

Security Assistance and Arms Transfers: Human Rights Frameworks and Recommendations for Strengthening

Josh Paul, for the Institute for Middle East Understanding

Introduction¹

The history of U.S. arms transfers goes back to before World War One, but in its current form the purposes for which the U.S. may transfer arms are most importantly framed by the Arms Export Control Act of 1976², which states that defense articles and services may be transferred “solely for internal security, for legitimate self-defense³, for preventing or hindering the proliferation of weapons of mass destruction and of the means of delivering such weapons, to permit the recipient country to participate in regional or collective arrangements or measures consistent with the Charter of the United Nations, or otherwise to permit the recipient country to participate in collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security, or for the purpose of enabling foreign military forces in less developed friendly countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries.”⁴

In laying out this framework, Congress embedded the management and oversight of U.S. security assistance, including arms transfers, primarily (after the President) in the Secretary of State, who is “responsible for the continuous supervision and general direction of economic assistance, military assistance, and military education and training programs, including but not limited to determining whether there shall be a military assistance (including civic action) or a military education and training program for a country and the value thereof...”⁵

Lexicon

This paper follows standard Department of State terminology, including:

Security Assistance – Refers only to grant military and security assistance, which may include training without the direct provision of arms.

Security Cooperation – Refers to DoD activities with partnered forces that may or may not include the “temporary” provision of arms.

Arms Transfers – Refers to any transfer of defense articles and services (as defined under the International Traffic in Arms Regulations (ITAR) or Arms Export Control Act of 1976, however funded or authorized.

This is a structure that is almost unique to the United States: for most other countries security assistance is a function of the defense ministries, and arms transfers are authorized either by defense ministries or ministries of trade. But as Congress laid out, the purpose of establishing these authorities under the Secretary of State was so that “such programs are effectively integrated both at home and abroad and the foreign policy of the United States is best served thereby.”⁶

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² 22 USC 2751 et seq.

³ Of note, there is no definition in law of what constitutes legitimate vs. illegitimate, self defense - and nor for that matter of what self-defense actually is.

⁴ 22 USC 2754

⁵ 22 USC 2382(c)

⁶ Ibid

The role of human rights in arms transfers and security assistance has been hotly contested for many years, with a sequence of relevant laws, policies, and processes being introduced over the years, as described below. As such, decisions about assistance and transfers are ultimately viewed by the Executive Branch as tools of foreign policy – and, such policy being, from the Executive Branch’s perspective, the President’s inherent prerogative under Article II of the U.S. Constitution, the Executive has traditionally sought to minimize statutory efforts to constrain its freedom of action, while at the same time weighing any human rights implications of arms transfers against a much broader perspective on what constitutes the American foreign policy interest.

In this era of “strategic competition”⁷ the United States is – or at least should be – distinguished from its adversaries and competitors most fundamentally by its democratic values, which include an understanding of human rights rooted in the liberal tradition. However, the existing framework in U.S. domestic policy and law offers⁸ few meaningful constraints, and policymakers, driven by pressure from partners and allies, as well as from U.S. industry itself, may sometimes prioritize decision-making factors which contradict publicly espoused American values. Strengthening the guardrails around human rights in security assistance and arms transfers in this context is therefore not a question of political or ideological agenda – it is a matter of national security. And, in the absence of incentives for the Executive to do so, it is up to Congress to act.

Process Overview

The U.S. is by far the world’s largest exporter of arms by both volume and value, accounting for 40% of the global trade – and growing.⁹ The U.S. exports arms through two major mechanisms:

Foreign Military Sales (FMS): FMS, authorized under the Arms Export Control Act of 1976, constitute government-to-government sales. A country submits a Letter of Request (LOR) for a defense article or service; the Defense Security Cooperation Agency, working with the relevant U.S. military service (for instance, the Air Force for most fighter jet requests), works with the country to definitize the request and turn it into a draft Letter of Offer and Acceptance (LOA); this potential case is then submitted to the State Department for policy review and approval; if approved and above the statutory thresholds,¹⁰ the case is notified to Congress prior to issuance of the LOA. The U.S. Government then contracts with industry on behalf of the partner to build and deliver the capability in question.

