

Exporting Coercive Power

Regulations and best practices for Security Force Assistance

Globally, the provision of military training and equipment via Security Force Assistance (SFA) programmes is worth billions of dollars each year and is often motivated by a desire to address security challenges such as violent extremism, migration, and organized crime. There are however risks involved in assisting the development of another state's coercive power, especially if its security forces are fighting in a conflict. This policy brief examines how the US, UK and UN attempt to prevent their SFA from being used by parties that commit war crimes or other serious human rights violations. It concludes with targeted recommendations for small states that lack specific laws and guidelines for the provision of SFA.

Brief Points

- Providers of security assistance should avoid complicity in war crimes or serious violations of human rights.
- The provision of training or equipment is covered by obligations and responsibilities found in international law.
- The United Kingdom, United States and United Nations conduct risk assessments prior to providing training or equipment.
- All SFA providers should undertake a prior risk assessment, monitoring during a programme, and later evaluation of lessons learned.
- Risk assessments should be undertaken by people with detailed knowledge of the recipient state's security forces and the conflicts in which they operate.

Introduction

The provision of military training or equipment to states via Security Force Assistance (SFA) programmes is often justified by politicians in moral terms – SFA is provided to make the world safer, to contribute to collective security or to fulfil responsibilities to allies. The provision of SFA does not, however, occur in a legal vacuum. Providers have specific responsibilities laid down in a complex web of obligations found in international law. This policy brief focuses specifically upon the legal responsibilities of Western European and North American states when they provide SFA. Other states' obligations may differ (for example, if they are parties to different treaties or regional organizations); nevertheless, all are obliged to follow many of the legal obligations described in this policy brief.

SFA entails an external state or international organization providing training and equipment in order to strengthen the recipient's operational capacity and professionalism. SFA is often provided in areas affected by armed conflict, terrorism or high levels of organized crime and other forms of violence. There are clear risks that providers of training or equipment could assist units that perpetrate war crimes or other serious violations of human rights. Those risks need to be continually reassessed, as they will be affected by changes in the intensity of the conflict and the policies of the recipient state.

Ethical Considerations and Legal Obligations

The provision of training and equipment is covered by international law, and sometimes regulated by specific treaties or other agreements. These legal obligations are more well-defined concerning the provision of assistance to states compared to assisting non-state armed groups such as militias or rebels.

States have a general commitment to ensure respect for the Geneva Conventions (specifically under Common Article 1). A broad interpretation of this commitment (that is not accepted by all states) entails that when providing training or equipment, state parties should use their influence to ensure that recipients abide by the conventions. Similar responsibilities also apply to other key aspects of international law. States should not aid or assist others to commit a 'wrongful act', such as international aggression, genocide or serious violations of human rights or humanitarian law (as described in Article 16 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts). States' responsibilities when providing SFA can therefore be drawn from some of international law's fundamental documents, especially: Articles 1 and 55 of the UN Charter concerning the maintenance of peace and respect for fundamental freedoms; Article I of The Convention on the Prevention and Punishment of the Crime of Genocide, which covers complicity in such acts; and Article 3 of the Universal Declaration of Human Rights, which concerns the right for everyone to life, liberty and security of person.

Notably, these responsibilities do not extend to any form of assistance provided to another state or any act committed by the security forces of a government that has received SFA. Instead, responsibilities are limited to circumstances in which SFA has knowingly been provided to a specific unit or individual that committed a wrongful act. Consequently, if governments are to sincerely attempt to meet these responsibilities, they should first obtain detailed information on the actions of units that may be provided with training or equipment (see below for descriptions of how this works in practice).

One challenge is that small states, such as Belgium, Estonia or Norway, often provide SFA as part of broad

multilateral coalitions. In such a circumstance, a small state may have little or no influence upon the overall objectives or implementation of SFA, and its relationship with the recipients of assistance may be more complicated. This is problematic when part of the reason for small states' participation is to confer trust and legitimacy in large multinational SFA programmes.

