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# Human Rights Violations in Yemen and the Prospects for Justice

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## Abstract

This chapter explores some of the more egregious international human rights and international humanitarian law violations alleged to have been committed by all parties to the current war in Yemen. The particular focus here is on gross breaches of the principles of distinction, proportionality and precaution, the recruitment of children to armed forces, arbitrary detention and enforced disappearance committed by all sides to this conflict. The recent responses by domestic, international and civil society actors are addressed through the lens of the global governance of international human rights and international humanitarian law. This contribution closes by giving thought to how gross violations might be accounted for in the context of post-conflict transitional justice, finding that an ad hoc tribunal to be the most appropriate, albeit imperfect, vehicle.

**Keywords:** Yemen; human rights; humanitarian law; global governance

## Introduction

This chapter explores some of the more egregious international human rights (IHR) and international humanitarian law (IHL) violations alleged to have been committed by all parties to the current war in Yemen. It sets aside debates relating to *lex specialis* and the distinction or complementarity of IHR laws against IHL (Milanović, 2011) and instead addresses current and potential responses to those violations through the lens of global governance. The concept of a governance regime complex (Keohane and Victor, 2011) is applied to IHR and IHL institutions to provide a framework within which to describe the various domestic and international responses so far, and to analyse the difficult matter of how to address and determine accountability for gross violations. Global governance regimes are taken as those that have been ascribed powers of regulation and authority and where the principles and norms referred to are not limited to the national borders of individual states so that ‘the ensemble of all forms of regulation... are oriented towards social values and have cross-border effects’ (Zürn, 2005, p127). A regime complex provides an apt way of conceptualising the function of more than one regime in relation to a particular matter or field, and of understanding the way those regimes overlap and intersect but can also create friction.

The first section of this chapter summarises the background to the current war in Yemen, introduces the IHR and IHL principles the government of Yemen and other armed actors are bound by, and explains why the war has been defined as a non-international armed conflict (NIAC). In the second section, some of the most significant allegations of IHR violations and breaches of IHL committed during the current war are considered, including gross violations of the principles of distinction, proportionality and precaution, the recruitment of children to armed forces, arbitrary detention and the blocking of humanitarian aid. The final section of this

chapter outlines some of the recent responses to the conflict and explores how post-conflict transitional justice might be approached while acknowledging the persisting and precarious geo-political situation. This chapter concludes somewhat darkly. Given the respective interests of the permanent five members of the United Nations Security Council, their individual and collective influence at the United Nations and their respective alliances to the separate parties to the war, it is difficult to envisage how and what form an agreed upon independent court or similar mechanism would take.

## **Current Armed Conflict in Yemen**

### **Background**

Yemen is long celebrated for its historical importance, ancient society and unique architecture afforded UNESCO world heritage protection (Maréchaux and Maréchaux, 1997; Marchand, 2017; Crassard and Khalidi, 2017). Yet tribal conflict, separatism and terrorism have long defined its territory and people (Day, 2012; Rezk, 2017; Orkaby, 2017). For countries, such as the United States, these characteristics constitute danger. In 2004, US security policy was that 20<sup>th</sup> century institutions built upon ‘ideas of hierarchy and separation and a set of stable, unchanging threats’ were ill equipped to address the challenges of the 21<sup>st</sup> century (Weinstein et al, 2004). To address threats emanating from weak and fragile states, where the US was unable to work directly with the ruling elite on fundamental reform in order to pursue its own security agenda, the recommendation was to ‘aggressively’ focus efforts on building popular pressure and increase the costs of continued repression, namely the costs to the ‘recalcitrant government’, by supporting human rights groups, legal assistance mechanisms, independent media, and other civil society organizations (Weinstein et al, 2004, 54). This strategy supports allegations that the US helped spark, or at least fanned, the flames of the Arab Spring (Nixon, 2011).

The roots of Yemen’s present conflict lie in the political transition following its Arab Spring (Juneau, 2014; Moosa Elyah et al, 2018). In 2012, with US and UN support, Abd-Rabu Mansour Hadi, Saleh’s then vice-president, was ‘elected’ to replace Ali Abdullah Saleh as president (The Journal, 2012). A national dialogue followed (an approach with some historical success having been central to the resolution eight years of war in north Yemen between 1962-1970 (Moosa Elyah et al, 2018)), as well as the drafting of a new constitution, and a multi-dimensional framework - the Joint United Nations Framework to Support the Transition in Yemen (2012-2014). A country Office of the High Commissioner for Human Rights (OHCHR) was established in 2013, demonstrating a firm commitment to improving human rights across the country.

Yet Hadi’s position within Yemen was weak compared to the substantial power base built by Saleh over decades (Juneau, 2014, 377). Saleh returned to re-stake his claim supported by the Shia Ansar Allah movement, known as the Houthis, which had emerged in the northern part of Yemen during the early 1990s as a peaceful theological movement but had since developed a military approach. Saleh swiftly regained control of Yemen’s capital Sana’a, prompting the Hadi government to all but step down with Hadi placed under house arrest, and later exiled to Riyadh (Gardiner, 2015). The scale of the conflict escalated in March 2015 following Hadi’s exile and his request for support (S/2015/217). In what has been since

labelled a ‘proxy war’ (Wintour et al, 2016), the Saudi-led coalition—which initially comprised nine states: Saudi Arabia, Egypt, Morocco, Jordan, Sudan, the UAE, Kuwait, Qatar and Bahrain—has operated in the name of the Yemeni government, with arms and military support primarily from the US and the UK on the one hand (Spencer, 2016; Wilcken, 2018), while on the other hand the Shia Houthis were supported by Iran (Mwatana, 2018a and 2017; UNHRC A/HRC/39/43, 2018; Amnesty International, 2018).