Direct Commercial Sales (DCS): Partners are also able to procure defense articles and services¹¹ directly from U.S. industry via the DCS process. In this instance, it is the U.S. entity itself that will come in with an export license application to the State Department’s Directorate of Defense Trade Controls (DDTC). DDTC will farm out the application for review by interested stakeholders in the Department and, as applicable, across the government, before making a determination on the license; as with FMS, if the case falls above statutory thresholds, it must be notified to Congress before the license is issued.

While these are the two major means of arms transfers, historically accounting for over \$150B in annual defense export authorizations, the U.S. Government has a number of other authorities available for the direct transfer of arms to partners. These include (but are not limited to) the Excess Defense Articles (EDA)¹² program under which arms declared excess by the military services may be made available to partners on a grant or sale basis; military Presidential Drawdown,¹³ under which defense articles may be transferred directly from DOD stocks; and, Acquisition and Cross Servicing Agreements (ACSAs).¹⁴ A further mechanism for the transfer of arms in very specific circumstances is the War Reserve Stockpile Ammunition (WRSA), including that in Israel (WRSA-I) which is a U.S. military stockpile held in a foreign country, the contents of which may be made available to that country in the event of an emergency.¹⁵

⁷ See National Security Strategy, <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf>

⁸ The picture in international law is somewhat different. See https://www.icrc.org/en/doc/assets/files/other/icrc_002_0916.pdf

⁹ https://www.sipri.org/sites/default/files/2023-03/2303_at_fact_sheet_2022_v2.p

¹⁰ In 22 USC 2776

¹¹ As defined by the International Traffic in Arms Regulations (ITAR), 22 CFR 120 et seq

¹² Under Section 644(g) of the FAA

¹³ Under Section 506(a)(1) of the FAA

¹⁴ Which are typically focused on logistics but can be used to provide anything up to unguided ('dumb') bombs for payment 'in kind'. 10 USC 2341.

¹⁵ 2 U.S. Code § 2321h2

Separate from these mechanisms of transfer, the U.S. provides a number of allies and partners with military grant assistance funding to enable them to procure U.S. defense articles and services at low,¹⁶ or no, cost. The most prominent among these is the State Department's Foreign Military Financing program, appropriated in the base budget for the past 20 years at approximately the \$6 billion level (of which Israel has received, since the start of the current Memorandum of Understanding (MOU) \$3.3 billion, or over half the total available).¹⁷ Unlike other countries, FMF for Israel is considered "obligated upon appropriation" - meaning that the full year sum is transferred to Israel's interest-bearing account at the Federal Reserve Bank of New York as soon as the appropriations bill is enacted (Egypt and Israel both enjoy such interest-bearing accounts; for most other countries, FMF is held by the Defense Finance Accounting Service (DFAS) in a DSCA account, and does not accrue interest).

The U.S. also provides grant military assistance through a number of DOD funding authorities, including "Section 333" funding.¹⁸ Almost all grant assistance funding, no matter its source, supports arms transfers that are managed within the Foreign Military Sales process.

DCS vs FMS

While FMS cases are government-to-government agreements, in DCS the U.S. Government's role is to license an export occurring under a commercial contract. Because of how the current regulations interpret a statutory directive that "the names of the countries and the types and quantities of defense articles for which licenses are issued under this section shall not be withheld from public disclosure" (22 USC 2778(e)), and because of a sense that publication of further detail about commercial defense exports could disadvantage U.S. companies by revealing cost information, such information is treated as corporate proprietary. This means that licensing information about cases below the Congressional notification is almost never provided to Congress, while DCS formal notifications appear in the Congressional Record as just a reference number, as opposed to their FMS counterparts which not only contain more detail in the Record, but also have announcements of their notification posted to the Defense Security Cooperation Agency (DSCA) website.

In addition, because DCS cases are contracts between a U.S. entity and a foreign entity (not always a government, for instance in the case of a license for overseas manufacturing), the Directorate of Defense Trade Controls has long argued that the only provisos it can place on cases are those that the U.S. party to the transaction can fairly enforce – such as limitations on the level of technology being exported – rather than how the defense article will be used. To do this, on rare occasions an exchange of diplomatic notes, or some similar mechanism, between the U.S. and counterpart government have been arranged prior to the issuance of a DCS license.

