

**Legal Impediments to the Prosecution of War Crimes in
Internationalized Armed Conflicts:
The Case of Yemen**

HUMR5200

Thesis in The Theory and Practice of Human Rights

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Dedication

To all victims of Yemen's war that have fallen...

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Abbreviations

AI	Amnesty International
AJIL	American Journal of International Law
API	Protocol I Additional to the Geneva Conventions 12 August 1949, and concerning the Protection of Victims of International Armed Conflicts 8 June 1977
APII	Protocol II Additional to the Geneva Conventions 12 August 1949, and concerning the Protection of Victims of Non-International Armed Conflicts 8 June 1977
CA2	Common Article 2 of the Geneva Conventions 12 August 1949
CA3	Common Article 3 of the Geneva Conventions 12 August 1949
CCW	Convention on Prohibitions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects 10 October 1980
CIHL	Customary International Humanitarian Law
GCI	Geneva Convention (II) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field 12 August 1949
GCII	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members Armed Forces in the Field 12 August 1949 (GCI)
GCIII	Geneva Convention (III) relative to the Treatment of Prisoners of War 12 August 1949
GCIV	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 12 August 1949
GCC	Gulf Cooperation Council
GCs	Geneva Conventions
HCIV	Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907
HRW	Human Rights Watch
IAC	International Armed Conflict
IHL	International Humanitarian Law
ICC	International Criminal Court
ICL	International Criminal Law
ICJ	International Court of Justice

ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia 25 May 1993
ICTR	International Criminal Tribunal for Rwanda 8 November 1994
NGO	Non-Governmental Organization
NIAC	Non-International Armed Conflict
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
SC	Security Council
UN	United Nations
UAE	United Arab Emirates
UNHRC	United Nations Human Rights Council

CHAPTER ONE

1 General Overview of the Study

1.1 Introduction

The pressure for political transitions brought about by the Arab Spring in 2011 caused the descent of several countries in the region into civil war. Yemen is a prominent example, where internal turmoil turned into hostilities in 2014 and led to the military conquest by a non-state actor of the capital Sana'a.¹ The Yemeni government relocated to the southern city of Aden, and in 2015 a Saudi-led foreign coalition intervened with military means in its support, a military campaign that is still ongoing four years later.² In the years since 2015, the Saudi-led coalition has faced multiple allegations of serious violations of international humanitarian law.³ The subject of this thesis is the international law applicable to these atrocities, and legal and extra-legal impediments that exist for holding individuals in the Saudi-led coalition to account for international crimes.

In September 2014, Yemen's capital and other parts of the country came under the control of the Houthis and forces loyal to the former President Ali Abdullah Saleh.⁴ In March 2015 President Abdo Rabbu Mansour Hadi fled from Aden to Saudi Arabia and made a request to the Arab League, the Gulf Cooperation Council (GCC) and the UN Security Council (SC) to intervene in the ongoing armed conflict.⁵ On the 25th of March 2015, Saudi Arabia intervened together with a coalition of eight countries from the region (Bahrain, Kuwait, the United Arab Emirates (UAE), Egypt, Jordan, Morocco, Sudan and Qatar).⁶ Along with military support

¹ May Darwich, "The Saudi Intervention in Yemen: Struggling for Status," *Insight Turkey* 20, no.20 (Spring 2018): 128.

² Ibid.; Alia Chughtai and Faisal Edroos, "Yemen conflict: Who controls what?," *Al-Jazeera*, January 16, 2019, <https://www.aljazeera.com/indepth/interactive/2016/08/yemen-conflict-controls-160814132104300.html>. See annex 1.

³ UN Human Rights Council (UNHRC), *Situation of Human Rights in Yemen, including violations and abuses since September 2014*, A/HRC/39/43, (August 17, 2018), para. 107.

⁴ Human Rights Watch (HRW), *Word Report*, (New York: Seven Stories Press, 2018), 631, 637.

⁵ UN Security Council (UNSC), Resolution 2216, S/RES/2216, (14 April 2015): "Noting the letter dated 24 March 2015 from the Permanent Representative of Yemen, to the United Nations, transmitting a letter from the President of Yemen, in which he informed the President of the Security Council that 'he has requested from the Cooperation Council for the Arab States of the Gulf and the League of Arab States to immediately provide support, by all necessary means and measures, including military intervention, to protect Yemen and its people from the continuing aggression by the Houthis'."

⁶ UNHRC, *Situation of Human Rights in Yemen*, para.1: Qatar withdrew in June 2017; Haim Malka, *Maghreb Neutrality: Maghreb-Gulf States Ties since the GCC Split*, June 2018, 3: Morocco also withdrew in 2018.

from the United States of America (USA) and the United Kingdom (UK), the coalition attacked the positions of the Houthi-Saleh opposition. The intervention's objective is to restore the now-exiled President Hadi.⁷ The United Nations Security Council recognized in 2015 the lawfulness of the request made by President Hadi, commending the intervention in support.⁸

The coalition operation consisted of maritime blockades, aerial bombardments and a more limited ground-force.⁹ While the coalition succeeded in driving the opposition/Houthi forces out of southern Yemen, a stalemate soon was established in central Yemen around the city of Ta'izz and the strategically important port of Hodeidah, through which 70% of the imports to northern Yemen pass.¹⁰

As of March 2017, according to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Yemen had already become the world's biggest humanitarian crisis due to the ongoing armed conflict.¹¹ Four years of war in a drought-ridden country has had devastating effects on livelihoods. The coalition's blockades of strategically important ports have further deteriorated the humanitarian situation. As of May 2018, it is estimated that there are at least 8 million people on the brink of famine.¹² An additional challenge is linked to diseases such as cholera.¹³ There have also been numerous reports concerning the use of unlawful means and methods of war. For instance, Human Rights Watch (HRW) has documented that the Saudi-led coalition has used widely banned cluster munitions in populated areas causing the killing and wounding of dozens of civilians. In February 2017 an attack on a farm, using Brazilian-made cluster munitions caused the casualty of two boys.¹⁴ It has also been claimed that many people have suffered arbitrary detention and torture at the hands of the Governments of Yemen, Saudi Arabia and the United Arab Emirates. Other allegations of interna-

⁷ UNHRC, *Situation of Human Rights in Yemen*, para. 18; Human Rights Watch (HRW), "Yemen: Events of 2018," *HRW*, 2018, <https://www.hrw.org/world-report/2019/country-chapters/yemen>.

⁸ UNSC, Resolution 2216: "Reiterating its support for the efforts of the Gulf Cooperation Council in assisting the political transition in Yemen and commending its engagement in this regard..."

⁹ UNHRC, *Situation of Human Rights in Yemen*, para. 18; UN Security Council (henceforth UN Panel of Experts), *Letter dated 25 January 2019 from the Panel of Experts on Yemen addressed to the President of the Security Council*, S/2019/83, (25 January 2019), para. 51; HRW, *World Report*, 631.

¹⁰ UNHRC, *Situation of Human Rights in Yemen*, para. 7, 20, 60-62.

¹¹ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Humanitarian Bulletin Yemen: Yemenis bear the brunt of almost two years of conflict*, Issue 21, 18 March 2017, https://reliefweb.int/sites/reliefweb.int/files/resources/20170318_HB_EN_Final.pdf.

¹² UNHRC, *Situation of Human Rights in Yemen*, para. 14

¹³ *Ibid.*

¹⁴ HRW, *World Report*, 633-635.

tional crimes by international fact-finding missions are linked to how the aerial campaigns have been conducted.¹⁵ As of November 2018, it is estimated by the United Nations Human Rights Office of the High Commissioner (UN OHCHR) that there are 17,640 civilian casualties including 6,872 dead and 10,768 injured in Yemen, and that the majority of these casualties (10,852) are a result of airstrikes carried out by the Saudi-led coalition.¹⁶

1.2 Research Question and Objective

The subject of this thesis is questions of international law and accountability that arise from the armed conflict in Yemen. Authoritative fact-finding reports indicate that serious violations of international law have been committed in Yemen during the conflict.¹⁷ The Group of Experts in the Report of 2018 of the Human Rights Council (UNHRC) for example, recommended that the international community along with the League of Arab States strive to ensure accountability for serious violations committed in Yemen.¹⁸

Therefore, this thesis examines the prospects for prosecution of individuals allegedly responsible for these alleged war crimes. The objective is to map and assess the current possibilities and impediments under international law (IL) and institutions in general, and international criminal law (ICL) in particular, to hold war criminals in internationalized armed conflicts to account. Internationalized armed conflict in this thesis refers to non-international armed conflicts (NIACs) with foreign intervention. Yemen is a country which is not a member to the Rome Statute, nor does it belong to any regional organization or court with jurisdiction over individuals for violations of international law. The quest of this thesis is to review legal norms and the competence of various international and domestic institutions for holding alleged war criminals in the war in Yemen to account. The review and analysis are intended to illustrate to what extent the legal duty to prosecute war criminals is subject to circumscriptions. However, while most of the impediments to be scrutinized will be of legal nature, some extra-legal considerations will be added to further compile a thorough account of impediments to prosecu-

¹⁵ UNHRC, *Situation of Human Rights in Yemen*, para. 10; UN Panel of Experts, *Letter dated 25 January 2019 from the Panel of Experts on Yemen*, 4.

¹⁶ United Nations Human Rights Office of the High Commissioner (UN OHCHR), “Bachelet Urges States with the Power and Influence to end Starvation, Killing of Civilians in Yemen,” 10 November, 2018 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23855&LangID=E>.

¹⁷ HRW, *World Report*, 632; UNHRC, *Situation of human rights in Yemen*, para. 108.

¹⁸ UNHRC, *Situation of human rights in Yemen*, para. 112.

tion. The author refers to extra-legal aspects as comprising: politics, diplomatic relations, alliances, geopolitics, limited statehood, biased investigations and lack of competence in investigating war crimes.

To achieve this objective, the thesis will firstly map out the basic structures of international law applicable to the situation in Yemen and the system to hold war criminals to account. It will then identify and analyse the possible impediments present in these norms and structures, both of a legal and extra-legal nature. Finally, it will outline the prospects for prosecutions of the alleged serious violations that are occurring in Yemen. The review will rely on examination of primary sources of international law (treaties, general principles and custom) and secondary sources (jurisprudence and authoritative academic writing).¹⁹ More specifically, in terms of international humanitarian law (IHL), the primary sources are treaties of IHL, customary international humanitarian law (CIHL) and the fundamental principles of IHL.²⁰ The thesis will also examine empirical studies and international reports related to the situation in Yemen.²¹ Finally, for assessing some of the extra-legal impediments to accountability mechanisms, the thesis will rely on presenting some theoretical perspectives from geopolitics.²²

The author acknowledges that allegations of war crimes have been directed at all warring parties in Yemen's multi-layered conflict.²³ However, this thesis will specifically focus on accountability mechanisms for Yemeni authorities and the foreign interventionist forces. It therefore limits the scope of examination to violations of international law allegedly perpetrated by Yemeni government forces and the Saudi-led coalition in general since its intervention in March 2015. Moreover, while the crimes to be presented focus on the states of the coalition in general, most of these crimes are specifically linked to Saudi Arabia and the UAE,

¹⁹ Article 38, Statute for the International Court of Justice (ICJ Statute). Adopted on 26 June 1945. Entered into force on 24 October 1945.

²⁰ Henckaerts, J-M. and Doswald-Beck, L., *Customary International Humanitarian Law Vol I Rules* (henceforth ICRC Study) (Cambridge: Cambridge University Press, 2005); *Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Advisory Opinion), ICJ, Advisory Opinion of 8 July 1996, ICJ Reports 1996, paras 82, 91: noting that the great majority of IHL treaty rules had already become customary and reflect main humanitarian principles. These rules indicate the normal conduct and behaviour expected of States. Further, the ICJ stated that the use of nuclear weapons has to comply with the fundamental principles of IHL.

²¹ UN Panel of Experts, *Letter dated 25 January 2019 from the Panel of Experts on Yemen*; UNHRC, *Situation of Human Rights in Yemen*.

²² Martin Griffiths and Terry O'Callaghan, *International Relations: The Key Concepts* (London: Routledge, 2002).

²³ UNHRC, *Situation of Human Rights in Yemen*, para. 107.

due to their greater involvement in the conflict.²⁴ These circumscriptions in scope are also informed by the fact that information about alleged violations by the Yemeni government and the coalition is more available and has a higher degree of reliability than the situation among warring Yemeni parties on the ground in Yemen. Further, the prosecution of non-state actors by states following civil war poses different types of problems both from a legal and extra-legal perspective. Accountability for states and those individuals most responsible acting on their behalf in interventions in foreign armed conflicts, is a considerably more complicated undertaking. This is the subject of the thesis.

1.3 Scope and Circumscriptions of the Thesis

1.3.1 Scope

From the categories of international crimes, only serious violations or war crimes are to be analysed.²⁵ While the category of ‘grave breaches’ apply only to common article 2 situations, the corresponding category for common article 3 situations are serious violations of IHL.²⁶ Only qualified infractions of humanitarian law will be examined. Moreover, only few alleged serious violations from Yemen and the prospects of prosecuting the perpetrators of these crimes will be scrutinized. Avenues that can assert jurisdiction over these alleged war crimes will be considered at both national and international level.

1.3.2 Circumscriptions

This thesis is not based on field research or interviews. Description of the factual circumstances in the warzone in Yemen is based on fact-finding missions by authoritative inter-governmental organizations (IGOs) and non-governmental organisations (NGOs), notably the SC, the UNHRC, Amnesty International (AI) and HRW. Furthermore, the timeframe is also limited, as only alleged war crimes committed since the coalition’s intervention in 2015 will be assessed.

²⁴ UN Panel of Experts, *Letter dated 25 January 2019 from the Panel of Experts on Yemen*, 20.

²⁵ Article 8(c), (e), Statute of the International Criminal Court (ICC or Rome Statute). Adopted on 17 July 1998. Entered into force on 1 July 2002.

²⁶ Eve la Haye, “Individual Criminal Responsibility for War Crimes Committed in Internal Armed Conflicts,” chap. 4 in *War Crimes in Internal Conflict* (Cambridge, Cambridge University Press, 2008), 133, 176.

