

The Chamber has approved all three previous investigative requests from the OTP, regarding situations in Kenya, Cote d'Ivoire, and Georgia.<sup>36</sup> However, the Chamber's review can take several months, and the judges might request more information from the OTP before making a decision.<sup>37</sup> Neither the ICC nor the OTP have made any indications since the Report was released that an investigation of the situation in Afghanistan is forthcoming.

#### USE OF FORCE AND ARMS CONTROL

*United States Strikes Houthi-Controlled Facilities in Yemen, Reaffirms Limited Support for Saudi-Led Coalition Notwithstanding Growing Concerns About Civilian Casualties*  
doi:10.1017/ajil.2017.26

Since March 2015, the United States has supported a Saudi-led military coalition fighting a Houthi insurgency that seized control of Yemen's capital and governmental institutions in 2014.<sup>1</sup> At the request of ousted Yemeni President Abdo Rabbo Mansour Hadi, the Saudi-led coalition launched an air campaign in Yemen to "defend Saudi Arabia's border and to protect Yemen's legitimate government."<sup>2</sup> To support these efforts, President Obama authorized the "provision of logistical and intelligence support to [coalition] military operations" and the establishment of a "Joint Planning Cell with Saudi Arabia to coordinate U.S. military and intelligence support."<sup>3</sup> The United States has disclaimed any direct offensive role in the conflict<sup>4</sup> while acknowledging that it has provided support by refueling coalition warplanes,<sup>5</sup> supplying targeting intelligence,<sup>6</sup> and sending U.S. military personnel to assist the planners of the coalition's air campaign.<sup>7</sup>

<sup>36</sup> David Bosco, *Exclusive: International Criminal Court Poised to Open Investigation into War Crimes in Afghanistan*, FOREIGN POLICY (Oct. 31, 2016), at <http://foreignpolicy.com/2016/10/31/exclusive-international-criminal-court-poised-to-open-investigation-into-war-crimes-in-afghanistan/>.

<sup>37</sup> *Id.*

<sup>1</sup> U.S. Dep't of State, Fact Sheet: U.S. Relations with Yemen (Feb. 2, 2017), at <https://www.state.gov/r/pa/ei/bgn/35836.htm>.

<sup>2</sup> White House Press Release, Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen (Mar. 25, 2015), at <https://obamawhitehouse.archives.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (stating that "U.S. forces are not taking direct military action in Yemen in support of this effort").

<sup>5</sup> E.g., Matthew Rosenberg & Mark Mazzetti, *U.S. Ship off Yemen Fires Missiles at Houthi Rebel Sites*, N.Y. TIMES (Oct. 12, 2016), at <https://www.nytimes.com/2016/10/13/world/middleeast/yemen-rebels-missile-warship.html> (reporting that, as of October 2016, the U.S. military had "refueled more than 5,700 aircraft involved in the [Saudi-led] campaign").

<sup>6</sup> E.g., Missy Ryan, *Civilian Casualties in Yemen Bring Charges of U.S. Responsibility for Saudi Actions*, WASH. POST (Oct. 3, 2016), at [https://www.washingtonpost.com/world/national-security/civilian-casualties-in-yemen-bring-charges-of-us-responsibility-for-saudi-actions/2016/10/03/29a9b606-864d-11e6-ac72-a29979381495\\_story.html](https://www.washingtonpost.com/world/national-security/civilian-casualties-in-yemen-bring-charges-of-us-responsibility-for-saudi-actions/2016/10/03/29a9b606-864d-11e6-ac72-a29979381495_story.html) (reporting that the Pentagon provided the Saudi military lists of "no-strike" locations, including civilian targets and infrastructure).

<sup>7</sup> E.g., Robert Wall, *U.S. Military Working to Prevent Weapons Shortfall in Islamic State, Yemen Strikes*, WALL ST. J. (Nov. 10, 2015), at <https://www.wsj.com/articles/u-s-military-working-to-prevent-weapons-shortfall-in-islamic-state-yemen-strikes-1447143660> (reporting a November 2015 statement by a commander of the U.S. Air Force Central Command that the U.S. military had a small detachment of personnel helping coordinate activities in the Saudi Arabian center planning air strikes).

On October 12, 2016, however, the United States engaged in a more direct way: U.S. Armed Forces conducted missile strikes that destroyed three Houthi radar facilities on the Yemeni coast.<sup>8</sup> The strikes were carried out in response to a launch of anti-ship cruise missiles—apparently by the Houthis—into international waters patrolled by the U.S. Navy.<sup>9</sup> The attack marked the first direct U.S. military action against the Houthi rebels, as opposed to the supportive role it has played in the Saudi-led campaign to reinstate Yemen’s deposed government.<sup>10</sup> Given this new posture, the U.S. strikes raise questions about domestic and international legal authorization for such use of force, and about the United States’ role in the broader conflict between the Houthis and the Saudi-led coalition.

Then-President Obama authorized the October strikes at the recommendation of former Secretary of Defense Ash Carter and Chairman of the Joint Chiefs General Joseph Dunford.<sup>11</sup> Obama notified Congress of the military action on October 14, 2016, pursuant to the War Powers Resolution (WPR).<sup>12</sup> Obama invoked his “constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive” to justify the strikes as a matter of U.S. domestic law.<sup>13</sup> He also expressed “appreciat[ion for] the support of the Congress in this action,”<sup>14</sup> implicitly acknowledging the lack of express statutory authorization for the attacks.<sup>15</sup>

Obama’s WPR letter explained the administration’s justification for the strikes in terms of international law. It read:

I directed these strikes in response to anti-ship cruise missile launches perpetrated by Houthi insurgents that threatened U.S. Navy warships in the international waters of the Red Sea on October 9 and October 12. The targeted radar facilities were involved in the October 9 launches and other recent attacks. These limited and proportionate strikes were conducted to protect our personnel and our ships and will preserve our freedom of navigation in this important maritime passageway. The United States stands ready to take action in self-defense, as necessary and appropriate, to address further threats.<sup>16</sup>

<sup>8</sup> White House Press Release, Letter from the President – War Powers Resolution (Oct. 14, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/10/14/letter-president-war-powers-resolution> [hereinafter WPR Letter].

