

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY KRISTEN E. EICHENSEHR*

In this section:

- Investigations Continue into Mysterious Illness Affecting U.S. Officials in Havana and Elsewhere
- Biden Administration Imposes Sanctions and Seeks to Cement Alliances to Counter China and Russia
- Biden Administration Launches Reset in Relations with Saudi Arabia, Withdraws Support for Saudi-Led War in Yemen
- U.S. Supreme Court Rules that the Foreign Sovereign Immunity Act's Expropriation Exception Does Not Extend to Domestic Takings
- Military Coup in Burma Draws International Condemnation and Pressure
- Biden Administration Relies on Constitutional Authority and Unwilling or Unable Theory of Self-Defense for Airstrikes in Syria

* Jack V. Hoover, Kevin Krotz, Pierce MacConaghy, Kyle McGoey, Margaret Shin, and Lucianna Stamper contributed to the preparation of this section.

in other countries' domestic affairs, and stop forming small circles to seek bloc confrontation."⁷⁶

Biden Administration Launches Reset in Relations with Saudi Arabia, Withdraws Support for Saudi-Led War in Yemen

doi:10.1017/ajil.2021.29

The Biden administration has undertaken to reset U.S. relations with Saudi Arabia, making early moves to break with the Trump administration's policy toward the country on several key fronts. White House officials have shifted the locus of diplomatic contact between the two countries from Saudi Crown Prince Mohammed bin Salman, who enjoyed a close relationship with the Trump administration, to his father, King Salman. U.S. officials publicly released an intelligence report accusing Prince Mohammed of ordering the 2018 killing of Saudi dissident and *Washington Post* columnist Jamal Khashoggi and levied travel sanctions against seventy-six Saudi nationals in the crown prince's orbit. President Biden has also taken steps to end U.S. support for the Saudi-led coalition fighting in Yemen's civil war, revoking the terrorist designation assigned to the Houthis rebels in the final days of the Trump administration and initiating a review of U.S. arms sales.

The shift away from diplomatic engagement with Prince Mohammed represents a change from the close relationship he enjoyed with Trump administration officials, including President Trump's son-in-law and senior adviser, Jared Kushner.¹ Kushner and the crown prince built a close relationship that at times tested both U.S. diplomatic protocols and Saudi palace hierarchies,² as they worked together on a shared vision to reshape the geopolitical landscape of the Middle East.³ The relationship was tested in October 2018, with the killing of prominent regime critic and *Washington Post* columnist Jamal Khashoggi at the Saudi consulate in Istanbul.⁴ Media reports revealed that the Central Intelligence Agency (CIA) prepared a report in the weeks after the attack that assessed with "high confidence" that Prince Mohammed ordered the killing, citing intercepts of communications between

⁷⁶ Consulate General of the People's Republic of China in New York Press Release, Wang Yi Meets with Russian Foreign Minister Sergey Lavrov (Mar. 26, 2021), at <https://www.fmprc.gov.cn/ce/cgny/eng/xw/t1864347.htm>.

¹ See David D. Kirkpatrick, Ben Hubbard, Mark Landler & Mark Mazzetti, *The Wooing of Jared Kushner: How the Saudis Got a Friend in the White House*, N.Y. TIMES (Dec. 8, 2018), at <https://www.nytimes.com/2018/12/08/world/middleeast/saudi-mbs-jared-kushner.html> [<https://perma.cc/L5JY-J2YU>] (describing the close relationship between Kushner and Prince Mohammed).

² See *id.*

³ See Dexter Filkins, *A Saudi Prince's Quest to Remake the Middle East*, NEW YORKER (Apr. 9, 2018), at <https://www.newyorker.com/magazine/2018/04/09/a-saudi-princes-quest-to-remake-the-middle-east> [<https://perma.cc/ZF3U-GQFZ>].