1.4 Structure of the Thesis

This thesis is divided into six parts. After the introduction (Chapter 1), the first part will map out the legal norms applicable to situations of conflict, in particular to NIACs and Yemen (Chapter 2). Then, a selection of alleged war crimes will be scrutinized according to the principles of international humanitarian law (Chapter 3) before a review of the impediments for prosecuting these war crimes under the International Criminal Court (ICC) (Chapter 4). The next section will outline other arrangements outside of the ICC and analyze the impediments that the prosecution under these structures could pose (Chapter 5). Finally, the different assessments will be wrapped up in the conclusion (Chapter 6).

1.5 Methodology

This thesis is mostly based on an analysis of legal norms and instruments. Notwithstanding, the thesis also has a multidisciplinary edge. This entails a mixture of different methods and methodologies that apply with respect to both empirical and non-empirical (theoretical) information.

1.5.1 Empirical Research Methods

In terms of empirical information, qualitative methods, such as document analysis and case studies will help to shed light on the factual information concerning the situation and crimes committed in Yemen. This empirical information will be based on the authoritative reports by the fact-finding bodies mentioned above, news articles on Yemen from different organizations and other news agencies.

1.5.2 Non-Empirical Research Methods

This paper will mostly rely on a positivist, doctrinal approach to international law, based on the legal sources enumerated in the International Court of Justice (ICJ) Statute, and the inter-

pretative principles codified in the Vienna Convention on the Law of Treaties.²⁷ While IHL is to a large extent based on customary law,²⁸ the requirements of international criminal law (ICL) place ‘black-letter law’ at the centre in examining legal instruments and principles applicable that govern the prosecution of war crimes.²⁹ ICL has a distinctive trait as criminal prosecution demands the assessment of the two constitutive limbs of ICL – substantive (material) law and procedural criminal law. The first set of rules refers to the law proscribing certain categories of conduct and making their authors criminally liable, while the latter governs the procedures for prosecuting and trying (i.e. acquiring evidence about) individuals accused of such crimes.³⁰ Apart from the doctrine research method, the following theory may help to further explain the obstacles to war crimes accountability.

1.5.2.1 Geopolitics

Within the field of international relations, geopolitics is a method of studying the influence of geographical factors on state behaviour – how location, climate, natural resources, population, and physical terrain determine a state’s foreign policy options and its position in the hierarchy of states.³¹ Thus, a geopolitical perspective might contribute to acquiring a better understanding of the motivations or priorities in terms of prosecuting serious violations committed by Yemen, Saudi Arabia and members of the coalition, when it comes to the possibility of the SC to refer the Yemeni situation to the ICC.³²

²⁷ Article 31, Vienna Convention on the Law of Treaties (VCLT). Adopted on 22 May 1969. Entered into force on 27 January 1980.

²⁸ Marry Ellen O’Connell, “Historical Development and Legal Basis,” chap. 1 in *The Handbook of International Humanitarian Law*, ed. Dieter Fleck, 3rd ed. (Oxford: Oxford University Press), 26-28: noting that the Geneva Conventions, the 1907 Hague Conventions and Articles 48-57 of the Additional Protocol I are declaratory of customary law;

²⁹ Antonio Cassese, “The Principle of Legality in ICL,” chap. 2 in *Cassese’s International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), 23.

³⁰ Cassese, “Fundamentals of International Criminal Law,” chap. 1, 3.

³¹ Martin Griffiths and Terry O’Callaghan, *International Relations: The Key Concepts* (London: Routledge, 2002), 122.

³² Article 13(b), ICC Statute.

CHAPTER TWO

2 International Humanitarian Law

War crimes are serious violations³³ or grave breaches³⁴ of international humanitarian law that take place during armed conflict. It is IL more broadly that frames the duty and responsibility of states³⁵ and ICL that specifically stipulates the material and procedural requirements for bringing individuals to account for international crimes.³⁶ In the following sections, the multiple regimes of international law applicable to a situation of armed conflict will be outlined, and the specific regimes applicable to the actors involved in Yemen identified.

2.1 International Law

To start with, the international system revolves around the dynamism between obligation and responsibility. International law is the *lex generalis* that establishes state responsibility for international crimes.³⁷ Because of the historical tradition of considering states the prime actors within the international arena, the branch of state responsibility is the most developed branch of international responsibility.³⁸ At the international level, when it comes to states' responsibilities under IL in general, "The Draft Articles on Responsibility of States for Internationally Wrongful Acts" (ARSIWA) adopted by the International Law Commission (ILC) in 2001, comprise the most referred legal framework. These secondary rules apply to all violations of primary rules, including those within IHL branch. However, these secondary rules apply to the extent where IHL foresees a *lex specialis*.³⁹

³³ Article 8(2)(c)(e), ICC statute; Article 1, Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute). Adopted on 25 May 1993. Entered into force 25 May 1993; Article 1, Statute of the International Criminal Tribunal for Rwanda (ICTR Statute). Adopted on 8 of November 1994; Article 1(1), Statute of the Special Court for Sierra Leone (SCSL Statute). Adopted on 16 January 2002 by the UN Security Council Resolution 1315; Rule 156, the ICRC Study: "serious violations of international humanitarian law constitute war crimes"; Cassese et. all, "War Crimes," chap. 4, 65.

³⁴ Article 8(2)(a)(b), ICC Statute; Cassese, "War Crimes," chap. 4, 67.

³⁵ James Crawford and Simon Olleson, "The Character and Forms of International Responsibility," chap. 14 in *International Law*, ed. Malcom D. Evans (Oxford: Oxford University Press, 2018), 419.

³⁶ Cassese, "Fundamentals of International criminal Law," chap. 1, 3.

³⁷ Crawford and Olleson, "The Character and Forms of International Responsibility," chap. 14, 419.

³⁸ *Ibid.*, 415.

³⁹ Marco Sassoli, "State Responsibility for Violations of International Humanitarian Law," *International Review of the Red Cross* 84, no.846 (June 2002): 402-403.

Article 1 reads: “every internationally wrongful act of a State entails the international responsibility of that State”.⁴⁰ The ICJ emphasised this norm in its jurisprudence.⁴¹ International obligations are burdens to be borne mostly by the states.⁴² Under national legal systems, the source of obligation dictates the types and degrees of liability, while under IL there is no such distinction.⁴³ However, this does not mean that IL does not respond differently to international breaches, thus having different repercussions on states and individuals.⁴⁴ Also, a state can terminate its international obligations under a treaty after the breach occurred, but only in conformity with the applicable rules of treaty law.⁴⁵

In addition, according to article 58, the provisions in the ARSIWA must be interpreted “without prejudice to any question of the individual responsibility, [either civil or criminal], under international law of any person acting on behalf of a State.”⁴⁶ Therefore besides states, individuals can also be held to account if their conduct is attributed to a state.

The understanding of state responsibility is important as this branch of international law applies to Yemeni authorities, and to all individual members of the Saudi-led coalition. Thus, this type of accountability for investigating and prosecuting individuals accused of international crimes and possible hurdles to this, will also be assessed.

2.2 International Humanitarian Law

IHL is the branch of IL that is concerned with the lawfulness of military conduct in times of armed conflict. IHL or *jus in bello* is opposed to *jus ad bellum* that examines the legality of resorting to war.⁴⁷ Thus, it is of great importance to not mix *jus ad bellum* and *jus in bello*. Under IL and as stipulated in the UN Charter article 2(4), states “shall refrain from” using

⁴⁰Article 1, Article on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Adopted by the International Law Committee (ILC) on 10 August 2001.

⁴¹ *Jurisdictional Immunities of the State (Germany v Italy (Greece intervening))*, ICJ, Judgement of February 3 2012, ICJ Reports 2012, 99, para. 136: where the ICJ stated that the “responsibility is automatically inferred from the finding that certain obligations have been violated.” *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ, Judgement of September 25 1997, ICJ Reports 1997, 7, paras 46-8, especially para 47: “when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect.”

⁴² Crawford and Olleson, “The Character and Forms of International Responsibility,” 416.

⁴³ *Ibid.*, 421.

⁴⁴ *Ibid.*, 423.

⁴⁵ Article 6, VCLT.

⁴⁶ Article 58, ARSIWA.

⁴⁷ O’Connell, “Historical Development and Legal Basis,” chap. 1, 13.

armed force against each other. However, they can resort to armed force under two exceptional instances: either under article 51 of the UN Charter, as an individual or collective exercise of the right to self-defence, or under articles 39-42, if authorized by the Security Council.⁴⁸ In Yemen's case, though highly contested, President Hadi stated in his letter of request that he is acting under article 51 and thus exercises self-defence.⁴⁹ However, IHL is not concerned with the reasons why states, such as those that form the Saudi-led coalition, resort to armed force; rather, it considers all parties to a conflict – the coalition states and all other belligerents on the ground in Yemen – on an equal footing, having the same corresponding rights and obligations.⁵⁰ Hence, it will not be returned to the legality of reasons for coalition's intervention in Yemen, as it is not relevant to this thesis.

In terms of treaty law, IHL is governed by two extensive bodies of law: the “law of the Hague” and the “law of Geneva”. The first revolves mostly around the Hague Conventions of 1907 and is concerned with rules for conducting hostilities. The latter governs the rules regarding the protection of victims of war. The “law of Geneva” comprises four Geneva Conventions (GCs) and their Additional Protocols I and II (API and APII).⁵¹ The Hague Conventions of 1907, the GCs⁵² and some fundamental provisions on protection of persons and on IHL main principles within API are declarative of customary law.⁵³ Moreover, the ICJ considers the GCs to mirror the “*fundamental general principles of humanitarian law*”.⁵⁴ The IHL fundamental principles are: humanity⁵⁵, distinction⁵⁶, proportionality⁵⁷, military necessity⁵⁸, precaution⁵⁹, prohibition of causing unnecessary and superfluous injury.⁶⁰

⁴⁸ Articles 2(4), 39-42, 51, Charter of the United Nations (UN Charter). Adopted on 26 June 1945. Entered into force 24 October 1945.

⁴⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion of 9 July 2004, para. 139: the ICJ stipulated that the right to self-defence is limited to the case when a state is attacked by other state/s and not non-state actors.

⁵⁰ David Turns, “The Law of Armed Conflict,” chap. 27 in *International Law*, ed. Malcom D. Evans (Oxford: Oxford University Press, 2018), 843.

⁵¹ O’Connell, “Historical Development and Legal Basis,” chap 1, 26-27.

⁵² *Ibid.*, 27.

⁵³ *Ibid.*, 29; ICRC Commentaries to the Geneva Conventions and Additional Protocols (Commentary) to API, 628, para 1993.

⁵⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, (Merits), ICJ, Judgment of June 27 1986, ICJ Reports 1986, 14, ICJ, para. 219. (*Nicaragua case*)

⁵⁵ Article 75, API: fundamental guarantees; Article 4, APII: fundamental guarantees; Preamble, APII; Rules 87-105 (treatment of civilians and persons hors de combat, fundamental guarantees), ICRC Study; Article 8(c)(i), Article 8(c)(ii), Article 8(e)(vi), ICC Statute; See also the jurisprudence of the ICTY in *Prosecutor v. Tadić*, case no. IT-94-1, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Appeals Chamber, 2 October 1995, para. 119: which admits that “what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife”.

Humanitarian law distinguishes between an international armed conflict (IAC) and a NIAC. In the words of the ICJ, there are instances when several conflicts exist side by side and thus, each conflict must be classified separately.⁶¹ With regard to this remark, the Yemeni situation comprises more than one conflict, where the intervention of the international coalition is of great interest. Thus, the types of conflict present in Yemen must be determined. There are specific instruments that determine and govern each type of conflict. The GCs and API are applicable to IACs, while common article 3 (CA3) applies to NIACs and APII applies to a subset of NIACs.

In common article 2 (CA2) to the GCs, an IAC is: “... *all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*”⁶² While it was discussed during the 1970s and 1980s whether internationalized armed conflicts were subject to CA2, legal doctrine has eventually determined that CA2 conflicts require state actors on both sides.⁶³ The jurisprudence of the ICJ established that the “overall control” of a state over a non-state actor would suffice to render a conflict international. However, this “overall control” test is agreed by the Court to be applicable only in the case of conflict characterization and not to be relied on when establishing state responsibility.⁶⁴

⁵⁶ Articles 48, 51 (1), (2), API: civilians enjoy target immunity, Article 52(2), API: only military objectives can be directly attacked; Article 13(2), APII: civilians “shall not be the object of attack”; Rules 1, 7, ICRC Study; Article 8(e)(i), (ii), (iii), (iv), ICC Statute.

⁵⁷ Articles 51(5)(b), 57(2)(a)(iii) and (b), API; Rule 14, ICRC Study.

⁵⁸ Article 35(1), API; Article 22, Hague Regulations: the means and methods of war are limited; Article 8(e)(ix): killing treacherously a combatant adversary.

⁵⁹ Article 57(1), API; Rules 15-24, ICRC Study.

⁶⁰ Article 35(2), API; Rule 70, ICRC Study; Article 8(e)(xiii), (xiv), (xv): employing poison, poisonous or other gases and bullets that expand or flatten, ICC Statute.

⁶¹ *Nicaragua case*, ICJ, para. 218.

⁶² Common Article 2 to the Geneva Conventions I-IV (GCs): Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (GCI). Adopted on 12 August 1949. Entered into force on 21 October 1950; Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GCII). Adopted on 12 August 1949. Entered into force on 21 October 1950; Convention (III) relative to the Treatment of Prisoners of War (GCIII), 12 August 1949. Entry into force on 21 October 1950; Convention (IV) relative to the Protection of Civilian Persons in Time of War (GCIV). Adopted on 12 August 1949. Entered into force on 21 October 1950

⁶³ Jelena Pejic, “The Protective Scope of Common Article 3: more than meets the eye,” *International Review of the Red Cross*, 93 (881) (March 2011): 6.

