

2019

**COMMUNICATION UNDER ARTICLE 15 OF THE
ROME STATUTE OF THE INTERNATIONAL
CRIMINAL COURT REGARDING THE SITUATION IN
YEMEN**



مرکز حقوق کیفری بین المللی ایران

Iranian Center for
International Criminal Law



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of the International Criminal Court
Regarding the Situation in Yemen

Introduction

1. This Article 15 Communication brings the war crimes committed by the so-called Saudi-led Coalition against Yemeni civilians to the attention of the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC”). Iranian Center for International Criminal Law (“ICICL”), as a Non-Governmental Organization founded under the Dutch Law, presents the communication to make its contribution to put an end to impunity in Yemen.
2. The Communication is based on the probative and authentic evidence of war crimes collected since 2015 by multiple independent sources, including United Nations (“UN”) offices, international human rights organizations, and the media. In addition, the communication brings to the fore the legal basis for exercising the Court’s jurisdiction over the situation under consideration.
3. The Communication highlights the mass international humanitarian law violations perpetrated against the Yemeni civilian population by members of the Saudi-led Coalition, including Jordan, from 2015 to present. In the context and associated with an ongoing non-international armed conflict in Yemen, next to other members of the Coalition, Jordan as a State Party to the ICC has committed various war crimes as referred to in the Rome Statute. Although there are allegations against all parties to the ongoing conflict in Yemen, the claims against the Coalition’s members serve as the principal focus of this communication. This attention is reasoned by the fact that the Court’s jurisdiction in the current situation

may be exercised at least on the basis of personal jurisdiction that highlights those crimes committed by certain parties to the conflict, as referred to in this Communication.

4. The communication begins with a brief overview of the historical background against which the current armed conflict in Yemen is taking place to build up a more comprehensive image of the conflict's roots and causes. Then, the statutory requirements to select a situation, as referred to in Article 53, will be discussed to show that the situation under communication falls within the Court's jurisdiction and is admissible to initiate a full investigation into the alleged crimes.

Contextual Background

5. Yemen is located in the southwest of Asia, in the southern part of Arabian Peninsula along the Red Sea and the Indian Ocean and near South Arabia and Oman. This strategic location at the southern entrance of the Red Sea, which is a crossroads of trade and communication routes, has always influenced the history, culture, economy, and population of Yemen.¹ The main religion in Yemen is Islam and the most common denominations are Shafi'i Sunni (approximately 56%) and Zaidi Shia (42%).² North Yemen gained independence in 1918 after the fall of Ottoman Empire, and for 44 years Zaidi Shia Imams ruled the country³ until 1962 when Abdullah al-Salal led a revolution against the rule of Imams and proclaimed republic in North Yemen.⁴ On the other hand, Aden in South Yemen was administered as part of British India, and in 1937 became a British Colony. In 1967 with the support of the Soviet Union, a South Yemeni insurgency caused the United Kingdom ("UK") to withdraw from its former colony, and the People's Democratic Republic of Yemen was declared in the South.
6. Over the years, there were several disputes between the North, with the support of Saudi Arabia, and the South, which was under the influence of the Soviet Union at the time. In

¹ Burrowes, R. and Wenner, M.W, Encyclopedia Britannica: Yemen, 2017.

² Yemen: Ethno-Religious Composition (Summary), accessible at: http://gulf2000.columbia.edu/images/maps/Yemen_Ethno_Religious_summary_lg.png

³ Dresch, P., A History of Modern Yemen, Cambridge University Press, 2000.

⁴ Katz, M. N., Moscow's Double-track Policy Sanaa and the Soviets. Problems of Communism, 1984, p. 23.

May 1990 after decades of hostilities, the two States unified as the Republic of Yemen, and Ali Abdullah Saleh was chosen as the president of united Yemen.⁵ However, soon after the Parliamentary election in 1993, the political tension between the North and South was reappeared. Political crisis together with the bad economic situation in the southern parts resulted in a civil war between the South and North.

7. In 1990 after years of being at the center of the economic and political control in Yemen, Zaidis' power, a Shia Islam denomination, was challenged with the unification of Yemen and the subsequent presence of what was now the majority Sunni Muslim population.⁶ In the early 1990s, the Houthis movement began as a moderate theological cause named "the Believing Youth" to promote Zaidi revival in Saada.⁷ However, over the years, the Houthi movement turned into a religious-political- armed movement called "Ansar Allah" with the leadership of Hussein Badreddin al Houthi in opposition with the Saleh government. "The formation of the Houthi organizations was a reaction to the foreign intervention. Their views include shoring up Zaidi support against the perceived threat of Saudi-influenced ideologies in Yemen and a general condemnation of the former Yemeni government's alliance with the United States, which, along with complaints regarding the government's corruption and the marginalization of much of the Houthis' home areas in Saada, constituted the group's key grievances".⁸
8. As mentioned in the report of the United Nations High Commissioner for Human Rights, "since 2011, Yemen has been the theatre of a number of simultaneous and overlapping armed conflicts."⁹ The current armed conflict in Yemen between the forces loyal to the self-appointed President Abd Rabbo Mansour Hadi supported by the Saudi-led Coalition, and the Popular Committees affiliated with the Houthis has its roots in 2011 protests

⁵ The Situation in Yemen. (2015). Contemporary Security Council, Model United Nations. 37th Annual Conference. Canisius College. p. 1.

⁶ Religious Beliefs in Yemen, 25 April 2017, accessible at: <https://www.worldatlas.com/articles/religious-beliefs-in-yemen.html>.

⁷ "Yemen's Abd-al-Malik al-Houthi", BBC News, 3 October 2014.

⁸ Baron A. , "What Went Wrong with Yemen", Politico, 25 March 2015, accessible at: <https://www.politico.com/magazine/story/2015/03/yemen-intervention-116396>.

