

**POWERS USED FOR EVIL: UNITED STATES
DEFENSE CONTRACTORS' AIDING AND ABETTING
OF SAUDI ARABIAN WAR CRIMES IN THE YEMENI
CIVIL WAR**

Nicholas W. Carter*

ABSTRACT.....	140
I. U.S. DEFENSE CONTRACTORS: HEROES OR VILLAINS?....	140
II. THE STORY: THE YEMENI CIVIL WAR.....	142
III. THE KINGDOM OF SAUDI ARABIA: THE DECIDED VILLAIN.....	145
IV. THE U.S. ARMS TRADE: ABUSING POWER FOR PROFITS	148
V. HOLDING THE VILLAINS ACCOUNTABLE: INTERNATIONAL ACCOMPLICE LIABILITY	154
VI. VILLAINS UNCHECKED: CORPORATE CRIMINALITY IN INTERNATIONAL LAW	159
VII. BEHIND THE CORPORATE MASKS: LIABILITY OF EXECUTIVES IN INTERNATIONAL LAW.....	160
<i>A. Principal Crime</i>	161
<i>B. Facilitation – Actus Reus</i>	162
<i>C. Facilitation – Mens Rea</i>	163
VIII. JUSTICE FOR THE VICTIMS BY PROSECUTING THE VILLAINS.....	165
<i>A. ICC Prosecution</i>	166
<i>B. U.N. Security Council Resolution</i>	168
IX. DEFENDING THE VILLAINS: ARGUMENTS SUPPORTING U.S. DEFENSE CONTRACTORS	169
X. U.S. DEFENSE CONTRACTORS: POWERS USED FOR EVIL	172

* J.D. Candidate, 2020, Syracuse University College of Law. The author would like to thank his friends and family for their unwavering support during this process, Professor Elizabeth August for her invaluable guidance and assistance, and Professor David Crane for his help in developing the topic of this note.

ABSTRACT

Yemen has long been one of the poorest countries in the Middle East and an afterthought in the geopolitical community. However, two Middle Eastern powers have long maintained interest in the small state: Saudi Arabia and Iran. The Kingdom of Saudi Arabia brought relative stability to Yemen through its long-standing influence over the Yemeni government, but the Arab Spring of 2011 introduced uncertainty. The departing Saleh regime gave way to the incoming Hadi leadership, but President Hadi was quickly and consistently challenged by an insurgent group who had long sought relevance in Yemen: the Houthi movement. The Houthis have historically been an unsophisticated group of rebels but began showing signs of real power during its conquest of Yemen, and in 2014, it gained its desired relevance, when it seized control of the Yemeni government and chased President Hadi out of the country. Saudi Arabia chalked the Houthis' sudden logistical and technological surge up to the help of Iran and inserted itself into the Yemen conflict in 2015.

It has been almost four years since Saudi Arabia and its coalition inserted itself into the Yemen conflict and the situation in the country is now desperate. Civilians are dying at alarming rates, in large part at the hands of the Saudi military forces – specifically through Saudi airstrikes. These attacks, which have come by the thousands, are occasionally considered war crimes by the international community due to the tremendous toll they take on civilian lives. Dozens of these strikes have been carried out with weapons made in the United States, supplied by defense contractors such as Lockheed Martin and Raytheon. The executives of these corporations could, and should, be held criminally responsible under international criminal law for aiding and abetting Saudi Arabian war crimes in Yemen. This note will explore the background of the Yemeni Civil War, how Saudi Arabia became involved, U.S. corporations' assistance to Saudi Arabia, and the legal path that could be taken to prosecute executives for these corporations.

I. U.S. DEFENSE CONTRACTORS: HEROES OR VILLAINS?

“With great power comes great responsibility” are some of the most recognizable words to ever come from a comic book, and although they were uttered in the context of Spider-Man's fictional world, they have real world application as well. Characters who are graced with superpowers rarely choose to use their powers for good without a struggle, as they are often times given the chance to use their powers for personal gain, which would ultimately make them a villain. Real-world

entities that hold the real-world equivalent of superpowers are often faced with similar choices – use resources, funds, and skills to improve the world, or allow such assets to go to waste by not ensuring their proper use.

The closest thing to a “superhuman” that the modern geopolitical sphere has ever seen is the United States of America (“U.S.”) and its many assets. Not since the great Roman Empire has there been such a dominant force capable of doing such good, but at the same time, equipped with the powers to do tremendous evil. Whether a hero uses his powers for good or evil is usually a matter of opinion, just like whether the U.S. uses its powers for good or evil is typically dependent upon who you ask. Some believe the U.S. is a hero in the international community, fighting crime and enforcing the proper status quo whenever it is needed. Others see the U.S. as a villain, imposing its will on weaker and poorer countries in order to continue dominating the world. The U.S.’s assistance to Saudi Arabia in its intervention in Yemen, specifically its continued weapons sales to Saudi Arabia, is one of such instances. Some believe the U.S. is doing good by helping Saudi Arabia in its proxy-crusade against the enemy Iran, while others see the U.S. assistance to Saudi Arabia for what it is: aiding and abetting of war crimes.

Saudi Arabia has violated international law through its actions in Yemen, and the U.S. government has used its power to aid and abet it on several occasions.¹ U.S. defense contractors, like the country they reside in, possess great powers well, and, like a superhuman using his power for personal gain, have failed to fulfill the great responsibility bestowed upon them. U.S. defense contractors have manufactured and sold weapons to Saudi Arabia that have been used to commit war crimes on multiple occasions (and continue to do so today). This has resulted in these corporations violating international law by aiding and abetting Saudi Arabian war crimes in Yemen. I argue that the executives of these U.S. defense contractors should be held liable for aiding and abetting these Saudi Arabian war crimes.

1. See U.N. Human Rights Council, Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014, U.N. DOC. A/HRC/39/43 (Aug. 17, 2018); see also *Yemen Conflict: UN experts detail possible war crimes by all parties*, BBC NEWS (Aug. 28, 2018), available at <https://www.bbc.com/news/world-middle-east-45329220> (last visited Feb. 2, 2019) (stating that the international law community has condemned Saudi Arabia’s involvement in the Yemeni Civil War as internationally criminal due to its continued violation of customary principles of international law and Common Article 3 of the Geneva Conventions).

II. THE STORY: THE YEMENI CIVIL WAR

When the Kingdom of Saudi Arabia (“KSA”) originally began its intervention in Yemen it predicted that its forces’ presence in the country would be short-lived.² KSA originally had two objectives in Yemen: eliminate the threat of the Iranian-backed Shia insurgency group known as the Houthi movement and get out.³ This would give the recently removed Sunni leadership a chance to regain power, allowing KSA to maintain its influence over Yemen.⁴ KSA believed this could be accomplished in a matter of weeks, but weeks turned into months, and now months have turned into five brutal years.⁵ The Yemen conflict is dragging on with no real end in sight and conditions across the country are becoming increasingly desperate.⁶ International humanitarian bodies have referred to it as the worst man-made humanitarian crisis in the world currently and the world’s largest humanitarian disaster in the last fifty years.⁷ Official death tolls are seemingly unreliable – the United Nations (“U.N.”) last estimated that the Yemen conflict had produced a total of 10,000 casualties, but that figure has not been updated for over two years.⁸ Other independent investigative entities estimate the actual figure to currently be around 60,000 total casualties, with at least 6500 of those being civilian deaths.⁹

2. Thalia Rahme, *Yemen crisis: Why is there a war?*, BBC NEWS (Dec. 18, 2018), available at <https://www.bbc.com/news/world-middle-east-29319423> (last visited Feb. 2, 2019).

3. *Debunking Media Myths About the Houthis in War-Torn Yemen*, GLOBAL VOICES (Apr. 1, 2015), available at <https://globalvoices.org/2015/04/01/debunking-media-myths-about-the-houthis-in-war-torn-yemen/> (last visited Mar. 8, 2019) (stating that the Houthi movement is a Shia Muslim group of the Zaidi sect. The Houthi movement’s formal name is “Ansar Allah,” which translates to “Supporters of God.”).

4. See Rahme, *supra* note 2.

5. See Robert F. Worth, *How the War in Yemen Became a Bloody Stalemate – and the Worst Humanitarian Crisis in the World*, N.Y. TIMES (Oct. 31, 2018), available at <https://www.nytimes.com/interactive/2018/10/31/magazine/yemen-war-saudi-arabia.html> (last visited Mar. 8, 2019).

6. See *id.*

7. *Yemen could be ‘worst’ humanitarian crisis in 50 years*, AL JAZEERA NEWS (Jan. 5, 2018), available at <https://www.aljazeera.com/news/2018/01/yemen-worst-humanitarian-crisis-50-years-180105190332474.html> (last visited Feb. 2, 2019).

8. *Id.*

9. *Yemen War Death Toll Exceeds 60,000 According to Latest ACLED Data*, ACLED DATA (Dec. 11, 2018), available at <https://www.acleddata.com/2018/12/11/press-release-yemen-war-death-toll-now-exceeds-60000-according-to-latest-aced-data/> (last visited Feb. 2, 2019) (stating that the death toll in the Yemeni Civil War is much higher than the U.N. report on the conflict, which has not been updated since 2017. ACLED’s data only takes death by violence into account, so the total number of civilian casualties is in reality much higher due to preventable causes such as disease and malnutrition).

