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## Justice Without Power: Yemen and The Global Legal System

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## NOTE

# JUSTICE WITHOUT POWER: YEMEN AND THE GLOBAL LEGAL SYSTEM

*Amulya Vadapalli\**

*The war in Yemen has remained the world's worst humanitarian crisis since 2015, and yet it is shockingly invisible. The global legal system fails to offer a clear avenue through which the Yemeni people can hold the state actors responsible for their harm accountable. This Note analyzes international legal mechanisms for vindicating war crimes and human rights abuses perpetrated in Yemen. Through the lens of Yemen's humanitarian crisis, it highlights gaps in the global legal structure, proposes alternative accountability processes, and uses a variety of sources—including interviews with practitioners and Arabic-language legal scholarship—to explicate a victim-centered transitional justice process for the Yemeni people.*

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### INTRODUCTION

On February 24, 2022, the head of the World Food Programme announced that thirteen million people in Yemen were in danger of death by starvation.<sup>1</sup> That same day, Russia invaded Ukraine and explosions rocked major Ukrainian cities.<sup>2</sup> Only one event made headlines.<sup>3</sup> Yemen is the world's largest and worst humanitarian crisis,<sup>4</sup> with twenty-two million people in need of humanitarian assistance<sup>5</sup>—a fact evident to those who pay attention to the crisis, and shockingly invisible to those who do not.<sup>6</sup> In fact, the more the situation in Yemen worsens, the more it recedes from international attention.<sup>7</sup> Yemen has often been described in (mostly Western) research as the canonical example of a fragile, unstable state.<sup>8</sup> International attention to

1. Natalie Prieb, *Head of UN Food Agency Says 13 Million People in Yemen Headed Toward Starvation*, HILL (Feb. 24, 2022, 2:49 PM), <https://thehill.com/policy/international/595719-head-of-un-food-agency-says-13-million-people-in-yemen-headed-toward> [perma.cc/L3WF-6UTM].

2. Aditi Sangal et al., *February 24, 2022 Russia-Ukraine News*, CNN (Feb. 25, 2022, 8:06 AM), <https://www.cnn.com/europe/live-news/ukraine-russia-news-02-24-22-intl/index.html> [perma.cc/R4D9-XJBX].

3. As a clarifying note, I do not intend in any way to minimize the suffering of Ukrainians.

4. *Yemen—The World's Worst Humanitarian Crisis*, WORLD FOOD PROGRAMME, <https://www.wfp.org/yemen-crisis> [perma.cc/NHR8-LZPL].

5. *Why Is Yemen the World's Worst Humanitarian Crisis?*, INT'L RESCUE COMM. (Oct. 15, 2018), <https://www.rescue.org/article/why-yemen-worlds-worst-humanitarian-crisis> [perma.cc/C2CM-UVHF].

6. See Malaka Gharib, *Not Every War Gets the Same Coverage as Russia's Invasion—and That Has Consequences*, NPR: GOATS & SODA (Mar. 4, 2022, 2:47 PM), <https://www.npr.org/sections/goatsandsoda/2022/03/04/1084230259/not-every-war-gets-the-same-coverage-as-russias-invasion-and-that-has-consequences> [perma.cc/ZB29-Q6B5].

7. *Id.*; See Press Release, ICRC, *Yemen: Plight of Population Is Growing as World Attention Wanes* [EN/AR], RELIEFWEB (Mar. 10, 2022), <https://reliefweb.int/report/yemen/yemen-plight-population-growing-world-attention-wanes-enar> [perma.cc/WFD7-3FKW].

8. See, e.g., Daniel Byman, *Yemen's Disastrous War*, SURVIVAL, Oct.–Nov. 2018, at 141, 142 (describing Yemen's history as a “chronicle of instability”); Maria-Louise Clausen, *Competing for Control over the State: The Case of Yemen*, 29 SMALL WARS & INSURGENCIES 560, 561 (2018) (calling to “move beyond a representation of the Yemeni state as fragile and in need of capacity building to strengthen its legal-rational credentials”).

humanitarian crises often, paradoxically, wanes after nations are written off as permanent sites of war, destined to be forever scarred by conflict. Critically, however, inattention to Yemen allows powerful actors to perpetrate war crimes and harm the Yemeni people without facing political condemnation or legal consequences.

This Note examines how the war in Yemen exposes structural inadequacies in the global legal system, specifically with regard to vindicating crimes and abuses perpetrated by powerful states and entities.<sup>9</sup> By cataloging the options available to hold the state actors involved in the war in Yemen accountable, this Note demonstrates that specific structural aspects of the current global legal system allow powerful states to evade accountability for violating international law. This Note then explains the role that victim-centered transitional processes could play in building an alternative framework for ensuring justice for the Yemeni people and others similarly situated.

Importantly, this Note does not contend that the coalition of countries on one side of the war<sup>10</sup> is solely responsible for the state of the war in Yemen. War crimes have been committed by both sides: a 2020 United Nations (UN) report noted that “all parties continue to show no regard for international law or the lives, dignity, and rights” of civilians.<sup>11</sup> However, this Note does not discuss accountability for the Houthis or other actors in the war.<sup>12</sup> Rather, since this Note seeks to analyze international legal mechanisms for holding powerful states accountable, it only focuses on the actions of foreign state actors, particularly those of Coalition members.

Part I describes the history of the war in Yemen, the war’s major actors, and relevant sources of international law. Part II analyzes the relative strengths and weaknesses of possible avenues of accountability for state actors. Part III discusses potential international mechanisms for holding perpetrators in Yemen accountable, analyzes the current legal system’s shortcomings, and suggests two reforms: (1) the creation of an automatic trigger mechanism for International Criminal Court (ICC) investigations and (2) the creation of a regional human rights court in the Middle East/West Asia.

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9. Given the ongoing nature of the violations in Yemen, this Note covers events until the Fall of 2022.

10. For discussion of coalition membership and involvement, see *infra* Section I.A.

11. *Fresh War Crimes Fears Highlighted in New Yemen Report*, UN NEWS (Sept. 9, 2020), <https://news.un.org/en/story/2020/09/1072012> [perma.cc/8N8N-2W23] (quoting Press Release, *UN Group of Eminent International and Regional Experts on Yemen Releases Their Third Report Yemen: A Pandemic of Impunity in a Tortured Land*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R (Sept. 9, 2020), <https://www.ohchr.org/en/press-releases/2020/09/un-group-eminent-international-and-regional-experts-yemen-releases-their?LangID=E&NewsID=26218> [perma.cc/7VA5-ZSXM]); see also Nick Cumming-Bruce, *War Crimes Committed by Both Sides in Yemen*, *U.N. Panel Says*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/world/middleeast/war-crimes-yemen.html> [perma.cc/D6Y3-X8NB].

12. See *infra* Section I.A.

The goals of international justice are often manifold: accountability, justice for victims, and fact-finding, among others.<sup>13</sup> Though it is beyond the scope of this Note to define the goals of a post-war accountability system in Yemen, the analysis herein views “justice” as centered around holding perpetrators accountable and defending victims of the conflict.

## I. THE WAR IN YEMEN IN CONTEXT

### A. Stakeholders and Actors

“The poorest country in the Arab world was being bombed and starved by the richest countries in the Arab world with American support.”<sup>14</sup>

The war in Yemen is best understood through the complex web of actors involved. Broadly speaking, regional politics centered around Saudi Arabia and Iran as well as domestic unrest precipitated the war in Yemen. But, ever since the war began in 2015, it has involved a global set of actors with myriad political and economic interests in the region. On one side of the war is a coalition of Arab countries, backed by Western arms sales, and on the other side of the war is a Yemeni group, the Houthis. A brief analysis of these actors and their motivations is below, followed by an explanation of the relevant international legal frameworks that apply to the conflict.

Three sets of actors are driving the war in Yemen. First, Yemeni stakeholders, including the internationally recognized government (previously led by Abdrabbuh Mansur Hadi and now led by a council backed by Saudi Arabia),<sup>15</sup> the Houthis, and Al-Qaeda in the Arabian Peninsula (AQAP), are each fighting to retain, gain, or determine control of the country’s government. Second, the “Coalition,” which comprises Saudi Arabia, the United Arab Emirates (UAE), and other Organisation of Islamic Cooperation (OIC) states,<sup>16</sup> has engaged in both direct combat and political maneuvering to sway

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13. See generally CHRISTINE CHINKIN & MARY KALDOR, INTERNATIONAL LAW AND NEW WARS 430–475 (2017).

14. Bruce Riedel, *Saudi Arabia’s Role in the Yemen Crisis*, in GLOBAL, REGIONAL, AND LOCAL DYNAMICS IN THE YEMEN CRISIS 115, 127 (Stephen W. Day & Noel Brehony eds., 2020).

15. *Yemen’s Aden-Based Government Appoints New Defence, Oil Ministers*, REUTERS (July 28, 2022, 4:14 PM), <https://www.reuters.com/world/middle-east/yemens-aden-based-government-appoints-new-defence-oil-ministers-2022-07-28> [perma.cc/N4DK-SF8Z].

16. The other OIC states involved in the coalition are Sudan (which significantly reduced its involvement in 2019), Bahrain, Kuwait, Qatar (until 2017), Egypt, Jordan, Morocco (until 2019), and Senegal. See Kali Robinson, *Yemen’s Tragedy: War, Stalemate, and Suffering*, COUNCIL ON FOREIGN RELS. (Oct. 21, 2022, 1:49 PM), <https://www.cfr.org/backgrounder/yemen-crisis> [perma.cc/43A3-A8T8]; Giorgio Cafiero, *Winding Down Sudan’s Dark Role in the Yemen War*, RESPONSIBLE STATECRAFT (Dec. 12, 2019), <https://responsiblestatecraft.org/2019/12/12/winding-down-sudans-dark-role-in-the-yemen-war> [perma.cc/S6TJ-B89V]; *Qatar Row: Saudi and Egypt Among Countries to Cut Doha Links*, BBC NEWS (June 5, 2017), <https://www.bbc.com/news/world-middle-east-40155829> [perma.cc/L9QA-4ACU]; *Morocco Suspends Participation in Saudi-Led War in Yemen*, AL JAZEERA (Feb. 8, 2019), <https://www.aljazeera.com/news/2019/>

control of Yemen while avoiding repercussions for their involvement. Third, non-Coalition state actors, including the United States, the United Kingdom (UK), France, and Italy, enable combat by exporting arms and providing tactical support to military forces in Yemen.<sup>17</sup> Iran has also been alleged to be involved, on the side of the Houthis.<sup>18</sup>

### 1. Yemeni Stakeholders

The Yemeni government was led from 1990 to 2012 by Ali Abdallah Saleh,<sup>19</sup> who coined the phrase “dancing on the heads of snakes” to describe holding power in Yemen.<sup>20</sup> During the war, Saleh first switched positions to ally with the Houthis and was later killed in 2017 when trying to switch back to allying with the Coalition.<sup>21</sup> His son, Ahmed Saleh, who subsequently declared his animosity toward the Houthis (described below), is currently Coalition-supported.<sup>22</sup> Abd Rabbuh Mansour Hadi was the head of the internationally recognized Yemeni government until April 2022, when he was replaced by a Saudi Arabia-backed leadership council.<sup>23</sup>

The Houthis—officially called Ansar Allah—are a political and Islamist movement from the north of Yemen.<sup>24</sup> A largely Shi’ite movement, the

2/8/morocco-suspends-participation-in-saudi-led-war-in-yemen [perma.cc/VN9A-TF8K]; *Senegal to Support Yemen Campaign*, BBC NEWS (May 5, 2015), <https://www.bbc.com/news/world-middle-east-32586230> [perma.cc/TFC3-XAPC].

17. See Patrick Wintour, *UK, US and France May Be Complicit in Yemen War Crimes—UN Report*, GUARDIAN (Sept. 3, 2019, 9:43 AM), <https://www.theguardian.com/world/2019/sep/03/uk-us-and-france-may-be-complicit-in-yemen-war-crimes-un-report> [perma.cc/PYJ3-UDJF]; *Italian Arms Exports to Yemen: State and Corporate Responsibility*, EUR. CTR. FOR CONST. & HUM. RTS. (Oct. 27, 2020, 11:00 AM), <https://www.ecchr.eu/en/event/italian-arms-exports-to-yemen-state-and-corporate-responsibility> [perma.cc/7T6U-WCWC].

18. Michelle Nichols & Jonathan Landay, *Iran Provides Yemen’s Houthis ‘Lethal’ Support, U.S. Official Says*, REUTERS (Apr. 21, 2021, 12:54 PM), <https://www.reuters.com/article/us-yemen-security-usa-idUSKBN2C82H1> [perma.cc/ECJ3-KGCN].

19. *Yemen President Officially Steps Down After 33 Years in Power*, RADIO FREE EUR. (Feb. 27, 2012), [https://www.rferl.org/a/yemen\\_president\\_officially\\_steps\\_down\\_after\\_33\\_years\\_in\\_power/24497436.html](https://www.rferl.org/a/yemen_president_officially_steps_down_after_33_years_in_power/24497436.html) [perma.cc/K7CY-FS7D].

20. Robert F. Worth, Opinion, *The Man Who Danced on the Heads of Snakes*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/opinion/sunday/yemen-saleh-death-legacy.html> [perma.cc/PSG8-EU52].

21. *Id.*

22. See Ateq Garallah, *The Houthis March South*, CARNEGIE ENDOWMENT FOR INT’L PEACE: SADA (May 29, 2019), <https://carnegieendowment.org/sada/79228> [perma.cc/HNF3-KFK8]; Sami Aboudi & Noah Browning, *Exiled Son of Yemen’s Saleh Takes Up Anti-Houthi Cause*, REUTERS (Dec. 4, 2017, 5:34 AM), <https://www.reuters.com/article/us-yemen-security-idUSKBN1DY12V> [perma.cc/MMD6-9FBE].

