



# OPINION ON THE INTERNATIONAL LEGALITY OF ARMS TRANSFERS TO SAUDI ARABIA, THE UNITED ARAB EMIRATES AND OTHER MEMBERS OF THE COALITION MILITARILY INVOLVED IN YEMEN

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# INTRODUCTION

This opinion addresses the legality under international law of the transfer of conventional arms and related equipment to the parties currently engaged in the conflict in Yemen. The opinion does not assess the legality of the export, import or sale of arms to those parties in the light of the domestic law of each supplying State, nor does it consider in detail the obligations of non-state armed groups or of corporate actors in their roles as suppliers and users of arms.<sup>1</sup> The focus here is on the international legal obligations of the parties to the conflict in Yemen and of third States which supply their arms. Set out below are the main international norms relevant to arms transfer decisions which are necessary for the protection of the civilian population in Yemen and the civilian infrastructure indispensable to its survival.<sup>2</sup>

States that transfer arms to other countries are subject to international legal accountability. They have a duty to withhold such arms transfers when it is reasonably foreseeable the recipients will use the arms for

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1 Domestic law can also provide a valid legal basis for asserting an obligation to cease all sales of military equipment to Saudi Arabia and other coalition members, as evidenced by judicial remedies sought or currently pending before national courts seeking to stop arms exports to Saudi Arabia: THE NETHERLANDS : *NCM, PAX and Stop Vanpenhandel, v. Staten der Nederlanden*; UNITED KINGDOM, *Campaign against Arms Trade v. Secretary of State for International Trade*, [2017] EWHC 1726 (QB); [2018] ECWA Civ 101; [2019] EWCA Civ 1020; CANADA, *Turp v. Canada (Minister of Foreign Affairs)*, 2017 CF 84; 2018 CF 12; 2018 CFA 133; BELGIUM : *Ligue des droits de l'Homme and la Coordination nationale d'action pour la paix et la démocratie v. Walloon Region*; FRANCE: *Action Sécurité Éthique Républicaine (ASER) v. Prime Minister of France*; *Criminal prosecutions of corporate and State officials have also been pursued, see, e.g., in ITALY, Rete Italiano per il Disarmo, European Center for Constitutional and Human Rights and Mwatana Organisation for Human Rights v. Italy and Rheinmetall, RWM Italia.*

2 For the obligations of non-state armed groups see: Situation of human rights in Yemen, Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/30/31 (7 September 2015), paras 24, 89-90(a); Situation of human rights in Yemen, Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/33/38 (4 August 2016), para 10; Final report of the Panel of Experts on Yemen, in : UN Doc. S/2018/193 (31 January 2017), para 135, fn 164; Final report of the Panel of Experts on Yemen, in: UN Doc. S/2019/83 (25 January 2019), para 133.

serious violations of international law, or divert them to such end users. As explained below, those States supplying arms to the parties to the conflict in Yemen bear an enormous responsibility for the large numbers of civilians that have incurred serious injury and loss, including of their homes, resulting in mass internal and external displacement. Civilian infrastructure essential to the survival of the population has been destroyed or seriously damaged in armed attacks, and access to humanitarian aid continues to be impeded by armed forces and militias. According to the United Nations millions are suffering from what it has said is ‘the world’s worst humanitarian crisis’.<sup>3</sup>

Since 2011, Yemen has been the theatre of a number of simultaneous and overlapping non-international armed conflicts. This Opinion focuses on arms used in the predominant conflict, which especially since 2015 has become one between, on the one hand, forces loyal to President Abd Rabbo Mansour Hadi, supported by the Gulf Council coalition forces led by Saudi Arabia and the United Arab Emirates (UAE) and, on the other, the Popular Committees affiliated with the Houthis and the army units loyal to former President Ali Abdullah Saleh. Other non-international armed conflicts have been taking place between the Yemeni armed forces supported by the United States, and non-State armed groups, such as Al Qaeda in the Arab Peninsula (hereinafter “AQAP”) and the so-called “Islamic State”, as well as between different Yemeni non-State armed groups.

The application of relevant international law and standards to prevent the misuse and irresponsible transfer of arms in Yemen should be an essential part of efforts by the international community to secure peace and security. In particular international humanitarian law (IHL) as well as international human rights law (IHRL) obligations apply under both treaty and customary law. Credible reports since mid-2014 show that all parties to the conflicts in Yemen have a record of general disrespect for and non-compliance with their obligations under IHL and IHRL. Both of these bodies of international law co-apply in a complementary and mutually reinforcing manner in time of armed conflict. IHL prohibits the targeting of civilians and civilian objects, as well as attacks that fail to effectively discriminate between military and civilian targets, or that are disproportionate in their effects on civilians.

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3 See for example, UN Office for the Coordination of Humanitarian Affairs (OCHA), About OCHA Yemen <https://www.unocha.org/yemen/about-ocha-yemen>.

When such attacks seriously violate IHL because they are carried out recklessly if not deliberately, and when military force is used during armed conflict to wilfully commit grave violations, those individuals involved in their planning or execution may attract liability for the commission of war crimes. Mounting evidence in reports by credible organizations points to the armed forces of governments active in Yemen as having carried out such IHL violations. At the same time, credible reports maintain that the armed forces have perpetrated serious violations of their State obligations under IHRL. Armed opposition groups also stand accused of breaches of IHL and of abuses of IHRL through their obligations under customary international law. Some of those IHL and IHRL violations include breaches of peremptory norms, which are fundamental rules of the international community from which no derogation is permitted.

Parties to the conflict have used, and threatened to use, armed force to inflict disproportionate and otherwise unlawful harm on the civilian population. Detailed reports of the findings of United Nations expert investigators and of independent field researchers since 2015 show how the armed forces of Saudi Arabia, the United Arab Emirates (UAE) and some of their coalition allies (hereinafter “the Saudi-UAE coalition”) have taken part in aerial and ground attacks purportedly to support the Yemeni government against the Houthi and other rebel forces,<sup>4</sup> during which thousands of civilians have been killed, wounded, displaced and had their fundamental rights grossly violated. These attacks have included the deliberate launching of air strikes on public spaces with a high concentration of civilians. The pattern of such aerial attacks resulting in civilian casualties began as early as August 2009 to January 2010, and resumed unabated from March 2015 until the present time. Major civilian casualties have also resulted from the unlawful use of small arms, light weapons and artillery by Houthi fighters, who have indiscriminately shelled civilian areas, planted landmines, laid to siege several cities, used child soldiers, committed other grave human rights abuses and deployed missiles and drones to attack civilian infrastructure, including across the border in Saudi Arabia. Both sides have denied humanitarian access to

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4 The Houthi movement, officially called Ansar Allah, is an Islamic religious-political-armed movement that emerged from Sa'ada in northern Yemen in the 1990s.



the affected population.<sup>5</sup>

The latest report of the UN Human Rights Council Group of Eminent International and Regional Experts on Yemen published in September 2019 is based upon a wide range of evidence related to allegations of serious violations of international law since September 2014.<sup>6</sup> The Group found further reasonable grounds to believe that the parties to the conflict are responsible for incidents and patterns of conduct amounting to serious violations of IHRL and IHL, some of which are likely to amount to war crimes. The Group once again highlighted failure of the parties to acknowledge any responsibility for violations and their refusal to take any meaningful steps to remedy the plight of civilians and to address the pervasive lack of accountability of their forces. The practical impact of the violations on the lives of ordinary Yemenis is described as ‘immense and wide ranging’, the Group of Experts summarizing that impact as follows:

Shelling and airstrikes create the sense that there is no safe place to hide from the fighting. Landmines left by the Houthis kill and maim people long after battles have subsided. The blockade, siege-like tactics, attacks impacting objects essential to the survival of the population and impediments to the delivery of aid deprive the population of necessary items amidst the unprecedented humanitarian crisis. People are arrested and detained arbitrarily, disappeared, and subjected to torture and ill-treatment, including sexual violence. The population lives in fear of being detained or otherwise targeted for any perceived dissent. Parties to the conflict actively recruit children, including through force, and restrict the work of activists, journalists, human rights defenders and humanitarian workers.<sup>7</sup>

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5 Growing harm to civilians is described in the reports to the Human Rights Council (HRC) of the United Nations High Commissioner for Human Rights (A/HRC/30/31 of 7 September 2015, A/HRC/33/38 of 4 August 2016, A/HRC/36/33 of 13 September 2017) and then, after HRC resolution 36/31 of 3 October 2017, its reports on the findings of the Group of Eminent and Regional Experts on Yemen to the Human Rights Council (A/HRC39/43 of 17 August 2018, and A/HRC/42/17 of 9 August 2019).

6 UN Human Rights Council, Report of the Detailed Findings of the Group of Eminent Regional and International Experts on Yemen, UN Doc. A/HRC/42/CRP.1, 3 September 2019 (hereinafter, UN Human Rights Council, Detailed Report of the Group of Experts on Yemen, September 2019). The methodology and extensive fact finding methods of the Group are explained in pp.7-11

7 UN Human Rights Council, Detailed Report of the Group of Experts on Yemen, September 2019, pp. 1-2

The UN Group explained that third States, especially those with influence on Yemen's warring parties – including the US, Britain, France and Iran – have IHL obligations that are not simply bilateral but owed *ergo omnes to the international community as a whole, and in the prevailing circumstances* “should prohibit the authorization of transfers of, and refrain from providing, arms that could be used in the conflict to such parties.”<sup>8</sup> As outlined below, these four States and many more have been supplying arms to the armed forces active in Yemen while the international community has been made increasingly aware of the gross and systematic misuses of armed force in that country. As a result of deliberate and reckless actions by the parties to the conflict, the total number of displaced persons had reached about two million by March 2017. At that point already, more than 1.1 million cases of acute watery diarrhoea or cholera had been reported. The civilian population's needs extend to all sectors, including health, food, sanitation and water, housing and protection. Over 150 relief organizations, including eight UN agencies, were working around the clock to provide emergency help.<sup>9</sup>

Reporting to the Security Council on 17 June 2019, the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator estimated that 70,000 people had been killed in Yemen since 2016, and that there were 30 active front lines in the country. Eighty per cent of the population – more than 24 million people – needed assistance and protection. “Yemen is getting more violent, not less. The conflict is getting worse, not better.”<sup>10</sup> The UN Under-Secretary-General said that fighting in the last year had displaced 250,000 people, while the number

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8 Ibid, § 902-919 and 932-933.

9 UN News, ‘Yemen: Tackling the world's largest humanitarian crisis’, 24 September 2018, <https://news.un.org/en/story/2018/09/1020232>.

10 Mark Lowcock, UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, quoted in UN Security Council, ‘United Nations Officials Urge Parties in Yemen to Fulfil Stockholm, Hodeidah Agreements, amid Security Council Calls for Opening of Aid Corridors’, SC/13845, 17 June 2019, <https://www.un.org/press/en/2019/sc13845.doc.htm>. Also in April 2019, the United Nations Development Programme (UNDP) issued a report warning that the death toll in Yemen could rise to 233,000 by the end of 2019 – far higher than previous estimates. That projection included deaths from combat as well as 131,000 indirect deaths due to the lack of food, health crises such as a cholera epidemic, and damage to Yemen's infrastructure see UNDP, Assessing the Impact of War on Development in Yemen, April 2019, <https://www.arabstates.undp.org/content/rbas/en/home/library/crisis-response0/assessing-the-impact-of-war-on-development-in-yemen.html>

of attacks that resulted in the death or injury of a child more than tripled between the last quarter of 2018 and the first quarter of 2019. Since the war began, food imports had declined by more than 40 per cent, fuel imports by 70 per cent, and medicines by 50 per cent. The value of the Yemeni rial currency had plummeted. The fighting meanwhile had led to relatively few major shifts in control. The large majority of Yemenis still lived in areas controlled by the Houthi movement and their allies. After tens of thousands of air strikes, shells, mortars and ground clashes, this had changed only marginally since 2016. “So, the war is not only brutal, it is unwinnable”, he explained.<sup>11</sup>

This opinion sets out applicable international law and relevant facts to explain why the international transfer of arms and other military equipment by States to members of the Saudi-UAE coalition, transfers made in the knowledge that the same types of arms have regularly been used in Yemen for such serious violations is itself a breach of international law – including of specific rules that form part of customary international law and rules of treaty law.

All States are bound by customary law on the responsibilities of States, which is codified by the International Law Commission, and which prohibits international assistance to other States in the knowledge that the receiving State is engaged in serious violations of international law and would use the assistance for such violations. In the sections below, it is argued that such are the very circumstances prevailing in relation to Yemen.

Certain States involved in the conflict have also consented to be bound by treaty law. The States parties to the Arms Trade Treaty (ATT) engaged in arms transfers to the Saudi-UAE coalition forces have failed to comply in particular with their legal obligations under the prohibitions of the Treaty. Article 6 prohibits the transfer of conventional arms and related munitions, parts and components when the States parties involved in the

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11 Lowcock, *ibid*. See also recent data published by the Armed Conflict Location & Event Data Project (ACLED) on 18 June 2019, estimating the total number of fatalities in Yemen since March 2015 to be more than 91,000, and alleging that the Saudi-led coalition was responsible for over 8,000 of the 11,700 people killed as a result of direct targeting of civilians in Yemen, while the Houthi forces and their allies were responsible for over 1,900 such killings. ACLED, ‘Yemen War Death Toll Exceeds 90,000 According to New ACLED Data for 2015’, Press release, 18 June 2019, <https://www.acleddata.com/2019/06/18/press-release-yemen-war-death-toll-exceeds-90000-according-to-new-acled-data-for-2015/>.

transfer are aware there is reliable evidence that potential recipients would use those arms and related items for the most serious violations of IHL involving war crimes and other acts that are international crimes.<sup>12</sup> Despite many reports by UN and other credible experts citing accumulating and overwhelming evidence detailing how the Saudi-UAE coalition forces and their allies operating in Yemen have been involved in consistent patterns of serious violations of IHL and IHRL, States named in this opinion have continued to supply arms of the type used by the perpetrators, as outlined below. In the absence of measures to end impunity or to undertake the necessary institutional reforms that would prevent the repetition of such serious violations, it is reasonable to assume that those States continuing to supply arms to the Saudi-UAE coalition are aware that in the ongoing course of events in Yemen the recipients would almost certainly misuse arms and equipment of the same or similar type and function to commit further serious violations.

In addition, the States transferring such arms to the Saudi-UAE coalition and to the Houthi forces are in breach of other relevant international obligations under international agreements to which they are a party, as explained below. Moreover, the UN Security Council has imposed an arms embargo on certain non-State armed groups operating in Yemen and accused Iran of instances that violate the UN arms embargo on Yemen by supplying arms to the Houthi forces.

By August 2018 the Group of Experts, which was established by the UN Human Rights Council on 29 September 2017 to report on the situation of human rights in Yemen, including violations and abuses since September 2014, had “identified, where possible, individuals who may be responsible for international crimes”.<sup>13</sup> The Group of Experts submitted the list of individuals to the UN High Commissioner for Human Rights after examining all available information and interviewing key actors

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12 Neither international law nor prevailing State practice requires that there be evidence to show that the specific weapons were previously used by the recipient State to commit violations of international law.

13 UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Eminent International and Regional Experts and a summary of technical assistance provided by the Office of the High Commissioner to the National Commission of Inquiry, UN Doc. A/HRC/39/43, 17 August 2018 (hereinafter, UN Human Rights Council, Findings of the Group of Eminent Experts on Yemen, August 2018), Conclusions and Recommendations, § 109.

in Yemen, Saudi Arabia, the United States and other countries. While acknowledging that more information is needed on some incidents documented by the Group to establish the criminal responsibilities of specific individuals, the Group of Experts decided that enough credible information was available in August 2018 to call on the international community, including the League of Arab States, to, *inter alia*: “Refrain from providing arms that could be used in the conflict in Yemen”.<sup>14</sup> The call for a cessation of arms transfers to the parties to the conflict was reiterated in the Group’s report published in September 2019.<sup>15</sup>

After having examined the mounting information available relating to the conflict in Yemen and the arms transfers to the parties (set out in Part I), the authors of this opinion are of the view that there is a systematic pattern of serious and recurring violations of the fundamental rules of international law which have been and continue to be committed by all parties to the conflict in Yemen,<sup>16</sup> including the forces of Saudi Arabia, the UAE and members of the coalition militarily involved in Yemen (as set out in Part II below). In such circumstances, the undersigned authors maintain, third States have obligations to stop transferring conventional arms and their munitions, parts and components that would be used by the parties to the conflict in Yemen as long as that pattern prevails (set out in Part III below).

While third States’ government officials and corporate actors may in certain circumstances be the subject of prosecution for aiding and assisting international crimes, and should keep this in mind as a set of very palpable risks arising from such actions, these questions are not the focus of the present opinion.

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14 *Ibid.*, § 112 (b).

15 UN Human Rights Council, Detailed Report of the Group of Experts on Yemen, September 2019, par. 99 b)

16 It has been particularly difficult to prove the role of other coalition States (e.g. Bahrain, Jordan) in violations due to the scarcity of available information about the extent and nature of their involvement in decision-making and actual operations.



# **PART I**

## **The Conflict in Yemen and Arms Transfers to its Parties**

## A. THE CONFLICT IN YEMEN

### 1. *The Beginning and Intensification of the Conflict*

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It is often forgotten that hostilities between the parties in Yemen and the military involvement of Saudi Arabian forces there go back to the civil war, which has been raging intermittently in Yemen at least since 2004 when fighting broke out between government troops and the rebel Houthi movement of northern Yemen.<sup>17</sup> Since 2004, six rounds of armed conflict intermittently raged in Sa'dah governorate, which borders Saudi Arabia, in which thousands of people were killed and many others injured. In south Yemen tens of thousands of people participated in sporadic protests against perceived discrimination by the government against southerners since 2007. Some factions of the Southern Movement increasingly called for the secession of the south of the country. The government responded with brutal repression. In August 2009, the Saudi air force undertook a bombing campaign causing large numbers of civilian casualties and displacement of the population.<sup>18</sup>

During the civil war, the government of Yemen began to reverse progressive measures it had initiated towards protecting human rights, believing that such action would help counter acts of terrorism in Yemen, allegedly committed by Al-Qaida, and ignoring previous warnings not to do so by international bodies including the UN Human Rights Committee.<sup>19</sup> The government engaged in arbitrary arrests, secret detention, torture, unfair trials and suspected arbitrary killings of political opponents, journalists

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17 Amnesty International, 'Arms Transfers to the Middle East and North Africa: Lessons for an Effective Arms Trade Treaty', Index: ACT 30/117/2011, July 2011, <https://www.amnesty.org/en/documents/act30/117/2011/en/>, pp. 63–65.

18 Amnesty International, 'Yemen: Cracking Down Under Pressure', Index: MDE 31/010/2010, August 2010, <https://www.amnesty.org/en/documents/MDE31/010/2010/en>, pp. 39–47.

19 Concluding Observations of the Human Rights Committee: Yemen, CCPR/CO/75/YEM, 26 July 2002, para18; see also CCPR/CO/84/YEM 9 September 2005, para13.



and human rights defenders.<sup>20</sup> Deeply held grievances amongst the population in the north and south of Yemen were neglected. The rebels in the north followed a clan leader, Hussein Badreddine al-Houthi, who was killed in September 2004. Sporadic acts of terrorism continued, followed by repressive measures. These escalated in 2007 after protests by retired soldiers against the government began in the south of Yemen. In 2008 there were several bomb attacks on police, officials, foreign businesses, tourists, and the embassy of the United States of America (USA) in Sana'a. Qatar brokered a mediation agreement between the Houthis and the government but it failed to hold, and repressive measures were intensified.

A sharp increase in fighting and attacks on civilians began in August 2009 and continued into January 2010 on both sides of the Saudi Arabia–Yemen border until a ceasefire on 11 February. This coincided with an upsurge in the provision of US military equipment and training for the Yemeni armed forces.<sup>21</sup> In August 2009 the government of Yemen backed by Saudi Arabia launched operation “Scorched Earth” against the Houthi rebels, a military offensive on a scale not seen before then resulting in many civilian casualties. According to Amnesty International:

In November 2009, the fighting spilled over the border with Saudi Arabia, which deployed its army and air force against the Huthis in Sa'dah. There followed weeks of heavy bombing of Sa'dah, particularly Razih, by Saudi Arabian planes, which is reported to have killed hundreds of people and caused widespread damage to homes, other buildings and infrastructure. In January 2010, the Huthis announced a ceasefire and said they would withdraw from Saudi Arabia. Shortly after, Saudi Arabia declared an end to its involvement in the fighting.<sup>22</sup>

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20 Amnesty International, August 2010, op cit, pp. 5-24.

21 The US Department of Defense Section 1206 'train and equip' funding for Yemen rose from US\$4.3m in financial year 2006 to US\$66.8m in financial year 2009 –according to the US Congressional Research Service, 'Yemen: Background and U.S. Relations', 13 January 2010, at [http://assets.opencrs.com/rpts/RL34170\\_20100113.pdf](http://assets.opencrs.com/rpts/RL34170_20100113.pdf). A secret US directive signed on 30 September 2009 ordered a significant expansion of clandestine US military activity to counter militant Islamist groups, according to the New York Times, 'US is said to expand secret actions in mideast', 24 May 2010.