⁴ For an account of the Trump administration's initial response to Khashoggi's killing, see Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 131, 166–69 (2019).

members of the kill team and the crown prince's aides.⁵ President Trump, however, cast doubt on the assessment, arguing that the world “may *never* know all of the facts” and reiterating the U.S. commitment to “remain a steadfast partner of Saudi Arabia to ensure the interests of our country, Israel and all other partners in the region.”⁶

While the State Department levied sanctions in 2018 against alleged participants in the killing,⁷ members of both parties in Congress criticized the Trump administration's refusal to accept the CIA's findings or take direct action against Prince Mohammed.⁸ The crown prince and the White House maintained a close relationship for the remainder of President Trump's term, working behind the scenes to rally support for the Abraham Accords, which came to define the Trump administration's attempted Middle East realignment.⁹

President Biden expressed a contrasting vision of Saudi Arabia on the campaign trail, vowing to treat the kingdom's leaders like “the pariah[s] that they are” for their human rights record in the region.¹⁰ Biden criticized the Trump administration's approach and called for “a reassessment of our relationship with Saudi Arabia,” arguing:

It is past time to restore a sense of balance, perspective, and fidelity to our values in our relationships in the Middle East. President Trump has issued Saudi Arabia a dangerous blank check. . . . Among the most shameful moments of this presidency came after the brutal Saudi murder of journalist Jamal Khashoggi, as Trump defended not the slain U.S. resident but his killers. America's priorities in the Middle East should be set in Washington, not Riyadh. . . .

We will make clear that America will never again check its principles at the door just to buy oil or sell weapons. We should recognize the value of cooperation on counterterrorism and deterring Iran. But America needs to insist on responsible Saudi actions and impose consequences for reckless ones.¹¹

⁵ Shane Harris, Greg Miller & Josh Dawsey, *CIA Concludes Saudi Crown Prince Ordered Jamal Khashoggi's Assassination*, WASH. POST (Nov. 16, 2018), at https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d_story.html [<https://perma.cc/UJLN7-ZNRZ>].

⁶ White House Press Release, Statement from President Donald J. Trump on Standing with Saudi Arabia (Nov. 20, 2018), at <https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-donald-j-trump-standing-saudi-arabia> [<https://perma.cc/8VNG-WFZY>].

⁷ Mark Landler & Gardiner Harris, *U.S. Levels Sanctions on 17 Saudis for Alleged Involvement in Khashoggi Killing*, N.Y. TIMES (Nov. 15, 2018), at <https://www.nytimes.com/2018/11/15/world/middleeast/saudis-sanctions-khashoggi.html> [<https://perma.cc/662C-UJXD>].

⁸ See Galbraith, *supra* note 4, at 168; see also Eric Schmitt & Nicholas Fandos, *Saudi Prince “Complicit” in Khashoggi's Murder, Senators Say After C.I.A. Briefing*, N.Y. TIMES (Dec. 4, 2018), at <https://www.nytimes.com/2018/12/04/us/politics/cia-senate-khashoggi-.html> [<https://perma.cc/T2KA-PKM5>].

⁹ Martin Chulov, *Saudi Heir and Jared Kushner Inch Kingdom Towards Deal with Israel*, GUARDIAN (Sept. 24, 2020), at <https://www.theguardian.com/world/2020/sep/24/saudi-heir-and-jared-kushner-inch-kingdom-towards-deal-with-israel> [<https://perma.cc/A54V-F9QG>]. For an overview of the Abraham Accords, see Kristen Eichensehr, *Contemporary Practice of the United States*, 115 AJIL 115, 116 (2021).

¹⁰ Ben Hubbard, *After Trump's Embrace, Saudis Brace for a Chillier Tone from Biden*, N.Y. TIMES (Nov. 20, 2020), at <https://www.nytimes.com/2020/11/20/world/middleeast/saudi-arabia-biden-trump.html> [<https://perma.cc/3E7S-4EMC>].

¹¹ Council on Foreign Relations, *The Presidential Candidates on Saudi Arabia* (July 30, 2019), at <https://www.cfr.org/article/presidential-candidates-saudi-arabia> [<https://perma.cc/5QDA-G2J9>].

In the first days of the Biden administration, House Intelligence Committee Chairman Adam Schiff (D-CA) pressed newly confirmed Director of National Intelligence Avril Haines to release the CIA's report into Khashoggi's killing "without delay," pointing to Trump's obstruction of Congress and Biden's promise to pursue accountability on behalf of Khashoggi and his family.¹² Reversing the Trump administration's judgment that the report could not be made public, the Biden administration arranged a diplomatic call with Saudi Arabia on February 25 to prepare them for the report's release.¹³ The call was notable in excluding Prince Mohammed. White House Press Secretary Jen Psaki had previously explained the shift by announcing the Biden administration's desire to return to "counterpart to counterpart" engagement, and clarifying that "[t]he President's counterpart is King Salman."¹⁴ Psaki also affirmed the administration's intention "to recalibrate our relationship with Saudi Arabia," pledging to maintain close cooperation "even as we make clear areas where we have disagreements and where we have concerns."¹⁵