23. *Yemen’s Aden-Based Government Appoints New Defence, Oil Ministers*, *supra* note 15.

24. MARIEKE BRANDT, *TRIBES AND POLITICS IN YEMEN* (2017).

Houthis are currently led by Abdul Malik Al-Houthi.<sup>25</sup> The group has repudiated foreign intervention in Yemen, particularly by the United States, and attracted support from those disillusioned with the present state of Yemeni politics. The Houthis have gained support since 2015 with a wide cross-section of Yemeni society due to the harshness of the Coalition's bombing campaign, as well as the economic situation in Yemen.<sup>26</sup>

AQAP is an affiliate of Al-Qaeda—once considered one of its most dangerous affiliates.<sup>27</sup> AQAP has cut deals with the Coalition during the war, though the United States denies this.<sup>28</sup> The group remains active in Yemen and was suspected of abducting UN officials as recently as February 2022.<sup>29</sup>

## 2. The Coalition

The Coalition is a shorthand term for an alliance of OIC states, led by Saudi Arabia and the UAE, that oppose Houthi control of Yemen. The Coalition's stated goals at the conflict's outset were to counter Iran's backing of the Houthis, reinstate Hadi in Sana'a, and deter the Houthis. However, the Coalition has fragmented throughout the war.<sup>30</sup> Some Coalition members have left, and others have clashed directly in Yemen.<sup>31</sup> Saudi Arabia and the UAE, the largest and most important Coalition members, disagree on the status of

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25. *Id.*; Clausen, *supra* note 8, at 563; Andrew England & Simeon Kerr, *Houthi Attack Tests UAE Effort to Ease Tensions with Iran*, FIN. TIMES (Jan. 19, 2022), <https://www.ft.com/content/67fed7c0-6e83-475b-b4ec-d66d39cacbd2> [perma.cc/S8X6-XY5H].

26. Ben Hubbard, *How a Saudi-Led Alliance Battling an Iran-Backed Militia Devastated Yemen*, N.Y. TIMES (Apr. 7, 2022), <https://www.nytimes.com/2022/04/07/world/middleeast/yemen-war-saudi-arabia.html> [perma.cc/4YCK-A38B].

27. *Al-Qaeda in the Arabian Peninsula (AQAP)*, COUNCIL ON FOREIGN RELS. (June 19, 2015, 8:00 AM), <https://www.cfr.org/background/al-qaeda-arabian-peninsula-aqap> [perma.cc/MWM7-DJD4].

28. *US Allies, Al Qaeda Battle Rebels in Yemen*, FOX NEWS (Aug. 7, 2018, 2:13 PM), <https://www.foxnews.com/world/us-allies-al-qaeda-battle-rebels-in-yemen> [perma.cc/7WVB-MSPC]; Carlo Muñoz, *Pentagon Denies Reports of U.S. Allies Bribing, Recruiting Al Qaeda Fighters in Yemen*, WASH. TIMES (Aug. 8, 2018), <https://www.washingtontimes.com/news/2018/aug/8/pentagon-denies-us-allies-bribe-recruit-al-qaeda> [perma.cc/5LXJ-E2AZ].

29. *Five UN Workers Abducted by Suspected Al-Qaida Militants in Yemen*, GUARDIAN (Feb. 12, 2022, 6:03 PM), <https://www.theguardian.com/world/2022/feb/12/five-un-workers-abducted-by-suspected-al-qaida-militants-in-yemen> [perma.cc/FZ68-5YRX].

30. Ibrahim Jalal, *Five Years On, Has the Arab Coalition Achieved Its Objectives in Yemen?*, MIDDLE E. INST. (Apr. 2, 2020), <https://www.mei.edu/publications/five-years-has-arab-coalition-achieved-its-objectives-yemen> [perma.cc/D5S7-U3L8].

31. *Qatari Forces in Saudi-Led Coalition Return Home*, REUTERS (June 7, 2017, 4:10 PM), <https://www.reuters.com/article/us-gulf-qatar-alliance-idUSKBN18Y2YH> [perma.cc/R4AM-WTC2]; *Why Are Saudi and the UAE Competing in Southern Yemen?*, TRT WORLD (May 13, 2020), <https://www.trtworld.com/magazine/why-are-saudi-and-the-uae-competing-in-southern-yemen-36281> [perma.cc/PZN8-JEYV]; *Saudi Commentators Go Public in Criticising UAE Role in Yemen*, REUTERS (July 18, 2021, 10:29 AM), <https://www.reuters.com/world/saudi-commentators-go-public-criticising-uae-role-yemen-2021-07-18> [perma.cc/RHY5-R2SM].

several areas in Yemen, including the Perim and Soqatra islands.<sup>32</sup> The war's protracted nature also owes in part to Coalition members' lack of expertise with warfare; Saudi Arabia's last large military operation, for example, was Operation Desert Storm in 1991—and even there, Saudi forces played only a limited role.<sup>33</sup>

Saudi Arabia, specifically, has long been Yemen's most important neighbor and trading partner<sup>34</sup> and previously carried out a unilateral military intervention in Yemen in November 2009.<sup>35</sup> Following the failure of a peace proposal led by Saudi Arabia in March 2021,<sup>36</sup> peace and political support for the Saudis have been difficult to marshal.<sup>37</sup> But the war continues unabated: while some commentators have asserted that the Houthis have already won the war because of their impending conquest of Marib, Saudi Arabia deployed newly formed units to oil-rich areas of Yemen in February 2022.<sup>38</sup>

Though the Coalition is frequently referred to as "Saudi-led,"<sup>39</sup> this characterization obscures the UAE's extensive involvement and allows the Saudis to remain the public face of the war despite the fact that the UAE controls much of the south of Yemen without consultation from the Saudis.<sup>40</sup> Post-

32. Riedel, *supra* note 14, at 128.

33. *Id.* at 123.

34. See Jonathan Fenton-Harvey, *Saudi Arabia's Soft Power Strategy in Yemen*, CARNEGIE ENDOWMENT FOR INT'L PEACE: SADA (Apr. 2, 2019), <https://carnegieendowment.org/sada/78749> [perma.cc/3CWZ-C6LY] (describing Saudi Arabia's recent economic influence in Yemen).

35. Junxiang Mao & Ammar Ahmad Ahmad Gady, *The Legitimacy of Military Intervention in Yemen and Its Impacts*, 12 BEIJING L. REV. 560, 568–69 (2021).

36. Jon Gambrell, *Saudi's Unilateral Yemen Cease-Fire Offer Rejected by Rebels*, AP NEWS (Mar. 29, 2022), <https://apnews.com/article/middle-east-religion-boycotts-dubai-united-arab-emirates-204ea3723cd4d520025d88e5b603b5ac> [perma.cc/FME5-Z5CM].

37. Diana Hodali, *Saudi Arabia Has Lost the War in Yemen*, DW (Mar. 25, 2021), <https://www.dw.com/en/saudi-arabia-has-lost-the-war-in-yemen/a-57007568> [perma.cc/T93E-AP8L]; Hussam Radman, *Saudi Arabia's Role in Southern Yemen*, SANA'A CTR. FOR STRATEGIC STUD. (Jan. 17, 2022), <https://sanaacenter.org/publications/analysis/16146> [perma.cc/W68K-UUPN].

38. See Hodali, *supra* note 37; Bruce Riedel, *The Houthis Have Won in Yemen: What Next?*, BROOKINGS: ORDER FROM CHAOS (Feb. 1, 2022), <https://www.brookings.edu/blog/order-from-chaos/2022/02/01/the-houthis-have-won-in-yemen-what-next> [perma.cc/BXP3-HF9Z]; Mohammed Ghobari, *Fighting Eases in Yemen's Marib as Saudi-Led Coalition Revamps Forces*, REUTERS (Feb. 8, 2022, 10:39 AM), <https://www.reuters.com/world/middle-east/fighting-eases-yemens-marib-saudi-led-coalition-revamps-forces-2022-02-08> [perma.cc/C4RD-KY38].

39. See, e.g., *Saudi-Led Coalition Bombs Sanaa, Says It Hit Drone-Control Site*, AL JAZEERA (Feb. 14, 2022), <https://www.aljazeera.com/news/2022/2/14/saudi-led-coalition-targets-satellites-station-in-yemen> [perma.cc/X69Q-REU4]; *Saudi-Led Coalition Forces Red Cross Plane to Land After Flying over Yemen*, NEW ARAB (July 25, 2018), <https://english.alaraby.co.uk/news/saudi-led-coalition-forces-red-cross-plane-land> [perma.cc/VK9A-MP2W]; *Saudi-Led Coalition Strikes Target Yemen Capital After Drone Attack*, FRANCE 24 (Feb. 14, 2022, 3:03 AM), <https://www.france24.com/en/middle-east/20220214-saudi-led-coalition-strikes-target-yemen-capital-after-drone-attack> [perma.cc/CCB2-U7ZY].

40. See Sheren Khalel, *UAE Deeply Involved in Yemen Despite Claims of Withdrawal, Experts Say*, MIDDLE E. EYE (Feb. 22, 2021, 6:30 PM), <https://www.middleeasteye.net/news/uae-yemen-conflict-deeply-involved-experts-say> [perma.cc/365W-6HWR].



2015, the UAE has led the Coalition's forces in the south of Yemen and has ties to the southern secessionist movement, *Hirak*.<sup>41</sup> With that said, the UAE has attempted to reduce its overt involvement in the war in recent years. It withdrew frontline forces in 2019 and officially withdrew from the conflict in February 2020.<sup>42</sup> However, the UAE remains deeply involved in the war through proxies, and the UAE's actions still inform the Coalition's strategy.<sup>43</sup> For example, in early 2022, the Coalition launched air attacks on Sana'a in response to the seizure of a UAE-flagged vessel in the Red Sea.<sup>44</sup> The UAE has also been solely responsible for specific human rights abuses in Yemen, including the operation of torture prisons in the country's south.<sup>45</sup>

### 3. Non-Coalition State Actors

Numerous state actors not formally involved in the Coalition have also influenced the war in Yemen. Despite their unique and myriad reasons for involvement in the war (briefly detailed below), it is useful to analyze these countries together. They each form a part of the intricate puzzle of the war and are essential to crafting solutions for legal accountability.

These non-Coalition state actors have sold or provided arms and support to various sides during the war. Sometimes referred to as a Middle Eastern "cold war," the rivalry between Iran and Saudi Arabia has affected numerous conflicts in the region beyond Yemen.<sup>46</sup> "The Saudi-led Coalition's ongoing military operation against Houthi rebels in Yemen forms a key front in Riyadh's wider battle against Iranian influence."<sup>47</sup> Coalition members have repeatedly stressed Iranian interests and involvement in the war.<sup>48</sup> Saudi Arabia,

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41. See Riedel, *supra* note 14, at 136; Peter Salisbury, Opinion, *Yemen's Southern Transitional Council: A Delicate Balancing Act*, INT'L CRISIS GRP. (Mar. 30, 2021), <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/yemens-southern-transitional-council-delicate-balancing-act> [perma.cc/SYW9-FMKW].

42. Riedel, *supra* note 14, at 129; Ibrahim Jalal, *The UAE May Have Withdrawn from Yemen, but Its Influence Remains Strong*, MIDDLE E. INST. (Feb. 25, 2020), <https://www.mei.edu/publications/uae-may-have-withdrawn-yemen-its-influence-remains-strong> [perma.cc/AE98-NTJG].

43. See Khalel, *supra* note 40; *Yemen: Saudi-Led Coalition Targets Sanaa After Vessel Seized*, AL JAZEERA (Jan. 5, 2022, 2:01 PM) [hereinafter *Coalition Targets Sanaa*], <https://www.aljazeera.com/news/2022/1/5/saudi-led-coalition-strikes-targets-in-yemens-capital> [perma.cc/DKG5-CJLA].

44. *Coalition Targets Sanaa*, *supra* note 43.

45. Alice Speri, *She Helped Expose Secret UAE-Run Prisons in Yemen—and Paid a Steep Price*, THE INTERCEPT (Dec. 31, 2021, 6:00 AM), <https://theintercept.com/2021/12/31/uae-yemen-prisons-disappeared> [perma.cc/AX9U-9DG8].

46. DILIP HIRO, *COLD WAR IN THE ISLAMIC WORLD* (2018); Adam Baron, *The Middle East's New Battle Lines: Yemen*, EUR. COUNCIL ON FOREIGN RELS., [https://ecfr.eu/special/battle\\_lines/yemen](https://ecfr.eu/special/battle_lines/yemen) [perma.cc/2V3J-X454].

47. Baron, *supra* note 46.

48. See, e.g., *Yemen: Why Is the War There Getting More Violent?*, BBC NEWS (Mar. 22, 2022), <https://www.bbc.com/news/world-middle-east-29319423> [perma.cc/LS5L-X9JB]; Nichols & Landay, *supra* note 18.

the UAE, and their allies, as well as the United States, have repeatedly described the Houthis as “Iran-aligned.”<sup>49</sup> But although Iran supports the Houthis, their level of support is unclear.<sup>50</sup>

On the side of the Coalition, the United States remains the most important non-Coalition member and the most heavily scrutinized by scholars. The United States has a long military history in Yemen, most recently centered around drone warfare and the “War on Terror.”<sup>51</sup> Until January 2015, immediately prior to the start of the war in Yemen, the United States even received information from the Houthis through an intelligence relationship.<sup>52</sup> Scholars have scrutinized the legality of the United States’ involvement in Yemen,<sup>53</sup> and concluded that the United States “may be violating several international laws, including Article 2(4) of the UN Charter, Article 16 of the ILC Draft Articles of State Responsibility, and Common Article 1 of the 1949 Geneva Conventions.”<sup>54</sup> Article 2(4) of the UN Charter describes the conditions for the lawful use of force; Article 16 of the ILC Draft Articles of State Responsibility covers aid or assistance in the commission of an internationally wrongful act; and Common Article 1 includes a duty to respect, and to ensure respect for, the convention in all situations.<sup>55</sup>

The major European powers involved in the war are the UK, France, and Italy. The UK has sold more than £20 billion (approximately \$23 billion) of arms to Saudi Arabia since 2015.<sup>56</sup> British government personnel support the Coalition’s work and train Saudi forces.<sup>57</sup> And Britain’s largest arms company, BAE Systems, provides essential weapons, maintenance, and engineers to Saudi Arabia.<sup>58</sup> France is a major arms exporter to both Saudi Arabia and the UAE; the UAE was the fifth-largest purchaser of French arms and military

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49. Nichols & Landay, *supra* note 18.

