried introducing the Saudi Arabia False Emergencies Act and the Saudi Arabia Accountability and Yemen Act of 2019.¹⁸⁸ However, President Trump thwarted Congress' attempts to ease the suffering in Yemen by either vetoing proposed legislation or continuing to endorse arms deals despite the wishes of Congress.¹⁸⁹ He has sent five letters to Congress, two of which, in December 2017 and June 2018, state that the US in a "non-combat role," "continued to provide logistics and other support to anti-Houthi forces in Yemen."¹⁹⁰

*Evidence of US Weapons and Arms Being Used
or Sold*

Black markets in Yemeni villages sell "expensive and sought after" American arms; these shops fill individual orders as well as supply full militias.¹⁹¹ Video evidence of US-made Mine-Resistant Ambush Protected ("MRAP") vehicles being used by separatist militia groups led by the Southern Transitional Council ("STC") emerged in February 2019.¹⁹² The MRAP vehicles are built to withstand ballistic arms fire, mine blasts and improvised explosive devices ("IEDs").¹⁹³ These vehicles can be traced to a \$2.5 billion arms sale contract between the US and the UAE which included an end user agreement that required the UAE must be the final end user of the tanks.¹⁹⁴ The UAE claims there was no breach, but air conditioning units inside the vehicles bear serial numbers from Real Time Laboratories, an American company with a manufacturing facility in Mississippi. Real Time Labs stated that they supplied the product to the US government under a 2010 subcontract with BAE Systems.¹⁹⁵

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¹⁸⁶ Todd, *supra* note 172.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Hathaway, *supra* note 181, at 12.

¹⁹¹ Elbagir, *supra* note 171.

¹⁹² *Id.*

¹⁹³ Nima Elbagir, Mohamed Abo El Gheit, Florence Davey-Attlee & Salma Abdelaziz, "American Weapons Ended up in the Wrong Hands in Yemen. Now They are Being Turned on the US-backed Government," CNN (October 20, 2019), available at: <https://www.cnn.com/2019/10/18/world/american-weapons-yemen-war-intl/index.html>.

¹⁹⁴ Elbagir, *supra* note 171.

¹⁹⁵ Elbagir, *supra* note 193.

A prominent group known as Alwiyyat al Amalqa or “Giants Brigade,” a UAE-supported militia, recorded a video that shows an MRAP vehicle, purportedly being driven in convoy to join the separatists' battle against government forces in the south.¹⁹⁶ The Giants Brigade placed their insignia on MRAP vehicles.¹⁹⁷ These were found to have been made in Beaumont, Texas and contained serial numbers from the manufacturer, Navistar, the largest provider of armored vehicles for the US military.¹⁹⁸ CNN investigators also found an image showing a serial number of an MRAP in the hands of a senior Houthi official which was then linked back to the same \$2.5 billion sale to the UAE in 2014.¹⁹⁹ Further, footage broadcasted on a pro-Iranian Lebanese channel showed US-made armored vehicles being unloaded into a Yemeni port off UAE ships²⁰⁰ and Saudi and UAE media sources boasted about an airdrop onto the al-Qaeda in the Arabian Peninsula (“AQAP”) frontline which included American-made BGM-71 TOW anti-tank missiles.²⁰¹ AQAP even uses US-made Oshkosh armored vehicles; as a show of force AQAP paraded through the streets of Taiz in 2015 in the armored vehicles.²⁰² US manufactured bombs have also been used in strikes on civilians. A bomb strike in August 2018 against a school bus in Northern Yemen killed 51 people, including 40 children.²⁰³ Trace elements of the explosive showed the bomb was a General Dynamics-made laser-guided MK 82 general purpose bomb.²⁰⁴

Evidence of Intelligence Support

On March 26, 2015, Saudi military forces relied heavily on US surveillance images and targeting information to carry out an airstrike in Yemen, targeting Houthi rebels in Aden.²⁰⁵ Although Saudi or Emirati pilots pull the trigger on weapons in Yemen, the US provides the support in the form of warplanes, munitions, and intelligence.²⁰⁶ In 2015, the US moved to expand intelligence sharing with Saudi Arabia to, “help them get a better sense of the battlefield and the state of play with the Houthi forces.”²⁰⁷ The intelligence forces also helped identify ‘no-strike’ areas the coalition should avoid to minimize civilian casualties.²⁰⁸ As part of this intelligence expansion, the US stationed a team of American military advisers at the coalition air command in Riyadh since 2016.²⁰⁹

¹⁹⁶ *Id.*

¹⁹⁷ Elbagir, *supra* note 171.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Elbagir, *supra* note 193.

²⁰¹ Elbagir, *supra* note 171.

²⁰² *Id.*

²⁰³ Hathaway, *supra* note 181, at 14-15.

²⁰⁴ *Id.* at 15.

²⁰⁵ Karen DeYoung, “Officials: Saudi-led action relied on US intelligence,” Washington Post (March 26, 2015), available at: https://www.washingtonpost.com/world/national-security/officials-saudi-led-action-in-yemen-relied-heavily-on-us-intelligence/2015/03/26/6d15302c-d3da-11e4-8fce-3941fc548f1c_story.html.

²⁰⁶ Declan Walsh, “Saudi Warplanes, Most Made in America, Still Bomb Civilians in Yemen,” New York Times (May 22, 2019), available at: <https://www.nytimes.com/2019/05/22/world/middleeast/saudi-yemen-airstrikes-civilians.html>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

B. THE UNITED KINGDOM

The UK is the second largest exporter of arms to Saudi Arabia, with its defense exports amounting to a record high of £14 billion in 2018 alone.²¹⁰ Chief among these defense exports are bombs, intelligence, and refueling services.²¹¹ This trend to engage in extensive arms contracts is fairly recent. Military exports to Saudi Arabia skyrocketed in 2015 to £2.9 billion, whereas in 2014 military exports were only £83 million.²¹² These arms sales run counter to accepted provisions within the law of the UK.²¹³ As a party to the Arms Trade Treaty, the UK is bound by the provision banning arms exports by a country if they know the arms will be used or are likely to be used in the commission of war crimes.²¹⁴ Further, under UK law, it is illegal to license arms if they might be used deliberately or recklessly to harm civilians.²¹⁵

Planes, Bombs, and Technical Assistance

In March 2019, the UK signed a preliminary agreement to sell 48 Typhoon multi-role fighter jets from British-based BAE Systems, Europe's biggest defense company, to Saudi Arabia despite public outcry to implement an embargo on Saudi Arabia.²¹⁶ In May 2019, BAE stated that it would continue to ship its weapons to Saudi Arabia despite Germany's ban on arms sales.²¹⁷ Saudi Arabia absolutely depends on weapons produced by BAE and a BAE employee even stated that "[i]f it weren't there, in seven to 14 days there wouldn't be a jet in the sky."²¹⁸

²¹⁰ Dan Sabbagh, "UK reclaims place as world's second largest arms exporter," *The Guardian* (July 30, 2019), available at: <https://www.theguardian.com/world/2019/jul/30/uk-reclaims-place-as-worlds-second-largest-arms-exporter>.

²¹¹ Gardiner Harris, Eric Schmitt & Rick Gladstone, "US and Britain Seek Yemen Cease-Fire as Relations With Saudis Cool," *New York Times* (October 31, 2018), available at: <https://www.nytimes.com/2018/10/31/world/middleeast/saudi-arabia-yemen-cease-fire.html?searchResultPosition=brit2>.

²¹² Arron Merat, "'The Saudis couldn't do it without us': the UK's true role in Yemen's deadly war," *The Guardian* (June 18, 2019), available at: <https://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war>.

²¹³ *Id.*

²¹⁴ "Yemen: Western powers may be held responsible for war crimes - UN," *BBC* (September 4, 2019), available at: <https://www.bbc.com/news/world-middle-east-49563073>.

²¹⁵ *Id.*

²¹⁶ Richard Pérez-Peña, "Britain to Sell Jets to Saudis Despite Conduct of Yemen War," *New York Times* (March 9, 2018), available at: <https://www.nytimes.com/2018/03/09/world/middleeast/uk-saudi-arms-jets-yemen.html?searchResultPosition=1>.

²¹⁷ Ben Chapman, "BAE Working with UK Government to Supply Saudi Arms Despite German Ban," *The Independent* (May 9, 2019), available at: <https://www.independent.co.uk/news/business/news/bae-systems-weapons-sales-saudi-arabia-german-arms-export-ban-a8906851.html>.

²¹⁸ Merat, *supra* note 212.



These contracts not only supply fighter jets and technical assistance to Saudi Arabia, but they also supply bombs as well.²¹⁹ British bombs are produced by BAE Systems and the UK-based subsidiary of Raytheon, a US-based defense contractor, in Glenrothes in Scotland and Harlow and Stevenage in Southeast England.²²⁰ The British Government has paid large sums of money for the

manufacturing of these bombs, which are then transferred directly to the Saudi Royal Air Force: for example £22,000 per bomb for Paveway II and III bombs, £105,000 per Brimstone I and II air-launched, ground attack missiles, and £790,000 per Storm Shadow air-launched cruise missiles.²²¹ Despite evidence of misuse of these weapons in actions that may amount to war crimes, the May and Johnson Governments have justified the sales by stating the British Government does not pick the targets in Yemen and that Saudi Arabia already investigates its own violations of international humanitarian law.²²² In June 2019, the UK temporarily suspended the approval of any new licenses to sell arms to Saudi Arabia after a court ruled that ministers acted unlawfully in selling the weapons when there was clear evidence that they might be used to violate international humanitarian law.²²³ This was in stark contrast to a previous decision of the High Court in 2017 which ruled that arms sales to Saudi Arabia were legal and the Court held that British Defense Military has a “wider and more sophisticated range of information” than the court does to make such a decision.²²⁴ The temporary injunction against arms sales may be short-lived because later that month, Liam Fox, the Secretary of State for International Trade, stated in Parliament that he disagreed with the decision and would appeal it.²²⁵

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ Michael Wolgelenter & Rick Gladstone, “UK to Suspend Issuing Arms Licenses to Saudi Arabia,” *New York Times* (June 20, 2019), available at: <https://www.nytimes.com/2019/06/20/world/europe/uk-saudi-arabia-yemen-arms.html>.

²²⁴ Rick Gladstone, “British Court Allows Arms Sales to Saudis, Rejecting Criticism Over Yemen,” *New York Times* (July 10, 2017), available at: <https://www.nytimes.com/2017/07/10/world/middleeast/yemen-saudi-arabia-britain-arms-sales-high-court.html?searchResultPosition=3>.

