

The Struggle for Justice

The situation of impunity and accountability avenues for violations committed in Yemen



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A photograph of a war-torn city, likely in Yemen, showing a dirt road winding through a densely packed area of heavily damaged, multi-story buildings. The buildings are made of brick and have many windows missing or boarded up. Debris is scattered on the ground. A person is walking on the road in the distance. The background shows a hillside with more buildings. The text "Executive summary" is overlaid in white on the image.

Executive summary

After more than eight years of armed conflict, the civilian population in Yemen continues to endure serious violations and abuses of international humanitarian law and human rights law in a pervasive climate of impunity. Many of these violations may amount to crimes under international law such as war crimes and crimes against humanity. The suffering of civilians is exacerbated as they face one of the world's worst humanitarian crises, with no immediate signs of relief. All parties to the conflict and those supporting them hold responsibility for causing this human suffering and perpetuating the conflict. There are no clean hands in this devastating war. The loud pleas of victims and their families, public reports, civil society-led litigation, and repeated briefings by United Nations (UN) experts over many years, have put States, non-State actors, including armed groups and arms companies, and the international community on notice. No one can claim to be ignorant of the atrocities that have been and continue to be committed against civilians in Yemen.

And still, little to no efforts have been made by the parties to the conflict to hold accountable those responsible for past and ongoing atrocities, many of which may constitute international crimes. The quest for justice has been infected by "a pandemic of impunity."¹ Under intense pressure from Saudi Arabia and the United Arab Emirates (UAE), the mandate of the only independent international mechanism investigating all parties to the conflict and laying the groundwork for accountability – the UN Group of Eminent Experts on Yemen (UNGEE) – was not renewed by the UN Human Rights Council in 2021. Saudi Arabia, backed by the UAE, conducted an aggressive lobbying campaign to shut down the UNGEE. Since 2017, public reporting by the UNGEE had played an important role in addressing – even if only limitedly – the vast accountability gap. By disbanding the UNGEE, the international community turned its back to the massive scale of violations and suffering that the people of Yemen continue to endure. The need to address the pervasive accountability gap remains urgent and necessary.

The following report, by Mwatana for Human Rights and Ceasefire Centre for Civilian Rights, examines several avenues to pursue criminal accountability for international crimes committed in Yemen since September 2014. The aim of this report is to assess the feasibility and the potential impacts of pursuing each of these accountability avenues, considering the present realities of the ongoing war. Existing accountability avenues are considered, particularly the domestic judicial systems of the parties to the conflict, the International Criminal Court (ICC), and foreign domestic courts in third

1 The 2020 report of the UNGEE was entitled "A Pandemic of Impunity in a Tortured Land," see UNGEE, 'Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014' UN Doc A/HRC/45/CRP.7 (September 29, 2020) ("UNGEE 2020 Detailed Findings"), <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/GEE-Yemen/A-HRC-45-CRP.7-en.pdf>.

States. The possible establishment of new international accountability mechanisms is also explored, namely an independent international criminally-focused investigative mechanism, an independent civil society investigation and reporting mechanism, and an ad hoc international criminal tribunal. The different avenues of accountability outlined in this report should not be understood as stand-alone options for ensuring justice. The avenues may operate in parallel and cooperate in ensuring justice.

The focus of this report is on criminal accountability, which concerns legal processes aimed at establishing the individual criminal responsibility of perpetrators for their involvement in war crimes, crimes against humanity, genocide, or other serious crimes, such as torture and enforced disappearances. Potential perpetrators may include States' political and military officials, leaders and members of non-State armed groups or State-supported or -recruited forces, as well as State officials, corporate executives, and, in some jurisdictions, corporations as legal persons involved in arms transfers to warring parties.

This report makes the case for the pursuit of a comprehensive form of criminal accountability. This entails holding to account perpetrators affiliated to all conflict parties for the full range of international crimes and other violations of international law that are relevant to the war in Yemen. All victims should have access to justice and receive reparations for the harms suffered. One-sided or partial justice does not lay the necessary foundation for long-lasting peace in Yemen. Amnesties that prevent investigation and prosecution of international crimes are impermissible, as clearly recognized in international law and by the UN. The denial of justice only fuels the next cycle of violence, which is a clear lesson from past experience in Yemen where former President Saleh and his cabinet received a blanket amnesty. To ensure that perpetrators can actually be held criminally accountable, a first crucial step is the collection and preservation of evidence.

However, the struggle for justice in Yemen is not without significant obstacles. Few avenues of accountability for international crimes are currently available and those that exist are limited in their capacity to contribute to comprehensive criminal accountability. The pursuit of justice is faced with a failure of political will, unreliable warring parties-affiliated bodies that do not meet international standards, and an ongoing armed conflict characterized by mass victimization and the involvement of a multitude of powerful local, regional, and international perpetrators of a varied State and non-State nature.

Investigations and prosecutions at the domestic level | *States are legally required to investigate alleged crimes under international law committed by their nationals or*

armed forces, or within territory under their jurisdiction, with a view to prosecuting the suspects where appropriate. International law also obliges them to provide effective remedies to victims, including equal and effective access to justice.

Yemen's justice system lacks relevant laws and capacity, and suffers from deep-seated shortcomings, such as endemic violations of fair trial rights, rendering it incapable of ensuring effective accountability in accordance with recognized standards of international human rights law. The fragmented and war-torn justice system in Yemen requires comprehensive long-term reform. The domestic judicial systems of Saudi Arabia, the UAE, and Iran are equally unavailable avenues due to their record of pervasive human rights violations, lack of judicial independence, and manipulation by the executive. The warring parties' investigative bodies, such as the National Commission to Investigate Alleged Violations of Human Rights (NCIAVHR) and the coalition's Joint Incidents Assessment Team (JIAT), fail to meet the standards set by international law to ensure accountability, including but not limited to issues of independence, credibility, and transparency. The warring parties have been unwilling to take serious action on criminal accountability. The limited steps purportedly taken by certain warring parties to hold individuals within their ranks criminally responsible during almost a decade of war have had little to no impact. Impunity continues to prevail.

This report therefore calls on the international community to take immediate action to mobilize independent avenues for accountability at the international level to address the acute impunity in Yemen and pave the way towards accountability and justice.

Independent international criminally-focused investigative mechanism | *The UN Human Rights Council and the UN General Assembly have established criminally-focused investigative mechanisms with mandates to collect, preserve, and analyze evidence of serious violations and crimes under international law committed in countries such as Syria and Myanmar. These mechanisms are investigative bodies only, without the authority to arrest perpetrators or hold criminal trials. Instead, they support ongoing or future accountability proceedings by sharing evidence and case files with competent justice authorities. Thus, there exists strong precedent for the creation of a similar mechanism for Yemen.*

This report urges the UN Human Rights Council and/or UN General Assembly to establish without delay an independent international criminally-focused investigative mechanism for Yemen whose mandate includes investigating violations of international humanitarian law and human rights violations and abuses and publicly reporting on the human rights situation in Yemen, as well as collecting, consolidating, preserving, and analyzing evidence, and preparing case files in order to facilitate and expedite on-

going or future criminal accountability processes. Since the UNGEE was disbanded in 2021, a criminally-focused mechanism with a strong mandate is even more critical, not only to expose to the world the horrific violations being committed in Yemen, but also to begin laying the groundwork for comprehensive criminal justice so that potential avenues of accountability can be effectively exploited now and in the future. The materials archived by such a mechanism may also make important contributions to broader accountability processes, such as reparations or truth-seeking. A truly independent, international mechanism is urgently needed to ensure accountability, which the warring parties' investigative mechanisms have failed to do. The collection and preservation of evidence is critical to the pursuit of justice, otherwise there is the risk that war criminals enjoy de facto amnesty through the loss or destruction of evidence.

Independent civil society investigation and reporting mechanism | *As the parties involved in the Yemeni conflict have been able to effectively undermine and hinder formal international mechanisms, such as the UNGEE which was shut down after immense pressure from Saudi Arabia and the UAE on UN Human Rights Council members, and political interests continue to overshadow accountability action, exploring alternative avenues for accountability outside of the traditional framework becomes necessary.*

This report encourages civil society to consider establishing an independent investigation and reporting mechanism that joins the forces of leading local and international human rights organizations to advance accountability and justice for Yemen. This mechanism could operate alongside other accountability mechanisms in the future, such as a UN-mandated criminally-focused investigative mechanism. By investigating and reporting on all alleged violations and international crimes committed by all parties to the conflict in Yemen since September 2014, such an independent civil society mechanism could contribute to holding perpetrators accountable, ensuring reparations for victims, and establishing a solid foundation for transitional justice.

International Criminal Court | *As the only permanent international criminal court, the ICC has the jurisdiction to investigate, prosecute, and try individuals bearing the greatest responsibility for the most serious crimes, including war crimes, crimes against humanity, and genocide. Yemen, most coalition members, including Saudi Arabia and the UAE, and Iran are not parties and thus are not in principle under the ICC's jurisdiction. Nevertheless, there are several pathways to trigger jurisdiction over the war in Yemen.*

While Yemen could become a State party to the ICC Rome Statute or merely accept the ICC's jurisdiction by making a declaration, there are no apparent indications of political will in Yemen to utilize either option to trigger the ICC's jurisdiction over Yemen. A

UN Security Council referral of the situation in Yemen to the ICC could instantly bypass such inaction and establish the Court's jurisdiction over all parties to the conflict. This report calls for such an urgent referral, which would significantly contribute to tackling impunity in Yemen. Although UN Security Council members have the power to refer Yemen's situation immediately – the gravity of the situation certainly warrants it – the current political climate in the Security Council renders the likelihood of this action remote. Nevertheless, another option remains feasible: the ICC could investigate alleged crimes committed in Yemen involving nationals of States that are currently party to the Rome Statute, including coalition member Jordan, arms transferring States such as the UK and France, or other countries from which mercenaries or nationals have reportedly been recruited including into senior military positions. While the ICC should claim jurisdiction where such States are unable or unwilling to fulfil their duty to genuinely investigate and prosecute the perpetrators, those most responsible in certain warring parties' ranks may remain fully or partly beyond prosecution. Should the ICC have jurisdiction, there are several distinct advantages, such as the Court's ability to contribute to comprehensive criminal accountability in the event of a UN Security Council referral and the reparations scheme. However, expectations must be tempered as the ICC can only ever accomplish a degree of justice with respect to a limited number of perpetrators and victims.

Foreign domestic courts in third States | *National authorities in foreign countries may pursue cases relating to international crimes committed in Yemen when the crime is committed by or against one of their own nationals, or based on the principle of universal jurisdiction. Universal jurisdiction provides the broadest basis for the exercise of extraterritorial jurisdiction, as there usually need not be a link between the crime and the State exercising jurisdiction. Certain international treaties also establish universal jurisdiction, particular for the crimes of torture and enforced disappearance.*

This report calls on third States to take immediate steps to exercise universal and other forms of jurisdiction in cases related to the war in Yemen. While foreign domestic courts are likely one of the more promising avenues for pursuing criminal accountability under current conditions, the exercise of universal jurisdiction is typically not without considerable obstacles. Sovereign State immunity may, for example, limit cases to less senior suspects. This is not unique to the Yemen context, which may also face a distinct obstacle because of Yemen's sparse diaspora in Europe and elsewhere that may limit the opportunities to target direct perpetrators. A UN criminally-focused mechanism for Yemen would provide clear advantages in facilitating universal jurisdiction cases by, for example, ensuring access to sufficient evidence despite the ongoing war or enabling national authorities to react quickly when there is momentum for judicial action. Coop-

eration with such a mechanism and other actors can significantly bolster the prospects of prosecutions; these other actors include other third-State and international investigative and prosecutorial authorities, such as the ICC on cases regarding arms transfer complicity, international actors, such as UN bodies which may facilitate access to the UNGEE's archive, and independent local and international civil society organizations (CSOs) engaged in documentation efforts and/or the provision of support to victims and affected communities. Coordination could also be fostered through States' institutional networks. Even if universal jurisdiction may not immediately lead to convictions, the report shows that such cases can still be of great value in combating impunity to the detriment of perpetrators.

Ad hoc international criminal tribunal | *Ad hoc international criminal tribunals are fully international justice institutions established by the UN Security Council. Past examples include the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). This type of tribunal has been created for the purpose of trying perpetrators of international crimes committed in specific country contexts.*

The establishment of a fully international criminal tribunal for Yemen that is dedicated exclusively to trying international crimes committed during the conflict in Yemen could offer distinct advantages. This new avenue could be more tailored to the Yemen context, while being external to the flawed domestic judicial system in Yemen and not dependent on Yemen's consent. As evidence is the cornerstone of successful prosecution, the creation of an independent international criminally-focused mechanism for Yemen would be a crucial preparatory measure for such a criminal tribunal. Despite these advantages, the establishment of an ad hoc international criminal tribunal for Yemen is currently not a viable option because of the political dynamics in the UN Security Council that make it highly unlikely that Council members would agree on such an initiative for Yemen.

Other justice and accountability measures | Criminal accountability should be viewed as one of a larger set of justice measures. Other interim or transitional justice measures to support reparations, truth, and guarantees of non-recurrence are complementary and help ensure that the consequences of mass atrocity are remedied in a holistic manner. Reparations, for example, can be a key means of centering victims and the harms suffered in justice responses. Justice processes must comply with international law, which recognizes clear legal obligations for States to impose accountability for serious crimes and provide effective remedies to victims, including reparations. Achieving lasting peace will require implementing Yemeni-led processes with the

participation of victims and civil society to ensure that justice responses align with the needs of those most impacted.

Other non-criminal justice avenues – such as UN human rights mechanisms or sanctions regimes – may also be used to promote accountability for human rights abuses. However, they do not establish criminal accountability nor substitute for initiatives to criminalize and prosecute those responsible for international crimes in Yemen. For example, while the UN Security Council has a Yemen-specific sanctions regime, the sanctions imposed under this regime do not in themselves constitute a measure of justice. Thus far, sanctions have been selective by only targeting one side of the conflict, despite widespread violations by all warring parties, and have been ineffective in preserving peace and security in Yemen.



**Yemen's
war context
since 2014**

2.1. The armed conflict in Yemen

The most recent war in Yemen began in 2014. On September 21st of that year, the Ansar Allah (Houthi) armed group took control over Yemen's capital Sana'a by force, in alliance with forces loyal to former President Ali Abdullah Saleh. President Saleh had been ousted from power in the wake of the 2011 widespread popular uprising, after over three decades of rule. By the end of 2014, Houthi-Saleh forces expanded their control to most of Sana'a Governorate. In early 2015, they placed the government of then-President Abdrabuh Mansour Hadi under house arrest, announced a "constitutional declaration," and dissolved the parliament. President Hadi fled to Aden, in southern Yemen, which had been declared the country's temporary capital. Houthi-Saleh forces eventually invaded Aden, forcing President Hadi to seek refuge in Riyadh, Saudi Arabia, in March 2015.²

On March 26, 2015, the non-international armed conflict entered a new phase when an international coalition led by Saudi Arabia and the UAE intervened in support of Yemen's internationally recognized Government against the Houthi-Saleh forces.³ The coalition continues to intervene in the conflict with the consent and military support of Yemen.⁴ Therefore, this foreign intervention involving air and ground operations did not alter the classification of the armed conflict under international humanitarian law.⁵

The ongoing armed conflict has witnessed shifting alliances and the emergence of distinct but related conflicts involving an increasing number of players. The alliance between the Ansar Allah (Houthi) armed group and Saleh forces ended in December 2017, after internal fighting and the eventual killing of former President Saleh by Houthi forces. The Houthi armed group has received political support from the Islamic Republic of Iran, which recognizes the Houthis as the legitimate government of Yemen and sent an "ambassador" to Sana'a. In terms of military support, the UNPoE found in 2021 that "[a]n increasing body of evidence suggests that individuals or entities in

2 Peter Salisbury, 'Yemen: Stemming the Rise of a Chaos State' (Chatham House 2016), <https://www.chathamhouse.org/2016/05/yemen-stemming-rise-chaos-state>; Kali Robinson, 'Yemen's Tragedy: War, Stalemate, and Suffering' (Council on Foreign Relations 2022), <https://www.cfr.org/backgroundunder/yemen-crisis>.

3 The coalition was initially composed of Saudi Arabia, the UAE, Bahrain, Egypt, Jordan, Kuwait, Qatar, Morocco, Senegal, and Sudan, but some States have withdrawn since then. UNGEE 2020 Detailed Findings, *supra* note 1, Annex I para 1.

4 Kristine Beckerle, 'Hiding Behind the Coalition: Failure to Credibly Investigate and Provide Redress for Unlawful Attacks in Yemen' (Human Rights Watch 2018) pp 41, 65, <https://hrw.org/report/2018/08/24/hiding-behind-coalition/failure-credibly-investigate-and-provide-redress-unlawful>.

5 RULAC, 'Non-International Armed Conflicts in Yemen,' <https://rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen> (accessed on May 2, 2023).

the Islamic Republic of Iran supply significant volumes of weapons and components to the Houthis.”⁶ On the other side, the Saudi/UAE-led coalition has received military and other support, including weapons supplies, from the USA, the UK, and France, among other States.⁷ The UAE has supported groups that have clashed with Yemen’s internationally recognized Government, most notably the Southern Transitional Council (STC).⁸ Other armed actors, such as al-Qaeda in the Arabian Peninsula and the Islamic State in Yemen, have taken advantage of the security vacuum and caused civilian harm. The USA has carried out drone strikes and ground raids purportedly targeting such actors, which have resulted in civilian deaths and injuries.⁹

On April 7, 2022, in Riyadh, former President Hadi transferred his executive powers to a Presidential Leadership Council. This eight-member Council includes prominent figures from military and political factions with control over territory and forces on the ground, including the STC.¹⁰

Past attempts at peace talks and ceasefires have failed to bring an end to the conflict. Most recently, Yemen’s internationally recognized Government and the Ansar Allah (Houthi) armed group agreed on a UN-brokered truce, with the tacit approval of Saudi

6 UNSC, ‘Final Report of the Panel of Experts on Yemen’ UN Doc S/2021/79 (January 25, 2021) p 2 (“UNPoE 2021 Report”), <https://digitallibrary.un.org/record/3898851?ln=en>; UNSC, ‘Final Report of the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140 (2014)’ UN Doc S/2022/50 (January 26, 2022) para 11 (“UNPoE 2022 Report”), <https://www.un.org/securitycouncil/sanctions/2140/panel-of-experts/work-and-mandate/reports>; UNSC, ‘Final Report of the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140 (2014)’ UN Doc S/2023/130 (February 21, 2023) p 3, <https://undocs.org/Home/Mobile?FinalSymbol=s%2F2023%2F130&Language=E&DeviceType=Desktop&LangRequested=False>.

7 Mwatana for Human Rights, ‘Death Falling from the Sky: Civilian Harm from the United States’ Use of Lethal Force in Yemen’ (2021) p 8, <https://mwatana.org/en/death-falling-from-the-sky/>; UNGEE, ‘Accountability Update’ UN Doc A/HRC/48/CRP.4 (September 14, 2021) paras 57–58 (“UNGEE 2021 Accountability Update”), https://www.ohchr.org/sites/default/files/2021-12/A_HRC_48_CRP4_En.pdf.