50. For example, though there remains strong evidence of Iranian support for the Houthis, the U.S. government in March and April 2015 asserted that Iran did not command or control the Houthi movement. Riedel, *supra* note 14, at 122.

51. See Max Byrne, *Consent and the Use of Force: An Examination of ‘Intervention by Invitation’ as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen*, 3 J. ON USE FORCE & INT’L L. 97 (2016).

52. Riedel, *supra* note 14, at 121.

53. E.g., Oona A. Hathaway, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa T. Yamamoto, *Yemen: Is the U.S. Breaking the Law?*, 10 HARV. NAT’L SEC. J. 1 (2019).

54. *Id.* at 73.

55. See *id.* at 59, 64, 68; John Hursh, *International Humanitarian Law Violations, Legal Responsibility, and US Military Support to the Saudi Coalition in Yemen: A Cautionary Tale*, 7 J. ON USE FORCE & INT’L L. 122, 142, 147 (2020).

56. *True Value of UK Arms Trade to Saudi Arabia Worth over £20 Billion Since 2015*, CAMPAIGN AGAINST ARMS TRADE (July 15, 2021), <https://caat.org.uk/news/true-value-of-uk-arms-trade-to-saudi-arabia-worth-over-20-billion-since-2015> [perma.cc/7MS8-9G9E].

57. Arron Merat, *‘The Saudis Couldn’t Do It Without Us’: The UK’s True Role in Yemen’s Deadly War*, GUARDIAN (June 18, 2019, 1:00 AM), <http://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war> [perma.cc/L6YS-MTSA].

58. *Id.*

equipment between 2011 and 2020.<sup>59</sup> These weapons have been extensively used against civilians in Yemen despite the French government's denials.<sup>60</sup> Furthermore, French special forces were on the ground in Yemen according to 2018 reports.<sup>61</sup> Italy has also been a major arms exporter to the Coalition, and Italian-manufactured bomb fragments have been found on the ground in Yemen.<sup>62</sup> Human rights groups filed a communication against Italy in the ICC and a criminal complaint in the Rome Prosecutor's Office.<sup>63</sup>

In addition to these three major European players, Spain has supported the Coalition through arms sales, including laser-guided bombs and ships.<sup>64</sup> Finally, Germany previously sold arms to the Coalition but ceased arms exports to Saudi Arabia following the murder of journalist Jamal Khashoggi in 2020.<sup>65</sup>

### B. *History of the War*

While numerous actors have waded in to promote their own interests, the current war in Yemen might, at its core, be understood as the most recent stage in a long-running struggle between the Houthi movement and ruling Yemeni governments. Between 2004 and 2009, six wars were fought between government forces and the Houthi movement.<sup>66</sup> In the wake of the 2011 anti-government protests across the Arab world (popularly referred to as the "Arab Spring"),<sup>67</sup> Ali Abdallah Saleh signed the Gulf Cooperation Council (GCC) initiative and transferred executive powers, albeit unwillingly, to then-Vice President Abdrabbuh Mansur Hadi.<sup>68</sup>

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59. INT'L FED'N FOR HUM. RTS., ARMS SALES: FRANCE AND THE UNITED ARAB EMIRATES, PARTNERS IN THE CRIMES COMMITTED IN YEMEN? 5, 23 (2021), <https://www.fidh.org/IMG/pdf/arms781ang.pdf> [perma.cc/W7QZ-249E].

60. Helal Aljamra & Youssef Igrouane, *French-Made Weapons Used Against Civilians in Yemen's Rising Death Toll*, INSIDE ARABIA (June 27, 2019), <https://insidearabia.com/french-made-weapons-used-against-civilians-in-yemens-rising-death-toll> [perma.cc/22D5-TLXU].

61. *French Special Forces on the Ground in Yemen: Le Figaro*, REUTERS (June 16, 2018, 5:24 AM), <https://www.reuters.com/article/us-yemen-security-france-idUSKBN1JC099> [perma.cc/5AQ3-XNSK].

62. *Italian Arms Exports to Yemen: State and Corporate Responsibility*, *supra* note 17.

63. *Id.*

64. Zach Campbell, *Left-Wing Leaders in Spain Condemn the War in Yemen, but Keep Up Arms Sales to Saudi Arabia*, THE INTERCEPT (Dec. 21, 2018, 11:34 AM), <https://theintercept.com/2018/12/21/yemen-war-spanish-weapons-saudi-arabia> [perma.cc/8KT4-5JM].

65. Bojan Pancevski & Laurence Norman, *Germany to Halt Arms Sales to Saudi Arabia over Khashoggi Killing*, WALL ST. J. (Nov. 19, 2018, 11:04 AM), <https://www.wsj.com/articles/germany-to-halt-arms-sales-to-saudi-arabia-over-khashoggi-killing-1542640934> [perma.cc/7JUT-EBV7].

66. Mao & Gady, *supra* note 35, at 568.

67. Sean David Hobbs, *Why the Phrase "Arab Spring" Should Be Retired*, CAIRO REV. GLOB. AFFS. (Feb. 4, 2021), <https://www.thecairoreview.com/essays/why-the-phrase-arab-spring-should-be-retired> [perma.cc/Z9KW-FVSD].

68. Clausen, *supra* note 8, at 566.

In September 2014, the Houthis, buoyed by economic and political dissatisfaction, took control of Yemen's capital, Sana'a.<sup>69</sup> Soon after, a Peace and National Partnership Agreement signed by the Yemeni government and the Houthis, under the aegis of UN endorsement, collapsed.<sup>70</sup> In January 2015, the Houthis kidnapped Hadi's chief of staff<sup>71</sup> and placed Hadi under house arrest.<sup>72</sup> The following month, Hadi, who had previously resigned, fled to Aden in the south of Yemen and retracted his resignation.<sup>73</sup> And a month after that, in March 2015, the members of the future Coalition announced the beginning of their military operations in Yemen, effectively commencing the current war.<sup>74</sup>

The first phase of the Coalition's involvement, Operation Decisive Storm in 2015 and 2016, resulted in nothing more than a quagmire.<sup>75</sup> This characterization still applies to the war today. Operation Decisive Storm was followed by Operation Restoring Hope, which is still ongoing.<sup>76</sup> There is evidence that Saudi Arabia expected a quick victory in Yemen;<sup>77</sup> it has instead been embroiled in the conflict for eight years.<sup>78</sup> The UAE has also tried (unsuccessfully) to extricate itself from the war.<sup>79</sup>

69. April Longley Alley, *Yemen's Houthi Takeover*, MIDDLE E. INST. (Dec. 22, 2014), <https://www.mei.edu/publications/yemens-houthi-takeover> [perma.cc/F7N3-82XQ]. President Hadi had recently announced an end to fuel subsidies and the National Dialogue Conference process had dragged on. PROJECT ON MIDDLE E. POL. SCI., POLITICS, GOVERNANCE, AND RECONSTRUCTION IN YEMEN (2018), [http://pomeps.org/wp-content/uploads/2018/02/POMEPS\\_Studies\\_29\\_Yemen\\_Web-REV.pdf](http://pomeps.org/wp-content/uploads/2018/02/POMEPS_Studies_29_Yemen_Web-REV.pdf) [perma.cc/V48V-M765].

70. Mareike Transfeld, *The Failure of the Transitional Process in Yemen: The Houthi's Violent Rise to Power and the Fragmentation of the State*, SWP COMMENTS, Feb. 2015, at 1, 2.

71. *Gunmen Kidnap Yemeni President's Chief of Staff*, FRANCE 24 (Jan. 17, 2015), <https://www.france24.com/en/20150117-gunmen-kidnap-yemen-president-chief-staff-mubarak> [perma.cc/R43H-SVUP].

72. Marcus Montgomery, *A Timeline of the Yemen Crisis, from the 1990s to the Present*, ARAB CTR. WASH. D.C. (Feb. 19, 2021), <https://arabcenterdc.org/resource/a-timeline-of-the-yemen-crisis-from-the-1990s-to-the-present> [perma.cc/8XPD-GEYC].

73. *Id.*

74. Steve Almasy & Jason Hanna, *Saudi Arabia Launches Airstrikes in Yemen*, CNN (Mar. 26, 2015, 12:38 AM), <https://www.cnn.com/2015/03/25/middleeast/yemen-unrest/index.html> [perma.cc/9C9M-V5MB].

75. Editorial, *Five Years Since Decisive Storm*, SANA'A CTR. FOR STRATEGIC STUD.: THE YEMEN REV. (Apr. 1, 2020), <https://sanaacenter.org/publications/the-yemen-review/9518> [perma.cc/4GC6-BEBK].

76. *See Saudi-Led Coalition Announces End to Yemen Operation*, REUTERS (Apr. 21, 2015, 2:22 PM), <https://www.reuters.com/article/us-yemen-security-saudi-idUSKBN0NC24T20150421> [perma.cc/UE56-S626].

77. Editorial, *The Guardian View on Yemen: The Forgotten War*, GUARDIAN (Dec. 30, 2021, 1:25 PM), <https://www.theguardian.com/commentisfree/2021/dec/30/the-guardian-view-on-yemen-the-forgotten-war> [perma.cc/5KR3-MG36].

78. Robinson, *supra* note 16.

79. *See supra* Section I.A.2.

### C. Violations of International Law

Yemen has been the world's worst humanitarian crisis since 2015 and has been called the "world's worst humanitarian crisis" measured by the people affected.<sup>80</sup> The Coalition's war crimes loom large in this assessment.<sup>81</sup> Seven actions or approaches taken by Coalition members in Yemen comprise the bulk of these war crimes.

(1) Air Strikes. In 2020 alone, 32 Coalition air strikes killed 104 civilians and injured 81 others.<sup>82</sup> Throughout the war, air strikes enabled by U.S. technical assistance<sup>83</sup> have targeted airports,<sup>84</sup> funerals,<sup>85</sup> weddings,<sup>86</sup> and even a school bus carrying children.<sup>87</sup> Coalition forces have also repeatedly struck medical care sites.<sup>88</sup> In an especially damning example, the Coalition struck Doctors Without Borders sites *after* the organization shared the sites' coordinates with them.<sup>89</sup>

(2) Obstructing Aid. The Coalition has repeatedly obstructed humanitarian aid to Yemen.<sup>90</sup> The Coalition's naval and air blockade has prevented aid agencies from delivering crucial food and medical aid to Yemenis, thereby exacerbating the humanitarian crisis.<sup>91</sup>

80. *From the Field: Millions of Yemenis Facing 'Death Sentence'*, UN NEWS (Feb. 25, 2021), <https://news.un.org/en/story/2021/02/1085292> [perma.cc/NX83-Y4WS].

81. See Cumming-Bruce, *supra* note 11.

82. MWATANA FOR HUM. RTS., A TRAGEDY WITHOUT JUSTICE 18 (2021), <https://mwatana.org/wp-content/uploads/2021/09/Human-Rights-in-Yemen-in-2020-En-1.pdf> [perma.cc/P6RS-Q9WB].

83. Timothy Robbins, Hijab Shah & Melissa Dalton, *U.S. Support for Saudi Military Operations in Yemen*, CTR. FOR STRATEGIC & INT'L STUD. (Mar. 23, 2018), <https://www.csis.org/analysis/us-support-saudi-military-operations-yemen> [perma.cc/76MD-BJK9].

84. *E.g.*, *Saudi-Led Coalition Forces Target Yemeni Airport in Air Strike*, BBC NEWS (Dec. 20, 2021), <https://www.bbc.com/news/world-middle-east-59736335> [perma.cc/J9P8-3BZN].

85. *E.g.*, Nadia Khomami, *Airstrikes on Yemen Funeral Kill at Least 140 People*, UN Official Says, GUARDIAN (Oct. 8, 2016, 7:37 PM), <https://www.theguardian.com/world/2016/oct/08/saudi-led-coalition-airstrike-hit-yemen-funeral-officials-say> [perma.cc/HT4C-LFHK].

86. *E.g.*, *Yemen War: Saudi-Led Air Strike on Wedding 'Kills 20'*, BBC NEWS (Apr. 23, 2018), <https://www.bbc.com/news/world-middle-east-43863608> [perma.cc/C2WD-SFRP].

87. Andrew England, *Children Among Dozens Killed in Saudi-Led Air Strike in Yemen*, FIN. TIMES (Aug. 9, 2018), <https://www.ft.com/content/f01676ca-9bc3-11e8-ab77-f854c65a4465> [perma.cc/7N9N-EWGW].

88. *Yemen: No True Accountability in Bombing of MSF-Supported Hospital*, DOCTORS WITHOUT BORDERS (Oct. 30, 2019), <https://www.doctorswithoutborders.org/latest/yemen-no-true-accountability-bombing-msf-supported-hospital> [perma.cc/S8X5-3LGR].

89. *Id.*; *Yemen, Humanitarian Impact of the Conflict*, INT'L COMM. OF THE RED CROSS: HOW DOES LAW PROTECT IN WAR? ¶ 36, <https://casebook.icrc.org/case-study/yemen-humanitarian-impact-conflict> [perma.cc/67HR-L6B9].

90. HUM. RTS. WATCH, DEADLY CONSEQUENCES: OBSTRUCTION OF AID IN YEMEN DURING COVID-19 (2020), [https://www.hrw.org/sites/default/files/media\\_2020/09/yemen0920\\_web\\_3.pdf](https://www.hrw.org/sites/default/files/media_2020/09/yemen0920_web_3.pdf) [perma.cc/WHQ3-RD64].