22 Amnesty International, August 2010, op cit, *Ibid*, p. 41.

That aerial bombing campaign and the intensified fighting led to mass displacement of the population, which reached around 280,000 people, according to the UN refugee agency (UNHCR). Further evidence of the scale of death and destruction came with hundreds of photographs obtained by Amnesty International.<sup>23</sup> The pictures, acquired from an independent source and taken in March 2010 in and around the town of al-Nadir in Razih, showed a level of destruction of which the world had been largely unaware. Among the damaged or destroyed civilian buildings photographed were marketplaces, mosques, petrol stations, small businesses, a primary school, a power plant, a health centre – and dozens of houses and residential buildings. The pictures taken then were consistent with testimonies given to Amnesty International in March 2010 by many people who had fled Sa’ada.<sup>24</sup> Several witnesses also told Amnesty International that some attacks leading to civilian deaths were on areas in which there were no Houthi fighters. As noted by Amnesty International, such serious allegations required the immediate establishment of an impartial and independent inquiry.

Foreign governments, and most notably the US and United Kingdom (UK) governments, had supplied jet fighter aircraft, associated weaponry, upgrades and related technical assistance to Saudi Arabia. Such governments had also provided a high level of ongoing in-country technical support relating to the operation of those fighter jets, their ordnance and management, so their personnel on the ground were aware that, during the period of attacks in Yemen, Saudi Arabian aircraft departed from bases carrying visible ordnance, returning later with empty pylons. In August 2010, Amnesty International called on the US and UK governments to conduct a thorough independent review of their military supplies and assistance to Saudi Arabia.<sup>25</sup> In a diplomatic cable on 30 December 2010 from Riyadh, the US Embassy had described the Saudi assault as the use of “massively disproportionate force in [the Saudis’] effort to repel and clear the lightly armed Houthi guerrillas from the border area” and admitted it was disturbed by the imprecision of Saudi aerial bombing and artillery

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<sup>23</sup> *Ibid.*, p. 44-51.

<sup>24</sup> *Ibid.* 49.

<sup>25</sup> *Ibid.*

shelling.<sup>26</sup> However, the US government continued to supply substantial military equipment as well as advice and training to Saudi Arabia's armed forces, and provided smaller amounts of military aid to Yemen's special forces.<sup>27</sup> In its reply to a communication from Amnesty International, the UK government did not mention the UN reports or the large number of UK personnel providing support to the Saudi Arabian air force and merely stated that, while it was concerned about the impact of the conflict on Yemeni citizens, it was difficult to estimate the impact in northern Yemen because of lack of access and the security situation in the area, but nevertheless it would continue to supply arms to Saudi Arabia, including the new Eurofighter Typhoon, and provide training, including in IHL, IHRL and accountability.<sup>28</sup>

## **2. From the Popular Revolution of 2011 to 'Operation Decisive Storm'**

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In 2011, mass protests arose against the 33-year rule of Ali Abdullah Saleh, President of Yemen in a series of events described as a "popular revolution" which were seen as part of "the Arab Spring" in the region. A deal brokered by the Gulf Cooperation Council granted Saleh immunity and transferred power to Vice-President Abdi Rabbo Mansour Hadi in 2012, following an election in which he was the only candidate. Yemenites conducted a

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26 See, for quotes from US Embassy cables from Riyadh: Justin Elliot, 'Contrary to public statements, Obama admin fueled conflict in Yemen', *Salon*, 10 December 2010, [https://www.salon.com/2010/12/09/obama\\_yemen\\_saudi\\_houthi\\_conflict/](https://www.salon.com/2010/12/09/obama_yemen_saudi_houthi_conflict/), and Spencer Ackerman, 'U.S. Satellites, Ammo Aided Saudis in Border War', *Wired*, 7 December 2010, <https://www.wired.com/2010/12/u-s-satellites-ammo-aided-saudi-war-on-yemeni-rebels/>.

27 Data for US military sales to Saudi Arabia for each year between April 2014 and April 2018 amounts to \$139 billion in value: Christopher M. Blanchard, 'Saudi Arabia: Background and U.S. Relations', Congressional Research Service, Washington DC, updated 21 September 2018. Data for US military support to Yemen between 2009 and 2014 amounts to about \$400 million in value: Jeremy Sharp, 'Yemen: Background and U.S. Relations', Congressional Research Service, Washington DC, 11 February 2015.

28 UK Department for Business, Innovation and Skills, letter to Amnesty International UK, 18 September 2010. Some details of the various tasks carried out for the Royal Saudi Air Force by UK employees of UK contractors in Saudi Arabia, and the 'pull back' from direct operational tasks in late 2009, are summarized by Mike Lewis and Katherine Templar, 'UK Personnel Supporting the Saudi Armed Forces – Risk, Knowledge and Accountability', 2018, available at: <https://www.mikelewisresearch.com/RSAFFinal.pdf>

National Dialogue Conference, accompanied by a constitution-making process. In 2014, the conflict escalated between the government forces led by President Hadi, the Houthis and other armed groups over power-sharing arrangements and the draft constitution. In September, the Houthis and the armed forces aligned to former President Saleh seized and consolidated control over the capital, Sana'a and other parts of the country.<sup>29</sup> Hadi's presidential term was due to end with democratic elections scheduled for February 2014. However, his term was extended for a further year without a poll. In January 2014, before the formal end of his term, Hadi announced his resignation while the Houthi forces blockaded his palace.

After escaping Sana'a, Hadi announced from Aden that he had reversed his decision to resign, saying that it was made under duress. He then called for a military intervention by the Gulf Cooperation Council before fleeing to Saudi Arabia where he has since been based. In March 2015, Saudi Arabia formed a coalition with Bahrain, Egypt, Jordan, Kuwait, Morocco, Senegal, the Sudan and the UAE to intensify military action against the Houthi rebels in "Operation Decisive Storm".<sup>30</sup> Hadi's forces had lost control of Sana'a, the main city in northern Yemen, and large parts of the country, including Ta'izz and Aden, to the Houthi rebels and their allies, loyalists of the former President Saleh. The intervention by the coalition consisted of aerial bombing followed by a naval blockade and ground operations led by the UAE. Qatar left the coalition on 5 June 2017, and Morocco withdrew on 7 February 2019. Note that Pakistan also contributed 1,000 soldiers to reinforce Saudi Arabia's armed forces.

Since the start of the coalition's 'Operation Decisive Storm', the number of civilian casualties greatly increased. This was a result of the large number of aerial bombing raids by coalition jet fighters, and the extensiveness of ground operations by coalition as well as Houthi armed forces using small arms, light weapons, short-range missiles, artillery and explosive ordnance. Data from several UN agencies in the period

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29 See Human Rights Council, Report of the Group of Experts on Yemen, August 2018, § 17.

30 See, for a discussion of how the composition of the coalition changed throughout the conflict, having included Qatar at the outset, Human Rights Watch, 'Hiding Behind the Coalition: Failure to Credibly Investigate and Provide Redress for Unlawful Attacks in Yemen', 24 August 2018, <https://www.hrw.org/report/2018/08/24/hiding-behind-coalition/failure-credibly-investigate-and-provide-redress-unlawful>.

from December 2014 to late March 2015 after the renewal of Saudi-UAE coalition airstrikes, showed that civilian residential areas and the airport in Sana'a had been attacked, at least 334,000 people in Yemen had been displaced within the country, and almost two-thirds of Yemen's 24 million people were in need of humanitarian aid, many of them facing famine.<sup>31</sup> By December 2015, the number of internally displaced persons was estimated to be 2.5 million, the majority being women and children.<sup>32</sup>

### **3. From 'Operation Decisive Storm' to 'Operation Restore Hope'**

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On 21 April 2015, the Saudi-UAE coalition announced an end to "Operation Decisive Storm" and a "shift from military operations to the political process" in "Operation Restore Hope", but nevertheless continued its military strikes while the Houthi forces and other armed groups retaliated, all parties causing civilian deaths, injuries and displacement.

The Group of Experts appointed by the UN Human Rights Council reported in August 2018 that shelling and sniper attacks by parties to the conflict had resulted in large numbers of civilian casualties in the Hajjah, Lahij, Ma'rib and Ta'izz governorates.<sup>33</sup> Additionally, the naval forces of members of the coalition imposed a de facto land and sea blockade of the whole of Yemen, hindering the civilian population's access to sufficient food, medicines and other essential goods, as explained below. Coalition and Yemen government forces have also carried out numerous other acts in violation of IHL and also in violation of international human rights law (IHRL).

According to credible independent reports, the various armed groups and

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31 See report from March 2015 including data from UN agencies including UNHCR, the World Food Programme (WFP), OCHA, the World Health Organization (WHO) and UNICEF: Almgidat Mojalli, 'Civilians killed as Saudi Arabia bombs Yemen', The New Humanitarian, 26 March 2015 <http://www.thenewhumanitarian.org/news/2015/03/26/civilians-killed-saudi-arabia-bombs-yemen>; and 'As Yemen crumbles, civilians brace for the worst', The New Humanitarian, 24 March 2015, <http://www.thenewhumanitarian.org/analysis/2015/03/24/yemen-crumbles-civilians-brace-worst>.

32 UN OCHA, Yemen Humanitarian Bulletin Issue 7, issued on 18 December 2015.

33 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, §§ 40 and 41.

militias, including Houthi-Saleh forces, pro-Hadi forces, Salafist militias, Islah militias and jihadist groups, have also committed grave abuses of human rights and alleged war crimes, including arbitrary killings, torture, enforced disappearances and violence against women, recruitment of child soldiers and blocking emergency aid from reaching civilians. The Houthi forces have also used missiles and drones to strike Saudi targets, and with their allied forces loyal to the former President Saleh have used rockets, artillery shelling and small arms in ground operations, including indiscriminate shelling, occupation of schools, and use of landmines.

## **B. ARMS TRANSFERS TO THE PARTIES IN THE CONFLICT**

Arms and other military materiel supplied by other States and companies in other States have been transferred to the armed forces of Yemen and to members of the Saudi-UAE coalition active in Yemen since the escalation of the conflict in 2009-2010. In the period 2006 to 2014, the Yemen government's armed forces had been supplied with military weapons on a relatively large scale. These were exported from as well as financed by the USA, and supplemented by exports of smaller quantities of infantry arms, ammunition and armoured vehicles supplied from Austria, Brazil, Bulgaria, China, Czech Republic, Germany, Italy, Jordan, Montenegro, the Netherlands, the Philippines, Russia, Saudi Arabia, South Africa, South Korea, Spain, Slovakia, Turkey, and Ukraine. From 2015 to 2017, China, Saudi Arabia, United Arab Emirates and the USA continued exporting arms directly to Yemen after which officially reported data is currently unavailable.<sup>34</sup>

Expressions of international concern about armed attacks on protesters in Yemen were made since the early 2000s against a backdrop of increased foreign military assistance and continued arms supplies. On 29 March 2011, Amnesty International called on all governments to immediately

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<sup>34</sup> Amnesty International, 'Arms Transfers to the Middle East and North Africa: Lessons for an effective Arms Trade Treaty', 2011 Index: ACT 30/117/2011. United Nations Commodity Trade Data, <https://comtrade.un.org>. UN Register of Conventional Arms, <https://www.un.org/disarmament/convarms/register/>. Stockholm International Peace Research Institute, <https://www.sipri.org/daabases/armstransfers>

suspend the authorization, supply and transfers of weapons, munitions, armaments and related material to the security forces in Yemen, which could be used with excessive force in the policing of protests. The organization's investigative findings alleged that serious violations of fundamental human rights in Yemen were "widespread and pervasive". However, apart from the Netherlands suspending exports to Yemen and the Czech Republic's announcement to suspend new export licences, no discernable action was taken by supplying States until 2015.<sup>35</sup>

During and after the 2011 rebellion, Yemen government stockpiles of arms from multiple sources were looted and captured by rebels and diverted clandestinely. An illicit market grew in Yemen for small arms, light weapons, ammunition and other military materiel. In addition, according to the UN Panel of Experts appointed by the Security Council, members of the rebel Houthi movement have been assisted in their anti-government struggle by Iran.<sup>36</sup> Iran has been accused by the UN of supplying missiles and drones to the Houthi forces in violation of the UN arms embargo, but there are now indications those weapons are being assembled by the Houthis from imported parts and components. Nevertheless, UN and other experts believe their primary source of small arms and light weapons has been from local capture, looting and defections of government soldiers.

The USA, the UK and France, principally among other States, continued to provide ongoing logistical and intelligence support, substantial military supplies and diplomatic advice and support to the Saudi-UAE coalition armed forces. The USA has provided direct military support to the Yemen armed forces and is still by far the largest single supplier of arms by monetary value to Saudi Arabia, followed by the UK, given that a large proportion of exports are made up of advanced fighter jets, naval equipment, high-tech munitions and weapon systems. However, there have been other significant suppliers of basic military equipment such as small arms, light weapons,

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35 Ibid, p 63.

36 UN Security Council, Final Report of the Panel of Experts on Yemen prepared in accordance with paragraph 6 of resolution 2342 (2017), UN Doc. S/2018/68, 26 January 2018, § 79: "The Panel has now identified strong indicators of the supply of arms-related material manufactured in, or emanating from, the Islamic Republic of Iran subsequent to the establishment of the targeted arms embargo on 14 April 2015, particularly in the area of short-range ballistic missile technology (see paras. 86 to 96 below) and unmanned aerial vehicles (paras. 98 to 105 below)."

ammunition and other infantry materiel used by all parties to the conflict. In addition, Saudi Arabia and the UAE have armed and largely controlled the approximately 140,000 troops in the regular army of Yemen and in other militias. Some of the militias or popular resistance forces such as the Southern Transitional Council (STC), the Security Belt Forces (SBF), the Hadrami Elite Forces, and the Shabwani Elite Forces, have opposed the Yemen government. The STC and SBF have been armed by the UAE, which along with the deployment of Sudan troops funded by Saudi Arabia, has had the largest external troop presence on the ground in Yemen.<sup>37</sup>

The USA and the UK established a joint “planning cell” with Saudi Arabian military commanders in Riyadh. The USA has conducted air strikes against Al-Qaida in the Arabian Peninsula (AQAP) throughout the conflict, reporting that 36 such attacks had been carried out during 2018. The USA, the UK and France have also maintained close cooperation with the UAE, Bahrain, Kuwait and Jordan. Those and other governments supplying arms to Saudi Arabia and the UAE have been aware of the mounting UN and other detailed reports alleging serious violations of IHL committed during the intensified bombing raids by coalition aircraft using precision-guided missiles and artillery shelling, including direct attacks on civilians and civilian objects and attacks resulting in disproportionate civilian casualties, as well as evidence of serious violations of IHL and IHRL in ground operations by soldiers and allied militias using small arms, light weapons and armoured vehicles.

Although a few governments have recently suspended such transfers because of public concern about the humanitarian catastrophe and the allegations that the recipients have been perpetrating serious violations of IHL and IHRL, supplies have continued to flow. Some of the supplies were found diverted to unauthorized end-users, including armed opposition groups, as explained below.

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37 UAE-supported militias have now taken control of the temporary capital from the Hadi forces : see Mohammed Mukhashaf, “ UAE carries air strikes against Yemen Government Forces to support separatists ”, *Reuters*, 29 August 2019: <https://www.reuters.com/article/us-yemen-security/uae-carries-out-air-strikes-against-yemen-government-forces-to-support-separatists-idUSKCN1VJ17E> and Matilde Blayo. “ Les séparatistes reprennent la ville d’Aden ”, *La Croix*, 29 August 2019 [<https://www.la-croix.com/Monde/Moyen-Orient/separatistes-yemenites-reprennent-ville-dAden-2019-08-29-1201043936>].



## 1. Authorized Exports to Saudi Arabia, the UAE and Yemen since 2015

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Saudi Arabia and the UAE are the main coalition members intervening in Yemen. The table in Annex 1 shows the main 20 countries that have exported major conventional weapons to Saudi Arabia between 2015 and 2018 and the main 17 countries that have exported such equipment to the UAE over the same period. The table is based upon ‘trend indicator’ data collected from various sources and analysed by the Stockholm International Peace Research Institute (SIPRI). SIPRI has excluded from the table data on the supply of small arms, light weapons, their ammunition and related materiel, as well as on transfers of dual-use items and technologies which have both military and non-military applications. Note also that for such estimates SIPRI uses a common unit, the “trend-indicator value” (TIV), which is not equivalent to the sales price of the items but rather is an estimated value constructed by SIPRI to allow comparisons and the measurement of trends in the flow of arms to particular countries and regions over time.<sup>38</sup>

United Nations data on the actual export and import of conventional arms is based on States’ reports to the UN Commodity Trade Database, Comtrade, and to the UN Register of Conventional Arms, although some States do not provide returns and the categories omit or obscure some types of arms.<sup>39</sup> In each case, the national authorities of the exporting States had issued an export authorization usually in the form of a licence or permit for a company or an agency to proceed with exports after the authorities in Saudi Arabia had authorized the import. SIPRI also collects information about actual transfers from arms suppliers and recipients; the type and number of weapon systems ordered and delivered; the years of deliveries; and the financial value of the deal.<sup>40</sup>

Based on an analysis of available data on the value and/or the number

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38 SIPRI, Sources and Methods, Explanation of the TIV tables, <https://www.sipri.org/databases/armstransfers/sources-and-methods>.

39 UN Commodity Trade Database, Comtrade, <https://comtrade.un.org/>; UN Register of Conventional Arms, <https://www.un.org/disarmament/convarms/register/>.

40 SIPRI Arms Transfers Database, <https://www.sipri.org/databases/armstransfers>.

of items actually transferred as reported by States,<sup>41</sup> it is evident that between 2013 and 2018 the top suppliers of conventional weapons and/or munitions can be summarized as follows:

(i) Supplies to Saudi Arabia:

The range of items supplied varies greatly. The *United States* was by far the largest supplier overall. Reported US transfers included combat jets, attack helicopters, missiles and their launchers, large artillery, combat vehicles, small arms light weapons, their ammunition and other munitions. The *United Kingdom* was by far the second largest, supplier, deliveries mainly comprising combat aircraft, missile launchers and large numbers of missiles as well as sniper rifles and light machine guns. *Canada* supplied hundreds of armoured combat vehicles and also rifles and some machine guns. *France* supplied naval equipment, large numbers of armoured combat vehicles and missile launchers as well as some artillery, rifles and parts and accessories. *Brazil* was a large supplier of rocket launchers with vehicles, large calibre artillery systems, as well as small arms ammunition. The *Republic of Korea* supplied large amounts of ammunition. *Croatia* supplied small arms and ammunition. *Bulgaria* and *Slovakia* supplied tens of thousands of assault rifles as well as a few thousand machine guns and mortars, rockets, and grenade launchers, and in 2018 supplied multiple rocket launchers. In addition, *Bulgaria* supplied armoured personnel carriers. *Serbia* supplied combat vehicles and large calibre artillery. *Poland* supplied armoured vehicles and some small arms. *Italy* exported naval guns, munitions and small arms. Before suspending their transfers, *Germany* supplied patrol boats and thousands of assault rifles, *Spain* exported munitions, *Belgium* supplied military weapons, *Austria* supplied thousands of pistols, and *Switzerland* supplied ammunition, parts and accessories. *South Africa* exported many armoured vehicles, munitions and some artillery guns.

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<sup>41</sup> The analysis and summary of available data here is by Peter Danssaert and Brian Wood in the context of their research work for the International Peace Information Service, Antwerp (<https://ipisresearch.be>).

(i) Supplies to the United Arab Emirates:

Again, there has been a wide range of items supplied by States to the UAE. The United States was by far the largest supplier, transferring many thousands of guided bombs, air to surface and other missiles, combat and other helicopters, ground attack aircraft, a range of armoured vehicles, small arms including pistols, and parts and accessories. France was the next largest, exporting naval equipment, a range of munitions and small arms. The Republic of Korea increasingly supplied large amounts of munitions and military weapons. Italy provided aircraft, naval vessels, munitions and large numbers of small arms. Germany supplied munitions and small arms as well as parts and components for naval and air force equipment supplied by Canada and the UK. The United Kingdom supplied a range of munitions, small arms and communications equipment. Canada supplied armoured vehicles, small arms, transport aircraft and parts for US-supplied combat aircraft. South Africa exported ammunition and large numbers of armoured vehicles, and Poland also supplied armoured vehicles. Finland also supplied armoured vehicles and some small arms, and Denmark supplied armoured vehicles and/or parts for such vehicles. Russia supplied a large quantity of munitions including anti-tank missiles, and Colombia also supplied a large quantity of munitions. Spain supplied some transport aircraft and also significant deliveries of munitions. Turkey supplied a substantial consignment of air to surface missiles in 2016. The Czech Republic supplied very large numbers of small arms. This does not exhaust the list of arms suppliers to the UAE.

