

ARTICLE

Yemen: Is the U.S. Breaking the Law?

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Abstract

The almost four-year long brutal civil war in Yemen between the central government of President Abdu Rabbu Mansour Hadi and a Shi'a Islamic movement called the Houthis shows no signs of slowing. Over the course of the conflict, thousands of civilians have died, millions have been forced to flee their homes, and many have suffered from famine. A coalition of countries led by Saudi Arabia has provided extensive support to President Hadi, including by conducting an ongoing military campaign against the Houthis. In the course of this military campaign, the Saudi-led coalition has been accused of violating international humanitarian law by killing hundreds of civilians through airstrikes, as well as contributing to a humanitarian disaster by imposing a blockade. Though not a member of the Saudi-led coalition, the United States has provided invaluable support to the coalition's campaign through weapons sales, mid-air refueling of coalition aircraft, targeting assistance, and other training and logistical support. This assistance raises serious questions about the potential legal liability of the United States under both domestic and international law. This Article surveys and analyzes a variety of domestic and international law that may apply to the U.S. role in Yemen. It examines four U.S. domestic laws: the War Powers Resolution, the Arms Export Control Act, the War Crimes Act, and the Alien Tort Statute. It then turns to international law, asking whether the U.S. is a party to the conflict between the Saudi-led coalition and Houthis and whether the United States' support for the Saudi-led coalition raises legal concerns under Article 2(4) of the UN Charter, the International Law Commission's Draft Articles on State Responsibility, or Common Article 1 of the Geneva Conventions. The article finds that continued U.S. support for the Saudi-led coalition in Yemen may violate several domestic and international laws. The article concludes by considering whether and how the laws might be enforced and U.S. legal violations brought to an end.

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The war in Yemen between the Saudi Arabia-led coalition and an alliance of local factions is in its fourth year. The conflict has caused thousands of civilian deaths, forced millions of people to flee their homes, and pushed the country to the brink of famine, all part of what UN agencies have described as a catastrophic situation.¹

The United States has played a large, though poorly understood, role in this war, providing weapons, intelligence, targeting expertise, and logistical support to the Saudi-led coalition. That coalition, in turn, has been accused of aggravating the humanitarian disaster with airstrikes that have killed hundreds of civilians and a blockade that has restricted the flow of vital supplies available to Yemen's population.²

A January 26, 2018 report by the United Nations Panel of Experts on Yemen declared that “[a]fter nearly three years of conflict, Yemen, as a State, has all but ceased to exist.”³ The report went on to document many violations of international humanitarian law (IHL, also known as the law of armed conflict) and human rights law, including ten air strikes by the Saudi-led coalition in 2017 leading to at least 157 fatalities and 135 injuries.⁴ The panel found that even if in some of these cases, the Saudi Arabia-led coalition had targeted legitimate military objectives, “it is highly unlikely that the IHL principles of proportionality, and precautions in attack were respected in these incidents.”⁵

All of this raises serious legal questions—under both domestic law and international law—regarding the U.S.'s involvement in the conflict in Yemen and the resulting humanitarian disaster.⁶ Many of these issues have been raised by politicians, scholars, journalists, and non-government organizations separately, but thus far there has been no comprehensive legal analysis. This article aims to fill that gap.

This article begins in Part I with a brief background of the current conflict in Yemen between the Houthis and the U.S.-supported Saudi-led coalition. It then moves to legal analysis, starting in Part II with the four domestic laws that are potentially implicated: (1) The War Powers Resolution; (2) the Arms Export Control Act; (3) the War Crimes Act and the U.S. federal statute for aiding and abetting; and (4) the Alien Tort Statute. Part III turns to an analysis of the international legal issues implicated by U.S. participation in the conflict. In addition to whether the United States is a party to the conflict, Part III examines (1) Article 2(4) of the UN Charter; (2) the International Law Commission's (ILC) Draft Articles on State Responsibility; and (3) Common Article 1 of the Geneva Conventions. In the course of these analyses, this

¹ *UN Agency Chiefs Call for Immediate Lifting of Humanitarian Blockade in Yemen*, UN NEWS (Nov. 16, 2017), <https://news.un.org/en/story/2017/11/636332-un-agency-chiefs-call-immediate-lifting-humanitarian-blockade-yemen>.

² Nicolas Niarchos, *How the U.S. Is Making the War in Yemen Worse*, NEW YORKER (Jan. 22, 2018), <https://www.newyorker.com/magazine/2018/01/22/how-the-us-is-making-the-war-in-yemen-worse>.

³ Rep. of the Panel of Experts on Yemen, transmitted by Letter dated 26 January 2018 from the Panel of Experts on Yemen mandated by Security Council Resolution 2342 (2017) to the President of the Security Council, U.N. Doc. S/2018/594, 2 (Jan. 26, 2018).

⁴ *Id.* at 46.

⁵ *Id.* at 295.

⁶ These conclusions are based on publicly available information as of November 1, 2018. They do not address any covert U.S. activities or otherwise classified facts. This report focuses on the role of the United States.

article notes several potential legal violations. Finally, Part IV concludes by looking at the challenges of enforcing these potential violations of domestic and international law.

I. *Background of the Current Conflict*

The current civil war in Yemen began in 2015 and involves an uprising by a group called the Houthi-Saleh alliance. A coalition of countries led by Saudi Arabia intervened to support the internationally-recognized government in Yemen. That coalition has received significant military support from the United States in the form of weapons sales, mid-air refueling, and targeting assistance. This Part provides an overview of the Houthi-Saleh alliance and the civil war in Yemen, the Saudi-led coalition, civilian casualties from Saudi-led coalition military strikes, and the role of the U.S. military in the conflict. This background provides context for the legal analysis that follows.

A. *The Houthi-Saleh Alliance and the Civil War in Yemen*

The primary insurgent group in Yemen, and the primary target of the Saudi-led coalition, is the Houthis.⁷ The Houthis are a predominantly Zaydi Shi'a Islamic religious-political-armed movement founded in the late 1990s in the northwestern province of Sa'ada by Hussein Badreddin Al-Houthi. In 2004, the Saleh government sent forces into Sa'ada to suppress protests led by Al-Houthi, killing him that same year.⁸ Saudi Arabia claims the Houthis are an Iranian proxy, and while it is widely believed Iran sponsors the Houthis, the level of Iranian support and influence remains contested.⁹

In 2011, after Arab Spring protests rocked Yemen, the central government began to unravel. Former Yemeni President Ali Abdullah Saleh agreed to relinquish his office at the end of 2011.¹⁰ Saleh was replaced by his Vice President, Abdu Rabbu Mansour Hadi. The transition agreement under which Hadi took power stipulated that Saleh was immune from prosecution and Hadi would form a national unity government, comprised of members of the incumbent ruling party and the Yemeni opposition.¹¹ When the effort to form a unity government failed in January 2014, the Houthis launched a military offensive against tribal allies of President Hadi.¹²

Shortly after commencing attacks against President Hadi's allies, the Houthis were joined by forces loyal to Saleh in what proved to be a temporary alliance against Hadi. The Houthi-Saleh forces seized the Yemeni capital, Sana'a, in late 2014 and placed Hadi under house arrest in early 2015. Hadi escaped to the port city of Aden, and eventually fled to Saudi Arabia.¹³ The Houthi alliance expanded rapidly between 2014 and 2015, eventually capturing the important port city of

⁷ See JEREMY M. SHARP, CONG. RESEARCH SERV., R43960, YEMEN: CIVIL WAR AND REGIONAL INTERVENTION 1 (2018), <https://fas.org/sgp/crs/mideast/R43960.pdf>.

⁸ Saeed Al Batati, *Who Are the Houthis in Yemen?*, AL JAZEERA (Mar. 29, 2015), <http://www.aljazeera.com/news/middleeast/2014>.

⁹ See SHARP, *supra* note 7, at 1 n.2.

¹⁰ *Yemen's Saleh Agrees to Transfer Power*, AL JAZEERA (Nov. 24, 2011), <http://www.aljazeera.com/news/middleeast/2011/11/2011112355040101606.html>.

¹¹ Kareem Fahim & Laura Kasinof, *Yemen's Leader Agrees to End 3-Decade Rule*, N.Y. TIMES (Nov. 23, 2011), <http://www.nytimes.com/2011/11/24/world/middleeast/yemen-saleh-transfer-power-deal-saudi-arabia.html>.

¹² SHARP, *supra* note 7, at 2; see also Al Batati, *supra* note 8.

¹³ SHARP, *supra* note 7, at 2.

Aden in southern Yemen. Figure 1 shows the expansion of the Houthi-Saleh alliance between 2012 and spring 2015 in a map developed by the European Council on Foreign Relations.

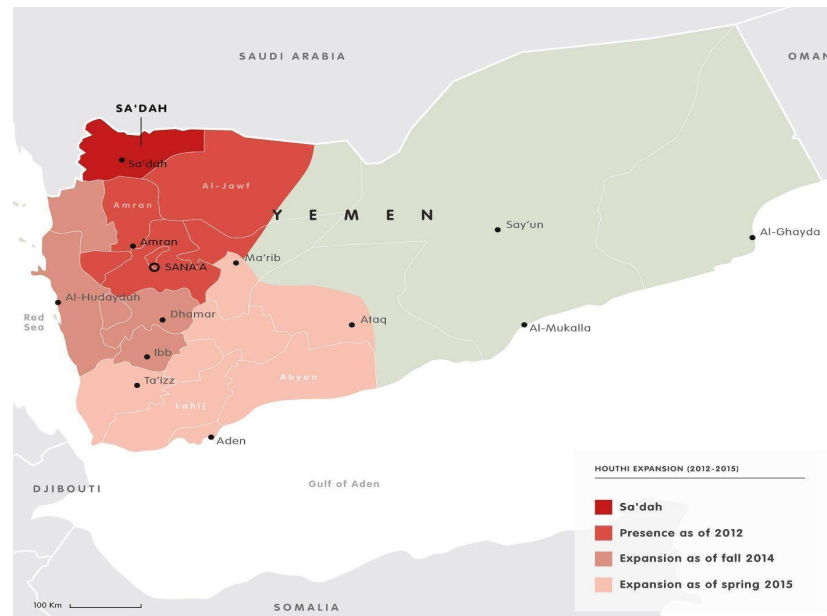


Figure 1: Houthi-Saleh Alliance Expansion, 2012–2015¹⁴

On March 24, 2015, President Hadi requested assistance from Saudi Arabia, the United Arab Emirates, Bahrain, Oman, Kuwait, and Qatar.¹⁵ These countries responded by forming a Saudi-led coalition that provided support to a patchwork of Yemeni ground forces loyal to Hadi, consisting of military units, tribal militias, and Islamic militants.¹⁶ The Saudi-led coalition was successful in retaking the southern port city of Aden and other traditionally Sunni areas in southern Yemen. Houthi-Saleh forces retained control of western Yemen.¹⁷ (Figure 2, also from the European Council on Foreign Relations, shows areas of Houthi control as of early 2017.) UN Special Envoy Ismail Ould Cheikh Ahmed, appointed in April 2015 by UN Secretary-General Ban Ki-moon, attempted to reach a negotiated settlement between the Houthis and Hadi, but failed to get the two sides to reach agreement on even a basic framework for peace.¹⁸

¹⁴ Adam Baron, *Mapping the Yemen Conflict*, EUR. COUNCIL ON FOREIGN REL., <http://www.ecfr.eu/mena/yemen> (last visited Oct. 16, 2018) (graphic design by Marco Ugolini) (reprinted with permission of Adam Baron and Marco Ugolini).

¹⁵ *GCC Statement: Gulf Countries Response to Letter from Yemen President*, NATIONAL (Mar. 26, 2015, 4:00 AM), <https://www.thenational.ae/uae/gcc-statement-gulf-countries-response-to-letter-from-yemen-president-1.4831> [hereinafter *GCC statement*].

¹⁶ SHARP, *supra* note 7, at 1 n.1.

¹⁷ *See id.* at 2.

¹⁸ *Secretary-General Appoints Ismail Ould Cheikh Ahmed as New Special Envoy for Yemen*, UN NEWS (Apr. 25, 2015), <https://news.un.org/en/story/2015/04/497042-secretary-general-appoints-ismail-ould-cheikh-ahmed-new-special-envoy-yemen>; *see also* SHARP, *supra* note 7, at 4.

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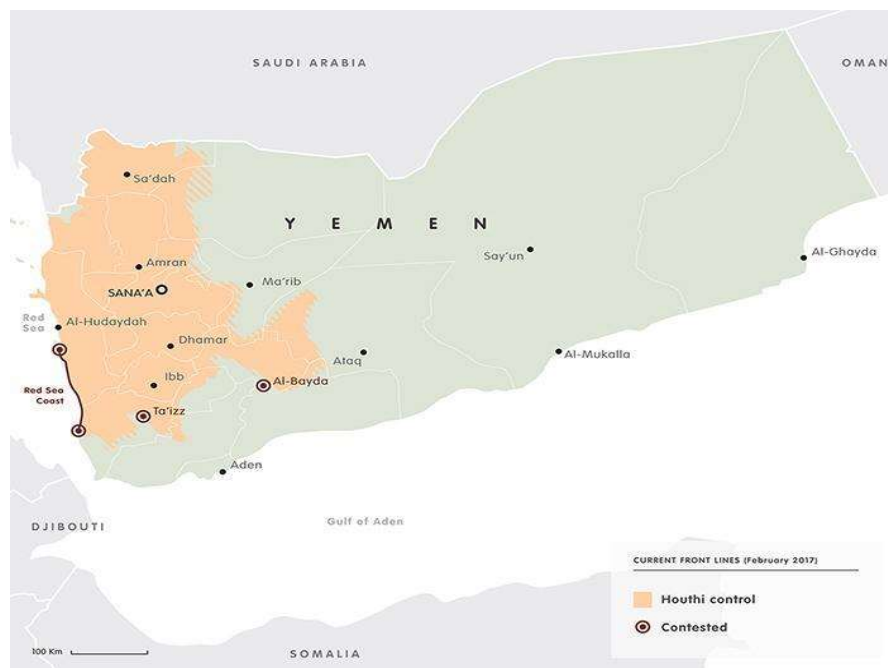


Figure 2: Houthi-Saleh Areas of Control in Yemen (as of February 2017).¹⁹

In December 2017, the Houthi-Saleh alliance fell apart after Saleh unexpectedly announced he was open to dialogue with the Saudi-led coalition. Days later, Houthi fighters killed Saleh.²⁰ Amid an escalation in violence, the President of the Houthi's Supreme Political Council was killed in a coalition drone strike on 23 April 2018.²¹ The war continued unabated. In June 2018, violence erupted in the south-western port city of Al-Hudaydah. As of early August 2018, there were reports that 55 civilians had been killed and 170 wounded.²² In September 2018, just as the UN Special Envoy arrived in Sana'a province to revive peace talks with the Houthi leadership, a Saudi-led coalition raid killed two children in a home in Sa'ada.²³ In mid-September 2018, fighting in Al-Hudaydah continued with another "large-scale" offensive in the region by the Saudi-led coalition

¹⁹ Baron, *supra* note 14 (graphic design by Marco Ugolini) (reprinted with permission of Adam Baron and Marco Ugolini).

²⁰ Patrick Wintour, *Yemen Houthi Rebels Kill Former President Ali Abdullah Saleh*, GUARDIAN (Dec. 4, 2017), <https://www.theguardian.com/world/2017/dec/04/former-yemen-president-saleh-killed-in-fresh-fighting>.

²¹ *Yemen: June 2018 Monthly Forecast*, SECURITY COUNCIL REPORT (May 31, 2018), https://www.securitycouncilreport.org/monthly-forecast/2018-06/yemen_34.php.

²² Mohammed Ali Kalfood & Margaret Coker, *Dozens of Dead in Yemen, and Blame Pointing in Both Directions*, N.Y. TIMES (Aug. 6, 2018), <https://www.nytimes.com/2018/08/06/world/middleeast/yemen-port-attack.html>.

²³ *'Why Were They Killed?': Saudi-UAE Attack Hits Children in Yemen*, AL JAZEERA (Sept. 17, 2018), <https://www.aljazeera.com/news/2018/09/killed-children-pay-price-yemen-war-180917054225399.html>.

and its UAE ally.²⁴ Notwithstanding the occasional ceasefire and potential for UN-mediated peace talks,²⁵ the end of the war in Yemen appears to be nowhere in sight.²⁶

B. The Saudi-Led Coalition and Civilian Casualties

Since the beginning of its involvement, the Saudi-led coalition has come under intense scrutiny for killing civilians and destroying civilian infrastructure with its airstrikes. The United Nations Panel of Experts on Yemen has published four annual reports documenting numerous violations of human rights, IHL, and other international law provisions by all parties in Yemen.²⁷ In its 2017 report, the Panel documented ten cases of coalition airstrikes that it concluded violated IHL:

- On March 16, 2017, a helicopter fired at a Somali migrant boat in the Red Sea, killing 42 civilians and injuring 34.
- On June 9, 2017, a strike on a residential building in Sana'a killed 4 civilians and injured 8.
- On August 4, 2017, a strike on a residential building in Sa'ada killed 9 civilians and injured 3.
- On August 23, 2017, a strike on a motel in Arhab killed 33 civilians and injured 25.
- On August 25, 2017, a strike on a residential building in Sana'a killed 16 civilians and injured 17.
- On September 2, 2017, a strike on a residential building in Hajjah killed 3 civilians and injured 13.

²⁴ *Saudi-UAE Alliance Launches Fresh Offensive on Yemen's Hodeidah*, AL JAZEERA (Sept. 18, 2018), <https://www.aljazeera.com/news/2018/09/saudi-uae-alliance-launches-fresh-offensive-yemen-hodeidah-180918060908882.html>.

²⁵ See Margaret Coker, *In Yemen, A Pause in Fighting Raises Hope for Peace Talks*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/world/middleeast/yemen-al-hudaydah-united-arab-emirates.html>; Stephanie Nebehay, *Yemen Peace Talks Collapse in Geneva after Houthi No-Show*, REUTERS (Sept. 8, 2018), <https://www.reuters.com/article/us-yemen-security-un/yemen-peace-talks-collapse-in-geneva-after-houthi-no-show-idUSKCN1LO08Z?il=0>; *Skipping Geneva Talks, Yemen's Houthis Set Conditions for Second Meeting*, AL ARABIYA ENGLISH (Sept. 17, 2018), <http://english.alarabiya.net/en/News/gulf/2018/09/17/After-skipping-Geneva-talks-Yemen-s-Houthis-set-conditions-for-second-meeting.html>; April Longley Alley, *Collapse of the Houthi-Saleh Alliance and the Future of Yemen's War*, INTERNATIONAL CRISIS GROUP (Jan. 11, 2018), <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/collapse-houthi-saleh-alliance-and-future-yemens-war>.

²⁶ The latest reports as of this writing include unverified claims that the UAE hired American mercenaries to carry out assassinations in Yemen. If true, that would raise additional domestic and international legal concerns—among them the legal liability of the Americans who participated in the actions themselves. See Aram Roston, *American Mercenaries Were Hired to Assassinate Politicians in the Middle East*, BUZZFEED NEWS (Oct. 16, 2018), <https://www.buzzfeednews.com/article/aramroston/mercenaries-assassination-us-yemen-uae-spear-golan-dahlan>.

²⁷ Rep. of the Panel of Experts on Yemen, transmitted by Letter dated 26 January 2018 from the Panel of Experts on Yemen mandated by Security Council Resolution 2342 (2017) to the President of the Security Council, U.N. Doc. S/2018/594 (Jan. 26, 2018); Rep. of the Panel of Experts on Yemen, transmitted by Letter dated 27 January 2017 from the Panel of Experts on Yemen to the President of the Security Council, U.N. Doc. S/2017/81 (Jan. 31, 2017); Rep. of the Panel of Experts on Yemen, transmitted by Letter dated 26 January 2012 from the Panel of Experts on Yemen to the President of the Security Council, U.N. Doc. S/2016/73 (Jan. 26, 2016); Rep. of the Panel of Experts on Yemen, transmitted by Letter dated 20 February 2015 from the Panel of Experts on Yemen to the President of the Security Council, U.N. Doc. S/2015/125 (Feb. 20, 2015).

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- On September 16, 2017, a strike on a vehicle in Ma'rib killed 12 civilians.
- On November 1, 2017, a strike on a market in Sa'ada killed 31 civilians and injured 26.
- On November 10, 2017, a strike on a residential building in Sa'ada killed 4 civilians and injured 4.
- On November 14, 2017, a friendly fire strike against President Hadi's military forces in Ta'izz resulted in the 3 civilian deaths and 5 injuries.²⁸

These cases offer but a snapshot of the civilian harm caused by coalition airstrikes. From March 2015 to June 2018, there were at least 11 airstrikes that hit marketplaces; five that hit funerals, weddings, and analogous social gatherings; four that hit detention facilities; 11 that hit civilian boats; and 32 that hit medical facilities and educational, cultural, and religious sites that have special protection under international humanitarian law. In the 60-recorded cases of air strikes that hit residential areas, more than 500 civilians were killed, including 233 children.²⁹ On August 9, 2018, a Saudi-led airstrike hit a school bus, killing dozens, including at least 29 children.³⁰ Two weeks later, two other Saudi-led airstrikes reportedly killed 22 children and 4 children, respectively.³¹ On September 16, 2018, another air strike reportedly killed four employees at a radio station.³²

International human rights organizations have questioned the impartiality of investigations into Saudi-led coalition strikes in Yemen. A Human Rights Watch report claims that the Saudi-led coalition's investigations into alleged war crimes in Yemen (via the Joint Incidents Assessment Team) lack credibility, impartiality, and transparency.³³ The report warns Britain, France, and the U.S. that they risk complicity by continuing to supply arms. Moreover, a UN Panel of Eminent Experts on Yemen determined that actions of the Saudi-led Coalition may have amounted to war crimes.³⁴

C. U.S. Military Involvement

(1) Airstrikes and Limited Ground Operations

²⁸ Rep. on Yemen 2018, *supra* note 3, annex 58 (Jan. 26, 2018).

²⁹ U.N. High Commissioner for Human Rights, *Report of the UN High Commissioner for Human Rights Containing the Findings of the Group of Independent Eminent International and Regional Experts*, ¶¶ 31–35, U.N. Doc. A/HRC/39/43 (Aug. 17, 2018).

³⁰ Shaub Almosawa & Ben Hubbard, *Saudi Coalition Airstrike Hits School Bus in Yemen, Killing Dozens*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/world/middleeast/yemen-airstrike-school-bus-children.html>.

³¹ Rick Gladstone, *U.N. Says Saudi-Led Airstrike Killed at Least 22 Yemeni Children*, N.Y. TIMES (Aug. 24, 2018), <https://www.nytimes.com/2018/08/24/world/middleeast/un-saudi-airstrike-yemen-children.html>.

³² *Saudi-led Air Strike Kills Four at Yemen Radio Station, U.N. Intensifies Diplomacy*, REUTERS (Sept. 16, 2018), <https://www.reuters.com/article/us-yemen-security-hodeidah/saudi-led-air-strike-kills-four-at-yemen-radio-station-u-n-intensifies-diplomacy-idUSKCN1LW0BP>.

³³ See Human Rights Watch, *Hiding Behind the Coalition: Failure to Credibly Investigate and Provide Redress for Unlawful Attacks in Yemen* (Aug. 24, 2018), <https://www.hrw.org/report/2018/08/24/hiding-behind-coalition/failure-credibly-investigate-and-provide-redress-unlawful>; see also *Yemen War: Saudi Coalition War Crimes Investigation 'Not Credible'*, BBC (Aug. 24, 2018), <https://www.bbc.com/news/world-middle-east-45295678>.

³⁴ U.N. High Commissioner for Human Rights, *Report of the UN High Commissioner for Human Rights Containing the Findings of the Group of Independent Eminent International and Regional Experts*, U.N. Doc. A/HRC/39/43 (Aug. 17, 2018).

Since 2011, the United States has conducted extensive airstrikes in Yemen, including against Al-Qaeda in the Arabian Peninsula (AQAP) and, more recently, against the Islamic State (ISIS). The Obama Administration relied on Congress's 2001 Authorization for the Use of Military Force (AUMF) against groups responsible for the 9/11 attacks to justify military actions against AQAP, arguing that the group is considered to be "part of, or at least an associated force of," Al-Qaeda.³⁵ The 2001 AUMF has also been used to justify U.S. actions against ISIS in Yemen.³⁶ This position is the subject of ongoing legal controversy.³⁷ Despite this controversy, the United States maintains its stance that actions against ISIS are authorized by the 2001 AUMF.³⁸

The United States conducted a total of 157 airstrikes in Yemen from 2011 through 2016. U.S. strikes increased from twenty-one strikes in 2016, under the Obama Administration, to at least 131 in 2017, the first year of the Trump Administration.³⁹ By September 2017, U.S. Central Command stopped issuing updated statements for individual strikes and simply estimated that it had conducted over 100 strikes.⁴⁰ In late December 2017, the Department of Defense acknowledged "multiple ground operations and more than 120 strikes in 2017."⁴¹ Most of the 2017 airstrikes were against AQAP, though at least three in 2017 were against the Islamic State.⁴²

The United States has also conducted ground raids in Yemen using Special Operations forces in pursuit of suspected terrorist targets. The precise scope of these raids is not public, but

³⁵ *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing Before the S. Comm. on Foreign Relations*, 113th Cong. 11 (2014) (statement of Stephen W. Preston, General Counsel, U.S. Department of Defense); see also JEREMY M. SHARP, CONG. RESEARCH SERV., RL34170, YEMEN: BACKGROUND AND U.S. RELATIONS, 12 (2015), <https://fas.org/sgp/crs/mideast/RL34170.pdf>.

³⁶ Stephen W. Preston, *The Legal Framework for the United States' Use of Military Force Since 9/11*, Speech at the Annual Meeting of the American Society of International Law (Apr. 10, 2015), <https://www.defense.gov/News/Speeches/Speech-View/Article/606662>; Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, but Says It Isn't Necessary*, N.Y. TIMES (Sept. 10, 2014), <https://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html>.

