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August 13, 2018

Glenn A. Fine  
Acting Inspector General  
Office of Inspector General  
Department of Defense

Dear Acting Inspector General Fine:

Thank you for your service. I write in regards to the ethical and legal implications for Department of Defense (DoD) personnel who support the Saudi and UAE Coalition operating in Yemen. The Coalition has repeatedly hit civilian targets—including schools, hospitals, funerals & weddings—nowhere near military targets. I previously served on active duty as a JAG and a number of the Coalition's airstrikes look like war crimes. I am deeply concerned that continued support by the U.S. could put our personnel in ethical and legal jeopardy of aiding and abetting war crimes. I request that you initiate an investigation to determine the risk that DoD personnel supporting Coalition operations in Yemen are violating DoD regulations, the Law of Armed Conflict, the Uniform Code of Military Justice, federal statutes or international law.

As you may know, Congress recently passed into law the National Defense Authorization Act for Fiscal Year 2019, which includes a requirement that the Secretary of Defense review whether the Armed Forces or coalition partners of the United States violated Federal law or DoD policy while conducting operations in Yemen. However, given the legal and political complexities surrounding U.S. involvement in the conflict and the administration's failure to adequately address the concerns raised by Members of Congress, I believe a separate, independent review by your office is warranted.

One of the core missions of the DoD IG is to "[h]elp ensure ethical conduct throughout the DoD." The DoD IG is also tasked with "keeping the Secretary of Defense and the Congress fully and currently informed about problems and deficiencies" that relate to DoD operations. Whether DoD personnel are potentially aiding and abetting war crimes, or violating DoD regulations or federal laws, is certainly well within your jurisdictional responsibility. The continued attacks on civilians by the DoD-supported Coalition, along with the recent military offensive by the Coalition on the port city of Hodeida and last week's air strike on a school bus in Saada, adds urgency to this request.

## FACTS

For nearly three years, I and other Members of Congress have repeatedly tried to sound the alarm over the Coalition's operational conduct in Yemen and the implications for U.S. personnel involved. The U.S. is refueling Coalition jets, and providing intelligence and other assistance. I first sent a formal letter regarding Coalition operations to the Chairman of the Joint Chiefs of Staff in September 2015. I was provided classified briefings by the Departments of State and Defense and reassured that the Coalition's behavior would improve. That turned out to be incorrect.

Dozens of Members of Congress on both sides of the aisle and in both chambers have now written letters and offered legislative proposals designed to end support for the Coalition until the American people have confidence that we are not contributing to potential war crimes. The Coalition's conduct has also contributed to the worst humanitarian catastrophe currently on planet earth. This is not a partisan issue, as U.S. support for the Coalition started under the Obama Administration and continues with the Trump Administration, and there has been bipartisan outrage over the Coalition's conduct.

In 2016, the Obama Administration placed a freeze on the sale of precision-guided munitions (PGMs) following warnings by State Department officials that U.S. officials could be implicated in war crimes given the likelihood that U.S.-supplied PGMs could be used to assist unlawful attacks in Yemen. This freeze was lifted by the Trump Administration in 2017 following purported commitments by the Kingdom of Saudi Arabia to reduce civilian casualties. Congress has remained skeptical, passing a law that requires the DoD to determine whether the members of the Coalition have abided by their commitments. Coalition airstrikes, however, have continued to hit civilian targets.

This letter to you is not one I wanted to write, but I believe there is no other alternative than to start an investigation. Despite giving every opportunity for the DoD-supported Coalition to stop striking civilians, the Coalition's operations continue to exact an unacceptable toll. In January 2018, the UN Panel of Experts on Yemen concluded that all parties to the conflict in Yemen, including the U.S.-supported Coalition, were implicated in "widespread violations" of international law and that measures to minimize civilian casualties remained "largely ineffective." Just last month, at least 45 civilians were killed and many more wounded in coalition airstrikes over a four-day period on a wedding, a bus, and a home.<sup>12345</sup>

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<sup>1</sup> Reuters. *Saudi-led air strikes kill at least 20 at Yemen wedding*. April 23, 2018.

<sup>2</sup> CNN. *Scores killed in three days of Yemen Airstrikes*. April 24, 2018.