Power vacuums across the country have been filled by ‘a plethora of armed groups’ including al Qaeda in the Arab Peninsula (AQAP) and insurgents linked to so-called Islamic State (Baron, 2016). Salafi factions have used their ‘powerful social force’ to create more formal political structures in Aden and Taiz in the southern part of Yemen, and there has been an emergence of localised resistance forces (Baron, 2016; S/2016/73, 2016). At the time of writing, the Houthis are in control of much of north Yemen, which has historically been a largely Shia (Zaidi) area, with contested areas being primarily the Red Sea port of Hodeidah and Ta’izz (European Council on Foreign Relations). Saleh’s defection in December 2017 to allegedly seek peace with Saudi Arabia achieved little; within two days he was killed by Houthi forces (Wintour, 2017).

### **Yemen’s International Obligations**

Yemen’s interaction with UN IHR treaty and charter mechanisms indicates a commitment in principle to IHR laws and norms. However, improved human rights protection on the ground does not necessarily follow a state’s IHR treaty ratification (Hathaway, 2002 and 2007). Yemen has ratified seven key IHR treaties including the International Covenant on Civil and Political Rights (ICCPR) (of which article 6 prohibits arbitrary killing in armed conflict), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention against Torture (CAT) and Convention on the Rights of the Child (CRC), as well as two of the three CRC optional protocols: on the involvement of children in armed conflict (OP-CRC-AC), and on the sale of children, child prostitution and child pornography (OP-CRC-SC). Yemen’s acceptance of complaints procedures is limited to the inquiry procedure under CAT and CRPD and the individual complaints procedure under CRPD. It has not accepted the individual complaints procedure for ICCPR, CEDAW or ICESCR.

In 2013, Yemen described efforts to strengthen its national human rights infrastructure in anticipation of its second cycle Universal Periodic Review (UPR), a process involving a comprehensive peer review of a state’s compliance with its legal and voluntary IHR and IHL (A/HRC/WG.6/5/YEM/1, 2013, paras 25-35). This included the government and OHCHR jointly drafting a National Human Rights Institution (NHRI) Bill. However, this failed to go beyond consultation, with recommendations to create an NHRI being repeated during Yemen’s third cycle UPR in January 2019 (A/HRC/WG.6/32/YEM/3, 2018, para 8). Recommendations supported by Yemen in January 2014 to ratify the International Convention for the Protection of All People from Enforced Disappearance (ICPPED) and the Statute of the International Criminal Court (ICC) have not been implemented. Whilst Yemen met its reporting obligations under its third cycle UPR in January 2019, there is no standing invitation to special procedures and, at the time of writing, treaty body reports are overdue for CAT, ICCPR, CERD, CRC and CRPD. In relation to IHL, Yemen is party to each of the four Geneva Conventions and

Additional Protocols I and II. It is not party to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. (See Rogers' chapter in this volume.)

During peacetime, international human rights law protects the right to life and the right not to be arbitrarily deprived of one's life (ICCPR article 6, UDHR article 3, ECHR article 2, ACHPR article 4, IACHR article 4). During a non-international armed conflict (NIAC), defined below, civilians and those no longer taking part in hostilities are protected under the principle of distinction, namely that civilians should be distinguished from legitimate military targets (common article 3, the Fourth Geneva Convention). (See Alexander's chapter in this volume.) Additional Protocol II (APII) to the Geneva Conventions affords further protection to civilians in an NIAC, for example, under Article 14 APII, starvation of civilians as a method of combat is prohibited and this includes prohibiting attacks on objects needed for civilian survival relating to the provision of food and water. During an international armed conflict (IAC), protection is specifically afforded under the Geneva Conventions Additional Protocol I (API).

### **Classifying the Armed Conflict in Yemen**

To some extent, the classification of armed conflict determines those principles of IHL that apply. An IAC exists when two or more states are engaged in opposing armed conflict (Common Article 2 to the Geneva Conventions, 1949). There is an NIAC when, under Common Article 3, the armed conflict is 'not of an international character occurring in the territory of one of the High Contracting Parties' and the intensity threshold defined in Article 1(2) APII is met. Notwithstanding the classification, the principles of IHL set out in APII apply to an IAC reflect applicable customary IHL and will therefore also be taken into account in an NIAC (ICJ, 2018, p. 6).

The war in Yemen has been classified as an NIAC (ICJ, 2018 and A/HRC/42/17, 2019). The ICJ cites two co-existing NIACs, one between Yemen's government and the Houthis, the other between the Saudi-led coalition and the Houthis. In each, the parties are a state and an armed non-state actor, and the intensity threshold is met. However, President Hadi's request for assistance on behalf of the Yemeni government was made after he had fled Yemen, begging the question '[w]hether or not an ousted government, particularly one acting from abroad, is still entitled to consent to foreign intervention on national territory' (ICJ, 2018, 3). Subsequent reports indicate that Hadi has effectively been placed under house arrest in Riyadh (Al Jazeera, 2018), although he was recently present in Yemen (Fenton-Harvey, 2019). This is an important consideration given Hadi's request is central to Saudi Arabia's claim of legitimate intervention (FCO, 2016, para 28). A United Nations group of experts (see below) identifies further NIACs between Yemen's and other non-State armed groups, such as Islamic State in Iraq and the Levant and Al-Qaida in the Arabian Peninsula, and among different armed groups, with all being subject to those provision that regulate NIACs (A/HRC/42/17, 2019, paras 9-10).

