

**THE U.S. SHOULD  
SUPPORT AN  
EFFECTIVE HUMAN  
RIGHTS RULE IN  
THE ARMS TRADE  
TREATY**

**AMNESTY  
INTERNATIONAL**



First published in July 2010 by  
Amnesty International publications  
International Secretariat  
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United Kingdom

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Index: AMR 51/057/2010  
Original Language: English

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## SUMMARY

In December 2009, the United States joined 150 countries voting in favour of UN General Assembly Resolution 64/89, thereby launching the formal process towards an Arms Trade Treaty (ATT) to require states to improve the regulation international transfers of conventional arms. An effective ATT would ensure that States do not authorize an international transfer of arms, including weapons, ammunition and other military and security equipment, components and production technologies, where there is a substantial risk that they will be used in serious violations of international law, particularly international human rights law.

This short briefing note explains how U.S. support for such a human rights standard in an Arms Trade Treaty would:

- be consistent with long-standing U.S. arms control legislation;
- support major existing U.S. policy goals for U.S. arms exports;
- support U.S. efforts to protect national and regional security and stability, a central stated goal of U.S. policy regarding the ATT.

As in other countries with such laws and policy, the practical application of human rights standards in U.S. arms controls has been variable. Yet a strong human rights standard is already a central foundation of U.S. conventional arms export control law. Failing to incorporate a similarly robust standard into the proposed ATT would undermine the impact of U.S. arms export control policy, and fail significantly to help protect lives, rights and livelihoods.

## HUMAN RIGHTS STANDARDS IN EXISTING U.S. ARMS TRANSFER CONTROLS

The United States should at least promote a human rights standard in the ATT consistent with those provisions contained in U.S. law. Indeed, the U.S. Secretary of State has stated that

*[m]ultilaterally, we have consistently supported high international standards, and the Arms Trade Treaty initiative presents U.S. with the opportunity to promote the same high standards for the entire international community that the United States and other responsible arms exporters already have in place to ensure that weaponry is transferred for legitimate purposes.<sup>1</sup>*

Using conventional arms controls to promote human rights is one of the five major policy goals for U.S. arms exports, defined in Presidential Decision Directive 34 of 1995:

*To promote peaceful conflict resolution and arms control, human rights, democratization, and other U.S. foreign policy objectives.*

As the table below shows, in fact U.S. arms export control laws already contain precautionary human rights principles intended to deny arms transfers likely to be used in serious human rights violations. U.S. arms export control laws also contain considerations related to international humanitarian law.<sup>2</sup>

Moreover, successive U.S. governments have joined over 50 other states in the Organization for Security and Cooperation in Europe (OSCE) to jointly commit to the principle that “[e]ach participating State will avoid [arms] transfers which would be likely to be used for the violation or suppression of human rights and fundamental freedoms.”<sup>3</sup> Similarly, as part of the Wassenaar Arrangement of the world’s largest arms producers and exporters, the U.S. government has agreed that “[e]ach Participating State will avoid issuing licences for exports of SALW where it deems that there is a clear risk that the small arms in question might (...) be used for the purpose of repression; Be used for violation or suppression of human rights and fundamental freedoms”.<sup>4</sup>

This “preventative approach”, adopted by the U.S. and other states in the OSCE and Wassenaar Arrangement, aims to prevent international transfers of arms where there is credible and reliable information indicating that there is a substantial risk that a particular group, such as the security forces, are likely to use those arms for serious violations or abuses of human rights. To this end, dozens of civil society groups, including Amnesty International, have proposed a similarly preventative human rights standard for the Arms Trade Treaty:

*States Parties should not authorize an international transfer of conventional arms where there is a **substantial risk** that they are likely to be used in **serious violations** of international human rights law or international humanitarian law.*

U.S. arms export control laws are also based, in most instances, upon human rights defined by international law and standards to which the United States is already bound.<sup>5</sup> However, the core legal provisions in U.S. law are framed in manner that points towards a sanctions or “punitive approach” rather than a “preventative approach”: once evidence regards a particular country obtained by the U.S. authorities indicates that the government of that country is engaged in a 'consistent pattern of gross violations of internationally recognised human rights', the U.S. government is, with some exceptions, required to end all security assistance to that country, including the export of arms. (see box below).

