

# Walking the Talk:

2021 Blueprints for a Human Rights-Centered  
U.S. Foreign Policy



## Chapter 8: Overhauling U.S. Security Sector Assistance



# Acknowledgments

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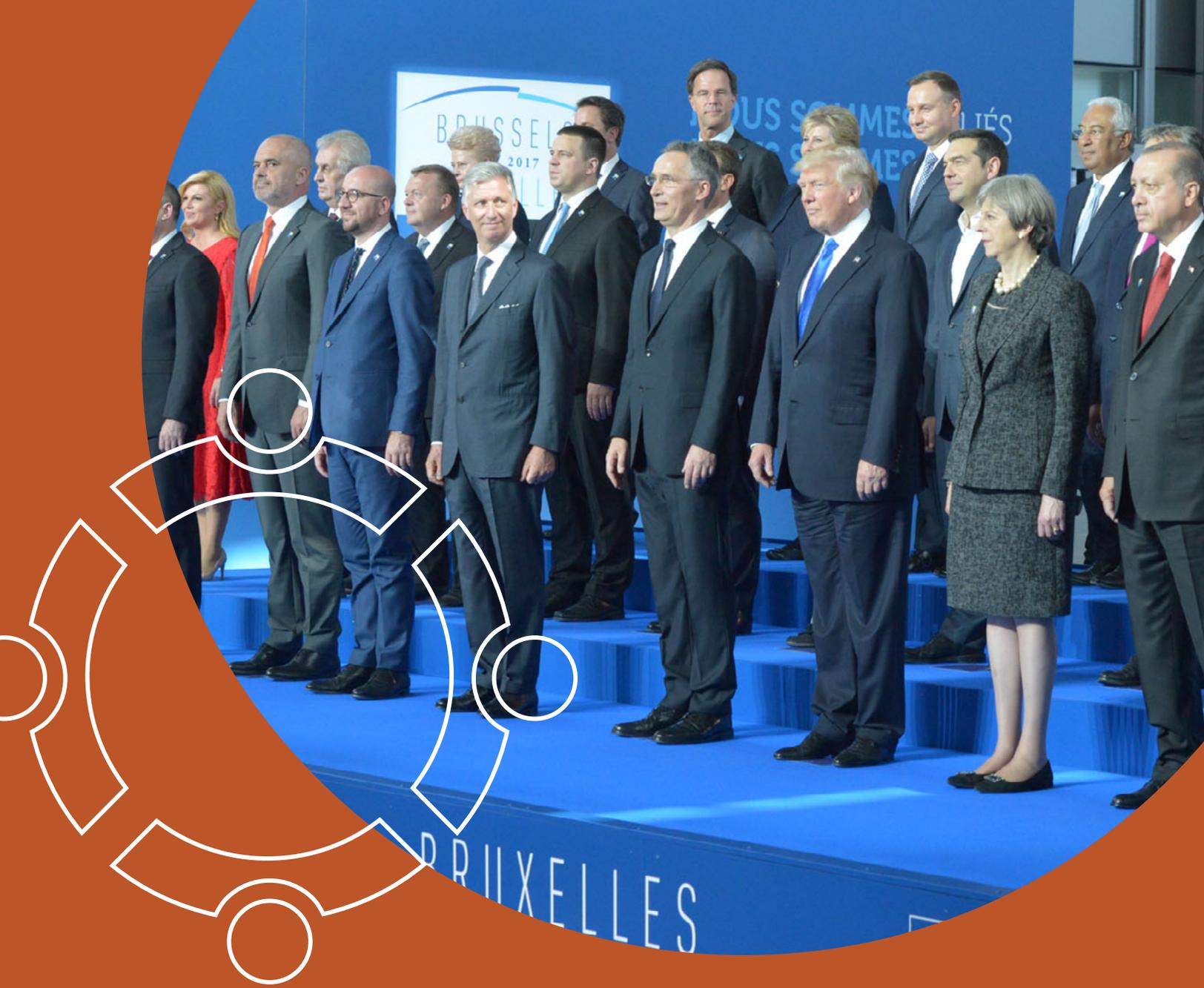
Human Rights First challenges the United States of America to live up to its ideals. We believe American leadership is essential in the struggle for human dignity and the rule of law, and so we focus our advocacy on the U.S. government and other key actors able to leverage U.S. influence. When the U.S. government falters in its commitment to promote and protect human rights, we step in to demand reform, accountability, and justice.

When confronting American domestic, foreign, and national security policies that undermine respect for universal rights, the staff of Human Rights First focus not on making a point, but on making a difference. For over 40 years we've built bipartisan coalitions and partnered with frontline activists, lawyers, military leaders, and technologists to tackle issues that demand American leadership.