If Iran's involvement amounts to overall control of the Houthis, the conflict may be classed as an IAC because one state would be in armed conflict with another. There is a potential argument that an IAC is being waged against the people of Yemen: the UAE trained and backed Security Belt, a southern separatist movement, considers attacks against the government in

Yemen to be with the consent of the Saudis, and permissible because they do not amount to attacks against Hadi (Middle East Eye, 2018), yet such attacks amount to aggression by one state against another. (The role played by the Saudi-led coalition and its suppliers of arms and military support is addressed below.)

## **IHR and IHL Violations and Abuses**

Before the current conflict, the human rights situation in Yemen was fragile. Half the population lived below the poverty line and adult literacy was at less than seventy percent (UNICEF, 2013). Unsurprisingly, there were early-warnings of catastrophic consequences for Yemen and its people in the event of ‘a full-blown sectarian conflict’ erupting (Chonghaile, 2015). These have come to pass. As of December 2018, one source estimated over 70,000 deaths related to the war, including tens of thousands of civilians (Armed Conflict Location and Events Dataset). More recent warnings are of this figure approaching 100,000 (Austin, 2019). Official figures put the toll at far less (Beaumont, 2019; Civilian Impact Monitoring Report, 2018). Yemen suffers almost chronic under-development (Moyer et al, 2019). It is estimated that seventy-five percent of Yemen’s population (22.2 million people) now depend upon humanitarian aid (The World Bank, 2018). The young, old and vulnerable are particularly at risk of death from cholera outbreaks across the majority of the country (Care International, 2019). Over three million people are estimated to have been internally displaced and around 10,000 individuals are at risk of famine, whilst refugees continue to enter the country from the horn of Africa (UNDP: Joint United Nations Framework, 2019; Savage and Kalfood, 2016; Gardiner and Rosser, 2018). The situation has been declared the ‘world’s worst’ and an ‘unprecedented’ humanitarian disaster (ECHO, 2019; UN, 2019). An already weak public infrastructure and crippled health system is on the brink of collapse (World Health Organization, 2018).

Numerous IHR and IHL violations and potential war crimes are documented in reports and investigations by civil society actors and UN appointed panels and committees of experts based upon interviews and investigations conducted on the ground in Yemen. These have included Human Rights Watch, Amnesty International, Mwatana (a Yemen-based non-governmental organisation (NGO)), a group of international experts appointed in September 2017, a National Committee to Investigate Alleged Violations of Human Rights in Yemen, and a Panel of Experts on Yemen established pursuant to Security Council Resolution 2140 (2014). Such reports have been submitted to various formal mechanisms including the Human Rights Council, Universal Periodic Review and the Security Council. Across these sources, allegations of grave breaches and potential war crimes have been made against all parties. This section is a non-exhaustive account of some of those allegations.<sup>1</sup>

## **Principles of distinction, proportionality and precaution**

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<sup>1</sup> There is not scope here to consider the limitations of human rights fact-finding missions, but see for example, Alston, P. and Knuckey, S., (eds) *The Transformation of Human Rights Fact Finding* (Oxford, New York: Oxford University Press 2016), Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence and Sex Trafficking* (University of Chicago Press 2016).

Violations of the principles of distinction, proportionality and precaution by all sides to the war have meant civilian casualties and loss of life, severe damage to civilian infrastructure, forced displacement and a detrimental impact upon the rights to health, education, and water (Mwatana, 2018 (a)). Naval and air blockades have interrupted and prevented the flow of aid, fuel and medical supplies into the country (A/HRC/WG.6/31/SAU/3, 2018, para 12).

The Saudi-led coalition is cited in numerous reports for having violated the principles of distinction, proportionality and precaution. Civilians have been killed or injured in attacks against non-military targets including homes, schools, hospitals, factories, weddings, markets, a refugee camp, electricity and water processing plants, and children on a bus (S/2016/73, 2016; Leigh Day Solicitors, 2016; Human Rights Watch, 2018). Some attacks have employed a ‘double-tap’ or ‘double strike’ tactic in which a second bomb is dropped shortly after the first (Lockhart, 2016). Such tactics are indisputably in breach of IHL where the second attack indicates either a lack of proportionality assessment and precautionary measures being taken (A/HRC/39/43, 2018, para 38), or an intention to target emergency responders and civilians first on the scene (Merat, 2019). Investigations of such incidents have been conducted by the Joint Incidents Assessment Team (JIAT), though it has been criticised for lacking credibility and independence because it is party to the Saudi-led coalition (A/HRC/39/43, 2018, para 104).

In its findings, the JIAT explained an October 2016 attack against a funeral in a hall was based upon intelligence that the hall was a Houthi target but that the air operation was undertaken without the coalition command’s authority so that ‘non-compliance with coalition rules of engagement and procedures, and the issuing of incorrect information’ resulted in civilian deaths and injuries (JIAT Press Statement, 2016). Further failings to verify intelligence led to a coalition attack on a busload of children returning from a trip - the ‘regret’ reported at the time related to the target having been in a market area rather than in open space. The tens of children killed and injured appeared to be overlooked with the coalition representative maintaining a steadfast position that the target was Houthi leaders responsible for ‘recruiting and training young children’ (HRW, 2018). Both incidents may amount to war crimes (HRW, 2018). In a subsequent coalition statement mistakes were admitted with assurances that those responsible would be ‘punished’ (Reuters, 2018). Yet, given previous announcements that all soldiers will receive a Saudi royal pardon for any military or disciplinary penalties relating to the war in Yemen, any punishment seems unlikely (Arabian Business, 2018).