⁶⁴ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgement of 26 February 2007, ICJ Reports 2007, para. 404: the Court notes that “insofar as the “overall control” test is employed to determine whether or not an armed conflict is international..., it may well be that the test is applicable and suitable... On the other

Judging by the information provided so far in the authoritative reports and news, the involvement of other states on the side of the Houthis, such as Iran does not satisfy the requirements of the “overall control” test for categorizing Yemeni conflict as international.⁶⁵ Therefore, in the case of Yemen the fact that there is a foreign coalition intervening on the side of the Yemeni government does not render the conflict international, as there must be states on both warring sides. Thus, CA2 does not apply to Yemen due to Iran’s low degree of involvement, which does not make it a warring party.

Common article 3 to the GCs, defines NIAC as: “... *armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.*”⁶⁶ Common article 3 is considered to set a high threshold for qualifying conflicts as armed conflicts, since it takes place on the territory of a state where security branches of the state has the right to engage in the use of force as part of law enforcement tasks. Due to its wording, CA3 application implies the existence of at least two parties to the conflict – “*each party to the conflict shall be bound to apply...*” – and it can be interpreted to entail an armed conflict either between an armed group and the governmental forces or between armed groups alone.⁶⁷ The International Committee of the Red Cross (ICRC) and the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), sustain that a considerable threshold in terms of organization and hostilities must be attained before the lower threshold of CA3 is met.⁶⁸

hand, the ICTY presented the “overall control” test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.”

⁶⁵ UN Panel of Experts, *Letter dated 25 January 2019 from the Panel of Experts on Yemen*, paras 107, 108: stating that the Panel has documented that the Houthis have been supplied with unmanned aerial vehicles and fuel by Iran; Darwich, “The Saudi Intervention in Yemen: Struggling for Status,” 129-130.

⁶⁶ CA 3, GCs.

⁶⁷ Pejic, “The Protective Scope of Common Article 3: more than meets the eye,” 3.

⁶⁸ *Ibid.*, 4-5; *Fatmir Limaj et al.*, case no. IT-03-66-T, Trial Chamber II, ICTY, Judgement of 30 November 2005, para.90; *Ramush Haradinaj et al.*, case no. IT-04-84-T, Trial Chamber I, ICTY, Judgement of 3 April 2008, para.60. In these two cases the ICTY established that level of organization is characterized by the existence of command structure, headquarters, the ability to procure and distribute arms and carry out military acts, ability to negotiate ceasefires, peace accords, etc.; *Ramush Haradinaj et al.*, ICTY, para. 49: “the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and calibre of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict”; *Prosecutor v. Tadić*, case no. IT-94-1, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Appeals Chamber, 2 October 1995, para.70: the ICTY refers to “protracted armed conflict”.

The conflict is taking place in Yemen which is a party to the GCs. The Houthis meet the level of organization, as in September 2014 the Houthis led a military coup and took control of the capital Sana'a. Now they are currently controlling the west and north west of Yemen, including the capital and they are consistently carrying out military activities.⁶⁹ There is also evidence that show the presence of a command structure.⁷⁰ The intensity level of conflict requirement is also fulfilled as the control of Sana'a by the Houthis made the sitting president flee to Aden – the then new proclaimed capital. After this, fearing the Houthis' advancement to Aden, Hadi fled to Saudi Arabia.⁷¹ Moreover, the majority of casualties in Ta'izz were at the hands of the Houthis and their allies.⁷² Also, the Houthis have been relentlessly engaging in numerous attacks against the Government and the coalition forces.⁷³

The broad language within CA3 – “*armed conflict not of an international character*” can be understood to cover all the states and non-state parties, including the coalition as it intervened on the side of the NIAC between the Government and the Houthis. Therefore, CA3 applies to all parties within the war in Yemen. In similar vein, article 8(2)(f) of the ICC Statute, explicitly states that the proscribed violations of article 8(2)(e) of the same Statute must appear in a protracted NIAC, on the territory of a state between the governmental forces and armed groups or between these groups.⁷⁴ This article is held to have the same threshold of application as CA3.⁷⁵

However, an even higher threshold is present in article 1 of APII, which stipulates that a NIAC takes place only between a state party's “*armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military opera-*

⁶⁹ Chughtai and Edroos, “Yemen conflict: Who controls what?”, *Al-Jazeera*. See annex 1.

⁷⁰ UNHRC, *Situation of Human Rights in Yemen*, 24-26; UN Panel of Experts, *Letter dated 25 January 2019 from the Panel of Experts on Yemen*, 23, para. 66: “The Houthi military structure is organized in four segments: (a) one group fighting in Ta'izz; (b) one group holding Hudaydah; (c) one group fighting along the border with Saudi Arabia; and (d) a common force in charge of missiles and unmanned aerial vehicles.”

⁷¹ Darwich, “The Saudi Intervention in Yemen: Struggling for Status,” 128.

⁷² UNHRC, *Situation of Human Rights in Yemen*, para. 41.

⁷³ UN Panel of Experts, *Letter dated 25 January 2019 from the Panel of Experts on Yemen*, 83, para. 28: noting that the Houthis continue to pose challenges to the Yemeni Government and it has expanded the control over governmental and non-governmental entities in the northern areas held by them.

⁷⁴ Article 8(2)(f), ICC Statute.

⁷⁵ Pejic, “The Protective Scope of Common Article 3: more than meets the eye,” 5.

tions...”.⁷⁶ This article and Protocol do ‘*not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.*’⁷⁷ The language in paragraph 2 is reproduced verbatim in article 8(2)(d) of the ICC, establishing when the violations of article 8(2)(c), which reproduces CA3, apply.⁷⁸

APII presents in article 1 four mandatory elements to qualify a conflict as a NIAC. The issues refer to: the territorial scope, parties to the conflict, level of organization of these parties and the level of intensity of the conflicts.

It was already established that the conflict takes place in Yemen, which is a party to this Protocol, that the Houthis exist “*under responsible command*”, with control over the northern part of Yemen and that they are able “*to carry out sustained and concerted military operations*”.⁷⁹ The level of intensity requirement is also fulfilled as the acts of the Houthis are not merely “*sporadic*” or pertain to “*internal disturbances*”; the armed conflict between this armed group and the Government has been going on since September 2014.⁸⁰

Although the definition in APII clearly applies to the conflict between Hadi’s government and the Houthis and their supporters, is it applicable between the Houthis and the coalition? Judging by the explicit wording of this provision – armed conflict between “*armed forces and dissident armed forces or other organized armed groups*” – the conflict between the international Saudi-led coalition and the Houthis seems to not fall under this category of NIAC. However, given that the coalition has been fighting the Houthis in support for the Yemeni government after its request, it can be stated that the belligerent relationship between the coalition and the Houthis is governed by IHL applicable to NIAC. Thus, once again the internationalization of a conflict by a foreign intervening party on the side of the government, does not turn the conflict into an IAC. This applies to all subsets of NIACs entailed by CA3 and APII.⁸¹

⁷⁶ Article 1(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (APII). Adopted on 8 June 1977. Entered into force on 7 December 1978.

⁷⁷ Article 1(2), APII.

⁷⁸ Article 8(2)(d), ICC Statute.

⁷⁹ See *supra*, note 55, 60, 61.

⁸⁰ UNHRC, *Situation of Human Rights in Yemen*, para.6; Chughtai and Edroos, “Yemen conflict: Who controls what?”, *Al-Jazeera*. See annex 1.

⁸¹ Tristan Ferraro, “The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict,” *International Review of the Red Cross*, 97 no. 900, (2015):1243-1244.

All in all, the armed conflict in Yemen can be categorized as a NIAC under both thresholds. Both provisions apply to Yemen and the member states of the coalition as they are all parties to APII (except for Egypt).⁸² Moreover, CA3 applies to all parties in the conflict, including the non-state actors, as it is customary law.

Now that it has been demonstrated that the conflict in Yemen is internal, it should be mentioned what provisions within the Hague and Geneva systems are applicable to this type of conflict. The ICRC states that there are few protections under the Hague Regulations, that are considered to be customary law applicable also to NIACs.⁸³ Of the “Geneva law” articles, only CA3 and APII apply to NIACs. Customary law is constituted by state practice (*usus*) and the belief that this practice is required, prohibited or allowed (*opinio juris sive necessitatis*).⁸⁴ This means that while there is a distinction between IACs and NIACs at the level of treaty law, CIHL bridges this difference and is thus binding on all parties to a conflict. Thus, in a NIAC scenario, one has to rely to a great extent on the ICRC Study of 2005 that encompasses 161 customary rules, of which 148 apply to both cases of armed conflict. While CA3 has customary status, APII does not enjoy the same status and is not ratified by all states – only 168 states.⁸⁵ Therefore, it is vital to distinguish between the bodies and sources of law governing each type of conflict, as IAC is far more developed than the rules applicable to NIAC, which are fewer and primarily rely on CIHL. However, it must be stated that this Study attempted to bring API and APII under the same common denominator – that of customary law⁸⁶ – a remark which is of great interest when considering to what extent these Rules represent custom.

Investigating, prosecuting and punishing war crimes in a NIAC, is also subjected to a limited body of law. Not all crimes committed during an armed conflict are war crimes; they must

⁸² Ole Kristian Fauchald and Bård Sverre Tuseth, *Global and Regional Treaties 2016* (Oslo: University of Oslo, 2016), 742.

⁸³ Jean-Marie Henckaerts, “Study on Customary International Humanitarian Law: A Contribution to The Understanding and Respect for The Rule of Law In Armed Conflict,” in *Custom as a Source of International Humanitarian Law*, ed. Larry Maybee and Benarji Chakka (New Dehli, 2006), 279-280: stating that the protections against destruction or seizure of the property of the enemy, unless required by imperative military necessity, against pillage, and special protections of cultural properties reflect custom in internal conflicts.

⁸⁴ *Ibid.*, 261.

⁸⁵ Fauchald and Tuseth, *Global and Regional Treaties 2016*, 738.

⁸⁶ Henckaerts, “Study on Customary International Humanitarian Law: A Contribution to The Understanding and Respect for The Rule of Law in Armed Conflict,” 50: the ICRC considered the law applicable to NIAC “rudimentary” as both CA3 and APII do not provide provisions on the conduct of hostilities; however, such rules were actually found under customary law.

present a nexus with the armed conflict and be of a qualified nature.⁸⁷ War crimes are serious violations of conventional or customary rules of IHL.⁸⁸ These breaches will give rise not only to state responsibility, but also to individual criminal responsibility of the person responsible for the breach.⁸⁹ The grave breaches stipulated in the GCs and API are war crimes and they clearly entail both types of responsibilities mentioned above.⁹⁰ Contrary to IACs, in terms of NIACs, there is no IHL treaty that stipulates which breaches during a NIAC can amount to war crimes. Nonetheless, there is the customary view that provisions included in CA3, which is treaty law and reproduced verbatim in the ICC statute, are serious breaches and thus war crimes.⁹¹ Though in the 1990s and in the context of an IAC, CA3 is considered to enclose “*elementary considerations of humanity*” and “*minimum yardstick applicable to all armed conflicts*”.⁹² Other than this so-called mini treaty, the determination of war crimes and the duty to prosecute war criminals rely extensively on CIHL and case-law. Thus, in the Yemeni case the sources of law to determine war crimes are CIHL and past case-law related to NIACs.

Responsibility to Prosecute War Crimes

For serious breaches of IHL – that is, war crimes – the primary responsibility to investigate and prosecute perpetrators of war crimes lies with states.⁹³ They can prosecute war crimes that occurred on their territory (territorial jurisdiction).⁹⁴ States also have the duty to prosecute their nationals or members of their armed forces accused of such crimes (the principle of active nationality).⁹⁵ Lastly, states can prosecute criminals whose victims are their nationals (the principle of passive nationality).⁹⁶

The fact that states have the primary responsibility can be gathered from the principles of sovereignty, expressed in article 1 of the ARSIWA and the following IHL provisions. Common article 1 to the GCs reads that the parties to these Conventions “*undertake to respect and en-*

⁸⁷ Cassese, “War Crimes,” chap. 4, 77.

⁸⁸ *Ibid.*, 65.

⁸⁹ *Ibid.*

⁹⁰ Article 50, GCI; Article 51, GCII; Article 130, GCIII; Article 147, GCIV; Article 85, API.

⁹¹ Philippe Kirsch, “Customary Humanitarian Law, Its Enforcement, and the Role of the International Criminal Court,” in *Custom as a Source of International Humanitarian Law*, 79-85, saying that the Statute is “a codification of customary norms.”

⁹² *Nicaragua case*, ICJ, para.218.

⁹³ Preamble, ICC; Rule 158, ICRC.

⁹⁴ Cassese, “The Repression of International Crimes in Domestic Jurisdictions,” chap. 15, 274.

⁹⁵ *Ibid.*, 276.

⁹⁶ *Ibid.*, 277.

sure” the provisions within them no matter the circumstances. Under the GCs, states are responsible for violations of IHL and they cannot absolve each other of such responsibilities.⁹⁷ Article 3 of the Hague Convention and article 91 of API provides that state parties to these instruments are liable for all deeds committed by their armed forces. Moreover, a violation of a provision enshrined within these treaties shall make a state liable to pay compensation, “*if the case demands*.”⁹⁸ Is the same applicable to NIACs? As already stated, no humanitarian treaty law that governs NIACs stipulates which specific rules are serious breaches, let alone that states have a duty to prosecute these breaches. However, states can punish a member of the armed forces that violated IHL either by means of disciplinary procedures or, if serious violations, by criminal ones.⁹⁹ Rule 139 of the ICRC Study reads that any party to the conflict must respect and ensure respect for IHL.¹⁰⁰ At the very least, all the states under discussion in this thesis are obliged to ensure respect and enforce CA3 and their treaty obligations under APII. Further, states are responsible for violations committed by its organs, the armed forces, persons and entities empowered by it, those acting on its instructions or by privates whose conduct is acknowledged and adopted by the state.¹⁰¹

Apart from the responsibility of the offender states, the principle of *aut dedere aut judicare* clearly obliges state parties to the Conventions and API to search and prosecute alleged war criminals. The parties to these instruments can do so or can extradite after a *prima facie* case.¹⁰² It is not yet established whether this principle of universal jurisdiction is a customary norm.¹⁰³ Moreover, it must be noted that the language of the GCs is thus different from that in the Genocide Convention, where only at the national level the territorial state shall try those that committed the crime of genocide on its territory.¹⁰⁴ The articles of the GCs and API mentioned above contain a general obligation to punish war criminals, unlike the Genocide Con-

⁹⁷Common Article 1, GCs; Article 51, GCI; Article 52, GCII; Article 131, GCIII; Article 148, GCIV.