²²⁵ *Id.*

Personnel and Intelligence

The UK's involvement, however, does not end with weapon sales.²²⁶ Under another contract to the UK government, BAE provides "in-country" services to Saudi Arabia's military where they train Saudi pilots and conduct essential maintenance on planes that have flown thousands of miles across the desert to hit their intended targets in Yemen.²²⁷ They also provide more direct combat logistical support such as arming and assembling the British-sold jets and the munitions they carry.²²⁸ An estimated 95% of the tasks necessary to fight the air war in Yemen are carried out by UK government contractors.²²⁹ An estimated 6,300 British contractors are working at "forward operating bases in Saudi Arabia as well as 80 Royal Air Force personnel."²³⁰ As of May 2018 there are an unknown number of British troops deployed to Yemen to help Saudi Arabia and the UK government has refused to respond when asked if UK troops are deployed in Yemen.²³¹

C. FRANCE

France, the third largest weapons exporter in the world, has indirectly contributed to the Yemeni Civil War by selling weapons to the Saudi Arabian government.²³² From 2008 to 2017, Saudi Arabia was France's second biggest export market, however, France denies that their weapons exports are large and describe them as "relatively modest" and subject to tight restrictions.²³³ A report issued by the *Direction du renseignement militaire* ("DRM"), the French military intelligence agency, showed that French arms, tanks, and laser guided missile systems are being used in Yemen by Saudi Arabia and the UAE.²³⁴ This report details ample evidence that French weapons are continually used in the Yemeni conflict. For example, Caesar cannons, manufactured by a French company, Nexter, are deployed along the Saudi-Yemeni border as are French-made Leclerc tanks in bases in south-eastern Yemen.²³⁵ The use of these tanks helps coalition offensives for the control of the Houthi-led party of Hodeidah.²³⁶ *Aérospatiale*/Eurocopter AS532 Cougar transport helicopters and Airbus SE A330 Multi Role Tanker Transport ("MRTT") refueling planes, as well as French-built ships, have aided in the blockade of Yemeni ports and has led to food and medical shortages.²³⁷ The MRTT allows for these nation's air forces to conduct deep strikes within Yemen, including a number of the alleged

²²⁶ Merat, *supra* note 212.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² Benjamin Dodman, "France Under Pressure to Come Clean Over Arms Exports in Yemen War," France 24 (April 21, 2019), available at: <https://www.france24.com/en/20190420-france-arms-exports-yemen-saudi-uae-khashoggi-disclose>.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

incidents that may constitute war crimes.²³⁸ However, France continuously asserts that French arms are used for defensive purposes outside of Yemeni territory or are under coalition control and that the sale of these weapons complies with international obligations.²³⁹

Despite evidence of frequent unlawful attacks, France continues to sell munitions and other arms to Saudi Arabia even though they have knowledge that their weapons are used in these attacks as evidenced by the DRM report.²⁴⁰ Moreover, the Arms Trade Treaty, to which France is a party, prohibits the authorization of arms transfers with the knowledge that these would be used to commit war crimes.²⁴¹

D. GERMANY

In November 2018, in response to the killing of journalist Jamal Khashoggi, Germany implemented an embargo on arms exports to Saudi Arabia.²⁴² The German government extended the ban for another six months starting September 2019.²⁴³ However, despite these bans, there is evidence that Germany's arms export restrictions are ineffective, as reports indicate that German made weapons are still being used in the Yemen conflict.²⁴⁴ In 2018, the German government approved €416 million worth of exports to Saudi Arabia.²⁴⁵ Then, in March 2019, Germany's coalition government approved a €400 million arms export to Saudi Arabia and its allies, and also approved 208 arms deals with Saudi Arabia, the UAE, Bahrain, Egypt, Jordan, and Kuwait.²⁴⁶ American-made armored trucks equipped with German-based Dynamit Nobel Defense made FeWas weapons stations have been sighted in Yemen.²⁴⁷ In 2009, reports detailed that the German government approved the export of these weapons stations to UAE at a cost of €81 million.²⁴⁸ Evidence shows howitzers with German-made chassis and motors have been used by the Coalition to shell targets in Yemen near the Saudi Yemeni border.²⁴⁹

²³⁸ *Id.*

²³⁹ Dodman, *supra* note 234.

²⁴⁰ *Id.*

²⁴¹ "Yemen: Western powers may be held responsible for war crimes – UN," *supra* note 216.

²⁴² Giovanna Maletta, "Legal Challenges to EU Member States' Arms Exports to Saudi Arabia: Current Status and Potential Implications," Stockholm International Peace Research Institute (June 28, 2019), available at: www.sipri.org/commentary/topical-background/2019/legal-challenges-eu-member-states-arms-exports-saudi-arabia-current-status-and-potential.

²⁴³ "Germany extends ban on arms sales to Saudi Arabia," Deutsch Welle (March 28, 2019), available at: <https://www.dw.com/en/germany-extends-ban-on-arms-sales-to-saudi-arabia/a-48107734>.

²⁴⁴ Maletta, *supra* note 242.

²⁴⁵ Naomi Conrad & Nina Werkhäuser, "In Yemen War, Coalition Forces Rely on German Arms and Technology," Deutsche Welle, (February 2, 2019), available at: <https://www.dw.com/en/in-yemen-war-coalition-forces-rely-on-german-arms-and-technology/a-47684609>.

²⁴⁶ "Germany Selling Arms to Countries Bombing Yemen," Middle East Monitor (March 28, 2019), available at: <https://www.middleeastmonitor.com/20190328-germany-selling-arms-to-countries-bombing-yemen/>.

²⁴⁷ "War in Yemen, Made in Europe," Arms Trade Watch, available at: <https://yemen.armstradewatch.eu/land.html>.

²⁴⁸ Conrad & Werkhäuser, *supra* note 245.

²⁴⁹ "War in Yemen, Made in Europe," *supra* note 247.

German arms are also widely used by the UAE armed forces, which has led a ground and naval campaign in the Yemen conflict.²⁵⁰ Their involvement in Yemen is made possible because the Emirates use German-made technology and weapons, such as FeWas weapon stations, MAN trucks, most likely manufactured as part of a joint venture between Germany's defense firm Rheinmetall and MAN SE, a subsidiary of Volkswagen, and tank armor.²⁵¹ In 2015, Eritrea agreed to lease its seaport in Assab Eritrea to the UAE for thirty years, which enabled the UAE to shuttle soldiers and military gear across the Red Sea to Yemen, and to more easily blockade the Yemeni coast.²⁵² Several satellite images taken of the port showed several warships built by shipbuilder Lurssen.²⁵³ From March 2017, satellite images continue to show that German-built minesweeper vessels occupy the waters in the port of Assab and the harbor of Mokha.²⁵⁴

German assistance is not limited to tanks and ships but extends to the air force as well. Many of the components of the Tornado jetfighter, primarily utilized by the Royal Saudi Air Force, such as the center fuselage, fuel system, and engine are all German-made.²⁵⁵ Germany continues to supply essential components for Typhoon air jets to the UK who then sell the jets to Saudi Arabia.²⁵⁶ In January 2018, Houthi forces reportedly shot down a SLC Tornado fighter jet in Sadaa province.²⁵⁷ Germany has also supplied essential components for an Airbus A330 MRTT to Saudi Arabia and the UAE.²⁵⁸

Germany's government is likely aware that the arms trade with Saudi Arabia is violating international law.²⁵⁹ This is evidenced by its embargo on arms deals with Saudi Arabia, and the government's reaction to the public outcry to halt trade.²⁶⁰ However, as recently as February 2019, Germany's Minister of Economic Affairs and Energy, Peter Altmaier, claimed that while Germany does sell weapons to other countries, he had no knowledge of Germany selling weapons to Saudi Arabia.²⁶¹

²⁵⁰ Conrad & Werkhäuser, *supra* note 245.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Teodora Torrendo, "So We Found off the Coast of Yemen in Germany Built Warships," CC Discovery (February 27, 2019), available at: <https://www.ccdiscovery.com/so-we-found-off-the-coast-of-yemen-in-germany-built-war-ships>.

²⁵⁴ *Id.*

²⁵⁵ Conrad & Werkhäuser, *supra* note 245.

²⁵⁶ *Id.*

²⁵⁷ "Saudi Warplane Crashes in Yemen; Pilots Escape," al-Jazeera, (January 7, 2018), available at: <https://www.aljazeera.com/news/2018/01/saudi-warplane-crashes-yemen-pilots-escape-180107182349027.html>

²⁵⁸ Conrad & Werkhäuser, *supra* note 245.

²⁵⁹ "German Ban on Arms Exports to Saudis Spurs Pushback," Spiegel International (March 6, 2019), available at: <https://www.spiegel.de/international/germany/germany-s-ban-on-arms-exports-to-saudi-arabia-spurs-pushback-a-1255764.html>.

²⁶⁰ *Id.*

²⁶¹ Martin Lejeune, "German Arms and Soldiers in Yemen," (April 10, 2019), available at: <http://www.martinlejeune.de/german-arms-and-soldiers-in-yemen/>.

V. CONDUCT BY RELEVANT CORPORATE ACTORS

Throughout the Yemeni civil war there have been well documented instances of airstrikes conducted by the SLC that may amount to war crimes.²⁶² In many cases, to carry out these legally questionable attacks, the SLC has made use of bombs, missiles, and weapons platforms produced and sold by various US and European corporations.²⁶³

In August 2017, the SLC conducted an airstrike on a residential area in Sanaa with a laser guided-bomb produced by Raytheon, resulting in the deaths of seven people.²⁶⁴ Raytheon was implicated in another SLC attack that took place in 2016, in which a well-digging site was struck by Raytheon-made Paveway II laser-guided bomb which killed 31 civilians.²⁶⁵ Additionally, in April 2018, media reports demonstrated that the bombing of a wedding party in Al-Raqah village, carried out by the SLC, involved the use of another bomb equipped with a Paveway II laser guidance system manufactured by Raytheon killing at least 20 people.²⁶⁶



²⁶² “Yemen: US-Made Bomb Kills and Maims Children in Deadly Strike on Residential Homes,” Amnesty International (Sept. 22, 2017), available at: https://www.amnesty.org/en/latest/news/2017/09/yemen-us-made-bomb-kills-and-maims-children-in-deadly-strike-on-residential-homes/?utm_source=TWITTER-IS&utm_medium=social&utm_content=1085878152&utm_campaign=Amnesty&utm_source=TWITTER-IS&utm_medium=social&utm_content=1086046440&utm_campaign=Other_issue.

²⁶³ Conrad & Werkhäuser, *supra* note 245; Dodman, *supra* note 232; Gladstone, *supra* note 224; Walsh, *supra* note 206; “Yemen: Western powers may be held responsible for war crimes – UN,” *supra* note 214.

²⁶⁴ “Yemen: US-Made Bomb Kills and Maims Children in Deadly Strike on Residential Homes,” *supra* note 264.

²⁶⁵ Beckerle, *supra* note 57.

²⁶⁶ Mashal Hashem & James Allen, “How Lobbying Firms Helped Destroy Yemen,” The Nation (May 16, 2019), available at: <https://www.thenation.com/article/tom-dispatch-lobbying-firms-yemen/>.

