

International Legal Principles and their Application to the Conflict in Yemen

For the attention of a Parliamentary Committee on Arms Export Controls (“The Committee”)

Introduction

1. The application of the Consolidated EU and National Criteria on Arms Exports (“The Consolidated Criteria”) requires an accurate assessment of the recipient’s past compliance with international humanitarian law (“IHL”). This legal note is intended to aid the Committee’s analysis of the conduct of hostilities by the Saudi/UAE-led coalition (the “Coalition”) in Yemen. It covers the applicable law and provides a brief analysis of a selection of observed patterns of violations of international law, which we believe are important in relation to assessing the risk of future violations. In this way, we seek to assist the Committee’s work in scrutinising the government’s decisions against the Consolidated Criteria.
2. Criterion 2c of the Consolidated Criteria provides that “having assessed the recipient country’s attitude towards relevant principles established by international human rights instruments, the Government will... not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law”.
3. In its public statements, the Coalition espouses a strong commitment to IHL compliance, stating that it operates a no-strike list (“NSL”) amounting as of 2017 to over 33,000 locations¹ and follows a robust procedure designed to ensure civilian protection.² In February 2016, the Coalition established a body named the Joint Incident

¹ See, for example, this statement on the website of the Saudi embassy:
https://www.saudiembassy.net/sites/default/files/FactSheet_Military%20Targeting%20in%20Yemen_May%202017.pdf

² See, for example, the second witness statement of Peter Watkins as filed in R(Campaign Against Arms Trade) v Secretary of State for International Trade: <https://www.caat.org.uk/resources/countries/saudi-arabia/legal-2016/watkins-statement-2.pdf>

Assessment Team (“JIAT”)³ as a means of employing ‘operational learning’,⁴ improving targeting procedures and ensuring accountability for transgressions. JIAT claims to “stand at equal distance from the parties”.⁵

4. This note is based on what can be ascertained about the Coalition’s conduct as evidenced by the detailed factual information and covering overview submitted by Mwatana for Human Rights (“Mwatana”) and the Global Legal Action Network (“GLAN”), (“The Evidence”).

Applicable law

5. IHL is a body of law applicable to armed conflict which imposes limits to how parties to a conflict may conduct hostilities.⁶ At its core, IHL balances the demands of military necessity and the imperative to minimise human suffering in war.⁷ The Committee will be readily familiar with the core principles of IHL: the protection of civilians, distinction, proportionality and precautions. These principles entail interrelated legal obligations. While articulated extensively in the treaty law governing international armed conflicts, they are widely recognised as reflecting customary international law, are binding on all states, and are also applicable in non-international armed conflict.⁸ The UK’s own *Manual of the Law of Armed Conflict* confirms that the definitions used

³ R (Campaign Against Arms Trade) v Secretary of State for International Trade [2017] EWHC 1726 (QB), Divisional Court Judgment para 130

⁴ <https://www.justsecurity.org/60766/grading-pompeo-certification-yemen-war-civilian-protection-time-reconsideration/>

⁵ Saudi Press Agency: <https://www.spa.gov.sa/1812902>

⁶ IHL is derived from treaty law, much of which has, over time, crystallised into customary international law (“CIL”), thereby existing independently of treaty law and being applicable to all states. The conflict in Yemen is classified as a Non-International Armed Conflict (“NIAC”). As such, the treaty law which is applicable is Common Article 3 and Additional Protocol II (“APII”) to the Geneva Conventions of 12 August 1949. Additionally, much of Additional Protocol I (“API”), which was drafted to apply to International Armed Conflict, is now recognised as CIL, applicable in both international and non-international armed conflict. Violations of IHL entail the responsibility of the state when they are consequences of acts attributable to the state, even if when carried out contrary to instructions. The term “serious violations of international humanitarian law”, for the purposes of the Arms Trade Treaty and related domestic regimes, is not synonymous with “war crimes” – although serious violations of IHL, when committed with intent, are war crimes.

⁷ E.g. Yoram Dinstein (2015) *Military Necessity* Max Planck Encyclopaedia of Public International Law

⁸ The war in Yemen is classified as a non-international armed conflict because it is principally being fought between the Yemeni government and the Houthi movement. Further discussion of this classification is beyond the scope of this note.

in respect of international armed conflicts should be treated as applicable to non-international armed conflicts.⁹ The analysis below reflects this.