The Biden administration released the unclassified annex to the report on February 26. Although the report did not reveal new facts, it represented the first official acknowledgement by the U.S. government that Prince Mohammed ordered Khashoggi's killing.¹⁶ The report based its assessment "on the Crown Prince's control of decision making in the Kingdom since 2017, the direct involvement of a key adviser and members of Muhammad bin Salman's protective detail in the operation, and the Crown Prince's support for using violent measures to silence dissidents abroad, including Khashoggi."¹⁷ The report also named with "high confidence" eighteen Saudi nationals who "participated in, ordered, or were otherwise complicit in or responsible for the death of Jamal Khashoggi on behalf of Muhammad bin Salman."¹⁸

The same day, Secretary of State Antony J. Blinken announced "Khashoggi Ban" visa sanctions on "76 Saudi individuals believed to have been engaged in threatening dissidents

¹² Letter from Rep. Adam Schiff to Dir. of Nat'l Intelligence Avril Haines (Jan. 22, 2021), available at https://intelligence.house.gov/uploadedfiles/cm_schiff_odni_letter_1.22.21.pdf [<https://perma.cc/BTK6-E2S5>].

¹³ Karen DeYoung, *Release of Intelligence Report on Khashoggi Killing Could Push Already Strained U.S.-Saudi Relations to New Lows*, WASH. POST (Feb. 18, 2021), at https://www.washingtonpost.com/national-security/khashoggi-intelligence-release-mbs-ordered-killing/2021/02/18/d46ee2c6-71e1-11eb-85fa-e0ccb3660358_story.html [<https://perma.cc/79CQ-Q7UP>]; White House Press Release, Readout of President Joseph R. Biden, Jr. Call with King Salman bin Abdulaziz al-Saud of Saudi Arabia (Feb. 25, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/25/readout-of-president-joseph-r-biden-jr-call-with-king-salman-bin-abdulaziz-al-saud-of-saudi-arabia> [<https://perma.cc/MN27-KQTZ>].

¹⁴ White House Press Release, Press Briefing by Press Secretary Jen Psaki, February 16, 2021 (Feb. 16, 2021), at <https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/16/press-briefing-by-press-secretary-jen-psaki-february-16-2021> [<https://perma.cc/4FK4-JQC3>].

¹⁵ *Id.*; see also Steve Holland & Trevor Hunnicut, *Biden Plans to "Recalibrate" Saudi Relations in Shot at Mbs—White House*, REUTERS (Feb. 16, 2021), at <https://www.reuters.com/article/us-mideast-usa-biden/biden-plans-to-recalibrate-saudi-relations-in-shot-at-mbs-white-house-idUSKBN2AG2AR> [<https://perma.cc/C3KR-YVC4>].

¹⁶ Julian E. Barnes & David E. Sanger, *Saudi Crown Prince Is Held Responsible for Khashoggi Killing in U.S. Report*, N.Y. TIMES (Feb. 26, 2021), at <https://www.nytimes.com/2021/02/26/us/politics/jamal-khashoggi-killing-cia-report.html> [<https://perma.cc/6ZJ4-EN59>].

¹⁷ Office of the Dir. of Nat'l Intelligence, _____ Assessing the Saudi Government's Role in the Killing of Jamal Khashoggi (Feb. 11, 2021), available at <https://www.dni.gov/files/ODNI/documents/assessments/Assessment-Saudi-Gov-Role-in-JK-Death-20210226v2.pdf> [<https://perma.cc/5BY6-47VZ>].

¹⁸ *Id.*

overseas, including but not limited to the Khashoggi killing.”¹⁹ Citing Section 212(a)(3)(C) of the Immigration and Nationality Act,²⁰ Blinken cast the Khashoggi Ban as

a new visa restriction policy . . . [which] allows the State Department to impose visa restrictions on individuals who, acting on behalf of a foreign government, are believed to have been directly engaged in serious, extraterritorial counter-dissident activities, including those that suppress, harass, surveil, threaten, or harm journalists, activists, or other persons perceived to be dissidents for their work.²¹