Other major US defense contractors have also been implicated in alleged SLC war crimes, such as Lockheed Martin and Boeing. In March 2016, a General Dynamics-made precision-guided MK-84 bomb, produced by Lockheed, was used in an attack on a market that left 97 people dead.²⁶⁷ The next day another MK-84 bomb was used in a second strike that targeted rescue workers.²⁶⁸ Additionally, in August 2018, the SLC used a Lockheed Martin-made MK-82 bomb, to strike a school bus in Dahyan Yemen, killing 51.²⁶⁹ In March 2017, a Boeing made Apache attack helicopter was used in a SLC attack that targeted a boat carrying Somali refugees; upwards of 42 innocent people were killed in the attack.²⁷⁰ Additionally, Boeing-built combat planes, such as the F-15, have played a central role in the SLC's campaign in Yemen.²⁷¹ As of May 2017, Human Rights Watch documented 23 instances in which remnants of US supplied weapons were found at the scene of alleged unlawful Coalition attacks.²⁷²

European corporations have also supplied war materials directly to the nations within the SLC. BAE Systems manufactures Eurofighter Typhoon jets, Challenger tanks, and a range of bombs all of which it sells around the world.²⁷³ The British government subcontracted BAE to provide weapons, maintenance and engineers to Saudi Arabian government forces.²⁷⁴ Between 2011 and 2015, French based multinational aerospace corporation Airbus SE, sold its A-330 MRTT tanker aircraft to the Saudi Arabian Air Force.²⁷⁵ After the assassination of journalist Jamal Khashoggi, by Saudi Arabian agents, Germany banned its arms manufacturers from selling weapons to Saudi Arabia.²⁷⁶ German arms manufacturer Rheinmetall, owns the Italian Arms manufacturer RWM Italia.²⁷⁷ Because RWM Italia is not directly a German company it was not subject to the German ban on arms sales to Saudi Arabia. As a result, RWM Italia was able to export some of its MK-80 bombs to Saudi Arabia.²⁷⁸

²⁶⁷ Nima Elbagir, Salma Abdelaziz, Ryan Browne, Barbara Arvanitidis & Laura Smith-Spark, "Bomb that killed 40 children in Yemen was supplied by the US," CNN (August 17, 2018), available at: <https://www.cnn.com/2018/08/17/middleeast/us-saudi-yemen-bus-strike-intl/index.html>.

²⁶⁸ Billy Briggs, "US Arms Manufacturer with Factor in Glenrothes Develops 'Lethal' Missile Steering System Similar to One Used in Yemen Bombing," Daily Record (April 10, 2016), available at: <https://www.dailyrecord.co.uk/news/uk-world-news/arms-manufacturer-factory-glenrothes-develops-7726745>.

²⁶⁹ Elbagir, *supra* note 267.

²⁷⁰ Ryan Goodman & Samuel Oakford, "Did US Provide Helicopter Used in Attack of Somali Refugees in Yemen?" Just Security (March 24, 2017), available at: <https://www.justsecurity.org/39210/united-states-implicated-helicopter-somali-refugees-yemen/>.

²⁷¹ Mandy Smithberger & William Hartung, "Our Man from Boeing," POGO (January 29, 2019), available at: <https://www.pogo.org/analysis/2019/01/our-man-from-boeing/>. Note: The sale of these F-15s long pre-dated the outbreak of the YCW, along with agreements to maintain and upgrade these aircraft and their capabilities.

²⁷² Beckerle, *supra* note 57.

²⁷³ *Id.*

²⁷⁴ Merat, *supra* note 212.

²⁷⁵ "Criminal Complaint against RWM Italia S.p.A. and Italian Arms Export Authority," MWATANA (April 18, 2018) available at: mwatana.org/en/criminal-complaint-against-rwm-italia-s-p-a-and-italian-arms-export-authority/.

²⁷⁶ "Germany extends ban on arms sales to Saudi Arabia," *supra* note 243.

²⁷⁷ "Criminal Complaint against RWM Italia S.p.A. and Italian Arms Export Authority," *supra* note 275.

²⁷⁸ Maletta, *supra* note 242.

It is possible that these corporations could be held accountable both for criminal and civil liability for their complicity in these actions if the actions are found to be war crimes or crimes against humanity.

Foreign Military Sales v. Direct Commercial Sales

Within the context of US corporate sales connected to the conflict in Yemen, there is a critical distinction between transactions made through the US Foreign Military Sales (“FMS”) program and direct commercial sales. Due to the nature of these FMS program transactions, corporate defense contractors may be able to insulate themselves from liability, as their transfers are technically to the Federal government, rather than directly to in-theater actors. Direct commercial sales, on the other hand, are direct transactions between US defense contractors and foreign governments.²⁷⁹ While these are often subject to federal approval, these transactions do not directly involve the federal government other than the aforementioned regulatory role.²⁸⁰

Direct commercial sales that are under \$1 million dollars are not disclosed to Congress, and some deals are reported at a far lower amount than they are worth.²⁸¹ Data provided by the Security Assistance Monitor shows no recorded direct commercial sales between 2014 and 2019.²⁸² The FMS program is overseen by the US State Department, makes the US government a middle-man between the arms manufacturers and the purchasing state.²⁸³ For a 2% administrative fee added to the purchase price, the Department of Defense acts as a broker, coordinating with private companies to fulfill the order.²⁸⁴ While certain countries can buy weapons systems directly from manufacturers, Saudi Arabia in particular prefers to use the FMS program because they believe they receive more favorable and expedient treatment from American companies when the Pentagon liaises with them on the Saudis behalf.²⁸⁵ FMS sales are usually delivered by the United States Transport Command, the US military’s primary logistical support command, to the foreign customer.²⁸⁶ However, Saudi Arabia hires private charter flights loaded with guided-bomb components to fly the weapons directly to Saudi Air force bases.²⁸⁷ Ultimately, because Saudi Arabia uses the FMS program, these sales are considered government-to-government transactions.²⁸⁸ As a result, transactions that are conducted through the FMS

²⁷⁹ Frank Andrews, “REVEALED: The Full Extent of US Arms Deals with Saudi Arabia and the UAE,” Middle East Eye (April 4, 2019), available at: <https://www.middleeasteye.net/news/revealed-full-extent-us-arms-deals-saudi-arabia-and-uae>.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² “Direct Commercial Sales,” Security Assistance Monitor, available at: <http://www.securityassistance.org/content/direct%20commercial%20sales?year=>.

²⁸³ Jeffrey E. Stern, “From Arizona to Yemen: The Journey of an American Bomb,” New York Times (December 11, 2018), available at: <https://www.nytimes.com/2018/12/11/magazine/war-yemen-american-bomb-strike.html>.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ Celia Pena-Gomez, “Lockheed Martin Defense Contract with Saudi Arabia has been Increased,” Americans for Democracy and Human Rights in Bahrain (July 30, 2018), available at: <https://www.adhrb.org/2018/07/lockheed-martin-defense-contract-with-saudi-arabia-has-been-increased/>.

program could potentially insulate responsible corporate actors. When faced with potential liability, companies can claim that it was the US government that supplied the materials used to commit any alleged war crimes.

VI. AVENUES FOR ACCOUNTABILITY

The situation unfolding in Yemen offers complicated, yet not unique, jurisdictional issues. Since Yemen is currently considered a failed state and is also not a party to the Rome Statute, there are few options for prosecution of the crimes that are occurring there. However, this paper seeks to offer advice on where and how the claims stemming from the conflict can be litigated. Since Yemen's judicial system currently does not provide an avenue for accountability because of the war, this section considers alternative pathways through international courts.

A. INTERNATIONAL CRIMINAL COURT

Accountability at the ICC

Drawing on a long history stemming from the Nuremberg Trials, the Rome Statute came into full effect on July 1, 2002, and the ICC began its work fighting impunity for international crimes.²⁸⁹ The ICC differs from the ad-hoc tribunals in that it is an autonomous court that is not limited to a specific situation.²⁹⁰ One of the defining features of the ICC is the doctrine of complementarity. Article 17 of the Rome Statute states that the Court may only prosecute when the State Party responsible for judicial action is "unwilling or unable genuinely to carry out the investigation or prosecution."²⁹¹ Luis Moreno-Ocampo, the first Prosecutor for the ICC, stated that "the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but a duty of the States."²⁹² The ICC, therefore, acts more as a gap-filler, rather than a replacement for domestic prosecution.²⁹³ If a state is able to provide effective justice for international crimes, use of the ICC would be unnecessary.²⁹⁴

There are currently over 120 countries that are party to the Rome Statute, including France, Germany, Italy, and the United Kingdom.²⁹⁵ The United States, Russia, Saudi Arabia, and Yemen are not parties to the Rome Statute and remain outside of the jurisdictional reach of the Court. As such, the ICC would have limited, if any, jurisdiction over the Yemen Conflict.

²⁸⁹ "History of the ICC," Coalition for the International Criminal Court, available at: <http://iccnw.org/?mod=icchistory>.

²⁹⁰ "Understanding the International Criminal Court," ICC, pg. 4, available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.

²⁹¹ Rome Statute, *supra* note 76, at Art. 17(1)(a).

²⁹² Irene Marinakis, "A Weak ICC: Can the ICC Succeed without US Participation," *Eyes on the ICC* (2008), pg. 129 (citing Luis Moreno-Ocampo, "Paper on Some Policy Issues before the Office of the Prosecutor," September 2004).

²⁹³ Daniel Nsereko, "The ICC and Complementarity in Practice," *Leiden Journal of International Law* (2013), pg. 429.

²⁹⁴ *Id.*

²⁹⁵ "State Parties-Chronological List," ICC, available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx.

Giving the ICC Jurisdiction over Yemen

The ICC may exercise its jurisdiction in three instances: (1) a situation is referred to the Court by the UN Security Council; (2) nationals of a State Party have committed crimes enumerated by the Rome Statute or such crimes occurred in the territory of a State Party;²⁹⁶ or (3) the Prosecutor may initiate an investigation into a situation *proprio motu*, on their own, so long as the situation is within the jurisdiction of the Court.²⁹⁷

1. Security Council Referral

Whereas, the ICC may not exercise jurisdiction over non-State Parties unless the State submits to the Court's jurisdiction, Article 13(b) allows the ICC to exercise its jurisdiction over non-State Parties when the UN Security Council refers a situation to the Court under its Chapter VII powers.²⁹⁸ Without further enforcement from the Security Council, however, such referrals may be ineffective in aiding the ICC in its investigations and prosecution efforts. In 2005, for example, the Security Council referred the situation in Darfur to the ICC Prosecutor in Resolution 1593 and stated that the Sudanese Government "shall cooperate fully with . . . the Prosecutor."²⁹⁹ But the Sudanese Government flouted its obligations under the Resolution and the Security Council failed to enforce the mandate, due to both Russia and China threatening to veto any resolutions to that effect.³⁰⁰

The threat of the veto makes it all the more likely that a Security Council referral for Yemen will not occur. Three of the five permanent members, the United States, Russia and China, are not members of the ICC, complicating the relationship between the Court and the Security Council.³⁰¹ Furthermore, not only is the United States particularly hostile toward the ICC,³⁰² but other members of the P-5, namely the United Kingdom and France are implicated in assisting in the atrocities occurring in Yemen. Even if the Security Council were to refer the situation to the Court, it is unlikely that it would act to compel other states to cooperate with investigations or proceedings.

²⁹⁶ Dapo Akande, *The Jurisdiction of the International Criminal Court of Nationals of Non-Parties: Legal Basis and Limits*, 1 J. Int'l Crim. Just., 618, 618-19 (2003); Rome Statute, *supra* note 75, at Art. 12-13.

²⁹⁷ Rome Statute, *supra* note 76, at Art. 13(c), 15(4).

²⁹⁸ Nsereko, *supra* note 293, at 430.

²⁹⁹ Stuart Ford, "The ICC and the Security Council: How Much Support Is There for Ending Impunity," Thurgood Marshall Law Review Online (2016), pg. 36.

³⁰⁰ Ford, *supra* note 299, at 40.

³⁰¹ C. Cora True-Frost, "Weapons of the Weak: The Prosecutor of the ICC's Power to Engage in the UN Security Council," Florida State University Law Review (2016), pg. 288.