In order to moderate that “punitive approach”, the human rights standards in U.S. arms control law are subject to large executive discretion: the President may waive the provisions of the Arms Export Control Act and the Foreign Assistance Act on the grounds of national security, while the human rights standards of the ‘Leahy Law’ can be waived by the Secretary of State for Defense if she or he deems that ‘extraordinary circumstances’ require it.<sup>6</sup>

| U.S. law                                 | Area of arms transfer controls  | Provisions  |
|--|---|---|
| U.S. Foreign Assistance Act <sup>7</sup> | Exports of defense articles or defense services to government end-users | <p><i>“... 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”</i></p> <p>Security assistance is defined as <i>“any license ...[for] the export of defense articles or defense services [on the U.S. Munitions List] to or for the armed forces, police, intelligence, or other internal security forces of a foreign country”</i></p> <p>Gross violations of internationally recognized human rights' are defined as <i>“includ[ing] torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person”</i></p> |

| U.S. law   | Area of arms transfer controls   | Provisions   |
|--|--|--|
| U.S. Foreign Assistance Act & Export Administration Regulations <sup>8</sup> | Exports of policing and security equipment <sup>9</sup>                                      | <p><i>“licenses may not be issued under the Export Administration Act of 1979 for the export of crime control and detection instruments and equipment to a country, the government of which engages in a consistent pattern of gross violations of internationally recognized human rights”<sup>10</sup></i></p> <p><i>“[export licences] will generally be considered favorably on a case-by-case basis unless...there is evidence that the government of the importing country may have violated internationally recognized human rights”<sup>11</sup></i></p> <p>In 2009, the Department of Commerce proposed strengthening this provision to consider <i>“international norms regarding human rights and the practices of other countries that control exports to promote the observance of human rights”</i> in applying controls on this category of equipment.<sup>12</sup></p> |
| 'Leahy Law'  | Foreign military or security assistance (equipment or training) to foreign government forces | Foreign military or security assistance may not be provided to <i>“any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights”<sup>13</sup></i>  |

Amnesty International believes that a “punitive” or “sanctions” approach to framing the human rights provisions in the ATT would inevitably lead to states demanding executive discretion or waiver provisions. These provisions could then be exploited by unscrupulous governments to authorise irresponsible arms transfers. In addition, this approach in the ATT would reduce the decision-making process to one where States that are seen to have “bad human rights records” cannot receive any imports of arms. Such an approach may lead state parties of the ATT to fail to take fully into account specific legitimate military, security and policy needs of a state to protect its population, consistent with international standards for the rule of law. It could also undermine the creation of opportunities for constructive dialogue between potential exporting and importing States, whereby preventative or remedial measures may be discussed and implemented as a prerequisite for decisions regarding particular arms transfers that would then no longer pose a substantial risk of being used in serious human rights violations.

As an alternative, a risk-based system to consistently apply international human rights law to arms transfer decisions under the ATT should be clearly defined in law

as a preventative mechanism. It should be an objective means to prevent irresponsible arms transfers likely to be used to commit or facilitate serious human rights violations. A decision not to allow the international transfer of items on a state's conventional arms control list should be based on the principle of protecting human rights, taking full account of the most likely use of the types of arms in question over the projected life-cycle of the items. The decision should not be a punitive measure in the sense outlined above, or be made to secure an economic, political or military advantage to a State or group of States.