6. The principle of **distinction** dictates that attacks may be conducted only against the enemy's armed forces and military objectives. There must be a clear distinction between the armed forces and civilians, or between those who take a direct part in hostilities and those who are protected against direct attack. This is an intransgressible rule and the cornerstone of IHL. Insofar as objects are concerned, "military objectives" are defined according to a two-stage process. This definition is:

*"... those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."*¹⁰

7. Civilian objects are defined negatively as 'objects which are not military objectives' – that is, anything which does not fit the definition of 'military objectives'.¹¹ Under IHL, soldiers "must both *not try* to kill civilians and *try not* to kill civilians".¹² Attacks in violation of the principle of distinction include attacks directed against civilians or civilian objects as well as attacks which are **indiscriminate**. The former are attacks specifically aiming at an identified civilian object. The latter – indiscriminate attacks – are attacks that involve a failure to distinguish between military and civilian objectives.¹³ An indiscriminate attack is 'no better than' a direct attack against civilians

⁹ UK Ministry of Defence (2014), *The Manual of the Law of Armed Conflict*, at 15.9.1.

¹⁰ Article 52(2) AP I. This definition has become accepted as applicable in NIAC – see ICRC database Rule 8. (emphasis added).

¹¹ Article 52(1) API. This definition has become accepted as applicable in NIAC – see ICRC database Rule 9. See also 15.16.1 of the UK Military Manual on civilian objects: "*attacks on the following are prohibited unless they are being used for military purposes: civilian dwellings, shops, schools, and other places of non-military business, places of recreation and worship, means of transportation, cultural property, hospitals, and medical establishments and units.*"

¹² Michael Walzer, *Just and Unjust Wars* (Basic Books 2nd edn 1977) 155–6.

¹³ Indiscriminate attacks are those: (a) which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by IHL; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. The definition is an expression of customary international law applicable in NIAC, and is derived from Article 51(4)(a) API.

or civilian objects since ‘either course of action is equally irreconcilable with the cardinal principle of distinction.’¹⁴

8. Once a military target is identified, consideration of the legality of an attack involves a further assessment of whether the attack could cause **disproportionate** incidental civilian harm.¹⁵ In furtherance of compliance with distinction and proportionality, IHL requires belligerents to take all feasible **precautions** when conducting an attack as part of the practical application of the principle of distinction.¹⁶ Article 57 Additional Protocol I lays out distinct obligations for precautions to be taken before and during an attack both in order to verify the military nature of the target and in order to avoid or at least minimise incidental civilian harm,¹⁷ and this is reflected in the UK Military Manual at para 15.22 (as amended).
9. Respect for the principles of distinction, proportionality and precaution necessarily requires the strict incorporation of IHL in **operational practice**, along with **clear procedures** of review and accountability.¹⁸ A more developed application of these principles follows, with reference to the factual information.

Patterns of Violations

10. The evidence sets out the factual summaries of air strikes which appear to constitute serious violations of IHL in relation to a number of protected objects and prohibited

¹⁴ Yoram Dinstein, 2016, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 3rd Edition. Whilst this text covers IAC, much of the commentary pertains to the meaning of rules that have equal force in NIAC, such as those prohibiting indiscriminate and disproportionate attacks.

¹⁵ An attack on a legitimate military objective will be unlawful if it “*may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.*” Such attacks are characterised by Article 51(5)(b) API as “indiscriminate” attacks however, they are given their own category in modern IHL terminology – see ICRC database Rule 14, which confirms that the proportionality rule is applicable in NIAC as a rule of customary international law.

¹⁶ Prosecutor v. Stanislav Galic, IT-98-29-T, Judgment (TC) 5 December 2003, para. 58; Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, at para. 28 (recalling that commanders deciding on an attack have duties (1) to do everything practicable to verify that the objectives to be attacked are military objectives; (2) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimising incidental civilian casualties or civilian property damage; and (3) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage).

¹⁷ Article 57(2) API

¹⁸ For an example of a US collateral damage assessment process, see Cross, Dullum & Jenzen-Jones (2016)-*Explosive Weapons in Populated Areas*, Armement Research Services, 45

behaviours. References to the covering overview begin with the initials ‘CO’, while pages in the annex can be identified with the letter ‘A’. This section applies the law presented above to that evidence and provides, for the Committee’s convenience, a brief legal analysis of recurring patterns in the Coalition’s conduct. This analysis is not exhaustive – instead, the selection of patterns aims to illustrate key serious violations of IHL which are substantially at odds with the Coalition’s assurances and espoused commitment to IHL.