*It is nevertheless difficult to obtain exact details of the exports because of secrecy surrounding the arms trade. For example, at least three government ministries in the UK (those responsible for trade, defence and foreign affairs) processed and authorized 18,107 "open licences" to companies in the UK for deliveries of arms and dual-purpose equipment to Saudi Arabia worth over US\$ 6.5 billion between 2015 and 2017, yet with no disclosure required of the quantities or values of the items involved. A delivery could range from a single part for an aircraft valued at US\$ 12,50 ) £10) up to 20*

*Eurofighter Typhoon jets valued at US\$ 3.25 billion (£2.5 billion). The figures exclude authorizations under “single individual” export and brokering “trade licences”.*<sup>42</sup>

The international interdependence of major arms manufacturing and the trade in technologies, parts and components is also an important factor that can sometimes obscure export data. Saudi Arabia received a total of 72 Eurofighters from the UK between 2009 and 2017 for around US \$8.8 billion (£ 5.6 billion), including 24 received between 2015 and 2017, yet these Eurofighter Typhoons consisted of roughly 30 per cent of German components, 20 per cent of Italian components and 13 per cent of parts from Spain. Likewise, between 2010 and 2015 the French arms manufacturer Nexter had delivered 132 Caesar self-propelled artillery guns to Saudi Arabia with the Unimog chassis and diesel engines for this weapon system supplied from Germany. Some of the turreted armoured combat vehicles Canada is exporting to Saudi Arabia in a controversial US\$ 11.5 billion (CAN\$ 15 billion) arms deal will feature medium or high-calibre weapons supplied by a Belgian subcontractor.<sup>43</sup> Saudi Arabia and Russia are negotiating a deal under which Russian AK-103 assault rifles – a type already imported and used by the special forces of the Royal Saudi Land Forces (RSLF) – would in future be produced in the Kingdom under licence.<sup>44</sup>

The deployment and use of particular types of arms in Yemen has been documented, usually in generic descriptions. However, sometimes the specific make of weapon or equipment has been identified. The Eurofighter Typhoons have been used in Saudi air force bombing raids in Yemen since 2009. A recent report that documents in some detail 27 Saudi Arabia and UAE attacks on civilians in Yemen points to remnants

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42 Export licence data, but not actual deliveries, is made available by the UK government to the UK Parliament on a quarterly basis. The Campaign Against Arms Trade has compiled the licensing data into a visual representation for exports to Saudi Arabia in 2017: [https://www.caat.org.uk/resources/export-licences/licence?use=military&region=Saudi+Arabia&index=value&order=desc&date\\_from=2017-01-01&date\\_to=2017-12-31&n=0](https://www.caat.org.uk/resources/export-licences/licence?use=military&region=Saudi+Arabia&index=value&order=desc&date_from=2017-01-01&date_to=2017-12-31&n=0).

43 Global Security, SANG LAV-III Light Armored Vehicles, <https://www.globalsecurity.org/military/world/gulf/sang-lav-3.htm>. Steven Chase, Daniel Leblanc, ‘Armoured vehicles in Saudi deal will pack lethal punch’, *Globe and Mail*, 6 January 2016, <https://www.theglobeandmail.com/news/politics/armoured-vehicles-in-saudi-deal-will-pack-lethal-punch/article28046099/>.

44 Jeremy Binnie, ‘Saudi Arabia continues to acquire arms from Eastern Europe’, *Jane’s Defence Weekly*, 5 June 2019 <https://www.janes.com/article/89049/saudi-arabia-continues-to-acquire-arms-from-eastern-europe>.

indicating that US-made munitions were used in 25 of the cases, and UK-made munitions in five cases.<sup>45</sup> In December 2015, Saudi Arabia was reported to have used French CAESAR self-propelled artillery guns to bomb Yemen from the Saudi border town of Najran. The naval blockade imposed by the coalition is mostly conducted using Saudi Arabian, Egyptian, and UAE frigates. Saudi Arabia and the UAE reportedly supplied the Yemen government forces with military equipment, including armoured vehicles, light attack aircraft and small arms, although it appears that the UAE has increasingly provided arms to irregular militias in the south opposed to the Yemen government.

Other members of the coalition reported to have been militarily active in Yemen in a secondary role have also been supplied regularly with arms from a wide range of countries. Since 2015 Egypt has acquired advanced combat aircraft, naval equipment and missile systems from France and naval guns from Italy, adding to its supplies from the USA and now Germany and Russia. France, Italy and the USA are also major suppliers of Kuwait while Bahrain has been supplied with US combat aircraft, attack helicopters and radar.<sup>46</sup> It is also important to bear in mind that Saudi Arabia, the UAE and other coalition members receive training and maintenance services for many of the larger weapon systems supplied, and that has involved large numbers of foreign personnel being deployed in Saudi Arabia and the UAE. Furthermore, Saudi Arabia has supported the deployment of Sudanese military units comprising a large number of foreign troops in Yemen. The UAE too has a large presence of soldiers in Yemen. In addition, both Saudi Arabia and the UAE are reported to have recruited, armed, and trained mercenaries from around the world.<sup>47</sup>

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45 Mwatana for Human Rights (Yemen), University Network for Human Rights (USA) and PAX for Peace (Netherlands), "Day of Judgement"; The Role of the US and Europe in Civilian Death, Destruction and Trauma in Yemen', February 2019, See also Jeffrey E Stern, 'From Arizona to Yemen: The Journey of an American Bomb', *New York Times*, 11 December 2018.

46 See for an overview of arms supplies to the coalition using SIPRI data: Samuel Perlo-Freeman, 'Who is arming the Yemen war? An Update', *Reinventing Peace*, 19 March 2019, <https://sites.tufts.edu/reinventingpeace/2019/03/19/who-is-arming>.

47 *New York Times*, 'Emirates Secretly Sends Colombian Mercenaries to Fight', 25 November 2015. David Kirkpatrick, 'On the Front Line of the Saudi War in Yemen: Child Soldiers from Darfur', *New York Times*, 28 December 2018. Aram Roston, 'A Middle East Monarchy Hired American Ex-Soldiers to Kill its Political Enemies. Could This be the Future of War', *BuzzFeed News*, 16 October 2018.

## 2. The UN Arms Embargo on Entities in Yemen

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The Houthi forces, and groups linked to Al-Qaida and Isis, have since 15 April 2015 been subject to an arms embargo imposed by the UN Security Council. Through its resolution 2216 (2015), the Security Council imposed targeted sanctions including an arms embargo on listed individuals and their armed organizations in Yemen. Each UN Member State is required to take necessary measures to prevent the direct or indirect supply, sale or transfer of military equipment from its jurisdiction to those individuals and the entities acting at the direction of those listed individuals.

The Security Council's Panel of Experts which was established to investigate breaches of those UN sanctions, alleged in January 2018 that components and liquid fuel tanks related to extended-range short-range ballistic missiles used by the Houthi forces were supplied by Iran, whose authorities failed to take the necessary measures to prevent the direct or indirect supplies.<sup>48</sup> The Panel of Experts also reported that Iran had failed to prevent the supply of Borkan-2H short-range ballistic missiles, field storage tanks for liquid bipropellant oxidizer for missiles and unmanned military aerial vehicles to the Houthi forces.<sup>49</sup> In July 2019, Houthi leaders exhibited a number of missiles and drones on local television bearing the mark "Made in Yemen", claiming that the rebels were making advanced missiles and drones and using them against southern airports in Saudi Arabia.<sup>50</sup>

Nevertheless, evidence from SIPRI data, the UN Panel of Experts, and other sources indicates that the main sources of arms held by the Houthi forces have been from within Yemen – from units of the Yemeni army, their former pro-Saleh allies, captured weapons, and locally assembled equipment.

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48 UN Security Council, Report of the UN Panel of Experts on Yemen, January 2018, UN Doc. S/2018/68, §§ 86–114.

49 Ibid.

50 The National, 'Yemeni rebels unveil new weapons to 'change course of the war''. 8 July 2018 <https://www.thenational.ae/world/mena/yemeni-rebels-unveil-new-weapons-to-change-course-of-the-war-1.884106>; also BBC Monitor, 'Yemen rebels showcase 'new' weapons', 7 July 2019, both reports based upon the pro-Houthi Al-Masirah Television coverage of an exhibition by the rebels on 7 July 2018.

### 3. Diversion of Arms Transfers to Parties to the Conflict in Yemen

The diversion and attempted diversion to embargoed groups of small arms, light weapons, ammunition and ground vehicles used in ground fighting is a major factor enabling the government armed forces, their allied militias and rebel armed groups to continue committing serious violations of IHL and IHRL. Diversions have been carried out through illicit cross-border trafficking, battlefield captures, and especially the looting of government stocks, before and after the imposition of the UN arms embargo on rebel armed groups in 2015 as was alleged by the UN Panel of Experts in its reports of January 2017<sup>51</sup> and January 2018.<sup>52</sup>

Moreover, detailed allegations by investigative journalists surfaced in November 2018 that Saudi Arabia and the UAE disregarded authorized end-use agreements with US, Canadian and European authorities and companies by allowing the diversion of sophisticated armoured vehicles, rocket launchers, grenades and rifles not only to the Yemen government forces but also to local armed factions and groups.<sup>53</sup> Austria, Canada, Belgium, Germany, Switzerland and the USA were named in the year-long investigation as countries where the weapons and equipment had originated and been supplied at some point to Saudi Arabia or the UAE but were found to be in the hands of armed militias and rebel groups, including Al-Qaida and Isis. For example, the investigators alleged that between July and October 2018 Canadian Lav-25 armoured vehicles were spotted six times in Yemeni convoys in Hajjah and Saada. In several cases apparent

51 UN Security Council, Report of the UN Panel of Experts on Yemen, UN Doc. S/2017/81, January 2017, §§ 60–75.

52 UN Security Council, Report of the UN Panel of Experts on Yemen, UN Doc. S/2018/68, January 2018, §§ 117–21.

53 Allegations were made in an Arabic language documentary film aired by Deutsch Welle television entitled 'Yemen and the Global Arms Trade' and posted on YouTube on 4 December 2018, based on investigations by Mohamed Abo-Elgheit and a team of other journalists from Arab Reporters for Investigative Journalism (Arij). It appears the film was originally entitled 'The End User' as reported in Rod Austin, 'Yemen: inquiry finds Saudis diverting arms to factions loyal to their cause', *The Guardian*, 28 November 2018, <https://www.theguardian.com/global-development/2018/nov/28/arms-yemen-militia-were-supplied-by-west-find-analysts>.

attempts had been made to erase Saudi markings. Other examples include Houthi fighters as well as Yemen militias being in possession of German-made G3 assault rifles and MG3 machine guns that have been supplied to Saudi Arabia over the past decade, as well as US-made Oshkosh mine-resistant ambush-protected armoured vehicles supplied to Saudi Arabia and the UAE between 2011 and 2014.

In February 2019, Amnesty International accused the UAE of diverting weapons to unaccountable militias in Yemen including “The Giants”, the Security Belt and Elite Forces which are trained and funded by the UAE, but not accountable to any government.<sup>54</sup> Some of them stand accused of war crimes, including during the offensive on the port city of Hodeidah and in the UAE-backed network of secret prisons in southern Yemen. Amnesty International and others have previously documented these forces’ role in enforced disappearances and other violations at these facilities – including detention at gunpoint, torture with electric shocks, waterboarding, hanging from the ceiling, sexual humiliation, prolonged solitary confinement, squalid conditions and inadequate food and water.<sup>55</sup> A wide variety of US-supplied armoured vehicles equipped with heavy machine guns, including MATV, Caiman and MaxxPro models, have been documented in the hands of these UAE-backed militias. Weapons used by these militias include Bulgarian rifles and in Hodeidah include Serbian-made Zastava MO2 Coyote machine guns and the Agrab armoured-truck-mounted Singaporean 120mm mortar system mounted on a South African RG-31 armoured vehicle – the UAE is the only country known to purchase this combined weapon system.

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54 Amnesty International, ‘When arms go astray: Yemen’s deadly new threat of arms diversion to militias’, 6 February 2019, <https://arms-uae.amnesty.org/en/>.

55 These forms of torture in UAE secret detention facilities and those of UAE-backed militias were documented in Amnesty International, ‘“God only knows if he’s alive”: Enforced disappearance and detention violations in southern Yemen’, Index: MDE 31/8682/2018, May 2018, <https://www.amnesty.org/en/documents/mde31/8682/2018/en/>.



## **4. Suspension of Arms Transfers to Parties to the Conflict in Yemen**

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In response to international concern about the humanitarian crisis and high rate of civilian casualties in Yemen, as well as the murder of Saudi journalist Jamal Khashoggi in the Saudi Consulate in Turkey in October 2018, the governments of several of the countries supplying Saudi Arabia and the UAE announced their intention to stop or suspend their arms supplies to Saudi Arabia and the UAE, and some proceeded to do so. In recognition of their international obligations, they announced at various times that they would not export arms to Saudi Arabia, or to the UAE and States that would use the arms in, or transfer them to, parties involved in the conflict in Yemen. These governments include those of Austria, Flanders, Finland, Denmark, Netherlands, Norway, Sweden, Switzerland, South Africa and, most significantly, Germany. But, unlike Germany, it appears most of these governments have not so far revoked existing export licences.<sup>56</sup>

Some of these governments have only announced a temporary halt, while many other governments such as the USA and UK have allowed arms supplies to continue despite strong opposition to the trade in the US Congress and UK Parliament and an Appeal Court order prohibiting the issuance of new export licences. Moreover, supply companies have found ways to circumvent their home government's restrictions. For example, a German manufacturer has supplied aerial ordnance to Saudi Arabia from a subsidiary firm based in Sardinia and was authorized to do so by the Italian authorities, and also supplied an ammunition manufacturing plant and materials to Saudi Arabia from a joint venture company based in South Africa. Furthermore, new suppliers of arms have reportedly entered the market. Colombia added its name to the list of exporters to UAE for the first time in 2018. A Belgian company is reported to have signed an agreement with Saudi Arabia on 28 January 2019 to create a joint venture specializing in tank and wheeled armoured

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<sup>56</sup> Perlo-Freeman, *op cit.*, March 2019.

vehicle gun turrets.<sup>57</sup>

There are still States continuing to allow exports of significant quantities or types of weapons, munitions and other military equipment to Saudi Arabia and the UAE. Those willing suppliers currently include Canada, China, France, Italy, Russia, South Africa, the Republic of Korea, South Africa, Spain, Turkey, the UK, and the USA. Saudi Arabia has ordered 500 armoured personnel carriers from France, and five Avante-2200 frigates from Spain, along with naval guns from Italy, and is in discussions with the UK to order a further 48 Typhoon combat aircraft in addition to those previously purchased. From the USA they have ordered 70 helicopters, and an unknown number of batteries of the Patriot missile system, amongst other items.

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57 Army Recognition, 'Belgian company CMI will produce turrets in Saudi Arabia', 30 January 2019, [https://www.armyrecognition.com/january\\_2019\\_global\\_defense\\_security\\_army\\_news\\_industry/belgian\\_company\\_cmi\\_will\\_produce\\_turrets\\_in\\_saudi\\_arabia.html](https://www.armyrecognition.com/january_2019_global_defense_security_army_news_industry/belgian_company_cmi_will_produce_turrets_in_saudi_arabia.html). See also Christine Scharff, 'L'entreprise wallonne CMI produira des armes en Arabie saoudite' (The company Wallonne CMI will produce weapons in Saudi Arabia), L'Echo, 30 January 2019, <https://www.lecho.be/economie-politique/belgique/wallonie/cmi-produira-des-armes-en-arabie-saoudite/10092257.html>.

## **PART II**

# **The Saudi-UAE Coalition's Serious Violations of International Humanitarian Law and International Human Rights Law**

Having declared the situation in Yemen to be a threat to international peace and security, the UN Security Council has repeatedly called on all parties to the conflict in Yemen to comply with their obligations under international law, including international humanitarian law and human rights law.<sup>58</sup> Failure to do so risks that States that authorize such arms transfers are found to be wrongfully assisting the parties to commit serious violations of IHL and IHRL.

International law provides for differentiated responses to State complicity, depending on the seriousness of the breach of the law in question. States that render aid or assistance in maintaining serious breaches of peremptory norms under international law are complicit in serious breach of peremptory norms.<sup>59</sup> This responsibility regime is codified in Part II Chapter III of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts 2001, a referential codification of customary rules that, while not adopted into a treaty, specifies the obligations of all third States which aid or assist wrongdoing State(s) committing serious breaches of peremptory norms of international law such as the "intransgressible rules of IHL"<sup>60</sup> and the prohibition of torture. Third States that have supplied and are continuing to supply arms to the warring parties in Yemen thus have obligations that are triggered by the seriousness of the breaches of IHL and IHRL committed by the responsible States.

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58 See Security Council resolutions 2140 (26 February 2014), 2201 (15 February 2015), 2216 (14 April 2015), 2402 (26 February 2018), 2451 (21 December 2018), and 2456 (26 February 2019).

59 Helmut Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011), p. 8. Antonio Cassese, *International Law* (Oxford University Press, 2005), p. 262.

60 Luigi Condorelli, Laurence Boisson de Chazournes, 'Quelques remarques a propos des obligations des États de respecter et 'faire respecter' le droit humanitaire en toutes circonstances' (Some remarks about the obligations of States to respect and 'ensure respect' for humanitarian law in all circumstances), in Christophe Swinarski (ed.), *Studies and Essays in International Humanitarian Law in Honour of Jean Pictet* (Martinus Nijhoff 1984) pp. 33–4. See also Marco Sassoli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare* (Edward Elgar 2019) pp. 89–90.

## A. SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Serious and mounting allegations have been made against Saudi Arabia, the UAE and members of the coalition militarily involved in Yemen particularly in relation to three types of serious violations of the more fundamental rules of IHL: (1) bombings of civilians; (2) maintaining a blockade of key entry-ports to the country that is obstructing the delivery of humanitarian aid; and (3) widespread breaches of Common Article 3 of the Geneva Conventions. Current reports by UN bodies and other independent organizations on the ground in Yemen indicate that the alleged violations are continuing unabated; including similar types of attacks, similar extents of injury to civilians, and similar denial and distortion of these facts by the coalition authorities. While international attention focused between mid 2018 and mid 2019 on the battle for the port of Al-Hudaydah, followed by ceasefire discussions brokered by the UN, the parties shifted their focus and resources to frontlines in Ta'izz, Hajjah, Sa'dah, and Al-Dhale'e. Civilians continued to be killed and injured by the fighting.

There is no comprehensive count of the number of civilian casualties and persons injured during the conflict. The August 2018 report of the UN Group of Experts stated that "From March 2015 to June 2018, there were at least 16,706 civilian casualties, with 6,475 killed and 10,231 injured in the conflict; however, the real figure is likely to be significantly higher".<sup>61</sup> The Group's report in August 2019 did not include an overall estimate of civilian casualties, but stated that the Office of the United Nations High Commissioner for Human Rights had "documented at least 7,292 civilians killed (including at least 1,959 children and 880 women) and 11,630

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61 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, § 27. See also UN OCHA, Global Humanitarian Review 2019, <https://reliefweb.int/sites/reliefweb.int/files/resources/GHO2019.pdf>, p. 16: "Almost four years of conflict, economic collapse and escalating conflict have brought Yemen closer to famine than ever before. During 2018, the situation has worsened. Nearly 80 per cent of the entire population – 24 million people – now require some form of humanitarian assistance and protection. Across the country, 18 million people are food insecure, including 8.4 million who are suffering from extreme hunger. Seven million Yemenis are malnourished, including close to two million children and more than one million lactating and pregnant women."

civilians injured (including 2,575 children and 1,256 women) in Yemen as a direct result of the armed conflict between March 2015 (when it began such tracking) and June 2019.”<sup>62</sup>

Those figures are estimated to be much higher by the independent researchers from the Armed Conflict Location & Event Data Project (ACLED) working in partnership with the Yemen Data Project. According to data published by ACLED on 18 June 2019, the total number of reported fatalities in Yemen rose to more than 91,600 from the start of 2015 – that is, over the past four and a half years – and there were nearly 4,500 direct civilian targeting events, resulting in approximately 11,700 reported civilian fatalities, since January 2015.<sup>63</sup> These estimates do not include the substantial number of deaths in Yemen from cholera and famine. In January 2019, the Yemen Data Project, another independent research project, estimated that at least 56,000 civilians were killed between January 2016 and October 2018, and from March 2015 to the end of 2018, the number of civilian deaths related to combat could have been as high as 80,000.<sup>64</sup> These totals do not include deaths as a result of disease or malnutrition.

## **1. Violations of International Humanitarian Law in Aerial Attacks**

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Among the many attacks that have caused grave harm to civilians, and are thus presumptively unlawful, are the following:<sup>65</sup>

■ On 10 March 2017, six rebels and 22 civilians were killed in a Saudi-UAE

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62 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2019, § 23.

63 ACLED, 'Yemen War Death Toll Exceeds 90,000 According to New ACLED Data for 2015', Press release, 18 June 2019, <https://www.acleddata.com/2019/06/18/press-release-yemen-war-death-toll-exceeds-90000-according-to-new-acled-data-for-2015/>.

