

# HERDING CATS: PRIORITIZING HUMAN RIGHTS IN THE CONVENTIONAL ARMS TRANSFER POLICIES

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## POSTSCRIPT

In February 2023, after the writing of this Article but prior to its publication, President Biden released his Conventional Arms Transfer policy in NSM-18. For the author's analysis of the policy, see John Chappell & Ari Tolany, *Unpacking Biden's Conventional Arms Transfer Policy*, LAWFARE (Mar. 1, 2023, 1:34 PM), <https://www.lawfaremedia.org/article/unpacking-bidens-conventional-arms-transfer-policy> (concluding that the policy maintains the traditional structure used since the Reagan Administration, contains stronger human rights provisions than its predecessors, and leaves important questions about implementation). The author further recommends Rachel Stohl et al., *Biden's New Policy: Can Human Rights Reshape U.S. Conventional Arms Transfers?*, ARMS CONTROL TODAY (May 2023), <https://www.armscontrol.org/act/2023-05/features/bidens-new-policy-human-rights-reshape-us-conventional-arms-transfers>. The Robert Jervis International Studies Forum also published a collection of essays responding to the policy. ROBERT JERVIS INT'L SEC. STUD. F., H-DIPLO | RJISSF POLICY ROUNDTABLE II-2: BIDEN'S CONVENTIONAL ARMS TRANSFER POLICY (Diane Labrosse et al. eds., 2023).

## I. INTRODUCTION

During the Second World War, the United States, under the direction of President Franklin Delano Roosevelt, became a "great arsenal of democracy" for its European allies,<sup>1</sup> building up a formidable armaments industry that has remained a significant factor in U.S. foreign policy.<sup>2</sup>

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<sup>1</sup> *Fireside Chat 16: On the "Arsenal of Democracy"*, UNIV. OF VA. MILLER CTR., at 33:50 (Dec. 29, 1940), <https://millercenter.org/the-presidency/presidential-speeches/december-29-1940-fireside-chat-16-arsenal-democracy>.

<sup>2</sup> Shana Marshall, *The Defense Industry's Role in Militarizing U.S. Foreign Policy*, in 294 MIDDLE E. REP., EXIT EMPIRE—IMAGINING NEW PATHS FOR U.S. POLICY (Waleed Hazbun et al. eds., Spring 2020).

President Roosevelt and his successors have had to carefully consider the consequences of decisions to transfer arms overseas. As President Dwight D. Eisenhower foretold in his 1961 Farewell Address, the new “conjunction of an immense military establishment and a large arms industry” came with “grave implications. Our toil, resources[,] and livelihood are all involved; so is the very structure of our society.”<sup>3</sup> President Eisenhower was primarily concerned with the consequences of the “military-industrial complex” for American society.<sup>4</sup> However, the greatest costs have arguably been borne by those living in the shadow of arms made in the United States and supplied to perpetrators of human rights abuses and war crimes.

Since the end of the Cold War, the United States has consistently been the world’s leading arms exporter.<sup>5</sup> From 2017 to 2021, the United States sold more weapons than Russia, France, and China combined.<sup>6</sup> In 2020 alone, U.S. Government-authorized arms exports reached \$175 billion.<sup>7</sup> Exporting weapons is a leading way that the United States participates in armed conflict, far more common than direct uses of military force abroad.<sup>8</sup> The United States has directly provided arms to twenty conflicts since 2000, and belligerents use U.S.-manufactured weapons in conflicts around the world.<sup>9</sup>

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<sup>3</sup> Dwight D. Eisenhower, U.S. President, Farewell Address (Jan. 17, 1961), <https://www.archives.gov/milestone-documents/president-dwight-d-eisenhowers-farewell-address>.

<sup>4</sup> *Id.*

<sup>5</sup> *Top List TIV Tables*, STOCKHOLM INT’L PEACE RSCH. INST., <https://armstrade.sipri.org/armstrade/page/toplist.php> (last visited Sept. 16, 2022) (under Step 1, ensure “suppliers” is selected; under Step 2, choose the range from 1991 to 2021; under Step 3, ensure “On screen” is selected, then click “Download”).

<sup>6</sup> PIETER D. WEZEMAN ET AL., TRENDS IN INTERNATIONAL ARMS TRANSFERS, 2021, at 2 (2022). The next three largest exporters of major arms from 2017 to 2021 were Russia, France, and China. *Id.* The statistics are based on deliveries completed during the period under consideration, not the entrance of parties into a contract, which is another common measure of arms sale volume. See *Sources and Methods*, STOCKHOLM INT’L PEACE RSCH. INST., <https://www.sipri.org/databases/armstransfers/sources-and-methods> (last visited May 16, 2023).

<sup>7</sup> U.S. Bureau of Pol.-Mil. Affs., *U.S. Arms Transfers Increased by 2.8 Percent in FY 2020 to \$175.08 Billion*, U.S. DEP’T OF STATE (Jan. 20, 2021), <https://www.state.gov/u-s-arms-transfers-increased-by-2-8-percent-in-fy-2020-to-175-08-billion/>. The cited figure includes both Foreign Military Sales and Direct Commercial Sales. *Id.*

<sup>8</sup> See Katherine Arnold, *U.S. Proxy Warfare: Patterns in Middle Eastern Conflicts*, LONDON SCH. OF ECON & POL. SCI. (May 9, 2023), <https://blogs.lse.ac.uk/lseih/2019/09/03/u-s-proxy-warfare-patterns-in-middle-eastern-conflicts/> (documenting the U.S. Government’s preference to indirectly participate in regional conflicts by exporting arms to its allies).

<sup>9</sup> WORLD PEACE FOUND., *Top Arms Suppliers: United States of America*, WHO ARMS WAR, <https://whoarmswar.tufts.edu/supplier/united-states-of-america/> (last visited May 16, 2022).

Arms transfers and security assistance are potent U.S. foreign policy tools. Security assistance strengthens international partnerships.<sup>10</sup> Interoperability of U.S. and partner equipment enhances cooperation and reinforces regional security structures.<sup>11</sup> Arms transfers can facilitate American diplomatic efforts,<sup>12</sup> encouraging governments to engage with U.S. allies.<sup>13</sup> As concerns mount about strategic competition with China,<sup>14</sup> some see arms transfers as a way to shore up support and compete with rising powers as they extend partnerships.<sup>15</sup> Particular administrations emphasize the domestic economic benefits of arms exports,<sup>16</sup> although some analysts argue that economic benefits are exaggerated.<sup>17</sup> When effectively conditioned, arms transfers may provide leverage to incentivize reform and respect for human rights.<sup>18</sup>

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<sup>10</sup> *U.S. Security Assistance in the Middle East: Hearing Before the Subcomm. on Near E., S. Asia, Cent. Asia, & Counterterrorism of the Comm. on Foreign Rels.*, 117th Cong. 7 (2021) (statement of Mira Resnick, Deputy Assistant Secretary for Regional Affairs, Bureau of Political-Military Affairs, U.S. Department of State).

<sup>11</sup> *Id.* at 8 (“Security cooperation—including security agreements, Foreign Military Sales[], exercises, training, and exchanges—are integral components to the overall U.S. regional strategy that improve interoperability with the U.S. partner nations’ forces to meet their legitimate external defense needs and deter regional threats.”).

<sup>12</sup> *See id.* at 7 (“[S]ecurity cooperation and security assistance are among the many different tools we can use to advance diplomacy.”).

<sup>13</sup> *Id.* This was the case with U.S. military aid to Egypt after the Camp David Accords, for example. *See* Duncan L. Clarke, *U.S. Security Assistance to Egypt and Israel: Politically Untouchable?*, 51 MIDDLE E.J. 200, 202 (1997).

<sup>14</sup> Remarks on United States Foreign Policy at the Department of State, 2021 DAILY COMP. PRES. DOC. 1 (Feb. 4, 2021) (“American leadership must meet this new moment of advancing authoritarianism, including the growing ambitions of China to rival the United States . . . .”); Address Before a Joint Session of the Congress, 2021 DAILY COMP. PRES. DOC. 3 (Apr. 28, 2021) (“We’re in competition with China and other countries to win the 21st [C]entury. We’re at a great inflection point in history.”).

<sup>15</sup> *See* Joe Gould, *Pentagon’s Arms Sales Chief Retires as Biden Administration Faces Decisions on Transfer Policy*, DEF. NEWS (Oct. 13, 2021), <https://www.defensenews.com/digital-show-dailies/ausa/2021/10/13/pentagons-arms-sales-chief-resigns-as-biden-administration-faces-decisions-on-transfer-policy/> (“Grant said America’s strategic competition with Russia and China should weigh on U.S. decisions to sell arms to foreign partners . . . . She called strategic competition ‘a new lens for us.’”).

<sup>16</sup> *See, e.g.*, Glenn Kessler, *Trump’s Claim of Jobs from Saudi Deals Grows by Leaps and Bounds*, WASH. POST (Oct. 22, 2018, 3:00 AM), <https://www.washingtonpost.com/politics/2018/10/22/trumps-claim-jobs-saudi-deals-grows-by-leaps-bounds/> (demonstrating President Trump’s enthusiasm for the economic benefits associated with arms exports).

<sup>17</sup> *See* Jonathan D. Caverley, *Dispelling Myths About U.S. Arms Sales and American Jobs*, CARNEGIE ENDOWMENT FOR INT’L PEACE (May 18, 2021), <https://carnegieendowment.org/2021/05/18/dispelling-myths-about-u.s.-arms-sales-and-american-jobs-pub-84521>; *see also* A. Trevor Thrall & Caroline Dorminey, *Risky Business: The Role of Arms Sales in U.S. Foreign Policy*, CATO INST., Mar. 13, 2018, at 1 (contending that “[t]he economic benefits of arms sales are dubious . . .”).

<sup>18</sup> *See* MAX BERGMANN & ALEXANDRA SCHMITT, A PLAN TO REFORM U.S. SECURITY ASSISTANCE 32 (2021) (explaining how the U.S. can protect civilians, as well as its own interests, by ensuring its partners enforce proper human rights standards).

However, U.S. arms transfers can also facilitate significant harm, whether by directly enabling abuses or legitimizing groups and individuals that perpetrate harms unrelated to the weapons provided.<sup>19</sup> In Yemen, the human rights organization Mwatana documents that the Saudi-led coalition used U.S.-manufactured weapons in strikes against homes,<sup>20</sup> marketplaces,<sup>21</sup> a school bus,<sup>22</sup> a funeral hall,<sup>23</sup> and a wedding party<sup>24</sup> killing hundreds of civilians. For years, the United States provided equipment, training, and other assistance to units of the Afghan Nation Security Forces accused of child sexual abuse.<sup>25</sup> In May 2021, Israeli airstrikes killed 60 Palestinians in Gaza, at least 129 of whom were civilians, including 66 children.<sup>26</sup> That month, the Biden Administration approved \$735 million in precision-guided missiles to the Israeli Government.<sup>27</sup>

It should come as no surprise that arms sales have long been the subject of significant controversy in the United States. For example, in the 1930s, the Special Committee on Investigation of the Munitions Industry, popularly known as the Nye Committee, examined the influence of arms

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<sup>19</sup> See MICHAEL T. KLARE, *AMERICAN ARMS SUPERMARKET* 183–84 (1984) (providing examples of when U.S. arms transfers have negatively impacted diplomatic relations and contributed to repressive regimes).

<sup>20</sup> *Yemen: U.S. Made Bomb Used in Deadly Air Strike on Civilians*, AMNESTY INT'L (Sept. 26, 2019), <https://www.amnesty.org/en/latest/press-release/2019/09/yemen-us-made-bomb-used-in-deadly-air-strike-on-civilians/>. The Saudi-led coalition treated entire neighborhoods, cities, and regions as military targets, a violation of international humanitarian law. Michael Newton, *An Assessment of the Legality of Arms Sales to the Kingdom of Saudi Arabia in the Context of the Conflict in Yemen 2* (Vand. Univ. Sch. L., Working Paper No. 17-26, 2022).

<sup>21</sup> *Yemen: U.S. Bombs Used in Deadliest Market Strike*, HUM. RTS. WATCH (Apr. 7, 2016, 10:00 PM), <https://www.hrw.org/news/2016/04/08/yemen-us-bombs-used-deadliest-market-strike>.

<sup>22</sup> *Yemen: Coalition Bus Bombing Apparent War Crime*, HUM. RTS. WATCH (Sept. 2, 2018, 12:00 AM), <https://www.hrw.org/news/2018/09/02/yemen-coalition-bus-bombing-apparent-war-crime>.

<sup>23</sup> *Yemen: Saudi-Led Funeral Attack Apparent War Crime*, HUM. RTS. WATCH (Oct. 13, 2016, 12:00 AM), <https://www.hrw.org/news/2016/10/13/yemen-saudi-led-funeral-attack-apparent-war-crime>.

<sup>24</sup> Aric Toler, *American-Made Bomb Used in Airstrike on Yemen Wedding*, BELLINGCAT (Apr. 27, 2018), <https://www.bellingcat.com/news/mena/2018/04/27/american-made-bomb-used-airstrike-yemen-wedding>.

<sup>25</sup> Leila Miller, *Pentagon Maintained Aid for Afghans Accused of Rights Abuses, Watchdog Says*, PBS (Jan. 25, 2018), <https://www.pbs.org/wgbh/frontline/article/pentagon-maintained-aid-for-afghans-accused-of-rights-abuses-watchdog-says/>.

<sup>26</sup> OCHA, *RESPONSE TO THE ESCALATION IN THE OPT | SITUATION REPORT NO. 3: (4-10 JUNE 2021)*, at 1 (June 12, 2021), <https://www.ochaopt.org/content/response-escalation-opt-situation-report-no-3-4-10-june-2021>.

<sup>27</sup> Jacqueline Alemany et al., *Biden Administration Approves \$735 Million Weapons Sale to Israel*, WASH. POST (May 17, 2021, 6:21 PM), <https://www.washingtonpost.com/politics/2021/05/17/biden-administration-approves-735-million-weapons-sale-israel/>.

manufacturers on the U.S. decision to enter World War I.<sup>28</sup> In the 1980s, the United States armed the Nicaraguan Contras, which sought to overthrow the Nicaraguan Government and committed violations of international humanitarian law (“IHL”), including torture, kidnapping, murder, and sexual assault.<sup>29</sup> In response, Congress passed the Boland Amendment, which prohibited the expenditure of U.S. funds for the purpose of overthrowing the Nicaraguan Government.<sup>30</sup> The Reagan Administration dodged the restriction by selling arms to the embargoed Iranian Government and using the proceeds to fund the Contras.<sup>31</sup> During the Obama and Trump Administrations, arms sales to the governments of Saudi Arabia and the United Arab Emirates facilitated widespread civilian harm and possible war crimes in Yemen.<sup>32</sup> A congressional attempt to block such sales failed when President Trump vetoed a joint resolution of disapproval in 2019.<sup>33</sup>

Amid these controversies, and in light of the consequences of conventional arms proliferation, U.S. presidents have often struggled to manage the costs and benefits of arms transfers. Since the Carter Administration, Conventional Arms Transfer (“CAT”) policies have

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<sup>28</sup> “*Merchants of Death*” U.S. SENATE, <https://www.senate.gov/about/powers-procedures/investigations/merchants-of-death.htm> (last visited Oct. 14, 2022) (describing the Nye Committee’s investigations into reports that arms manufacturers unduly influenced the U.S. Government’s decision to enter World War II).

<sup>29</sup> DONALD T. FOX & MICHAEL J. GLENNON, REPORT TO THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AND THE WASHINGTON OFFICE ON LATIN AMERICA CONCERNING ABUSES AGAINST CIVILIANS BY COUNTERREVOLUTIONARIES OPERATING IN NICARAGUA, at iii, 15, 22, app. 1, (1985), <https://www.wola.org/sites/default/files/downloadable/Central%20America/past/1985-Nicaragua-Abuses%20Against%20Civilians%20by%20Counterrevolutionaries%20Operating%20in%20Nicaragua%20PART%201.pdf>.

<sup>30</sup> Memorandum from J.R. Scharfen to W. Robert Pearson, Nat’l Sec. Council (Aug. 23, 1985) (available online at [https://www.brown.edu/Research/Understanding\\_the\\_Iran\\_Contra\\_Affair/documents/d-nic-21.pdf](https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/documents/d-nic-21.pdf)); see *Legal Limits on Aid to the Contras*, WASH. POST (May 28, 1987), <https://www.washingtonpost.com/archive/politics/1987/05/28/legal-limits-on-aid-to-the-contras/92132e1c-559a-442b-9585-94090c8e9f84/> (outlining the history and context of the Boland Amendment).

<sup>31</sup> Bryan Craig, *The Iran-Contra Affair*, UNIV. OF VA. MILLER CTR. (July 12, 2017), <https://millercenter.org/issues-policy/foreign-policy/iran-contra-affair>.