In exceptional circumstances, such a preventative approach would allow for the imposition of comprehensive arms embargoes. If a wide range of arms and related items were being used for serious violations and abuses of human rights, or for grave breaches of international humanitarian law, and a substantial risk existed that further types of arms or related items would be misused in this way, states should act without delay to impose a generalised cessation or embargo on the transfer all those types of arms and related items. A cessation should be maintained until the substantial risk of the arms or related items being used for serious violations of human rights or international humanitarian law has ended through remedial actions. This is also reflected in U.S. state practice.

## **U.S. SUSPENSIONS OF ARMS SUPPLIES ON HUMAN RIGHTS GROUNDS**

The implementation of human rights standards in U.S. arms export control practice has been variable: Amnesty International has documented a range of U.S. arms transfers to end-users known to be persistently violating international human rights and humanitarian law with arms of the kind supplied from the United States.<sup>14</sup> Notably, this appears to have occurred when the human rights standards in U.S. arms export control law have been subject to waivers under executive discretion.

Nonetheless the United States has also regularly suspended arms supplies to particular armed forces and government end-users on human rights grounds. The ATT would not impose blanket arms embargoes upon particular countries in this way. Nonetheless, U.S. arms transfer suspensions provide a barometer of the USA's application of human rights standards to its arms transfers, and indicate a standard comparable to other states with robust human rights standards in their arms control laws.

The USA currently restricts arms transfers to four countries not subject to UN arms embargoes, on the grounds of persistent violations of international human rights law or international humanitarian law: Myanmar, China (policing and paramilitary equipment), Sri Lanka and Zimbabwe.<sup>15</sup> Equally, previous unilateral U.S. suspensions of arms transfers have reflected international human rights concerns: for example, both the USA and the EU suspended arms transfers to Indonesia in 1999 following serious human rights violations perpetrated by the Indonesian military in East Timor.<sup>16</sup>

## AT WHAT THRESHOLD SHOULD HUMAN RIGHTS VIOLATIONS PREVENT AN ARMS TRANSFER?

Decisions on authorising or refusing arms transfers under the ATT will remain with the national authorities of the state authorizing the transfer. Amnesty International has nonetheless proposed a workable standard of assessment for national authorities in which each proposed arms transfer should be assessed objectively on a case-by-case basis, considering both the human rights record of the proposed end-user, and the nature of the equipment to be transferred. The transfer should not be authorised if there is a **substantial risk** that it is likely to be used to facilitate **serious violations** of international human rights or humanitarian law.

In making this determination, reference should be made to credible evidence and previous findings of serious violations by independent competent bodies, NGOs, UN reports and other reliable, verifiable sources. Such reports might also establish the occurrence and nature of human rights violations or abuses leading the prospective transferring state to determine for itself that there is a substantial risk of those violations or abuses being repeated or facilitated with the use of the equipment to be transferred. Two aspects are helpful for such a determination:

1. Scale and persistence of the violations: is there a conduct that involves a pattern of violations or abuse of that right? Are the violations persistent or affecting many people?

2. Character and pervasiveness of the violations: does the violation amount to a crime under international law? Do the violations or abuses apply to a significant spectrum of human rights: civil, economic, political, cultural and social? The range and nature of the rights being violated or abused can also determine the existence of a 'substantial risk'.<sup>17</sup>

## HUMAN RIGHTS, ARMS TRANSFERS AND SECURITY

U.S. government policy statements on the ATT have emphasised that case-by-case risk assessment of all conventional arms transfers should be carried out by all states and that the ATT should principally be:

*a means to have all nations do what the United States already does: examine each conventional weapons transfer before it is authorized to be certain that it will enhance - not undermine - **security and stability**.*<sup>18</sup>

The U.S. government has argued that arms transfers contributing to states' instability enable "*terrorist groups or rogue nations to destabilize regions or support terrorist activity*", fostering terrorism, criminality and regional instability.<sup>19</sup>