The provision of military *equipment* via SFA is covered by international law. The provision of arms and ammunition is for a majority of states governed by the Arms Trade Treaty (ATT) and other applicable regional arms trade conventions or regulations. The ATT prohibits arms transfers if they are in violation of a State Party's "relevant international obligations." These include International Humanitarian Law (IHL) or International Human Rights Law (IHRL). The Treaty also requires that an exporter conduct an assessment of the risk that an export could be used to commit or facilitate serious violations of human rights or international humanitarian law (or other wrongful acts). Not all military equipment is covered by the ATT, though states may voluntarily extend its scope. Similar obligations can be found in the EU Common Position on arms exports, which covers a much wider range of equipment than the ATT.

There are no similar multilateral legal agreements that specifically concern *training*, though it is, of course, covered by the general legal principles described above. In some states, training may be covered by national laws or policies: for example, in Germany by the MFA's 2019 document *Ressortgemeinsame Strategie zur Unterstützung der Sicherheitssektorreform (SSR) im Kontext von Krisenprävention, Konfliktbewältigung und Friedensförderung*. Concerning norms, the 2006 NATO Allied Joint Doctrine for Security Force Assistance includes the principles of legitimacy and rule of law (including human rights, governance and gender concerns). The doctrine explicitly calls for elements on

human rights, gender and civil military relations to be included in training.

Fulfilling Legal and Ethical Obligations

Abiding by these legal obligations is often challenging. In an effort to ensure compliance with these laws, SFA providers conduct assessments before and during their SFA programmes. This section briefly describes the procedures employed by the United States, the United Kingdom and the United Nations. These states are not the only ones: for example, Japan's policy is that prior to providing security training it should examine the situation in the potential recipient country regarding democratization, the rule of law and the protection of basic human rights.

United States

US SFA is directly provided both by the Department of State (DoS) and Department of Defense (DoD) and is covered by separate legislation for each department. Both departments are prohibited from using funds to provide assistance to units of foreign security forces where there is credible information that the potential recipient unit has been involved in committing a gross violation of human rights. (The legislation is colloquially known as 'Leahy laws', named after its champion in the US Senate.) An exception exists if the government of an implicated security forces unit has taken necessary steps to remedy disqualifying actions, such as by disciplining perpetrators. Another exception, which applies to the DoD, is in cases where assistance is necessitated by a humanitarian or national security emergency. For example, in humanitarian relief operations, the US armed forces may provide fuel to foreign military units that are distributing aid without first having vetted those units.

Potential recipient units are vetted prior to them receiving assistance. The DoS assesses potential recipients of its own

assistance and plays a key role in vetting carried out by the DoD. The DoS has established a vetting process which takes place in embassies located in the potential recipient country and in Washington. It has developed a specialized database that speeds up checks on units and individuals. In addition to its own sources, the DoS uses outreach to the DoD, CIA, relevant US law enforcement agencies, civil society organizations and journalists. Information received from the potential recipient government is checked and verified. The situation in the country is monitored after an assistance programme has been initiated. For example, as part of its assistance to Colombia during the early 2010s, US personnel vetted between 30,000 and 35,000 individuals and 1,400 units per year. Programmes have been suspended or halted in the light of events. For example, after Cameroonian security forces were involved in human rights violations, in 2019 the US cut SFA provided to that state.

United Kingdom

The UK introduced a risk assessment procedure concerning SFA in December 2011. Its Overseas Security and Justice Assessments (OSJAs) are confidential and are carried out concerning all engagements with the security and justice sectors in recipient states. The aim of the OSJAs is to assess risks concerning IHL and IHRL and identify actions to mitigate those risks. Assistance can be provided even if risks cannot be mitigated, but such an exception requires ministerial approval. In-country personnel are responsible for ensuring that OSJAs have taken place for all programmes before they are initiated. The OSJAs are reviewed if the programme is to be extended, or if there has been a substantial change in the recipient country. A review can cause a programme to be re-designed, paused or stopped.

