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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

President Biden Issues Conventional Arms Transfer Policy That Emphasizes Human Rights Considerations

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On February 23, 2023, President Joseph R. Biden, Jr. issued a United States Conventional Arms Transfer (CAT) Policy that provides guidance for the executive branch's review and evaluation of all proposed arms transfers.¹ Released by nearly every president since Jimmy Carter,² the Biden CAT Policy, which was long anticipated,³ differs from those that preceded it by emphasizing the consideration of human rights in the U.S. government's arms transfer decisions. The policy comes after years of criticism, by civil society and members of Congress, of U.S. arms sales to certain countries due to human rights concerns. It contrasts with the Trump administration's focus on "supporting U.S. industry" and "strengthen[ing] the [country's] manufacturing and defense industrial base."⁴ It also reflects the administration's broader prioritization of civilian harm mitigation in military operations.⁵ Depending on its implementation, the policy could have significant consequences. The United States is the world's largest arms exporter, with forty percent of global transfers between 2018 and 2022 and sales in fiscal year 2022 alone in excess of \$200 billion.⁶

¹ White House Press Release, Memorandum on United States Conventional Arms Transfer Policy (Feb. 23, 2023), at <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/23/memorandum-on-united-states-conventional-arms-transfer-policy> [<https://perma.cc/8DMB-N7PN>] [hereinafter NSM-18].

² Of the last eight presidents, only Presidents George H. W. Bush and George W. Bush did not issue CAT policies. See Conventional Arms Transfer Policy Statement by the President (May 19, 1977), at <https://www.presidency.ucsb.edu/documents/conventional-arms-transfer-policy-statement-the-president> [<https://perma.cc/FVN9-VJLH>] (Carter); Announcement Concerning a Presidential Directive on United States Conventional Arms Transfer Policy (July 9, 1981), at <https://www.reaganlibrary.gov/archives/speech/announcement-concerning-presidential-directive-united-states-conventional-arms> [<https://perma.cc/9BYH-STJ3>] (Reagan) [hereinafter Reagan Policy]; White House Press Release, Conventional Arms Transfer Policy (Feb. 17, 1995), at <https://irp.fas.org/offdocs/pdd34.htm> [<https://perma.cc/326L-KRCD>] (Clinton); White House Press Release, Presidential Policy Directive – United States Conventional Arms Transfer Policy (Jan. 15, 2014), at <https://obamawhitehouse.archives.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p> [<https://perma.cc/3KA3-9JGZ>] (Obama) [hereinafter Obama Policy]; National Security Presidential Memorandum Regarding U.S. Conventional Arms Transfer Policy (Apr. 19, 2018), at <https://trumpwhitehouse.archives.gov/presidential-actions/national-security-presidential-memorandum-regarding-u-s-conventional-arms-transfer-policy> [<https://perma.cc/B3BS-A9KG>] (Trump) [hereinafter Trump Policy].

³ See Mike Stone & Patricia Zengerle, *Biden Plans Shift in Arms Policy to Add Weight to Human Rights Concerns*, REUTERS (Aug. 4, 2021), at <https://www.reuters.com/world/us/exclusive-biden-plans-shift-arms-export-policy-favor-human-rights-sources-2021-08-04> [<https://perma.cc/PA54-P4AB>].

⁴ See, e.g., Kristen E. Eichensehr, Contemporary Practice of the United States, 115 AJIL 115, 146 (2021) (reviewing tensions between Congress and the executive branch concerning U.S. arms sales to the Saudi-led coalition in Yemen); Trump Policy, *supra* note 2, Sec. 2(c)–(d).

⁵ See Jacob Katz Cogan, Contemporary Practice of the United States, 117 AJIL 330, 352 (2023) (discussing the U.S. Department of Defense's Civilian Harm Mitigation and Response Action Plan).

⁶ Pieter D. Wezeman, Justine Gadon & Siemon T. Wezeman, SIPRI Fact Sheet: Trends in International Arms Transfers, 2022, at 1 (Mar. 2023), at https://www.sipri.org/sites/default/files/2023-03/2303_at_fact_sheet_2022_v2.pdf [<https://perma.cc/A2UE-URZ7>]; U.S. Dep't of Defense Press Release, FY22 Security Cooperation Figures Announcement (Jan. 25, 2023), at <https://www.dsca.mil/news-media/news-archive/fy22-security-cooperation-figures-announcement> [<https://perma.cc/25W6-MHF7>] (\$51.92 billion from foreign military sales and related programs); U.S. Dep't of State Press Release, Fiscal Year 2022 U.S. Arms Transfers and Defense Trade (Jan. 25, 2023), at <https://www.state.gov/fiscal-year-2022-u-s-arms-transfers-and-defense-trade> [<https://perma.cc/ZD57-YZS4>] (\$153.7 billion from direct commercial sales).