⁹⁸Article 3, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Regulations). Adopted on 18 October 1907. Entered into force on 26 January 1910; Art. 91, API.

⁹⁹ Silja Voneky, “Implementation and Enforcement of International Humanitarian Law,” chap. 14 in *The Handbook of International Humanitarian Law*, ed. Dieter Fleck, 3rd ed. (Oxford: Oxford University Press), 661.

¹⁰⁰ Rule 139, ICRC Study.

¹⁰¹ Articles 4, 5, 7, 8, 10, 11, ARSIWA; Rule 149, ICRC Study.

¹⁰² Ibid.

¹⁰³ International Law Commission (ILC), The Obligation to Extradite or Prosecute (*aut dedere aut judicare*), *Yearbook of the International Law Commission*, vol. II (Part Two), 2014.

¹⁰⁴ Article VI, Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Adopted by the United General Assembly on 9 December 1948 as General Assembly Resolution 260. Entered into force on 12 January 1951; Cassese, “The Repression of International Crimes in Domestic Jurisdictions,” chap. 15, 286.

vention, as they stipulate that every state party can bring alleged criminals to justice, thus ensuring the principle of universal jurisdiction.

Though there is no generally accepted definition under international law, the principle of universality is said to mean that it derogates from the territorial or personal link with the crime required by ordinary criminal jurisdictions, and a state can thus prosecute whatever alleged perpetrator irrespective of his/her nationality.¹⁰⁵ The GCs and API articles do not require, at least not explicitly, a territorial link. Nonetheless, there are countries that require a legal condition – the alleged war criminals must be present on the territory or must have fallen in the hands of these particular states, while others do not.¹⁰⁶ This means that in the former case it is more unlikely for the prosecution to take place as the criminals can avoid traveling abroad to such states. However, does this principle extend to crimes committed during NIACs?

In terms of NIACs, it is impossible to sustain that there is a duty under customary law to exercise universal jurisdiction to prosecute war crimes in internal conflicts, as only two minor treaties provide for such a duty.¹⁰⁷ The ICRC has suggested that “*states have the right*” to exercise universal jurisdiction domestically over war crimes and not a duty like in IAC.¹⁰⁸ However, while some scholars also share this opinion, there is doubt that a general state practice exists in this sense.¹⁰⁹ Therefore, it is difficult to affirm that this right is customary and extends to serious violations in internal conflicts. Nonetheless, such crystallization is in progress.¹¹⁰ Rule 161 emphasises that states must do everything possible to cooperate and facilitate the investigation and prosecution of the suspects.¹¹¹ This Rule does not rely on extensive

¹⁰⁵ Philippe Xavier, “The Principles of Universal Jurisdiction and Complementarity: How do the two Intermesh?” 88, no. 862, June 2006, *International Review of the International Committee of the Red Cross*, 337.

¹⁰⁶ Rule 157, ICRC Study: commentary: The ICRC notes that there are military manual and national legislations that require such link and cases where the proceedings against a suspect can commence while not present in the territory of the prosecuting State.

¹⁰⁷ la Haye, “National Prosecution of War Criminals and Internal Armed Conflicts,” chap. 5, 255, 227: universal principle over only for two types of war in NIACs: crimes against the UN personnel and the serious violations of the Second Protocol to the Hague Convention for the Protection of Cultural Property.

¹⁰⁸ Rule 157, ICRC Study.

¹⁰⁹ Ibid.; Yoram Dinstein, “War Crimes,” chap. 10 in *Non-International Armed Conflict in International Law* (Cambridge: Cambridge University Press, 2000), 189; Rule 157, ICRC Study: see the commentary to this Rule, only four states have prosecuted persons for war crimes in NIACs under this principle.

¹¹⁰ la Haye, “National Prosecution of War Criminals and Internal Armed Conflicts,” chap. 5, 255

¹¹¹ Rule 161, ICRC Study.

perception that this is custom and practiced as such in NIACs. In fact, it finds support in few UN resolutions.¹¹²

Therefore, when it comes to Yemen, at national level the prime responsibility to ensure compliance with IHL and to prosecute war crimes, lies with Yemen and the coalition's states. In addition to this, a secondary responsibility over the war crimes in Yemen, can be ensured by other states (third parties) by exercising jurisdiction under the principle of universality. However, this principle does not reflect custom in a NIAC.

2.3 International Criminal Law

In the introduction some allegations from the war in Yemen were presented. Now, how could individuals involved in these actions, be held accountable under international law?

If the conduct which violates IHL is not attributable to a state and thus does not fall under the domain of IL, then this violation might still give rise to individual criminal responsibility. This is a secondary type of attribution that distinguishes IHL from other branches of IL.¹¹³

Such individual liability is also triggered by article 8(2) of the Rome Statute, that offers a precise overview of war crimes applicable to both types of conflict. These provisions are considered customary in nature.¹¹⁴ Article 8 also includes war crimes committed against enemy belligerents and civilians by using prohibited means of warfare.¹¹⁵ As a matter of treaty law the Statute applies to the contracting states – 124 – thus leaving many powerful and important states partaking in contemporary NIACs, outside the direct jurisdiction of the Statute. While this is true, according to article 13 non-state parties' nationals can also be responsible for the war crimes under the jurisdiction of the Court.¹¹⁶ Since the provisions expressed in the ICC Statute applicable to NIACs are deemed customary law in nature, it is applicable to all.

The jurisdiction of the Court may be triggered by the SC with the effect that any state or party to an armed conflict globally can be brought before the ICC ex-post facto. By implication

¹¹² Ibid., see the commentary to this Rule.

¹¹³ Sassoli, "State Responsibility for Violations of International Humanitarian Law," 404.

¹¹⁴ See supra, note 76.

¹¹⁵ Article 8(2)(b)(xvii), (xviii), (xix), (xx), Article(8)(2)(e)(xiii), (xiv), (xv), ICC Statute.

¹¹⁶ Article 13(b), ICC Statute.

therefore, the provisions expressed in the ICC Statute applicable to NIACs are deemed applicable to all parties irrespective of current ratification of the Statute. However, the Court has limited, secondary jurisdiction as part of the principle of complementarity, meaning that it has jurisdiction over a case if the state is incapable or unwilling to carry out the investigation or prosecution.¹¹⁷ This means that once again, the state has the primary jurisdiction to investigate and prosecute war crimes. Consequently, in this thesis article 8(c)-(e) of the Rome Statute will be referred to as expressions of *lex lata* in order to determine whether the parties to the armed conflict in Yemen – the Hadi government, Saudi Arabia and the UAE or other coalition members have committed serious violations of IHL amounting to war crimes under international law.

Individuals may act independently of the state, but who are doubted to be considered “*subjects*” under international law *per se*. Although the body of responsibility of other actors of IL such as corporations, individuals, etc. is not as extensively developed as the state responsibility regime and a general regime of responsibility is absent, ICL governs individual *criminal* responsibility.¹¹⁸ As the International Military Tribunal put it, international crimes are committed by actual individuals and their punishment is vital for the enforcement of international law of armed conflict.¹¹⁹ This principle of individual criminal responsibility for war crimes is a long-standing rule of customary international law already recognized since the Lieber Code and the Oxford Manual, reiterated in later humanitarian law treaties.¹²⁰ After World War II, the prosecution of the war criminals during IACs, by the International Military Tribunals at

¹¹⁷ Article 17, ICC Statute.

¹¹⁸ Crawford and Olleson, “The Character and Forms of International Responsibility,” chap. 14, 415-417.

¹¹⁹ *Judgement of the Nuremberg International Military Tribunal 1946, 1947*, 41 AJIL 172, 221, 223.

¹²⁰ Articles 44 and 47, Instructions for the Government of Armies of the United States in the Field (Lieber Code). Adopted on 24 April 1863; Article 84, The Laws of War on Land (Oxford Manual). Adopted on 9 September 1880; Articles 49, GCI; Articles 50, GCII; Articles 129, GCIII; Articles 146, GCIV; Article 28, Convention for the Protection of Cultural Property in the Event of Armed Conflict. Adopted on 14 May 1954. Entered into force 7 of August 1956; Article 15, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. Adopted on 26 March 1999. Entered into force 9 of March 2004; Article 85, API; Article 14, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Amended Protocol II) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW). Adopted on 10 October 1980. Entered into force 2 December 1983; Article 9, The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention). Adopted on 18 September 1997. Entered into force 1 March 1999.

Nuremberg and Tokyo was based on this customary law.¹²¹ Today, this principle of individual criminal responsibility is recognized by many IHL treaties either implicitly¹²² or explicitly¹²³, and statutes of international courts and tribunals in NIACs.¹²⁴ This fact confirms its customary nature and its existence cannot be disputed in relation to any type of armed conflict.¹²⁵ Therefore, war crimes can give rise to both state responsibility and criminal individual responsibility. Consequently, both legal regimes IL and ICL, are relevant to and overlap with IHL. This means that in the case study of this paper, the alleged war crimes could entail both the state responsibility of the Yemeni Government and the Governments of the coalition, when it comes to breaches of IHL committed by their nationals, armed forces or any other agents that represent their governments and act under their instructions, and the individual liability of those that committed the war crimes.

In a similar vein, commanders' behaviour can trigger state responsibility and also individual responsibility under both national and international criminal level.¹²⁶ Not only a positive act but also the omission to take a required action from the part of a civilian or military superior can trigger the criminal responsibility of this person. Thus, superior responsibility is a mode of criminal liability.¹²⁷ This would definitely apply if, for instance, a high-state official or a commander from the Yemeni Government or the coalitions' Governments is proven to have omitted to hinder the unfolding of an alleged war crime.

The elements of such liability are: effective control, that is the existence of a relation of subordination between the accused and the one that committed or was about to commit the crime, the accused's knowledge or constructive knowledge of subordinate's involvement, failure of the accused to prevent or to punish, and according to the ICC, the superior's failure to exercise control over the subordinates.¹²⁸ Under the ICC the constructive knowledge threshold is

¹²¹ Article 6, Charter of the International Military Tribunal, Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis. Adopted on 8 August 1945; Article 5, Charter of the International Military Tribunal for the Far East. Adopted on 19 January 1946 and amended on 26 April 1946.

¹²² Article 14, Amended Protocol II to the CCW; Articles 15, 22, Second Protocol to the Hague Convention for the Protection of Cultural Property.

¹²³ Article 9, Ottawa Convention; Article 4, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Adopted on 25 May 2000. Entered into force 12 February 2002.

¹²⁴ Articles 5, 8, 25, ICC Statute; Articles 2, 3, ICTY Statute; Articles 4, 5, ICTR Statute; Article 1, SCSL Statute.

¹²⁵ Rule 151, ICRC Study: "*individuals are criminally responsible for war crimes they commit*".

¹²⁶ Voneky, "Implementation and Enforcement of International Humanitarian Law," 661.

¹²⁷ Article 28(b), ICC Statute.

¹²⁸ Cassese, "Omission Liability and Superior Responsibility," chap. 10, 187.

different with respect to non-military and military superiors. For the former the threshold is higher than for the latter, article 28(b) stipulating that the non-military superior “*consciously disregarded information which clearly indicated that the subordinates were committing or about to commit*” war crimes. The latter situation, enclosed in article 28(a), provides for a lower threshold and thus states that a military superior “*should have known*”.¹²⁹ There are various forms of individual criminal liability: direct perpetration, indirect perpetration, co-perpetration, aiding and abetting, attempt and abandonment, as well as contribution to group crimes acting with a common purpose.¹³⁰

In order for an individual to be criminally responsible, the following must be met: the objective element (*actus reus*), the subjective element (*mens rea*)¹³¹ and the principle of legality.¹³² It is very important to state that lately ICL came to adopt the doctrine of strict legality, characteristic to civil law countries. This doctrine, *nullum crimen nulla poena sine lege*, postulates that an individual may be found guilty and punished only if at the moment of the perpetration of an act, this act was considered a criminal offence under the law.¹³³ For example, if for the Yemeni case there will ever emerge a new statute in the context of a new criminal tribunal, the exact alleged crimes to be analysed in next chapter will not be brought before the court as they happened before the respective statute came into force. At the same time, if any of these alleged crimes express customary law they are considered to be “in force” and no argument of *nullum crimen* can be relied on.

All international crimes, along with war crimes must entail both a ‘guilty act’ (*actus reus*) and a ‘guilty mind’ (*mens rea*) to trigger criminal responsibility.¹³⁴ In the case of war crimes, besides the actual criminal act, the ICC requires the existence of intent and knowledge under the mental element.¹³⁵ However, paragraph 2 of article 30 defines intent to encompass recklessness or culpable negligence.¹³⁶ Therefore, whenever a provision in the Statute or customary law stipulates otherwise, the Court will consider that sufficient. Furthermore, the conjunctive

¹²⁹ Article 28(a), ICC Statute.

¹³⁰ Article 25(3), ICC Statute.

¹³¹ Cassese, “The Elements of International Crimes,” chap. 3, 37.

¹³² Cassese, “The Principle of Legality in ICL,” chap. 2, 24;

¹³³ *Ibid.*, 22, 24.

¹³⁴ Cassese, “The Elements of International Crimes,” chap. 3, 37, 38.

¹³⁵ Article 30, ICC Statute.

¹³⁶ Article 30(2), ICC Statute.

“*and*” should be understood to mean “*or*” if there is a provision that requires only intent or only knowledge.¹³⁷

This chapter has established which war crime-related instruments apply to NIACs and Yemen and that war crimes can engage state and individual responsibility. In the next chapter, four reported acts of war in Yemen will be scrutinized to determine if they constitute serious violations.

