

# WITH GREAT POWER:

Modifying US Arms Sales  
to Reduce Civilian Harm



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*COVER 11 year old Manar and her friends at their damaged school*  
Oxfam/Anas al Baba

Report designed by Dena Verdesca.

**Center for Civilians in Conflict (CIVIC)** works to improve protection for civilians caught in conflicts around the world. We call on and advise international organizations, governments, militaries, and armed non-state actors to adopt and implement policies to prevent civilian harm. When civilians are harmed, we advocate for the provision of amends and post-harm assistance. We bring the voices of civilians themselves to those making decisions affecting their lives. CIVIC's vision is for a future where parties involved in conflict go above and beyond their legal obligations to minimize harm to civilians in conflict. To accomplish this, we assess the causes of civilian harm in particular conflicts, craft creative solutions to address that harm, and engage with civilians, governments, militaries, and international and regional institutions to implement these solutions. We measure our success in the short term by the adoption of new policies and practices that lead to the improved wellbeing of civilians caught in a conflict. In the long term, our goal is to create a new global mindset around robust civilian protection and harm response.

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*A child holds up bullets collected from the ground*  
UN/Albert Gonzalez Farran

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## EXECUTIVE SUMMARY

International arms sales represent an enduring and prominent feature of American foreign policy. The United States sells or licenses the sale of weapons to other governments to advance its foreign policy, security, and economic interests. But when US-made or sold weapons fall into the wrong hands or become associated with corruption, human rights abuses, violations of the laws of war, and human suffering, the United States may be exposed to legal, moral, reputational, and strategic risks.

The US government has in place a number of laws, regulations, and policies that are designed to prevent unintended consequences arising from US arms transfers, including the misuse or diversion of the arms it sells. Nonetheless, human rights groups and research organizations have documented numerous cases of diversion and instances of civilian harm caused by US-sold arms and munitions, suggesting that existing legal, regulatory, and policy controls may not be adequate. This report assesses existing controls and identifies ways to modify the US arms sales process to reduce civilian harm associated with US-sold weapons, while preserving the intended policy benefits of international arms sales.

## BACKGROUND

The global arms trade reached an estimated total value of \$91.3 billion in 2015 (the last year when complete data was available).<sup>1</sup> While the United States is not the only country that sells conventional arms through government-to-government and commercial transactions, it holds an unrivaled dominance measured in global market share. According to the Stockholm International Peace Research Institute (SIPRI), the total value of international US arms exports delivered in 2016 was close to \$10 billion, or 29 percent of the total global export market.<sup>2</sup> The US has maintained an average of 33 percent market share in international arms exports between 2011 and 2015, followed most closely by Russia (25 percent) and China (5.9 percent).<sup>3</sup> These figures do not include transfer agreements, estimated at \$40.2 billion, or over 50% of the global total, when last measured in 2015.<sup>4</sup> All reporting indicates that the US will remain the market leader in 2017.<sup>5</sup> Of the 82 countries identified by the Uppsala Conflict Data Program as a party or secondary party to an armed conflict in 2016, the US delivered major military items (measured in Foreign Military Sales) to at least 62 of them; in 34 countries where conflict took place, the US delivered arms in 27.<sup>6</sup>

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1 Estimates by the Stockholm International Peace Research Institute (SIPRI) based on figures published from arms exporting states in 2015, the latest year for which the data was available. SIPRI notes that the actual value may be much higher. "SIPRI Yearbook 2017: Armaments, Disarmament and International Security." Stockholm International Peace Research Institute, 2017. <https://www.sipri.org/sites/default/files/2017-09/yb17-summary-eng.pdf>

2 Taken from the SIPRI Arms Transfers Database. <https://sipri.org/databases/armstransfers>.

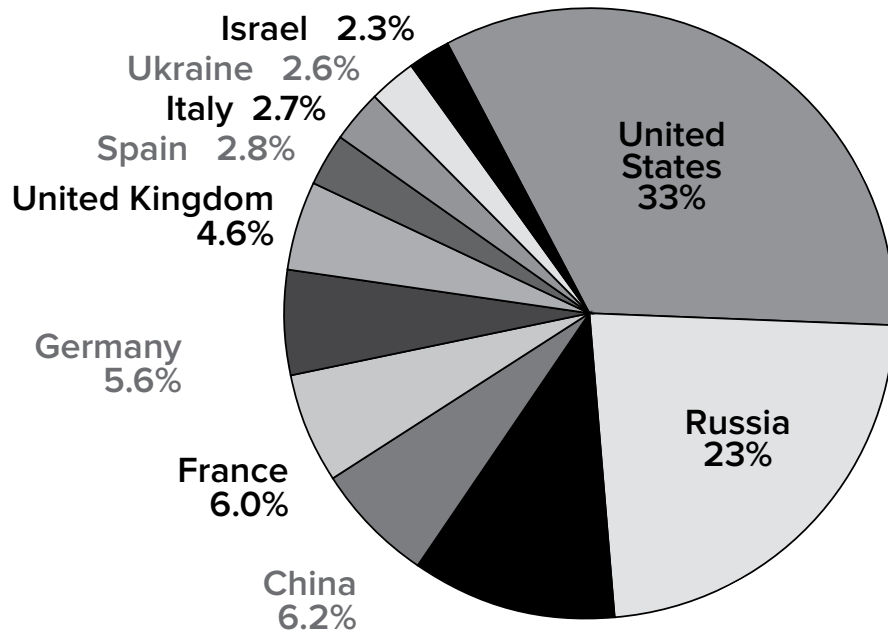
3 "SIPRI Yearbook 2016: Armaments, Disarmament and International Security." Stockholm International Peace Research Institute, 2016. <https://www.sipri.org/sites/default/files/YB16-Summary-ENG.pdf>.

4 Theohary, Catherine, Conventional Arms Transfers to Developing Nations, 2008-2015, Congressional Research Service, December, 2016, <https://fas.org/sgp/crs/weapons/R44716.pdf>, accessed November 3, 2017

5 Taken from the SIPRI Arms Transfers Database. <https://sipri.org/databases/armstransfers>.

6 Based on data received from the Security Assistance Monitor and the Uppsala University Conflict Data Program, Allansson, Marie, Erik Melander & Lotta Themnér (2017) Organized violence, 1989-2016. *Journal of Peace Research* 54(4). Gleditsch, Nils Petter, Peter Wallensteen, Mikael Eriksson, Margareta Sollenberg, and Håvard Strand (2002) Armed Conflict 1946-2001: A New Dataset. *Journal of Peace Research* 39(5).

**SIPRI ARMS SALES<sup>7</sup>**



Meanwhile, in 2016, armed conflict in as many as 34 countries killed an estimated 102,000 people and caused an unquantified level of damage to civilian infrastructure, including homes, schools, and hospitals.<sup>8</sup> Although no single weapon or technology caused this level of death and destruction, the global arms trade has a direct bearing on the effects of war on civilians. In the 2017 United Nations report on the Protection of Civilians in Armed Conflict, the UN Secretary-General called specific attention to the relationship between arms proliferation and human suffering in war, noting that “high levels of arms and ammunition in circulation, combined with poor controls on them, contribute to insecurity and facilitate violations of international humanitarian and human rights law.”<sup>9</sup> Research by the International Committee for the Red

Cross (ICRC) confirms that “when conventional arms are poorly regulated and widely available, the humanitarian consequences are grim: violations of international humanitarian law and human rights law, restricted medical and humanitarian assistance, prolonged armed conflicts, and high levels of armed violence and insecurity...even after wars have ended.”<sup>10</sup>

Of mounting concern are the effects of explosive weapons used in urban areas, as seen in recent military campaigns in Iraq and Syria. According to data collected by Action on Armed Violence, civilians represent approximately 92 percent of those reported killed and injured when security forces employ explosive weapons in populated areas.<sup>11</sup> Analysts estimate that explosive weapons led to the death

7 Summary: SIPRI Yearbook 2017: Armaments, Disarmament and International Security.” Stockholm International Peace Research Institute, 2017. <https://www.sipri.org/sites/default/files/2017-09/yb17-summary-eng.pdf>

8 Taken from Uppsala University Conflict Data Program, <http://www.pcr.uu.se/data/>, (Accessed June 17, 2017). Allansson, Marie, Erik Melander & Lotta Themnér (2017) Organized violence, 1989-2016. *Journal of Peace Research* 54(4). Gleditsch, Nils Petter, Peter Wallensteen, Mikael Eriksson, Margareta Sollenberg, and Håvard Strand (2002) *Armed Conflict 1946-2001: A New Dataset*. *Journal of Peace Research* 39(5).

9 United Nations, Security Council, Report of the Secretary-General on the protection of civilians in armed conflict, S/2016/447 (13 May 2016), available from [http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2016\\_447.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_447.pdf)

10 Peter Maurer, “Speech by ICRC President Peter Maurer to the High Level Segment of the Third Conference of States Parties to the Arms Trade Treaty” (speech, Geneva, September 11, 2017), ICRC. <https://www.icrc.org/en/document/failure-manage-arms-trade-responsibly-putting-dirt-cheap-price-lives-civilians>

11 Action on Armed Violence, “Explosive Truths: Monitoring explosive violence in 2016”, May 15, 2017, <https://aoav.org.uk/2017/explosive-truths-monitoring-explosive-violence-2016/>

of 32,000 civilians in 2016 alone.<sup>12</sup> While improvised explosives caused much of this damage, civilians also suffered the effects of commercially available “smart” and “dumb” bombs, missiles, and mortars that were dropped, launched, or shot from the ground, air, and sea. In addition to civilian deaths and injuries, these weapons cause high levels of forced displacement and critical damage to essential civilian infrastructure, including hospitals, sanitation systems, and transportation systems essential for food security.

With its outsized influence on the trade and use of arms worldwide, the US has the ability, the opportunity, and the responsibility to shape the arms trade to reduce harm to civilians. Moreover, ensuring that US-made and -sold weapons are deployed as intended, within the bounds of international humanitarian and human rights law, is also a core US national security interest. The 2014 US Conventional Arms Transfer Policy, enshrining 20 years of bipartisan policy on arms transfers<sup>13</sup> recalls that, “In the hands of hostile or irresponsible state and non-state actors ... weapons can exacerbate international tensions, foster instability, inflict substantial damage, enable transnational organized crime, and be used to violate universal human rights.”<sup>14</sup>

## METHODOLOGY

The primary intent of this report is to provide options to policymakers and lawmakers for reducing the potential for civilian harm caused by US-made weapons in armed conflict, although the analysis may also be relevant to preventing diversion and violations of law, including human rights and international humanitarian law. This report focuses on gaps and potential solutions to the arms transfer process itself; it offers no analysis of the value or wisdom of leveraging security assistance and arms sales as a tool of political leverage or behavior modification. The report also focuses on the potential for harm caused by state security actors that receive assistance from the US, and therefore includes little to no analysis of the harm caused by non-state armed groups or individuals using commercially available small arms. The authors hope that the recommendations may yet offer solutions to problems outside of the scope of this report and encourage others to pursue these and other important areas of research.

To reach the findings and conclusions of this report, our research team conducted at least 25 interviews with experts on the arms trade and with former and current government officials who have direct experience with US arms sales. While the contributions and opinions varied from issue to issue, our recommendations reflect a consensus of their views on the most important gaps in the US arms export control system and ways address them.

The research team also conducted desk research into existing international arms transfer treaties and multilateral export control agreements, international law, US laws, US policies, and technical manuals related to US arms sales produced by both the Department of Defense and the Department of State. The research included an analysis of country-specific cases, with a mind toward generalizing the most important conclusions for adapting US arms sales processes and policies to minimize harm to civilians. This report has very few references to country-specific cases by design, in order to ensure that the recommendations can be applied without prejudice to many regions or countries.

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12 Dathan, Jennifer. “Explosive Truths: Monitoring Explosive Violence in 2016,” Action on Armed Violence, April 2017. <http://bit.ly/2waipCV>.

13 PDD 27 is based on PDD-34 of 1995, which in its factsheet notes that the policies goal is “to promote peaceful conflict resolution and arms control, human rights, democratization, and other U.S. foreign policy objectives.”

14 The White House. Presidential Policy Directive – United States Conventional Arms Transfer Policy (PPD 27). Washington, DC. January 15, 2014. Accessed September 20, 2017. <https://obamawhitehouse.archives.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>.





# US ARMS SALES TO COUNTRIES IN CONFLICT



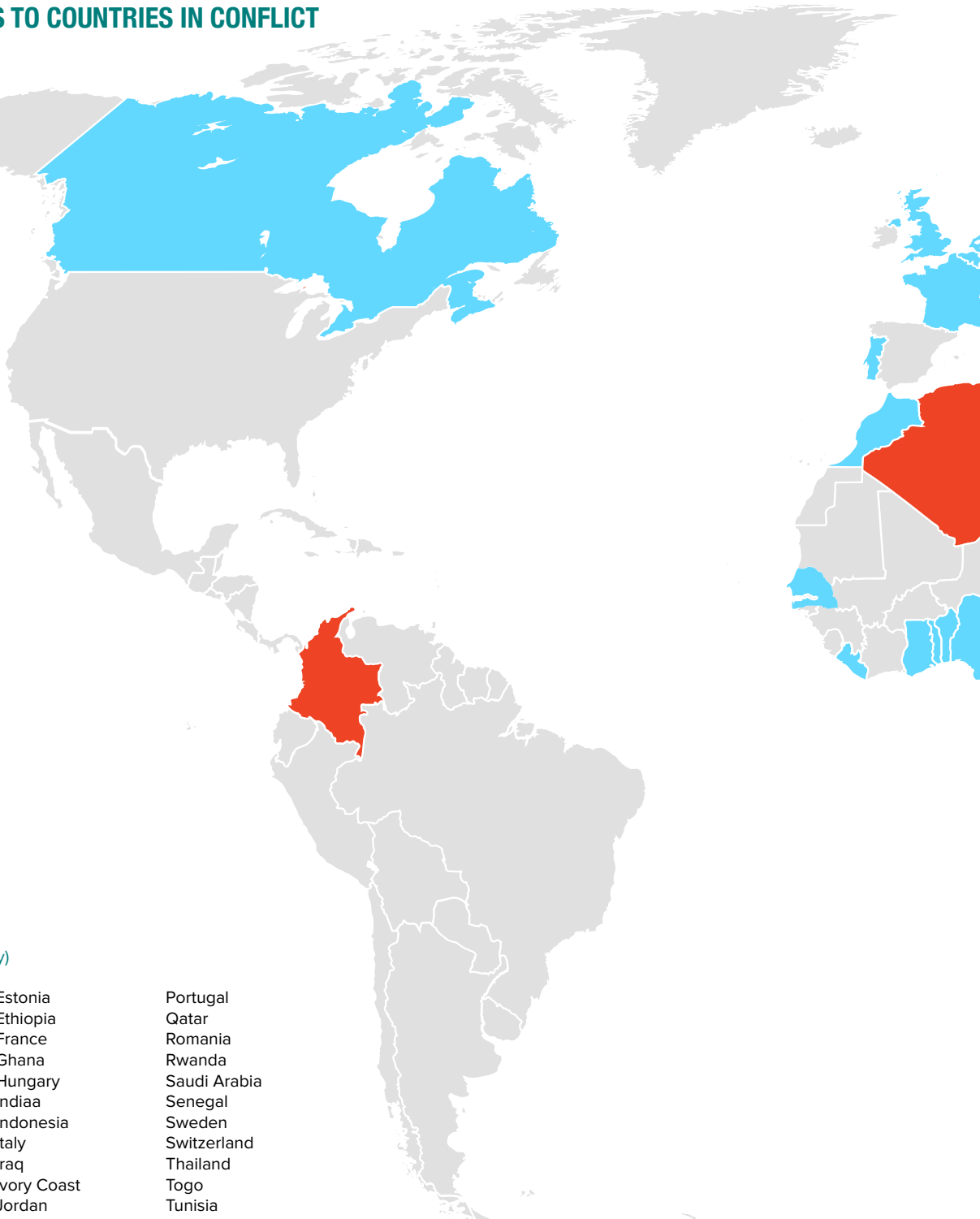
## Locations of Conflict + US Arms Sales