The Houthis/Ansar Allah and the Saudi-led coalition have both been cited as responsible ‘for killing and maiming and attacks on schools and hospitals’ due to ‘the very large number of violations attributed to the two parties’ (A/70/836–S/2016/360, 2016, para 228). However, reference to Saudi Arabia was subsequently removed from the Secretary-General’s report, suggesting political manoeuvring (A/70/836/Add.1–S/2016/360/Add.1, 2016). Nonetheless, reports of the High Commissioner for Human Rights refer to the majority of civilian injuries and deaths being attributable to the Saudi-led coalition (A/HRC/36/33, 2017).

### **Recruitment of children to armed forces**

All parties are alleged to recruit and use children in the armed conflict. Under OP-CRC-AC, Yemen is required to take ‘all feasible measures’ to ensure armed forces members under the age of 18 do not ‘take a direct part in hostilities’ (article 1) and that armed forces should not

compulsorily recruit anyone under the age of 18 (article 2). Under article 4, the same restrictions apply to armed groups. Under customary IHL, applicable in NIACs and IACs, children must not be recruited into armed forces or armed groups (ICRC Customary IHL, rule 136).

The use of child soldiers in Yemen pre-dates the current conflict. A Yemeni Presidential Decree in 2012 prohibited the recruitment of children to the Yemeni armed forces (C/OPAC/YEM/CO/1, 2014). In 2014, the Security Council called upon Yemen to ‘end and prevent the recruitment and use of children... in the government forces of Yemen’ and established a panel of experts to update the Security Council on this and other matters (S/RES/2140 (2014)). In 2016, that panel’s annual report stated ‘[f]ood scarcity and economic insecurity are linked directly to child recruitment by armed groups’ whereby families receive money for their recruited children, with orphans being particularly vulnerable to recruitment (S/2016/73, 2016, para 159). Nearly one third of all combatants in the current war are reportedly under the age of 18, with Houthi forces cited as responsible for recruiting the vast majority, followed by Yemeni forces and resistance fighters (S/2016/73, 2016, para 159). This is in clear contravention of the CRC, OP-CRC-AC and principles of IHL.

In 2016, the UN Secretary-General reported 762 verified cases of boy child soldiers, with the Houthis responsible for 72%, pro-Government popular committees for 15%, and AQAP for 9% (A/70/836–S/2016/360, 2016, para 165). The same report referred to a verified ‘six-fold increase in the number of children killed and maimed [in 2015] compared with 2014, totalling 1,953 child casualties (785 children killed and 1,168 injured)’ with the ‘alarming trends’ continuing into 2016. Of these casualties, more than 70% were boys and 60% were attributed to Saudi-led coalition forces (510 deaths and 667 injuries) (A/70/836–S/2016/360, 2016, para 167). A subsequent report in May 2018 covering the period January – December 2017, cited grave violations including an increase in the recruitment of child soldiers, verifying 842 cases, of which ‘534 (nearly two thirds) were attributed to the Houthis, 142 cases to the Security Belt Forces and 105 to the Yemeni Armed Forces’ (A/72/865–S/2018/465, 2018, paras 200 – 212). As in the earlier report, whilst the Houthis were identified as recruiting the majority of child soldiers, the majority of child deaths and injuries were attributed to coalition air-strikes (A/72/865–S/2018/465, 2018, paras 204 – 205). In January 2019 during Yemen’s third cycle UPR, repeated and specific concerns were raised by many states about the impact of the armed conflict on children and their involvement in it, including Belgium, Bulgaria, Iran, Slovenia, New Zealand and Zambia and others (A/HRC/41/9, 2019).

### **Arbitrary detention and freedom of expression**

Allegations of arbitrary detention and curtailment of the right to freedom of expression of political opponents, human rights defenders, journalists and others, apply to all sides to the conflict, with the majority of verified cases attributed to Houthi/Saleh affiliates (A/HRC/36/33, 2017). Journalists have been reportedly detained by Houthi forces, and Houthi shellfire on 26 May 2017 was alleged to have killed Takieddin al-Hudhaifi, a freelance cameraman, and Wael al-Absi who worked for the official Yemen TV channel (Gulf Center for Human Rights, 2018(a)). Those loyal to President Hadi have allegedly conducted ‘arbitrary arrests, enforced disappearances, raids against media offices, the closure and confiscations of newspapers, unfair



trials, and the blocking of websites’ (Global Voices, 2017). In June 2018, two Yemeni human rights defenders were detained by Saudi and UAE-led coalition forces whilst travelling to engage in human rights activities overseas having previously been detained by Houthi security services (Gulf Center for Human Rights, 2018 (b)).

### **Other violations**

In addition to violations addressed above, evidence has been presented of torture, sexual violence, restrictions on the freedom of movement and discrimination against religious and other minorities (Mwatana, 2019). The conflict has created a greater number of internally displaced people (IDPs) which has led to an increase in regional discrimination in host governorates (A/HRC/WG.6/32/YEM/33, para 11). Where people do return to their homes, they are at risk from unexploded landmines and the ‘lack of public services, the weakened economy and rampant inflation’ leave ‘many Yemenis short of means to secure decent livelihoods’ (A/HRC/WG.6/32/YEM/2, 2018, para 55). Aerial attacks against hospitals have made women and children wary of undertaking often long and difficult journeys to health facilities (United Nations Population Fund, 2019).