⁹ United Nations, General Assembly. Situation of Human Rights in Yemen: Report of the United Nations High Commissioner for Human Rights, A/HRC/33/38, 4 August 2016, p. 5.

against the former president Ali Abdullah Saleh, which then transformed into a complex conflict between armed tribal militants and governmental forces.¹⁰

9. In April 2011, negotiations under the auspices of the Gulf Cooperation Council (“GCC”), the UN and the European Union resulted in the GCC Initiative on Yemen and a complementary set of implementation mechanisms. In November 2011, as the violence spread, Saleh was no longer able to resist the protests, and agreed to sign the Gulf Initiative based on which the power was peacefully transferred from Saleh to his vice-president Hadi who was tasked to hold the Presidential election within 60 days. The United Nations Security Council (“UNSC”) expressed its support in several statements by the Council’s President, encouraging the parties to work together for the transfer of power in Yemen. The same was emphasized in 2014 (2011) UNSC Resolution.¹¹
10. Hadi held the presidential election in February 2012, however, as he was the sole announced candidate, the Yemeni parties including Houthis and Southern called for a boycott.¹² Given the boycott and in the absence of any other potential candidate, Hadi won the election. After the election, Hadi was given a two-year timeframe to convene a Conference for National Dialogue (“NDC”) and host a general election by early 2014.
11. In January 2014, the result of NDC containing nearly 1800 recommendations, was released and the UNSC unanimously voted for resolution 2140 in support of the transition process.¹³ One of the most controversial recommendations by Hadi’s government was the federalization (decentralization) of Yemen, which was opposed by the Houthis movement. Houthis believed that the proposed six-region federal State structure will divide Yemen into two separated economic sectors, a wealthy and a deprived one.
12. In July 2014, the Hadi government raised the prices of gasoline and diesel which led to a mass protests headed by Houthis. By the end of September 2014, Houthis took the control

¹⁰ Ruys, T. and Ferro L., *Weathering the storm: legality and legal implications of the Saudi-led military Intervention in Yemen*. International & Comparative Law Quarter, 2016, p. 63.

¹¹ UN Security Council Resolution (2014), On Situation in Yemen. S/RES/2014, 21 October 2011.

¹² Ruys and Ferro, p. 63, *supra* note 10.

¹³ UN Security Council Resolution (2140), On the Middle East, 26 February 2014, Paras. 3, 11 and 15.

of Sana'a and by mid-December 2014, and after the signature of the “Peace and National Partnership Agreement”, a new government was formed.

13. In early 2015, President Hadi and the members of his cabinet were put under house arrest and collectively resigned. Soon after this resignation, the Houthis released a ‘constitutional declaration’ and established a presidential council and a supreme revolutionary committee to govern the country.¹⁴ On 15 February 2015, the UNSC adopted resolution 2201 in which the Council condemned Houthi actions, and demanded them to “withdraw their forces from government institutions and normalize the security situation in the capital and other provinces and relinquish government and security institutions” and “safely release President Hadi, Prime Minister Bahah, members of the Cabinet and all individuals under house arrest or arbitrary detention.” A week later, Hadi escaped to Aden where he released a statement appearing to rescind his resignation, and declared Aden as Yemen’s temporary capital. However, after Houthis gained more power, he fled to Riyadh and requested military assistance from the GCC and the League of Arab States.¹⁵
14. Faced with a rapid Houthi advancement, Hadi requested military assistance, and fled to Riyadh. By 25 March 2015, a Coalition of states led by Saudi Arabia and the United Arab Emirates intervened at the request of President Hadi, with the aim of restoring the internationally recognized government to power. The Coalition launched an aerial bombing campaign against Houthi forces.
15. On 26 March, ‘Operation Decisive Storm’ was launched, led by the Coalition, receiving support from several other GCC and Arab countries. The operation formally lasted until 22 April 2015, after which the military objectives were allegedly achieved, and Operation ‘Renewal of Hope’ began. This second operation purportedly shifted focus to ‘the political process that will lead to a stable and secure future of Yemen’, but was, however, not fundamentally different from Decisive Storm, in the sense that bombardments of Houthi strongholds continued largely unabated. A five-day humanitarian ceasefire was agreed on 12 May 2015, but hostilities resumed within hours of its expiration. Since then, gross

¹⁴ Ruys and Ferro, (2016). P. 64, *supra* note 10.

¹⁵ UN Security Council Resolution (2216), Cessation of violence in Yemen and the Reinforcement of Sanctions Imposed by Resolution 2104, 14 April 2015.

human rights violations, including what could amount to war crimes, have been committed throughout the country to this day.

16. As the war has continued, the alliance between Houthis and forces loyal to Saleh have fractured. In December 2017, Houthis killed Saleh in Sanaa and assumed exclusive control over the capital.¹⁶ On the other hand, the Hadi government with the support of Coalition forces has been based in Aden since 2015.
17. Since 2018, several steps have been taken within the framework of UN-mediated negotiations in Rimbo, Sweden towards a termination of hostilities, however, none has led to a permanent solution to date.

Jurisdiction

18. Following communicating a situation under Article 15, an initial assessment should be made by the OTP to find out if there is any jurisdictional basis to open a preliminary examination. If a situation is not manifestly outside of the Court's jurisdiction, the Prosecution shall open a preliminary examination. According to Paragraph 2 of Article 15, the information received by the OTP "shall" be assessed in terms of their seriousness.
19. The point of departure to find out whether the OTP might select a situation for a full investigation is to assess whether the Court has jurisdiction over the situation at issue. Jurisdiction requires an assessment of (i) subject-matter jurisdiction; ii) temporal jurisdiction, and (iii) either territorial or personal jurisdiction.
20. In the following paragraphs, it will be established that the Court does appropriately have jurisdiction to engage in the situation of the Coalition intervention in Yemen.

Subject-Matter Jurisdiction

21. Subject-matter jurisdiction refers to the crimes within the Court's jurisdiction, as referred to in Article 5, i.e. war crimes, crimes against humanity, genocide and the crime of aggression.

¹⁶ Non-International Armed Conflicts in Yemen, 14 May 2019, Accessible at: <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse2accord>.

22. On the basis of the information available, and without prejudice to possibility of the commission of other crimes within the jurisdiction of the Court, which may be identified during the course of an investigation, there is a reasonable basis to believe that in the context of the current situation of crisis in Yemen, including the time period between 26 March 2015 to the date of this communication, the following conduct has been committed at a minimum: (i) intentionally directing attacks against civilians (article 8(2)(e)(i)), (ii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance missions (article 8(2)(e)(iii)), (iii) attacks against buildings dedicated to hospitals and places where the sick and wounded are collected (article 8(2)(e)(iv)), (iv) intentionally directing attacks against protected objects, including buildings dedicated to education (article 8(2)(e)(iv)) as war crimes.
23. War crimes consist of two constituent elements, namely the contextual element and the specific element; i.e. the relevant conduct.¹⁷ To exercise the Court’s jurisdiction over war crimes, two preliminary requirements have to be fulfilled, namely, there must be an armed conflict, and the crime must be closely related to the existing armed conflict (“*nexus* requirement”).¹⁸

Contextual Element of War Crimes

24. Neither the Statute nor the Elements of Crimes define the concept of “armed conflict”. The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in Tadic’ case, by reference to various provisions of the Geneva Conventions and Additional Protocols I and II, defined an armed conflict as follows: “[...] an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State”.¹⁹ The conflict in Yemen is widely presented as the war between the forces loyal to internationally recognized President Mansour Hadi supported by the Saudi-led Coalition,

¹⁷ ICC, PTC I, Lubanga Dyilo Case, Decision on the Prosecutor’s Application under Article 58, 10 February 2006, para. 80.