Finally it is worth noting that Leahy requirements (as currently interpreted by the U.S. government, based on the interpretation of what comprises security 'assistance') attach to the funding source (grant assistance) rather than the mechanism of sale. If an FMS or DCS case are being funded by the partner (as the vast majority are) Leahy vetting and the prohibition on provision to a unit implicated in gross violations of human rights does not apply.

¹⁶ When host nation and U.S. funds are combined.

¹⁷ While FMF almost always has to be expended in the U.S., returning these taxpayer funds to the U.S. economy (if not, actually, to the taxpayers), Israel has long retained an authority for "offshore procurement" using FMF funds, allowing it to spend an amount (currently ~20% of its allocation) in the Israeli domestic defense industry market; this has contributed over the years to the growth of an Israeli defense industry that is now a top-ten global arms exporter, often competing against the U.S., again thanks to the U.S. taxpayer. See https://www.inss.org.il/wp-content/uploads/2020/08/Memo2020_e.pdf for extensive discussion on the pros and cons of this approach from an Israeli perspective. Under the current (2016) MOU with Israel, OSP is due to be zeroed out by the end of the MOU; however, the pending supplemental proposal from the Administration permits the entirety of the requested FMF (\$3.5B) to be expended via OSP, i.e., in Israel.

¹⁸ 10 USC 333. This is the main global security assistance authority for DOD, which combines several previous authorities including Section 1206 counterterrorism capacity building.

The Congressional Notification Process

FMS and DCS transfers above certain thresholds must be notified to Congress where they can be blocked only by passage of a Joint Resolution of Disapproval (JRD); realistically, JRDs must achieve veto-proof support to be effective; none ever has, and so Congress has never formally blocked an arms transfer.

Because the JRD process is a highly visible one, and therefore potentially very embarrassing to a partner, an informal system has existed by mutual consent of the State Department and the Committees of Jurisdiction (House Foreign Affairs and Senate Foreign Relations Committees) since 1979 (this process is known in its current iteration after minor modifications in 2012 as the 'Tiered Review Process'). Under tiered review, the Chair and Ranking Member of these two Committees (the "four corners"), through their professional staff, are provided with advance copies of arms sales notifications the Department intends to advance, and have a certain amount of time to question the Department about the sales (though in practice the Department, particularly under the current Administration, has declined to formally notify any sale until it gets the 'go-ahead' from all four 'corners' involved).

This process, which has historically been tightly held by the Chairs and Rankings, as such amounts to a Congressional mechanism to hold arms sales indefinitely (though such holds are not binding upon the Department, which can advance sales to formal notification whenever it wishes, though doing so over the concerns of a Committee Chair or Ranking would likely be ill-advised). The Department typically meets with professional staff on a monthly basis to run through arms transfers pending with Congress, a running list of which is maintained and shared for the pending FMS and DCS cases on a regular basis.

Once a Chair or Ranking gives their consent to proceed with a formal notification, it is extremely unlikely they will reverse themselves and oppose it in a JRD context.

Frameworks

As has already been noted, the Foreign Assistance Act of 1961 and Arms Export Control Act of 1976 are the fundamental statutory frameworks for the U.S. export of arms. Within these two statutes, there are several provisions of particular note as regards human rights and points at which Congress and other entities external to the Executive Branch may intercede:

Leahy Law¹⁹: 22 USC 2738d: No assistance shall be furnished under this chapter or the Arms Export Control Act [22 U.S.C. 2751 et seq.] to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.

Transnational Repression: 22 USC 2756: No letters of offer may be issued, no credits or guarantees may be extended, and no export licenses may be issued under this chapter with respect to any country determined by the President to be engaged in a consistent pattern of acts of intimidation or harassment directed against individuals in the United States.

502B: 22 USC 2304: (a)(1)... a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

(a)(2) Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights...²⁰

(a)(3) In furtherance of paragraphs (1) and (2), the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.