8 In 2019, Yemen’s Government and the STC signed a power-sharing deal (Riyadh Agreement), but tensions remain high. UNPoE 2021 Report, *supra* note 6, paras 39–42; Peter Salisbury, ‘Yemen’s Southern Transitional Council: A Delicate Balancing Act’ (Crisis Group 2021), <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/yemens-southern-transitional-council-delicate-balancing-act>.

9 Andrea Carboni and Matthias Sulz, ‘The Wartime Transformation of AQAP in Yemen’ (ACLEDD 2020), <https://acleddata.com/2020/12/14/the-wartime-transformation-of-aqap-in-yemen/>; Mwatana for Human Rights, *supra* note 7; RULAC, *supra* note 5.

10 Peter Salisbury, ‘Behind the Yemen Truce and Presidential Council Announcements’ (Crisis Group 2022), <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/behind-yemen-truce-and-presidential-council-announcements>.

Arabia, which was in effect from April to October 2022.¹¹ Despite the truce agreement, Mwatana for Human Rights identified and documented various attacks and violations against civilians during the truce period, including but not limited to indiscriminate ground attacks, attacks on health facilities and personnel, the recruitment and use of children, detention-related abuses, and landmine incidents.¹² Since the truce took effect in April 2022, the coalition's air campaign, which had seen a violent increase in the months prior, has been in a temporary halt. Nevertheless, airstrikes can resume at any time. The civilian population continues to face severe hardships under the deteriorating economic and humanitarian situation resulting from the ongoing war. Building on the truce, the UN Special Envoy for Yemen has continued his efforts to mediate an end to the war. At the same time, talks are underway between regional and Yemeni parties, most notably bilaterally between the Ansar Allah (Houthi) armed group and Saudi Arabia.¹³ The eventual outcome and impact of these developments on the war in Yemen remain uncertain for now. What is clear, however, is that no durable peace can be achieved without comprehensive accountability and reparations for victims.

2.2. Documentation of violations, abuses, and international crimes committed in Yemen

Since the beginning of the war in September 2014, UN bodies, independent national and international CSOs, media outlets, and other actors have extensively reported on the commission of serious violations of international humanitarian law and violations and abuses of international human rights law by all parties to the armed conflict in Yemen. Many of these violations may amount to international crimes such as war crimes, potentially engaging the criminal responsibility of individuals affiliated with the parties to the conflict and those who support them. Because of the vast number of public reports, and leaving aside media articles, only a selection is presented here to outline the ongoing context of mass perpetration and victimization of civilians by all parties to the conflict in Yemen since 2014.

11 OSESGY, 'United Nations Initiative for a Two-Month Truce' (2022), <https://osesgy.unmissions.org/unit-ed-nations-initiative-two-month-truce-0>; International Crisis Group, 'How Huthi-Saudi Negotiations Will Make or Break Yemen' (December 29, 2022) p 4, <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/b089-how-huthi-saudi-negotiations-will-make-or-break-yemen>.

12 Mwatana for Human Rights, 'Violations and Abuses against Civilians during Yemen's Truce' (November 7, 2022), <https://mwatana.org/en/yemens-truce/>.

13 Samy Magdy, 'Yemen Rebels, Saudis in Back-Channel Talks to Maintain Truce' AP News (January 17, 2023), <https://apnews.com/article/politics-yemen-government-saudi-arabia-houthis-2b3a40079aaf6ce6bac9817d86d8c52a>; OSESGY, 'Briefing to the United Nations Security Council by the Special Envoy for Yemen Hans Grundberg' (April 17, 2023), <https://osesgy.unmissions.org/briefing-united-nations-security-council-special-envoy-yemen-hans-grundberg-11>.

On September 29, 2017, the UNGEE was established by the UN Human Rights Council as a response to the need to monitor and report on the human rights situation in Yemen.¹⁴ On October 7, 2021, member States of the Human Rights Council voted against renewing the mandate of the UNGEE, after aggressive lobbying by Saudi Arabia, backed by the UAE, despite the ongoing war.¹⁵ The conflict escalated in the ensuing months, with more than 650 civilian casualties reported in January 2022 alone, an average of 21 per day – the highest toll in years. On January 21, 2022, a coalition airstrike on a detention center killed and injured scores of detainees, while others trying to flee were reportedly shot at by Houthi forces, making this incident one of the worst in years.¹⁶ No international investigative mechanism that lays the groundwork for accountability is presently in place.

From 2018 to 2021, the UNGEE documented a pattern of international humanitarian law and human rights violations and abuses committed by all parties to the conflict since September 2014, amounting to possible international crimes, identified those responsible, and provided guidance on access to justice and accountability. The UNGEE's first report, published in 2018, concluded that their documentation "strongly suggests that violations and crimes under international law have been perpetrated and continue to be perpetrated in Yemen," including war crimes by Yemen's internationally recognized Government, coalition (including Saudi Arabia and the UAE), and the Ansar Allah (Houthi) armed group.¹⁷ The parties to the conflict have also fueled the severe humanitarian crisis in Yemen.¹⁸ Since 2015, the Saudi/UAE-led coalition has imposed varying naval and air restrictions, with a devastating impact on the civilian population. In this regard, the UNGEE concluded, in 2018, that such acts, with requisite intent, may

14 UNHRC Resolution 36/31 UN Doc A/HRC/RES/36/31 (October 3, 2017), <https://undocs.org/A/HRC/RES/36/31>.

15 Stephanie Kirchaessner, 'Saudis Used "Incentives and Threats" to Shut down UN Investigation in Yemen' The Guardian (December 1, 2021), <https://www.theguardian.com/world/2021/dec/01/saudi-arabia-yemen-un-human-rights-investigation-incentives-and-threats>; Human Rights Watch, 'Civil Society Groups Seek Urgent UN Action on Yemen: More Than 85 Groups Urge General Assembly to Establish New Investigative Mechanism' (December 2, 2021) ("Civil Society Groups Seek Urgent UN Action on Yemen"), <https://www.hrw.org/news/2021/12/02/civil-society-groups-seek-urgent-un-action-yemen>.

16 UN News, 'Sharp Escalation in Fighting Across Yemen Risks Spiralling Out of Control' (February 15, 2022), <https://news.un.org/en/story/2022/02/1112042>; Mwatana for Human Rights and Human Rights Watch, 'Yemen: Latest Round of Saudi-UAE-Led Attacks Targets Civilians' (April 18, 2022), <https://www.hrw.org/news/2022/04/18/yemen-latest-round-saudi-uae-led-attacks-targets-civilians>.

17 UNGEE, 'Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014' UN Doc A/HRC/39/43 (August 17, 2018) paras 100, 108 ("UNGEE 2018 Report"), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/252/79/PDF/G1825279.pdf?OpenElement>.

18 UNOCHA, 'Global Humanitarian Review 2022' (2022) pp 115–118, <https://www.unocha.org/2022GH0>.

amount to international crimes involving individual criminal responsibility at the highest levels of government of coalition member States and Yemen.¹⁹ The UNGEE's public reporting on violations by all warring parties continued until its disbandment in 2021. In the UNGEE's last report of 2021, the experts concluded that individuals in the coalition (particularly from Saudi Arabia and the UAE), Yemen's Government, the STC, and Ansar Allah have committed acts that may amount to war crimes. Such acts include, depending on the party, unlawful airstrikes, murder of civilians, torture and ill-treatment, rape and other forms of sexual violence, denial of fair trial, child recruitment, the use of anti-personnel mines, and impeding of humanitarian relief supplies.²⁰

The UN Office of the High Commissioner for Human Rights (UNOHCHR) has published, over the years of the conflict in Yemen, statements, briefings, and reports that find violations of international humanitarian law and human rights violations and abuses by all parties to the conflict in Yemen, potentially amounting to international crimes. For example, already early in the conflict, in April 2015, the UN High Commissioner for Human Rights called for investigations into civilian casualties caused by the different warring parties and warned of the risk of war crimes.²¹ On March 24, 2017, the UNOHCHR reported on thousands of civilian deaths and injuries inflicted by the different parties to the conflict and stated that, "The international community cannot allow those responsible for thousands of civilian deaths to continue to enjoy full impunity."²² Another recent example is a briefing of June 18, 2021, in which the UNOHCHR Spokesperson stated: "We are seriously concerned at the continuing impact of fighting on civilians and the targeting of civilian objects in Marib Governorate in Yemen," reporting on attacks against civilians by the Houthi armed group and calling on all conflict parties to respect their obligations under international humanitarian law.²³

The UNPoE of the UN Security Council Sanctions Committee submitted public reports, statements, and letters informing members of the UN Security Council and the inter-

19 UNGEE 2018 Report, *supra* note 17, paras 46–59.

20 UNGEE, 'Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014' UN Doc A/HRC/48/20 (September 13, 2021) para 87 ("UNGEE 2021 Report"), <https://digitallibrary.un.org/record/3953934?ln=en>. See also e.g. UNGEE 2018 Report, *supra* note 17, paras 73, 80; UNGEE 2020 Detailed Findings, *supra* note 1, para 420.

21 UNOHCHR, 'Yemen: Zeid Calls for Investigations into Civilian Casualties' (April 14, 2015), <https://www.ohchr.org/en/press-releases/2015/04/yemen-zeid-calls-investigations-civilian-casualties>.

22 UNOHCHR, 'Two Years of War, 13,000 Civilian Casualties in Yemen: Civilian Killings in Yemen' (March 24, 2017), <https://www.ohchr.org/en/press-releases/2017/03/two-years-war-13000-civilian-casualties-yemen?LangID=E&NewsID=21444>.

23 UNOHCHR, 'Press Briefing Notes on Yemen' (June 18, 2021), <https://www.ohchr.org/en/2021/06/press-briefing-notes-yemen?LangID=E&NewsID=27173>.

national community of the international humanitarian law violations and human rights violations and abuses committed by the different warring parties over the course of the ongoing conflict in Yemen. For example, in 2016, the UNPoE reported that “all parties to the conflict in Yemen have violated the principles of distinction, proportionality and precaution, including through their use of heavy explosive weapons in, on and around residential areas and civilian objectives, in contravention of international humanitarian law. The use of such attacks in a widespread or systematic manner has the potential to meet the legal criteria for a finding of a crime against humanity.”²⁴ In the following year 2017, the UNPoE found that airstrikes by the Saudi/UAE-led coalition and Houthi violations associated with deprivation of liberty that “are sufficiently widespread as to reflect a wider policy” may amount to war crimes.²⁵ Another example is the UNPoE’s 2021 report that concluded: “Egregious violations of international humanitarian law and human rights continue to be committed by the Houthis, the Government of Yemen, the Southern Transitional Council, the United Arab Emirates and Saudi Arabia. There has been no significant initiative to hold the perpetrators to account. The absence of the rule of law and the dysfunction of the judicial system give leeway to impunity.”²⁶

The UN Secretary-General’s annual reports on Children and Armed Conflict have documented the responsibility of all parties to the conflict in Yemen for committing six patterns of grave violations against children, reflecting data collected and verified by the UN Monitoring and Reporting Mechanism. Over more than eight years of conflict, children in Yemen have been repeatedly subjected to countless grave violations that may amount to international crimes. For example, the 2016 annual report documented a fivefold increase in the number of children recruited in 2015 compared with the previous year and a sixfold increase in the number of children killed and maimed; these alarming trends continued into 2016.²⁷ Other examples include the 2021 and 2022 an-

24 UNSC, ‘Final Report of the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140 (2014)’ UN Doc S/2018/192 (January 26, 2016) para 124, <https://undocs.org/S/2018/192>.

25 UNSC, ‘Final Report of the Panel of Experts on Yemen’ UN Doc S/2018/193 (January 31, 2017) paras 127, 138, 143, <https://www.undocs.org/S/2018/193>.

26 UNPoE 2021 Report, *supra* note 6, p 8.

27 UNGA/UNSC, ‘Children and Armed Conflict, Report of the Secretary-General’ UN Doc A/70/836-S/2016/360 (April 20, 2016) para 6, <https://undocs.org/Home/Mobile?FinalSymbol=A%2F70%2F836&Language=E&DeviceType=Desktop&LangRequested=False>.

nual reports in which Yemen was among the countries where the highest number of grave violations against children were verified by the UN.²⁸

Since the outbreak of the war in 2014, independent national and international CSOs have continued to extensively document and report on patterns of violations and abuses of international law potentially amounting to international crimes committed by all parties to the conflict in Yemen. CSOs have also made numerous submissions to UN human rights mechanisms, including to UN Universal Periodic Review processes and to UN treaty bodies assessing the human rights record of warring parties, among other interventions and advocacy efforts at the UN level.

Mwatana for Human Rights has documented thousands of incidents committed by the Saudi/UAE-led coalition, the Ansar Allah (Houthi) armed group, the internationally recognized Yemeni Government and its loyal forces, the UAE-supported STC, and the UAE-supported Joint Forces in the West Coast. Mwatana has also documented remnants of weapons used in attacks that violate international humanitarian law, including US-, British-, and Italian-made weapons. Through field investigative research in the various regions of Yemen, Mwatana's trained team has investigated incidents concerning land and air attacks on civilians and civilian objects, landmines, enforced disappearance, arbitrary detention and torture, attacks on schools and hospitals, child recruitment and use, sexual violence, starvation as a weapon of warfare, violence against migrants, women's rights, among other prominent violations. Among the 30 human rights reports issued by Mwatana between 2014 and 2023 are, for example, the 2020 report on attacks on Yemen's schools, the 2020 report on attacks on health care in Yemen, and the 2021 report by Mwatana for Human Rights and Global Rights Compliance that demonstrates how the Houthi armed group and the Saudi/UAE-led coalition have used starvation as a method of warfare, which constitutes a war crime.²⁹ Mwatana has filed submissions with UN human rights mechanisms, including reports to the UN Universal Periodic Reviews of Yemen (2019) and Saudi Arabia (2018) and shadow reports to UN treaty bodies, such as submissions to the UN Committee on Economic, Social and

28 UNGA/UNSC, 'Children and Armed Conflict, Report of the Secretary-General' UN Doc A/75/873-S/2021/437 (May 6, 2021) para 5, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/113/09/PDF/N2111309.pdf?OpenElement>; UNGA/UNSC, 'Children and Armed Conflict, Report of the Secretary-General' UN Doc A/76/871-S/2022/493 (June 23, 2022) para 7, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/344/71/PDF/N2234471.pdf?OpenElement>.

29 Mwatana for Human Rights, "I Ripped the IV Out and Started Running": Attacks on Health Care in Yemen' (2020), <https://mwatana.org/en/i-ripped-iv-out-of-my-arm/>; Mwatana for Human Rights, 'Undermining The Future: Attacks on Yemen's Schools, March 2015 – December 2019' (2020), <https://mwatana.org/en/undermining-future/>; Mwatana for Human Rights and Global Rights Compliance, 'Starvation Makers: The Use of Starvation by Warring Parties in Yemen' (2021), <https://mwatana.org/en/starvation-makers/>.

Cultural Rights (2020) and the UN Committee against Torture (2022).³⁰ Other written submissions and oral briefings to UN special rapporteurs and other special procedures mandates holders have also been made by Mwatana over the years of war.

Other reputable international CSOs have also documented and reported on conflict-related violations and international crimes committed in Yemen. Human Rights Watch has issued various reports and statements on violations and potential war crimes since the start of the armed conflict in Yemen. To list a few examples, Human Rights Watch reported in October 2016 that a Saudi/UAE-led coalition airstrike on a funeral ceremony in Yemen's capital Sana'a, which killed at least 100 people and wounded more than 500, is an apparent war crime; a 2021 statement documented Houthi attacks on civilians in Yemen; and a 2023 statement, jointly released with other human rights organizations, urged all parties to the conflict to put an end to arbitrary detention and enforced disappearance.³¹ Amnesty International, among other prominent CSOs, has also documented violations by parties to the conflict in Yemen since September 2014, and has issued various statements and reports related to the human rights situation in Yemen, for example on unlawful attacks, USA complicity in war crimes, arbitrary detention, torture, and unfair trials.³² In December 2021, more than 85 civil society groups urged UN action on Yemen in response to widespread and systematic abuses and war crimes committed by all parties to the conflict in Yemen, including the killing and injuring of tens of thousands of civilians.³³

30 Mwatana for Human Rights, 'Submission to the United Nations about Universal Periodic Review of Saudi Arabia' (March 29, 2018), <https://mwatana.org/en/submission-to-the-united-nations/>; Mwatana for Human Rights, Human Rights Clinic, Cairo Institute for Human Rights Studies, FIDH, and GCHR, 'Submission to the United Nations Universal Periodic Review of Yemen' (2019), https://scholarship.law.columbia.edu/human_rights_institute/17/; Mwatana for Human Rights, 'Submission to the UN Committee on Economic, Social, and Cultural Rights for Consideration before Adopting the List of Issues with Respect to Yemen on the 67th Pre-Sessional Working Group on 19 - 23 October 2020' (2020), <https://mwatana.org/en/submission-to-uncescri/>; Mwatana for Human Rights, 'Joint Submission on the United Arab Emirates to the 74th Session of the UN Committee Against Torture' (July 13, 2022), <https://mwatana.org/en/74st-session/>.

31 Human Rights Watch, 'Saudi-Led Funeral Attack Apparent War Crime: Credible International Investigation Urgently Needed' (October 13, 2016), <https://www.hrw.org/news/2016/10/13/yemen-saudi-led-funeral-attack-apparent-war-crime>; Human Rights Watch, 'Houthi Forces Attack, Displace Villagers: End Attacks on Civilians; Allow Aid Access' (November 24, 2021), <https://www.hrw.org/news/2021/11/24/yemen-houthi-forces-attack-displace-villagers>; Human Rights Watch, 'Release Arbitrarily Detained People: Joint Statement Urges Warring Parties to Reveal Fate of Forcibly Detained' (April 18, 2023), <https://www.hrw.org/news/2023/04/18/yemen-release-arbitrarily-detained-people>.

32 Amnesty International, 'The US Should Have No Part in War Crimes in Yemen' (August 31, 2018), <https://www.amnesty.org/en/latest/news/2018/08/the-us-should-have-no-part-in-war-crimes-in-yemen/>; Amnesty International, 'Air Strikes and Cluster Munitions Attacks: Amnesty International Documentation of Coalition Attacks in Yemen: 2015 - Present' (2019), <https://www.amnesty.org/en/documents/mde31/1094/2019/en/>; Amnesty International, 'Released and Exiled: Torture, Unfair Trials and Forcible Exile of Yemenis under Houthi Rule' (2021), <https://www.amnesty.org/en/documents/mde31/3907/2021/en/>.

33 Civil Society Groups Seek Urgent UN Action on Yemen, *supra* note 15.

An aerial photograph of a village, likely in a developing region, showing a large area of rubble and debris in the foreground. The debris consists of broken bricks, stones, and twisted metal. In the background, several simple, single-story buildings with flat roofs are visible. Some buildings appear to be in various stages of construction or repair. A few people are scattered throughout the scene, some sitting on the ground, others standing near the buildings. The overall atmosphere is one of devastation and hardship. A white text overlay is centered in the middle of the image.