¹⁸ ICC, PTC I, Lubanga Dyilo case, Decision of the Confirmation of Charges, 29 January 2007, para 288.

¹⁹ ICTY, Tadic case, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

and Popular Committees affiliated with Houthis. However, there are several other actors like Al-Qaeda and the Islamic State, Secessionists in the south, Salafists and other tribal forces who are not necessarily under the control of the government forces or Houthis.²⁰ Accordingly, there are multiple parallel and overlapping armed conflicts taking place in Yemen.

25. The designation ‘conflicts of a non-international character’ applies to “armed conflicts that take place in the territory of a state, when there is a protracted armed conflict between government authorities and organized armed groups or between such groups”.²¹
26. The ongoing armed conflict from, at least, 26 March 2015, between the internationally recognized government of Yemen and the Houthis, on the one hand, and also the Saudi Arabia-led Coalition and the Houthis, on the territory of Yemen, should be currently classified as non-international for the following reasons: (1) parties to the conflicts are an organized armed group and States; (2) the hostilities between the parties have reached the requisite threshold of intensity as evidenced, among other things, by the methods and means employed in the fighting, in particular the air campaign implemented by the Coalition, and by the casualties left behind to date.
27. To constitute a non-international armed conflict, there needs to be a sufficient degree of intensity in hostilities between the parties, measured by the weapons employed, duration of conflict and other factors. Given the intensity criterion, “the level of armed violence must reach a certain degree of intensity that goes beyond internal disturbances and tensions.”²² Moreover, for the purposes of international law, the armed groups must exhibit sufficient organization and control to be capable of sustaining military operations and adhere to international humanitarian law, so that they can be considered “parties” to the conflict. The organization criterion is necessary to ensure that the concerned armed group is able to carry out sustained military operations and to implement international humanitarian law.²³ The criminal tribunals have appealed to several indicators including the existence of command structure, the ability of the group to access weapons, coordinate

²⁰ The War Report (2017), The Armed Conflict in Yemen: A Complicated Mosaic, Geneva Academy, October 2017. P. 2.

²¹ ICC Rome Statute, Article 8, para. 2 (f).

²² <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse4accord>.

²³ Additional Protocol II to the Geneva Conventions (1977), Article 1.

and carry out military operations, and have control over a certain territory, etc., to establish that this factor is fulfilled.²⁴

28. In the current situation, considering, *inter alia*, the seriousness of the attacks, the spread of clashes over territory and over a period of time, the number of casualties, the type of weapons used, and the UN resolutions,²⁵ it can be concluded that the level of violence has reached the required degree of intensity.

29. As mentioned, in Yemen several armed groups and tribal forces are involved in the conflict which makes it difficult to analyse their degree of organization. However, with regard to the Houthis forces, who constitute one party to the conflict under consideration by this communication, it can be said that they have control over significant parts of the territory of Yemen since 2014, they exercise *de facto* authority in the areas they control, they have allegedly established relationships with some other States, and they are sufficiently organized to have representatives in the recent negotiations with Hadi government. Thus undoubtedly, Houthi forces have the required degree of organization.²⁶ Therefore, as both elements are fulfilled, it can be concluded that there is at least one non-international armed conflict in Yemen between the Hadi forces and Houthi movement. It deserves to be noted that if the current war in Yemen is reclassified as an international armed conflict during further investigations, more underlying acts could be attributed to the members of the Coalition.

30. Indirect intervention by a State operating through proxy non-State forces, may internationalize an otherwise non-international armed conflict as long as sovereign nation States are opposed to each other. Even though many countries are involved in the conflict in Yemen, the fighting does not involve one State engaged in an armed conflict against another State yet. As the jurisprudence of the Court shows, direct and indirect intervention, which does not result in two sovereign States opposing each other, will not render a non-

²⁴ ICTY, The Prosecutor v Ramush Haradinaj and others, Trial Chamber, Judgment, April 2008, para 60.

²⁵ As the ICTY in Ljube Bošković and Johan Tarčulovski case mentioned, these indicators should be taken into account to assess the intensity of the conflict. See: ICTY, The Prosecutor v Ljube Bošković and Johan Tarčulovski, Trial Chamber, Judgment, 10 July 2008, para 177.

²⁶ <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse2accord>.

international armed conflict international. Consequently, the legal regime for a non-international armed conflict seems to be applied in the situation at issue.

31. As mentioned above, the Saudi-led Coalition initiated airstrikes against Houthis upon Hadi's request in 2015. Since the intervention took place with the consent of Hadi who, despite some controversies, is considered by the international community as the lawful government of Yemen,²⁷ such investigation does not affect the classification of armed conflict.²⁸ In addition, some believe that third states are supporting the Houthis forces by providing weapons, financial aid etc. However, as there is not enough evidence to prove that any external state exercises 'overall control' over Houthis, which is an established threshold in international criminal jurisprudence,²⁹ at this stage, these allegations cannot change the classification of the armed conflict at this stage.³⁰

Underlying Acts of War Crimes

A) Intentionally directing attacks against the civilian population

32. On the basis of the information available, there is a reasonable basis to believe that members of the Coalition have committed the war crime of intentionally directing attacks against the civilian population pursuant to article 8(2)(e)(i) through a vigorous and massive air campaign causing significant civilian casualties.
33. According to the UN, "from March 2015 to June 2018, there were at least 16,706 civilian casualties, with 6,475 killed and 10,231 injured in the conflict". Among several actors in place, the Coalition air strikes "have caused most of the documented civilian casualties".³¹ There is a large number of incidents proving the existence of a policy implemented by the Coalition to target civilians on land and at sea through hitting residential areas, markets, funerals, weddings, detention facilities and civilian boats.

²⁷ UNSC Resolution 2216.

²⁸ ICC, Prosecutor v. Thomas Lubanga Dyilo. Judgment pursuant to Article 74 of the Statute, 5 April 2012, para 533.

²⁹ ICTY, Appeals Chamber, Prosecutor v. Dusko Tadić, 15 July 1999, Judgment.

³⁰ ICC, Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, 5 April 2012, para 541.