Patterns by object type: objects indispensable to the survival of the civilian population and economic targets

11. The identification of patterns by object type can allow inferences to be made about the motivations of the attacker. One such pattern has been the repeated destruction of critical infrastructure and commercial targets (collectively referred to in this note as “economic targets”).¹⁹ The focus on these attacks also allows for an applied explanation of IHL’s core principles, which are relevant irrespective of the category of civilian object, and Coalition adherence to those principles.

12. The evidence describes attacks on factories [A271, A272, A275], markets [A1, A19, A32, A263, A265, A278, A282] bridges [A261, A274], a fuel station [A285], a water facility [A286], farms [A270, A277] and the residences of those who maintained civilian infrastructure [e.g. A93, A265]. Moreover, the Yemen Data Project has logged in its dataset 133 air raids on ‘water & electricity’ targets which include, *inter alia*, water stations, wells, pumps, desalination plants and irrigation canals, 667 on farms, 217 on ‘market places’ and 68 on ‘private factories’.²⁰

¹⁹ It should be noted here that the evidence also references repeated attacks in residential areas, which are a prominent feature of the Coalition’s campaign [e.g. A52, A93, A132, A174, A234, A240, A260, A262, A264, A267, A273, A276, A280, A281, A284, A285, A287]. However, in the interests of brevity, this note focuses on attacks on economic targets.

²⁰ Yemen Data Project is an independent Yemeni organisation which records airstrikes and notes the status of the objects as at the beginning of the conflict. It does not perform analysis of potential change of use and does not verify attacks through field investigations. As such, each ‘data point’ in the YDP dataset is not put forward as a violation of IHL per se – it is merely intended to be used as bulk data. Visit: <https://www.yemendataproject.org/>. Data ascertained as of November 2019.

13. Under customary international law, objects indispensable to the survival of the civilian population (“OIS”) may not be attacked.²¹ In addition to being consistent with the general principle of distinction (such objects are civilian in principle), this is a corollary of the explicit rule against starvation of civilians as a method of warfare. OIS include, but are not limited to ‘food stuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.’²² The meaning of ‘objects indispensable’ is context-dependent, and in this regard it is important to note the water-scarce Yemeni nation’s dependence on irrigation wells and pumps (which require fuel), imports of food and essential items which need to be transported, and fuel for that transportation.²³
14. As with all civilian objects, OIS can become military objectives if they are put to a military use or purpose, and indeed this is often offered as a justification by the Coalition for such attacks [e.g. A286]. If such a situation is suspected by the attacking party, there are a number of specific considerations relevant to an assessment of the legality of destroying them. First, the definition of “military objectives” cannot be interpreted so broadly as to render it meaningless. Markets, factories and farms are not military objectives unless *the specific object* makes a contribution to *military* action at the time of the attack – this would not include making a general contribution to the economy of the adversary. Creating harsh conditions in order to reduce the adversary’s support among the civilian population is not a lawful motivation for launching attacks.
15. Second, in relation to a suspected change of use, an attacking party must actually have evidence (including intelligence) demonstrating an identifiable use or an intention to put a civilian object to military use – targeting an object on the basis of an *inferred* change of use is unlawful.²⁴ Key in this determination is the taking of all feasible precautions to determine a concrete change of use of civilian objects. The military advantage must be definite, not speculative or theoretical: ‘Otherwise, an adversary force could simply range around a country destroying all its bridges and thus wreaking

²¹ Article 14 Additional Protocol II and ICRC study Rule 54.

²² Article 14 Additional Protocol II and ICRC study Rule 54.

²³ Global Rights Compliance policy brief: *Accountability for Mass Starvation: Starvation in Yemen*; September 2019. See <https://starvationaccountability.org/wp-content/uploads/2019/09/WPF-GRC-POLICY-BRIEF-Accountability-for-Starvation-Yemen-Sept-2019.pdf>

²⁴ Dinstein (2015), para 244

indiscriminate havoc upon civilian objects.’²⁵ At this juncture, we also note Mwatana’s reporting that “most” of the fuel stations in Saada city were bombed within three days during 2015,²⁶ and highlight that the YDP dataset has logged 779 raids on transport infrastructure, including around 170 bridges.²⁷

16. Third, if a military use or purpose has been identified, the attack must not be launched if to do so will result in disproportionate harm to civilians. In the case of OIS in particular, the principle of proportionality applies not only to the *immediate* effects²⁸ of the attack but also to its ‘reverberating effects’.²⁹ By way of example of immediate effects, the evidence covers the bombing of al Dhaleel bridge [A261], which the Coalition claimed was being used by the Houthis but was “clear of civilians” at the time of the attacks. According to Mwatana, the attack killed or wounded dozens of civilians, many of whom were hit by the “second-wave” attack, launched about ten minutes after the first, while rescuers were present.