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

<sup>10</sup> See Zachary Burdette, *Today’s Headlines and Commentary*, LAWFARE (Oct. 13, 2016), at <https://www.lawfareblog.com/todays-headlines-and-commentary-1166>.

<sup>11</sup> U.S. Dep’t of Defense Press Release, Statement by Pentagon Press Secretary Peter Cook on U.S. Military Strikes Against Radar Sites in Yemen (Oct. 12, 2016), at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/972169/statement-by-pentagon-press-secretary-peter-cook-on-us-military-strikes-against>.

<sup>12</sup> War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

<sup>13</sup> WPR Letter, *supra* note 8.

<sup>14</sup> *Id.*

<sup>15</sup> This was not the first time former President Obama relied on his Article II powers to justify the use of military force abroad. See, e.g., Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 110 AJIL 587, 590 (2016) (discussing the administration’s invocation of “unit self-defense”—grounded in the president’s Article II authority as Commander in Chief—to justify air strikes in Somalia); Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 174, 206–07 (2015) (quoting a WPR letter by Obama, justifying air strikes against the Islamic State based on the president’s “constitutional authority to conduct U.S. foreign relations and [authority] as Commander in Chief and Chief Executive”); John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 568, 574 (2011) (discussing President Obama’s reliance on Article II powers to justify U.S. military actions in Libya).

<sup>16</sup> WPR Letter, *supra* note 8.

The “recent attacks” Obama referred to began on October 9, when two cruise missiles were launched from Yemen at the USS *Mason* and the USS *Ponce* in international waters near the Bab al-Mandeb strait, a heavily trafficked waterway between Yemen and Djibouti.<sup>17</sup> On October 12, at least one more missile was fired at the USS *Mason* from Houthi-controlled territory near the coastal city of Hudaydah.<sup>18</sup> Although none of the missiles reached their apparent U.S. targets, the USS *Mason* “employed defensive countermeasures.”<sup>19</sup> The Houthis reportedly denied responsibility for the October 9 and October 12 attacks,<sup>20</sup> but a senior administration official expressed “no doubt that the Houthis launched those missiles at our ships.”<sup>21</sup>

When asked about the extent of the threat posed, the same U.S. official explained that “it may not have been the first time that our ships had been targeted,” apparently referring to an October 1 Houthi attack that damaged an Emirati vessel that had previously been part of the U.S. Navy.<sup>22</sup> “[A]ll of this combined,” said the official, “represents an uptick in Houthi aggression on the maritime front. And given . . . the volume of shipping and the presence of our own ships which are in that area, we did regard it as a threat to the point where a firm response was necessary.”<sup>23</sup>

The administration emphasized the limited nature of the strikes as directly responsive to specific provocations by Houthi insurgents. Peter Cook, the Pentagon spokesman, explained that “[t]hese targets were chosen based on our assessment that they were involved in missile launches in recent days. And they were struck in order to defend our ships and their crews and to protect freedom of navigation through a waterway that is vitally important to international commerce.”<sup>24</sup> Cook described the Bab al-Mandeb strait as a “vital link connecting Asia and Europe,” noting that four million barrels of oil pass through it each day.<sup>25</sup> A senior administration official similarly characterized the U.S. action as a “very specific and targeted strike” against radar sites used in prior Houthi attacks, such that “the response was appropriate in both scope and immediacy.”<sup>26</sup> The official later added, “we also have a responsibility in terms

<sup>17</sup> See U.S. Dep’t of Defense News, *USS Mason Responds to Missile Threat off Yemen’s Coast* (Oct. 12, 2016), at <https://www.defense.gov/News/Article/Article/971904/uss-mason-responds-to-missile-threat-off-yemens-coast>; Dan Lamothe, *Navy Launches Tomahawk Missiles at Rebel Sites in Yemen After Attacks on U.S. Ships*, WASH. POST (Oct. 12, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/10/12/more-missiles-fired-from-rebel-held-territory-in-yemen-at-u-s-navy-ships>.

<sup>18</sup> U.S. Dep’t of Defense News, *supra* note 17.

<sup>19</sup> *Id.*

<sup>20</sup> *Yemen Denies Targeting U.S. Warship*, SABA NEWS AGENCY (Yemen) (Oct. 13, 2016), at <https://www.saba-news.net/en/news443542.htm> (quoting a Houthi military official for the allegation that “[t]hese allegations are unfounded and the army as well [as] popular forces have nothing to do with this action”).

<sup>21</sup> U.S. Dep’t of State Special Briefing, Senior Administration Officials on Yemen (Oct. 14, 2016), at <https://2009-2017.state.gov/r/pa/prs/ps/2016/10/263158.htm>.

<sup>22</sup> *Id.*; see also Lamothe, *supra* note 17. For the Houthis’ asserted responsibility for the October 1 attack, see *Army Destroys UAE Warship off Mocha Coast*, SABA NEWS AGENCY (Yemen) (Oct. 1, 2016), at <https://www.saba-news.net/en/news442035.htm>.