¹⁹ Note that there is a parallel Leahy Law for DOD assistance under 10 USC 362

²⁰ Of note, this section includes a broad description of what constitutes GVHRs, but that definition does not convey to the Leahy language, in the application of which there is no statutory definition of GVHRs.

Israel and Human Rights Vetting

All of the listed statutory requirements are global, but this does not mean they are implemented identically around the world. Leahy Vetting is a good example. As the law states, assistance cannot be provided to units that are involved in gross violations of human rights (GVHR). For most countries, any unit or individual, prior to being provided with materiel assistance or military training, is vetted by the State Department's Bureau of Democracy, Labor and Human Rights (DRL), for any reported potential GVHRs. If any empowered official in that process objects to the unit or individual, they are not permitted to receive the assistance or training under consideration. However, for Israel (along with Egypt and Ukraine), as a function in part of the scope of U.S. military assistance it receives (which would mean needing to vet every single unit of the IDF – an impossibility based on current resources allocated to Leahy Vetting), the Department has established the “Israel Leahy Vetting Forum (ILVF).” In this forum, rather than proactive screening of units, when reports are received of potential GVHRs, they are reviewed by a working group comprising DRL, the Bureau of Political-Military Affairs (PM), the Bureau of Near Eastern Affairs (NEA), the Office of the Legal Advisor (L) and Embassy Jerusalem; the Government of Israel is then consulted on the incident, including on whether it has taken any actions to address the incident. Then, the ILVF must come to consensus on whether a GVHR has occurred (unlike regular Leahy Vetting where a single objection is sufficient to withhold assistance). To-date, the ILVF has not come to consensus on any allegation of GVHR.

It is also important to note statutory requirements as apply to “End Use Monitoring”(EUM):²¹

22 U.S.C. 2314 CONDITIONS OF ELIGIBILITY.—(a) In addition to such other provisions as the President may require, no defense articles or related training or other defense service shall be furnished to any country on a grant basis unless it shall have agreed that—

(1) it will not, without the consent of the President— [...]

(C) use or permit the use of such articles or related training or other defense service for purposes other than those for which furnished;

22 USC 2753: (a)Prerequisites for consent by President; report to Congress

No defense article or defense service shall be sold or leased by the United States Government under this chapter to any country or international organization, and no agreement shall be entered into for a cooperative project (as defined in section 2767 of this title), unless— [...]

(2)the country or international organization shall have agreed not to transfer title to, or possession of, any defense article or related training or other defense service so furnished to it, or produced in a cooperative project (as defined in section 2767 of this title), to anyone not an officer, employee, or agent of that country or international organization (or the North Atlantic Treaty Organization or the specified member countries (other than the United States) in the case of a cooperative project) and not to use or permit the use of such article or related training or other defense service for purposes other than those for which furnished unless the consent of the President has first been obtained;

22 USC 2785 (a)(1)... the President shall establish a program which provides for the end-use monitoring of such articles and services.

(2)Requirements of program

To the extent practicable, such program— [...]

(B)shall be designed to provide reasonable assurance that—

(i)the recipient is complying with the requirements imposed by the United States Government with respect to use, transfers, and security of defense articles and defense services; and

(ii)such articles and services are being used for the purposes for which they are provided.

²¹ For a separate discussion of what EUM is in practice, see below.

Also of note in this context is the penalty for “end use” violations, as laid out in Section 3 of the AECA (22 USC 2753(c)(1)(A)):

No credits (including participations in credits) may be issued and no guaranties may be extended for any foreign country under this chapter as hereinafter provided, if such country uses defense articles or defense services furnished under this chapter, or any predecessor Act, in substantial violation (either in terms of quantities or in terms of the gravity of the consequences regardless of the quantities involved) of any agreement entered into pursuant to any such Act (i) by using such articles or services for a purpose not authorized under section 2754 of this title or, if such agreement provides that such articles or services may only be used for purposes more limited than those authorized under section 2754 of this title for a purpose not authorized under such agreement...