91. *Id.*; *Saudi-Led Coalition Forces Red Cross Plane to Land After Flying over Yemen*, *supra* note 39.

(3) Arbitrary Detentions. The administration of Coalition-controlled areas in Yemen has included arbitrary detentions across the country.<sup>92</sup> Coalition-backed forces, particularly the UAE-backed Southern Transitional Council, were responsible for 101 documented arbitrary detentions in 2020.<sup>93</sup>

(4) Enforced Disappearances. Coalition-backed forces, including the internationally recognized Yemeni government, were responsible for eighty-nine enforced disappearances in 2020.<sup>94</sup>

(5) Torture. Torture has been widespread throughout Coalition-controlled areas. Reports of mass torture and sexual abuse in UAE-run prisons in the south surfaced in 2018.<sup>95</sup> Between 2016 and 2020, the internationally recognized government was responsible for at least 282 incidents of arbitrary or abusive detention, 90 incidents of enforced disappearance, and 65 incidents of torture.<sup>96</sup>

(6) Health Care Infrastructure. Coalition-backed forces have attacked health infrastructure throughout the war. In 2020 alone, Coalition-backed forces were responsible for twenty-two attacks on health care infrastructure.<sup>97</sup>

(7) Starvation. Finally, the Coalition's use of starvation as a tool of war is arguably the most well-researched and documented war crime in Yemen.<sup>98</sup> The hunger crisis in Yemen is a "confluence of human policies and interests," as blockades and indiscriminate targeting of civilian infrastructure have disrupted the food supply in the country.<sup>99</sup>

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92. See generally *Mapping Territorial Control in Yemen*, ACLED, <https://acleddata.com/mapping-territorial-control-in-yemen> [perma.cc/MBU8-9CNF]; MWATANA FOR HUM. RTS., *supra* note 82, at 67; *Yemen: Saudi Forces Torture, 'Disappear' Yemenis*, HUM. RTS. WATCH (Mar. 25, 2020, 12:00 AM), <https://www.hrw.org/news/2020/03/25/yemen-saudi-forces-torture-disappear-yemenis#> [perma.cc/VHE2-37NJ].

93. *Yemen: Riyadh Agreement Ignores Rights Abuses*, HUM. RTS. WATCH, (Dec. 12, 2019, 12:00 AM), <https://www.hrw.org/news/2019/12/12/yemen-riyadh-agreement-ignores-rights-abuses> [perma.cc/9SW2-QE4J]; MWATANA FOR HUM. RTS., *supra* note 82, at 67.

94. MWATANA FOR HUM. RTS., *supra* note 82, at 73. Enforced disappearances is a term used to describe abduction by state officials or those acting with state consent. *Enforced Disappearances*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/enforced-disappearances> [perma.cc/4DCQ-QGPQ].

95. *Report: Mass Torture in Network of UAE-Run Prisons in South Yemen*, AL JAZEERA (Aug. 12, 2018), <https://www.aljazeera.com/news/2018/8/12/report-mass-torture-in-network-of-uae-run-prisons-in-south-yemen> [perma.cc/G8YC-DRUZ].

96. MWATANA FOR HUM. RTS., *IN THE DARKNESS: ABUSIVE DETENTION, DISAPPEARANCE AND TORTURE IN YEMEN'S UNOFFICIAL PRISONS MAY 2016–APRIL 2020*, at 16 (2020), <https://mwatana.org/wp-content/uploads/2020/06/In-the-Darkness.pdf> [perma.cc/M7LQ-USCE].

97. MWATANA FOR HUM. RTS., *supra* note 82, at 22.

98. See Laura Graham, Note, *Pathways to Accountability for Starvation Crimes in Yemen*, 53 CASE W. RSRV. J. INT'L L. 401 (2021); Laura Graham, Note, *Prosecuting Starvation Crimes in Yemen's Civil War*, 52 CASE. W. RSRV. J. INT'L L. 267 (2020).

99. Johan Leijon, *The Crime of Hunger: Yemen's Humanitarian Crisis*, E-INT'L RELS. (Sept. 17, 2020), <https://www.e-ir.info/2020/09/17/the-crime-of-hunger-yemens-humanitarian-crisis> [perma.cc/6V2S-3WD4].

#### D. *Applicable International Legal Frameworks*

The actions of non-Yemeni state actors serve as a playbook for how to avoid accountability during war. Their tactics include using the funds they pay to humanitarian organizations and powerful alliances on the United Nations Security Council (UNSC) as sources of political cover.<sup>100</sup> Thus, international legal frameworks for holding the state actors perpetrating and enabling Yemen's humanitarian crisis accountable must be evaluated in light of those actors' ability to influence or restrain a given legal avenue.

A threshold inquiry in determining relevant sources of international law is how the conflict in Yemen should be classified. The conflict in Yemen is best classified as a noninternational armed conflict (NIAC)<sup>101</sup> because, without evidence of *direct* Iranian involvement in Yemen, the Houthis are only a nonstate armed group.<sup>102</sup> With the conflict thus classified, several international legal provisions may apply. Common Article 3 of the Geneva Convention, which applies to NIACs, provides an obligation to protect civilians.<sup>103</sup> This obligation has been repeatedly violated by the parties in Yemen.<sup>104</sup> Similarly, the 1977 Additional Protocol II to the Geneva Convention applies to NIACs and prohibits collective punishment.<sup>105</sup>

Of the relevant stakeholders, Saudi Arabia, the UAE, Yemen, France, and Italy have ratified Additional Protocol II, and the United States has signed it.<sup>106</sup> Additionally, Common Article 1 of the Geneva Convention includes a duty to respect, and to ensure respect for, the convention in all situations.<sup>107</sup> Article 1 imposes a positive obligation on states to align their activities more closely with both state and nonstate actors.<sup>108</sup>

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100. See *infra* Part II.

101. *Non-international Armed Conflicts in Yemen*, RULAC, <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen> [perma.cc/PUY9-HAYH].

102. LOUISE ARIMATSU & MOHBUBA CHOUDHURY, *THE LEGAL CLASSIFICATION OF THE ARMED CONFLICTS IN SYRIA, YEMEN, AND LIBYA* 30–31 (2014), [https://www.chathamhouse.org/sites/default/files/home/chatham/public\\_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf](https://www.chathamhouse.org/sites/default/files/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf) [perma.cc/Q48F-T84S].

103. Waseem Ahmad Qureshi, *The Crisis in Yemen: Armed Conflict and International Law*, 45 N.C. J. INT'L L. 227, 255–57 (2020).

104. *Id.* at 258–60.

105. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), arts. I, IV, June 8, 1977, 1125 U.N.T.S. 609.

106. *Id.* at 675; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977., INT'L COMM. OF THE RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=475](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475) [perma.cc/7SWK-KHLZ].

107. Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, art. 1, Aug. 12, 1949, 75 U.N.T.S. 287.

108. Oona Hathaway et al., *Common Article 1 and the U.S. Duty to Ensure Respect for the Geneva Conventions in Yemen*, JUST SEC. (Apr. 26, 2018), <https://www.justsecurity.org/55415/common-article-1-u-s-duty-ensure-respect-geneva-conventions-yemen> [perma.cc/MM7L-XZ7B].

Turning to the International Covenant on Civil and Political Rights (ICCPR), Saudi Arabia and the UAE are neither signatories nor parties to the agreement, which might complicate, or render impossible, an inquiry into whether it has been violated.<sup>109</sup> Yemen is a party to the ICCPR and has ratified it but has not accepted the individual complaint mechanism under the First Optional Protocol to the ICCPR.<sup>110</sup> Yemen has, however, accepted the inquiry procedure under the Convention against Torture.<sup>111</sup> All members of the conflict are party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>112</sup>

In addition to these treaty-based sources, customary international humanitarian law recognizes the principles of distinction and civilian immunity,<sup>113</sup> which require parties to minimize harm to civilians. Human rights law applies in conflict situations except when it is subject to derogation or when international humanitarian law prevails as the *lex specialis*.<sup>114</sup> Additionally, international human rights law is increasingly influencing the international humanitarian laws for NIACs.<sup>115</sup>

But international legal theory provides inadequate tools to countries besieged by war. In the case of Yemen, both the “consent of the host government” and the “responsibility to protect” principle (R2P) have been used to justify the Coalition’s intervention.<sup>116</sup> Both tools allow intervening countries

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109. *UN Treaty Body Database: Ratification Status for CCPR*, UNITED NATIONS HUM. RTS. TREATY BODIES, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en) [perma.cc/6S95-TV25]. A larger question is to what extent the ICCPR is now customary international law that would be applicable to nonsignatories. See, e.g., Kristen D.A. Carpenter, *The International Covenant on Civil and Political Rights: A Toothless Tiger*, 26 N.C. J. INT’L L. & COM. REGUL. 1, 3 (2000) (“[T]he Covenant is part of the body of customary international law.”).

110. *UN Treaty Body Database: Ratification Status for CCPR*, *supra* note 109.

111. *UN Treaty Body Database: Ratification Status for CAT*, U.N. HUM. RTS. TREATY BODIES, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CAT&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CAT&Lang=en) [perma.cc/Y3B8-Q4T6].

112. *Q & A on the Conflict in Yemen and International Law*, HUM. RTS. WATCH, (Apr. 6, 2015, 10:00 PM) <https://www.hrw.org/news/2015/04/06/q-conflict-yemen-and-international-law> [perma.cc/2HHV-D27M].

113. Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT’L REV. RED CROSS 501 (2008). There remains an active debate about whether and to what extent international humanitarian law and human rights are in tension. See, e.g., *id.* at 502.

114. *IHL and Human Rights*, INT’L COMM. OF THE RED CROSS: HOW DOES LAW PROTECT IN WAR?, <https://casebook.icrc.org/law/ihl-and-human-rights> [perma.cc/7DFS-B3G9].

115. MARCO SASSÖLI, INTERNATIONAL HUMANITARIAN LAW 425 (2019).

116. The Coalition has also insinuated a collective self-defense argument, but this has been repudiated. See Tom Ruys & Luca Ferro, *Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen*, 65 INT’L & COMPAR. L.Q. 61 (2016); Isabella Wong, *Authority to Consent to the Use of Force in Contemporary International Law: The Crimean and Yemeni Conflicts*, 6 J. ON USE FORCE & INT’L L. 52 (2019).



to use force that would otherwise have been prohibited under Article 2(4) of the UN Charter.<sup>117</sup>

It is debatable whether “host country consent” was ever given in Yemen. President Hadi invited the Coalition to intervene, but questions remain about his ability to represent the Yemeni government when he did so and whether the subsequent intervention complied with the scope of his request.<sup>118</sup> Legal scholars have posited that, even when consent has been granted, “[i]f a non-international armed conflict exists, the actions of the intervening state are governed by international humanitarian law.”<sup>119</sup> Thus, even if President Hadi consented to the Coalition’s intervention, consent has served as a poor limiting principle given the war’s devastating humanitarian consequences. Yemen highlights how the “intervention by invitation” doctrine is prone to manipulation and should not serve as an impermeable shield to international legal liability for Coalition members.<sup>120</sup>

R2P rhetoric appeared in the Coalition’s statements justifying the war.<sup>121</sup> R2P, which allows for the use of force in limited contexts, has been criticized because of its inconsistent and politicized application.<sup>122</sup> R2P is, at best, inapplicable to the war in Yemen because it is not clear that the Coalition even intends to use it as a legal justification for its actions.<sup>123</sup> At worst, it was (mis)used to justify the Coalition’s intervention by providing a human-rights-centered narrative and legal cover for Coalition actions that were truly focused on the political goal of reinstating President Hadi.<sup>124</sup>

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117. See David Wippman, *Pro-democratic Intervention*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 797, 805–06 (Marc Weller ed., 2015); Niels Blokker, *Reconfiguring the UN System of Collective Security*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW*, *supra*, at 193–197.

118. Wong, *supra* note 116, at 75; Hathaway et al., *supra* note 53, at 62–63.

119. Oona A. Hathaway et al., *Consent Is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict*, 165 U. PA. L. REV. 1, 2 (2016).

120. Ruys & Ferro, *supra* note 116.

121. *Statement by Saudi Ambassador Al-Jubeir on Military Operations in Yemen*, OPERATION RENEWAL OF HOPE (Mar. 25, 2015), <http://www.operationrenewalofhope.com/statement-by-saudi-ambassador-al-jubeir-on-military-operations-in-yemen> [perma.cc/66NN-HRPR] (writing that Saudi actions were designed “to protect the people of Yemen and its legitimate government from a takeover by the Houthis”).

122. Alex J. Bellamy, *Sovereignty Redefined: The Promise and Practice of R2P*, in *THE RESPONSIBILITY TO PROTECT TWENTY YEARS ON* 13 (Pinar Gözen Ercan ed., 2022).

123. Drew Thompson, *Responsibility While Protecting (RwP) and the Intervention in Yemen*, ETHICS & INT’L AFFS. (Jan. 25, 2017), <https://www.ethicsandinternationalaffairs.org/2017/responsibility-protecting-intervention-yemen> [perma.cc/W9SC-WV4Z] (“The mention to the people and the legitimate government, and not explicitly to protection from mass atrocities, may suggest that RtoP is not actually being invoked by the Saudi-led coalition.”).

124. Haseenah Huurieyah Wan Rosli, *The Forsaken War in Yemen: R2P as Mere Rhetoric?*, in *THE RESPONSIBILITY TO PROTECT TWENTY YEARS ON*, *supra* note 122, at 171; Elinor Buys & Andrew Garwood-Gowers, *The (Ir)Relevance of Human Suffering: Humanitarian Intervention and Saudi Arabia’s Operation Decisive Storm in Yemen*, 24 J. CONFLICT & SEC. L. 1 (2019).