Reaction to the announcement was mixed even within Biden’s Democratic Party, in part because the United States declined to sanction Prince Mohammed directly.²² Rep. Schiff criticized the sanctions as a half-measure, saying “[t]here are ways to bring about more personal repercussions without completely rupturing the relationship,” but he added that the report was “very powerful,” casting it as “an official U.S. government statement that the crown prince of Saudi Arabia has blood on his hands, and that blood belongs to an American resident and journalist.”²³ Senator Mark Warner (D-VA), chair of the Senate Intelligence Committee, welcomed the sanctions as a first step, but suggested that the administration should “keep open additional sanctions against [Prince Mohammed] if we don’t see a change in behavior.”²⁴

In conversations with reporters, White House officials said they had concluded that levying travel sanctions, asset freezes, and criminal charges directly against Prince Mohammed would cause irreparable damage to U.S.-Saudi relations and undermine U.S. interests in fighting terrorism and countering Iran.²⁵ White House sources also cited the difficulties of designating which of the kingdom’s copious assets around the globe could be attributed to the crown prince’s control, and the realization that the situation would become even more difficult if and when Prince Mohammed ascends to the throne.²⁶

The Saudi Ministry of Foreign Affairs released a statement “completely reject[ing] the negative, false and unacceptable assessment in the report pertaining to the Kingdom’s leadership,” and “reject[ing] any measure that infringes upon its . . . sovereignty.”²⁷

¹⁹ U.S. Dep’t of State Press Release, Accountability for the Murder of Jamal Khashoggi (Feb. 26, 2021), at <https://www.state.gov/accountability-for-the-murder-of-jamal-khashoggi> [<https://perma.cc/Q7LD-RNJC>].

²⁰ 8 U.S.C. § 1182(a)(3)(C).

²¹ U.S. Dep’t of State Press Release, *supra* note 19.

²² Gordon Lubold & Stephen Kalin, *Biden Administration Urged to Penalize Saudi Crown Prince Over Khashoggi Killing*, WALL ST. J. (Feb. 28, 2021), at <https://www.wsj.com/articles/biden-administration-urged-to-penalize-saudi-crown-prince-over-khashoggi-killing-11614546231> [<https://perma.cc/YXU3-W9ZH>].

²³ Barnes & Sanger, *supra* note 16.

²⁴ Lubold & Kalin, *supra* note 22.

²⁵ Barnes & Sanger, *supra* note 16.

²⁶ John Hudson & Karen DeYoung, *Inside the Biden Team’s Deliberations Over Punishing the Saudi Crown Prince*, WASH. POST (Mar. 1, 2021), at https://www.washingtonpost.com/national-security/khashoggi-killing-intelligence-report-mbs-saudi-arabia/2021/03/01/5bdebe68-7ae1-11eb-b0fc-83144c02d676_story.html [<https://perma.cc/BZ4K-HUM7>]. The official described the goal of the report’s release as “a recalibration, not a rupture.” *Id.*

²⁷ Saudi Press Agency Press Release, The Government of The Kingdom of Saudi Arabia Completely Rejects the Assessment in the Report Submitted to US’ Congress Regarding Murder of Saudi Citizen Jamal Khashoggi (Feb. 26, 2021), at <https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=2195179#2195179> [<https://perma.cc/5FC5-MEJD>].

The relatively muted Saudi response may be due at least in part to Prince Mohammed's desire for assistance from the State Department with two pending civil suits against him—one by Hatice Cengiz, Khashoggi's fiancée, for violations of the Alien Tort Statute and Torture Victim Protection Act related to Khashoggi's death;²⁸ and another by Saad Aljabri, a former Saudi intelligence officer who accused the crown prince of plotting to target him in a capture-or-kill operation similar to the one against Khashoggi.²⁹ The crown prince has moved to dismiss both cases on a variety of grounds, including that he is entitled to status-based head-of-state immunity, based on his family relationship to the king, role as the designated successor, and current high-level government positions and role in running the country.³⁰ In Aljabri, the crown prince also argues that he is entitled to conduct-based immunity for official actions and that the court should not recognize a *jus cogens* exception to such immunity.³¹ The Saudi government's request to the U.S. State Department for a suggestion of immunity "remains under consideration,"³² but analysts speculate that the Biden administration's shifting posture toward Prince Mohammed could signal trouble for the crown prince's chances of evading both suits.³³

