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U.S. Arms Sales and Human Rights: Legislative Basis and Frequently Asked Questions

U.S. law establishes the conditions under which the U.S. government and U.S. commercial entities may sell defense articles to foreign countries. This In Focus provides an overview of the main laws and policies that may limit such sales on the basis of human rights concerns.

Background

The Arms Export Control Act (AECA; P.L. 90-629; 22 U.S.C. 2751 et seq.) and the Foreign Assistance Act of 1961 (FAA; P.L. 87-195; 22 U.S.C. 2151 et seq.) establish provisions governing Foreign Military Sales (FMS) and Direct Commercial Sales (DCS) to foreign consumers, including foreign governments. FMS refers to the sale of U.S.-origin defense articles, equipment, services, and training (hereinafter referred to as “defense articles”) on a government-to-government basis. DCS refers to the sale of U.S.-government licensed defense articles and services directly from U.S. firms to eligible foreign governments and international organizations.

The AECA and FAA establish eligibility prerequisites for the sale of defense articles to foreign purchasers. The acts also require that such sales be for specific authorized military purposes and subject to end-use monitoring (EUM). The acts authorize the termination of future sales and deliveries if a recipient is found to be in substantial violation of a sale-related agreement with the United States or to be otherwise using such defense articles for unauthorized purposes. The FAA and executive branch policy restrict certain sales of defense articles to foreign recipients found to have committed human rights violations.

General Limitations on FMS and DCS

Although the AECA does not refer specifically to human rights, the act includes general provisions and conditions for the export of U.S.-origin defense articles that may indirectly address human rights concerns. For example,

- Section 38(a)(1) of the AECA (22 U.S.C. 2778(a)(1)) authorizes the President to control the import and export of defense articles for broad policy goals, including world peace and U.S. security and foreign policy.
- Section 42(a) of AECA (22 U.S.C. 2791(a)) requires the executive branch, to consider, among other factors, whether a given defense article sale might “increase the possibility of outbreak or escalation of conflict.” See also Section 511 of the FAA (22 U.S.C. 2321d).
- Section 3(a) of AECA (22 U.S.C. 2753(a)) requires prospective recipients of defense articles to meet certain prerequisites for eligibility. These include purchaser commitments to refrain from transferring title to or possession of any defense article to unauthorized persons, as well as from diverting articles for unauthorized purposes or uses. See also Section 505(a) of the FAA (22 U.S.C. 2314(a)).
- Section 4 of the AECA (22 U.S.C. 2754) states that defense articles may be sold or leased for specific purposes only, including internal security, legitimate self-defense, and participation in collective measures requested by the United Nations or comparable organizations. See also Section 502 of the FAA (22 U.S.C. 2302).
- Section 3(c)(1)(B) of the AECA (22 U.S.C. 2753(c)(1)(B)) prohibits the sale or delivery of U.S.-origin defense articles when either the President or Congress find that a recipient country has used such articles in substantial violation of an agreement with the United States governing their provision or “for a purpose not authorized” by Section 4 of the AECA or Section 502 of the FAA. (See also Section 505(d) of the FAA (22 U.S.C. 2314(d)).) If found to be in violation by presidential determination or joint resolution of Congress, Section 3(c)(3) of the AECA (22 U.S.C. 2753(c)(3)) stipulates that, absent a presidential waiver, such countries would be ineligible for future U.S. arms sales until the President determines the violation has ceased and recipients assure violations will not recur. Such a waiver is not available if Congress has adopted a joint resolution described above.

Human Rights-Related Prohibitions

Section 502B(a)(1) of the FAA (22 U.S.C. 2304(a)(1)) states that a “principal goal” of U.S. foreign policy “shall be to promote the increased observance of internationally recognized human rights by all countries.” To this end, Section 502B(a)(2) of the FAA (22 U.S.C. 2304(a)(2)) stipulates that, absent the exercise of a presidential certification of “extraordinary circumstances,”

no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.

“Security assistance” is defined by Section 502B(d)(2) of the FAA (22 U.S.C. 2304(d)(2)) to include, for the purposes of the section, “sales of defense articles or services, extensions of credits (including participations in credits), and guaranties of loans” under the AECA. This section also defines security assistance to include

- assistance provided pursuant to part II of the FAA for military assistance (chapter 2), the economic support fund (chapter 4), military education and training (chapter 5), peacekeeping operations (chapter 6), or anti-terrorism assistance (chapter 8); and

- any license in effect with respect to the export to or for the armed forces, police, intelligence, or other internal security forces of a foreign country of (i) defense articles or defense services under Section 38 of the AECA (22 U.S.C. 2778); or (ii) items listed under the 600 series of the Commerce Control List [a list that contains specific dual-use commodities, technologies, and software that are controlled for export].