The state of the country deteriorates more and more each day: it is under a food emergency that is speeding towards famine, with two-thirds of its people not knowing where their next meal is going to come from.¹⁰ Preventable disease is everywhere and unemployment rates continue to climb.¹¹ The situation in Yemen has been described as apocalyptic, which feels like an understatement considering the totality of the circumstances.¹² When all factors are considered together it is safe to assume that the war's high casualty mark will only continue to rise. There is no one side to blame for the crisis in Yemen – every party involved has contributed to the chaos.¹³ With that being said, KSA's fingerprints are all over the Yemeni people's current plight.¹⁴

KSA entered the Yemen conflict in 2015 but the ongoing violence in the country can be traced back to the Arab Spring of 2011, when President Ali Abdullah Saleh was forced out of office and replaced with Abdrabbuh Mansur Hadi.¹⁵ Hadi, a Sunni Muslim, was generally perceived as weak, and the Houthi Movement sought to take advantage immediately.¹⁶ This aggression resulted in the Houthi insurgency gaining tremendous ground from 2012-2014, seizing parts of the region sporadically.¹⁷ The Houthis were bolstered by supporters of the Saleh regime and also received covert assistance from Iran in its effort to take

10. See *85,000 children 'dead from malnutrition'*, BBC NEWS (Nov. 21, 2018), available at <https://www.bbc.com/news/world-middle-east-46261983> (last visited Feb. 2, 2019) (stating that Yemen is on the brink of famine due to the current war); see also *Fighting Famine in Yemen*, WORLD FOOD PROGRAM, USA (June 2019), available at <https://www.wfpusa.org/countries/yemen/> (last visited July 20, 2019) (stating that a child in Yemen dies every ten minutes from preventable causes, and that 3.2 million women and children in Yemen currently suffer from acute malnutrition).

11. See *Yemen: Health*, UNICEF (2018), available at https://www.unicef.org/yemen/activities_11434.html (last visited Mar. 8, 2019) (stating that 14.1 million Yemeni people are in need of healthcare and that around 10,000 Yemeni children died of preventable diseases in 2017); see also *Knoema – Unemployment Rate*, KNOEMA (2019), available at <https://knoema.com/atlas/Yemen/Unemployment-rate> (last visited Mar. 8, 2019) (showing that Yemen's unemployment rate is over 14%).

12. See Al Jazeera, *supra* note 7.

13. See Rahme, *supra* note 2.

14. See Glen Carey & Sarah Algethami, *How Saudis, Allies Made Yemen a Humanitarian Crisis*, BLOOMBERG (Oct. 19, 2018), available at <https://www.bloomberg.com/news/articles/2018-10-19/how-saudis-turned-yemen-war-into-humanitarian-crisis-quicktake> (last visited July 20, 2019).

15. See Emma Graham-Harrison, *Beyond Syria: the Arab Spring's aftermath*, THE GUARDIAN (Dec. 30, 2018), available at <https://www.theguardian.com/world/2018/dec/30/arab-spring-aftermath-syria-tunisia-egypt-yemen-libya> (last visited July 27, 2019).

16. See Rahme, *supra* note 2.

17. See *id.*

control of large portions of Yemen.¹⁸ This outside assistance eventually allowed the Houthis to drive President Hadi out of the country.¹⁹ The Houthis subsequently took control of the government after seizing the capital of Sana'a in late 2014, and KSA's coalition began their intervention shortly after.²⁰

Although the fighting in Yemen has largely been between the KSA-led coalition and Houthi insurgents, nearly everyone in the international community agrees that the conflict is really a proxy war between KSA and Iran.²¹ The U.N. Security Council has stated that it believes Iran may be violating its arms embargo by shipping weapons to the Houthis in Yemen – a theory supported by the fact that the Houthi movement was a grassroots effort for years and largely unfamiliar with military technology until it began using sophisticated weapons at the outset of its conquest of Yemen.²² Iran employed a go-to diplomatic strategy by denying any involvement in the conflict when it first began, but has remained quiet on the subject since then.²³

Many western nations rely heavily on their business relationships with KSA and are terminally at odds with Iran, so it is in their best

18. *Id.*

19. *Id.*

20. *See id.*; *see also* Jon Gambrell, *Associated Press: Here are the members of the Saudi-led coalition in Yemen and what they're contributing*, BUS. INSIDER (Mar. 30, 2015), available at <https://www.businessinsider.com/members-of-saudi-led-coalition-in-yemen-their-contributions-2015-3> (last visited Feb. 2, 2019) (listing the members of the Saudi Arabian-led coalition in its intervention in the Yemen conflict, which includes the United Arab Emirates (UAE), Kuwait, Bahrain, Qatar, Sudan, and Egypt. All countries in the coalition contribute to the Saudi Arabian efforts in Yemen to an extent, but Saudi Arabia and UAE are the main antagonists of the coalition).

21. *See* Rahme, *supra* note 2.

22. *See* U.S. Dep't of State, *Iran Action Group, Outlaw Regime: A Chronicle of Iran's Destructive Activities* (2018) (summarizing Iran's general attitude towards the West and its allies, including its ongoing proxies with Saudi Arabia. The report discusses Iranian influence in the Yemen conflict and its support for the Houthi movement in Yemen); *see also* Fatima Abo Alasrar, *Denying Iran's role in Yemen muddles peace process*, ARAB NEWS (Oct. 9, 2018), available at <http://www.arabnews.com/node/1385156> (last visited Feb. 3, 2019) (stating that the Houthi movement has historically been a rebel group without access to sophisticated technology until recently, and that Iranian weapons were found in the aftermath of fighting in which the Houthis were involved).

23. *See* Simon Tisdall, *Iran-Saudi proxy war in Yemen explodes into region-wide crisis*, THE GUARDIAN (Mar. 26, 2015), available at <https://www.theguardian.com/world/2015/mar/26/iran-saudi-proxy-war-yemen-crisis> (last visited Feb. 2, 2019) (noting that Iran has not given many indications of its involvement in Yemen, but that it has actively criticized Saudi Arabia's role in the conflict).

interest for KSA to maintain its influence over Yemen.²⁴ As a result, KSA has received American support for much of the war, but the full extent of U.S. involvement is unclear.²⁵ The U.S. has acknowledged its participation in the conflict by confirming that it shares intelligence with KSA, and has also given logistical support to KSA's military via training and mid-air refueling of KSA military aircraft.²⁶ The U.S.'s major contribution to the fighting, however, has come through its billion dollar arms deals with KSA.²⁷

III. THE KINGDOM OF SAUDI ARABIA: THE DECIDED VILLAIN

There are ten different countries and several non-state actors allegedly involved in the Yemeni Civil War, but the conflict is considered non-international in character by international law standards since the two main belligerents consist of the Yemeni government and an opposition group *within* Yemen.²⁸ Non-international armed conflicts like the Yemeni Civil War are bound by Common Article 3 of the Geneva Conventions,²⁹ which asserts that “violence to life and person, in particular murder of all kinds” shall “remain prohibited at any time and in any place whatsoever” when applied to “[p]ersons taking no active part in the hostilities.”³⁰ Common Article 3 of the Geneva Conventions is regarded as the minimum standard for non-international conflict, and any violation is considered a grave breach of the Geneva Conventions.³¹

24. See Matt Schiavenza, *Why the U.S. is Stuck with Saudi Arabia*, THE ATLANTIC (Jan. 24, 2015), available at <https://www.theatlantic.com/international/archive/2015/01/why-the-us-is-stuck-with-saudi-arabia/384805/> (last visited Mar. 8, 2019).

25. See Marlo Safi, *Understanding U.S. Involvement in Yemen's 'Forgotten War'*, NAT'L REV. (Nov. 30, 2018), available at <https://www.nationalreview.com/2018/11/yemen-civil-war-american-involvement-under-increasing-scrutiny/> (last visited Feb. 2, 2019) (giving an overview of U.S. involvement in the Yemen War, but also highlighting that the depth of American assistance to Saudi Arabia is not entirely clear at this point).

26. See *id.*

27. Irina Ivanova, *Saudi Arabia is America's No. 1 weapons customer*, CBS NEWS (Oct. 12, 2018), available at <https://www.cbsnews.com/news/saudi-arabia-is-the-top-buyer-of-u-s-weapons/> (last visited Feb. 2, 2019).

28. See *Key Facts About the War in Yemen*, AL JAZEERA (Mar. 25, 2018), available at <https://www.aljazeera.com/news/2016/06/key-facts-war-yemen-160607112342462.html> (last visited Mar. 8, 2019); see also Rahme, *supra* note 2.

29. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Common Article 3 of the Geneva Conventions].

30. Common Article 3 of the Geneva Conventions.

31. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

The customary international law principles of civil immunity, distinction, and proportionality apply to non-international conflicts as well, but they are not codified anywhere in treaty law.³² Civil immunity and distinction lay the foundation for the protection of civilians in customary international law. These principles make clear that civilians can never be the direct targets of military attacks, and that parties to a conflict must distinguish between civilians and combatants at all times.³³ Customary international law accepts the fact that some civilian casualties are inevitable, but requires combatants to take all feasible precautions to minimize harm to civilians as well as civilian objects, meaning all attacks must be limited to military objectives.³⁴ When civilian casualties are seemingly inevitable the principle of proportionality says that aggressors cannot carry out attacks which will cause disproportionate civilian casualties.³⁵ Attacks that violate these principles are typically condemned as war crimes by the international community.

It seems as if KSA has violated both Common Article 3 of the Geneva Convention as well as the customary principles of international law on numerous occasions during its intervention in Yemen.³⁶ The KSA military has carried out approximately 16,000 air strikes in Yemen since 2015.³⁷ Roughly one third of those have hit non-military targets, resulting in over 4300 civilian casualties.³⁸ Nonetheless, KSA has not changed its “unceasing” air campaign even after its impact on the civilian population became apparent.³⁹ International law imposes an

32. See *Customary IHL Database: Rule 1. The Principle of Distinction between Civilians and Combatants*, ICRC, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 (last visited Feb. 2, 2019) [hereinafter ICRC].

33. See *id.*

34. See *id.*

35. See *id.*

36. See Declan Walsh, *The Tragedy of Saudi Arabia's War*, N.Y. TIMES (Oct. 28, 2018), available at <https://www.nytimes.com/interactive/2018/10/26/world/middleeast/saudi-arabia-war-yemen.html> (last visited Feb. 2, 2019).

37. Sudarman Raghavan, *Saudi Arabia's Role in Yemen War Comes Under Renewed Scrutiny After Khashoggi Killing*, THE WASH. POST (Oct. 31, 2018), available at <https://www.washingtonpost.com/world/saudi-role-in-devastating-yemen-war-comes-under-new-scrutiny-after-khashoggi-murder/2018/10/29/> (last visited Mar. 8, 2019).

38. Lee Keath, *Civilian death toll in Yemen mounting despite US assurances*, AP NEWS (Nov. 10, 2018), available at <https://www.apnews.com/24ee4b33373a41d389e2599c5aa7bbfa> (last visited Feb. 2, 2019).

