

2021

## Broken, Beaten, and Starved: Attacking Water Resources as Objects Indispensable to the Survival of a Civilian Population in Yemen's Internal Armed Conflict

Meagan DeSimone

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# **BROKE, BEATEN, AND STARVED: ATTACKING WATER RESOURCES AS OBJECTS INDISPENSABLE TO THE SURVIVAL OF A CIVILIAN POPULATION IN YEMEN’S INTERNAL ARMED CONFLICT**

MEAGAN DESIMONE\*

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\* J.D./M.A. in International Relations Candidate, 2021, American University Washington College of Law; B.A., International Studies, 2016, Emory University. I want to extend my sincerest gratitude to Dean Emeritus Claudio Grossman for the constant support and encouragement throughout my law school career and while writing this comment. A special thanks to my partner Esteban Serrano Montufar for sharing this journey with me as my sounding board and advocate for my passions. I also want to acknowledge all of the serendipitous conversations with those who challenged and shaped my perspectives when developing this comment.

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I. INTRODUCTION

Yemen is currently experiencing one of the largest starvation crises in modern history.<sup>1</sup> About two-thirds of Yemen’s population struggle for access to food and drinkable water.<sup>2</sup> The lack of access led to severe cholera outbreaks from contaminated water and food, and at its peak resulted in ten thousand cases per week.<sup>3</sup>

The starvation crisis primarily stems from Yemen’s internal armed conflict beginning in 2014, when the Houthi rebels stormed into Yemen’s capital and conquered it.<sup>4</sup> Backed by members of the army of former President Ali Abdullah Saleh, the Houthis drove out the internationally recognized Yemeni government into Saudi Arabia.<sup>5</sup> By March 2015, Saudi Arabia intervened on behalf of Yemen’s government, primarily through airstrikes.<sup>6</sup> Dozens of these airstrikes

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1. See UN Office for the Coordination of Humanitarian Affairs [UNOCHA]: UN Country Team in Yemen, *Yemen: 2019 Humanitarian Needs Overview*, at 7 (Dec. 2018), [https://yemen.un.org/sites/default/files/2019-08/2019\\_Yemen\\_HNO\\_FINAL.pdf](https://yemen.un.org/sites/default/files/2019-08/2019_Yemen_HNO_FINAL.pdf) [hereinafter UNOCHA Yemen] (explaining the context of Yemen’s food crisis).

2. See *id.* at 4 (describing that about ten million people in Yemen are food insecure, making it the largest man-made humanitarian crisis).

3. *Yemen Cholera Outbreak is Worst in World with WHO Now Recording 10,000 Cases Per Week*, REUTERS (Oct. 3, 2018), <https://www.newsweek.com/yemen-cholera-outbreak-worst-world-10000-cases-who-1149984>.

4. See Marcel Serr, *Understanding the War in Yemen*, 11 ISR. J. FOREIGN AFF. 357, 364 (2017) (detailing the series of conflicts, events, and geo-politics that lead to the conflict as it existed when the article was published).

5. See *id.* at 358–59, 363 (recounting the “Arab Spring” movement in Yemen and its impacts).

6. See YEMEN DATA PROJECT, Collating and Disseminating Data on the Conduct of the War in Yemen with the Purpose of Increasing Transparency and Promoting Accountability, <http://yemendataproject.org/> (last visited Feb. 14, 2021) (The Yemen Data Project tracks the conduct of war in Yemen, including information the location, authority, and casualties of aerial bombardments) (reporting that the Saudi Arabian led coalition has performed more than twenty thousand air raids in over 2000 days).

hit critical supplies of food and water, a condition that worsened through a blockade preventing humanitarian aid.<sup>7</sup> Suffering increased as multiple internal conflicts sprang up in the State, including a self-determination movement in the south and the incursion of Al-Qaeda.<sup>8</sup>

Many international groups condemned the airstrikes and Yemen's starvation crisis as violating international humanitarian law under Protocol II.<sup>9</sup> Protocol II establishes laws that State parties must follow during non-international armed conflicts.<sup>10</sup> Within the Protocol, Article 14 prohibits the use of starvation as a method of warfare via attacks against objects indispensable to the survival of a civilian

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7. *Data: Airwar, YEMEN DATA PROJECT*, <https://yemendataproject.org/data.html> (click 'to download the full database click here' under the section "Airwar") (last visited Sept. 20, 2020) (counting each individual airstrike and categorizing the type of target and the number of casualties).

8. *See Yemen: What is the Southern Transitional Council?*, AL JAZEERA (Apr. 26, 2020), <https://www.aljazeera.com/news/2020/04/yemen-southern-transitional-council-200426072715154.html> (explaining that the Southern Transitional Council (STC) began as an independence movement for southern Yemen in 2017, backed by the United Arab Emirates (UAE)); Steven A. Cook, *America is Not an Innocent Bystander in Yemen*, FOREIGN POL'Y (Sept. 26, 2018), <https://foreignpolicy.com/2018/09/27/america-is-not-an-innocent-bystander-in-yemen/> (discussing how foreign involvement in Yemen increased as the United States and others engaged to fight Al Qaeda).

9. *See* U.N. Human Rights Office of the High Commissioner of Human Rights [UNOHCHR], *Yemen: United Nations Experts Point to Possible War Crimes by Parties to the Conflict*, (Aug. 28, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23479> (outlining the standards of international humanitarian law that creates obligations for the parties to the non-international armed conflict in Yemen); *see also* NARIS KHAN, ISLAMIC HUMAN RIGHTS COMMISSION, VIOLATING WITH IMPUNITY: SAUDI WAR CRIMES IN YEMEN 12–14 (2016) (providing a brief legal analysis with international legal principles and violations committed by Saudi Arabia). *But see* Merrit Kennedy, *U.S. Stands by Saudi Arabia, Despite Criticism Over Civilian Casualties in Yemen*, NPR (Sept. 12, 2018, 4:50 PM), <https://www.npr.org/2018/09/12/647044729/u-s-stands-by-saudi-despite-criticism-over-civilian-casualties-in-yemen> (showing that the U.S. solidified its allegiance to Saudi Arabia and the United Arab Emirates in a letter by Secretary of State Mike Pompeo to Congress). *See generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (outlining the standards of international humanitarian law activities in Yemen will be held to).

10. Protocol II, *supra* note 9, 1125 U.N.T.S. at 615; *see discussion infra* Part II(B).

population.<sup>11</sup> While international humanitarian law serves primarily to protect individuals, this provision is one of only a handful that protects water resources, particularly within the more limited protections under non-international armed conflicts.<sup>12</sup>

This Comment argues that Saudi Arabia violated Article 14 of Protocol II, as a party of the Protocol, when it attacked water resources for the purpose of starving civilians in Yemen.

Part II of this Comment provides the historical context of Yemen's internal armed conflict, explores the legal background of Protocol II and Article 14, and discloses defenses underlying this Article.<sup>13</sup> Part III applies the facts from Part II to analyze Yemen's internal armed conflict and the Saudi-led attacks to break down whether Saudi Arabia violated Protocol II.<sup>14</sup> Part IV suggests recommendations to remedy the situation.<sup>15</sup> Part V concludes.<sup>16</sup>

## II. BACKGROUND

The background provides information on Yemen's internal armed conflict and the international humanitarian law that prohibits Saudi Arabia from using starvation as a method of warfare. It discusses how Saudi Arabia became involved in Yemen's civil war, its means of attack in airstrikes, and justifications. Further, it explains the humanitarian crisis in Yemen. Additionally, this section introduces Protocol II Additional to the 1949 Geneva Conventions, which governs non-international armed conflicts. It then focuses on Article 14 of Protocol II. This discussion applies a criminal law framework to

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11. Protocol II, *supra* note 9, 1125 U.N.T.S. at 615; *see* discussion *infra* Part II(B)(2).

12. *See Water and Armed Conflicts*, INT'L COMM. RED CROSS, <https://casebook.icrc.org/case-study/water-and-armed-conflicts> (last visited Feb. 14, 2021) (describing the protections for water in armed conflicts, and specifying the four main prohibitions in the law: ban on employing poison or poisonous weapons; ban on destroying, confiscating, or expropriating property; ban on destroying objects indispensable to the survival of the civilian population; and the ban on attacking works or installations containing dangerous forces – the last two of which apply to non-international armed conflicts).

13. *See* discussion *infra* Part II.

14. *See* discussion *infra* Part III.

15. *See* discussion *infra* Part IV.

16. *See* discussion *infra* Part V.

breakdown the acts and intent necessary to constitute a violation and how particular defenses can or cannot be used under this Article.

#### A. AN OVERVIEW OF YEMEN'S ARMED CONFLICT

While Yemen experiences several internal armed conflicts, including southern self-determination and terrorism, the following section centers on the relevant facts and parties to Yemen's armed conflict between the internationally recognized government and the Houthis. Then, it focuses on Saudi Arabia and its coalition's airstrikes by examining what targets it strikes, particularly water resources in Yemen. Additionally, the section discusses the starvation crisis in Yemen through deprivation of water and cholera outbreaks.

##### *i. Yemen's Internal Armed Conflict and Saudi Arabia Coalition Airstrikes*

In 2015, the Houthi rebel group, supported by weapons and financing by Iran, ran the Yemeni government out of the country and into Saudi Arabia after capturing the capital city and inserting a shadow government.<sup>17</sup> The rebellion grew in such strength that Yemeni leader Abd Rabbu-Mansour Hadi requested military support from Saudi Arabia, United Arab Emirates, Bahrain, Oman, Kuwait, and Qatar.<sup>18</sup> In response, Saudi Arabia led a coalition to support President Hadi with his consent as the internationally recognized leader of the Yemen government and launched attacks over Houthi-controlled territory.<sup>19</sup> Over the following four to five years, Saudi Arabia targeted Yemen using about 20,000 airstrikes, caused over 8,500 civilian deaths, and attacked over 6,500 known non-military

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17. See Serr, *supra* note 4, at 358 (explaining that in 2015 the Houthis seized the presidential palace, placed President Hadi under house arrest, but he eventually escaped and declared that the Houthis staged a coup with help of security services that favored the former President Ali Abdullah Saleh).

18. See Permanent Rep. of Qatar to the U.N. Security Council [UNSC], Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/217 (Mar. 27, 2015) (requesting support in the name of international and regional peace and security).