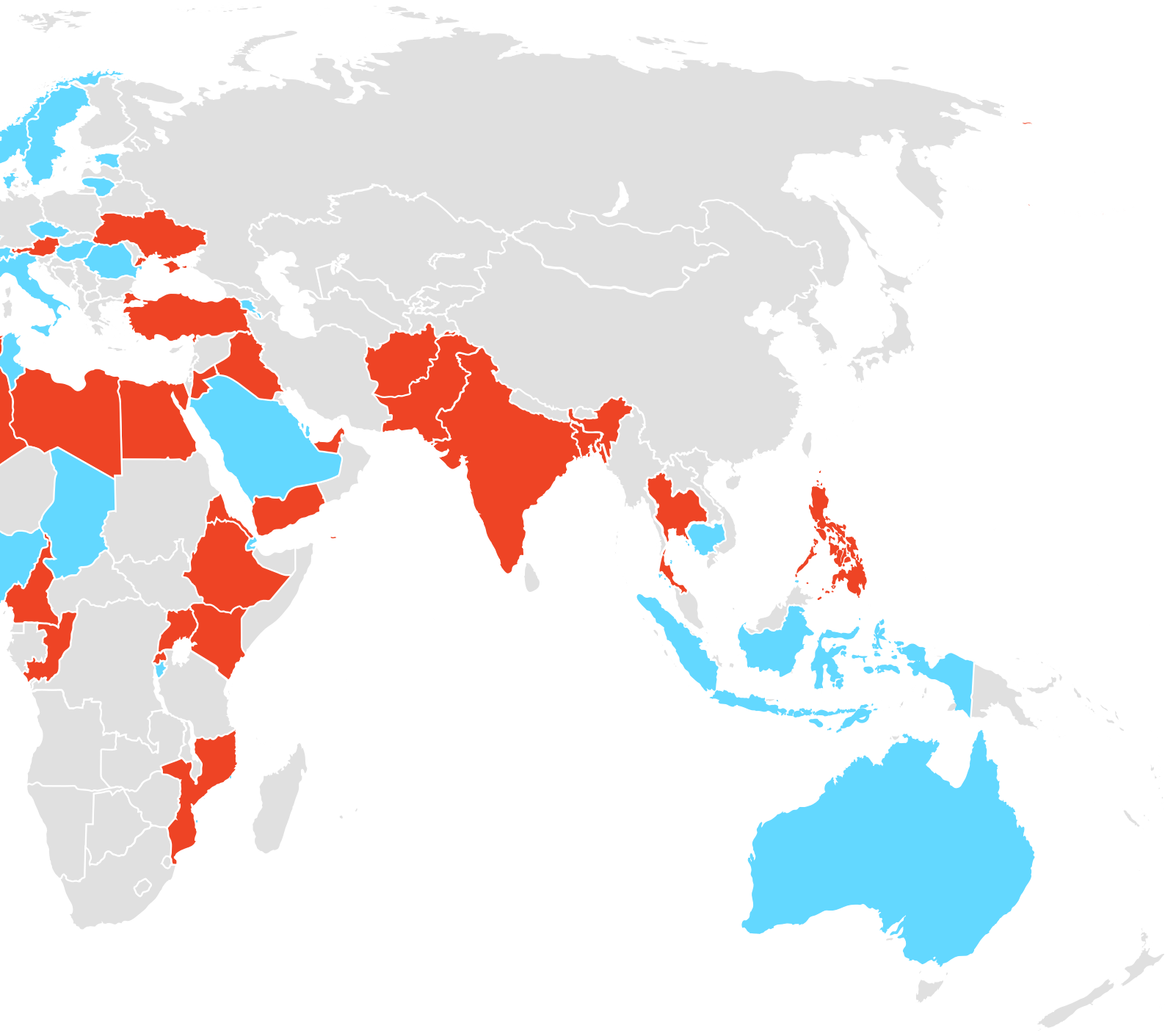
- Afghanistan
- Algeria
- Azerbaijan
- Bangladesh
- Cameroon
- Colombia
- Republic of Congo
- Egypt
- Eritrea
- Ethiopia
- India
- Pakistan
- Iraq
- Jordan
- Kenya
- Libya
- Mozambique
- Nigeria
- Pakistan
- Philippines
- Rwanda
- Thailand
- Turkey
- Uganda
- Ukraine
- Yemen



## Parties to Conflict (Primary and Secondary) + US Arm Sales

- |                   |             |                      |
|-------------------|-------------|----------------------|
| Afghanistan       | Estonia     | Portugal             |
| Algeria           | Ethiopia    | Qatar                |
| Armenia           | France      | Romania              |
| Australia         | Ghana       | Rwanda               |
| Austria           | Hungary     | Saudi Arabia         |
| Azerbaijan        | Indiaa      | Senegal              |
| Bahrain           | Indonesia   | Sweden               |
| Bangladesh        | Italy       | Switzerland          |
| Belgium           | Iraq        | Thailand             |
| Benin             | Ivory Coast | Togo                 |
| Burundi           | Jordan      | Tunisia              |
| Cambodia          | Kenya       | Turkey               |
| Cameroon          | Liberia     | Uganda               |
| Canada            | Libya       | Ukraine              |
| Chad              | Lithuania   | United Arab Emirates |
| Colombia          | Morocco     | United Kingdom       |
| Republic of Congo | Mozambique  | Yemen                |
| Czech Republic    | Netherlands |                      |
| Denmark           | Nigeria     |                      |
| Djibouti          | Norway      |                      |
| Egypt             | Pakistan    |                      |
| Eritrea           | Philippines |                      |





This report acknowledges that weapons, including those sold by the United States, are designed and intended for use in war. The harm experienced by civilians in war is as much a function of how weapons are used as which weapons are used. At the same time, we assume that without the proper safeguards, the risk of harm to civilians increases with the use of certain arms, by certain actors, in certain circumstances.

#### **THE REPORT IS STRUCTURED IN FOUR PARTS:**

##### **Part 1**

clarifies basic international and US domestic legal obligations and requirements that apply before, during, and after an arms sale, and how the US government interprets these legal obligations.

##### **Part 2**

provides a step-by-step narrative description of the two primary programs that govern most major arms sales in the US: Foreign Military Sales (FMS) and Direct Commercial Sales (DCS). This section includes an overview of the major and minor stakeholders in the process.

##### **Part 3**

analyzes the gaps and challenges in the current FMS and DCS processes subject to improvement or modification in order to reduce the risk of harm to civilians in conflict.

##### **Part 4**

provides recommendations to the US Departments of State and Defense and the US Congress.

#### **THE REPORT ALSO INCLUDES SEVERAL SUPPLEMENTARY ANNEXES TO INFORM THE READER:**

##### **Annex A**

A summary table of the sales amount requiring Congressional approval or notification

##### **Annex B**

Country Team Assessment (CTA) - Standard Criteria for Country Team Review of Arms Sales

##### **Annex C**

A list of items designated by the US Department of Defense as eligible for Foreign Military Sales Only (i.e. not eligible for Direct Commercial Sales)

##### **Annex D**

The US Department of State's "Framework for Policy Review and Risk Assessment of Proposed SSA [Security Sector Assistance] Activities"

##### **Annex E**

DSCA Policy Memo Amending Reporting Requirements for Cluster Munitions

##### **Annex F**

Glossary of Terms and Acronyms

## MAIN GAPS AND RECOMMENDATIONS

Our analysis discovered the following gaps in law, policy, and practice that, if addressed, could help mitigate the risks associated with arms sales:

- **Interpreting and applying international law:**

Interpretation of international law by the US government may enable arms sales in spite of the likelihood of violations of the laws of war by its partners. The US should ensure that it has the access and information necessary to evaluate whether or not the conduct of its partners is lawful when the partner becomes involved in the conduct of hostilities using certain US weapons. Even when facts are inconclusive, the US government should strongly consider if conduct is widely perceived to violate international law when making arms sales decisions. The US government should also more seriously consider information provided by credible third parties in its legal assessments.

- **Aligning arms sales with the real needs, capabilities, and conduct of partners:**

The weapons systems and defense items desired for purchase by many countries are misaligned with their capabilities and needs, leading to greater potential for civilian harm. While political and economic benefits may be appropriate variables in an overall estimate of costs and benefits, industry representatives or senior diplomats may benefit disproportionately from the political or economic rents of an arms sale and often distort a more objective risk analysis. The US government should more rigorously evaluate arms sales on the basis of aggregated risk as a function of prior conduct and its consequences, alignment of interests, and partner capacity and competence.

- **Avoiding premature commitments that compromise due diligence:**

As designed, the Foreign Military Sales (FMS) process commits US policymakers to sales too early in the process, effectively “locking in” sales decisions before appropriate due diligence can be paid. No commitments should be made to sell high-risk arms to the purchasing country until such time as a sale has been fully vetted.

- **Accounting for fluid conflict environments:**

No automatic or systematic controls exist to appropriately adapt the arms sales process as the risk of armed conflict increases or upon the

outbreak or escalation of armed conflict. The US government should establish conflict-related “tripwires” that require re-assessment of certain arms sales and the identification of options for preventing the use of certain weapons systems at any sign of adverse consequences. The US government should understand how and when the major arms it sells are used in conflict.

- **Strengthening terms of sale and end-use monitoring: Maintaining basic access, oversight, and visibility into the use of US-sold defense items should be a part of the weapons sales lifecycle.**

The US government agencies involved in arms sales under-utilize contractual agreements as a key instrument for controlling and reviewing the use of defense items. Controls throughout the arms sales process are almost exclusively focused on protecting technology from diversion or transfer, rather than misuse or other unintended consequences. The US government should strengthen the terms of sale and end-use monitoring requirements for certain defense items, to include clearer standards for use.

- **Customizing technical assistance to reduce harm:**

The provision of technical assistance in the appropriate deployment of weapons systems can help to mitigate the risk of misuse, especially in the case of the defense items most commonly associated with civilian harm. However, at present, technical assistance customized to reduce harm is not systematically paired with major weapons sales conducted via the Foreign Military Sales program in high risk countries or for high risk items. The US government should conduct pre-sale assessments that consider the full spectrum of variables related to appropriate use; ensure that arms sales are accompanied by customized technical assistance focused on appropriate and lawful use of the specific item; include the promotion of changes in process and policy that ensure appropriate use; and, in some cases, require testing before delivery as a prerequisite to finalizing the sale. The time lag between sale and delivery is a good opportunity to customize training, and to promote any necessary adaptations to partner policies or processes that minimize risk of misuse.

- **Strengthening Congressional oversight roles:**

The notification and subsequent evaluation of a proposed sale by Congress should provide for the checks and balances needed to ensure the adequate consideration of risk



*Unexploded ordnance lie on the ground waiting to be placed in a pit for detonation*  
AU UN IST/Tobin Jones

and alignment with the American public interest. In practice, however, Congress rarely appeals to existing domestic regulation to block or modify risky sales. Congress should request additional analysis regarding civilian harm and mitigation measures for certain sales; more regularly invoke domestic regulations (such as the Arms Export Control Act) governing the appropriate use of US arms by partner forces; and utilize legislation such as the National Defense Authorization Act to strengthen measures to prevent civilian harm associated with arms transfers. Congress should also clarify that the legislative intent of existing authorities requires that conditions of sale and monitoring include compliance with human rights law and the laws of armed conflict.

- **Increasing transparency:** While the arms sales process as a whole has been well documented, the timelines and decision-making processes for specific arms sales suffer from a lack of transparency, hindering public oversight. The US government should make information on potential sales—including planned civilian harm mitigation measures—available earlier in the process, and should more regularly consult with affected stakeholders in the United States and within the purchasing country.

These and further recommendations for the executive branch and Congress can be found in Part 4 of this report.

## PART 1

# International Law, Treaties and Agreements, and Domestic US Law Pertaining to Arms Transfers

The United States has both “negative” and “positive” obligations under customary and treaty-based

international law that apply to its arms sales. The US government and commercial arms vendors licensed to conduct sales by the US are also subject to domestic US law and regulations, many of which may also serve to fulfill international legal obligations and commitments. While the prevention of civilian harm may not be the express purpose of some of these laws, they nonetheless contain important provisions that serve to ensure that arms transfers neither exacerbate the effects or duration of conflict nor facilitate violations of human rights or the laws of armed conflict. Both international and domestic bodies of law may impose requirements before a sale is undertaken, while a sale is being considered, or after a sale has been concluded, and the legal requirements may differ depending on the recipient, the item, and its dollar value. This section provides a basic summary of international and domestic legal obligations. An analysis of their strengths and shortcomings is provided in Part 3 of this report.

## State Responsibility and International Humanitarian Law<sup>15</sup>

Irresponsible arms sales, or the failure to restrict such sales, may give rise to state responsibility under international law, codified by the International Law Commission in the 2001 Articles on State Responsibility for Internationally Wrongful Acts (Draft Articles).<sup>16</sup> Under the Draft Articles, a State may be liable for aiding and assisting other States in violating international law if it does so *with knowledge of the circumstances of the violation* and is itself bound by the rule (emphasis added).<sup>17</sup> However, there is uncertainty as to the precise interpretation of knowledge of intent, or *mens rea*, required to trigger state responsibility, and whether “recklessness” could be a sufficient condition. The Commentary to the Draft Articles introduces the requirement of intent of the selling party by stating that “Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission” of the violation by the latter.<sup>18</sup> Under this interpretation, a State which provides weapons with the knowledge that the recipient State is committing systematic violations of international law

15 For an extensive discussion of international obligations raised in the arms sales context, see Brian Finucane, “Partners and Legal Pitfall”, 92 *International Law Studies* 207 (2016).