<sup>32</sup> Nick Cumming-Bruce, *War Crimes Report on Yemen Accuses Saudi Arabia and U.A.E.*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/world/middleeast/un-yemen-war-crimes.html>; see Julian Santos, *U.S. Involvement in Yemen War Crimes*, INST. FOR YOUTH IN POL. (June 21, 2021), <https://www.yipinstitute.com/article/u-s-involvement-in-yemen-war-crimes>.

<sup>33</sup> 165 CONG. REC. S5053 (daily ed. July 24, 2019) (recording President Trump’s veto message, which overrode congressional disapproval of proposed arms transfers to Saudi Arabia, the United Kingdom, Spain, and Italy).

provided a roadmap for arms transfer decision-making in the executive branch.<sup>34</sup>

This Article examines human rights in the CAT policies. Centering the analysis on human rights requires deemphasizing other issues such as strategic competition and economic benefits. Nevertheless, this research fills a gap in current literature, which has not shown how human rights concerns have evolved from one CAT policy to the next in the half-century since the first policy's release. This analysis aims to show how the position of human rights in the CAT policies has changed and then makes recommendations for what a CAT policy that centers on human rights might look like, which may inform how analysts assess human rights in future policies.

While the prominence of human rights concerns has waxed and waned in the CAT over the decades, side-by-side analysis of the policies reveals broader trends. The CAT policies have mostly been evolutionary documents, shifting at the edges while adhering to a form established during the Reagan Administration that centers on case-by-case considerations of multi-factor lists.<sup>35</sup> The CAT policies' format is flexible by design, but the format blunts the policies' ability to affect decision-making. To better prioritize human rights, the CAT policies should move away from the longstanding format and incorporate specific restrictions, including implementing the legally binding prohibition on arms sales to certain countries established in Section 502B of the Foreign Assistance Act. However, the deep-seated flaws in the CAT policies also demonstrate that presidential action alone is insufficient to prioritize human rights. Congress needs to strengthen its oversight of executive arms sales, including by refining the tools at its disposal to hold the President accountable for problematic arms transfers.

Section I of this Article introduces the CAT policies and describes their position relative to U.S. laws regarding arms exports. Situating the CAT policies in the context of other laws and regulations, the Section

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<sup>34</sup> Letter from Elizabeth Field, Acting Dir., Int'l Affs. & Trade, to Robert Menendez, Ranking Member on the Comm. on Foreign Rels., U.S. Senate (Sept. 9, 2019) (available online at <https://www.gao.gov/assets/gao-19-673r.pdf>).

<sup>35</sup> See Announcement Concerning a Presidential Directive on United States Conventional Arms Transfer Policy 1 PUB. PAPERS 615, 616 (July 9, 1981) [hereinafter NSDD-5] (announcing President Reagan's CAT policy); see also Memorandum from William J. Clinton, U.S. President, on Presidential Decision Directive/NSC-34: U.S. Policy on Conventional Arms Transfer to Members of the Presidential Cabinet (Feb. 10, 1995), available at <https://clinton.presidentiallibraries.us/items/show/101150> [hereinafter PDD-34] (prescribing President Clinton's CAT policy); see also Directive on United States Conventional Arms Transfer Policy 1 PUB. PAPERS 30, 31–32 (Jan. 15, 2014) [hereinafter PPD-27] (establishing President Obama's CAT policy); see also National Security Presidential Memorandum on United States Conventional Arms Transfer Policy, 2018 DAILY COMP. PRES. DOC. 2–4 (Apr. 19, 2018) [hereinafter NSPM-10] (implementing President Trump's CAT policy).

shows the CAT policies' importance in an area of law characterized by broad delegations of legislative power to the President.

Section II analyzes each of the five CAT policies and discusses President Biden's upcoming policy with a focus on human rights and international humanitarian law. Progressing through the policies of the Carter, Reagan, Bush, Obama, and Trump Administrations, the analysis identifies points of continuity and departure and highlights certain controversial arms sales in each administration. The Section also analyzes early indications from the Biden Administration regarding its forthcoming CAT policy.

Section III assesses overarching trends and key takeaways from the analysis of the CAT policies and argues that the policies could serve as meaningful instruments for human rights promotion despite significant shortcomings in the policies thus far. In particular, the Section argues that the predominant format of the CAT policies—multi-factor lists of considerations that allow for excessive flexibility—does not adequately mitigate the human rights risks posed by some U.S. arms sales.

Section IV offers the President and Congress recommendations to prioritize human rights in arms transfer law and policy. The recommendations should serve as benchmarks for a CAT policy that centers on human rights issues. For the executive branch, the Section recommends introducing specific restrictions on arms sales to recipients that pose particularly high human rights risks. The Section further proposes that the CAT policy implement Section 502B of the Foreign Assistance Act, a legal prohibition on security assistance to certain governments that presidents have neglected since the 1980s. The Section urges the legislative branch to restructure the framework legislation governing the congressional and presidential roles in arms sales. The Section closes with reflections on the importance of arms transfer decisions and the need to prioritize human rights in the laws and policies that structure those decisions.

## II. WHAT ARE THE CONVENTIONAL ARMS TRANSFER POLICIES?

A hierarchy of authorities governs U.S. arms sales. The Constitution, U.S. statutes, international law, and administrative regulations together dictate how arms sales take place.<sup>36</sup> Presidential directives like the CAT policies command relatively little authority within that hierarchy and

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<sup>36</sup> See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 66 (2d ed. 1996) (explaining the Constitution's effect on congressional power regarding arms sales); see also A. Trevor Thrall et al., *Power, Profit, or Prudence? U.S. Arms Sales Since 9/11*, 14 *STRATEGIC STUD. Q.* 100, 100–03 (2020) (describing the influence of law, executive branch policy, and international treaties on arms sales).

must be consistent with statutory requirements.<sup>37</sup> Nevertheless, the CAT policies play a significant role in how presidents approach arms sale decisions. This Section introduces the CAT policies in the context of relevant U.S. law and policy.

Under the Foreign Commerce Clause of the United States Constitution, Congress has the exclusive and inherent authority to “regulate commerce with foreign nations.”<sup>38</sup> Arms exports regulations, including human rights restrictions, are a clear exercise of the foreign commerce power, which encompasses both private sales of arms licensed by the U.S. Government and government sales of arms to foreign purchasers.<sup>39</sup>

Congress may delegate authorities to the executive branch so long as it provides an intelligible principle to which the executive branch must conform in carrying out the delegated authority.<sup>40</sup> The current framework statutes for the arms trade are the Foreign Assistance Act of 1961 (“FAA”)<sup>41</sup> and Arms Export Control Act of 1976 (“AECA”),<sup>42</sup> which delegate congressional arms transfer authorities to the President and offer principles to guide the President’s exercise of delegated powers. The FAA authorizes the President to “furnish military assistance . . . to any friendly country or international organization” to strengthen the security of the United States and promote world peace.<sup>43</sup> The AECA authorizes the President to “control the import and the export of defense articles and defense services” “[i]n furtherance of world peace and the security and foreign policy of the United States.”<sup>44</sup> The Export Control Reform Act of 2018 is also relevant to export controls on firearms and certain dual-use items on the Commerce Control List.<sup>45</sup>

The FAA expressly references human rights issues. Section 502B of the FAA enshrined human rights promotion as “a principal goal of the

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<sup>37</sup> See JOHN RAMMING CHAPPELL & BRITTANY BENOWITZ, HUMAN RIGHTS, CIVILIAN HARM, AND ARMS SALES: A PRIMER ON U.S. LAW AND POLICY 3 (2022) (stating that presidential arms transfer authority is delegated from Congress and is subject to Congressional oversight and revocation).

<sup>38</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>39</sup> See HENKIN, *supra* note 36.

<sup>40</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

<sup>41</sup> Foreign Assistance Act, 22 U.S.C. §§ 2151–2450.

<sup>42</sup> Arms Export Control Act, 22 U.S.C. §§ 2751–2799aa-2.

<sup>43</sup> 22 U.S.C. § 2311(a).

<sup>44</sup> 22 U.S.C. § 2778(a)(1).

<sup>45</sup> See Export Control Reform Act, 50 U.S.C. §§ 4801(2), 4811(2)(A)(i)–(ii) (2018).



foreign policy of the United States” for the first time.<sup>46</sup> Section 502B also bans providing security assistance to “any country the government of which engages in a consistent pattern of gross violation of internationally recognized human rights.”<sup>47</sup> Section 620M, formerly Section 620J, is popularly known as the “Leahy Law” and stipulates that “[n]o assistance shall be furnished under [the FAA or AECA] to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.”<sup>48</sup>

Although the FAA and AECA asserted some congressional oversight for arms sales, they delegated the bulk of arms sales decision-making to the President.<sup>49</sup> The executive branch decides when the U.S. Government should sell arms, and it licenses arms sales by private companies.<sup>50</sup>

Congress’s affirmative approval for individual sales is not required.<sup>51</sup> While Congress can theoretically block specific arms sales with a joint resolution of disapproval under the AECA after a mandatory presidential notification of a major arms sale, it has never done so.<sup>52</sup> After *INS v. Chadha* invalidated the legislative veto, Congress amended the AECA—which then only required a concurrent resolution of disapproval to override an arms sale—to require a joint resolution subject to a presidential veto.<sup>53</sup> Congress has occasionally passed AECA joint resolutions of disapproval but failed to overcome a presidential veto. For example, in 1988 and 2019, Congress passed joint resolutions blocking arms sales to Saudi Arabia, but Presidents Reagan and Trump vetoed the

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<sup>46</sup> International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, tit. III, sec. 301(a), § 502B(a)(1), 90 Stat. 729, 748 (codified as amended at 22 U.S.C. § 2304(a)(1)).

<sup>47</sup> *Id.*

<sup>48</sup> Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, tit. VI, sec. 7034(k), § 620J, 125 Stat. 786, 1216 (codified as amended at 22 U.S.C. § 2378d(a)); Bureau of Democracy, Hum. Rts., & Lab., *About the Leahy Law*, U.S. DEP’T OF STATE (Jan. 20, 2021), <https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet/>.

<sup>49</sup> Foreign Assistance Act, 22 U.S.C. §§ 2151–2450; Arms Export Control Act, 22 U.S.C. §§ 2751–2799aa-2; see Bureau of Pol.-Mil. Affs., *U.S. Arms Sales and Defense Trade*, U.S. DEP’T OF STATE (Jan. 20, 2021) (outlining the extensive powers of the President under the AECA and FAA).

<sup>50</sup> Bureau of Pol.-Mil. Affs., *supra* note 49.

<sup>51</sup> See *id.* (indicating that while the process of selling arms to foreign nations may involve notifying Congress, it does not require congressional approval).

<sup>52</sup> Arms Export Control Act, 22 U.S.C. § 2753; CHAPPELL & BENOWITZ, *supra* note 37, at 5.

<sup>53</sup> Arms Export Control Act, Pub. L. No. 99-247, § 36(b)(3), 100 Stat. 9, 9 (1986) (codified as amended at 22 U.S.C. §§ 2753, 2776, 2796b); see also Peter K. Tompa, *The Arms Export Control Act and Congressional Codetermination Over Arms Sales*, 1 AM. UNIV. INT’L L. REV. 291, 292–93 (1986) (discussing the effects of *INS v. Chadha* on the AECA).

resolutions, and Congress failed to garner enough support to override the vetoes.<sup>54</sup>

Nor has Congress blocked arms sales to a particular country using its authority to do so under the FAA.<sup>55</sup> Only once, in 1976, did Congress request and receive a report on human rights in specified countries under Section 502B(c) of the FAA.<sup>56</sup> Such a report is a prerequisite for an FAA joint resolution of disapproval.<sup>57</sup> Unlike the AECA, Section 502B of the FAA has always required Congress to muster a two-thirds supermajority in each chamber to overcome a presumptive presidential veto.<sup>58</sup> Section 502B's joint resolution of disapproval came as a compromise after President Ford vetoed an earlier bill that would have allowed for a concurrent resolution of disapproval.<sup>59</sup>

Although Congress has occasionally used its power of the purse to restrict security assistance or invoked the foreign commerce power to impose arms embargoes, it has only rarely done so. For example, Congress banned the expenditure of U.S. funds for the purpose of overthrowing the Nicaraguan Government in the Boland Amendment<sup>60</sup> and embargoed arms sales to Chile in the Kennedy Amendment.<sup>61</sup> However, Congress has generally been less assertive in limiting arms sales to partners that commit human rights abuses in recent decades.

Since 1977, five presidents—Carter, Reagan, Clinton, Obama, and Trump—have released CAT policies to guide executive branch decision-making related to arms sales consistent with the requirements of the FAA

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<sup>54</sup> Vanessa Patton Sciarra, *Congress and Arms Sales: Tapping the Potential of the Fast-Track Guarantee Procedure*, 97 YALE L.J. 1439, 1448 (1988); Catie Edmondson, *Senate Fails to Override Trump's Veto on Saudi Arms Sales*, N.Y. TIMES (July 29, 2019), <https://www.nytimes.com/2019/07/29/us/politics/trump-veto-saudi-arms-sales.html>.

<sup>55</sup> See CHAPPELL & BENOWITZ, *supra* note 37, at 8.

<sup>56</sup> See generally U.S. DEP'T OF STATE, HUMAN RIGHTS AND U.S. POLICY: ARGENTINA, HAITI, INDONESIA, IRAN, PERU, AND THE PHILIPPINES, H.R. REP. NO. 80-756, at III (1976).

<sup>57</sup> 22 U.S.C. § 2304(c)(4)(A) (2014).

<sup>58</sup> See International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, tit. III, sec. 301(a), § 502B, Stat. 729, 749 (codified at 22 U.S.C. § 2304) (amending § 502B(c)(4)(A) to allow Congress to issue a joint resolution, subject to presidential veto, that prohibits arms transfers to certain countries).

<sup>59</sup> David Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 GA. J. INT'L & COMPAR. L. 231, 246–48 (1977); see Tompa, *supra* note 53, at 299–300; see also Veto of the Foreign Assistance Bill, 2 PUB. PAPERS 1482 (May 8, 1976) (“These provisions are incompatible with the express provision in the Constitution that a resolution having the force and effect of law must be presented to the President and, if disapproved, repassed by a two-thirds majority in the Senate and the House of Representatives. They extend to the Congress the power to prohibit specific transactions authorized by law without changing the law—and without following the constitutional process such a change would require.”).

<sup>60</sup> See Memorandum from J.R. Scharfen to W. Robert Pearson, *supra* note 30.

<sup>61</sup> Richard D. Lyons, *Senate Votes Overhaul of Military Aid*, N.Y. TIMES (Feb. 19, 1976), <https://www.nytimes.com/1976/02/19/archives/senate-votes-overhaul-of-military-aid-senate-votes-bill-for.html>.

and AECA.<sup>62</sup> Neither President George H.W. Bush nor President George W. Bush released a new policy, instead relying on the policies of their immediate predecessors.<sup>63</sup> After his inauguration in 2021, President Biden announced a comprehensive review of the Trump Administration's policy on conventional arms transfers,<sup>64</sup> signaling the release of a still-forthcoming sixth CAT policy.

### III. HUMAN RIGHTS IN THE CAT POLICIES

Each CAT policy has treated human rights differently. The policies have incorporated human rights issues to varying extents and used different mechanisms to consider arms transfer decisions. The following Section assesses how the prioritization of human rights issues relative to other factors and the express language of the CAT policies have changed from one policy to the next. It analyzes relevant provisions of the CAT policies thus far and then discusses President Biden's anticipated CAT policy.

#### A. *President Carter, 1977–1981*

President Jimmy Carter's CAT policy grew out of concerns about the proliferation of conventional arms amid a boom in U.S. arms sales in the 1970s that came with the implementation of the Nixon Doctrine.<sup>65</sup> A surge in orders from the Middle East drove total orders to \$8.3 billion in 1974,

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<sup>62</sup> See Conventional Arms Transfer Policy: Statement by the President, 1 PUB. PAPERS 931–32 (May 19, 1977) [hereinafter PD-13]; see also NSDD-5, *supra* note 35; PDD-34, *supra* note 35; PPD-27, *supra* note 35; NSPM-10, *supra* note 35. At the time of this Article's publication, the Biden Administration has released its CAT policy ("NSM-18") and emphasized the role of human rights considerations in conducting arms transfers. See Memorandum from the White House on United States Conventional Arms Transfer Policies, *supra* note 62.

<sup>63</sup> See RICHARD F. GRIMMETT, CONG. RSCH. SERV., 95-639 F, CONVENTIONAL ARMS TRANSFERS: PRESIDENT CLINTON'S POLICY DIRECTIVE 1 n.2 (1995) ("The Bush Administration issued no policy statement of guidelines to the public."); see also David G. Anderson, *The International Arms Trade: Regulating Conventional Arms Transfers in the Aftermath of the Gulf War*, 7 AM. UNIV. INT'L L. REV. 749, 752 n.8 (1992) (noting that while no policy has been specifically outlined, the Bush Administration did not significantly differ from President Reagan's CAT policy).