17. In the case of the July 2018 bombing of Nushoor water supply facility [A286] which supplied 10,500 people with safe drinking water, the Coalition’s response was that the facility was a warehouse being used to store weapons.³⁰ Taking into account the

²⁵ Shue, Henry and Wippman, David (2002) “Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions.” *Cornell International Law Journal* vol. 35, No. 3, Article 7, p 561. Available at <https://scholarship.law.cornell.edu/cilj/vol35/iss3/7/>

²⁶ Mwatana for Human Rights, ‘Blind Air Strikes’ (2017) https://mwatana.org/wp-content/uploads/2017/10/Blind-Airstrikes-Report_En.pdf, 36

²⁷ YDP data can include repeat raids on the same objects.

²⁸ Also referred to as ‘first tier collateral damage and incidental injury (i.e. damage and injury directly caused by the kinetic force of the attack’ – Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 *Yale Hum. Rts. & Dev. L.J.* 143, 168 (1999), cited by Shue and Wippman p. 567

²⁹ For an analysis of the law in the context of dual-use objects, see also Morris Cotter (2018), *Military Necessity, Proportionality and Dual-Use Objects*, *Journal of Conflict and Security Law*, Vol. 23, No. 2; and Isabel Robinson and Ellen Nohle (2016) *Proportionality and precautions in attack: The reverberating effects of using explosive weapons in populated areas* *International Review of the Red Cross*, 98 (1), 107-145. There are varying degrees of remoteness of ‘reverberating effects.’ For example, in the case of a water treatment plant, the deprivation of water is quite a direct and foreseeable consequence and could even be considered an immediate effect (See Cotter, p.298 on ‘limited proportionality.’) In the case of a factory, the loss of jobs and consequent economic disadvantage is more remote. It is beyond the scope of this note to cover this topic in its entirety, however it is worth noting that the kinds of effects flowing from the destruction of OIS are on the more “immediate” end of the spectrum.

³⁰ It should be noted that satellite imagery depicts two small water tanks at Nushoor; it is not currently understood how those could have been used to store weapons. See: <https://www.google.com/maps/place/17%C2%B002'25.1%22N+43%C2%B055'06.6%22E/@17.040152,43.9180668,269m/data=!3m1!1e3!4m5!3m4!1s0x0:0x0!8m2!3d17.0403028!4d43.9184944> (coordinates taken from UN Panel of Experts Report for 2019). In light of this and the general credibility of the Coalition’s statements (see below), this claim should be treated with scepticism.

‘reverberating effects’, any attack aimed at destroying a weapons store in these circumstances must confer an advantage that would effectively need to justify/outweigh depriving 10,500 civilians of water. The gravity of such effects are compounded by the widely reported humanitarian catastrophe ongoing in Yemen, and should at least indirectly inform this proportionality calculus. Further, the facility was on the Coalition’s no-strike list,³¹ which would have allowed the Coalition to accurately estimate the likely civilian impact, even if the facility was being used in military action at the time of the attack.

18. It is pertinent to recognise that the scale of the bombings of economic targets does not lend itself to an interpretation of such attacks as a series of either legitimate attacks or mistakes, but is more indicative of a deliberate military strategy . The overall pattern of attacks strongly suggests a policy aimed at creating intolerable living conditions. As set out at para 14 above, such a motivation for launching attacks would be unlawful. Further, the wider context of the Coalition’s land, sea and air blockade is highly relevant to attacks on OIS in two respects. First, the reverberating consequences of attacking OIS are amplified by the already extant shortages imposed by the blockade,³² which affects the proportionality analysis. Second, it allows for inferences to be made about the reason for the bombings.³³ Analysis of Coalition motivation behind the destruction of essential transport, irrigation and food infrastructure cannot be separated from the concurrent blockade of fuel and essential supplies and the non-payment of civil servants’ salaries in Houthi-controlled areas,

