

War Crime Risk Grows for U.S. Over Saudi Strikes in Yemen

State Department officials have raised alarms about the legal risk in aiding airstrikes that kill civilians. The Trump administration recently suppressed findings as it sold more

By Michael LaForgia and Edward Wong

WASHINGTON — The civilian death toll from Saudi Arabia’s disastrous [air war over Yemen](#) was steadily rising in 2016 when the State Department’s legal office in the Obama administration reached a startling conclusion: **Top American officials could be charged with war crimes for approving [bomb sales](#) to the Saudis and their partners.**

Four years later, more than a dozen current and former U.S. officials say the legal risks have only grown as President Trump has made [selling weapons](#) to Saudi Arabia, the United Arab Emirates and other Middle East nations a [cornerstone of his foreign policy](#).

Yet rather than taking steps to address the legal issues, State Department leaders have gone to great lengths to conceal them. Even after a State Department inspector general [investigation](#) this year revealed that the department had failed to address the legal risks of selling bombs to the Saudis, agency officials ensured that details of the finding were put in a classified part of the [public report](#) released in August, and then so heavily redacted that lawmakers with security clearances could not see them.

At a congressional hearing on Wednesday, Democrats on the House Foreign Affairs Committee accused the State Department’s top lawyer and the assistant secretary overseeing weapons sales of negligence on civilian deaths and of covering up the legal risks.

“It’s a moral issue and a criminality issue,” said Representative Ted Lieu, a California Democrat and a former military lawyer, adding that it was clear that State and Defense Department officials had “potential legal liability for aiding and abetting war crimes.”

The assistant secretary, [R. Clarke Cooper](#), admitted that the issue “has vexed several administrations.”

Legal scholars say U.S. officials are [right to be concerned](#). No episode in recent American history compares to Yemen, where the United States has provided material support over five years to the Saudi-led coalition for actions that have caused the continuous killing of civilians. More than 127,000 people have died in the war, including 13,500 civilians in targeted attacks, according to an [estimate](#) from the Armed Conflict Location and Event Data Project.

U.S. officials have had full knowledge of the pattern of indiscriminate killing, which makes them [legally vulnerable](#). Legal scholars say prosecutors abroad — including those from

nations like Sweden, Germany and Argentina that assert universal jurisdiction over war crimes anywhere in the world — could bring charges against American officials. Although there has been no move so far by any foreign court to do so, some State Department officials who shepherd arms sales overseas are worried enough to consider retaining their own legal counsel and have discussed the possibility of being arrested while vacationing abroad.

“If I were in the State Department, I would be freaking out about my potential for liability,” said [Oona Hathaway](#), a Yale Law School professor and a Defense Department lawyer in the Obama administration. **“I think anyone who’s involved in this program should get themselves a lawyer.** It’s very dangerous territory the U.S. is in, continuing to provide support given the number of civilians who have been killed.”

There are precedents. Spanish prosecutors in 2009 [pursued charges](#) against six officials in the George W. Bush administration over torture of prisoners at Guantánamo Bay, Cuba, **although a higher court dismissed the case.**

Beyond courts in sovereign nations, charges against Americans over Yemen could also be brought in an international tribunal if one were set up to investigate atrocities in that war. United Nations investigators last week issued a detailed [report](#) on atrocities in Yemen that [asked the Security Council](#) to refer actions by all parties to an international tribunal for potential war crimes prosecution, a sign of momentum behind the idea of legal action.

International judges and prosecutors are at the same time more eagerly embracing the idea of holding Americans accountable for wartime actions in other parts of the world. In March, the International Criminal Court in The Hague ruled that its chief prosecutor could [open an investigation](#) into the actions of American forces in the Afghanistan war — the first time the court had authorized a case against the United States. The Trump administration responded this month by [imposing sanctions](#) on the chief prosecutor and another court lawyer, a sign of how seriously it takes the potential of war crimes charges.

State Department spokespeople declined to discuss the decision-making process but issued a statement that said the agency had a strategy to lessen civilian casualties before the last major arms sale to the Saudi-led coalition in May 2019. They added that the department had “continued to work tirelessly” on reducing civilian harm in Yemen and elsewhere, citing redesigned policies, expanded analyses and new training for the Saudis and the Emiratis, who are part of the Saudi-led coalition.

The Obama administration had its own struggles with Yemen. When a State Department lawyer determined in 2016 that American officials could be charged with war crimes, the agency’s top lawyer effectively set the opinion aside when he decided not to send the analysis to the secretary of state’s office. By then the administration was already taking a tougher line on civilian deaths in Yemen. That December, a month before leaving office, President Barack Obama [blocked a shipment](#) of precision-guided bombs that he had agreed to sell to the Saudis.

