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AECA AND THE UNITED STATES WAR CRIMES CONNECTIONS IN YEMEN

by Rachel Hage*

I. Introduction

The conflict in Yemen wages on, and many states, including Saudi Arabia and the United States, have been complicit in human rights violations.¹ The United States' current and past administrations have continued to sell arms to Saudi Arabia despite multiple international organizations' documenting the state's human rights violations.² This Article argues that, despite the lack of transparency regarding how much support the United States is lending to Saudi Arabia arms being used in Yemen, the United States may be held responsible for human rights violations in Yemen. The Arms Export Control Act (AECA) provides the U.S. President with the authority and responsibility for the exportation of defense articles and services.³ Under the AECA, specifically 22 U.S.C. § 2785, the United States fails to comply with arms sales requirements by not sufficiently performing end-use monitoring, failing to ensure arms sold to Saudi Arabia are used for their intended purpose, and breaking international law as cited under the Foreign Assistance Act of 1961.

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1 See generally Annual Rep. of the U.N. High Commissioner for Hum. Rts. & Reps. of the Off. of the High Commissioner and the Secretary-General, Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014, U.N. Doc. A/HRC/42/CRP.7 (2020) [hereinafter UNHCR Report].

2 See *id.* at 73, 106.

3 22 U.S.C. § 2778.

II. Background

After decades of growing tensions, the war in Yemen began in 2014 when Houthi rebels attempted to overthrow the then-Yemeni government.⁴ The Houthi rebels, a Zaydi Shiite movement backed by Iran, formed in northern Yemen in the 1980s, and opposed the growing Saudi influence within Yemen.⁵ The Houthis currently maintain control of the region.⁶

The Yemeni government, backed by Saudi Arabia, remains a majority Sunni coalition.⁷ While the UN has attempted to broker many peace negotiations, they continue to fall through.⁸ Saudi Arabia plays a significant role in the conflict by conducting a military campaign to reduce Houthi control while simultaneously blocking humanitarian aid and committing war crimes through violence against civilians.⁹ The United States, along with France, Germany, and the United Kingdom, continue to fund the Yemeni government indirectly through Saudi Arabia.¹⁰ While Congress has attempted to enforce stricter oversight of the American-made weapons deployed in Yemen, each bill has failed, and Former President Trump and President Biden have vetoed attempts at reform.¹¹

4 Kali Robinson, *Yemen's Tragedy: War, Stalemate, and Suffering*, COUNCIL ON FOREIGN RELS. (May 1, 2023, 1:44 PM), <https://www.cfr.org/background/yemen-crisis>.

5 Bruce Riedel, *Who are the Houthis, and Why are We at War with Them?*, BROOKINGS INST. (Dec. 18, 2017), <https://www.brookings.edu/blog/markaz/2017/12/18/who-are-the-houthis-and-why-are-we-at-war-with-them/>.

6 *War in Yemen*, COUNCIL ON FOREIGN RELS. (Apr. 25, 2023), <https://www.cfr.org/global-conflict-tracker/conflict/war-yemen>.

7 *Id.*

8 See Robinson, *supra* note 5.

9 Joyce Sohyun Lee, Meg Kelly and Atthar Mirza, *Saudi-Led Airstrikes in Yemen have been Called War Crimes. Many Relied on US Support*, WASH. POST (June 4, 2022), <https://www.washingtonpost.com/investigations/interactive/2022/saudi-war-crimes-yemen/>.

10 See Robinson, *supra* note 5.

11 Cameron Glenn, *Who are Yemen's Houthis?*, WILSON CTR., (July 7, 2022), <https://www.wilsoncenter.org/article/who-are-yemens-houthis>; see also Joyce Sohyun Lee, Meg Kelly & Atthar Mirza, *Saudi-Led Airstrikes in Yemen Have Been Called War Crimes. Many Relied on US Support*, WASH. POST (June 2022), <https://www.washingtonpost.com/investigations/interactive/2022/saudi-war-crimes-yemen/>; Oona A. Hathaway et al., *Yemen: Is the U.S. Breaking the Law?*, 10 HARV. NAT'L SEC. J. 1, 8 (2018).

Hundreds of thousands of people have died in the armed conflict in Yemen, including civilians.¹² Millions more are suffering or have perished from hunger, and the Saudi-led coalition has placed massive restrictions on aid delivery—a situation that COVID-19 exacerbated.¹³ Moreover, the Saudi coalition carried out at least 200 air raids, and 716 individual airstrikes in February 2022.¹⁴ In February 2022, out of fifty-nine air raids where the target was identified: nine hit residential areas, killing two civilians and injuring ten.¹⁵ This was just one month in an eight-year war, where recording abuses has been difficult due to ongoing violence and lack of sufficient human rights monitoring.¹⁶

Congress passed the AECA in response to amending the Foreign Military Sales Act of 1968 (“the Act”).¹⁷ The Act governs military and commercial sales of defense articles, services, and training to guide conduct for all actors in the international arms market.¹⁸

III. Analysis

Under 22 U.S.C. § 2785, which governs end-use monitoring of defense articles and services, the United States is required to “provide reasonable assurance that” the recipient of U.S. munitions complies with and uses such articles for their intended purposes.¹⁹ However, the Saudi-led coalition continues to commit human rights abuses, and the United States arms play a key role in these violations.²⁰

12 Andrea Prasow, *U.S. War Crimes in Yemen: Stop Looking the Other Way*, HUM. RTS. WATCH (Sept. 21, 2020, 5:37 PM), <https://www.hrw.org/news/2020/09/21/us-war-crimes-yemen-stop-looking-other-way>.