<sup>3</sup> United Nations. *Letter dated 26 January 2018 from the Panel of Experts on Yemen mandated by Security Council resolution 2342 (2017) addressed to the President of the Security Council*. January 26, 2018.

<sup>4</sup> UN Office of the High Commissioner for Human Rights. *Yemen: An "Entirely Man-Made Catastrophe"*. September 5, 2017.

<sup>5</sup> UN Office of the High Commissioner for Human Rights. *Press briefing note on Yemen and Nicaragua*. April 24, 2018.

Throughout the Coalition's air campaign, the Yemen Data Project has tracked approximately 17,000 airstrikes and found the rate of strikes on civilian, non-military targets has remained consistent at 33 percent over the course of the conflict. The past four months bear out the same pattern: 36, 38, 20, and 26 percent, respectively.<sup>6</sup> More recently, the Coalition's air campaign has ramped up targeting on the west coast of Yemen near Hodeidah, resulting in more reports of civilian sites being hit.<sup>7</sup> Just last week, a Coalition airstrike hit a school bus, killing and injuring dozens of children.<sup>8</sup>

As former Deputy Assistant Secretary of Defense for the Middle East Andrew Exum wrote last year, "Decades of U.S. training missions had not produced a Saudi military capable of independently planning and executing an effective air campaign that minimized collateral damage." Indeed, it seems unreasonable to expect the Coalition to make meaningful progress mid-conflict to its operational methodologies after years of weak training, mentoring, and engagement.<sup>9</sup>

But it's not just a matter of gross negligence or incompetence. The Coalition, which has air superiority, has in a number of cases very precisely struck civilian targets. These are not cases where a Coalition jet is evading air defenses and trying to hit a moving rebel vehicle but missed and struck a civilian target. Rather, the Coalition intended to hit the civilian target. For example, Coalition jets precisely struck a funeral attended by a large number of people and then came around and struck the same civilian target again.<sup>10</sup> It is indisputable that the DoD-supported Coalition has killed large numbers of children, women, and men who are civilians.

## ANALYSIS

The coalition's operational conduct indicates serious violations of international humanitarian law. Saudi Arabia, the United Arab Emirates and the Government of Yemen are party to Additional Protocols I and II of the Geneva Conventions. The disproportionate airstrikes on civilians constitute a violation of Articles 51 and 85 of Additional Protocol I and customary international law in non-international armed conflict.<sup>11</sup><sup>12</sup><sup>13</sup><sup>14</sup> The individuals responsible for these unlawful airstrikes would be liable for war crimes not only if they sought to deliberately target civilians, but also if the strikes were conducted with criminal recklessness, disregarding an unjustifiable risk to civilians.<sup>15</sup>

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<sup>6</sup> Yemen Data Project.

<sup>7</sup> Yemen Peace Project.

<sup>8</sup> CNN. *The schoolboys on a field trip in Yemen were chatting and laughing. Then came the airstrike.* August 13, 2018.

<sup>9</sup> Andrew Exum. *The Atlantic. What's Really at Stake for America in Yemen's Conflict.* April 14, 2017.

<sup>10</sup> Reuters. *Saudi coalition violated law with Yemen funeral strike: U.N. monitors.* 20 Oct. 2016.

<sup>11</sup> International Committee of the Red Cross. *Practice Relating to Rule 14: Proportionality in Attack.*

<sup>12</sup> Brian Egan. *"International Law, Legal Diplomacy, and the Counter-ISIL Campaign."* Remarks, Office of the Legal Adviser, Department of State. April 1, 2016.

<sup>13</sup> Department of Defense, *Law of War Manual (2016)*, ch.17.

<sup>14</sup> International Committee of the Red Cross. *Protection of Objects Indispensable to the Survival of the Civilian Population.*

<sup>15</sup> International Committee of the Red Cross. *Commentary of 1987. Repression of Breaches of this Protocol. Protocol I.*

If the coalition's targeting of farms, food storage sites, and water sites was deliberate, these airstrikes would constitute a violation of Article 14 of Additional Protocol II and customary international law in non-international armed conflict. International humanitarian law prohibits warring parties from carrying out attacks on objects that are indispensable to the civilian population or from using starvation as a method of warfare. Warring parties must allow and facilitate the rapid passage of humanitarian aid for civilians in need and ensure the freedom of movement of humanitarian workers. The Saudi-led coalition has unnecessarily hindered the delivery of humanitarian aid and the free movement of aid workers, damaged or destroyed objects indispensable to the survival of the civilian population and, in November, closed all entry and exit points to Yemen, immediately and predictably exacerbating existing food shortages in Yemen.

