

## Arbitrary Detention in Yemen during the Covid-19 Pandemic

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### Summary of key points

*Many persons, whether civilian or otherwise hors de combat, remain detained by all sides to the conflict in Yemen. Their detention potentially violates several established provisions of international humanitarian law, international human rights law, and may violate international criminal law. These detainees are reportedly kept in crowded and unsanitary conditions, thereby heightening the risks they face in light of the Covid-19 pandemic. Governments and other organised groups and parties to the conflict should release them where possible and, in any event, should ensure that all feasible measures are taken to mitigate their health risks in light of the Covid-19 pandemic.*

### Introduction:

Since 2014, armed conflict has ravaged Yemen. The emergence of the novel coronavirus (and the disease it causes, Covid-19) in early 2020 as a global health crisis added a new threat to the myriad dangers facing the population of Yemen.<sup>1</sup> In its 2021 report, the United Nations Group of Eminent International and Regional Experts on Yemen (“UN Expert Group”) noted that “[p]rotracted conflict, disease outbreaks, the COVID-19 pandemic, flooding, import restrictions, an economic and fuel crisis, and limited humanitarian aid have made everyday life in Yemen unbearable for many.”<sup>2</sup> Moreover, the UN Expert Group noted that violations of International Human Rights Law (“IHRL”) and International Humanitarian Law (“IHL”) continue to be committed by various parties to the conflict.<sup>3</sup> However, with the mandate of the UN Expert Group not having been renewed after its 2021 report, there is heightened potential for violations of international law to be overlooked, which is particularly concerning in light of the growing presence of Covid-19 in Yemen.

The discussion herein focuses on one particularly vulnerable group of persons in Yemen, namely detainees.<sup>4</sup> All parties to the conflict reportedly hold detainees, and the fate of detainees, as well as their potential release and/or exchange, is a critical humanitarian issue in Yemen. Many detainees have reportedly been arbitrarily detained and then kept in crowded and unsanitary conditions, thereby

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\* The views herein are those of the author alone and are not based on a criminal standard of proof.

<sup>1</sup> <https://www.ibanet.org/article/0cda105f-2325-4639-91b4-d7f9c8d2b3d4>.

<sup>2</sup> UN Group of Eminent International and Regional Experts on Yemen, 4<sup>th</sup> Report to the Human Rights Council, “A nation abandoned: A call to humanity to end Yemen’s suffering” 14 September 2021 (“UN Group of Experts 2021 Report”), para.17, 31

(<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27458&LangID=E>; link to the full report contained therein).

<sup>3</sup> UN Group of Experts 2021 Report, summary of report (These violations include “airstrikes and shelling, failing to abide by international humanitarian law principles, humanitarian restrictions as well as obstacles to access to food and healthcare, arbitrary detention, enforced disappearances, gender-based violence, including sexual violence, torture and other forms of cruel, inhuman or degrading treatment, denial of fair trial rights, violations of fundamental freedoms, persecution and violations against journalists, human rights defenders, minorities, migrants, internally displaced persons and violation of children's rights.”).

<sup>4</sup> The provisions governing detaining and interning persons during armed conflict are referred to below.

exposing them to heightened risks of suffering from Covid-19. Governments and other organised groups and parties to the conflict should ensure their release where possible and, in any event, should take all feasible measures to mitigate the risks presented by the Covid-19 pandemic.

### **Civilians and persons *hors de combat* continue to be detained by all parties to the conflict**

Large numbers of civilians and persons *hors de combat* have been detained by the parties to the conflict and, in many cases, remain deprived of their liberty. Detainees have been held incommunicado for months and sometimes even years. Such detention can be unlawful and/or arbitrary. Provisions of international humanitarian law that are particularly relevant are discussed further below, but it bears noting that arbitrary detention encompasses a wider range of circumstances than unlawfulness *stricto sensu*. The United Nation’s Working Group on Arbitrary Detention has stated that:

“[t]he notion of ‘arbitrary’ includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary. ‘Arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.”<sup>5</sup>