¹³⁷ Cassese, “The Elements of International Crimes,” chap. 3, 56.

CHAPTER THREE

3 Alleged War Crimes in Yemen

Under IHL all parties to the conflict are treated subject to the principle of equality of belligerents. This entails that all parties are subject to the same rights and the same obligations in relations to the enemy belligerent.¹³⁸ This feature is of vital importance and must be heeded in order to ensure an objective and correct assessment of war crimes. The alleged war crimes selected are limited to acts of the state parties involved in the fighting; the Yemeni government, Saudi Arabia and the UAE. In the following, the lawfulness of four different types of means and methods of war that have marked this armed conflict will be discussed: massive airstrikes, naval and aerial blockade, torture and use of indiscriminate weapons.

3.1 Air Strikes (Indiscriminate Attacks)

Air strikes do not represent prohibited methods of war *per se*, yet in conducting them, as well as any other method, the fundamental principles of IHL must be heeded at all times, in both types of conflict.¹³⁹ In Yemen, most of the civilian deaths have been perpetrated at the hands of the coalition, especially in the governorates of Sana'a, Ta'izz, Hajjah, Hodeidah and Sa'dah.¹⁴⁰ Air strikes have been used on a large scale and on numerous occasions they have hit "residential areas, markets, funerals, weddings, detention facilities, civilian boats and even medical facilities".¹⁴¹ One airstrike hit a school bus in the busy market of Dhahyan, 20 kilometres north of the Houthi-controlled Sa'dah, which killed at least 26 children and wounded at least 19. The bomb hit near a bus that was full of boys on an excursion. The bus was parked by a grocery store as the driver left to buy water for the children.¹⁴² HRW spoke to 14 bystander witnesses (9 of which were children) that identified some of the victims saying that the victims were civilians and that they were no evident military targets. However, HRW could not confirm the absence of Houthi military target. The spokesperson of the coalition, said that this was "lawful" and directed at "the militants responsible" for an attack on Jazan

¹³⁸ Nils Melzer, "Introduction to IHL," (Geneva: International Committee of the Red Cross, 2016), 17.

¹³⁹ William H. Boothby, "Practical Aspects of Contemporary Targeting: Non-International Armed Conflict", in *The Law of Targeting* (Oxford: Oxford University Press), 441.

¹⁴⁰ Amnesty International, *Report 2017/2018: The State of the World's Human Rights*, 2018, 401.

¹⁴¹ UNHRC, *Situation of Human Rights in Yemen*, para. 28.

¹⁴² HRW, "Yemen: Coalition Bus Bombing Apparent War Crime. States Supplying Arms Risk Complicity," HRW, September 2, 2018, <https://www.hrw.org/news/2018/09/02/yemen-coalition-bus-bombing-apparent-war-crime>.

using a ballistic missile. Abdo Ali Al-Haouri, a baker assistant and witness, stated “the market was crowded, all the shops were open”. A 16-year-old boy that worked in a barbershop across the street from the bus said that he was wounded by metal fragments in his lower back due to the attack and now needs assistance to walk.¹⁴³

Therefore, the legal question is – is this attack unlawful under IHL applicable to NIACs?

To determine a serious violation of IHL, one must ascertain three aspects: has the principle of distinction been respected (was the target lawful), was the expected collateral damage excessive in relation to the direct and concrete military advantage anticipated (disproportionate) and finally did the attacker take sufficient precaution in attack, i.e. was the time and place for executing the strike and the means selected in line with the duty of precautions in attack?

Under IHL the means and methods to be used by the parties to a conflict are limited.¹⁴⁴ This is held to be an undisputable customary principle that applies to all parties to a conflict, be it even an internal one.¹⁴⁵ Article 13(2) of APII emphasises that civilian population or individuals “*shall not be the object of attack*”.¹⁴⁶ Article 13(1) of APII reads that civilians “*enjoy general protection against the dangers arising from military operations*”.¹⁴⁷ Moreover, children also enjoy special protection under article 4(3) of APII, as children shall be met with special respect and the parties to the conflict “*shall provide them with the care and aid they require*”.¹⁴⁸

While the principle of proportionality is not explicitly recognized in APII, it is inherent in the principle of humanity to not conduct disproportionate attacks.¹⁴⁹ Therefore, after the distinction is heeded, customary Rule 14 urges the parties to respect the rule of proportionality and thus the expected damage to civilian health, life and objects not be excessive to the direct and concrete military advantage anticipated.¹⁵⁰

¹⁴³ Ibid.

¹⁴⁴ Article 35(1), API.

¹⁴⁵ *Prosecutor v. Tadić case*, ICTY, para. 110; Boothby, “Principles of the Law of Targeting: Customary Rules of Targeting,” 58.

¹⁴⁶ Article 13(2), APII.

¹⁴⁷ Article 13 (1), APII.

¹⁴⁸ Article 4(3) APII.

¹⁴⁹ Preamble, APII.

¹⁵⁰ Rules 14, ICRC Study.

Although not comprised in APII, the principle of precaution expressed in article 57 of API is still understood to follow from the obligation that “*the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations*”.¹⁵¹ It may also be suggested that precaution is the principle that operationalizes the duty of distinction and proportionality. The lack of more specific rules applicable to conduct of hostilities in NIACs makes it necessary to rely on customary law. The ICRC Study states that precautionary measures must be taken throughout the attack, i.e. even after proportionality is complied with.¹⁵² Rule 16 states that those who plan or attack must do everything feasible to ensure that the targets are indeed military objectives and are not civilians or civilian objects and they do not enjoy special protection.¹⁵³ This is a requirement demanding a certain quantity and quality of information about the enemy. Then, the commander/s must take all feasible precautions in considering the means or methods to be employed to avoid and minimize the collateral damages.¹⁵⁴

Moreover, the precaution principle asks those in charge to refrain from conducting an attack whose expected incidental life loss, damage or a combination of these will be excessive to the military advantage anticipated.¹⁵⁵ An attack must be cancelled or suspended if it becomes apparent that the target is not a military one, or that it must be granted special protection or that the expected incidental life loss, damage or a combination of these will be excessive to the military advantage anticipated.¹⁵⁶ If the circumstances allow, effective advance warning must be given.¹⁵⁷ Lastly, if there are several military objectives whose military advantages to be obtained are deemed to be similar, the choice must be given to that attack that causes least civilian casualties and damaged objects.¹⁵⁸

Nonetheless, while it seems to be beyond question that the principle of precaution applies to NIACs, the fully developed requirements, such as advance warning, have been questioned by scholars whether they apply in such detail to NIACs.¹⁵⁹

¹⁵¹ Article 13(1), APII.

¹⁵² Rules 15-21, ICRC Study; Article 57, API.

¹⁵³ Rule 16, ICRC Study.

¹⁵⁴ Rule 17, ICRC Study.

¹⁵⁵ Rule 18, ICRC Study.

¹⁵⁶ Rule 19, ICRC Study.

¹⁵⁷ Rule 20, ICRC Study.

¹⁵⁸ Rule 21, ICRC Study.

¹⁵⁹ Dinstein, “LONIAC Customary International Law,” chap. 11 in *Non-International Armed Conflict in International Law*, 218; Boothby, “Practical Aspects of Contemporary Targeting: Non-International Armed Conflict”, 445.

From the scenario described in Dhahyan there are several indicators suggesting that the planning and targeting of the school bus resulted from a disregard by the military commander of some of the fundamental principles of conduct of hostilities. According to a subsequent statement by Saudi Arabia, the attack was directed at a military target, allegedly present in the market. This fact alone does not allow for a total disregard of the context. Furthermore, respecting the customary rule of proportionality, given the location and the dense and well-known presence of civilians, should have caused the commander to choose either a different method or weapon, with less extensive explosive capacity, or alternatively a different timing or location. It should have been clear that a bomb, which is a weapon with wide impact, is expected to be indiscriminate due to its effects that cannot be limited, all the more that it was dropped in a busy market in broad daylight. During this time of day, it is expected that civilians go to their workplaces, or do the groceries and children are around as they go to summer schools, like in this case.

Feasible precautions are also understood to include refrain, cancellation or suspension of such attacks due to the fact that there was a busy daylight environment where civilians, including children were expected to dwell. Even if there was a legitimate military target, the place was crowded with the presence of civilians and children, and thus only a very high military advantage could balance out the casualties. The time sensitivity of the attack and the perceived technological ability to track, make it highly likely that the party could have traced him to a place further away from the market. It seems highly plausible that the attack represented a violation of precautions in attack and consequently was disproportionate.

Further, will such a disproportionate attack qualify as a war crime?

Under the ICC Statute, only an attack intentionally directed at civilians is a war crime.¹⁶⁰ There is no information to demonstrate the intention to hit and kill civilians, meaning that the ICC provision does not apply to this case. Moreover, launching a disproportionate attack is not included as a war crime in NIACs under this instrument.

But why would this crime not be included under NIACs, given that it is under the list of war crimes in IACs? It seems from the negotiating history of the ICC, that the war crimes from

¹⁶⁰ Article 8(e)(i), ICC Statute.

IACs that are not under NIACs have not yet attained customary status, according to some states.¹⁶¹ Thus, the Study's view that "*launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury and damage*" are serious violations under CIHL, is difficult to concur with. This becomes all the more apparent when it is considered that the Rule is based on the national law of several states (19) and two cases under the ICTY.¹⁶²

In conclusion, as of now, Saudi Arabia and the coalition's states cannot be held criminally responsible under the ICC. Neither is there a well-established customary view that performing a disproportionate attack is a war crime in NIACs. Nonetheless, the principle of universality gives third parties the right to prosecute such individuals if under their domestic law, disproportionate attacks in NIACs are considered serious violations.

3.2 Naval and Aerial Blockade (Unlawful Measures/Starvation)

As already stated, under the IHL all acts of war have to comply with the fundamental principles. In Yemen, the access restrictions imposed by the coalition are well-documented and they have been imposed at varying points in time and with alternating levels since its intervention. These blockades are deemed to have caused "widespread and devastating effects on the civilian population".¹⁶³ The closure of Hodeidah port made the coalition deny in March 2017 three vessels with humanitarian aid from the side of Save the Children and ask them to detour around and reach port Aden, thus delaying the aid by three months.¹⁶⁴ OCHA stated that the coalition continued to deny entrance in August of four vessels with fuel also needed for hospitals and in November, of twenty-nine ships with essential supplies.¹⁶⁵ Moreover, on the 6th of November 2017 the coalition imposed a total ban on all Yemeni borders, blocking all humanitarian aid and commercial trade. And although it promised to give immediate humanitarian access, the first shipments with aid reached Hodeidah and the needy on the 26th of Novem-

¹⁶¹ Knut Dormann, "War Crimes under the Rome Statute of the ICC, with special focus on the Negotiations on the Elements of Crimes," *Max Planck UNYB* 7 (2003): 347.

¹⁶² Rule 156, ICRC Study: see the commentary under this Rule.

¹⁶³ UNHRC, *Situation of Human Rights in Yemen*, para. 47.

¹⁶⁴ AI, *Report 2017/2018*, 402.

¹⁶⁵ *Ibid.*

ber.¹⁶⁶ This blockade has affected civilians due to Yemen's 90% reliance on the goods made available through imports before this conflict.¹⁶⁷

The blockade of Sana'a International Airport to commercial traffic impeded thousands of Yemenis seeking medical aid abroad.¹⁶⁸ On August 31st 2017 the founder of the Yemen Red Crescent Society lost his life due to the fact that he could not avail of the needed treatment in Yemen and neither could he travel abroad. Even humanitarian flights were halted for three weeks.¹⁶⁹

Therefore, were these naval and aerial blockades and their collateral effects lawful under IHL?

Stipulated above was that the principle of proportionality applies to NIACs, as a matter of CIHL. Article 14 of APII and Rule 53 present that the use of starvation as a method of warfare is prohibited.¹⁷⁰ According to article 18(2) of APII, when the civilian population suffers due to lack of essential supplies, relief actions shall be taken, with the consent of the party to this Protocol.¹⁷¹ Article 7(1) of APII states that the wounded and the sick "*shall be respected and protected*".¹⁷²

Though these blockades are premised on military advantages, these methods of war must comply with the principle of proportionality.¹⁷³ However, these blockades have contributed to the severe humanitarian impact – in April 2018, 17.8 million people were food insecure and 8.4 million people were on the verge of famine. Also, the stated military objectives could not be verified due to the lack of a clear and published list of prohibited items.¹⁷⁴ Moreover, the naval blockade and the effective closing of the Sana'a airport violated the duty to offer humanitarian relief for the needy and the protection of thousands of wounded and sick Yemenis.¹⁷⁵

¹⁶⁶ Ibid., para. 49.

¹⁶⁷ UNHRC, *Situation of Human Rights in Yemen*, paras 47, 52.

¹⁶⁸ Ibid., para 56; HRW, *Word Report*, 635.

¹⁶⁹ UNHRC, *Situation of Human Rights in Yemen*, para. 56.

¹⁷⁰ Article 14, APII; Rule 53, ICRC Study.

¹⁷¹ Article 18(2), APII.

¹⁷² Article 7(1), APII.

¹⁷³ UNHRC, *Situation of Human Rights in Yemen*, para. 58.

¹⁷⁴ Ibid., para. 53.

¹⁷⁵ Ibid., para. 58.

The prohibition of starvation demands to prove that the Saudis and the coalition had the purpose to starve the population as a method of war, which the reports do not provide sufficient information for. Nonetheless, it is highly likely that the blockades mentioned were unlawful because, judging by the information provided, they resulted in disproportionate casualties in relation to the military advantage and resulted in the violation of the duty to provide relief and protection to the wounded and sick.

But are such apparent IHL violations war crimes in a NIAC?