³⁷ See Alex Swoyer, *Soldier Who Supports War Against Islamic State Files Lawsuit Calling it Illegal*, WASH. TIMES (Apr. 23, 2017), <http://www.washingtontimes.com/news/2017/apr/23/nathan-smith-army-captain-sues-over-isis-war>; Charlie Savage, *Suit Calling War on ISIS Illegal Is Rejected*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/us/politics/judge-lawsuit-war-isis.html>. An analysis of whether U.S. actions against ISIS are covered by the 2001 AUMF is outside the scope of this paper.

³⁸ See Letter from Charles Faulkner, Bureau of Legislative Affairs, U.S. Dept. of State, to Senator Bob Corker, Comm. on Foreign Relations (Aug. 2, 2017), <https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000>.

³⁹ Courtney Kube, Robert Windrem, & William M. Arkin, *U.S. Airstrikes in Yemen Have Increased Sixfold Under Trump*, NBC NEWS (Feb. 1, 2018, 7:11 PM), <https://www.nbcnews.com/news/mideast/u-s-airstrikes-yemen-have-increased-sixfold-under-trump-n843886>; Jennifer Griffin & Lucas Tomlinson, *Trump Foreign Policy: American Military Increasingly Involved in Yemen Civil War*, FOX NEWS (June 29, 2017), <http://www.foxnews.com/politics/2017/06/29/trump-foreign-policy-american-military-increasingly-involved-in-yemen-civil-war.html>.

⁴⁰ *US Airstrikes in the Long War*, LONG WAR JOURNAL, FOUNDATION FOR THE DEFENSE OF DEMOCRACIES, <https://www.longwarjournal.org/us-airstrikes-in-the-long-war> (last visited Apr. 10, 2018).

⁴¹ Hans Nicholas & Mosheh Gains, *Pentagon Confirms U.S. Ground Operations in Yemen*, NBC NEWS (Dec. 20, 2017), <https://www.nbcnews.com/politics/national-security/pentagon-confirms-u-s-ground-operations-yemen-n831616>.

⁴² Bill Roggio, *US Military Hits Islamic State in Yemen*, LONG WAR JOURNAL, FOUNDATION FOR THE DEFENSE OF DEMOCRACIES (Oct. 27, 2017), <https://www.longwarjournal.org/archives/2017/10/us-military-hits-islamic-state-in-yemen.php>.

one raid against AQAP—the first commando raid authorized by President Trump—led to the death of a Navy SEAL, Chief Petty Officer William Owens.⁴³ The operation that killed Owens also led to the death of a number of civilians, including children, leading Yemen to withdraw permission for ground missions in February 2017.⁴⁴

On May 3, 2018, a New York Times report revealed that a team of U.S. Green Berets, operating from Saudi Arabia's side of the border with Yemen in December 2017, had helped locate and destroy several ballistic missile stockpiles and launch sites belonging to the Houthis. There were no indications that U.S. troops had crossed the border into Yemeni territory, but the revelations suggested that U.S. forces were far more deeply involved in the conflict than had been previously disclosed.⁴⁵

(2) Attacks on U.S. Navy Ships and Response

The United States has not taken direct military action against the Houthis (who are not covered by existing congressional authorizations for the use of force), except in one response to direct attack. In October 2016, on three separate occasions, Houthi-Saleh forces unsuccessfully launched anti-ship cruise missiles against U.S. Navy ships patrolling off the coast of Yemen.⁴⁶ The strikes may have been in response to the recent Saudi-led bombing of a funeral in Sana'a, in which a number of civilians were killed.⁴⁷ On October 14, 2016, President Obama notified Congress in a letter to the Speaker of the House and the President Pro Tempore of the Senate that the U.S. had taken missile strikes against radar facilities in Houthi-controlled territory. The letter described the actions as “limited and proportionate” acts of self-defense pursuant to President Obama’s “constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.”⁴⁸ President Obama also referenced the strikes in his six-month periodic update to Congress on December 5, 2016, pursuant to the War Powers Resolution.⁴⁹

⁴³ Eric Schmitt & David E. Sanger, *Raid in Yemen: Risky From the Start and Costly in the End*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/world/middleeast/donald-trump-yemen-commando-raid-questions.html>.

⁴⁴ David E. Sanger & Eric Schmitt, *Yemen Withdraws Permission for U.S. Antiterror Ground Missions*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/world/middleeast/yemen-special-operations-missions.html>.

⁴⁵ See Helene Cooper, Thomas Gibbons-Neff & Eric Schmitt, *Army Special Forces Secretly Help Saudis Combat Threat From Yemen Rebels*, N.Y. TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/us/politics/green-berets-saudi-yemen-border-houthi.html>.

⁴⁶ Idrees Ali & Matt Spetalnick, *U.S. Warship Targeted in Failed Missile Attack from Yemen: Official*, REUTERS (Oct. 15, 2016), <http://www.reuters.com/article/us-yemen-security-usa/u-s-warship-targeted-in-failed-missile-attack-from-yemen-official-idUSKBN12G004>.

⁴⁷ JEREMY M. SHARP, CONG. RESEARCH SERV., IN10599, YEMEN: RECENT ATTACKS AGAINST U.S. NAVAL VESSELS IN THE RED SEA (2016), <https://fas.org/sgp/crs/mideast/IN10599.pdf>.

⁴⁸ Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY (Oct. 14, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/10/14/letter-president-war-powers-resolution>.

⁴⁹ Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY (Dec. 5, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/05/letter-president-supplemental-6-month-war-powers-letter>.

Since assuming office, President Trump has sent five letters to Congress pursuant to the War Powers Resolution. Two of the letters were submitted shortly after airstrikes in Syria,⁵⁰ while the remaining three were six-month periodic reports on worldwide operations.⁵¹ The December 11, 2017 and June 8, 2018 periodic reports both mentioned that the United States, “in a non-combat role,” “continued to provide logistics and other support” to anti-Houthi forces in Yemen.

(3) U.S. Military Assistance

On March 25, 2015, the United States announced that it would provide “logistical and intelligence support” to the Saudi-led coalition forces against the Houthis.⁵² Since then, U.S. military assistance to the Saudi-led coalition against the Houthi alliance has been in the form of weapons sales and mid-air refueling.⁵³ The refueling operations, which were halted in November 2018,⁵⁴ involved a U.S. tanker refueling coalition aircraft outside of Yemen’s airspace at least once a day. Intelligence sharing involved embedding a joint coordination planning cell in Saudi Arabia’s operations center.⁵⁵ According to defense officials at the outset of U.S. assistance, the United States would not provide targeting information to the Saudis, but would review Saudi-picked targets and advise on the risk of civilian casualties.⁵⁶ In August 2016, the United States withdrew the U.S. military personnel from Saudi Arabia who had been coordinating with the Yemen campaign.⁵⁷

⁵⁰ Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY (Apr. 15, 2018), <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-3>; Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY (Apr. 8, 2017), <https://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate>.

⁵¹ Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, The White House, Office of the Press Secretary (June 8, 2018), <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-2>; Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, The White House, Office of the Press Secretary (Dec. 11, 2017), <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-2>; Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY (June 6, 2017), <https://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate>.

⁵² Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY (Mar. 25, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen>.

⁵³ Jamie Crawford, *U.S. Boosts Assistance to Saudis Fighting Rebels in Yemen*, CNN (Apr. 8, 2015, 5:48 PM), <http://www.cnn.com/2015/04/08/politics/yemen-u-s-assistance-saudi-coalition/index.html>.

⁵⁴ The refueling missions were halted in November 2018. Phil Stewart, *U.S. Halting Refueling of Saudi-led Coalition Aircraft in Yemen’s War*, REUTERS (Nov. 9, 2018), <https://www.reuters.com/article/us-usa-yemen-refueling/u-s-halting-refueling-of-saudi-led-coalition-aircraft-in-yemens-war-idUSKCN1NE2LJ>. See *infra* text accompanying notes 88-93.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Steve Visser, *US Military Distances Itself from Saudi-Led War in Yemen*, CNN (Aug. 20, 2016, 8:04 PM), <http://www.cnn.com/2016/08/20/middleeast/us-military-yemen-saudi-led-coalition/index.html>.

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In May 2016, the United States provided support to efforts by the Yemeni military and the UAE to retake the port city of Mukalla from AQAP.⁵⁸ The American amphibious assault ship *USS Boxer* positioned itself off the coast of Yemen and provided medical support to UAE troops. In addition, a Pentagon spokesman revealed that the U.S. military had deployed a “small number” of troops on the ground in Yemen to provide intelligence and logistical assistance, including “advice and assistance with operational planning, maritime interdiction and security operations, medical support and aerial refueling.”⁵⁹

A year into the war between the Saudi coalition and Houthi-Saleh alliance, members of Congress expressed growing concern about civilian casualties. Several resolutions were considered to rein in or place conditions on military assistance to Saudi Arabia in an effort to curb civilian casualties, including halting the sale of cluster munitions (H.R. 5293), but these proposals were ultimately rejected.⁶⁰ However, political circumstances changed in October 2016, following the aforementioned bombing of a funeral in Sana’a that killed 140 people and the subsequent retaliatory missile attacks by Houthi-Saleh forces against U.S. ships.⁶¹ The Obama Administration announced its intention to review U.S. military assistance to the Saudi-led coalition. In December 2016, the Obama Administration cancelled the planned sale of 16,000 precision-guided munition kits (valued at \$350 million) and announced that it would restrict further intelligence sharing involving targeting Houthi-Saleh forces. At the same time, the United States announced it would continue its refueling operations and would step up its training of the Saudi Air Force, as well as continue intelligence sharing in regards to AQAP and securing the Saudi-Yemeni border.⁶²

After President Trump took office in early 2017, U.S. foreign policy shifted back toward a pro-Saudi stance. During his visit to Riyadh, President Trump announced his intent to sell \$110 billion in arms to Saudi Arabia.⁶³ In June 2017, a move by Senators concerned about civilian deaths to prevent the sale of \$500 million in precision-guided munitions was narrowly defeated 53-47.⁶⁴ In order to help gain approval for the weapons sale, Saudi Foreign Minister Adel Al-Jubeir wrote a letter to U.S. Secretary of State Rex Tillerson promising to exercise greater caution to avoid civilian casualties.⁶⁵ To help it fulfill this promise, the U.S. military promised to provide the Saudi

⁵⁸ Andrew Tilghman, *U.S. Reveals Troops on the Ground in Yemen*, MILITARY TIMES (May 6, 2016), <https://www.militarytimes.com/news/your-military/2016/05/06/u-s-reveals-troops-on-the-ground-in-yemen>.

⁵⁹ *Id.*

⁶⁰ CHRISTOPHER M. BLANCHARD & JEREMY M. SHARP, CONG. RESEARCH SERV., IN10557, SAUDI MILITARY CAMPAIGN IN YEMEN DRAWS CONGRESSIONAL ATTENTION TO U.S. ARMS SALES (2016), <https://fas.org/sgp/crs/weapons/IN10557.pdf>.

⁶¹ See Sudarsan Raghavan, *U.S.-Backed, Saudi-led Coalition Found Responsible for Yemen Funeral Attack That Killed More Than 100*, WASH. POST (Oct. 15, 2016), https://www.washingtonpost.com/world/us-backed-saudi-led-coalition-claims-responsibility-for-yemen-funeral-attack-that-killed-more-than-150/2016/10/15/43a3adea-92bf-11e6-a6a3-d50061aa9fae_story.html.

⁶² Helene Cooper, *U.S. Blocks Arms Sale to Saudi Arabia Amid Concerns Over Yemen War*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/us/politics/saudi-arabia-arms-sale-yemen-war.html>.

⁶³ Helene Cooper, *Senate Narrowly Backs Trump Weapons Sale to Saudi Arabia*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/world/middleeast/trump-weapons-saudi-arabia.html>.

⁶⁴ Joe Gould, *US Lawmakers Skeptical of Arms Sales to Saudi Arabia, Pakistan, Lebanon*, DEFENSE NEWS (June 15, 2017), <https://www.defensenews.com/congress/2017/06/15/us-lawmakers-skeptical-of-arms-sales-to-saudi-arabia-pakistan-lebanon>.

⁶⁵ Eric Schmitt, *Saudi Arabia Tries to Ease Concerns Over Civilian Deaths in Yemen*, N.Y. TIMES (June 14, 2017), <https://www.nytimes.com/2017/06/14/world/middleeast/saudi-arabia-arms-training-yemen.html>.

military with a \$750 million training program that included lessons on avoiding civilian casualties in airstrikes. Saudi Arabia also promised that it would expand its list of off-limits targets and strictly adhere to that list. Last, the U.S. targeting cell that had previously worked in Riyadh would return and be given greater access to Saudi operations, working in the air operations control center itself rather than a separate office.⁶⁶ Sen. Mark Warner (D-Va.), who was among the five Democrats who voted for the plan, mentioned the need for more training of the Saudi military as his reason for approving the arms sale.⁶⁷

Since the Senate vote, however, the record of the Saudi-led coalition has not been promising. As documented by the UN High Commissioner for Human Rights, at least 1,114 civilians were killed between July 2017 and June 2018.⁶⁸ In December 2017 alone, two separate Saudi airstrikes—one on a market in Taiz province and another on a farm in Al-Hudaydah province—killed 68 civilians in one day.⁶⁹

Faced with a growing humanitarian crisis in December 2017, President Trump called on Saudi Arabia to end its blockade of Yemen and allow aid to reach civilians.⁷⁰ The Saudi-led coalition recently committed \$1.5 billion in aid to Yemen and promised to set up regular humanitarian aid flights and establish 17 “safe passage corridors” for overland transportation of aid.⁷¹ These promises, however, like previous ones by Saudi Arabia, have been met with criticism for failing to make any substantial difference in helping Yemen’s civilian population.⁷² For instance, in June 2018, the Saudi-led coalition invaded Yemen’s main Red Sea port and disrupted the delivery of food and other supplies to civilians, thus intensifying the humanitarian disaster.⁷³

As fighting intensified during late July and August 2018, U.S. Secretary of Defense James Mattis responded to reports of indiscriminate attacks against civilians by the Saudi-led coalition. In particular, international media widely reported on an August 9 airstrike against a school bus in

⁶⁶ *Id.*

⁶⁷ Press Release, Sen. Mark R. Warner on Senate Votes on Arms Sales to Saudi Arabia (June 13, 2017), <https://www.warner.senate.gov/public/index.cfm/pressreleases?ID=AA6B36D4-BF73-47C1-BFE5-8819F6B8549B>.

⁶⁸ U.N. High Commissioner for Human Rights, *Report of the UN High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts*, paras. 31-35, U.N. Doc. A/HRC/39/43 (Aug. 17, 2018). See also UN Panel of Experts on Yemen, *Final report of the Panel of Experts in accordance with paragraph 6 of resolution 2342 (2017)*, U.N. Doc. S/2018/68, annex 58 (Jan. 26, 2018).

⁶⁹ *Yemen War: Saudi-led Strikes ‘Kill 68 Civilians in One Day,’* BBC NEWS (Dec. 28, 2017), <http://www.bbc.com/news/world-middle-east-42503472>.

⁷⁰ Rebecca Kheel, *Trump Pressures Saudi Arabia on Yemen Blockade*, HILL (Dec. 7, 2017), <http://thehill.com/policy/defense/363680-trump-pressures-saudi-arabia-on-yemen-blockade>.

⁷¹ Ann M. Simmons, *Having Devastated Yemen in Bombing Campaign, Saudi Arabia Pledges \$1.5 Billion in Humanitarian Aid*, L.A. TIMES (Jan. 22, 2018), <http://www.latimes.com/world/middleeast/la-fg-global-saudi-yemen-aid-20180122-story.html>.

⁷² *Id.*; Kristine Beckerle, *Saudi Claims to Ease Yemen Blockade a Cruel Fiction*, HUMAN RIGHTS WATCH (Nov. 13, 2017), <https://www.hrw.org/news/2017/11/13/saudi-claims-ease-yemen-blockade-cruel-fiction>.

⁷³ Margaret Coker & Eric Schmitt, *Humanitarian Crisis Worsens in Yemen After Attack on Port*, N.Y. TIMES (June 13, 2018), <https://www.nytimes.com/2018/06/13/world/middleeast/yemen-al-hudaydah-assault-saudi-coalition.html>; see also Editorial Board, *Horror Multiplies in Yemen*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/opinion/yemen-saudi-attack-port-houthis.html>.

northern Yemen, which killed 51 people, including 40 children.⁷⁴ The bomb used in the airstrike was U.S.-made laser-guided MK 82.⁷⁵ The attack renewed calls within the international community for the United States to cease the provision of weapons and military support to the Saudi-led coalition.⁷⁶ In response, Secretary Mattis stated that U.S. support to the Saudi-led coalition and UAE is “not unconditional” and that “every mistake like this is tragic in every way, but we have not seen any callous disregard by the people we're working with.”⁷⁷

In July 2018, Congress attempted to assert some measure of control over U.S. support for the Saudi-led coalition by inserting Section 1290 into the 2019 National Defense Authorization Act (NDAA). Section 1290, titled “Certifications Regarding Actions by Saudi Arabia and the United Arab Emirates in Yemen,” required the Secretary of State to certify within 30 days of the President’s signature of the NDAA that the Saudi-led coalition was pursuing an end to the conflict in Yemen, making an effort to reduce civilian casualties, and facilitating humanitarian assistance.⁷⁸ If the Secretary could not make such a certification—and could not justify a waiver under subsection (a)(2) based on U.S. national security—then Section 1290 prohibited the Executive Branch from expending federal funds on inflight refueling of Saudi-led coalition aircraft. President Trump signed the NDAA into law on August 13, 2018, but his signing statement included an objection to Section 1290, that it potentially conflicted with “the President’s exclusive constitutional authorities as Commander in Chief and as the sole representative of the Nation in foreign affairs.”⁷⁹

On September 12, 2018, Secretary of State Mike Pompeo certified that Saudi Arabia and the UAE were “undertaking demonstrable actions to reduce the risk of harm to civilians and civilian infrastructure,” in compliance with Section 1290.⁸⁰ Secretary Mattis offered his own

⁷⁴ Salma Abdelaziz, Alla Eschenko & Joe Sterling, *Saudi-Led Coalition Admits ‘Mistakes’ Made in Deadly Bus Attack in Yemen*, CNN (Sept. 2, 2018), <https://www.cnn.com/2018/09/01/middleeast/saudi-coalition-yemen-attack/index.html>.

⁷⁵ *Id.*

⁷⁶ Editorial Board, *Why Are U.S. Bombs Killing Civilians in Yemen?*, N.Y. TIMES (Aug. 28, 2018) <https://www.nytimes.com/2018/08/28/opinion/us-yemen-saudi-arabia-trump-civilian-casualties.html>; Rasha Mohamed, *The US Should Have No Part in War Crimes in Yemen*, WASH. POST (Aug. 31, 2018), 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=.e6e3be69bc79.

⁷⁷ *Pentagon Chief Mattis Holds Talks in UAE After Yemen Warning*, AL JAZEERA (Sept. 8, 2018), <https://www.aljazeera.com/news/2018/09/pentagon-chief-mattis-holds-talks-uae-yemen-warning-180908115211623.html>; *Mattis: U.S. Still Backs Saudi-UAE Alliance Amid Yemeni Deaths*, AL JAZEERA (Aug. 28, 2018), <https://www.aljazeera.com/news/2018/08/mattis-backs-saudi-uae-alliance-yemeni-deaths-180828151535451.html>; see also Patrick Wintour, *All Sides in Yemen May Be Responsible for War Crimes, Say UN Experts*, GUARDIAN (Aug. 28, 2018), <https://www.theguardian.com/world/2018/aug/28/all-sides-in-yemen-may-be-responsible-for-war-crimes-say-un-experts>.

⁷⁸ John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1290 (2018).

⁷⁹ Presidential Statement on Signing H.R. 5515 (Aug. 30, 2018), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-h-r-5515>. The President’s signing statement raises interesting constitutional questions about the proper scope of congressional and executive authority in foreign relations and how these conflicts arise in matters of defense appropriations and certifications. However, these questions are beyond the scope of this paper. See generally Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988) (discussing how the Appropriations Clause interacts with certain executive powers, including control over foreign affairs).

⁸⁰ Press Statement, Secretary of State Michael R. Pompeo, Certification to Congress on Actions of Saudi Arabia and UAE in Yemen Under the NDAA (Sept. 12, 2018), <https://www.state.gov/secretary/remarks/2018/09/285861.htm>.

support for the certification.⁸¹ However, a week after the announcement, the *Wall Street Journal* reported that, according to a leaked classified memo, Secretary Pompeo had made the certification over the objection of his advisers. Several offices within the State Department urged Secretary Pompeo to refuse to certify Saudi and UAE compliance, but to submit a waiver citing U.S. national security concerns. This would have allowed the United States to continue military assistance while applying diplomatic pressure to the Saudi-led coalition to improve the conduct of its campaign. But the Bureau of Legislative Affairs advised Secretary Pompeo that this course of action would jeopardize a two billion dollar arms sale with Saudi Arabia, reportedly prompting Pompeo to certify compliance. The State Department refused to comment on internal deliberations.⁸²

Even before news of the internal debates broke, Secretary Pompeo's NDAA certification aroused the anger of several members of Congress. Senator Jeanne Shaheen accused the Trump Administration of "deliberately sidestepping congressional oversight."⁸³ Congressman Ro Khanna, who had already co-sponsored one bill pursuant to the War Powers Resolution to halt U.S. military support for the Saudi-led coalition in September 2017⁸⁴ and had announced plans to introduce another,⁸⁵ introduced a resolution on September 26, 2018, this time with over 50 co-sponsors.⁸⁶ On October 10, a bipartisan group of senators wrote a letter to Secretary Pompeo in which they stated that they were "skeptical a certification that the two Governments [Saudi Arabia and the UAE] have undertaken demonstrable actions to reduce the harm to civilians is warranted when the Saudi coalition has failed to adopt some U.S. recommendations while civilian deaths and casualties due to coalition airstrikes have increased dramatically in recent months."⁸⁷ As of November 2018, Secretary Pompeo had yet to respond.

In early November 2018, Saudi Arabia announced that it had asked the United States to end its refueling operations, claiming that it no longer required assistance in conducting operations in Yemen. The United States planned to continue other types of support, including humanitarian assistance and the training of Yemeni government forces.⁸⁸ The decision to halt refueling may have been a way of showing supporting for the peace efforts of the UN envoy, but it may also have

⁸¹ Rebecca Kheel, *Pompeo Allows US Military Aid to Saudi Coalition in Yemen to Continue*, HILL (Sept. 12, 2018, 9:14 AM), <https://thehill.com/policy/defense/406224-pompeo-allows-us-military-aid-to-saudi-coalition-in-yemen-to-continue>.

⁸² Dion Nissenbaum, *Top U.S. Diplomat Backed Continuing Support for Saudi War in Yemen Over Objections of Staff*, WALL STREET J. (Sept. 20, 2018), <https://www.wsj.com/articles/top-u-s-diplomat-backed-continuing-support-for-saudi-war-in-yemen-over-objections-of-staff-1537441200>.

⁸³ Kheel, *supra* note 81.

⁸⁴ H.R. Con. Res. 81, 115th Cong. (2017).

⁸⁵ Rebecca Kheel, *Dems Plan Resolution to Withdraw US Forces from Yemen Civil War*, HILL (Sept. 6, 2018), <https://thehill.com/policy/defense/405340-dems-plan-resolution-to-withdraw-us-forces-from-yemen-civil-war>.

⁸⁶ H.R. Con. Res. 138, 115th Cong. (2018).

⁸⁷ Letter to Secretary of State Mike Pompeo (Oct. 10, 2018), [https://www.young.senate.gov/imo/media/doc/2018.10.10%20Letter%20to%20Secretary%20Pompeo%20\(Yemen%20Certification\).pdf](https://www.young.senate.gov/imo/media/doc/2018.10.10%20Letter%20to%20Secretary%20Pompeo%20(Yemen%20Certification).pdf). For a critical assessment of the certification, see Ryan Goodman, *Annotation of Sec. Pompeo's Certification of Yemen War: Civilian Casualties and Saudi-Led Coalition*, JUST SECURITY (Oct. 15, 2018), <https://www.justsecurity.org/61053/annotation-sec-pompeos-certification-yemen-war-civilian-casualties-resulting-saudi-led-coalitions-operations/>.

⁸⁸ Stewart, *supra* note 54.

been attempt by the United States to distance itself from Saudi Arabia following the murder of journalist Jamal Khashoggi by Saudi agents in October 2018.⁸⁹

Public backlash against Saudi Arabia for the Khashoggi murder helped prompt a new round of legislation aimed at curbing U.S. support for the Saudi-led coalition. On November 15, 2018, Senator Bob Menendez introduced a bipartisan bill, the Saudi Arabia Accountability and Yemen Act of 2019, that, among other things, would suspend certain arms transfers to Saudi Arabia, prohibited the resumption of in-flight refueling of Saudi-coalition aircraft, and directed a review of the accuracy of the previous NDAA certification.⁹⁰ On November 28, the Senate voted to discharge Senate Joint Resolution 54, which had been blocked by a procedural vote and stalled in the Foreign Relations Committee since March, out of committee.⁹¹ The resolution required the removal of U.S. armed forces from their role in assisting the Saudi-led coalition against the Houthis.⁹² A new pair of similar resolutions were introduced in the House of Representatives on November 29.⁹³

II. *U.S. Domestic Legal Issues*

The situation described in Part I raises a host of legal issues—both domestic and international. This Part addresses several of the most pressing U.S. domestic legal issues. Specifically, it addresses four separate sets of laws and their application to U.S. involvement in Yemen: (1) the War Powers Resolution, (2) the Arms Export Control Act and Foreign Assistance Act, (3) the War Crimes Act and the U.S. Federal Statute on Aiding and Abetting, and (4) the Alien Tort Statute. The next Part then turns to the international legal issues.