19. The prohibition on deliberate starvation of the civilian population as a method of warfare is in the spotlight following the unanimous decision by the Assembly of States Parties on 6 December 2019 to amend the Rome Statute of the International Criminal

³¹ UN Panel of Experts Report for 2019

³² For completeness, we do not argue that the Coalition is solely responsible for shortages of essential items in Yemen – other parties, in particular the Houthis, have confiscated supplies, and there were pre-existing shortages. Further, price rises linked to the conflict (in particular the non-payment of salaries) have meant that there are people starving in areas where food is available. However, the blockade (in combination with the destruction of infrastructure) has arguably had the most significant impact.

³³ See Global Rights Compliance policy paper, *The Crime of Starvation and Methods of Prosecution and Accountability* at para. 104, which lists four factors it suggests are likely to provide “cogent evidence of a perpetrator’s intent, criminal or otherwise”. <https://sites.tufts.edu/wpf/files/2019/06/The-Crimes-of-Starvation-and-Methods-of-Prosecution-and-Accountability.pdf>

Court to include starvation as a war crime in non-international armed conflicts.³⁴ The historic amendment aligns international criminal law (ICL) with the well-established customary international law and IHL position, that the deliberate starvation of civilians is a crime in both conflict designations. The Rome Statute criminalizes: ‘Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.’³⁵

Patterns by behaviour: failure to take all feasible precautions to verify targets

20. The Coalition’s purported procedures for targeting were set out in a statement made by the Kingdom of Saudi Arabia in May 2016, and were further elaborated upon in the UK government’s defence to judicial review proceedings brought by Campaign Against the Arms Trade.³⁶ They set out a division between so-called pre-planned, dynamic and combat engagement strikes. Pre-planned strikes represent the default procedure,³⁷

³⁴ Global Rights Compliance and the World Peace Foundation’s project [“Accountability for Mass Starvation: Testing the limits of the law”](#) has actively supported the amendment. GRC in particular have collaborated with the Swiss throughout 2019, and the Amendment has underpinned all of GRC’s starvation outputs, such as: [high-level panel events](#), including co-sponsoring with the Swiss the only side event during 18th Session of the Assembly of the State Parties (ASP 18) which focussed on the starvation amendment; [policy papers](#), advocacy [interviews](#), and analysis. The new crime will be inserted under Article 8(2)(e). For more see [www.starvationaccountability.org](#).

³⁵ Noting that under the Article 8(2)(e) crime in a NIAC the wording is slightly different omitting the reference to the Geneva Conventions. For the first authoritative assessment of the ICL war crime of starvation see, W. Jordash, C. Murdoch, J. Holmes, [Strategies for Prosecuting Mass Starvation](#) (2019) Journal of International Criminal Justice: Starvation Special Issue (‘Jordash *et al* Starvation Article’); For a detailed analysis of the legal frameworks on starvation see [Jordash *et al* Starvation Article](#); In see the GRC WPF Compendium of Expert Policy Papers entitled *Accountability for Mass Starvation: Testing the Limits of the Law* which foreshadow the publication of the forthcoming Starvation Textbook, the first authoritative assessment of starvation for practitioners in international law, policy makers, and related humanitarian actors. See GRC’s Starvation Legal Policy Paper available at [www.starvationaccountability.org](#).

³⁶ R (Campaign Against the Arms Trade) v Secretary of State for International Trade [2017] EWHC 1726 (QB), Divisional Court Judgment para 135 & Second Witness Statement of Peter Watkins, from para 18 <https://www.caat.org.uk/resources/countries/saudi-arabia/legal-2016/watkins-statement-2.pdf>

³⁷ Para 18.1 of the Second Watkins statement states: “Pre-Planned targets are those identified for action under the Saudi-led Coalition’s RoE where the actions of the target are not immediately directly threatening Coalition forces or civilians. All the targets are authorised by the Delegated Authority and subject to a Targeting Clearance Board (TCB), which assists the decision-making and should include a formal Collateral Damage Estimate2 (CDE) in the Saudi MOD or SAOC. The Delegated Authority is an identified suitably experienced and authoritative senior military officer. Targets are planned and prepared in accordance with the Air Tasking Order (ATO). It means that the target is . agreed before the aircraft takes off, although the pilot may still check the target before he conducts the strike.” The TCB is defined in footnotes as “a panel of suitable qualified military personnel that assists the Delegated Authority with the approval of analysed targets and ensures that there are not circumstances that would lead to a conclusion that a target is no longer valid.” A CDE is said to provide “a formal process which allows appropriately qualified military personnel to assist the commander as he considers risks against a target in terms of military necessity and proportionality.”