The law requires that the “President shall report to the Congress promptly upon the receipt of information that a violation described in paragraph (1) of this subsection may have occurred;” however, “Section 3” violation reports are extremely rare given the consequences they invoke upon a partner, and have been historically considered only for illicit retransfers or re-/reverse-engineering. The Department has also historically read this section to apply only to defense articles provided via FMS, as opposed to DCS, though it has made informal efforts to inform Congress of such violations involving DCS transfers²² as a matter of comity.

In addition to these codified requirements, the annual Appropriations Act for the Department of State contains a myriad of human rights-related legal requirements. Many of these are country-specific, such as requirements for certifications to be made (some waivable, some not) before military grant assistance can be provided to a country. Others have global applicability, such as the Section 7008 “coup restrictions” as reflected in the FY23 State and Foreign Operations Appropriations Bill.

In addition to these statutory requirements, Administrations may apply such written policies as they see fit, both to specific countries, and as general guidelines for arms transfers. The central such policy is the Conventional Arms Transfer (CAT) Policy, issued by each Administration since Reagan to provide a framework for policy decisions on arms transfers. The current CAT Policy,²³ much like its predecessors, integrates human rights into a broader list of considerations for arms transfers, requiring specifically that each potential case take into account:

The risk that the recipient may use the arms transfer to contribute to a violation of human rights or international humanitarian law, based on an assessment of the available information and relevant circumstances, including the capacity and intention of the recipient to respect international obligations and commitments;

- and -

The risk that the transfer will have adverse political, social, or economic effects within the recipient country, including by negatively impacting the protection of human rights, fundamental freedoms, or the activity of civil society; encourage or contribute to corruption; contribute to instability, authoritarianism, or transnational repression; contribute to impunity of security forces; or undermine democratic governance or the rule of law;

²² For DCS transfers, there is also the regulatory framework of the ITAR (22 CFR 120 et seq) which defines what articles require DCS licensing and permits the proscription entirely of entire countries based, among other factors, on their human rights record. This paper does not focus on regulatory frameworks as they are internally driven by the Executive Branch and, while Congress can regulate via statute, this author does not generally recommend doing so due to the high possibility of unforeseen consequences.

²³ <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/23/memorandum-on-united-states-conventional-arms-transfer-policy/>

Most crucially, however, the Biden Administration's CAT Policy goes beyond any of its predecessors in a section on human rights that begins by noting that:

The legitimacy of and public support for arms transfers among the populations of both the United States and recipient nations depends on the protection of civilians from harm, and the United States distinguishes itself from other potential sources of arms transfers by elevating the importance of protecting civilians. Strong United States human rights and security sector governance standards for arms transfers — in addition to ensuring compliance with end-use requirements and providing human rights and international humanitarian law training, as appropriate — encourage recipient governments to respect international law, human rights, and good governance, and help prevent violations of human rights or international humanitarian law.

That section contains not just a guideline or framework, but a directive (*italics added*):

In light of these considerations, and consistent with applicable law, *no arms transfer will be authorized where the United States assesses that it is more likely than not that the arms to be transferred will be used by the recipient to commit, facilitate the recipients' commission of, or to aggravate risks that the recipient will commit: genocide; crimes against humanity; grave breaches of the Geneva Conventions of 1949, including attacks intentionally directed against civilian objects or civilians protected as such; or other serious violations of international humanitarian or human rights law, including serious acts of genderbased violence or serious acts of violence against children.*

All of these requirements listed to date – statutory and policy – are applicable to the U.S. Government. When it comes to what is required of partners receiving U.S. weaponry, these requirements are conveyed, to some extent, in a series of agreements. First, any recipient of grant U.S. military assistance must sign a “505 Agreement” that applies the conditions of Section 505 of the FAA, as quoted above.²⁴ Furthermore, for any FMS case there is a set of standard terms and conditions,²⁵ which convey similar requirements, including that

The Transferee agrees that the USG retains the right to verify reports that defense articles and services have been used for purposes not authorized or for uses not consented to by the USG.

- and -

That, unless prior written consent of the Government of the United States of America has first been obtained, the Transferee will use such commodity, including related data and information, solely for internal security, for legitimate self-defense, for preventing or hindering the proliferation of weapons of mass destruction and of the means of delivering such weapons, to permit the Transferee to participate in regional or collective arrangements or measures consistent with the Charter of the United Nations, or otherwise to permit the Transferee to participate in collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security.

