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May 19, 2017

The United States Senate  
Washington, DC

Dear Senators:

As Congress prepares to debate the subject of arms sales to Saudi Arabia, questions have arisen concerning whether these sales are consistent with U.S. statutory obligations regarding arms sales and military assistance to Saudi Arabia in the context of the ongoing conflict in Yemen. Relating to these deliberations, the American Bar Association's Center for Human Rights has been requested to provide an expert opinion on whether further sales to Saudi Arabia would be consistent with the Arms Export Control Act.

The Center is pleased to transmit the attached *Assessment of the Legality of Arms Sales to the Kingdom of Saudi Arabia in the Context of the Conflict in Yemen*, prepared by Professor Michael Newton (LTC U.S. Army, ret.), Professor of the Practice of Law, Vanderbilt University School of Law.

The views expressed in this paper have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

We hope that this *Assessment* will be of value to the Senate and appreciate the opportunity to be of assistance on this important subject.

Sincerely,



Michael Pates

Director



Brittany Benowitz

Chief Counsel

# **An Assessment of the Legality of Arms Sales to the Kingdom of Saudi Arabia in the Context of the Conflict in Yemen<sup>1</sup>**

**May 19, 2017**

## **I. Introduction**

This White Paper analyzes U.S. statutory obligations regarding arms sales and military assistance to Saudi Arabia in the context of the ongoing conflict in Yemen. The United States has provided significant support for Saudi Arabia, including over \$115 billion in arms sales over the last eight years. During the course of hostilities conducted by a Saudi-led coalition in Yemen over the last two years, the United States has provided billions of dollars of equipment for use in Yemen and provided in-flight re-fueling to support bombing operations. In light of credible allegations of widespread violations of international humanitarian law by all parties to the conflict resulting in significant civilian casualties over the last two years, concerns have been raised about the legality of further arms sales under U.S. law. In the face of persistent reports of wrongdoing, Saudi Arabia has failed to rebut allegations or provide detailed evidence of compliance with binding obligations arising from international humanitarian law. In the context of multiple credible reports of recurring and highly questionable strikes, even after Saudi units received training and equipment to reduce civilian casualties, the United States cannot continue to rely on Saudi assurances that it will comply with international law and agreements concerning the use of U.S.-origin equipment. Under these circumstances, further sales under both the Arms Export Control Act and the Foreign Assistance Act 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. Congress should utilize the expedited review procedures of both Acts to ensure compliance with the law.

## **II. Factual Background**

### **A. Allegations of Serious Violations of International Law**

Since 2015, a coalition led by Saudi Arabia has participated in air and ground campaigns against Houthi rebels in Yemen who seized large areas of the country from the control of the legitimate government.<sup>2</sup> The air campaign has resulted in significant civilian casualties. Additionally, attacks and blockades by both sides have severely restricted the flow of humanitarian aid and significantly

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<sup>1</sup> Prepared by Professor Michael Newton (LTC U.S. Army ret.), Professor of the Practice of Law, Vanderbilt University School of Law, <http://law.vanderbilt.edu/bio/michael-newton>, with expert research assistance provided by Kourtney J. Kinsel.

<sup>2</sup> See *Yemen Crisis: Who is Fighting Whom?*, BBC NEWS (Oct. 14, 2016), <http://www.bbc.com/news/world-middle-east-29319423>.

contributed to a looming famine<sup>3</sup> that would affect 17.1 million people who are currently food insecure.<sup>4</sup> Of these, 7.3 million are in need of emergency food assistance.<sup>5</sup>

The Office of the U.N. High Commissioner for Human Rights (OHCHR) has reported that “[t]he cases monitored by the Office indicate that air strikes were the single largest cause of casualties, resulting in approximately one third of the deaths and injuries recorded by the OHCHR.”<sup>6</sup> The OHCHR reported that between July 2015 and June 2016, 1,259 civilians were allegedly killed and 1,360 injured by air strikes led by Saudi Arabia and its coalition forces.<sup>7</sup> In March 2017, the OHCHR reported that at least 4,773 civilians have been killed and another 8,272 injured.<sup>8</sup> It further reported that there had been an “intensification in hostilities” in the first three months of the year, including 106 civilians killed mostly by coalition forces in one month.<sup>9</sup>

In a series of investigations undertaken between 2015 and 2017, a U.N. Panel of Experts (the “Panel”)<sup>10</sup> concluded that the Saudi coalition had breached its international obligations during the course of hostilities. After an investigation in 2015, it concluded that the Saudi-led coalition had bombed residential neighborhoods and treated “the entire city of Sa’dah and region of Maran as military targets.”<sup>11</sup> The Panel assessed the information to which it had access and concluded the coalition has committed “a grave violation of the principles of distinction, proportionality and precaution” and in some specific instances “found such violations to have been conducted in a widespread and systematic manner.”<sup>12</sup> The targeting of entire cities, as inferred from the statement of Saudi officers,<sup>13</sup> is one such egregious violation of applicable international law related to targeting that suggests deliberate disregard for binding international obligations. While the Saudi statements could have been taken to imply a general operational priority, the Panel assessed the continuing pattern of questionable strikes to warrant the adverse inference.

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<sup>3</sup> Oxfam, *Yemen: Millions Knowingly Pushed to the Brink of Famine* (Mar. 23 2017), <http://www.oxfam.org.uk/media-centre/press-releases/2017/03/millions-in-yemen-knowingly-pushed-to-the-brink-of-famine>.

<sup>4</sup> RELIEFWEB, YEMEN EMERGENCY FOOD SECURITY AND NUTRITION ASSESSMENT (EFSNA) 2016 - PRELIMINARY RESULTS (Jan. 26, 2017), <http://reliefweb.int/report/yemen/yemen-emergency-food-security-and-nutrition-assessment-efsna-2016-preliminary-results>.

<sup>5</sup> *Id.*

<sup>6</sup> U.N. Office of the High Comm’r on Human Rights [OHCHR], *Situation of Human Rights in Yemen*, ¶ 24, A/HRC/33/38 (Aug. 4, 2016) [Hereinafter OHCHR Report].

<sup>7</sup> *Id.* ¶ 13.

<sup>8</sup> OHCHR, *Over 100 civilians killed in a month, including fishermen, refugees, as Yemen conflict reaches two-year mark*, (24 March 2017),

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21444&LangID=E#sthash.qU46xFhX.dpuf>.

<sup>9</sup> *Id.*

<sup>10</sup> See U.N. SCOR, Res 2140, ¶ 21, U.N. Doc. S/Res/2140, (Feb. 26, 2014) (establishing the Panel of Experts).

<sup>11</sup> U.N. Panel of Experts on Yemen, Rep., transmitted by letter dated 22 January 2016 from the Panel of Experts on Yemen established pursuant to Security Council resolution 2140 (2014) addressed to the President of the Security Council, ¶ 128, U.N. Doc. S/2016/73 (2014).

<sup>12</sup> *Id.*

<sup>13</sup> On May 8, May 2015, Brigadier General Assiri (official spokesman for the Saudi-led coalition) stated publicly that “[w]e have also declared Saada and Marran as military targets loyal to the Houthi militias and as a result the operations will cover the whole area of those two cities.” See HUMAN RIGHTS WATCH, *TARGETING SAADA: UNLAWFUL COALITION AIRSTRIKES ON SAADA CITY IN YEMEN* (2015), <https://www.hrw.org/report/2015/06/30/targeting-saada/unlawful-coalition-airstrikes-saada-city-yemen>.

In 2016, a second investigation by the Panel identified 119 purportedly unlawful strikes.<sup>14</sup> Saudi Arabia provided no public rebuttal to support the countervailing conclusion that such strikes were properly within the realm of lawful discretion during armed conflicts not of an international character.<sup>15</sup> In 2017, the Panel's third assessment included a detailed investigation of a number of air strikes and concluded that the Saudi-led coalition has likely contravened international norms in at least ten.<sup>16</sup> These air strikes alone led to "at least 292 civilian fatalities, including at least 100 women and children."<sup>17</sup> The strikes hit primarily civilian locations, including residential buildings, factories, a hospital, and a marketplace.<sup>18</sup> Eight of the ten air strikes, all of which occurred in 2016, involved precision guided munitions (PGMs).<sup>19</sup> The Panel noted that Saudi and other coalition authorities failed to provide information concerning the ten air strikes, in contravention of a resolution of the U.N. Security Council calling for all member states to support the work of the Panel.<sup>20</sup>

The locations targeted by the air strikes and the number of civilian casualties suggest violations of international humanitarian law by the coalition forces.<sup>21</sup> Human rights organizations have reported many more questionable coalition attacks, with Human Rights Watch reporting that it has documented 81 apparently unlawful coalition attacks, including 23 allegedly involving the use of U.S. weapons.<sup>22</sup>

In addition to reports of widespread violations of international humanitarian and human rights law in Yemen, there are credible reports of a consistent pattern of gross violations of internationally

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<sup>14</sup> U.N. Panel of Experts on Yemen, Rep., transmitted by letter dated 22 January 2016 from the Panel of Experts on Yemen established pursuant to Security Council resolution 2140 (2014) addressed to the President of the Security Council, ¶ 138, U.N. Doc. S/2016/73 (Jan. 26, 2016), [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2016/73](http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/73).

<sup>15</sup> See Michael A. Newton, *Charging War Crimes: Policy & Prognosis*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT*, Chapter 29, 732 (Carsten Stahn ed., Oxford University Press 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2397926](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397926).

<sup>16</sup> U.N. Panel of Experts on Yemen, Rep., transmitted by letter dated 27 January 2017 from the Panel of Experts on Yemen addressed to the President of the Security Council, 2, U.N. Doc. S/2017/81 (Jan. 31, 2017), <http://reliefweb.int/report/yemen/letter-dated-27-january-2017-panel-experts-yemen-addressed-president-security-council> [Hereinafter Third Panel of Experts Report].