64 Yemen Data Project, <https://yemendataproject.org/data.html>.

65 See, for a list of coalition air strikes against civilians investigated by UN experts, UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018 pp. 38-41.

coalition air raid on a market in Khoukha city<sup>66</sup> – which Joint Incident Assessment Team (JIAT) was set up by the Yemeni Government and the Saudi-UAE coalition in 2016, says had never happened;

- On 23 August 2018, strikes by the Saudi-UAE coalition killed 26 schoolchildren, after two weeks earlier 40 schoolchildren had been killed on a bus taking them on an excursion;<sup>67</sup>
- Between June and October 2018 three airstrikes hit buses in Al-Hudaydah carrying civilians, including displaced persons fleeing conflict-affected areas. In one incident, two minibuses at a Houthi checkpoint were hit in close succession, killing 17 individuals, including at least one woman and one child, and injuring 34, including three boys, two girls and a woman. The coalition admitted possible “collateral damage” in this case.
- On 8 October 2016 an air attack on Al-Kubra Hall in the city of Sana’a during the funeral of the father of a senior official killed at least 137 civilians and injured 695, including 24 boys.<sup>68</sup>
- On 22 April 2018 a coalition air strike hit a wedding celebration in Al-Raqah village, in the Bani Qa’is district of the Hajjah Governorate. At least 23 male civilians were killed, including 8 boys.<sup>69</sup>
- In 11 air strikes on civilian boats off the shores of Hudaydah from November 2015 until May 2018, approximately 40 fishermen were killed or disappeared.<sup>70</sup>

Indeed, in a report of 24 August 2017 on the children in armed conflict, the UN Secretary-General noted that many children have been victims of the conflict. The figures quoted for the year 2016 are significant:

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66 ‘Yémen : 20 civils et 6 rebelles tués dans un raid aérien de la coalition arabe’ (Yemen: 20 civilians and 6 rebels killed in Arab coalition raid), *L’Orient-Le Jour*, 10 March 2017, <https://www.lorientlejour.com/article/1039895/yemen-20-civils-et-6-rebelles-tues-dans-un-raid-aerien-de-la-coalition-arabe.html>.

67 Louis Imbert, ‘Au Yémen, 26 enfants tués dans de nouvelles frappes de la coalition’, *Le Monde*, 24 August 2018, <https://www.lemonde.fr/yemen/article/2018/08/24/au-yemen-la-coalition-saoudienne-accusee-de-dissimuler-des-crimes-de-guerres53459251667193.html>.

68 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, § 32.

69 *Ibid.*, § 32.

70 *Ibid.*, § 34.

Large numbers of child victims were also confirmed in Sa'dah, where 91 per cent (222 of 245 casualties) were attributed to air strikes by the coalition. In the reporting period, air strikes were the cause of over half of all child casualties, with at least 349 children killed and 334 children injured. For example, in October a coalition air strike hit Salah Hall in Sana'a during a funeral, killing at least 24 children.<sup>71</sup>

Houthi rebels and coalition forces have also seriously damaged schools and hospitals in attacks that are presumptively unlawful (placing the burden of proof on the attacking party to show that the attacks were lawful):

The United Nations verified 52 incidents of attacks on schools and hospitals, resulting in the partial or complete destruction of facilities (46), attacks on protected personnel (3) and looting (3): 73 per cent of attacks were attributed to the coalition (28 schools, 10 hospitals) and 15 per cent to the Houthis and affiliated forces (4 schools; 4 hospitals). Attacks were also attributed to the Popular Resistance (2), the Yemeni Armed Forces (1) and crossfire.

A total of 33 attacks on schools were verified, affecting 30 schools. The majority of the incidents (28) resulted in the destruction of schools as a result of air strikes by the coalition, while 4 incidents were attributed to the Houthis and 1 to the Yemeni armed forces.

The United Nations verified 19 incidents of attacks on hospitals, affecting 16 facilities, with hospitals being subjected to multiple attacks in Ta'izz and Marib, 10 of which were attributed to air strikes by the coalition; for example, on 10 January, in Sa'ada Governorate, 1 hospital was hit by an air strike, resulting in 4 deaths, 10 injuries and the destruction of several hospital buildings. Of the remaining verified attacks, 4 were attributed to the Houthis in Ta'izz and Jawf and 2 to the Popular Resistance.<sup>72</sup>

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71 Report of the Secretary-General, Children and Armed Conflict, UN Doc. A/72/361-S/2017/821, 24 August 2017, § 191.

72 *Ibid.*, §§ 193–5.



In October 2015, a Médecins sans Frontières (MSF) hospital was destroyed in Sa'ada province. MSF reported:

Hospital staff and two patients managed to escape after the first strike at 10:30pm. Further raids followed for about two hours. One staff member was slightly injured while fleeing. Now that this hospital has been destroyed, at least 200,000 people are deprived of access to life-saving medical care.<sup>73</sup>

The coalition at first denied that this attack took place. A JIAT check concluded that the hospital had been taken over by Houthi armed forces and that its targeting was legitimate, but should have occurred only after the coalition warned the occupants, after which the coalition maintained that it was a procedural error. Another attack on an MSF clinic occurred on 11 June 2018. MSF indicated that the coordinates of the facility had been shared with the coalition on 12 separate occasions.<sup>74</sup>

These reports, as well as many other reports by UN experts and independent humanitarian organizations, point to evidence of a mounting accumulation of attacks by the Saudi-UAE coalition that have targeted civilians and civilian objects and that have been disproportionate. Such attacks are flagrant violations of the rules of IHL binding notably Saudi Arabia and the UAE, which are parties to the Additional Protocol II of 8 June 1977 to the Geneva Conventions of 12 August 1949 (AP II) applicable in non-international armed conflict: they have been bound by AP II since respectively 28 November 2011 and March 9 1983. The above-mentioned attacks violate this instrument (AP II, Article 11, § 1; Article 13, § 2) and relevant customary IHL rules.<sup>75</sup>

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73 Médecins sans Frontières, 'Un hôpital MSF détruit par des frappes aériennes de la coalition' (MSF hospital destroyed by coalition aerial attacks), Communiqué, 27 October 2015, <http://archive.wikiwix.com/cache/?url=http%3A%2F%2Fwww.msf.fr%2Fpresse%2Fcommuniques%2Fyemen-hopital-msf-detruit-frappes-aeriennes-coalition>.

74 MSF, <https://www.msf.org/report-bombing-msf-facility-unacceptable-and-contradictory-abs-yemen>.

75 See, e.g., Rule 7, The Principle of Distinction between Civilian Objects and Military Objectives, International Committee of the Red Cross (ICRC), Customary IHL Study, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7)

Although Saudi Arabia and other members of the coalition try to justify these aerial attacks by the fact that Houthi rebels were in the area, the nature of the areas attacked (dozens of airstrikes on schools, market places, hospitals) and the identity of the victims (a large proportion being children) places on the targeting party a heavy burden to provide a justification, based on the law of armed conflict, that the attack was necessary, proportionate and complied with the obligations on precautions. It must be noted that an armed attack must always be limited to “military objectives”, that is,

those objects which, by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage (1st AP, Article 52, § 2; customary IHL, rule 8, Definition of Military Objectives).

UN experts and independent field researchers have investigated numerous attacks that have resulted in heavy civilian casualties including many children, and that have targeted civilian infrastructure including schools and hospitals, without finding any evidence to demonstrate how such attacks offer the Saudi-UAE coalition a “definite military advantage”. Moreover, the Saudi Arabia and UAE governments did not attempt to present credible evidence to justify such attacks when requested to do so during 2017 by the UN Security Council’s Panel of Experts. The UN Panel concluded in January 2018 that the evidence “strongly demonstrates that these attacks violated the IHL obligations of individual member States of the Saudi Arabia-led coalition” and that “All States whose forces engage in, or otherwise participate in military operations on behalf of the coalition are responsible for ‘all acts committed by persons forming part of its armed forces.’”<sup>76</sup>

The team of UN human rights experts corroborated the assessment of the Security Council experts. In its report of August 2018, the Group of Eminent Regional and International Experts on Yemen, established by UN

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<sup>76</sup> UN Security Council, Report of the UN Panel of Experts on Yemen, UN Doc. S/2018/68, January 2018; Annex 58, § 5. The report cites the updated commentary to Common Article 1 of the Geneva Conventions of 12 August 1949. See also Article 3 of The Hague Convention respecting the Laws and Customs of War on Land, 1907.

Human Rights Council Resolution 36/31 to undertake a comprehensive review of the human rights situation in Yemen, concluded, inter alia, *that*:

Information documented by the Group of Experts strongly suggests that violations and crimes under international law have been perpetrated and continue to be perpetrated in Yemen... The Group has reasonable grounds to believe that the parties to the armed conflict in Yemen have committed a substantial number of violations of international humanitarian law. Subject to a determination by an independent and competent court: (a) Individuals in the Government and the coalition, including Saudi Arabia and the United Arab Emirates, may have conducted attacks in violation of the principles of distinction, proportionality and precaution that may amount to war crimes;

[The Group, inter alia] ...recommends that parties to the conflict... (a) Immediately cease acts of violence committed against civilians in violation of applicable international human rights and international humanitarian law, take all feasible precautions to protect civilians from the effects of hostilities and meet the basic needs of the civilian population, in particular women and children; (b) Respect international humanitarian law, including in relation to the prohibition on attacks against civilians and civilian objects, and the core principles of distinction, proportionality and precaution;<sup>77</sup>

Regarding airstrikes, ACLED estimated that of the 3,362 air strikes carried out by the Saudi-UAE coalition in 2018, 420 strikes hit residential areas, 231 struck farms, 95 hit civilian buses or vehicles, and 57 hit educational facilities or marketplaces. Ten attacks took place on medical facilities and two displaced persons' camps run by NGO.<sup>78</sup> Data gathered by the Yemen

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77 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, § 100, § 108, § 111(a) and (b).

78 See, for 2018 data, ACLED, 'Fatalities in the Yemen Conflict', <https://www.acleddata.com/2018/11/08/fatalities-in-the-yemen-conflict>.

Data Project from open sources indicated that only 37% of coalition air raids hit military targets while 31% hit civilian targets, with 32% unknown.<sup>79</sup>

According to ACLED, “Since 2015, the Saudi-led coalition and its allies are responsible for over 8,000 of the approximately 11,700 fatalities reported in connection with direct targeting of civilians in Yemen ... Approximately one out of ten events involving the Saudi-led coalition has resulted in the targeting of civilians, while around 75% of total civilian fatalities recorded by ACLED were attributed to the coalition.”<sup>80</sup>

The UN Panel of Experts on Yemen appointed by the Security Council stated in January 2018 that: “Saudi Arabia, on behalf of the Saudi Arabia led-coalition has refused to engage with the Panel, stating that ‘the coalition’s activities’ fall outside the mandate of the Panel of Experts.”<sup>81</sup> A JIAT was set up by the Yemeni Government and the Saudi-UAE coalition in 2016 following concerns expressed by the UN and others about detailed reports of alleged serious violations of IHL that may also constitute war crimes. However, the UN Panel concluded after conducting detailed investigations of ten airstrikes that: “In all cases investigated, there was no demonstrable evidence that the civilians in, or near these objects, who are *prima facie immune from attack, had lost their civilian protection*.”<sup>82</sup> Most incidents were uninvestigated and even unacknowledged by the JIAT, which absolved the coalition of any responsibility for its actions in almost every case it has investigated.<sup>83</sup>

The Group of Experts appointed by the UN Human Rights Council stated

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79 Yemen Data Project full data summary, 26 March 2018, at <https://mailchi.mp/ca40d221c28d/1000-days-of-saudi-led-air-war-in-yemen-291387>

80 ACLED, ‘Special Focus on Coalition Forces in the Middle East: The Saudi-led Coalition in Yemen’, accessed 14 August 2019, <https://www.acleddata.com/2018/07/31/special-focus-on-coalition-forces-in-the-middle-east-the-saudi-led-coalition-in-yemen/>.

81 UN Security Council, Report of the UN Panel of Experts on Yemen, UN Doc. S/2018/68, January 2018 § 3.

82 *Ibid.*, Annex 58, § 4(b).

83 *Ibid.* See also Human Rights Watch, ‘Hiding Behind the Coalition: Failure to Credibly Investigate and Provide Redress for Unlawful Attacks in Yemen’, 24 August 2018, p. 5, <https://www.hrw.org/report/2018/08/24/hiding-behind-coalition/failure-credibly-investigate-and-provide-redress-unlawful>. See also Kristine Beckerle, ‘The Saudi Playbook: Self-Investigations of Civilian Deaths in Yemen and Khashoggi’, 22 October 2018, <https://www.justsecurity.org/61178/saudi-playbook-self-investigations-civilian-deaths-yemen-khashoggi/>.

in its report of August 2018 that it had reviewed 71 incidents investigated by the Saudi-UAE coalition's JIAT. All but one of these were cases brought to the attention of the JIAT by the Office of the UN High Commissioner for Human Rights (OHCHR) or civil society organizations.<sup>84</sup> Those civil society organizations had often visited the sites and spoke with victims and witnesses immediately after the attacks took place. Some also performed crater and weapons analysis. In their very detailed report the Group of Experts expressed, *inter alia*: "serious concerns as the summaries [by the JIAT] lacked details of legal analyses undertaken, and rarely addressed reports of civilian casualties", and that:

The Experts requested JIAT to provide information about its terms of reference, appointments process, and reporting structure. It has received no response. However, the Experts received reliable information suggesting that at times, JIAT findings were substantially altered by the Saudi Ministry of Foreign Affairs. The Experts also sought information about JIAT rules of procedure and the coalition's process for determining whether to implement JIAT recommendations, and has received no response.<sup>85</sup>

More recently, in August 2019 the Group of Experts reported that it had reviewed JIAT's latest conclusions and reiterated its concerns about JIAT's functioning, methodology and policies, and the insufficient legal analysis presented in its public findings, which raised concerns as to the impartiality of its investigations and the thoroughness and credibility of its analysis. "The assessment of the targeting process is particularly worrying, as it implies that an attack hitting a military target is legal, notwithstanding civilian casualties, hence ignoring the principle of proportionality."<sup>86</sup>

Also in August 2019, a leading non-governmental organization in Yemen, Mwatana for Human Rights, and the UK-based international legal and educational organization, the Global Legal Action Network (GLAN), working with the UK law firm Bindmans, submitted a body of new evidence to the

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<sup>84</sup> UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, Annex III, § 1.

<sup>85</sup> *Ibid.*, Annex III, § 3.

<sup>86</sup> UN Human Rights Council, Report of the Group of Experts on Yemen, August 2019, § 90

UK government showing why the JIAT assurances are not credible and how the Saudi-UAE coalition has failed to take adequate steps to remedy and ensure non-repetition of the IHL violations it has repeatedly committed throughout its bombing campaign in Yemen. Since 2015, Mwatana has documented about 400 coalition airstrikes that caused grave harm to civilians or civilian objects. The submission provides detailed evidence on 13 attacks that took place between 2015 and 2019 including those where JIAT denied that civilians were severely harmed in the attack occurred despite concrete evidence to the contrary.<sup>87</sup>

In 2018, the UN Group of Experts reviewed 60 cases where air strikes had hit residential areas, killing more than 500 civilians, including 84 women and 233 children, as well as 29 cases of air strikes hitting public spaces, some of them densely populated, 11 cases where markets were hit, and five where funeral and wedding gatherings were attacked, including one of the deadliest incidents where the coalition air force targeted Al-Kubra Hall in Sana'a during a funeral on 8 October 2016, killing at least 137 male civilians and injuring 695, including 24 boys.<sup>88</sup> In addition, the Group reviewed four air strikes on detention facilities, 11 air strikes hitting civilian boats off shore, including one carrying Somali refugees, and 32 air strikes hitting medical, educational and cultural sites and facilities.<sup>89</sup> Moreover, the Group of Experts investigated 11 such air strikes in great detail – by interviewing victims, witnesses and other credible sources; analysing satellite imagery, photographs and videos; and visiting sites in the Hurairah, Sa'dah and Sana'a governorates – and reviewed another 139 incidents involving substantial civilian loss of life, injuries and damage to medical, educational, cultural and religious sites, as well as the destruction of critical infrastructure at the Hudaydah seaport in August 2015 which has caused foreseeable harm by hindering essential supplies to all of

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87 Global Legal Action Network and Mwatana for Human Rights, 'New evidence submitted to UK government exposing extent of Saudi/UAE-led coalition whitewashing of Yemen airstrike violations', 15 August 2019, <https://www.glanlaw.org/single-post/2019/08/15/New-evidence-submitted-to-UK-government-exposing-extent-of-SaudiUAE-led-coalition-whitewashing-of-Yemen-airstrike-violations>. See also 'UK receives report documenting Saudi cover-up of unlawful Yemen airstrikes', *The Guardian*, 15 August 2019.

88 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, §§ 29–32.

89 *Ibid.*, §§ 33–6.

Yemen.<sup>90</sup> The UN Group of experts concluded:<sup>91</sup>

The specific cases investigated by the Group of Experts raise serious concerns about the targeting process applied by the coalition. The Group submitted a request to the coalition for specific information on this process; regrettably, it has not received any response to date. The brief public reports by the coalition's Joint Incidents Assessment Team do not provide any detail on the targeting process....

Based on the incidents examined, and information received in relation to the targeting process, the Group of Experts have reasonable grounds to believe the following:

- (a) In the absence of any apparent military objective in the vicinity, the objects struck raise serious concerns about the respect of the principle of distinction and how military targets were defined and selected. The use of precision-guided munitions would normally indicate that the object struck was the target;
- (b) The number of civilian casualties raises serious concerns as to the nature and effectiveness of any proportionality assessments conducted;
- (c) *The timing of some attacks and the choice of weapons raise serious concerns as to the nature and effectiveness of any precautionary measures adopted;*
- (d) The failure to ensure that all relevant commanders have access to the no-strike list raises serious concerns about the ability of the coalition to comply with the special protections accorded to such objects;
- (e) The use in some cases of "double strikes" close in time, which affect first responders, raises serious concerns as to whether updated proportionality assessments and precautionary measures were carried out for the second strikes.

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90 *Ibid.*, Annex IV summarizing 11 investigations by the UN Group of Experts of air attacks on civilians.

91 *Ibid.*, § 37.

While it is not always possible to know with certainty whether there was any military personnel or movable or immovable property targeted in an attack, the egregious nature of the harm caused to civilians by these attacks significantly places the burden of proof on the targeting party to justify the attack as compliant with IHL rules on precautions and proportionality.<sup>92</sup> There are also many attacks including on residential homes in which independent investigators did not manage to find any military objective, as well as aggregate data indicating that hundreds of residential areas have been attacked, which suggest a high risk that such presumptively unlawful attacks, that remain without adequate justification or proper investigation, will happen again.

The Saudi-UAE coalition governments involved in air strikes have repeatedly failed to take reasonable precautions to avoid civilian casualties, in particular allowing air force personnel to ignore the no-strike list and in some cases to launch “double strikes” in some cases in actual knowledge that their precision-guided strikes would kill and injure civilians and first responders. Indeed, the degree of *actual* error recorded in the coalition forces’ operations and targeting processes demonstrates a serious systems failure that attests to the coalition governments’ inability and unwillingness to respect international law in good faith. An unprecedented account of decisions made in the Saudi war room concerning a singular attack appears in a leaked US intelligence report, where the intelligence analyst concluded that the attack was “an indication of failure to follow proper procedure even though safeguards are in place,” and that “[t]he Saudis failed to corroborate the target with additional intelligence sources or weigh the lack of time-sensitivity with the decision to strike immediately.”<sup>93</sup>

Based on the body of evidence found in authoritative reports, it is clear that the coalition forces have and will continue to commit serious violations of IHL, including repeatedly conducting indiscriminate and disproportionate attacks that have caused grave harm to civilians and essential civilian objects.

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92 The burden of proof is placed on the targeting party when the presumption is that the object is of a civilian character: Rule 10. Civilian Objects’ Loss of Protection from Attack, ICRC Customary IHL Study, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule10](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule10).

93 Quoted in Iona Craig, Shuheib Almosawa, ‘U.S.-backed Saudi airstrike on family with nine children shows ‘clear violations’ of the laws of war’, *The Intercept*, 2 September 2018, <https://theintercept.com/2018/08/02/saudi-airstrikes-yemen-war-laws/>.



## **2. Violations of International Humanitarian Law in the Course of Ground Operations**

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In addition, there are numerous credible reports of serious violations of IHL that have been perpetrated by combatants and security forces of all parties to the conflict in Yemen in the course of their ground operations. Those operations are carried out principally through the use and threat of use of small arms, light weapons, artillery, combat vehicles, their ammunition, military transport and communications equipment. According to numerous reports, such weapons and materiel have originated from a wide range of countries and have reached the adversaries in Yemen, including the armed forces of Yemen and the Saudi-UAE coalition, through direct supply as well as indirectly through forms of diversion to militias and armed opposition groups. Details of this supply are outlined in Section II below.

According to the UN Panel of Experts, there have been “duplicate” military units often using the same names but divided into “legitimate” units loyal to the current President, and “shadow” units loyal to the Houthi forces or the former President Saleh, resulting in a chaotic conflict between broken brigades and battalions in which no one side has been able to impose its will on the other.<sup>94</sup> The battle lines in Yemen remain largely unchanged after five (as of 2014) years of fighting, although control of territory continues to change hands at the local level.

In this context, many of the parties to the conflict have used weaponry and munitions to perpetrate serious breaches during ground operations. The UN Group of Experts reported in August 2018 that:

Shelling and sniper attacks by parties to the conflict have resulted in large numbers of civilian casualties in the Hajjah, Lahij, Ma'rib and Ta'izz governates. The Group of Experts focused on such attacks in the city of Ta'izz, an urban environment with some of the most intense and sustained fighting in the country [...]