Both international instruments and U.S. policy widely recognize that security depends on the respect of human rights.<sup>20</sup> Articles 55 and 56 of the UN Charter require UN Member States to take "joint and separate action" to promote "universal respect for, and observance of, human rights and fundamental freedoms for all", in



order to create “conditions of stability and well-being which are necessary for peaceful and friendly relations among nations”. U.S. policy, including the 'Fragile States Strategy' of the U.S. Agency for International Development, likewise argues that serious and widespread human rights violations contribute significantly to states' fragility, and thus impact negatively on U.S. and international security.<sup>21</sup>

Importantly, however, the U.S. alone cannot unilaterally prevent international arms supplies that foster wider instability and conflict, not least through facilitating serious human rights violations. For example, at the peak of Nepal's civil war in February 2005, the U.S. reportedly postponed supplies of arms and “lethal” military training to Nepal. Yet China and India continued to authorise arms supplies to Nepal throughout 2005, facilitating ongoing violence and human rights violations.<sup>22</sup>

Fragility and insecurity lack international definition, and states often disagree about what constitute 'fragile' or 'unstable' situations, and the acceptability of arms transfers threatening to exacerbate such fragility or instability. Arguably a human rights rule in arms transfer controls, based on international human rights law, could instead provide an objective international standard for preventing international transfers of conventional arms which threaten stability and security.

## CONCLUSION

As the negotiations unfold in the UN process to agree an Arms Trade Treaty, the United States should support clear human rights provisions in the Treaty that will require all states to prevent irresponsible transfers of conventional arms. This would be consistent with states' existing legal obligations – both domestic and international – and with the specific policy goals of the U.S and a majority of states. Like U.S. arms export control law, the ATT human rights standard must be based upon states' obligations under international human rights law, and must not merely require states to 'take into account' the risk of the misuse of arms. However, the human rights provisions in the ATT should not be framed in a manner that allows punitive measures, but rather must place a positive preventative obligation on states not to allow the international transfer of conventional arms in circumstances where credible evidence points to a **substantial risk** that the arms are likely to be used in **serious violations of international human rights law or international humanitarian law**.

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<sup>1</sup> Statement on the Arms Trade Treaty by Hillary Rodham Clinton, October 14, 2009 (<http://www.state.gov/secretary/rm/2009a/10/130573.htm>)

<sup>2</sup> Although it is not the main subject of this paper, U.S. export control law and policies also contain provisions relating to U.S. obligations under international humanitarian law. Under the Foreign Assistance Act, the Secretary of State must inform Congress about “consolidated information regarding the commission of war crimes” by proposed recipients of security assistance. Specific prohibitions on weapons whose effect is indiscriminate or excessively injurious under international humanitarian law have also been incorporated into U.S. arms export policy: transfers of anti-personnel landmines have been suspended since October 1992 (last extended to 2014 by Public Law 110-161, Fiscal Year 2008 Consolidated Appropriations Act, Section 634(j), 26 December 2007, p. 487). The U.S. has also permanently prohibited transfers of all cluster munitions which leave behind 1% or more of their submunitions as ‘duds’, as well as requiring that other cluster munition transfers must only be made on the condition that the receiving country agrees that the cluster munitions “will not be used where civilians are known to be present” (Omnibus budget bill HR 1105, signed into law on March 11, 2009)

<sup>3</sup> OSCE, *Principles governing conventional arms transfers*, adopted at the 49<sup>th</sup> Plenary Meeting of the Special Committee of the OSCE Forum for Security Co-operation in Vienna 25 November 1993

<sup>4</sup> *Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons* as adopted by the Plenary of 11-12 December 2002

<sup>5</sup> UN Charter, International Covenant on Civil and Political Rights, Convention on the Prevention and Punishment of the Crime of Genocide, United Nations Convention Against Torture, among other existing international legal obligations.