<sup>23</sup> U.S. Dep’t of State Special Briefing, *supra* note 21.

<sup>24</sup> U.S. Dep’t of Defense News Transcript, Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room (Oct. 13, 2016), at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/973367/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in>.

<sup>25</sup> *Id.*

<sup>26</sup> U.S. Dep’t of State Special Briefing, *supra* note 21.

of maritime shipping [in] a very, very heavily used waterway, with some many thousands of ships that traverse this area on a yearly basis involving many countries.”<sup>27</sup>

Although the administration’s initial references to self-defense suggested reliance on Article 51 of the UN Charter,<sup>28</sup> the United States promptly clarified that it acted with the consent of the Yemeni Government. In an October 15, 2016, letter to the UN Security Council, Samantha Power, the U.S. Ambassador to the United Nations, explained the U.S. strikes as follows:

These actions were taken with the consent of the Government of Yemen. Although the United States therefore does not believe notification pursuant to Article 51 of the Charter of the United Nations is necessary in these circumstances, the United States nevertheless wishes to inform the Council that these actions were taken consistent with international law.<sup>29</sup>

The United States did not provide any more detail about the nature of the consent obtained. As explained in prior White House statements and confirmed in its December 2016 Report on the Legal Frameworks Guiding the Use of Force, the United States had previously obtained consent from the Yemeni Government to carry out counterterrorism operations against Al-Qaeda in the Arab Peninsula (AQAP) and to support Saudi-led coalition military operations against Houthi insurgents in Yemen.<sup>30</sup> However, direct U.S. strikes

<sup>27</sup> *Id.* Although this point has not been discussed in relation to these strikes, the United States has in the past relied on the customary international law right of transit passage to navigate international straits like the Bab al-Mandeb. See, e.g., Bureau of Oceans & Int’l Envtl. & Sci. Affairs, U.S. Dep’t of State, No. 112, Limits in the Seas: United States Responses to Excessive National Maritime Claims 65–67 (Mar. 9, 1992), at <https://2009-2017.state.gov/documents/organization/58381.pdf> (citing Diplomatic Note No. 449, Oct. 6, 1986 from the American Embassy at Sanaa) (“[T]he Government of the Yemen Arab Republic may not legally condition the exercise of the right of transit passage through or over an international strait, such as Bab-el-Mandeb, upon obtaining prior permission. Transit passages is a right that may be exercised by ships of all nations . . .”). According to the UN Convention on the Law of the Sea, ships exercising the right of transit passage shall “refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait” and shall “refrain from any activities other than those incident to their normal modes of . . . transit unless rendered necessary by *force majeure* or by distress.” United Nations Convention on the Law of the Sea, Art. 39, Dec. 10, 1982, 1833 UNTS 397. Though not party to the Convention, the United States has claimed that the “normal mode” of transit for warships exercising their right of transit passage includes activities consistent with the security of their forces. Bureau of Oceans & Int’l Envtl. & Sci. Affairs, *supra* at 65.

<sup>28</sup> UN Charter, Art. 2(4), 51 (allowing limited use of force in another state’s territory based on the “inherent right” of self-defense).

<sup>29</sup> Letter dated 15 October 2016 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2016/869 (Oct. 15, 2016) [hereinafter Letter from Samantha Power].

<sup>30</sup> White House Press Release, *supra* note 2; REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 18 (Dec. 2016), available at <https://www.documentcloud.org/documents/3232529-Framework-Report-Final.html#document/p4> [hereinafter REPORT GUIDING THE USE OF FORCE] (stating that “U.S. support for the Saudi-led coalition . . . is being provided in the context of the Coalition’s military operations being undertaken in response to the Government of Yemen’s request for assistance, including military support, to protect the sovereignty, peace, and security of Yemen”). Claims about Yemen’s consent are complicated by the fact that the constitutionally elected president, President Abdo Rabbo Mansour Hadi, was exiled in 2014 after the Houthi rebels and loyalists to former President Ali Abdullah Saleh seized the capital city of Sana’a. U.S. Dep’t of State, 2015 Country Reports on Human Rights Practices: Yemen (Apr. 13, 2016), at <https://2009-2017.state.gov/j/drl/rls/hrrpt/2015/nea/252955.htm>; see also Alex Moorehead, *Yemen’s Consent for U.S. Counterterrorism Operations: Questions for the Trump Administration*, JUST SECURITY (Feb. 9, 2017), at <https://www.justsecurity.org/37530/yemens-consent-u-s-counterterrorism-operations-questions-trump-administration> (discussing the uncertainty about the legal validity of consent by the Hadi administration). The United States has not publicly questioned the legitimacy of the exiled government’s consent, though the recent White House Report acknowledged general challenges in seeking consent from “countries where governments are rapidly changing [or] have lost control of significant parts of their territory. . . .” See REPORT GUIDING THE USE OF FORCE, *supra* at 30.

against Houthi insurgents—-independent from the United States’ support for the Saudi-led forces—likely required additional consent from the Government of Yemen, which appears to have been granted.<sup>31</sup>

The Obama administration was careful to circumscribe the October 12 strikes as separate from the broader war in Yemen. According to a senior administration official, the U.S. government was “very clear that this was not meant to indicate support for coalition operations either in Yemen writ large or on the Red Sea. And [it] also made clear in public statements that [the United States was] not intending to be brought into the war in . . . any fashion.”<sup>32</sup> The Pentagon spokesperson echoed this stance, affirming that “these strikes are not connected to the broader conflict in Yemen” and that “[t]he United States continues to encourage all parties in the Yemen conflict to commit to a cessation of hostilities and to seek a political solution to that conflict.”<sup>33</sup>