**Justice as the
foundation
for peace**

Criminal justice for grave crimes has long been denied in Yemen. For more than eight years, an overwhelming level of impunity has been among the main factors contributing to the atrocities committed by all warring parties across the territory. Even before the start of the current conflict, after the 2011 uprising, an immunity deal granted former President Saleh and his cabinet a blanket amnesty for crimes committed during more than three decades of rule. Eventually, this trade-off, in which supposed-security was deemed more important than accountability, saw Saleh taking up arms alongside the Ansar Allah (Houthi) armed group, igniting a devastating conflict that continues to date. The UNPoE has identified the widespread violations of international humanitarian law and human rights with impunity by all parties as one of the critical challenges to peace, security, and stability.³⁴

Holding those who are responsible for international crimes in Yemen criminally accountable serves important purposes. Criminal accountability can make a real difference on the ground by promoting the protection of the civilian population, civilians, and civilian objects. Such efforts play a critical role in breaking the cycles of violence and impunity, in the interests of deterring atrocities against civilians and contributing to their non-recurrence. Crimes under international law, such as war crimes or crimes against humanity, have been recognized as “the most serious crimes of concern to the international community as a whole” that “must not go unpunished.”³⁵ Their effective prosecution expresses the international community’s condemnation of such crimes, by ensuring that those individuals responsible are brought to justice for what they have done, that there is no impunity, and that the harm caused to the victims is acknowledged. As such, criminal accountability vindicates victims’ right to justice.

Yemen is far from achieving these goals. The lack of criminal accountability and the weak rule of law at the domestic level, along with a straggling international criminal justice response, have continued to bolster the confidence of the parties to the conflict and their supporters in their de facto immunity. In the absence of any real prospect of being held accountable, perpetrators have little to no incentive to stop causing massive harm and suffering to civilians in Yemen. The same holds for foreign and corporate supporters, such as arms manufacturers, that continue to perpetuate the conflict by knowingly putting profits over people’s lives and dignity. This vast accountability gap has exacerbated the suffering of the civilian population.

34 UNPoE 2021 Report, supra note 6, p 8.

35 Rome Statute of the ICC, Preamble.

Concerted action toward criminal accountability is thus of urgent importance. To this end, the pursuit of a comprehensive form of criminal accountability ensures addressing perpetrators from all parties to the conflict and those supporting them, and all alleged crimes under international law relevant to the armed conflict in Yemen. This approach underscores that amnesties for international crimes should not be permitted, as recognized in international law and by the UN.³⁶ Lessons from previous experiences in Yemen, as noted above, clearly reinforce the need for accountability to ensure long-lasting and sustainable peace.

36 Amnesties for war crimes are not permitted under international humanitarian law. International human rights law also excludes amnesties for individuals responsible for international crimes and other gross human rights violations, such as crimes against humanity, torture, and enforced disappearance. Nor are amnesties permissible that interfere with victims' right to an effective remedy, particularly reparations. The UN has a "policy of opposing amnesties for war crimes, crimes against humanity, genocide or gross violations of human rights, including in the context of peace negotiations." Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law - Volume I, Rules* (Cambridge University Press 2005) rule 159, <https://ihl-databases.icrc.org/en/customary-ihl/v1>; UNOHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (2009) pp v, 11-22, <https://www.ohchr.org/en/publications/policy-and-methodological-publications/rule-law-tools-post-conflict-states-amnesties>; UNGEE 2021 Accountability Update, *supra* note 7, para 70.

A photograph of a desolate, rocky landscape. In the background, there is a partially destroyed stone building. The foreground is filled with rocks, debris, and a rusted metal box. The text "Obstacles to criminal accountability efforts" is overlaid in white.

**Obstacles
to criminal
accountability
efforts**

The fight against impunity in Yemen faces considerable obstacles. This section outlines some of these obstacles and presents a broader background against which the pursuit of criminal justice is set. The report's subsequent discussion of the specific avenues to criminal accountability addresses some of these issues in greater detail.

4.1. Availability of criminal accountability avenues

The prosecution of individuals responsible for international crimes is subject to the availability of national and international legal avenues. In the case of Yemen, there are currently few options for pursuing criminal justice. Additionally, the available options are limited by a range of constraints. Even if successful, justice efforts are likely to result in only partial outcomes that do not reflect the full spectrum of criminality or may fail to focus on those who bear greatest responsibility.

At present, the domestic judicial systems of the parties to the conflict – including Yemen, Saudi Arabia, and the UAE – are not viable options for pursuing justice for international crimes committed in Yemen. They are unable to guarantee credible investigations and trials pursuant to recognized standards of international human rights law. The limited steps taken so far at the domestic level have not been effective in curbing the impunity that still prevails. The current situation does not indicate the domestic political will to dispense effective justice and implement needed reforms (see Section 5).

Against this backdrop, avenues available at the international level and in third States – particularly the ICC and foreign domestic courts (see Sections 6.2 and 6.3) – have become considerably important. Each of these avenues has inherent advantages and drawbacks in terms of key considerations, including the current ability to prosecute those bearing the greatest responsibility for international crimes, impact of geopolitical dynamics, accessibility for victims, legitimacy, and contribution to post-conflict justice in Yemen.

The international community has the option to address the limited availability of accountability avenues by putting in place new mechanisms. The establishment of an independent international criminally-focused mechanism for Yemen constitutes a crucial step that can be immediately taken if States muster sufficient political courage (see Section 6.1.1). Such a mechanism is a highly valuable preparatory, interim measure short of an ICC referral or an ad hoc international criminal tribunal for Yemen (see regarding the latter Section 6.4). However, present circumstances are not conducive to a UN Security Council referral of the situation in Yemen to the ICC, nor to the creation of a dedicated tribunal for Yemen. CSOs can strengthen their accountability efforts by creating an independent investigation and reporting mechanism (see Section 6.1.2).

4.2. Political will

The adoption of measures to tackle the pervasive accountability gap depends largely on political will. Despite their claimed commitment to justice, all parties to the conflict have failed to credibly investigate and prosecute alleged international crimes committed by individuals in their ranks. After more than eight years of conflict, inadequate accountability measures have been taken, while impunity continues to reign. The UNGEE expressed, in its last report, a troubling concern at “evidence of a more deep-seated reluctance” among the internationally recognized Government of Yemen, coalition members, and the Ansah Allah (Houthi) armed group to undertake action on criminal accountability.³⁷

The warring parties have also taken considerable steps to keep others from scrutinizing their actions by hindering investigations into international crimes, including at the UN level. The Guardian revealed that Saudi Arabia used aggressive tactics against delegates at the UN Human Rights Council, as part of a lobbying campaign to dismantle the UNGEE – the only international investigative mechanism for Yemen that contributed to laying the groundwork for accountability since 2017. The UNGEE had strongly recommended that the international community focus on criminal accountability. The alleged tactics deployed by Saudi Arabia included financial incentives and threats against member States of the UN Human Rights Council, for example to deny a State’s nationals access to a holy site if the relevant member State did not reject the measure to continue the mandate of the UNGEE. The warring party lobbying effort was successful. The Human Rights Council voted against extending the UNGEE’s mandate in October 2021, making it the first time the Council rejected a draft resolution since its establishment in 2006.³⁸

Since then, the international community has failed to create other mechanisms – such as a UN criminally-focused investigative body – to fill the resulting gap. For its part, the UN Security Council has shown no willingness to refer the situation in Yemen to the ICC, despite the gravity of the situation. States and corporations continue to provide arms and other military support to conflict parties involved in patterns of abuse, regardless of repeated documentation and condemnation, at the domestic and international levels, of their role in perpetuating the conflict and their possible complicity. The failure of political will has placed an even heavier burden on local and interna-

37 Ibid. para 29.

38 Kirchgaessner, *supra* note 15.

tional CSOs to advance the accountability agenda through documentation, reporting, and litigation.

4.3. Unreliability

The parties to the conflict have over the years established their own investigative bodies as an apparent attempt to ward off international criticism and scrutiny rather than to address impunity. The internationally recognized Government of Yemen revived the NCIAVHR, in 2015, as pressure was mounting at the UN Human Rights Council to establish an international investigation. The Saudi/UAE-led coalition created its own investigative body JIAT, in 2016, in response to international criticism concerning its military operations. The Ansar Allah (Houthi) armed group, in 2021, declared its intention to create an independent national investigation committee, after the UNGEE had publicly reported on their violations for several years. However, Houthi investigations into violations by its own members are exceptional and do not meet international standards. Houthi-related bodies claimed to investigate civilian harm have not been independent, impartial, credible, effective, nor transparent (see Section 5.1).³⁹

The UN and reputable human rights organizations have also raised significant concerns about the NCIAVHR and JIAT, because these warring parties-bodies fail to meet international standards including but not limited to issues of independence, transparency, and effectiveness (see Section 5). For example, in 2022, the UNOHCHR drew attention to the NCIAVHR's critical need for structural and functional independence, impartiality, and transparency.⁴⁰ The UNGEE concluded that the NCIAVHR, which is embedded in Yemen's governmental structure, and the coalition's JIAT do not meet the standards set by international law to ensure accountability.⁴¹

These bodies have provided the parties to the conflict with a ready-made excuse that action is being taken when confronted with alleged violations so as to evade any meaningful accountability. Experience has shown that government-established commissions

39 UNGEE 2021 Accountability Update, *supra* note 7, paras 25-28; Mwatana for Human Rights and Lowenstein International Human Rights Clinic Yale Law School, "'Returned to Zero': The Case for Reparations to Civilians in Yemen" (2022) pp 119-124, <https://mwatana.org/en/zero/>.

40 UNOHCHR, 'Implementation of Technical Assistance Provided to the National Commission of Inquiry to Investigate Allegations of Violations and Abuses Committed by All Parties to the Conflict in Yemen' UN Doc A/HRC/51/62 (September 19, 2022) paras 12-13, 37 ("UNOHCHR 2022 Report"), <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session51/list-reports>.

41 UNGEE, 'Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014' UN Doc A/HRC/42/CRP.1 (September 3, 2019) paras 885, 888 ("UNGEE 2019 Detailed Findings"), <https://www.securitycouncilreport.org/un-documents/document/a-hrc-42-crp-1.php>; UNGEE 2020 Detailed Findings, *supra* note 1, paras 366 (fn 545), 380.

in times of armed conflict are near-impossible to be independent in practice and in perception. Therefore, an international investigative mechanism is required.⁴² However, since the UN Human Rights Council failed to renew the mandate of the UNGEE in October 2021, the international community has taken no decisive action to address the huge accountability gap. Yet, shortly after the UNGEE's termination, a significant group of States released a joint statement calling on the international community to address the "urgent need for independent and impartial monitoring and investigations" and "use all opportunities within the UN-system to assess facts on the ground in an impartial manner, and work towards accountability."⁴³ Contrary to this call, States have shifted their attention to supporting the bodies of warring parties, such as the NCIAVHR and JIAT, which is highly problematic given their failure to comply with international standards.⁴⁴ To date, the international community has not fulfilled its responsibility towards the innocent civilian population in Yemen, including by failing to establish an international criminally-focused mechanism for Yemen as urged by numerous CSOs.⁴⁵ The failures of the warring parties-affiliated bodies combined with the lack of effective domestic steps toward accountability clearly demonstrate that currently only an international, independent mechanism can ensure accountability.

4.4. Multitude of perpetrators

The conflict in Yemen involves a large number of individuals who may hold responsibility for international crimes. The local, regional, and international dimensions of the conflict implicate a variety of actors: State and non-State armed actors, including State armed forces, State-backed and -recruited forces, and non-State armed groups; Yemeni and non-Yemeni actors including certain neighboring States, European countries, the USA, and Iran; as well as public and private actors, involving military, governmental,

42 UNHRC, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston' UN Doc A/HRC/8/3 (May 2, 2008) paras 14, 20, 35, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/132/53/PDF/G0813253.pdf?OpenElement>; Sarah Knuckey, 'The UN Human Rights Council Supports Yemen's "National Inquiry," but Is It a Whitewash in the Making?' (October 2, 2015), <https://www.justsecurity.org/26517/human-rights-council-supports-yemens-national-inquiry-whitewash-making/>.

43 Government of the Netherlands, 'Joint Statement on Yemen' (October 29, 2021), <https://www.government.nl/documents/diplomatic-statements/2021/10/29/joint-statement-on-yemen>.

44 UNHRC Resolution 51/39 UN Doc A/HRC/RES/51/39 (October 11, 2022) paras 5–6, 18, <https://undocs.org/A/HRC/RES/51/39>.

45 Civil Society Groups Seek Urgent UN Action on Yemen, *supra* note 15.

and corporate actors.⁴⁶ Some of these actors are connected through shifting military and political alliances, while others support warring parties through arms transfers and other military assistance.

Individuals affiliated with such actors, such as members of State armed forces, non-State armed groups, political leaders, and mercenaries can incur criminal responsibility for committing, or attempting to commit – directly, indirectly, or as co-perpetrator – a crime under international law. An individual may also be prosecuted for ordering, soliciting, inducing, aiding and abetting the commission of an international crime, or for otherwise contributing to the commission, or attempted commission, of such a crime by a group of persons acting with a common purpose.⁴⁷

Commanders of State armed forces and non-State armed groups, and other superiors, are criminally responsible for international crimes committed pursuant to their orders.⁴⁸ Military commanders, civilian leaders, and other superiors may also be held criminally responsible based on command/superior responsibility when they knew or had reason to know that subordinates were about to commit or were committing international crimes and took insufficient measures to prevent them or punish the responsible persons.⁴⁹ The latter failure to punish subordinates can result from a failure to investigate and/or report possible crimes to the appropriate authorities.⁵⁰

Government officials and corporate executives risk being complicit in international crimes through arms transfers to parties to the conflict accused of committing these suspected crimes in Yemen. Criminal liability of individuals may in some domestic jurisdictions also extend to legal persons, such as arms companies. However, the ICC lacks jurisdiction over companies, and can therefore only prosecute natural persons, such as corporate executives, implicated in international crimes.⁵¹

46 Marta Abrantes Mendes, 'A Passage to Justice: Selected Yemeni Civil Society Views for Transitional Justice and Long-Term Accountability in Yemen' (Open Societies Foundations 2021) p 13, <https://www.opensocietyfoundations.org/publications/a-passage-to-justice>.

47 As modes of liability can differ between criminal jurisdictions, reference is made to the Rome Statute of the ICC, art. 25. See regarding war crimes also Henckaerts and Doswald-Beck, *supra* note 36, rules 151 and 152.

48 Rome Statute of the ICC, art. 25(3)(b); Henckaerts and Doswald-Beck, *supra* note 36, rule 152.

49 Rome Statute of the ICC, art. 28; Henckaerts and Doswald-Beck, *supra* note 36, rule 153.

50 *Ibid.* commentary to rule 153 at p 562.

51 Where provided for in national law, corporations may, in addition or alternatively, be sued for damages for their role, such as complicity, in international crimes.

International justice efforts tend to focus on those bearing the greatest responsibility, seeking to target those who planned, ordered, or masterminded these crimes at the highest military and political levels. Immunities enjoyed by foreign State officials can stand in the way of victims' pursuit of justice before domestic courts. However, such immunities may be inapplicable before certain international courts.⁵²

No single avenue is at present capable of addressing the entire range of actors involved in the Yemen conflict, nor the various legal, political, and other questions that arise. For instance, foreign domestic courts and the ICC have provided entry points to bring complaints against government and corporate actors potentially complicit through arms trade, but their respective ability to prosecute those bearing greatest responsibility in warring parties' ranks remains limited or absent due to jurisdictional, political, and practical challenges.

4.5. Ongoing armed conflict

The ongoing armed conflict poses considerable challenges to the investigation and prosecution of international crimes. Since September 2014, the scale of serious violations and victims has continued to increase with each additional year of fighting. Moreover, the military situation creates a challenging security context and is likely to complicate the access of international investigators or prosecutors to the country. In-country movement is also subject to serious safety and security risks. Witnesses, victims, and others may be fearful of sharing their experiences when living under the control of hostile actors or facing the absence of robust protection mechanisms. Others may have been forced to flee, once or repeatedly, during years of sustained fighting, which may complicate investigations into specific cases. Despite Yemen's many internally displaced persons, much fewer have sought refuge outside its borders. This may challenge international authorities' access to victims and witnesses, while suspects may be less likely to trigger third States' jurisdiction. In a situation of prolonged war, prosecutors will inevitably face challenges in gathering witness testimonies, documentation, and other physical evidence.

Investigative access also relies on cooperation from the different actors involved in the conflict. The national territory has fractured along the lines of the control exercised by powerful armed actors.⁵³ The Ansar Allah (Houthi) armed group controls the capital

52 Alexandre Skander Galand, 'Victims' Right to Justice, Immunities and New Avenues for International Criminal Justice' (2022) 25 *International Community Law Review* 184.

53 For a map of territorial control in Yemen, see ACLED, 'The State of Yemen,' <https://acleddata.com/2022/07/20/the-state-of-yemen-q1-2022-q2-2022/>.

Sana'a and much of the northern parts of the country, where most of the civilian population resides. The UNGEE was for several years not granted access to Yemen and other coalition countries, despite repeated requests.⁵⁴ Yet, the UNGEE has been able to engage on its public findings with the various conflict parties, such as the Houthi armed group, the coalition, the UAE, and the STC.⁵⁵ Differently, the government-affiliated NCI-VHR has been persistently denied responses to its correspondence by the Houthi armed group, as well as formal access to the areas controlled by the group.⁵⁶

Investigative and prosecutorial authorities are likely to face challenges in gaining direct access to evidence and obtaining the cooperation of those who possess such material, particularly the parties to the conflict. Nonetheless, they may still engage with local and international CSOs that are involved in documentation work and maintain close relationships with victims and affected communities. Such cooperation can support their work by facilitating access to crucial materials and witnesses that would otherwise remain inaccessible.

54 UNGEE 2021 Report, *supra* note 20, para 9.

55 UNGEE 2020 Detailed Findings, *supra* note 1, para 22.

56 NCI-VHR, 'Tenth Periodic Report of the National Commission to Investigate Alleged Violations of Human Rights 1/7/2021- 31/7/2022' (2022) p 58, <https://www.nciye.org/en/?p=1209>; UNOHCHR 2022 Report, *supra* note 40, para 15.

A close-up photograph of a wooden gavel resting on a wooden block. The gavel has a dark wood head with several rounded segments and a brass band around the middle. The handle is also made of dark wood. The background is a textured, mottled brown surface. The entire image is framed by a white border.

**Investigations
and prosecutions
at the domestic
level**

All States party to the armed conflict in Yemen have the duty to investigate alleged violations of international humanitarian law and human rights violations and abuses that amount to international crimes committed by their nationals or armed forces, or on territory over which they have jurisdiction. Where there is sufficient evidence, they have a duty to prosecute and punish those responsible.⁵⁷ States also have the duty to provide remedies to victims, which includes equal and effective access to justice and reparations.⁵⁸ Domestic courts have traditionally constituted the primary avenue for criminal justice. However, States' failure to bring perpetrators to justice may in and of itself give rise to a violation, contribute to the recurrence of atrocities, and prompt the international community to take action to address the gravest crimes of concern to all.