39. See *Saudi air strikes on Yemen intensify, residents in capital stay indoors*, REUTERS (Dec. 6, 2017), available at <https://www.reuters.com/article/us-yemen-security/saudi-air-strikes-on-yemen-intensify-residents-in-capital-stay-indoors-idUSKBN1E00JZ> (last visited Feb. 2, 2019).

affirmative duty on state actors whose military attacks result in disproportionate civilian casualties to investigate such attacks, but KSA has rarely done so effectively, which is a demonstration of its passive attitude towards the atrocities.⁴⁰

There has been shockingly little Western media coverage of KSA's slaughter of Yemeni civilians, but a few attacks have garnered more attention than the rest.⁴¹ The first occurred in Mastaba in March 2016, when a KSA-fired missile hit a busy market, resulting in 106 civilian deaths.⁴² When asked for answers, KSA stated that the market constituted a military objective because it was a well-known Houthi gathering spot.⁴³ An independent investigation of the attack led by Human Rights Watch ("HRW") found that there were in fact Houthi troops in the area, but the number of enemy combatants in the vicinity of the market paled in comparison to the civilians in the market.⁴⁴

The second attack that gained significant Western attention occurred in October 2016, when KSA forces launched an air raid on a funeral in Sana'a.⁴⁵ In this case, there were 140 civilian casualties and approximately 600 people wounded, with seemingly no combatants killed or hurt.⁴⁶ KSA initially denied its involvement in the attack, but subsequently claimed responsibility, to an extent.⁴⁷ Its acceptance of blame was not exactly contrite, as it placed most of its culpability on the fact that the coalition forces were given bad intelligence, which led it to believe that the funeral was actually a gathering of enemy military personnel.⁴⁸

40. *See Yemen War: Saudi Coalition War Crimes Investigation 'Not Credible'*, BBC NEWS (Aug. 24, 2018), available at <https://www.bbc.com/news/world-middle-east-45295678> (last visited Mar. 8, 2019).

41. *See Rahme, supra* note 2 (the Yemeni Civil War is often referred to as the "forgotten war" because Western media has not covered the war extensively).

42. *Yemen: US Bombs Used in Deadliest Market Strike*, HUM. RTS. WATCH (Apr. 7, 2016), available at <https://www.hrw.org/news/2016/04/07/yemen-us-bombs-used-deadliest-market-strike> (last visited Feb. 2, 2019).

43. *See id.*

44. *Id.* (stating that there were about ten Houthi fighters killed in the attack, and that there were two or three more Houthi fighters in the vicinity, roughly 250 meters away from the site of the attack).

45. *Saudi-led coalition admits to bombing Yemen funeral*, THE GUARDIAN (Oct. 15, 2016), available at <https://www.theguardian.com/world/2016/oct/15/saudi-led-coalition-admits-to-bombing-yemen-funeral> (last visited Feb. 2, 2019) [hereinafter *Yemen funeral*].

46. *Id.*

47. *See id.*

48. *See id.*

The KSA attack that has earned the most Western attention up to this point was the coalition's August 2018 strike on a school bus travelling through Saada that killed fifty-four civilians, including forty children.⁴⁹ KSA has struggled to muster up an excuse for the incident; it has referred to the attack as "unjustified," but also stated that it *believed* there to be a Houthi target in the area, while ultimately accepting responsibility for being wrong about that belief.⁵⁰

These are just three examples of dozens of alleged violations of international law committed by KSA throughout the Yemeni Civil War. The U.N. and Human Rights Watch have conducted independent investigations of all three attacks, and each was condemned as an apparent war crime.⁵¹ The twist on these attacks, as well as at least twenty-one others, is that the remnants of U.S.-made weapons were found at the site of each.⁵²

IV. THE U.S. ARMS TRADE: ABUSING POWER FOR PROFITS

There is little dispute among legal scholars that the U.S. government could eventually be in hot water for its role in the Yemeni Civil War as a result of its active assistance to the KSA coalition in its efforts.⁵³ Attorneys for the Obama administration were weary of potential blowback for assisting KSA in Yemen, but the Trump administration has said little about potential human rights violations perpetrated by KSA and how it might affect U.S. officials in the future.⁵⁴

Former U.S. Secretary of Defense General James Mattis was quoted as saying that assisting KSA in its defense endeavors was not a "blank check," and that KSA would need to clean up its act if it wanted

49. Salma Abdelaziz, Alla Eshchenko, & Joe Sterling, *Saudi-led coalition admits 'mistake' made in deadly bus attack in Yemen*, CNN (Sept. 2, 2018), available at <https://www.cnn.com/2018/09/01/middleeast/saudi-coalition-yemen-attack/index.html> (last visited Feb. 2, 2019).

50. *Id.*

51. Rahme, *supra* note 2.

52. See Nima Elbagir, Salma Abdelaziz, & Laura Smith-Spark, *Made in America*, CNN (Sept. 2018), available at <https://www.cnn.com/interactive/2018/09/world/yemen-airstrikes-intl/> (last visited Feb. 2, 2019).

53. See Warren Strobel & Jonathan Landay, *As Saudis bombed Yemen, U.S. worried about legal blowback*, REUTERS (Oct. 10, 2016), available at <https://www.reuters.com/article/us-usa-saudi-yemen/exclusive-as-saudis-bombed-yemen-u-s-worried-about-legal-blowback-idUSKCN12A0BQ> (last visited Feb. 2, 2019).

54. *Id.*

to continue receiving military support from the U.S.⁵⁵ The Pentagon has chimed in when the remnants of U.S. weapons have been found at the scene of apparent KSA war crimes, but has blamed the attacks on KSA military personnel not knowing how to aim their weapons properly – something that the U.S. does not see as its problem.⁵⁶ This attitude is irresponsible and startling. Such a response is analogous to a shooting range employee giving a child who has no experience with guns a rifle and saying, “I just give the kids the guns – teaching them how to aim them is not really what I do,” after the child ends up shooting someone. The instructor allowing the child to continue shooting the gun even though he knew that the child did not know how to aim it properly is no different from the U.S.’s current attitude towards the KSA intervention in Yemen.

Many legal scholars look to the U.S.’s practical assistance to KSA, i.e. its sharing of intelligence and mid-air refueling of KSA aircrafts, as its main cause for concern.⁵⁷ This type of support obviously raises serious legal and moral questions, but U.S. arms sales to KSA could ultimately be what bring the U.S. under the lens of international criminal law.

KSA has long been the U.S.’s number one client when it comes to arms sales and that does not look as if it is going to change anytime soon.⁵⁸ President Trump’s first trip abroad as leader of the free world included a visit to Riyadh, Saudi Arabia, where he inked a Jared Kushner-facilitated deal that will send roughly \$110 billion in U.S. weapons to KSA over the span of ten years.⁵⁹ A yearly average of \$11 billion in sales seems like a lot, but that number appears as if it’s closer to the floor than the ceiling for U.S. arms sales to KSA: 2017 sales

55. Patrick Wintour, *US says support for Saudi Arabia not a ‘blank cheque’ after Yemen air raid*, THE GUARDIAN (Oct. 9, 2016), available at <https://www.theguardian.com/world/2016/oct/09/saudi-arabia-investigate-air-raid-on-funeral-in-yemen> (last visited Feb. 2, 2019).

56. See Nima Elbagir, Salma Abdelaziz, Ryan Browne, Barbara Arvanitidis, & Laura Smith-Spark, *Bomb that killed 40 children in Yemen was supplied by the US*, CNN (Aug. 17, 2018), available at <https://www.cnn.com/2018/08/17/middleeast/us-saudi-yemen-bus-strike-intl/index.html> (last visited Feb. 3, 2019) (quoting former US Secretary of Defense James Mattis as saying that the Pentagon does not help the Saudi Arabian military with exact targeting of airstrikes).

57. Melissa Dalton & Hijab Shah, *U.S. Support for Saudi Military Operations in Yemen*, CSIS (Mar. 23, 2018), available at <https://www.csis.org/analysis/us-support-saudi-military-operations-yemen> (last visited Feb. 3, 2019).

58. Ivanova, *supra* note 27.

59. *Id.*

alone amounted to \$18 billion.⁶⁰ Defense industry giants Lockheed Martin (“Lockheed”) and Raytheon look poised to continue to rake in the lion’s share of U.S.-KSA defense contract dollars through the duration of the new deal between the two countries, as Lockheed alone estimates that it will sell around \$29 billion in weapons to KSA through the deal, while Raytheon expects to bring in a comparatively measly \$6 billion in sales.⁶¹ These projections are business as usual for both companies, as they have consistently been among the top sellers of U.S.-made weapons over the last twenty years.⁶²

If the money that American defense contractors see from arms deals between the U.S. and KSA is a high point for the corporations, seeing their weapons turn up at sites of apparent war crimes has to be the low point. Unfortunately, this is a reality that U.S. defense contractors have faced on several occasions since KSA became involved in Yemen. As stated earlier, remnants of U.S. weapons have been found at ground zero of twenty-four separate KSA attacks that resulted in disproportionate civilian casualties and were deemed to be apparent war crimes.⁶³

In an independent investigation conducted two weeks after the March 2016 attack on the civilian market in Mastaba, Human Rights Watch uncovered shrapnel from a 2000 pound MK-84 bomb equipped with a Paveway laser guidance kit, which are typically produced by Raytheon.⁶⁴ The Sana’a funeral bombing that killed 140 civilians took place several months later, and the U.N. subsequently conducted an independent investigation which uncovered what was left of a 500 pound U.S.-made Paveway missile.⁶⁵ Pieces of U.S.- made weaponry were also found at the site of the August 2018 fieldtrip attack that resulted in the death of forty children, as investigative journalist outlet *Bellingcat* found leftovers of a Lockheed-produced 500 pound Paveway

60. *Id.*

61. *Id.*

62. *See id.*

63. *Yemen: Coalition Bus Bombing Apparent War Crime*, HUM. RTS. WATCH (Sept. 2, 2018), available at <https://www.hrw.org/news/2018/09/02/yemen-coalition-bus-bombing-apparent-war-crime> (last visited Feb. 3, 2019).