Notwithstanding its care to limit the scope of its military action, the U.S. administration recognized the perceived relation between the October 12 strikes and the United States’ role in the greater conflict. As one senior official put it:

[T]hese particular strikes . . . sort of bring up to the present more than a year of activity by the Saudi-led coalition in Yemen which has had a number of unfortunate consequences which we have talked about publicly: one, our discomfiture with the way that the war has dragged out, the loss of life; and number two, particularly the civilian casualties. And so that’s been sort of an underpinning . . . of this conflict.<sup>34</sup>

The official also acknowledged that the Houthis “could manipulate this [U.S. attack] in all kinds of different ways . . .”<sup>35</sup> Indeed, a Houthi news agency described the U.S. allegations of Houthi provocation as “false justifications to pave the way for [the] Saudi-led coalition to escalate their aggressi[ve] attacks against Yemen . . .”<sup>36</sup> To preempt similar conclusions by the international community, the United States “underscore[d its] public messages with private messages to various partners and actors in the region,” emphasizing that it was “serious in terms of responding when provoked, but also that [this was] a very limited and very particular, very focused response.”<sup>37</sup> The message of the U.S. official was clear: the United States is “not getting [involved] in the war,” is “not joining the coalition,” and is “continu[ing] to focus on . . . a ceasefire.”<sup>38</sup>

While its October 12 attacks apparently struck “in remote areas where there was little risk of civilian casualties,”<sup>39</sup> the United States has acknowledged the high number of civilian casualties resulting from attacks by the Saudi-led coalition it supports.

Prior to the October 12 attack, the United States had scaled back its support of the Saudi-led coalition due to increasing concerns about civilian casualties. According to the UN High

<sup>31</sup> See Letter from Samantha Power, *supra* note 29.

<sup>32</sup> U.S. Dep’t of State Special Briefing, *supra* note 21.

<sup>33</sup> U.S. Dep’t of Defense News Transcript, *supra* note 24.

<sup>34</sup> U.S. Dep’t of State Special Briefing, *supra* note 21.

<sup>35</sup> *Id.*

<sup>36</sup> *Yemen Denies Targeting U.S. Warship*, SABA NEWS AGENCY (Yemen) (Oct. 13, 2016), at <https://www.saba-news.net/en/news443542.htm>.

<sup>37</sup> U.S. Dep’t of State Special Briefing, *supra* note 21.

<sup>38</sup> *Id.*

<sup>39</sup> Lamothe, *supra* note 17.

Commissioner for Human Rights, by October 10, 2016, more than four thousand civilians had been killed since the Saudi-led coalition entered the war in Yemen.<sup>40</sup> The High Commissioner singled out as “outrageous” airstrikes on a community hall where a funeral was being held.<sup>41</sup> The High Commissioner protested any continued support of the coalition, asserting that “[s]ince the beginning of this conflict . . . , weddings, marketplaces, hospitals, schools—and now mourners at a funeral—have been hit, resulting in massive civilian casualties and zero accountability for those responsible.”<sup>42</sup> Human Rights Watch (HRW) labeled the funeral attack “an apparent war crime” and identified a munition used in the strikes as a U.S.-made bomb.<sup>43</sup>

In response to the funeral attack, the White House issued the following statement:

We are deeply disturbed by reports of today’s airstrike on a funeral hall in Yemen, which, if confirmed, would continue the troubling series of attacks striking Yemeni civilians. U.S. security cooperation with Saudi Arabia is not a blank check. Even as we assist Saudi Arabia regarding the defense of their territorial integrity, we have and will continue to express our serious concerns about the conflict in Yemen and how it has been waged. In light of this and other recent incidents, we have initiated an immediate review of our already significantly reduced support to the Saudi-led Coalition and are prepared to adjust our support so as to better align with U.S. principles, values and interests, including achieving an immediate and durable end to Yemen’s tragic conflict. We call upon the Saudi-led Coalition, the Yemeni government, the Houthis and the Saleh-aligned forces to commit publicly to an immediate cessation of hostilities and implement this cessation . . . .<sup>44</sup>

The Saudi-led coalition initially denied responsibility for the strikes,<sup>45</sup> but soon after the White House’s response, Saudi Arabia sent a letter to the UN Security Council expressing its “deep[] regrets” about the attack, committing to an immediate investigation, and affirming its “full respect for . . . and compliance with international humanitarian law and international human rights law.”<sup>46</sup> Within a week, the Saudi-led Joint Incidents Assessment Team (JIAT) released the results of its investigation, which found that coalition aircraft had “wrongly targeted the location, resulting in civilian deaths and injuries” due to “the issuing of incorrect information.”<sup>47</sup> It concluded that “appropriate action . . . must be taken against those who caused the incident, and that compensation must be offered to the families of the victims.”<sup>48</sup>

<sup>40</sup> UN Human Rights Office of the High Comm’r, *Outrageous Attack on Funeral Makes International Investigation into Yemen Even More Vital – Zeid*, OHCHR (Oct. 10, 2016), at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20662&LangID=E>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Yemen: Saudi-Led Funeral Attack Apparent War Crime: Credible International Investigation Urgently Needed*, HUMAN RIGHTS WATCH (Oct. 13, 2016), at <https://www.hrw.org/news/2016/10/13/yemen-saudi-led-funeral-attack-apparent-war-crime>.

<sup>44</sup> White House Press Release, Statement by NSC Spokesperson Ned Price on Yemen (Oct. 8, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/10/08/statement-nsc-spokesperson-ned-price-yemen>.