<sup>64</sup> Mike Stone & Patricia Zengerle, *Exclusive-Biden Plans Shift in Arms Policy to Add Weight to Human Rights Concerns*, REUTERS (Aug. 4, 2021, 4:35 PM), <https://www.reuters.com/world/us/exclusive-biden-plans-shift-arms-export-policy-favor-human-rights-sources-2021-08-04/>.

<sup>65</sup> See Michael C. Jensen, *U.S. Arms Exports Boom, Particularly to the Mideast*, N.Y. TIMES (Apr. 14, 1975), <https://www.nytimes.com/1975/04/14/archives/us-arms-exports-boom-particularly-to-the-mideast-orders-at-record.html>; see also William D. Hartung, *Nixon's Children: Bill Clinton and the Permanent Arms Bazaar*, 12 WORLD POL'Y J. 25, 29 (1995).

an eightfold increase over the late 1960s.<sup>66</sup> To mitigate conventional arms proliferation, President Carter's CAT policy implemented specific, measurable restrictions on U.S. arms transfers.<sup>67</sup> The first president to incorporate human rights issues into U.S. foreign policy in earnest,<sup>68</sup> President Carter included human rights considerations into his CAT policy,<sup>69</sup> although they would occupy a more prominent position in subsequent policies.

## 1. Origins

The 1970s saw a resurgence of interest in human rights in the United States, which had led to the drafting of the Universal Declaration of Human Rights in the 1940s but since retreated from engagement on human rights issues.<sup>70</sup> Samuel Moyn argues that the second half of the Cold War ushered in a "search for a new moral culture of idealism and activism."<sup>71</sup> The civil rights and antiwar movements helped elevate human rights concerns, as did the establishment of civil society organizations like Amnesty International and Helsinki Watch (later Human Rights Watch).<sup>72</sup> Before long, the human rights revolution reached Capitol Hill.<sup>73</sup>

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<sup>66</sup> Jensen, *supra* note 65; *see also* Emma Rothschild, *Carter and Arms: No Sale*, N.Y. REV. BOOKS (Sept. 15, 1977), <https://www.nybooks.com/articles/1977/09/15/carter-and-arms-no-sale/> ("The boom in [U.S.] military sales began in 1973. But the well-known and spectacular figures reported at the time—\$10 billion a year or more of "sales" in 1974 and 1975—measured orders, or agreements to sell military goods and services, rather than actual military exports. What is happening now is that deliveries are catching up with these earlier orders.").

<sup>67</sup> PD-13, *supra* note 62.

<sup>68</sup> Cedric W. Tarr, Jr., *Human Rights and Arms Transfer Policy*, 8 DENVER J. INT'L L. & POL'Y 573, 578 (1979).

<sup>69</sup> PD-13, *supra* note 62, at 932.

<sup>70</sup> *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); *see also* Barbara Keys, *Congress, Kissinger, and the Origins of Human Rights Diplomacy*, 34 DIPLOMATIC HIST. 823, 826 (2010) (describing "the human rights revolution" that occurred during the 1970s).

<sup>71</sup> SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 120 (2018).

<sup>72</sup> *See* BRUCE W. JENTLESON, THE PEACEMAKERS 251–62 (2018) (showing the evolution of Amnesty International and Helsinki Watch from humble beginnings to becoming prominent advocates for human rights); *see also* THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE 244, 324 (2007) (outlining Martin Luther King Jr.'s vision of a human rights movement "sweeping the globe" and his public denouncement of the Vietnam War); *see also* Salar Mohandesi, *From Anti-Imperialism to Human Rights: The Vietnam War and Radical Internationalism in the 1960s and 1970s* (2017) (Ph.D. dissertation, University of Pennsylvania) (available online at <https://repository.upenn.edu/cgi/viewcontent.cgi?article=4264&context=edissertations>) (tracing the history of the antiwar movement and how human rights "came to displace anti-imperialism").

<sup>73</sup> *See* Keys, *supra* note 70, at 824–26 (describing the events that led to Congress's renewed focus on human rights).

Long considered a rubber-stamp body for the President's policy, the House Foreign Affairs Committee became a significant vehicle for pressuring the executive branch on human rights issues due to the advocacy of Representative Donald Fraser (D-Minn.).<sup>74</sup> As Chair of the House Foreign Affairs Subcommittee on International Organizations and Movements, Congressman Fraser held a series of hearings on human rights and U.S. foreign policy starting in 1973.<sup>75</sup> In early 1974, Congressman Fraser issued a fifty-four-page report titled *Human Rights in the World Community: A Call for U.S. Leadership*.<sup>76</sup> The report marked a watershed moment for human rights in U.S. foreign policy, directly resulting in the institutionalization of human rights issues in the State Department bureaucracy.<sup>77</sup>

Georgia Governor Jimmy Carter ran his presidential campaign in the context of a new congressional commitment to human rights, and he pledged to incorporate human rights concerns as a focal point of his foreign policy.<sup>78</sup> Carter also spoke out against excessive arms exports, often saying, “[w]e cannot be both the world’s leading champion of peace and the world’s leading supplier of weapons of war.”<sup>79</sup>

## 2. President Carter’s PD-13

Soon after President Carter’s inauguration, he turned to arms sales issues. On May 13, 1977, President Carter issued the first CAT policy, Presidential Directive 13 (“PD-13”), which committed to restraining U.S. arms transfers.<sup>80</sup> Recognizing the leading role of the United States as the world’s foremost arms exporter, Carter implemented the policy

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<sup>74</sup> *Id.* at 830.

<sup>75</sup> Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT’L L. 246, 251 (1982); see Sarah B. Snyder, “A Call for U.S. Leadership”: Congressional Activism on Human Rights, 37 DIPLOMATIC HIST. 372, 372–73 (2013) (arguing that Congressman Fraser’s hearings precipitated a wave of human rights legislation, formalized human rights as a factor in U.S. foreign policy, and laid the groundwork for President Carter’s work on human rights).

<sup>76</sup> DONALD M. FRASER, HUMAN RIGHTS IN THE WORLD COMMUNITY: A CALL FOR U.S. LEADERSHIP, H.R. REP. NO. 29-692, at 3 (1974).

<sup>77</sup> Keys, *supra* note 70, at 832.

<sup>78</sup> *Carter and Human Rights, 1977-1981*, U.S. DEP’T OF STATE: OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1977-1980/human-rights>, (last visited February 18, 2023).

<sup>79</sup> *E.g.*, Jimmy Carter, Candidate for U.S. President, Address at a Luncheon of the Foreign Policy Association in New York City, (June 23, 1976) (transcript available online at <https://www.presidency.ucsb.edu/documents/address-luncheon-the-foreign-policy-association-new-york-city>).

<sup>80</sup> PD-13, *supra* note 62, at 931; see Martin Langvandslie, Promising Restraint: The Carter Administration’s Arms Transfer Policy 50–51 (2004) (Cand. Philol. thesis, University of Oslo).

unilaterally.<sup>81</sup> In his statement, Carter declared, “the United States will henceforth view arms transfers as an exceptional foreign policy implement, to be used only in instances where it can be clearly demonstrated that the transfer contributes to our national security interests.”<sup>82</sup> The statement further stipulated, “in the future the burden of persuasion will be on those who favor a particular arms sale, rather than those who oppose it.”<sup>83</sup>

President Carter offered six specific “controls” that applied across the board to implement his policy of arms restraint.<sup>84</sup> Carter committed to decreasing the total dollar volume of new arms sales in 1977 and set the goal of further reducing the dollar value in subsequent years.<sup>85</sup> In two of the policy’s controls, PD-13 committed to limiting the proliferation of advanced arms, making specific pledges regarding sales of newly developed weapons systems.<sup>86</sup> The Carter policy prohibited coproduction agreements for “significant weapons, equipment, and major components.”<sup>87</sup> In addition to existing legal requirements regarding retransfer of U.S. arms, the CAT policy stated that the United States may stipulate that it would not allow retransfers as a condition for arms sales.<sup>88</sup> The Carter Administration’s final control required “policy level [authorization] by the Department of State” for the promotion of arms sales by private companies and stated that U.S. embassies and military elements would not “promote or assist in the promotion of arms sales without specific authorization.”<sup>89</sup>

### 3. A New Role for Human Rights

Although human rights considerations did not appear among President Carter’s six controls, human rights considerations appeared

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<sup>81</sup> PD-13, *supra* note 62, at 931; see Jimmy Carter, U.S. President, Address Before the United Nations General Assembly (Mar. 17, 1977) (“We will also seek to establish Soviet willingness to reach agreement with us on mutual military restraint in the Indian Ocean, as well as on such matters as arms exports to the troubled areas of the world.”). Conventional arms transfer talks with the Soviet Union began later that year. See *U.S. and Soviet Agree to Hold Regular Talks to Curb Arms Trade*, N.Y. TIMES (May 12, 1978), <https://www.nytimes.com/1978/05/12/archives/us-and-soviet-agree-to-hold-regular-talks-to-curb-arms-trade-early.html>.

<sup>82</sup> PD-13, *supra* note 62, at 931.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 931–92.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 932.

<sup>87</sup> *Id.*

<sup>88</sup> PD-13, *supra* note 62, at 932.

<sup>89</sup> THE WHITE HOUSE, PRESIDENTIAL DIRECTIVE/NSC–13, at 3 (1977), <https://www.jimmycarterlibrary.gov/assets/documents/directives/pd13.pdf>. Though President Carter announced his CAT policy to the American public on May 19, 1977, he first instituted a slightly different, classified version on May 13.

elsewhere in his CAT policy. President Carter pledged, “[i]n formulating [a] security assistance program consistent with these controls, we will continue our efforts to promote and advance respect for human rights in recipient countries.”<sup>90</sup> Because the Carter Administration drafted the CAT policy early in the human rights revolution, any mention of human rights marked a departure from the Nixon and Ford Administrations, in which Secretary of State Henry Kissinger typically resisted calls to meaningfully integrate human rights into U.S. foreign policy.<sup>91</sup>

The Carter Administration took significant strides in institutionalizing concern for human rights in U.S. foreign policy.<sup>92</sup> Where the Nixon and Ford Administrations resisted congressional human rights mandates, the Carter Administration committed resources and attention to strengthening the Bureau of Democracy, Human Rights, and Labor, and preparing the annual Country Reports on Human Rights Practices required by Section 502B of the FAA.<sup>93</sup> President Carter also cut off security assistance to eight Latin American partners with poor human rights records.<sup>94</sup>

But the Carter Administration had significant shortcomings in implementation of arms transfer restraint. The sale of sophisticated Airborne Warning and Control Systems (“AWACS”) to Iran in 1978 drew criticism for violating the CAT policy.<sup>95</sup> The Carter Administration never restricted security assistance to Indonesia’s Government, which held thousands of political prisoners.<sup>96</sup> Nor did President Carter succeed in his goal of reducing the total value of U.S. arms exports, which increased from \$12.8 billion in 1977 to \$17.1 billion in 1981.<sup>97</sup> One congressional critic said in 1978 that Carter’s policy “made a difference in semantics, but no [difference] in practice.”<sup>98</sup>

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<sup>90</sup> PD-13, *supra* note 62, at 932.

<sup>91</sup> See Keys, *supra* note 70, at 823–28; see also Langvandslien, *supra* note 80, at 76.

<sup>92</sup> See *Carter and Human Rights*, *supra* note 78 (discussing the changes made to the State Department’s approach to human rights during the Carter Administration).

<sup>93</sup> *Carter and Human Rights*, *supra* note 78; see Keys, *supra* note 70, at 825 n.7 (stating that Presidents Ford and Nixon clashed with Congress when discussing the human rights framework established during this era).

<sup>94</sup> David P. Forsythe, *Congress and Human Rights in U.S. Foreign Policy: The Fate of General Legislation*, 9 HUMAN RIGHTS Q. 382, 383 (1987).

<sup>95</sup> See Harold J. Logan, *Bureaucracy Still Struggling to Restrain U.S. Arms Sales*, WASH. POST (Nov. 12, 1977), <https://www.washingtonpost.com/archive/politics/1977/11/12/bureaucracy-still-struggling-to-restrain-us-arms-sales/a033ef13-6f62-4e56-b6b1-a7428910902b/>.

<sup>96</sup> See Forsythe, *supra* note 94, at 384.

<sup>97</sup> William Stueck, *Placing Jimmy Carter’s Foreign Policy*, in *THE CARTER PRESIDENCY: POLICY CHOICES IN THE POST-NEW DEAL ERA* 244, 252 (Gary M. Fink & Hugh Davis Graham eds., 1998).

<sup>98</sup> Logan, *supra* note 95.

## B. *President Reagan, 1981–1995*

The Reagan Administration's CAT policy directly opposed President Carter's policy.<sup>99</sup> Where Carter used specific restrictions to advance a policy of arms transfer restraint, Reagan offered lists of factors and goals to consider arms sales on a case-by-case basis.<sup>100</sup> President Reagan rejected President Carter's unilateral restraint, instead putting narrowly defined national security interests at the forefront of arms sale decisions.<sup>101</sup>

### 1. President Reagan's CAT Policy

President Ronald Reagan was critical of his predecessor's approach to arms sales.<sup>102</sup> The Reagan Administration focused on Cold War politics in its weapons sale decisions, arming authoritarian anticommunist partners.<sup>103</sup> Across the board, the Reagan Administration removed arms transfer restrictions that it alleged "substituted theology for a healthy sense of self-preservation" and were part of "an American withdrawal from world responsibilities."<sup>104</sup>

Accordingly, President Reagan's 1981 CAT policy struck a stark contrast from its predecessor. Whereas the Carter CAT policy introduced a presumption against arms transfers as a general matter, the Reagan CAT policy stressed that the U.S. Government would review proposed

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<sup>99</sup> Randall Fowler, *Art of the Arms Deal: Reagan, AWACS, and the Rhetorical Presidency*, 105 Q.J. SPEECH 273, 289 (2019).

<sup>100</sup> See Michael Klare, *Carter's Arms Policy*, NACLA (Sept. 25, 2007), <https://nacla.org/article/carter%27s-arms-policy> (explaining how President Carter reduced the sale of weapons by restricting the total dollar value of U.S. military exports and constraining the advancement of military technology); see generally James Reston, *Washington; Reagan's Falkland Test*, N.Y. TIMES, (May 23, 1982), <https://www.nytimes.com/1982/05/23/opinion/washington-reagan-s-falkland-test.html> (noting that the Reagan Administration indicated that Britain's request for military assistance during the Falkland Islands War would be "evaluated on a case-by-case basis.").

<sup>101</sup> See David J. Louscher & Michael D. Salomon, *New Directions and New Problems for Arms Transfers Policy*, 35 NAVAL WAR COLL. REV. 40, 41 (1982) (stating that President Carter arduously campaigned for unilateral initiatives to control arms sales); cf. William D. Hartung, *Why Sell Arms? Lessons From the Carter Years*, 10 WORLD POL'Y J. 57, 58 (1993) (excerpting that the Reagan Administration disfavored President Carter's arms-transfer restraint, instead preferred a more laissez-faire approach).

<sup>102</sup> See Michael Gordon, *Reagan and Arms Treaty: A Sharp Shift in Policy*, N.Y. TIMES (May 30, 1986), <https://www.nytimes.com/1986/05/30/world/reagan-and-arms-treaty-a-sharp-shift-in-policy.html> (indicating that President Reagan viewed the Carter Administration's strategic arms treaty as "fatally flawed").

<sup>103</sup> See Forsythe, *supra* note 94, at 384–85.

<sup>104</sup> John M. Goshko, *Carter Restraints on Arms Sales to Friends Are Scrapped by Reagan Administration*, WASH. POST (May 22, 1981), <https://www.washingtonpost.com/archive/politics/1981/05/22/carter-restraints-on-arms-sales-to-friends-are-scrapped-by-reagan-administration/9222a9d9-a381-445c-b5ac-2301f067aeac/>.



sales on a case-by-case basis.<sup>105</sup> While Carter called arms transfers an “exceptional foreign policy implement,”<sup>106</sup> Reagan uplifted arms transfers as “an essential element of [U.S.] global defense posture and an indispensable component of its foreign policy.”<sup>107</sup>

The Reagan Administration scrapped the six Carter-era controls and introduced a list of arms transfer goals and a list of factors to consider in arms transfer decisions.<sup>108</sup> Whereas Carter’s controls offered specific, measurable benchmarks, the Reagan Administration’s model offered more flexibility in implementation but also ensured that the CAT policy need not affect arms sale outcomes, focusing instead on factors for considering proposed sales.<sup>109</sup> Each subsequent CAT policy has followed President Reagan’s model, using multi-factor lists of goals and considerations.<sup>110</sup>

The Reagan Administration’s goals and factors emphasized a narrow conception of national security in the Cold War context. The policy stressed that “[t]he United States will evaluate requests primarily in terms of their net contribution to enhanced deterrence and defense. It will accord high priority to requests from its major alliance partners and to those nations with whom it has friendly and cooperative security relationships.”<sup>111</sup>

## 2. Erasing Human Rights

The Reagan Administration’s CAT policy made no mention of human rights factors.<sup>112</sup> One criterion required considering “whether any detrimental effects of the transfer are more than counterbalanced by positive contributions to United States interests and objectives.”<sup>113</sup> But the Reagan CAT policy did not acknowledge that violations of human

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<sup>105</sup> Compare PD-13, *supra* note 62, at 931 (placing the burden of persuasion on the party favoring a particular arms sale), with NSDD-5, *supra* note 35, at 616 (“All requests will be considered on a case-by-case basis.”).