64. HUM. RTS. WATCH, *supra* note 42; *Raytheon’s Paveway™ Precision Guided Bomb Kit Wins U.S. Air Force Contract Competition*, RAYTHEON (Nov. 30, 2006), available at <http://investor.raytheon.com/phoenix.zhtml?c=84193&p=irol-newsArticle&ID=937371> (last visited Feb. 3, 2019).

65. *See Yemen funeral*, *supra* note 45.

laser-guided missile during its examination of the scene of the attack.⁶⁶ Proof of the use of U.S. weapons has been found at the sites of attacks on hospitals, schools, and hotels as well.⁶⁷

Executives from Lockheed Martin and Raytheon have both tried to downplay their involvement in the chain of events leading up to the attacks by treating the attacks as business transactions with negative consequences when pressed about their weapons being used to carry out attacks on civilian targets in Yemen.⁶⁸ For instance, Lockheed Martin CEO Marillyn Hewson has clung strongly to the government's policy towards KSA and its involvement in Yemen by saying that her company will continue to follow the government's agenda.⁶⁹ Ms. Hewson's stance makes sense to an extent, on paper at least – defense contractors can sell products to countries on their own through direct commercial sales (“DCS”), but contractor to country sales are tightly regulated and scrutinized heavily by the U.S. government. Contractors are usually not able to sell any products which the government identifies as carrying technological or security concerns.⁷⁰ Rather, these weapons typically must be sold through the U.S. government and are identified as foreign military sales only items (“FMS”).⁷¹ However, the government maintains discretion over the items that may be sold using particular channels, and often times reputable contractors who sell to the U.S. government as well as foreign countries will be granted permission to sell FMS weapons to foreign governments.⁷² Both Lockheed and Raytheon sell FMS through the government and make DCS directly to KSA, and both companies are well aware of who will probably end up

66. Julian Borger, *U.S. supplied bomb that killed 40 children on Yemen school bus*, THE GUARDIAN (Aug. 19, 2018), available at <https://www.theguardian.com/world/2018/aug/19/us-supplied-bomb-that-killed-40-children-school-bus-yemen> (last visited Mar. 8, 2019).

67. See Rasha Mohamed, *It's time for the U.S. to stop supplying weapons to the Saudi-led coalition in Yemen*, WASH. POST (Aug. 31, 2018), available at https://www.washingtonpost.com/news/democracy-post/wp/2018/08/31/its-time-for-the-u-s-to-stop-supplying-weapons-to-the-saudi-led-coalition-in-yemen/?utm_term=.feb224dae6f (last visited Feb. 3, 2019).

68. See Aaron Gregg & Christian Davenport, *Defense contractors stand with White House on Saudi arms sales*, WASH. POST (Oct. 25, 2018), available at https://www.washingtonpost.com/business/2018/10/25/defense-contractors-stand-with-white-house-saudi-arms-sales/?utm_term=.a9e39381e4ef (last visited Feb. 3, 2019).

69. *Id.*

70. *Foreign Military Sales vs Direct Commercial Sales*, NDIA (2017), available at <http://www.ndia.org/policy/international/fms-vs-dcs> (last visited Feb. 3, 2019).

71. *Id.*

72. *See id.*

with their weapons when they sell them through the government.⁷³ Thus, the U.S. arms industry is conscious that its weapons are being received by a regime that is not always using them for defensive or peace-keeping purposes.

Unfortunately, placing arms in the hands of warring countries is the standard for U.S. arms sales and not the exception. The U.S. sold over \$67 billion in arms to developing countries from 1985 to 1995, including over half the arms that entered the Middle East during that time.⁷⁴ The Middle East's military expenditures to gross national product ratio for that decade was 7.9%, the highest in the world during that time.⁷⁵ This was probably due to the fact that there were eleven globally recognized conflicts in the region over the course of that decade, most of which involved U.S. weapons.⁷⁶ However, U.S. arms sales were not limited to the Middle East during that decade. In fact, 90% of the fifty significant ethnic and territorial conflicts that occurred in the early 1990s involved at least one party that received U.S. weapons or military technology.⁷⁷ In 1993 alone the U.S. sold 90% of its arms to developing countries with poor human rights records.⁷⁸ These statistics are a troubling demonstration that the U.S. is no stranger to selling its arms into unstable situations.

The continuous attacks on civilian targets carried out by KSA over the course of the last several years, paired with the mysterious disappearance of KSA dissident journalist Jamal Khashoggi, has put the countries that make up the international arms dealing community at odds with the idea of continuing to sell weapons to KSA.⁷⁹ News

73. See generally Celia Pena-Gomez, *Lockheed Martin defense contract with Saudi Arabia has been increased*, ADHRB (July 30, 2018), available at <https://www.adhrb.org/2018/07/lockheed-martin-defense-contract-with-saudi-arabia-has-been-increased/> (last visited Mar. 8, 2019).

74. See Lucien J. Dhooge, *We Arm the World: The Implications of American Participation in the Global Armaments Trade*, 16 ARIZ. J. INT'L & COMP. L. 577, 588 (1999).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. See Andreas Rinke, Andrea Shalal, & Maria Sheahan, *Merkel: No German arms exports to Saudi until killing cleared up*, REUTERS (Oct. 22, 2018), available at <https://www.reuters.com/article/us-saudi-khashoggi-germany-merkel/merkel-no-german-arms-exports-to-saudi-until-killing-cleared-up-idUSKCN1MW2LT> (last visited Feb. 3, 2019); see also Christal Hayes, *Finland, Denmark and Germany stop arm sales to Saudi Arabia after Khashoggi's death*, USA TODAY (Nov. 24, 2018), available at <https://www.usatoday.com/story/news/world/2018/11/24/jamal-khashoggi-finland-denmark-germany-arms-sales/2101874002/> (last visited Feb. 3, 2019).

outlets began compiling lists of countries and manufacturers who are still choosing to sell weapons to KSA just after Khashoggi's disappearance in the Fall of 2018, but that has not kept the U.S. from going about business as usual with KSA.⁸⁰ The international law community leaves questionable arms sales practices largely unchecked, so the U.S. will be able to continue these dealings for as long as it wants. The only time international law truly forbids arms sales to/from a specific country is when a formal embargo is declared, in which case arms sales to that country are technically prohibited.⁸¹ However, embargoes are rare and ineffective due to the lack of international uniformity in the implementation of arms trade regulation.

The international law community attempted to address the issue of selling arms to human rights violators in 2014 with the Arms Trade Treaty (ATT), but it has been almost entirely moot since its passage.⁸² The ATT's stated mechanism is to obligate member states to monitor arms exports and ensure that weapons do not cross existing arms embargoes or end up being used for human rights abuses, including terrorism. Member states, with the assistance of the U.N., will put into place enforceable, standardized arms import and export regulations (much like those that already exist in the U.S.), and will be expected to track the destination of exports to ensure they do not end up in the wrong hands. Ideally, that means limiting the inflow of deadly weapons into places like Syria.⁸³

The ATT's mission sounds like an effective way for the international community to limit weapons exports to states who use arms to violate international law in theory. However, the treaty has been totally ineffective in practice, largely because the U.S. has signed it, but not ratified it, while Russia and China have avoided it altogether.⁸⁴ Those three nations constitute three of the world's top five

80. See Angela Dewan, *These are the countries still selling arms to Saudi Arabia*, CNN (Nov. 23, 2018), available at <https://www.cnn.com/2018/11/22/middleeast/arms-exports-saudi-arabia-intl/index.html> (last visited Feb. 3, 2019).

81. For a general overview of arms embargoes and their aims, see DAMIEN FRUCHART ET AL., UNITED NATIONS ARMS EMBARGOES: THEIR IMPACT ON ARMS FLOWS AND TARGET BEHAVIOUR (Stockholm Int'l Peace Res. Inst. & Uppsala Univ. 2007), available at <https://www.sipri.org/sites/default/files/SIPRI07UNAE.pdf> (last visited Feb. 3, 2019).

82. See Kirk Jackson, *The Arms Trade Treaty: A historic and momentous failure*, CEASEFIRE (Apr. 29, 2013), available at <https://ceasefiremagazine.co.uk/failure-arms-trade-treaty/> (last visited Feb. 3, 2019) (discussing why the newly adopted ATT would not be effective).

83. See *id.*

84. See *There's a treaty for that: A UN treaty to regulate the global arms trade has little impact*, THE ECONOMIST (Aug. 18, 2018), available at <https://www.economist.com/>

weapons exporters, so the impact of the ATT would be furthered exponentially if even one of them agreed to sign on.⁸⁵ However, there is strong doubt that Congress will ratify the ATT, and the idea of Russia or China participating in such an agreement is almost laughable.⁸⁶

The requirements of arms dealers under U.S. domestic law are not exactly lax, but U.S. defense contractors consistently manage to skirt existing regulations. FMS sales are reviewed by Congress before being approved, and DCS sales are closely scrutinized by the government before defense contractors are allowed to even begin negotiating weapons deals with foreign countries.⁸⁷ These deals are usually approved, but the legality of these sales still comes under U.S. federal jurisdiction, with the applicable law being Section 2301 of the Foreign Assistance Act of 1961.⁸⁸ According to this law, arms transfers from the U.S. to foreign governments should be for the purpose of improving the climate of political independence and individual liberty in recipient countries.⁸⁹ Section 2304(a)(2) goes on to prohibit military assistance to any country which engages in “a consistent pattern of gross violations of internationally recognized human rights.”⁹⁰ On top of this, any arms sales to countries with poor human rights records are supposed to be vetted by the Executive before such deals are finalized.⁹¹ Again, such rules and regulations are nice in theory, but have been ineffective when it comes to arms sales to KSA.

V. HOLDING THE VILLAINS ACCOUNTABLE: INTERNATIONAL ACCOMPLICE LIABILITY

It has already been established that international law recognizes criminal responsibility for violations of human rights as far as direct

international/2018/08/18/a-un-treaty-to-regulate-the-global-arms-trade-has-little-impact (last visited Feb. 3, 2019).