The interruption of the flow of humanitarian aid into parts of the country because of air and naval blockades has exacerbated the risk of starvation, with concerns raised that starvation is being used as a weapon of war (S/2016/73, 2016). In 2017, Sana’a international airport was closed by the Saudi-led coalition to commercial flights preventing access to medical treatment outside of the country, with reports of thousands of deaths as a direct result (Norwegian Refugee Council, 2017). Part of the December 2018 Stockholm Agreement was for the Red Sea Port of Hodeida, a vital passage for aid and supplies into Yemen, to be re-opened. Some five months later, the process of the Houthis handing over the port has begun, but Sana’a international airport remains closed (Al Jazeera, 2019).

### **Responses to Violations and Abuses**

The international community looks on unconcerned as the architects of Yemeni suffering continue to purchase weapons from the governments of the US, the UK, and France, thus buying their silence in grave violations of human rights and international humanitarian law (Mwatana, 2019 (b)).

Taking the concept of a regime complex, which Keohane and Victor (2011) present as comprising different entities relevant to a particular field, in their case climate change, this author has argued elsewhere that conceptualising individual IHR institutions as regimes that occupy a regime complex encapsulates the overlapping and intersecting function of international and domestic IHR mechanisms as well as their friction (Ashley, 2018). Whilst each rule-complex is constituted, for example, under a specific treaty to address a particular area of international law, *lex specialis*, the argument pursued by Martii Koskenniemi was that in reality self-containment is neither feasible nor intended; *lex generalis* is to be taken into account and other relevant conventional international law (Koskenniemi, 2006, paras 47, 164, 462 and 470-472).

Specific regimes that populate the IHR regime complex include: international institutions of global focus including UN treaty bodies and UN Charter mechanisms, such as the UPR; international institutions with regional reach, for example, the Inter-American Court of Human Rights and the European Court of Human Rights; and domestic institutions including NHRIs (Ashley, 2018). The part played by multiple actors in Yemen's war gives rise to a 'problem diversity' (Keohane and Victor, 2011, 13) whereby many regimes within the complex are apt to respond, and do so, yet the multi-faceted response does not achieve the objective of either bringing violations to an end or determining difficult questions of liability and accountability. Herein lies a central challenge. The power and influence of governance mechanisms is limited if their powers are confined to a process of state observation, standard-setting and norm dissemination. For those governance regimes whose output is the making of resolutions without any enforcement powers, addressing a lack of compliance becomes a political matter rather than a legal one. When resolutions pass unheeded, questions of the legitimacy and authority of the recommending regime arises (Bodansky, 1999).

Civil society actors can be forgiven for thinking the 'international community looks on unconcerned'. In this context, this section considers certain domestic-level responses that have been pursued, the response of existing international mechanisms, and those specifically created to investigate and report on matters of concern. It gives some closing thought to derivative responsibility for IHR and IHL violations by an intervening state (de Wet, 2018), and how abuses conducted by all sides to the war might be addressed in a future post-conflict transitional justice environment.

### **Domestic-level responses**

A number of states, including Germany, Denmark and Finland, have stopped supplying arms to Saudi Arabia because of concerns over their use in the commission of IHL violations, but the US and UK continue (Stone, 2018; Gambino and Borger, 2019). This is despite a UK parliamentary committee concluding at the relatively early stages of the war that 'it is very difficult to continue to support Saudi Arabia while maintaining the credibility of our arms licensing regime' (Business, Innovation and Skills Committee, 2016, para 106). UK parliamentary questions have been used to raise the matter of attacks against civilians on occasion, one such example being written question – 255648, referring to bombings at a Sana'a school on 7 April 2019, and a Save the Children-supported hospital on 26 March 2019.

An NGO, Campaign Against Arms Trade (CAAT), achieved partial success in its application for judicial review of the UK government's decision-making process to grant / renew export licences for the sale or transfer of arms and military equipment to Saudi Arabia.<sup>2</sup> The UK is bound by Articles 6(3) and 7 of the Arms Trade Treaty, Criteria 2 and 6 of the EU Common Position and Criterion 2(c), requiring it not to grant export licenses 'where there is a clear risk that the items might be used in the commission of a serious violation of IHL' by the recipient country (Business, Innovation and Skills Committee, 2016, para 7).

In June 2019, the UK Court of Appeal allowed one of CAAT's four grounds of appeal against a previous High Court decision, although the UK government was granted leave to

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<sup>2</sup> *R (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020.

appeal to the Supreme Court. That ground was that ‘evidence shows that the Secretary of State’s consideration of Saudi Arabia’s past and present record of respect for IHL, including whether a pattern of violations could be discerned, was fundamentally deficient’.<sup>3</sup> Press coverage has implied a consequential halt in the sale and export of arms to Saudi Arabia, however, the ruling does not apply to provision under extant licenses.<sup>4</sup> Under extant Open Individual Export Licences (OIELs) the UK can continue exporting military and dual-use items, including accessories and components for military equipment from helmets to military software and, crucially, air launched rockets, air-to-air missiles, air-to-surface missiles, bombs and related components.<sup>5</sup> The existence of extant licences therefore seriously undermines the capacity of civil society to hold the UK government to account and to prevent the potential use of UK manufactured equipment in the commission of war crimes and other violations of IHL. It remains to be seen whether the Supreme Court will adopt an apologist role and reinstate the High Court ruling, serving to legitimise the UK’s approach (Weill, 2014).