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<sup>94</sup> UN Security Council, Report of the UN Panel of Experts on Yemen, UN Doc. S/2017/81, January 2017, §§ 40–41.

The information available indicates that civilians, including women and children, were hit by shelling and snipers from the Houthi-Saleh forces and other parties to the conflict while in their homes, just outside their homes, fetching water at local wells, on their way to purchase food, travelling to seek medical attention and delivering critical supplies. Some witnesses alleged that they were subjected to almost daily attacks in their residential neighbourhoods.<sup>95</sup>

In August 2019, the UN Group of Experts concluded that “individuals in the Government of Yemen and the coalition have conducted attacks using indirect-fire weapons and small arms fire in violation of the principle of distinction, acts that may amount to war crimes...[and]... have committed acts that may amount to war crimes, including murder, torture, cruel or inhuman treatment, rape, outrages upon personal dignity, denial of fair trial, and enlisting children under the age of 15 or using them to participate actively in hostilities.”<sup>96</sup> The Group also accused individuals in the Houthi forces of having conducted attacks using indirect-fire weapons and small arms fire in violation of the principle of distinction, including launching direct attacks against civilians or civilian objects and indiscriminate attacks, and acts that may amount to war crimes including murder, torture, cruel or inhuman treatment, and outrages upon personal dignity, denial of fair trial, hostage-taking, and enlisting children under the age of 15 or using them to participate actively in hostilities.<sup>97</sup>

Common Article 3 to the 1949 Geneva Conventions applies in situations like that in Yemen of non-international armed conflict. Common Article 3 establishes fundamental rules from which no derogation is permitted. It requires humane treatment for all persons in enemy hands, without any adverse distinction. It specifically prohibits murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and the carrying out of executions.

Notwithstanding these absolute prohibitions to which all the parties,

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<sup>95</sup> UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, §§ 40–42.

<sup>96</sup> UN Human Rights Council, Report of the Group of Experts on Yemen, August 2019, § 96

<sup>97</sup> *Ibid* § 96.

including non-state armed groups, are bound, and which also form part of international customary law applicable to armed conflicts, investigations by the Group of Experts confirmed widespread arbitrary detention throughout the country, and ill-treatment and torture in some facilities.<sup>98</sup> Detainees have been subjected to torture and other cruel treatment in facilities such as those at Al Rayyan and Bureiqa (controlled by the UAE); the 7 October facility in Abyan, Lahij Central Prison and Al Mansoura Prison (controlled by Security Belt Forces); and Ma'rib Political Security (controlled by the government).<sup>99</sup> As explained below, such acts not only constitute a pattern of serious violations of IHL but also gross and systematic violations of IHRL. The role of Houthi forces in detention-related abuses, including torture and hostage-taking, has been documented in detail in a Human Rights Watch report.<sup>100</sup>

The Group of Experts also received substantial information indicating that the government of Yemen, the coalition-backed forces and the Houthi-Saleh forces have all conscripted or enlisted children into armed forces or groups and used them to participate actively in hostilities. In most cases, the children were between the ages of 11 and 17 years, but there have been consistent reports of the recruitment or use of children as young as eight years old.<sup>101</sup>

States authorizing the export of arms and military equipment to the Saudi-UAE coalition have been made increasingly aware through detailed reports by UN and other experts, both at the time of those export authorizations and throughout the transfers and subsequent sales, that the armed forces of Yemen and Saudi-UAE coalition governments were using and would continue to use such arms and equipment to facilitate serious violations of

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98 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, § 65.

99 *Ibid.*, § 70.

100 See, e.g., Human Rights Watch, 'Yemen: Houthi Hostage-Taking', 25 September 2018, <https://www.hrw.org/news/2018/09/25/yemen-houthi-hostage-taking>. See, on coalition attacks on Yemeni fishermen, Human Rights Watch, 'Yemen: Coalition Warships Attack Fishing Boats', 21 August 2019, <https://www.hrw.org/news/2019/08/21/yemen-coalition-warships-attack-fishing-boats>. See also Mwatana for Human Rights, 'Withering Life: Human Rights Situation in Yemen 2018', <http://mwatana.org/en/withering-life2018/>.

101 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, § 96.

the Geneva Conventions and of IHRL.<sup>102</sup> The arms-supplying States have also been aware through reports of the diversion by those armed forces of small arms, light weapons, their ammunition and other military equipment to armed groups that are involved in such violations.<sup>103</sup> Such transfers cannot be justified by the fact that adversaries such as the Houthi armed forces and their allies are also committing serious violations of IHL and IHRL, and receiving some of their arms in breach of the UN arms embargo.

### **3. Violations of International Humanitarian Law Resulting from the Blockade of Yemen**

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In relation to the blockade of Yemen and its effect on the delivery of humanitarian aid to its population, in addition to hindering the entry of food, medicines and fuel supplies resulting from the bombing of Hudaydah seaport in August 2015, as well as subsequent restrictions on imports by the coalition forces,<sup>104</sup> the UN Group of Experts on Yemen found that:

The coalition has imposed severe naval and air restrictions in Yemen, to varying degrees, since March 2015, citing the arms embargo provisions of Security Council resolution 2216 (2015). Prior to the conflict, Yemen imported nearly 90 per cent of its food, medical supplies and fuel. These de facto blockades have had widespread and

102 See for example the Legal Opinion by Philippe Sands QC, Andrew Clapham, and Blinne Ní Ghrálaigh: 'The Lawfulness of the Authorisation by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the Context of Saudi Arabia's Military Intervention in Yemen', Matrix Chambers, London, 11 December 2015, [https://www.amnesty.org.uk/files/webfm/Documents/issues/legal\\_opinion\\_on\\_saudi\\_arms\\_exports\\_16\\_december\\_2015\\_correction.pdf](https://www.amnesty.org.uk/files/webfm/Documents/issues/legal_opinion_on_saudi_arms_exports_16_december_2015_correction.pdf), para. 11. Professors Sands, Clapham and Ni Ghralaigh find that the UK government is in breach of national, EU and international law and policy for failing to suspend such transfers and any further authorization for arms exports to Saudi Arabia "in circumstances where such weapons are capable of being used in the conflict in Yemen, including to support its blockade of Yemeni territory". See also Oona Hathaway et al., 'Is the US Breaking the Law?', *Harvard Journal of National Security* 10(2) (2019), p. 66.

103 Rod Austin, 'Yemen: inquiry finds Saudis diverting arms to factions loyal to their cause', *The Guardian*, 28 November 2018, <https://www.theguardian.com/global-development/2018/nov/28/arms-yemen-militia-were-supplied-by-west-find-analysts>.

104 Human Rights Watch, 'Yemen: Coalition's Blocking Aid, Fuel Endangers Civilians', 27 September 2017 <https://www.hrw.org/news/2017/09/27/yemen-coalitions-blocking-aid-fuel-endangers-civilians>.

devastating effects on the civilian population, in particular in the areas controlled by the de facto authorities. ...

On 6 November 2017, in response to missiles fired at Saudi Arabia by Houthi forces, the coalition imposed a total blockade on all the borders of Yemen, preventing all humanitarian aid and commercial trade, including food and fuel, from entering the country. After the coalition announced that it would allow urgent humanitarian and relief materials to enter, the first shipments of food reached Hudaydah on 26 November. The first vessel containing fuel entered on 22 December. In April 2018, the coalition announced that all ports were reopened; however, as of June 2018, restrictions remain....

As of April 2018, nearly 17.8 million people were food insecure and 8.4 million were on the brink of famine. Health-care facilities were not functioning, clean water was less accessible and Yemen was still suffering from the largest outbreak of cholera in recent history.

... Moreover, in the three years that the naval restrictions have been in place, no searches by either the United Nations Verification and Inspection Mechanism or coalition forces have discovered weapons....

... [There are reasonable grounds to believe that these naval and air restrictions are imposed in violation of international human rights law and international humanitarian law... The Government and the member States of the coalition must also allow and facilitate rapid and unimpeded passage of humanitarian relief. Given the severe humanitarian impact that the de facto blockades have had on the civilian population and in the absence of any verifiable military impact, they constitute a violation of the proportionality rule of international humanitarian law.<sup>105</sup>

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105 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, §§ 47, 49, 53 and 58. See also 'Yemen on the brink of "world's worst famine in 100 years" if war continues', *The Guardian*, 15 October 2018.

The Group of Experts is right to conclude that the blockade imposed on Yemen by the coalition violates IHL, in particular article 14 of the Protocol II which provides that “[s]tarvation of civilians as a method of combat is prohibited” and that “[i]t is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”. The blockade is also a violation of Rule 53 of the Customary IHL Study of the International Committee of the Red Cross (ICRC) applicable to our case, which “prohibits the use of famine against civilians as a method of warfare”, including when such dire conditions result from the draconian character of the restrictions imposed on life-saving goods for the population.

Furthermore, the ICRC is of the view that the “starvation of civilians”, when committed in an international or a non-international armed conflict, is a war crime<sup>106</sup>. The International Criminal Court has only been given jurisdiction on such a crime when it occurs in the context of an international armed conflict (Statute of the International Criminal Court, Article 8, § 2, b, xxv). Yet, the substantive rules of the Statute are an expression of international custom,<sup>107</sup> and are part of a number of States’ domestic laws.<sup>108</sup> Even if this blockade were to be directed against the Houthi forces and not against the civilian population as such, it nevertheless directly affects the civilian population and, as the above-mentioned report of the Group of Experts points out, its effects on this population are foreseeable and disproportionate to the military objectives ostensibly being pursued by this blockade.

Of equal concern, in calling for the silencing of guns and unimpeded access for humanitarian aid to reach the civilian population, the UN Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator also stated that in the first half of 2018, the Houthi Ansar Allah-affiliated authorities in Yemen had prevented or delayed 55 United Nations field

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106 See ICRC, Practice Relating to Rule 53. Starvation as a Method of Warfare, Customary IHL Database [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter17\\_rule53](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter17_rule53)

107 International Criminal Tribunal for the former Yugoslavia (ICTY), Case IT-95-17/1-T, *Furudzija*, 10 December 1998, § 227. See also Case IT-94-1-A, *Tadic*, 15 July 1999, § 223.

108 Practice Relating to Rule 53. Starvation as a Method of Warfare, ICRC Customary IHL Study, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule53](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule53).

missions, and the World Food Programme Executive Director expressed alarm that food was being diverted in areas controlled by Ansar Allah.<sup>109</sup> From late 2018 until May 2019 the Houthi forces blocked access to grain stored at the Red Sea Mills that could feed 3.7 million people per month.<sup>110</sup>

## B. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW

The facts set out above, namely the aerial bombing that has deliberately or recklessly targeted civilians, the blockade of Yemen impeding the delivery of humanitarian aid, and the actions of armed units during ground operations, constitute serious violations not only of IHL, but also of IHRL.

The UN Group of Experts reported in August 2018 that it has “reasonable grounds to believe that the Governments of Yemen, the United Arab Emirates and Saudi Arabia are responsible for human rights violations, including enforced disappearances. As most of these violations appear to be conflict related, they may amount to the following war crimes: rape, degrading and cruel treatment, torture and outrages upon personal dignity.”<sup>111</sup> The UN Group of Experts found that:

In most cases, detainees were not informed of the reasons for their arrest, were not charged, were denied access to lawyers or a judge and were held incommunicado for prolonged or indefinite periods. Some remain missing. Parties to the conflict are using undeclared detention facilities in an apparent, and if confirmed unlawful, attempt to put detainees outside the reach of the law... Reports indicate poor material conditions and grossly inadequate medical care for detainees. The Group has also received allegations of deaths in custody.<sup>112</sup>

109 UN Security Council, *op. cit.* SC/13845, 17 June 2019. See also Mwatana annual report documenting about 70 cases of aid obstruction, with Houthis responsible for about 60, Mwatana 2018, *op. cit.* <http://mwatana.org/en/withering-life2018/>.

110 UN Human Rights Council, Report of the Group of Experts on Yemen, 9 August 2019, § 16.

111 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, § 73.

112 *Ibid.*, §§ 65 and 66.

Again in their August 2019 report, the UN Group concluded that they had “reasonable grounds to believe that the Governments of Yemen, and the United Arab Emirates and Saudi Arabia to the extent they have control, are responsible for human rights violations, including arbitrary deprivation of the right to life, enforced disappearances, arbitrary detention, rape and other forms of sexual violence, torture, ill-treatment and child recruitment, and violations of fundamental freedoms, and economic, social and cultural rights.”<sup>113</sup> The UN Group also stated it had reasonable grounds to believe that the Houthi authorities were responsible for “human rights violations in the areas over which they exercise effective control, including arbitrary deprivation of the right to life, arbitrary detention, enforced disappearances, sexual violence, torture, ill-treatment and child recruitment, and violations of fundamental freedoms, and economic, social and cultural rights.”<sup>114</sup>

The capacity of Yemen’s state institutions to protect even the most fundamental human rights of the population has been systematically undermined, inter alia by its inability to control many parts of Yemen, including the movement of goods and persons from key entry ports. The UN Panel of Experts reported in January 2018 that Yemen, as a State, has all but ceased to exist and has been replaced by warring statelets, and that no one side has either the political support or the military strength to reunite the country.<sup>115</sup> The Saudi-backed government in Yemen has continued to merge popular resistance forces into the army, including Abu al-Abbas Brigades, which became part of the Armoured Brigade 35 in Ta’izz where much fighting has taken place with significant civilian casualties. Although the government of Yemen rejected the Panel’s analysis, it nevertheless admitted that the UAE has established control across southern Yemen, both by its direct action and through its proxy forces, namely the Security Belt Forces, the Hadrami Elite Forces and the Shabwani Elite Forces, despite resistance from President Hadi, who has

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113 UN Human Rights Council, Report of the Group of Experts on Yemen, 9 August 2019, § 94.

114 Ibid, § 95.

115 UN Security Council, Report of the UN Panel of Experts on Yemen, UN Doc. S/2018/68, January 2018, introductory summary.



disavowed those forces.<sup>116</sup>

Coalition-backed forces have been empowered to fill the void left by the defunct criminal justice system, resulting in widespread arbitrary detention. “Hundreds of individuals have been detained for perceived opposition to the Government or to the United Arab Emirates” including students, human rights defenders, journalists and supporters of political parties.<sup>117</sup> The Group of Experts also reported a proliferation of sexual violence since September 2014, including rape of adult male detainees, committed by UAE personnel, while children under the age of 15 have been militarily conscripted and used in hostilities.<sup>118</sup> Human rights defenders have faced relentless harassment, threats and smear campaigns from the government, coalition forces, including those of Saudi Arabia and the UAE, and the de facto authorities, while women human rights defenders, journalists and activists have faced specific repression on the basis of gender.<sup>119</sup> The parties to the Yemen conflict have impeded access to areas under their control by international media and independent human rights monitoring organizations, censored television, blocked websites, banned newspapers and raided media offices.<sup>120</sup>

In the context of the ongoing hostilities, the government of Yemen and its Saudi Arabian, UAE and other allies must respect the human rights of the Yemeni population as part of its obligations under IHRL which during armed conflict co-applies alongside IHL under certain conditions. The general relationship between IHRL and IHL obligations was addressed in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, whereby the International Court of Justice clearly affirmed the application of IHRL in times of conflict, while also specifying that it was applicable in the exercise by States of their effective control over persons outside their own territory:

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116 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, § 20, citing Observations of the Government of Yemen concerning the report dated 26 January 2018 of the Panel of Experts on Yemen of the Security Council Committee established pursuant to resolution 2140 (2014), p. 4.

117 *Ibid.*, §§ 68 and 76.

118 *Ibid.*, §§ 71, 86, 87, 95–8.

119 *Ibid.*, §§ 81 and 82.

120 *Ibid.*, §§ 84 and 85.

The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In this Advisory Opinion the Court found that:

“...the protection afforded by human rights conventions does not cease in the case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” (*I.C.J. Reports 2004*, p. 178, para. 106.)

It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”, particularly in occupied territories (*ibid.*, pp. 178-181, paras. 107-113).<sup>121</sup>

The European Court of Human Rights (ECtHR) has advanced a further test for establishing IHRL jurisdiction of a foreign power besides the “control of an area” test: it has been described as the “state agent authority and control” test, which applies “whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 [of the European Convention] to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual”.<sup>122</sup>

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121 ICJ Reports, 2005, pp. 242-3, § 216.

122 ECtHR, *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07, Judgment of 7 July 2011, para. 137.

The “state agent authority and control” test creates obligations only with regard to the rights “that are relevant to the situation of that individual”, whereas under the “effective control over an area” test the controlling State has the responsibility to secure “the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified” and would be “liable for any violations of those rights”.<sup>123</sup>

Hence, the armed forces of Yemen and the Saudi-UAE coalition militarily involved in ground operations in Yemen have both negative and positive obligations to respect the human rights of the population in their control. For example, in relation to the UAE forces operating in Yemen, the UN Panel of Experts concluded that:

The primary legal justification for the UAE’s involvement in the armed conflict in Yemen is based on the invitation issued by the legitimate Government of Yemen. The UAE’s obligations are analysed herein under both IHL and IHRL regimes, *as both are binding on the UAE in respect of its obligations in Yemen*. Under IHL and/or IHRL and norms, the following are prohibited at all times: arbitrary arrest and deprivation of liberty of individuals, non-adherence to certain due process rights, violence to life and person, torture and ill treatment, sexual violence, outrages upon personal dignity, and threats to commit the above acts, and enforced disappearances. [emphasis added]<sup>124</sup>

States authorizing the supply of arms to Yemen and the Saudi-UAE coalition militarily involved in Yemen have been aware that those forces must respect the rights guaranteed by IHRL, whether these rights are codified in an international treaty to which that State is a party, or are

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123 *Ibid.*, para. 138. See also, on the use of the functional approach by other regional and universal treaty practice and domestic case law: IACHR, Report N° 112/10, Inter-State petition IP-02, *Franklin Guillermo Aisalla Molina, Ecuador v Colombia*, Admissibility, 21 October 2010, OEA/Ser.L/V/II.140, Doc. 10, para 100; *The Queen (On the Application of Mazin Mumaa Galteh Al-Skeini and Others) v The Secretary of State for Defence*, Court of Appeal (Civil Division), 21 December 2005, para 197 (Lord Justice Sedely).

124 UN Security Council, Report of the UN Panel of Experts on Yemen, UN Doc. S/2018/68, January 2018, Annex 62: section II, § 3.

applicable as part of customary international law.<sup>125</sup>

## **1. Violations of Customary International Law Norms on Human Rights**

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Saudi Arabia, the UAE and other members of the coalition militarily involved in Yemen are bound by the customary norms codified in the Universal Declaration of Human Rights (UDHR) of 10 December 1948 and adopted by the UN General Assembly and now considered customary.<sup>126</sup> And although Saudi Arabia, the UAE some other members of the coalition militarily involved in Yemen have not ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the fundamental guarantees enshrined in these treaties are part of customary international law and as such are binding on the parties.

Those customary law standards include the non-derogable rights, listed in Article 4 of the ICCPR, considered so important that they cannot be suspended under any circumstances, even during states of emergency and armed conflict. Such rights are related but are not identical to those international legal norms considered in the eyes of most States to enjoy preemptory status (*jus cogens*), as defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties. *Peremptory norms also differ from international crimes which give rise to individual criminal responsibility for crimes against humanity.*<sup>127</sup> The UN Human Rights Committee has included arbitrary deprivations of life, torture and inhuman or degrading treatment, taking of hostages, imposing collective punishments, arbitrary

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<sup>125</sup> See also, on extraterritorial jurisdiction based on causality through “reasonability” and due diligence: Cedric Ryngaert, ‘Jurisdiction: Towards a Reasonableness Test’ in M Langford et al. (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP 2013), 192–211; A Berkes, ‘Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights’, in: *Research Handbook on Human Rights and Investment*, Y Radi (ed) (2019 E Elgar), Forthcoming, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3120800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120800).

<sup>126</sup> See, e.g., Éric David, *Droit des organisations internationales*, Bruxelles, Bruylant, 2016, § 3.2.43.

<sup>127</sup> Crimes against humanity are defined, for jurisdictional purposes, in the Rome Statute of the International Criminal Court of 17 July 1998.

deprivations of liberty, and deviating from fundamental guarantees of fair trial, including the presumption of innocence, as core non-derogable rules, some of which enjoy peremptory status, which must be respected during states of emergency.<sup>128</sup> According to the reports on Yemen by the UN Office of the High Commissioner for Human Rights (OHCHR), the parties to the conflict and the Hadi government authorities in Yemen have repeatedly committed serious violations of customary IHRL.

## **2. Violations of International Human Rights Treaty Law**

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Other IHRL obligations found in the specialized human rights treaties have also been seriously violated by the parties to the conflict in Yemen. Yemen, Saudi Arabia, the UAE and other members of the coalition militarily involved in Yemen have ratified some of these treaties. This further body of IHRL rules is therefore of relevance for States making decisions regarding the supply of arms.