In its 2020 and 2021 reports to the Human Rights Council, the Expert Group in Yemen provides examples of numerous cases of arbitrary and/or unlawful detention. These include: “allegations of arrest and/or detention of aid workers by the Houthis”;<sup>6</sup> “cases in Sana’a of women and men, including journalists and human rights defenders, arbitrarily detained by the Houthis in prisons, such as Sana’a Central Prison, unofficial facilities such as the security and intelligence detention centre, and in secret detention facilities, including former residential buildings in and around Sana’a”;<sup>7</sup> “arbitrary detention and torture, including sexual violence against men and boys, perpetrated by United Arab Emirates forces prior to their withdrawal from Yemen in mid-2019, at the secret detention facility in Al-Buraiqeh coalition base in Aden”;<sup>8</sup> “cases of women detained by the Houthis – in secret detention facilities operating in at least five former residential buildings in and around Sana’a between December 2017 and December 2019 – because of their political views and/or participation in

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<sup>5</sup> The Working Group on Arbitrary Detention, <https://www.ohchr.org/EN/Issues/Detention/Pages/AboutArbitraryDetention.aspx>. The Working Group has adopted the following criteria for assessing cases of alleged arbitrary deprivation of liberty: “Category I: When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of their sentence or despite an amnesty law applicable to them); Category II: When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights; Category III: When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character. Category IV: When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy; and Category V: When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights.”

<sup>6</sup> Report of the Group of Eminent International and Regional Experts on Yemen, 28 September 2020, A/HRC/45/6, para.55 (“2020 Report”) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/GEE-Yemen/2020-09-09-report.pdf>.

<sup>7</sup> Ibid, Para.63.

<sup>8</sup> Ibid, Para.66.

demonstrations [...] [d]etainees were accused of prostitution and immorality, supporting the coalition, spying and affiliation with enemies”;<sup>9</sup> “a group of six medical workers (two doctors, three nurses and one hospital guard) by armed men affiliated with Government of Yemen forces”;<sup>10</sup> and “four members and supporters of the southern transitional council were reportedly arbitrarily detained for nearly a week, owing to their political affiliation, by armed men allegedly connected to the Government of Yemen”.<sup>11</sup> Worryingly, there are indications that arbitrary detentions continue to occur on a large-scale.<sup>12</sup>

The UN Expert Group concluded that many cases “involved persons being detained by militias affiliated with authorities in control of territory, and held without charge for prolonged periods, including in unofficial and secret detention sites” and that “political considerations have been key motivating factors, with persons being detained on the basis of perceived affiliation with an opposing party and some being held for the purpose of prisoner exchange deals”.<sup>13</sup> Additionally, detentions have been conducted in order to force a relative, wanted by one of the Parties to the conflict, to turn themselves in,<sup>14</sup> and “in some cases the Houthis required payments from the families for the release of detainees.”<sup>15</sup> Detentions are not limited to former combatants; the UN Group of Experts found that journalists, human rights defenders, and religious minorities have been subjected to arbitrary detention, and that all parties to the conflict have resorted to arbitrary arrests and detention.<sup>16</sup> Arbitrary detention in Yemen is reportedly frequently accompanied by torture and sexual violence, including against women and children.

### **Detainees face heightened risks in light of the Covid-19 pandemic**

Yemen’s first confirmed case of coronavirus was recorded on 10 April 2020. By mid-November 2021, the WHO reported 9,918 confirmed cases of Covid-19 and 1,923 deaths therefrom in Yemen.<sup>17</sup> The United Nations Under-Secretary-General for Humanitarian Affairs, Mark Lowcock, told the UN Security Council on 24 June 2020 that Covid-19 was spreading rapidly throughout Yemen and that 25% of cases have been fatal, about “five times the global average.”<sup>18</sup> However, the numbers may be higher, as testing is limited and reporting sporadic.<sup>19</sup> In particular, Houthi authorities in the north do not report about Covid-19 cases in areas under their control.<sup>20</sup> Worryingly, the UN stated in 2020 that “[w]ar-torn Yemen has so far received Covid-19 vaccine doses enough to cover only 1.5 percent of its population.”<sup>21</sup>

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<sup>9</sup> Ibid, Para.70.