This section assesses the capacity of the domestic judicial systems of Yemen and those of coalition leaders Saudi Arabia and the UAE, including warring parties-affiliated bodies, to investigate and prosecute international crimes pursuant to international law standards.⁵⁹ Investigations into suspected violations must be independent, impartial, prompt, thorough, effective, credible, and transparent.⁶⁰ Where sufficient evidence of

57 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13 (May 26, 2004) para 18 ("General Comment No 31"), <https://digitallibrary.un.org/record/533996?ln=en>; Henckaerts and Doswald-Beck, supra note 36, rule 158; UN Commission on Human Rights, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher' UN Doc E/CN.4/2005/102/Add.1 (February 8, 2005) principle 19 ("UN Principles to Combat Impunity"), <https://undocs.org/C/CN4/2005/102/ADD1>; UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' adopted by UNGA Resolution 60/147 on December 16, 2005 UN Doc A/RES/60/147 (March 21, 2006) principle 4 ("UN Basic Principles and Guidelines"), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.

58 Ibid. principles 3 and 11. On the international legal obligation of the warring parties to provide reparations to civilian victims in Yemen, see Mwatana for Human Rights and Lowenstein International Human Rights Clinic Yale Law School, supra note 39.

59 The inclusion of certain States, such as Iran, the USA, and the UK, elsewhere in the report does not detract from their role in the Yemen conflict through their support for one of the warring parties. Iran's domestic legal system does not constitute an available avenue for victims to access justice, as concluded in Section 6.3.

60 General Comment No 31, supra note 57, para 15; UN Principles to Combat Impunity, supra note 57, principle 19; UN Basic Principles and Guidelines, supra note 57, principle 3(b); Mark Lattimer, 'The Duty in International Law to Investigate Civilian Deaths in Armed Conflict' in Mark Lattimer and Philippe Sands, *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Hart/Bloomsbury 2018), pp 41-72; UN Human Rights Committee, 'General Comment No 36: Article 6: Right to Life' UN Doc CCPR/C/GC/36 (September 3, 2019) para 28, <https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life>.

a crime exists, cases must be examined by a competent, independent, and impartial court that complies with standards for due process and fair trial guarantees.⁶¹

5.1. Yemen

5.1.1. Domestic legislation and legal structures

Yemen signed the Rome Statute of the ICC in 2000 but has yet to ratify it. The Yemeni Criminal Code does not include provisions dealing with international crimes, such as war crimes and crimes against humanity, nor does the Code appear to cover all relevant modes of liability, particularly superior or command responsibility.⁶² War criminals could be tried for certain ordinary crimes, like murder. However, the prosecution of offenses as international crimes is important because it recognizes their gravity, serves appropriate sentencing, and avoids legal obstacles, such as statutes of limitation.⁶³ Moreover, some domestic crimes in Yemen carry the death penalty, which has been imposed in unfair and politicized trials contrary to international law.⁶⁴

Not only does the Yemeni Criminal Code need major reform, but Yemen's justice system is unlikely to fairly prosecute individuals. Fair trial rights are systematically violated across Yemen. Examples include limitation or denial of access to a lawyer, the extortion of forced confessions through torture, and the lack of access of defendants and their counsel to case files.⁶⁵ Conflict parties have sought to instrumentalize the ju-

61 Universal Declaration of Human Rights, arts. 10-11; Geneva Conventions, Common art. 3(1)(d); International Covenant on Civil and Political Rights, art. 14; Additional Protocol II to the Geneva Conventions, art. 6(2); Arab Charter on Human Rights, arts. 12-13; Henckaerts and Doswald-Beck, *supra* note 36, rule 100.

62 Republican Decree for Law No 12 for 1994 Concerning Crimes and Penalties ("Yemeni Criminal Code").

63 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; Henckaerts and Doswald-Beck, *supra* note 36, rule 160; UNGEE 2020 Detailed Findings, *supra* note 1, para 389 fn 583; Elena Maculan, 'International Crimes or Ordinary Crimes? The "Dual Classification of the Facts" as an Interpretive Method' (2021) 21 *International Criminal Law Review* 403, p 410, https://brill.com/view/journals/icla/21/3/article-p403_403.

64 See e.g. Yemeni Criminal Code, *supra* note 62, art. 234. UNGEE 2020 Detailed Findings, *supra* note 1, paras 356, 389; Mwatana for Human Rights, 'Courts for Abuse: A Case Study of Yemen's Specialized Criminal Courts 2015-2020' (2021) p 120, <https://mwatana.org/en/unfair-trials/>.

65 UNGEE 2020 Detailed Findings, *supra* note 1, paras 348-356; Mwatana for Human Rights, *supra* note 64, pp 104-107, 130-131.

diciary as a tool to serve political interests or to suppress and intimidate any opposition or dissent, which has further affected trust in its ability to administer impartial justice.⁶⁶

The only domestic legislation in Yemen encompassing war crimes is the Military Crimes and Penalties Code of 1998.⁶⁷ Other international crimes, such as crimes against humanity, are, however, not included in the Military Crimes and Penalties Code. The UN-GEE and other independent experts have expressed concerns about the adjudication of international crimes cases by military courts in lieu of civilian courts.⁶⁸ According to the UN-GEE, Yemen's military justice system may be even less compliant with human rights than the ordinary civilian courts, which suffer from deep-seated weaknesses.⁶⁹

In addition to inadequate protection of fair trial rights, Yemen's judiciary is beset by other serious problems, including in its ability to render justice independently and impartially. These deficiencies existed before the war but have been exacerbated during the course of the protracted hostilities.⁷⁰ More than eight years of armed violence, ensuing instability, and devastation continue to severely strain the rule of law, the fair and impartial administration of justice, and the credibility of the judiciary among Yemeni citizens. The conflict has caused severe damage to the judicial infrastructure. The judicial system has been confronted with a growing caseload and, at the same time, weak or absent judicial and law enforcement authorities, little experience in prosecuting international crimes, and insufficient budgets.⁷¹ An environment of intimidation exists,

66 Amnesty International, 'Yemen: Huthi-Run Court Sentences 30 Political Opposition Figures to Death Following Sham Trial' (July 9, 2019), <https://www.amnesty.org/en/latest/press-release/2019/07/yemen-huthi-run-court-sentences-30-political-opposition-figures-to-death-following-sham-trial/>; UN-GEE, 'Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014' UN Doc A/HRC/45/6 (September 28, 2020) paras 86, 90 ("UNGEE 2020 Report"), <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/GEE-Yemen/2020-09-09-report.pdf>; Mohammed Alshuwaiter, 'The Impact of the War on Yemen's Justice System' (International Legal Assistance Consortium 2021) pp 9-10, <https://www.publicinternationalallawandpolicygroup.org/report-the-impact-of-the-war-on-yemens-justice-system>; UNPoE 2022 Report, *supra* note 6, p 3.

67 Republican Decree for Law No 21 for 1998 Concerning Military Crimes and Penalties, Chapter Three.

68 UN Commission on Human Rights, 'Draft Principles Governing the Administration of Justice through Military Tribunals' UN Doc E/CN.4/2006/58 (January 13, 2006), commentary to principle no 9, <https://digitallibrary.un.org/record/571377?ln=en>.

69 UN-GEE 2020 Report, *supra* note 66, para 98; UN-GEE 2020 Detailed Findings, *supra* note 1, para 390.

70 *Ibid.* paras 337, 383-384; Abrantes Mendes, *supra* note 46, pp 11, 25, 27.

71 Mohammed Alshuwaiter and Emelie Kozak, 'The Judiciary in Yemen: The Status Quo, Current Challenges and Post-Conflict Considerations' (Deep Root 2019) pp 16-20, <https://www.deeproot.consulting/single-post/2019/11/25/the-judiciary-in-yemen-the-status-quo-current-challenges-and-post-conflict-considerations>; UN-GEE 2020 Detailed Findings, *supra* note 1, para 389; Alshuwaiter, *supra* note 66, pp 1-2; Mwatana for Human Rights, *supra* note 64, p 131; UNPoE 2022 Report, *supra* note 6, para 96.

raising serious concerns about the protection of victims, witnesses, and members of the judiciary facing likely reprisals in politically sensitive cases.⁷²

Another grave concern is the fact that Yemen's judicial system has fragmented according to the territorial control exercised by different conflict actors. In practice, parallel legal systems have emerged that do not recognize the legitimacy of one another. Alongside the formal judiciary under the control of Yemen's internationally recognized Government, the Ansar Allah (Houthi) armed group operates its own judicial system in the areas it controls, including a specialized criminal court in Yemen's capital Sana'a.⁷³ The Houthi armed group has subjected scores of persons to arbitrary detention, enforced disappearance, torture and other ill-treatment, and to unfair trials in which defendants have been sentenced to death. The group has used the courts as a political tool against critics and opponents.⁷⁴

5.1.2. National Commission to Investigate Alleged Violations of Human Rights (NCIAVHR)

The NCIAVHR was created by presidential decree in 2012, following Yemen's popular uprising.⁷⁵ Then-President Hadi only appointed the commissioners in 2015, amid growing pressure at the UN Human Rights Council for an international inquiry into alleged abuses committed since the conflict began. Since then, the NCIAVHR's mandate has expanded to include monitoring and investigating all alleged violations of human rights and international humanitarian law that have occurred in Yemen's territory since 2011, identifying perpetrators, and referring cases to the Attorney General's Office for further investigation and possible prosecution.⁷⁶

72 UNGEE 2020 Detailed Findings, *supra* note 1, paras 357-362, 382, 388; UNGEE 2021 Accountability Update, *supra* note 7, para 7.

73 Alshuwaiter and Kozak, *supra* note 71, pp 3, 13.

74 UNGEE 2020 Detailed Findings, *supra* note 1, paras 340-341; Mwatana for Human Rights, 'Ansar Allah (Houthi) Armed Group Carries Out a Brutal Execution after Unfair Trials by the Specialized Criminal Court' (September 23, 2021), <https://mwatana.org/en/unfair-trials/>; Amnesty International, 'Yemen: Houthi Authorities Must Release Four Journalists Sentenced to Death' (May 20, 2022), <https://www.amnesty.org/en/latest/news/2022/05/yemen-houthi-authorities-must-release-four-journalists-sentenced-to-death/>.

75 Presidential Decree No 140 of 2012.

76 UNOHCHR, 'Implementation of Technical Assistance Provided to the National Commission of Inquiry to Investigate Allegations of Violations and Abuses Committed by All Parties to the Conflict in Yemen' UN Doc A/HRC/48/48 (August 24, 2021) para 23 ("UNOHCHR 2021 Report"), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/231/91/PDF/G2123191.pdf?OpenElement>; UNOHCHR 2022 Report, *supra* note 40, paras 4-5.

The NCIHVHR is not structurally independent, which raises serious concerns about the credibility of its activities and contradicts the essential requirements of the Paris Principles.⁷⁷ This is reflected in the NCIHVHR's establishment by presidential decree and not in a constitutional or legislative text, the exclusive authority of the President of Yemen – as of April 7, 2022, the Presidential Leadership Council – to appoint and dismiss commissioners, and the lack of transparency in the process for their selection. The NCIHVHR is understood to report directly to the coalition-backed Presidential Council, which includes military commanders of different armed forces.⁷⁸ Other critical issues include transparency gaps in terms of budget and funding, as well as the selection criteria used to determine which cases it publicly reports on and submits to the Attorney General.⁷⁹ Although the NCIHVHR has published several reports that refer to alleged violations committed by the different parties to the conflict, these reports have not provided sufficient information to adequately assess their findings and the underlying international legal analysis.⁸⁰ The credibility of its investigations and findings are thus severely compromised. Besides this legitimacy deficit, the NCIHVHR has faced considerable challenges because of the continuation of the conflict, security and political constraints, and warring parties' limited or lack of cooperation, including from both the coalition and the Houthis.⁸¹

The NCIHVHR does not prosecute or try suspected perpetrators of serious crimes. Instead, the NCIHVHR only gathers information and conducts investigations, which it shares with the government-controlled Yemeni courts. However, the chronic shortcomings of Yemen's justice system render the NCIHVHR unable to contribute to effective accountability.⁸² As the NCIHVHR itself has recognized, there is a need "to rebuild the rule of law in Yemen."⁸³ Although the UNGEE was informed in mid-2020 that 19 cases had progressed to the trial stage at the specialized criminal courts, the status of these

77 Principles relating to the Status of National Institutions (The Paris Principles), <https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris>.

78 UNOHCHR 2021 Report, *supra* note 76, para 7; UNOHCHR 2022 Report, *supra* note 40, para 6.

79 UNGEE 2019 Detailed Findings, *supra* note 41, paras 880, 884; UNOHCHR 2021 Report, *supra* note 76, paras 13-14; UNOHCHR 2022 Report, *supra* note 40, paras 12-13. The UNOHCHR 2022 Report states that Saudi Arabia provides financial support to the NCIHVHR.

80 See e.g. UNGEE 2019 Detailed Findings, *supra* note 41, para 882; NCIHVHR, *supra* note 56, pp 19–20, 23–24; UNOHCHR 2022 Report, *supra* note 40, paras 18, 37.

81 UNGEE 2020 Report, *supra* note 66, para 95; UNOHCHR 2021 Report, *supra* note 76, paras 15-16; NCIHVHR, *supra* note 56, pp 58–60; UNOHCHR 2022 Report, *supra* note 40, paras 15-16.

82 UNGEE 2019 Detailed Findings, *supra* note 41, para 884.

83 UNOHCHR 2022 Report, *supra* note 40, para 22.

cases, including the charges and rank or office held by the accused, remains unclear.⁸⁴ No verdicts appear to have been rendered to date.

The NCIAVHR appears to have recognized these current realities when it submitted a proposal to the Supreme Judicial Council, in 2017, for the creation of a dedicated domestic court and prosecutor's office with exclusive jurisdiction over cases received from the NCIAVHR. One of the arguments presented for this initiative was that there might be "grounds for international parties to intervene in Yemen" in the absence of a credible, competent, and law-abiding specialized court.⁸⁵ In September 2020, the internationally recognized Government of Yemen announced, at the UN Human Rights Council, its intention to create a specialized court. However, no formal action appears to have been taken to that end.⁸⁶ Also, as noted by the UNGEE, it is highly unlikely that this initiative alone can overcome the deep-seated weaknesses that the justice system is facing.⁸⁷ Another significant concern is whether a domestic court in Yemen can by itself be effective in holding foreign perpetrators accountable. The war in Yemen involves not only local actors, but also powerful regional and international actors likely involved in crimes under international law. The sovereign immunity of certain foreign State officials can be a legal barrier to holding those most responsible accountable. Even if it would be legally possible for Yemen to prosecute such foreign actors, it appears – at least for now – politically impossible.

5.1.3. Ansar Allah (Houthi) armed group inadequate investigations into civilian harm

In areas under its control, the Ansar Allah (Houthi) armed group has set up ad hoc mechanisms that it claims investigate and respond to civilian harm caused by their forces in Yemen, particularly the Redress Committee and the Authority to Lift Injustice. However, a detailed study by Mwatana for Human Rights and the Lowenstein International Human Rights Clinic Yale Law School has demonstrated that these Houthi investigations into violations by its own members are far from meeting international standards. These bodies do not operate independently nor impartially. They significantly lack in credibility, while being thoroughly ineffective and non-transparent. They have mostly failed to investigate potential violations committed by the Houthis and have ignored

84 UNGEE 2021 Accountability Update, *supra* note 7, para 9.

85 UNOHCHR 2021 Report, *supra* note 76, para 24.

86 UNGEE 2021 Accountability Update, *supra* note 7, para 13; NCIAVHR, *supra* note 56, pp 15, 59; UNOHCHR 2022 Report, *supra* note 40, para 20.

87 UNGEE 2021 Report, *supra* note 20, para 75.

most of its victims. Instead, these Houthi-related bodies have exposed civilian petitioners to further risks to their safety. The Houthi group's responses to the harm they have caused to civilians have been utterly inadequate.⁸⁸

5.1.4. Conclusion

While Yemen's judicial system should have offered, in theory, a primary forum of accountability for international crimes, in practice, however, serious shortcomings render it incapable of delivering accountability in accordance with standards of international law. The challenges are enormous for a country still in the midst of war marked by an unimaginable scale of atrocities and suffering. There is no doubt that a comprehensive set of reforms – likely to take many years – is needed to rebuild Yemen's national legal system, bring it into line with international standards, and equip it with the laws and institutional capacity needed to effectively deal with the gravest crimes under international law.⁸⁹ Therefore, the international community should immediately activate international accountability avenues to begin addressing the acute impunity in Yemen and the grievances of victims who have been waiting for justice for nearly a decade.

5.2. Saudi Arabia and the UAE

5.2.1. Coalition's Joint Incidents Assessment Team (JIAT)

The members of the Saudi/UAE-led coalition are obliged to investigate, with a view to prosecuting, international crimes allegedly committed by their nationals or members of their armed forces, or in territory under their jurisdiction. JIAT was established, in 2016, by the coalition in the context of mounting evidence of coalition violations. JIAT, an investigative mechanism, was originally composed of 14 individuals from coalition member States and reports directly to the Minister of Defense of Saudi Arabia.⁹⁰ The mandate of this body involves investigating "claims and accidents" arising out of coalition operations in Yemen, gathering evidence, and preparing reports and recommendations.⁹¹

88 Mwatana for Human Rights and Lowenstein International Human Rights Clinic Yale Law School, *supra* note 39, pp 119-124.

89 UNGEE 2020 Detailed Findings, *supra* note 1, paras 382, 389; Mwatana for Human Rights, 'UN Human Rights Council: Prioritize Yemen Accountability and Redress' (September 29, 2020), <https://mwatana.org/en/prioritize-yemen-accountability-and-redress/>.

90 UNGEE 2019 Detailed Findings, *supra* note 41, paras 112, 889.

91 Saudi Press Agency, 'Joint Incidents Assessment Team (JIAT) on Yemen Responds to Claims on Coalition Forces' Violations in Decisive Storm Operations' (August 5, 2016), <https://www.spa.gov.sa/1524799>; Beckerle, *supra* note 4, pp 1–2.