## II. AVENUES OF ACCOUNTABILITY

“International law is hardest to enforce against states which do not want to comply with it and which have powerful political allies, especially ones with U.N. veto power, to protect them from official sanction.”<sup>125</sup>

This Part explores potential avenues for holding the Coalition and arms-exporting countries accountable in international and domestic venues. The approaches discussed below can largely be divided into UN-based and non-UN-based avenues.

The UN might be the expected path for pursuing accountability for crimes and abuses in Yemen. However, the outsized influence of Coalition members in the UN undermines its ability to hold the perpetrators of Yemen’s humanitarian crisis accountable in two ways. First, the UN’s structure impedes it from even monitoring the conflict effectively. For example, the United Nations Human Rights Council (UNHRC), the highest state-comprised political body for human rights in the UN system, could not sustain its investigation into Coalition-committed war crimes in Yemen. Due to intense lobbying, primarily from Saudi Arabia, the UN investigators’ mandate was not renewed, despite repeated urging by human rights groups.<sup>126</sup> The Group of Eminent Experts on Yemen (GEE), which existed from 2017 to 2020, was tasked with comprehensively reviewing all violations of international law in Yemen and identifying those responsible.<sup>127</sup> In 2020, the GEE recommended that the UNSC refer the crisis in Yemen to the ICC.<sup>128</sup> Subsequently, Saudi Arabia and other Coalition members ensured the GEE’s mandate was not renewed through a “stealth campaign” of threats and incentives.<sup>129</sup> The Coalition members’ ability to quash a resolution in the UNHRC—the first time a UNHRC

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125. D. Wes Rist, *What Does the ICJ Decision on The Gambia v. Myanmar Mean?*, ASIL: INSIGHTS (Feb. 27, 2020), <https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean> [perma.cc/K83S-XPPE].

126. See *UN Votes to Shut Down War Crimes Probe in Yemen, in Stinging Defeat for Rights Groups*, FRANCE 24 (Oct. 8, 2021, 5:39 AM), <https://www.france24.com/en/middle-east/20211008-un-ends-war-crimes-probe-in-yemen-in-major-setback-for-rights-body> [perma.cc/88SN-6YTH]; Stephanie Nebehay, *U.N. Urged to Restore Scrutiny of War Crimes in Yemen*, REUTERS (Dec. 2, 2021, 2:50 PM), <https://www.reuters.com/world/middle-east/un-urged-restore-scrutiny-war-crimes-yemen-2021-12-02> [perma.cc/9PYE-YGKY].

127. Press Release, *Statement by Group of Experts on Yemen on HRC Rejection of Resolution to Renew Their Mandate*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R (Oct. 8, 2021) [hereinafter OHCHR Press Release], <https://www.ohchr.org/en/press-releases/2021/10/statement-group-experts-yemen-hrc-rejection-resolution-renew-their-mandate> [perma.cc/D29Q-U833].

128. Hum. Rts. Council, Rep. of the Grp. of Eminent Int’l & Reg’l Experts on Yemen: Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014, ¶ 99, U.N. Doc A/HRC/45/6 (Sept. 28, 2020).

129. Stephanie Kirchgaessner, *Saudis Used ‘Incentives and Threats’ to Shut Down UN Investigation in Yemen*, GUARDIAN (Dec. 1, 2021, 1:00 AM), <https://www.theguardian.com/world/2021/dec/01/saudi-arabia-yemen-un-human-rights-investigation-incentives-and-threats> [perma.cc/LY28-3QJR].

resolution had ever been defeated—exposes the structural inadequacies that prevent the UN from holding powerful states accountable.<sup>130</sup>

Yet, the power politics that animate the UN make these outcomes unsurprising. To ask the UN to investigate Coalition members is to ask the organization to bite the hand that feeds it. The Office for the Coordination of Humanitarian Affairs webpage for Yemen thanks Coalition members: “In 2019, the Kingdom of Saudi Arabia provided a *generous* grant of US\$500 million for humanitarian action carried out by UN agencies.”<sup>131</sup> As is the case here, multilateral organizations are vulnerable to “mission capture” unless voluntary contributions are regulated.<sup>132</sup> However, regulating voluntary contributions would be impossible in Yemen where multilateral organizations are starved for contributions.<sup>133</sup> The countries that contribute the most to humanitarian funding also provide “the majority of arms to the conflict.”<sup>134</sup> Further, Coalition members have harshly retaliated against those who criticize their actions.<sup>135</sup> Saudi Arabia, for example, has long used funding to deflect attention from criticism against it;<sup>136</sup> the GEE decried the “environment of fear and reprisal created by the parties to the conflict.”<sup>137</sup>

Organizations such as Mwatana for Human Rights face these gaps in the global legal system while formulating a legal strategy for Yemen, as “avenues

130. Stephanie Nebehay, *U.N. Ends Yemen War Crimes Probe in Defeat for Western States*, REUTERS (Oct. 8, 2021, 9:30 AM), <https://www.reuters.com/world/middle-east/un-ends-yemen-war-crimes-probe-historic-defeat-rights-body-2021-10-07> [perma.cc/6XLS-27CQ].

131. *Attacks on Hospitals Deprive Vulnerable Yemenis of Health Care*, UNITED NATIONS OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS. (Feb. 11, 2020) (emphasis added), <https://www.unocha.org/story/attacks-hospitals-deprive-vulnerable-yemenis-health-care> [perma.cc/R364-VS27].

132. See, e.g., Kristina Daugirdas & Gian Luca Burci, *Financing the World Health Organization: What Lessons for Multilateralism?*, 16 INT’L ORGS. L. REV. 299, 335, 337 (2019); Sneha Barot & Susan A. Cohen, *The Global Gag Rule and Fights over Funding UNFPA: The Issues That Won’t Go Away*, 18 GUTTMACHER POL’Y REV. 27 (2015); Christoph Harig & Nicole Jenne, *Whose Rules? Whose Power? The Global South and the Possibility to Shape International Peacekeeping Norms Through Leadership Appointments*, 48 REV. INT’L STUD. 646 (2022); Kseniya Oksamytna, Vincenzo Bove & Magnus Lundgren, *Leadership Selection in United Nations Peacekeeping*, 65 INT’L. STUD. Q. 16 (2021).

133. See, e.g., *Yemen Emergency*, WORLD FOOD PROGRAMME, <https://www.wfp.org/emergencies/yemen-emergency> [perma.cc/7ZXQ-YK57] (“WFP is facing a significant funding shortfall.”).

134. Ann Marie Kimball & Aisha Jumaan, *Yemen: The Challenge of Delivering Aid in an Active Conflict Zone*, 5 GLOB. SEC.: HEALTH, SCI. & POL’Y 65, 66 (2020).

135. See, e.g., Ben Hubbard, *Lebanese Minister Who Criticized War in Yemen Resigns Under Saudi Pressure*, N.Y. TIMES (Dec. 3, 2021), <https://www.nytimes.com/2021/12/03/world/middleeast/lebanon-george-kordahi-resign-saudi.html> [perma.cc/2FRW-2APE].

136. See, e.g., Eric Rosand & Alistair Millar, *The Odd Couple at the Center of the U.N.’s Counterterrorism Growth*, JUST SEC. (July 8, 2020), <https://www.justsecurity.org/71273/the-odd-couple-at-the-center-of-the-u-n-s-counterterrorism-growth> [perma.cc/Q7KL-PRDJ].

137. OHCHR Press Release, *supra* note 127.

for accountability and for redress in regards to Yemen are very limited.<sup>138</sup> Domestic opportunities for prosecution are also limited. For one, prosecutions in the Coalition countries are improbable and would not follow international legal standards.<sup>139</sup> Because the parties to the conflict have not ratified relevant treaties, and their treaty provisions do not overlap, organizations like Mwatana have had to develop alternate legal strategies. As such, Mwatana has focused its efforts on the arms trade in European countries and specifically on European government actors granting licenses to arms-manufacturing companies and the responsibility of arms companies.<sup>140</sup> Since these domestic opportunities are so constrained, the UN's role takes on greater importance, both through formal means and as a way of putting pressure on parties to the conflict.<sup>141</sup>

### A. UN-based Avenues

Beyond the power politics of UN members, the mechanics of the UN impede it from commencing an impartial inquiry into the war in the first place.

#### 1. Security Council

Structural power imbalances in the UN and its consequently limited ability to hold powerful states accountable are most visible in the UNSC.<sup>142</sup> One proposed approach for investigating starvation crimes in Yemen is for the UNSC to create an ad-hoc tribunal based on UNSC Resolution 2417 (which condemned starvation as a method of warfare).<sup>143</sup> There is precedent for the UNSC establishing a tribunal with its own mandate: it established the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994).<sup>144</sup> However, both tribunals were products of a more unipolar UN, when member countries had an expansive view of the UN's role in responding to state human rights violations.<sup>145</sup>

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138. Zoom Interview with Olivia Herman, Legal Advisor, Mwatana for Hum. Rts., at 4:45 (Mar. 18, 2022) [hereinafter Herman Interview] (on file with the *Michigan Law Review*).

139. *Id.* at 5:03.

140. *Id.* at 3:43, 19:25.

141. *Id.* at 5:32.

142. See U.N. GAOR, 75th Sess., 27th, 28th plen. mtg., U.N. DOC. GA/12288 (Nov. 16, 2020).

143. See Graham, *supra* note 98, at 403; Press Release, Security Council, Adopting Resolution 2417 (2018), Security Council Strongly Condemns Starving of Civilians, Unlawfully Denying Humanitarian Access as Warfare Tactics, U.N. Press Release SC/13354 (May 24, 2018).

144. *International Tribunals*, UNITED NATIONS SEC. COUNCIL, <https://www.un.org/securitycouncil/content/repertoire/international-tribunals> [perma.cc/JQ98-Q7V7].

145. See Carol M. Glen, *Multilateralism in a Unipolar World: The UN Security Council and Iraq*, 6 INT'L RELS. ASIA-PACIFIC 307 (2006); Ralph Zacklin, *THE UNITED NATIONS SECRETARIAT AND THE USE OF FORCE IN A UNIPOLAR WORLD* (2010).

Humanitarian actors have recommended that the UNSC support an independent investigatory mechanism to encourage the end of the war.<sup>146</sup> Previously, however, the UNSC has only passed resolutions regarding the war in Yemen that were limited in both scope and impact. UNSC Resolution 2216, passed at the beginning of the war in 2015, called for an end to all hostilities, imposed sanctions on individuals, and called for actors to “abide by the Gulf Cooperation Council.”<sup>147</sup> But many of the GCC members are also members of the Coalition.

UNSC action on Yemen can be distinguished from, for example, action on Syria, where Russian and Chinese vetoes have repeatedly blocked the delivery of aid, and more recently, action on Ukraine, which Russia vetoed.<sup>148</sup> In contrast, action on Yemen has received mostly unanimous support within the UNSC, but has still been ineffective.<sup>149</sup> For example, in 2018, Russia vetoed a draft resolution authored by the UK that highlighted Iran’s role in Yemen.<sup>150</sup> But later in the same session, the UNSC “unanimously approved a Russian-drafted resolution” addressing the same issues without discussing Iranian involvement.<sup>151</sup> Overall, Saudi Arabia and other Coalition members’ relationships with the UNSC’s permanent<sup>152</sup> and nonpermanent members have created a “great deal of consensus, but very little movement.”<sup>153</sup>

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146. MWATANA FOR HUM. RTS., *supra* note 82, at 133.

147. Press Release, Security Council, Security Council Demands End to Yemen Violence, Adopting Resolution 2216 (2015), with Russian Federation Abstaining, U.N. Press Release SC/11859 (Apr. 14, 2015).

148. Michelle Nichols, *Russia, Backed by China, Casts 14th U.N. Veto on Syria to Block Cross-Border Aid*, REUTERS (Dec. 20, 2019, 1:02 PM), <https://www.reuters.com/article/us-syria-security-un-idUSKBN1YO23V> [perma.cc/7MK4-SGWR]; Michelle Nichols & Humeyra Pamuk, *Russia Vetoes U.N. Security Action on Ukraine as China Abstains*, REUTERS (Feb. 25, 2022, 10:13 PM), <https://www.reuters.com/world/russia-vetoes-un-security-action-ukraine-china-abstains-2022-02-25> [perma.cc/79YB-3KE].

149. See, e.g., *UN Security Council Extends Yemen Arms Embargo to All Houthis*, AL JAZEERA (Feb. 28, 2022), <https://www.aljazeera.com/news/2022/2/28/un-security-council-extends-yemen-arms-embargo-to-all-houthis> [perma.cc/R2TQ-PYN8] (11 votes in favor and 4 abstentions).

150. Rick Gladstone, *Russia Vetoes U.N. Resolution to Pressure Iran over Yemen Missiles*, N.Y. TIMES (Feb. 26, 2018), <https://www.nytimes.com/2018/02/26/world/middleeast/iran-yemen-security-council.html> [perma.cc/7K3Y-3AV2].

151. *Id.*

152. The permanent members of the UNSC are China, France, Russia, the UK, and the United States. *Current Members*, UNITED NATIONS SEC. COUNCIL, <https://www.un.org/securitycouncil/content/current-members> [perma.cc/8NE9-XS9Q].

153. Waleed Alhariri & Nickolas Ask, *Five Years of the UN Security Council Toeing the Saudi Line*, SANA’A CTR. FOR STRATEGIC STUD. (Apr. 9, 2020), <https://sanaacenter.org/publications/analysis/9603> [perma.cc/9L6N-4EMD].

## 2. General Assembly

Despite many proposed reforms, the UNSC's veto power and limited membership render it an improbable path for a resolution on Yemen.<sup>154</sup> Another UN-based approach would use mechanisms established through the United Nations General Assembly (UNGA). But members of the UNGA do not have veto power, and therefore the ability of powerful states to lobby other states regarding UNGA actions is limited.