In parallel to the change in relations with the Saudi royal family and the release of the Khashoggi report, the Biden administration has taken several steps to reverse Trump administration policy and withdraw U.S. support for the Saudi-led campaign against the Houthis rebels in Yemen.³⁴ In Biden's first week in office, State Department officials announced a temporary pause in sales of precision munitions to Saudi Arabia and fighter planes to the United Arab Emirates.³⁵ Blinken downplayed the significance of the move, calling it "typical at the start of an administration to review any pending sales to make sure that those that are being considered is something that advances our strategic objectives and advances our foreign policy."³⁶ But the deals had been approved in the waning days of the Trump administration despite a heated back-and-forth with Congress over previous rounds of arms sales to the Saudi-led coalition, sparking hope among some congressional Democrats that Biden would permanently cancel the sales.³⁷

²⁸ Complaint at 50–54, *Cengiz v. bin Salman bin Abdulaziz al Saud et al.*, No. 1:20-cv-03009 (D.D.C. Oct. 20, 2020) (Doc. 1).

²⁹ Complaint at 3–5, *Aljabri v. Bin Salman bin Abdulaziz al Saud et al.*, No. 1:20-cv-02146 (D.D.C. Aug. 6, 2020) (Doc. 1).

³⁰ Motion to Dismiss Amended Complaint at 27–30, *Aljabri v. Bin Salman bin Abdulaziz al Saud et al.*, No. 1:20-cv-02146 (D.D.C. Apr. 5, 2021) (Doc. 92); Motion to Dismiss at 20–23, *Cengiz v. bin Salman bin Abdulaziz al Saud et al.*, No. 1:20-cv-03009 (D.D.C. June 4, 2021) (Doc. 21).

³¹ Motion to Dismiss Amended Complaint at 31–34, 38–39, *supra* note 30.

³² Motion to Dismiss Amended Complaint at 27, *supra* note 30; *see also* Motion to Dismiss at 20 n. 13, *supra* note 30.

³³ Pranshu Verma & Mark Mazzetti, *U.S. Considers Granting Immunity to Saudi Prince in Suspected Assassination Attempt*, N.Y. TIMES (Dec. 22, 2020), at <https://www.nytimes.com/2020/12/22/us/politics/mbs-saudi-immunity-trump.html> [<https://perma.cc/6Z69-UXJA>].

³⁴ For an overview of U.S. aid to the Saudi-led coalition, see Kristen Eichensehr, *Contemporary Practice of the United States*, 115 AJIL 115, 146 (2021).

³⁵ Michael Crowley, *Biden Administration Reviewing Trump Arms Sales to U.A.E. and Saudi Arabia*, N.Y. TIMES (Jan. 27, 2021), at <https://www.nytimes.com/2021/01/27/us/politics/biden-arms-sales-uae-saudi-arabia.html> [<https://perma.cc/245P-WUH8>].

³⁶ *Id.*

³⁷ *See id.*; Eichensehr, *supra* note 34, at 152–53. Senator Chris Murphy, both a close Biden ally and a leading critic of U.S. support for the Saudi effort in Yemen, called the decision "the right move," and argued that "[t]he

A week later, in his first foreign policy address, Biden announced a major shift in U.S. posture toward the war in Yemen, which he called a “humanitarian and strategic catastrophe”:

We’re also stepping up our diplomacy to end the war in Yemen. . . . I’ve asked my Middle East team to ensure our support for the United Nations-led initiative to impose a cease-fire, open humanitarian channels, and restore long-dormant peace talks.

This morning, Secretary Blinken appointed Tim Lenderking, a career foreign policy officer, as our special envoy to the Yemen conflict. . . . Tim’s diplomacy will be bolstered by . . . USAID, working to ensure that humanitarian aid is reaching the Yemeni people who are suffering . . . unendurable devastation. This war has to end.

And to underscore our commitment, we are ending all American support for offensive operations in the war in Yemen, including relevant arms sales.