<sup>45</sup> See *Coalition to Probe Yemen Raid that Killed 140*, AL ARABIYA (Saudi Arabia) (Oct. 9, 2016), at <https://english.alarabiya.net/en/News/middle-east/2016/10/08/Saudi-denies-Yemeni-funeral-bombing.html> (quoting coalition sources denying involvement).

<sup>46</sup> Letter from Abdallah Al-Mouallimi, Permanent Representative of Saudi Arabia to the United Nations, to the President of the United Nations Security Council (Oct. 11, 2016), UN Doc. S/2016/850 [hereinafter Saudi Letter to UN].

<sup>47</sup> *Press Statement by the Joint Incidents Assessment Team (JIAT) on the Great Hall Incident in Sana’a*, SAUDI PRESS AGENCY (Oct. 15, 2016), at <http://www.spa.gov.sa/1548647>.

<sup>48</sup> *Id.*

Multiple human rights groups have challenged the credibility of JIAT's investigations and the coalition's willingness to implement its recommendations.<sup>49</sup>

Since announcing its top-to-bottom review of its coalition support in October, the United States has taken steps to limit the scope of such assistance and to advance a peaceful resolution to the Yemen conflict. The Obama administration encouraged and welcomed temporary cease-fires between the Houthis and the Saudi-led coalition in October and November,<sup>50</sup> though none of them gave way to lasting peace. The coalition continued conducting air strikes in Yemen, many of which allegedly struck civilian targets and infrastructure.<sup>51</sup> For instance, in late October the coalition struck a Yemeni compound, reportedly killing more than forty men being held as prisoners.<sup>52</sup> Human rights groups questioned the lawfulness of the attack,<sup>53</sup> but the coalition insisted that the compound was used as a "command and control center for [Houthi] military operations" and that "targeting protocols and procedures were followed fully."<sup>54</sup>

By mid-December 2016, the administration's review gave rise to interim adjustments in its strategy for assisting the Saudi-led coalition. According to press reports, the United States decided to decrease the number of personnel working with the coalition in Riyadh.<sup>55</sup> It did not, however, curtail its refueling of Saudi warplanes.<sup>56</sup> In a White House press briefing, Press Secretary Josh Earnest summarized the administration's updated position:

<sup>49</sup> See, e.g., *Amnesty International Response to the Saudi Arabia-Led Coalition's Investigations*, AMNESTY INT'L (Jan. 16, 2017), at <https://www.amnesty.nl/actueel/amnesty-international-response-saudi-arabia-led-coalitions-investigations>; *Letter to Saudi-Led Coalition Joint Incidents Assessment Team Regarding Yemen Investigations*, HUMAN RIGHTS WATCH (Jan. 13, 2017), at <https://www.hrw.org/news/2017/01/16/letter-saudi-led-coalition-joint-incidents-assessment-team-regarding-yemen>. For JIAT's findings on other challenged coalition attacks, see *Joint Incidents Assessment Team (JIAT) on Yemen Responds to Claims on Coalition Forces' Violations in Decisive Storm Operations*, SAUDI PRESS AGENCY (Aug. 5, 2016), at <http://www.spa.gov.sa/viewstory.php?lang=en&newsid=1524799>.

<sup>50</sup> See U.S. Dep't of State Press Statement, *Announcement of Cessation of Hostilities in Yemen* (Oct. 18, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/10/263252.htm> (welcoming a seventy-two-hour cease-fire beginning on October 19, 2016); U.S. Dep't of State Press Statement, *On the Cessation of Hostilities in Yemen* (Nov. 20, 2016), at <https://2009-2017.state.gov/secretary/remarks/2016/11/264466.htm> (welcoming the renewal of a forty-eight-hour cease-fire that began on November 19, 2016).

<sup>51</sup> E.g., Ben Hubbard, *U.S. Fingerprints on Attacks Obliterating Yemen's Economy*, N.Y. TIMES (Nov. 13, 2016), at <https://www.nytimes.com/2016/11/14/world/middleeast/yemen-saudi-bombing-houthis-hunger.html> (enumerating various civilian targets attacked by the coalition—including hospitals, schools, bridges, power stations, poultry farms, seaports, factories, weddings, and funerals—and concluding that "hitting Yemen's economy is part of the coalition's strategy"); *Bombing Businesses: Saudi Coalition Airstrikes on Yemen's Civilian Economic Structures*, HUMAN RIGHTS WATCH (July 10, 2016), at <https://www.hrw.org/report/2016/07/10/bombing-businesses/saudi-coalition-airstrikes-yemens-civilian-economic-structures> (documenting attacks on "civilian economic structures" from March 2015 through February 2016).

<sup>52</sup> Ben Hubbard, *Airstrikes by Saudi-Led Coalition Kill Dozens in Western Yemen*, N.Y. TIMES (Oct. 30, 2016), at <https://www.nytimes.com/2016/10/31/world/middleeast/airstrikes-kill-dozens-in-western-yemen.html>; Sudarsan Raghavan, *Airstrikes Kill More Than 40 and Wound Scores in Yemeni Port City*, WASH. POST (Oct. 31, 2016), at [https://www.washingtonpost.com/world/airstrikes-kill-more-than-40-and-wound-scores-in-yemeni-port-city/2016/10/30/4666dbfd-afa3-4f8f-9542-7ad77664d4ee\\_story.html](https://www.washingtonpost.com/world/airstrikes-kill-more-than-40-and-wound-scores-in-yemeni-port-city/2016/10/30/4666dbfd-afa3-4f8f-9542-7ad77664d4ee_story.html).