Two examples of the UNGA's ability to serve as an avenue of accountability are the Extraordinary Chambers in the Courts of Cambodia (2003)—established through General Assembly Resolution 228<sup>155</sup>—and the Special Court for Sierra Leone. The former entity is a hybrid court created following a request for partnership with the UN. The Extraordinary Chambers had a broad mandate relating to international human rights law and crimes against humanity.<sup>156</sup> However, the creation of the mechanism was severely delayed, and it deals only with crimes committed between 1975 and 1979.<sup>157</sup> The second example, the Special Court for Sierra Leone, was succeeded by the Residual Special Court for Sierra Leone.<sup>158</sup> This court had a broad mandate similar to the court in Cambodia and secured the conviction of former Liberian president Charles Taylor—which is powerful evidence of its impact.<sup>159</sup>

Both courts balanced international and domestic law. This balancing will also be relevant to accountability efforts in Yemen, which will inevitably face issues of cultural competence.<sup>160</sup> Further, these courts offered more participatory forms of accountability and were evidence that more recent efforts at accountability and prosecution tilt towards a hybrid international and domestic model.

154. See, e.g., Matthew Gould & Matthew D. Rablen, *Reform of the United Nations Security Council: Equity and Efficiency*, 173 PUB. CHOICE 145 (2017) (proposing reforms to the structure of the UNSC but finding almost all suggestions ineffective).

155. G.A. Res. 75/257 B (July 7, 2021).

156. See Mikkel Jarle Christensen et al., *The Extraordinary Chambers in the Courts of Cambodia: Politics and Ethics in Victim Recognition and Rape Prosecution*, in THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2019, at 261, 263–65 (Giuliana Ziccardi Capaldo ed., 2020).

157. See OPEN SOC'Y JUST. INITIATIVE, PERFORMANCE AND PERCEPTION: THE IMPACT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 15–16 (2016), <https://www.justiceinitiative.org/uploads/106d6a5a-c109-4952-a4e8-7097f8e0b452/performance-perception-eccc-20160211.pdf> [perma.cc/7U7H-92MP].

158. CHARLES C. JALLOH, THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE 104 (2020).

159. Owen Boycott, *War Criminal Charles Taylor to Serve 50-Year Sentence in British Prison*, GUARDIAN (Oct. 10, 2013, 6:54 AM), <http://www.theguardian.com/world/2013/oct/10/former-liberian-president-charles-taylor-british-prison> [perma.cc/6L6Q-UCJC].

160. See *infra* Section III.A.

### 3. Other Alternatives

Other alternatives for action on Yemen within the UN system include a mechanism similar to the International, Impartial and Independent Mechanism (IIIM) for Syria—an independent investigatory body created through the UNGA by Resolution 71/428.<sup>161</sup> Evidence gathered by the IIIM can be used to pursue treaty-based prosecution. Early research about the IIIM indicates that the mechanism will likely face roadblocks because it lacks a prosecution platform and because of its prosecutorial inadequacy compared to the ICC or an international tribunal.<sup>162</sup> Human rights groups have advocated for the creation of an IIIM or similar mechanism focused on Yemen to supplement future accountability mechanisms.<sup>163</sup>

An IIIM-like mechanism focused on crimes and abuses perpetrated in Yemen could have two key impacts: dealing a reputational cost to Coalition countries and supporting universal jurisdiction prosecutions in third countries.<sup>164</sup> But the advantages of an IIIM-style approach come with corresponding disadvantages. The mechanism's lack of prosecutorial power could allow it to pursue accountability and, therefore, justice for the Yemeni people without achieving a consensus rendered impossible by Coalition members. Without forward-looking accountability mechanisms, this lack of consensus could lead to an imperfect peace in Yemen that fosters future discontent.

### 4. International Court of Justice

Outside of the UNGA, the International Court of Justice (ICJ) presents an avenue for accountability within the UN. The ICJ is designed to handle disputes between nations rather than address individual criminal legal responsibility, which is addressed instead by the ICC.

Historically, the ICJ has been reluctant to embroil itself in politically contentious disputes. In the late 1990s, it denied a complaint by the Federal Republic of Yugoslavia against NATO states.<sup>165</sup> A recent example of the ICJ's effectiveness, and a potential blueprint for Yemen, is a case filed by The Gambia against Myanmar for violations of the Convention on the Prevention and

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161. G.A. Res. 71/248 (Dec. 21, 2016).

162. Deanna Rafla-Yuan, *The International, Impartial and Independent Mechanism on Syrian War Crimes: What It Does and Doesn't Do*, 9 J. GLOB. RTS. & ORGS. 61, 79 (2018–2019).

163. Herman Interview, *supra* note 138, at 11:37.

164. *Id.* at 12:52.

165. Peter H.F. Bekker & Christopher J. Borgen, *World Court Rejects Yugoslav Requests to Enjoin Ten NATO Members from Bombing Yugoslavia*, ASIL: INSIGHTS (June 17, 1999), <https://www.asil.org/insights/volume/4/issue/4/world-court-rejects-yugoslav-requests-enjoin-ten-nato-members-bombing> [perma.cc/WYM5-UCEK].

Punishment of the Crime of Genocide.<sup>166</sup> The case is a powerful parallel for Yemen in terms of UN politics—Myanmar is supported by the Chinese government, which previously intimated that it would veto any international community action against Myanmar.<sup>167</sup> But several important differences exist between Yemen and The Gambia's situations.

First, The Gambia's case is buoyed by years of UN fact-finding reports.<sup>168</sup> These reports are notably absent for Yemen. If a similarly situated country brought charges as a proxy for Yemen, the pattern of retaliation described above could result in political and economic costs.<sup>169</sup> Second, the path to ICJ jurisdiction over a case regarding state actions in Yemen is more legally fraught. The ICJ has no compulsory jurisdiction unless states have lodged a declaration to the court per Article 36 of the ICJ Statute or compulsory jurisdiction has been created by a compromissory clause in a relevant convention.<sup>170</sup> In the Gambia–Myanmar case, ICJ jurisdiction is based on the Genocide Convention's compromissory clause.<sup>171</sup> This treaty, however, does not offer a viable path for Yemen for two reasons. First, Yemen has made a reservation against Article IX of the convention—the compromissory clause that would have granted the ICJ jurisdiction<sup>172</sup>—and second, in the author's view, there are no credible reports of genocide occurring in Yemen.

Furthermore, The Gambia was supported by the fifty-seven-member OIC,<sup>173</sup> but it is unlikely that the OIC would similarly support Yemen. The OIC has actually commended the Coalition members' humanitarian support

166. Press Release, International Court of Justice, The Republic of The Gambia Institutes Proceedings Against the Republic of the Union of Myanmar and Asks the Court to Indicate Provisional Measures, U.N. Press Release No. 2019/47 (Nov. 11, 2019) [hereinafter *Gambia-Myanmar Press Release*].

167. U.S. INST. OF PEACE, CHINA'S ROLE IN MYANMAR'S INTERNAL CONFLICTS (2018), <https://www.usip.org/sites/default/files/2018-09/ssg-report-chinas-role-in-myanmars-internal-conflicts.pdf> [perma.cc/N3GL-DYZ5]; *Developments in Gambia's Case Against Myanmar at the International Court of Justice*, HUM. RTS. WATCH (Feb. 14, 2022, 3:30 AM), <https://www.hrw.org/news/2022/02/14/developments-gambias-case-against-myanmar-international-court-justice> [perma.cc/76RN-5S35] (“[T]he Security Council has been deadlocked on Myanmar, in part because China and Russia oppose action on Myanmar and have threatened to veto any resolution.”).

168. David J. Scheffer, *Why the ICJ Is Trying to Protect Myanmar's Rohingya*, COUNCIL ON FOREIGN RELS. (Jan. 24, 2020, 2:48 PM), <https://www.cfr.org/article/why-icj-trying-protect-myanmars-rohingya> [perma.cc/5Z3L-EQFM].

169. See *supra* Section I.A.

170. 1 THE INTERNATIONAL COURT OF JUSTICE, at xii–xiii (William A. Schabas ed., 2020).

171. *Gambia-Myanmar Press Release*, *supra* note 166.

172. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; *Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-1&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en) [perma.cc/2M55-TZDN].

173. *Developments in Gambia's Case Against Myanmar at the International Court of Justice*, *supra* note 167; *Member States*, ORG. OF ISLAMIC COOP., <https://www.oic-oci.org/states/?lan=en> [perma.cc/HV33-4CZ7].



initiatives in Yemen, particularly those of Saudi Arabia.<sup>174</sup> The Gambia–Myanmar case will probably continue for many years before a judgment is reached. Even after a favorable ICJ decision, enforcement remains a perennial problem.<sup>175</sup> The ICJ’s orders are legally binding but can only be enforced internationally through the UNSC.<sup>176</sup>

There is also the larger question of which treaty could provide the basis for a criminal charge for the ICJ to hear in connection with the Yemen crisis. The Convention on the Elimination of Racial Discrimination is, out of the relevant treaties that create ICJ jurisdiction, the only treaty that applies to Yemen, Saudi Arabia, *and* the UAE.<sup>177</sup> And even if Yemen seeks to invoke ICJ jurisdiction under this Convention, Yemen has a reservation that could be read as incompatible with the purpose of the convention.<sup>178</sup>

However, there is precedent for shoehorning ICJ cases to comply with treaty obligations.<sup>179</sup> For example, the legislative basis for the ICJ’s jurisdiction over the current proceedings on Ukraine comes from Russia’s allegations of genocide to justify its intervention in Ukraine, which Ukraine has used to bring a case under the Convention on Genocide.<sup>180</sup>

Finally, international law can hold states responsible for actions outside their territory in situations where it has effective control—for example, Israel in Palestine<sup>181</sup> and the UK in Iraq<sup>182</sup>—and therefore maintaining a case against Saudi Arabia and the UAE for their actions in Yemen would not be impossible. Even if Yemen is not bound by a treaty with a compromissory clause allowing for ICJ jurisdiction, Saudi Arabia or the UAE’s treaty obligations may suffice if those obligations are found to have effective control in Yemen. The

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174. *OIC Secretary-General Welcomes Saudi Initiative to End Yemeni Crisis and Calls on All Parties to Stop Bloodshed in Yemen*, ORG. OF ISLAMIC COOP. (Mar. 22, 2021), [https://www.oic-oci.org/topic/?t\\_id=25958&t\\_ref=16312&lan=en](https://www.oic-oci.org/topic/?t_id=25958&t_ref=16312&lan=en) [perma.cc/EA3Z-MXEL].

175. See Irène Couzigou, *Enforcement of UN Security Council Resolutions and of ICJ Judgments: The Unreliability of Political Enforcement Mechanisms*, in *THE ENFORCEMENT OF EU LAW AND VALUES* (András Jakab & Dimitry Kochenov eds., 2017).

176. *How the Court Works*, INT’L CT. OF JUST., <https://www.icj-cij.org/en/how-the-court-works> [perma.cc/Z3TC-65VS].

177. This analysis is my own, based on the relevant countries’ treaty obligations.

178. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf> [perma.cc/BP4J-7DS4].

179. See, e.g., Patrick Wintour, *International Court of Justice to Fast-Track Ruling on Russian Invasion*, GUARDIAN (Mar. 7, 2022, 9:56 AM), <https://www.theguardian.com/world/2022/mar/07/international-court-of-justice-to-fast-track-ruling-on-russian-invasion-of-ukraine> [perma.cc/HSU4-VPA4].

180. *Id.*

181. See Maryam Jamshidi, *How Israel Weaponizes International Law*, BOS. REV. (May 24, 2021), <https://bostonreview.net/articles/how-israel-weaponizes-international-law> [perma.cc/ZTD6-NG6A].

182. *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99.

Netherlands, which has led the push for action on Yemen in the UNHRC,<sup>183</sup> could potentially file the case in the ICJ. However, this avenue would require the Netherlands to marshal the political will to bring a case and would be striking in its novelty—a state without a direct link to the conflict bringing a claim against involved state parties.<sup>184</sup>

All avenues discussed above are limited by their dependence on the UN: an organization with limited ability to overcome the political power of influential member states responsible for perpetrating crimes and abuses in Yemen. The failure of the UNHRC to renew its mandate on Yemen is sobering evidence of the UN system's limitations and the necessity of other options. The most important alternatives are the ICC, universal jurisdiction exercised by individual states, and second-state court proceedings based on domestic laws.

## 5. International Criminal Court

The ICC, founded through the adoption of the Rome Statute,<sup>185</sup> has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>186</sup> The court's jurisdiction rests on the consent of state parties or a referral from the UNSC.<sup>187</sup> A referral from the UNSC can establish ICC jurisdiction pursuant to Article 13(b) of the Rome Statute, though such a referral can be vetoed by a permanent UNSC member. For example, Russia and China vetoed draft resolutions to refer the crisis in Syria to the ICC.<sup>188</sup>

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183. See U.S. Mission Geneva, *Joint Statement on the Situation in Yemen*, U.S. MISSION TO INT'L ORGANIZATIONS IN GENEVA (Mar. 8, 2022), <https://geneva.usmission.gov/2022/03/08/joint-statement-on-yemen-hrc-49> [perma.cc/T2ML-GGHY] (relaying a statement urging action on Yemen delivered by H.E. Paul Bekkers on behalf of fifty countries).

184. There is some debate about whether this kind of action would truly be novel. There is arguably precedent from *Belgium v. Senegal*, where Belgium brought a claim against Senegal for violating the Convention against Torture by not bringing criminal charges against Hissene Habre, the former President of Chad who had been living in Senegal after being granted asylum by the government following his overthrow in 1990. See *Questions Relating to Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 2012 I.C.J. 422 (July 20). However, in that case, Belgium was perhaps specially affected. See generally *Habré Case: Q&A on "Belgium v. Senegal"*, HUM. RTS. WATCH (Mar. 29, 2012, 2:00 AM), <https://www.hrw.org/news/2012/03/29/habre-case-qa-belgium-v-senegal> [perma.cc/5D3H-2SV8].