16 The Draft Articles on State Responsibility, adopted in 2001, “seek to formulate ... the basic rules of international law concerning the responsibility of States for their internationally wrongful acts” (International Law Commission, “Commentary to the Draft Articles on State Responsibility of the International Law Commission on the work of its Fifty-third session”, UN Doc. A/56/10, New York, 2001, p. 59). The Draft Articles were commended by the United Nations General Assembly in 2001 (UNGA Res 56/83) and 2004 (UNGA Res 59/35) and have been widely cited by the International Court of Justice as well as various courts and tribunals. For a more detailed discussion of the status of the Draft Articles, see James R. Crawford, “State Responsibility”, *Max Planck Encyclopaedia of Public International Law*, 2006.

17 Article 16, Draft Articles.

18 International Law Commission, Commentary, p. 155.

could be held responsible for facilitating violations. A State may also be liable for the actions of non-State actors where the non-State actor acts on the instructions of, or is directed or controlled by, the State.<sup>19</sup> Draft Article 41(2) also prohibits States from rendering assistance that would maintain a situation created by a serious breach of a “peremptory norm” of international law, including genocide, crimes against humanity, and a violation of the fundamental rules of the Geneva Conventions.<sup>20</sup> There is no requirement of *mens rea* where peremptory norms are being violated. Arms sales that aid another State in genocide, crimes against humanity, or indiscriminate or deliberate attacks on civilians could therefore trigger state responsibility.

International Humanitarian Law (IHL), also known as the Law of Armed Conflict, lays out the rules applicable during an armed conflict. Under Common Article 1 of the 1949 Geneva Conventions, to which the US is a party, States party to the law “undertake to respect and to ensure respect for the present Convention in all circumstances.”<sup>21</sup> In 1986, the International Court of Justice—the principle judicial body of the United Nations—ruled that “there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to ‘respect’ the Conventions and even ‘to ensure respect’ for them ‘in all circumstances.’” The International Committee of the Red Cross (ICRC) also argues that Common Article 1 “has an external dimension related to ensuring respect for the Conventions by others that are Party to a conflict,” a duty that applies to the “entire body of international humanitarian law binding upon a particular State.”<sup>22</sup> A State that sells arms to another State that then uses them to commit IHL violations could be particularly influential, depending on the means and degree of influence, in ensuring respect for IHL by withdrawing the means for those violations.<sup>23</sup> Failure to withdraw material support by ceasing arms sales under some circumstances could amount to a breach of the exporting State’s duty to ensure respect.

During a 2016 public address, then-State Department

Legal Advisor Brian Egan made clear that the United States does “not share [ICRC’s] expansive interpretation of Common Article 1” but, as a matter of policy, “always seek[s] to promote adherence to the law of armed conflict generally and encourage other States to do the same.” Nonetheless, Egan conceded in the same remarks that the elements of legal liability established by Article 16 of the Draft Articles will be as “a matter of international law ... [used] in assessing the lawfulness of [US] assistance to, and joint operations with, those military partners.”<sup>24</sup>

## International Criminal Law

International Criminal Law is a body of public international law that proscribes certain behaviors including war crimes, genocide, and crimes against humanity, and makes individuals who engage in such behavior criminally liable. International ad hoc or permanent criminal tribunals often include provisions on complicity, defining the crime of aiding and abetting as offering “practical assistance, encouragement or moral support” to the perpetrator of the crime,<sup>25</sup> be it war crimes, genocide, or crimes against humanity, including by offering the means for its commission. Most international criminal tribunals indicate that the required *mens rea* for aiding and abetting is one of knowledge, rather than intent.<sup>26</sup> The International Criminal Court, to which the United States is not a state party, is an outlier for limiting liability to cases where the person acts “for the purpose of facilitating the commission” of the crime.<sup>27</sup>

The US Department of Defense’s (DoD) Law of War Manual requires both knowledge of the crime and “a desire to help the activity succeed.”<sup>28</sup> However, US military courts and other US military bodies may apply a broader interpretation.

Ryan Goodman, co-editor-in-chief of the law and national security blog *Just Security* and former DoD Special Counsel, points to a 1994 Department of Justice (DOJ) memorandum assessing US government

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19 Article 8, Draft Articles.

20 International Law Commission, Commentary, p. 283-284.

21 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) Merits, Judgment of 27 June 1986, para 220.

22 International Committee of the Red Cross, Commentary to Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, (2nd ed 2016), paras 125-126 and 153.

23 Ibid, para 167.

24 Brian Egan, Legal Advisor, U.S. Department of State, Address at the Annual Meeting of the American Society of International Law, Washington, DC: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016), 92 INTERNATIONAL LAW STUDIES 235, 245 (2016), <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1668&context=iils>.

25 *Prosecutor v. Anto Furundjiza*, ICTY Judgment (Trial Chamber), 10 December 1998, para 249.

26 Finucane, “Partners and Legal Pitfall,” p. 420.

27 Article 25(3)(c) ICC Statute.

28 US Department of Defense, *Law of War Manual*, Washington, D.C., 2016), §18.23.4.



culpability under the US federal aider and abettor statute, which suggests that the mere risk of violations could trigger liability for the United States under the War Crimes Act.<sup>29,30,31</sup> The memo, written by Walter Dellinger in the Office of Legal Counsel, concluded that “USG agencies and personnel may not provide information (whether ‘real-time’ or other) or other USG assistance (including training and equipment) ... in circumstances in which there is a *reasonably foreseeable possibility* that such information or assistance will be used [in shooting down civil aircraft]” (emphasis added).<sup>32</sup> The DoD’s own Law of War Manual cites the Dellinger Opinion as key support for aiding and abetting liability for war crimes.<sup>33</sup> This supports the position that knowledge of a significant risk of unlawful activity is sufficient *mens rea* for complicity under US federal law when it comes to assisting the commission of a particularly grave or serious crime.<sup>34</sup> Applied to arms sales, it would therefore not be necessary to show that officials of the exporting State intended the commission of the underlying crime in order to prove complicity.

## The Arms Trade Treaty

The Arms Trade Treaty (ATT) was adopted in April 2013 and entered into force on December 24, 2014.<sup>35</sup> The treaty has since been ratified by 92 States, and another 42, including the United States, have signed but not yet ratified. The ATT is the first legally binding treaty to regulate “[u]nregulated and irresponsible arms transfers [that] intensify and prolong conflict, lead to regional instability, facilitate human rights abuses ... and hinder social and economic development.”<sup>36</sup>

States that have ratified the ATT are legally required

to develop national systems that control “the cross-border trade of conventional arms.”<sup>37</sup> Under Article 6(3) of the ATT:

A State Party shall not authorize any transfer of conventional arms covered under Article 2(1)<sup>38</sup> or of items covered under Article 3 or Article 4<sup>39</sup> if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.<sup>40</sup>

Article 7 of the ATT further requires state parties to assess the potential for the arms to be used to commit or facilitate serious violations of IHL and human rights law. If a risk exists, the state parties are obligated to consider measures to mitigate the risk. If, after considering mitigation measures, the risk appears “overriding,” the State must not authorize the transfer.<sup>41</sup>

The ATT contains criteria for determining whether to transfer arms. Included in these criteria are considerations of the potential that the conventional arms or items:

(a) would contribute to or undermine peace and security; (b) could be used to: (i) commit or facilitate a serious violation of international humanitarian law; (ii) commit or facilitate a serious violation of international human rights law; (iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or (iv) commit

29 Goodman, Ryan. “The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen.” *Just Security*, September 1, 2016. Accessed September 6, 2017. <https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen/>

30 18 U.S. Code § 2 - Principals.

31 18 U.S. Code § 2441 - War Crimes.

32 Department of Justice, Office of Legal Counsel. United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking, July 14, 1994. <https://www.justice.gov/sites/default/files/olc/opinions/1994/07/31/op-olc-v018-p0148.pdf>

33 Goodman, Ryan. “The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen.” *Just Security*, September 1, 2016. Accessed September 5, 2017. <https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen/>

34 Memorandum Opinion for the Deputy Attorney General, “US Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking”, July 14, 1994, p. 158, <https://www.justice.gov/sites/default/files/olc/opinions/1994/07/31/op-olc-v018-p0148.pdf>.

35 United Nations Office for Disarmament Affairs, The Arms Trade Treaty, <https://www.un.org/disarmament/convarms/att/> (last visited June 29, 2017).

36 United Nations Office for Disarmament Affairs, *Arms Trade Treaty Implementation Toolkit Module 1 Why Join the ATT?* Accessed October 22, 2017. <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2015/08/2015-08-21-Toolkit-Module-1.pdf>

37 Ibid.

38 Arms covered under Article 2(1) include battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons.

39 Article 3 covers ammunition/munitions fired and Article 4 covers parts and components.

40 Arms Trade Treaty art. 1, Sept. 25, 2013, U.N. Doc. A/RES/69/49.

41 Ibid.

or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.<sup>42</sup>

In addition, States must also consider whether the arms transferred could be “used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.”

While the ATT could be a powerful tool to prevent irresponsible arms transfers, critics note that it lacks an enforcement mechanism, only stating that each nation “shall take appropriate measures to enforce national laws and regulations ... that implement [the] treaty.” To date, such national discretion has allowed States to define for themselves “appropriate measures.”<sup>43</sup>

And while not legally bound by the requirements of the ATT, as a signatory the US *is* legally required to ensure that its actions regarding arms transfers across borders do not undermine the treaty’s stated objective of promoting “international and regional peace, security and stability” or violate the object and purpose of the treaty in other ways.<sup>44</sup> US Presidential Policy Directive 27 (PPD-27), issued on January 15, 2014 by President Barack Obama, includes language governing conventional arms transfers that mirrors US obligations in the ATT.<sup>45</sup>

## International Human Rights Law

International Human Rights Law refers to the body of international law designed to promote and protect human rights in domestic and international contexts. Arms sales may implicate the right to life, which is binding upon the US through the Universal Declaration of Human Rights<sup>46</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>47</sup> The ICCPR also requires State parties to “respect and to ensure respect to all individuals within its territory.”<sup>48</sup> According to the

UN Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, States must not only refrain from violating human rights, but must also act with due diligence to protect human rights.<sup>49</sup> Under international human rights law, a State could be held responsible for failing to prevent human rights violations, including those committed by private actors under its jurisdiction. Under the due diligence standard, a State therefore has an affirmative duty to ensure that transferred arms not be used to commit human rights violations. However, the extraterritorial application of human rights treaties is hotly disputed. Notably, the US considers the ICCPR to apply exclusively within its territory.<sup>50</sup> Under the US interpretation, the Covenant would not impose any obligation on the US to respect or ensure the right to life for any individual located outside its territory.

## Other International Treaties and Legal Instruments

Other international treaties governing arms transfers include the **Convention on Certain Conventional Weapons (CCW)**, which bans and restricts the use of weapons that cause unnecessary suffering to combatants and/or have an indiscriminate effect on civilians; the **Ottawa Convention**, which bans the use, stockpiling, production and transfer of antipersonnel mines; the **Convention on Cluster Munitions (CCM)**, which bans the use, production, transfer, and stockpiling of cluster munitions; the **Missile Technology Control Regime (MTCR)**, a non-binding multilateral understanding to “limit the risks of proliferation by controlling transfers to delivery systems capable of weapons of mass destruction;”<sup>51</sup> and the **Wassenaar Arrangement**, a “voluntary export control regime” that encourages members to “exchange information on transfers of conventional weapons and dual-use goods and technologies.” The United States has signed and ratified the CCW and is a founding member of the MTCR and the Wassenaar Arrangement, whose

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42 Arms Trade Treaty, art. 7, Sept. 25, 2013, U.N. Doc. A/RES/69/49.

43 Ward, Alex and Timme, Morgan. “Will the United Nations Arms Trade Treaty Be Effective?” Atlantic Council, June 11, 2013. Accessed September 7, 2017. <http://www.atlanticcouncil.org/blogs/new-atlanticist/will-the-united-nations-arms-trade-treaty-be-effective>.

44 Arms Trade Treaty art. 1, Sept. 25, 2013, U.N. Doc. A/RES/69/49.

45 Presidential Policy Direct, United States Conventional Arms Transfer Policy <https://obamawhitehouse.archives.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p> (15 Jan. 2014).

46 Article 3 UDHR.

47 Article 6 ICCPR.

48 Article 2(1) ICCPR.

49 Barbara Frey, Special Rapporteur, Prevention of human rights violations committed with small arms and light weapons, A/HRC/Sub.1/58/27, 2006, para 9.

50 US Department of States, List of Issues to be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America, Question 4, UN Human Rights Committee (July 17, 2006), available at : <https://www.state.gov/j/drl/rls/70385.htm>.

51 Missile Technology Control Regime Guidelines for Sensitive Missile-Relevant Transfers, Article 1. <http://mtrc.info/guidelines-for-sensitive-missile-relevant-transfers/>.

*A man reacts to his destroyed house in Gaza.* (Opposite page.)  
Oxfam/Mohammed Al Baba



Dual-Use List as part of the US Controls Lists and Licensing Procedures.<sup>52</sup> The United States has not signed or ratified the Ottawa Convention or the CCM; however, in September 2014 the US revised its policy on the production, use, stockpiling, and transfer of antipersonnel landmines to align “with the key requirements of the Ottawa Convention,” and maintains the policy that, by the end of 2018, the United States will only use, stockpile, and transfer cluster munitions that have no more than a one percent fail rate.<sup>53</sup>

## US Laws

The domestic regulation of international arms transfers by the United States is governed primarily by two sources of legislation: The Arms Export Control Act and the Foreign Assistance Act. The Arms Export Control act designates the regulatory authority for arms sales to the executive branch and sets important thresholds for congressional notification of sales and violations of the terms of sale, while the Foreign Assistance Act clarifies the purposes for and circumstances under which arms may or may not be sold under its authority.