<sup>53</sup> E.g., *Yemen: US-Made Bombs Used in Unlawful Airstrikes*, HUMAN RIGHTS WATCH (Dec. 8, 2016), at <https://www.hrw.org/news/2016/12/08/yemen-us-made-bombs-used-unlawful-airstrikes>.

<sup>54</sup> Raghavan, *supra* note 52.

<sup>55</sup> Missy Ryan, *With Small Changes, U.S. Maintains Military Aid to Saudi Arabia Despite Rebukes over Yemen Carnage*, WASH. POST (Dec. 13, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/12/13/with-small-changes-u-s-maintains-military-aid-to-saudi-arabia-despite-rebukes-over-yemen-carnage>.

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

Th[e] review is ongoing, but there are a couple of steps that the United States is prepared to take to change some of the assistance that we provide.

That includes refocusing our efforts to support the Saudis when it comes to enhancing their border security and their territorial integrity. The concerns that the Saudis have expressed, which is entirely legitimate, is that you have an organization that has overthrown the government of Yemen and has menaced Saudi Arabia, on a number of occasions even breaching their borders. . . . And so we are going to focus our efforts on helping the Saudis protect their border. We are also going to undertake steps to refocus our information-sharing and the responsibilities of our personnel in Saudi Arabia to be focused on this effort.<sup>57</sup>

That same day, the United States reportedly blocked a sale of precision munitions to Saudi Arabia, valued at over \$350 million.<sup>58</sup> That decision echoed a May 2016 determination to suspend all cluster-munitions sales to Saudi Arabia given the danger those weapons posed to civilians.<sup>59</sup> The December decision did not satisfy human rights groups that had long called for a complete suspension of U.S. arms sales to Saudi Arabia.<sup>60</sup> Other sales made clear that the United States was not halting the transfer of all military equipment to Saudi Arabia.<sup>61</sup> And U.S. members of Congress had even tried and failed to block similar arms sales to the Kingdom earlier in the year.<sup>62</sup>

The sale of U.S. munitions and other forms of U.S. support for the Saudi-led coalition have been controversial since the Saudis entered the war in Yemen. Human rights groups and international law scholars have debated whether various kinds of U.S. assistance might impose liability on the United States for legal violations by the coalition. According to HRW, the United States qualifies as “a party to the conflict in Yemen” given its provision of targeting intelligence and refueling of planes during bombing raids.<sup>63</sup> With respect to munitions, HRW has found remnants of U.S.-supplied weapons at twenty-three allegedly unlawful coalition air strikes, including the October funeral attack, and claims that “the repeated use of US-manufactured munitions in unlawful attacks could make the US

<sup>57</sup> White House Press Release, Press Briefing by Press Secretary Josh Earnest and Special Envoy for the Global Coalition to Counter ISIL, Brett McGurk (Dec. 13, 2016), at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/13/press-briefing-press-secretary-josh-earnest-and-special-envoy-global>.

<sup>58</sup> Helene Cooper, *U.S. Blocks Arms Sale to Saudi Arabia Amid Concerns over Yemen War*, N.Y. TIMES (Dec. 13, 2016), at <https://www.nytimes.com/2016/12/13/us/politics/saudi-arabia-arms-sale-yemen-war.html>. When asked for details, a State Department spokesman refused to discuss pending arms sales. U.S. Dep’t of State Press Release, Daily Press Briefing (Dec. 13, 2016), at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/12/265200.htm>.

<sup>59</sup> John Hudson, *Exclusive: White House Blocks Transfer of Cluster Bombs to Saudi Arabia*, FOREIGN POLICY (May 27, 2016), at <http://foreignpolicy.com/2016/05/27/exclusive-white-house-blocks-transfer-of-cluster-bombs-to-saudi-arabia/>.

<sup>60</sup> See, e.g., Cooper, *supra* note 58 (“The absence of a more comprehensive ban, given the ongoing unlawful strikes and the potential U.S. complicity, is deeply concerning.”) (quoting the Washington director of Human Rights Watch).

<sup>61</sup> U.S. Dep’t of State Press Release, Daily Press Briefing (Dec. 9, 2016), at <https://2009-2017.state.gov/r/pa/prs/dpb/2016/12/265016.htm> (confirming approval of military sales to Saudi Arabia worth \$3.5 billion, mostly for Chinook helicopters not intended for combat roles).

<sup>62</sup> See H.R.J. Res. 98, 114th Cong. (2016); S.J. Res. 32, 114th Cong. (2016).

<sup>63</sup> Letter from Sarah Margon, Washington Director of Human Rights Watch, to Barack Obama, President of the United States (Oct. 31, 2016), available at [https://www.hrw.org/sites/default/files/supporting\\_resources/review\\_of\\_the\\_armed\\_conflict\\_in\\_yemen\\_letter\\_to\\_president\\_obama\\_english.pdf](https://www.hrw.org/sites/default/files/supporting_resources/review_of_the_armed_conflict_in_yemen_letter_to_president_obama_english.pdf) [hereinafter HRW Letter]; *Yemen: US-Made Bombs Used in Unlawful Airstrikes*, HUMAN RIGHTS WATCH (Dec. 8, 2016), at <https://www.hrw.org/news/2016/12/08/yemen-us-made-bombs-used-unlawful-airstrikes>.



complicit for future transfers of arms to Saudi forces.”<sup>64</sup> The senators who spearheaded the 2016 resolutions to block arms sales to Saudi Arabia have also criticized the United States’ lack of oversight over its military support for the Saudi-led coalition.<sup>65</sup>