185. The Rome Statute is an international criminal law instrument that founded the ICC. See *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> [perma.cc/TRQ9-C44N].

186. *Id.*

187. *Id.*

188. Ian Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, GUARDIAN (May 22, 2014, 11:07 AM), <http://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court> [perma.cc/524R-QHXG]. A referral for the crisis in Ukraine has not been attempted due to the certainty of a Russian veto. See Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, JUST SEC. (Mar. 16, 2022), <https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly> [perma.cc/

The main Coalition members and Yemen have not ratified the Rome Statute, so any prosecution would need to proceed pursuant to the second route: a UNSC referral.

Furthermore, unlike the ICJ, the ICC can prosecute individuals. The ICC functions as a court of last resort when national courts are unable to prosecute—a condition that has been fulfilled by the collapse of the Yemeni domestic legal system.<sup>189</sup> Legal human rights defenders have submitted a communication<sup>190</sup> to the Office of the Prosecutor regarding the “responsibility of corporate and political actors” in Germany, France, Italy, Spain, and the UK.<sup>191</sup>

Unfortunately, there exists a failed parallel for the case of Yemen: the prosecution of the United States for actions in Afghanistan. After heavy pressure from the United States, the ICC excluded United States actions from investigation, despite credible evidence of detention, torture, and rape.<sup>192</sup> This decision has damaged the credibility of the court, particularly since the decision was announced through a press release with insufficient justification.<sup>193</sup> Given the Coalition countries’ previous retaliatory actions, it is probable that these issues would plague any prosecution concerning Yemen.

These are not the ICC’s only drawbacks.<sup>194</sup> The ICC has consistently faced accusations of racism and inequality.<sup>195</sup> To date, it has only indicted Black and

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L2PZ-RLW3] (“A Security Council referral to the ICC is inconceivable in the context of Ukraine, owing to the Russian veto—as would be the case in any current or future situation involving aggression by one of the five permanent members of the Council and perhaps even their close allies.”).

189. MOHAMMED ALSHUWAITER, INT’L LEGAL ASSISTANCE CONSORTIUM, *THE IMPACT OF THE WAR ON YEMEN’S JUSTICE SYSTEM* (2021), <https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/61dee94b6073db3fb6061779/1641998668657/The-Impact-of-the-War-on-Yemens-Justice-System.pdf> [perma.cc/YV4E-SLD3].

190. A communication is akin to a criminal complaint and can form the basis for a preliminary investigation. *Communication (ICC)*, EUR. CTR. FOR CONST. & HUM. RTS., <https://www.echr.eu/en/glossary/communication-icc> [perma.cc/XUU3-V3D6].

191. *Made in Europe, Bombed in Yemen*, MWATANA FOR HUM. RTS. (Dec. 12, 2019), <https://mwatana.org/en/made-in-europe-bombed-in-yemen> [perma.cc/Q4Z3-659W].

192. Daphne Psaedakis & Michelle Nichols, *U.S. Blacklists ICC Prosecutor over Afghanistan War Crimes Probe*, REUTERS (Sept. 15, 2020, 4:49 PM), <https://www.reuters.com/article/usa-icc-sanctions-int-idUSKBN25T2EB> [perma.cc/NM7V-9W53]; Marlise Simons, Rick Gladstone & Carol Rosenberg, *Hague Court Abandons Afghanistan War Crimes Inquiry*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/world/asia/icc-afghanistan-.html> [perma.cc/8CTF-BULH].

193. Teri Schultz, *Afghanistan: Why Is the US Excluded from ICC Probe?*, DW (Sept. 30, 2021), <https://www.dw.com/en/afghanistan-why-has-the-icc-excluded-the-us-from-war-crimes-probe/a-59367096> [perma.cc/E8SR-W7MS].

194. See, e.g., CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT (Richard H. Steinberg ed., 2016).

195. Kamari Maxine Clarke, *Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality*, JUST SEC. (July 24, 2020), <https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality> [perma.cc/4FYX-Q5PD].

Arab-African individuals, and some experts openly view the court as biased.<sup>196</sup> A prosecution of Coalition members risks bolstering this view, though a prosecution of arms-exporting states would not.

Despite the myriad structural issues with pursuing accountability through the UN, inaction has negative consequences beyond failing to address human rights abuses in Yemen. The (in)actions of UN bodies signal to the Coalition countries, and other nations more generally, that powerful or influential states need not fear reprisal from the UN for abusing human rights. Following the nonrenewal of the mandate of eminent experts in the UNHRC, violations of international law in the conflict in Yemen have escalated with a significant impact on civilians.<sup>197</sup>

## B. *Non-UN-based Avenues*

### 1. Universal Jurisdiction (in Domestic Courts)

Two alternatives to UN-controlled mechanisms exist in states' domestic legal systems: universal jurisdiction and domestic cases with extraterritorial effects. Universal jurisdiction (whereby states can process crimes they have no connection to) can be invoked by states with authorizing statutes.<sup>198</sup> The example most relevant to the crisis in Yemen is the prosecution, and recent convictions, of former Syrian officials in Germany for state-sponsored torture.<sup>199</sup> Similar statutes exist in France, Sweden, and the Netherlands.<sup>200</sup> The Netherlands has been an outspoken advocate for monitoring human rights violations in Yemen. For example, it sponsored the failed UNHRC resolution.<sup>201</sup>

A possible first step for Yemen is a criminal complaint submitted by human rights lawyers in the UK against Saudi Arabia and the UAE in October 2021.<sup>202</sup> This approach appears similar to the ongoing German prosecution of

196. *Id.*; AFRICA AND THE ICC (Kamari M. Clarke, Abel S. Knottnerus & Eefje de Volder eds., 2016).

197. Herman Interview, *supra* note 138, at 7:45.

198. Joshua Ruby, Note, *An Evolutionary Theory of Universal Jurisdiction*, 14 UCLA J. INT'L L. & FOREIGN AFFS. 567, 568–69 (2009).

199. *Germany: Conviction for State Torture in Syria*, HUM. RTS. WATCH (Jan. 13, 2022, 4:00 AM), <https://www.hrw.org/news/2022/01/13/germany-conviction-state-torture-syria> [perma.cc/CA7Z-P9FE].

200. See Alexandra Lily Kather, "Water Finds Its Way"? *Universal Jurisdiction as an Avenue for Justice in Syria*, LIEBER INST.: ARTICLES OF WAR (July 28, 2021), <https://lieber.westpoint.edu/water-finds-way-universal-jurisdiction-justice-syria> [perma.cc/2EFY-C3WV].

201. Nebehay, *supra* note 126.

202. *Yemen War: Lawyers Submit Case to Police Accusing UAE, Saudi*, AL JAZEERA (Oct. 20, 2021), <https://www.aljazeera.com/news/2021/10/20/group-of-lawyers-to-submit-yemen-war-crimes-dossier-to-uk-police> [perma.cc/W362-MNE2].

former Syrian officials,<sup>203</sup> which is largely a patchwork of domestic prosecutions, but such a patchwork approach may prove inefficient and ineffective. There is also some pushback against accountability processes that do not belong to the people harmed,<sup>204</sup> an issue reviewed in Part III and one that applies to almost all the methods reviewed above. Prosecutions based on universal jurisdiction are further haunted by the frequent challenges of navigating political will and practicalities.<sup>205</sup> Thus, prosecutions can occur in a jurisdiction that lacks any link to the individuals being prosecuted but are rare in practice. The lack of a significant Yemeni diaspora in Europe (compared to, for example, Syrians) will make prosecutions in European states based on universal jurisdiction both less politically feasible and less practicable.<sup>206</sup>

## 2. Domestic Courts Using Extraterritorial Jurisdiction

A related second avenue is the use of domestic courts with extraterritorial reach. In those cases, jurisdiction hinges on the level of involvement with the war.<sup>207</sup> Such an approach essentially requires countries to prosecute themselves, or their high-ranking government officials, for crimes committed outside their borders. Examples of this in the Yemen context include Italy,<sup>208</sup> where a criminal complaint has been filed against Italian officials and corporate actors over arms exports.<sup>209</sup> The organizations that filed the Italian complaint were told by the government, in response, that arms exports were crucial to the economy.<sup>210</sup> Despite evidence of an Italian-manufactured weapon remnant, the public prosecutor moved to dismiss the complaint, and the case is currently under appeal.<sup>211</sup>

In the United States, this avenue seems improbable. While a new political will may have entered with the Biden administration—which ended support for offensive operations in Yemen<sup>212</sup>—American arms sales to Coalition

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203. See, e.g., Jenny Hill, *German Court Finds Syrian Colonel Guilty of Crimes Against Humanity*, BBC NEWS (Jan. 13, 2022), <https://www.bbc.com/news/world-europe-59949924> [perma.cc/7V7Z-5EPE].

204. Charlotte Bailey, *Syrian War Crimes on Trial in Germany: Will Justice Be Lost in Translation?*, NEW HUMANITARIAN (Oct. 21, 2021), <https://www.thenewhumanitarian.org/2021/10/21/syrian-war-crimes-trial-germany-will-justice-be-lost-translation> [perma.cc/BDQ2-GR7U].

205. HOWARD VARNEY & KATARZYNA ZDUŃCZYK, INT’L CTR. FOR TRANSITIONAL JUST., *ADVANCING GLOBAL ACCOUNTABILITY: THE ROLE OF UNIVERSAL JURISDICTION IN PROSECUTING INTERNATIONAL CRIMES* 23–25 (2020), [https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_Universal\\_Jurisdiction.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_Universal_Jurisdiction.pdf) [perma.cc/492K-XGSA].

206. Herman Interview, *supra* note 138, at 20:20.

207. See, e.g., MWATANA FOR HUM. RTS., *supra* note 82, at 129 (discussing the proposed criminal prosecution of Italian actors in Italian courts for involvement in war).

208. *Id.*

209. *Id.*

210. Herman Interview, *supra* note 138, at 2:00.

211. *Id.* at 21:30.

212. *Yemen War: Joe Biden Ends Support for Operations in Foreign Policy Reset*, BBC NEWS (Feb. 5, 2021), <https://www.bbc.com/news/world-middle-east-55941588> [perma.cc/5277-6PTC].

countries have continued unabated,<sup>213</sup> indicating that the U.S. position on Yemen has not truly shifted. Continued U.S. support remains essential for the war in Yemen; without it, the war conceivably may end.<sup>214</sup>

Another consideration is the feasibility of conducting any accountability inquiry while the war is ongoing (as has occurred in the case of Syria). The existence of an accountability mechanism may even accelerate a true end to the war. Some writers posit that the Coalition may be preparing to exit Yemen as soon as it can find a sustainable exit strategy,<sup>215</sup> but commentators have long speculated about a supposedly imminent end to the war.<sup>216</sup> However it occurs, an end to the war will require dealing with the many-faceted beast the war has turned into as it has become more protracted.<sup>217</sup>

The existence of these avenues is, in and of itself, a triumph. That they are manacled by considerations of politics is not an end to the inquiry of justice for Yemen. Rather, it is an invitation to build stronger processes, insulated from manipulation, and better able to fulfill their promises as avenues for justice.

### III. AN END TO A QUAGMIRE

This Note argues that the UN, its constituent states, and the global legal system as a whole have failed to provide justice for the Yemeni people. Thus, this Part analyzes what the situation in Yemen demonstrates about the global legal system's (in)ability to bring perpetrators to justice and offers suggestions

213. William Hartung, *The Biden Administration's Missile Sale to Saudi Arabia Is Offensive, and Must Be Stopped*, FORBES (Nov. 28, 2021, 12:47 PM), <https://www.forbes.com/sites/williamhartung/2021/11/28/the-biden-administrations-missile-sale-to-saudi-arabia-is-offensive-and-must-be-stopped> [perma.cc/TK9J-WP7X].

214. See Mohamad Bazzi, *The United States Could End the War in Yemen If It Wanted to*, ATLANTIC (Sept. 30, 2018), <https://www.theatlantic.com/international/archive/2018/09/iran-yemen-saudi-arabia/571465> [perma.cc/YG2G-Y5JR]; Ali Harb, *Saudi Arabia Would End Yemen War Without US Support, Experts Say*, MIDDLE E. EYE (Mar. 1, 2019, 7:39 PM), <http://www.middleeasteye.net/news/saudi-arabia-would-end-yemen-war-without-us-support-experts-say> [perma.cc/Q2AE-XRR6].

215. E.g., Gregory D. Johnsen, *The Beginning of the End for the Saudi-Led Coalition in Yemen*, THE ARAB GULF STATES INST. IN WASH. (Dec. 2, 2021), <https://agsiw.org/the-beginning-of-the-end-for-the-saudi-led-coalition-in-yemen> [perma.cc/MK8L-DE3N].

216. E.g., Tim Lister, *Yemen Fighting Brings Saudi-Led Coalition to Brink of Collapse*, CNN (Aug. 31, 2019, 10:33 AM), <https://www.cnn.com/2019/08/31/middleeast/yemen-saudi-coalition-collapse-intl/index.html> [perma.cc/7RDZ-EX8L]. But see A Yemeni journalist, *Hopes for Peace in Yemen Fade as the New Year Begins*, NEW ARAB (Dec. 31, 2021), <https://english.alaraby.co.uk/analysis/hopes-peace-yemen-fade-new-year-begins> [perma.cc/U8QN-HFJS].

217. For example, the many foreign fighters on Yemeni soil should be considered in any transitional justice efforts. See Tom Stevenson, *Saudi's Coalition in Yemen: Militias and Mercenaries Backed by Western Firepower*, MIDDLE E. EYE (Mar. 28, 2019, 2:06 PM), <http://www.middleeasteye.net/news/saudis-coalition-yemen-militias-and-mercenaries-backed-western-firepower> [perma.cc/VXG7-YRYM]; CRISTIÁN CORREA, INT'L CTR. FOR TRANSITIONAL JUST., A TRANSITIONAL JUSTICE APPROACH TO FOREIGN FIGHTERS (2021), [https://www.ictj.org/sites/default/files/2022-03/ICTJ\\_Report\\_Foreign-Fighters\\_EN\\_0.pdf](https://www.ictj.org/sites/default/files/2022-03/ICTJ_Report_Foreign-Fighters_EN_0.pdf) [perma.cc/YGX3-L2VU].

for moving away from the current international legal system, which is overly reliant on, and therefore constrained by, political will.