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# Overhauling U.S. Security Sector Assistance

# Introduction

America's global network of formal allies and security partners provides the U.S. government with an unparalleled source of strength. Security partnerships, however, are only as strong as the common interests and values that bind them. Historically, U.S. alliances with other human rights-respecting, democratic states, such as NATO, have proven both durable and successful in advancing American interests over the long run. The opposite is also true. History is replete with examples of U.S. support for human rights-abusing allies and partners negatively impacting U.S. long-term interests.<sup>1</sup>

One of the primary tools the U.S. government uses to establish and maintain its security-based partnerships is the provision of defense-related goods and services, alternatively referred to as “security assistance,” “security cooperation,” and “security sector assistance.”<sup>2</sup> According to the Congressional Research Service, this category of U.S. foreign assistance encompasses a “wide spectrum of activities, including the transfer

***[T]he United States is today, by far, the world's largest arms exporter.***

of conventional arms, training and equipping regular and irregular forces for combat, law enforcement training, defense institution reform, humanitarian assistance, and engagement and educational activities.”<sup>3</sup> Proponents of robust security assistance programs argue that such programming

promotes regional stability, builds the capacity of partner militaries to confront shared threats, provides the United States with influence over foreign governments' policies (including with respect to human rights), and significantly benefits the U.S. economy.<sup>4</sup> Detractors of these programs point to the U.S. government's long history of arming and supporting human rights abusers and the negative impact that such support has had on U.S. strategic interests.<sup>5</sup> While it is difficult to quantify the extent to which such assistance has bought the United States access and influence with foreign partners, a wide range of analysts argue that U.S. security assistance programming is in need of reform.<sup>6</sup>

Since the attacks of September 11, 2001, the size of U.S. security assistance programming has increased dramatically, including to governments and groups with well-documented histories of systemic human rights violations.<sup>7</sup> As one element of the larger security assistance picture, the United States is today, by far, the world's largest arms exporter.<sup>8</sup> Since 2001, the United States has publicly acknowledged the sale of \$560 billion in arms to 167 different countries.<sup>9</sup> Between 2014 and 2018, U.S. arms exports increased by 29 percent.<sup>10</sup> While many of the largest buyers of American-made arms are democratic allies such as Australia and Japan, many others are not. In fact, of the 10 largest recipients of U.S. arms exports between 2014 and 2018, half were rated “not free” by Freedom House in its annual analysis of worldwide political rights and civil liberties.<sup>11</sup>

1 See, for example, U.S. government support for Iranian Shah Mohammad Reza Pahlavi, Cuban dictator Fulgencio Batista y Zaldívar, and Pakistani President Muhammad Zia-ul-Haq.

2 Definitions according to the Defense Security Cooperation Agency, *Security Assistance Management Manual*, available at <https://www.samm.dsca.mil/chapter/chapter-1>.

3 Susan Epstein, Liana Rosen, Congressional Research Service, R45091, *U.S. Security Assistance and Security Cooperation Programs: Overview of Funding Trends*, p. 1 (Feb. 1, 2018) available at <https://fas.org/sgp/crs/natsec/R45091.pdf>; see also Nina Serafino, Congressional Research Service, R44444, *Security Assistance and Cooperation: Shared Responsibility of the Departments of State and Defense* (May 26, 2016) available at <https://fas.org/sgp/crs/natsec/R44444.pdf>.

4 Melissa Dalton et al., Center for Strategic and International Studies (CSIS), *Oversight and Accountability in U.S. Security Sector Assistance*, p. 60 (Feb. 2018) available at <https://www.csis.org/analysis/oversight-and-accountability-us-security-sector-assistance>.

5 A. Trevor Thrall, Caroline Dorminey, CATO Institute, *Risky Business: The Role of Arms Sales in U.S. Foreign Policy*, p. 11 (Mar. 13, 2018) available at <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-836.pdf>.

6 See *supra* notes 4, 5; Gordon Adams, Richard Sokolsky, *Governance and Security Sector Assistance: The Missing Link—Part II*, *Lawfare* (Jul. 19, 2015) available at <https://www.lawfareblog.com/governance-and-security-sector-assistance-missing-link%E2%80%94part-ii>; Mara Karlin, Brookings, *Why Military Assistance Programs Disappoint* (2017) available at <https://www.brookings.edu/articles/why-military-assistance-programs-disappoint/>.

7 For example, since 9/11, the United States government has sold an average of \$1.8 billion in U.S. weapons to Libya, Iraq, Yemen, the Democratic Republic of Congo, and Sudan, all of which have egregious human rights records. See Thrall, Dorminey, *supra* note 5.

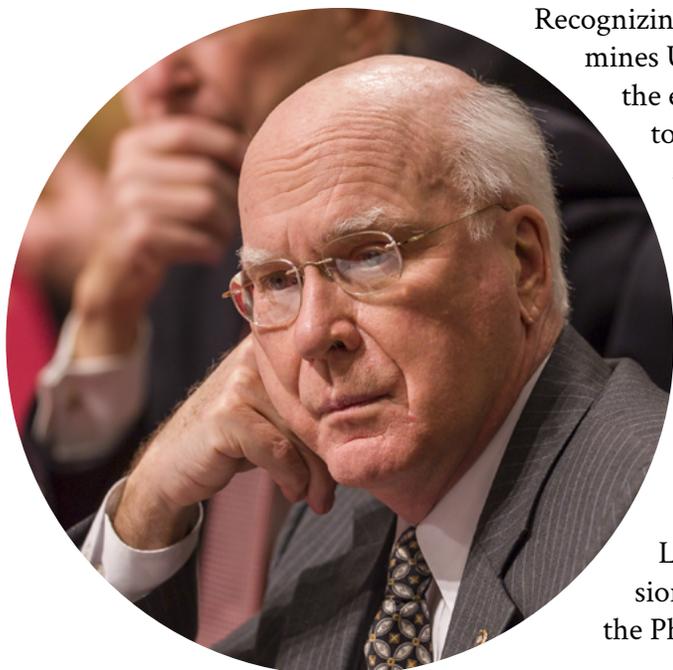
8 Stockholm International Peace Research Institute (SIPRI), *Global Arms Trade: USA Increases Dominance; Arms Flows to the Middle East Surge* (Mar. 11, 2019) available at <https://sipri.org/media/press-release/2019/global-arms-trade-usa-increases-dominance-arms-flows-middle-east-surge-says-sipri>.