<sup>106</sup> PD-13, *supra* note 62, at 931.

<sup>107</sup> NSDD-5, *supra* note 35, at 616.

<sup>108</sup> See *id.* (providing the Reagan Administration’s rationale for arms transfer decisions); see also PD-13, *supra* note 62, at 931 (explaining the Carter Administration’s six controls to “implement a policy of arms restraint.”).

<sup>109</sup> Compare PD-13, *supra* note 62, at 931–32 (stating unambiguous language, such as “the United States will not” and “will not be permitted”), with NSDD-5, *supra* note 35, at 616 (providing more leeway by using ambiguous terms when considering arms transfer decisions, such as “may require” and “any detrimental effects”).

<sup>110</sup> See PDD-34, *supra* note 35, at 3; PPD-27, *supra* note 35, at 31; NSPM-10, *supra* note 35, at 3–4.

<sup>111</sup> NSDD-5, *supra* note 35, at 616.

<sup>112</sup> See *id.* (showing generally no mention of human rights factors within the policy).

<sup>113</sup> *Id.*

rights or international humanitarian law were detrimental effects.<sup>114</sup> As one of Reagan's Administration officials put it:

We do not necessarily believe that (human rights) should be the sole determinant of relationships entered into for our security . . . [n]or do we believe that a policy which has the effect of isolating us from contacts with other countries necessarily advances our ability to persuade other countries to improve their civil rights conditions.<sup>115</sup>

U.S. security assistance to other countries skyrocketed 300% from 1980 to 1984.<sup>116</sup> Weapon sales to the Global South increased as the Reagan Administration sought to “arm countries seen as threatened by U.S. enemies such as the Soviet Union, Cuba[,] or Libya.”<sup>117</sup> In 1983, President Reagan lifted an arms embargo against Guatemala amid an ongoing genocide against Mayan people there.<sup>118</sup> Just weeks after the release of his CAT policy, President Reagan approved the sale of \$8.5 billion in AWACS surveillance aircraft to Saudi Arabia.<sup>119</sup> Many in Congress opposed the sale, with 301 representatives and 48 senators voting to block the transfer in a concurrent resolution of disapproval.<sup>120</sup>

### *C. President Clinton, 1995–2014*

The Clinton Administration's CAT policy did not significantly depart from the structure of the Reagan policy. However, with Cold-War concerns about the Soviet Union passed, the Clinton policy reintegrated human rights concerns and placed greater emphasis on restraint, echoing Carter's policy.

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<sup>114</sup> See *id.* (suggesting that the Reagan Administration failed to consider whether human rights violations resulting from a particular arm transfer were a “detrimental effect” to be counterbalanced by the transfer's positive contributions to U.S. interests).

<sup>115</sup> Dean Reynolds, *Reagan Nixes Human Rights Considerations in Arms Sales*, UNITED PRESS INT'L (July 10, 1981), <https://www.upi.com/Archives/1981/07/10/Reagan-nixes-human-rights-considerations-in-arms-sales/1054363585600/>. The statement mischaracterized President Carter's policy which included human rights as just one factor to be considered when making arms transfer decisions.

<sup>116</sup> See Forsythe, *supra* note 94, at 385.

<sup>117</sup> Dan Morgan, *U.S. Policy on Weapons Sales in Third World Is Loosening*, WASH. POST (Aug. 1, 1982), <https://www.washingtonpost.com/archive/politics/1982/08/01/us-policy-on-weapons-sales-in-third-world-is-loosening/802b5414-980a-4b1c-847f-1affbd522469/>.

<sup>118</sup> Bernard Gwertzman, *U.S. Lifts Embargo on Military Sales to Guatemalans*, N.Y. TIMES (Jan. 8, 1983), <https://www.nytimes.com/1983/01/08/world/us-lifts-embargo-on-military-sales-to-guatemalans.html>.

<sup>119</sup> Charles Mohr, *Saudi AWACS Deal Passes \$8 Billion*, N.Y. TIMES (Aug. 22, 1981), <https://www.nytimes.com/1981/08/22/world/saudi-awacs-deal-passes-8-billion.html>.

<sup>120</sup> H.R. Con. Res. 194, 97th Cong. (1981).

## 1. President Clinton's PDD-34

After the Cold War ended, President Bill Clinton developed an updated CAT policy, which he released on February 10, 1995, in Presidential Decision Directive 34 ("PDD-34").<sup>121</sup> The policy balanced Carter's restraint with Reagan's instrumentalization of arms sales as a defense policy tool. In its own words, PDD-34 "promote[d] restraint . . . in transfers of weapons systems that may be destabilizing or dangerous to international peace. At the same time, the policy support[ed] transfers that [met] legitimate defense requirements of [U.S.] friends and allies, in support of [U.S.] national security and foreign[] policy interests."<sup>122</sup>

In structure, however, the operative provisions of the Clinton policy took their cue from the Reagan Administration. Like its direct predecessor, PDD-34 revolves around two lists: the CAT policy's goals and the criteria that "[a]ll arms transfer decisions [took] into account."<sup>123</sup> The policy also declined to adopt President Carter's presumption of denial, saying "the U.S. Government will continue to make arms transfer decisions on a case-by-case basis" as it did during the Reagan Administration.<sup>124</sup> By and large, PDD-34's goals and criteria also bore a strong resemblance to the Reagan Administration's policy. Of the Clinton Administration's five goals, four overlapped significantly with those of the Reagan Administration.<sup>125</sup>

Clinton's CAT policy was the first to emphasize the importance of U.S. economic considerations in arms transfer decision-making.<sup>126</sup> While the Carter policy factored in the economic impact of arms transfers on recipient countries,<sup>127</sup> the Clinton policy stated that it would consider "[t]he impact on U.S. industry and the defense industrial base" in arms transfer decisions.<sup>128</sup> The Reagan policy listed "enhanc[ing] United States defense production capabilities and efficiency" as a goal of arms transfers but did not mention U.S. industry or include defense production as a decision-making criterion.<sup>129</sup>

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<sup>121</sup> PDD-34, *supra* note 35, at 1; GRIMMETT, *supra* note 63, at 1.

<sup>122</sup> GRIMMETT, *supra* note 63, at 9.

<sup>123</sup> *Id.* at 11.

<sup>124</sup> *Id.*

<sup>125</sup> Compare PDD-34, *supra* note 35, at 3 (promoting military advancement for the U.S. and its allies, international stability, and increased military production), with NSDD-5, *supra* note 35, at 616 (promoting military advancement for the U.S. and its allies, international stability, and increased military production).

<sup>126</sup> Lora Lumpe, *Clinton's Conventional Arms Export Policy: So Little Change*, ARMS CONTROL TODAY, May 1995, at 9, 9.

<sup>127</sup> PD-13, *supra* note 62, at 932.

<sup>128</sup> PDD-34, *supra* note 35, at 9.

<sup>129</sup> NSDD-5, *supra* note 35, at 616.

Between discussing the goals of the CAT policy and listing criteria for consideration of arms sales, the Clinton Administration added two new sections: “Supporting Arms Control and Arms Transfer Restraint”<sup>130</sup> and “Supporting Responsible U.S. Transfers.”<sup>131</sup> The former Section included several paragraphs discussing U.S. policy “to promote control, restraint, and transparency of arms transfers”<sup>132</sup> while the latter comprised a paragraph describing the role of the U.S. Government in supporting approved arms transfers.<sup>133</sup>

## 2. Reincorporating Human Rights

PDD-34 mentioned human rights as both a goal of arms transfers and a criterion to consider in arms transfer decisions,<sup>134</sup> reincorporating human rights issues into the CAT policy and emphasizing human rights more than the first two policies.

For the first time, President Clinton’s CAT policy explicitly listed human rights as one of five conventional arms transfer goals.<sup>135</sup> The Reagan Administration’s CAT policy expressed that “[a]ppplied judiciously, arms transfers can . . . foster regional and internal stability, thus encouraging peaceful resolution of disputes and evolutionary change.”<sup>136</sup> Clinton expanded the goal to include promoting “peaceful conflict resolution and arms control, human rights, democratization, and other U.S. foreign policy objectives.”<sup>137</sup>

After the Reagan Administration removed human rights considerations from the arms transfer criteria, the Clinton Administration restored them. In its list of twelve criteria to consider in arms transfer decisions, PDD-34 included “[t]he human rights, terrorism[,] and proliferation record of the recipient and the potential for misuse of the export in question.”<sup>138</sup> By including both a prospective recipient’s human rights record and the potential for misuse, the Clinton

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<sup>130</sup> U.S. ARMS CONTROL & DISARMAMENT AGENCY, WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS 32 (Daniel Gallik & Dennis Winstead eds., 24th ed. 1995) [hereinafter WMEAT].

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> PDD-34, *supra* note 35, at 3, 8–9.

<sup>135</sup> *Id.* at 3. While the Carter Administration included human rights in its CAT policy, the policy did not use the criteria like its successors did. PD-13, *supra* note 62, at 932; see Hartung, *supra* note 101, at 59 (“Carter seemed to be setting the stage for an effective reversal of the pro-arms-sales attitude of the Nixon/Ford years.”).

<sup>136</sup> NSDD-5, *supra* note 35, at 616.

<sup>137</sup> GRIMMETT, *supra* note 63, at 3.

<sup>138</sup> *Id.* at 11.

CAT policy required both backward- and forward-looking assessments of human rights issues.

Human rights concerns also appeared in the policy's section on "Supporting Arms Control and Arms Transfer Restraint."<sup>139</sup> Where President Reagan rejected the idea of unilateral restraint, President Clinton's policy expressed that "restraint would be considered on a case-by-case basis in transfers . . . where the transfer of weapons raises issues involving human rights or indiscriminate casualties, such as anti-personnel landmines."<sup>140</sup> The statement reflected widespread concern about civilian harm from anti-personnel landmines in the mid-1990s.<sup>141</sup>

Nevertheless, President Clinton drew criticism for some of his Administration's arms sales.<sup>142</sup> President Carter expressed his "deep disappointment" when President Clinton ended a twenty-year moratorium on advanced weapons transfers, including fighter jet sales, to Latin America.<sup>143</sup> The Clinton Administration also sold more than \$5 billion in arms sales to Turkey even as the Turkish Government escalated human rights abuses and continued repressing its Kurdish minority.<sup>144</sup>

#### D. *President Obama, 2014–2018*

President Obama's CAT policy worked within the model established by Presidents Reagan and Clinton, but it also elevated human rights issues to new heights. For the first time since the Carter Administration, the Obama CAT policy included a specific prohibition on certain arms

<sup>139</sup> See WMEAT, *supra* note 130.

<sup>140</sup> See NSDD-5, *supra* note 35, at 617 (showing that President Reagan rejected the idea of unilateral restraint); GRIMMETT, *supra* note 63, at 10.

<sup>141</sup> International activism brought unprecedented attention to the humanitarian consequences of landmines, which raised particular concern for their long-lasting nature and inability to distinguish between civilians and combatants. Four years after the release of President Clinton's CAT policy, the Ottawa Convention, also known as the Mine Ban Treaty, was signed in 1997 and the International Campaign to Ban Landmines received the Nobel Peace Prize the same year. See GRIMMETT, *supra* note 63, at 10 (inferring that the U.S. will transfer landmines on a case-by-case basis); see generally Steven Lee Myers, *Clinton Agrees to Land-Mine Ban, but Not Yet*, N.Y. TIMES (May 22, 1998), <https://www.nytimes.com/1998/05/22/world/clinton-agrees-to-land-mine-ban-but-not-yet.html> (showing concern amongst U.S. citizens regarding the use of landmines).

<sup>142</sup> See Wade Boese, *Clinton Ends 20-Year Ban on High-Tech Arms to Latin America*, 27 ARMS CONTROL TODAY 21, 21 (1997) (highlighting that U.S. and Latin American military contractors criticized the policy's leniency toward high-tech arms in Latin America).

<sup>143</sup> *Id.*; see also Douglas Waller & Jane Knight, *How Washington Works . . . Arms Deals*, TIME, Apr. 14, 1997, at 48 ("President Bill Clinton gave his approval for U.S. defense contractors to market jet fighters to Chile.").

<sup>144</sup> Michelle Ciarrocca, *U.S. Arms for Turkish Abuses*, MOTHER JONES (Nov. 17, 1999), <https://www.motherjones.com/politics/1999/11/us-arms-turkish-abuses/>; see also Hartung, *supra* note 65, at 30 (noting that Turkish Prime Minister Çiller's narrow military approach to the Kurdish problem resulted in the depopulation of over 1,400 villages in southeast Turkey and the deaths of over 15,000 people).

transfers on human rights grounds,<sup>145</sup> marking a departure from the purely case-by-case consideration of listed factors.

### 1. President Obama's PPD-27

The Arab uprisings of 2011 spurred on the Obama Administration's review of U.S. conventional arms transfer policy.<sup>146</sup> Images of U.S. manufactured teargas canisters used to forcibly disperse protests in Egypt's Tahrir Square reportedly drove U.S. officials to complete their multi-year review.<sup>147</sup> The Obama Administration published its CAT policy on January 15, 2014, in Presidential Policy Directive 27 ("PPD-27"), released nearly two decades after its predecessor.<sup>148</sup>

In format, PPD-27 is nearly identical to PDD-34, with sections on goals, criteria, "Supporting Arms Control and Arms Transfer Restraint," and "Supporting Responsible U.S. Transfers."<sup>149</sup> In the tradition of Presidents Carter and Clinton, President Obama appealed to unilateral restraint while adopting President Reagan's position that decisions to restrain would occur on a case-by-case basis.<sup>150</sup>

Like the Clinton Administration, the Obama Administration framed conventional arms transfer decisions as a balance. PPD-27 recognized conventional weapons as "legitimate instruments for the defense and

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<sup>145</sup> PPD-27, *supra* note 35, at 31 ("Ensuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law.")

<sup>146</sup> See *New Rules Tighten Rights, Atrocity Criteria in U.S. Weapons Shipments*, REUTERS (Jan. 15, 2014, 12:22 PM), <https://www.reuters.com/article/us-usa-weapons-sales/new-rules-tighten-rights-atrocity-criteria-in-u-s-weapons-shipments-idUSBREA0E16920140115> ("This is an area that has been a challenge for U.S. foreign policy for some time, but it really has been crystallized in the last couple of years with the events in the Middle East.") [hereinafter *Weapons Shipments*].

<sup>147</sup> See Rachel Stohl, *Promoting Restraint: Updated Rules for U.S. Arms Transfer Policy*, ARMS CONTROL ASS'N (Mar. 2014), <https://www.armscontrol.org/act/2014-03/promoting-restraint-updated-rules-us-arms-transfer-policy>.

<sup>148</sup> See PPD-27, *supra* note 35, at 30.

<sup>149</sup> Compare *id.* at 32–33 (specifying that two of three categories in Obama's CAT Policy were "Supporting Arms Control and Arms Transfer Restraint" and "Supporting Responsible U.S. Transfers"), with GRIMMETT, *supra* note 63, at 9–10 (using identical language as Clinton's CAT policy: "Supporting Arms Control and Arms Transfer Restraint" and "Supporting Responsible U.S. Transfers").

<sup>150</sup> Compare PD-13, *supra* note 35, at 932 ("[Criteria for arms restraint policy] will be binding unless extraordinary circumstance[s] necessitate a Presidential exception, or where I determine that countries friendly to the United States must depend on advanced weaponry . . . to maintain a regional balance."), and GRIMMETT, *supra* note 63, at 8 ("[T]he United States will exercise unilateral restraint in cases where overriding national security or foreign policy interest require us to do so."), and NSDD-5, *supra* note 35, at 616 ("All requests [for weapons] will be considered on a case-by-case basis."), with PPD-27, *supra* note 35, at 33 ("[T]he United States will exercise unilateral restraint in the export of arms in cases where such restraint will be effective or is necessitated by overriding national interests. Such restraint will be considered on a case-by-case basis [for specific] transfers . . .").

security policy of responsible nations” and acknowledged their capacity to “exacerbate international tensions, foster instability, inflict substantial damage, enable transnational organized crime, and be used to violate universal human rights.”<sup>151</sup>

Most of the content also drew heavily from the Clinton Administration’s policy. PPD-27 sets forth ten goals for U.S. arms transfers, eight of which appeared in some form among the five goals in President Clinton’s policy.<sup>152</sup> The two entirely new goals focused on counterterrorism, homeland security, and combatting transnational organized crime, reflecting U.S. concerns that intensified amid the War on Terror in the early 2000s.<sup>153</sup> The Obama policy also added two new criteria to Clinton’s twelve factors while incorporating one Clinton criterion, consistency with international agreements, into the framing summary directly prior to the list of criteria.<sup>154</sup>

## 2. Elevating Human Rights

The Obama Administration’s CAT policy gave new prominence to human rights and international humanitarian law considerations. As Tom Kelly, the State Department’s former Assistant Secretary for Political-Military Affairs, said, “[w]e wanted to make sure that it’s very clear that human rights considerations really are at the core of our arms transfer decisions.”<sup>155</sup>

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<sup>151</sup> PPD-27, *supra* note 35, at 30.