19. See HUMAN RIGHTS WATCH, YEMEN: EVENTS OF 2018 (2019) (adding that the U.S. also supported the coalition with intelligence, air refueling, and selling weapons).

targets.<sup>20</sup> Specifically, the coalition airstrikes attacked farmland, water supplies like wells and water tanks, and water facilities and projects.<sup>21</sup> Particularly, half of the attacks on water resources occurred in two governates, Saada and Hudaydah, which are primary conflict zones.<sup>22</sup> About two-third of these attacks occurred in five governates: Saada, Hudaydah, Taiz, Hajja, and Sanaa.<sup>23</sup> Saudi Arabia justifies its airstrikes continuously targeting civilians by designating them as accidents, military objectives, or denying the existence of the strike.<sup>24</sup>

## ii. *The Starvation Crisis*

The starvation crisis stems from several causes and developed into one of the worst known humanitarian crises.<sup>25</sup> States, including Saudi Arabia, periodically set up naval blockades preventing humanitarian aid from key ports.<sup>26</sup> The airstrikes hit hundreds of critical water

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20. See YEMEN DATA PROJECT, *supra* note 6 (showing infographics in which the total number of civilian's injured and killed is over 18,000).

21. See Human Rights Council, *Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014: Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen*, ¶¶ 46–51, A/HRC.42/CRP.1 (Sept. 3, 2019) [hereinafter *HRC Detailed Findings Report*] (analyzing international humanitarian law violations generally from all parties to the conflict, analyzing the categorization of the conflict as non-international, and developing the legal basis for responsibility of each party, including Saudi Arabia).

22. *Data: Airwar*, *supra* note 7 (sorting attacks by the governate that the airstrike occurred within, and then eliminating all but those strikes on water resources).

23. *Id.* (categorizing data on airstrikes by the governate that was attacked).

24. See Stephanie Nebehay, *Saudi Arabia Admits Coalition 'Mistakes' in Targeting in Yemen*, REUTERS (Oct. 1, 2018), <https://www.reuters.com/article/us-yemen-security-saudi-children-idUSKCN1MB3O4> (expressing Saudi Arabia's assertion that it held violators accountable, had a list of off-limit targets in Yemen, and excused hitting those targets because Houthi rebels used them as refugees, while admitting it violation rules of engagement on at least one occasion).

25. See Yuliya Talmazan, *Yemen Crisis: Three Stats that Reveal the Scale of World's Worst Humanitarian Crisis*, NBC NEWS (Oct. 28, 2018), <https://www.nbcnews.com/news/world/yemen-crisis-three-stats-reveal-scale-world-s-worst-humanitarian-n923741> (showing that the number of cholera deaths of children at the time was over 50,000, one million people had cholera, and Yemeni children had lived through 18,000 airstrikes at that point); *Humanitarian Crisis in Yemen Remains the Worst in the World, Warns UN*, UN NEWS (Feb. 14, 2019), <https://news.un.org/en/story/2019/02/1032811> (approximately eighty-percent of Yemen's population – about twenty-four million people – need assistance and protection).

26. See *Yemen: Coalition Blockade Imperils Civilians*, HRW (Dec. 7, 2017),



resources: water tanks and trucks, water drillers, water projects, water desalination or sewage plants, water pumps, wells, and water factories.<sup>27</sup> The attacks on water infrastructure led to massive cholera outbreaks killing thousands, many of which were children.<sup>28</sup> About twenty million people of the State of Yemen are deprived of critical food, water, and sanitation necessary for survival.<sup>29</sup> For example, attacks on water in Taiz City put 400,000 people at risk by depriving them of safe drinking water.<sup>30</sup> Governates such as Saada, Hudaydah, Taiz, and Hajja have been in states of emergency regarding starvation since 2017.<sup>31</sup> Sanaa and other more inland governates have also been at a critical level approaching emergency since then.<sup>32</sup> The international community has called for humanitarian pauses of the violence to give people necessary aid, to no avail, and demanded accountability for the starvation crisis numerous times since the start of the conflict.<sup>33</sup>

## B. ADDITIONAL PROTOCOL II

The following section will discuss the parameters of Protocol II: the

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<https://www.hrw.org/news/2017/12/07/yemen-coalition-blockade-imperils-civilians#> (describing the blockade's restriction of food, fuel, and medicine in the poorest country in the Middle East).

27. See Data: Airwar, *supra* note 7.

28. See JEREMY M. SHARP, CONG. RESEARCH SERV., IN10729, YEMEN: CHOLERA OUTBREAK 1–3 (2017) (setting out the United States' assessment of the cholera outbreak and asserting that, as of August 1, 2017, 1,900 people have died of cholera, 80% of whom are children and elderly people).

29. See *Yemen*, WFP, <https://www.wfp.org/countries/yemen> (last visited Sept. 23, 2020) (claiming that, without food assistance, the number of people facing hunger would be over twenty million).

30. See SHARP, *supra* note 27, at 3 (expressing the U.S. and U.N. joint call for rehabilitation of the water system in Ta'iz City).

31. See *Mapping the Yemen Conflict*, EUR. COUNCIL FOREIGN REL., <https://www.ecfr.eu/mena/yemen> (last updated July 2019) (displaying infographic titled 'Food insecurity' from February 2017 and categorizing based on stressed, critical level, or emergency level of insecurity).

32. See *id.* (displaying 'Food insecurity' infographic, which shows the Western governates around Yemen's borders are almost entirely at an "emergency level", while the northwestern inland area was at a "crisis level" as of February 2017).

33. See Jane Ferguson, *Is Intentional Starvation the Future of War?*, NEW YORKER (July 11, 2018), <https://www.newyorker.com/news/news-desk/is-yemen-intentional-starvation-the-future-of-war> ("The Saudis have ignored pleas from every humanitarian organization operating in Yemen to halt the offensive on Hodeidah.").

requirement of a non-international armed conflict and how States are responsible. Additionally, the section will focus on Article 14, which prohibits the use of starvation as a method of warfare by attacking objects indispensable to the survival of a civilian population. This section will discuss the elements of Article 14 using a criminal law framework, namely *actus reus* and *mens rea* and an analogous case example to create a specific and clear understanding of how a State violates Article 14. Meeting these criteria demonstrates a violation of Article 14 of Protocol II.

*i. Scope of Protocol II: Non-International Armed Conflict and State Responsibility*

To better protect victims in conflicts based within a State, States came together in 1977 and put into force the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims in Non-International Armed Conflicts, also known as Protocol II.<sup>34</sup> The Protocol applies only to non-international armed conflicts, and a similar treaty exists for international armed conflicts, known as Protocol I.<sup>35</sup> For a State to be responsible for violations under Protocol II, the State must meet a series of criteria listed in Article 1: the conflict must occur within the territory of a party to Protocol II, the responsible State must also be party to Protocol II, the conflict must be non-international in nature, and the State must be responsible for the action that violates the Protocol.<sup>36</sup> Yemen became a party to Protocol II in 1990,<sup>37</sup> and Saudi Arabia did the same in 2001.<sup>38</sup>

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34. See generally Protocol II, *supra* note 9, 1125 U.N.T.S. at 611–17.

35. See generally Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1, June 8, 1977, 1125 U.N.T.S. 3, 7 [hereinafter Protocol I]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 2, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol II, *supra* note 9, 1125 U.N.T.S. at 611.

36. Protocol II, *supra* note 9, 1125 U.N.T.S. at 611.

37. Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims if non-international armed conflict (Protocol II): Accession, Yemen, June 20, 1990, 1567 U.N.T.S. 309 [hereinafter Yemen Accession].

38. See Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims if non-international armed conflict (Protocol II):

Article 1 of Protocol II defines non-international armed conflicts as between the armed forces of a party to Protocol II and a dissident or organized armed group.<sup>39</sup> An international armed conflict, defined in Protocol I, is State against State armed conflict or a non-State group fighting for self-determination against a State as a racist regime, alien occupant, or colonial power.<sup>40</sup> Conversely, Article I of Protocol II specifies that “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” are not armed conflicts.<sup>41</sup> Protocol II is unique in its definition of non-international armed conflicts because it requires non-State armed groups to have territorial control to carry out sustained military operations.<sup>42</sup>

ii. *The Central Case Categorizing Armed Conflicts: Tadić*

The landmark case encapsulating the legal distinctions between international, non-international armed conflicts, and internal disturbances is *Prosecutor v. Tadić*, from the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>43</sup> The ICTY is the first tribunal created by the United Nations Security Council in 1993 to prosecute individuals for widespread violations of international

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[https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/internationale-vertraege/datenbank-staatsvertraege/detailansicht-staatsvertrag.ggst0\\_51.contract19770113.html?\\_charset=UTF-8](https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/internationale-vertraege/datenbank-staatsvertraege/detailansicht-staatsvertrag.ggst0_51.contract19770113.html?_charset=UTF-8) (last updated Nov. 27, 2017) [hereinafter Saudi Arabia Accession: Switzerland] (showing Saudi Arabia deposited its accession to Protocol II on Nov. 28, 2001, which entered the treaty into force for Saudi Arabia on May 28, 2002); see also *Treaties, States Parties and Commentaries*, INT'L COMM. RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=475](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475) (last visited Sept. 25, 2020) [hereinafter Saudi Arabia Accession: ICRC].

39. Protocol II, *supra* note 9, 1125 U.N.T.S. at 611.

40. See Protocol I, *supra* note 34, 1125 U.N.T.S. at 7; Geneva Convention IV, *supra* note 34, 75 U.N.T.S. at 288; see also Protocol II, *supra* note 9, 1125 U.N.T.S. at 611.

41. Protocol II, *supra* note 9, 1125 U.N.T.S. at 611.

42. *Id.*

43. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

humanitarian law within the former Yugoslavia.<sup>44</sup> The first case came out against Duko Tadić, charged with counts of several international crimes: grave breaches of the Geneva Conventions, violations of laws or customs of war, and crimes against humanity.<sup>45</sup>

One of the many procedural decisions during the trial included the defense's appeal of the case for lack of jurisdiction, in part, because no internal or international armed conflict existed.<sup>46</sup> In that decision, the court analyzed whether an armed conflict existed in the former Yugoslavia, bringing the case into the court's jurisdiction, and articulated definitions.<sup>47</sup> Citing the Geneva Conventions and Protocols I and II, the court confirmed that an international conflict occurs when State armed forces resort to armed conflict.<sup>48</sup>

Additionally, the ICTY Trial Chamber, in its decision of the Tadić case, analyzed when fighting within a State rises to the level of a non-international armed conflict.<sup>49</sup> The Trial Chamber set out a two-pronged inquiry: whether there was sufficient fighting and whether the non-State group was adequately organized.<sup>50</sup> In this case, the Trial Chamber looked at the continued involvement of U.N. Security Council and the ongoing nature of the conflict in considering its nature and scope.<sup>51</sup> Clashes between opposing groups occurred on both sides of the checkpoints dividing the parties and continued once the Bosnian Serbs obtained territorial control and separation.<sup>52</sup> In assessing the organization of the party breaking away from the State, the Bosnian Serbs, the ICTY assessed the determinable territorial control of the group, its political organization, and the constitution of an organized

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44. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶1–2 (Int'l Crim. Trib. For the Former Yugoslavia May 7, 1997).

45. *Id.* ¶¶ 9, 17 (explaining that the crimes remained the same, but the prosecution reorganized the charges and lowered the number of counts).