Below, this Note outlines modest proposals for reforming the global legal system. These reforms address two salient principles for the conflict in Yemen: (1) that *what* has happened should be unacceptable without accountability and (2) that these actions are intrinsically linked to *who* is responsible. Rather than suggesting an entire reworking of the system, the reforms proposed in Part III aim to think creatively about corrections that can fill in the gaps highlighted in Part II, trying to balance the ideal with the practical. Before turning to these proposals, this Note first discusses what an ideal accountability mechanism for Yemen might look like, including through reference to Arabic-language legal literature.

### A. *Issues of Cultural Competence*

As recommended by the former UN Special Rapporteur, Pablo de Greiff, the participation of victims in any transitional justice process is essential.<sup>218</sup> Of the options surveyed above in Part II, only the ICC explicitly centers victims' experiences in the accountability process.<sup>219</sup> A non-Yemeni accountability process, such as one based in universal jurisdiction, will have to grapple with issues of what this Note refers to as "cultural competence."<sup>220</sup> This Note posits that centering victims' experiences through a culturally competent accountability process ensures the process' credibility and that credible peace processes lay the foundations for future peace.<sup>221</sup>

Previous transitional processes in the region, and in Yemen specifically, that relied on a sophisticated understanding of local dynamics were notably more successful than those that did not. In Yemen, the 2011 GCC initiative and the 2019 Riyadh Agreement achieved success, albeit limited, because they focused on "in-depth expertise, a nuanced understanding of local dynamics, [and] geopolitical sensitivity."<sup>222</sup> Currently, stakeholders' views on justice in

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218. Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence*, ¶¶ 36–63, U.N. Doc. A/HRC/34/62 (Dec. 27, 2016).

219. Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence*, Pablo de Greiff, ¶ 92, U.N. Doc. A/HRC/27/56 (Aug. 27, 2014) ("Provisions for victim participation in the statutes of international and hybrid courts and tribunals, such as the International Criminal Court . . .").

220. This is a well-established concept in the healthcare setting. See, e.g., Jean Lau Chin, *Culturally Competent Health Care*, 115 PUB. HEALTH REPS. 25 (2000).

221. *Yemen: ICRC Expresses Deep Concern About the Human Toll Caused by Escalating Violence*, INT'L COMM. OF THE RED CROSS (Jan. 21, 2022), <https://www.icrc.org/en/document/yemen-icrc-expresses-deep-concern-about-human-toll-caused-escalating-violence> [perma.cc/HF9N-XTGD] ("The lack of a credible peace process increases the chances that a similar tragedy will occur again . . .").

222. Ibrahim Jalal, *From Stockholm to Riyadh: Breaking the Yemen Peace Process Deadlock*, MIDDLE E. INST. (Feb. 13, 2020), <https://www.mei.edu/publications/stockholm-riyadh-breaking-yemen-peace-process-deadlock> [perma.cc/3S7J-6UUE].

the war differ dramatically,<sup>223</sup> which poses problems for a peace process that aims to hold all the stakeholders in the war accountable rather than to create a victor's justice.

The emphasis placed on cultural competence by those leading the accountability process will inform its structure. A framework that emphasizes cultural competence might prioritize a delayed prosecution, but one that is led by those more familiar with Yemen (assuming an end to the war). A framework that does not emphasize cultural competence, or does so to a lesser degree, is more likely to be an extraterritorial process, most likely in Europe. This is not to suggest a culturally competent process would be free of bias, or even possible, but merely that cultural competency is an important consideration in weighing ideal accountability mechanisms. Prioritizing issues of cultural competence also promotes hybrid models that combine local and international law, including creative approaches that focus on the nationalities of the staff involved.<sup>224</sup> International legal involvement, in a hybrid format, supplements domestic ownership of accountability processes by providing attention and pressure to the issues.<sup>225</sup>

As an imperfect proxy, Arabic-language legal scholarship provides insight into how Arabic-speaking scholars view the conflict in Yemen and the applicability of international human rights mechanisms to the war more broadly. There exists a debate in the Arabic-language legal scholarship about the importance and place of the United Nations and its initiatives. Though some scholars lend credence to the ICC and national courts, there is an emphasis on national courts and their ability to prosecute with reference to past prosecutions for "terrorism" in Yemen.<sup>226</sup> The scholarship also questions the efficacy of the UN, particularly the UNHRC and examines its defects in detail.<sup>227</sup>

### B. *The Problem of Political Will*

Whether international law can ever produce politically neutral results is a pressing question in the literature that bears directly on the situation in

223. Amulya Vadapalli, *Arguing Justice in Yemen's Civil War: A Researcher's Notebook* 61 (Apr. 8, 2019) (B.A. honors thesis, Duke University) (on file with the Duke University Library system), <https://dukespace.lib.duke.edu/dspace/handle/10161/18346> [perma.cc/G58G-89SE].

224. Herman Interview, *supra* note 138, at 15:07–15:50.

225. *Id.* at 17:10–17:24.

226. See, e.g., *قادة قانونيون يضعون آليات فرض العدالة الدولية* [*Legal Leaders Establish Mechanisms to Enforce International Justice*], *العين الإخبارية* (Feb. 9, 2022, 3:28 PM), <https://al-ain.com/article/houthi-leaders-war-criminals54> [perma.cc/MRC9-7W22]. This site is focused exclusively on Houthi prosecution, and it lays out the various paths to prosecution and/or accountability of the Houthis available in international law.

227. E.g., (2020) 2449 *حقوق الإنسان في حماية حقوق* , 8 *دور مجلس حقوق الإنسان في حماية حقوق* عيسى سالم عظيمان العنزي, *المجلة القانونية* [Issa Salem Aziman Al-Anzi, *The Role of the Human Rights Council in Protecting Legal Rights*, 8 *LAW J.* 2449 (2020)], [https://law.journals.ekb.eg/article\\_138545\\_5e51bde990c0ff851599459cfc636052.pdf](https://law.journals.ekb.eg/article_138545_5e51bde990c0ff851599459cfc636052.pdf) [perma.cc/L9MT-V8F2] (examining the defects of the UNHRC).



Yemen.<sup>228</sup> The impracticalities of the options explored in Part II highlight the issues of a system that is based, essentially, on political will, and lead this Note to suggest three main reforms. None of these reforms are intended to suggest that the system needs to be (or even could be) reworked immediately. As the examples of Senegal,<sup>229</sup> East Timor,<sup>230</sup> Cambodia,<sup>231</sup> and Syria<sup>232</sup> show, an accountability process is not impossible, it simply requires an immense amount of political will.

First, the system of referrals by the UNSC to the ICC must be reworked. It relies on the idea that an inherently inequitable political body made up of states should control who is prosecuted. An automatic inquiry trigger built into the ICC charter would be an effective commitment mechanism. It could take the form of a factual trigger—for example, requiring the ICC to begin an investigation when a certain percentage of a population is considered at risk, determined by a permanent panel of rotating experts. An automatic trigger would still face issues that the ICC faces now in terms of jurisdiction and access.<sup>233</sup> It would also have to mitigate the risk that powerful actors could manipulate the percentage or number chosen as a trigger. The core obstacle to implementation, of course, is that the trigger's adoption must break out of a circular problem—to establish a system not reliant on political will requires political will to do so in the first place. Nevertheless, the trigger mechanism would contribute to addressing the criticisms of partiality and discrimination the court currently faces. Even with these tweaks, international mechanisms are inherently aimed at prosecuting a small number of high-level individuals, leading to a need for a more local avenue of accountability.<sup>234</sup>

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228. See, e.g., Tommy Nieminen, *One Situation for Two Courts: A Thesis About the Legal Proceedings Regarding the Rohingya Crisis* (2020) (LL.M. dissertation, Lund University), <https://lup.lub.lu.se/student-papers/search/publication/9010735> [perma.cc/SXG2-HZJH].

229. See *Habré Case: Q&A* on “Belgium v. Senegal,” *supra* note 184 (detailing attempts to prosecute Hissène Habré, a former dictator of Chad who fled to Senegal).

230. See *UNMIT Background*, UNITED NATIONS PEACEKEEPING, <https://peacekeeping.un.org/mission/past/unmit/background.shtml> [perma.cc/EUW2-U443] (providing a historical overview of the international community's efforts to help stabilize the government in East Timor).

231. See OPEN SOC'Y JUST. INITIATIVE, *supra* note 157 (examining the performance of the Extraordinary Chambers in the Courts of Cambodia, which was created by the government of Cambodia and the UN to prosecute Khmer Rouge actors).

232. See Rafla-Yuan, *supra* note 162, at 65–67 (describing the political difficulties that were overcome to hold perpetrators of war crimes in Syria accountable).

233. See *supra* Section II.A.5. The trigger mechanism would still face the legal problems of countries submitting to the ICC's jurisdiction, and even when they do so formally, they may not meaningfully participate in the proceedings.

234. See, e.g., *Q&A: The International Criminal Court and the United States*, HUM. RTS. WATCH (Sept. 2, 2020, 12:00 AM), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states#1> [perma.cc/WN8A-H8PS] (“As a matter of policy, the ICC prosecutor gives priority to cases against individuals who it determines are most responsible for the crimes under the court's jurisdiction.”).

Second, a regional human rights court should be created in the Middle East/West Asia.<sup>235</sup> A regional court and human rights body to address human rights violations is better placed to avoid accusations of cultural bias and deliver justice closer to home for Yemenis. Even after such a court's creation, regional, ethnic, religious, and political divides, especially pronounced for minority populations, will exist and will haunt any accountability process for Yemen. For example, the marginalized Jewish and *Muhammasheen* communities in Yemen have been particularly affected by the war, and may, therefore, not be accounted for in a regional court's perception of justice.<sup>236</sup> But a court formed by regional consensus (admittedly difficult to achieve) would solve the jurisdiction and access problem faced by international organizations currently. The successes of the Inter-American Court for Human Rights and the European Court of Human Rights, as bodies applying universal standards articulated in the regional context, provide powerful evidence that more localized justice might be better justice if the court's decisions are more keenly felt and accepted by those governed by them.<sup>237</sup>

Admittedly, the court would undoubtedly face significant obstacles of political will, funding, and representation. The establishment of a court may also be too little, too late for the Yemeni people, depending on the court's mandate, given that these violations will have occurred prior to its formation. However, a regional court outside of the UN system could have the added benefit of avoiding the criticism leveled more broadly at the UN's engagement with the Middle East/West Asia.<sup>238</sup>

Third, the two reforms above should be supplemented by a domestic Yemeni prosecutorial mechanism which could complement efforts in international and regional venues.<sup>239</sup> A domestic mechanism could also circumvent issues around treaty obligations and jurisdiction by setting its own jurisdictional mandate. Beyond the questions of political will, practical issues

235. The impetus for creation would need to be sustained activism by states in the region, focused on consensus building.

236. See Editorial, *The Urgency to Protect Yemen's Minorities*, SANA'A CTR. FOR STRATEGIC STUD.: THE YEMEN REV. (July 16, 2021), <https://sanaacenter.org/publications/the-yemen-review/14617> [perma.cc/28A9-K7S9].

237. See Laurence Helfer, *The Successes and Challenges for the European Court, Seen from the Outside*, EJIL: TALK! (May 14, 2014), <https://www.ejiltalk.org/the-successes-and-challenges-for-the-european-court-seen-from-the-outside> [perma.cc/74W9-BB65] (highlighting the European Court's precedent-setting legacy); Damián A. González-Salzberg, *The Effectiveness of the Inter-American Human Rights System: A Study of the American States' Compliance with the Judgments of the Inter-American Court of Human Rights*, 16 INT'L L.: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 115 (2010) (analyzing compliance with the court's decisions).

238. See Yara M. Asi, A "Crisis of Relevance": UN Failures in the MENA Region, ARAB CTR. WASH. D.C. (Oct. 5, 2021), <https://arabcenterdc.org/resource/a-crisis-of-relevance-un-failures-in-the-mena-region> [perma.cc/4FA2-LSWX].

239. For an example of a similar proposal for Ukraine, see PUB. INT'L L. & POL'Y GRP., DRAFT LAW FOR A UKRAINIAN HIGH WAR CRIMES COURT 1 (2022), <https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/62d6c27baae10b6ca51cadb7/1658241661209/DRAFT+Ukraine+Hfgh+War+Crimes+Court.pdf> [perma.cc/EY2U-X7MH].

of location, defendant availability, and funding would pose issues for this prosecutorial mechanism. The advantage of a domestic Yemeni prosecutorial mechanism, such as a High War Crimes Court, however, would be its ability to craft a national justice and reconciliation process through transparent, public trials.

#### CONCLUSION

The tragedy in Yemen matters. The Yemeni people matter. And they should matter to the global legal system. The suffering of the Yemeni people is an unwelcome signal to the global community. Every harm left unaccounted for is an indication that future harms will also be unaccounted for and that the boundaries of human rights are not inviolable for certain nations and people; each ignored conflict is a lost opportunity to deter future human rights violations.

This Note outlines how the global legal system allows some conflicts to be simply ignored and even deliberately forgotten. The structural gaps in the global legal system are, in a sense, frustratingly simple. Nations that perpetrate human rights abuses can do so with impunity if they have enough political influence to obstruct enforcement by international bodies that depend on political will to act. Until the global legal system is reformed, its marquee bodies will be unable to aid the Yemeni people and others similarly situated, enduring suffering at the hands of states too powerful to prosecute.