Under the ICC, using starvation as a method of warfare is not a war crime. This absence is also explained by scholars as being due to the fact that states did not consider such prohibition and war crime to have attained customary status in NIACs.¹⁷⁶ This view is in contrast to the ICRC's Rule that "*starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies*" is a war crime.¹⁷⁷ Also, the state practice documented by the ICRC is little and thus it seems doubtful to sustain that this is custom.¹⁷⁸

Nonetheless, among the serious violations of CA3, reiterated in the ICC Statute, is "*violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.*"¹⁷⁹ The violations of the mentioned obligations under APII in the aftermath of the blockades can be said to have amounted to murder, torture and cruel treatment. Thus, the Saudi Government and the coalition can be held criminally responsible before the ICC in the case of the deceased founder of Red Crescent Yemen and civilians malnourished due to famine. As a matter of customary law, these crimes can also be prosecuted under the domestic courts of third countries and future international courts. Moreover, while it is not generally accepted that using starvation as a method of warfare is a war crime under international custom, Saudi Arabia and the coalition could be held criminally responsible for such an act before the courts of third countries that criminalize such conduct, along with proving some mental element.

¹⁷⁶ Dormann, "War Crimes under the Rome Statute of the ICC," 348.

¹⁷⁷ Rule 156(vii), ICRC Study.

¹⁷⁸ Rule 156(vii), ICRC Study: see the commentary under this Rule.

¹⁷⁹ Article 8(2)(c)(i), ICC Statute.

3.3 Torture, Inhuman and Degrading Treatment, Sexual Violence, Outrages upon Personal Dignity (Protection of the Victims of War)

A fundamental principle of IHL is the duty of humane treatment of victims of war, that is defenceless enemy persons in the hands of a party to the conflict, as expressed in CA3.¹⁸⁰ In Yemen there have been widespread allegations of torture and inhumane treatment at the hands of the Governments of Yemen, Saudi Arabia and the UAE and UAE proxy forces, which are under its direct command¹⁸¹, represented by, *inter alia*, the Security Belt Forces.¹⁸² For instance, the Experts say that torture and degrading treatment occurred in prisons such as those controlled by the UAE, Al Rayyan and Bureiqa facilities; Ma'rib Political Security controlled by the Government and the 7 October facility in Abyan, Lahij Central Prison and the Al Mansoura Prison controlled by the Security Belt Forces.¹⁸³ In the southern part of Yemen, where the Government is mostly in control, around 50 people, among them numerous children, were being detained in very poor conditions.¹⁸⁴ Saudi Arabian forces arrested Yemeni fishermen who were beaten, interrogated and some kept in solitary confinement for prolonged periods.¹⁸⁵

The Group of Experts also concluded that the UAE personnel committed rape and sexual violence of adult male detainees. At the Bureiqa coalition facility, detainees told that they were being interrogated “while naked, bound and blindfolded, sexually assaulted and raped”. In the other prison controlled by the forces of the UAE, Bir Ahmed Prison, the forces “raided the facility and perpetrated sexual violence”. The UAE personnel engaged in March 2018 in forceful anus examinations, digital rape and rape using other objects, after around 200 detainees were stripped naked.¹⁸⁶

After considering these allegations, the legal question is – do these acts represent violations of IHL applicable to NIACs?

¹⁸⁰ CA3, GCs.

¹⁸¹ UN Panel of Experts, *Letter dated 25 January 2019 from the Panel of Experts on Yemen*, 17, para. 41.

¹⁸² UNHRC, *Situation of Human Rights in Yemen*, paras. 20, 65, 70, 72.

¹⁸³ *Ibid.*, para.70.

¹⁸⁴ HRW, *Word Report*, 633.

¹⁸⁵ UNHRC, *Situation of Human Rights in Yemen*, para.72.

¹⁸⁶ *Ibid.*, para.71.

Under CIHL, “*violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture*” and “*outrages upon personal dignity, in particular humiliating and degrading treatment*” are prohibited.¹⁸⁷ Under APII, “*violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment*” and “*outrages upon personal dignity, in particular humiliating and degrading treatment, rape...and any other form of indecent assault*” are prohibited at all times.¹⁸⁸ Thus, besides the obligations in CA3, Yemen, the UAE and Saudi Arabia are also obliged to respect and protect the mental health of the people in custody.

Judging by the explicit documentation of such practices, it seems that the military forces of the states discussed and the proxy forces are in clear violation of the principle of humanity and protection of victims of war against torture, inhuman and degrading treatment, rape, sexual violence.

The following question is – are these violations also war crimes in a NIAC?

Besides the above prohibitions under CA3, the ICC Statute also includes “*committing rape*” and “*any form of sexual violence*” as war crimes.¹⁸⁹ The military superiors of Yemen, Saudi Arabia and the UAE, including the proxy forces, “*should have known*” about these infractions, if they were indeed exercising “*effective control*” over the authorities incriminated, thus triggering command responsibility.¹⁹⁰

Judging from the available information, the three states engaged in cruel and degrading treatment and torture, while the UAE military and proxy forces also engaged in rape and sexual violence. Regarding the effective control needed to establish superior responsibility, there is no sufficient information to conclude this.

In conclusion, under the ICC, the domestic courts of third parties and future international courts, all the individuals in question, including the proxy forces of the UAE, can be brought

¹⁸⁷ CA3(2), (4), GCs.

¹⁸⁸ Article 4(2)(a), (e), APII.

¹⁸⁹ Article 8(2)(e)(vi), ICC Statute.

¹⁹⁰ Article 28(a), ICC Statute.

to trial for these war crimes, as they represent custom.¹⁹¹ Besides, either the perpetrators within the Yemeni, Saudi and UAE military and UAE proxy forces can be held individually criminally responsible or their commanders can be liable under superior responsibility. For superior responsibility it needs, however, to be proven that they had effective control over their personnel at the time of committing torture, cruel and degrading treatment, rape and sexual violence.

3.4 Indiscriminate Weapons (Unlawful Means)

Certain means of war are prohibited at all times.¹⁹² Other weapons and ammunition are restricted under IL either on account of their effects on civilians (indiscriminate)¹⁹³ or due to their effect on enemy belligerents (unnecessary suffering or superfluous injury).¹⁹⁴ The use of unlawful means of war in Yemen was documented to comprise the use of artillery and cluster bombs. For instance, the coalition engaged in attacks by using cluster munitions manufactured in the USA and Brazil and targeted populated areas leading to the wounding and death of many.¹⁹⁵ AI reported that the coalition in attacking the Sa'dah governorate used cluster munitions, whose bomblets were widely scattered, the unexploded ones representing a risk. The coalition used them in residential and farmland place in the city of Sa'dah injuring two and destroying property.¹⁹⁶ HRW stated that indiscriminate artillery attacks took place at the hands of the Government-aligned forces inside Yemen who attacked populated areas killing and wounding dozens of civilians.¹⁹⁷ Shelling was also reported by the UNHRC, saying that all parties employed such weapons which "resulted in large numbers of civilian casualties in the Hajjah, Lahij, Ma'rib and Ta'izz governates".¹⁹⁸

But are these means unlawful under NIACs?

¹⁹¹ The author is aware that, according to article 7(1)(f), (g) of the ICC Statute, torture, rape and sexual violence can also be prosecuted as a crime against humanity if it is proven that these practices are part of a "widespread and systematic" policy of the Yemeni government, "directed at a civilian population." Also, Yemen's state responsibility arises under the Convention Against Torture. However, this is not the subject of this thesis.

¹⁹² Rules 72-75, ICRC Study: e.g. poisonous, chemical weapons are prohibited.

¹⁹³ Rules 81-85, ICRC Study.

¹⁹⁴ Rules 77-79, 86, ICRC Study: e.g. exploding bullets are prohibited as they are in violation of the prohibition against superfluous injury or unnecessary suffering.

¹⁹⁵ HRW, *Word Report*, 633.

¹⁹⁶ AI, *Report 2017/2018*, 401.

¹⁹⁷ HRW, *Word Report*, 632.

¹⁹⁸ UNHRC, *Situation of Human Rights in Yemen*, paras 40, 42.

The prohibition of indiscriminate attacks by either means or methods of war are absent from APII. However, it can be inferred from the obligation under APII to not make civilian population or individuals the object of attack.¹⁹⁹ Moreover, according to the Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps²⁰⁰ and Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons²⁰¹ (which includes shells) to the Convention on Certain Conventional Weapons (CCW), these weapons are indiscriminate and prohibited in NIACs, as of 2001.²⁰² Moreover, Protocol V on Explosive Remnants of War to the CCW obliges its parties to clear, remove or destroy explosive remnants of war.²⁰³ The Convention on Cluster Munitions (CCM) of 2008 states in article 1 that each state party should “*never under no circumstance...a) use cluster munitions; b) develop, produce, otherwise acquire, stockpile, retain or transfer to anyone... cluster munitions*”.²⁰⁴ However, though the UAE and Saudi Arabia are parties to Protocol III, they are not parties to the amendment to the CCW of 2001, but they are parties to Protocol V, that specifically extends its provisions to NIACs.²⁰⁵ Yemen is not a party to the CCW.²⁰⁶ Also, neither Yemen, Saudi Arabia nor the UAE are parties to the CCM.²⁰⁷

In the *Tadić* case, the ICTY recognized the customary nature of the prohibition of indiscriminate attacks in NIACs.²⁰⁸ In a similar vein, the ICJ in its Advisory Opinion on Nuclear Weapons mentioned that “*states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.*”²⁰⁹ This customary view is mirrored in Rules 11 and 12, reading that “*indiscriminate attacks are prohibited. Indiscriminate attacks are: b) those which employ a method or means of combat which cannot be directed at a specific military objective; or c) those which employ a method or means of combat the effects of which cannot be limited...; and consequently, are*

¹⁹⁹ Article 13(2), APII.

²⁰⁰ Article 3(8), Amended Protocol II to the CCW.

²⁰¹ Article 2(1), Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the CCW.

²⁰² Article 1(3), CCW: extends the Convention to NIACs.

²⁰³ Article 1(3), Protocol V to the CCW.

²⁰⁴ Article 1, Convention on Cluster Munitions. Adopted on 3 March 2008. Entered into force 1 August 2010.

²⁰⁵ ICRC, Treaties, States Parties and Commentaries, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SA https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=AE.

²⁰⁶ ICRC, Treaties, States Parties and Commentaries, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=YE.

²⁰⁷ Fauchald and Tuseth, *Global and Regional Treaties 2016*, 2019.

²⁰⁸ *Prosecutor v. Tadić*, ICTY, para. 134.

²⁰⁹ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, para. 78.

of a nature to strike military objectives and civilians or civilian objects without distinction.”

Further, Rule 71 states that weapons indiscriminate in nature are prohibited. This means that such weapons are those that cannot be directed at a military objective or whose effects cannot be limited as required by international humanitarian law. This Rule states in its description that cluster bombs are such indiscriminate weapons.²¹⁰

Judging by the details provided, it seems that neither the coalition nor Yemen made civilians the object of their attacks. However, cluster munitions are indiscriminate by nature as they can neither specifically target a military objective, as this weapon comprises dozens of small bomblets which will spread around at the impact, nor can its effects be limited if they are dropped on a terrain where their pick-up is hindered. Thus, the cluster bombs employed by the coalition in Sa’dah are indeed indiscriminate as their *“effects cannot be limited”* because some remained unexploded risking to explode when encountered by a civilian. Also, these weapons could not *“be directed at a specific military objective”* and thus injured and destroyed civilians and civilian objects without distinction in the residential area and farmland in Sa’dah.

With regard to the shelling from the above scenario, the use of these types of weapons in populated areas can be considered indiscriminate as their *“effects cannot be limited”* and they hit military targets and civilians or civilian objects without being able to distinguish.

Thus, it is very likely that Yemen and the coalition, especially Saudi Arabia and the UAE, violated the prohibition of using indiscriminate means of war, all the more because these attacks were unfolding within populated areas. Also, under the treaty obligations of Protocol V, Saudi Arabia and the UAE must clear the areas of unexploded munitions.

Is the use of these indiscriminate means a war crime in NIACs?

The use of indiscriminate weapons, or more specifically the use of cluster munition or artillery are not criminalized under the ICC Statute. Under Rule 156 the use of such prohibited weapons and indiscriminate attacks *“resulting in the death or injury to civilians”* are considered war crimes.²¹¹ However, it was stated above that states do not support the view that in-

²¹⁰ Rule 71, ICRC Study.

²¹¹ Rule 156(iv), ICRC Study.

discriminate attacks are war crimes under CIHL applicable to NIACs. This is all the more prevalent in the case of the prohibited weapons.²¹²

Consequently, it follows that Yemen, Saudi Arabia and the UAE are not criminally responsible under the ICC for using means of combat that do not discriminate. Nor is there a well-established customary view considering these unlawful means war crimes in NIACs. However, their prosecution is possible under the domestic courts of countries that have criminalized such prohibited weapons or indiscriminate attacks in general.

This chapter has examined four alleged war crimes and concluded that not all of them are war crimes before the ICC or under customary law. However, prosecution of such IHL violations as war crimes might be possible under the domestic courts of third states. Now, it is only pertinent to evaluate in the last two chapters what the prospects are for these prosecutions to unfold under various arrangements by considering mostly legal impediments and several extra-legal considerations.

²¹² Dormann, “War Crimes under the Rome Statute of the ICC,” 347.

CHAPTER FOUR

4 Prospects for Prosecuting War Crimes under the ICC

From the crimes examined above, the Court has jurisdiction over the following: the war crime of murder, cruel treatment and torture, humiliating and degrading treatment, rape and other forms of sexual violence. Having determined them in last chapter, the prospects for their prosecutions must also be evaluated. To achieve this, important legal impediments and extra-legal considerations will be analysed.

4.1 ICC Jurisdiction

Considering the applicability of the provisions of the ICC, the jurisdiction can be exercised either by the states or by the Prosecutor only if the crime has occurred on the territory of or has been committed by a national of the state party or if a state accepts the jurisdiction of the Court.²¹³ Though Yemen, Saudi Arabia and the UAE are not parties to it, the Prosecutor of the Court in accordance with article 15 of the ICC could carry out an investigation in Yemen “*on the basis of information on crimes within the jurisdiction of the Court*” if Yemen in turn accepts the jurisdiction of the Court.²¹⁴ For instance, the Prosecutor now has quite vast information from authoritative institutions, one of these being the UNHRC’s “*Report on the Situation of human rights in Yemen, including violations and abuses since September 2014*”, released in August 2018. The Court’s jurisdiction can also be triggered by the SC, acting under chapter VII of the UN Charter.²¹⁵

4.2 Prosecution before the ICC

The Preamble to the ICC Statute recalls that it is “*the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*”.²¹⁶ The fact that Yemen, Saudi Arabia and the UAE are not parties to the ICC leaves the application of its provisions at the willingness of these states to recognize the jurisdiction of the Court or of the SC’s deter-

²¹³ Article 12(2), ICC Statute.