A. *War Powers Resolution*

On February 28, 2018, Senator Bernie Sanders introduced a joint resolution, co-sponsored by Senators Mike Lee and Chris Murphy, calling for the removal of U.S. armed forces from hostilities in the Republic of Yemen that have not been authorized by Congress.⁹⁴ Shortly after the resolution became public, then-Acting General Counsel of the Department of Defense, William Castle, released a letter arguing that the premise of the proposed resolution was “flawed” because it incorrectly asserted that U.S. forces had been introduced into “hostilities.”⁹⁵ On March 20, 2018,

⁸⁹ John Hudson & Missy Ryan, *Trump administration to end refueling of Saudi-coalition aircraft in Yemen conflict*, WASH. POST (Nov. 10, 2018), https://www.washingtonpost.com/world/national-security/trump-administration-to-end-refueling-for-saudi-coalition-aircraft-in-yemen/2018/11/09/d08ff6c3-babd-4958-bcca-cdb1caa9d5b4_story.html?utm_term=.628c3be9840e.

⁹⁰ S.3652, 115th Cong. (2018).

⁹¹ Scott R. Anderson, *Taking Stock of the Yemen Resolution*, LAWFARE (Nov. 30, 2018, 4:23 PM), <https://www.lawfareblog.com/taking-stock-yemen-resolution>.

⁹² S.J. Res. 54, 115th Cong. (2018).

⁹³ H.R. Con. Res. 142, 115th Cong. (2018); H.J. Res. 142, 115th Cong. (2018).

⁹⁴ S.J. Res. 54, 115th Cong. (2018). H.R. Con. Res. 81, *supra* note 84, was introduced in the House in September 2017, but it did not provoke a response from the Administration.

⁹⁵ William S. Castle, Acting General Counsel, Department of Defense, to The Honorable Mitchell “Mitch” McConnell 1 (Feb. 27, 2018), <https://assets.documentcloud.org/documents/4390794/Acting-GC-Letter-to-Majority-Leader-Re-Sanders.pdf>.

the Sanders-Lee-Murphy resolution was blocked by a procedural vote of 55-44.⁹⁶ However, in a surprising turn of events, on November 29, 2018, the Senate voted 63-37 to revive the resolution and discharge it from the Foreign Relations Committee.⁹⁷ The resolution is pending an additional procedural vote, which, if approved, will be followed by expedited debates on the Senate floor.⁹⁸ A number of resolutions have been introduced over the past year to rein in U.S. support for the Saudi-led coalition in Yemen,⁹⁹ but the Sanders resolution has so far made it further in the process of congressional approval than any other bill. This recent flurry of legislative activity has brought renewed attention to an important issue: the legality of the U.S. support for the Saudi-led coalition in Yemen under the War Powers Resolution (WPR)—the primary law governing the deployment of U.S. military forces.

To assess the charge that recent U.S. actions in Yemen violate the War Powers Resolution—and the Department of Defense’s response that it does not—it is necessary to undertake a careful examination of publicly available information about U.S. involvement in Yemen.¹⁰⁰ As noted in Part I, American forces are involved in the conflict in Yemen in three separate capacities: (1) U.S. Navy ships are located off the coast of Yemen; (2) U.S. forces have conducted operations against Al-Qaeda’s Yemen branch, known as Al-Qaeda in the Arabian Peninsula, or AQAP; (3) the U.S. military has provided assistance to Saudi-led operations including through targeting advisers and, up until November 2018, mid-air refueling of Saudi-led coalition aircraft.

We examine each of these in turn and conclude that U.S. military forces have not crossed the threshold of direct, imminent involvement in hostilities, under traditional interpretations of the War Powers Resolution. However, some members of Congress have advanced a novel interpretation of Section 8(c), arguing that the War Powers Resolution also encompasses *indirect* involvement in hostilities through support of foreign military forces. This argument has merit, although it rests on an expansive interpretation of the War Powers Resolution that could have

⁹⁶ Leigh Ann Caldwell, *Senate Blocks War Powers Resolution for Yemen*, NBC NEWS (Mar. 20, 2018), <https://www.nbcnews.com/politics/congress/senate-blocks-war-powers-resolution-yemen-n858451>.

⁹⁷ Leigh Ann Caldwell, *Senate advances bill to end U.S. involvement in Yemen war after ‘inadequate’ briefing on Saudi Arabia*, NBC News (Nov. 28, 2018, 4:36 PM), <https://www.nbcnews.com/politics/congress/after-inadequate-briefing-saudi-arabia-senate-advances-bill-end-u-n941386>.

⁹⁸ Anderson, *supra* note 91.

⁹⁹ H.R. Con. Res. 81, *supra* note 84. A resolution introduced on April 11, 2018, by Senator Todd Young proposed cutting off funds for refueling operations to the Saudi-led coalition unless the Secretary of State could certify that Saudi Arabia had undertaken good-faith efforts to reduce civilian casualties and end the humanitarian disaster. However, this proposed legislation did not invoke the War Powers Resolution. S.J. Res. 58, 115th Cong. (2018). The Saudi Arabia Accountability and Yemen Act of 2018, introduced by Senator Menendez on November 15, 2018, also did not invoke the War Powers Resolution. *See supra* note 90. As noted above, *supra* note 86, on September 27, 2018, Congressman Ro Khanna introduced a resolution invoking Section 8(c) of the War Powers Resolution. This bill stalled in committee, but Congressman Khanna introduced a new, identical bill on November 29, 2018. *See supra* note 93.

¹⁰⁰ This paper adopts the view that “hostilities” within the meaning of the War Powers Resolution means combat between U.S. and opposing forces. During the 2011 bombing campaign over Libya, the Obama Administration adopted the view that “hostilities” is an “ambiguous term of art” *Libya and War Powers: Hearing Before the S. Comm. On Foreign Relations*, 112th Cong. 8 (2011) [hereinafter *Hearing*] (statement of Harold Koh, Legal Adviser, U.S. Department of State). The continued bombing of Libya past 60 days did not constitute “hostilities” because the operations involved “limited exposure for U.S. troops,” “limited risk of serious escalation,” and “limited military means” *Id.* at 9. This interpretation is controversial and has not been adopted by the Department of Justice Office of Legal Counsel (OLC). *See Authority to Use Military Force in Libya*, 35 Op. O.L.C. 1 (2011) (addressing only the use force within the first 60 days).

implications for U.S. security assistance around the world. Moreover, the Department of Defense response appears to refute the argument on factual grounds, though some unanswered questions remain.

(1) U.S. Navy ships off the coast of Yemen

The War Powers Resolution states that under the President's constitutional powers as Commander in Chief, the President can introduce armed forces into "hostilities" or into "situations where imminent involvement in hostilities is clearly indicated by the circumstances" only pursuant to: "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."¹⁰¹ The presence of U.S. Navy ships off the coast of Yemen has not been specifically authorized by Congress and therefore prompts the question of whether their presence introduces American forces to a situation where "imminent involvement in hostilities is clearly indicated by the circumstances." If so, the President would be required to submit a report to Congress within 48 hours of introducing armed forces (which he has not done).¹⁰² And within 60 days after submitting a report (or of being required to submit a report), he would be required to terminate the use of armed forces.¹⁰³

The President has the authority to deploy combat-ready U.S. forces "into the territory, airspace, or waters of a foreign nation" without prior congressional approval, as long as the military personnel are not at imminent risk of hostilities.¹⁰⁴ The Department of Justice's Office of Legal Counsel has concluded that the President's power to deploy U.S. armed forces around the world is unfettered. As the individual who "is exclusively responsible for the conduct of diplomatic and foreign affairs," the President may, "absent specific legislative restriction, deploy United States armed forces abroad or to any particular region."¹⁰⁵ Therefore, the mere deployment of U.S. Navy

¹⁰¹ 50 U.S.C. § 1541(c).

¹⁰² "In the absence of a declaration of war, in any case in which United States Armed Forces are introduced: (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report . . ." *Id.* § 1543(a).

¹⁰³ The sixty-day period can be extended for thirty days if the President determines it is necessary to safely remove U.S. armed forces. Under OLC's interpretation, the President can deploy U.S. armed forces into hostilities for up to 60-90 days, so long as the military operations are not "sufficiently extensive in 'nature, scope, and duration' to constitute a 'war' requiring prior specific congressional approval . . ." Authority to Use Military Force in Libya, 35 Op. at 10. Operations that have passed the "nature, scope, and duration" test include the planned deployment of 20,000 ground troops into Haiti, the planned deployment of ground troops into Bosnia and Herzegovina, and the bombing campaign in Libya. *Id.* at 9. As a matter of the original meaning of the Declare War Clause, this view is contested, but resolving that dispute is beyond the scope of this article. See Saikrishna Bangalore Prakash, *Military Force and Violence, But Neither War Nor Hostilities*, 64 DRAKE L. REV. 995 (2016); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means By "Declare War,"* 93 CORNELL L. REV. 45 (2007).

¹⁰⁴ 50 U.S.C. § 1543(a)(2).

¹⁰⁵ Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. at 178 (internal quotations omitted) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950)); see also Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 330 (1995) ("As Commander in Chief, the President exercises 'the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country.'" (quoting

ships to the region does not trigger the War Powers Resolution, absent evidence that they have been introduced into hostilities or imminent hostilities.

U.S. Navy ships came under attack by Houthi-Saleh forces in three separate missile strikes in October 2016.¹⁰⁶ The ships were in international waters when they were attacked.¹⁰⁷ The United States responded by launching a missile strike against the Houthi-Saleh-controlled radar stations. President Obama reported the action in a letter to Congress, consistent with the War Powers Resolution.¹⁰⁸ Since the military action was taken as a short term, limited emergency response to an attack upon U.S. armed forces, and was promptly reported to Congress, the action was sufficient to conform to the Resolution's requirements.

The deployment of U.S. Navy ships off the coast of Yemen is likely not a deployment into hostilities or into a situation where hostilities are imminent. The failed missile strikes on U.S. Navy ships were the only direct attacks on U.S. forces by the Houthi-Saleh alliance during the nearly three-year war by the Saudi-led coalition, and there have been no further attacks on U.S. forces. The anti-ship cruise missile launchers used to attack U.S. ships appear to have been destroyed. Given this record, the risk of hostilities does not rise to the level of "imminent" under historical precedent.¹⁰⁹ If the risks were to rise, however, that would strengthen the case that hostilities are imminent, a report to Congress required, and the 60-day clock initiated.

Based on publicly available information about U.S. activities in the region, Counsel Castle's argument that U.S. forces are not currently engaged in hostilities appear to be consistent with historic understandings of the meaning of "hostilities" under the War Powers Resolution. But his letter asserts far greater authority than necessary—or warranted. It argues that the October 2016 strikes against radar facilities in Houthi-controlled territory in defense of U.S. Navy ships were justified under the President's Article II powers, a legally accurate analysis given the limited scope of the operation. But he further asserts that, "The President has authority pursuant to Article II to

Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 62 (1941) (Robert H. Jackson, Att'y Gen.)).

¹⁰⁶ Idrees Ali & Matt Spetalnick, *U.S. Warship Targeted in Failed Missile Attack from Yemen: Official*, REUTERS (Oct. 15, 2016), <http://www.reuters.com/article/us-yemen-security-usa/u-s-warship-targeted-in-failed-missile-attack-from-yemen-official-idUSKBN12G004>.

¹⁰⁷ Sam LaGrone, *Destroyer USS Mason Unsuccessfully Attacked From Yemen*, USNI NEWS (Oct. 10, 2016, 7:35 AM), <https://news.usni.org/2016/10/10/destroyer-uss-mason-attacked-yemen>.

¹⁰⁸ Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, (Oct. 14, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/10/14/letter-president-war-powers-resolution>.

¹⁰⁹ The deployment at issue here involves a much less substantial risk of attack than the deployment of U.S. Navy ships challenged by 110 members of the House of Representatives in *Lowry v. Reagan*, 676 F. Supp 333 (D.D.C. 1987). At the time of that suit, the Iran-Iraq war put vessels travelling through the Persian Gulf at risk of attack. On May 17, 1987, the USS Stark was hit by a missile launched by an Iraqi aircraft, resulting in the deaths of 37 sailors. In response to the increased danger of traversing the Persian Gulf, the United States began providing naval escorts to Kuwaiti oil tankers. The United States also deployed additional naval vessels to augment its aircraft carrier group already in the region. President Reagan did not request congressional authorization for these actions and did not initially report them to Congress under the WPR. Members of Congress filed suit challenging the action as a violation of the WPR, but the case was dismissed as raising a political question and therefore did not reach the merits. See MATTHEW C. WEED, CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 15–16 (2017), <https://fas.org/sgp/crs/natsec/R42699.pdf>.

take military action that furthers sufficiently important national interests.”¹¹⁰ The blanket claim that the President may act in any way to further national security interests goes far further than the recognized scope of the President’s unilateral constitutional war powers.

(2) Operations Against AQAP and ISIS in Yemen

The U.S. has acknowledged conducting operations against AQAP and ISIS in Yemen. In May 2016, for example, the Pentagon acknowledged that a small contingent of U.S. military personnel was stationed on the ground in Yemen, supporting UAE efforts to retake the Yemeni port city of Mukalla from AQAP.¹¹¹ The troops were in Yemen to support the Saudi-led coalition targeting AQAP, not the Houthis.

The United States has consistently taken the position that operations against Al-Qaeda and its affiliates, including AQAP and ISIS, are covered by the 2001 AUMF. However, there are real concerns that the 2001 statute, passed by Congress days after 9/11 and authorizing force against those affiliated with the attacks, cannot be properly applied to operations more than fifteen years later to a group and in a country with no direct involvement in those attacks.¹¹² Nonetheless, the government’s position that the 2001 AUMF applies to U.S. operations against AQAP¹¹³ as an affiliate organization of Al-Qaeda has been met with relatively little challenge. If, therefore, U.S. ground operations in Yemen have been and remain limited to operations against AQAP, many would accept that they are covered under the 2001 AUMF and do not need further Congressional authorization.¹¹⁴

However, General Counsel Castle’s letter to Senate Majority Leader McConnell does raise a question about the 2001 AUMF authority. The Senate joint resolution “directs the President to remove United States Armed Forces from hostilities in or affecting the Republic of Yemen, except United States Armed Forces engaged in operations directed at Al-Qaeda or associated forces....”¹¹⁵ Castle states in response that, pursuant to the 2001 AUMF:

U.S. armed forces are currently engaged in hostilities against both al Qaeda in the Arabian Peninsula (AQAP) and the Islamic State of Iraq and Syria (ISIS) in

¹¹⁰ See Castle, *supra* note 95.

¹¹¹ Tilghman, *supra* note 58.

¹¹² See, e.g., Brief of Experts on International Law and Foreign Relations as Amici Curiae in Support of Initial Hearing En Banc, *Al-Alwi v. Trump*, No. 17-5067 (D.C. Cir. Oct. 10, 2017) (arguing the 2001 AUMF no longer authorizes detention of Guantanamo detainee held since 2002); Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, YALE J. INT’L L. 123, 129–140 (2013) (examining reach and limits of 2001 AUMF); Bruce Ackerman & Oona Hathaway, *The World After Bin Laden*, WASH. POST (May 3, 2011), https://www.washingtonpost.com/opinions/topic-a-the-world-after-bin-laden/2011/05/02/AFF7ujhF_story.html (arguing authority under the 2001 authorization had lapsed).

¹¹³ *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing Before the S. Comm. on Foreign Relations*, 113th Cong. 11 (2014) (prepared statement of Stephen W. Preston, General Counsel, U.S. Department of Defense); Preston, *supra* note 36; Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, but Says It Isn’t Necessary*, N.Y. TIMES (Sept. 10, 2014), <https://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html>.

¹¹⁴ As noted in Section I.C, the inclusion of ISIS within the scope of the 2001 AUMF is the subject of ongoing legal controversy and is outside the scope of this paper.

¹¹⁵ S.J. Res. 54, 115th Cong. (2018).

Yemen. Hostilities against AQAP and associated forces are explicitly exempted from the resolution's termination requirement, but hostilities against ISIS are not similarly exempted.¹¹⁶

This suggests that ISIS is *not* an associated force of Al-Qaeda. That appears to be in some tension with earlier explanations of the legal basis for military operations against ISIS, which emphasized the historic ties between Al-Qaeda and ISIS to make the case that ISIS properly fell within the AUMF's scope.¹¹⁷ This response raises new questions about the legal basis under which the Trump Administration understands itself to be operating against ISIS. Administration statements since the letter was issued have not repeated the claim, suggesting it may have been made in error.

(3) Mid-air Refueling of Saudi-led Coalition Aircraft and Other Support

Perhaps the most controversial aspect of U.S. support for the Saudi-led coalition was the mid-air refueling of coalition aircraft. The refueling missions ceased in November 2018, which removed the most important factual hook for arguing that U.S. forces were at risk of hostilities and that the War Powers Resolution had been triggered. However, while the refueling assistance was still in effect, the Pentagon stated at the outset that all mid-air refueling missions were conducted outside of Yemeni airspace.¹¹⁸ Assuming that the U.S. military adhered to this policy (and there is no indication that it has not), it is difficult to argue that military personnel participating in the refueling were ever at imminent risk of hostilities. Military personnel who are providing targeting assistance and advice to the coalition have been stationed in the Saudi capital of Riyadh and far from the battlefield and the imminent risk of being caught up in direct hostilities.¹¹⁹ The closest that U.S. forces have come to hostilities is an operation in December 2017 where U.S. Green Berets on Saudi Arabia's side of the border with Yemen assisted in locating and destroying Houthi missiles caches.¹²⁰ Details of this mission are still obscure and it is unclear how exposed U.S. forces were to imminent hostilities.

However, a little-noticed provision of the War Powers Resolution, Section 8(c), provides:

For purposes of this joint resolution, the term 'introduction of United States Armed Forces' includes the assignment of member of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.¹²¹

The plain meaning of this provision appears to be that when the U.S. armed forces "command, coordinate, participate in the movement of, or accompany" foreign forces that are engaged in

¹¹⁶ Castle, *supra* note 95, at 2.

¹¹⁷ See Preston, *supra* note 36.

¹¹⁸ Crawford, *supra* note 53.

¹¹⁹ Schmitt, *supra* note 65.

¹²⁰ Cooper, Gibbons-Neff & Schmitt, *supra* note 45.

¹²¹ 50 U.S.C. § 1547(c).

hostilities, such as the Saudi-led coalition, there has been “introduction of U.S. Armed forces” within the meaning of the War Powers Resolution.

This provision first was highlighted by Congressmen Ro Khanna (D-Calif.), Mark Pocan (D-Wisc.), and Walter Jones (R-N.C.), when they introduced a resolution in the House, in September 2017,¹²² invoking the War Powers Resolution to order President Donald Trump to remove U.S. military forces supporting the Saudi-led war against the Houthi-Saleh alliance in Yemen. In a subsequent *New York Times* op-ed, the three lawmakers reiterated their argument that U.S. support for the Saudi-led coalition constituted a war that required authorization by Congress by specifically invoking the language of Section 8(c).¹²³ The Sanders resolution, later introduced in February 2018, invoked the same language.¹²⁴

There have been few interpretations of Section 8(c), making it difficult to assess the congressmen’s claims that the current U.S. support for the Saudi coalition runs afoul of it. In his testimony before the Senate Foreign Relations Committee on June 28, 2011 regarding U.S. operations in Libya, then-Legal Adviser Harold Koh argued in a footnote that the section gives rise to “a duty of Congressional notification, but not termination.” He further argued that Section 8(c) is textually linked by “introduction of United States Armed Forces” not to the “hostilities” language that triggers the termination requirement, but instead to the clause that triggers a reporting requirement.¹²⁵

In his February 27 letter to Senate Majority Leader McConnell, Acting General Counsel Castle offers a different interpretation of Section 8(c). He argues that the relevant question is “whether U.S. forces—not the foreign forces they are accompanying—are introduced into hostilities or situations involving the imminent threat thereof.”¹²⁶ The State Department came to a similar conclusion in 1981 when considering whether the section applied to U.S. military advisers in El Salvador. It concluded that Section 8(c) was not intended to require a report when U.S. military personnel might be involved in training foreign military personnel, if there were no imminent involvement of U.S. personnel in hostilities. The military personnel in El Salvador “will not act as combat advisors, and will not accompany Salvadoran forces in combat, on operational patrols, or in any other situation where combat is likely.”¹²⁷

Both Koh’s and Castle’s readings are difficult to square with the plain language of the Resolution. As noted above, the provision states that when the U.S. armed forces are assigned to “command, coordinate, participate in the movement of, or accompany” foreign forces that are engaged in hostilities, such as the Saudi-led coalition, that constitutes the “introduction of U.S.

¹²² H.R. Con. Res. 81, *supra* note 84.

¹²³ Ro Khanna, Mark Pocan & Walter Jones, *Stop the Unconstitutional War in Yemen*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/opinion/yemen-war-unconstitutional.html> (“Now we congressmen are invoking a provision of that 1973 law, which defines the introduction of armed forces to include coordinating, participating in the movement of, or accompanying foreign military forces engaged in hostilities.”).

¹²⁴ S.J. Res. 54, 115th Cong. (2018).

¹²⁵ *Hearing, supra* note 100, at 14 n.13. (statement of Harold Koh, Legal Adviser, U.S. Department of State).

¹²⁶ *See* Castle, *supra* note 95, at 2.

¹²⁷ WEED, *supra* note 109, at 10 (citing 127 CONG. REC. 3743–44 (daily ed. Mar. 5, 1981) (statement of Rep. Broomfield)).

Armed forces,” which, under Section 2 of the War Powers Resolution, the President is not authorized to do absent declaration of war, statutory authorization, or national emergency.

These readings are also in some tension with the limited legislative history of Section 8(c). At the time of the adoption of the Resolution, the Senate report stated that the purpose of Section 8(c) was:

to prevent secret, unauthorized military support activities and to prevent a repetition of many of the most controversial and regrettable actions in Indochina. The ever-deepening ground combat involvement of the United States in South Vietnam began with the assignment of U.S. “advisers” to accompany South Vietnamese units on combat patrols; and in Laos, secretly and without congressional authorization, U.S. “advisers” were deeply engaged in the war in northern Laos.¹²⁸

For 8(c) to serve the purpose of avoiding a repetition of such actions, it would seem to require more than mere reporting to Congress and to apply to situations where U.S. troops are acting as “advisers” to foreign troops involved in hostilities, even when those U.S. troops themselves are not involved in hostilities.

The obvious difficulty with the plain meaning interpretation of Section 8(c) is that it suggests that the United States violates the War Powers Resolution when it provides assistance to a foreign military involved in hostilities. As Jack Goldsmith has pointed out, this interpretation “implies that the assignment of one or two U.S. military aides to a foreign military effort triggers the WPR.”¹²⁹ This would arguably lead to what Koh called “absurd results” where the War Powers Resolution’s 60-day clock would “require termination of the ‘assignment’ of even a single member of the U.S. military to assist a foreign government force, unless Congress passed legislation to authorize that one-person assignment.”¹³⁰ Furthermore, commentators have noted that long-standing practice of the executive branch—coupled with years of congressional acquiescence to this interpretation—weighs on the side of the narrow interpretation of Section 8(c).¹³¹

It may not be necessary to resolve the debate over the proper scope of Section 8(c) in order to resolve the question of whether U.S. assistance to the Saudi-led coalition constitutes “hostilities” under the War Powers Resolution. The letter from Castle states that, “With respect to U.S. support to the KSA-led coalition, U.S. forces do not currently command, coordinate, accompany, or participate in the movement of coalition forces in counter-Houthi operations. Thus, no U.S. forces are accompanying the KSA-led coalition when its military forces are engaged, or an imminent threat exists that they will become engaged, in hostilities.” The letter later references “U.S.

¹²⁸ Weed, *supra* at note 109, at 5 (citing S. REP. NO. 93-220, at 24 (1973)).

¹²⁹ Jack Goldsmith, *Problems with the Obama Administration’s War Powers Resolution Theory*, LAWFARE (June 16, 2011, 8:38 AM), <https://www.lawfareblog.com/problems-obama-administrations-war-powers-resolution-theory>.

¹³⁰ *Hearing, supra* note 100, at 14 n.13. (statement of Harold Koh, Legal Adviser, U.S. Department of State). One of the few people to note these potential ramifications is Justin Metz, a student at Columbia Law School. Justin Metz, *How Recent War Powers Legislation May Affect the US Role in Yemen and Around the World*, SMALL WARS J. (Nov. 10, 2017), <http://smallwarsjournal.com/jrnl/art/how-recent-war-powers-legislation-may-affect-us-role-yemen-and-around-world>.

¹³¹ Anderson, *supra* note 91. There are, in addition, significant justiciability barriers to resolving in federal court.

participation in a Joint Combined Planning Cell with the [Saudi government] and mid-air refueling of [Saudi]-led coalition aircraft.”¹³² It is not clear from the letter whether the Department regards such participation as constituting “participat[ing] in the movement of coalition forces in counter-Houthi operations.” Given that the United States recently stopped its refueling missions of Saudi-led coalition, that point may be moot, at least for now. However, it would be reasonable to ask whether U.S. armed forces are still participating in the Joint Combined Planning Cell with the Saudi government, and whether the Department is correct to conclude that such participation does not constitute “command[ing]” and “coordinat[ing]” Saudi forces, implicating section 8(c). Moreover, Congress may want to clarify whether the Department is correct to conclude that refueling assistance does not constitute “participat[ion] in the movement of” such forces, implicating Section 8(c). If refueling enabled the Saudi coalition to move the forces operating in Yemen, it would be reasonable to conclude that the U.S. armed forces were thereby participating in those forces’ movement. That conclusion could have implications for any future refueling missions, whether in Yemen or in a similar situation elsewhere.