9 A. Trevor Thrall, Jordan Cohen, *The False Promises of Trump's Arms Sales*, *Defense One* (Apr. 5, 2019) available at <https://www.defenseone.com/ideas/2019/04/false-promises-trumps-arms-sales/156071/>.

10 *Global Arms Trade*, *supra* note 8.

11 Per data compiled by the Stockholm International Peace Research Institute (SIPRI), leading recipients of U.S.-manufactured arms in 2014-2018 were Saudi Arabia, Australia, UAE, Iraq, Taiwan, South Korea, Turkey, Japan, Qatar, and Israel. See Stockholm International Peace Research Institute (SIPRI), *Importer/Exporter TIV Tables*,

Simply put, notwithstanding U.S. law, the history of American security assistance programming has, in many instances, been defined by the U.S. government's willingness to support foreign governments that do not share the United States' interest in the protection and promotion of human rights. Presidential administrations since the end of World War II have consistently prioritized perceived short-term objectives over long-term U.S. interests, a logic that has resulted in the provision of security assistance to dozens of dictatorial and authoritarian regimes. Some of the more familiar examples include U.S. support for the Iranian Shah in the run-up to that country's 1979 revolution, support for General Manuel Noriega in Panama before his U.S.-led ouster in 1989, and support for Iraq's Saddam Hussein during the Iran-Iraq war. In many such examples, apparent American indifference to the human rights record of its security partner resulted in not only foreseeable human rights abuses, but also in intense public backlash toward the United States, as well as adverse effects on regional security.



Recognizing that American support for human rights abusers undermines U.S. interests, Congress has repeatedly attempted to restrict the executive branch's ability to provide security assistance to governments that have engaged in serious human rights abuse.<sup>12</sup> These statutory safeguards endeavor to limit executive discretion over the provision of security assistance by conditioning the receipt of such assistance on the human rights record of the recipient country. Congress has imposed human rights conditions on security assistance in various ways, including through broad statutory prohibitions on security assistance to known human rights abusers, targeted prohibitions on the provision of security assistance to units of foreign security forces deemed responsible for gross violation of human rights (so-called "Leahy Laws"), and country-specific prohibitions that ban the provision of assistance to individual governments, such as Egypt,<sup>13</sup> the Philippines,<sup>14</sup> and Indonesia.<sup>15</sup>

Though little-known and habitually ignored, the U.S. government's most important law related to human rights conditionality is the Foreign Assistance Act's Section 502B (codified at 22 U.S.C. § 2304(a)-(i)).<sup>16</sup>

Section 502B states that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."<sup>17</sup> It goes on to direct the president "to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise."<sup>18</sup>

available at <http://armstrade.sipri.org/armstrade/page/values.php>; see also Freedom House, *Countries and Territories: Global Freedom Scores*, available at <https://freedomhouse.org/report/freedom-world/freedom-world-2019/map>.

12 See Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 Am. J. Int'l L. 246 (1982) available at <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2605&context=facpub>.

13 See Congressional Research Service, RL33003, *Egypt: Background and U.S. Relations* (last updated May 27, 2020) available at <https://fas.org/sgp/crs/mideast/RL33003.pdf>.

14 See Cohen, *supra* note 12.

15 See Cohen, *supra* note 12 at p. 254; Murray Hiebert, Ted Osius, Gregory B. Poling, Center for Strategic and International Studies (CSIS), *A U.S.-Indonesia Partnership for 2020: Recommendations for Forging a 21st Century Relationship* (Sep. 2013) available at [https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/130917\\_Hiebert\\_USIndonesiaPartnership\\_WEB.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/130917_Hiebert_USIndonesiaPartnership_WEB.pdf). For a primer on the Leahy Laws, see U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Leahy Law Fact Sheet* (Jan. 22, 2019) available at <https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet/>.

16 22 U.S.C. § 2304(a)-(i), available at <https://www.law.cornell.edu/uscode/text/22/2304>.

17 *Id.* at § 2304(a)(1).

18 *Id.* at § 2304(a)(3).

In keeping with this intent, Section 502B prohibits the executive branch from providing security assistance to foreign governments that have engaged in a “consistent pattern of gross violations of internationally recognized human rights.”<sup>19</sup> The president may waive the restriction only if he or she provides Congress with a written certification that “extraordinary circumstances” justify the action.<sup>20</sup> Additionally, the Secretary of State is obligated to submit an annual report to Congress that details the human rights record of each proposed recipient of security assistance for the following fiscal year—a requirement that has resulted, in part, in the State Department’s annual *Country Reports on Human Rights Practices*, which are frequently referred to as the “Human Rights Reports.”<sup>21</sup>

***By both ignoring and circumventing Section 502B for nearly four decades, successive administrations have plainly undermined Congressional intent.***

Section 502B establishes a clear, if also non-absolute, expectation that the U.S. government will not provide security assistance to habitual human rights violators. Importantly, the section allows for executive branch discretion in supplying military arms and training when warranted by circumstances deemed extraordinary. Yet in so doing, it implicitly imposes a check in

the form of a certification required to be presented to the Speaker of the House and the chair of the Senate Foreign Relations Committee.<sup>22</sup> On balance, the section makes plain that the provision of weapons and other forms of security assistance to systemic abusers of human rights should be a rare occurrence.