U.S. arms transfers occur through direct commercial sales,⁷ foreign military sales (including financing and assistance programs), leases, provision of excess defense articles, and approvals of third-party transfers, changes of end-use, and upgrades. Congress, particularly through the Arms Export Control Act⁸ and the Foreign Assistance Act,⁹ has established general policies, restrictions, and oversight of arms transfers and has recognized the authority of the president to control the export of defense articles and services and to approve their transfer. Regulations, principally the State Department's International Traffic in Arms Regulations and the Commerce Department's Export Administration Regulations (depending on the item at issue),¹⁰ as well as agency policy documents, such as the Defense Department's Security Assistance Management Manual, set out the rules and procedures for the approval of specific arms transfers.

Within this legislative and regulatory framework, the CAT Policy "establishes the executive branch's priorities and rationale for adjudicating the export of conventional arms."¹¹ Using a structure akin to its predecessors, the Biden policy sets out ten foreign policy and national security objectives and identifies sixteen considerations to be "tak[en] into account" on "[a]ll decisions [by any government department or agency] on potential arms transfers," including technical data and defense services.¹² Many of these objectives and considerations appeared in prior policies, but there are new elements and shifts in emphasis in the Biden policy that reflect important changes in approach from those of prior administrations.¹³

The most striking is the policy's centering of human rights. As others had before, human rights is one of the policy's identified objectives and considerations. For the first time, though, human rights is considered separately in a standalone section. The policy also makes two important substantive changes. First, the policy envisions human rights as integral to national security. "United States national security," the policy explains, "is strengthened by greater respect worldwide for human rights and international law, including international humanitarian law."¹⁴ It is strengthened because "[t]he legitimacy of and public support for arms

⁷ Direct commercial sales are those directly between a U.S. company and a foreign party.

⁸ Arms Export Control Act of 1976, 22 U.S.C. § 2751, et seq.

⁹ Foreign Assistance Act of 1961, 22 U.S.C. § 2151, et seq.

¹⁰ International Traffic in Arms Regulations, 22 C.F.R. pts. 120–30; Export Administration Regulations, 15 C.F.R. pts. 730–80.

¹¹ NSM-18, *supra* note 1, Sec. 1. For the first time, the policy explicitly takes a whole-of-government approach, clarifying that it "applies to decisions on whether to authorize the transfer of United States arms to a foreign user . . . regardless of the authority or United States Government department or agency under which the transfer would occur." NSM-18, *supra* note 1, Sec. 2. During the Trump administration, the export regulation of certain firearms, guns, ammunition was controversially transferred from the State Department (ITAR) to the Commerce Department (EAR). See Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 85 Fed. Reg. 4136 (Jan. 23, 2020). The new CAT policy resolves any ambiguity regarding its applicability to items on the Commerce Control List.

¹² See NSM-18, *supra* note 1, Sec. 3. The policy does not rank the considerations, provide guidance on how to balance or evaluate considerations in the context of specific reviews, or preempt any applicable laws and regulations.

¹³ Among these changes include a greater attention to "emerging" and "sensitive" technologies, non-proliferation, global supply chains, multilateral agreements and cooperation, and particularly security sector governance (including "transparent, accountable, and legitimate management and oversight of security policy and practice"). See, e.g., *id.*, Secs. 2, 3, 5, 7.

¹⁴ NSM-18, *supra* note 1, Sec. 4. The same idea appears in the policy's objectives that relate to human rights and international humanitarian law. See *id.*, Sec. 2.

transfers . . . depends on the protection of civilians from harm.”¹⁵ And it is strengthened because strong human rights standards “encourage recipient governments to respect international law, human rights, and good governance, and help prevent violations of human rights or international humanitarian law.”¹⁶ National security and the promotion of human rights are not in tension. Rather, the promotion of human rights enhances U.S. national security. In the words of a State Department official, the contribution of human rights and international law to national security is an “explicit presumption[]” of the policy.¹⁷

Second, because of the connection between human rights and national security, the policy lowers the threshold for rejecting an arms transfer based on the risk of human rights violations. The policy provides:

no arms transfer will be authorized where the United States assesses that it is *more likely than not* that the arms to be transferred will be used by the recipient to *commit, facilitate the recipients’ commission of, or to aggravate risks that the recipient will commit*: genocide; crimes against humanity; grave breaches of the Geneva Conventions of 1949, including attacks intentionally directed against civilian objects or civilians protected as such; or other serious violations of international humanitarian or human rights law, including serious acts of gender-based violence or serious acts of violence against children.¹⁸