At the same time, Saudi Arabia faces missile attacks, [unmanned aerial vehicle] strikes, and other threats from Iranian-supplied forces in multiple countries. We’re going to continue to support and help Saudi Arabia defend its sovereignty and its territorial integrity and its people.³⁸

Some analysts expressed optimism at the administration’s renewed emphasis on multilateral diplomacy to end the conflict and alleviate suffering, and especially for the appointment of Lenderking, a career foreign service officer and former Deputy Chief of Mission at the U.S. Embassy in Riyadh.³⁹ However, other observers suggested that the move was “symbolic in a lot of ways,” given the dire conditions on the ground in Yemen and numerous strategic challenges that will make ending the war difficult.⁴⁰

One of those strategic challenges is the complicated U.S. posture toward the Houthi rebel group, officially known as Ansarallah, that occupies much of Yemen. On February 5, Biden notified Congress of his intent to lift the Foreign Terrorist Organization (FTO) designation of Ansarallah that went into effect the day before the Trump administration left office.⁴¹ Secretary Blinken cast the reversal as a response to concerns that that the designation would prevent international aid groups from operating in Yemen, explaining:

time is now to reset our relationships with Gulf allies.” Chris Murphy (@ChrisMurphyCT), TWITTER (Jan. 27, 2021), at <https://twitter.com/chrismurphyct/status/1354505226770911233?s=21> [<https://perma.cc/P3H2-RE74>].

³⁸ White House Press Release, Remarks by President Biden on America’s Place in the World (Feb. 4, 2021), at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-america-place-in-the-world> [<https://perma.cc/H5ZM-YE9X>].

³⁹ Ben Hubbard & Shuaib Almosawa, *Biden Ends Military Aid for Saudi War in Yemen. Ending the War Is Harder*, N.Y. TIMES (Feb. 5, 2021), at <https://www.nytimes.com/2021/02/05/world/middleeast/yemen-saudi-biden.html> [<https://perma.cc/2BNY-WMFR>]. For Lenderking’s biography, see U.S. Dep’t of State, Timothy A. Lenderking, U.S. Special Envoy for Yemen, at <https://www.state.gov/biographies/timothy-a-lenderking> [<https://perma.cc/XW4E-XKDN>].

⁴⁰ Hubbard & Almosawa, *supra* note 39; see also Sudarsan Raghavan & Missy Ryan, *The U.S. Is Changing Tack on the Saudi-Led War in Yemen. That’s the Easy Part*, WASH. POST (Feb. 5, 2021), at https://www.washingtonpost.com/world/middle_east/biden-yemen-diplomacy-challenges/2021/02/05/d7b4f97c-6712-11eb-bab8-707f8769d785_story.html [<https://perma.cc/5F89-2WX9>].

⁴¹ John Hudson & Missy Ryan, *Biden Administration to Remove Yemen’s Houthi Rebels from Terrorism List in Reversal of Trump-Era Policy*, WASH. POST (Feb. 6, 2021), at https://www.washingtonpost.com/national-security/biden-yemen-rebels-terrorist-list/2021/02/05/e65e55c8-5b40-11eb-aaad-93988621dd28_story.html [<https://perma.cc/4ZUL-G5QE>].

This decision is a recognition of the dire humanitarian situation in Yemen. We have listened to warnings from the United Nations, humanitarian groups, and bipartisan members of Congress, among others, that the designations could have a devastating impact on Yemenis' access to basic commodities like food and fuel. The revocations are intended to ensure that relevant U.S. policies do not impede assistance to those already suffering what has been called the world's worst humanitarian crisis. By focusing on alleviating the humanitarian situation in Yemen, we hope the Yemeni parties can also focus on engaging in dialogue.⁴²

Despite removing the FTO designation, the United States left in place sanctions on senior Houthi leaders. Noting that the United States is "actively identifying additional targets for designation," Blinken explained:

The United States remains clear-eyed about Ansarallah's malign actions, and aggression, including taking control of large areas of Yemen by force, attacking U.S. partners in the Gulf, kidnapping and torturing citizens of the United States and many of our allies, diverting humanitarian aid, brutally repressing Yemenis in areas they control, and the deadly attack on December 30, 2020 in Aden against the cabinet of the legitimate government of Yemen.⁴³

The administration has continued to condemn Houthi attacks on civilian populations in Saudi Arabia and Yemen,⁴⁴ and on March 2, the United States imposed new sanctions on two Houthi militants, accusing them of receiving weapons and support from Iran and attacking civilians "to advance the Iranian regime's destabilizing agenda" in Yemen.⁴⁵

In response to the removal of the FTO designation, a senior Houthi leader said that the "American administration backing down from this designation is a positive thing," because it "would have affected the Yemeni people," rather than Ansarallah fighters who "don't have money accounts outside, and . . . don't have relations outside."⁴⁶

It remains to be seen how the Biden administration's efforts will change the strategic calculus for the parties involved in the Yemen conflict. In the weeks after the FTO designation was lifted, Houthi rebels launched an offensive to consolidate territorial gains in the northern Marib province, a final holdout of Yemeni government forces and a safe haven for hundreds of thousands of refugees.⁴⁷ In March, Saudi Arabia announced its willingness to lift a partial air-

⁴² U.S. Dep't of State Press Release, Revocation of the Terrorist Designations of Ansarallah (Feb. 12, 2021), at <https://www.state.gov/revocation-of-the-terrorist-designations-of-ansarallah> [<https://perma.cc/W428-662j>].