There is a related concern that the United States, by supporting the Saudi-led coalition, could be described as a co-belligerent in the conflict with Saudi Arabia conflict and, if so, that might trigger the WPR’s prohibition on involving U.S. armed forces in “hostilities” or “imminent hostilities.” After all, as Nathalie Weizmann has argued, if the United States enters the conflict, it could be seen as a belligerent in the conflict.¹³³

The precise intended scope of Section 8(c) is surprisingly underdeveloped, given the extent of U.S. military assistance and advice in many parts of the world. Adopting the expansive definition of Section 8(c) advocated by several members of Congress could would provoke a reassessment of the unknown number of ongoing U.S. military advising missions around the world. It is therefore important to proceed with caution in interpreting the scope of this provision. To assess whether U.S. support to the Saudi-led coalition in Yemen implicates Section 8(c) would likely require, as a minimum, more information than is publicly available about the nature and scope of these activities. It would also help to have a more developed understanding of the meaning of Section 8(c), although this is unlikely given the paltry discussion in both legislative history and scholarly sources.

Last, the Acting General Counsel’s letter asserts in footnote 3:

Because the President has directed U.S. troops to support the KSA [Kingdom of Saudi Arabia] operations pursuant to his authority under Article II, and because the limited operation does not implicated [sic] Congress’s constitutional authority to Declare War, the draft resolution would raise serious constitutional concerns to the extent it seeks to override the President’s determination as Commander in Chief.¹³⁴

¹³² Castle, *supra* note 95, at 2.

¹³³ Nathalie Weizmann, *Are the U.S. and U.K. Parties to the Saudi-led Armed Conflict Against the Houthis in Yemen?*, JUST SECURITY (Sept. 22, 2016), <https://www.justsecurity.org/33095/u-s-u-k-parties-saudi-led-armed-conflict-houthis-yemen>.

¹³⁴ Castle, *supra* note 95, at 2–3 n.3.

This is a bold assertion of executive control over foreign affairs.¹³⁵ It suggests that the acting General Counsel of the Department of Defense believes that the President might be constitutionally entitled to disregard a joint resolution of Congress ordering the President to cease support to the Saudi-led coalition and continue those operations when his authority is at its lowest ebb.¹³⁶

After the Sanders resolution was blocked by a procedural vote in March 2018, it seemed like unlikely that these issues would provoke further attention, barring the unexpected success of one of the separate House resolutions. With the surprising vote in November 2018 to revive the Sanders resolution, these issues are poised once more for discussion and debate. However, the decision to stop mid-air refueling missions has changed the context and removes one of the key arguments that U.S. assistance to the Saudi-led coalition triggers Section 8(c) of the War Powers Resolution. The Trump administration recently push back against the Sanders resolution, arguing that it was based on an “erroneous premise” concerning the nature of U.S. assistance to the Saudi-led coalition.¹³⁷ As some commentators have pointed out, even if the Sanders resolution—or a similar bill—is passed by both houses of Congress and survives a presidential veto, it is not clear what effect the new law would have.¹³⁸ If the executive branch maintains its position that none of the current assistance programs to the Saudi-led coalition constitute “hostilities” as defined by the War Powers Resolution, then the answer is, quite possibly, the resolution would have no effect at all. A much more effective way for Congress to affect U.S. policy would be to pass the alternative bill, the Saudi Arabia Accountability and Yemen Act,¹³⁹ introduced by Senator Menendez, which does not depend on disputed legal interpretations of the War Powers Resolution.¹⁴⁰

III. *Arms Export Control Act and Foreign Assistance Act*

Since the start of the war, the United States has provided billions of dollars in arms sales to countries participating in the Saudi-led coalition that is fighting a war in Yemen against the Houthi-Saleh alliance,¹⁴¹ contributing to one of the world’s worst humanitarian crises.¹⁴² Investigative reports have tied shrapnel from U.S.-made bombs to numerous civilian deaths in Yemen.¹⁴³ As explained in Part I, recent efforts to halt U.S. assistance to the Saudi-led coalition, led by members of Congress concerned by civilian casualties of coalition airstrikes, have failed. Weapon transfers were temporarily halted when Sen. Bob Corker, chairman of the Senate Foreign

¹³⁵ Scott R. Anderson & Molly E. Reynolds, *Putting the Yemen Resolution in Procedural Context*, LAWFARE (Mar. 9, 2018), <https://www.lawfareblog.com/putting-yemen-resolution-procedural-context>.

¹³⁶ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹³⁷ Statement of Administration Policy, S.J. Res. 54, EXECUTIVE OFFICER OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET (Nov. 28, 2018), https://www.whitehouse.gov/wp-content/uploads/2017/11/sapsj54s_20181128.pdf.

¹³⁸ Anderson, *supra* note 91; Tess Bridgeman & Stephen Pomper, *How the Senate Should Move Forward on Resolution to Withdraw from Yemen War*, JUST SECURITY (Nov. 30, 2018), <https://www.justsecurity.org/61666/saudi-arabia-senate-move-resolution-withdraw-yemen-war-and-avoid-pitfalls-current-text>.

¹³⁹ S.3652, 115th Cong. (2018).

¹⁴⁰ Anderson, *supra* note 91; Bridgeman & Pomper, *supra* note 138.

¹⁴¹ Nicolas Niarcos, *How the U.S. is Making the War in Yemen Worse*, THE NEW YORKER (Jan. 22, 2018), <https://www.newyorker.com/magazine/2018/01/22/how-the-us-is-making-the-war-in-yemen-worse>.

¹⁴² *Yemen: The Forgotten War*, AMNESTY INT’L, <https://www.amnesty.org/en/latest/news/2015/09/yemen-the-forgotten-war>.

¹⁴³ Nima Elbagir, Salma Abdelaziz & Laura Smith-Spark, *Exclusive Report: Made in America -- Shrapnel Found in Yemen Ties US bombs to String of Civilian Deaths over Course of Bloody Civil War*, CNN (Sept. 18, 2018) <https://www.cnn.com/interactive/2018/09/world/yemen-airstrikes-intl/>.

Relations Committee, placed a hold on sales of lethal military equipment to all members of the Gulf Cooperation Council (including Saudi Arabia), in an effort to encourage them to settle internal disputes unrelated to the conflict in Yemen. But Senator Corker lifted that hold on February 8, 2018, opening the door to sales once more.¹⁴⁴

In May 2017, in the midst of debates over congressional proposals to halt arms sales, the American Bar Association (ABA) Center for Human Rights sent a report by Vanderbilt Law Professor Michael A. Newton to the Senate arguing that “further sales under both the Arms Export Control Act [AECA] and the Foreign Assistance Act [FAA] are prohibited until the Kingdom of Saudi Arabia takes effective measures to ensure compliance with international law and the President submits relevant certifications to the Congress.”¹⁴⁵ The report recommended that Congress bring a joint resolution under both the AECA and the FAA to halt the proposed restart of arms.¹⁴⁶ The report’s conclusions appear to be well-founded, as this Section explains.

In June 2017, the United States announced a \$750 million dollar training program for the Saudi military forces, paid for by the Saudis, that would include such “subjects as civilian casualty avoidance, the law of armed conflict, human rights command and control”¹⁴⁷ The United States also announced that it had received assurances from the Saudi government that it would endeavor to reduce civilian casualties.¹⁴⁸ Nonetheless, there is little evidence that the pace of civilian casualties slowed as a result. As noted in Section I.B, the United Nations Panel of Experts on Yemen documented eight separate strikes on civilians in the second half of 2017.¹⁴⁹

In this Section, we examine the legality of these actions under the AECA and FAA. We find persuasive the ABA’s conclusion that the United States’ sale of arms to Saudi Arabia violates both laws.

(1) The Arms Export Control Act

The AECA establishes presidential reporting requirements to Congress for major military sales and issuing of export licenses.¹⁵⁰ The AECA also establishes restrictions on how military

¹⁴⁴ Letter from Bob Corker, Chairman, U.S. Senate Committee on Foreign Relations, to Secretary of State Rex Tillerson (Feb. 8, 2018), https://partner-mco-archive.s3.amazonaws.com/client_files/1518620130.pdf.

¹⁴⁵ Michael A. Newton, *An Assessment of the Legality of Arms Sales to the Kingdom of Saudi Arabia in the Context of the Conflict in Yemen* 1 (May 19, 2017), https://www.americanbar.org/content/dam/aba/administrative/human_rights/ABACHRAssessmentofArmsSalestoSaudiArabia.pdf. The report was accompanied by a letter from the ABA. Letter from Michael Pates, Director & Brittany Benowitz, Chief Counsel, American Bar Association Center for Human Rights to United States Senate (May 19, 2017) [hereinafter ABA letter].

¹⁴⁶ *Id.* at 23.

¹⁴⁷ News Release, Defense Security Cooperation Agency, U.S. Department of Defense (June 5, 2017), http://www.dsca.mil/sites/default/files/mas/saudi_arabia_16-77.pdf.

¹⁴⁸ Schmitt, *supra* note 65.

¹⁴⁹ UN Panel of Experts on Yemen, *Final report of the Panel of Experts in Accordance with Paragraph 6 of Resolution 2342 (2017)*, U.N. Doc. S/2018/594 (Jan. 26, 2018), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2018/594.

¹⁵⁰ 22 U.S.C. § 2776(b)-(c); see also PAUL K. KERR, CONG. RES. SERV., RL31675, ARMS SALES: CONGRESSIONAL REVIEW PROCESS, (2018), <https://fas.org/sgp/crs/weapons/RL31675.pdf> (providing background on the AECA procedures). The President must notify Congress 30 calendar days prior to completing a sale to a foreign government

assistance may be used. It may only be used (1) “for internal security;” (2) “for legitimate self-defense;” (3) “for preventing or hindering the proliferation of weapons of mass destruction and of the means of delivering such weapons;” (4) “to permit the recipient country to participate in regional or collective arrangements,” including the United Nations; and (5) “for the purpose of enabling foreign military forces in less developed friendly countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries.”¹⁵¹ Credits, guarantees, and sales must be terminated if the President or Congress determines that the recipient country is using the military assistance for any purpose other than those listed in the AECA.¹⁵² That assistance may only restart when either the President determines that the country’s violation has ceased or the country has given satisfactory assurances to the President that the violation will not happen again.¹⁵³

Of the authorized purposes in the AECA, the most plausible for which the Saudis are using weapons purchased from the United States is “legitimate self-defense.”¹⁵⁴ President Hadi of Yemen requested the Saudi-led coalition’s assistance for the purpose of collective self-defense under Article 51 of the UN Charter.¹⁵⁵ That President Hadi made the request, however, does not end the inquiry. The question is whether the Saudi-led coalition has, in fact, acted consistent with Article 51 in the collective self-defense of Yemen.

Yemen has suffered “armed attack” by organized non-state actor groups and therefore has a right of self-defense against them under international law.¹⁵⁶ But a response in self-defense to an armed attack must be both “necessary” and “proportional” to the threat posed.¹⁵⁷ The principle of

of defense articles and services worth \$50 million or more, design and construction services worth \$200 million or more, or major defense equipment worth \$14 million or more. 22 U.S.C. § 2776(b). Similar timelines and monetary thresholds apply to commercial sales and the issuing of export licenses. *Id.* § 2776(c).

¹⁵¹ *Id.* § 2754.

¹⁵² *Id.* § 2753(c).

¹⁵³ *Id.* § 2753(c)(4).

¹⁵⁴ Newton, *supra* note 145, at 18.

¹⁵⁵ GCC statement, *supra* note 15.

¹⁵⁶ There has been some debate over whether the Article 51 right of self-defense does, in fact, apply to conflicts with non-state actor groups. That debate, however, is now reasonably well settled. See Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 770 (2012) (concluding self-defense against non-state actors is permissible); see also Elizabeth Wilmschurts & Michael Wood, *Self-Defense Against Nonstate Actors: Reflections on the “Bethlehem Principles,”* 107 AM. J. INT’L L. 390 (2013).

¹⁵⁷ See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8) (“The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.”); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 176 (June 27) [hereinafter Nicaragua] (The UN Charter “does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”); U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL ¶ 1.11.5 (last updated Dec. 2016) [hereinafter LAW OF WAR MANUAL] (“To constitute legitimate self-defense under customary international law, it is generally understood that the defending State’s actions must be necessary. For example, reasonably available peaceful alternatives must be exhausted. In addition, the measures taken in self-defense must be proportionate to the nature of the threat being addressed.” (citations omitted)); William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 303 (2004) (“To constitute legitimate self-defense under customary international law, it is generally understood that the defending State’s actions must be both ‘necessary’ and ‘proportional.’” (citation omitted)). Importantly, necessity and proportionality in this context are *jus ad bellum* criteria, separate and distinct from the *jus in bello* criteria of military necessity and proportionality.

necessity is satisfied when the act undertaken seeks solely to halt or repel the armed attack, and when there are no peaceful alternatives, such as diplomatic efforts, available.¹⁵⁸ To determine whether an act of self-defense is proportional, lawyers “consider the scale of the defensive force in relation to the act against which it is directed.”¹⁵⁹ The type of force used in self-defense does not need to be the same type of force used in the attack, but it must be “judged according to the nature of the threat being addressed.”¹⁶⁰

The May 2017 ABA Center for Human Rights report concluded that the Saudi-led coalition’s use of force in Yemen was not legitimate self-defense because it violated both necessity and proportionality.¹⁶¹ On necessity, it concluded that the “widespread indiscriminate or intentional targeting of civilians serves no lawful military purpose” and therefore “cannot by definition satisfy the principle of necessity”¹⁶² On proportionality, it explained that “systematic attacks on non-military targets do not deter legitimate threats and therefore do not meet the requirements of proportionality”¹⁶³

There is, admittedly, some danger here of importing the *jus in bello* principle of proportionality—which requires that there not be excessive civilian collateral damage in relation to the concrete and direct military advantage anticipated—into the analysis of *jus ad bellum* proportionality—which requires that the scale of defensive force be proportional to the threat posed. Yet if, as reports suggest, there have been significant numbers of attacks on non-military targets,¹⁶⁴ the ABA report was correct to conclude that these attacks are neither necessary to respond to the threat posed to the recognized government of Yemen by the Houthis or Houthi-Saleh alliance, nor proportional to it. As a consequence, it appears the ABA report was likely correct that the sales violate the AECA.

Credits, guarantees, and sales must be terminated if the President or Congress determines that the recipient country is using the military assistance for any purpose other than those listed in

¹⁵⁸ See, e.g., *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 76 (“[I]n this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms . . . which does not suggest that the targeting of the platforms was seen as a necessary act.”); see also Taft, *supra* note 157, at 304 (“The condition of ‘necessity,’ rather, requires that no reasonable alternative means of redress are available.” (citation omitted)).

¹⁵⁹ Sean Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILLANOVA L. REV. 699, 715 (2005); see also *Oil Platforms (Iran v. U.S.)*, *supra* note 157, ¶ 77 (“As a response to the mining . . . of a single United States warship . . . neither ‘Operation Praying Mantis’ as a whole, nor even that part of it that destroyed the [platforms], can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.”); LAW OF WAR MANUAL, *supra* note 157, ¶ 1.11.1.2 (“Force may be used in self-defense, but only to the extent that it is required to repel the armed attack and to restore the security of the party attacked.”); see also Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 391 (1993) (“The resort to force . . . is limited by the customary law requirement that it be proportionate to the unlawful aggression that gave rise to the right. In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.” (citation omitted)).

¹⁶⁰ Taft, *supra* note 157, at 305.

¹⁶¹ Newton, *supra* note 145, at 18.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ UN panel reports have found attacks on residential targets. See *supra* note 27.

the AECA.¹⁶⁵ Such a determination can be made by either the President, who must report his determination to lawmakers in writing, or by Congress, through a joint resolution.¹⁶⁶ Military assistance may then only restart when the President determines that the country's violation has ceased and the country has given satisfactory assurances to the President that the violation will not recur.¹⁶⁷

(2) The Foreign Assistance Act

The ABA report likewise makes a strong case that the sale of arms to Saudi Arabia violates the FAA.¹⁶⁸ The FAA prohibits security assistance “to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”¹⁶⁹ “Security assistance” includes “sales of defense articles or services, extensions of credits (including participations in credits), and guaranties of loans under the Arms Export Control Act.”¹⁷⁰ Even putting to one side its actions in Yemen, Saudi Arabia itself has a poor human rights record. The U.S. State Department's Report on Human Rights in Saudi Arabia in 2016 found a range of human rights problems, including insufficient regard for collateral civilian harm in its operations in Yemen.¹⁷¹ Most abuses found in the report were not connected to Saudi Arabia's actions in Yemen, but the ABA report rightly notes that the FAA does not require a causal link between the violations of international human rights and the specific provision of military assistance.¹⁷² In sum, it appears there is a strong case that the ABA is correct that the sale of weapons to the Saudi-led coalition may violate the FAA.

(3) Presidential Policy Directive 27

¹⁶⁵ 22 U.S.C. § 2753(c).

¹⁶⁶ *Id.* § 2753(c)(3). The President is required to report to Congress “upon receipt of information that a violation . . . may have occurred.” *Id.* § 2753(c)(2). The AECA provides expedited procedures for Congress to make a determination through a joint resolution. *Id.* § 2776(b)(1)–(3); *Id.* § 2776(c)(3)(A)–(B); Kerr, *supra* note 150, at 3–4. If a joint resolution is passed by a majority of both houses, then it must be presented to the President, who would, in all likelihood, veto any attempts by Congress to block it. Therefore, Congress would likely have to muster a two-thirds veto override in order to block the sale.

¹⁶⁷ 22 U.S.C. § 2753(c)(4).

¹⁶⁸ *Id.* § 2304(a)(2) provides that the President can obtain an exception from the FAA if he “certifies in writing to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that extraordinary circumstances exist warranting provision of such assistance.” The ABA report did not indicate that such a letter has been sent, and we have not found any evidence that such a letter has been sent. Newton, *supra* note 145, at 9.

¹⁶⁹ *Id.* § 2304(a)(2).

¹⁷⁰ *Id.* § 2304(d)(2)(B).

¹⁷¹ U.S. DEP'T OF STATE, SAUDI ARABIA 2016 HUMAN RIGHTS REPORT 1–2 (2016) <https://www.state.gov/documents/organization/265730.pdf>.

¹⁷² Newton, *supra* note 145, at 10. The ABA letter goes on to argue that gross human violations by Saudi Arabia in Yemen provide an independent basis for withdrawal of support. This is likely correct but is a much more challenging argument to make. *Id.* The U.S. government presently takes the (fairly exceptional) position that most human rights obligations do not apply extraterritorially. Nonetheless, because Saudi Arabia is acting with the consent of Yemen in its operations in Yemen, it is arguably bound by Yemen's human rights obligations toward its own citizens. See Oona A. Hathaway et al, *Consent Is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict*, 165 U. PENN. L. REV. 1 (2016). But this requires several steps of reasoning, and a careful *lex specialis* analysis, both beyond the scope of this article.

The U.S. government's continued sale of weapons to Saudi Arabia may also have run counter to Presidential Policy Directive 27 on conventional arms transfers, which was in effect from January 2014 to April 2018. President Obama put the 2014 Policy in place precisely to ensure that arms transfer decisions would meet the requirements of the AECA, FAA, and other applicable laws and regulations. It stated that one goal of U.S. conventional arms transfer policy was “[e]nsuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law.”¹⁷³

The 2014 Policy required, moreover, that proposed arms transfers take into account criteria including “[t]he human rights, democratization, counterterrorism, counterproliferation, and nonproliferation record of the recipient, and the potential for misuse of the export in question,” as well as “[t]he likelihood that the recipient would use the arms to commit human rights abuses or serious violations of international humanitarian law, retransfer the arms to those who would commit human rights abuses or serious violations of international humanitarian law, or identify the United States with human rights abuses or serious violations of international humanitarian law.”¹⁷⁴ Based on these criteria, the United States' arms sales dating from the start of the war through April 2018 arguably ran directly counter to the 2014 Policy.

In April 2018, the Trump administration replaced the 2014 Policy with a revised Conventional Arms Transfer Policy.¹⁷⁵ Among other changes, the 2018 Policy asks that proposed transfers take into account the commercial interests of U.S. contractors and the broader “defense industrial base.”¹⁷⁶ The President's memo notes that the executive branch will “advocate strongly on behalf of United States companies” when it determines that transfers are in the national security interest.¹⁷⁷ This marks a “fundamental shift” in U.S. policy, according to researcher Rachel Stohl.¹⁷⁸ It is apparently motivated by the desire to expedite arms sales to allies by relaxing the former, comprehensive risk assessment process and by giving U.S. senior officials, including the President, more discretion.¹⁷⁹

The 2018 Policy may also establish a loophole for officials seeking to sell to countries that commit human rights abuses. Although the 2014 Policy prohibited arms transfers to countries committing “attacks directed against civilian objects or civilians,” the 2018 Policy only prohibits transfers to countries committing attacks “*intentionally* directed against civilian objects or

¹⁷³ THE WHITE HOUSE, PRESIDENTIAL POLICY DIRECTIVE/PPD-27 (Jan. 15, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>.

¹⁷⁴ *Id.*

¹⁷⁵ DONALD J. TRUMP, NATIONAL SECURITY PRESIDENTIAL MEMORANDUM REGARDING U.S. CONVENTIONAL ARMS TRANSFER POLICY (Apr. 19, 2018), <https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-regarding-u-s-conventional-arms-transfer-policy/>; *Conventional Arms Transfer (CAT) Policy*, U.S. DEP'T OF STATE, <https://www.state.gov/t/pm/rsat/c14023.htm> (last visited Sept. 19 2018).

¹⁷⁶ *CAT Policy*, *supra* note 175; see also Mike Stone, *Trump Launches Effort to Boost U.S. Weapons Sales Abroad*, REUTERS (Apr. 19, 2018), <https://ca.reuters.com/article/topNews/idCAKBN1HQ2E6-OCATP>.

¹⁷⁷ NATIONAL SECURITY PRESIDENTIAL MEMORANDUM, *supra* note 175; see also Rachel Stohl, *Trump Administration's New Weapons Export Policies Stress Benefit to U.S. Economy*, JUST SECURITY (Apr. 30, 2018), <https://www.justsecurity.org/55496/trump-administrations-weapons-export-policies-stress-benefit-u-s-economy/>.

¹⁷⁸ Stone, *supra* note 175 (quoting Rachel Stohl).

¹⁷⁹ Stohl, *supra* note 177.

civilians.”¹⁸⁰ This textual change has become a point of concern for several arms control advocates.¹⁸¹

It is too early to tell how exactly the Trump Administration will implement this new policy. The 2018 Policy retains human rights and international humanitarian law interests as criteria, and it is the first conventional arms transfer policy to refer expressly to the prevention of civilian harm as a policy consideration.¹⁸² If reports that the Saudi-led coalition has intentionally targeted civilians are correct,¹⁸³ then weapons transfers may violate even this much less stringent policy, despite the existence of contravening U.S. manufacturing interests.

IV. *The War Crimes Act and the U.S. Federal Statute on Aiding and Abetting*

In this Section, we first explore whether any U.S. nationals could be exposed to *direct* liability under the War Crimes Act as a result of U.S. airstrikes against AQAP and the Islamic State. We conclude that a direct charge against a U.S. person for violating the War Crimes Act appears unlikely to succeed. We then evaluate whether U.S. government and military personnel could be *indirectly* liable under the U.S. federal statute on aiding and abetting. This is based on a suggestion made by Ryan Goodman that the United States might be complicit in war crimes committed by the Saudi-led coalition.¹⁸⁴ We conclude that an aiding and abetting charge is also unlikely to succeed.

(1) *The War Crimes Act*

The War Crimes Act of 1996 (18 U.S.C. § 2441) makes it a criminal offense for U.S. nationals and members of the U.S. armed forces to commit certain violations of international humanitarian law.¹⁸⁵ The Act defines a war crime to include, among other conduct, “grave breach[es] of Common Article 3” of the Geneva Conventions.¹⁸⁶ It further defines such grave

¹⁸⁰ Presidential Policy Directive/PPD-27, *supra* note 158; NATIONAL SECURITY PRESIDENTIAL MEMORANDUM, *supra* note 175 (emphasis added).

¹⁸¹ See Alex Emmons, *How A One-Word Loophole Will Make It Easier for the U.S. to Sell Weapons to Governments that Kill Civilians*, THE INTERCEPT (July 20, 2018), <https://theintercept.com/2018/07/20/trump-conventional-arms-transfer-policy/>; Michael Selby-Green, *Experts Fear US Arms Sales to Human Rights Abusers Will Become Easier Thanks to a ‘Loophole’ in Trump’s New Policy*, BUSINESS INSIDER (July 25, 2018), <https://www.businessinsider.com/loophole-could-make-us-arms-sales-to-human-rights-abusers-easier-2018-7>.

¹⁸² Sec. 2(e), NATIONAL SECURITY PRESIDENTIAL MEMORANDUM, *supra* note 175; Stohl, *supra* note 177.

¹⁸³ See *infra* Section II.C.2.

¹⁸⁴ 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), <https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen>.

¹⁸⁵ 18 U.S.C. § 2441.

¹⁸⁶ 18 U.S.C. § 2441(c). The War Crimes Act originally encompassed all breaches of Common Article 3. However, in 2006 Congress passed the Military Commissions Act, which narrowed domestic criminalization to apply only to a “grave breach” of Common Article 3. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 18 U.S.C. § 2241 and 10 U.S.C. §§ 948-49 (2006)). Common Article 3 and Additional Protocol II to the Geneva Conventions govern non-international armed conflicts—like the one in Yemen. Common Article 3 refers to Article 3, a provision shared among all four Geneva Conventions. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. However, because the

breaches to include torture, cruel or inhuman treatment, murder, and intentionally causing serious bodily injury.¹⁸⁷ “Murder” is defined as:

The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.¹⁸⁸

Despite this guidance, the scope of Common Article 3’s prohibition on murder remains unsettled. Some scholars, including Sarah Knuckey in a commentary on the 1949 Geneva Conventions, have argued that Common Article 3’s prohibition on killing civilians does not apply to conduct in hostilities, and rather pertains narrowly to situations where a party exerts control over civilian populations—for example, those who are *hors de combat* and detainees.¹⁸⁹ Under this interpretation, Common Article 3 protections would not extend to civilians in areas of active hostilities. Consequently, civilian deaths resulting from indiscriminate or disproportionate attacks would not amount to the “murder” under Common Article 3 and thus would *not* be considered a war crime pursuant to the War Crimes Act.