46. *See Tadić*, Case No. IT-94-1-I, ¶ 2 (listing the three-pronged attack of the defense's appeal: illegal foundation of the International Tribunal; wrongful primacy of the International Tribunal over national courts; and lack of jurisdiction *ratione materiae*).

47. *Id.* ¶¶ 66–70.

48. *Id.* ¶70.

49. Tadić, Case No. IT-94-1-T, ¶¶ 561–68.

50. *Id.* ¶ 561–71.

51. *Id.* ¶ 564–67.

52. *Id.* ¶ 564–66.

military force with a command structure.<sup>53</sup>

*iii. State Responsibility: Nicaragua v. U.S. and 'Co-Belligerents'*

The *Case Concerning Military and Paramilitary Activities in and Against Nicaragua in 1986* (*Nicaragua v. U.S.*) from the International Court of Justice (ICJ) demonstrated at what point a State's involvement in an armed conflict leads to its responsibility: the effective control test.<sup>54</sup> In the case, Nicaragua accused the United States of direct responsibility for the alleged crimes of the rebels called Contras.<sup>55</sup> The ICJ decided that the United States did not have effective control over rebels in Nicaragua by financing, organizing, training, supplying, and equipping the Contras.<sup>56</sup> As a result, the United States could not be responsible for the Contras' actions; it was only responsible for its own actions in connection to the Contras because it did not direct or enforce the acts perpetrated by the rebels.<sup>57</sup>

Alternatively, when attributing state responsibility to organized non-State groups, *Nicaragua v. U.S.*'s effective control test often is in competition with the broader overall control test from the *Tadić* case in its Appeals Chamber.<sup>58</sup> In this case, the ICTY did not decide on whether a State was responsible, but it asserted that a State is responsible for a non-State group when it coordinates or helps plan the military operations of the group in addition to any equipping, financing, or training.<sup>59</sup>

Additionally, while there is little in international humanitarian law describing the criteria for when a State becomes a party to another States' non-international armed conflict, a United Nations' expert analysis of the Yemen conflict and an expert from the International

53. *Id.* ¶¶ 563–64.

54. *Military and Paramilitary Activities in and Against Nicaragua* (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14, ¶ 115 (June 27).

55. *Id.* ¶ 1.

56. *Id.* ¶ 115.

57. *Id.* ¶ 115–16.

58. *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 124–131 (Int'l Crim. Trib. For the Former Yugoslavia July 15, 1999) (rejecting the “effective control” test, propounded by the ICJ in *Nicar. v. U.S.*, 1986 I.C.J. 14 (June 27), in favor of the “overall control” test in determining whether acts by a military or paramilitary group may be attributed to a State).

59. *Id.* ¶ 131.

Committee of the Red Cross have designated a point at which, similar to the control tests described above, States or multinational forces become “co-belligerents.”<sup>60</sup> They assert that a State may become a party of another State’s non-international armed conflict as a co-belligerent when it participates in military operations with the State that is in a non-international armed conflict.<sup>61</sup>

### C. COMPLIANCE WITH PROTOCOL II: A CRIMINAL LAW FRAMEWORK

Violations of Article 14 of Protocol II require two elements which can be easily described using a criminal law approach: *actus reus* and *mens rea*. First, the section briefly explains Article 14 and the application of the criminal law framework. Second, there will be a case analysis of the partial awards case from the Eritrea-Ethiopia Claims Commission as an analogous case. Third, the section will define the *actus reus*: attacks against objects indispensable for the survival of the civilian populations. Finally, there will be a breakdown of factors allowing for the inference of a State’s intent to use starvation as a method of combat, the *mens rea*.

#### *i. Article 14: Protection Against Starvation as a Method of Combat Via Attacks on Objects Indispensable to a Civilian Population’s Survival*

While the practice of starving out combatants is acceptable under international humanitarian law,<sup>62</sup> it is also a common tactic to target civilians using starvation.<sup>63</sup> Starvation under Protocol II is defined as

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60. See *HRC Detailed Findings Report*, *supra* note 20, ¶ 50; see also Tristan Ferraro, *The Applicability and Application of International Humanitarian Law to Multinational Forces*, 95 INT’L REV. RED CROSS 561, 584 (2014) (explaining that a multinational force becomes a co-belligerent and party to the conflict when it assists one of the parties to that armed conflict as an armed force).

61. See *HRC Detailed Findings Report*, *supra* note 20, ¶ 50; see also Ferraro, *supra* note 59, at 584 (applying the concept of co-belligerents to multinational armed forces).

62. See Esbjörn Rosenblad, *Starvation as a Method of Warfare – Conditions for Regulation by Convention*, 7 INT’L LAW. 252, 253 (1973) (citing scholarship declaring relative unanimity that starvation is acceptable against combatants).

63. See Beth Van Schaack, *Siege Warfare and the Starvation of Civilians as a Weapon of War and War Crime*, JUST SECURITY (Feb. 4, 2016),

“the action of subjecting people to famine, i.e. extreme and general scarcity of food.”<sup>64</sup> Article 14 is meant to prevent the use of starvation as a method of war by designating the most common forms of attack on objects necessary to prevent starvation.<sup>65</sup> The provision is titled the ‘Protection of Objects Indispensable to the Survival of the Civilian Population’ and specifies:

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as food stuffs, agricultural areas for the production of food stuffs, crops, livestock, drinking water installations and supplies and irrigation works.<sup>66</sup>

The basic principles of proving violations of an international crime stand true for State violations of treaties like Protocol II by breaking down violations into clear elements.<sup>67</sup> All international crimes have two common elements: the criminal act – *actus reus* – and a criminal intent – *mens rea*.<sup>68</sup> This construct is particularly relevant for violations of Article 14 of Protocol II because there is a specific requirement of intent to use starvation as a method of warfare; this raises the level of proof necessary to prove a violation of Article 14 beyond the act of an attack on objects indispensable to a civilian population’s survival.<sup>69</sup> The language of the provision inherently

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<https://www.justsecurity.org/29157/siege-warfare-starvation-civilians-war-crime/> (showing that starvation of civilians in war is not new or uncommon).

64. Sylvie-S. Junod, Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), in COMMENTARY ON THE ADDITIONAL PROTOCOL OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1456 (Yves Sandoz et al. eds., 1987).

65. *Id.*

66. Protocol II, *supra* note 9, 1125 U.N.T.S. at 615.

67. See NINA H.B. JØRGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 151–54 (2000) (arguing that it is logical to conflate the acts of an individual under criminal law with the acts of the State because they act as agents of the State and a State therefore must have an *actus reus* and *mens rea* for the crime).

68. See Yoram Dinstein, *International Criminal Law*, 20 ISR. L. REV. 206, 233 (1975) (exploring the basic elements of international crimes).

69. Cf. BEATRICE I. BONAFÈ, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES 2–5, 27–8 (2009)

requires a separate legal analysis of the act, actus reus, and intent, mens rea, to prove a State's violation.<sup>70</sup>

*ii. Example Case: Partial Award Case of the Eritrea-Ethiopia Claims Commission*

The following case demonstrates a rare direct example of when attacks on a water resource violates the prohibition on using starvation as a method of warfare. In 2000, Eritrea and Ethiopia signed the Algiers Agreement, ending about two years of hostilities between the two States.<sup>71</sup> Within the agreement came the Eritrea-Ethiopia Claims Commission, which created binding arbitration for claims coming out of international law violations, including humanitarian law, the 1949 Geneva Conventions, and the Additional Protocol I.<sup>72</sup> In April 2005, the Claims Commission looked at claims that included an attack on a water reservoir during Ethiopia's aerial bombardment.<sup>73</sup> The Commission decided that the attack constituted a violation of the language of Article 54 of Protocol I as part of customary international law,<sup>74</sup> the equivalent provision to Article 14 of Protocol II which applies to international armed conflicts.<sup>75</sup>

Specifically, Ethiopia conducted several airstrikes on a water

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(describing how under aggravated state responsibility, individual and state responsibility are linked in their origins and with respect to specific international crimes, including war crimes).

70. *Cf. id.* at 114–18 (demonstrating and discussing the interconnections between individual and state responsibility for international crimes in part because individuals and states can be held responsible for the same acts in different tribunals or mechanisms).

71. *See* Permanent Representative of Algeria to the UNSC, Identical Letters dates 12 December 2000 from the Permanent Representative of Algeria to the United Nations addressed to the Secretary-General and the President of the Security Council, annex, U.N. Doc. A/55/686-S/2000/1183 (Dec. 12, 2000); *see also Eritrea-Ethiopia Claims Commission*, PERM. CT. ARB., <https://pca-cpa.org/en/cases/71/> (last visited Apr. 5, 2020) (explaining the context surrounding the establishment of the Eritrea-Ethiopia Claims Commission).

72. *Eritrea-Ethiopia Claims Commission*, *supra* note 70.

73. Partial Award: Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims (Eri. v. Eth.), 26 R.I.A.A. 291, 328 (Eri.–Eth. Claims Comm'n 2005).

74. *Id.* at 330.

75. Protocol I, *supra* note 34, 1125 U.N.T.S. at 27–8.



reservoir in Harsile, Eritrea but did not cause any damage.<sup>76</sup> In admitting that it targeted the reservoir, Ethiopia justified the attack by asserting it believed Eritrea's military capacity would be restricted by losing supply of that water.<sup>77</sup> Eritrea responded by showing that the reservoir operated only for civilians and served as the sole source of water for the surrounding population.<sup>78</sup> The Commission found that the Ethiopian government had to have known that the reservoir served as a vital water source for the nearby city Assab.<sup>79</sup> In admitting to targeting the water reservoir and the knowledge they must have had that the reservoir served as a vital water source to civilians, the Commission found that Ethiopia targeted the reservoir to deprive civilians of water.<sup>80</sup>

*iii. Actus Reus: Attacks Against Objects Indispensable for the Survival of a Civilian Population*

There are two different avenues to decide whether there is an attack against an object indispensable to the survival of a civilian population: the attack is against an object specified in Article 14 of Protocol II or providing evidence that the object not listed in Article 14 is vital to a civilian population's survival.<sup>81</sup> Protocol II names a non-exhaustive list of typical objects targeted for starvation, including "drinking water installations and supplies and irrigation works."<sup>82</sup> Additionally, the Eritrea-Ethiopia Claims Commission case presents a specific example of an attack against a water reservoir.<sup>83</sup>

When it is not within the specific examples of Protocol II, the object

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76. Eri. v. Eth., 26 R.I.A.A. at 328.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. See Junod, *supra* note 63, at 1458 ("This sentence develops the principle prohibiting starvation from being used against civilians by pointing out the most usual ways in which starvation is brought about. By using the word "therefore" certain acts are emphasized, but the list is not exhaustive.").