85. Daniel Brown, *Weapons sales are on the rise – here are the top 10 countries exporting arms around the world*, BUS. INSIDER (Mar. 16, 2018), available at <https://www.businessinsider.com/top-countries-exporting-weapons-arms-sales-2018-3> (last visited Mar. 8, 2019).

86. THE ECONOMIST, *supra* note 84.

87. NDIA, *supra* note 70.

88. Dhooge, *supra* note 74, at 631.

89. *Id.* at 631-32.

90. *Id.* (stating that the Foreign Assistance Act, as written, is supposed to apply to foreign assistance of countries with poor human rights records as applied to their own citizens, but it only makes sense for the law to apply to assistance of countries with poor human rights records abroad as well. Saudi Arabia has both, so it should apply to weapons sales to it regardless).

91. *Id.*

perpetrators are concerned.⁹² However, international criminal law also recognizes accomplice liability in such circumstances under international laws and principles of criminal aiding and abetting.⁹³ This section will explore the development of accomplice liability in international criminal law as it applies to both individuals and corporations.

Accomplice liability exists in international criminal law in order to hold those actors besides material perpetrators of crimes accountable for their actions when there are parties other than the material criminals who render the commission of such crimes possible.⁹⁴ Among these actors are individuals occupying important positions in corporations, who, in the course of their ordinary work, make the commission of such crimes possible.⁹⁵

Accomplice liability was first recognized in international criminal law at Nuremberg, when the International Military Court sought to prosecute those who had a direct *impact* on the facilitation of the Holocaust through their actions without *actively* participating in the principle crimes, along with those individuals *acting* directly in the atrocity.⁹⁶ The Nuremberg Trials established the idea of accomplice liability in international criminal law, but the international community has struggled to clearly define aiding and abetting ever since.

In 1996 the International Law Commission (“ILC”) of the U.N. said that “complicity in the commission . . . of a war crime . . . is a crime under international law.”⁹⁷ This is the groundwork which the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) operated

92. See generally Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

93. See Rome Statute of the International Criminal Court art. 25(3), July 17, 1998, 2187 U.N.T.S. 90, rev. 2010. For a general overview and history of the development of accomplice liability in international criminal law, see William A. Schabas, *Enforcing international humanitarian law: Catching the accomplices*, 83 INT’L REV. RED CROSS 439 (2001).

94. Andrea Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for “Trading with the Enemy” of Mankind*, 5 INT’L CRIM. L. REV. at 623, 626 (2005).

95. *Id.* at 627.

96. *Id.* at 630 (emphasis added).

97. Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT’L HUM. RTS. 304, 307 (2008) (quoting *Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, (1950) 2 Y.B. Int’l L. Comm’n, 377, UN Doc. A/CN.4/SER.A/1950/Add.1).

under when prosecuting those who helped facilitate war crimes in both cases.⁹⁸ Both tribunals imposed individual criminal responsibility on any “person” who “aided and abetted in the planning, preparation, or execution” of war crimes.⁹⁹ The ILC further clarified these standards in the 1996 Draft Code of Crimes Against the Peace and Security of Mankind.¹⁰⁰ Finally, aiding and abetting was addressed in the Rome Statute of the International Criminal Court when it was drafted in 1998.¹⁰¹

International criminal law’s recognition of accomplice liability is virtually unquestioned at this point, but a full and proper definition for aiding and abetting in international criminal law is still debated, even after its development through case law and codification.

Just like almost every crime in almost every jurisdiction around the world, aiding and abetting in the international criminal sense requires some sort of an *actus reus* and a *mens rea*. And, as almost always, the *actus reus* is more easily defined than the *mens rea*. The *actus reus* of aiding and abetting in international law was discussed by the court in *Furundzija*, a case from the ICTY:

[T]he relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal . . . the position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime . . . in sum, the Trial Chamber holds that the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support, which has a substantial effect on the perpetration of the crime.¹⁰²

Article 25(3) of the ICC contains similar language for its interpretation of the *actus reus* element of aiding and abetting. It reads:

98. See Reggio, *supra* note 94.

99. *Id.*

100. See *Draft Code of Crimes against the Peace and Security of Mankind*, (1996) 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).

101. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, adopted July 17, 1998, entered into force, July 1, 2002, U.N. Doc. A/CONF.183/9, 21, art. 25.3(c), 37 I.L.M. 999 (1998) [hereinafter ICC Statute].

102. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 232-235 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998), quoted in Reggio, *supra* note 94, at 638.

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime jurisdiction of the Court if that person: [...] For the purposes of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission.¹⁰³

There are small differences in the wording of the ICC statute and the decisions of the *ad hoc* courts, but the spirit is consistent among the definitions. The distinction between the two standards is that Article 25 of the ICC uses “for the purposes of,” while the *ad hoc* courts do not allude to purpose at all in describing the actus reus.¹⁰⁴ The word “purpose” fits best when addressing the mens rea of the crime as opposed to the actus reus, so the ICC’s use of it will be discussed as part of the mens rea requirement.

Taken together, legal scholar Ryan Goodman defines the actus reus of aiding and abetting a war crime in international criminal law as an act in which “there is a principal person or entity that commits a war crime (main perpetrator), and another actor who committed an act that had a substantial effect upon the commission of the underlying offense.”¹⁰⁵

Legal scholars have long had a difficult time figuring out the exact mens rea standard of aiding and abetting under international law because of the split between international criminal tribunals, also known as “customary law,” and the codification found in the ICC. The court in *Furundzija* applied a knowledge test when determining the mens rea for aiding and abetting war crimes, stating “to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with the *knowledge* that the torture is taking place.”¹⁰⁶ In a subsequent decision by the ICTY, the court also said that “in addition to knowledge that his acts assist in the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his

103. ICC Statute, art. 25.3

104. See Reggio, *supra* note 94, at 637-44.

105. Ryan Goodman, *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen*, JUST SECURITY (Sept. 1, 2016), available at <https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen/> (last visited Feb. 3, 2019).

106. See Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 257.

conduct.”¹⁰⁷ The depth of the accomplice’s knowledge does not have to be extensive, as he does not need to know the *precise* crime that will be committed, but rather that a crime will *probably* be committed.¹⁰⁸

This has been the view of the international law community since these decisions were handed down, but the customary definition of the aiding and abetting mens rea became murky at the drafting of the Rome Statute in 1998 when the drafters seemingly included two mens rea standards.¹⁰⁹

The mens rea portion of Article 25(3) of the Rome Statute states that the contribution made in the act of aiding and abetting “shall be *intentional* and shall either: be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court;” or “[b]e made in the *knowledge* of the intention of the group to commit the crime.”¹¹⁰ This provision has confused legal scholars, but according to Maria Kelt and Herman Von Hebel, the dual mens rea provision was included in the Rome Statute so that future courts would have discretion over which mens rea to would apply to someone charged with aiding and abetting.¹¹¹ Generally speaking, Article 25(3) is considered to require purpose for aiders and abettors, but since nearly all international criminal law jurisprudence up to (and after) the drafting of the Rome Statute has applied a knowledge test to aiders and abettors, leading scholars believe a minimum requirement of knowledge will continue to be applied.¹¹²

In sum, an aider/abettor of a war crime must commit an act that has a substantial effect upon the commission of the underlying offense (the war crime), and the aider/abettor must know that the offense would occur, or that there was a substantial likelihood that their act would assist in the commission of the crime.¹¹³

107. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 286 (Int’l Crim. Trib. for the Former Yugoslavia, Mar. 3, 2000), available at <https://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf> (last visited Feb. 3, 2019).

108. Reggio, *supra* note 94, at 637-44.

109. Maria Kelt & Herman Von Hebel, *General Principles of Criminal Law and the Elements of Crimes*, quoted in ROY S.K. LEE & HAKAN FRIMAN, *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 19, 37 (2001).

110. ICC Statute, art. 25.3.

111. Kelt & Von Hebel, *supra* note 109.

112. Goodman, *supra* note 105.

113. *Id.*

VI. VILLAINS UNCHECKED: CORPORATE CRIMINALITY IN INTERNATIONAL LAW

It is first important to note that legal entities, such as corporations, cannot currently be held criminally responsible for violating international law.¹¹⁴ The drafters of the Rome Statute believed that respecting national sovereignty was important, and since not every country who is a party to the Rome Statute allows for the criminal prosecution of legal entities, the ICC thought it better to not allow criminal responsibility to be imposed upon legal entities.¹¹⁵ With that being said, the ICC and other international criminal tribunals have had no issue prosecuting leading figures of legal entities and groups in the past. However, this does not mean that just anyone within a corporation can be punished for the decisions made by executives; culpability is usually limited to those people high enough in the chain of command to make decisions which lead to the facilitation of war crimes.¹¹⁶

The court in *U.S. v. Krupp*, a case against the head of a large German engineering firm that produced various instruments used in WWII for the Nazis, stated, “[a]s already said, we hold that guilt must be personal. The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient.”¹¹⁷ The judge presiding over the U.S. Military Tribunal in which the case was being heard went on to elaborate as he quoted principles of American law:

Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company’s business may be held criminally liable individually therefor. So, although they are ordinarily not criminally liable for corporate acts performed by other officers or agents, and at least where the crime charged involves guilty knowledge or criminal intent, it is essential to criminal liability on his part that they actually and personally do the acts which constitute the offence or that they be done by his direction or permission. He is liable where his scienter or authority is established or where he is the actual present and efficient actor. When the corporation itself is

114. Reggio, *supra* note 94, at 650-51.

115. See Doug Cassel, *supra* note 97, at 304, 316; see also ICC Statute (showing that the U.S. is not a party to the Rome Statute and does not come within the ICC’s jurisdiction, so ICC principles do not apply to the U.S.).