When asked about HRW’s claims, a State Department spokesperson acknowledged the administration’s concern with the Saudis’ “particular targeting . . . inaccuracies that put civilians clearly at great risk,” but emphasized that the “cooperation [it] provide[s] to Saudi Arabia does not include . . . target selection or review. And . . . none of it constitutes endorsement of offensive operations in Yemen that have harmed civilians.”<sup>66</sup> This response aligned with the administration’s continuing position that its support is meant to protect Saudi Arabia’s territorial integrity and to minimize civilian casualties without joining the Saudi-led coalition or entering the Yemen war.<sup>67</sup> In early October 2016—prior to the U.S. strikes against Houthi sites—defense officials reportedly explained that U.S. involvement in coalition targeting was limited to providing coordinates for “no-strike” locations (including civilian targets or infrastructure) and that American officials did not help the coalition select munitions for individual attacks.<sup>68</sup> According to news reports, a senior defense official said that

[f]or better or for worse, [the Saudis] own this campaign. . . . We want them to prosecute this campaign in a way compliant with the laws of armed conflict and in a way that minimizes casualties in Yemen, but ultimately we have our own campaign . . . to prosecute against the Islamic State.<sup>69</sup>

Despite the Obama administration’s delineation of its actions as distinct from those of the coalition, critics have suggested various theories under which the United States could be liable for coalition misconduct. To the extent these theories depend on the United States’ awareness of such wrongdoing, they may be bolstered by a report recently released by a panel of independent experts appointed by the UN Security Council. The panel conducted a detailed investigation of the Yemen conflict and found “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>70</sup>

Many commentators have argued that the United States could be responsible for aiding or assisting Saudi Arabia’s alleged violations of international law.<sup>71</sup> Article 16 of the International Law Commission’s (ILC) Articles on State Responsibility, which reflect customary international law, establishes that a state may be responsible for another state’s

<sup>64</sup> HRW Letter, *supra* note 63.

<sup>65</sup> Senator Rand Paul (R-Ky.) reportedly said “[w]e are complicit and actively involved with war in Yemen,” yet “[there has] been no debate in Congress . . . over whether or not we should be at war in Yemen.” Rosenberg & Mazzetti, *supra* note 5. Senator Ted Lieu (D-Calif.) reportedly asked: “Why would we be refueling a jet carrying bombs if we don’t know what target it’s about to strike? If we just refueled a jet that is hitting a hospital, that’s a problem.” Ryan, *supra* note 6.

<sup>66</sup> U.S. Dep’t of State Press Release, Daily Press Briefing, *supra* note 61.

<sup>67</sup> See U.S. Dep’t of State Press Release, Special Briefing, *supra* note 21.

<sup>68</sup> Ryan, *supra* note 6.

<sup>69</sup> *Id.*

<sup>70</sup> See Final Rep. of the Panel of Experts on Yemen, at 3, transmitted by Letter Dated 27 January 2017 from the Panel of Experts on Yemen Addressed to President of the Security Council, UN Doc. S/2017/81 (2017).

<sup>71</sup> E.g., 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), at <https://www.justsecurity.org/32628/state-responsibility-assistance-foreign-forces-a-k-a-assess-us-uk-support-saudi-military-ops-yemen>; Beth Van Schaack, *Evaluating Proportionality and Long-Term Civilian Harm Under the Laws of War*, JUST SECURITY (Aug. 29, 2016), at <https://www.justsecurity.org/32577/evaluating-proportionality-long-term-civilian-harm-law-war>.

internationally wrongful act when that act would also be wrongful if committed by the former state, and when the former state provided the aid or assistance with a view to facilitating the wrongful act.<sup>72</sup> Critics have also suggested that the United States has a duty under Common Article 1 of the Geneva Conventions to ensure that other states do not violate the laws of armed conflict (including the principles of distinction and proportionality).<sup>73</sup> Lastly, commentators have debated whether the United States could be liable for aiding and abetting war crimes allegedly committed by the Saudi-led coalition.<sup>74</sup>

Although the U.S. administration does not appear to have addressed any of these particular theories vis-à-vis its role in Yemen,<sup>75</sup> its December 2016 Report on the Legal Framework Guiding the Use of Force provides some insight into the White House's reasoning. A section titled "Working with Others in an Armed Conflict: International Law Considerations" reads, in part, as follows:

The U.S. military's ability to engage and work with partners can and often does turn on international legal considerations. The United States military seeks to work with partners that will comply with international law, and U.S. partners expect the same from the United States. The United States' commitment to upholding the law of armed conflict also extends to promoting compliance by U.S. partners with the law of armed conflict. Receiving credible and reliable assurances that U.S. partners will comply with applicable international law, including the law of armed conflict, is an important measure that the United States military routinely employs in its partnered operations. As a matter of policy, the United States always seeks to promote adherence to the law of armed conflict and encourages other States and partners to do the same.

As a matter of international law, the United States looks to the law of State responsibility and U.S. partners' compliance with the law of armed conflict in assessing the lawfulness of U.S. military assistance to, and joint operations with, military partners. The United States has taken the position that a State incurs responsibility under international law for aiding or assisting another State in the commission of an internationally wrongful act when: (1) the act would be internationally wrongful if committed by the supporting State; (2) the supporting State is both aware that its

<sup>72</sup> Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Art. 16 (2001). The text of Article 16 states only that the aid or assistance must be provided "with knowledge of the circumstances of the internationally wrongful act"; however, the Commentaries attached to the Draft Articles explain this limitation in part as requiring that the aid or assistance be provided "with a view to facilitating the commission of that act." *Id.* at cmt. 3. Commentators have noted and challenged the role of the Commentaries in substantially limiting this element of Article 16. *See, e.g.*, Daniel Bodansky & John R. Crook, *Symposium: The ILC's State Responsibility Articles*, 96 AJIL 733, 789 (2002). *See infra* notes 77–79 and corresponding text for further discussion of Article 16.