<sup>17</sup> *Id.* at ¶ 120.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at ¶ 127 ("In 8 of the 10 investigations, the Panel found no evidence that the air strikes had targeted legitimate military objectives. For all 10 investigations [of airstrikes discussed above], the Panel considers it almost certain that the coalition did not meet international humanitarian law requirements of proportionality and precautions in attack. The Panel considers that some of the attacks may amount to war crimes.").

<sup>20</sup> *Id.* at ¶ 126.

<sup>21</sup> *Id.* at 3 ("The conflict has seen widespread violations of international humanitarian law by all parties to the conflict. The Panel has undertaken detailed investigations into some of these incidents and has sufficient grounds to believe that the coalition led by Saudi Arabia did not comply with international humanitarian law in at least 10 air strikes that targeted houses, markets, factories and a hospital.").

<sup>22</sup> Human Rts. Watch, *UAE: Clarify Role in Deadly Attack on Refugee Boat*, (Apr. 13, 2017), <https://www.hrw.org/news/2017/04/13/uae-clarify-role-deadly-attack-refugee-boat> (stating that "Human Rights Watch has documented 81 apparently unlawful coalition attacks since the start of the conflict"); Human Rts. Watch, *US Rebukes Saudi Arabia by Halting Arms Sale*, (Dec. 15, 2016), <https://www.hrw.org/news/2016/12/15/us-rebukes-saudi-arabia-halting-arms-sale> (stating that "US-supplied weapons were used in at least 23 apparently unlawful attacks that have killed Yemeni civilians").

recognized human rights within Saudi Arabia.<sup>23</sup> The last five annual human rights reports issued by the U.S. Department of State reference allegations of torture and prolonged arbitrary detention in Saudi Arabia.<sup>24</sup> The United Kingdom has designated Saudi Arabia as one of 27 countries of concern for wide-ranging and severe abuses.<sup>25</sup> As discussed below, Saudi Arabia's past record of domestic compliance with international human rights law is one of several factors that must be considered when evaluating the provision of security assistance in accordance with the relevant provisions of U.S. law.

## **B. Shift to Reduced Sales in 2016**

U.S. support for Saudi Arabia in the Yemeni conflict began in 2015. In November 2015, the Obama Administration notified Congress of a \$1.3 billion sale of "precision guided air-to-ground munitions" to Saudi Arabia.<sup>26</sup>

However, several members of Congress questioned the sales, expressing concern both about violations of humanitarian law and the possibility that the Saudi-led campaign was complicating efforts to combat Al-Qaida. Sen. Corker (R-TN) and Sen. Cardin (D-MD), the chairman and ranking member of the Senate Foreign Relations Committee respectively, utilized for the first time a recently enacted law to require a second notification prior to the delivery of the munitions based on concerns about the conduct of hostilities by the Saudi led coalition.<sup>27</sup> On April 13, 2016, Senators Murphy (D-CT) and Paul (R-KY) introduced a resolution intended "[t]o provide limitations on the transfer of certain United States munitions from the United States to Saudi Arabia."<sup>28</sup> The joint resolution sought to halt sales of air-to-ground munitions until the President could certify that Saudi Arabia was taking precautions to minimize civilian casualties and that the sales fell under one of the permitted purposes of the Arms Export Control Act.<sup>29</sup> A parallel resolution was introduced in the House on April 20, 2016.<sup>30</sup> Neither received floor consideration. An amendment to the National Defense Authorization Act of 2017 that would have prevented

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<sup>23</sup> HUMAN RIGHTS WATCH, SAUDI ARABIA: EVENTS OF 2016 (2017), <https://www.hrw.org/world-report/2017/country-chapters/saudi-arabia>.

<sup>24</sup> U.S. DEP'T OF STATE, SAUDI ARABIA 2012 HUMAN RIGHTS REPORT, <https://www.state.gov/documents/organization/204593.pdf>; U.S. DEP'T OF STATE, SAUDI ARABIA 2013 HUMAN RIGHTS REPORT, <https://www.state.gov/documents/organization/220586.pdf>; U.S. DEP'T OF STATE, SAUDI ARABIA 2014 HUMAN RIGHTS REPORT, <https://www.state.gov/documents/organization/236832.pdf>; U.S. DEP'T OF STATE, SAUDI ARABIA 2015 HUMAN RIGHTS REPORT, <https://www.state.gov/documents/organization/253157.pdf>; U.S. DEP'T OF STATE, SAUDI ARABIA 2016 HUMAN RIGHTS REPORT, <https://www.state.gov/documents/organization/265730.pdf>.

<sup>25</sup> UK FOREIGN AND COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY REPORT 2014 (2016), <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2014/human-rights-and-democracy-report-2014>.

<sup>26</sup> S.J. Res 32, 114th Cong. 2d Sess. (2016).

<sup>27</sup> John Hudson, *Flexing New Powers, Congress to Review Arms Shipments to Saudi Arabia*, FOREIGN POLICY (Dec. 10, 2015), <http://foreignpolicy.com/2015/12/10/flexing-new-powers-congress-to-review-arms-shipments-to-saudi-arabia/>.

<sup>28</sup> S.J. Res 32, 114th Cong. 2d Sess. (2016).

<sup>29</sup> *Id.* at § 4(1).

<sup>30</sup> H. J. Res 90, 114th Cong. 2d Sess. (2016).

further transfer of cluster munitions was narrowly defeated in the House.<sup>31</sup> A resolution of disapproval concerning the sale of tanks was also defeated in the Senate.<sup>32</sup>

In May 2016, the U.S. stopped sales of cluster munitions after reports that they had been used in or near civilian areas in violation of the terms of sale mandated by the Arms Export and Control Act.<sup>33</sup> In October 2016, the Obama administration announced a review of support to the Saudi-led coalition after a bombing of a funeral home with an U.S.-origin laser-guided bomb that resulted in over 100 civilian deaths.<sup>34</sup> When discussing the strike with journalists, administration officials stated that there was “no justification” for the strike.<sup>35</sup> In December 2016, the Obama administration halted a nearly \$400 million transfer of PGMs, citing “systemic, endemic” problems with Saudi Arabia’s targeting but without publicly citing any statutory obligation to suspend sales.<sup>36</sup> Administration officials reportedly noted that improving the precision of munitions would not help alleviate civilian casualties if the Saudi-led coalition did not select targets properly.<sup>37</sup> However, the administration also refused to change its practice of assisting by refueling of Saudi coalition planes.<sup>38</sup> A former Obama administration official testified in March 2016 that there was a temporary reduction in civilian casualties after the announced review of arms sales.<sup>39</sup>

### C. Potential Resumption of Sales in 2017

For the purposes of this memorandum, factual allegations reported by NGOs, the OHCHR, and other U.N. experts are assumed to be accurate, or at least reasonably so. This memorandum discusses provisions of U.S. law relevant to a resumption of arms sales in light of these persistent allegations.

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<sup>31</sup> Gabe Murphy, *Saudi Arms Deals Under Fire: 27 Senators Defy the Arms Industry*, PEACE ACTION’S GROUNDSWELL (Sep. 21, 2016), <https://peaceblog.wordpress.com/2016/09/21/saudi-arms-deals-under-fire-27-senators-defy-the-arms-industry/> (stating that, in June 2016, “an amendment that would have permanently blocked the transfer of cluster bombs to Saudi Arabia ... narrowly failed in a vote of 204-216”).

<sup>32</sup> Jordain Carney, *Senate rejects push to block Saudi arms sale*, THE HILL, Sep. 21, 2016, <http://thehill.com/blogs/floor-action/senate/297075-senate-rejects-push-to-block-saudi-arms-sale>.

<sup>33</sup> Cluster Munition Coalition, *US suspends cluster munitions sales to Saudi Arabia* (June 01, 2016), <http://www.stopclustermunitions.org/en-gb/media/news/2016/us-suspends-cluster-munitions-sales-to-saudi-arabia.aspx>.

<sup>34</sup> Ryan Cooper, *Full Text: Saudi-Led Coalition’s Statement of Explanation on Funeral Hall Bombing in Yemen*, JUST SECURITY (Oct. 16, 2016), <https://www.justsecurity.org/33615/full-text-saudi-led-coalitions-statement-explanation-funeral-hall-bombing-yemen/>.

<sup>35</sup> *Id.*; see also Patrick Wintour, *US says support for Saudi Arabia not a 'blank cheque' after Yemen air raid*, THE GUARDIAN, Oct. 9, 2016, <https://www.theguardian.com/world/2016/oct/09/saudi-arabia-investigate-air-raid-on-funeral-in-yemen>.

<sup>36</sup> Phil Stewart & Warren Strobel, *U.S. to Halt Some Arms Sales to Saudi, Citing Civilian Deaths in Yemen Campaign*, REUTERS, Dec. 13, 2016, <http://www.reuters.com/article/us-usa-saudi-arabia-yemen-exclusive-idUSKBN1421UK>.

<sup>37</sup> 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?\\_r=0](https://www.nytimes.com/2016/12/13/us/politics/saudi-arabia-arms-sale-yemen-war.html?_r=0).

<sup>38</sup> *Id.*; see also Press Release, U.S. Dep’t of Defense, Contracts (Sept. 1, 2016) (providing notice of U.S. company’s \$495 million contract for “F-14 S&SA type aircraft maintenance upgrade training” for the Royal Saudi Air Force, to be completed by August 2021), <https://www.defense.gov/News/Contracts/Contract-View/Article/933556>.

<sup>39</sup> Ryan Goodman, *Opinion: Will Arms Sales to Saudi Invite War Crimes Prosecution*, NEWSWEEK, 21 March 2017, <http://www.newsweek.com/will-arms-sales-saudis-invite-war-crimes-charges-569833>.