³⁰² Michael R. Pompeo, Secretary of State, "US Policy on the International Criminal Court Remains Unchanged," Press Release, US Department of State (October 9, 2019) available at: <https://www.state.gov/u-s-policy-on-the-international-criminal-court-remains-unchanged/> ("The United States remains committed to protecting its personnel from the ICC's wrong-headed efforts spearheaded by a few grandstanders...[and] respects the decisions of those nations that have chosen to join the ICC, and in turn, we expect that our decision not to join and not to place our people under the court's jurisdiction will also be respected.").

2. *Proprio motu*

Whether a situation has been referred by a State Party or initiated by the Prosecutor, it “must be determined whether there is a reasonable basis to proceed” so as not to waste time or resources.³⁰³ The Pre-Trial Chamber is responsible for reviewing the Prosecutor’s requests and ensuring that the burden has been met.³⁰⁴ This oversight is meant to prevent the Court from pursuing frivolous or politically motivated investigations.³⁰⁵ The Prosecutor’s ability to direct the ICC to investigate and prosecute cases is a departure from the ad-hoc tribunals, which were limited to specific events.³⁰⁶ Furthermore, this authority is curbed by the doctrine of complementarity, where the Prosecutor may only take cases “only when [States] fail to [act].”³⁰⁷

In 2007, the ICC opened investigations into Kenya regarding violence that erupted following the presidential election and again in 2010 in Cote d’Ivoire during a non-international armed conflict.³⁰⁸ However, the Prosecutor declined to open an investigation into the situation in Iraq, claiming that because the Court would only have jurisdiction over British nationals, the crimes were “insufficiently grave to warrant *proprio motu* action.”³⁰⁹

The Iraq situation is informative on whether the ICC would seek *proprio motu* action in Yemen. First, many of the states involved are not party to the Rome Statute, including Yemen itself. It is conceivable that the Prosecutor could seek to open an investigation into the UK, France, and Germany for their roles in aiding and abetting atrocities in Yemen, but concerns regarding complementarity would likely deter such action.

The possibility of the ICC having jurisdiction over Yemen is slight at best. As Yemen is not a member of the Rome Statute, the Court would need a Security Council referral under the Chapter VII powers to exercise its jurisdiction over events occurring in its territory. Such a referral would require enforcement by the Security Council to ensure cooperation with investigations and proceedings. Given that two of the P-5 members are potentially implicated in aiding and abetting war crimes and the United States’ hostility toward the Court, it is unlikely that either would occur. Further, the *proprio motu* authority of the Prosecutor would be limited to nationals of State Parties, making it more likely that the Prosecutor would decline to seek such action in this situation. It is conceivable that the Yemeni government that emerges from the conflict may cede jurisdiction to the ICC, but there is no indication of this being a likelihood at this time.

³⁰³ Nsereko, *supra* note 293, at 435.

³⁰⁴ *Id.*

³⁰⁵ Jonathan Jeung-Meng Fork, “Pro-Choice: Achieving the Goals of the International Criminal Court through the Prosecutor’s *Proprio Motu* Power,” Boston College International & Comparative Law Review (2011) pg. 57.

³⁰⁶ Kaveri Vaid, “Discretion Operationalized through Law: *Proprio Motu* Decision-Making at the International Criminal Court,” Florida Journal of International Law (2013), pg. 360.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 371.

³⁰⁹ *Id.* at 373.

B. AD-HOC TRIBUNALS AND HYBRID COURTS

First established by the UN Security Council in response to atrocities committed in the former Yugoslavia and Rwanda, ad-hoc tribunals and hybrid courts have provided pathways for post-conflict accountability in Kosovo, Bosnia Herzegovina, East Timor, Sierra Leone, Cambodia, Iraq, and elsewhere.³¹⁰ Created by the UN Security Council under its Chapter VII powers, both the ICTY and ICTR followed the groundwork laid by the International Military Tribunals after WWII.³¹¹ In contrast, the hybrid courts, like the ECCC and the SCSL were the result of agreements between the UN and the individual states.³¹²

The ICTY, ICTR, and SCSL, operate concurrently with domestic courts but are legally separate entities and function above domestic systems.³¹³ For example, the ICTY had “concurrent jurisdiction over serious violations of international humanitarian law” but was allowed to take over domestic investigations and court proceedings at any time.³¹⁴ The ECCC, in contrast, functions within the domestic system of Cambodia, and the East Timor and Kosovo panels act as interim administrators due to the current lack of judicial systems in those regions.³¹⁵ Given that the ICTY and ICTR were established under Chapter VII, the Courts were able to “oblige” third-party states to cooperate with the investigations and proceedings, where hybrid courts lack the binding quality of Chapter VII authorization and thus cannot not oblige third-party states to cooperate.³¹⁶ The hybrid court model does, however, have the advantage of combining the impartiality of fully international courts with the transparency and local “ownership” of proceedings in domestic courts.³¹⁷

Obstacles in Creating an Ad-hoc Tribunal

The Security Council’s decision to establish the ICTY and ICTR reflected the global consensus that certain crimes cannot go unpunished. By the late 1990s, criticism of the tribunals began to splinter the Security Council’s unanimity. Russia expressed frustration, particularly with the ICTY, over the excessive bureaucracy and accused the Court of lacking impartiality.³¹⁸ Some critics of the international criminal courts have argued that the ad-hoc tribunals have damaged, rather than advanced, confidence in international justice.³¹⁹ Despite this criticism, ad-

³¹⁰ “Ad-hoc Tribunals,” International Committee of the Red Cross (October 29, 2010), available at: <https://www.icrc.org/en/document/ad-hoc-tribunals>.

³¹¹ Veronika Bilkova, “Divided We Stand: The Ad-hoc Tribunals and the CEE Region,” AJIL Unbound (2016).

³¹² Laura Graham, “Pathways to Accountability for Starvation Crimes in Yemen,” Case Western Reserve University Journal of International Law Vol. 62 (2020), pg. 37.

³¹³ Sarah M.H. Nouwen, “Hybrid Courts – The Hybrid Category of a New Type of International Crimes Courts,” Utrecht Law Review (2006), pg. 202.

³¹⁴ “Mandate and Crimes Under ICTY Jurisdiction,” ICTY, available at: <https://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction>.

³¹⁵ Sarah M.H. Nouwen, *supra* note 313, at 210.

³¹⁶ Nouwen, *supra* note 313, at 212.

³¹⁷ Nouwen, *supra* note 313, at 202.

³¹⁸ Bilkova, *Ad-hoc supra* note 311, at 242.

³¹⁹ Ralph Zacklin, “The Failings of Ad-hoc International Tribunals,” Journal of International Criminal Justice (2004), pg. 542.

hoc tribunals do serve to provide criminal accountability where purely domestic systems would likely fail.³²⁰

Funding these institutions has proved difficult, as the ad-hoc tribunals are expensive to operate. The annual budget for the ICTY, for example, increased from a modest \$276,000 annual budget in 1993 to over \$301 million in 2010.³²¹ The UN agreement establishing the SCSL was different from the first two tribunals in that it funded the Court with volunteer donations from UN member states, whereas the ICTY and ICTR were treated as organs of the Security

Council.³²² With the establishment of the International Criminal Court (ICC), political will in the UN and the Security Council to establish a hybrid court and shoulder the financial burden seems unlikely.

**POLITICAL WILL IN
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Possibly the biggest hurdle in obtaining a Security Council resolution establishing an ad-hoc tribunal is the political gridlock among the five permanent (P-5) members, the United States, Russia, China, Great Britain, and France. In the past, the veto from one of the P-5 members has rendered the Security Council powerless to prevent atrocities and conflict.³²³ Recent division between the P-5 centers around the atrocities occurring in Syria, including the use of chemical weapons against civilian populations.³²⁴ Given

Russia's cooling attitude toward the efficacy of international tribunals and US support for the SLC, it is likely that gridlock will prevent the Security Council from agreeing on the establishment of any international tribunal.

³²⁰ Sandra L. Hodgkinson, "Are Ad-hoc Tribunals An Effective Tool for Prosecuting International Terrorism Cases?," 24 Emory International Law Review (2010), pg. 517.

³²¹ Jon Silverman, "Ten years, \$900m, One Verdict: Does the ICC Cost too Much?," BBC News (March 14, 2012), available at: <https://www.bbc.com/news/magazine-17351946>.

³²² Charles Chernor Jalloh, "Special Court for Sierra Leone: Achieving Justice?," Michigan Journal of Int'l Law (2011), pg. 402.

³²³ Jan Dirk Herbermann, "The U.N. Insecurity Council," Handelsblatt Today (September 27, 2016), available at: <https://www.handelsblatt.com/today/opinion/reform-gridlock-the-u-n-insecurity-council/23541184.html?ticket=ST-1077290-9NQzccn0rG9QbeOUTSTT-ap5>.

³²⁴ "Paralysis Constricts Security Council Action in 2018, a Division among Permanent Membership Fuel Escalation of Global Tensions," U.N. Press Release SC/13661 (January 10, 2019), available at: <https://www.un.org/press/en/2019/sc13661.doc.htm>.

Reforming the UN Security Council

The UN Security Council wields immense power to act in the face of international turmoil, but is often left powerless by the politics of the veto. Calls for Security Council reform have existed for decades, including proposals to prohibit the veto power in cases involving genocide, increase the number of permanent members, and eliminate the veto altogether.³²⁵ In 2008, a proposal identified five issues for reform: categories of membership, the veto power, regional representation, enlarging the Security Council, and changing the relationship with the General Assembly.³²⁶ Many states have called for the expansion of the P-5 membership and at least some restrictions on the veto power.³²⁷

One proposal is to create a “two-layered regional model” where “the goal is to have large regions with socio-cultural links and similar security issues” represented in the Security Council.³²⁸ The proposal would have the affected region vote on a resolution first, then the remaining UN member states. If both obtain 60% consensus, then the resolution is adopted.³²⁹ While this may help prevent a single veto from throwing the Security Council into gridlock concerning a Yemen ad-hoc court, it is unlikely that the Middle Eastern Region would come to a 60% consensus on the matter. Even if a measure passed under this structure, a Chapter VII Resolution would still be required to oblige third-party states to cooperate with the court. The United States, United Kingdom and France, supporters of the SLC in the conflict, will likely oppose such a resolution, effectively leaving any ad-hoc tribunal handicapped in its efforts to hold responsible individuals accountable for their crimes.

Another proposal is to limit the veto power when certain crimes – genocide, crimes against humanity, and war crimes – are implicated.³³⁰ The justification for this restriction is that the use of the veto violates the Member States’ responsibility under Article 24(1) of the UN Charter.³³¹ In 2013, France, along with members of the UN General Assembly, articulated a “voluntary agreement” that permanent members would refrain from using the veto in the face of grave atrocities.³³² As of 2019, 104 member states have endorsed this proposal, but there has been no movement in the Security Council to consider this reform.³³³ Such restrictions on the P-5 veto powers could, at the very least, prevent a single state from gridlocking the Security Council,

³²⁵ John L. Hirsch and James Bowen, “If Security Council Is So Flawed, Why Does Everyone Want a Seat?,” IPI Global Observatory (April 26, 2016), available at: <https://theglobalobservatory.org/2016/04/security-council-reform-cold-war/>.

³²⁶ Ville Lättilä, “A New Proposal for UN Security Council Reform,” Oxford Research Group (May 28, 2019), available at: <https://www.oxfordresearchgroup.org.uk/blog/a-new-proposal-for-un-security-council-reform>.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ “Reforming the UN Security Council,” Together First, pg. 7, available at: https://www.una.org/sites/default/files/0008499_TFR_UN_FINAL.pdf

³³¹ U.N. Charter, Art. 24(1): “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

³³² Together First, *supra* note 330, at 7.