³¹ United Nations Human Rights Council, Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts, 17 August 2018, para. 28.

34. In 60 cases, the UN Group of Experts reviewed the air strikes that hit residential areas, killing more than 500 civilians, including 84 women and 233 children.³² For instance, on 8 October 2016, in one of the deadliest incidents, the Coalition targeted Al-Kubra Hall in Sana'a during a funeral, killing at least 137 male civilians and injuring 695, including 24 boys. In 29 incidents, the UN Group of Experts reviewed air strikes hitting public spaces, including attacks on targets in densely populated areas with a death toll of more than 300 civilians. The Group investigated two incidents where air strikes had hit hotels. The 23 August 2017 air strike in the Bayt Athri area of the Arhab district, Sana'a Governorate, and the 1 November 2017 air strikes that hit a hotel in Al-Layl market in Sa'dah Governorate combined killed more than 50 male civilians and injured another 50. In each case, at least 12 boys were among the casualties.
35. Marketplaces have been widely targeted by the Coalition. The UN Group of Experts has also reviewed 11 incidents where air strikes hit marketplaces.³³ In one single attack, on 15 March 2016, "the Coalition air strikes on Khamees market in the Mastaba district of the Hajjah Governorate killed more than 100 civilians, including 25 children".
36. The Coalition has also directed its military attacks against funerals and weddings in Yemen. The UN Group of Experts have reviewed several air strikes involving such gatherings. For instance, the 8 October 2016 attack on Al-Kubra Hall in the city of Sana'a during the funeral of the father of a senior official killed at least 137 civilians and injured 695, including 24 boys.³⁴ Moreover, the Group investigated the Coalition air strike on 22 April 2018 that hit a wedding celebration in Al-Raqah village, in the Bani Qa'is district of the Hajjah Governorate. At least 23 male civilians were killed, including 8 boys.³⁵
37. Detention facilities has not remained immune from the widespread and systematic attacks launched by the Coalition. The UN Group of Experts have also reviewed a number of air strikes that hit detention facilities since the beginning of the conflict, including the 29

³² Ibid., para. 29.

³³ Ibid., para. 31.

³⁴ Ibid., para. 32.

³⁵ Ibid.

October 2016 air strikes on the Security Directorate Prison in the Al-Zaidia district of the Hudaydah Governorate, which killed at least 63 male civilians, mainly detainees.³⁶

38. Civilians have been intentionally targeted even in the sea. In 11 air strikes targeting civilian boats off the shores of Hudaydah from November 2015 until May 2018, of which 9 were reviewed and 2 investigated by the Group of Experts, approximately 40 fishermen were killed or disappeared. Amnesty International documented 41 coalition air strikes that appear to have violated international humanitarian law, many of which amount to war crimes. These have resulted in 512 civilian deaths and 433 civilian injuries.
39. To conclude, in the absence of any military objective in the urban areas, the Coalition evidently avoids respecting the principle of distinction and proportionality, given the large number of civilian casualties. As the UN experts insists “the use of precision-guided munitions would normally indicate that the object struck was the target”.³⁷

B) Intentionally directing attacks against what is involved in a humanitarian assistance

40. On the basis of the information available, there is a reasonable basis to believe that members of the Coalition have committed the war crime of intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance missions pursuant to article 8(2)(e)(iii), in addition to attacks against buildings dedicated to hospitals and places where the sick and wounded are collected, pursuant to article 8(2)(e)(iv).
41. Medical facilities are afforded special protection under international humanitarian law. Nevertheless, many such facilities have been targeted by the Coalition air strikes throughout the conflict. The UN Group of Experts reviewed information concerning at least 32 such incidents in 2018.³⁸
42. One instance is facilities operated by “Médecins sans frontières” that have been repeatedly targeted. For example, on 2 December 2015, a clinic in the Houban district was hit. Later,

³⁶ Ibid., para. 33.

³⁷ Ibid., para. 38.

³⁸ Ibid., para. 35.

an ambulance in the Sa'dah Governorate, struck on 21 January 2016. And, a hospital in the Abs district of the Hajjah Governorate, was raided on 15 August 2016. These attacks reoccurred while “all the locations of the Médecins sans frontières facilities had been shared with the Coalition and the ambulance was clearly marked”.³⁹ Attacking with this kind of knowledge makes these attacks intentional actions.

C) Intentionally directing attacks against schools

43. On the basis of the information available, there is a reasonable basis to believe that members of the Coalition have committed the war crime of intentionally directing attacks against protected objects, including buildings dedicated to education, pursuant to article 8(2)(e)(iv).
44. The UN Group of Experts have verified several attacks on schools, in particular by air raids attributed to the Coalition, the majority of which occurred in Sa'dah , Hajjah, and Hudaydah.⁴⁰
45. There has been a marked decrease in verified attacks on schools and hospitals compared to early years of the conflict. Nonetheless, according to the non-applicability of statute of limitations to the crimes within the Court's jurisdiction, this decrease does not preclude the ICC from prosecuting the earlier crimes.
46. Apart from the aerial bombing campaign against Yemenis cities, the Saudi-led Coalition has been running a blockade campaign against Yemen since 2015. The Coalition's restrictions on imports have worsened the dire humanitarian situation in Yemen. There are convincing pieces of evidence that the Coalition has delayed and diverted fuel tankers, closed critical ports and stopped goods from entering seaports controlled by the Houthis.⁴¹ Fuel needed to power generators to hospitals and pump water to civilian residences has also been blocked.

³⁹ Ibid., para. 36.

⁴⁰ UN, the Secretary-General Report on Children and Armed Conflict, 16 May 2018, para. 208.

⁴¹ For more information about the blockade see: United Nations Human Rights Council, Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts, 17 August 2018.

47. The available information might lead to a belief that the Coalition is responsible for acts that constitute crimes against humanity through persecution of Yemins. These allegations, which require further inquiry by the OTP should be given due consideration if a preliminary examination into the situation is opened. This communication, however, does not elaborate the allegations of crimes against humanity perpetrated by the Coalition members, including Jordan.

Personal Jurisdiction

48. The ICC lacks universal jurisdiction. Under Article 12, the Court has to found its jurisdiction based on territorial or personal ground, in the absence of a referral by the UNSC. In the Rome Statute, personal jurisdiction is an alternative to territorial jurisdiction. Legally speaking, there is no difference between these two bases in terms of exercising the Court's jurisdiction. Paragraph 2 of Article 12 of the Rome Statute refers to both territorial and personal jurisdiction as a firm basis for the Court to exercise its jurisdiction, without making any distinction and precedence between them.