⁴³ *Id.*

⁴⁴ U.S. Dep't of State Press Release, Houthi Attacks Impacting Civilians (Feb. 7, 2021), at <https://www.state.gov/houthi-attacks-impacting-civilians> [<https://perma.cc/DHC6-B4QL>]; U.S. Dep't of State Press Release, Houthi Attacks on Saudi Arabia (Feb. 28, 2021), at <https://www.state.gov/houthi-attacks-on-saudi-arabia> [<https://perma.cc/78FP-BHBT>].

⁴⁵ U.S. Dep't of Treasury Press Release, Treasury Sanctions Key Military Leaders of the Ansarallah Militia in Yemen (Mar. 2, 2021), at <https://home.treasury.gov/news/press-releases/jy0043> [<https://perma.cc/FH7S-WZD2>].

⁴⁶ Hudson & Ryan, *supra* note 41.

⁴⁷ Ali Al-Mujahed & Sudarsan Raghavan, *As Biden Seeks End to Yemen War, Rebels Press Offensive for Strategic Province*, WASH. POST (Feb. 21, 2021), at https://www.washingtonpost.com/world/the_americas/yemen-war-marib-houthi-rebel-biden/2021/02/21/7358d090-72c3-11eb-8651-6d3091eac63f_story.html [<https://perma.cc/V28F-9ACS>].

and-sea blockade that has prevented fuel, food, and medicine from reaching Yemeni civilians, on the condition that the Houthis endorse a UN-brokered ceasefire.⁴⁸ Although Houthi fighters rejected the deal, saying they “do not accept any military or political conditions for receiving” humanitarian aid, Yemen’s internationally recognized government eased the logjam in humanitarian aid delivery when it approved the docking of four fuel ships at the port of Hodeidah on March 24.⁴⁹

In early April, the Biden administration notified Congress of its intent to approve the previously paused sale of \$23 billion in weapons to the United Arab Emirates, while simultaneously moving to block many planned sales of weapons to Saudi Arabia.⁵⁰ The administration’s review assessed the sales’ ability to meet President Biden’s February 4 commitment to end “all American support for offensive operations in the war in Yemen, including relevant arms sales.”⁵¹ While planned sales to both countries included fixed-wing aircraft and armed attack drones, executive officials determined that many of the weapons sought by Saudi Arabia bore an unacceptable risk of being used in offensive operations or to target civilians.⁵²

Sporadic violence in the conflict has continued, with Houthi fighters launching three drone strikes in mid-April on targets in Saudi Arabia.⁵³ The State Department “strongly condemn[ed]” the strikes, highlighting the diplomacy of Lenderking and UN Special Envoy Martin Griffiths and accusing the Houthis of “prolonging the suffering of the Yemeni people and jeopardizing these efforts at a moment when there is a commitment from the international community to end the conflict now.”⁵⁴ After Lenderking made another trip to the region, the State Department again accused the Houthis of worsening the humanitarian situation in Yemen, noting that “[t]here is a fair deal on the table that will bring immediate relief to the Yemeni people” and asserting that the Houthis “passed up a major opportunity to demonstrate their commitment to peace and to make progress on this proposal by refusing to meet with UN Special Envoy Griffiths.”⁵⁵ In May, Lenderking noted that the United States is “troubled by the fact that the Houthis continue to fight in Marib,” where they are “putting a great deal of stress on an already fragile humanitarian situation,” and the United States

⁴⁸ Rick Gladstone & Shuaib Almosawa, *Saudi Arabia Offers Cease-Fire in Yemen and Lifting of Blockade*, N.Y. TIMES (Mar. 22, 2021), at <https://www.nytimes.com/2021/03/22/world/middleeast/saudi-arabia-offers-peace-yemen.html> [<https://perma.cc/QS7T-5PSE>].