Notwithstanding this plain intent, however, Section 502B’s requirements and prohibitions have been almost completely ignored since the provision’s enactment in 1976.<sup>23</sup> With the sole exception of the Carter administration, both Democratic and Republican presidents have generally disregarded Section 502B’s statutory restrictions and have provided security assistance to known human rights abusers without submitting written notification to Congress.<sup>24</sup> According to a 2014 American Bar Association Center for Human Rights report, between 2010 and 2013, eleven recipients of U.S. security assistance were also identified in the State Department’s annual human rights report as having perpetrated gross violations of human rights.<sup>25</sup> During that period, the Obama administration provided no written notification waiving Section 502B to Congress.<sup>26</sup> In fact, there is no record that any administration since Carter’s has consistently complied with Section 502B’s written certification requirement.<sup>27</sup> In response to a 2014 Congressional Research Service inquiry regarding executive branch invocation of 502B, the State Department replied that it could not provide “any instance in which Section 502B [had been] invoked,” noting that the “provision has not been used because it is ‘overly broad.’”<sup>28</sup>

In the view of current and former diplomats involved in U.S. government human rights policy, the executive branch’s ability to circumvent Section 502B rests on a legal interpretation of the provision’s language that defines away nearly all instances of applicable human rights violations as not constituting a “consistent pattern.”<sup>29</sup> The Carter administration, although more willing than its successors to recognize Section 502B,

19 *Id.* at § 2304(a)(2).

20 *Id.*

21 *Id.* at § 2304(b). The “Country Reports on Human Rights Practices” are available at <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/>.

22 The Senate report that accompanied 502B noted that the purpose of the provision was “to ensure that human rights considerations are brought to bear on decisions made within the Executive Branch . . . relating to the provision of . . . security assistance.” S. Rep. No. 94–876, 94th Cong. 2d Sess. 14–15 (1976); *see also* American Association for the International Commission of Jurists, *Human Rights and U.S. Foreign Policy: The First Decade 1973-1983*, p. 12 (1984) available at <https://thefactcoalition.org/wp-content/uploads/2020/07/FACT-Letter-Maloney-Amdt-1-NDAA-20200720-FINAL.pdf>.

23 Brittany Benowitz, Alicia Ceccanese, *How States Supporting Armed Proxies Can Reduce Civilian Casualties and Protracted Hostilities*, Just Security (May 20, 2020) available at <https://www.justsecurity.org/70222/how-states-supporting-armed-proxies-can-reduce-civilian-casualties-and-protracted-hostilities/>.

24 *See* Cohen, *supra* note 12, at p. 254.

25 *See* Benowitz, Ceccanese, *supra* note 23.

26 Nina M. Serafino et al., Congressional Research Service, R43361, “*Leahy Law*” *Human Rights Provisions and Security Assistance: Issue Overview* (Jan. 29, 2014) available at <https://fas.org/sgp/crs/row/R43361.pdf>.

27 *Id.*

28 *Id.*

29 Interviews with one current and one former Deputy Assistant Secretary of State, September 2019

pioneered the practice of selectively interpreting the law’s wording.<sup>30</sup> According to the Carter-era State Department, a “consistent pattern” of human rights abuse did not exist for purposes of 502B so long as there was some evidence that the government in question had taken steps to stop the abuse.<sup>31</sup> This narrow interpretation of the “consistent pattern” requirement, in conjunction with other restrictive interpretations of the statute’s provisions, has allowed various administrations to dramatically narrow Section 502B’s applicability and undermine Congressional intent.<sup>32</sup>

One recent, stark example of executive non-compliance with Section 502B and other human rights-related legal requirements has been the Trump administration’s response to various human rights violations in Saudi Arabia under the leadership of Crown Prince Mohammed bin Salman (MBS). Despite the Saudi government’s apparently premeditated murder of dissident *Washington Post* columnist Jamal Khashoggi, and its role in a military campaign in Yemen that has left millions on the brink of famine, the Trump administration has defied multiple Congressional attempts to prohibit arms sales to the Saudi government.<sup>33</sup> These efforts have included Secretary of State Mike Pompeo overruling State Department experts to exclude Saudi Arabia from a legally-mandated list of countries believed to use child soldiers,<sup>34</sup> Pompeo’s widely-challenged certification that Saudi Arabia and the United Arab Emirates (UAE) had undertaken steps to reduce civilian harm in Yemen,<sup>35</sup> and Trump’s invocation of emergency authorities, over bipartisan Congressional opposition, to sell weapons to Saudi Arabia and UAE.<sup>36</sup> In the case of the administration’s use of emergency authorities, a recently published Office of Inspector General report revealed that the claimed emergency did not exist—the administration had spent a month formulating its plan to circumvent the law and execute the sale—and indicated that the State De-



30 See Cohen, *supra* note 12 (noting that “the Carter administration adopted a highly strained reading of the statute which, although not contrary to its literal terms, produced a result contrary to congressional intent”).

31 Cohen, *supra* note 12.

32 Joe Renouard, *Human Rights in American Foreign Policy*, p. 132 (2016).

33 U.N. Office of the High Commissioner for Human Rights, *Khashoggi killing: UN human rights expert says Saudi Arabia is responsible for “premeditated execution”* (Jun. 19, 2019) available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24713&LangID=E>.