49. In 2015, in her statement regarding the situation of ISIS in Iraq and Syria, the Court's Prosecutor referred to a notion that is not recognized by the Rome Statute, namely the narrowness of jurisdiction. By refusing to open a preliminary examination, the Prosecutor stated that in the situation of ISIS, the legal basis for opening the preliminary examination is too 'narrow'.⁴² Nonetheless, this unprecedented notion is vacuous. To select a situation for investigation, the jurisdiction requirement either exists or does not exist, regardless of its narrowness or broadness. Judge Hans-Peter Kaul, in one of his dissenting opinions, explicitly referred to this dilemma. According to him, '[t]he Court either has jurisdiction or does not'.⁴³ There is no third possibility. In other words, the issue of jurisdiction is a black or white matter. Therefore, if there is a possibility to exercise the jurisdiction of the

⁴² Statement of the Prosecutor of the ICC on the Alleged Crimes Committed by ISIS, 8 April 2015, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>.

⁴³ ICC, PTC II, Dissenting Opinion by Judge Hans-Peter Kaul in Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 26.

Court based on the nationality of perpetrators, there is an obligation upon the Prosecutor to open a preliminary examination.

50. Yemen is not a State Party to the ICC. It means that the Court lacks territorial jurisdiction to prosecute war crimes committed on the territory of Yemen. Nevertheless, in the Saudi-led Coalition situation, at least, one member-State is involved in the ongoing conflict, namely Jordan.
51. The involvement of one or more Jordanian suspects in the current situation fulfills the jurisdiction requirement as set by the Rome Statute. The *prima facie* existence of personal jurisdiction excludes the situation under consideration from the category of situations that are manifestly outside of the Court's jurisdiction. According to the OTP Policy Paper on Preliminary Examinations, such situations do not reach a preliminary examination.⁴⁴ On the contrary, when a situation is not manifestly outside of the Court's jurisdiction and falls within the Court's jurisdiction based on territorial or personal factors, according to Article 15(2), the Prosecutor is under a clear statutory obligation to open a preliminary examination based on, *inter alia*, this communication that is triggering the dormant jurisdiction of the Court over a forgotten war.
52. Jordan, as a State Party to the Rome Statute, is a member of the Coalition formed by Saudi Arabia's initiative. The presence of Jordan and contributions made by this country to the common plan adopted by the Coalition as a whole brings the situation under question to the Court's jurisdictional scope. This is due to the nationality of a part of perpetrators who are responsible for crimes committed in Yemen.
53. The Coalition is never documented, and, as far as this report concerns, no legal or political instrument establishing has been made available to the public yet by it. This comes at no surprise, since it seems to be a purposeful decision made by the Coalition members to escape potential international responsibility arising out of the Coalition's violations of international law. Nevertheless, such a tactical undocumented procedure may not at all cast any doubt on the Coalition's existence, its members, including Jordan, and its unlawful conducts in Yemen. These facts are now well-established public knowledge, due to piles

⁴⁴ ICC OTP, Policy Paper on Preliminary Examinations, para 78.

of media reports and, more importantly, because of several references to the Coalition itself and its conducts in Yemen by the UN bodies.⁴⁵

54. The presence of Jordan and contributions made by this country to the common plan adopted by the Coalition as a whole brings the situation under question to the Court's jurisdictional scope because of the nationality of a part of perpetrators who are responsible for crimes committed in Yemen.
55. Given the available information, there is a reasonable basis to believe that some Jordanian nationals are criminally responsible, at least, under Article 25(3)(d) for contributing to the commission of crimes, as mentioned above, by a group of persons acting with a common purpose, for war crimes committed by the forces of Coalition in Yemen from 2015. Introducing this mode of liability is without prejudice to any further investigation upon opening a preliminary examination, which may result in finding another or other modes of liability under which war crimes committed in Yemen would be attributed to Jordanians.
56. Article 25(3)(d) of the Statute is aimed at combating group criminality, which usually involves the commission of comparably more serious crimes.⁴⁶ The concept referred to in Article 25(3)(d) is composed of objective and subjective elements. The relevant objective elements are defined as (i) a crime within the jurisdiction of the Court is attempted or committed; (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose; (iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute.
57. Subjective elements required for this kind of contribution are as follows: (i) the contribution shall be intentional; and (ii) shall either (a) be made with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime. Since knowledge of the group's criminal intentions is sufficient for criminal responsibility, it is therefore not required for

⁴⁵ See e.g. Situation of Human Rights in Yemen, including violations and abuses since September 2014, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, 17 August 2018; Situation of human rights in Yemen, including violations and abuses since September 2014, Report of the United Nations High Commissioner for Human Rights, A/HRC/36/33, 13 September 2017. And, Children and Armed conflict, Report of the Secretary-General, 20 April 2016, para. 164

⁴⁶ ICC, PTC I, The Prosecutor v. Mbarushimana case, Decision on the Confirmation of Charges, 16 December 2011, para 278.

contributors to have the intent to commit any specific crime and not necessary for suspects to satisfy the mental element of the crimes charged. This stands in sharp contrast with liability under Article 25(3)(a) of the Statute, where perpetrators must meet the subjective elements of the crimes charged.⁴⁷

58. Regarding the first objective requirement, as found above, there are reasonable grounds to believe that the war crimes within the jurisdiction of the Court were committed by the Coalition members from 2015 on many occasions.
59. ‘A group of persons acting with a common purpose’ requirement is identical to the concept of ‘an agreement or common plan between two or amongst more persons’.⁴⁸ Coalitions are formed on purpose. The Saudi Arabia’s initiative to found the Coalition, as a novel entity without any precedence, was undertaken following a common plan. A common purpose must include an element of criminality, but does not need to be specifically directed at the commission of a crime.⁴⁹ The agreement needs not be explicit, and its existence can be inferred from the subsequent concerted action of the group of persons.⁵⁰
60. There are reasonable grounds to believe that Jordan together with other members of the Coalition, as a group of persons in the sense of Article 25, have adopted and implemented the common plan of conducting widespread and systematic attacks against the Huthis and the civilian population affiliated to them in the areas under the Huthis’ control in order to support President Hadi. Suppressing Huthis and ousting them from the power was a plan agreed on by all states joining the Coalition, including Jordan.
61. Jordan has played a role in physically implementing the forgoing plan. For instance, according to the media, Jordan, among other contributions, deployed six fighter jets in the Coalition’s operation.⁵¹ Although the reports of the media are quoted from Jordanian

⁴⁷ Ibid., para. 289.