<sup>152</sup> See Stohl, *supra* note 147 (stating that Obama’s CAT policy expanded on the goals listed in Clinton’s CAT policy by adding two more goals); compare PDD-34, *supra* note 35, at 3 (ensuring that (1) U.S. military forces will continue to have a technological advantage, (2) stability will be promoted in regions critical to U.S. interest, (3) peaceful conflict resolution will be promoted, (4) allies will be helped in deterring and defending themselves against aggression, and (5) the stability of the U.S. defense industrial base will be enhanced), with PPD-27, *supra* note 35, at 31 (ensuring that (1) the U.S. and its allies will continue to enjoy technological superiority, (2) the industrial base will become stronger, (3) the ability of allies and partners to protect themselves against aggression will be promoted, (4) there will be stability in regions critical to U.S. interest, (5) peaceful conflict resolution and arms control will be promoted, (6) the conventional weapons will not be used as delivery systems of weapons of mass destruction, (7) other democratic governance will be supported, and (8) arms transfers will not contribute to human rights violations or violations of international humanitarian law).

<sup>153</sup> See Stohl, *supra* note 147.

<sup>154</sup> Compare GRIMMETT, *supra* note 63, at 11–12 (providing twelve criteria for all arms transfer decisions, the first one establishing a need for “[c]onsistency with international agreements”), with PPD-27, *supra* note 35, at 32 (“[t]he likelihood that the recipient would use the arms to commit human rights abuses or serious violations of international humanitarian law, retransfer the arms to those who would commit [such abuses or violations] . . . or identify the United States with [such abuses or violations] . . .”).

<sup>155</sup> See *Weapons Shipments*, *supra* note 146.

PPD-27 dedicated one of its ten conventional arms transfer policy goals to human rights,<sup>156</sup> whereas PDD-34's five goals included one where human rights appeared alongside "other U.S. foreign policy objectives."<sup>157</sup> The Obama Administration expressed, "[e]nsuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law" would be a goal of its policy.<sup>158</sup> The goal marked the first explicit mention of international humanitarian law in the CAT policies.<sup>159</sup> Clinton's policy alluded to customary international humanitarian law's principle of distinction in considering unilateral restraint for transferring arms that implicate "human rights or *indiscriminate casualties*" but it did not mention other principles of international humanitarian law, such as humanity and proportionality.<sup>160</sup>

Both of the Obama Administration's new criteria for arms control decisions reflected human rights concerns during the Arab uprisings, which saw U.S. arms used in ways U.S. policymakers did not originally intend.<sup>161</sup> PPD-27's criteria included the likelihood that a recipient would use arms to commit human rights abuses or serious violations of humanitarian law, retransfer arms to those who would commit such abuses and violations, or identify the United States with such abuses and violations.<sup>162</sup> The other new factor was "the risk that significant change in the political or security situation of the recipient country could lead to inappropriate end-use or transfer of defense articles."<sup>163</sup> Although the criterion does not explicitly mention human rights, it reflects a concern that political instability or changes in government could result in the misuse of arms, including human rights abuses.

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<sup>156</sup> PPD-27, *supra* note 35, at 31 ("Ensuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law.")

<sup>157</sup> PDD-34, *supra* note 35, at 3 ("To promote peaceful conflict resolution and arms control, human rights, democratization, and *other U.S. foreign policy objectives.*") (emphasis added).

<sup>158</sup> PPD-27, *supra* note 35, at 31.

<sup>159</sup> *Id.* ("Ensuring that arms transfers do not contribute to human rights violations or violations of international humanitarian law.") The other CAT policies lack any explicit mention of international humanitarian law. See PD-13, *supra* note 62; NSDD-5, *supra* note 35; PDD-34, *supra* note 35.

<sup>160</sup> See GRIMMETT, *supra* note 63, at 10. While Clinton's policy alluded to the international humanitarian law principle of considering unilateral restraint for arms transfers that could lead to haphazard casualties, it failed to mention other such principles. See *generally id.* (lacking any mention of international humanitarian law principles of humanity and proportionality).

<sup>161</sup> See Stohl, *supra* note 147.

<sup>162</sup> PPD-27, *supra* note 35, at 32.

<sup>163</sup> *Id.*



The Obama Administration also slightly expanded upon the Clinton Administration's single criterion related to human rights: while the Clinton Administration required consideration of the recipient's "human rights, terrorism, and proliferation record" and potential for misuse of the arms in question,<sup>164</sup> the Obama Administration added democratization, counterproliferation, and nonproliferation to the list.<sup>165</sup>

Like the Clinton Administration, the Obama Administration included a section on "Supporting Arms Control and Arms Transfer Restraint" in its CAT policy.<sup>166</sup> Where President Clinton's PDD-34 included just one clause on weapons that raise concerns about human rights or indiscriminate casualties,<sup>167</sup> PPD-27 dedicated a whole paragraph to humanitarian issues,<sup>168</sup> including the strictest human rights measure of any previous CAT policy. Although the Carter Administration's CAT policy also incorporated clear prohibitions on arms transfers in certain circumstances, it did not do so in the context of human rights issues.<sup>169</sup> The Clinton Administration's human rights considerations only factored into PDD-34 as one of many factors. PPD-27, on the other hand, instituted a blanket prohibition on arms transfers where the United States

has actual knowledge at the time of authorization that the transferred arms will be used to commit: genocide; crimes against humanity; grave breaches of the Geneva Conventions of 1949; serious violations of Common Article 3 of the Geneva Conventions of 1949; attacks directed against civilian objects or civilians who are legally protected from attack or other war crimes as defined in 18 U.S.C. [§] 2441.<sup>170</sup>

PDD-27's language was borrowed directly from the U.S. Government's negotiating position in talks around the Arms Trade

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<sup>164</sup> See GRIMMETT, *supra* note 63, at 11.

<sup>165</sup> See PPD-27, *supra* note 35, at 32.

<sup>166</sup> Compare GRIMMETT, *supra* note 63 at 9 (using the language "Supporting Arms Control and Arms Transfer Restraint"), *with id.* (using the language "Supporting Arms and Control and Arms Transfer").

<sup>167</sup> See PDD-34, *supra* note 35, at 6.

<sup>168</sup> See PPD-27, *supra* note 35, at 33.

<sup>169</sup> See PD-13, *supra* note 62, at 931–32 (establishing a set of controls on conventional arms transfers that reduce the dollar value of new arms sales and limit the volume of weapons that are exported, thereby abating the "virtually unrestrained spread of conventional weaponry").

<sup>170</sup> PPD-27, *supra* note 35, at 33.

Treaty, a multilateral agreement regulating the international trade in conventional arms.<sup>171</sup> Although the Arms Trade Treaty did not enter into force until December 24, 2014, the Obama Administration participated in negotiations, and President Obama signed the treaty on September 23, 2013.<sup>172</sup>

Despite the prominence of human rights in its CAT policy, the Obama Administration entered into more arms sales agreements than any administration since World War II.<sup>173</sup> Especially concerning Obama-era transfers included sales to Saudi Arabia, which has long repressed activists, political critics, and Shi'a citizens and began a brutal military campaign in Yemen in 2015.<sup>174</sup> The Obama Administration also removed a freeze on arms to Egypt, where an authoritarian leader took power in a military coup in 2013 and soon clamped down on political opposition and the freedom of expression.<sup>175</sup>

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<sup>171</sup> Compare *id.* (using language that was borrowed directly from the U.S. Government's negotiating position in talks surrounding the Arms Trade Treaty), with G.A. Res. 67/234 art. 6(3), The Arms Trade Treaty (Apr. 2, 2013) ("A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.").

<sup>172</sup> Daryl G. Kimball, *The Arms Trade Treaty at a Glance*, ARMS CONTROL ASS'N. (Aug. 2017), [https://www.armscontrol.org/factsheets/arms\\_trade\\_treaty](https://www.armscontrol.org/factsheets/arms_trade_treaty). The Senate never ratified the treaty. See S. Con. Res. 7, 113th Cong. (2013).

<sup>173</sup> William D. Hartung, *The Obama Administration Has Brokered More Weapons Sales than Any Other Administration Since World War II*, THE NATION (July 26, 2016), <https://www.thenation.com/article/archive/the-obama-administration-has-sold-more-weapons-than-any-other-administration-since-world-war-ii/>.

<sup>174</sup> See Yara Bayoumy, *Obama Administration Arms Sales Offers to Saudi Top \$115 Billion: Report*, REUTERS (Sept. 7, 2016, 3:24 PM), <https://www.reuters.com/article/us-usa-saudi-security/obama-administration-arms-sales-offers-to-saudi-top-115-billion-report-idUSKCN11D2JQ> (describing the types of weapons sold to Saudi Arabia during the Obama Administration as "small arms and ammunition to tanks, attach helicopters, air-to-ground missiles, missile defense ships, and warships."); see Samih Eloubeidi, *Saudi Arabia Human Rights Violations: Freedom of Religion and Speech*, UAB INST. FOR HUM. RTS. BLOG (Mar. 25, 2020), <https://sites.uab.edu/humanrights/2020/03/25/saudi-arabia-human-rights-violations-freedom-of-religion-and-speech/> (describing the hatred and intolerance that Saudi Arabia has toward Shia Muslims); see also Thrall et al., *supra* note 36, at 102, 107 (warning about U.S. involvement in the Yemen civil war).

<sup>175</sup> See Peter Baker, *Obama Removes Weapons Freeze Against Egypt*, N.Y. TIMES (Apr. 31, 2015), <https://www.nytimes.com/2015/04/01/world/middleeast/obama-lifts-arms-freeze-against-egypt.html> (stating that Abdel Fattah al-Sisi, a former military general, led a military coup to overthrow Egyptian President Mohamed Morsi and later arrested 40,000 people without providing a full accounting of the detentions).

### *E. President Trump, 2018–2022*

Although the Trump Administration’s CAT policy differed in format from its predecessors, it retained much of the substance. However, the policy elevated economic security more than any CAT policy thus far while eroding human rights considerations.

#### 1. President Trump’s NSPM-10

President Donald Trump released his CAT policy on April 19, 2018, in National Security Presidential Memorandum 10 (“NSPM-10”), which replaced President Obama’s PPD-27.<sup>176</sup> The Trump Administration’s CAT policy followed a different format from its predecessors, resembling a statute where previous policies consisted mainly of narrative text. Nevertheless, the Trump CAT policy preserved much of the Obama Administration’s content.

The Trump Administration’s framing of the role of conventional arms transfers in U.S. foreign policy harked back to the Reagan era. While Presidents Obama and Clinton balanced between Carter’s restraint and Reagan’s enthusiasm for arms transfers, the Trump policy favored Reagan’s approach. The policy emphasized that defending U.S. interests requires “a strong military, capable allies and partners, and a dynamic defense industrial base, which currently employs more than 1.7 million people. Strategic conventional arms transfers lie at the intersection of these interests and play a critical role in achieving our national, economic security, and foreign policy objectives.”<sup>177</sup>

As reflected in NSPM-10’s framing of arms transfers, the Trump Administration’s CAT policy elevated U.S. economic factors to unprecedented levels.<sup>178</sup> NSPM-10 stated, “[w]hen a proposed transfer is in the national security interest, which includes our economic security, and in our foreign policy interest, the executive branch will advocate strongly on behalf of United States companies.”<sup>179</sup> The statement struck a

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<sup>176</sup> See NSPM-10, *supra* note 35, at 1, 4.

<sup>177</sup> *Id.* at 1.

<sup>178</sup> See *id.* at 2, 3. The Trump Administration highlights economic security as a justification to increase the federal government’s promotion of arms sales around the world. See Thrall et al., *supra* note 36, at 102–03.

<sup>179</sup> NSPM-10, *supra* note 35, at 1.

stark contrast with President Carter's outright ban on U.S. Government promotion of private arms sales.<sup>180</sup>

Unlike previous administrations, President Trump's White House worked directly with the defense industry instead of referring industry representatives to relevant bureaus in the Departments of Defense and State.<sup>181</sup> President Trump spoke publicly about the economic boons of U.S. arms exports. After a Saudi special operations team murdered the Washington Post journalist Jamal Khashoggi, President Trump resisted calls to halt arms sales to Saudi Arabia, saying,

[w]ell, I think that would be hurting us . . . . We have a country that's doing probably better economically than it's ever done before . . . Part of that is what we are doing with our defense systems, and everybody is wanting them, and frankly I think that would be a very, very tough pill to swallow for our country.<sup>182</sup>

In defending continued arms sales to Saudi Arabia, President Trump also framed the issue in terms of competition with Russia and China. In a 2018 statement, President Trump said,

the Kingdom agreed to spend and invest \$450 billion in the United States . . . \$110 billion will be spent on the purchase of military equipment from Boeing, Lockheed Martin, Raytheon, and many other great U.S. defense contractors. If we foolishly cancel these contracts, Russia and China would be the enormous beneficiaries—and very happy to acquire all of this newfound business.<sup>183</sup>

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<sup>180</sup> President Carter's CAT Policy stated that

An amendment to the international traffic in arms regulations will be issued, requiring policy level authorization by the Department of State for actions by agents of the United States or private manufacturers which might promote the sale of arms abroad. In addition, embassies and military representatives abroad will not promote the sale of arms . . . .

PD-13, *supra* note 62, at 932.

<sup>181</sup> Josh Kirshner, *Will Biden's Conventional Arms Transfer Policy Be an Evolution or a Revolution?*, BREAKING DEF. (Jan. 14, 2022, 11:16 AM), <https://breakingdefense.com/2022/01/will-bidens-conventional-arms-transfer-policy-be-an-evolution-or-a-revolution/>.

<sup>182</sup> Joe Gould, *Trump Warns Halting Saudi Arms Sales Would Hurt Economy*, DEF. NEWS (Oct. 11, 2018), <https://www.defensenews.com/congress/2018/10/11/trump-warns-halting-saudi-arms-sales-would-hurt-economy/>.

<sup>183</sup> Statement on Standing with Saudi Arabia, 2018 DAILY COMP. PRES. DOC. 1 (Nov. 20, 2018). Fact-checkers concluded that President Trump's claims were inflated as Saudi Arabia had signed letters of offer and acceptance for only \$14.5 billion. See Calvin Woodward & Robert Burns, *AP Fact Check: Trump Inflates Value of Saudi Arms Deal*, AP NEWS (Nov.

With the President publicly lauding U.S. arms exports, U.S. foreign military sales agreements exceeded \$200 billion during the first three years of the Trump Administration.<sup>184</sup>

## 2. Eroding Human Rights

President Trump's approach to human rights in his CAT policy undercut the Obama Administration's human rights measures. Although some changes resulted from the Trump Administration's reformatting of the policy, the Administration reduced the number of human rights factors present in the U.S. CAT policy and diluted provisions that it retained from the Obama Administration.<sup>185</sup>

The Trump Administration's CAT policy includes a goal that appears similar to President Obama's prioritization of human rights and international humanitarian law. NSPM-10 stipulated that it would be the policy of the executive branch to "facilitate ally and partner efforts, through United States sales and security cooperation efforts, to reduce the risk of national or coalition operations causing civilian harm."<sup>186</sup> While the provision mentions neither human rights nor international humanitarian law, it does include "civilian harm."<sup>187</sup> Civilian harm is associated with international humanitarian law, but it encompasses all harm to civilian persons and civilian objects rather than harms that solely occur as a result of violations of the law of armed conflict.<sup>188</sup> However, by leaving out human rights law, the Trump policy goal excludes reducing abuses outside of armed conflict, leaving out cases of domestic repression that do not reach the threshold of a non-international armed conflict.<sup>189</sup>

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21, 2018), <https://apnews.com/article/jamal-khashoggi-north-america-donald-trump-economy-politics-2b4799b3d3ca4f6781efe1e70f207392>.

<sup>184</sup> Rachel Stohl, *Improving U.S. Conventional Arms Policies*, ARMS CONTROL ASS'N (Jan./Feb. 2021), <https://www.armscontrol.org/act/2021-01/features/improving-us-conventional-arms-policies>.

<sup>185</sup> Compare NSPM-10, *supra* note 35, at 2–3 (mentioning nothing explicitly about human rights), with PPD-27, *supra* note 35, at 31 (explicitly mentioning human rights as a policy goal).

<sup>186</sup> NSPM-10, *supra* note 35, at 2.