Since its establishment, concerns have been raised by independent UN experts and CSOs about JIAT's lack of transparency, independence, impartiality, and thoroughness required to conduct credible investigations of violations and crimes under international law. Human Rights Watch concluded in 2018, that: "Over the past two years, JIAT has failed to meet international standards regarding transparency, impartiality, and independence. [...] JIAT has not only conducted its investigations without a transparent methodology but appears to have regularly failed to conduct a thorough laws-of-war analysis in its investigations and produced flawed and dubious conclusions."⁹² The UNGEE reached similar conclusions in subsequent years.⁹³

The role of JIAT in ensuring criminal accountability for international crimes has been marked by a lack of clarity.⁹⁴ JIAT has shown little effort in its statements to identify which state's armed forces are involved in specific unlawful actions and the commanders who may be criminally responsible, except for Yemeni forces and some low-level officials.⁹⁵ Moreover, JIAT has almost exclusively focused on airstrikes; the investigation of other alleged violations, such as detention-related abuse, have been unsatisfactory.⁹⁶

On July 10, 2018, Saudi King Salman bin Abdulaziz Al Saud issued a "royal order pardoning all military men, who have taken part in the Operation Restoring Hope of their respective military and disciplinary penalties, in regard of some rules and disciplines."⁹⁷ The scope of this ambiguously worded pardon remains unclear, particularly whether it

92 Ibid. p 2. See also e.g. Amnesty International, 'Amnesty International Response to the Saudi Arabia-Led Coalition's Investigations' (January 16, 2017), <https://www.amnesty.org/en/documents/mde31/5494/2017/en/>; Médecins Sans Frontières, 'No True Accountability Three Years After Bombing of MSF-Supported Hospital' (October 30, 2019), <https://www.msf.org/yemen-hospital-bombing-investigation-findings-too-little-too-late>.

93 UNGEE 2019 Detailed Findings, *supra* note 41, paras 888-893; UNGEE 2020 Detailed Findings, *supra* note 1, paras 372, 380.

94 In 2017, for example, Amnesty International questioned whether JIAT's mandate includes identifying potential perpetrators and how it will ensure the prosecution of those suspected of criminal responsibility for international crimes. The UNGEE, in 2019, expressed concerns about the lack of information on the methodology and process followed by JIAT to determine whether to open a formal investigation and possibly refer cases to the judicial systems of Yemen or coalition member States. Amnesty International, *supra* note 92, p 1; UNGEE 2019 Detailed Findings, *supra* note 41, paras 889, 892.

95 Beckerle, *supra* note 4, pp 41, 51; UNGEE 2021 Accountability Update, *supra* note 7, paras 15-16.

96 See e.g. UN Committee Against Torture, 'Concluding Observations on the Initial Report of the United Arab Emirates' UN Doc CAT/C/ARE/CO/1 (August 22, 2022) para 15, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FCO%2FARE%2FCO%2F1&Lang=en.

97 The coalition-led intervention entered its second ongoing phase named "Operation Restoring Hope," following the end of "Operation Decisive Storm" on April 21, 2015. Saudi Press Agency, 'Custodian of the Two Holy Mosques Pardons All Military Men, Taking Part in Restoring Hope Operation, of Military, Disciplinary Penalties' (July 10, 2018), <https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=1783696>.

covers international crimes, and raises serious concerns about the effectiveness and credibility of the coalition members' actions toward criminal accountability.

In February 2020, the coalition's Spokesman announced that the Joint Command of the coalition had referred the investigative files involving violation of the rules of engagement to the concerned coalition member States for prosecution.⁹⁸ The coalition later added that these States are "to enforce all accountability statutory procedures, according to the laws and regulations of each country member of the coalition."⁹⁹ JIAT and Saudi officials informed the UNPoE that eight airstrike cases were being adjudicated by Saudi Arabia's military court system. However, these proceedings are not transparent, for example in terms of the charges, the rank of the accused, and their outcomes, and most likely cover only a small fraction of alleged crimes and perpetrators. Information on any legal action undertaken by other members of the coalition, including the UAE, is lacking.¹⁰⁰

5.2.2. Domestic judicial systems of Saudi Arabia and the UAE

Besides JIAT, each coalition member remains responsible for investigating and fairly prosecuting those responsible for alleged international crimes. In its 2021 report, the UNGEE expressed concern that member States are not undertaking these actions with appropriate speed, diligence, and transparency and that prosecutions may not reflect the seriousness of potential international crimes.¹⁰¹ Additionally, as for Saudi Arabia and the UAE, the following assessment clearly demonstrates that pervasive failures and human rights violations in their respective criminal justice systems, including with regard to fair trial rights, render them unavailable to pursue accountability for conflict-related crimes committed in Yemen. Therefore, the international community is urged to immediately mobilize accountability avenues at the international level to ensure accountability and effective access to justice for victims of the war in Yemen.

98 Saudi Press Agency, 'Spokesman for Coalition Forces Confirms Adherence to Provisions and Rules of International Humanitarian Law and Accountability of Violators of Rules of Engagement' (February 13, 2020), <https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2034044#2034044>.

99 'Response of the Coalition Forces Supporting Legitimacy in Yemen To the Report of the Group International and Regional Experts on Yemen For the Year 2020 (Unofficial Translation)' (October 7, 2020) para 24, <https://www.ohchr.org/en/hr-bodies/hrc/yemen-gee/index>; UNGEE 2021 Accountability Update, *supra* note 7, para 14.

100 UNGEE 2020 Detailed Findings, *supra* note 1, paras 373, 375-376; UNPoE 2021 Report, *supra* note 6, paras 122, 125; UNGEE 2021 Accountability Update, *supra* note 7, paras 14, 18-20.

101 UNGEE 2021 Report, *supra* note 20, para 76.

Saudi Arabia is not a State party to the Rome Statute of the ICC, nor does Saudi Arabia's Code of Military Justice of 1947 appear to explicitly cover war crimes.¹⁰² The Arab Charter on Human Rights, ratified by Saudi Arabia, contains guarantees of due process and fair trial, and the Law of Criminal Procedure includes internationally recognized rights, such as the right to counsel.¹⁰³ In stark contrast, Saudi Arabia has engaged in widespread violations of such international standards. There are arbitrary arrests and detentions, courts have relied on confessions obtained through torture, and grossly unfair trials have been conducted, with cases of defendants subsequently sentenced to death.¹⁰⁴

The Saudi judiciary's is characterized by endemic concerns over independence and impartiality, especially in high-profile cases. The Specialized Criminal Court has been criticized as "an instrument of repression to silence dissent" with its trials amounting to a "mockery of justice."¹⁰⁵ In response to the Saudi courts' sentencing in the Jamal Khashoggi case, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions expressed shock that "those who ordered the executions not only walk free but have barely been touched by the investigation and the trial" and concluded that "[i]mpunity for the killing of a journalist commonly may reveal political repression, corruption, abuse of power, propaganda, and even international complicity."¹⁰⁶ The lack of judicial

102 UNSC, 'Final Report of the Panel of Experts on Yemen' UN Doc S/2019/83 (January 25, 2019) para 140 fn 121, <https://undocs.org/Home/Mobile?FinalSymbol=S%2F2019%2F83&Language=E&Device-Type=Desktop&LangRequested=False>; UNGEE 2021 Accountability Update, *supra* note 7, para 18.

103 Arab Charter on Human Rights, e.g. arts. 13, 15-16, 19; Saudi Law of Criminal Procedure, Royal Decree No M/2, e.g. arts. 2, 4.

104 UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights: Compilation on Saudi Arabia' UN Doc A/HRC/WG.6/31/SAU/2 (August 30, 2018) paras 19, 22, 27-28, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/264/08/PDF/G1826408.pdf?OpenElement>; ESOHR, Reprieve, and Mena Rights Group, 'Report Submitted to the United Nations Committee Against Torture in the Context of the Third Periodic Review of Saudi Arabia' (2021) pp 16-18, <https://menarights.org/ar/node/24206>; Amnesty International, 'The State of the World's Human Rights 2021/22' (2022) pp 317-318, <https://www.amnesty.org/en/documents/pol10/4870/2022/en/>; Human Rights Watch, 'Saudi Arabia: Mass Execution of 81 Men' (March 15, 2022), <https://www.hrw.org/news/2022/03/15/saudi-arabia-mass-execution-81-men>.

105 Human Rights Watch, 'Saudi Arabia: Spy Trial a Mockery of Justice' (May 17, 2016), <https://www.hrw.org/news/2016/05/17/saudi-arabia-spy-trial-mockery-justice>; Amnesty International, 'Muzzling Critical Voices: Politicized Trials Before Saudi Arabia's Specialized Criminal Court' (2019) p 7, <https://www.amnesty.org/en/documents/mde23/1633/2020/en/>. See also UNHRC, *supra* note 104, paras 24, 26.

106 A US intelligence report concluded that Mohammed bin Salman – then Crown Prince, Deputy Prime Minister, and Minister of Defense, and now Prime Minister, of Saudi Arabia – approved the murder of Khashoggi. UNOHCHR, 'Khashoggi Murder: Saudi Sentences Anything but Justice, Says Expert' (December 26, 2019), <https://www.ohchr.org/en/press-releases/2019/12/khashoggi-murder-saudi-sentences-anything-justice-says-expert>; Stephanie Kirchgaessner, 'US Finds Saudi Crown Prince Approved Khashoggi Murder but Does Not Sanction Him' *The Guardian* (February 26, 2021), <https://www.theguardian.com/world/2021/feb/26/jamal-khashoggi-mohammed-bin-salman-us-report>.

independence and the failure to guarantee minimum fair trial standards demonstrate that the Saudi judicial system is not a viable avenue for seeking justice for serious crimes committed during the war in Yemen.

The UAE has not acceded to the ICC Rome Statute. Federal Decree-Law No. 12 of 2017 establishes national jurisdiction over four categories of international crimes: genocide, war crimes, crimes against humanity, and the crime of aggression. Contrary to the international trend towards the abolition of the death penalty, including for international crimes, this penalty can still be imposed by UAE courts.¹⁰⁷

Although the UAE Constitution and the Code of Criminal Procedure guarantee fair trial, judicial independence, and the prohibition of torture, arbitrary arrest, and secret detention, these fundamental legal norms are gravely disregarded in practice.¹⁰⁸ The UAE judiciary has been described as the State security's "tool to silence and imprison dissidents, leading to a loss of reputation and independence," and "under the de facto control of the executive branch of government."¹⁰⁹ The emblematic UAE 94 case – which involved mass convictions of prominent human rights defenders, lawyers, and others – and the persecution of prominent human rights defender Ahmed Mansoor have revealed serious violations of fair trial standards.¹¹⁰ The UAE authorities have also faced serious allegations of enforced disappearance and secret detention.¹¹¹ The UN Committee against Torture, in 2022, expressed concern about reports of a pattern of torture and ill-treatment against human rights defenders as well as about reports of grave human rights violations by the UAE's regular armed forces, by UAE proxy forces, and

107 UAE Federal Decree-Law No 12 of 2017 on International Crimes, e.g. arts. 2, 5, 9-20; UN Commission on Human Rights, *supra* note 68, commentary to principle no 19.

108 UAE Constitution of 1971, arts. 26, 28, 94; UAE Federal Law No 35 of 1992, arts. 2, 4.

109 UNHRC, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers: Mission to the United Arab Emirates' UN Doc A/HRC/29/26/Add.2 (May 5, 2015) para 33, <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session29/list-reports>; Gulf Centre for Human Rights, 'United Arab Emirates: Free Members of UAE94 and All Prisoners of Conscience' (July 3, 2021), <https://www.gc4hr.org/news/view/2768>; UN Committee Against Torture, *supra* note 96, para 23.

110 International Commission of Jurists, 'Mass Convictions Following an Unfair Trial: The UAE 94 Case' (2013), <https://www.icj.org/united-arab-emirates-amidst-crackdown-on-political-reform-advocates-icj-documents-massive-rights-violations-in-the-uae-94-trial/>; Amnesty International, "There Is No Freedom Here": Silencing Dissent in the United Arab Emirates (UAE)' (2014), <https://www.amnesty.org/en/documents/mde25/0018/2014/en/>; UNOHCHR, 'UAE: UN Expert Condemns Long-Term Detention of Human Rights Defenders' (June 10, 2021), <https://www.ohchr.org/en/press-releases/2021/06/uae-un-expert-condemns-long-term-detention-human-rights-defenders>; Human Rights Watch, 'UAE: State Security Retaliates Against Ahmed Mansoor' (January 7, 2022), <https://www.hrw.org/news/2022/01/07/uae-state-security-retaliates-against-ahmed-mansoor>.

111 MENA Rights Group, 'MENA Rights Group Highlights Widespread Practice of Enforced Disappearance in the United Arab Emirates in General Allegation to the UN' (August 19, 2022), <https://menarights.org/en/articles/mena-rights-group-highlights-widespread-practice-enforced-disappearance-united-arab>.

in detention centers under its jurisdiction in Yemen.¹¹² The Committee noted the lack of information provided by the UAE regarding the number of investigations and prosecutions of such cases in the context of the armed conflict in Yemen.¹¹³ These examples indicate that the UAE judicial system is more likely to be used as a tool of repression than as a means of ensuring accountability for abuses.

112 UN Committee Against Torture, *supra* note 96, paras 13, 15.

113 *Ibid.* para 15.

A photograph of a group of people in a conference room. In the foreground, a woman wearing a beige hijab and a black dress is talking to a man in a grey suit. Behind them, another man in a dark suit is looking towards the woman. To the right, a man in a dark suit is holding a folder. The room has orange chairs and a patterned wall. The text "International avenues to criminal accountability" is overlaid in white on the image.

**International
avenues to criminal
accountability**

6.1. Independent investigative mechanisms

6.1.1. Independent international criminally-focused investigative mechanism

Recent years have seen a trend towards establishing international criminally-focused investigative mechanisms within the UN system with broad mandates to collect, preserve, and analyze evidence of serious violations of international humanitarian law, international human rights law, and crimes under international law. Examples include the International, Impartial and Independent Mechanism for the Syrian Arab Republic (IIIM-Syria) established by the UN General Assembly in 2016 and the Independent Investigative Mechanism for Myanmar (IIM-Myanmar) established by the UN Human Rights Council in 2018.¹¹⁴ These mechanisms are investigative bodies only and cannot arrest suspects or hold criminal trials like international courts or tribunals. Instead, they lay the groundwork for ongoing or future criminal accountability processes by collecting and preserving evidence and preparing case files on individuals or organizations allegedly responsible for violations and the most serious crimes under international law. The materials stored and archived by the mechanism may also represent an important resource for transitional justice processes.

These existing mechanisms provide clear precedent for the establishment of a similar independent international criminally-focused investigative mechanism for Yemen by the UN Human Rights Council and/or the UN General Assembly, which provide better prospects for action than the UN Security Council. The UNGEE has supported the establishment of an investigative mechanism for Yemen, with a mandate similar to the IIIM-Syria or IIM-Myanmar.¹¹⁵ More than 85 civil society groups have also called on the UN to urgently establish such a mechanism in light of the failure of the UN Human Rights Council to renew the mandate of the UNGEE in 2021.¹¹⁶ Since the mandate of the UNGEE came to a close, the establishment of a criminally-focused mechanism by the UN is even more critical to help bridge the accountability gap in Yemen. Investigative bodies established by the warring parties, such as JIAT and the NCI/VHR, do not meet the standards under international law required to ensure accountability. After almost a decade of war, measures at the domestic level remain wholly inadequate in providing criminal accountability and redress (see Section 5). Therefore, a truly independent, in-

114 UNGA Resolution 71/248 UN Doc A/RES/71/248 (January 11, 2017), <https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F71%2F248&Language=E&DeviceType=Desktop&LangRequested=False>; UNHRC Resolution 39/2 UN Doc A/HRC/RES/39/2 (October 3, 2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/293/69/PDF/G1829369.pdf?OpenElement>.

115 UNGEE 2021 Accountability Update, *supra* note 7, paras 52-54, 84(h). See also UNGEE 2020 Report, *supra* note 66, paras 99, 108(b); UNGEE 2021 Report, *supra* note 20, para 82.

116 Civil Society Groups Seek Urgent UN Action on Yemen, *supra* note 15.

ternational mechanism is urgently needed. Yet, the UN has so far failed to garner the necessary political courage to fill the vacuum left by the disbandment of the UNGEE and address the urgent need to lay the foundations for criminal accountability and justice. This section outlines proposals for the design of such a criminally-focused investigative mechanism for Yemen and its importance for the pursuit of justice.

6.1.1.1. Role and impact of a criminally-focused investigative mechanism

The primary role of the existing criminally-focused investigative mechanisms for Syria and Myanmar is to collect, consolidate, preserve, and analyze evidence of serious violations and crimes under international law and to prepare files on those allegedly responsible in order to support ongoing or future accountability processes before national, regional, or international courts or tribunals. Based on the functioning of the existing mechanisms for Syria and Myanmar, the mandate of an international criminally-focused investigative mechanism for Yemen would likely be very broad in scope. A broad mandate would ensure that such mechanism is effective, responsive to the needs of victims, and able to deter ongoing and future violations committed by all warring parties in the entire territory without being restricted by any personal, temporal, or other limitations. Such a broad mandate would allow a future mechanism for Yemen to conduct investigations, collect evidence, and build files relating to serious violations committed by all parties since the conflict began in 2014. A future mechanism for Yemen could in this way lay the groundwork for comprehensive criminal accountability and justice for victims. Unlike the UNPoE, such a mechanism would have the mandate and resources to conduct international criminal investigations and prepare files for prosecution.

A future criminally-focused mechanism for Yemen could build upon the UNGEE's important work in the field of independent public reporting, while further strengthening the fight against impunity. Such mechanism should both investigate serious violations and publicly report on the human rights situation in Yemen, as well as collect and preserve evidence and prepare criminal justice-focused case files to be shared with relevant prosecutorial authorities. A strong dual mandate is needed to ensure not only that the egregious violations being committed in Yemen are exposed to the world, but also that potential avenues to bring perpetrators of international crimes to justice can be effectively utilized now and in the future.

Embedded within the UN system, a criminally-focused investigative mechanism for Yemen would carry out its work in an independent and impartial manner that preserves its credibility, without seeking or accepting instructions regarding the performance of its duties from any government or other source. Nevertheless, all parties to the conflict

(as well as UN member States, the UN system as a whole, and other stakeholders) would be called upon to cooperate fully with such a mechanism and to provide it with any relevant material they may possess. Similarly, like the mechanisms for Syria and Myanmar, a future mechanism for Yemen would likely view CSOs as central to its work, due in large part to their contextual expertise and their ability to contribute material that might otherwise be inaccessible.¹¹⁷ These existing mechanisms have increased the likelihood that human rights documentation work that may be relevant to an ongoing or pending investigation is identified and made accessible to the appropriate authorities. This has been particularly important in the context of both Syria and Myanmar, where investigating and prosecuting authorities have depended heavily on the documentation work of CSOs to build their cases.¹¹⁸

The creation of an ad hoc investigative mechanism for Yemen would address the urgent need to tackle the accountability gap immediately. Proposals for a future standing UN investigative mechanism – although an important step in the global fight against impunity – remain unsettled and require longer-term efforts. Therefore, action on Yemen should not be put on hold until such a standing mechanism may be established.¹¹⁹

6.1.1.2. Collection and preservation of evidence

There is an urgent need to gather and preserve evidence of serious violations committed in Yemen that may amount to international crimes. If immediately action is not taken to create a criminally-focused mechanism for Yemen, much of the evidence essential to future accountability efforts may be lost forever. War criminals should not enjoy de facto amnesty due to the loss or destruction of crucial evidence. Although CSOs and other UN bodies have documented violations in Yemen's war, they are unlikely to have the equivalent capacity or resources that a UN investigative body would possess. The admissibility of evidence in criminal proceedings poses specific and additional requirements, such as chain of custody, that may go beyond those of human

117 For example, for the head of the IIM-Syria, CSOs have been "vital interlocutors who provide a window onto the perspective of survivors and a much greater appreciation for the Syrian context." See Michelle Burgis-Kasthala, 'Assembling Atrocity Archives for Syria: Assessing the Work of the CIJA and the IIM' (2021) 19 *Journal of International Criminal Justice* 1193, p 1202, <https://academic.oup.com/jicj/article/19/5/1193/6423113>.