**The Arms Export Control Act (AECA)** grants the President “the authority to control the import and export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services.”<sup>54</sup> This authority was delegated to the Secretary of State via Executive Order 11958, where it currently resides, making the State Department the principal regulatory agency for international arms sales.<sup>55</sup> The AECA stipulates that decisions on arms exports “shall take into account whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.”<sup>56</sup> The law also requires the President to report to Congress any potential violations of the AECA. However, while the law was in part intended to provide Congressional oversight over arms transfers, Congress has never successfully blocked a proposed arms sale

by appealing to the AECA through a joint resolution of disapproval (a process elaborated in Part 2).<sup>57</sup>

While the AECA makes no explicit reference to IHL or human rights, it does stipulate that “sales be approved only when they are consistent with the foreign policy interests of the United States, [and] the purposes of the foreign assistance program of the United States as embodied in **the Foreign Assistance Act (FAA)** of 1961.” The FAA clarifies that defense items regulated under the AECA may be furnished:

...solely for internal security (including for antiterrorism and nonproliferation purposes), for legitimate self-defense, 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 assisting foreign military forces in less developed friendly countries (or the voluntary efforts of personnel of the Armed Forces of the United States in such countries) to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries.<sup>58</sup>

Importantly, section 620M of the FAA also clearly applies to defense articles and services transferred under the authority of the AECA. Known as the “Leahy law,” section 620M restricts assistance to security force units or individuals credibly associated with the commission of a gross violation of human rights. These include “torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right of life, liberty, or the security of person,” as well as “war crimes, crimes against humanity, and evidence of acts that may constitute genocide.”<sup>59</sup> However, at present, DSCA Policy 16-32 only requires the unit designation (i.e., which foreign security force unit the item will go to, necessary for Leahy review) for units that will

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52 See. U.S. Dept. of State, Overview of U.S. Export Control System <https://www.state.gov/strategictrade/overview/> (last accessed 17 May 2017).

53 Secretary of Defense Robert Gates, DoD Policy on Cluster Munitions and Unintended Harm to Civilians <http://www.acq.osd.mil/tc/treaties/ccwapl/DoD%20Policy%20on%20Cluster%20Munitions.pdf> (19 June 2008).

54 22 U.S.C. § 2278 (a)(1).

55 Executive Order 11958, Export Control Reform <https://obamawhitehouse.archives.gov/the-press-office/2013/03/08/executive-order-export-control-reform> (8 Mar. 2013).

56 22 U.S.C. § 2278 (a)(2).

57 Kerr, Paul K. “Arms Sales: Congressional Review Process.” Congressional Research Service. 25 July 2017.

58 22 U.S.C. §2302

59 22 U.S.C. § 2304(b)

receive equipment or services under the Foreign Military Financing (FMF) program, a small subset of the purchases that go through the FMS process.<sup>60</sup> In practice, the State Department does not restrict commercial arms sales on the basis of human rights violations to comply with the Leahy law.

### **The International Traffic in Arms Regulations (ITAR)**

sets the US government rules, requirements, and procedures for restricting and controlling defense related articles and services in accordance with US arms export control laws, including the AECA.<sup>61</sup> Specifically, it sets out registration and licensing policies for exports (and temporary imports) of defense items, as well as requirements for manufacturing defense items abroad. ITAR identifies certain countries that are prohibited from engaging in the US defense trade – including as end-users, manufacturers, intermediaries, and/or brokers – and establishes penalties for arms transfer violations. The State Department’s Directorate of Defense Trade Controls (DDTC) administers the ITAR, and delegates enforcement responsibilities to customs officials who investigate and/or seize exports that contravene the provisions of the AECA and ITAR.

**The US Munitions List (USML)**, contained in section 121 of the ITAR, designates certain defense articles, services, and data subject to control under the AECA. The USML also designates items that constitute “significant military equipment” (SME), and items that are subject to compliance with the Missile Technology Control Regime (MTCR).<sup>62</sup> Items on the USML are organized by category and sold either via Direct Commercial Sales or Foreign Military Sales. Certain dual-use commercial items are regulated by the Commerce Department’s Bureau of Industry and Security under the Export Administration Regulations (EAR).<sup>63</sup> The USML identifies items that are specifically designed or modified for military application and that: (a) have no predominantly civil applications; or (b) have civil applications but also have “significant military or intelligence applicability.”<sup>64</sup> Items with both military and civilian uses are controlled by the Department of

Commerce and are captured on the Commerce Control List (CCL).

The Department of State, with input from the Department of Defense, determines which items appear on the USML. All USML items are subject to the ITAR, and all commercial sales of these items – with a handful of exceptions – require an export license from the State Department. The US Congress has an oversight role regarding revisions to the USML, but does not have the ability to block revisions. The ITAR does require that relevant congressional committees be notified at least 30 days in advance of the removal of any item from the USML. The Commodity Jurisdiction Procedure responds to and settles questions regarding whether items are covered by the USML, as well as requests from industry to transfer items from the USML to the CCL. The State Department coordinates commodity determinations, which are made in consultation with the Department of Commerce, the Department of Defense, other government agencies, and the defense industry. State Department officials have the final say in any dispute.<sup>65</sup>

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60 United States. Defense Security Cooperation Agency. Identifying Foreign Military Financing Recipient Units, DSCA Policy 16-32. Arlington: US GPO, 2016. Accessed August 31, 2017. <http://www.samm.dsca.mil/policy-memoranda/dsca-16-32>.

61 United States. U.S. Department of State Directorate of Defense Trade Controls. The International Traffic in Arms Regulations (ITAR). Updated September 6, 2017. Accessed October 7, 2017. [https://www.pmdtcc.state.gov/regulations\\_laws/itar.html](https://www.pmdtcc.state.gov/regulations_laws/itar.html)

62 United States. U.S. Government Publishing Office. “Electronic Code of Federal Regulations,” updated October 19, 2017. Accessed October 22, 2017. [https://www.ecfr.gov/cgi-bin/text-idx?SID=86008bdfdf1fb2e79cc5df41a180750a&node=22:1.0.113.58&rgn=div5#se22.1121\\_11](https://www.ecfr.gov/cgi-bin/text-idx?SID=86008bdfdf1fb2e79cc5df41a180750a&node=22:1.0.113.58&rgn=div5#se22.1121_11)

63 In 2014, the Obama administration started “Export Control Reform”, placing significant numbers of defense and dual-use items from the ITAR under Commerce Department jurisdiction. See Benowitz, Brittany and Kellman, Barry, “Rethink Plans to Loosen U.S. Controls on Arms Exports”, [https://www.armscontrol.org/act/2013\\_04/Rethink-Plans-to-Loosen-US-Controls-on-Arms-Exports](https://www.armscontrol.org/act/2013_04/Rethink-Plans-to-Loosen-US-Controls-on-Arms-Exports)

64 United States. U.S. Department of State. “Overview of U.S. Export Control System,” 2011. Accessed October 22, 2017. <https://www.state.gov/strategictrade/overview/>

65 US Government Accountability Office, Export Controls: Processes for Determining Proper Control of Defense-Related Items Need Improvement, GAO-02-996 (GAO: Washington, DC, September 20, 2002, <http://www.gao.gov/products/GAO-02-996>).

## THE EUROPEAN UNION MODEL OF ARMS TRADE CONTROL

The European Union adopted a Common Position on arms exports in 2008 that sets out minimum criteria that all EU member states must consider before approving an arms transfer.<sup>66</sup> Under the terms of the Common Position, a member state may only grant an export license where it has reliable knowledge, prior to authorization, of manner in which the arms will be used by the purchasing country, including the purchasing country's adherence to international humanitarian law and human rights.<sup>67</sup> A member state must deny an export license if there is a clear risk that the arms may be used for internal repression or to commit serious violations of IHL.<sup>68</sup> To meet this standard, it is not required that the exporting country actually know that the specific weapons sold will be used to commit violations. The exporting state must also deny an arms export license if the arms could be used to cause or prolong an armed conflict or aggravate racial, ethnic, political, or religious tensions within the country in which the arms will be used.<sup>69,70</sup>

## PART 2

# The US Arms Sales Process and Stakeholders

Licensing and conducting the sale of controlled defense items to over 100 countries requires significant process, infrastructure, and personnel. While arms sales processes have been generally well-documented, the multitude of stakeholders involved and the volume of rules that apply to different categories of items can make the process difficult to understand even for those most well-versed in arms controls. This section aims to clarify the process and identify the specific government stakeholders with the ability and responsibility to improve the US arms sales process.

## Who's Who

### DEPARTMENT OF STATE

The Department of State, which has the primary statutory authority to regulate and promote the sale of US-manufactured arms, works with the Departments of Commerce and Defense to define which items will be controlled to ensure that sales adhere to legal and policy requirements. The State Department has the responsibility to conduct due diligence to ensure that controlled items are used in ways consistent with the terms of sale.

The State Department bureau responsible for regulating arms sales is the **Bureau of Political Military Affairs (PM)** and its several subsidiary offices, among them **Regional Security and Arms Transfers (RSAT)**, **Defense Trade Controls (DDTC)**, and **Security Assistance (SA)**. PM monitors political-military objectives around the world and ensures that security cooperation activities, including commercial and government-to-government sales of defense articles and services, are consistent with US foreign policy objectives.

The **Bureau of Democracy, Human Rights, and Labor (DRL)** implements the Leahy law by conducting "Leahy vetting" of foreign security forces prior to participating in US-funded training programs. DRL also provides expertise on the human rights practices of foreign countries to inform PM's arms sales decisions; however, the State Department's interpretation of the AECA and FAA does not provide DRL with the statutory authority

66 Council of the European Union, Common Position 2008/944/CFSP

67 Article 5, Common Position 2008/944/CFSP

68 Criterion 2, Common Position 2008/944/CFSP

69 Criterion 3, Common Position 2008/944/CFSP

70 Ibid., p. 75.



*This metal fragment was recovered at the site of an airstrike that killed 16 civilians and wounded 17 other noncombatants in Yemen on 25 August 2017. It contains a partial data plate for a MAU-169L/B computer control group -- a component used in laser-guided bombs. Amnesty searched open-source databases for the "69L/B" marking that is clearly readable on the fragment. That led to three separate lines of data that correlated to the same part. That's the nomenclature (MAU-169L/B), the Assembly Number (2252788-1), and the National Stock Number (1325-01-524-9697); all of which are partially readable on the fragment as well. The fifth and sixth integer of the National Stock Number was key to establishing national origin, as "01" is a code reserved for the United States. (John Ismay)*

Amnesty International/Rawan Shaif

to compel a denial of a commercial arms license or a government-to-government sale based on human rights concerns.

The Geographic or **Regional Bureaus**, divided into six geographic areas,<sup>71</sup> provide overall policy guidance for the countries in their regions, including arms sales and other security cooperation activities. The regional bureaus may support or oppose an arms sale depending on US foreign policy objectives.

The **Bureau of Intelligence and Research (INR)** is the intelligence analysis division within the Department of State. In arms sales determinations, INR may provide detailed analysis about security forces, foreign governments' weapons inventories, records of security force abuse, and/or analysis of the intended use or purpose of a weapons system by a specific country.

#### **DEPARTMENT OF DEFENSE**

The **Office of the Secretary of Defense for Policy - Security Cooperation** is the focal point for Security Cooperation and Building Partnership Capacity in the Pentagon. This office serves as the lead office within DoD for prioritizing, integrating, and evaluating bilateral and multilateral security cooperation activities.

The **Defense Security Cooperation Agency (DSCA)** oversees the transfer of defense articles and services via sale, lease, or grant "in furtherance of national security and foreign policy objectives" through FMS and other programs. DSCA also oversees the Defense Institute of Security Cooperation Studies (DISCS) and the Defense Institute for International Legal Studies (DIILS). DSCA publishes and maintains key sources of guidance for security cooperation activities, key among them the Security Assistance Management Manual (SAMM).<sup>72</sup>

The Service Branches (Army, Marine Corps, Navy, Air Force, National Guard, and Coast Guard) interact with partner forces to assist in developing requirements or provide input once a formal request for a transfer has been submitted. The services also provide training to partners that may accompany arms transfers.

#### **US EMBASSIES**

The US Ambassador and embassy representatives from the Departments of State and Defense all

have a role in the arms sales process. The Office of Defense Cooperation (also referred to as the Security Cooperation Office or Security Cooperation Organization, abbreviated SCO) communicates partner nation interests, concerns, and item requests to the US government (usually reporting to the Ambassador and DoD), and in turn represents US policies to the host nation. It is useful to note that, according to DoD Joint Publication 1-02, the term "SCO" refers to "all DoD elements located in a foreign country with assigned responsibilities for carrying out security assistance/cooperation management functions [including] military assistance advisory groups, military missions and groups, offices of defense and military cooperation, liaison groups, and defense attaché personnel designated to perform security assistance/cooperation functions" and that "the term 'SCO' refers not only to the organization, but to each of its assigned personnel (i.e., security cooperation officers)."<sup>73</sup> For the purposes of this report, the term SCO will refer primarily to the Security Cooperation Office at the Embassy and the Security Cooperation Officers that comprise the office.

#### **CONGRESS**

The congressional committees of jurisdiction for arms sales include the Senate and House Armed Services Committees, the Senate Foreign Relations Committee, and the House Foreign Affairs Committee. Circumstances where foreign assistance is involved may also trigger involvement from the Senate and House appropriations committees on foreign operations. These committees often receive informal notification and consultations on potential arms sales from the executive branch, as well as the formal notification of planned sales required for the FMS and DCS processes under the AECA. Congress can use legislation to block or modify a sale during this notification period or at any other time.

#### **CIVIL SOCIETY AND THE PUBLIC**

Though not an official participant in the FMS and DCS processes, civil society organizations in the US and in other countries play an essential role in documenting human rights abuses, corruption, and civilian harm in foreign militaries, as well as advocating for or against security assistance policies or sales. Congress, State, and Defense stakeholders may consult this information during the evaluation process.

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71 Africa (AF), Europe (EUR), Western Hemisphere (WHA), South and Central Asia (SCA), East Asia and the Pacific (EAP), and the Near East (NEA).

72 Defense Security Cooperation Agency, Security Assistance Management Manual. Accessed October 22, 2017. <http://www.samm.dsca.mil/>

73 Defense Security Cooperation Agency, Defense Institute of Security Cooperation Studies. The Management of Security Cooperation ("Green Book") Edition 37.1, 4-10, May 2017. Accessed September 8, 2017. [http://www.discs.dsca.mil/documents/greenbook/04\\_Chapter.pdf](http://www.discs.dsca.mil/documents/greenbook/04_Chapter.pdf)



## THE FOREIGN MILITARY SALES (FMS) PROCESS

Government-to-government sales of major defense items, and some items specifically designated by DSCA (listed in Annex C), are sold through a process known as Foreign Military Sales (FMS). With the exception of Israel and Egypt, purchases made using US government-provided Foreign Military Financing (FMF) must also be made through the FMS process. Some countries may choose to purchase through the FMS process due to the benefits of the program's "total package approach," which "ensures that FMS purchasers receive all support articles and services required to introduce and sustain equipment, and that items can be operated and maintained in the future."<sup>74</sup> The total package approach may also include training, technical assistance, initial support, ammunition, and follow-on support.<sup>75</sup> The FMS program is overseen by the State Department and administered by DSCA.

The purchase of defense items or services through FMS is a multi-part process:

### 1) Defining Requirements or "Pre-Case

**Development:"** Understanding and defining the purchasing government's legitimate defense requirements is the first step in the FMS process. This stage should not be seen as a static "snapshot," but rather an ongoing process of shaping and evaluating the defense needs of the partner nation. The development of these requirements should take into account compatibility of the desired items with the partner nation's legitimate defense and security needs; its ability to finance and maintain the items; and the technical capacity and political will to use the items appropriately.