³³³ *Id.*

though it is more likely to see a referral to the ICC than the creation of an ad-hoc tribunal as a result.

Lessons from Past Ad-hoc Tribunals

The ad-hoc tribunals have contributed to the progressive development of international criminal law substantively and procedurally in international and domestic institutions in the fight against impunity for crimes against humanity and violations of IHL.³³⁴ The tribunals have added to the creation and interpretation of international crimes. These contributions were reflected in the Rome Statute, the founding document of the ICC. Moreover, the ICC refers to the tribunals for interpretive guidance in its own case law. An ad-hoc tribunal for Yemen would benefit by utilizing the lessons and structures created by its predecessors, rather than attempting to build a statute and procedural rules from the ground up.

One of the biggest challenges the hybrid ad-hoc tribunals have faced is funding. Institutions like the ICC are funded by member states, where hybrid courts must obtain volunteer donations. The SCSL “spent a third of its time lobbying foreign governments to raise funding for the court rather than just focusing on prosecutions.”³³⁵ The Special Tribunal for Lebanon divides the financial burden between Lebanon and donor states.³³⁶ With the creation of the ICC, there is little desire to create and fund new ad-hoc tribunals. However, if an ad-hoc court were created, funding the court as an organ of the UN or Security Council, like the ICTY and ICTR, would ensure that the court spends its resources on prosecuting, rather than fundraising.

Looking at the complementarity principles of the ICC, national jurisdiction and responsibility for prosecution of international crimes appears more in vogue than the implementation of an international court.³³⁷ The hybrid courts provide a feasible avenue of providing the impartiality and legitimacy of the purely international courts, like the ICTY and ICTR, with the local accountability of domestic courts. As it concerns Yemen, utilizing local judicial systems, in whatever form they emerge from the conflict, could help legitimize criminal proceedings in the eyes of the Yemeni people.

C. INVOKING UNIVERSAL JURISDICTION IN DOMESTIC COURTS

Universal jurisdiction is a legal concept which is derived from the international law concept of *jus cogens*, the idea that there are certain values which are considered fundamental to the international community and cannot be ignored, and *erga omnes*, the idea that there are certain rights and obligations that are owed toward all. Universal jurisdiction allows states to exercise criminal jurisdiction over accused individuals even if the crime was committed outside

³³⁴ Hassan B. Jallow, “International Criminal Justice: Developments and Reflections on the Future,” pgs. 3-4, available at: https://www.brandeis.edu/ethics/pdfs/internationaljustice/Hassan_Jallow_Distinguished_Lecture_Brandeis_November_09.pdf.

³³⁵ Hodgkinson, *supra* note 320, at 523.

³³⁶ *Id.*

³³⁷ *Id.* at 525.

the state's jurisdiction, and regardless of the accused individual's nationality, state of residence or any relation with the prosecuting state.³³⁸

Introduced in relation to one of the first international crimes on record, piracy, universal jurisdiction today has been extended to include the specific international offences of war crimes, crimes against humanity, and genocide.³³⁹ Today, universal jurisdiction can be asserted in relation to a limited number of international crimes including war crimes, torture, crimes against humanity, genocide, piracy, hijacking, acts of terrorism, and attacks on UN personnel.³⁴⁰

Universal jurisdiction acts as an avenue of accountability when a State with original jurisdiction over an individual who is accused of any of the above limited international crimes is unable or unwilling to investigate and try accused individuals. Universal jurisdiction reduces the existence of "safe havens" where an individual accused of internationally condemned crimes such as war crimes, crimes against humanity and genocide could enjoy impunity.³⁴¹

This tool is already being explored as an option by nations seeking justice for the Yemeni people. Swiss non-governmental organization Trial International's 2020 Universal Jurisdiction Review found that the Argentinian government has opened a preliminary examination into Saudi Crown Prince Mohamed bin Salman's alleged complicity in war crimes and torture beginning with the March 25, 2015 SLC bombing of Yemen that triggered a major armed conflict in which thousands of civilians have been killed.³⁴²

States around the globe have invoked universal jurisdiction in the past to combat impunity for egregious crimes. Notably, Belgium passed a sweeping statute in 1993 granting Belgian courts universal jurisdiction over war crimes, crimes against humanity, and genocide, regardless of where they took place. Before the statute was repealed in 2003 and even now, it has been widely argued that Belgium's universal jurisdiction statute was the most extensive and far reaching attempt to date of a domestic state sanctioning the general use of its courts for trying

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³³⁸ “Basic Facts on Universal Jurisdiction,” Human Rights Watch (October 19, 2009), available at: <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>.

³³⁹ Roozbeh (Rudy) B. Baker, “Universal Jurisdiction and the Case of Belgium: A Critical Assessment,” *ILSA Journal of International and Comparative Law* (2009), pg. 142 n.6, available at SSRN: <https://ssrn.com/abstract=1424212>.

³⁴⁰ “Basic Facts on Universal Jurisdiction,” *supra* note 338.

³⁴¹ *Id.*

³⁴² Valérie Paulett, “Universal Jurisdiction Annual Review,” Trial International (2020), pg. 20, available at: http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/TRIAL-International_UJAR-2020_DIGITAL.pdf.

international crimes, rather than specific case by case application that is commonplace in domestic statutes and custom today.³⁴³

States with universal jurisdiction statutes that confer jurisdiction over crimes against humanity or war crimes, such as those in Germany, France or Spain, could provide an avenue for these courts to invoke universal jurisdiction over individual perpetrators that travel to those States.³⁴⁴ Universal jurisdiction has been invoked by the Special Court for Sierra Leone in bringing former President of Liberia, Charles Taylor, to justice for war crimes and CAH.³⁴⁵ It is also how the US invoked its extraterritorial jurisdiction under the torture statute to try and convict Taylor's son, Charles "Chuckie" Taylor, Jr. for torture crimes.³⁴⁶ Therefore, States with universal jurisdiction statutes may provide a realistic avenue of accountability to try perpetrators and those who aid and assist war crimes and CAH in Yemen.

D. CRIMINAL AND CIVIL LIABILITY IN DOMESTIC COURTS

Another avenue of accountability for individuals and corporate actors that have aided and abetted war crimes and CAH in Yemen can be pursued through domestic courts. This section explores these avenues.

I. CORPORATE CRIMINAL LIABILITY IN EUROPEAN DOMESTIC COURTS

A potential avenue for liability for corporate actors is through criminal prosecution in domestic courts. Recently, a few cases arose in which European states pursued, or considered pursuing, prosecutions against corporate actors for complicity in crimes committed abroad.³⁴⁷ In 2013, the Swiss opened proceedings against Argor-Heraeus, a gold refinery, for alleged complicity in war crimes committed in the DRC but the case was dropped for lack of evidence.³⁴⁸ Similar cases against corporate actors were considered by The Netherlands and Germany.³⁴⁹ While these cases did not result in successful prosecutions of corporate actors, they show that there is willingness among some States to use their domestic court systems to hold corporate actors accountable for their criminal conduct.

³⁴³ Baker, *supra* note 339, at 143.

³⁴⁴ Angela Mudukuti, "Universal Jurisdiction – Opportunities and Hurdles," *Opiniojuris*, (Sept. 4, 2019), available at: <http://opiniojuris.org/2019/04/09/universal-jurisdiction-opportunities-and-hurdles/>.

³⁴⁵ Bankole Thompson, "Universal Jurisdiction: The Sierra Leone Profile" (2015), pgs. 81-84.

³⁴⁶ Laura Richardson Brownlee, "Extraterritorial Jurisdiction in the United States: American Attitudes and Practices in the Prosecution of Charles "Chuckie" Taylor Jr.," *Washington University Global Studies Law Review* (2010), pg. 336.

³⁴⁷ Dienneke De Vos, "The Emerging Norm for Corporate Criminal Activity for International Crimes," *European University Institute* (December 9, 2017), available at: <https://me.eui.eu/dienneke-de-vos/blog/the-emerging-norm-of-corporate-criminal-accountability-for-international-crimes/>.

³⁴⁸ *Id.*

³⁴⁹ *Id.* Dutch investigation into Lima Holding B.V. for violations of IHL in Occupied Palestinian Territories by Israel (Investigation stopped after activities ceased); German investigation into Danzer Group director's culpability in attacks in the Dem. Rep. of Congo (investigation stopped for lack of evidence of officer's direct influence).

There are other examples where corporate officers were convicted by European domestic courts for complicity in crimes committed in other states.³⁵⁰ In France, for example, the French Code of Criminal Procedure (“CCP”) was amended in 2010 to incorporate the procedural aspects of the Rome Statute and grant broad jurisdiction to French courts regarding crimes committed following the amendment.³⁵¹ For criminal proceedings, the French CCP has four requirements. First, the individual must be present in France, or its jurisdiction, at the time of the investigation being opened.³⁵² If the suspect then flees, trials in absentia may still be conducted and there is existing precedent to support such trials. Second, for crimes other than torture and enforced disappearance, French prosecutors must verify that local national courts or international tribunals have declined to assert jurisdiction over such a matter or requested an individual’s extradition.³⁵³ Third, again for crimes other than torture and enforced disappearance, there is a requirement for double criminality.³⁵⁴ The alleged crimes committed must have been crimes in the jurisdiction where they were committed at the time they were committed, not just in France alone. Finally, for more serious offenses other than torture and enforced disappearance, prosecutors alone may open such an action.³⁵⁵ However, victims and other affected parties may assert a claim of torture along with their claim of other acts and be allowed to directly force an investigative judge to open a case.³⁵⁶

As a whole, the French legal system seems largely geared towards criminal liability for such actors in international crimes. However, given that these courts are willing to exercise criminal jurisdiction over actors, it is plausible to suggest that the same courts would be willing to exercise civil jurisdiction at a substantially reduced burden of proof for similar actions. It is also worth noting that there is precedent in French law for a judge opening an investigation, despite opposition from prosecutors. Amesys, a subsidiary of the French computer company Bull SAS, was accused of being complicit in torture via the sale of advanced surveillance equipment to the Qaddafi regime.³⁵⁷ A French appeal court affirmed the decision of the investigative judge and authorized such a proceeding to go forward.

Germany presents a unique issue in holding corporate actors accountable. Under German law, unlike in the United States and United Kingdom, corporations do not enjoy the benefits of “corporate personhood.”³⁵⁸ A corporation cannot be tried, in Germany, for criminal matters. However, it is much more common to hold officers, both current and former, accountable for their actions during their time with the company. Any civil action taken against a corporate actor

³⁵⁰ *Id.* (describing Guus Kouwenhoven trial and appeal (Dutch corporate executive convicted for supplying and storing weapons for Charles Taylor in Liberia, sentenced to 19 years for facilitation of war crimes); Frans van Anraat trial and conviction (Dutch national convicted of as an accessory to war crimes for supplying chemical agents to Saddam Hussein, sentenced to 16.5 years)).

³⁵¹ “The Legal Framework for Universal Jurisdiction in France,” Human Rights Watch (2014), pg. 4, available at: https://www.hrw.org/sites/default/files/related_material/IJ0914France_3.pdf.

³⁵² *Id.* at 5.

³⁵³ *Id.* at 5-6.

³⁵⁴ *Id.* at 7.

³⁵⁵ *Id.* at 7-8.

³⁵⁶ *Id.* at 8.

³⁵⁷ *Id.* at 9.