But within months, the new Trump administration delivered the bombs Mr. Obama had halted. Then the administration sought to advance still more sales: \$8.1 billion in weapons and equipment in 22 batches, including \$3.8 billion in precision-guided bombs and bomb parts made by Raytheon Company, to Saudi Arabia and the United Arab Emirates.

Lawmakers blocked shipments for nearly two years, until Secretary of State Mike Pompeo instructed his subordinates to circumvent Congress. They did so by declaring an emergency over Iran, which prompted the inspector general review. That investigation not only documented the longstanding legal worries but also created a critical [report](#) that could itself increase the legal risks, scholars said.

“The findings could be used as evidence in the future against U.S. officials or the U.S. government,” said [Ryan Goodman](#), a New York University law professor who was a Defense Department lawyer in the Obama administration.

With the civilian death toll [rising](#) in Yemen, the American role in the war has become a significant political issue.

Joseph R. Biden Jr., the Democratic presidential candidate who was vice president when the conflict began, says he would [end U.S. support](#) for the war. By contrast, Mr. Trump is doubling down on [arms sales](#) and boasting of revenue from the Saudis.

“I have a very good relationship with them,” Mr. Trump said during an [interview](#) in February. “They buy billions and billions and billions of dollars of product from us. They buy tens of billions of dollars of military equipment.”

But it quickly became clear that the Saudis and their partners at the time, including the Emiratis, were either using the bombs negligently or deliberately aiming them at civilians. In the first 18 months of fighting, human rights groups linked American bombs to attacks on homes, apartment buildings, factories, warehouses, a cultural center, an agricultural complex, a primary school and other nonmilitary sites.

As concerns over such strikes were intensifying in Washington, the State Department’s legal office examined whether American officials who approved arms sales to the Saudis and their partners faced legal risks.

Drawing on an international tribunal case against Charles Taylor, the Liberian warlord, that the United States has [cited in Qaeda prosecutions](#), the legal office reached the alarming conclusion that it put in writing in a memo in 2016: American officials, including the secretary of state, could be charged with war crimes for their role in arming the Saudi coalition, according to six current and former government officials with knowledge of the memo.

That year, scholars discussed a [law journal paper](#) laying out a war crimes argument for that type of conflict written by Brian Finucane, a State Department lawyer assigned to the agency’s Bureau of Political-Military Affairs, which oversees arms exports. [Speaking](#) in a

private capacity at a [Yale Law School conference](#) in 2018 on the Yemen war, Mr. Finucane said officials who could be prosecuted were “those who have decision-making authority or veto authority.” He added, “I think you’re looking at potentially very senior individuals.”

But the top State Department lawyer never sent the memo to the secretary of state’s office. Legal scholars say the government’s national security lawyers often engage in an increasingly [problematic practice](#): refraining from enshrining blunt legal opinions that might tie the hands of policymakers. Brian Egan, the department’s legal adviser at the time, did not respond to requests for comment. (Reuters [reported](#) on aspects of the concerns in 2016.)

Though the analysis did not advance within the State Department, the Obama administration opened a policy review, and Secretary of State John Kerry tried to [broker a cease-fire](#).

Over the spring of 2017, Mr. Trump’s aides and some State Department officials worked to unfreeze the bomb delivery that Mr. Obama had halted. Mr. Trump and his son-in-law and adviser, Jared Kushner, were preparing for a trip to Saudi Arabia that May and were eager for a big presidential announcement in Riyadh on the restart of U.S. arms sales.

Still, officials in the Political-Military Affairs Bureau wanted assurances that they could do the president’s bidding on arms sales without putting themselves in legal jeopardy. During one White House meeting before the trip, Mike Miller, then a senior State Department official involved in arms sales, put the concerns bluntly, according to two officials. He said he was worried he could be found liable for aiding the killing of civilians.

U.S. officials set to work to address the concerns. They had been given an opening by Defense Secretary Jim Mattis, who in March at the Pentagon had pressed the visiting [Mohammed bin Salman](#), the Saudi deputy crown prince, to “stop bombing the women and children.” The crown prince agreed to take steps to curb the killing. Over weeks, U.S. officials drafted guidelines for the Saudi and American governments to follow as a condition of future arms sales.

The officials envisioned the plan not only saving civilian lives, but also offering protection against claims of American complicity in war crimes.