**2) Submitting the Letter of Request (LOR):** Once the required capabilities have been identified, the purchasing government must submit a formal Letter of Request (LOR). There are no specific categories of information that must be in a LOR, but information that is often denoted includes the purchaser, the item(s) requested and in what quantity, the

intended end use, desired delivery date, funding source, requested additional services, requested training, support considerations (for example, plans for maintenance and storage), and delivery considerations. The purchasing government can request one of two types of responses: a Pricing and Availability (P&A) response, or a Letter of Offer and Acceptance (LOA). The P&A provides the purchaser a rough estimate of the projected cost and availability for the defense articles and services but is not a formal offer of sale, while the LOA is a formal US government offer to sell the defense articles and services.

**3) Evaluating the LOR:** To begin the process of evaluating a LOR, the implementing agency or office, often the SCO at the Embassy, enters the case into the Defense Security Assistance Management System (DSAMS), where US Embassy officials, State Department, DSCA, and other Defense components can begin the process of evaluating the case. The initial screening of the case done by the SCO will determine if the buyer is eligible, if the request is specific enough to act on, if the requested items are available, and if the request addresses a valid need. In many cases, a Country Team Assessment (CTA) may be required if the LOR meets the standards for Congressional notification (listed in Annex A), introduces a new capability in the country, requests articles or services of a sensitive nature, or if DSCA requests a CTA for any other given reason.<sup>76</sup> A CTA must address factors such as how the article will be used, how it contributes to the defense and security goals of the partner nation and of the US, how it will change the partner country's military capabilities, how the partner country will protect and safeguard sensitive technology, and the partner nation's human rights record.<sup>77,78</sup>

**4) Congressional Notification:** Under Section 36(b) of the AECA, Congress must be formally notified 30 days before the finalization of an FMS sale of defense articles or services of \$50 million or more; design and construction services for \$200 million or more; major defense equipment for \$14 million or more; and small arms and light weapons of \$1

74 Defense Security Cooperation Agency, Defense Institute of Security Cooperation Studies. The Management of Security Cooperation ("Green Book") Edition 37.1, 10-1, May 2017. Accessed September 8, 2017. [http://www.discs.dsca.mil/documents/greenbook/10\\_Chapter.pdf](http://www.discs.dsca.mil/documents/greenbook/10_Chapter.pdf)

75 Ibid.

76 Defense Security Cooperation Agency. Security Assistance Management Manual (SAMM) Chapter 5, "MS Case Development." Accessed September 8, 2017. <http://www.samm.dsca.mil/chapter/chapter-5>

77 Ibid.

78 Tom Mancinelli (Congressional Staffer and former State Department official working on security issues), interviewed by Annie Shiel in Washington, DC on July 5, 2017.



*Ordnance fills the bottom of the folded wing of an A-1 Skyraider attack aircraft.*  
Chris Hunkeler

million or more.<sup>79</sup> Congressional notification is the first time that the public becomes aware of a proposed sale. During the formal notification period, Congress may block or hold the proposed sale through a joint resolution of disapproval or other legislation. While a joint resolution must happen during the notification period, legislation prohibiting, modifying, or conditioning a sale through the regular legislative process can happen at any time. As noted by the Congressional Research Service, there are practical advantages to Congress blocking or modifying a sale before its finalization, including “(1) limiting political damage to bilateral relations that could result from signing a sales contract and later nullifying it with a new law; and (2) avoiding financial liabilities which the United States Government might face for breaking a valid sales contract.”<sup>80</sup> Should the statutory notification period elapse without such action from Congress, the executive branch is free to proceed with the sale. In addition to the formal notification process, the Departments of State and Defense provide prior consultations or informal notifications to Congress, which offer the opportunity to address any concerns that Congress may have regarding a proposed sale before it becomes public or moves to formal notification.<sup>81</sup>

#### **5) Preparing the Letter of Offer and Acceptance**

**(LOA):** At the end of the statutory notification period, if there is no action taken by Congress to hold or stop the sale, DSCA can officially countersign the LOA and offer the requested items to the purchaser. When the notification process draws to a close, the implementing agency notifies DSCA's Case Writing Division (DSCA-CWD), which then completes the LOA drafting process by conducting a final review for policy compliance and adding a payment schedule. The LOA also includes the standard terms and conditions of the sale (see Annex F). DSCA-CWD then coordinates with the implementing agency, DSCA headquarters, and legal teams for necessary reviews. After State-PM's final review, DSCA-CWD countersigns the LOA and indicates that the implementing agency can officially offer it to the purchaser.

**6) Accepting the Offer:** Upon receiving the LOA,

the purchasing government usually has 85 days to accept the offer. Eighteen countries have extended time periods for acceptance, ranging from Turkey's 100 days to India and Saudi Arabia's 180 days. Upon formal acceptance of the offer and payment of the initial deposit by the partner nation, the case enters the implementation and execution phase.

**7) Implementation and Execution:** During implementation, the orders for the defense articles and services listed in the LOA are prepared and processed. Execution is the longest phase of a FMS case and can last many years for a major case. This step includes acquisition, financing, logistics, training, shipment, and anything else required to complete the terms of the sale.

#### **8) End-Use Monitoring and Enhanced End-Use**

**Monitoring:** The DoD manages the End-Use Monitoring (EUM) of items sold through FMS through the **Golden Sentry** program. The purpose of EUM is ensure that defense articles transferred by the US are used according to the terms of the transfer agreement. There are two types of post-delivery EUM under the Golden Sentry program: **Routine EUM (REUM)** and **Enhanced EUM (EEUM)**. REUM is required for all defense articles and services provided through FMS. Under REUM, SCO personnel perform checks when the opportunity arises and are required to report any potential misuse or unauthorized transfer of US-origin defense articles to DSCA, the Department of State, and the appropriate regional Combatant Command (CCMD). These checks can take place during routine visits to partner nation installations, interactions with other Embassy personnel, and from any other available information. Some items are subject to a more rigorous process known as Enhanced EUM.<sup>82</sup> EEUM requires the SCO to regularly assess the physical security of the storage facilities for the transferred articles and conduct a check by serial number of the defense articles on the EEUM list. The SCO is required to keep an accurate record of all EEUM items in the recipient's possession, including mandated reports from the partner of any change in status. Contrary to popular belief, end-use monitoring typically focuses exclusively on the protection of US defense technology and the prevention of unauthorized transfers rather than the manner of use.<sup>83</sup>

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79 For NATO member states, NATO, Japan, Australia, South Korea, Israel, and New Zealand, the notification period is smaller and the numerical threshold is higher under both FMS and DCS.

80 Kerr, Paul K. "Arms Sales: Congressional Review Process." Congressional Research Service. 25 July 2017.

81 Tom Mancinelli (Congressional Staffer and former State Department official working on security issues), interviewed by Annie Shiel in Washington, DC on July 5, 2017.

82 A list of the defense articles that have been designated for EEUM for all FMS-eligible countries can be found in C8.4 of the DSCA Security Assistance Management Manual. Other defense articles may require EEUM on a case-by-case basis as determined in the transfer approval process. Source: Defense Security Cooperation Agency, Security Assistance Management Manual, "End-Use Monitoring" 8.4. Accessed October 22, 2017. <http://www.samm.dscamilitary.com/chapter/chapter-8#C8.4>

83 Expert Workshop on Civilian Harm and Weapons Sales hosted by CIVIC and the Stimson Center, June 16, 2017.

## Direct Commercial Sales (DCS)

DCS is the process through which a US manufacturer and a non-US purchaser come to an agreement to transfer defense articles and services without major involvement by the US government. Unlike the FMS process, in which US government representatives are actively involved in every step, the US government is only closely involved in the approval and monitoring phases of the DCS process. While FMS includes more sustainment and support through its “total package approach,” many items regulated by the USML may not require significant maintenance, and countries with more sophisticated defense acquisition and procurement infrastructure may not need additional support.

Like FMS, the purchase of defense items or services through DCS is a multi-step process:

**1) Registering with PM/DDTC:** Before the process can even begin, manufacturers and companies interested in selling to foreign purchasers must register with PM’s Directorate of Defense Trade Controls (DDTC) within the Department of State. Once registered, however, the purchaser interacts directly with the manufacturer on the contract without the US government serving as an intermediary. Once the purchaser has decided on the desired articles and services, the purchaser will submit an order directly to the vendor.

**2) Commodity Jurisdiction Request and Export License:** The vendor and purchaser may need to validate whether or not an item is listed in the USML and regulated by ITAR through a Commodity Jurisdiction (CJ) request. Direct commercial sales of items listed in the USML require a license prior to sale. The vendor and the purchaser must work together to put together a license application, which must include all the individuals, parties, and companies who will come in contact with the sale. These names are then vetted against an internal watch list maintained by DDTC to mitigate the risk of diversion and misuse. Entities that match records in the watch list are not automatically banned, but may invite additional review or scrutiny. Approximately 30 percent of license requests require an interagency review, potentially including entities such as the Defense Technology Security Administration (DTSA), State’s DRL and regional bureaus, NASA, and the Department of Energy.

**3) Congressional Notification:** Under Section 36(c) of the AECA, Congress must be formally notified of DCS sales within 30 calendar days before the issue of the export license for major defense equipment valued at \$14 million or more, defense articles or services valued at \$50 million or more, or any defense articles over \$1 million that are firearms-controlled under category 1 of the USML.<sup>84</sup> The formal notification process is the same as that under FMS.

**4) End-Use Monitoring:** End-Use Monitoring of DCS is conducted by the Department of State through the Blue Lantern program. **Blue Lantern** checks are conducted by US Embassy personnel and can include pre-license, post-license, and post-shipment checks to verify information about purchasers and end-users—namely, whether the recipient is compliant with US government standards about use, transfer, and security of defense articles and services. Due to the high volume of sales, Blue Lantern checks are more targeted than those in the Golden Sentry program, and are conducted on the basis of potential risk. Traditionally, around one percent of total license applications lead to a Blue Lantern check and about 25 percent of checks result in an “unfavorable” finding.<sup>85</sup> Unfavorable findings may result from incorrect information on the application (such as an incorrect address), information suggesting an individual or party involved in the sale is unreliable (for example, currently under investigation or with past criminal records), and refusal to cooperate with the check. There does not currently exist a category for findings of improper use (e.g., human rights abuses or civilian harm due to use of the item in question).

**5) Post Export License Approval:** After the export license is approved, the US government’s role is limited, with the exception of post-license and post-shipment Blue Lantern checks as laid out above. Contract negotiation, contract administration, quality control, inspection, shipment and delivery, and any other steps involved in the sale and shipment of the defense articles are executed between the purchaser and the contractor.

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<sup>84</sup> For NATO member states, NATO, Japan, Australia, South Korea, Israel, and New Zealand, the notification period is smaller and the numerical threshold is higher under both FMS and DCS.

<sup>85</sup> United States Department of State, Bureau of Political-Military Affairs, “End-Use Monitoring of Defense Articles and Defense Services, Commercial Exports FY 2016.” Accessed October 22, 2017. [http://pmdtcc.state.gov/reports/documents/End\\_Use\\_FY2016.pdf](http://pmdtcc.state.gov/reports/documents/End_Use_FY2016.pdf)



*Children play with the remnants of a bomb*  
UN/Albert Gonzalez Farran

## PART 3

# Process Evaluation

The US government has in place a number of controls designed to ensure the integrity of the arms sales process and to reduce the risk of unintended consequences. Although well-intended, these safeguards may be subject to misapplication or overly broad interpretation, enabling the transfer of weapons systems without corresponding risk mitigation measures.

**Challenges of applying international law**<sup>86</sup>: In theory, international and domestic laws may apply to arms sales prior to the actual purchase (i.e., an ex ante evaluation of the lawfulness of the sale itself), or once a sale has already taken place (i.e., an ex-post evaluation of the use of an item that has already been sold). As described in Part 1, the precise degree of US responsibility in arms sales may depend on the level and type of support it provides, its knowledge of partner practices, and any discernible intent to facilitate unlawful acts.

In practice, restricting US arms sales purely on the basis of the most directly relevant sources of domestic and international law is difficult if not impossible, especially when a legal challenge to a sale originates from outside of the US government itself. The degree to which the US weighs what it knows about its partners' internal operational processes vs. what it can deduce from observable patterns in its legal evaluation of conduct is unknown, may vary by case, and depend on specific facts. It is possible that absent any indicia of partner "intent," and without access to partner military operations, the United States may rarely determine that a purchasing state has committed violations of international humanitarian law, even when facts suggest reckless conduct or the likelihood of unlawful acts. It is also possible that the United States may have privileged access to information, and could determine that a partner has operated in accordance with international law, even when the consequences of partner conduct suggest otherwise.

Certain US laws, such as the Arms Export Control Act, hold promise for strengthening controls on high-risk US arms exports, but could be strengthened with additional clarification of intent that the scope and intent includes likely violations of law by end-users. Technicalities that relieve the US government of legal liability do not automatically relieve the US government from association with the human consequences of its decisions.

**Misaligned Capabilities and Needs**: The acquisition of conventional arms is an essential part of developing the warfighting capabilities a country needs to service its national security and defense aims. However, to be used effectively and appropriately, for legitimate purposes and in legitimate ways, the acquisition of arms must align with a clear and coherent strategy and real institutional capacities. Arms acquisitions should be supported and reinforced by military infrastructure, budgetary resources, doctrine, appropriate training, and technical expertise for industrial sustainment. For example, the US military part acquires arms based on its own "DOTMLPF-P" framework, which considers how weapons systems align with Doctrine, Organization, Training, Materiel, Leadership, Personnel, Facilities, and Policy.

While purchasing arms from the US through the FMS "total package approach" can help to fill gaps in certain areas, such as sustainment and training, large deviations between newly acquired arms and the capability to employ them appropriately can be difficult to resolve on short timelines and without adequate commitment or resources. As such, the US government undertakes an assessment of the capabilities and needs of the purchasing government using the country team assessment (CTA) prior to authorizing a sale in order to ensure that the item comports with a legitimate need and capacity. In a standard CTA, the US embassy country team is tasked with evaluating whether or not the defense item serves a legitimate defense need, whether the item is likely to be misused, and whether the purchasing country can sustain the item (see Annex E).<sup>87</sup> When considered seriously by decision makers, a thorough and proper assessment can help to reduce the likelihood that any defense item sold by the United States will be used incorrectly or for unsuitable purposes.

Current and former US government officials told our researchers that setting requirements—matching arms

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<sup>86</sup> Due to the summary nature of this report, the analysis of legal debates and challenges surrounding US practice is necessarily incomplete. For excellent analysis and recommendations for strengthening US compliance with international law, see Brian Finucane, "Partners and Legal Pitfall", 92 International Law Studies 207 (2016).