82. Protocol II, *supra* note 9, 1125 U.N.T.S. at 615 (specifying examples "such as food stuffs, agricultural areas for the production of food stuffs, crops, livestock, drinking water installations and supplies and irrigation works" and implying that the list is not exhaustive).

83. See Eri. v. Eth., 26 R.I.A.A. at 328–330.

must prove to be indispensable to a civilian population's survival.<sup>84</sup> For water resources, objects indispensable to a civilian population are those that would deprive that population of access to water.<sup>85</sup> The Eritrea-Ethiopia Claims Commission partial award case also used evidence that showed that the reservoir was a sole vital source of water for a nearby city in Eritrea.<sup>86</sup> Additionally, the Commission determined that the attack does not have to successfully destroy, remove, or render useless the object but must simply target that object.<sup>87</sup>

*iv. Mens Rea: Intent to Starve a Civilian Population as a Method of Combat*

The crux of Article 14 of Protocol II is the intent provision written into it requiring attacks on indispensable objects to be “for [the] purpose” of “starvation of civilians as a method of combat.”<sup>88</sup> Generally, these objects can be either military or civilian to violate Article 14 as long as the intent is to starve civilians and the objects are vital to their survival.<sup>89</sup>

State intent can be inferred from several factors.<sup>90</sup> For example, when the Eritrea-Ethiopia Claims Commission looked at intent in the partial award case, it determined that Ethiopia intended starvation of

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84. See Junod, *supra* note 63, at 1458 (“Objects indispensable to the survival of the civilian population’ means objects which are of basic importance for the population from the point of view of providing the means of existence.”).

85. See IHL Database: Rule 54. Attacks Against Objects Indispensable to the Survival of the Civilian Population, INT’L COMM. RED CROSS, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule54](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule54) (last visited Apr. 5, 2020) (defining objects indispensable to the survival of a civilian population in international and non-international armed conflicts).

86. Eri. v. Eth., 26 R.I.A.A. at 328.

87. *Id.* at 330.

88. Protocol II, *supra* note 9, 1125 U.N.T.S. at 615.

89. See Junod, *supra* note 63, at 1458 (“The text does not distinguish between objects intended for the armed forces and those intended for civilians. Except for the case where supplies are specifically intended as provisions for combatants, it is prohibited to destroy or attack objects indispensable for survival, even if the adversary may benefit from them.”).

90. See generally Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT’L L. 79, 81–4 (2013) (explaining the variation in determining intent under international humanitarian law).

civilians based on three sets of facts: they targeted the water reservoir, the evidence showed they must have known the target was not military in nature, and it served as a vital water resource for a nearby city.<sup>91</sup> Additional factors include adherence to the prohibitions and principles of international humanitarian law, particularly the principle of distinction, and steps taken to prevent suffering from attacks.<sup>92</sup> The International Committee for the Red Cross confirms this outlook in its commentary on Article 14 of Protocol II by asserting that the article is the only protection available against targeting civilian objects within non-international armed conflicts under the Protocol.<sup>93</sup>

A State's inability to comply with the international humanitarian law principle of distinction can particularly show intent to harm civilians.<sup>94</sup> While there is no designation of distinction in Protocol II, the definition in Protocol I has been incorporated into other treaties following Protocol II that apply to non-international armed conflicts.<sup>95</sup> The definition in Protocol I in Article 52(2) designates a military objective by which States must distinguish as those that will make a military contribution to the attacking party by offering the party a military advantage.<sup>96</sup> A method for proving failure to distinguish is

91. *Eri. v. Eth.*, 26 R.I.A.A. at 330.

92. Cf. Catriona Murdoch & Wayne Jordash, *Clarifying the Contours of the Crime of Starvation*, EJIL:TALK! (June 27, 2019), <https://www.ejiltalk.org/clarifying-the-contours-of-the-crime-of-starvation/>.

93. See Junod, *supra* note 63, at 1456 (raising the importance of the article in protecting vital civilian objects).

94. See Ohlin, *supra* note 89, at 85–6 (describing the direct, yet often unexpressed, connection between distinction and intent because distinction inherently requires an understanding of where attacks are directed).

95. See, e.g., Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 3 May 1996, art. 2(6), May 3, 1996, 2048 U.N.T.S. 133, 134 [hereinafter Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices]; Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 1(f), Mar. 26, 1999, 2253 U.N.T.S. 212, 212–13.

96. Protocol I, *supra* note 34, 1125 U.N.T.S. at 27 (“In so far as objects are concerned, military objectives are limited to 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.”).

through the patterns of the attacks.<sup>97</sup> For example, the South Africa Truth and Reconciliation Commission, in analyzing the responsibility of parties to the apartheid in South Africa, saw patterns of atrocities historically occurred as a State widened the scope of its attack.<sup>98</sup> The Commission found that the patterns of atrocities committed in South Africa occurred because State policy shifted to allow civilians to become acceptable targets.<sup>99</sup>

#### D. POSSIBLE DEFENSE: A LEGITIMATE PURPOSE FOR ATTACKING THE OBJECTS

While Article 14 of Protocol II does not address allowable defenses,<sup>100</sup> the omission of these defenses can be juxtaposed to the existence of allowable exceptions within the equivalent Article 54 of Protocol I for international armed conflicts.<sup>101</sup> The Vienna Convention on the Law of Treaties (Vienna Convention) allows for the interpretation of possible defenses not explicitly written into an article or treaty.<sup>102</sup> Interpretation of treaties under the Vienna Convention requires a text-centered analysis in light of the treaty's object and purpose, and can be put into relevant context.<sup>103</sup> Particularly, when there is ambiguity, Protocol II, as with other humanitarian law treaties, is meant to be interpreted in favor of civilians as that is the object and purpose of the treaty.<sup>104</sup>

Regarding defenses under Protocol I, Article 54 specifically allows derogation of obligation to the Article in certain conditions.<sup>105</sup> Primarily, attacks on objects indispensable for a civilian population's survival are not a violation when there is an imperative military necessity and the territory is within the State's control, so long as the

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97. See TRUTH & RECONCILIATION COMM'N OF S. AFR., THE REPORT OF THE TRUTH AND RECONCILIATION COMMISSION VOLUME 5 PRESENTED TO PRESIDENT NELSON MANDELA ON 29 OCTOBER 1998, 276–77 (2002).

98. *Id.*

99. *Id.*

100. See Protocol II, *supra* note 9, 1125 U.N.T.S. at 615.

101. See Protocol I, *supra* note 34, 1125 U.N.T.S. at 27–8.

102. See Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 332, 340 (allowing for context to be considered in interpreting a treaty).

103. *Id.*

104. *Id.*; Protocol II, *supra* note 9, 1125 U.N.T.S. at 611.

105. Protocol I, *supra* note 34, 1125 U.N.T.S. at 27–8.

purpose is not to starve civilians.<sup>106</sup> Adding the adjective “imperative” to the military necessity requirement severely limits the circumstances that States can legitimately claim allow them to attack objects necessary to civilian’s survival under Article 54.<sup>107</sup> However, the objects are legitimate military targets when they provide sustenance solely for the military or are in direct support of military action when it cannot be expected to starve civilians.<sup>108</sup> Generally, the legitimacy of the targets allowing for a derogation from Article 54 obligations relies on the intent of the State and its knowledge of the likelihood of starvation before its attacks.<sup>109</sup> Once the objects are targeted to starve a civilian population, the legitimacy of the military nature of the object is inadmissible as a defense.<sup>110</sup>

### III. ANALYSIS

This analysis argues that Saudi Arabia violated Article 14 of Protocol II, as a party to the protocol, when it attacked water resources for the purpose of starving civilians in Yemen and can assert no defenses to remove responsibility. First, there is an assessment of Saudi Arabia’s violation of Article 14 of Protocol II by analyzing the necessary elements using the language of the criminal law framework: a non-international armed conflict, *actus reus*, and *mens rea*.<sup>111</sup> Second, it argues that no defense is possible to remove responsibility for the violation of Article 14 of Protocol II through analyzing the analogous defenses written into Article 54 of Protocol I.

#### A. SAUDI ARABIA VIOLATED ARTICLE 14 OF PROTOCOL II BY ATTACKING WATER RESOURCES VITAL TO YEMENI CIVILIANS

Generally, experts agree that the armed conflict in Yemen qualifies as a non-international armed conflict, which brings the conflict within Protocol II obligations.<sup>112</sup> Saudi Arabia is obligated under Protocol II

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106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. See discussion *supra* Part II(B).

112. See HRC Detailed Findings Report, *supra* note 20, ¶ 46; see also Int’l Comm’n of Jurists, Bearing the Brunt of War in Yemen: International Law

because it is a party to the treaty and the location of the conflict, Yemen, is also a party to it.<sup>113</sup> The first necessary analysis for this obligation is the conflict's categorization as a non-international armed conflict, broken into two prongs: separating an armed conflict from an internal disturbance and separating a non-international armed conflict from an international armed conflict.<sup>114</sup> Second, there is an analysis of the types of water resources Saudi Arabia has targeted and whether they are categorized as objects indispensable to the survival of a Yemeni civilian population, demonstrating the *actus reus*. Finally, the section breaks down the various ways Saudi Arabia's actions may demonstrate an intent, *mens rea*, to starve a civilian population as a method of combat.

*i. Within the Bounds of Protocol II: Situation in Yemen  
Categorized as a Non-International Armed Conflict beyond internal*

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Violations and Their Impact on the Civilian Population 4–9 (2018) (concluding that the conflict in Yemen is a non-international armed conflict); Geneva Acad. of Int'l Humanitarian Law and Human Rights, *The War Report: Armed Conflicts in 2018* 34 (Annyssa Bellal ed., 2019) (counting Yemen among the non-international armed conflicts in 2018); Waseem Ahmad Qureshi, *The Crisis in Yemen: Armed Conflict and International Law*, 45 N.C.J. INT'L LAW 227, 247–48 (2020) (asserting that the evidence shows the conflict in Yemen does not rise to an international armed conflict); Haydee Dijkstal, *Yemen and the Stockholm Agreement: Background, Context, and the Significance of the Agreement*, AMER. SOC'Y INT'L L. (May 31, 2019), <https://www.asil.org/insights/volume/23/issue/5/yemen-and-stockholm-agreement-background-context-and-significance> (explaining why Yemen is a non-international armed conflict and asserting that this designation is widely accepted).

113. See Saudi Arabia Accession: Switzerland, *supra* note 37 (showing Saudi Arabia deposited its accession to Protocol II on Nov. 28, 2001, which entered the treaty into force for Saudi Arabia on May 28, 2002); Saudi Arabia Accession: ICRC, *supra* note 37 (showing Saudi Arabia's accession to Protocol II on Nov. 28, 2001); Yemen Accession, *supra* note 36, 1567 U.N.T.S. 309 (entering Protocol II into force for Yemen on Dec. 20, 1990). See generally U.N. Charter art. 102 (showing the obligation of states to report their accession of treaties to the U.N.); *Details Page of Treaty: Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, U.N.T.C. <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3cb8> (last visited Sept. 25, 2020) (including a list of signatories and parties to the treaty and showing no report by Saudi Arabia to the U.N. of its accession to Protocol II, which would be a violation of its obligation under U.N. Charter art. 102).