This assessment must “include consideration of the available information and relevant circumstances, including the proposed recipient’s current and past actions, credible reports that the recipient committed any of the . . . [specified] violations, and other information related to the overall capacity or intention of the recipient to respect international law.”¹⁹ The Obama and Trump CAT policies had a higher (and hence more difficult) standard for the rejection of a proposed arms transfer—“actual knowledge at the time of the authorization.”²⁰ Those policies also limited the inquiry to whether the arms would be used by the recipient to “commit” the atrocities. The Biden policy broadens the scope to include consideration of whether the arms would be used to “facilitate” the recipient’s commission of, or “aggravate risks” that they will commit, atrocities. The Biden policy also explicitly directs decisionmakers to consider the full range of available information, including non-governmental reporting, in the assessment of the likelihood that the recipient can or will respect international law. It too, for the first time, clearly provides that “the United States will re-assess and, as appropriate, review options for ceasing the transfer of or support for a previous authorization” if “circumstances have changed in ways that would materially increase the risk of the negative consequences listed.”²¹

It is to be seen whether the CAT Policy will prevent any countries currently receiving arms from getting permission for future transfers. Discussing the new policy a few weeks after its release, Deputy Assistant Secretary of State for Regional Security Mira Resnick provided as an example of the policy’s potential impact the 2021 decision to suspend certain arms transfers to

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Jaspreet Gill, *New Conventional Arms Transfer Focuses on Human Rights Over Economics*, BREAKING DEFENSE (Feb. 23, 2023), at <https://breakingdefense.com/2023/02/new-conventional-arms-transfer-focuses-on-human-rights-over-economics> [<https://perma.cc/C423-2NPM>] (quoting an unnamed U.S. State Department official).

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.*

²⁰ See, e.g., Obama Policy, *supra* note 2; Trump Policy, *supra* note 2.

²¹ NSM-18, *supra* note 1, Sec. 4.

Saudi Arabia because, in that case, the administration decided that it was “more likely than not that those precision-guided munitions would contribute to unacceptable civilian harm. That there was an unacceptable risk.”²²

Reaction in Congress has followed party lines. Republicans have criticized the CAT Policy for removing the Trump policy focus on economic security. House Foreign Affairs Committee Chair Michael McCaul and Senate Foreign Relations Committee Ranking Member Jim Risch stated that “[i]n 2018, the Trump administration changed the policy to elevate the importance of U.S. economic security, a move which directed the U.S. government to prioritize strengthening our defense industrial base.”²³ They continued: “The failure to reaffirm the importance of the economic component of our CAT policy at the same time we are facing historic challenges in our industrial base reflects this administration’s fundamental misunderstanding of the challenges we and our allies and partners are facing to obtain the weapons we need to keep our country safe and to deter aggression around the world.”²⁴ Democrats in Congress, such as House Foreign Affairs Committee Ranking Member Gregory Meeks, have supported the new CAT Policy. Meeks asserted that the policy “represents a meaningful step forward in ensuring the United States does not contribute to human rights abuses through its arms exports. U.S. arms transfer policy has long needed substantial reform. . . . I am hopeful this update represents the first of many more meaningful steps that ensure such exports serve both our national security interests and align with our democratic values.”²⁵ Senators Elizabeth Warren, Bernard Sanders, and Michael Lee, who, among others, have expressed concern for some time over the misuse of U.S. arms in Yemen by Saudi Arabia and the United Arab Emirates, have encouraged more robust end-use monitoring of arms transfers by the State and Defense Departments, as their programs currently “are not intended to address a partner nation’s operational use of transferred equipment,” including civilian harm.²⁶

The adoption of the Conventional Arms Transfer Policy could lead to a change in U.S. policy concerning the Arms Trade Treaty (ATT). Under the Obama administration, the

²² The Biden Administration’s New U.S. Conventional Arms Transfer Policy, 47:10 (Mar. 9, 2023), at <https://youtu.be/ULFfEv3Mxs> [hereinafter CAT Policy Discussion]; see Michael Crowley, *Biden Administration Reviewing Trump Arms Sales to U.A.E. and Saudi Arabia*, N.Y. TIMES (Jan. 27, 2021), at <https://www.nytimes.com/2021/01/27/us/politics/biden-arms-sales-uae-saudi-arabia.html>; Michael Crowley & Edward Wong, *U.S. Is Expected to Approve Some Arms Sales to U.A.E. and Saudis*, N.Y. TIMES (Apr. 14, 2021), at <https://www.nytimes.com/2021/04/14/us/politics/arms-sales-uae-saudi-arabia.html>.

²³ House Foreign Affairs Committee Press Release, McCaul, Risch Criticize Biden Admin for Altering and Politicizing Conventional Arms Transfer Policy (Feb. 24, 2023), at <https://foreignaffairs.house.gov/press-release/mccaul-risch-criticize-biden-admin-for-altering-and-politicizing-conventional-arms-transfer-policy> [<https://perma.cc/CT59-7NAQ>].