<sup>87</sup> United States Defense Security Cooperation Agency, Security Assistance Management Manual, "FMS Case Development," C5.1.4, May 2017. Accessed October 22, 2017. <http://www.samm.dsca.mil/chapter/chapter-5>

sales with the real needs of the partner—is one of the most important elements of the process, yet often where most problems originate.<sup>88,89</sup> One reason for discrepancies is that the US government’s interests in selling arms are distributed between industry, national security, and foreign policy aims. Where some foreign policy concerns, like human rights, may commend a more cautious approach, other economic or security incentives may promote riskier or higher volume sales. As a result of this interplay, security cooperation officers or other officials may represent details in a CTA in biased or incomplete ways that can lead to ill-advised transactions.

In interviews, former government officials described a so-called “wish-list phenomenon,” wherein the US government and the purchasing country pursue sales agreements based on a wish list of high-tech items that often greatly exceeds the capacity of the purchasing country’s military to appropriately use or sustain the weapons systems.<sup>90,91</sup> SCOs, who most often interact with the partner nation and receive these “wish-lists,” are trained primarily in technical contracting, process, and budgeting skills, and often lack sufficient regional expertise or training to successfully identify the real needs and existing capabilities of the partner defense institutions.<sup>92,93</sup> According to the “Green Book,” the basic textbook employed by the Defense Institute of Security Cooperation Studies (DISCS), “For the SCO, [the host country relationship] is the *raison d’être*.”<sup>94</sup> But without the proper training and controls, increased sales of wish-list items may come at the expense of proper and lawful use.

**Spoilers:** In some cases, senior White House, Defense, or State Department officials press for sales that are difficult to defend on the basis of an objective assessment of legitimate needs, capacity, or risks.

In some of these cases, the “pressure to deliver” exerted by public officials sped up the pre-sale review process, prioritizing bilateral deliverables over due diligence. Similarly, industry representatives commonly “lobby” purchasing country to buy a certain system or item, even if the item in question is ill-suited to the purchaser’s actual needs and capabilities. It is also not uncommon for industry representatives to intervene directly with State Department and other officials when a DCS license is delayed or rejected.<sup>95</sup> For example, the New York Times reported in December 2016 that major arm manufacturer Raytheon’s chief executive “personally lobbied Tony Blinken, the deputy secretary of state, and also reached out to Secretary of State John Kerry and Susan Rice, the national security adviser” to push for the sale of guided munitions to Saudi Arabia, which were ultimately denied by the Obama administration.<sup>96</sup> However, while the federal, state and local governments often provide large subsidies and tax breaks to defense contractors – ostensibly to create jobs – research has shown that military spending creates fewer jobs than other kinds of government spending.<sup>97,98</sup>

**Premature Commitments:** When a serious policy deliberation does take place regarding a potential sale, it often occurs too late in the process. As designed, the FMS process deprives US policymakers of latitude and flexibility by implicitly “locking in” sales decisions before appropriate due diligence can be paid. In many cases, the nature of the relationship between the security cooperation office or country team and the purchasing country can impart a sense of premature expectation and finality to the sale before the transaction has been fully evaluated. Many stakeholders who might offer important perspectives and context are often left out of the evaluation and vetting stages of the process. For example, the details of a potential sale

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88 Dr. Larry Lewis (Director, Center for Autonomy and Artificial Intelligence, CNA), interviewed by Annie Shiel in Arlington, VA, June 23, 2017.

89 Expert Workshop on Civilian Harm and Weapons Sales hosted by CIVIC and the Stimson Center, June 16, 2017.

90 *ibid.*

91 Dr. Larry Lewis (Director, Center for Autonomy and Artificial Intelligence, CNA), interviewed by Annie Shiel in Arlington, VA, June 23, 2017.

92 *ibid.*

93 Defense Security Cooperation Agency, Defense Institute of Security Cooperation Studies. SCM-O (SCM-351) Security Cooperation Management Overseas Course. [http://www.discs.dsca.mil/\\_pages/courses/onsite/scm-o.aspx?section=des](http://www.discs.dsca.mil/_pages/courses/onsite/scm-o.aspx?section=des)

94 Defense Security Cooperation Agency, Defense Institute of Security Cooperation Studies. The Management of Security Cooperation (“Green Book”) Edition 37.1, 4-10, May 2017. Accessed September 8, 2017. [http://www.discs.dsca.mil/documents/greenbook/04\\_Chapter.pdf](http://www.discs.dsca.mil/documents/greenbook/04_Chapter.pdf)

95 Expert Workshop on Civilian Harm and Weapons Sales hosted by CIVIC and the Stimson Center, June 16, 2017.

96 Cooper, Helene. “U.S. Blocks Arms Sale to Saudi Arabia Amid Concerns Over Yemen War.” The New York Times, December 13, 2016. Accessed September 6, 2017. [https://www.nytimes.com/2016/12/13/us/politics/saudi-arabia-arms-sale-yemen-war.html?\\_r=0](https://www.nytimes.com/2016/12/13/us/politics/saudi-arabia-arms-sale-yemen-war.html?_r=0).

97 Pollin, Robert and Heidi Garrett-Peltier. “The U.S. Employment Effects of Military and Domestic Spending Priorities: 2011 Update.” Political Economy Research Institute University of Massachusetts, Amherst, December 2011. Accessed September 20, 2017. [https://www.peri.umass.edu/fileadmin/pdf/published\\_study/PERI\\_military\\_spending\\_2011.pdf](https://www.peri.umass.edu/fileadmin/pdf/published_study/PERI_military_spending_2011.pdf)

98 Yusuf, Abdullah, Joseph Royce and Thomas Merritt. “President Trump’s arms deal with Saudi Arabia: business as usual.” Cable Magazine, July 1, 2017. Accessed September 20, 2017. <https://www.cablemagazine.scot/trump-saudi-arabia/>

are not disclosed to the interested public in either the purchasing country or in the United States until the formal Congressional notification period. By the time an LOR is submitted, the diplomatic momentum has shifted toward the mutual expectation of approval. Before the evaluation process has even begun, any person or organization, both inside government and out, with a legitimate challenge to the sale faces an uphill battle in reversing this momentum and risking embarrassment to the United States and its partner.

**Congressional Oversight:** The notification and subsequent evaluation of a proposed sale by Congress should provide for the checks and balances needed to ensure the adequate consideration of risk and alignment with the American public interest. However, many in Congress and their staff are unaware of the risks involved with certain sales or the available risk mitigation options that could be demanded as a prerequisite for the sale. The Senate Appropriations Committee is not notified of arms sales, and thus the legislative body with arguably the largest oversight role for US security assistance has little formal role in ensuring adequate oversight of arms sales as a security cooperation activity.

**Weak Terms of Sale:** The standard terms and conditions in a LOA do not bind the purchasing country to abide by IHL or other behavioral restrictions; rather, they include the benign language that “The purchaser notes its obligations under International Humanitarian Law and Human Rights Law.”<sup>99</sup> The standard terms and conditions do commit the purchaser to agree to use the articles under the terms specified by the AECA, including internal security, and legitimate self-defense; however, the fact that these uses are not defined or further elaborated leaves the purchaser’s interpretation of “legitimate purpose” vulnerable to abuse. As written, the standard terms and conditions set a low baseline of expectation of use by the purchasing country, and therefore a weak basis for the US to challenge a partner on misuse using the terms of sale (even though the US government does reserve the right to terminate the LOA at any time).

The authority to amend the standard terms of sale for certain items resides with the Director of DSCA. In a 2016 Memo on Cluster Munitions, for example, DSCA Director Joseph Rixey (Annex G) mandated that any

new letters of agreement obligate the purchaser to report on the circumstances of use: “a requirement that the purchaser agrees whenever the munitions being sold are taken out of inventory on a permanent basis to report the date, quantity, place expended, and a brief description of the circumstances under which it was expended.”<sup>100</sup>

**Lack of Process Adaptations for the Onset of Conflict:**

The potential for undesired consequences as a result of arms sales increases when a purchasing country becomes involved in non-international or international conflict. The onset of conflict may also carry legal implications if the US is selling arms to one or more parties to the conflict, depending on the nature and significance of the weapons being sold. However, no automatic or systematic controls currently exist to appropriately adapt the arms sales process as the risk of political violence or armed conflict increases, including by thoroughly re-assessing partner capabilities, behavior, risk and liability under new or evolving conflict dynamics.<sup>101</sup> Without such a systematic review, conflict may create a sense of urgency that in fact reduces pre-sale scrutiny or deference to human rights concerns, particularly when a partner is waging a military campaign.<sup>102</sup>

**Disproportionate Focus of End-Use Monitoring on Diversion:**

Once sold and delivered, defense items purchased through FMS or DCS may be subject to end-use monitoring (EUM). As described in Part 2, commercial sales are subjected to targeted monitoring through the Blue Lantern program, while foreign military sales are subject to Golden Sentry review. In both cases, EUM aims to prevent diversion and unauthorized transfer of valuable US arms and technologies rather than misuse, even though “appropriate use” is a standard term of sale. No process currently exists to modify EUM when the likelihood of use or misuse increases—for example, when the purchasing country enters an armed conflict or when its human rights record worsens. The US government is likely to learn of misuse or unintended consequences through classified intelligence, making it difficult to share with its partners, or from non-governmental organizations or journalists, placing the government in the position of damage control.

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99 United States Defense Security Cooperation Agency, Security Assistance Management Manual, Figure C5.F4 Letter of Offer and Acceptance (LOA) Standard Terms and Conditions. Accessed October 22, 2017. <http://www.samm.dsca.mil/figure/figure-c5f4>

100 United States Defense Security Cooperation Agency, “Revision of the Mandatory Note for Sales of Cluster Munitions with Submunitions with a Confirmed 99% or Higher Tested Rate,” DSCA Policy 16-29, E-Change 313, May 23, 2016. Accessed October 22, 2017. <http://www.samm.dsca.mil/policy-memoranda/dsca-16-29>

101 Expert Workshop on Civilian Harm and Weapons Sales hosted by CIVIC and the Stimson Center, June 16, 2017.

102 *ibid.*



## PART 4

# Recommendations

The most pragmatic approach to reducing civilian harm occurring from US arms sales involves applying targeted controls to the riskiest items, the riskiest partners, and under the riskiest circumstances. More emphasis should be placed on developing the capacity to manage, rather than fully eliminate, risk, allowing the United States to maintain important security relationships while reducing the potential for civilian harm. Specific recommendations follow below.

## Recommendations for the Executive Branch

**1. Evaluate arms sales on the basis of the reasonable likelihood that violations of international law have occurred or will occur, requiring access to relevant information where necessary:** As long as the US neither has nor seeks the knowledge it needs to assess partner conduct, international law will rarely serve as a meaningful basis for the proper internal vetting of sales decisions. The US government should conduct assessments of the purchaser's approach to international law, including its capacity for compliance and the likelihood of misapplication of relevant international law, before sales of major defense items are made. In its arms sales decisions, the US should also consider the probability of future violations of international humanitarian and human rights law when evidence of past violations, based on credible outside reporting and discernible patterns of behavior, suggest patterns of recklessness. Finally, the US should ensure it has the access it needs to evaluate partner compliance with IHL once arms have been sold. This could mean including such access as a condition of sale of certain items, or as a condition that is triggered when the buyer becomes involved in conflict (see Recommendation 3). Strengthening safeguards at several points in the process, even if purely as a policy decision, could nonetheless strengthen US adherence to relevant international commitments and obligations.<sup>103</sup>

**2. Identify and focus on the items most closely related to high incidence rates of civilian harm in conflict:** Some defense items, such as missiles, bombs, helicopters, and attack aircraft, can create disproportionate levels of civilian harm when misused. These items should be clearly identified and subject to greater levels of risk analysis, risk mitigation, and monitoring before, during and after a sale. For example, DSCA could subject all or some items under USML categories 3, 4, 5, and 8 (ordnance, missiles, bombs, and aircraft)<sup>104</sup> to additional scrutiny. Bombs and other explosives should be added to the FMS-only list. Specific provisions or terms of sale should be added to the sale of these items, including training requirements, stronger terms of use, access to partner government operations, and end-use monitoring (see Recommendation 9).

**3. Establish conflict tripwires.** The Departments of State and Defense should establish a set of "tripwires" associated with the onset or escalation of political violence, conflict, and mass atrocity crimes, along with an associated set of risk-mitigation measures and policy reviews for major arms sales at each stage of the sales process, including past sales. The process should include thorough reviews of partner capabilities, behavior, risk and liability under new or evolving conflict dynamics. The Departments of State and Defense should ensure that as the risk of civilian harm increases, so too does the visibility and access to partner operations. At the same time, the Departments should proactively consult civil society to identify the countries that merit additional risk mitigation measures or customized approaches, based on risk.

**4. Strengthen the standard terms and conditions and DCS licensing conditions for high-risk items.** The Director of DSCA (DoD) and the Assistant Secretary for Political Military Affairs (State) should issue joint guidance mandating that the standard terms and conditions for all sales require the purchasing country to comply with IHL and international human rights law, while also strengthening consequences for violating end-use agreements. DSCA should also work with Congress to clarify the definition of legitimate use under the "internal security" and "self-defense" clauses

<sup>103</sup> For additional recommendations, see ICRC, *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria*, Practical Guide, 2nd edition, 2016.

<sup>104</sup> Category 4: Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines  
Category 5: Explosives and Energetic Materials, Propellants, Incendiary Agents, and Their Constituents  
Category 8: Aircraft and Related Articles (<https://www.ecfr.gov/cgi-bin/text-idx?SID=86f008bdfdf1b2e79cc5df41a180750a&node=22:1.0.1.13.58&rgn=div5>)



*A man stands shocked in the remains of a house following an airstrike*

AFP/Getty Images/Dimitar Dilkov

of the Arms Export Control Act, and reiterate that appropriate use under these clauses requires adherence to international law. The Director of the DSCA should also revise the standard terms of sale of certain items to include appropriate conditions for use, mandated reporting on the circumstances and reasons for an item's expenditure or use, and where appropriate, any necessary additional commitments (for example, the partner's adherence to a no-strike list composed of entities that are not considered lawful targets).<sup>105</sup> Companies exporting items through the DCS process should be required to include conditions on terms of use and compliance with human rights and IHL on all licenses. The terms of sale for all items should also require end-use monitoring of use and conduct, rather than diversion alone (see Recommendation 9).

**5. Expand the unit designation requirement and Leahy vetting to FMS cases.** At present, DSCA Policy 16-32 requires the unit designation for any unit that will receive equipment or services under the FMF program, enabling the application of Leahy vetting to those units. The Director of DSCA should issue similar guidance requiring the unit designation for all units that will use designated high-risk items purchased under the FMS program, which should be subject to appropriate vetting under the Leahy law.