Nonetheless, there is an argument that “grave breaches” of Common Article 3, as defined by the War Crimes Act, *do* apply to the conduct of hostilities. First, a number of authorities have concluded or suggested that the prohibition on murder in Common Article 3 may, in some cases, extend to protection from indiscriminate and disproportionate targeting during the conduct of hostilities.¹⁹⁰ Second, the language in the War Crimes Act itself appears to contemplate the

United States is not a party to Additional Protocol II, only “grave breaches” of Common Article 3 amount to “war crimes” under the statute.

¹⁸⁷ 18 U.S.C. § 2441(d)(1).

¹⁸⁸ *Id.*, § 2441(d)(1)(D).

¹⁸⁹ Sarah Knuckey, *Murder in Common Article 3*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 450, 453-455 (Andrew Clapham, Paola Gaeta & Marco Sassoli eds., 2015).

¹⁹⁰ The ICTY has recognized that attacks on civilians that result in civilian deaths can be characterized as “murder.” *See, e.g.*, Prosecutor v. Pavle Strugar, IT-01-42-T, Case No. Trial Chamber Judgment, ¶ 240 (Int’l Crim. Trib. For the Former Yugoslavia Jan. 31 2005) (“...where a civilian population is subject to an attack such as an artillery attack, which results in civilian deaths, such deaths may appropriately be characterized as murder, when the perpetrators had knowledge of the probability that the attack would cause death.”); Prosecutor v. Blaškić, IT-95-14-T, Trial Chamber Judgment ¶ 511, 630 (Int’l Crim. Trib. For the Former Yugoslavia Mar. 3 2000) (Blaškić’s conviction for unlawful attack on civilians was based in part on the finding that he “terrorised [sic] the civilians by intensive shelling, murders, and sheer violence”). Commentaries have likewise acknowledged the possibility. NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) at 28; A. Cassese, ‘The Geneva Conventions of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law’, 3 UCLA PACIFIC BASIN LAW JOURNAL (1984) 55, at 107 (arguing that although Common Article 3 “on the face of it” does not “have any direct bearing on the actual conduct of hostilities,” on “close scrutiny,” it “contains some indirect regulation of the conduct of hostilities, designed to protect civilians,” and suggesting that “prohibitions” on targeting civilians “clearly follow from the provision banning the infliction of violence on the life and persons of non-combatants” in Common Article 3). In addition, the UN Mission to El Salvador cited Common Article 3 to provide support for the prohibition against targeting civilians. The report cited the “the prohibition on the indiscriminate use of such weapons laid down in article 3” for the general rule that “weapons must not be used indiscriminately....” UN Observer Mission in El Salvador, A/46/876 (19 February 1992), ¶ 143. The International Commission of Inquiry on Libya also cited Common Article

commission of “murder” during the conduct of hostilities. The War Crimes Act’s definition of “murder” does not include a clause indicating that murder applies specifically to situations where a person is “within [an individual’s] custody or physical control.” By contrast, such a limitation is present in the War Crimes Act’s definitions of both torture and cruel or inhumane treatment.¹⁹¹ Moreover, the War Crimes Act explicitly precludes the application of ‘murder’ to instances of “collateral damage” or “death, damage, or injury incident to a lawful attack.”¹⁹² Together, these carve-outs suggest that the “murder” may apply to *unlawful* targeting operations.

International reports have raised concerns about civilian casualties resulting from U.S. operations. In Yemen, unofficial reports indicate that the United States increased the number of air strikes from 21 strikes in 2016 to 131 in 2017.¹⁹³ The escalation in airstrikes has sent “claims of civilian casualties skyrocketing.”¹⁹⁴ A group of NGOs released a statement in March 2018 expressing deep concern over reported changes to the United States’ policy on the use of drone strikes.¹⁹⁵ The United States has also recently increased the number of special operations ground raids in Yemen. These ground operations have also resulted in civilian deaths. For instance, in January 2017, a U.S. ground raid in Al-Bayda in coordination with the United Arab Emirates killed at least fourteen civilians, including nine children.¹⁹⁶ In May of that year, a similar ground raid also led to the deaths of a number of civilians, again including children.¹⁹⁷

The mere fact of civilian deaths is not alone sufficient, however, to establish liability for unlawful targeting operations that lead to murder under War Crimes Act. Because prosecutable

3 in relation to the principle that “[i]nternational humanitarian law prohibits the intentional targeting of civilians.” 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 (12 January 2012), ¶ 156. See also Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011 ¶ 193, 206, 242 (“In terms of paragraph (1)(a) of Common Article 3, i.e. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, credible allegations point to the murder of civilians in widespread shelling of an indiscriminate nature by the SLA”; “The credible allegations of attacks on hospitals and humanitarian objects discussed above, in spite of their distinctive emblems and locations known by the government...point to murder in breach of Common Article 3, in that targeting....”).

¹⁹¹ 18 U.S.C. § 2441(d)(1)(D); 18 U.S.C. § 2441(d)(1)(A)–(B).

¹⁹² 18 U.S.C. § 2441(d)(3).

¹⁹³ Kube, Windrem, and Arkin, *supra* note 39; see also *Yemen: Events of 2017*, HUMAN RIGHTS WATCH (2017), <https://www.hrw.org/world-report/2018/country-chapters/yemen>.

¹⁹⁴ Spencer Ackerman, *‘They’re Going to Kill Me Next’: Yemen Family Fears Drone Strikes Under Trump*, THE GUARDIAN (Mar. 30, 2017), <https://www.theguardian.com/world/2017/mar/30/yemen-drone-strikes-trump-escalate>; see also Loveday Morris & Liz Sly, *Panic Spreads in Iraq, Syria as Record Numbers of Civilians are Reported Killed in U.S. Airstrikes*, WASH. POST (Mar. 28, 2017), https://www.washingtonpost.com/world/middle_east/panic-spreads-in-iraq-syria-as-record-numbers-of-civilians-are-reported-killed-in-us-strikes/2017/03/28/3cbce7f8-13bb-11e7-bb16-269934184168_story.html?utm_term=.89d1086cccd4.

¹⁹⁵ *NGO Statement on Reported Changes to U.S. Policy on Use of Armed Drones and Other Lethal Force*, HUMAN RIGHTS WATCH (Mar. 7, 2018), <https://www.hrw.org/news/2018/03/07/ngo-statement-reported-changes-us-policy-use-armed-drones-and-other-lethal-force>.

¹⁹⁶ *Yemen: U.S. Should Investigate Civilian Deaths in Raid*, HUMAN RIGHTS WATCH (Feb. 24, 2017), <https://www.hrw.org/news/2017/02/24/yemen-us-should-investigate-civilian-deaths-raid>; see also W.J. Hennigan, *Trump Steps up Airstrikes against Al-Qaeda in Yemen: More Ground Raids Could Follow*, L.A. TIMES (Mar. 4, 2017, 5:00 AM), <http://www.latimes.com/world/middleeast/la-fg-trump-yemen-20170304-story.html>.

¹⁹⁷ Eric Schmitt & Helene Cooper, *Navy SEALs Kill 7 Militants in Yemen Raid but Suffer Injuries*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/world/middleeast/navy-seals-yemen-raid.html>.

grave breaches of Common Article 3 do not include acts related to lawful “collateral damage” or “death, damage, or injury incident to lawful attack,” it would be necessary to establish that civilians were intentionally targeted or that the attack was knowingly disproportionate.¹⁹⁸ At present, there have been no public reports of such intentional or knowingly disproportionate strikes on civilians or civilian targets by U.S. forces during their operations against AQAP and ISIS.

The U.S. has never prosecuted anyone under the War Crimes Act, so the precise bounds of liability under the Act remain untested.¹⁹⁹ Nonetheless, it appears unlikely that U.S. persons will face direct liability under the Act because there is no public evidence that the United States is directly engaged in “grave breaches” of Common Article 3 in Yemen as defined by the War Crimes Act.

As we will show in the next section, however, there is a separate question of whether U.S. persons could be found liable for *aiding and abetting* violations of the War Crimes Act for actions taken in support of the Saudi-led coalition in Yemen including support for coalition airstrikes and the alleged torture committed by United Arab Emirates officials in Yemeni prisons.

(2) U.S. Federal Statute on Aiding and Abetting: War Crimes in Yemen

On 13 March 2018, U.S. Army Gen. Joseph Votel, the head of U.S. Central Command (CENTCOM), acknowledged before the Senate Armed Services Committee that the command did not track the strikes carried out during the Saudi-led coalition missions it was refueling.²⁰⁰ This admission was striking, given allegations described above that the Saudi-led coalition has been alleged to have engaged in repeated violations of international humanitarian law in Yemen. Numerous reports suggest that the Saudi-led coalition has targeted protected persons and objects, including civilians,²⁰¹ hospitals,²⁰² and food supplies.²⁰³ Additional reports allege that U.S. military

¹⁹⁸ See 18 U.S.C. § 2441(d)(3). A disproportionate attack may fall within Article 3’s prohibitions, if the definition proposed by some scholars cited above are followed. See, e.g., Knuckey, *supra* note 189; notes 175–78.

¹⁹⁹ MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL33662, THE WAR CRIMES ACT: CURRENT ISSUES 3 (2009), <https://fas.org/sgp/crs/intel/RL33662.pdf>.

²⁰⁰ As noted earlier, the refueling missions have since been halted. See John Hudson & Missy Ryan, *Trump administration to end refueling of Saudi-coalition aircraft in Yemen conflict*, WASH. POST (Nov. 10, 2018), https://www.washingtonpost.com/world/national-security/trump-administration-to-end-refueling-for-saudi-coalition-aircraft-in-yemen/2018/11/09/d08ff6c3-babd-4958-bcca-cdb1caa9d5b4_story.html?utm_term=.b1007dde9aeb; Stewart, *U.S. Halting Refueling of Saudi-led Coalition Aircraft in Yemen’s War*, *supra* note 54. Legal concerns about past U.S. refueling support, however, remain.

²⁰¹ *Bombing Businesses: Saudi Coalition Airstrikes on Yemen’s Civilian Economic Structures*, HUMAN RIGHTS WATCH (July 11, 2016), <https://www.hrw.org/report/2016/07/11/bombing-businesses/saudi-coalition-airstrikes-yemens-civilian-economic-structures>; *Saudi Coalition Airstrikes Target Civilian Factories in Yemen*, HUMAN RIGHTS WATCH (July 11, 2016), <https://www.hrw.org/news/2016/07/11/saudi-coalition-airstrikes-target-civilian-factories-yemen>.

²⁰² *Saudi ‘should be blacklisted’ over Yemen hospital attacks*, BBC NEWS (Apr. 20, 2017), <http://www.bbc.com/news/world-middle-east-39651265>.

²⁰³ Iona Craig, *Bombed into Famine: How Saudi Air Campaign Targets Yemen’s Food Supplies*, THE GUARDIAN (Dec. 12, 2017), <https://www.theguardian.com/world/2017/dec/12/bombed-into-famine-how-saudi-air-campaign-targets-yemens-food-supplies>.

interrogators cooperated with United Arab Emirates officials accused of torturing AQAP detainees in secret prisons across southern Yemen.²⁰⁴

The federal statute for aiding and abetting (18 U.S.C. § 2) provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.²⁰⁵

“Offense” is defined as “any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress,”²⁰⁶ and thus includes violations of the War Crimes Act.

Under Section 2(a), U.S. persons assisting the Saudi-led coalition can only be found liable for aiding and abetting a violation of the War Crimes Act where there has been an underlying violation of the War Crimes Act. Because the War Crimes Act only applies to U.S. nationals and members of the U.S. armed forces—not to members of foreign armed forces—individuals in the U.S. armed forces cannot be held liable for aiding and abetting violations under § 2(a) for their assistance to the Saudi-led coalition. As previously noted, it appears unlikely that a court would find a primary violation by a U.S. person under the War Crimes Act. Therefore, liability under § 2(a) is unlikely as well. If a primary violation of the Act were found, however, then those who assisted that crime could potentially be liable under § 2(a).

U.S. persons participating in assisting the Saudi-led coalition are more likely to be held liable under Section 2(b), the “perpetration by means” clause of the statute, which does not require an underlying violation of the War Crimes Act. This clause implements the “innocent-instrumentality doctrine” in criminal law, which applies in cases where an agent who causes harm has not actually committed any crime, but would have been guilty had *she* committed the act *herself*.²⁰⁷ The U.S. Attorneys’ Manual explains that § 2(b) “removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.”²⁰⁸ Under § 2(b), then, even though those participating directly in the Saudi-led coalition could not be liable under the War Crimes Act (because of the nationality requirement in the War Crimes Act), members of

²⁰⁴ Ahmed Al-Haj, *Yemen to probe alleged torture of detainees by UAE, U.S. interrogators*, CHI. TRIB. (June 24, 2017), <http://www.chicagotribune.com/news/nationworld/ct-yemen-torture-uae-us-interrogators-20170624-story.html>.

²⁰⁵ 18 U.S.C. § 2.

²⁰⁶ 18 U.S.C. § 3156(a)(2).

²⁰⁷ See, e.g., Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 369 (1985).

²⁰⁸ U.S. ATTORNEYS’ MANUAL, CRIMINAL RESOURCE MANUAL § 2472, (October 1998), <https://www.justice.gov/usam/criminal-resource-manual-2472-statutory-history>.

the U.S. armed forces might be prosecutable under § 2(b) for *aiding* violations that would amount to war crimes under the Act.²⁰⁹

In order to establish liability under § 2(b), the prosecution must prove four things: (1) the Saudi-led forces committed an act, which if directly performed by United States officials would constitute a violation of the War Crimes Act, (2) assistance from the United States officials caused the Saudi-led coalition to perform said act, (3) the United States officials did so “willfully,” and (4) United States officials possessed the requisite *mens rea* elements required by the War Crimes Act. We briefly address each element in turn, concluding that it is possible, though perhaps not likely, that members of the U.S. Armed Forces could be found liable for aiding and abetting violations of the War Crimes Act.

(a) *Acts Committed by Saudi-led Coalition*

The Saudi-led coalition has allegedly engaged in “intentional targeting of civilians” in Yemen. The UN Panel of Experts on Yemen, established pursuant to Security Council resolution 2140 implicated the Saudi-led coalition in a numerous violations of international humanitarian law in two separate reports.²¹⁰ Non-governmental organizations, including Amnesty International and Human Rights Watch, have also gathered evidence of Saudi-led coalition violations.²¹¹ These violations likely amount to war crimes under the statutory definitions provided in subsection (c)(3) of the War Crimes Act, which addresses “grave breaches” of Common Article 3.

The prohibition on “grave breaches” of Common Article 3, as defined by the War Crimes Act, likely applies to the conduct of hostilities. As noted above, there have been numerous credible reports that the Saudi-led coalition has engaged in the intentional targeting of civilians. For

²⁰⁹ Because the War Crimes Act is a statute that can only be violated by a specific class of individuals, it falls into a semi-insulated sub-category of “nonproxyable” offenses, which are violations that must be committed by a special class of designated persons and “never through the action of another.” Kadish, *supra* note 207, 373-374. In other words, because the War Crimes Act only applies to a special class of persons—either “a member of the Armed Forces of the United States or a national of the United States”—it could constitute a “nonproxyable” offense and thus, fall outside of the scope of the innocent-instrumentality doctrine. 18 U.S. Code § 2441(b). Some courts, however, have convicted defendants under the innocent-instrumentality doctrine, even where the underlying statute applied to a narrow class of persons. *See e.g., United States v. Walser*, 3 F.3d 380, 387 (11th Cir. 1993) (rejecting the defendant’s claims that she could not be found guilty of perjury because she was not a member of the special class of persons found in the statute. The court found Defendant guilty of aiding and abetting the perjury of a witness even though she was not herself placed under oath).

²¹⁰ UN Panel of Experts on Yemen, *supra* note 139; U.N. High Commissioner for Human Rights, *Situation of Human Rights in Yemen, including Violations and Abuses since September 2014: Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts and a Summary of Technical Assistance Provided by the Office of the High Commissioner to the National Commission of Inquiry*, A/HRC/39/43 (Aug. 17, 2018), https://www.ohchr.org/Documents/Countries/YE/A_HRC_39_43_EN.docx.

²¹¹ *See e.g.,* Kristine Beckerle, *U.S., Gulf Allies, Must Own Up to Their Role in Yemen’s Human Rights Abuses*, HUMAN RIGHTS WATCH (June 29, 2017, 4:26 PM), <https://www.hrw.org/news/2017/06/29/us-gulf-allies-must-own-their-role-yemens-human-rights-abuses>; Marjorie Cohn, *Saudi Arabia is Killing Civilians with U.S. Bombs*, HUFFINGTON POST (Jan. 25, 2017, 10:18 AM), https://www.huffingtonpost.com/marjorie-cohn/saudi-arabia-is-killing-c_b_9068780.html; *Yemen: Coalition Airstrikes Deadly for Children*, HUMAN RIGHTS WATCH (Sept. 12, 2017, 12:01 AM), <https://www.hrw.org/news/2017/09/12/yemen-coalition-airstrikes-deadly-children>; *Yemen: ‘Nowhere Safe for Civilians’: Airstrikes and Ground Attacks in Yemen*, AMNESTY INT’L (Aug. 18, 2015), <https://www.amnesty.org/en/documents/mde31/2291/2015/en/>.

example, on March 9, 2018, in a hearing before the Senate Armed Services, Senator Elizabeth Warren alleged that a strike undertaken by the Saudi-led coalition in February in Sa'ada, a northern Yemeni town, where the Saudi-led coalition was a "double-tap" airstrike, targeting medical personnel.²¹² This is not the first "double tap" allegation against the Saudi-led coalition. A video provided online by *The Telegraph*, claims to show a "double tap" strike against a funeral hall in Sana'a, Yemen's most populous city, from October 9, 2016, which allegedly killed more than 140 people and injured at least 525 others.²¹³ The allegations of Saudi Arabia's "intentional targeting of civilians," if substantiated in federal court, would almost certainly amount to war crimes under the standard prescribed by the War Crimes Act as contrary to international law.²¹⁴

In addition to U.S. support for airstrikes by the Saudi-led coalition, there have been reports that the U.S. may have been complicit in torture conducted by the United Arab Emirates (UAE) as part of the Yemen conflict. As previously noted, the UAE, a member of the Saudi-led coalition, has been accused of operating terrorism detention centers in Yemen where they employ techniques such as beating and electrocution.²¹⁵ The Associated Press reports that the United States has assisted UAE interrogations of individuals suspected of being members of AQAP in these detention facilities.²¹⁶ According to the AP, "U.S. defense officials speaking on condition of anonymity to discuss the topic, told AP that American forces do participate in interrogations of detainees at locations in Yemen, provide questions for others to ask, and receive transcripts of interrogations from Emirati allies." Acts of torture, as well as cruel and inhumane treatment, would amount to "grave breaches" of Common Article 3, as defined by subsection (a) and (b) of the War Crimes Act. If substantiated, these acts would meet the first aiding and abetting element, because they would constitute a violation of the War Crimes Act if United States officials had directly performed the acts.²¹⁷ Indeed, the case for torture charges is even stronger than for targeting violations, as the alleged victims were held in detention by UAE authorities, which eliminates any doubt about the applicability of Common Article 3.

(b) Causation

²¹² A double tap strike consists of two consecutive air strikes. The first strikes an initial target and the second targets civilians and first-responders tending to victims of the first strike. *See also Air Strikes Kill Five Civilians in Yemen*, REUTERS (Feb. 27, 2018), <https://www.reuters.com/article/us-yemen-security/air-strikes-kill-five-civilians-in-yemen-reuters-witness-idUSKCN1GB2OU>.

²¹³ Keely Lockhart, *Video Shows Moment 'Double Tap' Air Strike Hits Yemen Funeral Home*, TELEGRAPH (Oct. 9, 2016), <https://www.telegraph.co.uk/news/2016/10/09/video-shows-moment-double-tap-air-strike-hits-yemen-funeral/>.

²¹⁴ Newton, *supra* note 145, at 18.

²¹⁵ Kareem Fahim, *Beatings, Shocks, and 'the Grill': Reports allege torture in secret prisons run by United Arab Emirates in Yemen*, WASH. POST (June 22, 2017) http://wapo.st/2rZpP5b?tid=ss_tw&utm_term=.7e380a16ad46; *Report: Mass Torture in Network of UAE-run Prisons in South Yemen*, AL JAZEERA (Aug. 12, 2018), <https://www.aljazeera.com/news/2018/08/report-mass-torture-network-uae-run-prisons-south-yemen-180812144559235.html>.

²¹⁶ Maggie Michael, *In Yemen's Secret Prisons, UAE tortures and U.S. interrogates*, ASSOCIATED PRESS (June 22, 2017), <https://www.apnews.com/4925f7f0fa654853bd6f2f57174179fe>.

²¹⁷ *See also* Steve Vladeck, *The Potential Legal Implications for the U.S. in the AP's Disturbing UAE Torture Scoop*, JUST SECURITY (June 22, 2017), <https://www.justsecurity.org/42428/u-s-law-implications-aps-disturbing-uae-torture-scoop>.

Any prosecution under the “perpetration by means” statute (18 U.S.C. § 2(b)) would have to prove a clear causal link between U.S. support for the Saudi-led coalition and Saudi violations. Although there is some ambiguity in the case law about the precise causal standard, it appears that in order to establish causation, the prosecution would have to demonstrate that without the support of the United States, the Saudi-led coalition would not have carried out the attacks that allegedly violated international humanitarian law. Such a causal connection would be difficult to establish without a deep factual inquiry. However, based on publicly accessible information, a colorable argument exists that U.S. support plays a causal role in violations committed by the Saudi-led coalition for two reasons.

First, the Saudi-led coalition is heavily reliant on U.S. weapons transfers to continue its operations in Yemen. The UN Panel of Experts on Yemen and human rights organizations documenting alleged violations in Yemen report that U.S. weapons manufacturers produced many weapons recovered during post-strike documentation. The UN Panel of Experts on Yemen found that U.S.-manufactured weapons were used in at least half the documented unlawful attacks committed by the Saudi-led coalition in 2017. These include attacks committed with bombs from the Mark 80 series, which are “general purpose” bombs produced by the U.S, and U.S.-produced “Paveway” guidance units.²¹⁸ Between March 2015 and December 2016, Human Rights Watch found U.S.-supplied weapons at the site of 23 unlawful coalition airstrikes.²¹⁹ Human Rights Watch also reported that U.S. weapons were used in two of the deadliest airstrikes in the conflict—including in strikes that killed at least 97 and 100 people respectively.²²⁰ And most recently, an investigative report by CNN linked shrapnel from U.S. bombs to numerous civilian deaths in Yemen.²²¹

Second, until recently, the Saudi-led coalition depended on mid-air refueling by U.S. jets to continue its operations in Yemen. The United States engaged in mid-air refueling for coalition planes from 2015 until November 2018.²²² A spokeswoman for the U.S. Central Air Force Command reported that the United States transferred over 88 million pounds of fuel to more than 2,800 aircraft refueling operations in the Horn of Africa between January and mid-March 2018.²²³ The U.S. Air Force did not report the numbers of specific refueled flights to Yemen or where

²¹⁸ *Final report of the Panel of Experts in accordance with paragraph 6 of resolution 2342 (2017)*, U.N. Doc. S/2018/68 (2018), <https://reliefweb.int/sites/reliefweb.int/files/resources/N1800513.pdf> (documenting attacks committed with these weapons on (at the very least) the following dates in 2017: 7 June, 4 August, 23 August, 24 September, 1 November, 10 November, 14 November).

²¹⁹ *Yemen: U.S.-Made Bombs Used in Unlawful Airstrikes*, HUMAN RIGHTS WATCH (Dec, 8, 2016 12:00AM), <https://www.hrw.org/news/2016/12/08/yemen-us-made-bombs-used-unlawful-airstrikes>.

²²⁰ *Id.*

²²¹ Nima Elbagir, Salma Abdelaziz and Laura Smith-Spark, *Exclusive Report: Made in America -- Shrapnel found in Yemen ties US bombs to string of civilian deaths over course of bloody civil war*, CNN (Sept. 18, 2018) <https://www.cnn.com/interactive/2018/09/world/yemen-airstrikes-intl/>.

²²² Dion Nissenbaum, *U.S. Military Planes Cleared to Refuel Saudi Jets Bombing Yemeni Targets*, WALL STREET J. (April 2, 2015 5:36PM), <https://www.wsj.com/articles/u-s-military-planes-cleared-to-refuel-saudi-jets-bombing-yemeni-targets-1428010588>; Stewart, *U.S. Halting Refueling of Saudi-led Coalition Aircraft in Yemen's War*, *supra* note 54.

²²³ Oriana Pawlyk, *General Argues to Continue Refueling Saudi Planes in Yemen Fight*, MILITARY.COM (Mar. 13, 2018), <https://www.military.com/daily-news/2018/03/13/general-argues-continue-refueling-saudi-planes-yemen-fight.html>.²²⁴ Samuel Oakford, *The U.S. Military Can't Keep Track of Which Missions It's Fueling in Yemen War*,

the refueling takes place—but many of these refueling operations are believed to have been for the Saudi-led coalition.²²⁴

U.S. Air Force service tankers, like the U.S. Air Force KC-135 Stratotanker and the KC-10 Extender, were engaged in mid-air refueling operations for the coalition. The U.S. Armed Forces lauded these aircraft as “critical” in previous operations. For example, the U.S. Air Force stated that “[d]uring operations Enduring Freedom and Iraqi Freedom, KC-10s flew more than 1,390 missions delivering critical air refueling support to numerous joint and coalition receiver aircraft.”²²⁵ In an acquisition report, the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics wrote that Operations Enduring and Iraqi Freedom “could not have happened without these aerial refueling capabilities.”²²⁶ The Pentagon said that aerial refueling is a “vital” capability and allows “rapid deployment of forces to contingencies.”