whereas dynamic strikes are those which are conducted in response to time-sensitive threat or opportunity, thereby precluding the completion of the default pre-planned process. The Coalition does not claim that their targeting process for dynamic strikes is significantly different from the pre-planned process. For example, the procedure requires a Collateral Damage Assessment and clearance by an external Target Clearance Board, whether the strike is dynamic or pre-planned.³⁸

21. Alarminglly however, contrary to claims made by the Coalition, it is reported that dynamic attacks are conducted as the result of exchanges between un-trained sources inside Yemen and Coalition pilots - *without* approval by the central command rooms. Furthermore, the pilots reportedly do not have access to the NSL.³⁹ This is entirely consistent with incident reports submitted by Mwatana and GLAN in which the locations would have, or should have, been on the NSL [CO3]. Some reports claim that at least 80% of airstrikes are treated as ‘dynamic.’⁴⁰ This is a systemic issue which the Committee ought to consider when assessing the likelihood of future violations of IHL.

22. Even where dynamic attacks are coordinated from the command and control room, the Coalition’s conduct appears inconsistent with the application of its stated standards. In the case of the Maswadah incident [A198], a leaked US military document showed that a 500 lb munition was launched against a tent despite no intelligence to suggest that it was a military objective. The decision to attack was made within 50 minutes – the family inside the tent survived, because the bomb missed its target and the repeat airstrike was cancelled after a woman and four children were seen on the drone footage, fleeing the tent.

³⁸ Para 18.2 of the Second Watkins statement states: “Dynamic targeting prosecutes targets that have been identified too late for the routine [Air Tasking Order] cycle, or not selected for action in time to be included in the Pre-Planned targeting cycle, and therefore have not been scheduled. These targets are subject to the same targeting process, including a [Target Clearance Board]. This allows less time for target development, including intelligence collection and verification, which increases the risk of mistakes. In my previous Witness Statement, the term dynamic targeting has also encapsulated Time Sensitive Targets, which are those targets requiring immediate response because they represent a serious and imminent threat to Coalition forces, or are fleeting targets of opportunity that could have a significant military advantage if struck. Again, these strikes should be subject to the same target clearance processes and [Collateral Damage Estimate]”

³⁹ <https://www.nytimes.com/2019/05/22/world/middleeast/saudi-yemen-airstrikes-civilians.html>

⁴⁰ Interview with confidential source.

23. Recalling that IHL requires the identification of specific military targets (see para 16 above), a manifest failure to sufficiently verify contemplated targets through precautionary measures would constitute a violation of IHL. Mistaken identification of targets that result from a failure to take feasible precautions, particularly when consequential of “the nonchalant state of mind of the attacker” can lead to indiscriminate attacks in violation of the principle of distinction.⁴¹

Patterns by behaviour: failure to take all feasible precautions to avoid, or at least minimise, incidental civilian harm

24. The evidence observes a further pattern of attacks on crowded civilian gatherings using weapons with powerful effects [e.g. A32, A132, A179, A263, A265, A268, A269, A282]. The nature of the weapon used would indicate that, even if there was a clear military objective which was being targeted, the overall effect of the attack was excessive. The number of civilian casualties would be clearly foreseeable and could have been reduced by the use of a weapon with less powerful effects. This would indicate breaches of both the principle of proportionality and that of precautions.

25. Moreover, as noted above, precautions must be taken for the **minimisation** of incidental civilian harm – not just for the verification of targets. In some cases of attacks on markets, witness evidence suggests that small numbers of fighters may have been present [e.g. Zabid market in which 40 civilians were killed – A263]. Even if there is some evidence to suggest the presence (real or perceived) of a military target, the absence of precautionary measures to take into account the effects on civilians and to avoid or minimise such effects would amount to an indiscriminate attack. Failures to take such precautions may be reflected in the choice of weapon, the timing of the attack, or the absence of prior warning given to civilians.