114. See Protocol II, *supra* note 9, 1125 U.N.T.S. at 611.

*disturbances*

In Yemen, the conflict is fought between the State of Yemen and an internal rebel group, the Houthis, requiring the violence under Protocol II to rise beyond an internal disturbance.<sup>115</sup> Under the Tadić decision, the violence rises to a level of armed conflict based on the length of time of fighting, the organization of the non-State group, and its ability to sustain the fight against the State.<sup>116</sup> The Houthis are centralized to the point of instituting a shadow government in the capital, Sanaa, where they increased their power.<sup>117</sup> Iran's military supply demonstrates funding and support which helped build the strength of the Houthis to fight as a formidable, and successful, opponent and raises the conflict above mere "internal disturbances and tensions."<sup>118</sup> The fighting itself has lasted between the Houthi and Yemen for about five years, which further proves the Houthi's ability to sustain the armed conflict.<sup>119</sup> Therefore, the armed conflict in Yemen easily rises to the level of a non-international armed conflict because the Houthi rebellion is considered an organized group within the definition of Protocol II.<sup>120</sup>

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115. See *Tadić*, Case No. IT-94-1-I, ¶¶1–2 (providing the test necessary to find an armed conflict); see also *HRC Detailed Findings Report*, *supra* note 20, ¶¶ 46–51 (examining the fighting in Yemen).

116. *Tadić*, Case No. IT-94-1-T, ¶¶ 561, 564–67.

117. See *Yemen's Houthis Form Surprise New Government*, CNN (Nov. 29, 2016), <https://www.cnn.com/2016/11/29/middleeast/yemen-houthis-new-government/index.html> (describing the formation of a Houthi government over its controlled territory in 2016); see also Int'l Comm'n of Jurists, *supra* note 111, at 3–4 (depicting the Houthi takeover of Yemen's capital, Sanaa in 2014 and their subsequent rule over the north and banishment of President Hadi).

118. See Protocol II, *supra* note 9, 1125 U.N.T.S. at 611; Int'l Comm'n of Jurists, *supra* note 111, at 3 (concluding that the Houthi group is sufficiently organized based on their ability to take a large territory of Yemen including its capital and the sophisticated method of warfare used by both sides demonstrates sufficient intensity of fighting to constitute a non-international armed conflict).

119. See *Yemen Crisis: Why is There a War?*, BBC NEWS (June 19, 2020), <https://www.bbc.com/news/world-middle-east-29319423> (describing the roots of the conflict, the Houthi separatist movement, and how the Houthis have maintained territory in Yemen through various waves of fighting and peace negotiations).

120. Protocol II, *supra* note 9, 1125 U.N.T.S. at 611 (asserting that the Protocol applies to all armed conflict which do not fall within article 1 of Protocol I, which defines international armed conflicts, and must take place in one of two cases: between a High Contracting Party's armed forces and organized group which "exercise such control over a part of its territory as to enable them to carry out

ii. *Foreign State Responsibility Under Protocol II: Saudi Arabia Acts as a Co-belligerent in the Conflict Supporting the Yemen Government and Iran Does Not*

Additionally, the involvement of Saudi Arabia and allegation of involvement by Iran raise issues of whether an international armed conflict exists.<sup>121</sup> Saudi Arabia acts on behalf of and in assistance to Yemen through military operations, primarily airstrikes.<sup>122</sup> These airstrikes, coupled with blockades, make the bulk of Yemen's military capacity against the Houthi rebels.<sup>123</sup> The internationally recognized Yemen government, particularly President Hadi, is exiled in Saudi Arabia.<sup>124</sup> The limited international understanding of State responsibility in this context requires a State to act as a co-belligerent in which the State conducts military operations in another State's non-international armed conflict.<sup>125</sup> Saudi Arabia easily meets this bar because it actively participates in military operations and casualties as the primary hostile actor against the Houthis.<sup>126</sup> Under the United Nations' Expert Report on Yemen and the International Committee of the Red Cross experts' understanding on Yemen, this makes it a party

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sustained and concerted military operations").

121. Tadić, Case No. IT-94-I-I, ¶ 70.

122. See *Key Facts About the War in Yemen*, AL JAZEERA (Mar. 25, 2018), <https://www.aljazeera.com/news/2016/06/key-facts-war-yemen-160607112342462.html> (reporting that Saudi Arabian airstrikes have caused almost two-thirds of reported civilian deaths).

123. See *Death from Above: Every Saudi Coalition Air Raid on Yemen*, AL JAZEERA <https://interactive.aljazeera.com/aje/2018/Saudi-Arabia-air-raids-on-Yemen/index.html> (last updated Mar. 25, 2019) (describing Saudi Arabia's intervention and aerial campaign in Yemen, including information from the Yemen Data Project that estimates about two-thirds of the airstrikes have hit non-military or unknown targets and including the escalation by the Coalition in 2017 by blockading rebel-held territories including vital ports).

124. See Stephen Kalin & Ghaida Ghantous, *Saudi Arabia Struggles to Hold Yemen Coalition Together as Allies Face Off*, REUTERS (Sept. 2, 2019), <https://www.reuters.com/article/us-yemen-security-explainer/saudi-arabia-struggles-to-hold-yemen-coalition-together-as-allies-face-off-idUSKCN1VN0Y9> (exploring the divisions in Hadi's government because of alleged support by some for the Houthi rebels and the government's lack of inclusion of regional voices, which demonstrates further difficulty for Saudi Arabia to end the fighting).

125. See discussion *supra* Part II(B)(1)(ii).

126. See *Yemen: Events of 2018*, *supra* note 18 (describing how Saudi Arabia continues its airstrikes regularly with air refueling and intelligence support from the U.S.).



of the non-international armed conflict and responsible for its obligations as a party of Protocol II.<sup>127</sup>

While Saudi Arabia provides direct support to Yemen by performing the airstrikes on its behalf,<sup>128</sup> Iran does not exercise similar control over the Houthis that would raise the conflict to State against State under Protocol I.<sup>129</sup> Concrete evidence of Iran's support of the Houthis generally relies on the similarity of the design and model of the weapons Houthis possess to Iranian weaponry.<sup>130</sup> However, supplying or training a military raise issues under *U.S. v. Nicaragua* from the ICJ, which decided on very similar facts that the United States did not exercise effective control and was therefore not responsible over the rebel group in Nicaragua by equipping, financing, and training the Contras.<sup>131</sup> While Iran is suspected to have had more control at one point or another in the conflict, the evidence available does not show that Iran has effective control over the Houthi under *Nicaragua v. U.S.* or overall control under the *Tadić* decision because there is no evidence Iran provides the Houthis anything more than weaponry and possibly funding.<sup>132</sup> Given that Iran does not have

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127. See Protocol II, *supra* note 9, 1125 U.N.T.S. at 611; *HRC Detailed Findings Report*, *supra* note 20, ¶ 50; see also Ferraro, *supra* note 59, at 584 (describing the point at which a foreign armed force becomes a party to a non-international armed conflict: when it acts as a co-belligerent using its armed forces).

128. See Caitlin Foster, *Yemen Civil War: Who's Fighting the Brutal Conflict that's Left Millions on the Brink of Famine*, BUS. INSIDER (Mar. 14, 2019), <https://www.businessinsider.com/yemen-conflict-explained-2019-2> (describing Saudi Arabia's escalation of fighting to war in Yemen).

129. See Philippe Sands, Andrew Clapham, & Blinne Ni Ghraílaigh, *The Lawfulness of the Authorisation by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the Context of Saudi Arabia's Military Intervention in Yemen* ¶¶ 2.6–2.9 (2015) (finding no basis that there is an international armed conflict between Saudi Arabia and Iran because evidence of Iran's effective control is insufficient).

130. See Elisabeth Kendall, *Iran's Fingerprints in Yemen: Real or Imagined?*, ATLANTIC COUNCIL, 2–4 (2017) (explaining that Iran lacks control over the Houthis because, in spite of allegations of arming and training them, reports show Houthis defying Iranian advice).

131. *Nicar. v. U.S.*, 1986 I.C.J., ¶ 115.

132. See *Houthis Possess Arms 'Similar' to Those Made in Iran: UN Report*, AL JAZEERA (Feb. 1, 2020), <https://www.aljazeera.com/news/2020/02/houthis-possess-arms-similar-iran-report-200201092310615.html> (discussing a U.N. report that found evidence that Houthis' weaponry shared similar technical characteristics to Iranian manufactured weapons, and disclosed evidence that infers but cannot prove

control over the Houthis, this conflict also cannot rise to an international armed conflict because Iran is not a State acting as a co-belligerent, so the armed conflict is not a State against State as required under Article 1 of Protocol II.<sup>133</sup>

Additionally, an international armed conflict that would raise the obligations from Protocol II to Protocol I occurs when a non-State group fights against the State for the purpose of self-determination when that regime is racist, colonial, or alien in nature.<sup>134</sup> The Houthi rebels are fighting to overthrow and replace Yemen as the legitimate government of Yemen, rather than separate from Yemen.<sup>135</sup> While Saudi Arabia and its coalition dominate in its military representation over Yemen's exiled government and could be argued to be alien, the Houthi's purpose to overthrow the government limits another avenue for trying to raise the conflict to an international armed conflict.<sup>136</sup>

*iii. Actus Reus: Airstrikes on Water Resources are Objects Indispensable to the Survival of Yemen's Civilian Population*

Once the armed conflict falls within the Protocol II definition, a violation of Article 14 must prove that the party to the conflict, Saudi Arabia, attacked objects indispensable to a civilian population's

Iran carried out an attack where the Houthis took credit).

133. Protocol II, *supra* note 8, 1977, 1125 U.N.T.S. at 611.

134. Compare Protocol I, *supra* note 34, 1125 U.N.T.S. at 7 (asserting that armed conflicts can be internationalized between a State and non-State group under certain conditions) with Protocol II, *supra* note 9, 1125 U.N.T.S. at 611 (defining non-international armed conflict as anything that does not fall within the definition of international armed conflict under Protocol I that rises to the level of intensity of a State with a non-State group).

135. See Bruce Riedel, *Who Are the Houthis, and Why Are We At War with Them?*, BROOKINGS (Dec. 18, 2017), <https://www.brookings.edu/blog/markaz/2017/12/18/who-are-the-houthis-and-why-are-we-at-war-with-them/> (describing the historical existence of the Houthi before the war, its criticism of President Hadi, and collusion with former President Saleh to co-opt many from the military to take control of territory from the government).