34 Jonathan Landay, Matt Spetalnick, *Exclusive: Overruling his experts, Pompeo keeps Saudis off U.S. child soldiers list*, Reuters (Jun. 18, 2019) available at <https://www.reuters.com/article/us-usa-saudi-childsoldiers-exclusive/exclusive-overruling-his-experts-pompeo-keeps-saudis-off-u-s-child-soldiers-list-idUSKCN1TJ25H>.

35 This certification allowed the administration to avoid a moratorium on U.S. military refueling assistance to Saudi Arabia that was required under the McCain National Defense Authorization Act in the event that such a certification could not be made. See Ryan Goodman, *Annotation of Sec. Pompeo’s Certification of Yemen: Civilian Casualties and Saudi-Led Coalition*, Just Security (Oct. 15, 2018) available at <https://www.justsecurity.org/61053/annotation-sec-pompeos-certification-yemen-war-civilian-casualties-resulting-saudi-led-coalitions-operations/>.

36 Matthew Lee, Susannah George, *Trump cites Iran to bypass Congress on Saudi arms sales*, AP News (May 24, 2019) available at <https://apnews.com/4a1fe7a381045a783b27479f191809d>.

partment failed to “assess risks and implement mitigation measures to reduce civilian casualties” prior to the sale’s approval.<sup>37</sup> Throughout its tenure, the administration has made no Section 502B certifications related to Saudi Arabia. According to recent reporting, it is considering ending a long-standing informal notification process that has allowed members of Congress to place holds on proposed security assistance deals prior to the deal’s approval.<sup>38</sup> Such a move would eliminate a process that has existed since the 1980s and has served as one of the only reliable methods of Congressional oversight of security assistance programs.<sup>39</sup>

***As the next administration embarks on the necessary process of security assistance reform, it should recognize that implementing pre-existing, legally-mandated human rights conditions can help turn this critical foreign policy tool into a more effective mechanism for advancing U.S. interests.***

As the Trump administration has demonstrated, executive branch adherence to the legal requirements governing the provision of security assistance is virtually nonexistent. By both ignoring and circumventing Section 502B for nearly four decades, successive administrations have plainly undermined Congressional intent with little repercussion.

In an era of growing authoritarianism and heightened geopolitical competition

marked by stark ideological difference on matters of human rights, the next administration has an opportunity to reverse this history of executive branch non-compliance with U.S. law. To do so, a future president and secretary of state will need to clearly communicate to State Department officials that the new administration will comply with Section 502B’s requirements and restrictions. As detailed below, such an undertaking will require new legal interpretations and bureaucratic changes within the State Department.

The next administration will also need to strengthen the executive branch’s internal procedures for the review of proposed arms sales and transfers. In accordance with various provisions of both the Arms Export Control Act and the Foreign Assistance Act, every administration since Carter has established a framework for the review of proposed arms transfers known as its Conventional Arms Transfer (CAT) Policy.<sup>40</sup> A CAT policy establishes criteria that the Departments of State and Defense are required to consider when evaluating proposed arms sales and transfers.<sup>41</sup> The CAT policies of both the Obama and Trump administrations contained only weak commitments (the latter weaker than the former) to a review of the possible human rights implications of a proposed arms transfer.<sup>42</sup> In order to limit fully the potential that U.S. arms transfers do not facilitate human rights abuses abroad, the next administration should issue a new CAT policy that expressly prohibits the transfer of weapons in circumstances where human rights abuses are foreseeable.

Taking these steps will be worth the effort. Executive branch observance of other human rights conditionality provisions, such as the “Leahy Laws,” demonstrates that meaningful human rights conditions can

37 Jacqueline Feldscher, Nahal Toosi, *State Department Did Not Consider Civilian Casualties When Sending Arms to the Middle East, Report Finds*, POLITICO (Aug. 11, 2020) available at <https://www.politico.com/news/2020/08/11/state-department-civilians-middle-east-393584>.

38 Michael La Forgia, Edward Wong, Eric Schmitt, *Trump Administration May End Congressional Review of Foreign Arms Sales*, New York Times (Jun. 25, 2020) available at <https://www.nytimes.com/2020/06/25/us/politics/trump-congress-arms-sales.html>.

39 *Id.*

40 U.S. Government Accountability Office, GAO-19-673R, *Conventional Arms Transfer Policy: Agency Process for Reviewing Direct Commercial Sales and Foreign Military Sales Align with Policy Criteria* (Sep. 9, 2019) available at <https://www.gao.gov/assets/710/701248.pdf>.