²⁴ For an example of a 505 Agreement, see <https://www.state.gov/wp-content/uploads/2022/04/22-114-Samoa-Defense-Assistance-505.pdf>

²⁵ <https://samm.dsca.mil/sites/default/files/C5.F17.pdf>

Discussion

There is no lack of a statutory and policy framework to address human rights violations in both security assistance and arms transfers decision making – should an Administration choose to do so. But the countervailing pressures are intense. These may be diplomatic, coming from the partner or ally itself, including up to the Head of State level (and often reinforced by the respective Country Desk within the State Department, if not by the White House). They may come from the U.S. Defense Department, including the Combatant Commands, for whom interoperability and security cooperation are key tools in support of Operations and Contingencies Planning. They may come from U.S. industry, for whom loss or delay of a contract that has been “booked” may result in a loss in stock price. They may come from Congress, for whom a new defense contract or arms export may mean additional jobs in one – or more – districts.

In this context, the greatest weakness of the existing statutory framework is that, for the most part, it is permissive rather than directive. That is to say, human rights requirements in law tend to say that *The President may...* rather than *The President shall*. For instance, the Leahy requirement hinges on a determination that information concerning a GVHR is 'credible,' while the prohibition on military exports to a country engaged in transnational repression relies on the President to make a determination, but sets no requirements for when such a determination must be made. And, as applies to arms transfers, the AECA framework delegates substantial discretion to the President to shape and define the arms transfer process, providing numerous mechanisms to sidestep, or overcome, the JRD process.

A further weakness of the statutory framework emerges from its lack of specificity.²⁶ Several sections of law quoted above mandate that U.S. arms cannot be used for a purpose other than that for which they were provided/furnished, and such language is built into the 505 Agreements and LOAs that partners sign. Gross violations of human rights – or even lesser but intentional human rights violations – would seem, under the spirit of the law, to be a purpose for which the U.S. never provides weapons. Yet these clauses have typically been read by the Executive more narrowly, to prohibit only illicit retransfers or re- and reverse-engineering.²⁷

²⁶ Including in the basic parameters laying out the purposes for which arms may be provided - see Footnote 3, above.

²⁷ See also Footnote 20 for a weakness in the GVHR definition.

Recommendations

1. Tighten existing statutory requirements.

As identified above, there is an existing framework in statute for the consideration of human rights in arms transfers and security assistance which, with minor (though significant) adjustments, could provide a far more effective set of controls.

a. Purposes for which arms are provided/furnished: As noted above, the Arms Export Control Act and Foreign Assistance Act repeatedly state, in language carried in the FMS standard terms and conditions, that arms can only be used for the purposes for which they were furnished/provided. Legislative language noting that *“it shall be the policy of the United States that human rights abuses are not a purpose for which arms are ever provided or furnished”* would essentially re-energize this language,²⁸ including in the context of End Use Monitoring, where it is not currently applied. Congress may also wish to consider further defining “legitimate self defense” in 22 USC 2754, including by applying a similar human rights parameter, such as “legitimate self defense in accordance with the Geneva Conventions as interpreted under U.S. law and practice.”

b. Defining Gross Violations of Human Rights under Leahy: The definition of GVHR in 22 USC 2304 should be carried over to the Leahy vetting requirement under 22 USC 2738(d), and possibly expanded.²⁹

c. Applying Leahy more broadly: As currently and historically interpreted by the Executive Branch, Leahy vetting applies only to U.S.-funded grant military assistance. Clarifying the text of 22 USC 2738(d) to apply it to “all authorized or licensed arms transfers”³⁰ would ensure that countries using their own funding to procure defense articles are subject to the same requirements as those receiving grant assistance. This would impose an immense workload on the Department of State, and it is vital that any such language be accompanied by both a grace period and a significant increase in appropriations (likely well over \$10M on an annual basis) for DRL's Office of Security and Human Rights that conducts the Leahy Vetting Process.

d. Mandating determinations: As described in the text box above, there is no forcing function for mechanisms such as the Israel Leahy Vetting Process to come to a determination on whether a GVHR has occurred. Congress could require that for any allegation of GVHR that DRL finds credible, the Department has 90 days to make a determination as to whether or not a GVHR occurred – and that the results of such determinations should be reported to Congress on an annual basis. Alternatively, a more radical option might involve triggering Leahy determinations based on reliable outside metrics such as monitoring by human rights groups including organizations, including those with formalized roles under international law, or by creating in statute an Independent Commission or Ombudsman within the U.S. Government, perhaps as a part of the Government Accountability Office, responsible for overseeing international human rights reporting, and whose determinations of violations would override internal policy determinations.