136. See Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 2nd Sess., 18th mtg. at 153, CDDH/III/SR.18 (Feb. 12, 1975) [hereinafter Diplomatic Conference SR18] (arguing that Protocol II only concerns rebels trying to overthrow a government and not self-determination and using that argument to advocate for a less specific rule, which is now Article 14 of Protocol II).

survival. Protocol II specifically prohibits attacks against “drinking water installations and supplies and irrigation works,” while not limiting other indispensable objects.<sup>137</sup> Protocol II and the Eritrea-Ethiopia Claims Commission case present the foundational objects prohibited from attack in Yemen.<sup>138</sup> The Claims Commission case decided that Ethiopia had violated Article 54 of Protocol I, a similar provision prohibiting the use of starvation as a weapon by attacking objects indispensable to a civilian population’s survival.<sup>139</sup> In making that decision, the Claims Commission found that Ethiopia had targeted a water reservoir in Eritrea that served as a vital water source to a nearby city.<sup>140</sup>

Under these rules, the use of Saudi Arabian airstrikes against water infrastructure, supplies, and vital sources demonstrates acts on objects indispensable to the survival of a civilian population under Article 14 of Protocol II.<sup>141</sup> First, there have been dozens of airstrikes in four

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137. Protocol II, *supra* note 9, 1125 U.N.T.S. at 615.

138. *See id.*; Eri. v. Eth., 26 R.I.A.A. at 328–30.

139. *See* Eri. v. Eth., 26 R.I.A.A. at 328–30 (explaining that Ethiopia could not argue the target was a military objective because Ethiopia would have known that the water reservoir was a vital source of water for the nearby city). *Compare* Protocol II, *supra* note 9, 1125 U.N.T.S. at 615 with Protocol I, *supra* note 34, 1125 U.T.S. at 27–8 (“Protection of objects indispensable to the survival of the civilian population: 1. Starvation of civilians as a method of warfare is prohibited. 2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive. 3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party: (a) as sustenance solely for the members of its armed forces; or (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement. 4. These objects shall not be made the object of reprisals. 5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.”).

140. Eri. v. Eth., 26 R.I.A.A. at 330.

141. *See* Human Rights Council, Rep. of the Group of Eminent Int’l and Regional Experts as submitted to the United Nations High Commissioner for Human Rights,

years of conflict that hit sources of water, water infrastructure, or water supplies.<sup>142</sup> Specifically, the Yemen Data Project categorized almost every airstrike from Saudi Arabia since 2015, and the strikes have hit water tanks and trucks, wells, desalination plants, water pumps, water projects, water drillers, and some water factories.<sup>143</sup> Water tanks, trucks, pumps, and wells constitute “supplies” of water by granting access to communities struggling to find access to clean water.<sup>144</sup> Water projects and factories and desalination plants equally serve as vital installations to provide clean water in Yemen while the cholera outbreak signals an extreme lack of drinkable water.<sup>145</sup> The Yemen Data Project also did not designate almost any of these targets as military objects but rather economic objectives.<sup>146</sup>

These economic objectives are vital to the Yemen civilian population in light of the extreme need nationwide for drinkable water in the same way the water reservoir was vital to the nearby city in Eritrea in the Claims Commission case.<sup>147</sup> It was known since the

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*Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014*, A/HRC/42/17, ¶ 52 (2019) [hereinafter UN Expert Report] (finding that several attacks targeted objects indispensable to the survival of a civilian population in Yemen).

142. *Data: Airwar*, *supra* note 7 (categorizing data on Saudi coalition airstrikes, including the category ‘water & electricity’ that documents attacks on various sources of water, from sanitation facilities to water tanks and wells).

143. See *id.*

144. See Protocol II, *supra* note 9, 1125 U.N.T.S. at 615 (failing to define “water supply”); see also *Dictionary of Water Terms*, U.S. GEOLOGICAL SURV., [https://www.usgs.gov/special-topic/water-science-school/science/dictionary-water-terms?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/special-topic/water-science-school/science/dictionary-water-terms?qt-science_center_objects=0#qt-science_center_objects) (last visited Sept. 25, 2020) (asserting, under its definition of domestic water use, that “water supply” includes public water supply and self-service water supply like wells).

145. See *Water, Sanitation and Hygiene*, UNICEF, <https://www.unicef.org/yemen/water-sanitation-and-hygiene> (last visited Sept. 25, 2020) (cataloging UNICEF’s support of water supply systems through installations of water points, tanks, latrines, and more); see also Jim Robbins, *As Water Scarcity Increases, Desalination Plants Are on the Rise*, YALE ENV’T 360 (June 11, 2019), <https://e360.yale.edu/features/as-water-scarcity-increases-desalination-plants-are-on-the-rise> (explaining the vitality of desalination plants when water is known to be scarce and the growing need for them worldwide).

146. See *Data: Airwar*, *supra* note 7 (designating whether the target was military, economic, or unknown under column ‘Main Category’).

147. See *Eri. v. Eth.*, 26 R.I.A.A. at 328–30; see also Margaret Suter, *An Update on Yemen’s Water Crisis and the Weaponization of Water*, ATLANTIC COUNCIL

conflict's escalation in 2015 that most of Yemen lacked necessary food and water resources that slowly grew into near famine.<sup>148</sup> The International Committee of the Red Cross Commentary on Article 14 of Protocol II specifically defines starvation as the act of subjecting people to famine.<sup>149</sup> Saudi Arabia's blockade also prevented aid from coming into those areas to provide resources in 2017, making the water resources attacked such as tanks, wells, and desalination plants all the more vital for the civilian populations' survival.<sup>150</sup>

*iv. Mens Rea: Saudi Arabia's Knowledge of the Starvation Crisis, Failure to Abide by the Principle of Distinction, and the Pattern of the Airstrikes Demonstrate a State Policy Intending the Starvation of Civilians as a Method of Combat*

A violation of Article 14 of Protocol II also requires an attack on an object indispensable to the survival of a civilian population to be "for [the] purpose" of "starvation of civilians as a method of combat."<sup>151</sup> While proving intent is a difficult hurdle, scholarship and limited casework look at several factors to infer a State's intent to starve a civilian population: awareness of the risk that targeting an object or objects will have on a civilian population; respect for international humanitarian law prohibitions and principles, particularly distinction and patterns of armed conflict; and whether the State took steps to prevent starvation relating to the attack.<sup>152</sup> Specifically, in the Eritrea-

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(Nov. 28, 2018), <https://www.atlanticcouncil.org/blogs/menasource/an-update-on-yemen-s-water-crisis-and-the-weaponization-of-water/> (describing how the destruction of water facilities and fuel shortages cut costs of water trucking which left about 19.3 million Yemenis without clean water and sanitation, leading to a cholera outbreak).

148. See 10 million Yemenis 'One Step Away From Famine', UN Food Relief Agency Calls for 'Unhindered Access' to Frontline Regions, UN NEWS (Mar. 26, 2019), <https://news.un.org/en/story/2019/03/1035501> [hereinafter One Step Away From Famine] (quoting a UN World Food Programme spokesperson who explained that there was a thirteen percent increase in food insecurity in Yemen within that year).

149. See Junod, *supra* note 63, at 1456.

150. See Yemen: Coalition Blockade Imperils Civilians, *supra* note 25 (describing the prevention of humanitarian aid for civilians as part of Saudi Arabia's strategy for fighting the Houthis in Yemen).

151. Protocol II, *supra* note 9, 1125 U.N.T.S. at 615.

152. See *Eri. v. Eth.*, 26 R.I.A.A. at 328–30 (focusing specifically on awareness of the risks of targeting the water reservoir); Murdoch & Jordash, *supra* note 91

Ethiopia Claims Commission partial award case, the Commission looked at Ethiopia's attack on a water reservoir and surmised the intent to starve from three criteria: Ethiopia admitted to targeting the reservoir, evidence that the water source served as vital for a city of civilians and Ethiopia had to have known the vitality of the water source before targeting the reservoir.<sup>153</sup>

First, like Ethiopia's attack on the water reservoir,<sup>154</sup> Saudi Arabia had clear present knowledge throughout almost the entire five years of armed conflict that water resources were highly scarce and all water resources were vital to Yemeni civilian populations.<sup>155</sup> Saudi Arabia's targets were generally aimed at Houthi strongholds which included large cities with starving civilian populations, particularly Taiz and Hudaydah.<sup>156</sup> The starvation crisis and lack of water resources necessary for survival spread beginning in 2015.<sup>157</sup> International organizations and states chastised Saudi Arabia specifically several times for its airstrikes' impact on water resources and starvation generally.<sup>158</sup> Additionally, Saudi Arabia failed to prevent suffering

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(applying these criteria to the International Criminal Court's Rome Statute provision prohibiting attacks on objects indispensable to a civilian population's survival).

153. *Eri. v. Eth.*, 26 R.I.A.A. at 328.

154. *Id.*

155. See, e.g., One Step Away From Famine, *supra* note 147; Palko Karasz, *85,000 Children in Yemen May Have Died of Starvation*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/world/middleeast/yemen-famine-children.html>; *Yemen Facing Largest Famine the World Has Seen for Decades, Warns UN Aid Chief*, UN NEWS (Nov. 9, 2017), <https://news.un.org/en/story/2017/11/570262-yemen-facing-largest-famine-world-has-seen-decades-warns-un-aid-chief>; Emma Graham-Harrison, *Yemen Famine Feared as Starving Children Fight for Lives in Hospital*, GUARDIAN (Oct. 4, 2016), <https://www.theguardian.com/world/2016/oct/04/yemen-famine-feared-as-starving-children-fight-for-lives-in-hospital>.

156. See Samy Magdy, *Database Says 91,600 Killed in Yemen Fighting Since 2015*, A.P. NEWS (June 19, 2019), <https://apnews.com/b28a2bdb1b01413689e05a7204e6ea90> (highlighting Ta'iz and Hodayah as the most violent provinces with the largest instances of civilian targeting).

157. See Suter, *supra* note 146 (explaining that the armed conflict's beginning in 2015 sparked an increase in cholera cases from a decrease in water infrastructure).