41 *Id.*

42 The Obama administration’s CAT policy, promulgated in 2014 via PPD-27, only prohibited weapons transfers on human rights grounds in the event the administration had “actual knowledge at the time of authorization that the transferred arms will be used to commit” a narrow set of human rights violations. See Presidential Policy Directive (PPD-27), United States Conventional Arms Transfer Policy (Jan. 15, 2014) available at <https://obamawhitehouse.archives.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>. In 2018, the Trump administration further sidelined human rights considerations by promulgating a new CAT Policy that retained the narrow “actual knowledge” standard of PPD-27 but removed the Obama-era commitment to prohibit arms transfers when such knowledge exists. See National Security Presidential Memorandum (NSPM-10) § 2(d)(ii) (Apr. 19, 2018) available at <https://www.state.gov/united-states-conventional-arms-transfer-policy/>.



alter partner behavior in ways that promote the U.S. national interest.<sup>43</sup> In Colombia, for example, human rights conditions on security assistance pushed the Colombian government to increase its prosecution of Colombian military personnel accused of human rights violations.<sup>44</sup> While in Afghanistan, various freezes on security assistance to specific Afghan military units accused of human rights violations have led directly to criminal prosecutions and convictions.<sup>45</sup>

As the next administration embarks on the necessary process of security assistance reform, it should recognize that implementing pre-existing, *legally-mandated* human rights conditions can help turn this critical foreign policy tool into a more effective mechanism for advancing U.S. interests. When U.S. security assistance supports likeminded partner governments that share U.S. interests with regards to human rights and the rule of law, the United States benefits. American security assistance to its NATO allies during the Cold War, for example, helped secure the birth of a democratic post-war Europe.<sup>46</sup> By establishing the bureaucratic systems necessary to facilitate executive compliance with Section 502B and other human rights conditionality provisions, and establishing a robust CAT policy, the next administration will substantially improve the efficacy and impact of U.S. security assistance programs by reducing the flow of U.S. assistance to human rights abusers.

## Recommendations

**✓ Adhere to existing law by establishing within the State Department an annual process to determine whether countries receiving U.S. security assistance are engaged in “a consistent pattern of gross violations of internationally recognized human rights,” and cease providing security assistance to those found to be in violation, subject to waiver**

It has long been held, on a bipartisan basis, that prioritizing the protection and promotion of human rights in U.S. foreign policy is, in the words of one House subcommittee report from 1974, “morally imperative and practically necessary.”<sup>47</sup> As the Trump administration recently stated in an executive order:

*Human rights abuse and corruption undermine the values that form an essential foundation of stable, secure, and functioning societies; have devastating impacts on individuals; weaken democratic institutions; degrade the rule of law; perpetuate violent conflicts; facilitate the activities of dangerous persons; and undermine economic markets.*<sup>48</sup>

43 Lisa Haugaard, *The Law That Helps the U.S. Stop Heinous Crimes by Foreign Militaries*, Open Society Foundations Voices (May 22, 2015) available at <https://www.opensocietyfoundations.org/voices/law-helps-us-stop-heinous-crimes-foreign-militaries>.

44 *Id.*; see also Human Rights Watch, Press Release, Colombia: Aid Suspension Decision Welcome (Nov. 21, 2002) available at <https://www.hrw.org/legacy/press/2002/11/colombia112102.htm>.

45 See Dalton, *supra* note 4, at p. 60.

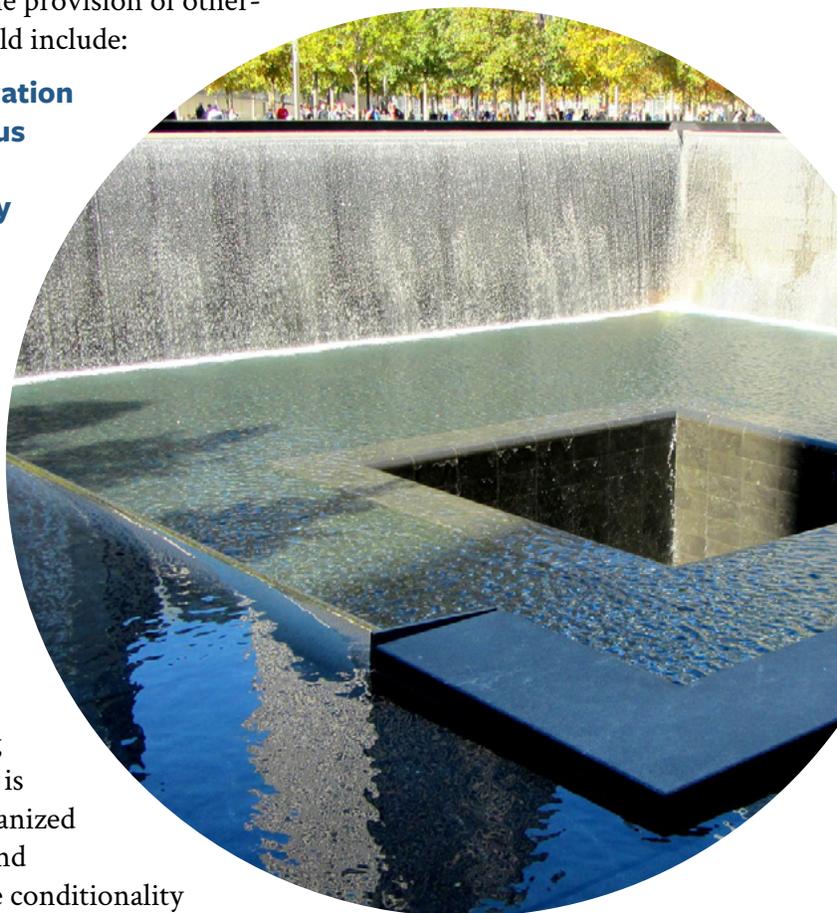
46 See Thrall, Dorminey, *supra* note 5, at p. 9.

47 Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs, *Human Rights in the World Community: A Call for U.S. Leadership*, 93d Cong., 2d Sess., at 9 (Comm. Print 1974) available at <https://babel.hathitrust.org/cgi/pt?id=mdp.39015078590430&view=1up&seq=4>.