13 *Id.*

14 *Id.*

15 *Yemen: Latest Round of Saudi-UAE-Led Attacks Targets Civilians*, HUM. RTS. WATCH (Apr. 18, 2022, 12:00 AM),

<https://www.hrw.org/news/2022/04/18/yemen-latest-round-saudi-uae-led-attacks-targets-civilians>.

16 *Id.*

17 See 22 U.S.C. § 2778 (The Arms Export Control Act (AECA) came into existence with the passage of the Foreign Military Sales Act (FMSA) of 1968. An amendment in the International Security Assistance and AECA of 1976 changed the name of FMSA to the AECA).

18 See 22 U.S.C. § 2751.

19 22 U.S.C. § 2785.

20 See generally, *Yemen: State and DOD Need Better Information on Civilian Impacts of U.S. Military Support to Saudi Arabia and the United Arab Emirates*, U.S. GOV’T ACCOUNTABILITY OFF.

A. Blue Lantern, 22 U.S.C. § 2785(2)(A)

The United States is violating 22 U.S.C. § 2785(2)(A) (“Blue Lantern program”) due to its failure to perform end-use monitoring of the munitions sold to Saudi Arabia.²¹ This statute aligns with § 38(g)(7) of the AECA, which requires a strict standard “for identifying high-risk exports for regular end-use verification.”²² The goal of Blue Lantern programs is to establish expectations of due diligence for exporters and importers.²³

The first objective of the Blue Lantern program is to build confidence in trade relationships, but the program emphasizes that Blue Lantern is not a law enforcement agency nor does it open “investigations” in order to further research issues.²⁴ The current system of checking compliance involves base-level observations through open-source research or consulting host government officials.²⁵ However, the lack of investigation and *prima facie* research does not allow anything more than shallow conclusions about the use of weapons sold.²⁶

Not all of Congress has turned a blind eye to these human rights violations; several bills have been introduced to monitor Saudi Arabia’s actions.²⁷ For instance, Representative Tom Malinowski introduced H.R. 6601, “Saudi Arabia Legitimate Self Defense Act,” to impose restrictions on defense services of U.S.-provided aircraft belonging to Saudi Arabian military units conducting offensive airstrikes in Yemen, but like many of its predecessors, the proposition ended there.²⁸

(June 15, 2022), <https://www.gao.gov/products/gao-22-105988>.

21 *Id.* at 39.

22 22 U.S.C. § 2785(a)(2).

23 TAMMY RUTLEDGE, U.S. DEFENSE TRADE CONTROLS AND THE BLUE LANTERN END-USE MONITORING PROGRAM 6, <https://www.bis.doc.gov/index.php/documents/update-2015-presentations/1375-civil-military-ddtc/file>.

24 *Id.* at 4.

25 OFF. OF DEF. TRADE CONTROLS POL’Y, BLUE LANTERN END-USE MONITORING PROGRAM 4 (2016), <https://www.bis.doc.gov/index.php/documents/pdfs/1588-end-user-verification-blue-lantern/file>.

26 *Id.* at 8.

27 Hathaway et al., *supra* note 12.

28 H.R. (IH) 6601, 117th 2d Cong. (2022), <https://www.govinfo.gov/content/pkg/BILLS-117hr6601h/html/BILLS-117hr6601h.htm>.

Additionally, Senator Elizabeth Warren inquired with The United States Central Command (“CENTCOM”) regarding the quality of arms use tracking the use of U.S. arms by Saudi Arabia, and CENTCOM responded that there is a database detailing every airstrike by the Saudi-led coalition.²⁹ The Senator and Congress do not have open access to CENTCOM’s database, and the Department of Defense (“DoD”) has denied knowledge of U.S.-made weapons being used for the inhumane treatment in Yemen, so Congress is forced to rely on external organizations’ reports.³⁰

B. Intended Purposes, 22 U.S.C. § 2785(2)(B)

Under 22 U.S.C. § 2785(2)(B), the President could be held liable for failing to impose requirements on Saudi Arabia to use the arms purchased from the United States only for their intended purposes.³¹ Multiple reports have outlined law-of-war violations, but the DoD and the Department of State have denied any illegal transfers of weapons sold to Saudi Arabia in Yemen.³² Nevertheless, CNN investigations found multiple Saudi coalition attacks where enlistees used U.S.-made weapons to strike and kill civilians, including children, in Yemen.³³ Additionally, many guns, grenades, and other U.S.-made weapons are sold in markets across Yemen.³⁴ The AECA requires the United States government to terminate sales if the President or Congress finds that the recipient is using defense articles in an unintended manner.³⁵ If a country is using U.S. military assistance for any purpose other than those listed in the AECA, then it is considered an unintended

²⁹ *Id.*

³⁰ See UNHCR Report, *supra* note 2. See also Hathaway et al., *supra* note 12.