118 See e.g. *Ibid.* pp 1201-1202; Konstantina Stavrou, 'Civil Society and the IIMM in the Investigation and Prosecution of the Crimes Committed against the Rohingya' (2021) 36(1) *Utrecht Journal of International and European Law* 95, pp 100-102, <https://utrechtjournal.org/articles/10.5334/ujiel.525/>.

119 See International Commission of Jurists, 'Options for the Establishment of a Standing Independent Investigative Mechanism (SIIM)' (2022), <https://www.icj.org/a-standing-independent-investigative-mechanism-siim-should-be-created-to-further-accountability-for-gross-human-rights-violations-and-crimes/>.

rights documentation. Preservation of evidence is not only important to guarantee the pursuit of comprehensive criminal accountability, but also to lay the foundations for accountability processes that go beyond criminal justice, including effective reparations for victims and truth-seeking.

An international criminally-focused investigative mechanism for Yemen could collect evidence directly and engage in open-source investigation. This may include taking witness testimonies, documenting crime scenes, and acquiring other types of physical, audio-visual, digital, and forensic material, in accordance with investigative best practices. The mechanism's broad mandate would also allow it to accept a wide range of material from a variety of sources, such as the archive of the now disbanded UNGEE (including a confidential list of individuals likely responsible for international crimes)¹²⁰ and other UN entities engaged in documentation activities, regional or international organizations, national authorities, local and international CSOs, and any other groups or individuals that may have access to relevant material, including victims themselves. The material could relate to the crimes themselves or to the persons responsible for those crimes, including evidence about the organizational structures to which those persons belong.

Like the existing mechanisms, a future mechanism for Yemen would be expected to have sophisticated preservation, storage, and processing capabilities to safeguard high-value material. Evidence collected by the mechanism would be systematically organized, catalogued, authenticated, and securely stored in a manner that ensures an uninterrupted chain of custody and complies with international standards, to maximize its use in future criminal proceedings. Such sophisticated, centralized management of evidence is clearly lacking in the Yemen context and requires significant resources that CSOs are unlikely to have when acting alone.

6.1.1.3. Support for fair and independent criminal proceedings

The existing mechanisms for Syria and Myanmar are investigative bodies only and do not hold criminal trials like international courts or tribunals. Rather, the mechanisms share the collected evidence and case files with competent criminal justice authorities in order to facilitate and expedite "fair and independent criminal proceedings in accord-

120 The UNGEE transmitted to the UNOHCHR a confidential list of individuals who may be responsible for international crimes. This list could be submitted to a future mechanism for Yemen. UNGEE 2020 Report, *supra* note 66, para 106.

ance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes.”¹²¹

Creating a future UN criminally-focused investigative mechanism for Yemen will mean that the mechanism may only share the material with authorities that can comply with international human rights law, including the right to a fair trial. Therefore, the courts in Yemen, Saudi Arabia, and the UAE are clearly not competent to receive such material (see Section 5). The evidence gathered, preserved, and analyzed by an international criminally-focused mechanism for Yemen could concretely support investigations and prosecutions by the ICC, foreign domestic courts exercising universal or other jurisdiction, or possibly a future ad hoc international criminal tribunal for Yemen. For example, human rights organizations have urged the ICC and foreign authorities in countries such as France to open criminal investigations into the alleged complicity of corporate and political actors in war crimes and crimes against humanity committed in Yemen.¹²² While these avenues currently face considerable challenges in dealing with direct perpetrators and those most responsible within the ranks of the warring parties, this should not withhold the international community from beginning to lay the groundwork for criminal justice to ensure that these potential avenues can be effectively exploited in the future. This requires, as a crucial first step, the collection and preservation of evidence in accordance with relevant criminal justice standards.

Making material available to criminal justice authorities via a criminally-focused investigative mechanism has concrete benefits. For example, a mechanism can run searches against its entire repository and pull all information from a range of sources that may be relevant to a particular investigation. Such mechanism can also share case files concerning individual suspects or expert analysis on key legal or factual issues likely to arise, such as briefs on specific incidents or crimes, which can ensure that the material can be more readily understood or used by justice authorities. It may even influence the opening of new cases in relation to incidents, individuals, or groups that may otherwise not be pursued. For example, a criminally-focused mechanism could enable foreign authorities to respond more promptly in universal jurisdiction cases, which are often pursued opportunistically when it becomes clear that a suspect will be travelling to a country or is already there. By virtue of these ways of working, an inves-

121 Resolution 71/248, *supra* note 114, para 4; Resolution 39/2, *supra* note 114, para 22.

122 ECCHR, Amnesty International, CAAT, Mwatana for Human Rights, Centre Delàs, and Rete Disarmo, ‘Made in Europe, Bombed in Yemen (Case Report) Joint Communication to The ICC Prosecutor Office’ (December 12, 2019), <https://mwatana.org/en/made-in-europe-bombed-in-yemen-case-report/>; ECCHR, ‘War Crimes in Yemen: Complaint against French Arms Companies,’ <https://www.ecchr.eu/en/case/yemen-arms-exports-france/> (accessed on May 2, 2023).

tigative mechanism may provide an added value that those conducting documentation activities cannot realistically achieve when acting on their own.

6.1.1.4. Broader support for accountability processes

The mandates of the existing mechanisms for Syria and Myanmar are defined broadly enough to allow them to contribute to accountability processes beyond criminal justice. For instance, information collected by IIM-Syria and IIM-Myanmar may be used to locate missing persons, to establish State responsibility, or for future transitional justice processes. Depending on a future mechanism's resources and priorities, this may also include, for example, engaging in limited outreach, advocacy, and capacity strengthening activities aimed at promoting accountability and ensuring victims' interests are fully recognized. In this respect, CSOs — particularly Yemeni-based organizations — will be important collaborators due to their contextual expertise, as well as their potential to facilitate access to other local actors and affected populations. Equally, there may be scope for CSOs to shape a future mechanism's internal strategy and workplan, to advise on certain thematic areas and to advocate on behalf of victims. Finally, the very existence of a criminally-focused investigative mechanism — with a mandate to investigate not just past violations, but also ongoing and future violations — may have a deterrent effect.¹²³

6.1.2. Independent civil society investigation and reporting mechanism

Given that the parties to the conflict have been able to effectively undermine and hinder formal international mechanisms, such as the UNGEE which was disbanded in 2021 after immense pressure from Saudi Arabia and the UAE on UN Human Rights Council members, that political interests continue to dominate the Yemeni file, and that action by the international community has remained absent despite of the ongoing war, opportunities for accountability outside of the traditional framework must be explored. The establishment of an investigation and reporting mechanism by leading independent human rights organizations could provide an important initiative, which could operate in parallel with other mechanisms in the future, such as a UN-mandated criminally-focused investigative mechanism. This independent mechanism could bring together local and international civil society to investigate in a coordinated manner all alleged violations of international humanitarian law and international human rights violations and abuses, potentially amounting to international crimes, committed in Yemen by all parties to the armed conflict since September 2014. In accordance with the

123 See e.g. Nadia Zed, 'A Commentary on the Mandate of the Independent Investigative Mechanism for Myanmar' (2020) 4 PKI Global Justice Journal 40, <https://globaljustice.queenslaw.ca/news/a-commentary-on-the-mandate-of-the-independent-investigative-mechanism-for-myanmar>.

highest international standards, this civil society mechanism could scrutinize the facts and circumstances related to these alleged violations and crimes, collect evidence and investigative leads, and identify those responsible for these violations and crimes, where possible. This mechanism could keep the human rights situation in Yemen under scrutiny and help reduce human rights violations by publicly reporting on these alleged violations and crimes perpetrated by all parties to the conflict. These efforts could contribute to ensuring that perpetrators are held accountable, victims receive reparation, and a coherent foundation for transitional justice is established.

6.2. International Criminal Court

No investigations or prosecutions regarding international crimes in Yemen have thus far been initiated by the ICC. Yemen, most coalition members, including Saudi Arabia and the UAE, and Iran are not States parties to the ICC's founding treaty, the Rome Statute. Still, there are different pathways in which the ICC's jurisdiction can be activated with respect to conflict-related international crimes committed in Yemen, as discussed below. If seized, the ICC could provide several advantages in the Yemen context, including the ability to deal with crimes committed in Yemen's entire territory by all warring parties since the start of the conflict; its material jurisdiction over war crimes, crimes against humanity, and genocide; and the role that victims can play in the judicial process and their right to request reparations. Nonetheless, the ICC is not a panacea. Its record with regard to other country situations demonstrates that the ICC can only hope to achieve some measure of accountability regarding a small number of perpetrators and victims.

6.2.1. Yemen becoming a State party to the ICC Rome Statute

Yemen signed the ICC Rome Statute in December 2000 but has not subsequently ratified it. Therefore, Yemen is not subject to the ICC's jurisdiction. If Yemen were to become a party, the jurisdiction of the ICC would only apply prospectively.¹²⁴ Yemen could, though, also make a declaration.¹²⁵ In that case, the criminal jurisdiction of the ICC could be backdated to the start of the war, September 2014. This combined action would give the ICC the power to investigate all crimes within its jurisdiction committed by all parties over the course of the entire armed conflict in Yemen, including State officials, members of their armed forces, as well as leaders and members of non-State armed groups. The ICC would also have jurisdiction over nationals of States that are not

124 Rome Statute of the ICC, art. 11(2).

125 Ibid., art. 12(3).

parties to the ICC who commit suspected crimes on Yemen's territory.¹²⁶ In this case, alleged perpetrators who are nationals of countries such as Saudi Arabia and the UAE would thus fall under the jurisdiction of the ICC. Should Yemen become a State party, the ICC's jurisdiction could be activated where either a State party, including Yemen itself, refers a case to the ICC or the ICC Prosecutor initiates an investigation.¹²⁷

6.2.2. Yemen accepting the ICC jurisdiction by declaration

Yemen may accept the jurisdiction of the ICC by making a declaration without becoming a party to the Rome Statute.¹²⁸ If considering or deciding to make such declaration, Yemen should be urged to recognize the ICC's jurisdiction over the entire territory in Yemen and from the relevant date (September 2014) onward. There have been several precedents in other contexts. Most notably, Côte d'Ivoire made a declaration in 2003, of unlimited duration, before it ratified the Rome Statute in February 2013.¹²⁹ The ICC relied on this declaration to establish its jurisdiction in the case against President Laurent Gbagbo.¹³⁰ Ukraine made two declarations that recognize the jurisdiction of the ICC, the first for events in the period November 2013 to February 2014, the second for events thereafter.¹³¹ The latter declaration provides the ICC with jurisdiction over crimes committed in the ongoing war in Ukraine. Palestine made a declaration in 2009. Following its recognition by the UN General Assembly as non-member observer State in 2012, the ICC Prosecutor recognized that the ICC has jurisdiction pursuant to that declaration, but only prospectively.¹³² Palestine made another declaration in December 2014, concern-

126 Ibid., art. 12(2)(a).

127 Ibid., art. 13(a) and (c).

128 Ibid., art. 12(3).

129 Republic of Côte d'Ivoire, 'Declaration Accepting the Jurisdiction of the International Criminal Court' (2003), <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/9CFE32D1-2FCB-4EB4-ACA0-81C2343C5ECA/279844/ICDEENG7.pdf>.

130 The Prosecutor v Laurent Gbagbo ICC (Decision on the "Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)") Pre-Trial Chamber I ICC-02/11-01/11 (August 15, 2012), <https://www.icc-cpi.int/court-record/icc-02/11-01/11-212-0>.

131 Declaration of the Embassy of Ukraine to the Kingdom of the Netherlands to the Registrar of the ICC (April 9, 2014), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>; Declaration of the Minister for Foreign Affairs of Ukraine to the Registrar of the ICC (September 8, 2015), https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

132 Discussion in William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2016) pp 360-361.

ing crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.”¹³³

6.2.3. Active personality jurisdiction

The ICC may exercise jurisdiction over nationals of States parties who are suspected of having committed or contributed to international crimes in Yemen that fall within the Court’s jurisdiction.¹³⁴ This type of active personality jurisdiction applies where a State party refers the situation in Yemen to the ICC or the ICC Prosecutor has initiated an investigation. Such jurisdiction does not require Yemen to be a State party to the Rome Statute, nor to have accepted the ICC’s jurisdiction by making a declaration.

Although most coalition members are not party to the Rome Statute, including leaders Saudi Arabia and the UAE, members Jordan and Senegal are ICC States parties with nationals active in Yemen.¹³⁵ Thus, their nationals could trigger the jurisdiction of the ICC provided their conduct amounts to a war crime, crime against humanity, or genocide. Nationals of other ICC States parties who have been recruited by warring parties to fight in Yemen, for example reportedly Australians by the UAE military, who have provided assistance to the coalition, such as UK or French nationals, or who are deployed as mercenaries in Yemen, for example reportedly Colombians by the Saudi/UAE-led coalition, could also be implicated.¹³⁶ Even if one of these nationals has committed such crimes, the Court’s jurisdiction would only be activated if a State party refers the situation to the Court or if the ICC Prosecutor were to initiate an investigation.

To that end, on December 11, 2019, Mwatana for Human Rights, European Center for Constitutional and Human Rights (ECCHR), Amnesty International, the Campaign Against Arms Trade (CAAT), Centre Delàs, and Rete Disarmo submitted a joint communication under article 15 of the Rome Statute to the ICC, calling on the ICC Prosecutor to investigate the individual criminal responsibility of arms exporters and government officials from Germany, France, Italy, Spain, and the UK for their potential complicity in alleged war crimes committed by the Saudi/UAE-led coalition in Yemen. The communi-

133 Declaration of the Government of the State of Palestine Accepting the Jurisdiction of the ICC (December 31, 2014), https://www.icc-cpi.int/sites/default/files/iccdocs/PIDS/press/Palestine_A_12-3.pdf.

134 Rome Statute of the ICC, art. 12(2)(b).

135 UNGEE 2018 Report, *supra* note 17, para 18.

136 Rori Donaghy, ‘Hundreds of Colombian Mercenaries to Fight for Saudi-led Coalition in Yemen’ Middle East Eye (November 2, 2015), <https://www.middleeasteye.net/news/hundreds-colombian-mercenaries-fight-saudi-led-coalition-yemen>; Rebecca Hamilton, ‘Hundreds of Foreigners are Fighting for UAE in Yemen – How War Crimes Trials May Deter Them’ Just Security (May 16, 2017), <https://www.justsecurity.org/40970/hundreds-foreigners-fighting-uae-yemen-how-war-crimes-trials-deter/>.

cation details 26 airstrikes carried out by the Saudi/UAE-led coalition that may amount to war crimes. Despite documented attacks on civilians and civilian objects, such as civilian homes, schools and hospitals, companies based in Europe have continued to supply arms to the coalition, particularly Saudi Arabia and the UAE. These arms exports to the coalition have brought profits to these European arms companies, and indirectly, to European countries as well. The communication remains pending.¹³⁷

Other CSOs have also submitted Yemen-related communications to the ICC Prosecutor.¹³⁸ However, public indications for opening an investigation into the situation in Yemen based on active personality jurisdiction have so far remained absent. The prevalence of double standards in the international community's overall approach to the Yemeni file remains regrettably striking. The sole exercise of active personality jurisdiction is unlikely to cover any or all perpetrators who bear the greatest responsibility within the warring parties' ranks. However, certain coalition members are ICC States parties and foreign nationals of ICC States parties may still hold senior military positions, reportedly Australians working for the UAE military, for example.¹³⁹

6.2.4. UN Security Council referral

The ICC could exercise jurisdiction over international crimes committed in Yemen's war if the UN Security Council referred the situation in Yemen to the Court. An ICC referral must be made pursuant to Chapter VII of the UN Charter. This entails that any permanent member of the Security Council with veto power – China, France, the Russian Federation, the UK, and the USA – needs to approve of the referral, at least by abstaining from or not vetoing relevant resolutions. To date, there have been two UN Security Council referrals: the situation in Darfur was referred to the ICC Prosecutor in

137 ECCHR, 'Made in Europe, Bombed in Yemen: ICC Must Investigate European Responsibility in Alleged War Crimes in Yemen', <https://www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen/> (accessed on May 2, 2023).

138 See e.g. Austin Koltonowski, 'Rights Groups Urge ICC to Investigate Mercenaries in Yemen' Jurist (November 28, 2017), <https://www.jurist.org/news/2017/11/rights-group-urges-icc-to-investigate-mercenaries-in-yemen/>; Iranian Center for International Criminal Law, 'Communication under Article 15 of the Rome Statute of the International Criminal Court Regarding the Situation in Yemen' (2019), <http://www.icicl.org/files/Article%2015%20Communication%20about%20Yemen%20July2019.pdf>; Frank Andrews, 'Yemen War: Victims Urge ICC to Investigate 'War Crimes' of Saudi-Led Coalition' Middle East Eye (August 30, 2021), <https://www.middleeasteye.net/news/yemen-saudi-arabia-uae-jordan-victims-investigation-war-crimes-coalition>.

139 Hamilton, *supra* note 136.

2005, following a recommendation by the International Commission of Inquiry on Darfur, and the situation in Libya in 2011.¹⁴⁰

A UN Security Council referral of the situation in Yemen to the ICC constitutes an action that the international community could take immediately to address the huge lack of accountability in Yemen. This would allow bypassing Yemen's lack of political will to either become a State party to the ICC Rome Statute or accept the Court's jurisdiction through a declaration, which are unlikely to happen. There are other clear advantages: the Court can deal with all conflict actors and third parties, address crimes relevant to the conflict in Yemen, such as war crimes and crimes against humanity, and ensure victims' rights to participate in the proceedings and receive reparations. The ICC is an independent body that conducts fair and impartial trials. Therefore, the ICC could make an effective contribution to comprehensive accountability by at least focusing on perpetrators bearing the greatest responsibility for the most serious crimes, which the warring parties have failed to do. The ICC could also act as a deterrent to perpetrators and improve the protection of civilians. The UNGEE has urged the UN Security Council to refer the situation in Yemen to the ICC "as a priority."¹⁴¹ The UNGEE identified "no principled reason for the Security Council not to do so" and agreed that this would make a "significant contribution to defeating impunity in Yemen."¹⁴²

While the gravity of the situation in Yemen merits an urgent referral to the ICC, the likelihood is remote due to current political dynamics in the UN Security Council. Attempts to, for instance, refer the situation in Syria to the ICC Prosecutor, in 2014, have failed because of Chinese and Russian vetoes.¹⁴³ This development is symptomatic of a growing opposition by China and Russia to any Security Council referral to the ICC, which has been further deepened by the Ukraine conflict. The three other permanent UN Security Council members with veto power – USA, UK, and France – are implicated in the Yemen conflict through their support to the Saudi/UAE-led coalition. The UK, one of the major arms exporters to the coalition, is the so-called penholder on Yemen and, thus, leads related negotiations and drafting of resolutions. Since the coalition inter-

140 UNSC Resolution 1593 UN Doc S/RES/1593 (March 31, 2005), [https://undocs.org/Home/Mobile?Final-Symbol=S%2FRES%2F1593\(2005\)&Language=E&DeviceType=Desktop&LangRequested=False](https://undocs.org/Home/Mobile?Final-Symbol=S%2FRES%2F1593(2005)&Language=E&DeviceType=Desktop&LangRequested=False); UNSC Resolution 1970 UN Doc S/RES/1970 (February 26, 2011), <https://www.un.org/securitycouncil/s/res/1970-%282011%29>.