Given the Saudi-led coalition’s apparent reliance on U.S. provided weapons and mid-air refueling operations, it is likely that without U.S. support, the Saudi-led coalition would not have been able to carry out many of its airstrikes. Thus, there is a strong claim that the U.S. support “caused” many of the Saudi-led coalition’s alleged violations of international humanitarian law in Yemen. The recent decision to halt refueling efforts appears to have been motivated in part by just such concerns.²²⁷ While the decision to halt refueling missions will likely reduce the U.S. responsibility for future violations, past violations remain.

Similarly, if the facts alleged are substantiated, there is a strong argument to be made that the U.S. has “caused” UAE torture of Yemeni detainees, which would amount to a “grave breach” of Common Article 3. For example, if the United States has provided questions to UAE interrogators and detainees were subjected to torture to obtain answers to those questions, the U.S. officials could reasonably be said to have “caused” that torture.

(c) *Willfully*

Federal courts have interpreted the term “willfully” in three different ways. In the first interpretation, the term “willfully” means an intentional violation of a known duty. In the second, the term requires that the defendant knowingly violate a known duty. In the third, “willfully” means that a defendant knowingly engages in an act, without regard for whether or not he knows that act violates a duty (effectively merging “willfully” with the Model Penal Code definition of

INTERCEPT (Sept. 18, 2017), <https://theintercept.com/2017/09/18/the-u-s-military-cant-keep-track-of-which-missions-its-fueling-in-yemen-war>.

²²⁴ Samuel Oakford, *The U.S. Military Can’t Keep Track of Which Missions It’s Fueling in Yemen War*, INTERCEPT (Sept. 18, 2017), <https://theintercept.com/2017/09/18/the-u-s-military-cant-keep-track-of-which-missions-its-fueling-in-yemen-war>.

²²⁵ *Fact Sheet: KC-10 Extender*, U.S. AIR FORCE (Oct. 1, 2003), <http://www.af.mil/About-Us/Fact-Sheets/Display/Article/104520/kc-10-extender>.

²²⁶ *Defense Science Board Task Force Report on Aerial Refueling Requirements*, OFFICE OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION, TECH., AND LOGISTICS, DEP’T OF DEF. (May 2004), <https://www.acq.osd.mil/dsb/reports/2000s/ADA423583.pdf>, at *iii.

²²⁷ Stewart, *U.S. Halting Refueling of Saudi-led Coalition Aircraft in Yemen’s War*, *supra* note 54.

“knowingly” with regard to his conduct.) (Indeed, the matter is the subject of a recently filed cert petition to the U.S. Supreme Court.)²²⁸

No legislative history exists suggesting why the U.S. Senate revised 18 U.S.C. § 2(b), to read “willfully causes” instead of its original form, “causes.”²²⁹ Interpreting 18 U.S.C. § 2(b), various federal courts have suggested that § 2(b) requires the defendant to intentionally cause an intermediary to commit an act prohibited by the underlying statute—in other words, “an individual ‘willfully’ causes an offense when he intends the commission of conduct that constitutes a crime and then intentionally uses someone else to commit it.”²³⁰ It seems clear that the United States does not desire that the Saudi-led coalition engage in international humanitarian law violations. In fact, documents acquired from the U.S. Department of State in a 2016 FOIA request indicate that the United States endeavors to ensure international humanitarian law compliance in Yemen.²³¹

Yet it is not clear that such intent is necessary to establish that the U.S. officials have acted “willfully.” If a court were to interpret “willfully” to mean the defendant “knowingly” enabled the Saudi-led coalition to commit international humanitarian law violations, U.S. officials might be liable. In the context of § 2(a) (the classic aiding and abetting clause) federal courts have inferred intent where an actor “knowingly provides essential assistance.” For example, in *United States v. Zafiro*, the Seventh Circuit held that where a defendant “knowingly provides essential assistance, we can infer that [that person] does want [the primary actor] to succeed, for that is the natural consequence of his deliberate act.”²³²

Whether or not the United States support for the Saudi-led coalition would satisfy this element depends almost entirely on how the federal courts decide to interpret “willfully” in the statute. However, U.S. engagement with the UAE interrogating forces might give rise to liability under either standard. In a chilling report from the Associated Press, one witness from the Yemeni security forces reported that American forces were present and “at times only yards (meters) away” from the commission of the alleged abuses.²³³ If substantiated, such behavior would certainly meet the “knowledge standard” and may even indicate that U.S. forces “intentionally” caused the UAE intermediary to commit the violations. It is important to note that “mere presence” will not always

²²⁸ Brief for the Cato Institute et al. as Amicus Curiae supporting Petitioners, *Ellison v. United States on Petition for Writ of Certiorari* (2018) (No. 17-1134).

²²⁹ CHARLES DOYLE, CONG. RESEARCH. SERV., R43769, AIDING, ABETTING, AND THE LIKE: AN OVERVIEW OF 18 U.S.C. § 2, (2014), <https://fas.org/sgp/crs/misc/R43769.pdf>.

²³⁰ *Id.*; see e.g., *United States v. Hsia*, 176 F.3d 517, 522 (D.C. Cir. 1999) (“[T]he government may show mens rea simply by proof (1) that the defendant knew that the statements to be made were false...and (2) that the defendant intentionally cause such statements to be made by another.”); *United States v. Gabriel*, 125 F.3d 89, 101 (2d Cir. 1997) (“The most natural interpretation of section 2(b) is that a defendant with the mental state necessary to violate the underlying section is guilty of violating that section if he intentionally causes another to commit the requisite act.”).

²³¹ E-mail, Re: For clearance: Paper on engaging Saudis on LOAC issues, (Aug. 18-19, 2015), U.S. DEPT. OF STATE, Case No. F-2015-16997 Doc No. C06017496 (Jul. 5, 2016), 1; E-Mail, FW: D meeting – Yemen civilian casualties and LOAC, (Jan. 20, 2016), U.S. DEPT. OF STATE, Case No. F-2015-16997 Doc No. C06018588 (Jul. 5, 2016) <https://goo.gl/YRi5m6>; Talking Points to Accompany Critical Infrastructure List as of October 16, 2015, U.S. DEPT. OF STATE, Case No. F-2015-16997 Doc No. C06018604 (Jul. 5, 2016) <https://goo.gl/CWWS9i>.

²³² 945 F.2d 881, 887 (7th Cir. 1991).

²³³ Al-Haj, *supra* note 204.

satisfy the ‘intent’ standard under legal theories of aiding and abetting,²³⁴ but presence in addition to an express or implied understanding *can* satisfy ‘intent.’²³⁵

(d) *Requisite Mens Rea of Underlying Statute*

Under the War Crimes Act, an individual can be guilty of the war crime of ‘murder’ if he or she “intentionally kills...one or more persons taking no active part in the hostilities.”²³⁶ And an individual can be guilty of a war crime of “torture” or “cruel or inhumane treatment” if the person “intend[s] to inflict to inflict severe or serious physical or mental pain or suffering.”²³⁷ To find a party guilty of aiding and abetting by their presence alone, a defendant must also be found to have some connection to the crime perpetrated in their presence even if they do not carry it out.²³⁸

With regards to the targeting violations, one factor that might militate against finding the requisite intent is the fact that the United States appears to have taken steps to reduce the likelihood that U.S. support would be used to intentionally kill persons “taking no active part in the hostilities” in Yemen. For example, as a condition for restarting U.S. military assistance in June 2017, the United States required a certification that Saudi Arabia would take greater care to avoid hitting civilian targets and otherwise causing disproportionate harm.²³⁹ Likewise, in September 2018, Secretary of State Pompeo certified to Congress that Saudi Arabia and the United Arab Emirates are “taking appropriate steps to avoid disproportionate harm to civilians and civilian infrastructure.”²⁴⁰ The measures taken by the United States to obtain assurances from Saudi Arabia that its practices are consistent with international humanitarian law might suggest members of the U.S. Armed Forces do not possess the requisite *mens rea* to be held accountable for aiding and abetting violations of the War Crimes Act under § 2(b).

Nonetheless, these assurances may not be sufficient to disprove *mens rea* if the United States knows the assurances to be false or ineffective. For example, Andrew Exum, a former Deputy Assistant Secretary of Defense for Middle Eastern Affairs, has argued that there are deep, systemic problems in the Saudi military that render it incapable of carrying out independent air operations without violating the international humanitarian law principle of discrimination.²⁴¹

²³⁴ More than mere presence at the scene is required to establish aiding and abetting. U.S. ATT’YS’ MANUAL, CRIM. RESOURCE MANUAL § 2478 (last updated October 1998), <https://www.justice.gov/usam/criminal-resource-manual-2478-what-not-aiding-and-abetting>; *see, e.g.*, United States v. de la Cruz-Paulino, 61 F.3d 986, 998 (1st Cir. 1995) (“To be convicted of aiding and abetting, more than ‘mere presence’ at the scene is required.”).

²³⁵ Thomas C. Creasy, Jr., *Criminal Law—Aiding and Abetting—Presence as a Factor*, 35 N.C. L. REV. 285, 286–88 (1957), <http://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4983&context=nlr>.

²³⁶ 18 U.S.C. § 2441(d)(1)(D).

²³⁷ *Id.* at (d)(1)(A)–(B).

²³⁸ Creasy, *supra* note 235.

²³⁹ 2019 NDAA, *supra* note 78, § 1290(c).

²⁴⁰ Ben Hubbard, *Yemen Civilians Keep Dying, but Pompeo Says Saudis Are Doing Enough*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/world/middleeast/saudi-yemen-pompeo-certify.html>.

²⁴¹ Andrew Exum, *What’s Really at Stake for America in Yemen’s Conflict*, ATLANTIC (Apr. 14, 2017), <https://www.theatlantic.com/international/archive/2017/04/yemen-trump-aqap/522957>; Ryan Goodman, *Former Deputy Assist Sec of Defense: “Glaring” “deficiencies” in Saudi Air Force responsible for civilian casualties in Yemen*, JUST SECURITY (Apr. 17, 2017 11:07 AM), <https://www.justsecurity.org/40040/deputy-assist-sec-defense-glaring-deficiencies-saudi-air-force-responsible-civilian-casualties-yemen>.

Establishing the *mens rea* of intent in the context of the alleged ‘torture’ or ‘cruel and inhuman treatment’ of AQAP detainees by the UAE would rely on an in-depth fact analysis. However, if U.S. military personnel were indeed present at the interrogations where torture took place, a court might readily infer intent. (See our analysis above suggesting that courts have been willing to infer intent where a person “knowingly provides essential assistance.”) Even if U.S. forces were not present, but provided essential interrogation questions, a court might infer intent, satisfying this prong of the § 2(b) ‘perpetration by means’ analysis.

(e) *Conclusion*

U.S. government personnel that have participated in mid-air refueling, targeting assistance, and other support to the Saudi-led coalition face limited legal risk of prosecution for aiding and abetting violations of the War Crimes Act, because establishing the requisite *mens rea* is likely to be difficult, if not impossible. However, if the UAE engaged in torture during interrogation with the participation of U.S. personnel, those personnel face greater potential liability for aiding and abetting violations of the War Crimes Act.

Regardless of their legal risk, U.S. government personnel should continue to endeavor to reduce the risk of IHL violations by the coalition. They could begin by continuing to place pressure on the Saudi-led coalition forces to abide by international humanitarian law. They should also track Saudi-led coalition flights that they refuel, to ensure that those flights do not perpetrate violations of international humanitarian law. Finally, they should ensure that U.S. forces are not complicit in the torture of detainees by the United Arab Emirates: if they have reason to suspect that detainees are subject to torture, they should insist on proper treatment and cease any support or assistance for the detention and interrogation.

V. *The Alien Tort Statute*

The Alien Tort Statute (ATS), a jurisdictional statute that allows non-U.S. citizens to sue in federal district court for violations of international law, might provide a basis for victims of the Saudi-led coalition’s unlawful attacks in Yemen to sue for restitution in U.S. courts. Although sovereign immunity protects officials and States involved in the Saudi-led coalition from suit under the ATS, U.S. corporations that manufacture and supply weapons to the coalition could potentially be liable for aiding and abetting violations committed using those weapons. While this theory of liability has yet to be tested, there are substantial hurdles to a successful suit.

(1) Aiding and Abetting Liability under the ATS

The ATS states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁴² The reach of the ATS has been the subject of a number of cases in front of the U.S. Supreme Court.²⁴³ Most recently, in *Jesner v. Arab Bank*, the Supreme Court concluded that

²⁴² 28 U.S.C. § 1350.

²⁴³ In *Sosa v. Alvarez-Machain*, the Supreme Court restricted the scope of the ATS to suits for “specific, universal, and obligatory” violations of international law. 542 U.S. 692, 732 (2004). In 2011, the Supreme Court concluded in *Kiobel v. Royal Dutch Petroleum Co.*, that a presumption against extraterritoriality applies to the ATS. 569 U.S. 108,

foreign corporations may not be sued under the ATS.²⁴⁴ However, the Court left open the possibility that U.S. corporations could be held liable—which could implicate U.S. corporations that supply weapons used by the Saudi-led coalition.²⁴⁵

The Supreme Court has not yet decided whether corporations can be held liable for aiding and abetting violations of the law of nations. There is currently a split in the circuits on the scope of aiding and abetting liability under the ATS. The Second,²⁴⁶ Fifth,²⁴⁷ Ninth,²⁴⁸ Eleventh,²⁴⁹ and D.C.²⁵⁰ Circuits have all recognized ATS liability for aiding and abetting violations of the “law of nations.” The majority of courts have adopted the approach similar to that of the Ninth Circuit in *John Doe I v. Unocal Corp.* There, the court assessed opinions from the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and found that the ATS standard for aiding and abetting is “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”²⁵¹ The Second Circuit, however, took a different approach in *Khulumani v. Barclay National Bank*, instead embracing the threshold enunciated in the Rome Statute that created the International Criminal Court, whereby an individual is liable for aiding and abetting a violation of the “law of nations” under the ATS if the defendant engages in conduct “for the purpose of facilitating the commission of such a crime.”²⁵² As we have written in a forthcoming article,²⁵³ the Second Circuit erred in looking to the Rome Statute as evidence of customary international law, because the Statute has a distinctive standard

117 (2013) (“The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.”).

²⁴⁴ 138 S.Ct. 1386, 1407 (2018).

²⁴⁵ William S. Dodge, *Jesner v. Arab Bank: The Supreme Court Preserves the Possibility of Human Rights Suits Against U.S. Corporations*, JUST SECURITY (Apr. 26, 2018), <https://www.justsecurity.org/55404/jesner-v-arab-bank-supreme-court-preserves-possibility-human-rights-suits-u-s-corporations/>.

²⁴⁶ *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 253 (2d Cir. 2009).

²⁴⁷ *Carmichael v. United Tech. Corp.*, 835 F.2d 109, 113–14 (5th Cir. 1988) (“We will also only assume, because it is unnecessary to decide, that the Alien Tort Statute does confer subject matter jurisdiction over private parties who conspire in, or aid and abet, official acts of torture by one nation against the citizens of another nation.”).

²⁴⁸ *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 749 (9th Cir. 2011), cert. granted, judgment vacated, 133 S. Ct. 1995 (2013) (“The Second and Eleventh Circuits have recognized that aiding and abetting may give rise to an ATS claim. As Judge Katzmman’s concurrence in *Khulumani* noted, in that case the United States conceded and the defendants did not dispute, the well-established international law concept of aiding and abetting. The D.C. Circuit recently reached the same conclusion. We agree. The ATS itself does not bar aiding and abetting liability.” (citations omitted)); *John Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002) (“Unocal may be liable under the ATCA for aiding and abetting the Myanmar Military in subjecting Plaintiffs to forced labor.”).

²⁴⁹ *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (“[T]he law of this Circuit permits a plaintiff to plead a theory of aiding and abetting liability under the Alien Tort Statute.”); *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002), aff’d, 402 F.3d 1148 (11th Cir. 2005) (“[T]he Court determines as a matter of law that Defendant may be held liable under the ATCA for conspiring in or aiding and abetting the actions taken by other Chilean military officials, contrary to international law, with respect to Plaintiffs’ decedent.”).

²⁵⁰ *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011), vacated, 527 F. App’x 7 (D.C. Cir. 2013) (“[W]e conclude that aiding and abetting liability is well established under the ATS.”)

²⁵¹ *John Doe I v. Unocal Corp.*, 395 F.3d 932 at 947 (9th Cir. 2002).

²⁵² *Khulumani*, 504 F.3d at 275 (quoting Rome Statute of International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90).

²⁵³ Oona A. Hathaway, et al., *Aiding and Abetting in International Law*, 104 CORNELL L. REV. (forthcoming 2019).

relevant to its unique context. Instead, the proper standard—and the standard adopted by most international courts—is knowledge that the acts assist the commission of the principal crime.

(2) The Sale of Cluster Munitions Used in Yemen

The Saudi-led coalition has allegedly violated international humanitarian law in Yemen.²⁵⁴ And although the officials and States involved may be able to claim sovereign immunity, the U.S. corporations that manufacture weapons used by the coalition may be liable under the ATS for aiding and abetting these violations. In particular, the manufacture and export of a weapon known as a “cluster munition” may create legal risk.

A cluster munition is a type of explosive weapon that disperses multiple “bomblets” over a wide area. The weapon is thought to be inherently indiscriminate for two reasons: first, cluster munition bomblets frequently fail to detonate and “leave behind large numbers of dangerous unexploded ordnance” which essentially become de facto landmines that can “kill and injure civilians.”²⁵⁵ Second, cluster munitions have wide-area effects, making them difficult to use in civilian-controlled areas without violating international humanitarian law obligations.²⁵⁶ Use of these weapons are at present widely considered to violate the international humanitarian law principle of discrimination—and more than 100 nations have signed onto the Convention on Cluster Munitions (which entered into force in 2010) banning their manufacture, export, and use.²⁵⁷

Nonetheless, the Saudi-led coalition has regularly used cluster munitions in Yemen, and U.S. corporations have, until fairly recently, manufactured and exported four out of the six documented types employed during the hostilities in Yemen.²⁵⁸ Human Rights Watch documented the Saudi-led coalition’s use of the U.S.-manufactured CBU-105 Sensor Fuzed Weapon in five different cluster munition attacks between March 2015 and December 2015.²⁵⁹

In 2014, Lockheed Martin, which manufactured three of the types of cluster munitions used in Yemen, announced it would cease manufacturing any weapons prohibited under the Convention

²⁵⁴ See *supra* note 27.

²⁵⁵ *What is the Convention on Cluster Munitions?*, THE CONVENTION ON CLUSTER MUNITIONS, <http://www.clusterconvention.org/> (last visited Nov. 3, 2018).

²⁵⁶ Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 39, <https://treaties.un.org/doc/Publication/CTC/26-6.pdf>.

²⁵⁷ *How many States joined the Convention?*, *supra* note 255.

²⁵⁸ The CBU-105 Sensor Fuzed Weapon was used in five different cluster munition attacks in four governorates (Sa’ada, Sana’a, Amran, and Al-Hudaydah) between April 2015 and December 2015. *Technical Briefing Note: Cluster Munition Use in Cluster Munitions*, HUMAN RIGHTS WATCH (Feb. 14, 2016), https://www.hrw.org/sites/default/files/supporting_resources/yemencm_bnote_final_en.pdf. The CBU-105 was manufactured by Textron Systems until 2016, when export demand slowed following the Obama Administration’s refusal to permit further export to Saudi Arabia. Thomas Gibbons-Neff, *Why the Last U.S. Company Making Cluster Bombs Won’t Produce Them Anymore*, WASH. POST (Sept. 2, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/09/02/why-the-last-u-s-company-making-cluster-bombs-wont-produce-them-anymore/?utm_term=.d746fa732f99.

²⁵⁹ *Id.*

on Cluster Munitions.²⁶⁰ The year before, Textron Systems Corporation, a U.S. corporation, secured a \$641 million contract to produce 1,300 CBU-105 Sensor Fuzed Weapon cluster munitions for Saudi Arabia—a weapon prohibited under the Convention.²⁶¹ In 2016, however, Textron announced it would no longer produce “sensor-fuzed weapon[s]” because of “reduced orders.”²⁶²

(3) Establishing Aiding and Abetting Liability Based on the Sale of Weapons

Despite the Saudi-led coalition’s probable use of U.S.-origin cluster munitions in Yemen, there are a number of hurdles to holding Lockheed Martin or Textron liable under the ATS for aiding and abetting the underlying offenses. First, a plaintiff would have to establish a connection between violations of the law of nations and U.S.-sold cluster munitions. It does appear such evidence may be available. Human Rights Watch has documented the use of U.S.-manufactured cluster munitions in Yemen, including evidence of at least six airstrikes using U.S. manufactured cluster munitions in at least four Yemeni governorates between 2015-2016.²⁶³ News organizations, including the New York Times, the Washington Post and CNN, have also reported on the use of U.S.-manufactured cluster munitions in unlawful attacks in Yemen.²⁶⁴ If a case were to move forward, plaintiffs would have to present evidence linking indiscriminate or disproportionate attacks and U.S.-manufactured weapons.

²⁶⁰ LOCKHEED MARTIN, *Press Release: Lockheed Martin Conducts Second Successful Production Qualification Flight Test of GMLRS Alternative Warhead*, LOCKHEED MARTIN (Feb. 3, 2014), <https://news.lockheedmartin.com/2014-02-03-Lockheed-Martin-Conducts-Second-Successful-Production-Qualification-Flight-Test-Of-GMLRS-Alternative-Warhead>.

²⁶¹ *Textron wins \$641 million deal to build Saudi cluster bombs*, REUTERS (Aug. 20, 2013), <https://www.reuters.com/article/us-textron-bombs/textron-wins-641-million-deal-to-build-saudi-cluster-bombs-idUSBRE97J0ZF20130820I>; *Technical Briefing Note*, *supra* note 258.

²⁶² Marjorie Censer, *Textron to Discontinue Production of Sensor-Fuzed Weapon*, INSIDE DEFENSE (Aug. 30, 2016), <https://insidedefense.com/insider/textron-discontinue-production-sensor-fuzed-weapon>.

²⁶³ Alex Emmons and Mohammed Ali Kalfood, *Banned by 119 Countries, U.S. Cluster Bombs Continue to Orphan Yemeni Children*, INTERCEPT (Dec. 14, 2016), <https://theintercept.com/2016/12/14/banned-by-119-countries-u-s-cluster-bombs-continue-to-orphan-yemeni-children> (“Researchers from Human Rights Watch identified the shell casings in photographs taken by The Intercept as a U.S.-made cluster bomb. The serial number documented in the photographs also begins with the five-number “commercial and government entity” (CAGE) code 04614 — indicating that the weapons were produced in the United States, by the Rhode Island-based company Textron Systems.”); *Yemen: Saudis Using U.S. Cluster Munitions: End Production, Transfer of These Banned Weapons*, HUMAN RIGHTS WATCH (May 6, 2016), <https://www.hrw.org/news/2016/05/06/yemen-saudis-using-us-cluster-munitions>.

²⁶⁴ Sewell Chan, *Report Finds Ban Hasn’t Halted Use of Cluster Bombs in Syria or Yemen*, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/world/middleeast/cluster-bombs-syria-yemen.html>; Rick Gladstone, *New Report of U.S.-Made Cluster Bomb Use by Saudis in Yemen*, N.Y. TIMES (Feb. 14, 2016), <https://www.nytimes.com/2016/02/15/world/middleeast/new-report-of-us-made-cluster-bomb-use-by-saudis-in-yemen.html>; Sudarsan Raghavan, *A Cluster Bomb Made in America Shattered Lives in Yemen’s Capital*, WASH. POST (July 10, 2016), https://www.washingtonpost.com/world/middle_east/a-cluster-bomb-made-in-america-shattered-lives-in-yemens-capital/2016/07/08/e3b722cc-283d-11e6-8329-6104954928d2_story.html; Nima Elbagir et al., *Bomb that Killed 40 Children in Yemen Was Supplied by the US*, CNN (Aug. 17, 2018), <https://www.cnn.com/2018/08/17/middleeast/us-saudi-yemen-bus-strike-intl/index.html>. *See also* Alex Ward, *The Pentagon Won’t Check if US Bombs Killed Kids in Yemen. CNN Did It For Them*, VOX (Aug. 20, 2018), <https://www.vox.com/2018/8/20/17760322/yemen-children-bomb-bus-pentagon>.

Second, under the majority approach to aiding and abetting liability under the ATS, a plaintiff must establish not only that the munitions were used in unlawful attacks but that U.S. manufacturers of cluster munitions *knew* the sale of the munitions would assist violations of international humanitarian law. This factor presents the most substantial hurdle. As noted earlier, Lockheed Martin ceased production of cluster munitions before the current war in Yemen erupted. On May 27, 2016, the United States suspended any transfers of cluster munitions to members of the Saudi-led coalition.²⁶⁵ Today many of the cluster munition attacks taking place in Yemen are committed with Brazilian-manufactured cluster munitions.²⁶⁶

One U.S. Company—Textron Systems—stands out as more vulnerable to suit under the ATS than others. In contrast to Lockheed Martin, which voluntarily ceased the production of cluster munitions in 2013, Textron continued to produce its variant of the weapon (the CBU-105) until early 2017.²⁶⁷ In fact, the same year Lockheed Martin ceased production of cluster munitions altogether, Textron contracted with the United States for the manufacture and delivery of cluster munitions to Saudi Arabia until December 31, 2015.²⁶⁸ By that point, the indiscriminate effects of cluster munitions were well documented. The Convention on Cluster Munitions, which bans such weapons precisely because of their indiscriminate effects, opened for signature in 2008 and entered into force in 2010. While none of the members of the Saudi-led coalition are parties to the Convention (nor is the United States), much of the international community recognized the indiscriminate nature of the cluster munitions.