Despite resistance in 2016 to transfer of arms to Saudi Arabia, the new administration has signaled a policy of continued arms sales to Saudi Arabia. In January, the administration approved a \$525 million observation-balloon sale to Saudi Arabia.<sup>40</sup> Further, recent reports indicate State Department approval of the transfer of the previously withheld precision guided munitions.<sup>41</sup> Meanwhile, U.S. forces have become further involved in Yemen in fights against Al-Qaida.<sup>42</sup> Senators Murphy, Paul, Durbin, and Franken introduced a new resolution that would condition sales on improvements in targeting and progress against Al-Qaida.<sup>43</sup>

In light of these developments, careful review of the statutory requirements concerning the transfer of weapons following credible allegations of impermissible employment is warranted.

### III. Statutory Limitations on U.S. Provision of Defense Articles and Services

Two statutes provide the primary authority for the sale of military equipment and services to foreign nations: the Arms Export Control Act of 1976 (AECA) and Foreign Assistance Act of 1961 (FAA).<sup>44</sup> The FAA provides the framework for a wide range of foreign assistance programs, including international military education and training. The AECA authorizes the sale of defense articles and services by the United States (known as foreign military sales), financing for such sales by the United States (known as foreign military financing) and sales by private parties licensed by the United States (known as direct commercial sales).<sup>45</sup>

#### A. Foreign Assistance Act

##### 1. Statutory Requirements

###### a. Prohibition on Sales to Consistent Human Rights Violators

The FAA limits the countries to which the United States can offer aid based on the human rights status of the recipient government. Section 502B (codified at 22 U.S.C. § 2304) mandates that “no security assistance may be provided to any country the government of which engages in a

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<sup>40</sup> Thomas Gibbons-Neff, *Trump's First Arms Sales, Holdovers from the Obama Era, Are Business as Usual*, WASH. POST, Jan. 24, 2017, [https://www.washingtonpost.com/news/checkpoint/wp/2017/01/24/trumps-first-arms-sales-holdovers-from-the-obama-era-are-business-as-usual/?utm\\_term=.af5823af2dd4](https://www.washingtonpost.com/news/checkpoint/wp/2017/01/24/trumps-first-arms-sales-holdovers-from-the-obama-era-are-business-as-usual/?utm_term=.af5823af2dd4).

<sup>41</sup> Missy Ryan & Anne Gearan, *Trump Administration Looks to Resume Saudi Arms Sale Criticized as Endangering Civilians in Yemen*, WASH. POST, Mar. 8, 2017, [https://www.washingtonpost.com/world/national-security/trump-administration-looks-to-resume-saudi-arms-sale-criticized-as-endangering-civilians-in-yemen/2017/03/08/a259090a-040e-11e7-b1e9-a05d3c21f7cf\\_story.html?utm\\_term=.1beb0e9836ff](https://www.washingtonpost.com/world/national-security/trump-administration-looks-to-resume-saudi-arms-sale-criticized-as-endangering-civilians-in-yemen/2017/03/08/a259090a-040e-11e7-b1e9-a05d3c21f7cf_story.html?utm_term=.1beb0e9836ff).

<sup>42</sup> See Joshua Keating, *The Trump Administration is Ramping up the War in Yemen*, SLATE: THE SLATEST (Mar. 3, 2017, 3:18 PM), [http://www.slate.com/blogs/the\\_slatest/2017/03/03/the\\_trump\\_administration\\_is\\_ramping\\_up\\_the\\_war\\_in\\_yemen.html](http://www.slate.com/blogs/the_slatest/2017/03/03/the_trump_administration_is_ramping_up_the_war_in_yemen.html) (detailing new U.S. activities against Al-Qaida in Yemen).

<sup>43</sup> Press Release, Al Franken, “Franken, Murphy, Paul, Durbin Announce Legislation to Set New Conditions for U.S. Military Support to Saudi Arabia,” (Apr. 13, 2017), [https://www.franken.senate.gov/?p=press\\_release&id=3671](https://www.franken.senate.gov/?p=press_release&id=3671).

<sup>44</sup> Nina M. Serafino, *Security Assistance and Cooperation: Shared Responsibility of the Departments of State and Defense*, CONG. RESEARCH SERV (2016), <https://fas.org/sgp/crs/natsec/R44444.pdf>.

<sup>45</sup> DEF. SEC. COOPERATION AGENCY, SECURITY ASSISTANCE MANAGEMENT MANUAL, GLOSSARY, <http://www.samm.dsca.mil/listing/esamm-glossary>.

consistent pattern of gross violations of internationally recognized human rights.”<sup>46</sup> “Security assistance” includes sales and licenses to foreign security forces under the AECA, among other forms of assistance.<sup>47</sup>

The application of Section 502B hinges on the satisfaction of five elements.<sup>48</sup> First, there must be a human rights violation. The statute builds in a reporting requirement: the Secretary of State must provide Congress with information about certain enumerated acts by governments potentially receiving assistance.<sup>49</sup> These reports can rely on “the relevant findings of appropriate international organizations, including nongovernmental organizations[.]”<sup>50</sup> Thus, the FAA suggests that a violation need not be determined by a court or tribunal, and can instead be supported by a “relevant finding” from an NGO or other international organization.

Second, the human rights violated must be “internationally recognized.” The FAA defines these violations as including:

torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person[.]<sup>51</sup>

While the statute does not define “other flagrant denial of the right to life, liberty, or the security of person,” this term should, in my expert opinion, encompass serious violations of international humanitarian law, resulting in the loss of civilian life. Indiscriminate or disproportionate attacks on civilians in the context of an armed conflict that result in civilian casualties arguably represent violations of the right to life under both international humanitarian law and international human rights law, depending on the context of operations and the information reasonably available to the decision maker.<sup>52</sup> Phrased another way, civilians and other non-combatants enjoy a right to life *vis-à-vis* participants in armed conflict which is protected and in some cases delimited by the applicable laws of armed conflict. Consistent with this reading of the statute, Section 502B requires the Secretary to include “consolidated information regarding the commission of war

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<sup>46</sup> 22 U.S.C. § 2304(a)(2).

<sup>47</sup> 22 U.S.C. § 2304(d)(2)(B).

<sup>48</sup> See Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT’L L. 246, 246–264 (1982) for a listing and further discussion of these factors. The elaboration of elements that follows heavily depends on Cohen’s detailed research into the legislative history of Section 502B.

<sup>49</sup> 22 U.S.C. § 2304(b).

<sup>50</sup> 22 U.S.C. § 2304(b)(1).

<sup>51</sup> 22 U.S.C. § 2304(d)(1).

<sup>52</sup> See U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL § 1.6.3.1. (2015, updated 2016), *citing* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (¶25) (July 8) (“In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable to armed conflict which is designed to regulate the conduct of hostilities.”) The advisory opinion explained that “whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to [international human rights law], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of [international human rights law] itself.”



crimes,” *i.e.* violations of international humanitarian law, in the annual human rights report used to evaluate eligibility for security assistance.<sup>53</sup>

Notably, the FAA does not require a causal linkage between the violations of internationally recognized human rights and the provision of the military assistance. In other words, nothing in the statute suggests that the military assistance need be used to help commit the violations.

Third, the violation must be “gross.” Gross is a proxy for significance: the violation must be of sufficient gravity.<sup>54</sup>

Fourth, there must be a “consistent pattern” of gross violations. Unlike the indicia for “gross,” the standards for a consistent pattern look to number and recurrence.<sup>55</sup>

Lastly, the government potentially receiving assistance must be involved in the violation. The statutory language—“engages”—may suggest responsibility, approval, or some other degree of *mens rea*. Historically, effective control of forces has not been required, and “approval by highest ranking officials” satisfies the “engages” requirement.<sup>56</sup>

By statute, an exception applies for military education, training and criminal control equipment—but not arms sales—even upon satisfaction of all of the above elements if the President notifies the Speaker of the House and the chairmen of the Senate Committees on Foreign Relations and Banking “that extraordinary circumstances exist warranting provision of such assistance.”<sup>57</sup> Additionally, certain assistance may resume where the President certifies to Congress that there has been a “significant improvement” in the human rights record of the country.<sup>58</sup> In practice, Section 502B’s requirements have often been sidestepped by the executive branch.<sup>59</sup>

#### **b. Prohibition on Sales to Countries Restricting Humanitarian Assistance**

The Foreign Assistance Act also prohibits the provision of security assistance or assistance under the Arms Export Control Act “to any country when it is made known to the President that the government of such country prohibits or otherwise restricts, directly or indirectly, the transport or delivery of United States humanitarian assistance.”<sup>60</sup> There is an exception permitting the continuation of assistance notwithstanding such activities by the recipient government, if the President determines that it is in the national security interest of the United States to do so.<sup>61</sup>

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<sup>53</sup> 22 U.S.C. § 2304(b).

<sup>54</sup> See *Tachiona v. Mugabe*, 234 F.Supp. 2d 401, 426-27 (S.D.N.Y. 2002) (“Among consistent patterns deemed ‘gross,’ the Restatement [on Foreign Relations] cites as examples: ‘systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention (even if not prolonged); ... denial of freedom of conscience ....’”) *citing* *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 702 (rev’d on other grounds).

<sup>55</sup> See Cohen, *supra* note 48 at 268.

<sup>56</sup> *Id.*

<sup>57</sup> 22 U.S.C. § 2304(a)(2); *but see* Cohen, *supra* note 48, at 247 (indicating that the waiver applies to all forms of security assistance).

<sup>58</sup> 22 U.S.C. § 2304(e), (f) and (g).

<sup>59</sup> See Cohen, *supra* note 48, at 246–64 (detailing tensions between the executive and legislative branches over implementation of Section 502B).

<sup>60</sup> 22 U.S.C. § 2378-1(a).

<sup>61</sup> *Id.* at § 2378-1(b).