²¹⁴ Article 15(1), ICC Statute.

²¹⁵ Article 13(b), ICC Statute.

²¹⁶ Preamble, ICC Statute.

mination to bring about justice. Therefore, although it intends to ensure international justice when it comes to most heinous crimes, the ICC Statute has limited jurisdiction.²¹⁷

Moreover, the absence of (efficient) implementing legislation, is noted in the case of several countries that have not yet or not precisely stipulated in their national law definitions of the international crimes and conditions of implementation of the principle of complementarity as enshrined under the Statute.²¹⁸ Although the elements of war crimes under the Statute are quite detailed, the national judge can encounter problems as these qualifying elements can be somewhat inadequate under the national system.²¹⁹ In this situation the prosecutors find themselves compelled to frame the international crimes in equivalent terms to the domestic definitions.²²⁰

The principle of complementarity under the ICC is also conditioned by two criteria: unwillingness and inability of the national courts.²²¹ This principle is very precisely framed within articles 1, 15, 17 and 19, however, the determination of these terms can be difficult to assess.²²² Though the term unwillingness is defined, it is difficult to evaluate the criteria. For instance, article 17(2) says that “*unwilling*” means: i) that the judicial system shields the perpetrator; ii) unjustified delay in proceedings or iii) independent and impartial concluded proceedings.²²³ The term “*unable*” could also be subject to difficulties in appreciation, but a reference to the number of cases the judiciary normally copes with in peace times would give a better evaluation threshold.²²⁴ These open terms are to be framed by the discretionary power – which can also be an impediment.²²⁵ These criteria are quite subjective when it comes to appreciation. It is the Prosecutor that establishes what is “*unwilling*” and “*unable*”. However, the decision will be reviewed by the Pre-Trial Chamber, which is another discretionary power. To this, the SC’s other appreciations for the principle of complementarity is added. These different approaches can lead to the fragmentation of this principle.²²⁶

²¹⁷ Preamble, Article 5, ICC Statute.

²¹⁸ Xavier, “The Principles of Universal Jurisdiction and Complementarity,” 390.

²¹⁹ Ibid.

²²⁰ Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, June 2006, 24.

²²¹ Article 17, ICC Statute.

²²² Xavier, “The Principles of Universal Jurisdiction and Complementarity,” 382.

²²³ Article 17(2), ICC Statute.

²²⁴ Xavier, “The Principles of Universal Jurisdiction and Complementarity,” 383.

²²⁵ Ibid., 390.

²²⁶ Ibid.

As IL provides, there must also be domestic law that stipulates that statutes of limitations do not apply to international crimes, such as war crimes.²²⁷ This rule is not considered customary with regard to all international crimes, but genocide, crimes against humanity and torture.²²⁸ However, the ICC bars such limitations with regard to all international crimes under its jurisdiction, including war crimes in NIACs.²²⁹ Therefore, the statutes of limitations would not be applicable to the alleged war crimes in Yemen enlisted in the ICC Statute under article 8(2)(c) and (e).

The implementation of the complementarity principle and the Statute, also requires legislation on immunity and mutual legal assistance to facilitate the investigation process and extradition, which is inefficient or lacking altogether in many states.²³⁰ For instance, some prosecutions of international crimes are hindered due to the absolute immunity that political officials in some governments enjoy – such as in China.²³¹

The general rule of international law on immunities says that there are two types – functional immunities and personal immunities – meant to protect the accused person for the deeds fulfilled under official capacity.²³² The former refers to the norm that individuals acting as agents of a given state cannot be accountable for violations of international law, but the state itself. This holds true, however, save on international crimes – which is also a customary rule.²³³ The latter type is granted in order to guard the official mission of these individuals without impairment or interference. The termination of this immunity comes when the official duties are ceased. This type of immunity applies mostly for ordinary crimes and international crimes tried before national courts.²³⁴ However, when it comes to international criminal courts, the availability of these personal immunities is rendered void²³⁵ – the Rome Statute does not rec-

²²⁷ Article 1, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Adopted on 26 November 1968. Entered into force 11 November 1970; Article 29, the ICC Statute; Rule 160, ICRC Study.

²²⁸ Cassese, “Legal Impediments to the Exercise of Criminal Jurisdiction,” chap. 17, 315.

²²⁹ Article 29, ICC Statute.

²³⁰ Bruce Broomhall, “Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for crimes under International Law,” *New England Law Review* 35, no.2 (2001): 412.

²³¹ Lijun Yang, “On the principle of Complementarity in the Rome Statute of the International Criminal Court,” *Chinese Journal of International Law* 4, issue 1 (January 1, 2005): 130.

²³² Cassese, “Obedience to Superior Orders and Official Capacity,” chap. 13, 240.

²³³ *Ibid.*, 248.

²³⁴ Cassese, “Legal Impediments to the Exercise of Criminal Jurisdiction,” chap. 17, 318-320.

²³⁵ *Ibid.*, 320.

ognize the immunity of states' officials.²³⁶ Again, here the ICC can, in the case of Yemen, avoid the obstacle of immunities and prosecute the alleged criminals.

APII enshrines the obligation of the authorities in power to strive to grant the broadest possible amnesty at the end of hostilities.²³⁷ However, this provision has been abused by many incumbent military and political leaders that exempted themselves from future prosecution by dint of passing amnesty laws – the so-called self-amnesties.²³⁸

The ICRC Study asserts that there is customary view which reckons that amnesty cannot be enjoyed when it comes to international crimes. This Rule is mainly based on the opinion of the URSS at the time of the adoption of article 6(5) of APII and some case-law.²³⁹ It also relies on some state practice represented by resolutions.²⁴⁰ Besides what this Rule provides, the Cambodia Bill of 2000 of the Extraordinary Chambers in the Courts of Cambodia also limits amnesties to perpetrators of international crimes.²⁴¹ However, this is not enough to establish that this Rule is indeed customary. Such a view with regard to all international crimes, is not yet crystallised as customary.²⁴²

However, when it comes to amnesties with respect to serious violations that entail *jus cogens*, especially torture²⁴³, it is held to be a customary view that amnesty should not apply to these perpetrators as it would be contrary to IL.²⁴⁴ Human rights bodies also consider that granting amnesties would be in conflict with the obligation of states to investigate violations of non-derogable human rights.²⁴⁵ Thus, while the Statute does not comprise a provision on amnesties, with respect to the mentioned prosecutable war crimes before this Court, it could be ar-

²³⁶ Article 27(2), ICC Statute.

²³⁷ Article 6(5), APII.

²³⁸ Cassese, "Legal Impediments to the Exercise of Criminal Jurisdiction." chap. 17, 309.

²³⁹ Rule 159, ICRC Study: see the commentary to this Rule.

²⁴⁰ UNSC, Resolution 1120, SC Resolution on Croatia, S/RES/1120, (14 July, 1997); Article 10, SCSL Statute.

²⁴¹ Article 40, Cambodia Bill of 2000 of the Extraordinary Chambers in the Courts of Cambodia for Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC). Adopted on 27 October 2004.

²⁴² Cassese, "Legal Impediments to the Exercise of Criminal Jurisdiction." chap. 17, 311-312.

²⁴³ *Prosecutor v. Anto Furundzija*, case no. IT-95-17/1-T, Trial Chamber, ICTY, Judgement of 10 December 1998, para. 155.

²⁴⁴ Cassese, "Legal Impediments to the Exercise of Criminal Jurisdiction," chap. 17, 312.

²⁴⁵ Rule 159, ICRC Study, commentary: mentioning *inter alia* the Inter-American Court of Human Rights in *Barrios Altos case* finding that that amnesty laws of Peru for "serious human rights violations such as torture, extrajudicial, summary or arbitrary executions and enforced disappearances were inadmissible because they violated non-derogable rights."

gued that amnesties do not represent an obstacle at least for those crimes that are *jus cogens* in the eyes of the Court.

Besides, the prosecution under the ICC can have some extra-legal dimensions to it, which might deter the SC's permanent members (P5) to use the referral. Thus, what are the prospects of triggering its jurisdiction by the SC? In order to provide a more thorough answer it should be resorted to the diplomatic relations, politics and geopolitics that surround Yemen.

The SC's referrals were generally criticised by the African states for being used as political tools, because the ICC would more likely be exercising jurisdiction in weak countries that are unable to exercise the primary jurisdiction, than in the most powerful states.²⁴⁶ This might be the case for poor Yemen, especially during or after war, when the state will be facing tremendous repercussions. Therefore, while the SC might want to refer Yemen, as it would also entail investigating the alleged war crimes committed by the Houthis, they might very well eventually avoid referring Yemen as they can be criticised again that the exercise of the ICC jurisdiction under complementarity only takes place in weak and poor countries.

Furthermore, three states (USA, Russia and China) out of the P5 are not parties to the ICC and thus do not esteem it²⁴⁷, possibly making it difficult to imagine that they would resort to the Court, and in this way somehow recognize its merits. The USA has never approved of or empowered the ICC; actually, under the Trump administration the USA is more aversive than ever.²⁴⁸

As a matter of politics and diplomacy, the fact that the USA, the UK and France actually support and are the allies of Saudi Arabia, makes the referral more unlikely. They must be seen as

²⁴⁶ Nadia Shamsi, "The ICC: A Political Tool: How the Rome Statute is Susceptible to the Pressures of More Power," *Willamette Journal of International Law and Dispute Resolution*, 24, no.1 (2016): 87.

²⁴⁷ Lawrence Moss, "The UN Security Council and the International Criminal Court Towards a More Principled Relationship," *International Policy Analysis*, (March 2012): 4: "Russia and the United States signed the treaty without ratifying it, and China has never signed the treaty."

²⁴⁸ Ron Synovitz, "Explainer: Why Does the U.S. Have it out for The International Criminal Court?" *Radio Free Europe Radio Liberty*, September 11, 2018, <https://www.rferl.org/a/explainer-why-does-u-s-have-it-out-for-international-criminal-court-/29484529.html>: John Bolton, the now national security adviser, threatened that Washington would impose sanctions against judges and prosecutors of the ICC if they carry on with the investigation into war crimes allegedly committed in Afghanistan by Americans: "We will ban its judges and prosecutors from entering the United States," Bolton said. "We will sanction their funds in the U.S. financial system, and, we will prosecute them in the U.S. criminal system. We will do the same for any company or state that assists an ICC investigation of Americans."

allied, and no countries with strong allies on the SC have thus far been transferred to the ICC by way of a Chapter VII decision under the UN Charter. For instance, in terms of weapons, in 2018 the Trump administration signed a \$110 billion arms deal²⁴⁹ and as of 2016 the UK authorised arms licenses worth \$5 billion and France \$18 billion, according to the Control Arms Coalition director.²⁵⁰ Moreover, USA has significantly helped Saudi Arabia with military training, logistics and intelligence since 2015.²⁵¹ Therefore, what are the prospects that the coalition's and especially, Saudi Arabia's great allies and weapons sellers could refer the allegations to the ICC? These alliances appear to represent important national interests for these states.

Besides the issues of alliances and diplomacy, the geopolitical strategies of the USA may further impede the interest for prosecutions. The comprehensive US support to the Saudi-led coalition is crucial for the USA. The erosion of the bipolar system made it possible for the USA to reach "an unprecedented level of global power" when we are to think about its proven military and intelligence capabilities during interventions like Iraq, Libya, Syria and Yemen, where Libya and Iraq have impressive petroleum resources.²⁵² Thus, the reintroduction of a multipolar world order and increasing rivalry between global powers, where strategically located allies are crucial, makes it less relevant with an ICC-transfer of states with clear allies on the UN Security Council.

Another argument that depicts politics as an impediment to accountability through the SC's referral, is the fact that there have only been two cases referred to the ICC so far, South Sudan²⁵³ and Libya.²⁵⁴ In both situations, the possibility for the ICC to ensure jurisdiction for prosecuting other non-member states than the nationals of Sudan and Libya was actually excluded.²⁵⁵ Such limited jurisdiction would feed the accusations considering the politicization

Mike Stone, Patricia Zengerle, Matt Spetalnick, "Exclusive: Trump, Industry Work Behind the Scenes to Save Saudi Arms Package," *Reuters*, October 24, 2018, <https://www.reuters.com/article/us-saudi-khashoggi-arms-exclusive/exclusive-trump-industry-work-to-save-much-touted-110-billion-saudi-arms-deal-idUSKCN1MY2M8>.

²⁵⁰ Global Justice, "Yemen: Western Arms being used for ICC Crimes?" *Global Justice*, September 19, 2016 <https://cicglobaljustice.wordpress.com/2016/09/19/yemen-western-arms-being-used-for-icc-crimes/>.

²⁵¹ Christopher M. Blanchard, *Saudi Arabia: Background and U.S. Relations*, September 21, 2018, Congressional Research Service Report. <https://fas.org/sgp/crs/mideast/RL33533.pdf>

²⁵² Hamideh Sedghi, "Trumpism: The Geopolitics of the United States, the Middle East and Iran," *Socialism and Democracy* 31, no. 3 (November 2017): 84.

²⁵³ UNSC, Resolution 1593, S/RES/1593, (March 31, 2005).

²⁵⁴ UNSC, Resolution 1970, S/RES/1970, (February 26, 2011).