<sup>10</sup> 2021 Report, para.40.

<sup>11</sup> 2021 Report, para.41.

<sup>12</sup> <https://morningexpress.in/yemen-southern-transition-council-accused-of-arresting-400-people-within-a-week/>.

<sup>13</sup> 2020 Report, para.62. See also <https://www.newsmax.com/world/globaltalk/yemen/2021/11/13/id/1044510/> (conveying reports regarding the cease-fire deal, including large prisoner exchanges, which was never fully implemented).

<sup>14</sup> <https://www.hrw.org/news/2020/07/02/yemen-aden-detainees-face-dire-covid-19-risk>.

<sup>15</sup> 2020 Report, para.62.

<sup>16</sup> 2021 Report, para.38.

<sup>17</sup> <https://covid19.who.int/region/emro/country/ye>.

<sup>18</sup> <https://reliefweb.int/report/yemen/under-secretary-general-humanitarian-affairs-and-emergency-relief-coordinator-mark-28>.

<sup>19</sup> <https://www.hrw.org/world-report/2021/country-chapters/yemen>.

<sup>20</sup> <https://english.aawsat.com/home/article/3254211/yemen-reports-30-new-covid-19-cases>.

<sup>21</sup> <https://www.aa.com.tr/en/latest-on-coronavirus-outbreak/covid-19-vaccines-delivered-to-yemen-cover-only-15-of-population-un/2413586>.

NGOs, such as Human Rights Watch, have warned that detainees face a grave risk from the Covid-19 pandemic, in addition to other health risks, such as cholera,<sup>22</sup> a recent outbreak of which is estimated to have killed approximately 2,000 people.<sup>23</sup> For instance, at the Bir Ahmed unofficial detention facility (located in a military camp in Aden), run by the UAE backed Southern Transitional Council, detainees faced serious risks due to the over-crowded conditions and lack of access to health professionals.<sup>24</sup> A victims group called the Mothers of Abductees Association (MAA), have complained that their relatives have been arbitrarily and forcibly arrested and disappeared. They report that some detainees have been held at Bir Ahmed for up to two years without charge or trial.<sup>25</sup> The MAA representatives claim that prison officials have died with Covid-like symptoms, and that there is insufficient space and sanitary conditions in the detention centre to prevent the prisoners being infected. They MAA association has gathered several accounts of improvised detention centres being established and persons being arbitrarily held in these locations, and often subjected to worse treatment and even death.<sup>26</sup> Their 2021 report documents that 638 persons have been detained by various parties to the conflict, including three women 17 and children.<sup>27</sup>

**Arbitrary detention of civilians and persons *hors de combat* potentially contradicts international humanitarian law, international human rights law, and potentially constitutes a violation of international criminal law**

In light of the heightened risk faced by detainees during the Covid-19 pandemic, and the ongoing detention of civilians and persons *hors de combat* in Yemen, it is apposite to recall the provisions relevant to the detention and treatment of persons during conflicts. At the international level, these provisions can be found in IHL, in IHRL, and in international criminal law.

Numerous provisions of IHL govern the detention and treatment of persons during international armed conflict.<sup>28</sup> These include articles 12-16, 21-22, 25-32, and 112-113 of Geneva Convention III in relation to prisoners of war, and of articles 27, 42, 76, 78, 85, 87, 89-92, of Geneva Convention IV in relation to civilians. These require not only sufficient health and sanitary measures to prevent epidemics spreading through the detained people, but also active inspections of facilities to ensure that they meet these standards.