States in the Saudi-UAE coalition are all State parties to the UN Convention on the Rights of the Child (CRC). That Convention does not include a derogation clause, and according to Article 38 of the Convention, remains applicable in situations of armed conflict. The facts set out in Part I-A of this opinion reveal violations of several fundamental rights, including:

- The inherent right to life of every child (CRC, Article 6);
- Right of children not to be separated from their parents against their will (CRC, Article 9 § 1);
- Right of the child to the enjoyment of the highest attainable standard of health (CRC, Article 24 § 1);
- Right of every child to a standard of living adequate for his or her physical, mental, spiritual, moral and social development (CRC, Article 27);
- Right to education (CRC, Article 28 § 1).

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<sup>128</sup> United Nations Human Rights Committee, General Comment No. 29, Article 4: Derogations during a state of emergency (2001). Reproduced in. UN Doc. HRI/GEN/1/Rev.9, (Vol. I), 27 May 2008.

A number of the Saudi-UAE coalition States are also parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Credible investigations by UN experts and reputable non-governmental organizations that investigate international law violations perpetrated in armed conflicts have made serious allegations that the military units of the Saudi-UAE coalition and the Yemen government and their allied militias, as well as de facto opposition authorities and armed groups, have violated key provisions of that Convention during 'Operation Restore Hope'. As concluded by the Human Rights Council Group of Experts on Yemen:

In violation of the absolute prohibition of torture and cruel or inhuman treatment, detainees have been beaten, electrocuted, suspended upside down or drowned during interrogation while blindfolded or handcuffed, and placed in solitary confinement for prolonged periods. They were also threatened with violence against their families.<sup>129</sup>

Credible reports also reveal systematic failings by the authorities of Yemen and the coalition States involved in the conflict in Yemen that most certainly amount to violations of this Convention:

The obligation to take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction (CAT, Article 2);

Finally, Yemen and the members of the Saudi-UAE coalition militarily involved in Yemen are also parties to the Arab Charter on Human Rights

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<sup>129</sup> UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, § 66. See also Amnesty International 'Yemen: "God only knows if he's alive": Enforced disappearance and detention violations in southern Yemen, Index: MDE 31/8682/2018, July 2018, <https://www.amnesty.org/en/documents/mde31/8682/2018/en/>; Radio France International (RFI), 'Yémen: un rapport d'Amnesty accuse les Emirats arabes unis de "crimes de guerre" (Yemen: Amnesty International report accuses the United Arab Emirates of "war crimes")', 12 July 2018, <http://www.rfi.fr/moyen-orient/20180712-yemen-eau-emirats-arabes-unis-coalition-crimes-guerre-torture-ai-amnesty-inter>.

(ACHR), and have also *violated many of its key provisions, including non-derogable ones*,<sup>130</sup> through their actions in the context of the Yemen conflict, including:

- The inherent right to life of every human person (ACHR Article 5 § 1) and the right not to be arbitrarily deprived of life (ACHR Article 5 § 2);
- Prohibition of mental or physical torture and any cruel, degrading, humiliating or inhuman treatment (Article 8);
- Right to liberty and security of the person (ACHR Article 14 § 1);
- Right to an adequate standard of living for the individual and their family, which ensures their well-being and a decent life, including food, clothing, housing and services, and the right to a healthy environment (ACHR Article 38);
- Right of every member of society to the enjoyment of the highest attainable standard of physical and mental health (ACHR Article 39).

It bears noting that Yemen is a State party to nine of the 13 core international human rights treaties. Yemen maintains primary responsibility under IHRL to respect and protect human rights, i.e. to prevent and repress human rights violations committed by other actors in its territory insofar as possible within the limits of its control.<sup>131</sup> These are the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child and the Optional Protocols

<sup>130</sup> Arab Charter on Human Rights, Article 4(2): eg fundamental principles of fair trial, presumption of innocence, prohibition of torture.

<sup>131</sup> UN OHCHR, Ratification Status for Yemen, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=193&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=193&Lang=EN). See e.g. Eg CRC, Concluding observations on the report submitted by Yemen under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, UN Doc. CRC/C/OPAC/YEM/CO/1 (26 February 2014), paras 25, 28.

thereto on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, the Convention on the Rights of Persons with Disabilities and the Convention relating to the Status of Refugees and the Protocol thereto.

There have also been other reports alleging that Yemen's armed forces, security services and judiciary have committed serious violations of fundamental human rights codified in these treaties.<sup>132</sup> This is of relevance for decisions to supply arms to Yemen in order to avoid contributing to those violations, as outlined in Part III below.

For example, the UK government has stated that, in addition to the human rights abuses and violations carried out by all parties to the conflict leading to civilian casualties, it is deeply concerned by both the Yemen government's and the Houthi forces' actions having the effect of "persecution on the grounds of religion or belief, and restrictions on freedom of speech and association. Women's rights have been affected, as has access to education for girls, and children continue to be recruited to fight in Yemen", and it has called on the government and all parties "to immediately cease arbitrary arrests and detention, enforced disappearance, torture and ill-treatment, and ensure detainees are treated in accordance with international law and norms."<sup>133</sup> The United States called *inter alia* on the Yemen government to "bring detention centres under unified, national government control, prevent abuse of detainees, and allow for investigations and prosecutions of allegations of abuse."<sup>134</sup>

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132 See, e.g., UN Human Rights Council, Summary of Stakeholders' Submissions on Yemen: Report of the Office of the UN High Commissioner for Human Rights, UN Doc. A/HRC/WG.6/32/YEM/3, 6 November 2018.

133 United Kingdom Mission to Geneva, Statement at the Universal Periodic Review 32 on human rights abuses in Yemen, 23 January 2019, <https://www.gov.uk/government/news/universal-periodic-review-32-yemen>.

134 United States of America recommendation reported in Human Rights Council, Report of the Working Group on the Universal Periodic Review, UN Doc. A/HRC/41/9, 17 April 2019.



## **PART III**

# **International Legal Obligations of Arms Supplying States**

## A. OBLIGATIONS PURSUANT TO THE INTERNATIONAL LAW ON STATE RESPONSIBILITY

Under international customary law States that violate international law incur international responsibility, and so do States that are found to have significantly contributed to the violations committed by another State by way of aiding or assisting that State, including by knowingly providing those state actors (or non-state actors where relevant) with arms and other means to continue to do so. In the context of the armed conflict in Yemen, this rule has both a negative aspect in the form of the obligation not to act in a particular manner, and a positive aspect in the form of an obligation to follow certain actions. These include at least three possible grounds under the international law of State responsibility that can apply cumulatively or in the alternative.

### ***1. Obligation Pursuant to Article 16 of the Articles on State Responsibility***

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The Articles on Responsibility of States for Internationally Wrongful Acts, prepared by the International Law Commission (ILC) and adopted by the UN General Assembly in 2001, contain the following rule:

#### **Article 16**

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:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.

Under this rule, a State that aids or assists another State to facilitate or further its violations of international law is itself committing a violation of international law. The ILC's commentary to this article states that "the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act", while making clear that "[there] is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act". It further states that the phrase with "knowledge of the circumstances of the internationally wrongful act" means that the responsibility of the assisting State is not engaged if the assisting or aiding State is "unaware of the purpose for which its assistance is intended to be used by" the other State.<sup>135</sup>

In the modern digital age, few assisting States can reasonably hide behind ignorance when credible and extensive information is widely and readily available from a multiplicity of sources including UN fact-finding bodies. It is usually the case that arms-exporting States do not actually intend, and certainly would not readily admit they intend, to help facilitate serious violations of IHL and IHRL by supplying arms to the end users. However, when facts are generally available indicating that the potential importing State involved in an armed conflict and accused of using force to commit human rights violations has recently been using arms similar to those under consideration for export, that should indicate to the potential exporting State that it must first closely examine the nature of the importing State's conduct before reaching a decision to export the arms. If the items that are being considered for transfer are similar in function to those used to repeatedly commit or facilitate serious violations of IHL or IHRL by the potential recipient armed forces, then without effective measures to redress the source of such violations and punish their perpetrators, in our view further transfers necessarily give rise to the international responsibility of arms exporting States for complicity.

Legal experts generally agree that the knowledge test can be met when a State considering aid or assistance to another State has either actual or almost certain knowledge or awareness, inferred from relevant facts

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<sup>135</sup> ILC Commentary to Article 16, 2001, in International Law Commission, Report on the work of the 53<sup>rd</sup> session, 2001, UN Doc. A/56/10, Chapter 4, State Responsibility, Commentary to Article 16, p. 66. [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

*and circumstances, that an internationally unlawful act entailed by its assistance would result. The obligation to inquire, discover and possess relevant knowledge of the foreseeable consequences, which is a part of the procedural obligations incumbent on States in the arms export licensing process, gives rise to a presumption of construed knowledge of what that State not only had the ability to know, but indeed also bore an obligation to make sure it knows. This view is based on the leading international jurisprudence and the works of leading publicists in international law. The most recent expert consultation on the subject of aiding and abetting and the law of State responsibility at Chatham House reached a similar conclusion; namely, that intent is satisfied by “knowledge or virtual certainty that the recipient State will use the assistance unlawfully”.<sup>136</sup> The prevailing State practice shows that “knowledge or virtual certainty that the recipient State will use the assistance unlawfully is capable of satisfying the intent element under Article 16, whatever its desire or purpose.”<sup>137</sup>*

In the case of Yemen-related arms transfers, while arms supplying States are unlikely to have authorised their exports with a view to intentionally facilitate attacks by Saudi Arabia, the UAE and coalition members that cause grave harm to civilians and civilian objects, the lawfulness of such export authorisations can be rebutted by demonstrating that the exporting States’ had prior knowledge of the pattern of persistent and serious breaches and alleged breaches of international law perpetrated by the coalition using similar weapons and munitions. It can be shown that the supplying States were aware, or at least should reasonably have been aware, that by providing similar arms and munitions to the alleged perpetrators the supplies would contribute further to such violations and therefore should have been refused. As the above-mentioned credible reports of persistent and serious violations of IHL and IHRL by members of the armed forces of Yemen and the Saudi-UAE coalition show, especially since March 2015, their armed forces operating in Yemen will almost certainly use any supplies of aircraft, aerial munitions, armoured vehicles and other weapons to conduct presumptively unlawful attacks that are indiscriminate or disproportionate and cause grave harm to civilians and

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136 Harriet Moynihan, ‘Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism’, Chatham House Research paper, November 2016. See also Aust, 2011, *op cit*.

137 Moynihan, *ibid.*, § 70.

civilian objects, and to facilitate gross violations of human rights, including by diverting arms to Yemeni irregular units and rebel fighters. Saudi Arabia and the UAE's long-standing practice of conducting such unlawful attacks and perpetrating such violations should clearly signal to supplying States that if and when they authorize such exports, they are almost certainly providing the means to carry out those serious violations of IHL and IHRL. The same customary law requires Iran to cease its supply of arms to the Houthi forces as long as those forces continue to commit serious violations of IHL and IHRL.

Already in 2010, the US government was aware that Saudi Arabian aircraft had carried out indiscriminate attacks and other violations of IHL that resulted in deaths of Yemeni civilians. For example, secret US embassy cables taken from a cache of 250,000 cables leaked to *The Guardian* by whistle-blowers' website WikiLeaks included details about the US Ambassador's meeting with Saudi Arabia's Assistant Minister of Defence and Aviation, Prince Khaled bin Sultan. The purpose of the meeting was to relay the US government's concerns about sharing imagery with Saudi Arabia in light of evidence that Saudi aircraft may have struck civilian targets during fighting with the Houthis in northern Yemen. The minutes of the meeting are worth quoting at length:

Ambassador Smith delivered points in reftel to Prince Khaled on February 6, 2010. The Ambassador highlighted USG concerns about providing Saudi Arabia with satellite imagery of the Yemen border area absent greater certainty that Saudi Arabia was and would remain fully in compliance with the laws of armed conflict during the conduct of military operations, particularly regarding attacks on civilian targets. The Ambassador noted the USG's specific concern about an apparent Saudi air strike on a building that the U.S. believed to be a Yemeni medical clinic. The Ambassador showed Prince Khaled a satellite image of the bomb-damaged building in question....

Prince Khaled, in addressing the Ambassador's concerns about possible targeting of civilian sites appeared neither defensive nor evasive. He was unequivocal in his assurance that Saudi military operations had been and would continue to be conducted with priority to avoiding civilian casualties. The Ambassador found this assurance credible, all the more so in light of Prince Khaled's acknowledgment that mistakes likely happened during the strikes against Houthi targets, of the inability of the Saudi Air Force to operate with adequate precision, and the unreliability of Yemeni targeting recommendations. *Based on these assurances, the Ambassador has approved, as authorized in refTel, the provision of USG imagery of the Yemeni border area to the Saudi Government. While the fighting with the Houthis appears to be drawing to a close, the imagery will be of continuing value to the Saudi military to monitor and prevent Houthi incursions across the border as well as enhancing Saudi capabilities against Al-Qaeda activities in this area.*<sup>138</sup> (emphasis added)

The US government's full recognition, or at least tacit awareness already in February 2010, of the Saudi air force's inability to operate with "adequate precision" and the "unreliability of Yemeni targeting" did not prevent it from continuing to authorize arms exports. Further US arms export authorizations were not based upon evidence that the necessary changes to Saudi targeting practices had been made to be compliant with IHL. Speaking to the US House of Representatives subcommittee on the Middle East, North Africa and international terrorism in March 2019, two former US officials said they realized as far back as 2016 that senior Saudi and UAE leaders were not interested in reducing civilian deaths in Yemen.<sup>139</sup> Another senior advisor on US military assistance recounted that "in light of continued concerns about problematic

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138 'US embassy cables: Saudi defence minister explains targeting of Yemeni rebels with air strikes', *The Guardian*, 8 April 2011, <https://www.theguardian.com/world/2011/apr/08/saudi-arabia-yemen-ali-mohsen>.

139 US House of Representatives Sub-Committee Hearing: The Humanitarian Crisis in Yemen: testimony of Dafna Rand, ex-deputy assistant secretary of state, and Jeremy Konyndyk, former director of the Office of US Foreign Disaster Assistance, 6 March 2019. <https://foreignaffairs.house.gov/2019/3/the-humanitarian-crisis-in-yemen-addressing-current-political-and-humanitarian-challenges>.

strikes and US legal and moral culpability, in September 2016, the State Department decided to discontinue its technical advising to the coalition on civilian harm mitigation...[and] ... US support to the Saudi-led coalition in 2017 and 2018 to improve conduct was reduced in scale compared to previous efforts” despite evidence that Saudi ‘dynamic’ air strikes were non-compliant with ‘no strike list’ procedures.<sup>140</sup>

In June 2017, American officials “extracted new promises of safeguards, including stricter rules of engagement and an expansion of the no-strike list to about 33,000 targets”, which reportedly allowed the US Secretary of State to sell precision-guided munitions to Saudi Arabia amounting to more than \$510 million.<sup>141</sup> Just over a year later, in August 2018, US officials realized that those measures seemed to make little difference, when a coalition air strike killed at least 40 boys on a packed school bus in northern Yemen.<sup>142</sup>

A former senior State Department official reportedly said that the United States had access to records of every airstrike over Yemen since the early days of the war, including the warplane and munitions used.<sup>143</sup> US efforts to advise the Saudis on how to protect civilians did not amount to much: the Saudis whitewashed an US-sponsored initiative to investigate errant airstrikes and often ignored a voluminous no-strike list.<sup>144</sup> “In the end, we concluded that they were just not willing to listen”, said Tom Malinowski, a former Assistant Secretary of State and an incoming member of Congress from New Jersey. “They were given specific coordinates of targets that should not be struck and they continued to strike them. That

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140 Larry Lewis, ‘Promoting Civilian Protection during Security Assistance: Learning from Yemen’, CAN, May 2019, pp. 9-17 [https://www.cna.org/CNA\\_files/PDF/IRM-2019-U-019749-Final.pdf](https://www.cna.org/CNA_files/PDF/IRM-2019-U-019749-Final.pdf)

141 Eric Schmitt, ‘Saudi Arabia Tries to Ease Concerns Over Civilian Deaths in Yemen’, *New York Times*, 14 June 2017, <https://www.nytimes.com/2017/06/14/world/middleeast/saudi-arabia-arms-training-yemen.html>

142 Declan Walsh, Eric Schmitt, ‘Arms Sales to Saudis Leave American Fingerprints on Yemen’s Carnage’, *New York Times*, 25 December 2018, <https://www.nytimes.com/2018/12/25/world/middleeast/yemen-us-saudi-civilian-war.html>. *Closer to the day of the attack that year HRW report that 26 children were killed and 19 were injured: HRW, Yemen: Coalition Bus Bombing Apparent War Crime, 2 September 2018, [hrw.org/news/2018/09/02/yemen-coalition-bus-bombing-apparent-war-crime](http://hrw.org/news/2018/09/02/yemen-coalition-bus-bombing-apparent-war-crime).*

143 *Ibid.*

144 *Ibid.*

struck me as a wilful disregard of advice they were getting.”<sup>145</sup>

The UK government submitted in the UK High Court in March 2016 that “...UK Liaison Officers located in KSA [Kingdom of Saudi Arabia] Air Operations Centre, Royal Saudi Air Force HQ and Ministry of Defence increase the flow of information between the UK and KSA to give the UK a better degree of insight into the KSA’s processes....The Defence Attache (British Embassy Riyadh) together with PJHQ [Permanent Joint Headquarters], and CASLO [Chief of Air Staff Liaison Officer] monitor and analyse targeting processes conducted by KSA.”<sup>146</sup>

Given that the UK shared a “planning cell” with the USA in Riyadh, since at least 2010, it is reasonable to assume that the UK government was equally aware of the unreliability of the targeting of aerial attacks. Up to August 2018, the UN Group of Experts reported that “[i]t received credible information that the no-strike list of protected objects was not being adequately shared within the coalition command chain”.<sup>147</sup> In March 2019, researchers for a UK television programme who interviewed several UK personnel who had been stationed in Riyadh confirmed that: “most air strikes are not directed by the Saudi Air Operations Centre, meaning targets are not always checked against ‘no strike lists’ of schools, hospitals and other civilian targets”.<sup>148</sup> The coalition is also known to not follow their own procedure in launching dynamic strikes, which have accounted for more than 80% of strikes.<sup>149</sup>

French government ministers had claimed that any French arms being used in the Yemen conflict were employed defensively but in April 2019, secret government documents detailing the use of French arms in the conflict

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145 *Ibid.*

146 UK High Court record cited by Mike Lewis and Katherine Templar, *op cit*, p 30;

147 UN Human Rights Council, Report of the Group of Experts on Yemen, August 2018, § 35.

148 ‘Britain’s Hidden War’, Channel 4 Dispatches, 1 April 2019, <https://www.channel4.com/press/news/britains-hidden-war-channel-4-dispatches>.

149 See, government submissions in the UK judicial review proceedings initiated by CAAT : <https://www.caat.org.uk/resources/countries/saudi-arabia/legal-2016/2017-02-03.defendant-skeleton.pdf>. See also on dynamic strikes: Larry Lewis, Promoting Civilian Protection during Security Assistance: Learning from Yemen (2019) [https://www.cna.org/CNA\\_files/PDF/IRM-2019-U-019749-Final.pdf](https://www.cna.org/CNA_files/PDF/IRM-2019-U-019749-Final.pdf).



in Yemen were leaked to a media outlet.<sup>150</sup> Leaked official documents, dated September 25, 2018, indicate that three French-supplied warships “participate” in the naval blockade on behalf of Saudi Arabia and its ally, the United Arab Emirates, alongside French-supplied helicopters.<sup>151</sup>

Even if it is obvious that the primary function of a transfer of arms is not the assistance to perpetration of serious violations of IHL and IHRL, the supply of arms could be a result of the arms-supplying State tacitly accepting and tolerating the violations by the end user. The result of such a transfer is that the arms supplying State comes to contribute, as a matter of international law, to such violations without it having to intend to do so. The tacit acceptance, tolerance or acquiescence of a supplying State are sufficient to show that it is indeed aware of the foreseeable consequences of its arm transfers, thus are sufficient to establish a causal link by way of proximity with the violations committed in the recipient State.<sup>152</sup>

The internal memorandum by UN Legal Counsel to the UN Mission in the Democratic Republic of the Congo (MONUC) on the Mission’s assistance to the Armed Forces of the Democratic Republic of the Congo (FARDC) is instructive in this regard:

If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law and if, despite MONUC’s intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such

150 Disclose, “La France et le Yémen: cartographie d’un mensonge d’Etat”, Mediapart, April 2019 ([https://www.mediapart.fr/journal/international/150419/la-france-et-le-yemen-cartographie-d-un-mensonge-d-etat?utm\\_content=buffer5e34b&utm\\_medium=social&utm\\_source=Facebook\\_Page&utm\\_campaign=CM](https://www.mediapart.fr/journal/international/150419/la-france-et-le-yemen-cartographie-d-un-mensonge-d-etat?utm_content=buffer5e34b&utm_medium=social&utm_source=Facebook_Page&utm_campaign=CM))

151 Disclose” Revelations: French warships’ participation in Yemen blockade, 17 September 2019, <https://disclose.ngo/en/article/french-made-ships-are-enforcing-blockade-starving-millions-yemeni-civilians>

152 This situation is a reminder of the criminal offence of concealment of a criminal act (French Criminal Code, art. 434-6; Belgian Criminal Code, art. 339): even if the intention of the concealer is not to commit the offence committed by the offender whom he is harbouring, the harbouring person is nevertheless criminally incriminated because the latter is considered by the criminal legislator as an assistance or encouragement to the offence committed by the person being harboured. This can sometimes go very far, as evidenced by the conviction of a doctor who has treated an injured offender following a criminal act”, see “Condamné pour avoir soigné”, dans Actualités du droit- le blog de Gilles devers <http://lesactualitesdudroit.20minutes-blogs.fr/tag/recel+de+malfaiteur>.

violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely. [...] MONUC may not lawfully provide logistic or “service” support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law. [...] This follows directly from the Organization’s obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.<sup>153</sup>

In other words, for MONUC to be held *ipso facto* responsible under the law on third-party responsibility it is not required to make any concrete contributions to the IHL and IHRL violations committed by FARDC, nor intend to contribute to such violations. The ILC therefore deemed it sufficient under the law of international responsibility that the international organisation or State possesses knowledge of the fact that it is helping an armed force that is at fault for committing such violations.<sup>154</sup>

This reasoning can be applied by analogy to an arms transfer from a State to a member of the Saudi-UAE coalition: an arms-supplying State may be absolutely unwilling to participate in the serious violations of IHL and IHRL being committed by coalition members; nevertheless in full knowledge of the foreseeable wrongful acts of the recipient State, the arms supplying State does in fact supply the means for the recipient State to continue committing such acts and thus directly violates its obligations under customary international law and the UN Charter.