²⁸ A similar concept is proposed in the SAFEGUARD Act as introduced in the previous Congress by Senators Menendez, Leahy, et al., and in the House by Representative Meeks.

²⁹ Previous legislation during the South African apartheid period, for instance, described apartheid as a GVHR.

³⁰ Here, too, the SAFEGUARD Act includes a comparable provision.

2. Codify the CAT

a. The Biden Administration's Conventional Arms Transfer Policy is, as previously noted, the most forward leaning iteration to date of this policy when it comes to human rights. But, it is only a policy: it can be ignored, without substantive consequence, repealed, or replaced. Embedding the CAT Policy in statute, particularly its prohibition on the transfer of arms when it is “more likely than not” that U.S.-provided arms will be used for, or aggravate the risk of, human rights abuses, would make it mandatory, and protect it from future revisions – and would be hard for the current Administration to oppose, given it is their own language.

3. Strengthen the JRD Process

a. As noted above, no Joint Resolution of Disapproval against an arms transfer has ever passed both Houses of Congress with a veto-proof majority, making the process, while politically relevant, substantially meaningless. The National Security Powers Act introduced in the previous Congress would require a positive vote to approve arms transfers except for NATO, Australia, Japan, Israel, New Zealand, South Korea, and Taiwan. That is probably too high a bar; another formulation might be to require a positive approval in Congress for all arms transfers to countries lacking democratic governance, as defined by an outside body such as Freedom House, or which commit gross violations of human rights.

b. The disparity between the Senate and the House processes when it comes to JRDs is also noteworthy; despite both having a form of expedited procedures, the House process is reliant on the Committee Chair and Rules Committee (and inherently Leadership) to permit a JRD to come to the floor, whereas in the Senate any Senator can bring a JRD to the floor if the Committee has not acted on it after 10 days. A change to the House rules could be advanced simply through the Rules Committee, or more lastingly via statutory language such as that in the 117th Congress' H.R. 5798 (Lieu/Omar). The increased possibility of a JRD in the House would by itself likely drive the Foreign Affairs Committee Chair and Ranking Member to more thoroughly consider the human rights implications of sales even to close partners.

4. Enhance, expand, and maintain reporting and oversight on arms transfers.

a. As noted above, Congress is not typically provided with any information whatsoever regarding arms transfers below the Congressional Notification Threshold – particularly when it comes to DCS – beyond what is required in the annual “Section 655 Report.”^{31 32} While the Department has long argued this is due to legal and regulatory prohibitions, it has somehow managed to overcome these prohibitions in order to provide the House Foreign Affairs and Senate Foreign Relations Committees with a biweekly list of all transfers authorized or licensed in the Ukraine context. Congress could seek similar reporting for countries of concern, whether informally, or via statute.

b. The galleys of the Congressional Budget Justification submitted by the Administration for FY24 contains a provision that would bring DCS licensing decisions into accord with dual-use licensing decisions made by the Commerce Department for articles controlled under the Commerce Control List (CCL) by making DCS licensing decisions not subject to challenge under the Administrative Procedures Act (APA). Congress should continue to not adopt this language (which the Senate Foreign Relations Committee has declined to do to date, to its credit).

³¹ See <https://www.state.gov/section-655-annual-military-assistance/>

³² The statutory requirement for this report calls for the provision of information to the level of the defense article, but the report as submitted by State has for the past years only included detail to the level of the U.S. Munitions List Category.