³⁵⁸ De Vos, *supra* note 347.

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would necessarily be an individual claim against specific persons, rather than a corporate actor more specifically.³⁵⁹ As a result, any compensatory outcome would be significantly reduced and any verdict would serve merely as a deterrent against the underlying corporate actor, rather than as an actual act of accountability.

These cases show that States’ domestic court systems are capable of holding corporate officers accountable for involvement in war crimes or CAH, even those committed abroad. Thus, European domestic courts may provide an additional avenue of accountability for corporate actors who have aided and abetted war crimes or CAH in Yemen.

II. UNITED STATES JURISDICTION FOR AIDING AND ABETTING

The Alien Tort Statute (“ATS”), enacted as part of the Judiciary Act in 1789,³⁶⁰ grants the federal district courts “original jurisdiction of any civil action by an alien for a tort only, committed *in violation of the law of nations* or a treaty of the United States.”³⁶¹ The ATS was rarely used until the Second Circuit decided the seminal case, *Filartiga v. Pena-Irala*, in 1975, where the plaintiffs, citizens of Paraguay, sued a police officer, another Paraguayan citizen, for civil damages of \$10 million for the torture and death of the plaintiffs’ relative.³⁶² The Court concluded that state-sponsored torture violates the modern-day law of nations (customary international law).³⁶³

The *Filartiga* decision led to a number of human rights decisions in US courts, and the legal scope of the ATS was not successfully challenged until the Supreme Court’s 2004 decision of *Sosa v. Alvarez-Machain*.³⁶⁴ In *Alvarez-Machain*, the Supreme Court held that the ATS is merely a jurisdictional statute; it does not create a cause of action.³⁶⁵ A plaintiff may bring a suit for an existing cause of action under the ATS only if it is “specific, universal, and obligatory.”³⁶⁶ This narrowed the scope of the ATS in US courts and curtailed the amount of human rights cases adjudicated in US courts.³⁶⁷

³⁵⁹ *Id.*

³⁶⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 568 US 108, 114 (2013).

³⁶¹ 28 USC. §1350 (emphasis added).

³⁶² *Filartiga v. Pena Irala*, 630 F.2d 876, 878-79 (2d Cir. 1980).

³⁶³ *Id.* at 882.

³⁶⁴ *Sosa v. Alvarez-Machain*, 542 US 692 (2004).

³⁶⁵ *Id.* at 713.

³⁶⁶ *Id.* at 732.

³⁶⁷ Luck Vidmar, “The Alien Tort Statute: Analysis of *Sosa v. Alvarez-Machain*,” *The Colorado Lawyer* (2004).

Aiding and Abetting Liability Under the ATS

Courts have determined that State liability for aiding and abetting exists under the ATS.³⁶⁸ Multiple US Circuit Courts concluded that aiding and abetting liability is a “well-established concept” in the law of nations.³⁶⁹ International law also recognizes aiding and abetting liability for war crimes.³⁷⁰ Courts must first determine the threshold question of whether a violation of the law of nations exists, if it does, then the ATS provides for aiding and abetting liability.³⁷¹

While in theory the ATS extends jurisdiction to federal courts to hear any alien’s tort claim, resulting from a violation of US treaties or the law of nations, the Supreme Court has taken a much more limited view on the statute. As a general rule, a federal court will be unwilling to hear cases involving matters occurring outside of the traditional geographic jurisdiction of federal courts or when it involves two alien parties and only minimal ties to the United States. The Court has also created a complex framework to determine whether cases come under the ATS.

Sosa Framework

In 2004, the Supreme Court unanimously decided *Sosa v. Alvarez*, which on its face, limited the applicability of the ATS to particularly notable international law cases fitting within a specific framework. Writing for the majority, Justice Souter stated that the purpose of the ATS was to provide jurisdiction to federal courts: “the ATS gave district courts ‘cognizance’ of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law.”³⁷² In particular, *Sosa* provides that the cause of action must (a) reflect an international norm that is “specific, universal, and obligatory”; and (b) involve proper exercise of judicial discretion, such as consideration of the foreign affairs impact of claim, in recognizing the claim.

³⁶⁸ *Doe I v. Unocal Corp.*, 395 F.3d at 945, 947 (9th Cir. 2002); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748 (9th 2011)(conc.); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007).

³⁶⁹ *Sarei*, 671 F.3d at 749.

³⁷⁰ *Sarei*, 671 F.3d at 765.

³⁷¹ *Unocal*, 395 F.3d at 945.

³⁷² *Sosa*, *supra* note 364, at US 713.

Sosa v. Alvarez Framework

General Principal	Generally Applied within US Law	Applied to Yemeni Civil War
Universality: Recognized norm under international law	<ul style="list-style-type: none"> • Mutual obligations, typically ratified treaties • Agreed upon norms • <i>Jus Cogens</i> 	<ul style="list-style-type: none"> • US pattern of non-ratification for relevant international treaties • US actions in previous Middle East wars have deviated from prohibited norms
Obligatory: Binding law upon alleged actor	<ul style="list-style-type: none"> • Obligations under ratified treaties • Not contrary to conduct by US government 	<ul style="list-style-type: none"> • US pattern of non-ratification, including Rome Statute and Cluster Munitions • Treaty Extensive use of cluster munitions by US Armed • Forces in recent wars
Specificity: Accepted definition of international norms within law	<ul style="list-style-type: none"> • For any cause of action, there must be an existing, accepted definition within US common law or statute 	<ul style="list-style-type: none"> • US has no accepted statutory definition of aiding and abetting for international • crimes, partially due to non-ratification of treaties • US courts are hesitant to expand existing common law norms (piracy footnote)
Prudential considerations: Factors in favor of non-justiciability	<ul style="list-style-type: none"> • Separation of powers – Foreign policy is outside the purview of judiciary • Expansion of common law 	<ul style="list-style-type: none"> • Supreme Court is unwilling to contradict official policy of the Executive branch on foreign policy • Judiciary as a whole is unwilling to expand common law norms

With the *Sosa* framework as the basis, the Court has continued to narrow the field of cases allowed into federal courts under the ATS. In their 2013 decision in *Kiobel v. Royal Dutch Petroleum Co.*, the Court severely restricted the territorial scope of the ATS.³⁷³ Under *Kiobel*, there is a presumption against extraterritorial claims and these claims must be sufficiently related to the United States for courts to exercise jurisdiction. The Court went on to hold “even where claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against the extraterritorial application.”³⁷⁴ Then, in 2018, the Court

³⁷³ *Kiobel*, *supra* note 3620, at 113-14. In *Kiobel*, Royal Dutch Shell allegedly compelled a local subsidiary to aid and abet the Nigerian government in its brutal suppression of a peaceful resistance to local oil development.

³⁷⁴ *Id.* at 125.

narrowed the ability of non-American citizens to sue non-American companies within US courts in *Jesner v. Arab Bank, PLC*, even if federal courts would otherwise be capable of exercising jurisdiction.³⁷⁵ In *Jesner*, the Court did note, however, that Congress would be able to extend further jurisdiction to federal courts to hear claims under the ATS.³⁷⁶ Additionally, they noted that plaintiffs may still have the capability to hold individual officers liable, rather than the corporations as a whole, but declined to discuss the jurisdictional implications of such an action.³⁷⁷

Within the context of Yemen, *Kiobel* and *Jesner* present numerous issues. First and foremost, any tortious act would presumably occur outside of the territorial jurisdiction of the federal courts. Any transfer of weapons, material aid, or support would likely occur through the previously mentioned subsidiaries or, at the very least, occur off US soil.³⁷⁸ Justice Breyer's concurrence in *Kiobel* states that the mere corporate presence of a foreign defendant who does not directly commit the crimes is insufficient to overcome the presumption against extraterritoriality. However, in Breyer's view, the ATS does provide extraterritorial jurisdiction if the defendant is an American national or if the conduct of the defendant "substantially and adversely affects an important American national interest" including "preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for... [a] common enemy of mankind."³⁷⁹ Given the lack of application of the *Sosa* framework to non-natural persons and entities, it is plausible to believe that an action against a corporate actor acting against the national interest may be sufficient to overcome the presumption. However, the related precedent seems to suggest a general unwillingness to apply the ATS to include corporate liability as a whole, regardless of any extraterritorial concerns. Moreover, the present status of the ATS in Supreme Court jurisprudence is uncertain given recent decisions that have further limited the scope of justiciable disputes and appropriate defendants.³⁸⁰ Finally, a number of large private defense contractors maintain separate subsidiaries within Saudi Arabia to serve the needs of their local client. As a result, the only connections to corporations within the United States or other nations are largely related to rolling up profits to the US-based or international parent firm or internal transfers of products. The minimal connections to the US fit the pattern of minimal connections outlined in *Jesner*.

III. STATE COURT LIABILITY WITHIN THE UNITED STATES

State courts provide a unique possibility for exercising jurisdiction over corporate actors in the Yemeni Civil War. Despite the Supreme Court's hostility towards allowing alien plaintiffs

³⁷⁵ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2013). In *Jesner*, the Court noted if the courts were to hold foreign corporations liable under US law, it would fundamentally alter the statutory and regulatory structure put in place by Congress. *Id.* at 1390. The Court also noted plaintiffs were required to exhaust any other remedies before even attempting to bring actions within federal court and bizarrely claimed international law limits liability to "natural persons alone. *Id.* at 1430, 1432.

³⁷⁶ *Id.* at 1405.

³⁷⁷ *Id.* at 1430.

³⁷⁸ *Id.* at 113.

³⁷⁹ *Id.* at 133.

³⁸⁰ *Doe v. Nestle*, 906 F.3d 1120, 1123-24 (9th Cir. 2019).

to enter into federal court, their own precedent may open a window for causes of action within state courts. There is a developing school of thought which indicates that state courts may, in fact, be the better venues to hear international human rights cases in the wake of *Kiobel* and *Jesner*.

State courts have several known advantages for such litigation and may have several more untested advantages. First and foremost, a majority of tort common law resides within state common law as state courts handle the overwhelming majority of civil litigation within the United States. This provides an experienced justice system to answer such complex litigation. Second, state law governs corporate entities. These corporate codes govern the required responsibilities of corporate entities incorporated within a particular state, regardless of where they operate. Finally, the Supreme Court in the post-*Kiobel* and post-*Jesner* environment seems to have implied that, while federal courts lack jurisdiction under the ATS, nothing precludes other courts from exercising jurisdiction. Extending this logic to state courts, rather than exclusively to international tribunals, is a controversial and relatively untried area of law. However, of the few instances where this jurisdictional question has been asked, state courts have found that they are the appropriate venue to hear international human rights cases.³⁸¹ Furthermore, federal courts have agreed in parallel cases that not only did these state courts have the authority to hear such cases, but they would be better suited to doing so than federal courts or some international tribunals.³⁸²

E. INTERNATIONAL COURT OF JUSTICE

The International Court of Justice (“ICJ”) adjudicates disputes and violations of international law committed by States; it does not hold individuals criminally responsible for their actions. Instead, the ICJ makes determinations about whether States have breached their international obligations, such as those arising under their treaty obligations. A breach of an international obligation by a State constitutes an internationally wrongful act, which the ICJ can order the State to cease, make assurances of non-repetition, and order a range of remedies from specific performance to compensatory damages, depending on the harm suffered.³⁸³

The ICJ’s jurisdiction is invoked: (1) when two States submit a matter to the ICJ to settle a dispute between them by special agreement (*compromis*); (2) by contentious jurisdiction arising from the Court’s compulsory jurisdiction

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³⁸¹ Seth Davis and Christopher A. Whytock, “State Remedies for Human Rights,” Boston University Law Review (2018), pg. 400, available at: <https://www.bu.edu/bulawreview/files/2018/03/DAVIS-WHYTOCK.pdf>.