Even so, there are factors that might militate against liability. For instance, Textron might avoid liability because the CBU-105 allegedly complied with export conditions imposed by the United States.²⁶⁹ However, some reports suggest the failure rate of the CBU-105 exceeds the threshold allowed by the United States because, when a cluster munition fails, its bomblets can become de facto landmines.²⁷⁰ It is also possible that at the time of the last transfer of cluster munitions by a U.S. company, the extent of civilian deaths in the bombing by the Saudi-led coalition may not have been well documented. Finally, the United States only prohibited the sale

²⁶⁵ John Hudson, *Exclusive: White House Blocks Transfer of Cluster Bombs to Saudi Arabia*, FOREIGN POLICY (May 27, 2016, 5:43PM), <https://foreignpolicy.com/2016/05/27/exclusive-white-house-blocks-transfer-of-cluster-bombs-to-saudi-arabia/>.

²⁶⁶ *Saudi-led Coalition's Recent Use of Brazilian-made Cluster Munitions Targets Residential Areas in Yemen*, CLUSTER MUNITION COALITION (Mar. 9, 2017), <http://www.stopclustermunitions.org/en-gb/media/news/2017/saudi-led-coalition%E2%80%99s-recent-use-of-brazilian-made-cluster-munitions-targets-residential-areas-in-yemen.aspx>.

²⁶⁷ Jeff Abramson & Alicia Jensen, *Textron to Halt Cluster Bomb Production*, ARMS CONTROL ASS'N (Oct. 2016), <https://www.armscontrol.org/Textron-to-Halt-Cluster-Bomb-Production>.

²⁶⁸ *US: Stop Providing Cluster Munitions: White House Pledges to Halt Deliveries to Saudis*, HUMAN RIGHTS WATCH (June 2, 2016, 9:23AM), <https://www.hrw.org/news/2016/06/02/us-stop-providing-cluster-munitions>; *Contract No. 593-13*, U.S. DEP'T OF DEF., (Aug. 20, 2013), <http://archive.defense.gov/Contracts/Contract.aspx?ContractID=5116>.

²⁶⁹ *United States: Cluster Munition Ban Policy*, LANDMINE & CLUSTER MUNITION MONITOR (Aug. 8, 2016), <http://www.the-monitor.org/en-gb/reports/2016/united-states/cluster-munition-ban-policy.aspx>.

²⁷⁰ Mary Wareham, *On Cluster Munitions, A Tentative Step Toward Sanity*, HUFFINGTON POST (June 6, 2016), https://www.huffingtonpost.com/mary-wareham/on-cluster-munitions-a-te_b_10319504.html (Stating that Human Rights Watch “researchers found multiple examples of CBU-105 Sensor Fuzed Weapons not functioning in ways that meet the required one percent reliability standard. They documented canisters from the weapons with all four “skeet” or submunitions still attached. Or with two attached.”); *see also Yemen: Cluster Munitions Harm Civilians Documented Use of 3 Varieties*, HUMAN RIGHTS WATCH (May 31, 2015), <https://www.hrw.org/news/2015/05/31/yemen-cluster-munitions-harm-civilians>.

of cluster munitions to the Saudi-led coalition in 2016, suggesting that the U.S. government did not regard their sale or use as inherently indiscriminate before that point.

For these reasons, Textron may be vulnerable to suit under the ATS for aiding and abetting the Saudi-led coalition's violations of international humanitarian law, but the hurdles to a successful suit are significant. It appears less likely that similar suits against other U.S. weapons manufacturers would succeed.

VI. International Legal Issues

VII. Is the United States a Party to the Conflict Between the Saudi-Led Coalition and the Houthis?

Under international law, a non-international armed conflict, or NIAC, exists where there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”²⁷¹ There are a number of NIACs currently under way in Yemen: First, there is a NIAC between the government of Yemen and the Houthis. Second, there are NIACs between the United States and three non-state actor groups: the Islamic State, Al-Qaeda, and AQAP—groups that the United States is directly targeting in counter-terrorism air and ground operations. Third, there are NIACs between non-state actor groups within Yemen (for example, between the Houthis and the Islamic State). Fourth, there are NIACs between the states that make up the Saudi-led coalition and the Houthis.²⁷²

The more difficult question is whether the United States is a party to the NIAC between the states in the Saudi-led coalition and the Houthis. According to Pentagon spokesperson Rebecca

²⁷¹ Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>. See also Prosecutor v. Du[ko Tadi], IT-941-T, Judgment ¶ 562 (Int'l Crim. Trib. For the Former Yugoslavia 7 May 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts/70507JT2-e.pdf> (“The test . . . [for] the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.”); International Committee of the Red Cross (ICRC), *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper 3 (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>; INT'L COMM. OF THE RED CROSS, COMMENTARY OF 2016, art. 3, ¶ 451, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#167_B (“the question of whether a situation of violence amounts to a non-international armed conflict should therefore be answered solely by reliance on the criteria of intensity and organization”); Oona Hathaway, Rebecca Crootof, Daniel Hessel, Julia Shu & Sarah Weiner, *Consent is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict*, 165 U. PENN L. REV. 1 (2016).

²⁷² The Saudi-led coalition is made up of governmental authorities. The Houthis, who had seized control of most of Yemen by the time the Saudi-led coalition intervened, are sufficiently organized to meet the organization test. The conflict between the Houthis and the Saudi-led coalition also unquestionably meets the test for intensity, given that fighting has lasted for more than two years and caused thousands of deaths. For a helpful overview of the non-international conflicts in Yemen, see Geneva Academy of International Humanitarian Law and Human Rights, *Non-international armed conflicts in Yemen*, RULAC (Mar. 22, 2018), <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen>. As of March 2018, none of the conflicts in Yemen can be properly characterized as an international armed conflict (IAC). The Saudi-led coalition has intervened on behalf and at the request of the internationally-recognized, legitimate government of Yemen. So far Iran's involvement appears to be limited to providing support without direct action.

Rebarich, the United States “is not a party to the Yemeni civil war.”²⁷³ It is true that the intensity of fighting between the United States and the Houthis is not, at present, sufficient on its own to meet the intensity threshold to qualify as a NIAC.²⁷⁴ However, the International Committee of the Red Cross (ICRC) has argued that a third-party state or multinational coalition supporting one side in a NIAC does not need to meet the same intensity threshold in order to be a party to the NIAC. It explained: “[I]t is not always necessary to assess whether, on their own, the actions of multinational forces meet the level of intensity required for the existence of a new non-international armed conflict in order for them to become Parties to that conflict.” It noted that this may be the case when, for example, “multinational forces are already involved in a non-international armed conflict against a non-State armed group and additional foreign forces provide support to the multinational forces.” In such cases, “depending on the function(s) they fulfill, the States sending such forces may also become parties to the non-international armed conflict.”²⁷⁵ The ICRC notes, moreover, that “[t]he decisive element would be the contribution such forces make to the collective conduct of hostilities. Only activities that have a direct impact on the *opposing* Party’s ability to carry out military operations would turn multinational forces into a Party to a pre-existing non-international armed conflict.”²⁷⁶

Some argue that the deployment of forces is not necessary for a state to join a pre-existing NIAC. Nathalie Weizmann, for instance, describes a four-part test whereby a supporting state becomes party to a “*pre-existing NIAC*” if it “undertake[s] actions *related to the conduct of hostilities*,” “*in support* of a party to that conflict” and “pursuant to an *official decision*” by the supporting party.²⁷⁷ The ICRC’s Legal Adviser Tristan Ferraro and others have likewise argued that “providing planes for refueling jet fighters involved in aerial operations carried out by the supported state,” as the United States has done for the Saudi-led coalition, might implicate the states as a party to a pre-existing NIAC.²⁷⁸

With the exception of a very small number of personnel operating outside the theater providing some logistical support, the United States has not yet sent forces to support the Saudi-led multinational coalition. It has therefore had relatively little direct effect on the Houthis’ ability

²⁷³ Samuel Oakford, *One American’s Failed Quest to Protect Civilians in Yemen*, ATLANTIC (Aug. 17, 2018), <https://www.theatlantic.com/international/archive/2018/08/yemen-saudi-airstrike-school-bus/567799/>.

²⁷⁴ The only direct exchange of fire publicly reported is the exchange between the U.S. Navy ships and Houthis in October 2016, but that was limited and appears unlikely to resume. If that were to change, then the legal analysis would, of course, change as well.

²⁷⁵ INT’L COMM. OF THE RED CROSS, COMMENTARY OF 2016, art. 3, ¶ 445, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#167_B. The ICRC clarifies that this does not displace the *Tadic* elements of organization and intensity for the applicability of IHL. *Id.* ¶ 446 (“such an approach to determining who is a Party to a non-international armed conflict complements, but does not replace, the determination of the applicability of humanitarian law on the basis of the criteria of the organization of the Parties and the intensity of the hostilities”).

²⁷⁶ *Id.* ¶ 446 (emphasis in original).

²⁷⁷ Weizmann, *supra* note 133. Weizmann also notes that co-belligerency might also be used to determine that a state is party to a NIAC. There are concerns, however, that the expansive application of co-belligerency theory in NIACs is based on an outdated understanding of the law of neutrality. It is also not clear that co-belligerency would ever include a party in a NIAC that would not be included under what Weizmann dubs the “support-based” approach. We therefore do not separately analyze that approach here.

²⁷⁸ Tristan Ferraro, *The Applicability and Application of International Humanitarian Law to Multinational Forces*, 95 INT’L REV. RED CROSS 561, 585 (2013).

to carry out military operations. Nonetheless, U.S. support for the Saudi-led coalition has been described as essential.²⁷⁹ Given the more lenient test applicable to parties joining a pre-existing NIAC, it is possible that such support is sufficient to involve the U.S. in the NIAC between those states and the Houthis despite the U.S.'s lack of any significant direct participation. Applying Weizmann's test, for example, the United States has undertaken actions related to the conduct of hostilities (refueling, provision of munitions, etc.) in support of a party to that conflict (the states that are in the Saudi-led coalition), pursuant to an official decision by the United States government.

At the moment, relatively little turns on the conclusion that the U.S. is or is not party to the NIAC between the Saudi-led coalition states and the Houthis. As long as the United States is not using direct force against the Houthis, its legal obligations are the same whether or not it is a party to that particular NIAC. If the United States were to use force against the Houthis, however, the lower threshold for triggering participation in a pre-existing NIAC could be important to shaping the U.S.'s legal obligations. In that case, it would be appropriate for the United States to proceed under the assumption that the legal obligations attending to a party to the conflict apply to its actions, even if the intensity threshold might not have been met if the events were analyzed in isolation.

VIII. *The Extent and Validity of Yemen's Consent to the Use of Force*

Although Article 2(4) of the UN Charter prohibits members from threatening or using force against another member, there are certain exceptions that may apply to the U.S. military involvement in Yemen, such as the Yemeni government's consent. However, recent reports that Yemen's President Hadi is under house arrest in Saudi Arabia raise deep concerns about the validity of his government's consent to military operations. In the absence of valid consent, many of the current U.S. operations in Yemen would likely be found to violate the UN Charter's prohibition on the use of force.

(1) Article 2(4) of the UN Charter and Associated Exceptions

Article 2(4) of the UN Charter states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."²⁸⁰ There are three exceptions to this blanket prohibition:

- A host state may consent to the use of force;
- A state may use force in self-defense under Article 51 of the Charter; and

²⁷⁹ See Jackie Northam, *As Yemen's War Worsens, Questions Grow About the U.S. Role*, NPR (Oct. 11, 2016 4:29 PM), <http://www.npr.org/sections/parallels/2016/10/11/497563923/u-s-reconsiders-support-of-saudi-led-coalition-in-yemen-conflict> (quoting Senator Chris Murphy as saying "I think it's safe to say that this bombing campaign in Yemen could not happen without the United States"); see also Mark Mazzetti & Shuaib Almosawa, *Support for Saudi Arabia Gives U.S. Direct Role in Yemen Conflict*, N.Y. TIMES (Aug. 24, 2016), <https://www.nytimes.com/2016/08/25/world/middleeast/yemen-saudi-arabia-hospital-bombing.html> (characterizing U.S. assistance as a "direct role" in the war).

²⁸⁰ U.N. Charter art. 2, ¶ 4.

- A state may use force if authorized to do so by the UN Security Council.

The consent exception has some additional qualifiers that are important in the Yemen context. Consent is limited to “particular conduct by another State . . . to the extent that the conduct remains within the limits of the consent given.”²⁸¹ Hence an intervening state can only carry out those acts consented to by the recipient of the intervention.²⁸² In addition, consent given by a representative of a state under duress is invalid.

While we conclude that the primary justification for ongoing military operations in Yemen is consent by the Yemeni government, each form of U.S. military involvement must be analyzed separately to determine whether it triggers Article 2(4) in the first place and, if so, the bounds of any consent given as well as whether the operation can be justified under any of the other exceptions.

(2) Ongoing Airstrikes and Limited Operations

The only ongoing direct use of force by the United States in Yemen is against the Islamic State, Al-Qaeda, and associated groups, including Al-Qaeda in the Arabian Peninsula. There is little doubt that the repeated use of military weaponry to cause significant property damage and loss of life within the territory of another sovereign state qualifies as a “use of force” under Article 2(4). The question, then, is whether any of the exceptions to the prohibition on the use of force applies.

Because there has been no Security Council authorization regarding Yemen, there are two possible legal bases for these uses of direct force: consent or self-defense. Prior to February 7, 2017, U.S. counterterrorism operations took place with the consent of the Yemeni government. On February 7, 2017, however, Yemen withdrew its consent for U.S. anti-terror ground missions after children were caught in the crossfire of a firefight between the Navy’s SEAL Team 6 and suspected terrorists.²⁸³ It does not appear that the government withdrew consent for air operations. At present, there is no public information suggesting the government has further restricted consent or reversed its withdrawal of consent for ground operations. Assuming the Yemeni government continues to consent to air operations but not ground operations, then air operations qualify for the consent exception. Any ground operations that have taken place after February 7, 2017, however, must be based exclusively on a self-defense justification.

²⁸¹ Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, commentary to art. 20, ¶ 1, Rep. of the Int’l Law Comm’n on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 68 (2001).

²⁸² *Id.* ¶ 9 (“where consent is relied on to preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent”). A consenting state, moreover, cannot consent to actions that it could not itself take. Oona Hathaway, Rebecca Crootof, Daniel Hessel, Julia Shu & Sarah Weiner, *Consent is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict*, 165 U. PENN L. REV. 1 (2016). For instance, it cannot consent to violations of IHL in its territory.

²⁸³ See Sanger & Schmitt, *supra* note 44.

In September 2014, the United States filed an Article 51 letter, as required for any use of force in self-defense under Article 51, to justify its use of force in Syria.²⁸⁴ In that letter, Ambassador Samantha Power explained that the United States was acting against the Islamic State in Syria in its self-defense and the collective self-defense of allied states, including Iraq, which had expressly requested its assistance. No similar letter has been filed regarding U.S. military operations against the Islamic State and Al-Qaeda and its affiliates in Yemen. This suggests that the United States is not operating in Yemen under Article 51 and in self-defense. If that is correct, however, then the United States would need to limit its military operations to those to which the Yemeni government has consented – air operations only. To the extent it is exceeding that consent, its use of force may violate the UN Charter’s prohibition on the use of force.

(3) Houthis Attacks on U.S. Navy Ships and Response

The one direct use of force by the United States against the Houthis took place after the Houthis fired on U.S. Navy ships in 2016. As discussed above, that use of force was justified as an act of self-defense. At present, the Houthis do not appear to pose any continuing threat to the United States and therefore self-defense would not be available to the United States as a justification for any renewed use of force against the Houthis in Yemen.

(4) U.S. Military Assistance to the Saudi-Led Coalition

Although the United States is not presently using direct force against the Houthis in Yemen, it is providing military weapons, training, and other assistance to the Saudi-led coalition in Yemen. Such support can cross the use of force threshold and thus bring a state into violation of Article 2(4) unless it is justified under one of the permitted exceptions to the prohibition on the use of force.²⁸⁵

In the *Military and Paramilitary Activities in and Against Nicaragua* case, the International Court of Justice held that military assistance provided by the United States to a rebel group violated customary international law.²⁸⁶ Unlike in *Nicaragua*, however, here the United States is not providing military assistance to a rebel group attempting to overthrow a government. Rather, it is providing assistance to a multinational coalition that is intervening at the request of the recognized government of Yemen.²⁸⁷ Whether the provision of support implicates Article 2(4) thus turns (again) on the scope of Yemen’s consent.

Here, President Hadi’s request to the Saudi-led coalition asked that it use “all necessary means” to combat the Houthi-Saleh alliance, a request that arguably includes the use of U.S.

²⁸⁴ Letter from Samantha J. Power, United States Ambassador to the United Nations, to Ban Ki-moon, Secretary-General of the United Nations (Sept. 23, 2014), <https://www.justsecurity.org/wp-content/uploads/2015/12/US-Article-51-Letter-Syria-09232014.pdf>.

²⁸⁵ Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT. SEC. J. 349, 363 (2014) (“Providing lethal (‘military’) training and logistical support . . . would . . . be an unlawful use of force. The provision of arms would unquestionably qualify as such.”).

²⁸⁶ *Nicaragua*, *supra* note 159, ¶ 292.

²⁸⁷ *GCC statement*, *supra* note 15.

military assistance.²⁸⁸ Notably, President Hadi’s letter requesting assistance was directed towards specific countries (Saudi Arabia, United Arab Emirates, Bahrain, Oman, Kuwait, and Qatar), not the international community in general. Any use of force by a state other than those to whom the letter was addressed may therefore be a violation of Article 2(4). Consent, after all, is not transitive—a state that has received consent may not transfer that consent to another state without the permission of the host state. In the context of the Saudi-led coalition’s operations against the Houthis in Yemen, however, the United States is not acting directly—it is acting exclusively through the Saudi-led coalition. Even its refueling missions take place outside of Yemeni airspace. Yemen’s request to the Saudi-led coalition for assistance using “all necessary means” can be reasonably understood as authorization of this form of assistance, as long as U.S. actions are channeled through the states to which Yemen granted consent.²⁸⁹ This conclusion is bolstered by statements by Yemeni government officials indicating support for the U.S. role. For example, in August 2017, Yemen’s ambassador to the United States said, “We need the U.S. government to continue to lend its political and logistical support to the legitimate government and the Arab coalition.”²⁹⁰ In addition, on October 13, 2017, the Yemeni Embassy to the United States issued a statement praising the U.S. strategy opposing Iran, which “exposes Iran’s attempts to use the Houthi rebels as puppets to destabilize the region.”²⁹¹

At the moment, U.S. military assistance to the Saudi-led coalition appears to fall within the scope of the Yemeni government’s consent to the actions of the Saudi-led coalition’s operations. If, however, the Yemeni government were to withdraw its consent to the Saudi-led coalition’s operations or if the Yemeni government were to make clear that it did not consider U.S. support for the coalition efforts to fall within the scope of its consent, then that support would have to cease to prevent a violation of Article 2(4).

(5) House Arrest of President Hadi and the Validity of His Consent

As the foregoing analysis shows, the central legal basis for U.S. operations in Yemen is the consent of the Yemeni government. However, news reports suggest that Saudi Arabia has placed Yemen’s President Hadi “under de facto house arrest in Riyadh because they deemed his political activities in the liberated port city of Aden as too meddlesome.”²⁹² Reports further suggest that Saudi Arabia has prevented him, his sons, ministers, and military officials, from returning home.

²⁸⁸ *Id.* For thoughtful analyses, see Robert Chesney, *U.S. Support for the Saudi Air Campaign in Yemen: The Legal Issues*, LAWFARE (Apr. 15, 2015, 3:02 PM), <https://lawfareblog.com/us-support-saudi-air-campaign-yemen-legal-issues>; see also Nathalie Weizmann, *International Law on the Saudi-led Military Operations in Yemen*, JUST SECURITY (Mar. 27, 2015), <https://www.justsecurity.org/21524/international-law-saudi-operation-storm-resolve-yemen>.

²⁸⁹ Chesney, *supra* note 288.

²⁹⁰ Hollie McKay, *US troops in Yemen not needed, nation’s US ambassador says*, FOX NEWS (Aug. 3, 2017), <http://www.foxnews.com/world/2017/08/03/us-troops-in-yemen-not-needed-nations-us-ambassador-says.html>.

²⁹¹ Yemen Embassy D.C. (@YemenEmbassy_DC), TWITTER (Oct. 13, 2017, 12:45 PM), https://twitter.com/YemenEmbassy_DC/status/918925800308723712.

²⁹² Simon Henderson, *Arabian Rendezvous: What the President Can Achieve in Riyadh*, WASH. INST. (May 17, 2017), <http://www.washingtoninstitute.org/policy-analysis/view/arabian-rendezvous-what-the-president-can-achieve-in-riyadh>.

Salah Al-Sayadi, a former Yemeni minister of state, resigned from office on March 21, 2018, just days after stating that Hadi was under house arrest and calling for his release.²⁹³ Hadi travelled to the United States for medical treatment in September 2018²⁹⁴ and remained there until the end of the month to speak at the UN General Assembly, before returning to Saudi Arabia.²⁹⁵ These developments raise dire concerns about the validity of any consent given by President Hadi on behalf of Yemen because consent given by a representative of a state under duress is invalid.²⁹⁶ The continued house arrest of President Hadi could, therefore, imperil the legal validity of the U.S.'s counterterrorism operations, the Saudi-led coalition's operations against the Houthis, and the U.S. support for those operations.

A. State Responsibility for U.S. Support of the Saudi-led Coalition

The international law of state responsibility, captured in the International Law Commission's (ILC) Draft Articles on State Responsibility, provides a possible ground on which the United States may be liable for its assistance to the Saudi-led coalition. Liability likely would turn on the bounds of U.S. intent and whether the United States knew that its aid would actually facilitate an internationally wrongful act.

(1) U.S. Responsibility for the Saudi-Led Bombing Campaign

ILC Article 16, which is understood to reflect customary international law,²⁹⁷ provides that: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."²⁹⁸ There is a strong case that U.S. support for the Saudi-led coalition meets this test.

²⁹³ *Arab coalition 'robbing Yemen of sovereignty'*, AL JAZEERA (Mar. 22, 2018), <https://www.aljazeera.com/news/2018/03/Arab-coalition-accused-undermining-yemen-sovereignty-180322053041573.html>.

²⁹⁴ *Yemen's Hadi to go to U.S. for medical treatment: government source*, REUTERS (Sept. 2, 2018, 4:28 PM), <https://www.reuters.com/article/us-yemen-president/yemens-hadi-to-go-to-u-s-for-medical-treatment-government-source-idUSKCN1LI0T4>.

²⁹⁵ *Yemen President Abdrabu Mansur Hadi calls on world to stop Iran's interference*, THE NATIONAL (Sept. 26, 2018, 10:17 PM), <https://www.thenational.ae/world/yemen-president-abdrabu-mansur-hadi-calls-on-world-to-stop-iran-s-interference-1.774403>; Ramadan Al Sherbini, *Hadi Swears in Yemen's New Prime Minister*, GULF NEWS (October 18, 2018), <https://gulfnews.com/news/gulf/yemen/hadi-swears-in-yemen-s-new-pm-prime-minister-1.2291304> (reporting that swearing in took place in Riyadh).

²⁹⁶ See, e.g., Vienna Convention on the Law of Treaties, art. 51, May 23, 1969, 1155 U.N.T.S. 331 ("The expression of a State's consent to be bound by a treaty which has been procured through the coercion of its representative through acts or threats directed against him shall be without any legal effect.")

²⁹⁷ Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 420 (Feb. 26); Ryan Goodman & Miles Jackson, *State Responsibility for Assistance to Foreign Forces (aka How to Assess US-UK Support for Saudi Ops in Yemen)*, JUST SECURITY (Aug. 31, 2016 8:45 AM), <https://www.justsecurity.org/32628/state-responsibility-assistance-foreign-forces-a-k-a-assess-us-uk-support-saudi-military-ops-yemen>.

²⁹⁸ Rep. of the International Law Commission on the Work of Its Fifty-Third Session, 2 Y.B. Int'l L. Comm'n 26–30, art. 16, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles].

Subsection (b)²⁹⁹ is clearly met by U.S. support for the Saudi-led coalition. Any bombings that indiscriminately violate international humanitarian law would be illegal if they were conducted by the United States itself, rather than by the Saudi-led coalition. It is true that the United States is not a party to Protocol II of the 1949 Geneva Conventions governing non-international armed conflicts. However, as a matter of treaty and customary international law, the United States is legally obligated to follow the full range of international humanitarian law obligations that apply to parties to a non-international armed conflict. Notably, these obligations are much broader than those that are subject to prosecution under the U.S. War Crimes Act.

Subsection (a) presents more difficulty and requires careful analysis of the assisting state's (here the U.S.'s) requisite intent. The ILC Commentary on the Draft Articles, which is meant to provide clarity, unfortunately does not entirely succeed on this point. In its commentary to Article 16(a), the ILC stipulates two related requirements:

- first, “the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful;”³⁰⁰ and
- second, “the aid or assistance must be given with a view to facilitating the commission of the act, and must actually do so.”³⁰¹

At first glance, these two requirements may appear inconsistent.³⁰² They can be reconciled, however, if the first element is understood to require *knowledge* that the aid or assistance facilitated an *internationally wrongful act*—that is, knowledge of the wrongfulness of the action to be taken by the assisted state. The second condition then would be understood to require *intent* to facilitate the action taken by the state, even if the state did not specifically intend that act's wrongfulness. Understood in this way, the ILC Commentary corresponds relatively closely to the text of Article 16 itself.