Where more than one UK government department is involved, all should cooperate and agree upon the outcome of the

assessment. There is an additional process if the SFA involves the provision of military equipment covered by the UK's arms export regulations. The OSJA assessment involves UK government country experts. They assess the risks of involvement in serious violations of IHL and IHRL by the recipient unit. Sources used include UK government human rights reports and those produced by other governments or civil society organizations. The assessment concerns both the current situation in the recipient state (including ongoing conflict), and probable instability over the next five years. Officials making an assessment are advised to consult with legal advisors. Relevant Foreign and Commonwealth Office personnel write an initial assessment and provide updates if the situation changes. Where risks have been identified, processes should be set up to monitor and report any violations. For example, in the case of training programmes in Sudan and DR Congo, the UK Department for International Development received reports of human rights violations by police units that received SFA. The department first monitored the programmes and later terminated them.

United Nations

In 2011, the UN applied its *Human rights due diligence policy on United Nations support to non-United Nations security forces*. This is to ensure that SFA provided by the UN is consistent with principles in the UN Charter, and with its obligations to respect, promote and encourage respect for international humanitarian, human rights and refugee law. It covers training, mentoring and advising, and also other activities such as financial, logistical and operational support. The policy requires that a risk assessment be conducted prior to the provision of assistance, as well as monitoring of a recipient's compliance with its international legal responsibilities. If risks are identified, then the UN agency should consider mitigation measures, and support should be withheld if the

measures are not considered to be sufficient. Risk assessments are carried out by the UN entity providing the support, with assistance from OHCHR field personnel. Assessments identify whether the risk of the recipient unit committing grave violations is 'high', 'medium' or 'low'. If medium, then mitigation measures are considered, and if high, then the UN would consider withholding support from some or all of the potential recipients. An example of mitigation measures concerns the UN Mission in Côte d'Ivoire (UNOCI), which along with the UN country team developed standard operating procedures for the implementation of a due diligence policy concerning the transfer of equipment to national security forces.

Recommendations

The above outline of a state's legal obligations and the three examples of how providers work to ensure compliance demonstrate that there are international legal obligations and established practices for the provision of SFA. It is important that national decision-makers do not treat these legal obligations as obscure principles. In particular, SFA programmes need to be carried out in accordance with these obligations when they are explained to citizens in moral terms – as means to help friends or allies resist aggression or to bring stability to conflict zones. Moreover, military personnel who work as instructors want their role to accord with their professional values, and the laws regulating the armed forces in which they serve. An SFA programme that ignored legal obligations concerning aspects such as human rights would risk causing reputational

damage to the provider, which could affect their wider objectives.

The examples from the US, UK and UN show that prominent SFA providers meet their obligations foremost by actively gathering information and conducting risk assessments about the units that might receive training and equipment. All SFA providers, including small states, should ensure that risks are identified and carry out the following measures:

- **A risk assessment** should be conducted prior to a programme being initiated. New assessments should be undertaken if the programme is extended or renewed, or if there is a significant material change in the circumstances of the recipient country. If risks are identified, then programme design should be altered to mitigate those risks. If that is not possible, the programme should be cancelled or suspended.
- **Monitoring** should be carried out during a programme. The provider should monitor the conduct of recipient units and the situation in the recipient country. Programmes should be paused if there is a need for a re-assessment of risks. If possible, the record of recipient units should be monitored after a programme ends. Doing so will allow an assessment of the long-term effects of SFA.
- **An evaluation** should be conducted after a programme has been completed to identify lessons learned.

Conducting a risk assessment is a complex task that requires collating and

analysing information from numerous different sources. In the above three examples, a key role was played by personnel with in-country competence, including detailed knowledge of the recipient state's security forces, and specialist experience in conducting risk assessments. Concerning the US and the UK, their respective foreign ministries provided necessary country expertise, and a similar role is played by OHCHR personnel concerning the UN. All states wishing to ensure the legal compliance of their SFA provision should similarly rely upon risk assessments conducted by specialists. In particular, in small states a key role can be played by Ministry of Foreign Affairs personnel, or others with sufficient country expertise. ■

Further Reading

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The author gratefully acknowledges the contribution made by Øystein H. Rolandsen, and of other reviewers, in the writing of this brief.

THE PROJECT

The brief is an outcome of the project 'Lessons Learned from Military Capacity Building', funded by the Norwegian Ministry of Defence, and of the project 'SFAssist', funded by the Research Council of Norway.

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