<sup>6</sup> The President may authorise military or security assistance without regard to the provisions of the Foreign Assistance Act or Arms Export Control Act, if she or he notifies Congress “that to do so is important to the security interests of the United States”. Arms sales may likewise be authorised outside of these provisions of these laws if the President determines that they are “vital to the national security interests of the United States”. The President must consult with Congress’ Foreign Affairs, Foreign Relations and Appropriations Committees prior to using the Presidential waiver, and the waiver cannot be used for more than \$250,000,000 of assistance or \$750,000,000 of funds in any fiscal year: U.S. Foreign Assistance Act 1961 (as amended), Section 614. Similarly, the Leahy provision in the Defense Authorisation Act can be waived by the Secretary of State for Defense if she or he determines that “extraordinary circumstances” require it.

<sup>7</sup> U.S. Foreign Assistance Act 1961 (as amended), Section 502B

<sup>8</sup> 15 Code of Federal Regulations (CFR) Chapter 7

<sup>9</sup> Crime control equipment’ defined in the Commerce Control List of the Export Administration Regulations

<sup>10</sup> U.S. Foreign Assistance Act 1961 (as amended), Section 502B

<sup>11</sup> Export Administration Regulations §742.79(b) and (d)

<sup>12</sup> U.S. Department of Commerce, ‘Revisions to the Commerce Control List To Update and Clarify Crime Control License Requirements’, *Federal Register Vol. 74, No. 153, August 11, 2009* (74 FR

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<sup>13</sup> The Leahy provision in successive versions of the Foreign Operations Appropriations Act (see Section 551 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act 2006) and the Defense Appropriations Act (see Section 8061 of Defense Appropriations Act 2009). Note that the FOAA version covers both equipment and training, but the DAA version covers only training.

<sup>14</sup> See, for example, Amnesty International, *Blood at the Crossroads: Making the case for a global Arms Trade Treaty* (Index: ACT 30/011/2008, October 2008), especially chapters 3 and 7 on Colombia and Iraq; and Amnesty International, *Somalia: International military and policing assistance should be reviewed* (Index: AFR 52/001/2010, January 2010)

<sup>15</sup> U.S. Department of State, Directorate of Defense Trade Controls, Country Policies and Embargoes ([http://www.pmdtc.state.gov/embargoed\\_countries/index.html](http://www.pmdtc.state.gov/embargoed_countries/index.html) accessed 25 March 2010). For China: the 'Tiananmen Square' sanctions, imposed in 1989, have suspended export licences for crime control and detection instruments and equipment (Foreign Relations Authorization Act, FY 1990 and FY 1991, Section 902)

<sup>16</sup> For U.S. suspension, see Federal Register, October 14, 1999 (64 FR 55805); for EU embargo, see *Council Common Position of 16 September 2009 concerning restrictive measures against the Republic of Indonesia (1999/624/CFSP)*

<sup>17</sup> Amnesty International, *How to apply human rights standards to arms transfer decisions* (Index: ACT 30/008/2008, October 2008)

<sup>18</sup> Remarks by Ellen Tauscher, Under-Secretary for Arms Control and International Security, delivered by Special Negotiator Donald Mahley, February 18, 2010 (<http://www.state.gov/t/us/136849.htm>). Emphasis added.

<sup>19</sup> Remarks by Ellen Tauscher, Under-Secretary for Arms Control and International Security, delivered by Special Negotiator Donald Mahley, February 18, 2010 (<http://www.state.gov/t/us/136849.htm>)

<sup>20</sup> "We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights." Kofi Annan, UN Secretary-General, *In larger freedom: towards development, security and human rights for all* (2005)

<sup>21</sup> USAID, *Fragile States Strategy* (PD-ACA-999), January 2005, pp.3-4 ([www.usaid.gov/policy/2005\\_fragile\\_states\\_strategy.pdf](http://www.usaid.gov/policy/2005_fragile_states_strategy.pdf))

<sup>22</sup> Amnesty International, *Nepal: Military Assistance Contributing to Grave Human Rights Violations* (Index: ASA 31/047/2005, June 2005); Amnesty International, *Dead on Time – arms transportation, brokering and the threat to human rights* (Index: ACT 30/008/2006, 10 May 2006), pp.11-15

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