⁴⁹ *Saudi-Led Coalition Clears Four Fuel Ships to Dock at Yemen’s Hodeidah Port - Sources*, REUTERS (Mar. 24, 2021), at <https://www.reuters.com/article/uk-yemen-security-ports-idAFKBN2BG136> [<https://perma.cc/Q93C-HZKN>].

⁵⁰ Michael Crowley & Edward Wong, *U.S. Is Expected to Approve Some Arms Sales to U.A.E. and Saudis*, N.Y. TIMES (Apr. 14, 2021), at <https://www.nytimes.com/2021/04/14/us/politics/arms-sales-uae-saudi-arabia.html> [<https://perma.cc/6BMD-URR2>].

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Yemen’s Houthis Claim Attack on Saudi Oil Facility, Air Base*, REUTERS (Apr. 23, 2021), at <https://www.reuters.com/world/middle-east/saudi-led-coalition-intercepted-houthi-explosives-laden-drone-state-tv-2021-04-22> [<https://perma.cc/B8RW-US9N>].

⁵⁴ U.S. Dep’t of State Press Release, *Houthis Attack While the International Community Commits to End Conflict in Yemen* (Apr. 15, 2021), at <https://www.state.gov/houthis-attack-while-the-international-community-commits-to-end-conflict-in-yemen> [<https://perma.cc/7YGL-QGU8>].

⁵⁵ U.S. Dep’t of State Press Release, *U.S. Special Envoy Lenderking Returns from Travel to Saudi Arabia, Oman, and Jordan* (May 7, 2021), at <https://www.state.gov/u-s-special-envoy-lenderking-returns-from-travel-to-saudi-arabia-oman-and-jordan> [<https://perma.cc/8JNX-V6V4>].

announced additional sanctions on two Houthi military leaders involved in the offensive against Marib.⁵⁶

STATE JURISDICTION AND IMMUNITY

U.S. Supreme Court Rules that the Foreign Sovereign Immunity Act's Expropriation Exception Does Not Extend to Domestic Takings

doi:10.1017/ajil.2021.30

In *Federal Republic of Germany v. Philipp*, the U.S. Supreme Court unanimously held that a country's taking of property from its own nationals does not fall within the Foreign Sovereign Immunities Act (FSIA) exception for "rights in property taken in violation of international law."¹ The case involved a claim that Nazi officials coerced a consortium of three art firms owned by Jewish residents of Germany to sell a collection of "medieval relics and devotional objects known as the Welfenschatz" to Prussia for "approximately one-third of their value."² The plaintiffs—descendants of the members of the consortium—argued that the coerced sale constituted genocide, thus bringing their claim within the FSIA exception. The Supreme Court disagreed, holding that "the expropriation exception is best read as referencing the international law of expropriation rather than of human rights" and that international law does not bar a state's taking of the property of its own nationals.³ The Court declined to reach Germany's alternative argument that international comity required dismissal of the case, and it vacated and remanded a companion case, *Republic of Hungary v. Simon*, that also posed the comity question.⁴

The Welfenschatz includes pieces dating back to the Holy Roman Empire.⁵ The consortium of art firms purchased the collection during the Weimar Republic and sold some pieces to European and U.S. museums before, the complaint alleges, Nazi official Hermann Goering used "a combination of political persecution and physical threats to coerce the consortium into selling the remaining pieces to Prussia in 1935" for well below market value.⁶ During the occupation of Germany after World War II, the United States came into possession of the collection and then returned it to the Federal Republic of Germany.⁷ The Stiftung

⁵⁶ U.S. Dep't of State Press Release, Special Briefing via Telephone with Timothy Lenderking, U.S. Special Envoy for Yemen (May 20, 2021), at <https://www.state.gov/special-briefing-via-telephone-with-timothy-lenderking-u-s-special-envoy-for-yemen> [<https://perma.cc/2YEG-L4W8>]; U.S. Dep't of State Press Release, The United States Designates Houthi Militants (May 20, 2021), at <https://www.state.gov/the-united-states-designates-houthi-militants> [<https://perma.cc/X3YD-YGYP>].

¹ Fed. Republic of Germany v. Philipp, 141 S. Ct. 703, 715 (2021).

² *Id.* at 708.

³ *Id.* at 712.

⁴ Republic of Hungary v. Simon, 141 S. Ct. 691 (2021).

⁵ Fed. Republic of Germany v. Philipp, 141 S. Ct. at 708.

⁶ *Id.*

⁷ *Id.*