116. See Reggio, *supra* note 94, at 120-21.

117. *U.S. v. Krupp*, 9 L.R.T.W.C. 1, 151, 9 T.W.C. 1448 (1948), *quoted in* Schabas, *supra* note 93, at 446 [hereinafter *The Krupp Case*].

forbidden to do an act, the prohibition extends to the board of directors and to each director separately and individually.¹¹⁸

Another example of the prosecution of corporate executives for aiding and abetting war crimes can be seen in Nuremberg's *Zyklon B* case. There, the court found Bruno Tesch, the owner of the company that produced the gas used in Nazi concentration camp gas chambers (Zyklon B) guilty of criminal aiding and abetting of war crimes.¹¹⁹ The court found that because Tesch *knew* what his insecticide would be used for, or that he knew with *substantial certainty* how the product would be used, he was responsible for aiding and abetting the Nazis in their efforts.¹²⁰ Bruno Tesch's procurist, Karl Weinbacher, was convicted as an accomplice as well, as he was found to have had enough knowledge of the workings of the Tesch firm to be considered an aider and abettor.¹²¹

If a corporation itself is going to be held criminally responsible for aiding and abetting a crime, it would need to be in a domestic court within the jurisdiction of a country whose law allows legal entities to be considered criminals, such as a U.S. federal court.¹²² However, customary international law has established in the cases above, as well as in other decisions heard in international court, that executives of corporations and companies who aid and abet in war crimes may very well be held liable for their actions.

VII. BEHIND THE CORPORATE MASKS: LIABILITY OF EXECUTIVES IN INTERNATIONAL LAW

Prosecuting corporate executives for accomplice liability on the international stage is tricky in its own right. Legal scholar Andrea Reggio accurately points out the fact that, in most cases, executives of companies who aid and abet war crimes are not doing so for the purpose of facilitating criminal activity.¹²³ These people are almost always economic actors who have business interests at stake, and as they are individuals in executive positions, their decisions have an effect on their

118. *Id.*

119. *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 Law Reports of Trials of War Criminals 93 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946) [hereinafter *The Zyklon B Case*].

120. *The Zyklon B Case*.

121. *Id.*

122. See CHARLES DOYLE, CONG. RES. SERV., R43293, CORPORATE CRIMINAL LIABILITY: AN OVERVIEW OF FEDERAL LAW (2013) for an overview of corporate criminal responsibility under U.S. federal law.

123. See Reggio, *supra* note 94, at 651-53.

entire companies – from the shareholders to the assembly lines. In Reggio's opinion, corporate executives are usually not pursued under accomplice liability theories simply because it creates a slippery slope;¹²⁴ if executives can be held criminally responsible, can those who build the products be held responsible as well? What about those who had the idea for the product itself? Reggio's slippery slope argument is compelling when speculating on why corporate executives have not been prosecuted for accomplice liability often in the past. However, it seems clear from a logical standpoint that the only people within a company who should be held criminally responsible for accomplice liability are those making the decisions that lead directly to the facilitation of the crime.

The application of international legal standards for accomplice liability to U.S. defense contractor executives' business activity with KSA creates a textbook example case of international criminal aiding and abetting. The executives of these corporations should be held responsible for facilitating war crimes when U.S. weapons are used by KSA to do so. This section will apply the laws and standards discussed above to the situation in Yemen to show this.

A. Principal Crime

It is indisputable that KSA has violated international law during its intervention in Yemen via indiscriminate and disproportionate airstrikes resulting in mass civilian casualties. KSA has shown no regard for civilian life on hundreds of occasions by launching airstrikes that cause tremendous civilian casualties. Anytime these airstrikes are aimed at civilian targets or cause disproportionate civilian casualties when they are aimed at military targets there are grounds for the international community to condemn such attacks as apparent war crimes.¹²⁵ These acts may fall under Common Article 3 of the Geneva Conventions or under the customary principles of international law.¹²⁶ The March 2016 attack on the civilian market in Mastaba is particularly illustrative of the applicable legal standards and relevant for purposes of this argument, as

124. See Reggio, *supra* note 94, at 651-72.

125. See Patrick Wintour, *All sides in Yemen may be responsible for war crimes, say UN experts*, THE GUARDIAN (Aug. 28, 2018), available at <https://www.theguardian.com/world/2018/aug/28/all-sides-in-yemen-may-be-responsible-for-war-crimes-say-un-experts> (last visited Feb. 3, 2019).

126. See Common Article 3 of the Geneva Conventions; see ICRC, *supra* note 32.

KSA used a U.S.-made weapon in the attack and subsequently denied culpability for the civilian casualties that resulted.¹²⁷

The Mastaba market attack appears to have been a deliberate strike on a civilian target in violation of Common Article 3, and as such, should be treated as a war crime. The attack was carried out on a known civilian area and resulted in mass civilian casualties. However, the attack should still be treated as a war crime even if the international legal community ultimately fails to recognize the market as a civilian target and treats the strike as a military operation. In such a case the act would be seen as an indiscriminate attack on a military objective that resulted in a disproportionate number of civilian casualties in violation of the principle of proportionality.¹²⁸ Thus, KSA's strike on the Mastaba market constitutes a war crime in this case regardless of which international legal standard applies, and the underlying principal offense of a war crime is present.¹²⁹

B. Facilitation – Actus Reus

Once the underlying principal offense is proven, a showing of the alleged aider's/abettor's action which helped facilitate the underlying crime is the first step in analyzing whether accomplice liability exists.¹³⁰ In order for the act of accomplice liability to be established, it must be shown that the individual committed an act which had a *substantial effect* on the commission of the underlying offense.¹³¹ KSA's attack on the Mastaba market in 2016 was carried out with a weapon that is typically manufactured and sold by Raytheon, which makes the sale of the weapon to KSA a textbook example of an act which had a substantial effect on the commission of a war crime.¹³² The attack may not have happened but for Raytheon's sale of the weapon to KSA, so the actus reus element of aiding and abetting is met as a result.

127. See HUM. RTS. WATCH, *supra* note 42 (citing the Saudi Arabian response to the Mastaba market bombing, as KSA claimed it believed there was a legitimate military target in the form of a militia gathering at the market. HRW found there were few, if any, Houthi fighters in or around the market at the time of the attack, and that Saudi Arabia knew the market was a popular civilian area).

128. See *id.*

129. See *id.* (the Mastaba bombing has already been condemned as an apparent war crime by Human Rights Watch).

130. See Reggio, *supra* note 94.

131. See *id.*

132. See HUM. RTS. WATCH, *supra* note 42.

C. Facilitation – Mens Rea

The international legal community has established that proving mens rea of accomplice liability in international criminal law is complicated. In the hypothetical case of U.S. defense contractor Raytheon aiding and abetting KSA war crimes in Yemen through its sale of weapons to KSA, international criminal prosecution would need to show that, at the very least, executives for Raytheon *knew*, or believed with substantial certainty, that KSA would commit a war crime while using its weapons. It might be difficult to prove that Raytheon executives *knew* that KSA would commit a war crime by attacking the market in Mastaba, but the mens rea definition of aiding and abetting does not require the accomplice to know the exact crime that will be committed – the accomplice must only know that his actions would substantially contribute to the commission of a war crime at some point. Raytheon executives probably did not know that the sale of its weapons would result in this exact attack. However, it is undeniable, based on KSA's extensive record of human rights violations in Yemen and consistent abuse of its access to advanced weapons systems, that Raytheon executives knew or believed with substantial certainty that the sale of its weapons would result in the commission of a war crime at some point.

Evidence of the use of U.S.-made weapons in a KSA-perpetrated war crime was first discovered after an attack in 2016, so U.S. defense contractors have known for at least two years now that their weapons are being used in apparent war crimes.¹³³ However, as U.S. defense contractors continue to sell weapons to KSA in billion-dollar quantities, it is becoming more and more clear that the executives of these corporations know what their weapons will be used for. The problem is that they are not doing anything to stop it.

Raytheon executives have gone on record multiple times to clarify their attitude towards KSA's troublesome and illegal behavior, which does not appear to be an issue worth discussing extensively in their eyes. Shortly after the disappearance of Jamal Khashoggi, Raytheon's CFO Anthony O'Brien said "[w]e continue to be aligned with the administration's policies, and we intend to honor our commitments," while CEO of Raytheon International stated in February 2019 that "[w]e are an element of U.S. policy – our role is not to make policy, our role is

133. *See id.* (identifying the bomb used in the Mastaba attack as "U.S. made," meaning U.S. defense contractors have known for at least that long that their weapons are being used to perpetrate apparent war crimes in Yemen).

to comply with it.”¹³⁴ O’Brien and Harris stuck with apparent company policy when making these comments, as the corporation’s CEO Thomas Kennedy has handled the Saudi Arabian controversies in a similar manner, saying that because Raytheon is a “global company providing technology and security solutions for over 80 countries” he feels confident that Raytheon will be able to “weather” these complexities.¹³⁵ Referring to KSA’s misuse of U.S. made weapons and other violations of international law as complexities is astoundingly insensitive, and shows either a lack of understanding of the situation at hand, or a complete and knowing disregard of the seriousness of his company’s decision to continue selling weapons to KSA. Even if it is to be believed that the executives of a global corporation such as Raytheon are totally ignorant of the situation in Yemen, such ignorance would be a classic case of willful ignorance, which scholar Andrea Reggio compares to a *mens rea* of knowledge.¹³⁶

Lockheed Martin CEO Marillyn Hewson also seems to be clinging to the government’s lead on U.S.-KSA relations, as she defers to the administration just as the Raytheon executives do. When speaking about Lockheed Martin’s continued weapons sales to KSA, Ms. Hewson said that “[m]ost of these agreements that we have are government-to-government purchases, so anything that we do has to follow strictly the regulations of the U.S. government . . . beyond that, we’ll just work with the U.S. government as they’re continuing their relationship with Saudi.”¹³⁷ All of what Ms. Hewson said is true – but the fact of the matter is that she knows where the weapons are going, and she knows what they are being used for. Ms. Hewson is simply weighing her bottom line heavier than the legality of her company’s weapons sales to KSA.

U.S. defense contractor executives are not oblivious to what KSA is using their companies’ products for, but they are not selling weapons to KSA for the purpose of assisting in the commission of war crimes. Rather, they are selling the weapons for economic gain, with the knowledge that their weapons will be used to carry out war crimes. This distinction is irrelevant, however, for purposes of deciding whether

134. Natasha Turak, *Raytheon International CEO on weapons sales to Saudi Arabia: 'We don't make policy'*, CNBC (Feb. 16, 2019), available at <https://www.cnbc.com/2019/02/16/raytheon-exec-on-sales-to-saudi-arabia-we-dont-make-policy.html> (last visited July 26, 2019).