²⁴ *Id.*

²⁵ House Foreign Affairs Committee Press Release, Meeks Issues Statement on Biden Administration’s Update to Arms Export Policy (Feb. 27, 2023), at <https://democrats-foreignaffairs.house.gov/press-releases?ID=87A9064A-D678-41F8-A5C5-26457234BB0C> [<https://perma.cc/E2SA-C9NF>].

²⁶ Letters of Senators Elizabeth Warren, Bernard Sanders, and Michael S. Lee to Secretary of Defense Lloyd J. Austin III and Secretary of State Antony J. Blinken (May 14, 2023), at <https://www.warren.senate.gov/imo/media/doc/Letter%20to%20DoD%20and%20DoS%20on%20Weapons%20Use%20Monitoring%20and%20Civilian%20Harm.pdf> [<https://perma.cc/QXD3-JBFT>]; see also Government Accountability Office, *Yemen – State and DOD Need Better Information on Civilian Impacts of U.S. Military Support to Saudi Arabia and the United Arab Emirates* (June 2022), at <https://www.gao.gov/assets/gao-22-105988.pdf> [<https://perma.cc/3MJC-WLRW>].

United States participated actively in the negotiation of the ATT,²⁷ signed the treaty following its adoption in 2013, and sent it to the Senate for advice and consent to ratification.²⁸ But in 2019 the Trump administration notified the United Nations, the treaty's depositary, that the United States "does not intend to become a party to the treaty . . . [and therefore] the United States has no legal obligations arising from its signature."²⁹ At the seventh conference of states parties to the ATT in August 2021, under the Biden administration, the United States stated that, following the adoption of a new conventional arms transfer policy, which was then being drafted, "the United States will . . . use that policy framework to review specific arms transfer issues, including determining the proper relationship of the United States to the Arms Trade Treaty."³⁰ Though the CAT Policy has now been issued, no announcement has been made to date regarding a change in the U.S. position concerning the ATT, including whether to seek the advice and consent of the Senate, where it is still pending.³¹ In March 2023, Deputy Assistant Secretary Resnick said that the administration is "reviewing the implications of decisions taken to date on the ATT to determine the proper position of the United States with respect to the treaty."³²

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

President Biden Issues Policy on Promoting Accountability for Conflict-Related Sexual Violence
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On November 28, 2022, President Joseph R. Biden, Jr. issued a memorandum on promoting accountability for conflict-related sexual violence (CRSV).¹ It states that the United States "does not accept CRSV as an inevitable cost of armed conflict" and emphasizes its "commit[ment] to supporting survivors . . . by invoking all tools available, including legal, policy, diplomatic, and financial tools, to deter such violence, break the vicious cycle of impunity, and provide the necessary services to survivors."² Though focusing on impunity and

²⁷ See CARRIELYN D. GUYMON, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 674–79 (2012), at <https://2009-2017.state.gov/documents/organization/211955.pdf>.

²⁸ Depositary Notification from the UN Secretary-General, UN Doc. C.N.654.2013.TREATIES-XXVI.8 (Sept. 25, 2013), at <https://treaties.un.org/doc/Publication/CN/2013/CN.654.2013-Eng.pdf> [<https://perma.cc/68B4-G3DF>]; see CARRIELYN D. GUYMON, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 710–15 (2013), at <https://2009-2017.state.gov/documents/organization/226409.pdf>.

²⁹ Depositary Notification from the UN Secretary-General, UN Doc. C.N.314.2019.TREATIES-XXVI.8 (July 19, 2019), at <https://treaties.un.org/doc/Publication/CN/2019/CN.314.2019-Eng.pdf> [<https://perma.cc/H9PQ-NWZ8>]; see Jean Galbraith, *Contemporary Practice of the United States*, 113 *AJIL* 812, 813 (2019).

³⁰ Statement by the United States of America (Aug. 31, 2021), at <https://thearmstradetreaty.org/hyper-images/file/USA%20-%20Treaty%20Universalization%20CSP7%20%28for%20posting%29/USA%20-%20Treaty%20Universalization%20CSP7%20%28for%20posting%29.pdf> [<https://perma.cc/92PK-3TWW>]; ATT Seventh Conference of States Parties (CSP7), Day 2, as Delivered, 1:28:25 (Aug. 31, 2021), at <https://www.youtube.com/watch?v=21dNMNyDCSI>.

³¹ President Trump had requested the treaty's return, but the Senate did not comply.

³² CAT Policy Discussion, *supra* note 22, at 1:15:25.

¹ See White House Press Release, *Memorandum on Promoting Accountability for Conflict-Related Sexual Violence* (Nov. 28, 2022), at <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/28/memorandum-on-promoting-accountability-for-conflict-related-sexual-violence> [<https://perma.cc/T38Z-7TPV>] [hereinafter *Presidential Memorandum*].

² *Id.*, Sec. 1.