Alternative recourse to domestic courts could follow the approach employed by the family of a Yemeni, Ali Jaber, killed by a US drone in 2012. Ali Jaber’s family sought legal redress in the Higher Administrative Court of Germany, arguing a close connection of the German Ramstein Air Base to the drone attack.<sup>6</sup> The German court found in favour of the argument that the hosting of a relay station used to forward data and control signals for US drones as well as data collected by those drones, meant the airbase played an essential role in their use. In the Court’s view there were ‘weighty indications that at least some of the armed drone operations conducted by the USA’ in Yemen were not compliant with international law, namely regarding the principle of distinction. It ruled the importance of Ramstein Air Base to US drone operations meant the German government should act to ensure US respect for international law when using Ramstein, giving permission to appeal to Germany’s Federal Administrative Court.

It is interesting to note that the German court’s view was that the US’s drone attack was part of an NIAC between AQAP and the government of Yemen, acknowledging the latter had sought the international community’s assistance in dealing with the threat AQAP posed to Yemen’s security. The Court questioned whether this classification could be sustained given the subsequent considerable weakening of AQAP. If so, ongoing US drone attacks to target AQAP (Yemen Embassy in the US, 2017) may fall outside of the NIAC definition, and the

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<sup>3</sup> *ibid* paras 49 and 167.

<sup>4</sup> Statement by the (then) Secretary of State for International Trade and President of the Board of Trade, 20 June 2019, House of Commons Hansard, Vol 662, col 377, <https://hansard.parliament.uk/commons/2019-06-20/debates/D9BD8C37-E5A0-4A7E-9959-AC40A0DEE622/ExportLicencesHighCourtJudgment> last accessed 02 August 2019.

<sup>5</sup> ‘Open Individual Export Licences (OIEL) where the end user is Saudi Arabia, that were extant as at 24 June 9am’, DEP2019-0710, Deposited Papers, UK Parliament. <https://www.parliament.uk/business/publications/business-papers/commons/deposited-papers/?fd=2019-06-27&td=2019-06-28&house=1#toggle-710> last accessed 02 August 2019.

<sup>6</sup> *Faisal bin Ali Jaber and others v. the Federal Republic of Germany*, North Rhine-Westphalia Higher Administrative Court, judgment from 19/3/2019 – 4 A 1361/15, Wording of the oral pronouncement of the judgment [https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/OVG\\_Muenster\\_oral\\_declaration\\_of\\_judgment\\_19\\_March\\_2019\\_EN.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/OVG_Muenster_oral_declaration_of_judgment_19_March_2019_EN.pdf) last accessed 02 August 2019.

self-defence provisions of Article 51 of the UN Charter, so generously interpreted and applied by the US during its war on terror.

### **United Nations institutions and mechanisms**

The direct response of IHR treaty bodies is restricted. If the UN Committee against Torture received reliable information of serious or systematic violations of CAT by Yemen it could undertake an inquiry. Yemen has not accepted the individual complaints procedure under the CRC, thus limiting the remit of the Committee on the Rights of the Child to that of making observations and related recommendations. As indicated above, at the time of writing Yemen's report to CRC is overdue meaning it is unlikely that CRC violations will be considered in that forum in the near future.

Following repeated demands for an international inquiry, a Group of Eminent Experts (GEE) was established in September 2017 (A/HRC/RES/36/31, 2017). Its first report in August 2018 presented evidence of serious violations of IHR and IHL, concluding the possible commission of war crimes by all parties and the potential implication of coalition partners (A/HRC/39/43, 2018). The second report, a year later, repeated these conclusions and presented further evidence of gross violations by all parties to the conflict including violations of the principles of distinction, proportionality and precaution, arbitrary detention, ill-treatment and torture, and rape and sexual violence, as well as citing an exacerbation of gender-based violence (A/HRC/42/17, 2019). The investigations of the GEE during 2018-2019 were hindered by a lack of cooperation on the part of Governments of Yemen, Saudi Arabia, the United Arab Emirates and Egypt which meant that despite de facto authorities agreeing to the GEE to visit areas under its control, the group was denied permission to enter Yemen by the Government (A/HRC/RES/42/2, 2019, para 7). The mandate of the GEE was renewed for a further 12 months (A/HRC/RES/42/2, 2019), with a report to be presented during the Human Rights Council's 45<sup>th</sup> session to be followed by an interactive dialogue (September 2020).

The UAE responded to the GEE's first report and subsequent renewed mandate with lengthy criticism, citing errors in the GEE's conduct and methodology, its misinterpretation and misapplication of relevant legal principles and incorrect findings of fact (UAE, 2019). Following the establishment of the GEE and its findings, there have been calls for a Commission of Inquiry. However, given the complexities of the war and the fragile geo-political relations within the Middle East and Gulf region, is it unlikely that a CoI would succeed in holding violators account, particularly taking account of the lack of progress of the CoI for Syria in this respect.<sup>7</sup>

In terms of resolutions and reports by existing UN institutions, there were no substantive Security Council resolutions regarding Yemen before 2011. There have since been 15, initially relating to the Arab Spring and then regarding the war, including on the Stockholm Agreement, sanctions and the creation and operation of a UN Mission to support the Hodeidah Agreement.<sup>8</sup>

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<sup>7</sup> For reports on the Syrian CoI established in 2011, see <https://www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/independentinternationalcommission.aspx> last accessed 02 August 2019.