158. See *HRC Detailed Findings Report*, *supra* note 20, ¶¶ 758–60 (analyzing the international humanitarian law violations of Saudi Arabia and other parties involved in the non-international armed conflict in Yemen); see also Editorial Board, *Saudis Try to Starve Yemen into Submission*, N.Y. TIMES (Nov. 16, 2017),

from such attacks on water resources, which is another factor that can demonstrate intent to starve civilians,<sup>159</sup> because it blocked humanitarian aid from entering for a period during 2017 of the fighting.<sup>160</sup>

Second, the recurrence of such attacks can be indicative of a failure to distinguish between civilian and military objects reflecting Saudi Arabia's intent to starve civilians.<sup>161</sup> Distinction, while not specific in Protocol II, is a principle of international humanitarian law that requires clear targeting of only military objectives in armed conflict.<sup>162</sup> In Yemen, Saudi Arabia attacked dozens of water resources including tanks, trucks, water projects, pumps, wells, desalination plants and sewage plants, almost none of which have been designated military targets.<sup>163</sup> The high number of these non-military, civilian objects

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<https://www.nytimes.com/2017/11/16/opinion/saudi-arabia-yemen-famine.html> (describing a United States resolution that denounced targeting Yemeni civilians and calling for parties to get necessary aid to all who need it); *Yemen: Attacks on Water Facilities, Civilian Infrastructure, Breach 'Basic Laws of War' Says UNICEF*, UN NEWS (Aug. 1, 2018), <https://news.un.org/en/story/2018/08/1016072> (condemning ongoing attacks on civilian facilities and services, including water supplies and a sanitation center).

159. See Murdoch & Jordash, *supra* note 91 (asserting four factors that can be used to determine intent to starve a civilian population: awareness of the risk that actions against an object indispensable to a civilian population's survival would lead to starvation; respect for international humanitarian law prohibitions; respect for positive obligations from international humanitarian law principles; and steps taken to ameliorate civilian suffering).

160. See Heba Kanso, *Factbox: A 'Never-ending Nightmare' for Yemenis One Year Since Blockade*, REUTERS (Nov. 6, 2018), <https://www.reuters.com/article/us-yemen-blockade-factbox/factbox-a-never-ending-nightmare-for-yemenis-one-year-since-blockade-idUSKCN1NB28C> (explaining that in 2017 the Saudi coalition imposed a blockade along Yemeni ports which resulted in lasting damage to the civilian population by further depleting food and fuel).

161. See *HRC Detailed Findings Report*, *supra* note 20, ¶ 760 (finding that all parties to the Yemen conflict violated international humanitarian law by targeting civilian objects, and more proof was necessary to demonstrate intent for violations of the prohibition against attacks on objects indispensable for the survival of the civilian population but the recurrence of such attacks can be indicative of the objective of the attacks).

162. See generally Rule 7. *The Principle of Distinction between Civilian Objects and Military Objects*, ICRC, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7#Fn\\_7228635\\_00007](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7#Fn_7228635_00007) (last visited Oct. 9, 2020).

163. *Data: Airwar*, *supra* note 7 (categorizing and specifying what the target was and whether it was a military, economic, or unknown target).

targeted in highly populated areas demonstrates Saudi Arabia's inability to abide by the international humanitarian law principle of distinction.<sup>164</sup>

Finally, the patterns that occurred throughout Saudi Arabia's airstrikes show its policy allowed starvation of civilians as an acceptable method of combat.<sup>165</sup> First, of the five governorates where Saudi Arabia attacked water resources the most,<sup>166</sup> Saada, Hudaydah, Taiz, Hajja, and Sanaa, all but Sanaa have been in an emergency starvation situation since 2017.<sup>167</sup> Second, almost half of the attacks on water resources between 2015 and 2019 targeted two governorates: Saada and Hudaydah.<sup>168</sup> There has been a visible shift from 2015 to 2019 towards these areas as centers of conflict between Saudi Arabia and the Houthi.<sup>169</sup> The pattern connecting main areas of conflict with attacks on water resources which serve as objects indispensable to a civilian population<sup>170</sup> demonstrates a policy of "starvation of civilians as a method of combat."<sup>171</sup> Like the South Africa Truth and Reconciliation Commission, which made legal determinations of violations during the apartheid, Yemen's failure to distinguish between civilians and military objects and targeting of water resources

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164. See Human Rights Council, Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014: Rep. of UNHCHR Containing the Findings of the Group of Independent Eminent International and Regional Experts and a Summary of Technical Assistance Provided by the Office of the High Commissioner to the National Commission of Inquiry, ¶ 108(a) U.N. Doc. A/HRC/39/43 (Aug. 17, 2018) ("Individuals in the Government and the coalition, including Saudi Arabia and the United Arab Emirates, may have conducted attacks in violation of the principles of distinction, proportionality and precaution that may amount to war crimes").

165. See *Data: Airwar*, *supra* note 7.

166. See *id.*

167. See *Mapping the Yemen Conflict*, *supra* note 30 (explaining that the worst affected population in the starvation crisis are the two poorest governorates: Taiz and Hudayduh).

168. See *Data: Airwar*, *supra* note 7.

169. See *Mapping the Yemen Conflict*, *supra* note 30 (displaying the main areas of fighting in 2015, 2017, and 2019; showing areas like Taiz remain contested throughout the four years and other contested areas began more inland in 2015 and moved north and west toward Hudayduh by 2019).

170. See discussion *supra* Part III(A)(3).

171. See TRUTH & RECONCILIATION COMM'N OF S. AFR., *supra* note 96, at 276–77 (analyzing the use of patterns to display State policy); see also discussion *supra* Part II(B)(2)(iv).



in high conflict areas shows a political shift towards starvation as an acceptable method of combat.<sup>172</sup> Saudi Arabia had the knowledge that water resources were scarce and attacking supplies and installations would risk civilian starvation, which allows for an inference of intent to starve civilians.<sup>173</sup>

B. SAUDI ARABIA CANNOT ASSERT ANY DEFENSE AVAILABLE  
UNDER PROTOCOL II BECAUSE IT HAD NO LEGITIMATE PURPOSE  
FOR AIRSTRIKES ON WATER RESOURCES IN YEMEN

Under Article 14 of Protocol II, there are no explicit exceptions allowing Saudi Arabia to derogate from its obligation under this Article.<sup>174</sup> One argument asserts that the purposeful insertion of this provision in Article 54 and the purposeful omission of defenses in Article 14 mean that those defenses would not be applicable to the latter.<sup>175</sup> The foundational rules of interpretation under the Vienna Convention can support this argument because the purpose of Protocol II is to protect civilians in non-international armed conflicts, rather than create an agreement between States.<sup>176</sup>

However, Saudi Arabia may argue that the exceptions written into Article 54 of Protocol I apply to Article 14 and allow legitimate purposes for attacking objects indispensable to the survival of a civilian population: imperative military necessity within territory it controls, objects solely for the military, or objects serving a direct military purpose.<sup>177</sup> Regardless, Saudi Arabia is unable to assert any of the exceptions in Article 54 of Protocol I.<sup>178</sup>

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172. See TRUTH & RECONCILIATION COMM'N OF S. AFR., *supra* note 96, at 276–77.

173. See *id.*; HRC *Detailed Findings Report*, *supra* note 20, ¶ 760 (accepting that the recurrence of airstrikes could infer intent to starve civilians as part of Saudi Arabia's policy in Yemen); discussion *supra* Part III(A)(3).

174. Protocol II, *supra* note 9, 1125 U.N.T.S. at 615.

175. See Junod, *supra* note 63, at 1456 (“A form of words whereby it would have been possible to make an exception in case of imperative military necessity was not adopted”).

176. Vienna Convention, *supra* note 101, 1155 U.N.T.S. at 340; see also Protocol II, *supra* note 9, 1125 U.N.T.S. at 611 (“The High Contracting Parties . . . [e]mphasizing the need to ensure a better protection for the victims of those armed conflicts . . . [h]ave agreed on the following”).

177. See Protocol I, *supra* note 34, 1125 U.N.T.S. at 27–8.

178. See *id.*

First, the allowance for an imperative military necessity is difficult to argue for Saudi Arabia because the defense requires control over the territory attacked.<sup>179</sup> For the attacks against water resources, all airstrikes attacked objects within Yemen's territory.<sup>180</sup> Beyond that, the Yemen government, which Saudi Arabia is serving in a primary military role, also does not have control over the area as Saudi Arabia attacked primarily Houthi controlled territory.<sup>181</sup> Second, based on the category of water resources hit, particularly wells, water tanks, and water projects, these have been designated non-military targets by the Yemen Data Project, which did not support direct military activity.<sup>182</sup> Finally, the legitimacy of the targets allowing for a derogation from the obligation under Article 14 relies on the intent of the State and its knowledge of the likelihood of starvation before its attacks.<sup>183</sup>

Saudi Arabia's intent to starve civilians and knowledge that water resources were vital to civilians' survival makes it impossible to argue any of the available defenses.<sup>184</sup> Without a defense, the non-international nature of the conflict, attacks against objects

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179. See *id.*; see also Claude Pilloud et al., *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 659 (Yves Sandoz et al. eds., 1987) (describing imperative military necessity as occurring only in an extreme case).

180. See *Mapping the Yemen Conflict*, *supra* note 30 (displaying maps of the frontlines, key fronts, and Houthi presence in 2015, 2017, and 2019).

181. See *October 2019 Yemen Front Lines Map*, CRITICAL THREATS (Dec. 2, 2019), <https://www.criticalthreats.org/analysis/october-2019-yemen-front-lines-map> (displaying a map of Houthi and Yemen government aligned territorial control); see also Alia Chughtai & Faisal Edroos, *Yemen Conflict: Who Controls What*, AL JAZEERA (Mar. 24, 2019), <https://www.aljazeera.com/indepth/interactive/2016/08/yemen-conflict-controls-160814132104300.html> (showing a map of Saudi-backed exiled government-controlled area, Houthi controlled area, and Al Qaeda presence).

182. See *Data: Airwar*, *supra* note 7. See generally Diplomatic Conference SR18, *supra* note 135 (discussing the reasoning behind Article 14, then titled Article 27 before final approval into Protocol II, where the representative from Ireland asserts that the total prohibition written into the article serves to prevent derogation under international humanitarian law principles like proportionality because of the importance in preventing environmental damage in armed conflict).

183. Protocol I, *supra* note 34, 1125 U.N.T.S. at 27; *Eri. v. Eth.*, 26 R.I.A.A. at 328–30.

184. See discussion *supra* at Part III(3–4).

indispensable for Yemen civilian's survival, and intent to starve civilians show Saudi Arabia's violation of Article 14 of Protocol II as a party to the treaty.

#### IV. RECOMMENDATIONS

The analysis above demonstrates the high legal standard necessary to protect necessary natural resources, where legal accountability happens only with the intent to starve civilians. Given these parameters, this Comment describes one practical recommendation for accountability of Saudi Arabia within the current international legal regime and a second recommendation which suggests a legal remedy for better protections in the future. First, this section recommends that a multi-faceted justice mechanism be put in place in Yemen, which will investigate crimes against international humanitarian law and repair damages to victims. Second, this Comment suggests the United Nations expand protections for natural resources at the core of the Article 14 violations in Yemen by creating a convention based on the International Law Commission's draft principles.