However, the conflict in Yemen has been characterised as non-international in nature by the Group of Eminent International and Regional Experts on Yemen,<sup>29</sup> which matches the views of the Geneva Academy in its conflict classification platform.<sup>30</sup> In non-international armed conflicts, fewer provisions explicitly govern the treatment of detainees than in international armed conflicts. Nonetheless, putting aside debates as to whether international humanitarian law provides a legal basis to authorise detention in non-international armed conflicts,<sup>31</sup> it is clear that several provisions of IHL

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<sup>22</sup> <https://reliefweb.int/report/yemen/under-secretary-general-humanitarian-affairs-and-emergency-relief-coordinator-mark-28>.

<sup>23</sup> <https://www.dw.com/en/yemens-war-explained-in-4-key-points/a-40056866>.

<sup>24</sup> <https://www.hrw.org/news/2020/07/02/yemen-aden-detainees-face-dire-covid-19-risk>.

<sup>25</sup> <https://ama-ye.org/?no=1303&ln=Ar>. See also <https://www.hrw.org/news/2020/07/02/yemen-aden-detainees-face-dire-covid-19-risk>.

<sup>26</sup> See, e.g. <https://ama-ye.org/?no=1375&ln=Ar>.

<sup>27</sup> [https://ama-ye.org/up/MOTHERS\\_ON\\_THE\\_GATES\\_OF JUSTICE%202.pdf](https://ama-ye.org/up/MOTHERS_ON_THE_GATES_OF JUSTICE%202.pdf).

<sup>28</sup> See generally, <https://www.justsecurity.org/73391/covid-19-and-international-law-series-international-humanitarian-law-treatment-of-detainees/>.

<sup>29</sup> See 2020 Report, para.12.

<sup>30</sup> <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen>.

<sup>31</sup> See, e.g., <https://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>.

regulate the way in which any such detention should be conducted. Moreover, the ICRC has determined that arbitrary deprivation of liberty is prohibited under customary international law in both international and non-international armed conflicts.<sup>32</sup>

Common Article III to the four Geneva Conventions, which is part of customary international law and constitutes a “minimum yardstick” applicable to all armed conflicts,<sup>33</sup> provides that “[p]ersons taking no active part in the hostilities...shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria” and that the “wounded and sick shall be collected and cared for.” Additionally, article 5(1)(b) of Additional Protocol II, which Yemen ratified in 1990,<sup>34</sup> requires that “persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained” be extended the same health and hygiene protections afforded to the “local civilian population.” It also requires that detaining authorities shall, “within the limits of their capabilities,” provide detainees with “the benefit of medical examinations” and ensure that detainees’ “physical or mental health and integrity shall not be endangered by any unjustified act or omission.” Article 7 provides that wounded shall be “be treated humanely” and “receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.” It has been noted that, although the treatment of detainees in the “NIAC context is less tightly regulated [than in the context of international armed conflicts] ... detainees are still entitled to “medical examinations,” proper treatment, and to a basic standard of health and hygiene.”<sup>35</sup>

On this basis, detainees infected with Covid-19 are entitled, to the greatest extent practicable, to appropriate medical care that is available (including where reasonably offered by humanitarian organisations). Ideally, “the detaining party should provide the medical facilities at a detention camp with respirators, oxygen tanks, and other equipment commonly used to deal with Covid-19 cases.”<sup>36</sup> At minimum, “detaining powers should ensure that detention facilities are large enough to allow for adequate social distancing and basic protective equipment is provided – i.e., masks” and “detainees in the NIAC context must be afforded the same Covid-19 protections as the local civilian population.”<sup>37</sup> It has been posited that “humanitarian bodies can offer their services to the parties to a NIAC (CA III), and the detaining party is arguably obligated to consent to humanitarian relief if it cannot meet the health needs of detainees on its own.”<sup>38</sup> For future purposes, it is also apposite to note that obligations under IHL regarding detainees continue even after the end of the hostilities, including in relation to those who continue to be detained after the end of hostilities and those whose liberty is restricted thereafter for reasons related to the conflict.<sup>39</sup>

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<sup>32</sup> Rule 99 (‘Arbitrary deprivation of liberty is prohibited’) in J-M. Henckaerts & L. Doswald-Beck, *International Committee of the Red Cross Customary International Humanitarian Law – Volume I: Rules* (Cambridge, Cambridge University Press, 2009), p. 344.