⁴⁸ Ibid., para. 271.

⁴⁹ ICC PTC I, Prosecutor v. Thomas Lubanga case, Decision on the Confirmation of Charges Para. 344.

⁵⁰ Ibid., Para. 345.

⁵¹ Gulf states consider Yemen ground offensive to halt Houthi rebel advance, 26 March 2015, accessible at: <https://www.theguardian.com/world/2015/mar/26/gulf-states-yemen-ground-offensive-to-halt-houthi-rebel-advance>. And, Jordan participates in Saudi-led operation in Yemen: official, 26 March 2015, accessible at: <https://www.reuters.com/article/us-yemen-strikes-jordan/jordan-participates-in-saudi-led-operation-in-yemen-official-idUSKBN0MM0JT20150326>. And, Saudi and Arab allies bomb Houthi positions in Yemen, accessible at:

official sources⁵², the incident of February 24, 2017, in which a Jordanian F-16 warplane crashed in Saudi Arabia⁵³ strongly evidences Jordan's contributions to the Coalition military operations in Yemen. A fact which has not been only denied by Jordanian officials or Coalition members, but in actual practice were justified by resorting to invitation to intervention from the Yemeni government.⁵⁴

62. As a result, it is reasonable to believe that Jordanian pilots have directly participated in one or more military operation conducted by the Coalition. A contribution to the commission of a crime by a group acting with a common purpose should be at least significant. Essentiality of contributions is not required here. A contribution is 'essential' if the common purpose cannot be achieved without it.⁵⁵ On the contrary, liability under Article 25(3)(d) provides for a residual form of accessory liability which makes it possible to criminalize those contributions to a crime which cannot be characterized as ordering, soliciting, inducing, aiding, abetting or assisting. Therefore, it is based on the minimum contribution to the commission of crimes in a collective manner. Jordan's contribution to the plan falls within this category.

63. Regarding the subjective element, on the basis of the available information there are reasonable grounds to believe that Jordan was aware of the existence of the armed conflict on the territory of Yemen, and that it was known that the conduct of the members of the Coalition was part of a widespread and systematic attack on the civilian population of Yemen. It deserves to be noted that an international campaign to persuade the Coalition to stop atrocities against civilians has failed, implying that Jordan has continued its involvement in atrocities deliberately. "Any efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes" is a factor to assess whether the

<https://www.aljazeera.com/news/middleeast/2015/03/saudi-ambassador-announces-military-operation-yemen-150325234138956.html>.

⁵² <https://www.reuters.com/article/us-yemen-strikes-jordan/jordan-pa...s-in-saudi-led-operation-in-yemen-official-idUSKBN0MM0JT20150326>.

⁵³ Jordan warplane crashes in Saudi, pilot survives, 24 February 2017, accessible ta: <https://www.gulf-times.com/story/534158/Jordan-warplane-crashes-in-Saudi-pilot-survives>.

⁵⁴ Jordan's Role in Yemen Part of Its Commitment to Arab Stability: Analysts, Al-Arabiya English, 27 March 2015, available at: <http://english.alarabiya.net/en/perspective/analysis/2015/03/27/Jord...ole-in-Yemen-part-of-its-commitment-to-Arab-stability-analysts.html> (accessed at April 27, 2019).

⁵⁵ Werle, G., Individual Criminal Responsibility in Article 25 ICC Statute, Journal of International Criminal Justice, 2007, p. 962.

contribution made under the Article 25(d) liability is significant.⁵⁶ Jordan's inactivity in this regard, and, on the contrary, its active participation in the ongoing conflict, should be taken into account in establishing the *means rea* of Jordanians' crimes.

64. Article 25(3)(d) liability is the only other way a person can be held criminally responsible for acting merely with knowledge of the criminal intentions of others. Long duration of conflict in Yemen, besides massiveness of casualties arising from the Coalition's intervention that have been constantly documented and reported by a large number of NGOs and media, do not allow Jordan to deny its knowledge of the circumstances in which the Coalition is operating. At least, Jordan's participation in the Coalition has been with the knowledge that war crimes would occur in the ordinary course of events.
65. Article 25(3)(d) of the Statute only refers to contributing to a crime committed by a group of persons without specifying that such contribution should be made by a member of that group or an outsider. At this stage, the available information does not determine in which operation(s) and incident(s) Jordanian national have participated. Specifying the exact responsibility of Jordanians requires more inquiry by the OTP. If, later, however it is proved that in any incident resulting in casualties, Jordanian nationals and pilots had a role, the direct perpetration or co-perpetration under Article 25(3)(a) should be considered as the proper mode of liability.
66. There are also reasonable grounds to believe that a campaign conducted simultaneously with and in close relation to the commission of crimes against the civilian population of Yemen has been put in place as part of the implementation of the common plan. Such a campaign is aimed at the concealment of the precise scope of the Coalition's members involvement in the alleged commission of war crimes by not providing information about the structure, members' roles and contributions, and missions of the Coalition. Jordan, by constantly refusing to answer a sizeable number of inquiries about its role in the Coalition's operations, has been a part of this campaign.
67. In summary, there are reasonable grounds to believe that Jordan has contributed to the implementation of the foregoing common plan with other members of the Coalition.

⁵⁶ ICC, PTC I, The Prosecutor v. Mbarushimana case, Decision on the Confirmation of Charges, 16 December 2011, para 284.

Although at this stage it is not proved that the Jordan's contribution is essential to the extent that, if withheld, it would frustrate the commission of crimes as they were committed, there are reasonable grounds to believe that the contribution made by Jordanians to the commission of war crimes by the Coalition is relevant enough so as to amount to a contribution "in any other way" in the sense of article 25(3)(d) of the Statute.

68. In addition to the above-mentioned statutory bases for the Court to exercise its jurisdiction over the situation at hand, there seems to be a second basis for the Court to seize the situation of the Saudi-led Coalition in Yemen, namely the involvement of the UK in the ongoing conflict in Yemen. The UK deposited its instrument of ratification to the Rome Statute on 4 October 2001. The ICC therefore has jurisdiction over Rome Statute crimes committed on UK territory or by UK nationals from 1 July 2002 onwards. There is a body of evidence and reports that shows the UK is aiding and abetting the crimes committed by the Coalition through supplying, *inter alia*, the Saudi Arabia with the military equipment. The then Foreign Secretary of the UK, Philip Hammond MP, in the beginning of the conflict, had said the UK would "support the Saudis in every practical way short of engaging in combat".⁵⁷ This support has included providing spare parts, maintenance, technical advice and resupplying for the Saudi air force, training in targeting and weapon use, and providing liaison officers in Saudi headquarters.⁵⁸

69. The Campaign Against Arms Trade (CAAT), backed by other human rights groups, including Human Rights Watch, Oxfam and Amnesty International, has prepared "overwhelming evidence" that British-made jets and bombs are being used by Saudi-led forces to violate international humanitarian law in Yemen. According to the group, the UK-made weapons have helped creating "a humanitarian catastrophe".⁵⁹ Based on the available information and evidence, the group has brought a legal challenge against the UK

⁵⁷ The Saudis Couldn't Do It Without us: the UK's True Role in Yemen's Deadly War, 18 June 2019, accessible at: <https://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war>.