<sup>187</sup> *Id.*

<sup>188</sup> See *Civilians Protected Under International Humanitarian Law*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/doc/war-and-law/protected-persons/civilians/overview-civilians-protected.htm>.

<sup>189</sup> See generally NSPM-10, *supra* note 35, at 2 (mentioning civilian harm within its policy considerations but excluding human rights law). Civilian harm is not a meaningful term under international human rights law because civilian status is determined according to international humanitarian law. See Cordula Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *ISR. L. REV.* 310, 310 (2007) ("International human rights law and international humanitarian law are traditionally two distinct bodies of law. While the first deals with the

NSPM-10's criteria include two human rights factors,<sup>190</sup> both of which came from the Obama Administration's section on "Supporting Arms Control and Arms Transfer Restraint," which the Trump Administration nixed.<sup>191</sup> However, NSPM-10 narrowed the scope of the Obama Administration's prohibition on arms transfers where the United States has actual knowledge at the time of authorization that the transferred arms will be used to commit atrocities. Where the Obama Administration included "attacks directed against civilian objects or civilians who are legally protected from attack,"<sup>192</sup> the Trump Administration qualified such attacks as "*intentionally* directed against civilian objects or civilians."<sup>193</sup>

The other human rights element in PPD-27's "Arms Transfer Restraint" section encouraged considering unilateral restraint where "the transfer of weapons raises concerns about undermining international peace and security, serious violations of human rights law, including serious acts of gender-based violence and serious acts of violence against women and children, serious violations of international humanitarian law, terrorism, transnational organized crime, or indiscriminate use."<sup>194</sup> NSPM-10 repeats the language almost exactly in its criteria section.<sup>195</sup>

Although the "Arms Transfer Decisions" provision of NSPM-10 resembles the "Arms Transfer Restraint" provision of PPD-27, the Trump Administration did not factor in the possibility of *retransfer* facilitating

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inherent rights of the person to be protected against abusive powers at all times, the other regulates the conduct of parties to an armed conflict."). International humanitarian law only applies to international and non-international armed conflicts, excluding domestic disturbances, riots, and other forms of violence that do not meet the *Tadić* factors of (1) a certain intensity of armed violence and (2) the actors taking part in violence exhibit a certain degree of organization. See Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). *Tadić* is the first international war crimes trial since World War II and was held in the recently established United Nations International Criminal Tribunal at the Hague. Michael P. Scharf, *International Decisions*, 91 AM. J. INT'L L. 718, 718 (Bernard H. Oxman ed., 1997).

<sup>190</sup> See NSPM-10, *supra* note 35, at 3–4 (listing "human rights" and "international humanitarian law" as executive branch considerations in making arms transfer decisions).

<sup>191</sup> Compare PPD-27, *supra* note 35, at 32–33 (containing a section entitled "Supporting Arms Control and Arms Transfer Restraint"), with NSPM-10, *supra* note 35 (containing no such section).

<sup>192</sup> PPD-27, *supra* note 35, at 33.

<sup>193</sup> NSPM-10, *supra* note 35, at 4 (emphasis added).

<sup>194</sup> PPD-27, *supra* note 35, at 33.

<sup>195</sup> See NSPM-10, *supra* note 35, at 4 ("The risk that the transfer may be used to undermine international peace and security or contribute to abuses of human rights, including acts of gender-based violence and acts of violence against children, violations of international humanitarian law, terrorism, mass atrocities, or transnational organized crime.").

human rights or international humanitarian law abuses.<sup>196</sup> Nor does it consider the possibility that an arms transfer could “identify the United States with human rights abuses or serious violations of international humanitarian law.”<sup>197</sup>

In one of the most significant departures from the Obama Administration’s policy, NSPM-10 does not require the executive branch to consider the human rights records of prospective arms recipients.<sup>198</sup> The Trump Administration removed the Clinton and Obama Administration’s criterion that the United States should consider recipients’ human rights records and the potential to misuse arms.<sup>199</sup>

The Trump Administration’s prioritization of economic benefits and dilution of human rights in the CAT policy coincided with arms sales to countries with concerning human rights records. According to a Cato Institute analysis, “the Trump [A]dministration sold more weapons to a riskier portfolio of clients than either the Bush or Obama [A]dministrations.”<sup>200</sup> Even as reports of possible war crimes mounted, the Trump Administration increased weapons sales to Saudi Arabia and the United Arab Emirates, which used the arms in their military campaign in Yemen.<sup>201</sup> The sales met strong congressional opposition.<sup>202</sup> In 2019, Congress came closer to successfully blocking an arms sale with a joint resolution of disapproval under the Arms Export Control Act than it had

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<sup>196</sup> See NSPM-10, *supra* note 35 (making no mention of possible human rights or international humanitarian law violations through the retransfer of weaponry) (emphasis added).

<sup>197</sup> Compare PPD-27, *supra* note 35, at 32, with NSPM-10, *supra* note 35 (making no mention of whether arms transfers could associate the United States with human rights abuses or violations of international humanitarian law).

<sup>198</sup> See generally NSPM-10, *supra* note 35 (making no mention of whether prospective arms recipients are investigated for past human rights abuses).

<sup>199</sup> Compare NSPM-10, *supra* note 35 (making no mention of criteria that human rights records and the potential to misuse arms should be taken into consideration), with PDD-34, *supra* note 35, at 9 (“The human rights, terrorism and proliferation record of the recipient and the potential for misuse of the export in question.”), and PPD-27, *supra* note 35, at 32 (“The human rights, democratization, counterterrorism, counterproliferation, and nonproliferation record of the recipient, and the potential for misuse of the export in question.”).

<sup>200</sup> Jordan Cohen, *Biden’s Conventional Arms Transfer Policy Review Could Be a Turning Point*, WAR ON THE ROCKS (Nov. 29, 2021), <https://warontherocks.com/2021/11/bidens-conventional-arms-transfer-policy-review-could-be-a-turning-point/> (commenting on how the Trump Administration prioritized economic gain over human rights considerations when it approved arms sales to Saudi Arabia over numerous, blatant objections by Congress).

<sup>201</sup> See *id.* (noting that the Trump Administration overcame congressional effort to prevent arms sales to Saudi Arabia because of the increased destruction of the Saudi war in Yemen, the murder of Jamal Khashoggi, Riyadh’s alleged assistance in the 9/11 terrorist attacks, and Saudi Arabia’s history of human right violations).

<sup>202</sup> *Id.*

in over thirty years.<sup>203</sup> President Trump vetoed the resolution, and the Senate failed to override his veto.<sup>204</sup> Arms sales to the Philippines, where the government of President Rodrigo Duterte has extrajudicially killed thousands in its “war on drugs,” also drew criticism.<sup>205</sup> Some members of Congress also spoke out against the Trump Administration’s arms sales to Azerbaijan,<sup>206</sup> which faced accusations of war crimes in its conflict with Armenia in the Nagorno-Karabakh region.<sup>207</sup>

### F. *President Biden’s Anticipated CAT Policy*

The Biden Administration had reportedly drafted a new CAT policy by August 2021 for expected release as soon as September 2021.<sup>208</sup> However, as of March 2022, the Administration has not released its CAT policy.<sup>209</sup> With U.S. arms transfers surging as the Biden Administration

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<sup>203</sup> After *INS v. Chadha*, Congress decided in 1986 to amend the veto provision in the Arms Export Control Act to substitute joint resolutions in place of concurrent resolutions thereby weakening congressional control on the executive branch’s veto power. See Scott R. Anderson, *Untangling the Yemen Arms Sale Debate*, LAWFARE (June 24, 2019, 1:10 PM), <https://www.lawfareblog.com/untangling-yemen-arms-sales-debate>. During the Saudi arms sales debate in 2019, a joint resolution was passed by Congress with bipartisan support for the first time. S.J. Res. 7, 116th Cong. (2019); see also *Congress and the Trump Administration Spar Over U.S. Arms Sales to the Saudi-Led Coalition in Yemen*, 115 AM. J. INT’L L., 146, 147 (2021).

<sup>204</sup> Edmondson, *supra* note 54.

<sup>205</sup> See A. Trevor Thrall & Jordan Cohen, *Don’t Sell Arms to the Philippines*, DEFENSE NEWS (Apr. 16, 2021), <https://www.defensenews.com/opinion/commentary/2021/04/16/dont-sell-arms-to-the-philippines/>.

<sup>206</sup> Joe Gould, *Democrats Urge Halt to Security Aid to Azerbaijan in Armenia Conflict*, DEFENSENEWS (Oct. 6, 2020), <https://www.defensenews.com/congress/2020/10/06/democrats-urge-halt-to-security-aid-to-azerbaijan-in-armenia-conflict/>.

<sup>207</sup> Sheila Paylan, *The U.N. Must Investigate Nagorno-Karabakh War Crimes*, FOREIGN POL’Y (Oct. 7, 2021, 2:39 PM), <https://foreignpolicy.com/2021/10/07/the-u-n-must-investigate-nagorno-karabakh-war-crimes/>.

<sup>208</sup> See Mike Stone & Patricia Zengerle, *Biden Plans Shift in Arms Policy to Add Weight to Human Rights Concerns*, REUTERS (Aug. 4, 2021, 4:35 PM), <https://www.reuters.com/world/us/exclusive-biden-plans-shift-arms-export-policy-favor-human-rights-sources-2021-08-04/>.

<sup>209</sup> See Rachel Stohl, *Why is the Biden Administration Still Silent on Arms Trade Treaty?*, STIMSON (Apr. 27, 2022), <https://www.stimson.org/2022/why-is-the-biden-administration-still-silent-on-arms-trade-treaty/> (noting that the Biden Administration has failed “to update U.S. policy towards the Arms Trade Treaty,” an agreement that regulates the cross-border transfer of conventional arms). However, on February 23, 2023, the Biden Administration released its CAT policy (“NSM-18”) and emphasized the role of human rights considerations in conducting arms transfers. Memorandum from the White House on United States Conventional Arms Transfer Policies to the Sec’y of State et al. (Feb. 23, 2023) (available online at <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/23/memorandum-on-united-states-conventional-arms-transfer-policy/>). Note that this Article was written prior to the Biden Administration’s release of NSM-18.



provides lethal aid to Ukraine to stave off a Russian invasion,<sup>210</sup> the announcement of the much-anticipated Biden CAT policy is on hold.

However, the Biden Administration has offered some previews of the CAT policy. Early reporting on a draft policy indicated that it would prioritize human rights more than the Trump Administration's policy.<sup>211</sup> In November 2021, remarks to the Defense Trade Advisory Group, a senior Biden appointee in the State Department's Bureau of Political-Military Affairs shed light on the anticipated CAT policy.<sup>212</sup> The appointee, Tim Betts, explicitly framed the CAT policy in human rights terms. His statement maintained the longstanding approach of considering arms sales on a case-by-case basis factoring in "political, military, economic, arms control, and human rights considerations."<sup>213</sup> However, Betts also said that the Biden Administration was working to update the CAT policy specifically to "ensure it reflects the President's goals of putting diplomacy first, respecting human rights and international humanitarian law, revitalizing and reimagining [sic] alliances, and delivering for the American people."<sup>214</sup> According to Betts, the Biden Administration "seek[s] to elevate human rights, stress the principles of restraint and responsible use, and consider our partners' security sector governance within [its] holistic approach to evaluating proposed arms transfers."<sup>215</sup>

Betts also shared that the Biden Administration would assess three specific considerations related to human rights in arms sale decisions:

- (1) Refrain from arms transfers that could contribute to human rights violations or abuses or violations of international humanitarian law;
- (2) Strengthen ally and partner efforts to develop effective security sector governance structures as well as to promote efforts to fulfill obligations under international law and mitigate civilian harm; and
- (3) Promote peaceful and responsible conflict resolution, arms control, and nonproliferation.<sup>216</sup>

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<sup>210</sup> See Peter Baker & Michael Levenson, *Biden Digs in on Ukraine Strategy, Seeking \$33 Billion More in Aid*, N.Y. TIMES (Apr. 28, 2022), <https://www.nytimes.com/2022/04/28/us/politics/ukraine-biden-aid.html>.

<sup>211</sup> See Cohen, *supra* note 200.

<sup>212</sup> Timothy Alan Betts, *Remarks to the Defense Trade Advisory Group*, U.S. DEPT OF STATE (Nov. 4, 2021), <https://www.state.gov/remarks-to-the-defense-trade-advisory-group/>.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

Betts also expressed that “[t]his Administration will not approve arms transfers where we believe such transfers are not in our national interest because of the risk of diversion, civilian harm, misuse, or contrary to any of the other criteria . . . mentioned.”<sup>217</sup>

Although the contents of the CAT policy remain unknown, Betts’ statement seems to indicate that the Biden Administration has considered a restoration of explicit human rights goals that the Trump Administration removed and potentially a new focus on empowering allies and partners to comply with human rights and international humanitarian law. An emphasis on security sector governance would also be new in the CAT policies, which have not previously considered the issue.

*Figure: Comparison of Human Rights Provisions in the CAT Policies*

	<i>Carter</i>	<i>Reagan</i>	<i>Clinton</i>	<i>Obama</i>	<i>Trump</i>
<i>Human rights promotion as a goal</i>			x	x	
<i>Human rights record/promotion as a criterion</i>	x		x	x	
<i>Likelihood of arms contributing to HR/IHL violations as a criterion</i>				x	x
<i>Blanket restriction on arms transfers with knowledge they will be used to commit atrocities</i>				x	x

#### IV. LESSONS LEARNED

While human rights have become an important part of the CAT policies, some administrations have prioritized them more than others in

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<sup>217</sup> *Id.*

the texts of their policies. Some trends are discernible among the CAT policies issued thus far with respect to human rights considerations, namely continuity between policies and flexibility of policy frameworks. Although those trends present significant limitations in the CAT policies, this Section argues that the policies nevertheless deserve attention and analysis.

### A. *Continuity*

The CAT policies are, by and large, evolutionary documents.<sup>218</sup> The core content of each CAT policy has usually continued from one policy to the next, although deletions, additions, and format changes can have significant implications for human rights issues.<sup>219</sup>

Since the Reagan Administration, the CAT policies have been characterized by continuity.<sup>220</sup> Although Democrats have taken measures to emphasize on human rights factors, the underlying structure of the policies remains consistently reliant on multi-factor lists of goals and criteria for arms transfer decisions.<sup>221</sup> While past CAT policies can provide points of comparison to assess President Biden's policy, they also demonstrate the flaws inherent to the prevailing format.

The content of CAT policies generally evolves gradually from one administration to the next. The notable exception was President Reagan's CAT policy, which reversed almost every operational provision of the Carter policy and, in some cases, directly rebutted President Carter's restraint-based approach.<sup>222</sup> However, preserving most of the language of the immediate predecessor policy has been a common practice since the Clinton Administration.

Each CAT policy except the Reagan policy has somehow incorporated human rights. Human rights promotion appeared as a goal of the Clinton and Obama policies and a criterion for considering arms transfers in the Carter policy.<sup>223</sup> The Clinton and Obama policies included the

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<sup>218</sup> See Kirshner, *supra* note 181.

<sup>219</sup> See Cohen, *supra* note 200.

<sup>220</sup> See Kirshner, *supra* note 181.

<sup>221</sup> *Id.*

<sup>222</sup> Compare NSDD-5, *supra* note 35, at 616 ("The United States must . . . not only strengthen its own military capabilities, but be prepared to help its friends and allies to strengthen theirs through the transfer of conventional arms and other forms of security assistance"), with PD-13, *supra* note 62, at 932 ("I am initiating this policy of restraint . . . we will do whatever we can to encourage regional agreements among purchasers to limit arms imports."); see also *Arms Transfers and Trade—Carter and Reagan*, AM. FOREIGN RELS., <https://www.americanforeignrelations.com/A-D/Arms-Transfers-and-Trade-Carter-and-reagan.html> (last visited Nov. 14, 2022) [hereinafter *Arms Transfers and Trade*].

<sup>223</sup> See PDD-34, *supra* note 35, at 3 ("U.S. conventional arms transfer policy will serve [to] avoid[] human rights violations . . . ."); PPD-27, *supra* note 35, at 31 ("Ensuring that

consideration of a recipient's human rights record as a criterion.<sup>224</sup> The Obama Administration also added a specific prohibition on arms transfers with the knowledge that they would facilitate atrocities and the likelihood of arms transfers contributing to violations of human rights or international humanitarian law.<sup>225</sup> The Trump Administration maintained both of those considerations.<sup>226</sup>

Of the five presidents who have released CAT policies, each Democrat has added new human rights factors, while each Republican has diluted or removed human rights factors. While no Democrat has operated solely on a Republican CAT policy (with the exception of President Biden, who is expected to replace President Trump's NSPM-10 soon), two Republicans—President George W. Bush and George H.W. Bush—have operated with Democratic CAT policies intact.