I am deeply concerned that continued U.S. refueling, operational support functions, and weapons transfers could qualify as aiding and abetting these potential war crimes, placing our own troops and officials in serious legal jeopardy. Under customary international law, responsibility for aiding and abetting can be established on the basis of "knowing that such act had the substantial likelihood of assisting the underlying offense."<sup>16</sup> Ryan Goodman, former Special Counsel at the Department of Defense, has noted that the Department's own regulations and judicial findings from the Guantanamo hearings also support the notion that aiding and abetting war crimes requires only *knowledge* that support could assist a potential crime—not direct intent on the part of the abettor to achieve the criminal result.

Mr. Goodman also points out that the U.S. Government's Supplemental Filing in the Guantanamo cases drew from the international criminal tribunal that prosecuted former Liberian President Charles Taylor for war crimes. The international tribunal in that case held that the mens rea for aiding and abetting war crimes requires only knowledge, not purpose. The judgment wrote that the accused "was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator."

The Justice Department's Office of Legal Counsel also reached a similar judgment in 1994 when asked to assess similar circumstances to the Yemen conflict. At the time, the Office of Legal Counsel was tasked to evaluate the legality of U.S. training, support, and intelligence provision to the air forces of Colombia and Peru, which were widely alleged to be shooting down civilian aircraft. The Justice Department concluded there was indeed a "very substantial danger" that the mere provision of U.S. intelligence and advisory support to these parties could constitute "aiding and abetting" of the underlying unlawful acts.<sup>17</sup>

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<sup>16</sup> Ryan Goodman. *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess U.S. and UK Support for Saudi Strikes in Yemen*. Justsecurity.org

<sup>17</sup> Office of Legal Counsel. *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*. Department of Justice. July 14, 1994.

Oona Hathaway, another former Special Counsel at the Department of Defense, has written that U.S. troops could also find themselves susceptible to liability for aiding and abetting coalition crimes under *domestic* law.<sup>18</sup> While non-U.S. forces could not be held liable under the War Crimes Act, U.S. forces might potentially be liable for the underlying offenses under the “perpetration by means” clause of the federal aiding and abetting statute.<sup>19</sup> Under this clause, an individual who willfully causes a violation of the War Crimes Act could be found guilty as if she committed the underlying offense herself. Notwithstanding explicit assurances by Saudi coalition officials that they are striving to ensure strikes are consistent with the laws of war, U.S. forces assisting the coalition as it carries out operations in Yemen may still possess the requisite *mens rea* for aiding and abetting if they knew such assurances to be false or such civilian harm mitigation efforts to be grossly ineffective.<sup>20</sup>

Given the likelihood, based on three years of conflict, that the coalition’s air campaign will continue to result in disproportionate civilian deaths, U.S. service members and officials appear to meet the *knowledge* standard for aiding and abetting coalition war crimes. We owe it to our troops to ensure that we are neither giving them illegal orders nor placing them in legal jeopardy. I therefore request that you initiate an investigation to determine the potential legal risk that U.S. service members supporting air operations over Yemen or officials involved in approving ongoing weapons sales to Saudi Arabia could be responsible for aiding and abetting war crimes under international law and U.S. statute.

Thank you for your attention to this matter. I look forward to your response.

Sincerely,



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Ted W. Lieu  
Member of Congress

cc: The Honorable James Mattis, Secretary of Defense

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<sup>18</sup> U.S. Code Title 18, sections 2 and 2441. <http://uscode.house.gov/browse.xhtml>

<sup>19</sup> U.S. Code Title 18, 18 U.S.C. § 2 (b).

<sup>20</sup> Hathaway, et al. *U.S. Federal Statute on Aiding and Abetting: War Crimes in Yemen – Part II*. Just Security.