²⁵⁵ UNSC Resolution 1593, para. 6; UNSC Resolution 1970, para. 6.

of the ICC.²⁵⁶ There has been criticism that the referrals were used in both cases mainly because the SC's members had political interests at stake. Considering Libya, the USA was interested in going after former Libyan leader Muammar Gaddafi and his staff and thus accused of wanting to replace the dictator with another regime in line with western politics.²⁵⁷ Therefore, the USA, UK and France could seem quite unlikely to refer Yemen as that would entail also subjecting Government's officials and Yemeni army to the jurisdiction of the Court, and thus not serving their interests. As the ICRC puts it, when it comes to cooperation between state officials and international bodies to investigate and prosecute, realpolitik and geopolitics are important dimensions that should not be ignored and that can lead to inaction.²⁵⁸

On the other hand, another political hurdle is that the members of the SC might rethink their willingness to refer Yemen exactly because they might want to avoid other politicization accusations. For instance, although the ICC was created in an effort to be an independent body to ensure justice, the fact that the SC can refer a situation to the ICC irrespective of a state's consent raises some political issues.²⁵⁹ This criticism largely stems from the fact that the USA, Russia and China are not parties to the Rome Statute, yet they have the ability to refer situations involving states which also are not party to the Statute. The fact that these three states can subject other states to the Court's jurisdiction while they can avoid it themselves, has fortified the idea that the ICC has become a political instrument through which SC states' interests can be advanced.²⁶⁰

It has been indicated that although the jurisdiction of the ICC can still be triggered even in the case of non-state parties and the statutory limitations, immunities and amnesties do not bar the Court, there are other legal and extra-legal aspects that can impede it.

²⁵⁶ Maria Radziejowska, "Awaiting Justice: Prospects for prosecuting War Crimes in Syria," *Policy Paper 79*, no. 31 (November 2013): 2.

²⁵⁷ Shamsi, "The ICC: A Political Tool: How the Rome Statute Is Susceptible to the Pressures of More Power," 94.

²⁵⁸ Xavier, "The principles of universal jurisdiction and complementarity," 395.

²⁵⁹ Preamble, ICC Statute.

²⁶⁰ Shamsi, "The ICC: A Political Tool: How the Rome Statute Is Susceptible to the Pressures of More Power," 93.

CHAPTER FIVE

5 Prospects for Prosecuting War Crimes under other Arrangements

The alleged war crimes documented in chapter three trigger both state and individual criminal responsibility. For those IHL infractions that are not considered war crimes either under the ICC Statute or custom – disproportionate/indiscriminate attacks, violation of the duty to provide relief and protection to the wounded and sick, and the use of indiscriminate weapons – or those that are considered such but still might not be prosecuted under this Statute due to the aforementioned impediments, there are other arrangements that could ensure such prosecutions. So, what states and which institutions can have jurisdictions over the alleged IHL violations analysed above and what impediments could their prosecution entail?

5.1 Prosecution by Yemen, Saudi Arabia and the UAE

The Yemeni government has the primary legal responsibility to address these violations as it has a duty to protect the individuals under its jurisdiction.²⁶¹ All other states have the obligation to investigate and prosecute violations that amount to war crimes committed by their state organs and armed forces.²⁶² As torture is a clear violation of *jus cogens* and it reflects custom, Yemen, Saudi Arabia, the UAE should prosecute those who engaged in torture, as well as any other alleged war crimes that mirror *jus cogens*. Moreover, even if the use of indiscriminate/disproportionate means and methods, the duty to provide relief and protection to the wounded and sick are not war crimes in the domestic law of Yemen, Saudi Arabia or the UAE, these acts would still be in contradiction with the obligations within APII and those who violate them should at least be sanctioned through disciplinary rules.

In terms of state responsibility, it was already stated that Yemen, Saudi Arabia and the UAE are responsible for what their state organs and armies commit and that these states should investigate and prosecute if needed. However, regarding Yemen, the fact that there is civil war makes legal procedures more difficult. Also, the rise of various armed groups and security

²⁶¹ UNHRC, *Situation of Human Rights in Yemen*, para. 101.

²⁶² Articles 4, ARSIWA; Rule 149(c), ICRC Study.

forces that lack command and control and the limited statehood of the central government over its security forces and territories, add to the state of impunity.²⁶³

Also, as noted by the Experts and AI, the National Commission of Inquiry (NCI) established by the Yemeni Government, lacks to a large extent, both competence and impartiality. The Commission asserts in its report that the de facto authorities in Sana'a did not cooperate and that the physical access is also impeded. The investigation has not been carried out in conformity with international obligations and the cooperation from the side of the Government is scarce and the Commission is not an independent body.²⁶⁴ In a similar vein, the Joint Incidents Assessment Team (JIAT), established by the Saudi-led coalition in 2016, also lacks independence, competence, represented by insufficient detailed findings, and mechanisms to ensure the implementation of the recommendations made by it.²⁶⁵

5.2 Prosecution by Third States under the Universality Principle

It was shown in chapter two that there is no obligation, nor right under customary law applicable to NIACs to exercise universal jurisdiction over serious violations; the only two provisions that provide for such a principle to extend to NIACs do not apply to the war crimes under discussion here.²⁶⁶ This fact alone can be seen as a legal impediment. However, states may still prosecute under this principle as a voluntary commitment to the international community. Thus, there might be states willing to exercise this type of jurisdiction over any of the above IHL violations in Yemen, as long as they consider these violations war crimes under the domestic law.²⁶⁷

Furthermore, there are no directives or guidelines on how the implementation of this principle is feasible. Although between customary and conventional law there is no value distinction, the degree of precision is conspicuous. Combined customary rules give support for implementing universal jurisdiction, but they do not provide the states with precise instructions or a

²⁶³ AI, *Report 2017/2018*, 402.

²⁶⁴ UNHRC, *Situation of Human Rights in Yemen*, para. 103; AI, *Report 2017/2018*, 402.

²⁶⁵ *Ibid.*, para. 104; *Ibid.*

²⁶⁶ See *supra*, note 107.

²⁶⁷ Xavier, "The Principles of Universal Jurisdiction and Complementarity," 387.

“ready-made course of action”.²⁶⁸ Therefore, even if some national courts would want to prosecute war crimes in NIACs, there might still be problems regarding how the implementation would work. Moreover, in terms of extradition, such obligation is absent under the law governing NIACs.

The lack of (detailed) definitions of war crimes, the inexistence of a customary rule against the statutes of limitations and amnesties over all war crimes, and the existence of personal immunities before national courts, could also hinder the prosecution under universality principle.²⁶⁹ However, as stated, there is the customary view that statutes of limitations do not apply to the war crime of torture, that the functional immunities do not apply when it comes to international crimes and that amnesties cannot be granted to violations of norms with *jus cogens* status, which at a minimum includes torture.

There are also some evidentiary challenges, posed by the fact that the territorial state has control over the evidence needed and that it can hinder access to the victims/witnesses.²⁷⁰ Moreover, the documents obtained from the territorial state could raise authenticity questions, that can make the procedures inadequate.²⁷¹ This could be an impediment with respect to Yemen, Saudi Arabia and the UAE, as they might be unwilling to cooperate with third states.

Another legal obstacle can be the norm of prosecutorial discretion. Under the principle of universality, present in some countries like the UK, Belgium, Norway, the Netherlands and Denmark, this discretion means that the prosecutors decide if a case should be judged and the criteria to this decision differs from country to country.²⁷² However, in some states the laws do prescribe a judicial or administrative review; the judicial one being more transparent and accountable.²⁷³ Thus, prosecuting individuals from the Governments of Yemen and the coalition’s states, can be an instance where the prosecutors are decision-makers, whose conclusions about starting an investigation are irrevocable.

²⁶⁸ Ibid., 386.

²⁶⁹ HRW, *Universal Jurisdiction in Europe: The State of Art*, (June 2006), 24-25.

²⁷⁰ Wolfgang Kaleck, “From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008,” *Michigan Journal International Law* 30, no.927/issue 3 (Spring, 2009): 962.

²⁷¹ Broomhall, “Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for crimes under International Law,” 412.

²⁷² HRW, *Universal Jurisdiction in Europe: The State of Art*, 30.

²⁷³ Ibid., 31.

The principle of universal jurisdiction is a “reserve tool”²⁷⁴, meaning that it is conditioned by the existence of the subsidiarity principle which requires that the universal jurisdiction can be practiced only if the judicial system in the home-country to the crimes “*is unable or unwilling to investigate and prosecute*”.²⁷⁵

The universal jurisdiction can lead to critical decisions which are expected to reflect a state’s position regarding another state.²⁷⁶ There is a great chance that this tool of justice is politically motivated. Therefore, the politicization can function as an impetus or impediment to justice. The universal jurisdiction will either be proceeded with because a given state wants to go after a possible adversary, or the investigation will not be started as a state does not want to disturb the diplomatic relations with Yemen and the states of the coalition.

5.3 Prosecution before other International Tribunals

The qualified war crimes under the ICC, if not prosecuted before this Court due to any of the mentioned possible hurdles, they could be prosecuted before other future international tribunals, as they reflect custom. As for the absent crimes from the ICC and those that are not custom, they could be part of new emerging statutes of ad hoc or hybrid tribunals. However, perpetrators must be punished in conformity with the limitation provided for by the strict legality principle, non-retroactivity or *nullum crimen sine proevia lege*, which stipulates that only the acts that took place at the moment or after they became criminal offences in the applicable law, are prosecutable.²⁷⁷ This mean that for these very violations, perpetrators could not be brought before international tribunals, because as indicated in chapter three, at the time of committing these violations, they were not held to be war crimes under customary law.

International criminal courts can be divided into three categories: the permanent ICC, ad hoc tribunals created by the SC resolutions and hybrid tribunals, created by voluntary agreements between the states in question and the UN, whose distinct feature is the blending national and

²⁷⁴ Ibid., 32.

²⁷⁵ UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, S/2004/616, (23 August 2004), para. 48.

²⁷⁶ Broomhall, “Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for crimes under International Law”, 400.

²⁷⁷ Cassese, “The Principle of Legality in ICL,” chap. 2, 23.

international justice systems.²⁷⁸ If ad hoc tribunals are established, new statuses will emerge with the help of SC resolutions. As the Appeals Chamber of the ICTY in the *Tadić* case of 1995 stated, “*the violation of the rule [of international humanitarian law] must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule*”.²⁷⁹ Thus, these statuses might entail both, customary and treaty law. Under such a tribunal all parties in the war in Yemen could be brought to trial if found guilty. In terms of hybrid institutions, they present the advantage that they have mixed composition and will not present many of the legal impediments with regard to the principles of universality and complementarity.

As established above, neither functional nor personal immunities are seen as obstacles. There is international practice, represented by case-law to sustain that personal immunities are not granted before the international courts.²⁸⁰ In *Arrest warrant*, the ICJ held that personal immunities do not apply to international courts “*where they have jurisdiction*”, naming the Statutes of the ICTY, ICTR and the ICC. The ICJ expressly stipulated that immunities do not bar it.²⁸¹

All in all, it seems indeed, as legal positivists claim, that states are the main actors, and even where the international institutions such as the SC, the ICC and international courts have authority and jurisdiction over matters of international law, it is still the states that empower them to function. Moreover, the binding aspect of the law is central to states, according to positivists.²⁸² In Yemen’s case, though Yemen, Saudi Arabia and the UAE are bound to investigate and prosecute their armed forces, they are not bound to accept the ICC jurisdiction and the SC is not bound to refer the case to the Prosecutor. Thus, the accountability for war crimes, lies primarily in states’ eagerness to comply with their international obligations.

²⁷⁸ Cassese, “The Repression of International Crimes in Domestic Jurisdictions,” chap. 15, 263-265.

²⁷⁹ *Prosecutor v. Tadić*, ICTY, para. 94.

²⁸⁰ *Prosecutor v. Charles Ghankay Taylor*, case no. SCSL-03-1-T, SCSL, Judgement of 26 April 2012, para.51(*Taylor Case*); *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), ICJ, Judgement of 14 February 2002, ICJ Reports 2002, para 61 (*Arrest Warrant*).

²⁸¹ *Arrest Warrant*, ICJ, para. 61.

²⁸² David Armstrong, Theo Farrell and Helene Lambert, “Three Lenses: Realism, Liberalism and Constructivism,” in *International Law and International Relations*, Cambridge (Cambridge: Cambridge University Press, 2012), 82-86.

CHAPTER SIX

6 Conclusions

It was suggested that IHL infractions are likely to have occurred in all four selections from chapter three. These infractions are: violation of the principles of humanity, proportionality and precaution – including indiscriminate attacks, violation of the duty to provide relief, violation of the protection of the wounded and sick, violation against torture, cruel and degrading treatment, rape and sexual violence and the use of indiscriminate weapons. However, only some of these infractions qualify as war crimes under the ICC and customary law, namely – murder, torture, cruel and degrading treatment, rape and sexual violence. This means that these crimes can be prosecuted before the ICC, third states' courts and future international tribunals. While these war crimes are most probable to be prosecuted due to the existence of a well-established law, there are various impediments to these prosecuting bodies. Thus, it is only somewhat likely that such prosecutions would occur.

Those infractions outside the Statute and that do not represent custom, could only be prosecuted as war crimes before national courts that criminalize them, under the principle of universality. However, there is only a right to do so, which does not reflect custom. This fact alone, could deter many states from exercising such jurisdiction, besides the other impediments that this principle entails. Further, the prosecution of these very infractions before future tribunals is impossible as the IHL infractions that are not war crimes under customary law cannot be prosecuted unless they are incorporated in the new statutes and only if such violations occurred after the criminalisation. Besides, the political/geopolitical atmosphere further hinders such prosecutions. Therefore, the prosecution of these infractions as war crimes is even more unlikely than in the case of those war crimes held to be custom.

As a matter of fulfilling the obligation under IHL, Yemen and the states of the coalition should investigate and prosecute the alleged crimes that represent custom. However, impartiality and incompetence are significant in the case of the NCI and JIAT.

All in all, while the prosecutions cannot be assured, the author reckons that at least few prosecutions with respect to the suggested IHL violations, could appear. Moreover, it is compelling to stress the importance of using non-legal means of pressure to discipline the warring parties in Yemen.

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ANNEX

ANNEX 1

MAP OF YEMEN'S CONTROLLED TERRITORIES AS OF JANUARY 2019

YEMEN

Who controls what