<sup>33</sup> See ICJ: Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits, Judgement, 27 June 1986, ICJ Reports 1986, p.100, § 218.

<sup>34</sup> <https://treaties.un.org/Pages/showActionDetails.aspx?objid=08000002800f40e8&clang=en>.

<sup>35</sup> <https://www.justsecurity.org/73391/covid-19-and-international-law-series-international-humanitarian-law-treatment-of-detainees/>.

<sup>36</sup> <https://www.justsecurity.org/73391/covid-19-and-international-law-series-international-humanitarian-law-treatment-of-detainees/>.

<sup>37</sup> <https://www.justsecurity.org/73391/covid-19-and-international-law-series-international-humanitarian-law-treatment-of-detainees/>.

<sup>38</sup> <https://www.justsecurity.org/73391/covid-19-and-international-law-series-international-humanitarian-law-treatment-of-detainees/>.

<sup>39</sup> See Additional Protocol II, article 2(2) (“2. At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those



While IHL provides some basic guarantees regarding detention in situations of non-international armed conflicts, which are detailed above, it is also well established that IHRL continues to apply during times of armed conflict.<sup>40</sup> As the International Court of Justice has stated, in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory:

“...the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”<sup>41</sup>

Human Rights obligations have been recognised to fall on both State authorities and organised non-State groups, particularly where the latter control areas of territory.<sup>42</sup>

Looking to the specific provisions of IHRL that are relevant, most broadly article 9 of the Universal Declaration of Human Rights provides that “[n]o one shall be subjected to arbitrary arrest, detention or exile”. Of course, the Universal Declaration is not strictly binding, but article 9 is amplified by article 9(1) of the International Covenant on Civil and Political Rights,<sup>43</sup> which is binding on Yemen, and provides that

“[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

Further provisions of the ICCPR provide additional protections, such as article 9(2)-(5) on due process following arrest.<sup>44</sup>

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deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.”).

<sup>40</sup> ICJ: Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons (ICJ Reports 1996 (I), p. 240, para. 25.)

<sup>41</sup> Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ Reports 2004, p. 136, para.106)

<sup>42</sup> See, e.g. Annual Report of United Nations Assistance Mission in Afghanistan, 2020, p.99 citing United Nations Secretary-General, Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011, para. 188. See also Report of the International Commission of Inquiry to investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya A/HRC/17/44, 1 June 2011; the Report of the International Commission of Inquiry on the Situation of Human Rights in the Syrian Arab Republic, A/HRC/19/69, para. 106; United Nations Mission in the Republic of South Sudan (UNMISS), Conflict in South Sudan: A Human Rights Report, 8 May 2014, para. 18.

<sup>43</sup> Yemen has been a party to the International Covenant on Civil and Political Rights since 1987; <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5>.

<sup>44</sup> ICCPR, articles 9(2)-(5) (“2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement. 4.

Article 37(b)-(d) of the Convention on the Rights of the Child, which Yemen has been a party to since 1991,<sup>45</sup> provides that

“(b) [n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

In addition to those provisions of IHL and IHRL, international criminal law is relevant to the assessment. Under international criminal law, arbitrary detention can potentially constitute several crimes. These could include the crime against humanity of “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”; under article 7(1)(e) of the Rome Statute,<sup>46</sup> as well as persecution under article 7(1)(h) if conducted on a discriminatory basis. It could also potentially constitute, in the context of a non-international armed conflict,<sup>47</sup> the war crimes of cruel treatment under article 8(2)(c)(i), outrages upon personal dignity under article 8(2)(c)(ii), or sentencing without due process under article 8(2)(c)(iv).<sup>48</sup> Importantly, these provisions generally reflect prohibitions that form part of customary international law and are thus considered by many to be binding on parties to conflicts, whether or not those parties have signed up to the Rome Statute of the International Criminal Court.<sup>49</sup>

### **Those who arbitrarily detain persons without taking measures to protect them from Covid-19 potentially violate IHL, IHRL, and international criminal law**

As noted above, Covid-19 poses a heightened threat to detained persons, particularly those detained in unsanitary conditions. The threat to detainees is compounded by “inadequate medical services, overcrowding, lack of adequate ventilation, and pre-existing health conditions lowering their

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Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”).