“Gross violations of internationally recognized human rights” is defined in Section 502B(d)(1) of the FAA (22 U.S.C. 2304(d)(1)). In determining whether a government has engaged in such violations, Section 502B(a)(4) of the FAA (22 U.S.C. 2304(a)(4)) requires the President to give particular consideration to international religious freedom. Section 502B(b) of the FAA (22 U.S.C. 2304(b)) additionally tasks the Secretary of State to prepare a report to Congress (the annual Country Reports on Human Rights Practices) with information on prospective foreign recipients of U.S. security assistance. Specified topics for the report include information on war crimes, crimes against humanity, genocide, coercion in population control, anti-Semitism, extrajudicial killings, trafficking in persons, freedom of the press, and child marriage.

Additionally, Section 502B(c)(1) of the FAA (22 U.S.C. 2304(c)(1)) provides several mechanisms for Congress to request a report, due within 30 days, from the Secretary of State concerning human rights in a particular country. Pursuant to Section 502B(c)(4)(A) of the FAA (22 U.S.C. 2304(c)(4)(A)), Congress may, at any time after receiving such a report, “adopt a joint resolution terminating, restricting, or continuing security assistance” to the relevant country.

Human Trafficking-Related Prohibitions

Certain categories of assistance, including but not limited to arms sales, may not be provided to governments identified in the State Department’s annual Trafficking in Persons report that fail to combat human trafficking (Section 110 of P.L. 106-386 22 U.S.C. 7107) or support or engage in the recruitment or use of child soldiers (Section 404(a) of P.L. 110-457; 22 U.S.C. 2370c-1). Under these provisions, the President may nevertheless continue assistance for national interest reasons.

Frequently Asked Questions

How does the Administration’s conventional arms transfer policy address human rights concerns?

Pursuant to a national security presidential memorandum of April 19, 2018, U.S. arms transfer decisions must take into consideration several factors, including “human rights and international humanitarian law.” The memorandum prohibits transfers of conventional arms if the U.S. government has “actual knowledge at the time of authorization” that such a transfer “will be used” to commit genocide, crimes against humanity, or certain human rights violations in breach of the Geneva Conventions.

How does U.S. policy guidance on arms sales address human rights consideration?

The Security Assistance Management Manual (SAMM) provides the U.S. Department of Defense (DOD) with policy guidance for executing arms sales. Among its

provisions, the SAMM requires senior U.S. Embassy leadership to prepare a Country Team Assessment (CTA) that describes and justifies support for a proposed arms sale. Such CTAs accompany letters of request for certain significant arms sales, including those requiring congressional notification pursuant to Section 36 of the AECA. According to Table C5.T1 of the SAMM, all CTAs must include a description of the “human rights ... record of the proposed recipient and the potential misuse of the defense articles in question.”

How does the U.S. government verify that recipients use defense articles as authorized?

Pursuant to Sections 38(g)(7) and 40A(a) of the AECA (22 U.S.C. 2778(g)(7) and 2785(a)), and Section 505(a)(3) of the FAA (22 U.S.C. 2314(a)(3)), U.S. origin defense articles sold via FMS and DCS are subject to end-use monitoring (EUM) to ensure that recipients use such items solely for their intended purposes. DOD’s Defense Security Cooperation Agency manages the department’s Golden Sentry EUM program for defense articles sold via FMS. The State Department’s Directorate of Defense Trade Controls coordinates the Blue Lantern program, which performs an analogous function for items sold via DCS.

Can arms embargoes be applied on the basis of human rights concerns?

Human rights considerations are among the reasons the United States may invoke to impose an arms embargo on a foreign government and prohibit U.S. persons from selling or transferring defense articles to such governments. The International Traffic in Arms Regulations reflect the executive branch’s implementation of statutory provisions related to the export of defense articles, including those related to arms embargoes. In addition, the U.N. Security Council may apply an arms embargo against a country for human rights purposes; Section 5 of the United Nations Participation Act of 1945 (22 U.S.C. 287c) authorizes the President to implement such sanctions.

Do the Leahy Laws apply to arms sales?

The U.S. “Leahy Laws”—Section 620M of the FAA (22 U.S.C. 2378d) and 10 U.S.C. 362—prohibit U.S. security assistance to a foreign security force unit when there is credible information that such unit has committed a “gross violation of human rights” (GVHR)—described by the State Department to mean (1) torture, (2) extrajudicial killing, (3) enforced disappearance, or (4) rape under color of law (in which a perpetrator abuses their official position to commit rape). In order to comply with the laws, the State Department leads a process of unit-level GVHR vetting before providing security assistance, including training and equipping. The Leahy Laws, however, do not define security assistance; in practice, the executive branch considers the term to mean support provided with U.S.-appropriated funds and, in its view, the restrictions are thus not applicable to FMS or DCS.

Paul K. Kerr, Specialist in Nonproliferation

Liana W. Rosen, Specialist in International Crime and Narcotics

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