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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, “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 “for a purpose not authorized” by AECA Section 4 or FAA Section 502. (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.” Section 502B(a)(2) (22 U.S.C. 2304(a)(2)) prohibits security assistance to “any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.” Section 502B(a)(2) also restricts licenses for the export of “crime control and detection instruments and equipment” to such countries. Certain exceptions can apply if the President certifies to Congress that “extraordinary circumstances” warrant the provision of assistance or licenses.

Section 502B(d)(2) of the FAA (22 U.S.C. 2304(d)(2)) defines “security assistance” 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, which contains dual-use items controlled for export.

Section 502B(d)(1) of the FAA (22 U.S.C. 2304(d)(1)) defines “Gross violations of internationally recognized human rights.” 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 violations of 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 with information on prospective foreign recipients of U.S. security assistance.

Section 502B(c)(1) of the FAA (22 U.S.C. 2304(c)(1)) provides 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 for such country.” If the State Department does not produce the report within 30 days, this section prohibits delivery of security assistance to the country pending the report’s delivery. The executive branch has objected to the provision on constitutional grounds; George H.W. Bush did so in a 1989 signing statement.

Executive branch determinations pursuant to some other human rights-related laws, such as the Trafficking Victims Protection Act (Division A of P.L. 106-386, as amended), can also result in restrictions on arms sales to certain foreign governments.

Frequently Asked Questions

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

Pursuant to a February 23, 2023, National Security Memorandum (NSM), the United States will not authorize arms transfers if “it is more likely than not that” such arms “will be used by the recipient to commit, facilitate the recipients’ commission of, or to aggravate risks that the recipient will commit: genocide; crimes against humanity; grave breaches of the Geneva Conventions of 1949 ... or other serious violations of international humanitarian or human rights law.” A February 8, 2024, NSM requires “credible and reliable written assurances” that recipients of U.S. arms funded with congressional appropriations or provided pursuant to Presidential drawdown authority will use such arms in accordance with applicable international law.

How does Department of Defense policy guidance on arms sales address human rights considerations?

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.” Neither the AECA nor FAA explicitly requires that recipients of U.S.-origin defense articles follow International Humanitarian Law (IHL). FMS customers must note their “obligations under” IHL, Figure C5.F4. of the SAMM states.

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?

The United States can impose an arms embargo on a foreign government based on human rights considerations. 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 reasons; 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 certain U.S. “assistance” to a foreign security force unit when there is credible information that such unit has committed a “gross violation of human rights” (GVHR). The State Department interprets this term to encompass (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), although other acts can also constitute GVHRs. The State Department leads a process of unit-level GVHR vetting before providing security assistance. The Leahy Laws do not define “assistance”; in practice, the executive branch considers the term to mean support provided with U.S.-appropriated funds. The restrictions are thus not applicable to FMS or DCS. (See also CRS In Focus IF10575, *Global Human Rights: Security Forces Vetting (“Leahy Laws”)*.)

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