“We worked pretty rigorously to try to give them a sense that this was now going to be a harder sell,” Tina S. Kaidanow,

But as Mr. Trump and Mr. Kushner prepared for the Saudi trip, officials pared back the guidelines in their effort to push through the weapons sales.

Emails obtained by The Times show that [Stuart E. Jones](#), then the acting assistant secretary in the Bureau of Near Eastern Affairs, and his colleagues discussed how to draft acceptable language about the use of precision-guided munitions for a letter that Adel al-Jubeir, the Saudi foreign minister, was to sign before Mr. Trump’s trip.

In April 2017, Timothy A. Lenderking, a deputy assistant secretary in the bureau, wrote to Mr. Jones that he had met with State Department lawyers “and agreed on edits to cut back the language of the letter.” The next day, Mr. Jones wrote that Mr. al-Jubeir had “quickly agreed” to sign a letter. (Mr. Jones, who left the State Department in 2018, referred questions to the department.)

The letter [listed about five assurances](#), including a promise by the Saudis to have their forces take part in a \$750 million training program run by the U.S. military.

In Riyadh, Mr. Trump and King Salman announced the arms deal.

‘A Horror Show’

After Mr. Trump abruptly [fired his first secretary of state, Rex W. Tillerson](#), in March 2018, and as Mr. Pompeo awaited Senate confirmation to lead the State Department, John J. Sullivan, the deputy secretary, served as the agency’s acting head.

The officials worried about the arms sales believed Mr. Sullivan to be attentive to the humanitarian concerns in the Yemen war. In the roughly three weeks he was running the department, they sent an appeal for legal clarity.

Mr. Sullivan responded by approving a memo the officials had drafted that recommended carrying out a robust strategy to reduce civilian casualties and updating the legal analysis before the bomb sales moved forward, according to two U.S. officials. But the agency failed to do those, the inspector general later determined.

Mr. Pompeo took over soon after. That August, a coalition jet dropped an American-made bomb on a [Yemeni school bus](#), killing 54 people, including 44 children, in an attack that Mr. Trump would later call “a [horror show](#).”

The next month, Mr. Pompeo issued a [formal certification](#) to Congress that the Saudi-led coalition was working to minimize civilian deaths, despite news reports and [internal](#) State Department assessments [to the contrary](#). Senior department officials had warned Mr. Pompeo against the certification, in part because they had grown more anxious over the legal issues, officials said.

The move [provoked a backlash](#) in Congress and strengthened lawmakers’ resolve to continue [blocking arms sales](#).

By April 2019, Mr. Pompeo was frustrated by the delay, and senior State Department political appointees were discussing a rarely invoked tactic to force through \$8.1 billion in weapons sales without congressional approval: declaring an emergency over Iran.

At the center of those discussions was Marik String, a former Senate aide who had joined the State Department in 2017. By January 2019, he had become the acting head of the Political-Military Affairs Bureau and closely oversaw the emergency planning.

Mr. Pompeo announced the emergency on May 24, 2019, and the [stalled weapons deals moved forward](#), including the sale of some 120,000 bombs and bomb parts to the Saudis and Emiratis.

But no updated civilian casualty mitigation strategy or legal analysis was carried out before the equipment was shipped, according to the inspector general's report.

Released this August, the report said that although Mr. Pompeo did not violate the law in declaring an emergency, the State Department had failed to take proper measures to reduce civilian casualties and the associated legal risk.

Notably, the public section of the final report did not include a recommendation from an earlier draft: The department should "update its analysis of legal and policy risks" related to selling bombs to the Saudi coalition, according to text obtained by The Times. The language of that recommendation was edited and moved to the classified annex after pressure from department officials.

The day Mr. Pompeo declared the emergency, he also promoted Mr. String to be the State Department's top lawyer. From that position, Mr. String [tried to pressure](#) Steve A. Linick, the inspector general, to drop his investigation, Mr. Linick said in [congressional testimony](#) this June. Mr. String's office also handled the redacting of the report, while [R. Clarke Cooper](#), the current head of Political-Military Affairs, pushed to classify the most significant material — after he had been an interview subject in the investigation. This May, Mr. Pompeo pushed Mr. Trump to fire Mr. Linick.

Since the emergency declaration, which applied to only the sales last year, the Saudis and their partners have sought to buy more American bombs. About \$800 million in orders is now pending, held up in the same congressional review process that had [frustrated Mr. Pompeo and the White House](#).

The Emirates announced last summer that it was [withdrawing](#) most of its forces from the grinding war in Yemen, but it continues to [fight in the Libyan war](#).