<sup>8</sup> 'UN Documents for Yemen: Security Council Resolutions' [https://www.securitycouncilreport.org/un\\_documents\\_type/security-council-resolutions/?ctype=Yemen&cbtype=yemen](https://www.securitycouncilreport.org/un_documents_type/security-council-resolutions/?ctype=Yemen&cbtype=yemen) last accessed 16 April 2020.

Over the same period, there have been seven Human Rights Council resolutions, seven Human Rights Council reports, various Security Council presidential statements, and six UN Secretary-General reports.<sup>9</sup> The Security Council has also invited domestic civil society's perspective (Mwatana, 2017). Human rights abuses and IHL violations have been cited during the Human Rights Council Universal Periodic Review (UPR) of Yemen in January 2019 (A/HRC/WG.6/32/YEM/3, 2018) and of Saudi Arabia in October 2018 (A/HRC/WG.6/31/SAU/3, 2018). Such attention at the UN level would suggest that seeking a resolution to the conflict is high on the agenda of the international community and the UN.

Calls for a political solution to the conflict have been made before various institutions of the UN (A/HRC/39/L.21, 2018). There has been some progress with diplomatic talks pursued by the UN Peace Envoy Martin Griffiths resulting in the Stockholm Agreement in December 2018, in which parties committed to a ceasefire in the city and port of Hodeidah, and other ports, the opening of humanitarian aid corridors in those ports, and a prisoner swap agreement. This (qualified) success may have been due in part to evidence collated by civil society and UN institutions of violations by all parties and increasing global awareness of the same. However, despite parties apparently seeing the agreement as a 'gateway to opening up negotiations on a political solution', implementation has been dogged with difficulty (Griffiths, 2019). Since the Stockholm Agreement, efforts implement a ceasefire have stalled, collapsed, been resurrected and stalled again, with ceasefire agreements being both celebrated for their progress and at risk of collapse on the same day (Griffiths, 2019 (a); Wintour and McKernan, 2019 (a) and (b)).

### **Civil society**

Global, regional and domestic civil society actors have repeatedly called for an end to the war, for independent investigation of IHR and IHL violations, and for parties to be held to account. In the process, civil society and UN agencies have undertaken on-the-ground investigations, arguably the most extensive by Yemeni NGO, Mwatana (Mwatana, 2017 & 2019 (a) and (b)). Combined, a significant body of evidence of IHR and IHL violations has been amassed, collated and distributed.

In the short term, reports of investigations and evidence gathering are used to raise awareness and have prompted certain western governments to curtail the flow of arms and military supplies to the Saudi-led coalition, as noted above. Evidence of verified cases of abuses and violations and cross-referencing of the same would make a vital contribution to any future investigations for prosecutions as part of, for example, a war crimes and/or criminal tribunal, as considered below. In late 2019, a coalition of NGOs submitted a joint Communication to the ICC requesting that it investigate the legal responsibility of corporate and political actors from Germany, France, Italy, Spain and the UK. It remains to be seen, at the time of writing, how the ICC will respond.<sup>10</sup> The Saudi-led coalition is, unusually, emulating the approach of holding individuals to account via court-martial proceedings against

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<sup>9</sup> *ibid.*

<sup>10</sup> 'Made in Europe, Bombed in Yemen' European Center for Constitutional and Human Rights (ECCHR), December 2019, <https://www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen/> last accessed 16 April 2020.

its own air crew, in what would appear to be an attempt to be absolved of state responsibility for IHL breaches (Wintour, 2020).

### **Post-conflict transitional justice**

This final subsection gives thought, firstly, to those mechanisms apt for determining liability for (gross) IHR and IHL violations and, secondly, to those parties that would fall within the relevant jurisdiction. A formal justice mechanism along the lines of a ‘competent and independent court’ (A/HRC/39/43, 2018, para 108) would need to complement peace-building and reconciliation on the ground within and between communities because all sides to the conflict have allegedly violated fundamental IHR laws and principles and committed grave breaches of IHL amounting to war crimes (A/HRC/39/43, 2018). Under formal international criminal justice, options for criminal prosecution include investigation and prosecution by the ICC, an ad hoc tribunal, and the prosecution of individuals in other states under the principle of universal jurisdiction.

Neither Yemen nor Saudi Arabia and its Gulf Co-operation Council coalition partners are party to the Rome Statute and so do not fall directly within the ICC’s jurisdiction, and nor is Iran. Under Article 12 of the Rome Statute, individuals accused of a crime that falls within the Court’s jurisdiction can themselves be subject to prosecution, but this is subject to the individual being a national of a state party to the Rome Statute or, if not, the State’s acceptance of ‘the exercise of jurisdiction by the Court with respect to the crime in question’ (Article 12, para 3). That said, the Security Council may refer situations to the ICC Prosecutor, whilst noting that those states that are not a signatory to the Rome Statute are not obliged to cooperate, as illustrated by referrals in respect of Sudan and Libya, (S/RES/1593 (2005) and S/RES/1970 (2011) respectively).

The creation of an ad hoc tribunal along the lines of the ICTR, ICTY or ECCC may be viable, despite the limited capacity of such a tribunal or court to provide the justice and resolution that victims might seek (Gegout 2013; Krever, 2013). Alternative restorative justice mechanisms including truth and reconciliation commissions, or the adaptation of traditional and primarily non-state-based justice apparatus such customary law-based hearings, could complement this approach. Customary approaches to conflict resolution continue within Yemen and many of Yemen’s traditional and religious procedures have been subsumed into written state law (Baker and Scheye 2007). Yet these approaches are not without issue. The adaptation of the *Gacaca* as a restorative justice mechanism following the 1994 genocide in Rwanda has been criticised as a ‘tool of political order’ and a means to lend credibility to the post-conflict government and consolidate its power (Loyle 2018; Longman 2009; Eltringham 2009). Elsewhere the relationship between truth and reconciliation has been deeply questioned (Clark 2012; Horne 2013; Pigou 2001).