135. See Ivanova, *supra* note 27 (referring to O’Brien’s support for the Trump administration’s decision to continue to associate with Saudi Arabia).

136. See Reggio, *supra* note 94, at 686-87.

137. See Ivanova, *supra* note 27.

or not defense corporation executives could still be held criminally liable for aiding and abetting war crimes, as even indirect support of war crimes due to economic interest has been found to rise to a mens rea of purpose in past ad hoc international tribunals.¹³⁸ The U.S. defense contractor executives' desire to maintain healthy economic relationships with KSA is illustrated through their continued efforts to win large military contracts with KSA, as well as their attendance at a major business summit hosted in Riyadh.¹³⁹ U.S. defense executives have also shown their support of KSA military operations through their express support for President Trump's \$110 billion arms deal with KSA from 2017.

Collectively, these factors show that the executives of U.S. defense contractors know, and have known, that their weapons are being used to commit war crimes in Yemen. Not only do they know what their weapons are being used for, but it is now apparent that they are, at best, indifferent towards how their weapons are being used. This establishes a mens rea of knowledge through either direct knowledge or willful ignorance. It could also be argued that if U.S. defense contractor executives have knowledge of their actions, then they also have purpose, through purposefully continuing to sell weapons to KSA for economic gain with the knowledge of how the weapons are being used. Even so, since the mens rea requirement established by principles of international law seems to only be knowledge, U.S. defense contractor executives clearly meet the required standard and should be held criminally liable as accomplices to war crimes.

VIII. JUSTICE FOR THE VICTIMS BY PROSECUTING THE VILLAINS

Now that it has been established that executives of U.S. defense contractors that continue to sell weapons to KSA should be considered accomplices of KSA war crimes in Yemen, a solution must be

138. See Reggio, *supra* note 94.

139. See Joan Vennoch, *Khashoggi and Raytheon profit ahead of principle?*, BOS. GLOBE (Oct. 22, 2018), available at <https://www.bostonglobe.com/opinion/2018/10/22/khashoggi-and-raytheon-profit-ahead-principle/PIRRCrOwPiaOipPaOpPd1N/story.html> (last visited Mar. 8, 2019) (reporting that Raytheon CEO Thomas Kennedy would remain a speaker at the Saudi-hosted business conference aka "Davos in the desert" even after controversies involving KSA); see also David Alexander, *Lockheed awarded \$1.48 billion Saudi missile defense contract: Pentagon*, REUTERS (July 19, 2019), available at <https://www.reuters.com/article/us-lockheed-martin-defense-saudi/lockheed-awarded-1-48-billion-saudi-missile-defense-contract-pentagon-idUSKCN1UE2JQ> (last visited July 27, 2019) (reporting that a July 2019 modification to a weapons sales contract between Lockheed Martin and KSA made the total value of the contract over \$5 billion).

addressed. Any sort of legal action against these corporations or their executives taken in U.S. federal court would need to be approved by the Department of Justice, which is unlikely to occur under the Trump administration.¹⁴⁰ Lockheed CEO Marillyn Hewson and President Trump seem to have a friendly relationship (even though Trump referred to her as “Marillyn Lockheed” at one point), and he may not allow the Justice Department to pursue her prosecution.¹⁴¹ Further, President Trump has orchestrated the most recent government-to-government military tech sales between the U.S. and KSA, so pursuing legal action against defense corporations would ultimately reflect poorly on him, making the likelihood of such a pursuit even slimmer.

Since the possibility of prosecution under U.S. federal law looks rather bleak, the only realistic route to bringing U.S. defense contractor executives to justice is the international course. There are two feasible paths to prosecuting U.S. defense contractor executives under international law: prosecution under the ICC or prosecution under an *ad hoc* court. Neither seems likely in the near future, but there are arguments to be made that either one is possible.

A. ICC Prosecution

The Rome Statute states that the ICC is somewhat of a last resort; the ICC only exercises jurisdiction over an international crime if the home country of the perpetrator is either unable or unwilling to prosecute the alleged criminal itself.¹⁴² The only way an individual can come under the jurisdiction of the ICC is if the home country of the individual is a party to the ICC or if the crime in question occurred within the boundaries of a state that is bound by the ICC.¹⁴³ The U.S. is

140. The only way that corporate executives could be held criminally liable under U.S. federal law is under the War Crimes Act of 1996. *See* War Crimes Act, 18 U.S.C. § 2441(c) (1996). Although the actions of the executives of U.S. defense contractors are not war crimes themselves, the War Crimes Act allows for aiding and abetting to be counted as a war crime as well. However, the Department of Justice would be the entity bringing suit against the executives, and the importance of companies like Lockheed Martin and Raytheon to the government, especially the Executive branch, makes any suit implausible.

141. Ben Brimelow, *Trump flubbed the name of Lockheed Martin CEO, calling her 'Marillyn Lockheed'*, BUS. INSIDER (Mar. 22, 2018), available at <https://www.businessinsider.com/trump-marillyn-lockheed-martin-ceo-hewson-2018-3> (last visited Feb. 3, 2019).

142. *See* ICC Statute, art. 17 (the International Criminal Court was established under the Rome Statute).

143. *See* David Davenport, *Will The International Criminal Court Prosecute Americans Over Afghanistan?*, FORBES (Mar. 26, 2018), available at <https://www.forbes.com/sites/daviddavenport/2018/03/26/will-the-international-criminal-court-prosecute-americans-over-afghanistan/#3c9befc110a5> (last visited Feb. 3, 2019) for an example of a

a signatory to the Rome Statute, but did not ratify it, and informed the ICC that it does not intend to do so.¹⁴⁴ This means that no one under U.S. jurisdiction can be brought under the arm of the ICC unless the U.S. consents to it (compulsory jurisdiction), or if the U.S.-based actor committed a crime in a territory that is bound by the ICC.

U.S. officials have been critical of the ICC in the past, referring to it as “freewheeling” in the sense that it lacks due process.¹⁴⁵ The U.S.’s disdain for the ICC has recently become more apparent, as the ICC has been attempting to investigate apparent war crimes committed by the U.S. in Afghanistan.¹⁴⁶ Afghanistan is a party to the Rome Statute, and since the ICC can exercise jurisdiction over a nation that violates international law within a country that is a party to the Rome Statute, the ICC technically has jurisdiction over the U.S. in that case. However, the Trump administration has made it clear that it does not intend to cooperate with the ICC’s investigation, even if it technically has jurisdiction over the U.S. The Trump administration’s National Security Advisor John Bolton has gone so far as to say that the administration would “fight back” against the ICC and impose sanctions on it by seeking to prosecute ICC officials if the ICC continued to investigate U.S. officials for war crimes in Afghanistan.¹⁴⁷

Yemen, like the U.S., is only a signatory to the Rome Statute, but it seems as if Yemen could ratify it once the government is stable.¹⁴⁸ Ryan Goodman believes, however, that the ICC will still be able to exercise jurisdiction over war crimes committed in Yemen even if Yemen does not eventually ratify the Rome Statute, since Yemen can

situation in which the ICC has said it would attempt to exercise jurisdiction over the United States.

144. See Steven Groves & Brett Schaefer, *U.S. Refusal to Ratify Rome Statute Vindicated by ICC Afghanistan Report*, THE HERITAGE FOUND. (Dec. 11, 2014), available at <https://www.heritage.org/report/us-refusal-ratify-rome-statute-vindicated-icc-afghanistan-report> (last visited Feb. 3, 2019).

145. See Bolton’s Remarks on the International Criminal Court, JUST SECURITY (Sept. 10, 2018), available at <https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/> (last visited Feb. 3, 2019); see also Owen Bowcott, Oliver Holmes, & Erin Durkin, *John Bolton threatens war crimes court with sanctions in virulent attack*, THE GUARDIAN (Sept. 10, 2018), available at <https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech> (last visited Feb. 3, 2019).

146. See JUST SECURITY, *supra* note 145.

147. See *id.*

148. See Ryan Goodman, *Does the Int’l Criminal Court Have Jurisdiction over Alleged War Crimes by Saudi-Led Coalition in Yemen?*, JUST SECURITY (Sept. 14, 2016), available at <https://www.justsecurity.org/32910/intl-criminal-court-jurisdiction-war-crimes-allegedly-committed-saudi-led-coalition-yemen/> (last visited Feb. 3, 2019).

consent to ICC jurisdiction regardless of whether it is a party to the Rome Statute or not.¹⁴⁹ If Yemen chooses to allow the ICC to exercise jurisdiction over it, the U.S. (and U.S.-based defense corporations) will, theoretically, be subject to the ICC's jurisdiction as well, since the U.S. and U.S.-based defense contractors have assisted in the commission of war crimes in Yemen. The U.S. government would not allow such jurisdiction to be exercised without a fight, since doing so would force the government itself to admit some fault in aiding and abetting KSA in their war crimes in Yemen. Thus, even though it is unlikely, there is a route for defense contractor executives to be prosecuted under the ICC.

B. U.N. Security Council Resolution

The other way executives of U.S. defense contractors could face international justice for aiding and abetting KSA war crimes in Yemen is through a U.N. Security Council resolution. Such action would create an investigation into the Yemeni Civil War, which would eventually lead to a special court for Yemen, created for the purpose of prosecuting war criminals from the Yemeni Civil War. Resolutions are binding on the parties which they are meant to address, so any U.N. country brought into a resolution is bound by decisions pursuant to the resolution under Chapter VII of the U.N. Charter.¹⁵⁰ This means that any individuals subpoenaed by an *ad hoc* court for Yemen, including U.S. defense contractor executives, would be required to participate in the proceedings.¹⁵¹ It is important to note that the five permanent members of the U.N. are able to veto any resolution if they so choose, and as a permanent member, the U.S. would have the power to do just that.¹⁵² However, there would be no guarantee that the U.S. would be implicated in a Security Council investigation, and even if it was, it would be an incredibly damning implication for the U.S. to veto a resolution that would create an investigation or *ad hoc* court for the

149. *Id.*

150. *Are UN resolutions binding?*, DAG HAMMARSKJÖLD LIBR. (Apr. 26, 2018), available at <http://ask.un.org/faq/15010> (last visited Feb. 3, 2019) (stating that U.N. Security Council Resolutions are usually binding when issued under Chapter VII of the U.N. Charter, which deals with maintaining peace and security of the United Nations. A resolution created for the purposes of investigating war crimes committed in Yemen would likely fall under Chapter VII).