<sup>45</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en#21](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en#21).

<sup>46</sup> However, the International Criminal Court does not currently have jurisdiction over events in Yemen *per se*, as Yemen is not a party to the Rome Statute. For jurisdiction to arise, it would require either a United Nations Security Council referral or an ad hoc referral by Yemen, or the establishment of some other jurisdictional link.

<sup>47</sup> See also Manuel J. Ventura, “Automatic Criminal Liability for Unlawful Confinement (Imprisonment) as a War Crime? A Potential Consequence of Denying Non-State Armed Groups the Power to Detain in Non-International Armed Conflicts”, in Ezequiel Heffes et al. (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (T.M.C. Asser Press/Springer, 2020), pp. 149-168.

<sup>48</sup> Commentators have stated that the fair trial requirements set out in this provision also apply to courts convened by non-State actors (see <https://cilrap-lexsis.org/clicc/8-2-c-iv/8-2-c-iv> citing Dörmann *et al.*, 2016, paras. 689-695).

<sup>49</sup> See ICC: Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’ (ICC-02/05-01/20-302)”, 1 November 2021.

resistance to the disease.”<sup>50</sup> The threat is also raised by the general break-down of health systems that occurs during extended armed conflicts. The threat is not unique to those detained in Yemen. Commentators have also pointed to the risks faced by those in conflict zones such as Libya and South Sudan, for example.<sup>51</sup>

Armed groups, whether governmental or non-governmental, who detain persons without taking measures to protect them from Covid-19 potentially violate several provisions of IHL, IHRL, and international criminal law, as detailed above. Whereas the mandate of the Expert Group for Yemen has not been renewed, the United Nations remains engaged in Yemen and has a strong interest, as well as a Charter-based duty,<sup>52</sup> to ensure that human rights are promoted and respected by all parties to the conflict. Where violations are particularly grave, the international community should ensure accountability for those responsible. In this respect, it bears recalling that Fabricio Guariglia from the Office of the Prosecutor of the ICC has opined that those who intentionally fail “to provide adequate health information, support, and facilities to a targeted group suffering a life-threatening epidemic” may potentially be held to account, including through various forms of responsibility under articles 25 and 28 of the Rome Statute.<sup>53</sup>

With the UN Expert Group no longer reviewing such violations in Yemen, actors seeking to end the conflict in Yemen and to mitigate its most harmful impacts must impress on all parties to the conflict that they bear potential responsibility for the arbitrary detention of civilians and persons *hors de combat*, including any negative health impacts or deaths among detainees in their power. Sanctions against individuals engaging in such conduct can be imposed by the United Nations.<sup>54</sup> Additionally, the possibility of criminal proceedings for such arbitrary detention, particularly where it heightens the risk of detainees suffering from Covid-19, may serve to deter parties from improperly holding people in prisons and improvised detention centres throughout Yemen.

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<sup>50</sup> <https://www.justsecurity.org/73391/covid-19-and-international-law-series-international-humanitarian-law-treatment-of-detainees/>.

<sup>51</sup> <https://www.justsecurity.org/73391/covid-19-and-international-law-series-international-humanitarian-law-treatment-of-detainees/>.

<sup>52</sup> See, United Nations Charter, *inter alia*, article 1(3) (“the Purposes of the United Nations are [...] promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; ...”).

<sup>53</sup> [COVID-19 Symposium: COVID-19 and International Criminal Law - Opinio Juris](#).

<sup>54</sup> See <https://www.ogeneva.com/2021/11/11/10073/>.