<sup>73</sup> *E.g.*, Harriet Moynihan, *State Complicity in Other States' Bad Acts—and How to Avoid It*, JUST SECURITY (Nov. 14, 2016), at <https://www.justsecurity.org/34379/state-complicity-states-bad-acts-and-avoid-2>; 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), at <https://www.justsecurity.org/33095/u-s-u-k-parties-saudi-led-armed-conflict-houthis-yemen>.

<sup>74</sup> *E.g.*, 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), at <https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen>.

<sup>75</sup> Against this backdrop, Reuters published an October 10, 2016, article detailing previously undisclosed material (obtained through the Freedom of Information Act) that illustrated U.S. officials' debates—spanning from mid-May 2015 to February 2016—as to whether the United States qualified as a "co-belligerent" in the Yemen war and whether the United States could be exposed to allegations of LOAC violations. *See* Warren Strobel & Jonathan Landay, *Exclusive: As Saudis Bombed Yemen, U.S. Worried About Legal Blowback*, REUTERS (Oct. 10, 2016), at <http://uk.reuters.com/article/uk-usa-saudi-yemen-exclusive-idUKKCN12A0BG>. These internal debates do not appear ever to have been discussed publicly.

assistance will be used for an unlawful purpose and intends its assistance to be so used; and (3) the assistance is clearly and unequivocally connected to the subsequent wrongful act.<sup>76</sup>

This position generally aligns with customary international law,<sup>77</sup> though the U.S. Report differs slightly from the ILC's explanation of Article 16 in its Commentaries attached to the Articles on State Responsibility. The Commentaries state: "There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act."<sup>78</sup> By requiring a "clear[] and unequivocal[]" nexus between the assistance and the wrongful act, the U.S. Report seems to set out a higher standard for establishing liability for aiding or assisting than does the ILC.

With the arrival of the Trump administration, it is unclear whether the United States will continue to support the Saudi-led coalition while disclaiming any direct role in regional hostilities. In a recent call between President Trump and King Salman bin Abd Al-Aziz Al Saud of Saudi Arabia, the two leaders "underscor[ed] their personal commitment to continued consultations on a range of regional and bilateral issues."<sup>79</sup>

#### USE OF FORCE AND ARMS CONTROL

*United States Expands Military Operations in North Africa and Classifies al-Shabaab as a Force "Associated" with Al Qaeda*

doi:10.1017/ajil.2017.20

In late 2016, the United States took two steps to facilitate its confrontation with violent extremist groups in North Africa. In December, the United States classified al-Shabaab as a force "associated" with Al Qaeda for purposes of the 2001 Authorization to Use Military Force (AUMF).<sup>1</sup> And at some unspecified point earlier that year, it appears (but has not been officially confirmed) that the United States and Tunisia reached a memorandum of understanding under which U.S. forces are permitted to launch reconnaissance missions aimed at extremists in Libya from an air base in Tunisia.<sup>2</sup>

Al-Shabaab, a nonstate actor that was designated as a foreign terrorist organization by the United States in March 2008,<sup>3</sup> has captured large rural areas of south-central Somalia while

<sup>76</sup> See REPORT GUIDING THE USE OF FORCE, *supra* note 30, at 14.

<sup>77</sup> Compare Int'l Law Comm'n, *supra* note 72, with REPORT GUIDING THE USE OF FORCE, *supra* note 30, at 14.

<sup>78</sup> Int'l Law Comm'n, *supra* note 72, at cmt. 5; REPORT GUIDING THE USE OF FORCE, *supra* note 30, at 14.

<sup>79</sup> White House Press Release, Readout of the President's Call with King Salman bin Abd Al-Aziz Al Saud of Saudi Arabia (Jan. 29, 2017), at <https://www.whitehouse.gov/the-press-office/2017/01/29/readout-presidents-call-king-salman-bin-abd-al-aziz-al-saud-saudi-arabia>.

<sup>1</sup> The White House, *Report on the Legal and Policy Framework Guiding the United States' Use of Military Force and Related National Security Operations* 5 (Dec. 2016), at [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal\\_Policy\\_Report.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf) [hereinafter Legal Policy Report].

<sup>2</sup> Adam Entous & Missy Ryan, *U.S. Has Secretly Expanded Its Global Network of Drone Bases to North Africa*, WASH. POST (Oct. 26, 2016), at [https://www.washingtonpost.com/world/national-security/us-has-secretly-expanded-its-global-network-of-drone-bases-to-north-africa/2016/10/26/ff19633c-9b7d-11e6-9980-50913d68eacb\\_story.html](https://www.washingtonpost.com/world/national-security/us-has-secretly-expanded-its-global-network-of-drone-bases-to-north-africa/2016/10/26/ff19633c-9b7d-11e6-9980-50913d68eacb_story.html); Mark Hosenball & Andrea Shalal, *U.S. Using Tunisia to Conduct Drone Operations in Libya: U.S. Sources*, REUTERS (Oct. 26, 2016), at <http://www.reuters.com/article/us-usa-drones-tunisia-idUSKCN12Q2PW>.

<sup>3</sup> U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 401 (June 2, 2016), at <https://www.state.gov/documents/organization/258249.pdf> [hereinafter Country Reports on Terrorism].