151. The U.S. is a member of the U.N., so if any U.S. citizens are called on to participate in action pursuant to a U.N. Security Council resolution then they would be required to cooperate, barring a U.S. veto of the resolution.

152. *See United Nations Security Council Fast Facts*, CNN (Mar. 28, 2018), available at <https://www.cnn.com/2013/09/03/world/united-nations-security-council-fast-facts/index.html> (last visited Feb. 3, 2019).

purposes of holding violators of human rights in Yemen accountable for their actions. However, it would not be shocking if the U.S. did just that.

IX. DEFENDING THE VILLAINS: ARGUMENTS SUPPORTING U.S. DEFENSE CONTRACTORS

There are strong arguments to be made against prosecuting executives of U.S. defense contractors who aid KSA in its internationally illegal efforts, but none are strong enough to overcome the reasons to pursue such prosecution. The first argument against prosecuting executives of U.S. defense contractors is the fact that, while these corporations have a responsibility to not facilitate war crimes, they also have a responsibility and obligation to their shareholders to do what they can to continue to make them money. They also have a responsibility to the government to continue to provide them with weapons that they can sell to KSA. Finally, there is the argument that if U.S. defense contractors did not sell weapons to KSA then someone else would. All three of these arguments are convincing and logical on the face, but none hold enough water to stop from pursuing legal action against U.S. defense contractor executives.

Lockheed Martin's anticipated sales to KSA for 2019 are around \$500 million, with 2020 projected sales to KSA close to \$900 million.¹⁵³ These sound like huge figures on their own, but considering that the defense tech giant pulled in a total of about \$50 billion in 2017, those amounts are very expendable.¹⁵⁴ As a matter of fact, Lockheed Martin has said itself that it does not have a "huge dependency on KSA sales."¹⁵⁵ Raytheon is in a similar situation, as only about 5% of its total annual sales come from KSA.¹⁵⁶ On the other hand, both countries sell a tremendous amount of weapons to the U.S. government itself, which accounted for 90% of Lockheed's net revenue in 2016.¹⁵⁷ This goes to

153. Aaron Gregg & Christian Davenport, *Defense contractors stand with White House on Saudi arms sales*, WASH. POST (Oct. 25, 2018), available at https://www.washingtonpost.com/business/2018/10/25/defense-contractors-stand-with-white-house-saudi-arms-sales/?utm_term=.01c2f53558f1 (last visited Feb. 3, 2019).

154. See Mike Stone, *Lockheed Martin profit beats, downplays Saudi exposure*, REUTERS (Oct. 23, 2018), available at <https://www.reuters.com/article/us-lockheed-results/lockheed-martin-profit-beats-downplays-saudi-exposure-idUSKCN1MX1ML> (last visited Feb. 3, 2019).

155. *Id.*

156. Gregg & Davenport, *supra* note 68.

157. Rich Duprey, *6 companies that are the most reliant on government contracts*, USA TODAY (Nov. 10, 2017), available at <https://www.usatoday.com/story/money/>

show that, although KSA is an important foreign client for U.S. defense contractors, they really do not need these sales to sustain extreme success, meaning Lockheed and Raytheon shareholders could remain happy even without sales to KSA. On top of this, shareholders of these corporations should expect ethical business practices from the corporations and the executives themselves. Selling products to a country that uses the products to violate international law does not seem as if it fits the mold of ethical business practices, and publicized unethical business practices can result in stock plummets, doing damage to shareholders' pockets.¹⁵⁸ Thus, although it may seem as if it is in the shareholders' best interest for these corporations to continue selling weapons to KSA, the reality of the situation is that it is in fact *not* in the best interest of the shareholders if these corporations continue to sell to KSA.

The second argument against the prosecution of defense contractor executives is that the government depends on them to produce weapons for KSA, and the U.S. relies heavily on its good relationship with KSA. However, this lends more support to the U.S. government's policy of selling weapons to KSA than it does to the defense contractors selling them to the U.S. The government's weapons sales to KSA accounted for about one-fifth of its total sales to foreign countries from 2012-2017.¹⁵⁹ However, the U.S. government is making itself potentially vulnerable to future legal action because of its sales to KSA, among other risks, so it is ultimately in the government's best interest to halt sales to KSA, at least for the time being.

Last, but not least, is the ever-popular theory that if U.S. defense contractors do not sell weapons to KSA, someone else will. This argument is not persuasive because U.S. defense contractors are almost irreplaceable in this case, but even if they were easily replaceable, U.S. allies and rivals alike would be unlikely to do so.

This is true for a few reasons. First, the capabilities of U.S.-based defense contractors far surpass defense contractors based in other countries (shown by sales), so it is unrealistic to think that foreign

business/2017/11/10/6-companies-that-are-the-most-reliant-on-government-contracts/107395784/ (last visited Feb. 3, 2019).

158. See Spuma M. Rao & J. Brooke Hamilton, III, *The Effect of Published Reports of Unethical Conduct on Stock Prices*, 15 J. BUS. ETHICS 1321 (1996) (stating that stock in corporations that have unethical business practices published tends to go down, decreasing the value of a shareholder's stock in the company for an appreciable period of time).

159. Ivanova, *supra* note 27.

defense contractors will take the U.S.'s spot.¹⁶⁰ Second, even if foreign defense contractors were poised to replace corporations like Raytheon and Lockheed, it is unlikely that any U.S. ally, such as the United Kingdom or France, would allow their corporations to split from U.S. foreign policy, in order to appease and align with the U.S. Finally, it is unrealistic that a U.S. *rival* would sell weapons to KSA, since KSA is arguably the U.S.'s most powerful friend in the Middle East. Russian relations with KSA have improved over the last few years, but Russia's allegiance remains with Iran, and as such, Russia would not do anything to support KSA in its proxy war against Iran, especially since Russia has already been involved in the Yemen conflict itself.¹⁶¹ Beyond this, Russia does not house defense contractors capable of meeting KSA's demands, making the sale of weapons to KSA even more unlikely.¹⁶² China has also seen its relationship with KSA blossom in recent years, but, like Russia, it has a stronger and more valuable relationship with Iran.¹⁶³ Beyond this, China has not expressed support for KSA and its coalition in the Yemen conflict and seems as if it would prefer peace in the Middle East, so it is difficult to see it doing anything to fuel the war.¹⁶⁴

160. See Amanda Macias, *American firms rule the \$398 billion global arms industry: Here's a roundup of the world's top 10 defense contractors, by sales*, CNBC (Jan. 10, 2019), available at <https://www.cnbc.com/2019/01/10/top-10-defense-contractors-in-the-world.html> (last visited July 27, 2019) (reporting that U.S. defense contractors Lockheed Martin, Boeing, and Raytheon make up about \$96 billion in global arms sales, while the United Kingdom's arms sales are around a third of that total and France's major weapons manufacturer grosses about \$9 billion annually).

161. See Anna Borshevskaya, *Will Russian-Saudi Relations Continue to Improve?*, FOREIGN AFF. (Oct. 10, 2017), available at <https://www.foreignaffairs.com/articles/saudi-arabia/2017-10-10/will-russian-saudi-relations-continue-improve> (last visited July 27, 2019) (stating that Russian-Saudi relations have been cordial recently); see also Jonathan Fenton-Harvey, *Russia's deadly game in Yemen*, THE NEW ARAB (Mar. 6, 2018), available at <https://www.alaraby.co.uk/english/indepth/2018/3/6/Russias-deadly-game-in-Yemen> (last visited July 27, 2019) (stating that Russia has supported Iran in the Yemeni Civil War).

162. See Macias, *supra* note 160 (stating that Russia's top defense firm, Almaz-Antey, grosses around \$9 billion a year).

163. See Ben Blanchard, *China's Xi speaks to Saudi king among Iran tensions*, REUTERS (May 8, 2019), available at <https://www.reuters.com/article/us-usa-iran-china-saudi/chinas-xi-speaks-to-saudi-king-amid-iran-tensions-idUSKCN1SE1S3> (last visited July 27, 2019) (illustrating the strategic relationship between China and KSA).

164. See Ben Blanchard, *China's Xi urges Yemen resolution in call with Saudi king*, REUTERS (Apr. 18, 2015), available at <https://www.reuters.com/article/us-yemen-security-china-saudi/chinas-xi-urges-yemen-resolution-in-call-with-saudi-king-idUSKBN0N909420150418> (last visited July 27, 2019) (stating that Chinese President Xi Jinping urged a political solution to the crisis in Yemen).

Thus, though it is clear that there are logical arguments to be made against prosecuting U.S. defense contractor executives, none of these arguments have strength to defeat the argument in favor of prosecuting these individuals. The international community should recognize the fact that these arguments do not hold enough water to ignore the actions of U.S. defense contractor executives and instead should pursue prosecution of these individuals.

X. U.S. DEFENSE CONTRACTORS: POWERS USED FOR EVIL

With great power comes great responsibility. U.S. defense contractors have been given a great power – they are undoubtedly powered by some of the brightest STEM and business minds in the world, yet as the top producers of the world's weapons they are also capable of creating technology that can tear populations of people apart and cause immense destruction. When selling weapons to KSA, U.S. defense contractors are not fulfilling the responsibility that comes with their power. Executives of U.S. defense contractors have aided and abetted war crimes committed by KSA in Yemen through the sale of weapons which they know are ultimately being used to kill innocent people.

Although the path to prosecuting defense contractor executives under international law would not be easy or straight-forward, it must be explored. Prosecution of these executives may be possible under the ICC or through a U.N. Security Council resolution investigation and creation of an *ad hoc* court. If the international community is serious about holding war criminals accountable for their actions, then it should be serious about holding their aiders and abettors accountable for their actions as well. U.S. defense contractors have great power – they should not be permitted to abandon the responsibility that comes with it.