5. Lean into Tiered Review

a. The Tiered Review process for arms transfers is, as described in a text box above, an extremely closely held prerogative of the Committee Chairs and Ranking Members. There is no statutory solution here, and this paper does not recommend (indeed, strongly opposes) seeking to make the informal review process for arms sales a statutory one. However, there is significant political space for Members, particularly those on the Committees, to pursue greater access to pending sales that are in the Tiered Review process: this could include making clear to other Members and the public that any sale formally notified by the Administration has been, with very few exceptions, endorsed by the Chairs and Ranking Members.

6. Pursue conditionality.

a. As Appropriations Acts have demonstrated for many decades, Congress is fully able to apply conditions to the obligation of U.S. taxpayer funds. The State and Foreign Operations Appropriations (SFOPS) Bill is commonly packed with conditions that must be met or reports that must be submitted prior to the obligation of some, or all, funding, for specific countries. The difficulty in doing so for some partners, and particularly in the context of a highly-scrutinized supplemental appropriation, is apparent, and therefore taking a global approach in the base SFOPS bill may provide a more practical path forward. Conditionality on FMF in particular may be applied on a global basis, with potential requirements including reports on Leahy Vetting outcomes, reports on below-threshold arms sales, or measurable requirements relating to the human rights record of the recipient countries.³³

7. Feed the Human Rights Processes

a. The Leahy Vetting Process, the new Civilian Harm Incident Response Guidelines (CHIRG) process, and the regular arms transfers policy review process are all designed, to various degrees, to take into account information about human rights violations from both internal and external sources. To the extent civil society can identify and provide credible information about potential or alleged violations of human rights or civilian casualty incidents, these may spark specific consideration in the Leahy process, or otherwise inform decision-making on arms transfers. The Department considers with the most gravity questions of intent, which are, of course, the hardest to support with evidence. Beyond intent, the more specific information that can be provided, the better. Of particular utility are munitions serial numbers captured during or in the immediate aftermath of incidents of concern, as the U.S. Government is able to link these back to specific transfers and, often, specific partner units. Such information should be provided as widely as possible, including at the State Department to PM, DRL, and L; and, at the Defense Department to DSCA and the Office of the General Counsel (OGC).

³³ One option this paper would offer, but which may not be politically palatable, would be that “none of the funds appropriated by this Act shall be used to sustain a military occupation.”

8. Catch-All

a. For any of the above recommendations, or any other proposal applied to State Department authorities under Title 22 USC, there is the risk that anything that makes it more difficult for State to authorize the export of arms will result in a shift of such authorities to other agencies where such restrictions do not apply. Therefore it is critical that any statutory changes written into Title 22 or SFOPS contain a provision that applies them equally to any arms transfers made under other authorities, including Commerce's Munitions List, and any applicable authorities under 10 USC (DOD) or 50 USC (Intelligence Activities).

9. Not Just a Moral Imperative: A Strategic One

When discussing human rights, the tendency is inherently to frame the arguments in moral terms. However, there is a strategic foreign policy argument to be made here, and it may be a more winning one in some circles. It goes something like this:

The United States, along with its like minded allies and partners, is engaged in a strategic competition whose outcome will define the future of our planet. Our foremost competitor, the People's Republic of China, offers an alternative to the Western model that promises all the economic benefits of capitalism with none of the complexities of democracy. In that competition, we will never win the argument with autocracies: they will be glad to take our arms, and our security guarantees, but they will always align with the PRC when it comes to political freedoms, and, increasingly, economic opportunities that come without political pressures for reform. But we can win it with the people of the world, because our values – human rights, liberal freedoms – are, the author of this paper believes, global values, rooted in the sanctity of the individual. And in this context, we can leverage the example of power, and arm all the allies and partners we wish – but those will be military alliances untethered from the politics of the nations themselves, and subject to the winds of political change. Or, we can demonstrate the power of example – and build lasting relationships, and trust, with populations at a deeper, subnational level, across the planet. If this competition is truly a strategic one – a transgenerational one – and if we truly offer the world a better future than the model advanced by our competitors and adversaries – then it is ultimately our values that not only define us, but which are our greatest advantage. If we abandon those in the pursuit of short term security objectives, we will find we have won little – and lost everything.