However, the President must first provide a certification to certain congressional committees justifying this determination.<sup>62</sup>

### **c. Prohibition on Sales to Foreign Units Engaged in Abuses**

Additionally, Section 620M of the Foreign Assistance Act (codified at 22 U.S.C. § 2378d) prohibits the U.S. government from providing security assistance, including assistance under the Arms Export Control Act,<sup>63</sup> to “any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.”<sup>64</sup> There is an exception to the provision where “the government of such country is taking effective steps to bring the responsible members of the security forces unit to justice.”<sup>65</sup> This section does not define “gross human rights violations.” The Department of State therefore uses the definition included in Section 502B(d) noted above.<sup>66</sup> A similar provision applies to assistance provided by the Defense Department.<sup>67</sup>

## **2. Analysis**

### **a. The government of Saudi Arabia has engaged in a consistent pattern of gross human rights violations in Saudi Arabia**

The current sale of arms to Saudi Arabia should be carefully assessed in light of the specific duties embedded in Section 502B. As a threshold issue, we have found no evidence that either President Obama or President Trump notified Congress of any “extraordinary circumstances” warranting assistance despite Saudi Arabia’s consistent pattern of gross human rights violations.<sup>68</sup> Thus, the threshold exception to Section 502B likely does not apply.

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<sup>62</sup> *Id.* at § 2378-1(c).

<sup>63</sup> The Department of State does not apply Section 620M to direct commercial sales under the AECA. The legal reasoning for this is unclear, as the law expressly applies to all “assistance” under the AECA. While assistance is not defined in Section 620M, Section 502B defines “security assistance” for the purposes of that section, to include licenses pursuant to the AECA, as discussed above. The Department does acknowledge that this section applies to equipment sold by the United States or purchased with U.S. financing. *See* GOVERNMENT ACCOUNTABILITY OFFICE, SECURITY ASSISTANCE: U.S. SHOULD STRENGTHEN END-USE MONITORING AND HUMAN RIGHTS VETTING, 39 (April 2016).

<sup>64</sup> 22 U.S.C. § 2378d(a).

<sup>65</sup> 22 U.S.C. § 2378d(b).

<sup>66</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, HUMAN RIGHTS: ADDITIONAL GUIDANCE, MONITORING, AND TRAINING COULD IMPROVE IMPLEMENTATION OF THE LEAHY LAWS, 13 (2013), <http://securityassistance.org/sites/default/files/658107.pdf>

<sup>67</sup> 10 U.S.C. § 362.

<sup>68</sup> Since 2004, the Department of State has designated Saudi Arabia as a “Country of Particular Concern” (CPC) under the International Religious Freedom Act of 1998 for having engaged in or tolerated particularly severe violations of religious freedom.” U.S. DEP’T OF STATE, SAUDI ARABIA INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2015, <https://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>. In 2016, the Secretary redesignated Saudi Arabia as a CPC and granted a waiver under the International Religious Freedom Act of 1998 that enables continued assistance for Saudi Arabia, including security assistance. This waiver does not obviate the need for a presidential waiver under Section 502B as that section of the Foreign Assistance Act covers human rights abuses other than those covered by the International Religious Freedom Act.

Saudi Arabia presents an apparent *prima facie* case for the immediate cessation of sales under the FAA. There are consistent and credible reports of clear violations of internationally recognized human rights as defined by the Act. Whether or not the specific assistance provided to Saudi Arabia is used to further violations of human rights is not a statutory factor to this analysis. Instead, the statute only looks to human rights violations—including flagrant denials of the right to life under international humanitarian law—writ large.

For the last five years, in the annual reports required by Section 502B for the purpose of informing the President’s determination of whether a country is eligible for security assistance, the U.S. Department of State (DOS) noted multiple violations that clearly fall within the statute’s definition.<sup>69</sup> For example, the FAA defines “prolonged detention without trial” as a grave human rights abuse.<sup>70</sup> The 2016 Human Rights Report found that “[a]uthorities held persons for months and sometimes years without charge or trial”.<sup>71</sup>

The report also notes a number of abuses amounting to the “flagrant denial of the right to life, liberty or security of person” which are also, by the FAA’s definition, gross human rights violations.<sup>72</sup> Saudi authorities sentenced to death several individuals for conduct allegedly undertaken while they were minors,<sup>73</sup> in clear contravention of Article 37 of the Convention on the Rights of the Child,<sup>74</sup> to which Saudi Arabia is a party.<sup>75</sup> Human rights groups reported that the trials failed to meet international standards because *inter alia* the courts allowed the admission of forced confessions into evidence.<sup>76</sup>

The DOS report also discusses allegations of torture and cruel, inhuman, or degrading punishment as reported by Amnesty International, Human Rights Watch, and the U.N. Committee against Torture.<sup>77</sup> These organizations reported that courts admitted coerced confessions into evidence and that “a climate of impunity” surrounded allegations of torture.<sup>78</sup>

The reports of human rights violations suggest that the violations are gross and consistent. Although the DOS finds that “[l]ack of governmental transparency and access made it difficult to

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<sup>69</sup> See *supra* note 24.

<sup>70</sup> 22 U.S.C. § 2304(d)(1).

<sup>71</sup> U.S. DEP’T OF STATE, SAUDI ARABIA 2016 HUMAN RIGHTS REPORT I(d) (2016), <https://www.state.gov/documents/organization/265730.pdf> [hereinafter DOS 2016 Report].

<sup>72</sup> 22 U.S.C. § 2304(d)(1).

<sup>73</sup> See, e.g., Miriam Wells & Namir Shihabi, *These Are the Juvenile ‘Offenders’ Saudi Arabia Executed in January*, VICE NEWS (Apr. 26, 2016), <https://news.vice.com/article/these-are-the-juvenile-offenders-saudi-arabia-executed-in-january>. See also *Saudi Arabia Executions: 7 Put To Death For Robbery*, THE HUFFINGTON POST (Mar. 13, 2013 09:23 AM), [http://www.huffingtonpost.com/2013/03/13/saudi-arabia-executes-7-men-by-firing-squad\\_n\\_2866655.html](http://www.huffingtonpost.com/2013/03/13/saudi-arabia-executes-7-men-by-firing-squad_n_2866655.html).

<sup>74</sup> G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (defining a child as a person under 18 years old and stating that no child shall be subject to capital punishment).

<sup>75</sup> See List of signatories to the Convention on the Rights of the Child, UNITED NATIONS, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf> (last visited Apr. 4, 2017).

<sup>76</sup> Human Rts. Watch, *Saudi Arabia: 3 Alleged Child Offenders Await Execution*, (Apr. 17, 2016), <https://www.hrw.org/news/2016/04/17/saudi-arabia-3-alleged-child-offenders-await-execution>.

<sup>77</sup> DOS 2016 Report, 5–6.

<sup>78</sup> *Id.* at 5.

assess the magnitude of many reported human rights problems,”<sup>79</sup> other organizations have pointed to the seriousness and consistency of these violations. The U.N. Committee against Torture, for example, recently stated that it “is deeply concerned at the numerous reports brought to its attention that torture and other ill-treatment are commonly practiced in prisons and detention centres.”<sup>80</sup> The British Foreign and Commonwealth Office (“FCO”) has also listed Saudi Arabia as one of 27 countries in the world in relation to which the UK has “wide-ranging concerns”, reflecting *inter alia* “the gravity of the human rights situation in the country, including both the severity of particular abuses and the range of human rights affected”.<sup>81</sup>

### **b. Human rights and humanitarian law violations committed by Saudi Arabia in Yemen**

In addition to committing gross human rights violations domestically, Saudi Arabia’s conduct in Yemen constitutes independent grounds for finding a consistent pattern of gross human rights violations. The principles of distinction and proportionality are obligatory and unwavering duties during all armed conflicts. Attacks by Saudi Arabia in Yemen that violate these core tenets of international humanitarian law would accordingly constitute “flagrant denials of the right to life” under international human rights law, as determined by the applicable body law in the context of an armed conflict, *to wit* international humanitarian law.

The conflict between Houthi coalition forces and the Yemeni government coalition is intrastate, likely making the conflict legally described as non-international.<sup>82</sup> The obligations of the Saudi led coalition under the relevant principles and rules of international humanitarian law are independent of the reported widespread non-compliance by Houthi insurgents with such norms. In an armed conflict not of an international character (NIAC), Article 3 Common to the Geneva Conventions requires that all “persons taking no active part in the hostilities” be protected from violence.<sup>83</sup> Additional Protocol II embodies a similar requirement.<sup>84</sup> The principle of distinction as applied even on a complex battlefield such as Yemen means that “civilians who take a direct part in hostilities forfeit protection from being made the object of attack.”<sup>85</sup> State responsibility for

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<sup>79</sup> *Id.*

<sup>80</sup> U.N. COMMITTEE AGAINST TORTURE, *Concluding Observations on the Second Periodic Report of Saudi Arabia*, CAT/C/SAU/CO/2, ¶ 7 (June 8, 2016).

<sup>81</sup> *Human Rights and Democracy Report 2014*, UK FOREIGN AND COMMONWEALTH OFFICE, <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2014/human-rights-and-democracy-report-2014> (last updated Apr. 21, 2016).

<sup>82</sup> See *Prosecutor v. Tadić*, Case No. IT-94-I-A, Judgment, ¶ 131 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.”). The involvement of Iran with the Houthi coalition does not likely rise to this level. See Nathalie Weizmann, *International Law on the Saudi-Led Military Operations in Yemen*, JUST SECURITY (Mar. 27, 2015, 8:53 AM), <https://www.justsecurity.org/21524/international-law-saudi-operation-storm-resolve-yemen/>.

<sup>83</sup> Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949; see also, e.g., U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL § 17.7 (2015, updated 2016) (“Parties to a conflict must conduct attacks in accordance with the principles of distinction and proportionality.”).

<sup>84</sup> Protocol II Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4 (June 8, 1977).