The figure below shows that major changes in the CAT policies do not necessarily map neatly onto the overarching trends in the quantity of U.S. arms exports.<sup>227</sup> For example, the largest reduction in U.S. arms exports occurred in the late 1990s and early 2000s, when there was no new CAT policy implemented. Despite significant changes in the CAT policy from President Obama to President Trump, exports have trended upwards since 2002. Overall trends show that the CAT policies are certainly not the single determinant of the volume of U.S. arms transfers, and significant changes in the policy are not necessarily reflected in overall trends.

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arms transfers do not contribute to human rights violations or violations of international humanitarian law.”); PD-13, *supra* note 62, at 932 (“[W]e will continue our efforts to promote and advance respect for human rights . . .”).

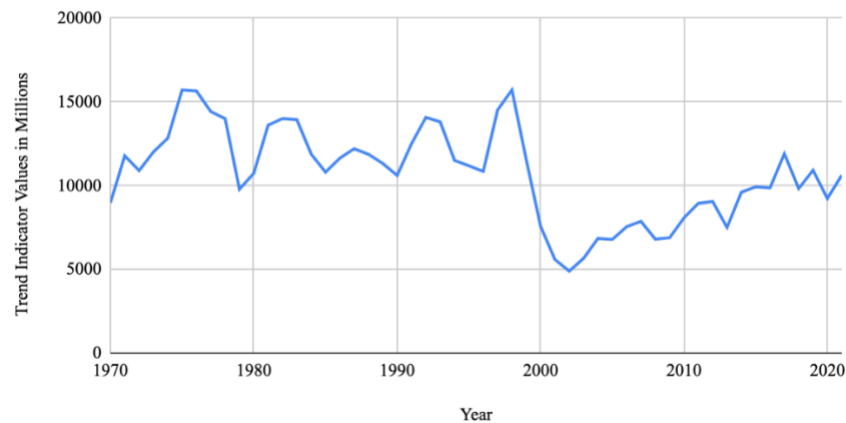
<sup>224</sup> PDD-34, *supra* note 35, at 3; PPD-27, *supra* note 35, at 31.

<sup>225</sup> See PPD-27, *supra* note 35, at 33.

<sup>226</sup> NSPM-10, *supra* note 35, at 4.

<sup>227</sup> The figure relies on the Stockholm International Peace Research Institute's Trend Indicator values, which “measures transfers of military capability rather than the financial value of arms transfers.” For more information on the methodology, see PAUL HOLTOM ET AL., MEASURING INTERNATIONAL ARMS TRANSFERS 1 (Stockholm Int'l Peace Rsch. Inst. ed., Dec. 2012).

U.S Arms Exports, 1970–2021 (in SIPRI Trend Indicator Values in Millions)



### B. Flexibility

Since President Reagan, the CAT policies have adhered to a format based on multi-factor lists, which afford executive branch decision-makers a high degree of flexibility. Each subsequent president has based their policy on similar lists. President Carter’s model of specific controls only reappeared to a limited extent in the Obama Administration, which added a narrow prohibition on transferring arms with the knowledge that they would be used to commit atrocities.<sup>228</sup>

Even presidents who prioritize human rights in their CAT policy text seem to approve arms sales to recipients who violate human rights and international humanitarian law. While it is easy to highlight problematic arms sales to which every U.S. president has agreed, it is far more difficult to identify specific violations of most CAT policies.<sup>229</sup> The failure of the CAT policies to affect U.S. arms sales outcomes with respect to human rights is rooted in their reliance on multi-factor lists.

The CAT policies’ lists of considerations for arms transfers are perhaps their least effective provisions. President Carter’s CAT policy

<sup>228</sup> Compare PD-13, *supra* note 62, at 931 (broadly construing a set of controls “applicable to all transfers except those to countries with which [the U.S.] ha[s] major defense treaties”), with PPD-27, *supra* note 35, at 33 (refusing to authorize “any transfer if [the U.S.] has actual knowledge at the time of the authorization that the transfer will be used to commit . . . crimes against humanity”).

<sup>229</sup> The notable exception is President Carter. The specific controls in his CAT policy make it easy to conclude that the Carter Administration did not meet its goals. See *Arms Transfers and Trade*, *supra* note 223.

consisted mostly of specific prohibitions and benchmarks.<sup>230</sup> The Reagan Administration reversed Carter's policy, instituting the multi-factor lists of goals and criteria that have since characterized every CAT policy.<sup>231</sup> Without clear prioritization, the consideration lists amount to multi-factor tests that reflect a broad range of issues without clarifying how they may relate to each other. As a 2019 report by the Government Accountability Office noted, "the CAT policy does not require State or [the Department of Defense] to evaluate the criteria in any specific way or take any specific actions."<sup>232</sup> While the lists preserve flexibility, they do not necessarily change the outcomes of decisions. So long as an executive branch official can affirm that they have considered human rights, they may approve any arms transfer as they see fit.

### C. *Do CAT Policies Matter?*

Examining fifty years of CAT policies invites the question of whether they matter for arms sales outcomes and the protection of human rights. After all, if the policies offer administrations maximal flexibility in their decision-making and typically borrow heavily from their predecessors, how important could the drafting decisions of each administration be? Despite their shortcomings, the CAT policies matter.

The CAT policies have an important place among the sources of law and policy that shape U.S. arms transfers. Congress has delegated the bulk of its authority regarding arms sales to the executive branch, and the CAT policies fill in significant gaps in the law to guide civil servants in the Department of State and Department of Defense in arms transfer decisions.<sup>233</sup> Precisely how the CAT policies fill those gaps matters. Administrations can make their CAT policies maximally flexible, but they could also make the CAT policies effective, implementable documents to both guide and constrain future decision-making. Individual arms sales do not typically receive as much thought or attention as CAT policy review processes.<sup>234</sup> The CAT policies could provide an opportunity for administrations to set priorities, enshrine principles, and establish constraints independent from short-term political and economic pressures.

Furthermore, the content of the CAT policies has symbolic and rhetorical value.<sup>235</sup> Presidents rarely make decisions about specific arms

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<sup>230</sup> *See id.*

<sup>231</sup> *See Kirshner, supra note 181.*

<sup>232</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-673R, CONVENTIONAL ARMS TRANSFER POLICY: AGENCY PROCESSES FOR REVIEWING DIRECT COMMERCIAL SALES AND FOREIGN MILITARY SALES ALIGN WITH POLICY CRITERIA 4 (2019).

<sup>233</sup> *See id.*

<sup>234</sup> Sciarra, *supra note 54*, at 1455, 1456 n.86.

<sup>235</sup> *See Arms Transfers and Trade, supra note 222.*

sales, which mostly fall to civil servants in the Department of State and Department of Defense.<sup>236</sup> But presidential directives like the CAT policies offer presidents and their appointees opportunities to signal to civil servants about overarching policy priorities.<sup>237</sup> Some presidents go further still, incorporating their CAT policy ideas into major foreign policy speeches and other documents.<sup>238</sup>

The CAT policies shape how external stakeholders engage with the executive branch.<sup>239</sup> For civil society and Congress, the CAT policy can provide a window into how the executive branch thinks about arms transfer policy. The policy review process provides civil advocates and legislators with a chance to engage with executive branch policymakers.<sup>240</sup> Appealing to the CAT policy can help civil society organizations and Congress frame their concerns about particular sales in the executive branch's terms.

The process of drafting the CAT policies also matters. At critical junctures in U.S. foreign policy—during the human rights revolution, after the Cold War, and during the Arab uprisings of 2011—administrations have used the CAT policy review process and the resultant policies to take stock of the status quo and reconsider priorities.<sup>241</sup> In a fast-paced policymaking environment where the urgent can often take precedence over the important, the opportunity for interagency review of decision-making frameworks is valuable.

The CAT policies matter partly because of their enormous potential. The policies could allow presidents to set the tone for arms transfers during their administration with specific, implementable directions from the highest levels of government. With sufficient buy-in, such a CAT policy could be a formidable vehicle for promoting human rights and reducing harm. Unfortunately, no CAT policy thus far has lived up to its potential, but the fact that so much of arms transfer policy falls to presidential direction means that the policies nevertheless deserve attention and study.

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<sup>236</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 232.

<sup>237</sup> *Id.*

<sup>238</sup> See, e.g., *Arms Transfers and Trade*, *supra* note 222 (noting that President Regan's "pro-sales stance was initially spelled out in a speech by Undersecretary of State James L. Buckley").

<sup>239</sup> See Sciarra, *supra* note 54, at 1447–49 (discussing how Congress's role in negotiating with the executive has changed since *Chadha*).

<sup>240</sup> See Kevin P. Sheehan, *Executive-Legislative Relations and the U.S. Arms Export Control Regime in the Post-Cold War Era*, 33 COLUM. J. TRANSNAT'L L. 179, 195–96 (1995).

<sup>241</sup> See, e.g., *id.* at 197 ("The issue of U.S. arms sales to the Middle East, in conjunction with the decline of bipolarism that has accompanied the fall of the Soviet empire, gives fuel to the proponents of substantial new systemic constraints on U.S. arms exports.").

## V. PRIORITIZING HUMAN RIGHTS

This Section proposes ways that the United States could change its approach to conventional arms transfers—both through the CAT policies and otherwise—to prioritize human rights. Thus, the recommendations do not purport to set forth a perfect policy but rather aim to set benchmarks for how an administration could truly put human rights at the center of their conventional arms transfer decisions.

To be sure, a president can and should strengthen the human rights-related factors and goals in the CAT policies, building on the steps taken during the Clinton and Obama Administrations. But changes that adhere to the overarching CAT policy structure that has predominated since the Reagan era can only go so far. A president who seeks to promote human rights in their CAT policy should go beyond the traditional format and incorporate specific human rights-related prohibitions, including a prohibition implementing Section 502B of the Foreign Assistance Act. Since the executive branch often falls short in defending human rights in arms transfer decisions, Congress also has a significant oversight role in conventional arms transfers and should strengthen existing tools to bolster its oversight capacity.<sup>242</sup>

### A. *Use Specific Prohibitions and Controls*

Lists of considerations provide maximal flexibility for presidential administrations, but they are exceptionally difficult to violate. So long as an administration can claim to have considered human rights factors, it can make any decision it desires with respect to an arms sale. The CAT policies should serve to constrain a presidential administration and ensure that decision-makers follow through on human rights priorities established during the drafting of the CAT policy. The standard format of the CAT policies since President Reagan focuses on the decision-making process—what factors the administration considers in each proposed sale—without necessarily affecting outcomes.

Specific prohibitions in the CAT policies are more effective than lists of considerations in promoting rights and reducing harm from U.S. arms sales. There are certain circumstances in which the United States should not provide arms, regardless of potential strategic benefits. Presenting arms transfer decisions as a matter of balancing factors, as recent CAT policies have done, is insufficient. From a moral and strategic standpoint, strengthening interoperability cannot outweigh contributing to genocide, for example. The prohibition on arms transfers that will be used to commit atrocities is a welcome acknowledgment of an absolute line that the United States will not cross. The CAT policies need more human rights

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<sup>242</sup> Sheehan, *supra* note 240, at 199.



bright lines. If presidents wish to truly prioritize human rights in their arms transfers, they should identify bright lines and incorporate them into specific, measurable prohibitions alongside more flexible lists of considerations. Such restrictions would help presidents hold their administrations accountable and measure success. The CAT policies could incorporate dollar-value caps or rules that, based on human rights risks, the United States should not transfer arms unless the President certifies the presence of extraordinary circumstances. The precise content of the specific prohibitions and controls would certainly be important, but their specificity and violability would be their most important departures from the status quo.

Even if an administration violates the controls it sets forth in its CAT policy—as the Carter Administration did—the fact that violations are ascertainable is important.<sup>243</sup> The ability of advocates, legislators, and analysts to identify violations of a CAT policy would facilitate advocacy and push the executive branch to improve. Under such circumstances, implementation of the CAT policies would go from a consideration of factors behind closed doors to assessing outcomes accessible to the public. Public accountability would be preferable to the opacity of the status quo.

The CAT policies' specific prohibitions and controls should reduce the risk that U.S. arms transfers will facilitate human rights abuses and violations of international humanitarian law. Unfortunately, the “actual knowledge” requirement of the only express prohibition in PPD-27<sup>244</sup> and NSPM-10<sup>245</sup> sets too high of a standard. Without insight into classified information, there is no indication that either the Obama or Trump Administrations ever had actual knowledge that U.S.-supplied arms would be used to commit atrocities at the time of authorizing a sale. The standard allows decision-makers to remain willfully ignorant of risks without conducting due diligence. For example, it would be difficult to believe that the Trump Administration could not have ascertained that U.S. arms sales to Saudi Arabia would be used to commit war crimes in Yemen. But the actual knowledge standard may allow the Administration to claim ignorance. Thus, the standard should be reduced to require that the United States does not authorize arms sales when it assesses, based on all relevant circumstances and the human rights record of the recipient, that there is a substantial risk the arms would be used to commit the atrocities listed in the policy.

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<sup>243</sup> See *Arms Transfers and Trade*, *supra* note 222.

<sup>244</sup> See PPD-27, *supra* note 35, at 33 (“The United States will not authorize any transfer if it has *actual knowledge* at the time of authorization . . .”) (emphasis added).

<sup>245</sup> NSPM-10 *supra* note 35, at 4 (“In making arms transfer decisions, the executive branch shall account for . . . whether the United States has *actual knowledge* at the time of the authorization . . .”) (emphasis added).

Future administrations could institute presumptions of denial for arms sales that pose particular human rights risks. President Carter's CAT policy noted that "the burden of persuasion will be on those who favor a particular arms sale, rather than those who oppose it."<sup>246</sup> A scoped revival of that principle would be appropriate in instances where arms sales are likely to contribute to violations of human rights or international humanitarian law. For example, the executive branch could implement a quantitative evaluation system similar to the Cato Institute's Arms Sales Risk Index<sup>247</sup> and institute a presumption of denial for sales to countries above a specified risk threshold.

### *B. Implement Section 502B of the Foreign Assistance Act*

A CAT policy that takes human rights seriously should implement Section 502B of the Foreign Assistance Act, which prohibits security assistance, including arms sales,<sup>248</sup> to "any country the government of which engages in a consistent pattern of gross violation of internationally recognized human rights."<sup>249</sup> Congress enacted the precursor to Section 502B in 1973 and gradually strengthened the statute in subsequent years.<sup>250</sup> Only in 1978, after President Carter released his CAT policy, did Congress amend Section 502B to make it a binding directive.<sup>251</sup> Nonetheless, no president since Carter has made a significant effort to comply with the law. The State Department has claimed that the law is "overly broad."<sup>252</sup> Each year, the State Department's Country Reports on Human Rights Practices, which Section 502B requires,<sup>253</sup> document gross violations of human rights by governments receiving U.S. security assistance. In some cases, gross violations have continued for five years or more, seemingly amounting to a consistent pattern.<sup>254</sup> Without executive branch commitment to Section 502B, security assistance to such countries continues unabated despite the law's binding prohibition.

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<sup>246</sup> PD-13, *supra* note 62, at 931.

<sup>247</sup> See A. Trevor Thrall & Jordan Cohen, *2021 Arms Sales Risk Index*, CATO INST. (Jan. 18, 2022), <https://www.cato.org/study/2021-arms-sales-risk-index>.

<sup>248</sup> 22 U.S.C. § 2304(a)(2), (d)(2)(B).

<sup>249</sup> *Id.* § 2304(a)(2).

<sup>250</sup> See Weissbrodt, *supra* note 59, at 241.

<sup>251</sup> See Cohen, *supra* note 75, at 250.

<sup>252</sup> See NINA M. SERAFINO ET AL., CONG. RSCH. SERV., R43361, "LEAHY LAW" HUMAN RIGHTS PROVISIONS AND SECURITY ASSISTANCE: ISSUE OVERVIEW 3 n.8 (2014).

<sup>253</sup> 22 U.S.C. § 2304(b).

<sup>254</sup> This is the case for Saudi Arabia, Egypt, the Philippines, and Nigeria, among other countries. See Elisa Epstein, *It's Time for the U.S. to Stop Selling Weapons to Human Rights Abusers*, HUM. RTS WATCH (Jul. 21, 2021, 4:13 PM), <https://www.hrw.org/news/2021/07/21/its-time-us-stop-selling-weapons-human-rights-abusers>.

Section 502B is similar to the Leahy Laws—both prohibit security assistance to proposed recipients that commit gross violations of human rights.<sup>255</sup> But while teams of civil servants conduct Leahy vetting to prevent violations, no such commitment exists for Section 502B.<sup>256</sup> A commitment to implementing Section 502B in the CAT policies could provide the momentum necessary to create Leahy-like procedures for Section 502B.