##### A. AS PART OF A FUTURE PEACE AGREEMENT, THE PARTIES TO IT SHOULD INCORPORATE INTERNATIONAL RESPONSIBILITY FOR VIOLATIONS OF PROTOCOL II THROUGH A JUSTICE MECHANISM

As Yemen works through finding an arrangement to end the violence, the State and its citizens must think towards accountability for crimes and repairing the damage.<sup>185</sup> The complexities of a non-international armed conflict in which foreign States actively support or are themselves parties to the conflict makes problem solving difficult.<sup>186</sup> Transitional justice out of conflict tends to require multi-

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185. See ASHI AL-KAHWATI, PEACE IN YEMEN 4–6 (Swed. Inst. of Int'l Affairs, 2019) (describing the historical roots of the current armed conflict in Yemen, as well as the various failed peace agreements and their faults).

186. Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U.L. REV. 145, 145 (1983) ("The intervention of foreign armed forces in a non-international armed conflict poses complex problems in relation to the law of war. This is not surprising, given that the law of war is based on the distinction between international armed conflicts and non-international armed conflicts. The set of rules that govern these two manifestations of organized violence differ greatly from each other.").

faceted approaches such as national, hybrid, or international tribunals,<sup>187</sup> truth and reconciliation commissions,<sup>188</sup> and reparations regimes.<sup>189</sup> Yemen should utilize a combination of these mechanisms to bring sustainable conditions for victims and justice for crimes committed.

For Yemen, accountability for crimes of foreign States is difficult to prosecute and bring them under the law.<sup>190</sup> A mass claims commission such as the one between Ethiopia and Eritrea could allow for a forum to find states like Saudi Arabia in violation of international law, showing a measure of accountability, while hopefully providing for reparations for the damage caused.<sup>191</sup> Fortunately, a National Commission of Inquiry in Human Rights Violations in Yemen already exists, and the agreement could add resources to this effort to train investigators and build the legal framework to apply in Yemen.<sup>192</sup>

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187. See generally Hortensia D. T. Gutierrez Posse, *The Relationship Between International Humanitarian Law and the International Criminal Tribunals*, 88 INT'L REV. RED CROSS 65, 69–73 (2006) (explaining that tribunals are for the purpose of individual criminal liability and for State violations look at the command structure to find government or military leaders responsible).

188. See generally *Violence in Twentieth Century Africa: Truth and Reconciliation Commissions*, EMORY SCHOLAR BLOGS, <https://scholarblogs.emory.edu/violenceinafrica/wiki-round-3-post-colonial/truth-and-reconciliation-commissions/> (last visited Sept. 20, 2020) (describing truth and reconciliation commissions as mechanisms for airing out violations and grievances as a method of healing rather than strictly punishment).

189. See generally *Reparations*, ICTJ, <https://www.ictj.org/our-work/transitional-justice-issues/reparations> (describing reparations as a victim centered approach focused on trying to fix the loss from the violations).

190. See Matthew Lister, *The Legitimizing Role of Consent in International Law*, 11 CHI. J. INT'L L. 663, 683 (2011) (“Given these conditions, parties will enter into an agreement that binds them only if, by entering this agreement, they expect to be made better off than they would be without it.”).

191. See *Eri. v. Eth.*, 26 R.I.A.A. at 328–30. But see Lea Brilmayer, *Understanding “IMCCs”: Compensation and Closure in the Formation and Function of International Mass Claims Commissions*, 43 YALE J. INT'L L. 273, 312–13 (2018) (warning that the benefits of international mass claims commissions depends on the motives of the States coming together, the cohesion with the public’s interests, and the difficulties created when the commissions prohibits complainants from redress).

192. See *Strengthening the Capacity to Investigate Human Rights Violations in Yemen*, INT'L DEV. LAW ORG. (June 27, 2019), <https://www.idlo.int/what-we-do/initiatives/strengthening-capacity-investigate-human-rights-violations-yemen> (describing the organizations work in building the Commission’s capabilities to

Additionally, truth and reconciliation commissions serve as platforms for more crimes to come to light because they can incorporate legal conditions which may prevent prosecution for some acts.<sup>193</sup> The benefits of these commissions are collective healing, confrontation of perpetrators for crimes, and institutional responsibility, while not preventing prosecutions for international crimes such as crimes against humanity and war crimes.<sup>194</sup> A truth and reconciliation commission in Yemen allows for broad, in-depth looks at the crimes committed, responsibility for those crimes, and should bring in Saudi Arabia and other States to share information and evidence when they otherwise would not.

This then requires an effective reparations scheme that can provide individual and collective compensation and rebuilding.<sup>195</sup> Generally, Saudi Arabia, as well as all State Parties, is obligated to repair violations of the nature of Article 14 of Protocol II already, so this mechanism would help fulfill its obligation in the event it is found to have violated Article 14.<sup>196</sup> By allowing for individuals and groups to gain economic and political stability, Saudi Arabia and other parties with responsibility for human rights and humanitarian law violations can contribute to Yemen's sustainable development.<sup>197</sup> The

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provide better accountability measures in Yemen).

193. See *Violence in Twentieth Century Africa: Truth and Reconciliation Commissions*, *supra* note 187 (explaining the history of using truth and reconciliation commissions and clarifying that amnesty does not apply to some crimes).

194. See *id.* (using Sierra Leone as a case study for the benefits of truth and reconciliation commissions).

195. See *Reparations*, *supra* note 188 (explaining that reparations can serve to repair damage from direct commission of violations or from the failure to prevent them).

196. See *Factory at Chorzow (Germ. v. Pol.)*, Judgment, 1927 P.I.C.J. (ser. A) No. 8, at 21 (July 26) (establishing as a principle of international law the obligation of a State to make reparations for its international law violations); Report of the Int'l Law Comm'n to the GAOR, at 91, U.N. Doc. A/56/10 (2001), *reprinted in* [1963] 2 Y.B. Int'l L. Comm'n 76, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (requiring under Article 31 that States provide full reparations for internationally wrongful acts and describes in the commentaries that this is an immediate obligation of a State once it has breach its responsibility).

197. See *Reparations*, *supra* note 188, at 95–107 (describing various ways reparations can take place such as financial compensation, restoration of civil and political rights, access to land or health care, reparations for individual victims or

combination of a reparations regime, claims commission, and truth and reconciliation commission can help rebuild the worst human-made humanitarian crisis in Yemen while attaining a level of accountability for Saudi Arabia which is not likely to happen otherwise.

B. THE UNITED NATIONS SHOULD RECOGNIZE THE NEED TO  
EXPAND PROTECTIONS FOR THE ENVIRONMENT DURING ARMED  
CONFLICT BY PASSING A CONVENTION

Finally, since Protocol II only protects water resources when it is attacked to starve civilians, the United Nations should work to pass a Convention based on the International Law Commission's draft principles on the protection of the environment in relation to armed conflict.<sup>198</sup> Particularly, the inclusion of the Martens Clause applied to the environment would allow for the protection of natural resources to adapt to changing methods of warfare such as starvation.<sup>199</sup>

The Martens Clause in the International Law Commission's draft principles is an evolution of a clause of the same name originating in the 1899 Hague Convention and has been rephrased in all four Geneva Conventions and Protocols I and II, among other international law documents.<sup>200</sup> The Martens Clause creates a State obligation in these

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collective reparations addressing the causes and consequences of violations within a region or State).

198. *See generally* International Law Commission, Protection of the Environment in Relation to Armed Conflicts: Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading, U.N. Doc. A/CN.4/L.037 (June 6, 2019) (laying out rules into categories: principles of general application, principles applicable during armed conflict, principles applicable in situations of occupation, and principles applicable after armed conflict).

199. *See id.* at 3 ("In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.").

200. *See* Convention with Respect to the Laws and Customs of War on Land: Regulations Concerning the Laws and Customs of War on Land, preamble, July 29, 1899, 32 Stat. 1803 [hereinafter Hague Convention of 1899]; *see also* Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, art. 63, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, art. 62, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention

treaties to protect civilians and combatants regardless of whether a written or customary international legal protection exists based on the “principles of humanity and from the dictates of conscience.”<sup>201</sup> By the adoption of a new convention with a Martens Clause applied to protect the environment in the same adaptive way, water resources and other natural resources could be protected before they are used as a weapon of warfare to starve civilians.<sup>202</sup>

## V. CONCLUSION

As a party to Protocol II, Saudi Arabia is responsible for its violation of Article 14 of the Protocol for attacking water resources during Yemen’s armed conflict.<sup>203</sup> In targeting water resources, Saudi Arabia attacked objects indispensable to the survival of a civilian population.<sup>204</sup> The crux of the violation lies in the issue of intent to starve a civilian population.<sup>205</sup> In this case, Saudi Arabia’s failure to distinguish between civilian and military objects, patterns of its targeting, and knowledge of the risk of starvation by targeting water resources demonstrates its intent to use starvation as a method of combat.<sup>206</sup> Saudi Arabia also cannot derogate from its responsibility by asserting the attacks were intended for a legitimate military

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Relative to the Treatment of Prisoners of War, art. 142, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention IV, *supra* note 34, 75 U.N.T.S. at 392; Protocol I, *supra* note 34, 1125 U.N.T.S. at 7; Protocol II, *supra* note 9, 1125 U.N.T.S. at 611.

201. Compare Geneva Convention I, *supra* note 199, 75 U.N.T.S. at 68, and Geneva Convention II, *supra* note 199, 74 U.N.T.S. at 120, and Geneva Convention III, *supra* note 199, 75 U.N.T.S. at 242, and Geneva Convention IV, *supra* note 34, 75 U.N.T.S. at 392, with Protocol I, *supra* note 34, 1125 U.N.T.S. at 7, and Protocol II, *supra* note 9, 1125 U.N.T.S. at 611 (demonstrating how the Martens Clause has common elements, namely “principles of humanity” and “dictates of conscience,” but some of the phrasing has evolved such as removing civilized nations in Protocols I and II).

202. See Dinah Shelton & Alexandre Kiss, *Martens Clause for Environmental Protection*, 30 ENVTL. POL’Y & L. 285, 286 (2000) (arguing that applying the Martens Clause into environmental humanitarian law would be responsive to technological and economic changes in society).

203. See *supra* Part III.

204. See *supra* Part III(A)(3).

205. See *supra* Part III(A)(4).

206. See *id.*

purpose.<sup>207</sup>

The conflict in Yemen poses great challenges and conveys the complexities of protecting civilians and necessary natural resources under the law of non-international armed conflict.<sup>208</sup> To combat this complexity, any future peace agreement in Yemen should incorporate an international justice mechanism with jurisdiction over violations within international criminal, humanitarian, and human rights law by any party to the conflict.<sup>209</sup> However, this will not resolve the high standard in which the destruction of natural resources are protected in non-international armed conflict; therefore, the United Nations should pass a convention on protection of the environment during armed conflict to protect resources in the future.<sup>210</sup>

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207. *See supra* Part III(B).

208. *See supra* Part IV.

209. *See supra* Part IV(A).

210. *See supra* Part IV(C).