<sup>85</sup> U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL § 5.9 (2015, updated 2016); *Prosecutor v. Tadić*, Case No. IT-94-I-T, Judgment, ¶ 615 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (“For that reason, the test the Trial

indiscriminate attacks arises under Additional Protocol II regardless of whether the attacks were intentional.<sup>86</sup> Similarly, the principle of proportionality prohibits attacks that are not expected to provide military advantages that outweigh expected civilian casualties.<sup>87</sup> If the conduct is intentional, it may also give rise to individual criminal responsibility. Under Article 8 of the Rome Statute, violating the principle of distinction is a war crime in any armed conflict if civilians or civilian objects such as non-military targets are the intentional object of attacks.<sup>88</sup> Any attack that is intentionally launched “in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” would violate established international humanitarian law.

Distinction also applies to the targeting of military objectives. Article 52(2) of Additional Protocol I states that “[a]ttacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action...”<sup>89</sup> Although Protocol I applies to international armed conflicts, customary practice has been to extend this principle of distinction to NIAC.<sup>90</sup>

It is important in this context to note that the duties and definitions embedded in Protocols I and II do not constrain the U.S. as a matter of binding treaty law. Nevertheless, the U.S. recognizes that many of our key allies do abide by the conventions as a matter of legal requirement. U.S. practice is to “treat the status of belonging to a hostile, non-State armed group as a separate basis upon which a person is liable to attack, apart from whether or not he or she has taken a direct part in hostilities.”<sup>91</sup> In practice, both U.S. law and that of our allies recognizes that members of non-State armed groups may lawfully be subject to attack, provided that the attacker complies with other relevant duties embedded in international humanitarian law. Conversely, intentional attacks against civilians and civilian objects may never be justified under the *lex specialis* laws of war.

According to public reports, Saudi-led airstrikes have targeted a market (at least 106 civilians killed), a hospital (at least 10 civilians killed), a facility for water drilling (at least 31 civilians killed), a residential complex (at least 9 civilians killed), a funeral ceremony (at least 132 civilians killed), a food production facility (at least 10 civilians killed), two civilian residences, (at least 16

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Chamber has applied is to ask whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3.”)

<sup>86</sup> U.N. International Law Commission, *Text of the Draft Articles with Commentaries Thereto: Responsibility of States for Internationally Wrongful Acts* (“ILC Articles”) (2001) GAOR 56<sup>th</sup> Session Supp. 10, 59, commentary to Art. 7 § 4, [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>87</sup> See generally MICHAEL NEWTON AND LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW (2014).

<sup>88</sup> Rome Statute of the International Criminal Court art. 8(b)(i) (July 17, 1998), 2187 U.N.T.S. 38544.

<sup>89</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 52(2) (June 8, 1977).

<sup>90</sup> See ICRC, *Customary IHL: Rule 8. Definition of Military Objectives* (“No contrary practice was found with respect to either international or non-international armed conflicts in the sense that no other definition of a military objective has officially been advanced.”), [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule8](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule8) (last visited Mar. 16, 2017).

<sup>91</sup> U.S. DEP’T OF DEFENSE, LAW OF WAR MANUAL § 5.9.2.1 (2015, updated 2016).

civilians killed), and nearby two schools (at least two civilians killed).<sup>92</sup> These numbers do not include injuries.

Although targeting of these objectives would not *de facto* violate the principles of distinction, many of these strikes killed or targeted relatively few enemy combatants and/or were perpetrated in areas beyond the actual targeted objective. The U.N. Security Council summed up its investigation of the strikes:

[The Panel] has undertaken detailed investigations into some of these incidents and has sufficient grounds to believe that the coalition led by Saudi Arabia did not comply with international humanitarian law in at least 10 air strikes that targeted houses, markets, factories and a hospital.<sup>93</sup>

These strikes and the associated civilian deaths are just a fraction of the apparently unlawful coalition attacks that the U.N., Human Rights Watch, Amnesty International and others have documented, and a fraction of the over 13,000 civilians killed or injured in the conflict.<sup>94</sup> These include attacks on sites designated by the United States on a “no strike” list intended to protect civilian targets, including a bridge key to delivering humanitarian aid.<sup>95</sup>

Absent any lawful justification, this conduct in the aggregate amounts to a “flagrant denial of the right to life.” As discussed above, the U.N. Panel of Experts has characterized Saudi Arabia’s conduct in Yemen as “widespread and systematic”, “grave violations” and “potential war crimes”. Saudi Arabia has engaged in a pattern of such conduct over the course of two years, resulting in over a thousand civilian deaths. Saudi officers have designated an entire city as a military target, in deliberate disregard of established international law applicable to targeting. Such conduct is “flagrant” by any definition of the word.

Credible reports of various U.N. bodies and international non-governmental organizations constitute *prima facie* evidence of consistent pattern of flagrant denials of the right to life, namely serious violations of the prohibition on indiscriminate or disproportionate acts. Absent evidence that such reports are not credible, Section 502B requires a cessation of arms sales. Furthermore, Saudi Arabia refused to provide information concerning the strikes to the Panel, as required by relevant U.N. Security Council resolutions.<sup>96</sup> It has investigated a limited number of strikes, concluding that the majority were justified; international organizations have questioned the independence and credibility of these investigations.<sup>97</sup>

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<sup>92</sup> See Third Panel of Experts Report, *supra* note 16, ¶ 120; see also Queen v. Sec’y of State for Bus., Innovation & Skills, EWHC (QB) CO/1306/2016, Written Submission on Behalf of Amnesty International, Human Rights Watch, and Rights Watch (UK) ¶¶34.1–34.6.

<sup>93</sup> Third Panel of Experts Report, *supra* note 16, at 3.

<sup>94</sup> U.N. OFFICE OF THE HIGH COMM’R ON HUMAN RIGHTS, *supra* note 8.

<sup>95</sup> See Warren Strobel & Jonathan Landay, *Exclusive: As Saudis bombed Yemen, U.S. worried about legal blowback*, REUTERS (Oct. 10, 2016), <http://www.reuters.com/article/us-usa-saudi-yemen-idUSKCN12A0BQ>; see also Ben Norton, *Famine looms in Yemen, as U.S.-backed Saudi bombing intentionally targets food production*, SALON (Oct. 27, 2016), <http://www.salon.com/2016/10/27/famine-looms-in-yemen-as-u-s-backed-saudi-bombing-intentionally-targets-food-production/>.

<sup>96</sup> Third Report of the Panel of Experts, *supra* note 16.

<sup>97</sup> See, e.g., Letter from Sarah Leah Whitson, Executive Director, Middle East and North Africa Division, Human Rights Watch, to Lt. Gen. Mansour Ahmed Al-Mansour, Legal Advisor, Joint Incidents Assessment Team (Jan. 13,

The U.K. Ministry of Defense has been tracking coalition air strikes to determine their compliance with international humanitarian law.<sup>98</sup> From May to July 2016, the Ministry was unable to identify “any military target” in a majority of the strikes.<sup>99</sup> It also noted that it did not have insight into the majority of strikes which were carried out without pre-planning and were therefore more likely to involve targeting errors.<sup>100</sup>

In light of credible investigations of humanitarian and human rights violations in Yemen, and the Kingdom of Saudi Arabia’s refusal to provide information mandated by the U.N. Security Council to the Panel of Experts, Section 502B requires a cessation of further arms sales. The United States cannot in good faith rely on unsupported Saudi assurances of compliance with international humanitarian law. Nor does the law permit a continuation of arms sales accompanied by a separate training program in the promise that future operations may comply with international humanitarian law based on improved targeting. The provision of precision guided munitions, training and software to improve targeting has not heretofore led to a cessation of questionable strikes.<sup>101</sup> Indeed, further sales in the face of an ongoing pattern of serious violations of international humanitarian law could theoretically give rise to individual criminal responsibility for U.S. personnel or contractors.<sup>102</sup>

Support for the airstrikes, including re-fueling of aircraft on a reimbursement basis, is also subject to the requirements of Section 502B.<sup>103</sup> Full compliance with Section 502B would ensure that U.S. personnel and contractors are not exposed to potential criminal liability.

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2017), <https://www.hrw.org/news/2017/01/16/letter-saudi-led-coalition-joint-incidents-assessment-team-regarding-yemen>.

<sup>98</sup> Queen v. Sec’y of State for Int’l Trade, EWHC (QB) CO/1306/2016, Skeleton Argument for the Claimant, Claim No. CO 1306/2016, ¶ 59(c)(v), <https://www.caat.org.uk/resources/countries/saudi-arabia/legal-2016/2017-01-30.caat-skeleton.pdf>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Resolving the Conflict in Yemen: U.S. Interests, Risks, and Policy, Hearing Before the Senate Committee on Foreign Relations (Mar. 9, 2017), Testimony of Dr. Dafna Rand, <https://www.foreign.senate.gov/hearings/resolving-the-conflict-in-yemen-us-interests-risks-and-policy-030917p> (according to Dr. Rand, the transfer of PGMs did not improve performance and that “[w]hat we’ve seen since is not an improvement in the targeting, and the issue itself is the target selection. It’s not the precision of the target itself, but it’s the choice of targets and adherence to the no strike list.”); see also Angus McDowell, Phil Stewart, & David Rohde, *Yemen’s guerrilla war tests military ambitions of big-spending Saudis*, REUTERS (April 19, 2016), <http://www.reuters.com/investigates/special-report/saudi-military> (stating that the United States has taken a variety of measures to improve targeting, from transferring precision guided munitions to providing training and software).

<sup>102</sup> See Goodman, *supra* note 39 (describing conflicting views within the United States government on whether specific intent is required to prove aiding and abetting war crimes). While there would be significant legal and political hurdles to any prosecution, if any U.S. personnel or contractors supported an operation knowing that it would target civilians, specific intent could be inferred and support for the operation would be an indictable offense in the United States under the War Crimes Act. 18 U.S. Code § 2441(c)(1). This is also a hotly debated issue in the relevant international jurisprudence.

<sup>103</sup> 10 U.S.C. § 2282 (authorizing the “provision of equipment, supplies, training, defense services and small-scale military construction” unless it is “is otherwise prohibited by any provision of law.”). This law will remain in effect until mid-2017, at which time it will be replaced by a similar provision with the same requirement that assistance comply with other provision of law. Pub. L. 114–328, §§ 333(d) & 1241(d)(5).