An impartial and independent international mechanism provides a further option, such as that in operation for Syria. However, the International Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in Syria (IIIM) faces challenges, not least in terms of debate as to its future funding source and the views of some UN member states that it is a ‘political scheme’ (GA/12139, 2019). It may be somewhat idealistic to claim that, ‘[I]f

adapted correctly, it [the mechanism] could be a positive initiative that allows the Syrian community to regain some trust in the international community, which until now has followed a path of inaction' (Kabawat and Fernando Travesí, 2018). It is similarly unlikely that such an approach would offer a suitable means of responding to the war in Yemen.

Assuming an approach can be agreed, significant challenges remain. These include the need for the cooperation of the state, de facto authorities and others to allow the prosecuting authority to access relevant sites and individuals (Ponte, 2006). This is notwithstanding issues highlighted by the literature on victimology in terms of bias (institutional and cultural), and the priorities and strategy that drive which harms and perpetrators are investigated and prosecuted, and those that are not (Killean, 2018). Resolution of the current conflict needs to also address the security threats within Yemen from AQAP and so-called Islamic State. Whilst the stronghold of AQAP had been significantly weakened and capacity degraded, there are suggestions of a resurgence as both AQAP and IS take advantage of the country's insecurity to mount suicide bombs and missile attacks (The Associated Press, 2019).

Addressing gross violations of human rights is further complicated by determining those third states that are indirectly party to the conflict. The relationship to the armed conflict of the UK and the US as the primary countries supplying arms, equipment, operational support and training, and practical support such as mid-air re-fuelling warrants further analysis (A/HRC/39/43, 2018, para 18; de Wet, 2018; Hathaway et al, 2019). If deemed a party, or a state with derivative responsibility under the threshold requirements of Article 16 of the Articles on State Responsibility (de Wet, 2018), the US and UK are implicated in the commission of gross IHR and IHL violations. Furthermore, there is potential for manufacturers of arms and military equipment to be implicated too (Hathaway et al, 2019). As well as supplying arms used in this conflict, the UK has personnel in Saudi Arabian military headquarters in a liaison capacity, training the coalition in targeting and weapon use and providing insight into the air campaign. This is with the intention, as stated by the then Foreign Secretary Philip Hammond, to 'support the Saudis in every practical way short of engaging in combat' (Business, Innovation and Skills Committee, 2016, para 64). This indicates the UK is closely involved. The matter of the UK's role was further addressed in Parliament in March 2019 following reports of British military personnel being seriously wounded during operations within Yemen; the Shadow Foreign Secretary's view being, if 'our forces are engaged in actual gun battles with the Houthi rebels and that does not constitute being a party to the conflict, I really do not know what does' (Emily Thornberry, 2019).

## **Conclusion**

This chapter has presented a brief account of the current war in Yemen and its complexities, including applicable IHR and IHL as well as allegations of violations and abuses. It has considered the categorisation of this war as an NIAC indicating the possibility of it also being considered an IAC. This is subject to further analysis of the nature of support provided by states claiming not to be directly involved, reported attacks by the UAE's Security Belt against the government of Yemen, and the relationship between Hadi and the Saudis. Responses at a domestic and international level by civil society, states and the UN have been explored

acknowledging, through the lens of global governance, the often limited powers of such actors and mechanisms.

This contribution has closed by giving thought to how to approach post-conflict transitional justice, indicating an ad hoc tribunal as the most appropriate, albeit imperfect, vehicle. In determining those states that would fall within the jurisdiction of such a court, the potential for derivative responsibility and/or liability under a relevant state's own domestic laws, particularly for the UK and the US given the extent and nature of support provided by each to the Saudi-led coalition, requires further analysis. In terms of non-state actor liability, the role of domestic arms manufacturers warrants examination. On an individual basis, a list of names has been provided by the GEE which includes those within the armed forces of Saudi Arabia, UAE, Yemen, Provincial Security, Security Belt Forces and Elite Forces, de facto authorities (Houthis) and those within other armed groups (A/HRC/39/43, 2018, Annex 1).

Despite high-level panel meetings where UN member states have pledged increased levels of humanitarian aid (UNOCHA, 2019), peace is proving hard to come by. Whilst the UN's Peace Envoy Martin Griffiths pursues a non-military resolution to the conflict, he does so in the shadow of a politically-charged paradox. In December 2018, it was a UK-drafted Security Council resolution that welcomed the Stockholm Agreement and urged parties to observe their obligations under IHL and to allow the safe movement of civilians (S/RES/2451 (2018)). In early 2019, it was also the UK that hosted a side event at the UN and committed a further £200 million in aid, raising its aid commitment to Yemen during the war to £770 million (DFiD Press Release, 2019). Yet, at the same time, the UK has boasted being the world's second largest global defence exporter in 2018 (US positioned as the first and France as the fourth), with sales reaching £14 billion of which 60% was to the Middle East, in particular to Saudi Arabia and the UAE (UK Defence & Security Export Statistics for 2018). Given this level of complicity, the outlook for Yemen is not yet optimistic.



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