³⁸² *Id.* at 401.

³⁸³ ARSIWA, *supra* note 94, at Arts. 2, 30-31, 34-36; *Wall AO*, *supra* note 96 at ¶ 151.

resulting from a declaration of accession to article 36(2) of the Statute of the Court in all legal disputes concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation; or (3) a question that the UN has asked the Court to decide as an advisory opinion.³⁸⁴ Notably, the ICJ is not bound by its own precedent and may choose not to render a judgment on an issue of international law that is not ripe.

Gambia demonstrated recently that a State may bring a claim against another State at the ICJ for violations of an *erga omnes* nature.³⁸⁵ In the wake of Yemen's conflict, States could utilize this option either by invoking the jurisdiction of the Court through *Compromis* (Special Agreement) or through the Court's contentious jurisdiction for violations of IHL.

Any State could bring a claim against any other States that may have committed violations of IHL. If arms provided were used to target objects indispensable to survival or to starve the civilian population, the States that provided them may have claims brought against them for aiding and abetting war crimes or CAH.

The most likely basis for ICJ jurisdiction over an issue of international law pertaining to the Yemeni conflict is if there has been a breach of a treaty or international convention. Either a State would have to bring a claim against another State or the Security Council would have to ask the court to issue an advisory opinion.³⁸⁶ In the context of States aiding and abetting war crimes or CAH, the ICJ's jurisdiction would not likely be invoked unless the States' acts were a violation of some peremptory norm, such as the prohibition on torture.

In order to invoke the ICJ's contentious jurisdiction, a treaty must exist that confers jurisdiction to the ICJ and the treaty must be related to the claims brought by the State seeking to have the Court adjudicate the matter.³⁸⁷ Yemen, Saudi Arabia, Iran, the US, UK, France, and Germany are all party to two treaties that include clauses that confer compulsory jurisdiction to the ICJ: the Torture Convention and the Convention on Elimination of All Forms of Racial Discrimination.³⁸⁸ A State could potentially bring a claim at the ICJ against any or all of these

³⁸⁴ "Basis of the Court's Jurisdiction," ICJ, (2017-2020), available at: <https://www.icj-cij.org/en/basis-of-jurisdiction>.

³⁸⁵ "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures," (January 23, 2020), ¶¶ 1-2, available at: <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>.

³⁸⁶ "Basis of the Court's Jurisdiction," *supra* note 384.

³⁸⁷ This is because none of the States involved in this armed conflict have made declarations of accession to the ICJ's compulsory jurisdiction. International Court of Justice, "Declarations recognizing the jurisdiction of the Court as compulsory," available at: <https://www.icj-cij.org/en/declarations>; But a local treaty, such as the Friendship, Commerce and Navigation treaty between the US and Nicaragua, could confer jurisdiction to the Court over a related dispute, as the Court determined in the *Paramilitary Activities* case. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)* (Judgment), ICJ (November 26, 1984), ¶ 176.

³⁸⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987), Art. 30; International Convention on the Elimination of All Forms of Racial Discrimination (1969), Art. 22. A complete list of treaties conferring compulsory jurisdiction to the ICJ through compromissory clauses is available on the Court's

States for violations under one of these treaties. For instance, any State could claim that a State breached its obligations under the Convention on Elimination of All Forms of Racial Discrimination Article 5(b) “the right to security of person . . . against violence or bodily harm . . .” or Article 5(d)(iv) “the right to public health, medical care”³⁸⁹ As an alternative, Yemen might claim under the Torture Convention that starvation of the civilian population, caused by a relevant State’s breaches in international obligations rises to the level of cruel, inhuman or degrading treatment under Article 16 of the Convention.³⁹⁰ If these States were found to have committed a violation of international law under these treaties, that would allow the Court to broaden its scope to determine whether other relevant States breached their international obligations by aiding and abetting war crimes or CAH in Yemen. The use of either of these treaties is a viable option for Yemen only if Yemen can first prove exhaustion of remedies or the inability of a State to prosecute those responsible for violations of either treaty.³⁹¹

States may bear responsibility for the crimes committed in Yemen because they buy weapons from corporations and then sell them to Saudi Arabia or the UAE, who then use the weapons themselves or sell the weapons to different parties and actors in Yemen. By engaging in this type of conduct, States are potentially acting in breach of Article 16 of the Draft Articles on State Responsibility which the ICJ has deemed customary international law.

Assuming that one of these treaties may be invoked to bring a claim before the ICJ, then the ICJ would provide an additional mechanism for accountability for war crimes and CAH committed in Yemen. As such, a decision by the ICJ could lend support for, or provide additional evidence to the ICC or an ad-hoc tribunal established to try individuals for war crimes and crimes against humanity.³⁹²

VII. OTHER ACTION

Accountability via Security Council Referral to the ICC

One path towards state and corporate accountability for aiding and abetting human rights violations in Yemen is through Security Council referral of the situation to the International Criminal Court. Neither Yemen nor Saudi Arabia is a party to the Rome Statute; thus Security Council intervention must occur for the ICC to assert jurisdiction over war crimes committed in

website. International Court of Justice, “Treaties,” available at:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en.

³⁸⁹ Racial Discrimination Convention, *supra* note 183, at art. 5(b) and 5(d)(iv).

³⁹⁰ Torture Convention, *supra* note 183, at art. 16.

³⁹¹ “Exhaustion of Domestic Remedies in the United Nations System,” International Justice Resource Center, (2017), pg. 1, available at: <https://ijrcenter.org/wp-content/uploads/2018/04/8.-Exhaustion-of-Domestic-Remedies-UN-Treaty-Bodies.pdf>.

³⁹² Such was the outcome of the *Bosnian Genocide* case at the ICJ which was ongoing at the time of the criminal trials at the ICTY. “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)” (Judgment), ICJ (July 11, 1996), pg. 595.

Yemen.³⁹³ The political lens through which the Yemen war is viewed and the potential complicity of the US and other Council member states in aiding and abetting human rights violations makes the likelihood of Security Council referral unlikely.³⁹⁴

Despite the consistent political gridlock in the Security Council, it has passed several resolutions which seek to alleviate the ongoing conflict in Yemen.³⁹⁵ One of the more significant actions taken by the Security Council is Resolution 2451 which authorized the implementation of a portion of the Stockholm Agreement.³⁹⁶ This agreement reached between the Government of Yemen and the Houthis.³⁹⁷ It aimed to achieve a ceasefire in the city of Hudaydah and the ports of Hudaydah, Salif, and Ras Issa and to have a “mutual redeployment of forces” in these areas as well.³⁹⁸ The Security Council Resolution 2451 authorized the establishment and deployment of an advance team to support the implementation of the ceasefire and redeployment of troops which was agreed upon in the Stockholm Agreement.³⁹⁹ To help further facilitate the implementation of Resolution 2451, Security Council Resolution 2452 authorized the establishment of a Special Political Mission to the UN to support the Hudaydah Agreement (UNMHA).⁴⁰⁰ This mandate had an initial duration of 6 months and aimed to lead, support, and oversee the redeployment of troops, to monitor the parties compliance with the Hudaydah Agreement, to help ensure the security of the city and ports and that security forces acted in compliance with Yemeni law, and to help facilitate and coordinate UN support to assist in the full implementation of the agreement.⁴⁰¹ The Security Council renewed this mandate in Resolution 2505 and will continue its support until at least July 15, 2020.⁴⁰² The Security Council should continue the Special Political Mission to the UN and to uphold the Hudaydah Agreement by passing an additional resolution that extends this mandate for a period longer than six months.

³⁹³ Nathan Hogan, “Five Sides of Justice: The Dangerous and Disproportionate Influence of the Permanent Five Members of the UN Security Council on the International Criminal Court,” Brigham Young University Pre-Law Review (2018), available at: <https://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=1294&context=byuplr>.

³⁹⁴ Richard Dicker, “As ICC Caseload Expands, UN Security Council Support Lags Far Behind,” International Criminal Justice Today (December 10, 2015), available at: <https://www.international-criminal-justice-today.org/arguendo/as-icc-caseload-expands-un-security-councils-support-lags-far-behind/>.

³⁹⁵ Security Council Report, “UN Documents for Yemen,” United Nations, available at: <https://www.securitycouncilreport.org/un-documents/yemen/> (listing all the Security Council resolutions passed on the situation in Yemen).

³⁹⁶ “UNMHA, Hudaydah Agreement,” UN Political and Peacebuilding Affairs (January 16, 2019), available at: <https://dppa.un.org/en/mission/unmha-hudaydah-agreement>.

³⁹⁷ *Id.*

³⁹⁸ Haydee Dijkstal, “Yemen and the Stockholm Agreement: Background, Context, and the Significance of the Agreement,” American Society of International Law (May 31, 2019), available at: <https://www.asil.org/insights/volume/23/issue/5/yemen-and-stockholm-agreement-background-context-and-significance>. (This portion of the Stockholm Agreement was coined as the Hodeidah Agreement).

³⁹⁹ “UNMHA, Hudaydah Agreement,” *supra* note 399.

⁴⁰⁰ *Id.*

⁴⁰¹ Security Council Resolution 2452, United Nations (January 16, 2019).

⁴⁰² “Security Council Extends Political Mission Overseeing Peace Agreement in Yemen for Six Months, Unanimously Adopting Resolution 2505 (2020),” United Nations (January 13, 2020), available at: <https://www.un.org/press/en/2020/sc14075.doc.htm>.

Accountability via the UN

Since the likelihood of the Security Council establishing an accountability mechanism for crime committed in Yemen is slim, the UN may be able to offer solutions by way of its own resolutions. For example, on December 21, 2016, the General Assembly passed resolution 71/248 which established the International, Impartial and Independent Mechanism (IIIM) to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011.⁴⁰³ The IIIM's mandate is to "collect, consolidate, preserve and analyse evidence of violations" of IHL, human rights law, and to prepare files and facilitate the advancement of international criminal prosecutions of the documented crimes.⁴⁰⁴ On September 27, 2018, the Human Rights Council, established a similar mechanism called the Independent Investigative Mechanism for Myanmar (IIMM) as a response to the human rights and humanitarian situation of Rohingya Muslims and other minorities in Myanmar.⁴⁰⁵ The IIMM's mandate is to collect evidence of the most serious breaches on international criminal and humanitarian law and to facilitate the advancement of future international criminal proceedings.⁴⁰⁶

The UN has already taken similar actions in response to the Yemeni conflict. On September 29, 2017 the Human Rights Council issues a resolution requesting the High Commissioner to establish a Group of Eminent International and Regional Experts on Yemen ("Eminent Experts on Yemen") who are knowledgeable in human rights law and in the context of the conflict in Yemen.⁴⁰⁷ This resolution calls on this group of experts to monitor and report on the human rights situation in Yemen and to conduct comprehensive examinations of alleged violations and abuses of international human rights and other fields of international law committed by the varying parties to the conflict since September 2014 and encourages the experts to engage with local Yemeni authorities and stakeholders to provide support for national, regional, and international efforts to promote accountability for these human



Three million people have been displaced by the conflict as of 2018. Credit: Reuters.