Applying this reading to the Saudi-led campaign, the second condition outlined above is clearly met: the United States has provided support to the Saudi-led coalition—including munitions, intelligence, and mid-air refueling—with a view to facilitating the coalition's military campaign. As described in earlier sections, this support has, in fact, facilitated that bombing campaign. This type of aid need not have been essential to the wrongful act to fall within Article 16; “it is sufficient if it contributed significantly to that act.”³⁰³ Significance turns on “how the assistance rendered relates to the wrongful act.”³⁰⁴ Harriet Moynihan of Chatham House explains

²⁹⁹ The ILC Commentary to the Draft Articles reaffirms the subsection (b) condition (explaining that “the completed act must be such that it would have been wrongful had it been committed by the assisting State itself”). *Id.* at art. 16 cmt. 3.

³⁰⁰ *Id.* at art. 16 cmt. 3.

³⁰¹ *Id.*

³⁰² Responding to this analytical mire, Ryan Goodman and Miles Jackson outline their own list of four conditions that must be met to establish a violation of Article 16. Goodman & Jackson, *supra* note 297.

³⁰³ Draft Articles, *supra* note 298, at art. 16 cmt. 5.

³⁰⁴ JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 401, 403 (2013).

that this “nexus element” has two dimensions: scale and remoteness.³⁰⁵ ILC member Nikolai Ushakov noted during the Commission’s 1978 session: “[P]articipation must be active and direct. It must not be too direct, however, for the participant then becomes a co-author of the offence, and that [goes] beyond complicity. If, on the other hand, participation [is] too indirect, there might be no real complicity.”³⁰⁶ Regardless of the metric,³⁰⁷ arming and mid-air refueling undoubtedly qualify as a significant contribution to the bombing campaign.

The harder question is whether the United States’ assistance meets the first requirement—that the United States *knew* that the aid or assistance it provided facilitated an internationally wrongful act. As the ILC Commentary puts it, “[i]f the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.”³⁰⁸

As noted above, there is some ambiguity in the Commentary as to whether the assisting state must intend to facilitate the *wrongful* act—that is, that it not only intends the act to occur but intends for it to occur in an internationally wrongful manner. A number of commentators have concluded that “knowledge” is the correct measure.³⁰⁹ But there is disagreement about what knowledge requires. Harriet Moynihan states that knowledge “means actual or near certain knowledge of specific illegality on the part of the recipient state.”³¹⁰ Intent in this view is satisfied by “knowledge or virtual certainty that the recipient state will use the assistance unlawfully.”³¹¹ Ryan Goodman and Miles Jackson, however, adopt a less stringent test in which mere knowledge of the circumstances is sufficient: “The assisting State has intention to facilitate and/or knowledge of the circumstances of the internationally wrongful act.”³¹²

The United States is undoubtedly aware that there have been numerous credible allegations of violations of international humanitarian law (IHL). Therefore, its support for the Saudi-led coalition almost certainly meets the less stringent knowledge test; it may also satisfy the more stringent “actual or near certain knowledge of specific illegality,” though that is a higher bar to clear.

(2) U.S. Responsibility for Facilitating Torture

As discussed previously, the United Arab Emirates—a member of the Saudi-led coalition—has been accused of torturing AQAP suspects in their terrorism detention facilities in Yemen. The Associated Press reported that U.S. officials have directly participated in

³⁰⁵ Harriet Moynihan, *State Complicity in Other States’ Bad Acts—and How to Avoid It*, JUST SECURITY (Nov. 14, 2016), <https://www.justsecurity.org/34379/state-complicity-states-bad-acts-and-avoid-2>.

³⁰⁶ CRAWFORD, *supra* note 304, at 402 (citing ILC Ybk 1978/I, 239).

³⁰⁷ While the ILC Commentary also contemplates the inclusion of contributions that are less than “significant,” this Article agrees with Ryan Goodman and Miles Jackson that a more lenient threshold has not yet reached the status of customary international law. See Goodman & Jackson, *supra* note 297.

³⁰⁸ Draft Articles, *supra* note 298, at art. 16 cmt. 4.

³⁰⁹ See CRAWFORD, *supra* note 284, at 406; see also Moynihan, *supra* note 286; see also Goodman & Jackson, *supra* note 279.

³¹⁰ Moynihan, *supra* note 287.

³¹¹ *Id.*

³¹² Jackson & Goodman, *supra* note 279.

interrogations at said facilities.³¹³ If substantiated, acts of torture, as well as cruel and inhumane treatment, would constitute an “internationally wrongful” act pursuant to subsection (b), as a matter of both treaty and customary international law.

Again, the primary challenge comes from subsection (a)—knowledge of facilitating the internationally wrongful act. At the moment, there is insufficient public information about the degree of involvement in the alleged torture or the knowledge of U.S. forces about the torture to arrive at a judgment on this issue. But there is enough public information to suggest that the test could potentially be met and therefore an investigation would be warranted.

(3) Mitigating Measures

The United States could implement mitigating measures to lessen its risk of liability under Article 16—and it has reportedly sought to do so, at least with regard to the bombing campaign. When the U.S. restarted its assistance in June 2017, it sought and received assurances that Saudi Arabia would take greater precautions to adhere to IHL. (Indeed, the prior cessation of support and subsequent decision to seek assurances reveals that the United States was very much aware of credible allegations of IHL violations by the coalition to that point.)

Credible assurances may mitigate liability because they may provide reason to believe that the United States does not have “actual or near certain knowledge” that IHL violations will occur. Yet if those assurances are not credible, then they cannot insulate the United States from liability. Some have argued that Saudi Arabia’s military is incapable of adhering to IHL due to serious, systemic problems and, as a result, any assurances could not mitigate U.S. responsibility.³¹⁴ Indeed, in April 2018 there was yet another reported strike on civilians in Yemen—this time an attack on a wedding that reportedly killed more than twenty people and wounded dozens of others.³¹⁵ Furthermore, since the restart of U.S. assistance, several airstrikes have taken place resulting in the deaths of civilians. A continuing pattern of IHL violations after the issuance of assurances makes it more likely that the United States has “actual or near certain knowledge” that there will be future IHL violations by the Saudi-led coalition despite assurances to the contrary—and thus that the United States is responsible for aiding and assisting an internationally wrongful act under Article 16.

IX. Common Article 1 and the U.S. Duty to Ensure Respect for the Geneva Conventions in Yemen

³¹³ Maggie Michael, *In Yemen’s Secret Prisons, UAE Tortures and US Interrogates*, ASSOCIATED PRESS (June 22, 2017), <https://www.apnews.com/4925f7f0fa654853bd6f2f57174179fe>.

³¹⁴ See Andrew Exum, *What’s Really at Stake for America in Yemen’s Conflict*, ATLANTIC (Apr. 14, 2017), <https://www.theatlantic.com/international/archive/2017/04/yemen-trump-aqap/522957>; see also Ryan Goodman, *Jared Kushner, the Arms Deal, and Alleged Saudi War Crimes*, JUST SECURITY (May 20, 2017), <https://www.justsecurity.org/41221/jared-kushner-arms-deal-alleged-saudi-war-crimes>; see also Ryan Goodman, *Former Deputy Assist Sec of Defense: “Glaring” “deficiencies” in Saudi Air Force responsible for civilian casualties in Yemen*, JUST SECURITY (Apr. 17, 2017), <https://www.justsecurity.org/40040/deputy-assist-sec-defense-glaring-deficiencies-saudi-air-force-responsible-civilian-casualties-yemen>.

³¹⁵ Shuaib Almosawa, *Wedding Is Hit by Airstrike in Yemen, Killing More Than 20*, N.Y. TIMES (Apr. 23, 2018), <https://www.nytimes.com/2018/04/23/world/middleeast/yemen-wedding-bombing.html>.

If the United States is aiding and assisting the Saudi-led coalition in its violation of international humanitarian law, as we previously concluded is likely, then the United States is not only in violation of its responsibilities under State Responsibility doctrine, but also its well-accepted obligation not to aid and assist violations under Common Article 1 of the Geneva Conventions.³¹⁶

Common Article 1 obligates states to “undertake to respect and to ensure respect” for the Geneva Conventions in all circumstances.³¹⁷ In March 2016, the International Committee of the Red Cross (ICRC) issued new Commentaries on the Geneva Convention—the first in more than six decades.³¹⁸ The ICRC Commentaries conclude that Common Article 1 imposes not only a negative obligation on states not to encourage violations of the law of armed conflict, but also (and more controversially) a positive third-party obligation on states to closely coordinate their activities with other parties, whether state or non-state actors. The Commentaries state: “Under the negative obligation, High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by Parties to a conflict. Under the positive obligation, they must do everything reasonably in their power to prevent and bring such violations to an end.”³¹⁹ Continued U.S. support for the Saudi-led military campaign in Yemen arguably violates both these negative and positive duties.

Beginning with the negative obligation: In *Nicaragua*, the International Court of Justice (ICJ) explained that Common Article 1 imposed on the United States “an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.”³²⁰ The ICJ found that the United States knew of allegations that the Contras were violating international humanitarian law (IHL) and held that knowledge of these allegations was sufficient to show the foreseeability of future IHL violations by the non-state actor. As the United States knew that IHL violations were “likely or foreseeable,” it had an obligation to halt the provision of any support that could broadly be construed as encouragement. Because it had not done so, it had violated its obligations under Common Article 1.

³¹⁶ This discussion relies heavily on Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539, 572 & n.135 (2017).

³¹⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

³¹⁸ INT’L COMMITTEE OF THE RED CROSS, COMMENTARY OF 2016, art. 1, ¶ 154 (2d ed. Mar. 22, 2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> [hereinafter ICRC Commentary].

³¹⁹ *Id.* art. 1, ¶ 154. Common Article 1 places affirmative responsibilities on states in both a non-international armed conflict (a conflict between a state and one or more non-state actors), and an international armed conflict (where two or more states are parties). *Id.* art. 1, ¶ 125 (“The High Contracting Parties undertake to respect and to ensure respect for ‘the present Convention’ in all circumstances. . . . Thus, the High Contracting Parties must also ensure respect for the rules applicable in non-international armed conflict, including by non-State armed groups. . . .”). While not all of the Articles of the Geneva Convention apply in an armed conflict, the “duty to ensure respect” that this Article discusses does.

³²⁰ *Nicaragua*, *supra* note 159, ¶ 220.

In the current case of Yemen, the United States may similarly be in violation of the negative obligation under Common Article 1. The United States has provided support in the form of munitions, intelligence, and mid-air refueling, despite knowing of credible allegations that Saudi Arabia has violated IHL. The U.S. government reportedly restarted sales of weapons to the coalition only after receiving assurances that Saudi Arabia would take greater precautions to avoid indiscriminate targeting and adhere to IHL. However, states that make a good faith effort to encourage parties to abide by IHL can still be held to violate their Common Article 1 negative duties. In *Nicaragua*, the ICJ found the United States liable for violating Common Article 1 despite the existence of a CIA manual that the United States claimed was intended to *discourage* the Contras from violating IHL (though the manual also included additional recommendations that encouraged violations).³²¹ Indeed, the ICJ took the manual's recommendations aimed at "mitigating" the violations by the Contras as evidence that the United States knew future violations were "likely or foreseeable." Hence, it appears that violations of the negative obligation not to encourage or induce violations of the Geneva Conventions might not be mitigated by recommendations or assurances.

That is particularly true in cases where, as here, there is evidence that efforts to mitigate IHL violations may have been ineffective. Indeed, the Saudi-led coalition's commission of IHL violations after it assured the United States it would take steps to mitigate them—as well as warnings that Saudi Arabia was incapable of adhering to IHL due to serious, systemic problems within its military—indicate that the recent IHL violations may well have been "likely or foreseeable" under the *Nicaragua* standard. Accordingly, continued U.S. support could be construed as encouragement in violation of Common Article 1's negative obligations.

The United States may also be in violation of any positive duties that exist under Common Article 1, though these are less widely accepted.³²² As already noted, the new ICRC Commentaries expressly embrace a positive obligation under Common Article 1 to take action to "ensure respect" of the Geneva Conventions. The ICRC was not the first to suggest that Common Article 1 imposes positive obligations. In its 2004 *Wall* Advisory Opinion,³²³ the ICJ adopted a more expansive reading of Common Article 1 than it had in *Nicaragua*. It found that the Article imposed negative duties "not to encourage" abuses, and also some *positive* third-state obligations.³²⁴ The ICJ interpreted Common Article 1 to imply that "every state party to [the Fourth Geneva] Convention, whether or not it is a party to a specific conflict, is under an *obligation to ensure* that the requirements of the instruments in question are complied with."³²⁵

According to the ICRC's legal staff, this positive obligation requires states "to exercise due diligence in choosing appropriate measures to induce belligerents to comply with the law."³²⁶ States must take "all possible steps, as well as any lawful means at their disposal" to ensure respect

³²¹ *Id.* ¶¶ 255–56.

³²² Hathaway et al., *supra* note 316, at 572 & n.135 (2017).

³²³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9) [hereinafter *Wall* Advisory Opinion].

³²⁴ *Id.* ¶¶ 156–60.

³²⁵ *Id.* ¶ 158 (emphasis added).

³²⁶ Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 97 INT'L REV. RED CROSS 1, 724 (2014).

for the Geneva Conventions.³²⁷ There is no bright-line rule for determining third-state obligations. Rather, the Commentaries stipulate a sliding scale exists whereby “the duty to ensure respect for the Geneva Conventions is particularly strong in the case of a partner in a joint operation, even more so as this case is closely related to the negative duty neither to encourage nor to aid or assist in violations of the Conventions.”³²⁸ The ICRC legal staff has also drawn from the *Bosnian Genocide* case’s interpretation of due diligence and concluded that the scope of third-state positive obligations under Common Article 1 is context-dependent— it may depend on the precise diplomatic, geographic, social, and economic ties between the third state and the belligerent.³²⁹

Whether the United States has violated its positive obligation under Common Article 1 may again turn on the adequacy of U.S. mitigation measures. Pursuant to the ICRC’s due diligence standard, states may discharge their affirmative obligations under Common Article 1 by undertaking efforts to mitigate and prevent violations. That IHL violations by the Saudi-led coalition have continued does not necessarily mean that the United States has not discharged its positive obligation. The due diligence obligation does not require states to attain specific outcomes.³³⁰ Rather, states fulfill their diligence obligation as long as they “make every effort” to prevent the violation.³³¹ Whether the assurances that the United States has received mitigate its positive obligation under Common Article 1 turns on the credibility of the assurances. If Saudi Arabia’s assurances cannot be considered credible—or if the Saudi military was incapable of adhering to IHL regardless of the assurances—then the United States was obligated not to provide any form of support. By this reasoning, the United States would be obliged to cease its support for the Saudi-led coalition and it may also be required to adopt additional affirmative measures, such as diplomatic pressure and public denunciations, in order to avoid further liability.

X. Conclusion

This article argues that continued U.S. support for the Saudi-led coalition in Yemen may violate several domestic laws. The question, however, is whether and how such laws might be enforced. Private companies that manufacture weapons used by the Saudi-led coalition may face liability under the Alien Tort Statute, although there are high hurdles to a successful suit. The U.S. government is protected by sovereign immunity. U.S. government personnel that provide military assistance to the Saudi-led coalition are at limited risk of aiding and abetting violations of the War Crimes Act. Even if a prosecutor could establish the requisite *mens rea*, there has never been a successful prosecution under the War Crimes Act, much less a prosecution for aiding and abetting a violation of the Act.

³²⁷ Hathaway et al., *supra* note 316, at 571 (citing Dörmann & Serralvo, *supra* note 326, at 724).

³²⁸ ICRC Commentary, *supra* note 318, art. 1, ¶ 167; *see also* Hathaway et al., *supra* note 316, at 573.

³²⁹ Hathaway et al., *supra* note 316, at 573 (citing Dörmann & Serralvo, *supra* note 326, at 723–25 (2014) (citing *Bosnian Genocide*, Judgment, 2007 I.C.J. 43, ¶ 430 (Feb. 26)).

³³⁰ Dörmann & Serralvo, *supra* note 326, at 723–25; *see also* ICRC Commentary, *supra* note 318, art. 1, ¶ 165.

³³¹ Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GER. Y.B. INT’L L. 9, 48 (1992). For an extended and speculative discussion of possible options a state may take to discharge “to ensure” Common Article 1 duties, *see generally* Umesh Palwankar, *Measures Available to States for Fulfilling Their Obligation to Ensure Respect for International Humanitarian Law*, 34 INT’L REV. RED CROSS 9 (1994).

The War Powers Resolution and the AECA are the two laws that are most likely to have an impact on U.S. policy in Yemen. Members of Congress could potentially sue the President in federal court for failure to comply with these acts. However, any such legal action might be dismissed as a nonjusticiable political question, as have past suits under the War Powers Resolution.³³² Furthermore, because both the War Powers Resolution and the AECA provide Congress with the means to challenge the President through a joint resolution, a suit brought by members of Congress in the D.C. Circuit Court of Appeals may be dismissed under the doctrine of equitable discretion.³³³

Congress could use its power to hold hearings to investigate the situation in Yemen and determine what steps would be appropriate. Congress can investigate whether the Saudi-led coalition has not lived up to its promise to reduce civilian deaths. Given widespread criticism of Secretary Pompeo's certification under the NDAA, Congress could examine whether the certification was warranted. It could examine, in the process, whether the coalition has taken steps necessary to reduce civilian casualties and otherwise abide by International Humanitarian Law. The information unearthed would place political pressure on the Trump Administration. It could also help build support for further legislative steps.

There are four possible next legislative steps. First, Congress could pass a joint resolution pursuant to the War Powers Resolution, either by following through on the Sanders resolution³³⁴ or by passing one of the other resolutions in the House of Representatives. However, even if such a resolution succeeded in Congress, the resolution would likely face a presidential veto, requiring Congress to muster a two-thirds veto override in both houses—which is highly unlikely. And even if Congress were able to override a presidential veto, it is not clear what legal effect the new law would have on the President, given lingering disputes about the definition of “hostilities” under the War Powers Resolution.³³⁵ The second option would be to pass a joint resolution pursuant to the AECA to block U.S. weapons sales to the Saudi-led coalition. Previous attempts have failed, most recently in June 2017, when a resolution in the Senate was narrowly defeated by a vote of 53-47. That vote, however, was at least partially secured by promises made by Saudi Arabia that it would take greater care to uphold IHL and avoid civilian casualties. Since that assurance, the

³³² See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (dismissing a challenge by members of Congress against the President over the arming of Nicaraguan Contras as a nonjusticiable political question); see also *Crockett v. Reagan*, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (affirming a district court dismissal of a war powers challenge by members of Congress against the President over the arming of Nicaraguan Contras because it presented a nonjusticiable political question). See generally JARED P. COLE, CONG. RESEARCH SERV., R43834, *THE POLITICAL QUESTION DOCTRINE: JUSTICIABILITY AND THE SEPARATION OF POWERS*, (2014), <https://fas.org/sgp/crs/misc/R43834.pdf> (providing background and examples of the use of political question doctrine by federal courts).

³³³ Equitable discretion is employed when Congress has the means to proceed through the legislative process, but fails to do so because of disagreement among the legislators. See *Melcher v. Federal Open Market Committee*, 836 F.2d 561, 565 (D.C. Cir. 1987) (“if a legislator could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator’s action”); see also *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881 (“Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator’s action.”); see also Sophia Goodman, *Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment*, 40 CASE W.L. REV. 1075 (1990) (explaining the background of equitable discretion doctrine and arguing that it should be abandoned by the D.C. Circuit).

³³⁴ S.J. Res. 54, 115th Cong. (2018).

³³⁵ Anderson, *supra* note 91; Bridgeman & Pomper, *supra* note 138.

Saudi-led coalition has continued to conduct airstrikes that violate IHL. Moreover, the Saudi government has been implicated in the torture and killing of journalist Jamal Khashoggi in the Saudi embassy, leading to new calls by members of Congress to halt arms sales (calls President Trump quickly rejected).³³⁶ But, like any other joint resolution, a joint resolution pursuant to the AECA would have to survive a presidential veto. The third option is to pass a bill independent of any other legal authority, such as the Saudi Arabia Accountability and Yemen Act of 2018.³³⁷ Given the outrage over recent behavior by Saudi Arabia, there may be momentum to pass such a bill, but it is not clear that there is enough support to survive a presidential veto.

The fourth option is perhaps the most effective: Congress could use its authority to restrict appropriations.³³⁸ The mid-air refueling of Saudi-led coalition aircraft, training, and targeting assistance can only continue if Congress appropriates funding for these operations. If Congress refuses to authorize these activities—by, for example, including a specific prohibition in the next National Defense Authorization Act—the President would be constitutionally prohibited from using funds to support such activities.³³⁹ As noted earlier,³⁴⁰ the 2019 NDAA used just such a technique—prohibiting spending in the absence of a certification from the Secretary of State that, among other things, steps had been taken by the coalition to reduce civilian casualties. That restriction could be strengthened to prohibit sales and other assistance outright—a prohibition that could later be lifted by Congress if there were clear evidence that the Saudi-led coalition ceased its IHL violations and put in place practices to ensure such violations would not occur in the future. Unlike the other legislative options, Congress does not have to survive a presidential veto. Although the President could veto an appropriations bill which restricted assistance for the Saudi-led coalition, the President would then have no money left with which to continue that assistance. Congress would simply need to hold firm and refuse to pass an appropriations bill without a restriction.

Enforcement in response to the United States' possible international law violations appears, for the moment, less likely. Although the United States may be violating several international laws, including Article 2(4) of the UN Charter, Article 16 of the ILC Draft Articles of State Responsibility, and Common Article 1 of the 1949 Geneva Conventions, enforcement of these laws is a challenge.

Yemen is not party to the Rome Statute of the International Criminal Court and therefore the United States support for the coalition's actions—in possible violation of Article 2(4) and therefore a possible crime of aggression—cannot fall within the Court's jurisdiction. As a permanent member of the United Nations Security Council, the United States can veto any attempt

³³⁶ Vivian Salama & Warren P. Strobel, *Trump Rejects Lawmakers' Calls to Halt Saudi Arms Sales*, WALL ST. J. (Oct. 11, 2018), <https://www.wsj.com/articles/trump-rejects-lawmakers-calls-to-halt-saudi-arms-sales-1539300140>.

³³⁷ S.3652, 115th Cong. (2018).

³³⁸ U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

³³⁹ As discussed *supra* note 99, the Senate has already shifted its focus towards appropriations. The 2019 National Defense Authorization Act 58 ties funding for military assistance to Saudi Arabia with a certification by the Secretary of State that Saudi Arabia is respecting IHL and making efforts to end the war in Yemen. 2018 National Defense Authorization Act, 115th Cong. (2018). The bill passed into law on December 12, 2017.

³⁴⁰ See *supra* text accompanying note 78-79.

by other countries to impose UN-enforcement, including mandated sanctions. In theory, the United States could face unilateral or coordinated multilateral economic sanctions by other countries. The recent decision by Germany to halt arms sales to Saudi Arabia (in response, notably, not to Saudi Arabia's actions in Yemen, but rather its role in the killing of Khashoggi) may open the door to further sanctions.³⁴¹ For now, however, the discussion of sanctions has not included secondary sanctions that would reach the United States, nor are they connected to the Saudi-led war in Yemen. In any case, sanctions are likely to begin with diplomatic overtures to the United States to reduce its support for the Saudi government.

The war in Yemen, and the U.S. role in it, reveals the degree to which the rule of law—both domestic and international—relies on a government, and government officials, committed to the rule of law, for the law to succeed. Sometimes violations of domestic law or international humanitarian law brings consequences that states cannot ignore, but most of the time law protecting the rights of the most vulnerable depend on states to self-police their own behavior. There are consequences for failing to do so: When the government violates domestic law—for example, ignoring constraints contained in the War Powers Resolution or the AECA—it undermines public trust in government. And when states fail to live up to their international legal obligations, they weaken the legal norms from which all states benefit.

It is a reminder that all public law—that is law that governs the behavior of state and state actors—faces an enforcement challenge. It is, after all, the state that is meant to enforce the law. What happens when the law constrains the state? Jack Goldsmith and Daryl Levinson observe precisely this problem when they write, “The puzzle of how a legal regime can coerce the compliance of states in a world where there is no entity more powerful than the state thus arises no less urgently in domestic constitutional law than it does in international law.”³⁴² The answer to this dilemma is that all public law relies to a significant extent on self-enforcement: states are not motivated primarily by threat of external enforcement. They instead rely on “some combination of rationally self-interested in normative, internalized, or role-based motivations.”³⁴³ At least part of that self-interest is commitment to the rule of law—independent of the content of a particular law—itself. The breakdown here is likely evidence of weak—or at least insufficiently strong—commitment to the norms reflected in the relevant laws, but also a willingness to erode the rule of law, or stand by as it is eroded by others, which is much the same thing.

It is an unfortunate reality that the United States, the nation that championed the creation of international laws governing human rights, humanitarian law, and the use of force, and which helped lead the way in incorporating many of those same commitments into domestic law to further support and enforce them, has proven reluctant to support the laws' robust enforcement. What is happening in Yemen will not bring down the international legal order. But the open violation of several core norms of that legal order that is taking place in Yemen is a dangerous sign that those norms are eroding. If law-breaking behavior faces little or no consequence, over time those laws

³⁴¹ Jakob Hanke, *Merkel Backs Call to Freeze Arms Exports to Saudi Arabia*, POLITICO (Oct. 21, 2018), <https://www.politico.eu/article/heiko-maas-norbert-rottgen-german-politicians-call-for-freeze-on-arms-exports-to-saudi-arabia-after-jamal-khashoggi-death/>.

³⁴² Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1823 (2009) (noting that Constitutional law and international law share “the problem of enforcement.”).

³⁴³ *Id.* at 1840.

are drained of their force and effect. The legitimacy and long-term viability of the international legal system cannot but suffer as a result.