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 (hereafter 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.

Human Rights-Related Prohibitions on Security Assistance

Section 502B of the FAA

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 waiver, 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...
provisions, the SAMM requires senior U.S. Embassy

- 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.

Child Soldiers Prevention Act of 2008 (CSPA)
Foreign governments with security forces (including police)
or government-supported armed groups that recruit or use
child soldiers are prohibited from receiving certain types of
security assistance, absent a presidential waiver. Pursuant
to Section 404(a) of the CSPA (P.L. 110-457; 22 U.S.C.
2370c-1), the prohibition applies to the extension of FMS
credits and the issuance of DCS licenses, among other
identified authorities in the FAA and AECA. Each year, the
State Department publishes a list of CSPA countries in its
annual Trafficking in Persons Report.

Frequently Asked Questions

How does the current Administration’s
conventional arms transfer policy address human
rights considerations?
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.” Specified considerations
include the risk that an arms transfer would contribute to
abuses of human rights, including acts of gender-based
violence and acts of violence against children. 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.

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