**6. Supplement Country Team Assessments (CTA) with annual interagency arms sales risk assessments for certain FMS recipient countries.** Conducting objective risk assessments as a standard operating procedure would both mitigate the potential for biased analysis during individual sales and improve the efficiency of CTAs by providing an agreed-upon body of analysis for the country in question. The current "Framework for policy review and risk analysis of proposed SSA Activities" (Annex B) provides a strong foundation, but a more detailed and targeted assessment should be required for the sale of any major defense equipment in USML categories 3, 4, 5, and 8 (which together includes ordnance, missiles, bombs, and aircraft) and all "FMS-Only" items. While requiring an assessment of all countries for all items is likely to constitute too heavy a burden for State and Defense staff, thorough assessments should be required for those countries to whom the US government is likely to sell major weapons systems or munitions, and who are either involved in armed conflict or have

an abusive human rights record. Risk assessments should include systemic factors (e.g. indicators of political violence or conflict, past conflict and human rights records, and corruption levels) and factors related to the technical and governance capacities of the purchasing country, including those specifically related to the risk of violations of IHL (e.g., command and control, training, intelligence, and coordination among elements of the military).<sup>106</sup> Assessments should include input from civil society in both the United States and the purchasing country.

**7. Adopt a more robust assessment framework for FMS pre-case development.** To improve the process of evaluating and shaping partner requirements, DSCA should adapt its evaluation of purchasing country needs to include doctrine, operations, training, and policy, similar to the US military's aforementioned DOTMLPF-P<sup>107</sup> framework. Evaluations could be conducted annually or even biannually.

**8. Institute formal processes for approvals and dissent.** Letters of Agreement and other formal records approving major sales (as a function of monetary or political value) should be formally approved and signed by the Director of DSCA or the Assistant Secretary for Political Military Affairs. US officials or offices that have well-grounded concerns about a sale or a denial should be empowered to document their positions, and differences of policy views should be adjudicated through a formal, documented escalation process. Dissenting views should be fairly represented in notifications to Congress.

**9. Require end-use monitoring programs to assess use, especially in conflict, and explicitly link end-use monitoring results to future sales.** The US government should ensure that it has the access it needs to maintain visibility into the ways in which the major weapons systems it sells are used, especially during conflict. End-use monitoring and evaluation of USML items such as bombs, missiles, and fighter aircraft should be required to include a review of use and expenditure. The criteria for evaluation should include the outcomes of use (for example, any reported cases civilian harm), rather than solely compliance with international law. Under the Blue Lantern program, the category for

105 Finucane, Brian. "Partners and Legal Pitfalls." *International Law Studies* 92 (2016): 407-431. <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1694&context=ils>.

106 Defense Security Cooperation Agency. *Identifying Foreign Military Financing Recipient Units*, DSCA Policy 16-32, September 12, 2016. <http://www.samm.dsca.mil/policy-memoranda/dsca-16-32>.

107 Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel, Facilities and Policy.

“unfavorable review” should be further delineated to include a category for credibly reported human rights abuses, violations of IHL, and harm to civilians or civilian infrastructure as a result of deliberate or inappropriate use. The US government should more consistently enforce sanctions for non-compliance, and link the results of end-use monitoring to future or prospective sales in the terms and conditions of sale.

**10. Bundle and sequence more technical assistance and training with sales.** FMS items in USML categories 4, 5, and 8 should be subject to a set of technical prerequisites rather than conditions. Through a system of prerequisites, purchasing countries could become eligible for the highest-risk items by aligning operations and training with weapons capabilities. Under such a system, the appropriate technical training would occur before the delivery of an item. FMS sales should also be bundled with technical and operational training from the US military related to appropriate use of an item—to include human rights-related training—which should be stipulated as a requirement in Letters of Offer and Acceptance.

**11. Provide training to security cooperation officers and the rest of the country team at the embassy.** Particularly for more complex country relationships, provide training and education to security cooperation officers, country teams, and other relevant embassy staff on the relationship between weapons systems and country capacities, risks, and the importance of defense institutions, accountability, and oversight.<sup>108</sup>

**12. Provide more insight and education to Congress and staff.** DoD should work with relevant Congressional committees and staff earlier in the process to identify options for minimizing harm to civilians through training and other due diligence measures for the sale of FMS-only items. Likewise, for higher-risk items Congress should demand additional information and analysis regarding risks to civilians; dissenting opinions within the executive branch; accompanying technical training and planned sequencing; terms of sale; and end-use monitoring (see recommendations for Congress below).

**13. Make the arms transfer process more transparent to non-governmental stakeholders and**

**the public.** As previously noted, civil society and the interested public in both the US and the purchasing country – key stakeholders who often have pertinent information about partners’ behavior and capacity and may be directly affected by a misguided sale – are often unaware of potential sales until they are officially notified to Congress. The Departments of State and Defense should identify ways to make the process more transparent to the interested public, whether through regular civil society outreach and consultation or public releases earlier in the process. The Office of Defense Trade Controls should also periodically release digital registration and licensing records to the public.

**14. Clarify tradeoffs in appropriately relative terms:** When discussing the tradeoffs involved with risk mitigation and controls on arms sales, external groups, and the US government itself, should clarify the true value represented by any one transaction, or even buyer, as a proportion of total US arms exports. Russia and China may present a competitive challenge in the arms sales market, but strengthening the terms of any one sale will not compromise a distinct American advantage in the global market, and could strengthen it in the long term.

**15. Engage industry and civil society in a dialogue focused on reducing risk in US arms sales:** Arms manufacturers can benefit from sensible and uniform measures that reduce the risk that their products will result in unlawful acts or other unintended consequences. State and DOD should engage industry in a dialogue, involving civil society, to justify risk-mitigation controls and to find innovative ways that industry can be part of the solution to civilian harm.

## Recommendations for Congress

**1. Require additional information on potential sales and mandate changes to terms of sale when necessary.** For higher-risk items, Congress should require additional information and planned mitigation measures regarding civilian harm, including analysis of civilian harm risks; dissenting opinions within the executive branch; accompanying technical training and planned sequencing; terms of sale; and end-use monitoring.

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<sup>108</sup> Rose Jackson suggests in her blueprint for US security sector assistance reform, “To be eligible for deployments to these complex countries, DoD security cooperation officers should be required to have higher-level certification through DSCA’s Defense Institute of Security Cooperation Studies. All SSA-related personnel at embassies should be required to participate in Integrated Country Strategy development and should be required to support the security sector lead as needed.”

**2. Employ, and therefore strengthen, existing legislation:** Congress should more regularly invoke the AECA for risky or concerning sales, including by asking for State and DoD's analysis of the parameters required in the AECA (e.g., contributing to an arms race or escalating conflict) and by asking for reports on potential violations of the AECA, particularly on the basis of use or behavior. Congress should clarify its intent that existing authorities include compliance with international humanitarian and human rights obligations as a condition of export. Congress should also require that the Departments of State and Defense apply the Leahy Law to Foreign Military Sales.

**3. Add a requirement in authorizations or appropriations bills to require risk assessments and reporting for specific arms-importing countries.** Congress should add a reporting requirement to the annual Defense or State Authorization bill to require more comprehensive risk assessment of countries involved in conflict that also receive US arms transfers. For example, a draft amendment to the NDAA for Fiscal Year 2018 (H.R. 2810) requires the President to submit “a report that contains a comprehensive strategy to support improvements in defense institutions and security sector forces in Nigeria” including “an assessment of efforts by the Government of Nigeria to improve civilian protection, accountability for human rights violations, and transparency in the defense institutions and security sector forces” and “an assessment of efforts undertaken by the security forces of the Government of Nigeria to improve the protection of civilians in the context of...ongoing military operations against Boko Haram in the northeast region.”<sup>109</sup> Such a report would aid both the executive and legislative branches in assessing the risk of civilian harm by security forces receiving US security assistance, including arms transfers.

**4. Inform constituents about the arms sales process, risky arms sales, and potential reforms.** As discussed above, the arms sales process can be difficult for the American public to access and understand, and the mechanisms by which concerned citizens can voice their concerns are often unclear. Members of Congress should inform their constituents about the process, potential concerning sales, and the ways in which members plan to strengthen or reform the process through legislation through hearings, public notices, and other means of communication.

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109 National Defense Authorization Act for Fiscal Year 2018, H. R. 2810 (2017).

## FOREIGN MILITARY SALES (FMS) PROCESS MAP



**1 DEFINING REQUIREMENTS** The partner nation, with guidance from US Embassy personnel defines which defense articles and services they seek to purchase.



**2 SUBMITTING THE LETTER OF REQUEST (LOR)** The purchasing government submits a formal Letter of Request, often including information on the items requested, intended use, desired delivery date, funding source, and other support considerations.



**3 EVALUATING THE LOR** Embassy officials, State Department, DSCA, and other Defense components begin the process of evaluating the case. If the LOR meets the standards for Congressional notification, a Country Team Assessment (CTA) is required.



**4 CONGRESSIONAL NOTIFICATION** If the sale includes particular articles and services, and if it exceeds a certain cost threshold, Congress must be notified. Depending on the country, Congress is notified 15 or 30 days before the LOA is signed. This is also when the sale becomes public.



**5 PREPARING THE LETTER OF OFFER AND ACCEPTANCE (LOA)** The LOR is reviewed by security cooperation offices in the Departments of Defense and State. This review includes assessments of whether the sale is possible, whether the partner nation can support the requested capabilities, and whether the sale fits US policy.



**6 SIGNING AND ACCEPTING THE LOA** If Congress has no objections and final reviews return favorably, the LOA is signed and presented to the partner nation as a formal offer of sale. The partner nation then has a set number of days, depending on the country, to sign and return the LOA.



**7 IMPLEMENTATION AND EXECUTION** This is the longest phase of the process and may take many years for larger sales. This phase includes steps such as placing the order with U.S. manufacturers, negotiating contracts, and arranging for shipment and delivery.



**8 END-USE MONITORING (EUM)** State and the Embassy conduct EUM checks done for all items through regular visits to partner country installations, and enhanced EUM checks that are required for certain items and conducted by serial number.

## FOREIGN MILITARY SALES (FMS) REVISED PROCESS MAP

*At any point during this process, the outbreak or escalation of conflict, political violence, or atrocities should trigger a thorough policy review of sales.*



## ANNEX A | CONGRESSIONAL NOTIFICATION THRESHOLDS

### Congressional Notifications

#### 30 CALENDAR DAYS

before final steps to conclude government-to-government sale / \*approve license for export

All countries except NATO member states, Japan, Australia, Israel, Jordan, South Korea, and New Zealand	Major defense equipment	\$14 million or more
	Defense articles or services	\$50 million or more
	Design and construction services	\$200 million or more
	*Commercially licensed sale of firearms controlled by USML	\$1 million or more

#### 15 CALENDAR DAYS

before final steps to conclude government-to-government sale / \*approve license for export

NATO member states, Japan, Australia, Israel, Jordan, South Korea, and New Zealand	Major defense equipment	\$25 million or more
	Defense articles or services	\$100 million or more
	Design and construction services	\$300 million or more
	*Commercially licensed sale of firearms controlled by USML	\$1 million or more



## ANNEX B | COUNTRY TEAM ASSESSMENT COMMON REQUIRED ELEMENTS

Table C5.T1. Country Team Assessment – Common Required Elements

#	Required Element
1	Reason the purchaser desires the defense articles or services and description of how the country or organization intends to use them.
2	Appropriateness of the proposed sale in responding to legitimate recipient security needs.
3	Impact of the proposed sale on the military capabilities of the proposed recipient, including the ability of the proposed recipient effectively to field, support, and appropriately employ the requested defense articles in accordance with their intended use.
4	Source of financing and risk of adverse economic, political, or social impact within the recipient nation and the degree to which security needs might be addressed through other means.
5	The human rights, terrorism, and proliferation record of the proposed recipient and the potential for misuse of the defense articles in question.
6	How the articles or services would contribute to both the U.S. and the recipient's defense/security goals.
7	The proposed recipient's will and ability to account for and safeguard sensitive technology from transfer to unauthorized third parties or in-country diversion to unauthorized uses.
8	The availability of comparable systems from foreign suppliers.
9	How the proposed sale would contribute to U.S. security and foreign policy goals.
10	How the proposed sale would affect the relative military strength of the countries in the region and its impact on U.S. relations with countries in the region. This is especially important when considering sales involving power projection capability or introduction of a system that could conceivably increase tension or contribute to an arms race.
11	Possible impact of or reaction to any in-country U.S. presence that might be required to carry out the sale or provide training.

SAMM Manual, Chapter 5, <http://www.samm.dsca.mil/chapter/chapter-5>

## ANNEX C | FMS ONLY LIST

Foreign Military Sales (FMS) only	
<b>General criteria are used to determine if an item can only be purchased through FMS</b>	
<ol style="list-style-type: none"> <li>1. Legislative or Presidential restrictions</li> <li>2. Department of Defense or military department (MILDEP) policy/directive/requirement, which considers:               <ol style="list-style-type: none"> <li>a. U.S. political/military relationship with the end-user and the geopolitical context</li> <li>b. Whether the sale is of a new or complex system or service</li> <li>c. Possibility of diversion and exploitation or technologies</li> </ol> </li> <li>3. Government-to-government agreement requirements</li> <li>4. Interoperability/safety requirements for U.S. forces</li> </ol>	
<b>General categories of military capabilities/systems that the USG considers only for sale through FMS</b>	
Select Radars	Air-to-Air Missiles
Attack Helicopters	Autonomous Weapons Systems
Ballistic Missile Defense Items	Special Purpose Aircraft Items
Counter IED Items	Cross Domain Solutions (involving critical U.S. systems)
Directed Energy Weapons	Fighter Aircraft
Ground Based Air Defense Items	Infrared Countermeasures
Intelligence Libraries/Threat Data	LADAR/LIDAR
Man-Portable Air Defense Items	Military Aerosol Delivery Systems
Missiles	Mission Equipment/Systems
Mission Planning Systems	Missile Technology Control Regime CAT I Items
GPS/PPS (some allowances for certain DCS transfers)	Nuclear/Nuclear Propulsion
Select Electronic Warfare Items	Select Sensor Fusion Man-Portable Night Vision Devices
Sensor Fused Weapons	Stand Off Weapons
Sonar	COMSEC
Select Torpedoes	Torpedo Countermeasures
Anti-Ship Cruise Missile Countermeasures	Unmanned Aerial Systems and Related Components

## ANNEX D

# Framework for Policy Review and Risk Assessment of Proposed SSA Activities

### RECIPIENT.....

**Do you know who the recipient unit is? If not, why not? Do you know its primary mission and chain of command? Are you familiar with past U.S. relationships with and assistance programs involving the unit?**

### INTERESTS.....

**Overlapping Interests:** What are the recipient's primary interests? Do they overlap with those of the United States? Where the U.S. interest is not the recipient's highest priority, what assurances are there that the recipient will use U.S.- provided capability and resources to advance the U.S. goal?