### c. Saudi Arabia has restricted the delivery of humanitarian assistance

A certification of national security interest would also be needed to authorize ongoing sales in light of Saudi Arabia's ongoing restriction of the delivery of U.S. humanitarian assistance. For nearly two years, Saudi Arabia has maintained a *de facto* naval blockade of Yemeni ports.<sup>104</sup> It also bombed the port and a bridge connecting the port that was reportedly on a U.S. no strike list as it was essential to the delivery of humanitarian assistance, including assistance provided by the United States.<sup>105</sup> More recently, Saudi Arabia denied access to the port to install U.S.-supplied cranes to increase the capacity to deliver humanitarian assistance.<sup>106</sup> These actions have apparently contributed to severe food and fuel shortages.<sup>107</sup> According to the United Nations, as a result of these actions and those committed by Houthi forces, over 17 million Yemenis face a famine.<sup>108</sup>

### d. Obligation to determine human rights record of recipient units

The United States cannot provide assistance to particular units or individuals under the FAA or the AECA where there are credible reports they have committed gross human rights violations. Where, as here, there is significant information in the public record concerning allegations of widespread abuses but little information on particular units, it is the practice of the United States to seek further information on which units were responsible and to limit assistance to those units that are determined not culpable. Given the extensive re-fueling operations conducted by the United States in support of the air campaign, specific information concerning particular units of concern should be readily available.<sup>109</sup> The re-fueling operations are, as a supportive measure providing supplies, also subject to vetting requirements.<sup>110</sup>

Assistance may be restored if the recipient government takes effective measures to hold those responsible accountable.<sup>111</sup> As discussed above, Saudi investigations to date have only examined a small fraction of the incidents of concern identified by credible sources and have broadly failed to acknowledge any wrongdoing.<sup>112</sup> It is unclear whether individuals responsible in those cases have been held accountable in an "effective" manner, e.g. in a manner proportionate to the alleged misconduct. This exception, therefore, clearly does not apply to the majority of units in question.

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<sup>104</sup> See Julian Borger, *Saudi-led naval blockade leaves 20m Yemenis facing humanitarian disaster*, THE GUARDIAN (June 5, 2016), <https://www.theguardian.com/world/2015/jun/05/saudi-led-naval-blockade-worsens-yemen-humanitarian-disaster> (referencing the effects of the blockade in 2015).

<sup>105</sup> See *supra* note 95.

<sup>106</sup> Missy Ryan, *U.S. plan to help Yemenis obtain humanitarian aid falters, amid growing food crisis*, WASHINGTON POST (March 17, 2017), [https://www.washingtonpost.com/news/checkpoint/wp/2017/03/15/u-s-plan-to-help-yemenis-obtain-humanitarian-aid-falters-amid-growing-food-crisis/?utm\\_term=.244bada779e9](https://www.washingtonpost.com/news/checkpoint/wp/2017/03/15/u-s-plan-to-help-yemenis-obtain-humanitarian-aid-falters-amid-growing-food-crisis/?utm_term=.244bada779e9).

<sup>107</sup> *Id.*

<sup>108</sup> RELIEFWEB, *supra* note 4.

<sup>109</sup> Oriana Pawlyk, *U.S. Air Force refueling missions over Yemen grow by 60 percent*, AIR FORCE TIMES (Aug. 8, 2016), <https://www.airforcetimes.com/story/military/2016/08/08/us-air-force-refueling-missions-over-yemen-grow-60-percent/88400838/> (quoting that over 1,100 refueling operations had been conducted as of August, 2016).

<sup>110</sup> 10 U.S.C. §§ 2282 and 362 (stating that the provision of funds and support are subject to determinations that the recipient government is not engaging in gross violations of human rights).

<sup>111</sup> See *supra* note 61.

<sup>112</sup> See *supra* note 97.



Historically, the bulk of sales to Saudi Arabia and other coalition nations appear to have been authorized as foreign military sales, *e.g.* government-to-government agreements.<sup>113</sup> Reports indicate that future sales may be structured as direct commercial sales. As discussed above, both foreign military sales and direct commercial sales are authorized by the Arms Export Control Act. Sales under either program to foreign government entities, by law, are subject to Section 502B and Section 620M of the Foreign Assistance Act. In practice, however, the State Department does not conduct vetting of direct commercial sales under Section 620M.

The manner in which the equipment is sold also has implications for oversight of compliance with end use agreements. The Department of Defense manages end use monitoring of foreign military sales while the Department of State is responsible for monitoring of direct commercial sales.<sup>114</sup>

## **B. Arms Export Control Act**

### **1. Statutory Requirements**

In addition to the requirements of the Foreign Assistance Act, arms sales to Saudi Arabia are subject to the Arms Export Control Act. That Act authorizes the President to control arms imports and exports “in furtherance of world peace and the security and foreign policy of the United States.”<sup>115</sup> The Congress has authorized military exports in furtherance of the United States’ goal to ensure, *inter alia*, that the “use of force has been subordinated to the rule of law.”<sup>116</sup> The AECA states that it was the sense of the Congress “that all such sales be approved only when they are consistent with the foreign policy interests of the United States [and] the purposes of the foreign assistance program of the United States as embodied in the Foreign Assistance Act of 1961.”<sup>117</sup> In keeping with this overarching goal, the AECA only allows the sale or lease of “defense articles and defense services” for certain purposes: internal security, legitimate self-defense, preventing or hindering WMD proliferation, arrangements consistent with the U.N. Charter for maintaining or restoring international peace and security, and for enabling economic and social development.<sup>118</sup> The AECA requires the recipient to enter into “end use agreements” certifying that they shall not “use or permit the use of such article or related training or other defense service for purposes other than those for which furnished unless the consent of the President has first been obtained[.]”<sup>119</sup>

As discussed below in Section C, the Arms Export Control Act (22 U.S.C. § 2753(c)(1)) provides that “[n]o credits (including participations in credits) may be issued and no guaranties may be

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<sup>113</sup> *Just the Facts: U.S. Arms Sales to Saudi Arabia*, SECURITY ASSISTANCE MONITOR (Feb. 25, 2016), [http://securityassistance.org/fact\\_sheet/just-facts-us-arms-sales-saudi-arabia-0](http://securityassistance.org/fact_sheet/just-facts-us-arms-sales-saudi-arabia-0).

<sup>114</sup> *A Comparison of Foreign Military Sales (FMS) Versus Direct Commercial Sales (DCS)*, DEFENSE SECURITY COOPERATION AGENCY 12 (Sept. 30, 2014), [http://www.dsca.mil/sites/default/files/final-fms-dcs\\_30\\_sep.pdf](http://www.dsca.mil/sites/default/files/final-fms-dcs_30_sep.pdf).

<sup>115</sup> 22 U.S.C. § 2778(a)(1).

<sup>116</sup> 22 U.S.C. § 2751.

<sup>117</sup> *Id.*

<sup>118</sup> 22 U.S.C. § 2754.

<sup>119</sup> 22 U.S.C. § 2753(a)(2). The requirements for end use agreements for “significant military equipment” (including all bombs, missiles, warheads, and some guidance components) are further delineated in the implementing regulations of the AECA, the International Trafficking in Arms Regulations. See 22 C.F.R. §123.10(a) (requiring submission of form DSP-83 which includes a certification that the item will only be used for an enumerated purpose). Form DSP-83 is available at [http://pmdtcc.state.gov/licensing/documentbts/dsp\\_83.pdf](http://pmdtcc.state.gov/licensing/documentbts/dsp_83.pdf). See also 22 CFR §121.1 (detailing the list of U.S. munitions and identifying which are considered “significant military equipment”).

extended” nor “cash sales or deliveries pursuant to previous sales” for any foreign country “if such country uses defense articles or defense services furnished under this chapter, or any predecessor Act, in substantial violation (either in terms of quantities or in terms of the gravity of the consequences regardless of the quantities involved) of any agreement entered into pursuant to any such Act (i) by using such articles or services for a purpose not authorized under section 2754 of this title or, if such agreement provides that such articles or services may only be used for purposes more limited than those authorized under section 2754 of this title for a purpose not authorized under such agreement[.]” Notably, there is no requirement that such misuse was intentional.

The AECA also has certain reporting and certification requirements.<sup>120</sup> The AECA requires the President to notify the Congress “upon receipt of information that a potential violation” has occurred.<sup>121</sup> The President may resume sales only after a certification to the Congress that the prohibition on sales would have a “significant adverse impact on United States security” unless Congress prohibits such sales by means of a joint resolution.<sup>122</sup> Alternatively, the President may resume sales if “(A) the President determines that the violation has ceased; and (B) the country concerned has given assurances satisfactory to the President that such violation will not recur.”<sup>123</sup>

## 2. Analysis

Credible reports indicate that Saudi Arabia has consistently used U.S.-origin defense articles in a manner that arguably violates the statutory limitation to “legitimate self-defense.” From the Panel’s list of ten strikes on civilian targets—which include hospitals, community centers, and residential buildings—the two most fatal strikes are confirmed to have involved U.S.-origin PGMs.<sup>124</sup> Case studies of these two, as well as two other strikes, indicate that there was little to no evidence of a legitimate military target in any of these strikes.<sup>125</sup>

Concerns remain regarding the continuing use of U.S.-origin munitions in a manner inconsistent with end-use agreements. For example, a recent attack on a boat carrying Somali refugees off the Yemeni coast may have involved a U.S.-supplied attack helicopter.<sup>126</sup>

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<sup>120</sup> See 22 U.S.C. § 2776.

<sup>121</sup> *Id.* at § 2753(c)(2).

<sup>122</sup> *Id.* at § 2753 (c)(3)(B).