48 Executive Order 13,818, Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, 82 Fed. Reg. 60839 (2017) available at <https://www.humanrightsfirst.org/sites/default/files/eo-13818-glomag.pdf>.

To ensure that U.S. security assistance programs assist in America’s effort to uphold human rights, rather than to abet their violation, the next administration should establish and implement procedures necessary to comply with the existing human rights conditionality provisions of Section 502B. These should, at a minimum, establish a defensible definition for what constitutes a “consistent pattern” of “gross violations” of human rights, and result in the curtailment of security assistance in instances in which the U.S. government is providing such assistance to systemic human rights violators, absent certification and waiver. In instances in which the president certifies that extraordinary circumstances exist to warrant provision of assistance otherwise prohibited under Section 502B, he or she should provide such certification to specified members of Congress. Such notifications should contain a detailed, factual explanation of why certification is justified, identifying the important U.S. interests at stake, and explaining how those interests can only be promoted through the provision of otherwise-prohibited assistance. Related actions should include:

- **Establishing clear criteria for the application of 502B that defines the statute’s various elements in a manner consistent with Congress’ intent to restrict U.S. security assistance to systemic human rights abusers.** The next administration should refrain from adopting an artificially restrictive definition of what constitutes a “consistent pattern” of “gross violations” of human rights. To determine whether a foreign state’s actions amount to a “consistent pattern,” it could, for example, look to the International Law Commission’s Draft Articles on State Responsibility, a document that reflects the consensus of the international legal community, and its framework for defining the analogous term “systematic.”<sup>49</sup> According to Draft Article 40, a human rights violation is “systematic” when it is carried out in “an organized and deliberate way.”<sup>50</sup> By establishing clear and transparent criteria for the application of the conditionality provision, the next administration will make it easier to avoid accusations of selective application of the statute and will make it easier for partners to identify how they can improve their human rights record and receive security assistance.
- **To better comply with the annual reporting requirement of Section 502B of the FAA (22 U.S.C. § 2304(b)), directing the Assistant Secretary of State for DRL to publish additional reporting on the human rights records of each recipient of U.S. security sector assistance.** Either by expanding the State Department’s annual Country Reports, or through a new, stand-alone document, the next administration should complete an annual, public assessment of the human rights records of U.S. security partners. Such a report would rely upon information obtained from embassy personnel, as well as other relevant sources from both inside and outside the federal government. For each proposed recipient of U.S. security assistance, the report should clearly state whether the government has engaged in widespread gross violations of human rights.<sup>51</sup>



49 International Law Commission, Responsibility of States for Internationally Wrongful Acts, art. 40 (2001) available at [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

50 *Id.*

51 During the Carter administration’s brief period of compliance with 502B, the State Department was reticent to formally state in writing that a security partner had

- **Requiring a senior-level decision on approval of security assistance.** To ensure that the human rights record of each U.S. security partner is fully considered prior to the sale of arms or provision of other forms of security assistance, the next administration should announce that either the Secretary of State or the Deputy Secretary of State will personally approve such assistance when relevant bureaus disagree on whether or not assistance should be provided. At present, when DRL objects to a given, proposed sale on human rights grounds, other bureaus have the ability to override that objection without the matter being elevated to more senior officials via a so-called “split memo.” In accordance with Section 502B, DRL should be allowed to present its information and analysis to the Secretary of State or the Deputy Secretary of State concerning whether the proposed recipient has engaged in gross violations of human rights, and, in the event that it is deemed that they have, whether extraordinary circumstances nevertheless require the provision of such assistance.<sup>52</sup>

### ✓ **Amend the Conventional Arms Transfer (CAT) Policy and prohibit the transfer of U.S. arms under circumstances in which there is a reasonably foreseeable possibility that the arms will aid and abet human rights abuse**

Before approving an arms transfer to a foreign security partner, the executive branch has committed to consider whether the recipient country will use the arms to commit violations of international human rights law.<sup>53</sup> This prospective assessment of risk supplements the analysis of past conduct required by Section 502B, and is a product of the CAT Policy, which establishes criteria for evaluating a country’s eligibility for arms transfers and is itself a regulation promulgated by the executive branch in accordance with the Arms Export Control Act and Foreign Assistance Act.<sup>54</sup> The CAT Policy is periodically amended by the executive branch through the issuance of a Presidential Memorandum, and has long included a mandatory evaluation of the human rights implications of the proposed transfer.<sup>55</sup> This human rights condition reflects both the domestic legal requirements pertaining to the vetting of prospective U.S. security partners and U.S. obligations under international law.<sup>56</sup>

Republican and Democratic administrations have used a narrow interpretation of U.S. obligations under both legal frameworks to reduce the likelihood that human rights considerations will impede arms transfers. Under the Obama administration’s CAT Policy, promulgated in 2014 through PPD-27, weapons transfers were prohibited on human rights grounds only in the event that the administration had “actual knowledge at the time of authorization that the transferred arms will be used to commit” a narrow set of human rights violations.<sup>57</sup> Notwithstanding this policy, a threshold of “actual knowledge” is not supported by the standard for determining state responsibility under international law, as articulated by Common Article 1 of the Geneva Conventions<sup>58</sup> and the decision of the International Court of Justice in *Nicaragua v. United States of America*,<sup>59</sup> as well as the standard for determining liability under the domestic aider and abettor

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engaged in gross violations of human rights and was barred from receiving security assistance under 502B. This hesitation resulted in confusion over the application of the statute and questions about which security partners were engaged in covered rights abuses. Cohen, *supra* note 12, at p. 264.