26. To the extent that it is feasible not to employ a weapon which will inevitably kill or injure a large number of civilians present at the site of an attack, there is an obligation

⁴¹ Dinstein (2016), p. 147, par. 394.

to do so under the principle of proportionality. The evidence shows that the smallest bombs employed routinely by the Coalition have extremely large blast and fragmentation areas which often extend further than the entire area of the targeted markets [e.g. A32, A263, A265, A278, A282]. The attacker must therefore consider whether the weapon used, in the circumstances, is ‘of a nature to strike military objectives and civilians or civilian objects without distinction.’ If the answer to either is affirmative, the attack would be unlawful and must not be launched.

Patterns of failures to credibly investigate

27. The evidence includes a substantial (but non-exhaustive) list of incidents in which JIAT has concluded, based on information furnished by the Coalition, that the Coalition was not responsible for the attacks [CO10, A52, A132, A174, A260, A263, A264, A267, A278]. However, the Mwatana/GLAN evidence consists of photographs and witness testimony that is irreconcilable with those conclusions. In three of the cases that are denied, the evidence includes photographs of bomb fragments found at the locations [52, 132, 174].⁴² There are, in our view, three possible explanations for this discrepancy:

- i. The first is that the airstrikes are not being logged by the pilots and as a result genuinely do not appear when the Coalition seeks to cooperate with JIAT;
- ii. Second, is that the Coalition is supplying false information to JIAT. For example, in the case of the al Jawf pick-up truck bombing [A116], JIAT reviewed “video footage” showing ‘no persons on [the] surface [of the truck].’⁴³ In contrast, the families of those killed told Mwatana that there were 12 children and three middle-aged women on the back of the truck. It is difficult to accept that JIAT, in these circumstances, could have been reviewing the correct footage; and

⁴² The Coalition controls the airspace over Yemen, and the Houthi forces do not have the capacity to conduct airstrikes.

⁴³ The Coalition has released samples of high resolution drone footage detailing what is visible using its reconnaissance technology. For an example displaying a pick-up truck, see <https://www.youtube.com/watch?v=iN0wmSNAj68> at approximately 15.39. It is clear that the presence or absence of civilians could be determined.

iii. A third and final possibility is that JIAT releases statements that it knows to be false. The credibility of the head of JIAT, Mansour al Mansour, has been called into question in the covering overview of the evidence [CO14].

28. These irreconcilable contradictions are significant for the evaluation of the Coalition's IHL compliance. If the Coalition's statements concerning the circumstances of an attack are not reliable, the UK government should not treat the Coalition as a credible or decisive source of information to establish whether individual attacks took place, let alone whether they did or did not violate IHL. The Coalition has previously made claims as to the existence of military targets without any substantiation and in cases where the evidence shows that this was not the case [A116, A198, A269]: there is inherent inaccuracy in any risk assessment by the UK government that relies on such statements.

29. The severe shortcomings in the review and accountability mechanisms reflect the Coalition's "attitude" to, and its unwillingness and/or inability to adhere to, IHL. The failure to respect IHL constitutes a violation of the law itself.⁴⁴ Further, such deep-seated deficiencies in the Coalition's practices reveal that the review mechanisms in use by the Coalition are insufficient to eradicate the clear risk of future serious violations.

Conclusion

30. Even if the Committee were to generously take into account a theoretical possibility that some of the repeated high-civilian-casualty attacks were nonetheless lawful, the broader facts reveal a systemic disregard for the core principles of IHL. There are clear grounds to conclude that attacks upon such a wide range of economic targets, including OIS, infrastructure and commercial targets, are designed to create, and/or are clearly creating, intolerable conditions for the civilian population. The Committee must be led to the unavoidable conclusion that the Coalition repeatedly violates IHL. It is therefore

⁴⁴ Common Article 1 to the Geneva Conventions states: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances"

unsurprising that the United Nations Group of Eminent Experts last year called on States to prohibit the transfer of arms for use in Yemen.⁴⁵

31. The Coalition's record will be of grave concern to the Committee. The stark history of past IHL violations reveals a lack of precaution, limited incorporation and operationalisation of the law and, it must be feared, contemporaneous knowledge that serious IHL violations were being committed. In these circumstances, the risk is clear that future items or transfers might be used in the commission of yet further serious violations of IHL.

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⁴⁵ United Nations Group of Eminent Experts Report 2019,
https://www.ohchr.org/Documents/HRBodies/HRCouncil/GEE-Yemen/A_HRC_42_CRP_1.PDF para 933.