<sup>123</sup> *Id.*

<sup>124</sup> Third Panel of Experts Report, *supra* note 16, at 48; see also Human Rts. Watch, *Yemen: US-Made Bombs Used in Unlawful Airstrikes*, (Dec. 8, 2016), <https://www.hrw.org/news/2016/12/08/yemen-us-made-bombs-used-unlawful-airstrikes> (indicating that evidence of U.S.-made munitions was found at the sites of the strikes numbered 1 and 10 in the Third Panel of Experts Report, totaling over 200 dead and over 700 injured, as well as several other airstrikes)

<sup>125</sup> Third Panel of Experts Report, *supra* note 16, at 199-225.

<sup>126</sup> See Ryan Goodman & Samuel Oakford, *Did U.S. Provide Helicopter Used in Attack of Somali Refugees in Yemen?*, JUST SECURITY (March 24, 2017 at 1:42 PM), <https://www.justsecurity.org/33615/full-text-saudi-led-coalitions-statement-explanation-funeral-hall-bombing-yemen/>; see also W.J. Hennigan, *Human rights groups say Saudi Arabia misused U.S.-made cluster bombs*, LOS ANGELES TIMES (May 23, 2016, 2:10 PM), <http://www.latimes.com/world/middleeast/la-fg-saudi-cluster-bombs-20160523-snap-story.html> (explaining that end-use agreements restrict the use of munitions to “clearly defined military targets and... [not] where civilians are known to be present or in areas normally inhabited by civilians”)

As discussed above, Saudi Arabia is only authorized to use U.S.-origin military equipment for certain enumerated purposes: internal security, legitimate self-defense, preventing or hindering WMD proliferation, to participate in regional or collective arrangements or measures consistent with the Charter of the United Nations, to permit the recipient country to participate in collective measures requested by the United Nations for the purpose of maintaining or restoring international peace or for enabling economic and social development.<sup>127</sup>

Saudi Arabia has justified the coalition's operations in Yemen on the grounds of self-defense. Absent express Security Council authorization, the U.N. Charter authorizes the use of force by states, including through collective measures, when such use of force is necessary to defend against an armed attack.<sup>128</sup> Saudi Arabia does have an inherent right of self-defense against non-state actors or protect its vital national interests. In the language of the AECA, operations in Yemen involving the use of U.S. supplied equipment would either arise under the authority of the U.N. Security Council (which has not been explicitly granted to date)<sup>129</sup> or other "arrangements or measures consistent with the Charter of the United Nations" for the purpose of legitimate self-defense. Collective self-defense at the request of the Yemeni government could meet this statutory test.

However, the lawful use of force in self-defense is also subject to certain requirements, including the requirement that such force be both proportionate and necessary.<sup>130</sup> These terms are distinct from the principles of proportionality and distinction under international humanitarian law. The legitimacy of self-defense actions are assessed in light of the nature of the threat faced, as opposed to the effect on civilians. However, because widespread indiscriminate or intentional targeting of civilians serves no lawful military purpose, they cannot by definition satisfy the principle of necessity under both bodies of law. Similarly, systematic attacks on non-military targets do not deter legitimate threats and therefore do not meet the requirements of proportionality for actions taken in self-defense.<sup>131</sup> This reading of the AECA is consistent with the DOD Security Assistance Management Manual which indicates that monitoring of end use agreements to ensure compliance with the legitimate purpose requirement must evaluate whether U.S.-origin equipment is only used against "legitimate military targets."<sup>132</sup>

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<sup>127</sup> 22 U.S.C. § 2754.

<sup>128</sup> Charter of the United Nations (1948), Art. 51 provides as follows: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter art. 51.

<sup>129</sup> Certain sanctions have been imposed by U.N. Security Council Resolutions but these do not provide authorization for the coalition's air campaign. See generally S.C.Res.2342, U.N.Doc.S/RES/2342 (Feb. 23, 2017).

<sup>130</sup> U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL, § 1.11.5 (2015, updated 2016) (stating that "[t]o 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).

<sup>131</sup> See Enzo Cannizzaro, *Contextualizing proportionality: jus ad bellum and jus in bello in the Lebanese war*, 88 INT'L REV. OF THE RED CROSS 719, 779-792 (2006), [https://www.icrc.org/eng/assets/files/other/irrc\\_864\\_cannizzaro.pdf](https://www.icrc.org/eng/assets/files/other/irrc_864_cannizzaro.pdf).

<sup>132</sup> *Security Assistance Management Manual, Chapter 8, Def. Sec. Cooperation* Agency, <http://www.samm.dsca.mil/chapter/chapter-8> (emphasizing the necessity of reporting on "any indication that United States-origin defense articles are being used against anything other than a legitimate military target ....").

It would clearly be inconsistent with the overarching purpose of the AECA to “subjugate the use of force to the rule of law” to permit the use of U.S.-origin military equipment in a manner inconsistent with international humanitarian law. Nor would such use be consistent with the purpose of the AECA to promote the goals of the Foreign Assistance Act, including ensuring respect for fundamental human rights.

As indiscriminate and disproportionate attacks on civilians in violation of international humanitarian law serve no lawful self-defense purpose, the use of U.S.-origin equipment in such attacks is a violation of Saudi Arabia’s end-use agreements. Saudi Arabia is therefore ineligible for a resumption in sales until the violations cease or the President certifies that a cessation in sales would have a significant impact on United States security. However, even if such a waiver were issued under the AECA, it would still be a violation of 502B to resume sales, as no such waiver is available for direct commercial sales under the FAA where there is a consistent pattern of gross violations.<sup>133</sup>

While some have argued that the sale of precision guided munitions may help reduce civilian casualties, this is not supported by the available evidence. Many of the unlawful strikes over the last two years have involved precision guided munitions, including the laser-guided bomb used to strike the funeral in 2016.<sup>134</sup> The repeated and ongoing strikes on civilian targets—including those on the no strike list and those essential to providing humanitarian assistance—also raise the strong possibility that such prohibited conduct is intentional. Regardless, the law requires a cessation of assistance until the President either issues the requisite certification or finds that the violation has ceased.

## C. Cluster Munitions

### 1. Statutory requirements

In addition to the general end use requirements of the AECA, cluster munitions are subject to additional requirements delineating their legitimate use given the unique danger they pose to civilians. Cluster munitions contain submunitions that spread over a wide area and their explosive remnants sometimes create *de facto* landmines.<sup>135</sup> These remnants pose a special risk to children, who may be attracted to the various shapes and colors of the submunitions.<sup>136</sup>

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<sup>133</sup> 22 U.S.C. § 2304(a)(2).

<sup>134</sup> See Cooper, *supra* note 34.

<sup>135</sup> *Cluster Munitions*, U.N. OFFICE FOR DISARMAMENT AFF.

<https://www.un.org/disarmament/convarms/clustermunitions/> (last visited Mar. 15, 2017).

<sup>136</sup> See Lt. Col. Michael O. Lacey, *Cluster Munitions: Wonder Weapon or Humanitarian Horror?*, 2009 ARMY LAWYER 28, 30 (May 2009). Cf. Andrew Feickert & Paul K. Kerr, *Cluster Munitions: Background and Issues for Congress*, CONG. RESEARCH SERV. 1 (Aug. 29, 2014) (discussing U.S. suspension of the use of cluster munitions in Afghanistan due to similarity in appearance to humanitarian food packets), <https://fas.org/sgp/crs/weapons/RS22907.pdf>.

The Convention on Cluster Munitions comprehensively prohibits cluster munitions and requires clearance of explosive remnants as well as assistance to victims of the weapons. It entered into force on 1 August 2010 and currently has 100 State Parties and 19 signatories.<sup>137</sup>

The United States is not a party to the Convention. However, current DOD policy limits the types of cluster bombs that can be used. In 2008, DOD issued a policy directive for cluster munitions, requiring that by the end of 2018, DOD will no longer use cluster munitions which, after arming, result in more than one percent unexploded ordnance across the range of intended operational environments. Additionally, cluster munitions sold or transferred by DOD after 2018 must meet this standard and must not be used in or near civilian areas. Any munitions in the current inventory that do not meet this standard will be unavailable for use after 2018.<sup>138</sup> Research indicates, however, that even those designed to have failure rates no more than one percent often have higher rates of failure in real world conditions.<sup>139</sup>

As cluster munitions, including those with a limited failure rates, are intended to be disbursed over a diffuse area, their use in civilian areas would be inherently indiscriminate and thus a violation of international humanitarian law. Recognizing this fact, since 2009, the Congress has repeatedly mandated that cluster munitions can only be sold or exported if they “do not result in more than 1 percent unexploded ordnance” *and* if the agreements authorizing their transfer specify that the munitions “will only be used against clearly defined military targets and will not be used where civilians are known to be present or in areas normally inhabited by civilians.”<sup>140</sup>

## 2. Analysis

There is reason to believe that U.S.-origin cluster munitions recently in use by the Saudi-led coalition fail to meet the congressionally mandated standards and have been used in or near civilian areas, in violation of relevant end use agreements. At a general level, conditions in the field differ from conditions during testing. Factors such as landing location, geographical barriers, and delivery technique may affect the percentage of ordnance exploded.<sup>141</sup> In 2015, Human Rights Watch reported “unexploded submunitions scattered about in fields normally used for agriculture and grazing.”<sup>142</sup> Some of these submunitions reportedly killed three individuals after the

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<sup>137</sup> *Convention on Cluster Munitions: Treaty Status*, U.N. OFFICE FOR DISARMAMENT AFF., [http://disarmament.un.org/treaties/t/cluster\\_munitions](http://disarmament.un.org/treaties/t/cluster_munitions) (last visited Mar. 15, 2017).

<sup>138</sup> Press Release, U.S. Dep’t of Defense, Cluster Munitions Policy Released (July 9, 2008), <http://archive.defense.gov/releases/release.aspx?releaseid=12049>.