**Conflicting Interests:** Is the security force affiliated with or known to cooperate with security forces or militias outside of government control? Is the security force involved in any commercial businesses, state-owned or otherwise that may present a conflict of interest or adversely impact its implementation of U.S. assistance?

### CONDUCT & APPEARANCES.....

**Affiliations:** Is the security force affiliated with a particular person or partisan, ethnic, tribal, or religious group that prevents it from acting impartially or appearing to act impartially?

**Corruption:** Is there public trust in the recipient? Is the security force known to be or reported to be corrupt, through acts such as permitting illicit trafficking across borders, buying and selling positions or professional opportunities, stealing government assets and resources, engaging in bribery, or maintaining rolls of ghost personnel? Is the security force linked to a particular criminal patronage network or organization? Is the recipient's budget, procurement, and personnel system transparent? Does the security force have standards of ethical behavior or policies regarding conflict of interest and are these policies enforced?

**Human Rights:** Are there reports of human rights abuses by the recipient? Even if they are unsubstantiated, does the public believe them to be true? Are there functioning systems for accountability in place? Has the recipient been denied assistance under the Leahy Law or on other human rights grounds in the past?

**Democratic Behavior:** Is the security force involved with civilian government in inappropriate ways (e.g., holding civilian office, directing civilian decision-making, interfering with elections, etc.)? Even where the security forces are not involved, is the regime undermining democracy or civil rights in ways that should influence U.S. assistance policy?

**End-Use Risks:** Given the above factors or other considerations, are there risks that the recipient violate its end-use assurances by inappropriately transferring the assistance to a non-government actor, an unapproved government recipient (such as a police force) or by using the assistance for a purpose other than that which was agreed between the United States and the recipient?

### ABSORPTIVE CAPACITY.....

**Human Resources:** Does the recipient have sufficient staff with the sufficient skillset to accept the proposed training and effectively make use of the capability? (Factors may include English or local language literacy, rampant absenteeism, quality of basic training, or chronic staffing shortages).

**Operations and Maintenance:** Does the recipient have the resources necessary to operate the provided equipment, including funding for associated consumables, such as fuel? Does the recipient have the logistical and supply chain management capability to ensure necessary people, supplies, and other associated requirements are where they need to be?

**Long-Term Sustainment:** Does the recipient understand the requirements for long-term sustainment and have the ability to integrate those requirements into its budget planning? Does the recipient have the ability to perform basic maintenance on provided equipment, and have a plan for higher level maintenance?

**Integration:** Does the recipient's leadership have the ability to integrate this new capability into its operations?

### PROGRAM PLANNING.....

**Strong Plans:** Does the security assistance program proposal rely on a clear "theory of change", describing how the program would contribute to established U.S. foreign policy objectives, as described in the Integrated Country Strategy? Does the program proposal address both operational and institutional gaps and challenges? Does it complement, rather than conflict with or duplicate, other U.S. assistance efforts? Is the program based on objectives that are Specific, Measurable, Achievable, Relevant, and Time-bound (SMART)?

**Partner Buy-In:** Is the recipient willing to integrate the capability into its operations, and fund its operations and sustainment? Will the partner use the assistance for its intended purpose?



*An F-16 Fighting Falcon aircraft releases flares*  
DoD/Sgt. Antony Lee, U.S. Army

## ANNEX E

### DSCA Policy Memo Amending Reporting Requirements for Cluster Munitions



DEFENSE SECURITY COOPERATION AGENCY  
DSCA 1210-01-0111-17 5042-101-57E-2001  
ARLINGTON, VA 22204-1406

MAY 23 2016

MEMORANDUM FOR DEPUTY UNDER SECRETARY OF THE AIR FORCE FOR  
INTERNATIONAL AFFAIRS  
DEPUTY ASSISTANT SECRETARY OF THE ARMY FOR DEFENSE  
EXPORTS AND COOPERATION  
DEPUTY ASSISTANT SECRETARY OF THE NAVY FOR  
INTERNATIONAL PROGRAMS  
DIRECTOR, DEFENSE CONTRACT MANAGEMENT AGENCY  
DIRECTOR FOR SECURITY ASSISTANCE, DEFENSE FINANCE  
AND ACCOUNTING SERVICE-INDIANAPOLIS OPERATIONS  
DIRECTOR, DEFENSE INFORMATION SYSTEMS AGENCY  
DIRECTOR, DEFENSE LOGISTICS AGENCY  
DIRECTOR, DEFENSE LOGISTICS INFORMATION SERVICE  
DIRECTOR, DEFENSE LOGISTICS AGENCY DISPOSITION  
SERVICES  
DIRECTOR, DEFENSE THREAT REDUCTION AGENCY  
DIRECTOR, MISSILE DEFENSE AGENCY  
DIRECTOR, NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY  
DEPUTY DIRECTOR FOR INFORMATION ASSURANCE,  
NATIONAL SECURITY AGENCY

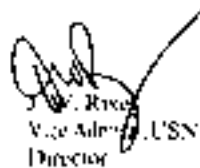
SUBJECT: Revision of the Mandatory Note for Sales of Cluster Munitions with  
Submunitions with a Confirmed 99% or Higher Testal Rate. (DSCA Policy 16-  
29, E-Change 212)

Recent instances of the use of cluster munitions have increased public discussion about civilian casualties from cluster munitions and revived humanitarian concerns related to their use. The Department of State has therefore requested that additional reporting requirements be associated with new sales of cluster munitions with submunitions at the legally required 99% or higher functioning rate.

This memo adds to the current mandatory Cluster Munitions note a requirement that the purchaser agrees whenever the munitions being sold are taken out of inventory on a permanent basis to report the date, quantity, place expended, and a brief description of the circumstances under which it was expended to the Bureau of Political-Military Affairs, Office of Regional Security and Arms Transfers (PMORSA/T), U.S. Department of State, either directly or through the Security Cooperation Office.



For questions concerning this policy, please or for general questions concerning the SMM, please contact Mike Slack, STR/SPI, michael.slack@mil.mil or (703) 697-9058. Implementing Agencies should ensure dissemination to supporting activities. Updates to the SMM are posted regularly at [www.cimmsdca.mil](http://www.cimmsdca.mil).



J.W. Rice  
Vice Admiral, USN  
Director

Attachment:  
As stated

cc:  
STATE/PM-RSAT  
AFRICOM  
CENTCOM  
EUCOM  
NORTHCOM  
PACOM  
SOCCOM  
SOUTHCOM  
TRANSCOM  
USASAC  
SATEA BRADOC  
NAVICP  
NETSAFA  
AFSAC  
AFSAT  
DISAM  
DTSA  
OUSD(AI&L)

# Security Assistance Management Manual (SAMM), E-Change 313 Revised Cluster Munitions Note

1. In Appendix 6, revise the Note Text as below:

## Cluster Munitions with Submunitions with a Confirmed 99% or Higher Tested Rate

### Note Usage

Mandatory for FMS LOAs that include cluster munitions or cluster munitions technology.

Mandatory for Amendments or Modifications that add cluster munitions or cluster munitions technology.

### References

### Note Input Responsibility

IA

### Note Text

“The purchaser agrees that the [insert type of munitions] will be used only against clearly defined military targets and will not be used where civilians are known to be present or in areas normally inhabited by civilians. Whenever these munitions are taken out of inventory on a permanent basis for any reason (retransferred or expended in testing, training, disposal, or operations), the purchaser agrees, by the 15th of the month following the end of any calendar year quarter in which such an event has occurred, to report the information required below to the U.S. Department of State, either directly at [PM\\_RSAT@state.gov](mailto:PM_RSAT@state.gov) or through the Security Cooperation Office:”

Date	Quantity	Recipient if retransferred; if expended, provide location of the expenditure (e.g., name of base, training range, target coordinates)	Brief Description of the Circumstances (e.g., retransfer or expended in testing, disposal, training, or operations)
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## ANNEX F | GLOSSARY OF TERMS AND ACRONYMS

<b>AECA:</b> Arms Export Control Act	<b>FMS:</b> Foreign Military Sales
<b>ATT:</b> Arms Trade Treaty	<b>ICCPR:</b> International Covenant on Civil and Political Rights
<b>CJ:</b> Commodity Jurisdiction Request	<b>ICRC:</b> International Committee for the Red Cross
<b>CCL:</b> Commerce Control List	<b>IHL:</b> International Humanitarian Law
<b>CCM:</b> Convention on Cluster Munitions	<b>INR:</b> The State Department's Bureau of Intelligence and Research
<b>CCMD:</b> Combatant Command	<b>ITAR:</b> International Traffic in Arms Regulations
<b>CCW:</b> Convention on Certain Conventional Weapons	<b>LOA:</b> Letter of Offer and Acceptance
<b>CTA:</b> Country Team Assessment	<b>LOR:</b> Letter of Request
<b>DCS:</b> Direct Commercial Sales	<b>MDA:</b> Mutual Defense Assistance Agreement of 1952 between the US and Israel
<b>DDTC:</b> The Office of Defense Trade Controls, within the State Department's Bureau of Political Military Affairs	<b>MTCR:</b> Missile Technology Control Regime
<b>DIILS:</b> Defense Institute for International Legal Studies	<b>NDAA:</b> National Defense Authorization Act
<b>DISCS:</b> Defense Institute of Security Cooperation Studies	<b>P&amp;A:</b> Pricing and Availability Response to a Letter of Request
<b>DOTMLPF-P:</b> Framework used by the US military that considers Doctrine, Operations, Training, Materiel, Leadership, Personnel, Facilities, and Policy	<b>PM:</b> The State Department's Bureau of Political Military Affairs
<b>DRL:</b> The State Department's Bureau of Democracy, Human Rights and Labor	<b>REUM:</b> Routine End-Use Monitoring
<b>DSAMS:</b> Defense Security Assistance Management System	<b>RSAT:</b> The Office of Regional Security and Arms Transfers within the State Department's Bureau of Political Military Affairs
<b>DSCA:</b> Defense Security Cooperation Agency	<b>SA:</b> The Office of Security Assistance within the State Department's Bureau of Political Military Affairs
<b>DSCA-CWD:</b> The Defense Security Cooperation Agency's Case Writing Division	<b>SAMM:</b> Security Assistance Management Manual
<b>DTSA:</b> Defense Technology Security Administration	<b>SCO:</b> The Office of Defense Cooperation, also referred to as the Security Cooperation Office or Security Cooperation Organization; may also refer to Security Cooperation Officers
<b>EAR:</b> Export Administration Regulations	<b>SIPRI:</b> Stockholm International Peace Research Institute
<b>EEUM:</b> Enhanced End-Use Monitoring	<b>SME:</b> Significant Military Equipment, a designation under the US Munitions List
<b>EUM:</b> End-Use Monitoring	<b>USML:</b> US Munitions List
<b>FAA:</b> Foreign Assistance Act of 1961	
<b>FMF:</b> Foreign Military Financing	



## MAIN GAPS AND RECOMMENDATIONS

### For Modifying the US Arms Sales Process

- 1 INTERPRETING & APPLYING INTERNATIONAL LAW** The US should ensure that it has the access and information necessary to evaluate whether or not the conduct of its partners is lawful when the partner becomes involved in the conduct of hostilities using certain US weapons.

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- 2 ALIGNING ARMS SALES WITH NEEDS, CAPABILITIES, & CONDUCT OF PARTNERS** The US government should evaluate arms sales on the basis of aggregated risk as a function of prior conduct and its consequences, alignment of interests, and partner capacity and competence.

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- 3 AVOIDING PREMATURE COMMITMENTS** The FMS process commits US policymakers to sales too early in the process, effectively “locking in” sales decisions before appropriate due diligence can be paid. No commitments should be made to sell high-risk arms to the purchasing country until such time as a sale has been fully vetted.

---

- 4 ACCOUNTING FOR FLUID CONFLICT ENVIRONMENTS** No systematic controls exist to appropriately adapt the arms sales process as the risk of armed conflict increases or upon the breakout or escalation of armed conflict. The US government should establish conflict-related “tripwires” that require re-assessment of certain arms sales and the identification of options for preventing civilian harm through the use of certain weapons systems at any sign of adverse consequences.

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- 5 STRENGTHENING TERMS OF SALE & END-USE MONITORING** Controls throughout the arms sales process are almost exclusively focused on protecting technology from diversion or transfer, rather than misuse or unintended consequence. The US should strengthen the terms of sale and end-use monitoring requirements for certain defense items, to include standards for use and behavior.

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- 6 CUSTOMIZING TECHNICAL ASSISTANCE TO REDUCE HARM** At present, technical assistance customized to address civilian harm is not systematically paired with major weapons sales conducted via the FMS program in high risk countries or for high risk items. The US government should ensure that arms sales are accompanied by technical assistance focused on appropriate and lawful use of an item; include the promotion of changes in process and policy that ensure appropriate use; and, in some cases, require testing before delivery as a prerequisite to finalizing the sale.

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- 7 STRENGTHENING CONGRESSIONAL OVERSIGHT ROLES** In practice, Congress rarely appeals to domestic regulations to block or modify risky sales. Congress should request additional analysis regarding civilian harm and mitigation measures for certain sales; more regularly invoke domestic regulations governing the appropriate use of US arms by partner forces; and utilize legislation such as the National Defense Authorization Act to strengthen measures to prevent civilian harm associated with arms transfers.

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- 8 INCREASING TRANSPARENCY** The US government should make information on potential sales – including planned civilian harm mitigation measures - available earlier in the process, and should more regularly consult with affected stakeholders in the United States and within the purchasing country.

## **ABOUT THIS REPORT**

*With Great Power: Modifying US Arms Sales to Reduce Civilian Harm*, is a joint product of the Center for Civilians in Conflict and the Stimson Center. The report examines how the US arms sales process works in practice, and how it might be amended to reduce the risk of harm to civilians in conflict. The report provides a brief overview of legal obligations and requirements, and describes existing US government processes used to sell weapons through commercial and government-to-government transactions. The report describes major gaps and risks in the US arms sales process that increase the risk of adverse or unintended consequences, especially for civilians in conflict, and provides a set of recommendations for the State and Defense Departments and the US Congress. The report is based on desk and legal research, interviews conducted with former and current US government officials and arms control experts, and a process improvement workshop conducted at the Stimson Center.

*BACK COVER U.S. Air Force F-15E Strike Eagle aircraft from the 335th Fighter Squadron drop 2,000-pound joint direct attack munitions on a cave in eastern Afghanistan  
DoD Photo/Staff Sgt. Michael B. Keller, U.S. Air Force*





**RECOGNIZE. PREVENT. PROTECT. AMEND.**

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