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<sup>153</sup> The documents were published in the *New York Times*, 9 December 2009, [www.nytimes.com](http://www.nytimes.com); cited in Report of the International Law Commission, 63rd session, UN Doc. A/66/10, pp. 104–5.

<sup>154</sup> International Law Commission, Responsibility of International Organizations, in Report of the International Law Commission, *ibid.*, p. 54 (online : <http://legal.un.org/docs/?path=../ilc/reports/2011/english/chp5.pdf&lang=EFSRAC>).

## 2. Obligations Pursuant to Article 41 of the Articles on State Responsibility

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Article 41 of the Articles on State Responsibility pertains to cases of serious breaches of peremptory norms:

### Article 41

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

The ILC commentary has clarified that the term “serious breach” in this context means “a gross and systematic” failure by the responsible State to fulfil an obligation imposed by a peremptory norm, which in the case of Yemen includes the “intransgressible violations of IHL”<sup>155</sup> as well as the prohibition of torture. Article 41 does not require either the knowledge or intent of the third State to aid or assist the acts of the responsible State; incidental and unwitting assistance to such acts that carry aggravated responsibility gives rise to the international responsibility of the assisting State.<sup>156</sup>

While different from State responsibility, the aiding and abetting mode of liability under international criminal law is insightful. In the *Charles Taylor case*, the *Special Court for Sierra Leone* considered that by *delivering weapons to rebel movements that were committing atrocities*

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<sup>155</sup> As the Court said of the rules of international humanitarian law in the advisory opinion on the Legality of the Threat or Use of Nuclear Weapons (see footnote 54 above), p. 257, para. 79, “they constitute intransgressible principles of international customary law”. On the relationship between human rights and humanitarian law in time of armed conflict, see page 240, para. 25.

<sup>156</sup> Aust, 2011, *op. cit.*, p. 343. Moynihan, 2016, *op. cit.*, p. 22.

in Sierra Leone, Charles Taylor, then President of Liberia, was criminally responsible for “planning”, “aiding and abetting” and “encouraging” the crimes committed by the rebels.<sup>157</sup> This judgment significantly widened the international legal definition of aiding and abetting such crimes, and was cited by the US public prosecutor in a Guantánamo case filing as reflecting the current state of international law on aiding and abetting.<sup>158</sup> Just as Charles Taylor could not ignore the abuses committed by Sierra Leonean rebels to whom he delivered weapons, so too the governments and companies of the USA, the UK, France, Canada, Belgium and other countries that have transferred arms and related items to Saudi Arabia, the UAE and other members of the coalition militarily involved in Yemen cannot ignore the violations of IHL committed in Yemen by those armed forces. Specific reference to this 2013 appellate judgment was reportedly made in one of the emails exchanged by US officials in Washington about the legal risk that US military personnel could be subject to prosecution.<sup>159</sup>

Tom Malinowski, the senior human rights official at the State Department until January 2017, told the *Just Security* online blog that “There is a strong policy argument for suspending some sales, as President Obama did, until concerns about these kinds of incidents are resolved, and a possibility of legal jeopardy for U.S. officials if sales continue despite continuing evidence of violations of the laws of war”.<sup>160</sup> Non-aid and non-assistance is not just a policy option, but a binding, fundamental legal obligation of

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157 Special Court for Sierra Leone (SCSL), case SCSL-03-1-T, 26 April 2011, Judgment Summary, *Taylor*, §§ 149, 157, 165, 181.

158 Military Commissions Trial Judiciary Guantanamo Bay, Cuba, *USA v Khalid Sheikh Mohammad et al*, Government Supplemental Filing, 18 October 2013, <https://www.justsecurity.org/wp-content/uploads/2015/12/KSM-AE120B-Govt-Supp-Brief-10182013.pdf>. Whereas key differences exist between the standard for aiding and abetting by individuals under international criminal law and by States under general international law, aid/assistance is a conduct that actually facilitates the wrong, ie the commission of the wrongful act (eg ARSIWA Commentary, p. 66, para 3 (commentary of Art 16 ARSIWA)).

159 Warren Strobel, Jonathan Landay, ‘Exclusive: As Saudis bombed Yemen, U.S. worried about legal blowback’, Reuters, 9 October 2016, <https://www.reuters.com/article/us-usa-saudi-yemen/exclusive-as-saudis-bombed-yemen-u-s-worried-about-legal-blowback-idUSKCN12A0BQ>. See also Kristine Beckerle, ‘U.S. Officials Risk Complicity in War Crimes in Yemen’, *Just Security*, 4 March 2017, <https://www.justsecurity.org/40518/officials-risk-complicity-war-crimes-yemen/>.

160 Ryan Goodman, ‘Jared Kushner, the Arms Deal, and Alleged Saudi War Crimes’, *Just Security*, 20 May 2017 <https://www.justsecurity.org/41221/jared-kushner-arms-deal-alleged-saudi-war-crimes/>.

all States, with well-substantiated grounds for legal liability of non-state actors such as corporate officials, under international criminal law.

Article 41(2) of the Articles on the Responsibility of States demands that arms supplying States ensure that they are neither aiding or assisting, nor giving effect to such serious violations through their recognition as lawful either of which would contribute to the maintenance of the unlawful situation created by what is usually a systemic and institutional practice that brings about and perpetuates such wrongs.<sup>161</sup> Third States cannot use their defence cooperation agreements with such recipient States to justify arms transfers. Such bilateral agreements with Saudi-UAE coalition members should in fact be reviewed and adjusted to account for the supplying State's international obligation to ensure non-assistance and non-recognition of serious breaches of peremptory norms.

### ***3. Obligations to Ensure Respect for International Humanitarian Law and Promote Human Rights and Fundamental Freedoms***

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Selling weapons and munitions to a State that is openly and flagrantly committing persistent violations of IHL and IHRL, as have been perpetrated by the Saudi-UAE coalition, is not only an act of endorsement and encouragement of practices that violate fundamental rights, but also a violation of all High Contracting Parties' obligations under the Geneva Conventions to "ensure respect" for IHL and all States' obligations under the Charter of the United Nations to promote human rights and fundamental freedoms.

The legality of a transfer of arms therefore also needs to be assessed in light of the general rules that place obligations on States to respect, ensure respect for, and enforce IHL and IHRL. These rules include:

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<sup>161</sup> See on the maintenance of the unlawful situation (eg ARSIWA Commentary, p. 115, para 11 (commentary of Art 41 ARSIWA)).

### **Common Article 1 of the Geneva Conventions 1949**

“The High Contracting Parties undertake to respect and ensure respect for this Convention in all circumstances.”

### **Article 55 of the UN Charter 1945**

“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: ... c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Common Article 1 to the Geneva Conventions extends the State’s obligations beyond its territory to prevent and repress foreseeable breaches of the Conventions by private persons or other States over which a State exercises authority. The ICRC has held that ‘the obligation to ensure respect for IHL requires a State to take positive steps to prevent IHL violations where there is a certain degree of predictability that they will be committed, and to prevent further violations in case they have already occurred.’<sup>162</sup>

The term “promote” places positive obligations on States, which according to Article 56 of the Charter “pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.” The International Court of Justice has held that a State intervening militarily in another State, whether or not with the latter’s consent, is obligated under IHRL to “take measures to respect and ensure respect” for human rights and international humanitarian law.<sup>163</sup>

The Human Rights Committee’s General comment No. 36 on the right to life maintains that States

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<sup>162</sup> ICRC, GC I, Commentary of 2016, paras 150, 165-166. ‘International Humanitarian Law and the challenges of contemporary armed conflicts’, 32nd International Conference of the Red Cross and Red Crescent, 31 October 2015, pp. 54-55, <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>.

<sup>163</sup> Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, p. 280.

[...] must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction.<sup>164</sup>

A similar conclusion was reached by the Inter-American Court of Human Rights in its opinion on the Environment and Human Rights.<sup>165</sup>

Moreover, the 2005 World Summit Outcome Document reaffirmed that “the promotion and protection of the full enjoyment of all human rights and fundamental freedoms for all are essential to advance development, peace and security”, adding:

we resolve to promote gender equality and eliminate pervasive gender discrimination by ...

(f) Eliminating all forms of discrimination and violence against women and the girl child, including by ending impunity and ensuring the protection of civilians, in particular women and the girl child, during and after armed conflicts in accordance with the obligations of States under international humanitarian law and international human rights law;

We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy, and recognize that they are interlinked and mutually reinforcing...<sup>166</sup>

164 HRC, General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36 (30 October 2018), para 22.

165 State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights, Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para 104(h). See also, African Commission on Human and Peoples’ Rights, General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life (Article 4), 4 to 18 November 2015, Banjul, The Gambia, paras 14. 41.

166 UN General Assembly, Resolution 60/1, 2005 World Summit Outcome, adopted 16 September 2005, UN Doc. A/RES/60/1, §§ 12, 58 and 119.

## **B. OBLIGATIONS PURSUANT TO THE ARMS TRADE TREATY**

Authorizing the supply of military equipment to the armed forces of Yemen or to those of the Saudi-UAE coalition members knowing that the arms would almost certainly be used in Yemen to commit or facilitate serious violations of IHL or IHRL would give rise to the international responsibility of the supplying States for undertaking an unlawful transfer in breach of their obligations under the Arms Trade Treaty (ATT), in addition to their responsibilities for the different modes of complicity discussed above.

The obligation to cease and desist from any transfer of arms that would contribute to certain violations of international law is based on States' obligations under IHL and IHRL, as well as, more specifically, the relevant provisions of the ATT, including Articles 6 and 7, applicable to those States that are parties to the Treaty. Nine of the 10 largest arms-exporting States to Saudi Arabia, for the period between 2014 and 2018, have signed or ratified the ATT.

### ***1. Obligations Pursuant to Article 6 of the Arms Trade Treaty***

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Adopted on 2 April 2013 and having entered into force on 24 December 2014, the ATT aims to establish “the highest common standards possible for the purpose of regulating or improving the regulation of the international trade in conventional arms” for the purpose, inter alia, of “contributing to international and regional peace, security and stability [and] reducing human suffering.” The conventional arms covered by the treaty, as specified in Article 2(1), include battle tanks, armoured combat vehicles, large calibre artillery systems, combat aircraft, combat helicopters, warships and missiles and missile launchers. Pursuant to Articles 3 and 4 of the ATT, ammunition and munitions fired, launched or delivered with conventional weapons are also covered by the Treaty, as are parts and components, where the export is in a form that makes it possible to assemble conventional weapons covered by the Treaty.



The most directly relevant “common standards” of the Treaty applicable to preventing potential arms transfers that would be misused in Yemen are the obligations on States parties under Article 6 to deny a proposed transfer of conventional arms and related items covered by the Treaty if the transfer would violate specified international obligations, or to stop the transfer in circumstances where it is known by the potential transferring State that the items would be used for serious violations of IHL, war crimes or crimes against humanity. This prohibition is directly applicable to the transfer of military equipment to the armed forces of Yemen and those of the Saudi-UAE coalition in the context of their conduct in Yemen, and reads as follows:

### **Article 6 (3)**

A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Articles 3 or 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

Article 6(3) refers to knowledge that the conventional arms and related items covered by the ATT “would” be used to commit the IHL violations and crimes listed, which is a lower burden of evidence to deny the transfer than knowledge that the arms “will” be used for such acts. In other words, the level of knowledge required to prohibit a potential transfer under Article 6(3) is not one of absolute certainty.<sup>167</sup> Rather, it is a level of near-certain knowledge regarding the probable consequences, if the transfer were to be authorized, based upon objective inference from credible and reliable information about the circumstances arising in the normal course of events, especially if there is a recurring pattern of such violations committed with arms or related items of a similar capability, or evidence of intent by the potential recipients to commit such violations.

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<sup>167</sup> See ICRC, ‘Understanding the Arms Trade Treaty from a Humanitarian Perspective, August 2016, p. 27–8.

With a view to the object of the ATT to establish the “highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms” for the purpose of “reducing human suffering”, arms transfer authorization systems and procedures consistent with the ATT require applicants to disclose all relevant information to the potential exporting State. Thus, it is almost inconceivable that a potential exporting State, if party to the ATT, will not have considered actual relevant knowledge or knowledge of the circumstances which are widely known or are reasonably suspected. Moreover, a breach of Article 6 would include cases where a State party should reasonably have known about the illegal use of the type of arms being deployed, but failed to follow up credible suspicions by seeking further information.<sup>168</sup>

It is unequivocal that under Article 6(3) of the ATT *States parties that are aware of mounting credible reports of a recurring pattern of suspected breaches of the specified international law, which are being carried out using conventional arms covered by the Treaty with similar capabilities to those arms being considered for transfer to the same end users, are obligated to prohibit that transfer. The same prohibition applies to potential exports of ammunition that can be fired, launched or delivered by such arms, and to exports of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered by the Treaty.*<sup>169</sup> This prohibition on transfers in Article 6(3) applies in the light of the mounting prima facie evidence available to all States about the use of conventional arms in Yemen for “grave breaches of the Geneva Conventions of 1949”, including attacks causing immense harm to civilians and civilian objects protected, and serious violations of Article 3 Common to all four Geneva Conventions, particularly in the course of ground operations. Many of these acts would almost certainly entail the individual responsibility for war crimes of the armed forces personnel of

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<sup>168</sup> See, for a detailed analysis of Article 6, Clare da Silva and Penelope Nevill, ‘Article 6 Prohibitions’, in Clare da Silva, Brian Wood (eds.), *Weapons and International Law: The Arms Trade Treaty* (Larcier Group, 2015), Chapter 6.

<sup>169</sup> Arms and related items covered by the scope of the Arms Trade Treaty are specified in Articles 2, 3 and 4

the Yemen government and the Saudi-UAE coalition in Yemen.<sup>170</sup>

The implementation of this ATT prohibition on arms transfers should have taken effect from the moment that the ATT entered into force for the particular arms-supplying State and the detailed evidence of the consequences of repeated bombardments and the brutality of ground operations in Yemen came to the attention of supplier States in the process of their duty to monitor the recipient State's behaviour when considering arms exports. Mounting evidence of regular patterns of serious breaches of IHL and IHRL had clearly emerged already in 2015. Those States were repeatedly informed about the grave effects of these bombings on civilians - by the UN on 31 March 2015,<sup>171</sup> and also by Amnesty International on 24 April 2015 and by Human Rights Watch on 1 April 2015. There were subsequent UN communiqués and detailed reports made available on 22 January and 4 August 2016, 31 January, 24 August, 19 December and 28 December 2017, as well as an authoritative report by the Human Rights Council Report of the Group of Experts on Yemen issued on 17 August 2018. Other reports were published widely by Amnesty International dated 25 November 2015, 15 January and 23 May 2016, 16 January, 9 March, and 22 September 2017, and by Human Rights Watch dated 27 July 2015 and 18 November 2015, 23 December 2016, 16 February and 8 September 2017. These reports also brought to the attention of many States detailed information concerning the recurring pattern of bombardments of civilians and civilian objects and of ground and naval operations involving serious violations of IHL and IHRL, as well as probable international crimes, committed by armed forces operating in Yemen, including those of Saudi Arabia, the UAE and other coalition member countries.<sup>172</sup>

However, States Parties to the ATT who have continued to authorise such

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170 See, e.g., Éric David, *Principles of the Law of Armed Conflict* (Bruylant, 2019, 6<sup>th</sup> edition) paras. 4.170 *et seq.* See also William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010).

171 'Yemen on verge of collapse, UN human rights chief warns', *BBC*, 31 March 2015, <https://www.bbc.com/news/world-middle-east-32133203>.

172 See, for more complete information on each of these information sources and the documentary references to such sources, Joseph Breman, Laurence Greig, *Legal Opinion - Les transferts d'armes de la France dans le cadre du conflit au Yémen, à partir d'avril 2015 jusqu'à la période actuelle* (Transfers of armaments from France in the context of the conflict in Yemen from April 2015 to date), *Ancile Avocats (AARPI)*, 16 March 2018.

arms transfers after the UN appealed to all States to protect civilians in 2015 and despite the deterioration of the situation of civilians which persists till today, have most probably been acting in violation of the prohibition contained in Article 6(3). Given the mounting evidence of serious violations of IHL and strong allegations of war crimes committed by those military units in Yemen, this obligation to prohibit transfers of conventional arms and related items to those units in such circumstances remains in effect today and should be effectively implemented at once to prevent further such transfers.

Article 6(2) of the ATT is also relevant to the situation under consideration:

### **Article 6 (2)**

A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.

This provision in Article 6 requires that all States parties must refuse to permit a potential transfer of conventional arms, or ammunition/munitions or parts and components covered by the treaty from within its jurisdiction, if the transfer “would violate” an international obligation of a relevant international agreement to which the transferring State is a party. The term “would violate” rather than “will violate” implies that the State must also consider existing treaty prohibitions of the direct consequences of authorizing the various forms of transfer (export, import, transit, trans-shipment and brokering) as defined by Article 2(2) of the ATT.

The relevant international agreements referred to in Article 6(2) could include treaties under which the arms or munitions themselves (such as anti-personnel mines or cluster munitions) are prohibited, or agreements prohibiting an activity essential for a transfer of such items (such as the requirement under the UN Firearms Protocol for firearms to be appropriately marked if they are to be legally exported and imported). Moreover, the prohibited activity could relate to the illicit export, import, transit, trans-shipment or brokering of the items, as these are trade

activities that are specifically covered by the concept of “transfer” in the ATT, in circumstances where the authorization of those trade activities would entail a breach other international agreements to which the State is a party, such as the UN Convention against Corruption and the UN Convention against Transnational Organized Crime. Foreseeable transnational criminal acts may arise from authorizing a transfer involving the unlawful physical movement or exchange of ownership and control of the items from one country or jurisdiction to another.

Obligations under the UN Charter are also highly relevant to Article 6(2). In February 2015, just over a month before the Saudi-UAE coalition forces stepped up their military intervention in Yemen, and when condemning “the growing number of attacks carried out or sponsored by Al-Qaida in the Arabian Peninsula”, the Security Council expressed “its determination to address this threat in accordance with the Charter of the United Nations and international law including applicable human rights, refugee and humanitarian law, and in this regard, through the Al-Qaida sanctions regime administered by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011)”.<sup>173</sup> The Security Council repeatedly called on all parties to the conflict in Yemen to comply with their obligations under international law, including applicable international humanitarian law and human rights law.

The requirement in Article 55 of the UN Charter that all Member States “shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all” is reinforced by Article 56 of the Charter whereby Member States “pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.” When Member States negotiated the Arms Trade Treaty in 2012 and 2013 they agreed a set of Principles set out in the Preamble of the Treaty including the following principle:

Respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights.

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<sup>173</sup> UN Security Council Resolution 2201, 15 February 2015.

It follows from these provisions in the UN Charter and the ATT that: (a) Yemen, Saudi Arabia, UAE and other States whose forces are operating in Yemen, as well as the USA, UK, France, Canada, Belgium and other States arming those forces, are all under a mutual treaty-based obligation to cooperate in achieving respect for, and observance of IHL as well of human rights and fundamental freedoms; and (b) all States must refrain from involvement in the threat or use of force in Yemen which is contrary to the prohibition in the UN Charter or hinders respect for IHL and observance of human rights and fundamental freedoms. “Involvement” can include the provision of the means of force, taking into account the customary law responsibilities of States that flow from Articles 16 and 41(2) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (widely seen as codifying custom), the jurisprudence of the International Court of Justice regarding the obligation of a State intervening militarily in another State, whether or not with the latter’s consent, to “take measures to respect and ensure respect” for human rights and international humanitarian law, and the obligations incumbent on all High Contracting Parties to the Geneva Conventions under Common Article 1 to the Conventions to “respect and ensure respect” for IHL.