52 By allowing DRL to elevate differences of analysis with other relevant bureaus, the next administration will provide additional teeth to a review process that was briefly instituted during the Carter administration. At that time, in order to ensure adherence to 502B, the Bureau of Human Rights reviewed the human rights record of each proposed recipient of security assistance and challenged decisions to provide assistance to known human rights abusers through an internal action memorandum process. Cohen, *supra* note 12, at p. 262 n. 82.

53 See Center for Civilians in Conflict, *With Great Power: Modifying US Arms Sales to Reduce Civilian Harm* (2018) available at <https://civiliansinconflict.org/wp-content/uploads/2018/01/With-Great-Power.pdf>.

54 See *id.* at p. 16; see also 22 U.S.C. § 2571, available at <https://www.law.cornell.edu/uscode/text/22/2751>.

55 *With Great Power*, *supra* note 53, at n. 13.

56 See generally *id.*

57 Presidential Policy Directive (PPD-27), United States Conventional Arms Transfer Policy (Jan. 15, 2014) available at <https://obamawhitehouse.archives.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>.

58 Geneva Convention Relative to the Treatment of Prisoners of War, art. 1 (Aug. 12, 1949) available at [https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32\\_GC-III-EN.pdf](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf).

59 American Bar Association, Center for Human Rights & Rule of Law Initiative, *The Legal Framework Regulating Proxy Warfare*, p. 49 (Dec. 2019) available at [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/chr-proxy-warfare-report-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf).

statute,<sup>60</sup> a law that expressly applies to the War Crimes Act.<sup>61</sup> Under U.S. law, an actor can be held liable for aiding and abetting violations of international law if, at the time the assistance was provided, there was a “reasonably foreseeable possibility” that the assistance would facilitate the unlawful act.<sup>62</sup>

In 2018, the Trump administration further sidelined human rights considerations by promulgating a new CAT Policy (NSPM-10) that retained the narrow “actual knowledge” standard of PPD-27 but removed the

Obama-era commitment to prohibit arms transfers when such knowledge exists.<sup>63</sup> Under Trump’s NSPM-10, “actual knowledge . . . that the transferred arms will be used to commit” human rights abuses is only one of several factors considered during the review of a proposed arms deal.<sup>64</sup> By removing PPD-27’s commitment to “not authorize any transfer” when “actual knowledge” of future human rights abuses exists, the Trump administration weakened an already-feeble human rights restriction and effectively guaranteed that human rights considerations will not impede future arms transfers.<sup>65</sup>

In order to align U.S. regulations concerning arms transfers with both domestic and international law, the next administration should improve upon the CAT Policies of both the Obama and Trump administrations. The next CAT Policy promulgated by the executive branch should remove all mention of the “actual knowledge” standard and instead adopt a clear prohibition on the approval of arms transfers in circumstances where there is a “reasonably foreseeable possibility”—the standard consistent with international law—that the arms will facilitate serious human rights violations.

- **Issue a new presidential memorandum revising the CAT Policy to prohibit arms transfers in the event that there is a reasonably foreseeable possibility that the arms will facilitate human rights violations.** In order to fully comply with U.S. obligations under international law and effectuate the purpose of the Foreign Assistance Act,<sup>66</sup> the next administration should revise the Trump administration’s CAT Policy and adopt an interpretation of the principle of state responsibility that is consistent with the ICJ’s ruling in *Nicaragua v. United States of America*, Common Article 1 of the Geneva Conventions, and previous executive branch interpretations of the federal aider and abettor statute.<sup>67</sup> Under this new policy, the administration should make clear that arms transfers are prohibited on human rights grounds whenever there is a *reasonably foreseeable possibility* that the arms will be used to perpetrate human rights violations.

60 18 U.S.C. § 2, available at <https://www.law.cornell.edu/uscode/text/18/2>.

61 War Crimes Act, 18 U.S.C. § 2441 available at <https://www.law.cornell.edu/uscode/text/18/2441>; Ryan Goodman, *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen*, Just Security (Sep. 1, 2016) available at <https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen/>.

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

63 National Security Presidential Memorandum (NSPM-10), U.S. Conventional Arms Transfer Policy, § 2(d)(ii) (Apr. 19, 2018) available at <https://www.state.gov/unit-ed-states-conventional-arms-transfer-policy/>.

64 *Id.*

65 See Benowitz, Ceccanese, *supra* note 23.

66 The Conference Committee report accompanying Section 502B in 1978 expressly stated that “human rights . . . must, as a matter of law, be taken into account in making security assistance decisions.” H. R. Rep. No. 95-1546, 95th Cong., 2d Sess. 27 (1978).

67 See, e.g., United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking, Memorandum Opinion for the Deputy Attorney General, Opinions of the Office of Legal Counsel (Jul. 14, 1994) available at <https://www.justice.gov/sites/default/files/olc/opinions/1994/07/31/op-olc-v018-p0148.pdf> (concluding that “USG agencies and personnel may not provide information... or other USG assistance... to Colombia or Peru in circumstances in which there is a *reasonable foreseeable possibility* that such information or assistance will be used in shooting down civil aircraft, including aircraft suspected of drug trafficking.” [emphasis added]).



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