⁵⁸ Business, Innovation and Skills and International Development Committees, The use of UK manufactured arms in Yemen (First Joint Report of the Business, Innovation and Skills and International Development Committees, Session 2016–17, HC 679).

⁵⁹ UK government accused of 'putting profit before lives' in case aimed at stopping arms exports to Saudi Arabia, 9 April 2019, accessible ta: <https://www.independent.co.uk/news/uk/home-news/uk-arms-sales-saudi-arabia-yemen-legal-case-high-court-bombing-weapons-trade-human-rights-violations-a8861471.html>.

government because of engaging with the arm trade with the Coalition that involves “a clear risk that the items might be used in the commission of a serious violation of international humanitarian law”. In 2017, the UK High Court denied a judicial review of the weapons exports.⁶⁰ However, in June 2019, the Court of Appeal ruled that the British arms sales to Saudi Arabia is unlawful and accused ministers of ignoring whether airstrikes that killed civilians in Yemen broke humanitarian law.⁶¹

70. The available information on the UK involvement in the Yemen war should trigger the Prosecutor to initiate and proceed with further investigation and examination to find out if there is a reasonable basis to believe that the UK nationals are criminally responsible, at least, under Article 25(3)(c) for facilitating the commission of war crimes referred to in this communication, through aiding, abetting or otherwise assisting their commission by providing the means for their commission. Given the information in place, there is a reasonable basis to believe that the UK government has continued providing the Coalition with the necessary means to commit war crimes in Yemen by deliberately ignoring the firm allegations against the Coalition.

71. In addition to the aiding and abetting, there are reports referring to the direct UK forces participation in the conflict in the field.⁶² These reports point out that several British soldiers have been wounded in Yemen, which requires further inquiry to find out whether other modes of liability are in place for attributing the responsibility to British nationals.

Temporal Jurisdiction

72. The above alleged crimes fall within the Court’s jurisdiction *ratione temporis*, since Jordan deposited its instrument of ratification of the Rome Statute on 11 April 2002 and the Statute entered into force for Jordan on 1 July 2002 in accordance with article 126(1) of the Statute.

⁶⁰ Ibid.

⁶¹ UK Arms Sales to Saudi Arabia Unlawful: Court of Appeal Declares, 20 June 2019, accessible at: <https://www.theguardian.com/law/2019/jun/20/uk-arms-sales-to-saudi-arabia-for-use-in-yemen-declared-unlawful>.

⁶² Serious Questions over SAS Involvement in Yemen War , 27 March 2019, accessible at: <https://www.theguardian.com/uk-news/2019/mar/27/serious-questions-over-sas-involvement-in-yemen-war>.

In this regard, the situation of the Saudi-led Coalition in Yemen may to be investigated as of 26 March 2015 when the operation Decisive Storm was launched.

Admissibility

73. As set out in Article 17(1) of the Rome Statute, admissibility requires an assessment of complementarity and gravity.

Gravity

74. Gravity includes an assessment of the scale, nature, manner of commission of the crimes, and their impact, bearing in mind the potential cases that would likely arise from an investigation of the situation.⁶³

75. In the gravity assessment of war crimes, due regard should be given to Article 8(1) of the Rome Statute, according to which the Court should focus particularly on cases of war crimes committed on a large scale as part of a plan or pursuant to a policy.

76. In the present situation, there is a significant body of evidence that proves the war crimes were committed on the large scale. The alleged crimes has led to a high number of direct and indirect victims. Civilians bear the brunt of the violence in Yemen. According to 2019 Humanitarian Needs Overview for Yemen report, “tens of thousands of people have been killed or injured since 2015, and among them at least 17,700 civilians as verified by the UN. An estimated 3.3 million people remain displaced, up from 2.2 million” in 2018.⁶⁴

77. The impact of crimes committed in Yemen are wide, and prove the sufficiency of the situation’s gravity. As well as causing the deaths and injuries of thousands of civilians, the Saudi-led Coalition has exacerbated an already severe humanitarian crisis resulting from years of poverty and poor governance causing immense human suffering. The UN Secretary-General has described Yemen as “the world’s worst humanitarian crisis”.⁶⁵ The

⁶³ ICC OTP, Policy Paper on Preliminary Examinations, p. 3.

⁶⁴ Report of the UN Office for the Coordination of Humanitarian Affairs, 14 February 2019, accessible at: https://reliefweb.int/sites/reliefweb.int/files/resources/2019_Yemen_HNO_FINAL.pdf

⁶⁵ <https://edition.cnn.com/2018/04/03/middleeast/yemen-worlds-worst-humanitarian-crisis-un-intl/index.html>.

collapse of Yemen's public institutions has disrupted access to essential services such as water, sanitation, health care and education. Twenty-four million people—three quarters of the population—are in need of some form of aid. Yemen was the poorest nation in the Middle East even before the conflict began. The Yemen's GDP per capita declined by 61%, and basic food prices and fuel prices increased by 98% and 110% respectively in the three years to March 2018. The humanitarian crisis is widely accepted to be the result of the conflict, and thus “manmade”.⁶⁶

78. Given the protracted nature of the conflict, the coping mechanisms of the civilian population are exacerbated and stretched thin. 22 million Yemenis today are in urgent need of humanitarian assistance to survive. According to UNICEF, the conflict has left 1 million workers without pay in the public sector for two years, and the organization estimates that 12 million Yemenis including children will depend on food assistance in 2019.⁶⁷
79. The dire economic conditions have worsened the already catastrophic humanitarian crisis in the country. With the inflation of the Yemeni Riyal and the government's inability to pay public sector salaries, September 2018 saw a wave of demonstrations spreading across the south of Yemen, with people protesting against corruption and blaming the government for the deterioration of the economy, which has left the vast majority of Yemenis unable to buy basic commodities.⁶⁸
80. As to the groups of persons that are likely to be the object of an investigation include those who appear to be most responsible for the most serious crimes, including persons with levels of responsibility in directing, ordering, facilitating or otherwise contributing to the commission of the alleged crimes, it should be noted that the Coalition was formed following an agreement between the high-level officials of several States, including Jordan. This means that those Jordanians who are responsible for the war crimes committed in Yemen include those who are the most responsible perpetrators with levels of

⁶⁶ Lise Grande, quoted in Bel Trew, ‘Yemen Facing the ‘World’s Worst Famine in 100 Years’ if Fighting does not Stop, Warns the UN’, The Independent, 15 October 2018, accessible at: <https://www.independent.co.uk/news/world/middle-east/yemen-famine-civil-war-conflict-food-shortage-civilians-starvation-un-deaths-a8585006.html>.