<sup>139</sup> See Andrew Feickart & Paul K. Kerr, *Cluster Munitions: Background and Issues for Congress*, CONG. RESEARCH SERVICE, (April 29, 2014), <https://www.fas.org/sgp/crs/weapons/RS22907.pdf>.

<sup>140</sup> See, e.g., Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 7054(b), 129 Stat. 2802 (2015); Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 7054(b)(1), 128 Stat. 584 (2014); Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 1706, 127 Stat. 429 (2013) (Reaffirming the conditions on the sale of cluster munitions set in the Consolidated Appropriations Act, 2012); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 7054(b), 125 Stat. 1243 (2011); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 7056(b), 123 Stat. 3380 (2009); Omnibus Appropriations Act, 2009, Pub. L. No. 110-161, § 7056(b), 123 Stat. 895 (2009).

<sup>141</sup> See Feickert & Kerr, *supra* note 139 at 5.

<sup>142</sup> Human Rts. Watch, *Yemen: Cluster Munition Rockets Kill, Injure Dozens*, (Aug. 26, 2015 10:00 P.M.), <https://www.hrw.org/news/2015/08/26/yemen-cluster-munition-rockets-kill-injure-dozens>.

unexploded ordnance was handled.<sup>143</sup> And in 2016, Amnesty International reported, after a ten-day research trip, that “[c]hildren and their families returning home in northern Yemen after a year of conflict are at grave risk of serious injury and death from thousands of unexploded cluster bomb submunitions.”<sup>144</sup>

Moreover, Human Rights Watch has documented the use of cluster munitions in or near civilian areas.<sup>145</sup> Some reports have found that U.S.-made cluster munitions have been dropped in or near civilian areas of Yemen on at least seven occasions.<sup>146</sup>

The Obama administration blocked transfer of cluster bombs to Saudi Arabia in May 2016.<sup>147</sup> The House of Representatives narrowly rejected an amendment that would have prevented further transfers.<sup>148</sup> Later in 2016, the only U.S. manufacturer of cluster munitions, Textron, halted production of the cluster munitions, citing a “current political environment” that made congressional and executive approval difficult to obtain.<sup>149</sup>

The use of cluster munitions near civilian areas suggests that these munitions are not being used in accordance with U.S. law or end use agreements with members of the Saudi-led coalition. The President is therefore obliged to notify the Congress of a “potential” violation of the end use agreements, if that has not been done already. Absent an investigation by a credible, independent entity resulting in evidence disproving this information, continued transfers of cluster munitions would violate Section 3 of the Arms Export Control Act.<sup>150</sup>

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<sup>143</sup> *Id.*; see also Rick Gladstone, *New Report of U.S.-Made Cluster Bomb Use by Saudis in Yemen*, N.Y. TIMES (Feb. 14, 2016) (“The evidence raises serious questions about compliance with U.S. cluster munition policy and export rules...”’) (quoting the Human Rights Watch arms director, Steve Goose), [https://www.nytimes.com/2016/02/15/world/middleeast/new-report-of-us-made-cluster-bomb-use-by-saudis-in-yemen.html?ref=collection%2Ftimestopic%2FCluster%20Munitions&action=click&contentCollection=timestopics&region=stream&module=stream\\_unit&version=latest&contentPlacement=8&pgtype=collection](https://www.nytimes.com/2016/02/15/world/middleeast/new-report-of-us-made-cluster-bomb-use-by-saudis-in-yemen.html?ref=collection%2Ftimestopic%2FCluster%20Munitions&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=8&pgtype=collection).

<sup>144</sup> *Yemen: Children Among Civilians Killed and Maimed in Cluster Bomb “Minefields,”* AMNESTY INT’L (May 23, 2016) [hereinafter Amnesty Int’l Report], <https://www.amnesty.org/en/latest/news/2016/05/yemen-children-among-civilians-killed-and-maimed-in-cluster-bomb-minefields/>.

<sup>145</sup> Human Rts. Watch, *US: Stop Providing Cluster Munitions: White House Pledges to Halt Deliveries to Saudis*, (June 2, 2016), <https://www.hrw.org/news/2016/06/02/us-stop-providing-cluster-munitions>.

<sup>146</sup> 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?utm\\_term=.544ba62ae428](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?utm_term=.544ba62ae428).

<sup>147</sup> John Hudson, *Exclusive: White House Blocks Transfer of Cluster Bombs to Saudi Arabia*, FOREIGN POLICY (May 27, 2016), <http://foreignpolicy.com/2016/05/27/exclusive-white-house-blocks-transfer-of-cluster-bombs-to-saudi-arabia/>.

<sup>148</sup> See Raghavan, *supra* note 146 (“But Congress last month voted to continue selling the [cluster] weapons to the kingdom, citing a desire not to ‘stigmatize’ the munitions.”).

<sup>149</sup> Textron, Inc., Form 8-K, U.S. Securities & Exchange Commission (Aug. 30, 2016), <http://d1lge852tjqow.cloudfront.net/CIK-0000217346/57f0bc04-5bf0-40d3-ab7c-159cbfc34be5.pdf?noexit=true>.

<sup>150</sup> It is unclear whether the cluster munitions used in or near civilian areas were exported after adoption of the 2008 Defense Department policy directive. Nonetheless, the Arms Export Control Act has always required recipients to agree to only use defense articles for certain enumerated purpose. In this case, the only relevant purpose is self-defense. See discussion *supra* Section III(B)(2). As discussed above, this entails an obligation to ensure that actions taken in self-defense are necessary and proportionate to the threat. As the use of cluster munitions against non-military targets is unnecessary to deter attacks, such use would violate pre-2008 end use agreements and necessitate a suspension in sales under Section 3 of the AECA.

#### IV. Policy Considerations

Section 502B of the FAA directs the President:

to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms....”<sup>151</sup>

Thus, the FAA implementation in practice obligates the executive to consider foreign perceptions of U.S. assistance to countries that fall short in their human rights obligations. Numerous reports indicate that Yemeni citizens blame the unlawful airstrikes on the United States.<sup>152</sup> Over the long term, this could prove counterproductive to overall goals of disrupting terrorist organizations in the Arabian Peninsula, defeating Da’esh, and stabilizing the region.

A significant body of research indicates that “harsh and brutal rule,” including in particular security force abuses, are leading drivers of violent extremism.<sup>153</sup> The Defense Department also acknowledged, in the 2010 Quadrennial Defense Review Report that “well-trained security forces are of limited utility, or indeed can even be counterproductive, without the institutional systems and processes to sustain them or the governance and regulatory frameworks to hold them accountable to civilian oversight and the rule of law.”<sup>154</sup> After conducting extensive international polling, the Center for Strategic International Studies concluded that security cooperation “can fuel grievances that motivate violence, such as when partners use heavy-handed tactics and extra-legal measures to address terrorist threats.”<sup>155</sup> There is therefore cause for concern that the United States’ ongoing support of the Saudi-led coalition may provoke more violent extremism in the long term in light of the highly questionable patterns of attacks affecting the civilian population.

#### V. Conclusion

Given the *prima facie* evidence of wrongdoing by Saudi Arabia, continued sale of arms to Saudi Arabia—and specifically of arms used in airstrikes—should not be presumed to be permissible

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<sup>151</sup> 22 U.S.C. § 2304(a)(3).

<sup>152</sup> Trevor Timm, *Opinion: The US is promoting war crimes in Yemen*, THE GUARDIAN (18 August 2016), <https://www.theguardian.com/commentisfree/2016/aug/18/us-promoting-war-crimes-yemen-saudi-bombing-obama>.

<sup>153</sup> See USAID, GUIDE TO DRIVERS OF VIOLENT EXTREMISM, (Feb. 2009), [http://pdf.usaid.gov/pdf\\_docs/Pnadt978.pdf](http://pdf.usaid.gov/pdf_docs/Pnadt978.pdf); see also Alan B. Krueger, *What Makes a Terrorist*, (2007); Philippe Bolopion & Belkis Wille, *Bleeding in Yemen: The Looming Humanitarian Crisis*, FOREIGN AFF. (April 2015) (“Beyond any legal obligations, however, it makes sense for the United States to impress upon coalition members their obligations to abide by the laws of war.... If it doesn’t, it will jointly bear the political and reputational stigma attached to military operations that wreak havoc on civilians.”).

<sup>154</sup> U.S. DEP’T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT (2010), [https://www.defense.gov/Portals/1/features/defenseReviews/QDR/QDR\\_as\\_of\\_29JAN10\\_1600.pdf](https://www.defense.gov/Portals/1/features/defenseReviews/QDR/QDR_as_of_29JAN10_1600.pdf).

<sup>155</sup> Center for Strategic International Studies, *Turning Point: A New Comprehensive Strategy for Combatting Violent Extremism*, at 48 (2016) citing Nancy Lindborg, “The Causes and Consequences of Violent Extremism and the Role of Foreign Assistance” (testimony before the *Subcomm. on State, Foreign Operations and Related Programs of the Senate Comm. on Appropriations*, April 12, 2016), <http://www.usip.org/publications/2016/04/12/the-causes-and-consequences-of-violent-extremism-and-the-role-of-foreign>.

based on the terms of the AECA and/or the FAA. Certain training and support should be predicated on a Presidential certification that they are in the direct interests of national security. Direct commercial sales should not resume until Saudi Arabia has ceased violating international humanitarian law, and provides evidence of such targeting compliance. The AECA authorizes members of Congress to bring a privileged joint resolution of disapproval within 30 days after the notification of any sale.<sup>156</sup> Under the FAA, members of Congress can bring a privileged resolution to halt further sales where there is a consistent pattern of human rights abuses.<sup>157</sup> Privileged resolutions must be considered within a set period and cannot be filibustered. Through regular legislation, the Congress can block a sale at any time prior to delivery. The Congress should use these provisions to bring the United States into compliance with the Arms Export Control Act and the Foreign Assistance Act.

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<sup>156</sup> 22 U.S.C. § 2776(b).

<sup>157</sup> 22 U.S.C. § 2304(c).