³¹ 22 U.S.C. § 2785(2)(B).

³² Akshaya Kumar, *US Government Watchdog Finds Flawed Weapons Monitoring in Yemen - Oversight Needed to Protect Yemeni Civilians, Hold Saudi Arabia and UAE Accountable*, HUM. RTS. WATCH (June 13, 2022, 1:10 PM), <https://www.hrw.org/news/2022/06/13/us-government-watchdog-finds-flawed-weapons-monitoring-yemen>.

³³ Nima Elbagir, Salma Abdelaziz & Laura Smith-Spark, *Made in America*, CNN, <https://edition.cnn.com/interactive/2018/09/world/yemen-airstrikes-intl/> (last visited February 23, 2023).

³⁴ Nima Elbagir Salma Abdelaziz, Mohamed Abo El Gheit & Laura Smith-Spark, *Sold to an Ally, Lost to an Enemy*, CNN, <https://www.cnn.com/interactive/2019/02/middleeast/yemen-lost-us-arms/> (last visited February 23, 2023).

³⁵ See Hathaway et al., *supra* note 12, at 21.

manner.³⁶ U.S. defense articles may only be used for the specific purposes for which they were intended, as specified in the export license. They may not be used for any other purpose, such as for re-export, retransfer, or diversion to a third party.³⁷ If there is a violation, the transaction must cease until the violation stops or there is satisfactory assurance that the violation will not take place again.³⁸ Although the AECA permits the use of munitions for “legitimate self-defense” purposes, the Saudi-led coalition’s actions may constitute war crimes, thus extending beyond the scope of self-defense purposes.³⁹

C. Foreign Assistance Act of 1961 Under 22 U.S.C. § 2785

The Foreign Assistance Act of 1961 invokes international law to hold the United States accountable for articles sold.⁴⁰ Nonetheless, the arms sales continue to violate § 2785.⁴¹ Since as early as 2015, the Saudi-led coalition has used U.S. arms in unlawful airstrikes and to kill civilians.⁴² Section 502B of the Foreign Assistance Act of 1961 lays out the United States’ goal of observing international human rights laws by denying security assistance “to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”⁴³ Therefore, the arms sales are contributing to these human rights violations and violating § 2785.⁴⁴

IV. Recommendations

Several possible solutions exist to end the United States’ connection to war crimes in Yemen and the coinciding domestic law violations. First, previous unenacted proposals, such as H.R. 6601, should serve as a base for recommendations that would require the State Department to further investigate U.S.-origin defense articles in Yemen.⁴⁵ Other options include adopting

³⁶ *Id.*

³⁷ 22 USCS § 2753.

³⁸ *Id.*

³⁹ Prasow, *supra* note 13.

⁴⁰ See 22 U.S.C. § 2785; Hathaway et al., *supra* note 12, at 4.

⁴¹ See generally Hathaway et al., *supra* note 12.

⁴² See Prasow, *supra* note 13.

⁴³ 22 U.S.C § 2304(a)(1)-(2).

⁴⁴ See Prasow, *supra* note 13.

⁴⁵ § 1337 of H.R. 7900 (as recommended by the GAO, requires

FY23 National Defense Authorization Act (NDAA) Subtitle F, 16 § 1271, which is a bill that outlines policy priorities for national security, and §1271 includes specific provisions requiring stricter weapons monitoring. For example, former President Trump cut Section 1290 of the 2019 NDAA, which required certification that the Saudi-led coalition showed intent to end the war.⁴⁶ Adopting additional measures requiring transparency would allow better insight into where U.S. arms are used and how to prevent future human rights violations.

V. Conclusion

The United States' lack of accountability continues to risk its complicity in international and domestic crimes.⁴⁷ The United States is in direct violation of domestic law under 22 U.S.C. § 2785 of the AECA. The Executive continues selling arms to Saudi Arabia despite Saudi Arabia's inability or refusal to fully report the results of end-use monitoring, failing to ensure arms sold to Saudi Arabia are used for their intended purpose, and breaking international law under the Foreign Assistance Act of 1961. These illegal actions gravely threaten the integrity of the United States' government, and they continue to harm and kill Yemeni civilians.

the State Department to develop guidance to investigate whether U.S.-origin defense articles have been used in Yemen by the Kingdom of Saudi Arabia or the United Arab Emirates in violation of relevant agreements).

⁴⁶ See Hathaway et al., *supra* note 12, at 8.

⁴⁷ See Kumar, *supra* note 33.