141 UNGEE 2021 Report, *supra* note 20, para 82.

142 UNGEE 2020 Report, *supra* note 66, para 109(b); UNGEE 2021 Accountability Update, *supra* note 7, para 47.

143 UNSC 'Overview of Security Council Meeting Records' UN Doc S/PV.7180 (May 22, 2014) p 4, <https://www.securitycouncilreport.org/un-documents/document/spv7180.php>.

vened in the conflict, in 2015, accountability-related language gradually disappeared from UN Security Council resolutions on Yemen.¹⁴⁴ However, more recent resolutions have underlined the need to ensure accountability.¹⁴⁵ The UNPoE also recommended, in 2021, that the Security Council start “exploring mechanisms of accountability to secure justice and redress for victims.”¹⁴⁶ Yet, the Council’s strategy on Yemen has been ostensibly focused on sanctions. The UN Security Council-mandated Committee, which is made up of the member States of the Council, has shown selectivity by only imposing sanctions on individuals affiliated with one side of the conflict, the Ansar Allah (Houthi) armed group. The UNPoE, which supports the Committee, has, however, reported on violations by the different warring parties. The UNGEE has recommended expanding the current sanctions to cover those that met sanctions criteria on all sides of the conflict.¹⁴⁷

6.2.5. Complementarity

Should the ICC have jurisdiction over international crimes committed in Yemen under any of the grounds set out in the previous sections, the Rome Statute would apply in full. Complementarity is a key issue that has arisen in several cases. The notion of complementarity denotes the relationship between ICC and domestic cases, by providing that the Court is only complementary to national criminal jurisdictions. Thus, States retain the primary responsibility to bring perpetrators of international crimes to justice. The ICC may only exercise jurisdiction when the concerned State is unwilling or unable to carry out genuine investigations or prosecutions. Based on the assessment in Section 5.1 of this report, the ICC could exercise jurisdiction over Yemen-related cases, as the justice system in Yemen is currently in no position to effectively investigate and prosecute those responsible for international crimes.

Since 2019, human rights organizations have urged the ICC to open an investigation into the alleged criminal responsibility of EU nationals for complicity in war crimes through arms transfers to the coalition accused of committing these crimes in Yemen.¹⁴⁸ As discussed previously, the ICC could exercise active personality jurisdiction based on the nationality of suspected perpetrators from different ICC States parties, such as Italy

144 Abrantes Mendes, *supra* note 46, p 43.

145 UNSC Resolution 2564 UN Doc S/RES/2564 (February 25, 2021), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/052/08/PDF/N2105208.pdf?OpenElement>; UNSC Resolution 2624 UN Doc S/RES/2624 (February 28, 2022), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/271/73/PDF/N2227173.pdf?OpenElement>.

146 UNPoE 2021 Report, *supra* note 6, para 159(a).

147 UNGEE 2020 Detailed Findings, *supra* note 1, para 402 and recommendation 7(b).

148 ECCHR, *supra* note 137.

and France. At the same time, the ICC Office of the Prosecutor could engage in so-called positive complementarity, which involves a coordinated approach in the prosecution of international crimes by the ICC and national authorities. Thereby, the ICC Prosecutor can encourage genuine national proceedings when possible. While this would not be possible in respect of Yemen's justice system as explained above, EU countries have the capacity and responsibility to conduct genuine investigations into these serious allegations of complicity. If they fail to do so, the ICC must take decisive action to exercise jurisdiction in accordance with the Rome Statute.

6.3. Foreign domestic courts in third States

For now, the pursuit of cases before domestic courts in third States – including based on universal jurisdiction – likely represents the more promising avenue to obtain a measure of accountability for international crimes committed in Yemen. This follows from the few accountability avenues presently available: the domestic judicial systems of the warring parties are not viable options, the exercise of jurisdiction by the ICC presents a series of obstacles (but active personality jurisdiction is currently possible), and an ad hoc international criminal tribunal for Yemen is a remote justice option (see Sections 5, 6.2, and 6.4).

The UNGEE has called upon third States to actively pursue criminal justice, whether based on the nationality of the perpetrator or victim, or universal jurisdiction, and to cooperate to that end.¹⁴⁹ Yemeni victims, lawyers, and CSOs (including Mwatana for Human Rights) have sought to initiate criminal cases in foreign domestic courts in countries such as Argentina, Italy, UK, and France against political, military, and corporate actors for their alleged role in serious crimes in Yemen, including war crimes, crimes against humanity, and torture.¹⁵⁰ In addition to criminal cases, CSOs have also sought accountability through administrative proceedings related to arms sales in foreign domestic courts. For example, Mwatana for Human Rights intervened in CAAT's legal challenge of the UK Government's July 2020 decision to resume licensing of arms sales to Saudi Arabia for use in the war in Yemen despite overwhelming evidence of

149 UNGEE 2021 Accountability Update, supra note 7, para 55.

150 Middle East Eye, 'France to Investigate Abu Dhabi Crown Prince Over Torture Accusations' (July 17, 2020), <https://www.middleeasteye.net/news/france-uae-investigate-crown-prince-torture-allegations>; Dan Sabbagh, 'Lawyers to Submit Yemen War Crimes Dossier to UK Police' *The Guardian* (October 20, 2021), <https://www.theguardian.com/world/2021/oct/20/lawyers-to-submit-yemen-war-crimes-dossier-to-uk-police>; Trial International, 'Universal Jurisdiction Annual Review 2022' (2022) pp 20, 69, https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf; ECCHR, supra note 122.

international humanitarian law violations.¹⁵¹ As this challenge was struck down in an appalling decision by the UK High Court in June 2023, the case shows the importance of continuing to exert pressure on those fueling the conflict in Yemen by pursuing multiple forms of accountability, be it administrative, criminal, or other.

This section assesses the different legal bases on which third States may investigate and prosecute international crimes committed in Yemen within their own domestic criminal justice systems, with a particular focus on universal jurisdiction. It is no secret that universal jurisdiction usually comes with significant challenges – this is not unique to the Yemen context. Despite these challenges, successful prosecutions have been achieved in other contexts, even when initially unthinkable. Currently, foreign domestic courts are one of few avenues that can help ensure access to justice for the victims of unimaginable atrocities committed in Yemen. Third States can take immediate steps to actively pursue such cases. Cooperation between the national authorities of third States, international actors, such as the ICC and a future independent international criminally-focused mechanism for Yemen, as well as independent local and international CSOs can significantly bolster the prospects of such prosecutions. A criminally-focused mechanism would be particularly important in facilitating and expediting criminal proceedings by sharing relevant evidence and case files so that national authorities have, for example, access to sufficient evidence or can react decisively when opportunities for judicial action arise. Even if these efforts may not immediately result in successful convictions, universal jurisdiction cases can nonetheless have significant value for the fight against impunity and be detrimental to perpetrators.

6.3.1. Extraterritorial jurisdiction

While criminal jurisdiction is primarily territorial, most national laws permit States to exercise jurisdiction over crimes under international law committed outside their territory when their interests are affected. The recognized grounds for such extraterritorial jurisdiction include crimes committed abroad by own nationals (active personality principle) or against own nationals (passive personality principle). Where third States recognize these principles, they may form the basis for the exercise of jurisdiction over crimes committed in Yemen.

Active personality applies to a potentially considerable range of foreign nationals suspected of involvement in crimes under international law committed in Yemen, such as members of the Saudi/UAE-led coalition, foreign mercenaries, and foreign arms

151 CAAT, 'Arms Sales to War in Yemen Back in Court' (April 22, 2021), <https://caat.org.uk/news/arms-sales-to-war-in-yemen-back-in-court/>.

dealers. However, States such as Saudi Arabia and the UAE prove unable to effectively pursue cases against their own nationals (see Section 5.2). Still, other countries, such as Australia, could investigate and where appropriate prosecute their own nationals who have been reportedly recruited to fight for coalition members in Yemen.¹⁵² The domestic courts of Iran, which supports the Ansar Allah (Houthi) armed group, are also not a viable avenue for prosecuting Iranian or other perpetrators allegedly implicated in conflict-related crimes in Yemen. Substantive and procedural laws are inadequate, while the judicial system is marred by unfair trials, lack of judicial independence, and use of the death penalty, among other grave issues.¹⁵³ In such cases, foreign nationals with dual nationality may offer an additional avenue for possible prosecution.

6.3.2. Universal jurisdiction

The use of universal jurisdiction is in principle not dependent on any jurisdictional link with the investigating or prosecuting State, as is required for the other forms of extraterritorial jurisdiction. Certain international treaties oblige States to establish universal jurisdiction, including over torture and enforced disappearance, while States may also decide to establish universal jurisdiction over genocide, crimes against humanity, and war crimes applicable in non-international armed conflicts. There is widespread practice to that effect, with many States providing for universal jurisdiction for one or more of these crimes.¹⁵⁴

6.3.2.1. Legal prerequisites and barriers to the exercise of universal jurisdiction

While some States recognize a pure or absolute form of universal jurisdiction, others restrict their exercise of universal jurisdiction by conditioning it on certain legal prerequisites. Many States require the presence of the alleged perpetrator on their territory to exercise universal jurisdiction. Some national laws, for example in Belgium, stipulate

152 Hamilton, *supra* note 136.

153 Amnesty International, 'Flawed Reforms: Iran's New Code of Criminal Procedure' (2016), <https://www.amnesty.org/en/documents/mde13/2708/2016/en/>; FIDH and OMCT, 'Indefensible: Iran's Systematic Criminalisation of Human Rights Defenders' (2019) pp 6–11, <https://www.fidh.org/en/issues/human-rights-defenders/iran-new-report-documents-the-systematic-criminalisation-of-human>; UNGA, 'Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran' UN Doc A/77/181 (July 18, 2022) paras 11–14, <https://www.ohchr.org/en/documents/country-reports/a77181-situation-human-rights-islamic-republic-iran-report-special>; Equipo Nizkor, 'Domestic Implementation of International Law: Islamic Republic of Iran,' <https://www.derechos.org/intlaw/irn.html> (accessed on January 6, 2023).

154 Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update' (2012) pp 1–2, Annex I, <https://www.amnesty.org/en/wp-content/uploads/2021/06/ior-530192012en.pdf>. See also the Justice Beyond Borders Project, an online mapping tool of the Clooney Foundation for Justice that provides an overview of domestic legislation on international crimes across the world: <https://justicebeyondborders.com/>.

for the exercise of universal jurisdiction the residence of either the victim or the perpetrator in the forum State unless the case concerns torture or enforced disappearance, where jurisdiction is based on specific treaty regimes.¹⁵⁵

These requirements constitute a significant hurdle for the Yemen context, as there is a sparse diaspora or refugee community outside the national territory. The current situation differs substantially from other contexts such as Syria, where many Syrians, including suspects and victims, sought refuge in Europe, contributing to a subsequent rise in the exercise of universal jurisdiction. There may be fewer Yemeni suspects and victims present in Europe or elsewhere that could prompt universal jurisdiction cases related to the Yemen war. As a result, foreign domestic courts have so far provided a more direct entry point to bring Yemen-related cases concerning complicity through arms transfers, while there has been less momentum to target direct perpetrators of international crimes. Yet hundreds of foreign nationals from Australia, France, and the UK, for example, have reportedly been recruited by the UAE, including into senior military positions, which could provide an opportunity to national authorities in these countries to exercise jurisdiction over alleged international crimes in Yemen.¹⁵⁶ Moreover, lawyers, victims, and CSOs have filed complaints with national authorities targeting the political and military elites of countries such as Saudi Arabia and the UAE, for example when present in or anticipated to travel to a foreign jurisdiction.¹⁵⁷ Such a complaint in France was, however, eventually dismissed in 2022 due to head of State immunity, which is a prominent barrier to universal jurisdiction.¹⁵⁸ Yet, functional immunity of State officials for any acts carried out while in office is often no longer recognized in respect of the commission of international crimes.¹⁵⁹ While foreign policy considerations,

155 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of all Persons from Enforced Disappearance legally oblige States to prosecute alleged offenders of torture and enforced disappearance, respectively, present in their territory unless they extradite them for the offence.

156 Hamilton, *supra* note 136.

157 TRIAL International, 'Mohammed Bin Salman', <https://trialinternational.org/latest-post/mohammed-bin-salman/> (accessed on April 26, 2023).

158 Under international law, which is largely followed by States, personal immunity extends to incumbent heads of State and government (such as a prime minister), foreign ministers, diplomats, and those granted special mission immunity representing a State or an international organization. Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21(4) *European Journal of International Law* 815, <https://academic.oup.com/ejil/article/21/4/815/418198>; TRIAL International, 'Universal Jurisdiction Annual Review 2023' (2023) p 51, <https://trialinternational.org/latest-post/2022-highlights-in-the-universal-jurisdiction-annual-review-ujar/>.

159 See e.g. Aziz Epik, 'No Functional Immunity for Crimes under International Law before Foreign Domestic Courts: An Unequivocal Message from the German Federal Court of Justice' (2021) 19(5) *Journal of International Criminal Justice* 1263, <https://academic.oup.com/jicj/article/19/5/1263/6464071?login=true>.

especially when investigating State officials or close allies, may still have an impact by limiting cases to less senior officials or low-level suspects, the perceived international political costs for investigating one's own nationals may significantly reduce these costs to practically zero.¹⁶⁰

In some countries, such as Germany, prosecutors can commence an investigation with a view to securing available evidence even if the suspect is not present in Germany. While this discretionary power may only be exercised when there is a realistic prospect of the suspect's presence in Germany, such broad requirements could enhance the outlook for the opening of Yemen-related cases. For instance, in 2020, a complaint was filed with the UK Metropolitan Police on behalf of Yemeni victims with evidence of war crimes and torture by the UAE in Yemen, naming a key advisor to the then UAE Crown Prince as a possible suspect. Although the suspect did not reside in the UK, he was said to travel to the UK regularly and in the near future. UK authorities were therefore urged to open an investigation and monitor the suspect's entry.¹⁶¹ So-called structural investigations provide a further advantage for pursuing accountability as they allow investigations to commence irrespectively of whether a specific suspect is identified or found to be present on the State's territory. This allows authorities to react quickly if a suspect enters their territory, while the evidence gathered can also be shared with other jurisdictions via mutual legal assistance frameworks or cross-border, regional, or international investigative actions, leading to greater coordination.¹⁶²

160 Hamilton, *supra* note 136.

161 Stoke White, 'Media Brief: Evidence of War Crimes and Torture by UAE in Yemen Submitted to London Metropolitan Police, US Department of Justice and Ministry of Justice in Turkey' (February 12, 2020), <https://acrobat.adobe.com/link/track?uri=urn%3Aaid%3Aascds%3AUS%3A8158fd6e-0058-4d86-b297-c7d0ec71e3b7&viewer%21megaVerb=group-discover>; Open Society Justice Initiative, TRIAL International, and Redress, 'Universal Jurisdiction Law and Practice in England and Wales' (May 2022) p 13, <https://redress.org/wp-content/uploads/2022/05/UJ-Law-and-Practice-in-England-and-Wales.pdf>.

162 Open Society Justice Initiative and Trial International, 'Universal Jurisdiction: Law and Practice in Germany' (2019) p 17, <https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf>.

6.3.2.2. Availability of evidence and cooperation in universal jurisdiction cases

National authorities may be reluctant to commence proceedings in cases where they have limited access to evidence. The burden of providing prima facie evidence, including identifying potential witnesses, may therefore fall on the shoulders of local and international CSOs, lawyers, and victims for the authorities to act upon. Nevertheless, a UN criminally-focused investigative mechanism for Yemen would offer clear advantages for universal jurisdiction cases that those documenting human rights violations are unlikely to provide on their own. Such a mechanism would have the mandate and resources to gather, consolidate, preserve, and analyze evidence from various sources of information in compliance with criminal justice standards intended to maximize their use in criminal proceedings. Evidence relevant to an investigation could be pulled from the mechanism's entire repository or case files with expert analysis of specific suspects or incidents could be made promptly available to the appropriate authorities. This could, for example, fill evidentiary gaps in specific investigations, mitigate the investigative challenges caused by the ongoing war, or even result in the opening of new cases that would not otherwise be pursued. An investigative mechanism that is specifically focused on facilitating and expediting criminal proceedings in national courts could put authorities in a position to react more quickly when opportunities for judicial action present themselves. For example, universal jurisdiction cases are often initiated opportunistically and ad hoc where information transpires that a suspect is travelling to, or is already present in, a country. Thus, such a mechanism could help ensure that national authorities can act swiftly as suspects may be present in the territory for only a limited duration.

Cooperative efforts could thus significantly bolster the prospects of Yemen-related cases based on universal jurisdiction or other jurisdictional grounds. Within this context, the UNGEE has called for closer cooperation between third States, while encouraging these States to actively use their institutional networks to share relevant investigative material.¹⁶³ This is also an important demand in CSO-led initiatives seeking investigations to be opened by national judicial authorities and the ICC into the alleged complicity of EU political and corporate actors in war crimes and crimes against humanity through arms transfers to the Saudi/UAE-led coalition. The judicial cooperation between the ICC and investigative authorities of countries engaged in the co-production of arms is particularly needed in view of the arms industry's transnational and opaque

163 UNGEE 2021 Accountability Update, supra note 7, para 55.

structure.¹⁶⁴ International cooperation in criminal matters can take different forms. In addition to the exchange of information or other forms of mutual legal assistance, there exist more advanced tools such as joint investigative teams or JITs, supported by Eurojust, that enable authorities to bring close cross-border investigations into international crimes. States may also collaborate with Europol's Analysis Project for Core International Crimes or Eurojust's Core International Crimes Evidence Database to improve coordination in the identification and prosecution of potential perpetrators.¹⁶⁵

6.3.2.3. Potential outcomes of pursuing universal jurisdiction

Foreign domestic courts represent an available avenue to seek criminal accountability for international crimes committed in Yemen by exercising universal or extra-territorial jurisdiction. Even if these efforts do not immediately result in a successful prosecution, universal jurisdiction cases can nonetheless have significant value. They can be used as an advocacy strategy to document international crimes, expose the alleged perpetrators, and criticize the lack of accountability. Such efforts may also have multiple practical effects. Alleged perpetrators may refrain from travelling to countries where they are at risk of prosecutions. This may be a mere inconvenience – albeit a notable symbolic exclusion – but may be more harmful to them where they have substantial connections to the target country, such as business interests and family links. In addition, alleged perpetrators may experience other disadvantages in foreign countries on account of being suspected of having committed international crimes, such as being barred from entry, not being granted refugee status, lacking employment prospects, or being subjected to sanctions.