⁶⁷ UNICEF, Humanitarian Action for Children, 2019, accessible at: <https://reliefweb.int/sites/reliefweb.int/files/resources/2019-HAC-Yemen.pdf>

⁶⁸ Amnesty International, Yemen War: No End in Sight, 14 March 2019, <https://www.amnesty.org/en/latest/news/2015/09/yemen-the-forgotten-war/>.

responsibility in directing, ordering, facilitating or otherwise contributing to the commission of alleged crimes.

81. In summary, the crimes allegedly committed in Yemen by the Coalition are sufficiently grave within the meaning and requirements of the Statute to justify the opening of an investigation, in particular considering their scale, nature, manner of commission, and their impact on victims and affected communities.

Complementarity

82. The Rome Statute determines a case as inadmissible if “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out investigation or prosecution”⁶⁹.

83. It seems that in the situation under question there is an absolute inactivity at the national level. The Saudi-led coalition established a “Joint Incidents Assessment Team (JIAT) in 2016, consisting of 14 individuals from the main Coalition members and mandated them to carry out the task of investigating the facts, collecting evidence, producing reports and making recommendations on claims and accidents during Coalition operations in Yemen. JIAT has been announcing the results of its investigations periodically, concluding, in general, that the procedures taken by the Coalition forces were in accordance with international humanitarian law and customary rules.⁷⁰

84. Nevertheless, the investigations, for many reasons, appear to lack independence, impartiality and effectiveness which greatly raises the high probability that they were carried out with the aim of shielding the persons concerned from criminal responsibility for the crimes committed by the Coalition in the situation of Yemen. Therefore, the investigation carried out at the national level lacks genuineness as required by Article 17.

85. Most importantly, there is insufficient transparency about the JIAT’s work, its mandate, its methodology etc. which renders the assessments of its credibility, reliability and

⁶⁹ Rome Statute of the International Criminal Court (2002, with amendments as of 2010), Article 17(1)(a)

⁷⁰ See e.g. JIAT’s reports of May 2, 2019, April 17, 2019, March 27, 2019, December 12, 2018, August 5, 2016, and December 6, 2016, refuting claims of violation of IHL rules by the Coalition. The reports are accessible at <https://www.spa.gov.sa/search.php?lang=en&search=jiat>.

genuineness more challenging. In spite of this, deep analyses have been carried out by several experts and scholars in the field, which reveal that the investigation is not in any way satisfactory and should not be considered as genuine for the purposes of Article 17 of the Rome Statute.

86. Two such most cited analyses are “Amnesty International” response to the Saudi Arabia-led Coalitions Investigations⁷¹ and “Human Rights Watch” report⁷² of JIAT’s investigations. The two entities are non-governmental organizations globally well-known for their independence, impartiality and expertise in issues of international human rights and humanitarian law. The analyses indicate that the JIAT’s investigations and conclusions are in several instances in sharp contradiction with the undisputed facts at issue⁷³, clear misapplications of international law and IHL rules⁷⁴, and, most importantly that they were conducted with the purpose of shielding coalition’s States or individuals against any future criminal responsibility.⁷⁵

87. The JIAT, therefore, shall not be considered, or at least does not appear to be based on a reasonable basis evidentiary threshold, a genuine investigation mechanism to identify commission of crimes within the jurisdiction of the ICC and to call for prosecution of individuals suspected of commission of the said crimes in Yemen. This leads to the conclusion that the OTP shall not assess the Yemen situation as inadmissible based on Article 17(1)(a) of the Statute. Consequently, the Prosecutor is under an obligation to promptly initiate a preliminary examinations into the situation at hand.

Interests of Justice

88. According to Article 53(1) of the Rome statute, contrary to jurisdiction and admissibility,

⁷¹ Amnesty International Response to Saudi Arabia-led Coalition’s Investigations (16 January 2017) Amnesty International, AI Index: MDE 31/5494/2017, accessible at <https://www.amnesty.org/en/documents/mde31/5494/2017/en/>

⁷² Human Rights Watch, Hiding behind the Coalition: Failure to Credibly Investigate and Provide Redress for Unlawful Attacks in Yemen, August 2018, accessible at <https://www.hrw.org/report/2018/08/24/hiding-behind-coalition/failure-credibly-investigate-and-provide-redress-unlawful>.

⁷³ Amnesty Int. Response, pp. 4-6, *supra* note 71.

⁷⁴ HRW Report, pp. 32-40, *supra* note 72.

⁷⁵ *Ibid.*

which are positive requirements that must be satisfied, the ‘interests of justice’ requirement is a potential countervailing consideration that may produce a reason not to proceed. As such, it is not required to establish that an investigation is in the interests of justice, but rather, whether there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to conduct an investigation.⁷⁶

89. In light of the gravity of unimaginable atrocities that have occurred in Yemen, and given the interest of victims who are suffering from the lasting impunity of those perpetrators of massive crimes responsible for their suffering and misery, there are no substantial reasons to believe that an investigation would not serve the interests of justice.
90. Opening an investigation by the Court is at present the only possible way to bring those who are responsible for the agony and despair of Yemenis to justice. Refusing to exercise the Court’s jurisdiction over a situation of crisis that manifestly falls within the Court’s jurisdiction is evidently in contravention with the Courts’ constituent objectives, namely ending impunity and giving voice to voiceless victims who have a fundamental right to be heard.

Relief Request

91. For the reasons set out above and on the basis of the information presented, Iranian Center for International Criminal Law respectfully requests the Office of the Prosecutor to, initially, open a preliminary examination *proprio motu* into the Situation in Yemen in relation to alleged crimes committed against Yemenis by nationals of Jordan in the period since 2015.

⁷⁶ ICC OTP, Policy Paper on Preliminary Examinations, para 67.