⁴⁰³ General Assembly Resolution 71/248, United Nations (December 21, 2016).

⁴⁰⁴ *Id.* at ¶ 4.

⁴⁰⁵ Human Rights Council A/HRC/39/2, United Nations (September 27, 2018).

⁴⁰⁶ "Independent Investigative Mechanism for Myanmar," UN Human Rights Council, available at: <https://www.ohchr.org/EN/HRBodies/HRC/IIMM/Pages/Index.aspx>. (There is the possibility to first establish a Fact-Finding Mission (FFM) through a General Assembly Resolution but this is typically done in the absence of evidence of violations of IHL. As this paper demonstrates, there is ample documented evidence that consistent violations of IHL are occurring in Yemen, thus rendering the implementation of a FFM futile).

⁴⁰⁷ "Resolution A/HRC/RES/36/31," United Nations Human Rights Council (September 29, 2017).

rights violations.⁴⁰⁸ The original mandate established for the Eminent Experts on Yemen to conduct their work for a period of one year that may be renewed by subsequent authorization.⁴⁰⁹ The Human Rights Council renewed this mandate in September 2018 which extended the scope of the Eminent Experts on Yemen investigations to specifically include IHL and this same mandate was renewed again in 2019.⁴¹⁰ In its most recent report in September 2019, the Eminent Experts on Yemen found that airstrikes and shelling have had an extreme impact on civilians and that many of these attacks amount to violations on IHL and calls for the immediate cessation of the acts of violence against civilians in Yemen.⁴¹¹ The UN should continue to renew its mandate with the Eminent Experts on Yemen to ensure that evidence is properly preserved and documented and to help facilitate the potential future prosecution of these crimes.

Criminal Accountability via Ad-hoc Tribunals

A third option for state and corporate accountability for aiding and abetting atrocities in the Yemen civil war is through the creation of an ad-hoc tribunal. In contrast to criminal accountability via the ICC, ad-hoc tribunals do not necessarily require Security Council Authorization. Ad-hoc tribunals such as, Lebanon, Sierra Leone, and Cambodia have been created through alternative means such as agreements between state governments and the United Nations.⁴¹²

For example, the Special Tribunal for Lebanon, set up to investigate and prosecute those responsible for the 14 February 2005 attack that killed 22 people, including Rafik Hariri, the former prime minister of Lebanon, was created after a request by the government of Lebanon to the United Nations.⁴¹³ It is important to note, however, that this agreement was not ratified by Lebanon, requiring the UN to enforce its provisions through the binding power of UN Security Council Resolution 1757.⁴¹⁴ While the UN ultimately provided the force for the creation and implementation of a specialized criminal court in Lebanon, it is neither a purely international court nor part of the domestic Lebanese judicial system. Rather, the Special Tribunal in Lebanon is a hybrid court comprised of Lebanese and international judges, with Lebanese criminal law guiding the prosecution of terrorism as a discrete crime.⁴¹⁵ In the case of Cambodia, after negotiations with the Royal Government of Cambodia and the United Nations to bring to trial

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ “Resolution A/HRC/RES/39/16,” United Nations Human Rights Council (September 28, 2018); “Resolution A/HRC/RES/42/2,” United Nations Human Rights Council (September 26, 2019).

⁴¹¹ Group of International and Regional Eminent Experts on Yemen, “Yemen: Collective Failure, Collective Responsibility – UN Expert Report,” United Nations (September 3, 2019), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24937&LangID=E>.

⁴¹² Security Council Resolution 1757, United Nations (May 30, 2007).

⁴¹³ “Security Council Authorizes Establishment of Special Tribunal to Try Suspects in Assassination of Rafiq Hariri,” United Nations, (May 30, 2007), available at: <https://www.un.org/press/en/2007/sc9029.doc.htm>.

⁴¹⁴ *Id.*

⁴¹⁵ Statute of the Special Tribunal for Lebanon (2007), available at: https://www.stl-tsl.org/sites/default/files/documents/legal-documents/statute/Statute_of_the_Special_Tribunal_for_Lebanon___English.pdf.

senior leaders during the Khmer Rouge period, the General Assembly issued Resolution 57/228 which established the Extraordinary Chambers in the Courts of Cambodia.⁴¹⁶

In contrast, in East Timor, the Ad-hoc Human Rights Court on East Timor in Jakarta (“the Ad-hoc Court”), was created via presidential decree in the midst of international outcry regarding the orchestrated violence committed by Indonesian National Army and Timorese militias during September 1999. Although the Ad-hoc Court was created to investigate and prosecute crimes related to these atrocities, government control over the criminal proceedings and a lack of political will to prosecute senior civil and military officials complicit in the violence has resulted in a failure by Indonesia to keep its commitments to the pursuit of justice in the aftermath of widespread violence.⁴¹⁷ The Ad-hoc Court’s track record for securing convictions of culpable government and civilian leadership hints at the difficulties of ad-hoc tribunals overseen by the government officials who have a vested interest in continued impunity. But the example of East Timor by no means suggests that this pathway to aiding and abetting accountability with regards to Yemen would be fruitless. Rather, ad-hoc hybrid tribunals that feature both international and domestic judges may provide more accountability in accordance with established standards of procedural and substantive due process.

States – including a post-war Yemen – should consider working alongside the United Nations to create an ad-hoc tribunal that would investigate and prosecute aiding and abetting atrocity crimes committed by parties to the Yemen conflict. An ad-hoc tribunal that is hybrid in nature would increase the impartiality and expertise of the court while providing the best chance at preventing impunity for serious breaches of international humanitarian and human rights law.

Accountability at the ICC via Proprio Motu

Members of the international community are encouraged to submit Article 15 communications to the OTP, thereby obliging the Prosecutor to examine the gravity and credibility of all information provided regarding alleged crimes. Nonetheless, it is important to note the limitations of this pathway towards accountability for aiding and abetting war crimes in Yemen. Those who bear the greatest responsibility for alleged Coalition atrocities in Yemen are likely to remain outside of the Court’s grasp, as neither territorial nor personal jurisdiction can be asserted over the actions of either Yemen or leading Coalition actors such as Saudi Arabia and the UAE. Furthermore, criminal responsibility under the Rome Statute is limited to natural persons, precluding corporations from being charged with crimes under the Statute. Thus, only employees of a corporation alleged to have aided and abetted human rights violations in Yemen, not the corporation itself, may be charged with crimes arising out of the corporation’s involvement in the conflict.

⁴¹⁶ General Assembly Resolution 57/228, United Nations (May 22, 2003).

⁴¹⁷ “Justice Denied for East Timor,” Human Rights Watch (December 20, 2002), available at: <https://www.hrw.org/report/2002/12/20/justice-denied-east-timor/indonesias-sham-prosecutions-need-strengthen-trial>.

Recently, the Iranian Center for International Criminal Law (“ICICL”) filed an Article 15 communication with the Office of the Prosecutor (“OTP”), requesting the OTP open a preliminary investigation into war crimes committed by the SLC since 2015.⁴¹⁸ Article 15(2) of the Rome Statute enables the Prosecutor to “initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.”⁴¹⁹ By submitting an Article 15 communication based on personal jurisdiction, the ICICL has sought to draw the OTP’s attention to war crimes committed by Jordanian and UK nationals, arguing that officials of both states are responsible, as principals (i.e., Jordan) and accessories (i.e., the UK), for the human rights violations committed by the SLC in Yemen.⁴²⁰ Both Jordan and the UK are State Parties to the Rome Statute, and thus fall within the jurisdiction of the ICC.

Even if a *proprio motu* investigation were initiated, the ICC’s jurisdiction is limited to nationals of State Parties. Thus, the ICICL’s communication would allow the OTP to investigate Jordanian and UK conduct regarding crimes occurring in Yemen, though it would require an analysis of complementarity before moving forward. Issues of complementarity could potentially prevent the Court from prosecuting individuals unless the OTP could demonstrate inability or unwillingness to hold responsible individuals liable in domestic courts. The court systems of the UK, France, Germany, and the United States would likely fail to meet such a standard. An additional barrier is the resistance to the ICC from the United States, Russia, and China, who will likely block any attempts to aid the OTP in their investigations. Despite these roadblocks, the OTP could take *proprio motu* action against nationals State Parties.

Sanctions

Another possible avenue for the international community to take to achieve a degree of accountability for aiding and abetting atrocity crimes in Yemen is through the enactment of both domestic and international targeted sanctions against arms companies affiliated with conflict actors.

⁴¹⁸ Mohammad Hadi Zakerhossein, “How Do We Create a Path to Justice in Yemen?” Justice Hub (July 17, 2019), available at: <https://justicehub.org/article/how-do-we-create-a-path-to-justice-in-yemen/>.

⁴¹⁹ Rome Statute, *supra* note 76.

⁴²⁰ “Iranian Center for International Criminal Law Requests the International Criminal Court Prosecutor to Open a Preliminary Examination into War Crimes in Yemen” Iranian Center for International Criminal Law (July 1, 2019), available at: <http://www.icicl.org/details.asp?id=552>.

With regards to targeted sanctions, the UN Security Council and domestic governments should impose sanctions against corporations documented as having supplied SLC members and rebel militias with fighter jets, armored combat vehicles, guidance systems, and other forms of armed support alleged to have been used to commit atrocity crimes. Consumers and investors at home and abroad should be encouraged to cut business ties with those accused of aiding and abetting war crimes in Yemen. In the UN Fact-Finding Mission on Myanmar's 2019 report submitted to the Office of the High Commissioner for Human Rights, the Mission noted that the implementation of targeted sanctions such as those recommended above would work to "erode the economic base of the military ... impair its ability to carry out military operations without oversight and thus reduce violations of human rights and international humanitarian law, and

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”

serve as a form of accountability in the short-term.”⁴²¹ These intentions hold true for targeted sanctions against conflict actors in Yemen as well as Myanmar and should be seriously pursued by the UN Security Council, which maintains the power to issue sanctions under Article 41 of Chapter VII of the UN Charter.⁴²² The General Assembly, though lacking in Chapter VII powers, should encourage Security Council Member States to adopt targeted sanction measures against corporate and state actors alleged to have been actively involved in aiding and abetting atrocity crimes in Yemen. In addition, states should consider adopting legislation that imposes targeted sanctions in the absence of Security Council action.

While targeted sanctions and other measures are seen as punitive in nature, their application in the context of the Yemen conflict may push conflict actors on both sides of the war to support re-engagement with comprehensive initiatives to promote a peaceful transition away from violence and towards a sustainable peace.

Conclusion

The looming threat of punishment for aiding and abetting may help to discourage individuals from aiding and abetting war crimes and crimes against humanity in Yemen. Although some international avenues of accountability appear unlikely, pressure from the UN on corporations and States to prevent and punish aiders and abettors should continue and be amplified. Domestic courts, particularly in Europe, could also prove useful in discouraging corporations and individuals from providing support to the conflict. Given that the situation in Yemen shows no signs of ceasing in the near future, the international community needs to act to ensure aiders and abettors are held to account.

⁴²¹ “UN Fact-Finding Mission on Myanmar Exposes Military Business Ties, Calls for Targeted Sanctions and Arms Embargoes,” Office of the High Commissioner of Human Rights (August 5, 2019), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24868&LangID=E>.

⁴²² “Sanctions,” United Nations Security Council, available at: <https://www.un.org/securitycouncil/sanctions/information>.