## ***2. Obligations Pursuant to Article 7 of the ATT***

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Article 7 of the ATT contains a second “common standard” that could result in an obligation not to authorize an export of conventional arms or related items to the armed forces operating in Yemen, including those of the governments of Yemen, Saudi Arabia, the UAE and other States involved in the coalition:

### **Article 7**

#### **Export and Export Assessment**

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner,

taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

- (a) would contribute to or undermine peace and security;
  - (b) could be used to:
    - (i) commit or facilitate a serious violation of international humanitarian law;
    - (ii) commit or facilitate a serious violation of international human rights law;
    - (iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
    - (iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.
2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.
  3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding\* risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.
  4. The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender - based violence or serious acts of violence against women and children. ...
  7. If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to

reassess the authorization after consultations, if appropriate, with the importing State.

- \* Note that the official translation of the term “overriding” is “préponderant” in French and “preponderante” in Spanish.

The risk assessment of a potential arms export under the procedure and the criteria set out in Article 7 of the ATT is only required if, after analysis, the export is not prohibited under Article 6. Since under the present circumstances States considering arms exports and other transfers to Yemen, or to Saudi Arabia, the UAE or other members of the coalition military involved in Yemen already have powerful information from the UN and other credible sources detailing the misuses of armed force by those States to commit and facilitate serious violations of IHL, Article 6 prohibits such transfers. This is the case under Article 6(3) of the ATT as well as arguably under Article 6(2). Both prohibitions impose an obligation on States parties in the current circumstances to cease all transfers of arms and related items covered by the treaty to armed forces in Yemen, Saudi Arabia the UAE and other coalition members. As long as this is the case, Article 7 is not applicable and cannot be invoked by arms-selling States in a manner that would seek to enable these transfers.

If circumstances change and the conditions for the application of paragraphs (2) and (3) of Article 6 of the ATT are no longer met, all States parties to the ATT would then still be required under Article 7 to conduct an objective risk assessment of each potential export of conventional arms or related items and to consider whether it would entail an obligation to cease the export to the armed forces of Yemen, Saudi Arabia, the UAE and other coalition members. In this regard, Amnesty International and the ICRC have proposed a methodology for making an objective and non-discriminatory risk assessment of the human rights consequences of a potential export of conventional arms or related items covered by the ATT.<sup>174</sup>

The negative consequences listed in Article 7 represent the benchmark that States have accepted for when the export of conventional arms and

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<sup>174</sup> Amnesty International, ‘Applying the Arms Trade Treaty to Ensure the Protection of Human Rights’, Index: ACT 30/0003/2015, 1 February 2005 <https://www.amnesty.org/en/documents/act30/0003/2015/en/>. See also ICRC “Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria - a Practical Guide”, Geneva, 2016



related items becomes unacceptable. These include those circumstances where there is an overriding risk that the export would undermine peace and security; or could be used to commit or facilitate a serious violation of IHL or a serious violation of IHRL; or an act of terrorism or transnational organized crime constituting an offence under international conventions or protocols to which the exporting State is a Party.

It is important to stress that mitigation measures under Article 7 are not just any measures that reduce the risk of negative consequences, but only those that are 'available' to and mutually agreed on by the potential exporting and importing States, and which would in practice effectively remove an overriding risk of any of the five negative consequences listed in Article 7(1). If any of the risks of those negative consequences remain overriding after relevant mitigation measures are considered and agreed, then the export must be denied.<sup>175</sup>

In the case of the UK, which was subject to domestic court proceedings, the UK Ministry of Defence claim that the Saudi Arabian authorities "continue to seek to improve their processes and increase the professionalism of their Armed Forces and continue to be receptive to UK offers to provide training and advice" is at odds with both the reality in which the coalition forces have as a matter of long-standing practice flouted their respect for IHL, and the UK's obligation to take a prudent approach and suspend or revoke their licences.<sup>176</sup> In making this assessment, it appeared that the UK Secretary of State for Trade relied merely upon assurances given by Saudi Arabia and others.<sup>177</sup>

In any case, in the light of the facts presented in Part II of this opinion, any assessment conducted pursuant to Article 7(1) should lead to the

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<sup>175</sup> See, for an analysis of Article 7, Clare da Silva, Brian Wood, 'Article 7: Export and Export Assessment', in Clare da Silva, Brian Wood (eds.), *Weapons and International Law The Arms Trade Treaty (Larcier Group, 2015)* p. 131.

<sup>176</sup> The UK Court of Appeal held that the UK government erred in failing to conduct a historic pattern assessment on the basis of past violations: "without them, how was the Secretary of State to reach a rational conclusion as to the effect of the training?": *CAAT et al v. Secretary of State for International Trade*, [2019] EWCA Civ 1020, Judgment of 20 June 2019, paras 138–45.

<sup>177</sup> Then Foreign Secretary, Boris Johnson MP, told the House of Lords Committee on International Relations on 26 January 2017 that the Government had "received sufficient assurances from the Saudis about the incidents that have taken place so far to think that we are still narrowly on the right side of that threshold".

conclusion that there has been, and still is, an overriding risk (in the French version of the ATT, a “preponderant risk”) that exports of conventional arms, ammunition, parts and components covered by the ATT have been persistently misused – and are likely to further be misused – in Yemen to commit or facilitate serious violations of IHL and IHRL, and therefore must be refused. In our view, as long as the overriding (preponderant) risk of such serious misuse remains, any such exports would constitute a violation of Article 7 of the ATT.

It should be noted that Member States of the European Union (EU) have an additional obligation to cease exports of military equipment on the EU Military List likely to be used by the parties to the conflict in Yemen. This obligation is a principal part of the Council Common Position 2008/944/CFSP governing the export of military technology and equipment. Adopted on 8 December 2008 under Title V of the EU Treaty, the previous EU Code of Conduct on Arms Exports was transformed into the current legally binding EU Common Position. The Common Position is similar in several respects to Article 7 of the ATT in that it requires States to undertake an objective risk assessment to avoid arms exports that could contribute to serious violations of international law.

Of direct relevance here is that the Common Position provides in its Criterion Two, *inter alia*, that “having assessed the recipient country’s attitude towards the relevant principles established by instruments of international humanitarian law, Member States shall (c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.” Criterion Two of the Common Position also requires EU Member States to refuse exports if there is a ‘clear risk’ that the equipment “might” be used for “internal repression”, which is defined by a list of serious violations of international human rights law.<sup>178</sup>

In view of the facts presented in Part II above, any assessment carried out

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178 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, Official Journal of the European Union, 13 December 2008, <http://data.europa.eu/eli/compos/2008/944/oj>. *Note that the Common Position was amended on 9 September 2019 to include, amongst other new provisions, recognition in Article 2 of Member States obligations under the Arms Trade Treaty and other international instruments.*

pursuant to the Common Position should also lead to the conclusion that there has been and still is a “clear risk” that exports by EU Member States of military technology and equipment “might” be used by the coalition forces in Yemen and by the armed forces of Yemen and their militias to commit serious violations of IHL and IHRL. Therefore, such exports should be refused. It should be noted that Article 4(2) of the Common Position states that: “The decision to transfer or deny the transfer of any military technology or equipment shall remain at the national discretion of each Member State.” This should simply be interpreted as an affirmation that the decisions on such exports are to be made at the Member State level, but that States should guarantee that there is an appropriate degree of rigour, accountability and transparency to the decision-making process. The EU User’s Guide to the Council Common Position summarizes guidance on the interpretation of the Criteria and implementation of its articles agreed to by Member States.<sup>179</sup> Thus, in our view, the continuation of such exports to the armed forces of Saudi Arabia, the UAE and the other countries of the coalition by some Member States constitute clear violations of the Common Position.

### **3. Obligations Pursuant to Article 11 of the ATT**

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Article 11(1) of the ATT requires that each State Party involved in the “transfer” of conventional arms “take measures to prevent their diversion”. The provisions in Article 11 include obligations and recommendations for States parties to prevent and mitigate the risk of diversion, as well as to detect and prosecute those who engage in the diversion of arms. Article 11 is also reinforced through other provisions of the Treaty.

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<sup>179</sup> The EU Users Guide to the Common Position requires that special attention be paid to previous use by the State and/or end-user of the conventional military equipment or technology similar to that specific in the export licence application; as well as to the recipients’ country’s commitment to: respect and improve human rights; bring violators to justice; ratify regional and international human rights instruments; and cooperate with international human rights mechanisms. Amongst other points of interpretation, the EU Guide recommends that in Criterion Two the combination of “clear risk” and “might” requires a lower burden of evidence than a clear risk that the military technology or equipment “will” be used for internal repression. Council of the European Union, User’s Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 29 April 2009. <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%209241%202009%20INIT>.

The obligations in Article 11(2) of the ATT require exporting States “to assess the risk of diversion of the export and to consider the establishment of mitigation measures such as confidence building measures or jointly developed and agreed programmes by the exporting and importing States.” Other prevention measures recommended in Article 11(2) include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorizing the export or other appropriate measures.

It is evident that States supplying arms and other military equipment to Yemen and the Saudi-UAE coalition have not taken adequate measures to prevent the diversion of their exported weapons and materiel, especially small arms, light weapons, their ammunition and basic vehicles. States that have approved such transfers in the knowledge that the arms will be diverted and which are party to the ATT are in breach of Article 11 of the Treaty. In this respect, it is not feasible, given the current situation in Yemen and the unreliability of the Saudi Arabia and UAE governments inter alia, to effectively implement measures that will prevent such diversion. This being the case, States parties to the ATT are obliged to prevent the transfer of arms that are likely to be used in Yemen by unauthorized end-users because it is assessed the arms would be diverted by Saudi Arabia, the UAE or other members of the coalition, or by the armed forces of Yemen, to armed militias or armed groups in Yemen.

# CONCLUSION

The civil war that has been tearing Yemen apart since 2014 is not over, and already about 80 per cent of the population (approximately 24 million people) need humanitarian assistance and protection. The UN Development Programme (UNDP) has estimated that if the conflict were to end in 2019, it would have led to 233,000 deaths, 102,000 from combat and 131,000 from lack of food, health services and infrastructure.

Notwithstanding this projected and as yet unabated human toll and the gravity of the ongoing international humanitarian law (IHL) and international human rights law (IHRL) violations described above, several European and other countries, as well as the USA and Canada, inter alia, continue to authorize exports of weapons and parts, as well as providing technical assistance to Saudi Arabia, the United Arab Emirates (UAE) and other coalition States. Parties to the Yemen conflict are in receipt of military equipment from arms-exporting States both directly and indirectly through diversion by other recipient States. Houthi forces, subject to an arms embargo by the Security Council, are in receipt of weapons from Iran. Other armed groups in Yemen have received diverted weapons and vehicles from Saudi Arabia and the UAE in breach of end-use agreements.

This opinion addresses the legal consequences for arms-supplying States of their ongoing arms transfers to parties to the conflict in Yemen. It focuses on the obligations and responsibilities of third States vis-à-vis the violations ongoing in the context of the conflict in Yemen, in view of their particular links with their principal perpetrators through both direct and indirect arms supplies. The authors of the present opinion respectfully submit as follows:

## ***The international law violations by the parties to the Yemen conflict***

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- Mounting evidence, since the beginning of the conflict in 2014, points to serious violations of IHL and IHRL, including grave breaches of the Geneva Conventions that in all likelihood would result in the determination that military and political officials of the various coalition members bear individual criminal responsibility for international crimes, if these questions were brought before a competent domestic court or international tribunal.
- There are now well-established and foreseeable patterns of grave and systematic violations of IHL and IHRL by Saudi Arabia, the UAE and other members of the coalition.
- Coalition members have persistently refused to undertake proper investigations of these violations, and have instead established their Joint Incident Assessment Team (JIAT) mechanism, which has routinely denied and misrepresented information about different military operations. Investigating serious violations is a core, minimum expectation of all High Contracting Parties to the Geneva Conventions and non-state actors customarily bound by IHL.
- Coalition members have failed to adopt even the most elementary reform measures to guarantee non-repetition. Neither the coalition States' assurances nor the work of the coalition's investigative mechanisms have effectively demonstrated either an ability or a willingness to respect international law in good faith. They have failed to properly use the no-strike lists to avoid and cancel aerial attacks and the list has clearly not been effectively incorporated into their targeting process.
- Coalition members are also responsible for committing serious violations of IHRL, primarily but not exclusively in the course of ground operations. These violations have been documented and condemned repeatedly by States and international organizations, including UN bodies, whose reports have been addressed to coalition and other States through multilateral processes in the form of clear demands for compliance by the coalition and parties to the conflict. Such efforts

have not materialized in any known adjustments in coalition States' practices or policies.

- Houthi forces also bear international responsibility for the commission of regular, serious IHL and IHRL abuses in the context of ground operations including the use of torture and ill-treatment of detainees.
- All coalition members and other parties to the conflict in Yemen acting in breach of their customary or conventional obligations in international law are required to cease and desist from these violations and put in place the necessary preventative processes and accountability mechanisms to ensure non-repetition.

### ***The obligations of arms-supplying States under the international law on State Responsibility***

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- All States that have supplied military equipment to the armed forces of Yemen or to Saudi Arabia, the UAE and coalition members in the knowledge of the serious violations of IHL and IHRL being committed by those armed forces, especially since March 2015, incur international responsibility for wrongfully assisting such acts. States that have and continue to provide arms to the States militarily involved in Yemen, necessarily aware that the arms would be used in such violations, incur a responsibility for assisting such unlawful acts.
- There is no question or doubt that arms-exporting States possess a detailed level of knowledge of the unlawful practices of coalition members.
- Arms-exporting States that are party to the Arms Trade Treaty (ATT) when considering an arms transfer covered by the Treaty are required by various provisions of the Treaty to scrutinize the practice of the potential importing State and of other potential end-users. In the case of potential end-uses in Yemen, States parties to the ATT which are considering an export to a member of the coalition have full knowledge of the nature of those States' conduct and would be seen as having either actual or almost certain knowledge of the internationally wrongful acts and thus aware of the purpose for which its assistance will be used

by the receiving State, as set out in Article 16 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts 2001. Importantly, that aid is not required to be essential to the commission of the wrongful acts.

- Article 41(2) of the Articles on the Responsibility of States provides that third States must not aid or assist serious breaches of peremptory norms such as the “intransgressible rules of IHL” and the prohibition on torture. There is abundant prima facie evidence that such manifestly unlawful acts are taking place in Yemen. In such circumstances where systematic breaches of those norms are being perpetrated, States continuing to export arms to the perpetrators are acting in breach of these obligations and are as such internationally responsible for wrongfully assisting such egregious international law violations.
- Arms-exporting States’ obligations, under Article 41(2) of the Articles on the Responsibility of States, to refrain from providing wrongful assistance to committing such violations include not recognizing as lawful the practice of the arms-buying State. In that circumstance the supplying State cannot use its defence cooperation agreement with such an importing State to justify a transfer. Such bilateral agreements with Saudi-UAE coalition members should, given the manifestly unlawful nature of the coalition States’ acts, be revised and adjusted to account for the supplying State’s international obligation to ensure non-assistance and non-recognition of serious breaches of peremptory norms.

### ***The obligations of arms-supplying States under the Arms Trade Treaty***

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- States parties to the ATT are prohibited under Article 6(3) from transferring conventional arms, ammunition/munitions or parts and components covered by the Treaty to States knowing those arms would be used, inter alia, in the commission of serious violations of Common Article 3 to the Geneva Conventions and acts that are likely to amount to war crimes in non-international armed conflicts such as making civilian objects the object of attack; using prohibited weapons; launching an



indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage; and using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies. Given that States are currently supplying arms to Saudi Arabia, the UAE and members of the coalition whose forces have been continuing to commit such violations in Yemen, those supplying States are acting in violation of their obligation under Article 6(3) of the ATT to prohibit such transfers in those circumstances. The continuous violations are arguably so distinctively foreseeable and grave that the transfer of arms that would assist in their perpetration is contrary to the very object and purpose of the Treaty and, more generally, to fundamental principles of international law.

- States parties to the ATT are also required under Article 6(2) not to authorize any transfer of conventional arms or other items covered by the Treaty if the transfer would violate the sending State's relevant international obligations under international agreements to which it is a Party. Respect for, and observance of, human rights and fundamental freedoms is a core purpose of the UN and under Article 55 and 56 States have an obligation to promote human rights and take joint and separate action in cooperation with the UN to achieve that purpose. It follows that Article 6(2) requires States parties to the ATT to refrain from arms transfers that would assist armed force being used to systematically violate fundamental human rights in Yemen.
- In many cases, such arms transfers also amount to the exporting State party's obligations under its domestic laws that give effect to its ATT and other obligations, such as those that Member States of the European Union (EU) have under their Common Position on arms exports. The EU rules require that arms export licences not be issued if there is a "clear risk" that the arms "might" be used for serious violations of IHL or of human rights. The mounting evidence of such violations has prompted, albeit belatedly, some EU Member States to suspend arms exports that might be used in Yemen, but others have continued in breach of the Common Position.
- Article 7 of the ATT also addresses the danger that an arms export would be used to commit or facilitate a serious violation of IHL or

IHL, and requires States parties to carry out an objective and non-discriminatory assessment, taking into account relevant factors, to determine whether the potential export would pose an overriding risk of such IHL or IHRL violations or have other negative consequences listed in Article 7. If mitigation measures are not in fact available and agreed with the importing State to remove the overriding risk of those negative consequences, then the export must be denied. However, Article 7 is *only applicable if the export is not already prohibited under Article 6 of the ATT, as is the case with arms transfers for use in Yemen, in which case an assessment of overriding risk and the possible recourse to mitigation measures is not relevant.*

- Article 11(1) of the ATT requires each State party involved in the transfer of arms and related items covered by the Treaty to take measures to prevent their diversion and if such measures are unrealistic with respect to the end-user then the exports must not be authorized. It is evident that Saudi Arabia, the UAE and other members of the coalition have been diverting arms to armed forces and irregular militias in Yemen, thereby further facilitating the recurring pattern of violations of IHL and IHRL. States parties to the ATT failing to address such diversion are in breach of Article 11.
- To comply with their obligations under international law, including customary law and international agreements, in particular the ATT, States exporting arms and military equipment that would be used by the armed forces of Yemen or the Saudi-UAE coalition operating in Yemen, or their allies in Yemen, should at once suspend and revoke all export licences until it is certain that serious violations of IHL and IHRL perpetrated with the use and threat of such arms by those parties in Yemen has ended.

**ANNEX****TABLE ON ARMS EXPORTS TO SAUDI ARABIA AND THE UNITED ARAB EMIRATES****Trend Indicator Values (TIVs) for 2015-2018 expressed in millions of dollars US <sup>180</sup>****I- SAUDI ARABIA**

<b>Country</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>Total</b>
1. United States of America	1714	1746	3246	3352	10059
2. United Kingdom	751	858	425	61	2094
3. France	174	78	142	155	549
4. Spain	208		15	70	293
5. Italy	89	89	48		226
6. Germany	2	14	105	114	235
7. Switzerland	142	44			186
8. Canada	111	11	2	14	138
9. China	35	15	35	40	125
10. Turkey	52	39	13		104
11. Netherlands	25				25
12. Bulgaria	8	1	15		24
13. Serbia	4	11	2		17
14. South Africa	5	4	6		15
15. Georgia		6	7		13
16. Finland	7				7
17. Austria	4	4			7
18. Slovakia	3	3			5
19. South Korea				3	3
20. Sweden		1			1
<b>Total</b>	<b>3334</b>	<b>2923</b>	<b>4060</b>	<b>3810</b>	<b>14128</b>

180 This data was generated from the Database of the Stockholm International Peace Research Institute (SIPRI) on 10 December 2019. The figures are SIPRI Trend Indicator Values (TIVs) expressed in millions of dollars US. Figures may not add up due to rounding conventions.

## II- UNITED ARAB EMIRATES

Country	2015	2016	2017	2018	Total
1. United States of America	812	660	685	799	2955
2. France	167	136	45		348
3. Turkey	84	84	84	125	377
4. Netherlands			167		167
5. China	15	15	35	40	105
6. Italy	77	11		13	100
7. Sweden	65	17	5		87
8. South Africa	20	27	28	7	83
9. Russian Federation				80	80
10. Germany	11	21	21	5	57
11. Canada	12	7	5	25	49
12. Finland	1	12			12
13. United Kingdom				8	8
14. Slovakia	3	3			5
15. Denmark	1	2			3
16. Singapore	2	1			3
17. New Zealand	1				1
<b>Total</b>	<b>1271</b>	<b>996</b>	<b>1074</b>	<b>1101</b>	<b>4640</b>

## **BIOGRAPHICAL INFORMATION ON THE AUTHORS**

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**ÉRIC DAVID** is professor emeritus at the Université libre de Bruxelles (ULB). He completed his doctoral studies at the ULB where he received his doctorate in 1996. He was a researcher at ULB's Center of International Law from 1996 to 2000, and has been its President since 2002. He has given courses in International Dispute Resolution and the Law of Armed Conflict, Elements of International Criminal Law and the Law of International Organizations. He has given lectures as a visiting professor in several African, Asian, European and North American universities as well, for the International Committee of the Red Cross and national sections of the Red Cross, as well as at Strasbourg's Institute of Human Rights and The Hague Academy of International Law. He has acted as counsel in a number of cases before the International Court of Justice. He is the author of numerous publications in the field of international humanitarian law and international human rights law, including the book *Principles of the Law of Armed Conflict*.

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