6.3.3. Criminal proceedings related to complicity in international crimes through arms sales

Criminal complaint before Italy's Public Prosecutor

On April 17, 2018, Mwatana for Human Rights, together with ECCHR and Rete Italiana Pace a Disarmo, filed a criminal complaint with Italy's Public Prosecutor's Office in Rome, requesting an investigation into the criminal liability of the directors of RWM Italia S.p.A., an Italian arms manufacturer, and senior officials of Italy's National Authority

164 ECCHR, Mwatana for Human Rights, Sherpa, and Amnesty International, 'Criminal Complaint Against French Arms Manufacturers for the Export of War Materials in the Context of the Yemen Conflict' (September 2022), https://www.ecchr.eu/fileadmin/user_upload/Q_A_-_September_2022_-_Criminal_complaint_against_French_arms_manufacturers_.pdf.

165 Europol, 'Europol Analysis Projects' (2023) AP CIC, <https://www.europol.europa.eu/operations-services-innovation/europol-analysis-projects>; Eurojust, 'Core International Crimes Evidence Database (CICED)' (2023), <https://www.eurojust.europa.eu/publication/core-international-crimes-evidence-database-ciced>.

for the Export of Armament (UAMA). The complaint focuses on their role in a deadly airstrike allegedly carried out by the Saudi/UAE-led coalition in the Deir Al-Hajari area in Yemen that claimed the lives of an entire civilian family. The bomb remnants found at the site of the attack indicate that they were manufactured by RWM Italia S.p.A., a subsidiary of the German arms giant, Rheinmetall AG.

The Italian Public Prosecutor's Office requested to dismiss the case in October 2019, which was appealed by Mwatana and the other organizations. In February 2021, the judge overseeing the preliminary investigations in Rome ordered that the criminal investigation must continue, however the Public Prosecutor was unwilling to proceed.¹⁶⁶ The Italian prosecutor refrained from investigating the liability of RWM Italia executives and the offenses of murder and personal injury, limiting the scope of his investigation to the offence of abuse of power by Italian export authorities and ignoring the seriousness of the crimes. This showed his unwillingness to sufficiently investigate the case. Mwatana and its partners appealed in March 2022, arguing that there is sufficient evidence in the case to move directly to trial.¹⁶⁷

On December 20, 2022, a hearing was held before the preliminary investigations judge, which represented the last opportunity for the Italian judiciary to adequately guarantee the right of access to justice for civilian victims of the conflict in Yemen fueled by Italian arms exports.¹⁶⁸ However, the judge unfoundedly dismissed the criminal proceedings on March 10, 2023.¹⁶⁹ Despite the decision to not indict Italian public officials and the CEO of the arms manufacturer, the judge found that their actions were clearly conducted in violation of the Arms Trade Treaty, a binding legal instrument ratified by Italy in April 2014, that requires a state not to authorize arms exports if it is aware of their possible use against civilian targets. Significantly, the judge pointed out their continued issuance of arms licenses despite their knowledge in this regard: "Following the interventions of the UN and then of the European Parliament, in view of parliamentary questions on the issue and complaints by NGOs, UAMA was therefore

166 Mwatana for Human Rights, 'Groundbreaking Decision for Victims of Italian Weapon Airstrikes in Yemen' (February 24, 2021), <https://mwatana.org/en/groundbreaking-decision/>.

167 Mwatana for Human Rights, 'Yemen War Crimes: Human Rights Groups Challenge Italy's Decision to Dismiss Criminal Investigation of Arms Company Executives and Export Authorities' (March 15, 2022), <https://mwatana.org/en/war-crimes/>.

168 Mwatana for Human Rights, 'Crucial Hearing in Rome on 20 December 2022: Italy's Last Opportunity to Bring Justice to Victims of Airstrike with Italian Arms in Yemen' (November 29, 2022), <https://mwatana.org/en/crucial-hearing/>.

169 For preliminary legal analysis about this decision, see Mwatana for Human Rights, 'Indictment of Italian Public Officials and RWM Italia Manager for Contributing to Potential War Crimes Dismissed Despite Prove of Violation of Arms Trade Treaty' (March 15, 2023), <https://mwatana.org/en/war-crimes-dismissed/>.

certainly aware of the possible use of the arms sold by RWM to Saudi Arabia in the conflict in Yemen to the detriment of civilians.”¹⁷⁰

Mwatana and the other applicants in the case have expressed their commitment to the pursuit of justice for the civilian victims of the conflict, which may also include legal action. In addition, as Italy is a State party to the Rome Statute, the ICC Office of the Prosecutor must open an investigation where Italian authorities fail to investigate and prosecute the criminal liability of alleged perpetrators in accordance with their obligations under the Rome Statute. As discussed in Section 6.2, Mwatana and partner organizations submitted a joint communication to the ICC in December 2019, requesting the ICC Prosecutor to open an investigation into the criminal liability of Italian and other European government officials and arms exporters for their alleged role in possible war crimes committed in Yemen.

Criminal complaint against French arms manufacturers

On June 2, 2022, Mwatana for Human Rights, ECCHR, and Sherpa, with support of Amnesty International France, filed a criminal complaint with the Paris Judiciary Tribunal against French arms companies Dassault Aviation, Thales, and MBDA France. The complaint requests an investigation into the possible complicity of the arms companies in war crimes and crimes against humanity allegedly committed by the Saudi/UAE-led coalition in Yemen. These international crimes were potentially enabled by their arms exports to Saudi Arabia and the UAE, amid abundant evidence of unlawful attacks on civilians by the coalition in Yemen. The complaint is currently being considered by the French authorities.¹⁷¹ The complaint is based on the facts included in the communication to the ICC submitted by Mwatana, ECCHR, and other partner organizations in December 2019, which also names the aforementioned French arms companies because of their potential complicity (see Section 6.2).

6.4. Ad hoc international criminal tribunal

The UN Security Council could establish an ad hoc international criminal tribunal for Yemen under Chapter VII of the UN Charter. Precedents for this justice option are the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International

170 Ibid.

171 Mwatana for Human Rights, 'Aiding and Abetting War Crimes in Yemen: Criminal Complaint Submitted Against French Arms Companies' (June 2, 2022), <https://mwatana.org/en/fr-crims/>.

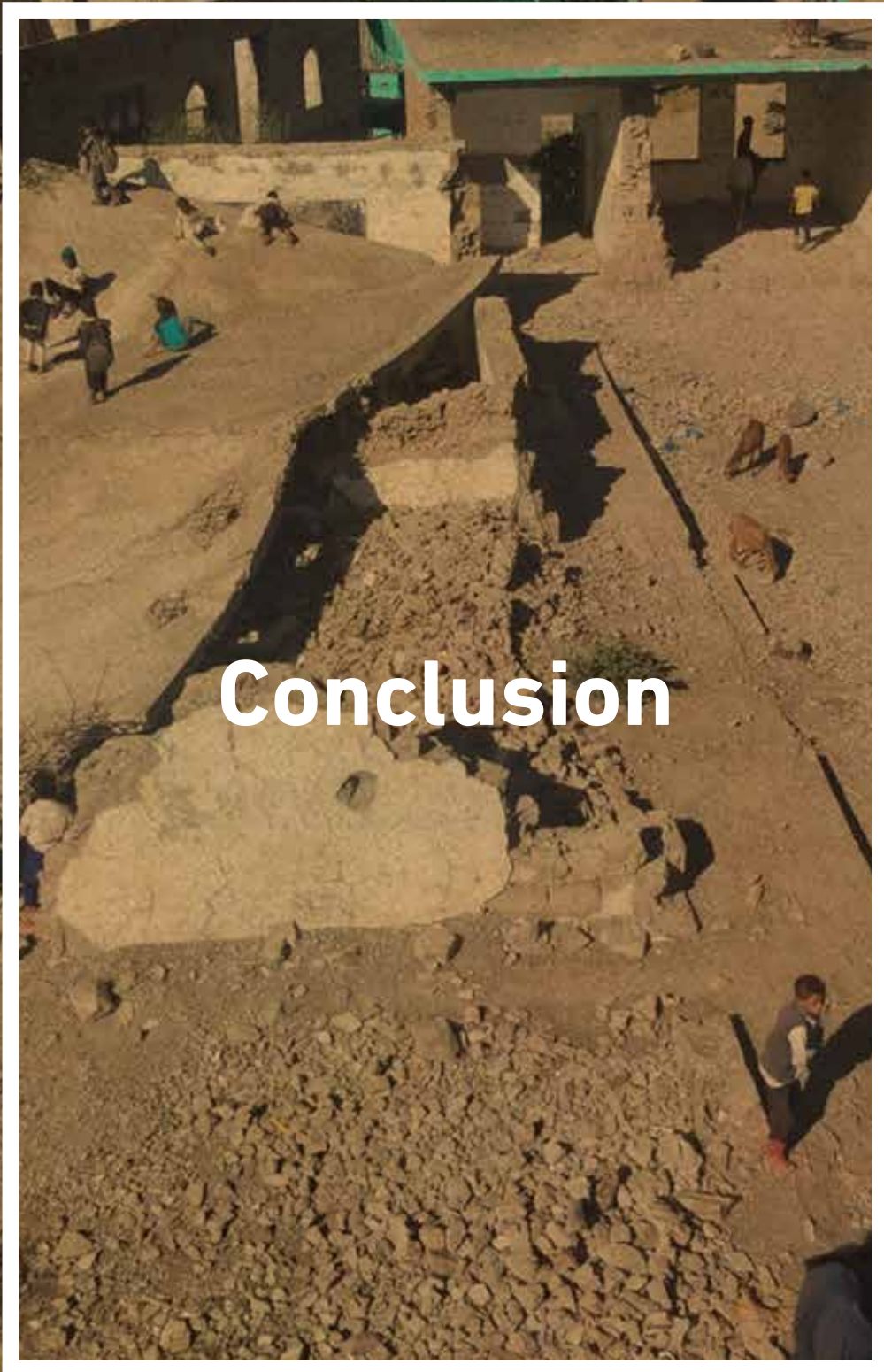
Criminal Tribunal for Rwanda (ICTR).¹⁷² The creation of an international accountability avenue dedicated exclusively to trying international crimes committed during the conflict in Yemen could offer distinct advantages. This new avenue would be expected to be more tailored to the Yemen context than other available avenues. Additionally, a fully international tribunal would be detached from Yemen's politicized domestic legal system that has been severely affected and fragmented because of the war. This would ensure the independent and impartial pursuit of justice. Based on past examples, an ad hoc tribunal would have its seat outside of Yemen, for example the ICTY was situated in The Hague (the Netherlands) and the ICTR in Arusha (Tanzania). Additionally, like the ICTY and the ICTR, the tribunal could consist of only international staff. A crucial preparatory measure would be the establishment of an independent international criminally-focused investigative mechanism for Yemen to collect and preserve vital evidence. Without sufficient evidence, successful prosecutions of perpetrators are simply not possible (see further Section 6.1.1).

Although an ad hoc international criminal tribunal established by the UN Security Council would eliminate the necessity of Yemen's consent, it would still require the agreement of all permanent Council members with veto power. However, current political dynamics in the UN Security Council make it highly unlikely that the Council members would agree to the establishment of such an ad hoc tribunal (see Section 6.2). An additional obstacle is that States have become less interested in creating such costly international tribunals. This type of criminal tribunal should also have become redundant now that the UN Security Council can refer situations warranting international justice action – like the situation in Yemen – to the ICC as a permanent international criminal court. For these reasons, a UN Security Council referral seems more likely than the establishment by the Council of an ad hoc tribunal for Yemen, although the former also remains a remote possibility.

As part of efforts to secure accountability for international crimes committed in Syria, it has been suggested that the UN General Assembly might be able to establish an ad hoc international criminal tribunal. However, it is questionable whether the General Assembly has the power to do so under the UN Charter. The UN General Assembly cannot issue resolutions that bind member States and establish a tribunal with compulsory legal authority over individuals or States.¹⁷³

172 UNSC Resolution 827 UN Doc S/RES/827 (May 25, 1993) p 2, as amended, [https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F827\(1993\)&Language=E&DeviceType=Desktop&LangRequested=False](https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F827(1993)&Language=E&DeviceType=Desktop&LangRequested=False); UNSC Resolution 955 UN Doc S/RES/955 (November 8, 1994) Annex, [https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F955\(1994\)&Language=E&DeviceType=Desktop&LangRequested=False](https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F955(1994)&Language=E&DeviceType=Desktop&LangRequested=False).

173 Derek Jinks, 'Does the U.N. General Assembly Have the Authority to Establish an International Criminal Tribunal for Syria?' Just Security (May 22, 2014), <https://www.justsecurity.org/10721/u-n-general-assembly-authority-establish-international-criminal-tribunal-syria/>.



Conclusion

The pursuit of justice for international crimes and other violations of international law committed in Yemen must be urgently prioritized. The limited measures taken to date have been wholly inadequate to bridge the vast accountability gap and ensure victims' right to access justice. Achieving long-lasting peace in Yemen requires working toward comprehensive criminal accountability. This involves addressing perpetrators from the various conflict sides and those supporting them, and all international crimes and violations that are relevant to the war in Yemen. Comprehensive accountability excludes any form of one-sided or partial justice and recognizes the impermissibility of amnesties under international law. Justice for the people of Yemen also requires reparations for the millions of civilian victims that have suffered unimaginable harms and destruction at the hands of the warring parties.

International action is urgent and necessary. The domestic judicial systems of the warring parties do not constitute available avenues to pursue accountability. The international community bears an important responsibility to ensure justice for the atrocious crimes that have been and continue to be perpetrated against civilians in Yemen. This report has shown that with political will and courage, much can be done to immediately pursue pathways to justice. Victims and affected communities cannot be asked to wait any longer.

An essential first step for any future accountability proceedings is the timely collection and preservation of evidence of international crimes committed by the different warring parties in Yemen. The creation of an independent international criminally-focused mechanism for Yemen by the UN Human Rights Council and/or UN General Assembly should happen without delay. This UN-mandated mechanism can begin laying the groundwork for criminal justice so that accountability avenues can be effectively exploited now and in the future. Such a mechanism may also make an important contribution to broader transitional justice measures, such as reparations or truth-seeking. A truly independent, international mechanism would overcome the failures of the warring parties' investigative bodies to ensure accountability, while also preventing war criminals from being granted *de facto* amnesty for lack of sufficient evidence.

The international community should also go a step further by immediately referring the situation in Yemen to the ICC. The grave situation in Yemen clearly warrants an urgent referral. Leading local and international human rights organizations are encouraged to consider joining their efforts in an independent civil society investigation and reporting mechanism to ensure that demands for accountability and justice move to concrete action. Third States are urged to pursue Yemen-related cases in their own jurisdictions based on universal jurisdiction or other jurisdictional grounds. While foreign domestic courts likely provide the more promising pathway under current con-

ditions, they are not without considerable obstacles. Therefore, close cooperation in Yemen-related cases should be fostered to maximize the prospects of prosecutions. This includes collaboration with other third-State and international investigative and prosecutorial authorities, such as the ICC in cases of arms transfer complicity, international actors, such as UN bodies, and independent CSOs engaged in documentation and/or support to victims. Institutional networks can also be utilized to strengthen such cooperation. A UN criminally-focused mechanism would play an important role in this accountability ecosystem as a justice facilitator for criminal proceedings.



Recommendations

To ensure criminal accountability and justice for victims, the following key recommendations are considered most urgent for setting a course towards sustainable peace in Yemen:

8.1. To all parties to the armed conflict in Yemen

- Conduct independent, impartial, prompt, thorough, effective, credible, and transparent investigations into all alleged or suspected violations of international law and international crimes since the conflict began, hold those responsible to account in accordance with international norms and fair trial standards, and promptly release public information about all accountability measures taken to date.
- Urgently provide civilian victims with credible remedies for violations and international crimes, including equal and effective access to justice, prompt and adequate reparation for harm suffered, and access to relevant information concerning violations and reparation mechanisms.
- Cooperate fully with UN entities, the International Criminal Court, and other criminal investigators, where appropriate, so that allegations of unlawful conduct, including international crimes, by all parties to the conflict can be properly investigated, documented, and the perpetrators thereof brought to account.

8.2. To the UN and the international community

- The UN Human Rights Council and/or the UN General Assembly should immediately create an independent international criminally-focused investigative mechanism for Yemen whose mandate includes investigating violations of international humanitarian law and human rights violations and abuses and publicly reporting on the human rights situation in Yemen, as well as collecting, consolidating, preserving, and analyzing evidence and preparing case files in order to facilitate and expedite fair and independent legal proceedings, in accordance with international standards, in national, regional, or international courts or tribunals.
- The UN Security Council should immediately refer the situation in Yemen to the International Criminal Court to conduct a full investigation into alleged international crimes committed by all parties to the conflict and into actors that may be complicit in them.
- Support the integration of human rights into peace negotiations, rejecting any steps that would undermine respect for human rights, accountability, and redress

(such as amnesties, immunities, one-sided and partial justice) and supporting processes towards effective transitional justice.

8.3. To States

- Collect and preserve all evidence relating to the commission or contribution to international crimes in Yemen available within your jurisdiction; exercise universal and other forms of jurisdiction with a view to prosecuting alleged perpetrators of these crimes; ensure that victims of these crimes can exercise their rights under human rights law and relevant legal instruments; and cooperate closely with other competent third-State and international investigative and prosecutorial authorities, international actors, and independent civil society organizations engaged in human rights documentation and/or the provision of support to victims and affected communities.
- Support independent civil society organizations to strengthen their capacity to monitor and document violations and abuses of international humanitarian law and international human rights law, and crimes under international law, committed in Yemen.

8.4. To civil society

- Consider establishing an independent civil society investigation and reporting mechanism that joins the forces of independent local and international human rights organizations to advance accountability and justice.
- Continue investigating, documenting, and publicly reporting on violations and abuses of international humanitarian law and international human rights law possibly amounting to crimes under international law committed by all sides to the ongoing armed conflict in Yemen.

9. List of abbreviations

- CAAT – Campaign Against Arms Trade
- CSOs – Civil society organizations
- ECCHR – European Center for Constitutional and Human Rights
- ICC – International Criminal Court
- ICTY – International Criminal Tribunal for the former Yugoslavia
- ICTR – International Criminal Tribunal for Rwanda
- JIAT – Joint Incidents Assessment Team
- NCIAVHR – National Commission to Investigate Alleged Violations of Human Rights
- STC – Southern Transitional Council
- UAE – United Arab Emirates
- UK – United Kingdom of Great Britain and Northern Ireland
- UN – United Nations
- UNGA – United Nations General Assembly
- UNGEE – United Nations Group of Eminent International and Regional Experts on Yemen
- UNHRC – United Nations Human Rights Council
- UNOCHA – United Nations Office for the Coordination of Humanitarian Affairs
- UNOHCHR – United Nations Office of the High Commissioner for Human Rights
- UNPoE – United Nations Panel of Experts on Yemen
- UNSC – United Nations Security Council
- USA – United States of America