Part of the reason for Section 502B's non-implementation is that the statutory term "consistent pattern" remains undefined.<sup>257</sup> In the rare cases when Congress presses executive branch officials on Section 502B implementation, the lack of a definition of "consistent pattern" allows executive branch lawyers to argue that no consistent pattern of gross violations of human rights exists in a particular country.<sup>258</sup> Federal courts have twice heard lawsuits regarding alleged violations of Section 502B with security assistance to Nicaragua and El Salvador.<sup>259</sup> But the courts dismissed the suits on equitable discretion and standing grounds and did not assess whether gross violations of human rights were consistent.<sup>260</sup>

The other ambiguous definition in Section 502B lies in its characterization of gross violations of human rights. The act defines gross violations of internationally recognized human rights to include: (1) torture or cruel, inhuman, or degrading treatment or punishment; (2) prolonged detention without charges and trial; (3) causing the disappearance of persons by the abduction and clandestine detention of those persons; and (4) other flagrant denial of the right to life, liberty, or the security of person.<sup>261</sup> The final, catch-all clause in the definition would benefit from clarification. Non-binding sources of legal scholarship provide some guidance as to what sorts of violations amount to "other

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<sup>255</sup> Compare 22 U.S.C. § 2378d(a) ("No assistance shall be furnished under this Act . . . if the Secretary of State has credible information that such unit has committed a gross violation of human rights."), with 22 U.S.C. § 2304(a)(2) ("[N]o 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.").

<sup>256</sup> See Daniel R. Mahanty, *The "Leahy Law" Prohibiting U.S. Assistance to Human Rights Abusers: Pulling Back the Curtain*, JUST SEC. (June 27, 2017), <https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain/>.

<sup>257</sup> See 22 U.S.C. § 2304(d) (defining other terms used in the statute but not "consistent pattern").

<sup>258</sup> See, e.g., *Defining the Military's Role Towards Foreign Policy: Hearing Before the S. Comm. on Foreign Rels.*, 110th Cong. 36 (2008) (statement of Sen. Russell D. Feingold).

<sup>259</sup> See *Clark v. United States*, 609 F. Supp. 1249, 1249 (D. Md. 1985); *Crockett v. Reagan*, 558 F. Supp. 893, 893 (D.D.C. 1982).

<sup>260</sup> See *Clark*, 609 F. Supp. at 1250. *Contra Crockett*, 558 F. Supp. at 901 ("[I]t is unnecessary to reach the other asserted bases for dismissal, which include standing, equitable discretion[,] and lack of a private right of action.").

<sup>261</sup> 22 U.S.C. § 2304(d)(1).

flagrant denial of the right to life, liberty, or the security of person.”<sup>262</sup> But an administration could publicly clarify in its CAT policy what it would consider a “flagrant denial of the right to life, liberty, or the security of person.” Such a clarification would provide an opportunity for Congress and civil society organizations to engage and advocate for an administration to follow through on its commitments.

Future CAT policies could direct executive branch officials to comply with Section 502B. Specifically, the CAT policy could note the binding authority of Section 502B and define ambiguous terms in the statute such as “consistent pattern” and “other flagrant denial of the right to life, liberty, or the security of person.” The president could incorporate Section 502B vetting into existing Leahy vetting procedures and appropriately resource vetting teams. If necessary, the president could use the statute’s waiver authority in extraordinary circumstances with a certification to the Chair of the House Foreign Affairs and Senate Foreign Relations Committees, preserving some flexibility while creating an opportunity for congressional oversight.<sup>263</sup>

### C. *Exercise Congressional Oversight*

Although the CAT policies are important parts of U.S. arms transfer law and policy, they are far from the only vehicles available to promote compliance with human rights and international humanitarian law and reduce harm from U.S. arms sales.<sup>264</sup> The structural flaws in the CAT policies demonstrate the need for legislative action. Congress, too, must play a robust role in exercising oversight for executive arms sale decisions. However, the joint resolution of disapproval mechanism upon which Congress relies for oversight does not function as intended.

The joint resolution of disapproval mechanism in the AECA requires affirmative congressional action to gather a supermajority that can block or modify an arms transfer.<sup>265</sup> There has not been a significant overhaul of the U.S. arms sales legal regime since *INS v. Chadha* invalidated the

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<sup>262</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 702 (Am. L. Inst. 1987). Additionally, an expert opinion commissioned by the ABA Center for Human Rights argued that intentional, disproportionate, or indiscriminate attacks in Yemen resulting in the loss of civilian life constitute a “flagrant denial of the right to life” under Section 502B. MICHAEL NEWTON, AN ASSESSMENT OF THE LEGALITY OF ARMS SALES TO THE KINGDOM OF SAUDI ARABIA IN THE CONTEXT OF THE CONFLICT IN YEMEN 7 (2017), <https://s3.documentcloud.org/documents/3727674/ABA-CHR-Assessment-of-Arms-Sales-to-Saudi-Arabia.pdf>.

<sup>263</sup> But see 22 U.S.C. § 2304(a).

<sup>264</sup> CHAPPELL & BENOWITZ, *supra* note 37, at 9 (suggesting that legislators could draft resolutions approving arms sales contingent upon enhanced end-use monitoring, demonstrated capacity to use the weapon lawfully in realistic circumstances, or agreement to not rely on unverified information for targeting, among other things).

<sup>265</sup> *Id.* at 5.

legislative veto in 1983.<sup>266</sup> Before *INS v. Chadha*, lawmakers could pass concurrent resolutions to block arms sales without a presidential signature.<sup>267</sup> Instead of relying on joint resolutions of disapproval, lawmakers should shift the burden to the executive branch, requiring the president to secure congressional approval to carry out major arms sales to countries that are not U.S. allies.<sup>268</sup> A resolution of approval mechanism, which advocates call “flip the script,” to replace the resolution of disapproval lowers the barrier to congressional oversight.<sup>269</sup> While Congress currently must rally bicameral supermajorities for a joint resolution of disapproval, it could prevent objectionable arms transfers with a majority in one chamber under a flip-the-script approach.<sup>270</sup> Congressional mobilization around arms sales to Ukraine demonstrates that legislators can still rally a majority to approve arms transfers they perceive as important to U.S. interests, assuaging concerns that gridlock might block important sales.<sup>271</sup> Instead, such votes would force a debate on controversial major arms sales to countries that are not NATO members or major non-NATO allies. Furthermore, in situations where the prompt transfer of arms is urgent, the President could invoke the drawdown authority, which allows the transfer of up to \$200 million in

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<sup>266</sup> *INS v. Chadha*, 462 U.S. 919, 959 (1983). The Court stated, “[t]o accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution’s prescription for legislative action: passage by a majority of both Houses and presentment to the President.” *Id.* at 958.

<sup>267</sup> *Types of Legislation*, U.S. SENATE, [https://www.senate.gov/legislative/common/briefing/leg\\_laws\\_acts.htm](https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm) (last visited Nov. 11, 2022).

<sup>268</sup> Then-Senator Joe Biden recommended such a reform after *INS v. Chadha* became law in 1984, writing, “I believe that the loss of the [legislative veto] will make it difficult for Congress to meet its responsibilities in a limited number of foreign policy areas. My primary concern is foreign policy—especially war powers and arms exports control.” Joseph R. Biden, *Who Needs the Legislative Veto?*, 35 SYR. L.J. 685, 685 (1984). Drawing the line at non-allies would leave out some countries that nevertheless have concerning human rights records, but it provides a compromise while shifting the presumption against the majority of the most concerning arms sales.

<sup>269</sup> Dan Mahanty & Annie Shiel, *Time to Flip the Script on Congressional Arms Sales Powers*, HILL (Mar. 15, 2020, 6:00 PM), <https://thehill.com/opinion/national-security/487347-time-to-flip-the-script-on-congressional-arms-sales-powers>.

<sup>270</sup> See Tompa, *supra* note 53, at 327. Another way to require congressional approval of arms sales would be revoking delegations of authority to the President and creating a fast-track process. A fast-track process is “an expedited legislative procedure, found most prominently in . . . trade laws, whereby Congress authorizes the president to initiate a foreign-affairs action . . . in exchange for a commitment [that] he will submit the product of that action back to Congress for final approval.” HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 176 (1990). For discussion of the benefits of a fast-track structure, see *id.* at 176–78; Sciarra, *supra* note 54, at 1449–53.

<sup>271</sup> See generally Jeff Abramson et al., *Arms Transfers to Ukraine*, FORUM ON THE ARMS TRADE, <https://www.forumarmstrade.org/ukrainearms.html> (last updated Nov. 11, 2022).

U.S. defense articles or services during unforeseen emergencies.<sup>272</sup> The drawdown authority would not be subject to a joint resolution of approval.

Members of Congress have introduced flip-the-script legislation. In 1986, soon after Congress amended the AECA to require a joint resolution instead of a concurrent resolution in response to *INS v. Chadha*, Congress passed a joint resolution of disapproval prohibiting President Reagan's proposed sale of \$354 million in missiles to Saudi Arabia.<sup>273</sup> However, President Reagan vetoed the resolution and convinced thirty-four senators to vote against an override, preventing the Senate from overcoming his veto by just one vote.<sup>274</sup> The 1986 Saudi arms transfer demonstrated the burden placed on Congress after *INS v. Chadha*.<sup>275</sup> Then-Senator Joe Biden (D-Del.) and Congressman Mel Levine (D-Cal.) proposed a bill<sup>276</sup> requiring congressional approval for certain "sensitive sales" to "restore a balance between the executive and legislative branches on foreign arms transfers."<sup>277</sup> In 2019, echoing the events of 1986, Congress failed to override President Trump's veto of another arms sale to Saudi Arabia.<sup>278</sup> Based on the text of Senator Biden's bill, Senator Chris Murphy (D-Conn.) proposed a bill using the "flip the script" approach "where the [A]dministration proposes to sell the most lethal or technologically advanced weapons" to countries other than key allies.<sup>279</sup>

Some have expressed concern that "flipping the script would further burden[] an already overburdened and generally disinterested Congress."<sup>280</sup> Requiring constant votes to require any arms transfer could hinder lawmaking. In his *Chadha* dissent, Justice White expressed similar concern about Congress's options without the legislative veto:

Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself

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<sup>272</sup> See 22 U.S.C. § 2318(a)(1).

<sup>273</sup> S.J. Res. 316, 99th Cong. (1986); see also Edward Walsh, *Senate, 73 to 22, Rejects Sale of Weapons to Saudi Arabia*, WASH. POST, May 7, 1986, at A1.

<sup>274</sup> Sciarra, *supra* note 54. President Reagan vetoed a resolution of disapproval again in 1988, pushing through a \$2 billion dollar arms sale to Kuwait. KOH, *supra* note 270, at 51.

<sup>275</sup> Sciarra, *supra* note 54, at 1447–48.

<sup>276</sup> S.J. Res. 316, 99th Cong. (1986).

<sup>277</sup> Joseph Biden & Mel Levine, *Foreign Policy Role for Congress*, N.Y. TIMES, Apr. 2, 1987, at A30.

<sup>278</sup> Edmondson, *supra* note 54.

<sup>279</sup> Sen. Chris Murphy, *National Security is Stronger When Congress is Involved. Here's How We Get Back to the Table*, WAR ON THE ROCKS (July 20, 2021), <https://warontherocks.com/2021/07/national-security-is-stronger-when-congress-is-involved-heres-how-we-get-back-to-the-table/>. The National Security Powers Act, Title II of which incorporates the flip-the-script framework, also includes titles on reasserting congressional oversight in the areas of war powers and national emergencies. See S. 2391, 117th Cong. §§ 101–110, 301–306 (2021).

<sup>280</sup> See Tompa, *supra* note 53, at 327.

with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies.<sup>281</sup>

A hybrid approach that requires resolutions of approval for only major arms transfers to non-allies addresses concerns about Congress's workload. By limiting resolutions of approval to the riskiest arms transfers, Senator Murphy's proposal limits votes while facilitating oversight of arms transfers that pose the greatest human rights risks.<sup>282</sup> A coalition of civil society organizations estimated that Senator Murphy's legislation, and its House companion, would "only require votes on approximately 60 cases per year, many of which could be packaged together to reduce the number of votes."<sup>283</sup>

#### D. *Arsenal of Democracy or Merchant of Death?*

Eight decades ago, the United States built an arsenal of democracy that has mutated into a military industrial complex. As the world's leading exporter of weapons, the United States now plays a key role in conflicts around the globe.<sup>284</sup> For many people overseas, munitions emblazoned with "Made in USA" have become the face of U.S. foreign policy. While arms exports can facilitate great harm, they can also yield significant benefits, requiring U.S. decision-makers to carefully consider decisions to approve arms sales abroad.<sup>285</sup>

Congress has delegated many of the most important arms sales authorities to the president.<sup>286</sup> Since 1977, five presidents have promulgated conventional arms transfer policies to guide their administrations' arms sales choices.<sup>287</sup> While President Carter issued a CAT policy based on arms transfer restraint and a series of specific controls, President Reagan soon reversed it and established a pattern in

<sup>281</sup> *INS v. Chadha*, 462 U.S. at 968 (White, J., dissenting).

<sup>282</sup> *CIVIC Welcomes Bipartisan Legislation on U.S. Arms Transfers Oversight*, CTR. FOR CIVILIANS IN CONFLICT (July 20, 2021), <https://civiliansinconflict.org/press-releases/nspa-legislation/>.

<sup>283</sup> Letter from Arms Control Association et al., to Bob Menendez, Chairman, S. Foreign Rels. Comm. et al. (Oct. 26, 2021), <https://civiliansinconflict.org/press-releases/ngo-letter-to-congress-on-arms-transfer-oversight-legislation/>.

<sup>284</sup> William Hartung, *We're #1: The U.S. Government is the World's Largest Arms Dealer*, FORBES (Mar. 18, 2022 12:43 PM), <https://www.forbes.com/sites/williamhartung/2022/03/18/were-1-the-us-government-is-the-worlds-largest-arms-dealer/?sh=666b277b5bb9>.

<sup>285</sup> See Thrall & Dorminey, *supra* note 17.

<sup>286</sup> Sheehan, *supra* note 240, at 190–91.

<sup>287</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 232, at 1. Note that this Article was written prior to the Biden Administration's release of NSM-18.

the CAT policies that has lasted to this day: Presidents make conventional arms transfer decisions on a case-by-case basis using lists of considerations that change slightly from one administration to the next.<sup>288</sup>

The longstanding format of the CAT policies affords the executive branch a great deal of flexibility. But that flexibility means that a president can make decisions as they see fit so long as they consider human rights among other factors. Lists of considerations need not have any constraining effect on executive decision-making.

Presidents who seek to promote and protect human rights in their CAT policies should implement specific, measurable restrictions to promote human rights. President Obama included in his CAT policy the first blanket prohibition on arms sales, albeit a narrow one, since the Carter Administration.<sup>289</sup> Other presidents should build on that model, identifying human rights lines that they will not cross and committing their administrations to implement specific restrictions.

One particular restriction that the executive branch should implement in the CAT policies is the binding prohibition established in Section 502B of the Foreign Assistance Act: no arms sales shall be made “to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”<sup>290</sup> Never has a President implemented the provision. By defining key terms and prioritizing implementation procedures in the CAT policy, a President could avoid identifying the United States with the worst human rights abuses, reduce moral complicity in gross violations of human rights, and send a powerful message of commitment to protecting and promoting human rights.

However, Congress, too, must live up to its proper oversight role. Unfortunately, Congress’s foremost tool to block arms sales of concern—the AECA’s joint resolution of disapproval—has not functioned since 1983.<sup>291</sup> In that year, *INS v. Chadha* invalidated the legislative veto and effectively ensured that Congress would need to muster two-thirds supermajorities in both chambers to overcome a presidential veto and

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<sup>288</sup> See Kirshner, *supra* note 181.

<sup>289</sup> Compare PPD-27, *supra* note 35, at 31 (“[T]he policy promotes restraint, both by the United States and other suppliers, in transfers of weapons systems that may be destabilizing or dangerous to international peace and security.”), with PDD-34, *supra* note 35, at 5 (discouraging a blanket policy of restraint), and NSDD-5, *supra* note 35, at 616 (making no mention of a prohibition on arms sales), and PD-13, *supra* note 62, at 931 (“I have concluded that the United States will henceforth view arms transfers as an exceptional foreign policy implement, to be used only in instances where it can be clearly demonstrated that the transfer contributes to our national security interests.”).

<sup>290</sup> 22 U.S.C. § 2304(a)(2).

<sup>291</sup> KOH, *supra* note 270, at 141.



block an arms sale. Congress has never done so.<sup>292</sup> Congress can enhance its ability to influence arms sales by passing legislation to shift to a presumption against the riskiest arms sales.

While conventional arms transfer policy may seem like an obscure area of executive branch decision-making, its consequences are felt around the world, especially where American explosives rain upon cities, where American teargas disperses protests, and where American weapons kill civilians. If the United States seeks to be an arsenal of democracy and a protector of human rights, it needs CAT policies that effectively prioritize human rights concerns. While balancing the diverse considerations associated with arms sales is difficult, this Article has offered guidance for decision-makers who wish to tip the scales in favor of human rights.

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<sup>292</sup> PAUL K. KERR, CONG RSCH. SERV., RL31675, ARMS SALES: CONGRESSIONAL REVIEW PROCESS 5 (2022).