

**Open Society Policy Center  
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**Export Control Reform:  
U.S. Weapons at Greater Risk of Being Used in Human Rights Violations  
Congress's Carefully Legislated Web of Statutes Being Dismantled by Regulatory Fiat**

As part of its ambitious arms export control initiative, the Obama Administration is eliminating human rights protections that Congress crafted over previous decades to prevent military equipment "Made in the USA" from landing in the hands of abusive security forces.

For more than three decades, every administration has screened proposed U.S. arms exports to countries with poor human rights records to ensure that the intended end-users are not engaged in gross human rights violations. This process has helped prevent the use of U.S. weapons in the commission of human rights violations in Bahrain, Democratic Republic of Congo, Guatemala, Indonesia, Nepal, Sri Lanka, and Turkey.<sup>1</sup>

The Obama Administration's plan to move thousands of military items from the State Department's more restrictive U.S. Munitions List (USML) process to the Commerce Department's Control List (CCL) will undermine this legal requirement in some cases and eliminate it entirely in others.

**No Export License Required = No Human Rights Vetting**

Most military items moving to the CCL will soon be eligible for export using license exemptions or license-free scenarios that remove these items from any human rights checks. According to a White House statement, such scenarios would have eliminated more than half of the licenses issued for military vehicles in 2009.<sup>2</sup> The table below provides examples of military parts and equipment exported to countries with poor human rights records in that year. Under the reformed system, these and other countries will be able to obtain spare parts without any government licensing requirement. That means

A new, broad license exemption is available to countries with mostly positive human rights records, namely in Europe. Already, U.S. companies can use the exemption to export many items with significant military value to Turkey, which previously received extra scrutiny because of past human rights concerns. (During the Clinton Administration, the State Department reportedly

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<sup>1</sup> For an excellent overview of the development and implementation of U.S. law in this regard, see Stephen B. Cohen, "Conditioning U.S. Security Assistance on Human Rights Practices," *The American Journal of International Law*, Vol. 76, No. 2 (Apr., 1982), pp. 246-279. For a more recent example of the U.S. government suspending U.S. arms transfers, see Justin Elliot, "Reveled: America's Arms Sales to Bahrain amid Crackdown," *ProPublica*, January 15, 2013, online at <http://www.propublica.org/article/americas-arms-sales-bahrain-crackdown>.

<sup>2</sup> The White House, "White House Chief of Staff Daley Highlights Priority for the President's Export Control Reform Initiative," Press Release, July 19, 2011, online at <http://www.whitehouse.gov/the-press-office/2011/07/19/white-house-chief-staff-daley-highlights-priority-presidents-export-cont>.

“found ‘highly credible’ evidence that U.S.-manufactured Sikorsky Black Hawk transport helicopters, Bell-Textron Super Cobra attack helicopters, and FMC Corp. M-113 armored personnel carriers had been used to attack Kurdish villages and violate the human rights of civilians.”<sup>3</sup>) International human rights organizations raised concerns about Turkey’s use of excessive force against protestors this year, indicating that careful review is still warranted.<sup>4</sup>

<b>U.S. Government Authorized Exports of Parts and Components for Military Vehicles or Aircraft in FY 2009 to Countries with Poor Human Rights Records<sup>5</sup></b>			
<b>Country</b>	<b>Category</b>	<b>Value (USD)</b>	<b>Human Rights Concerns</b>
<b>Honduras</b>	Military Aircraft	\$760,721	“...Unlawful killings by members of the police and government agents; arbitrary and summary killings committed by vigilantes and former members of the security forces....”
<b>Nigeria</b>	Military vehicles	\$338,838	“Human rights problems during the year included ...politically motivated and extrajudicial killings by security forces, including summary executions....”
<b>Pakistan</b>	Military aircraft	\$50,474,641	“Although the civilian government took some positive steps, the overall human rights situation remained poor. Major problems included extrajudicial killings, torture, and disappearances.”
<b>Thailand</b>	Military vehicles	\$1,594,720	“Security forces continued at times to use excessive force against criminal suspects, and there were reports that police tortured, beat, and otherwise abused suspects, detainees, and prisoners....”

### **Parts and Components Can Enable Human Rights Violations**

For decades U.S. administrations have examined exports of military items such as propeller systems for military aircraft and alternators and generators for military vehicles on the basis of the recipient’s human rights record. In 2002 the Indonesian government reportedly refused to purchase U.S. made parts and components for the C-130 Hercules military transport aircraft because of restrictions the U.S. government placed on the use of such military items after reviewing Indonesia’s request.<sup>6</sup> Until now, the State Department has considered these mundane

<sup>3</sup> Tamar Gabelnick, William D. Hartung, Jennifer Washburn, “Arming Repression: U.S. Arms Sales to Turkey During the Clinton Administration,” October 1999, online at <http://www.fas.org/asmp/library/reports/turkeyrep.htm#arms>.

<sup>4</sup> Amnesty International, “Turkey: Fresh protests spark fears over pending tear gas shipments,” September 12, 2013, News, <http://amnesty.org/en/news/turkey-fresh-protest-death-undercores-urgent-need-halt-tear-gas-shipments-2013-09-10>.

<sup>5</sup> U.S. Department of State, “Section 655 Annual Military Assistance Reports,” online at [http://www.pmdtc.state.gov/reports/655\\_intro.html](http://www.pmdtc.state.gov/reports/655_intro.html). U.S. Department of State, “2009 Country Reports on Human Rights Practices,” online at <http://www.state.gov/j/drl/rls/hrrpt/2009/index.htm>.

<sup>6</sup> The Guardian, “Indonesian Forces Begin Aceh Offensive,” May 19, 2003, <http://www.theguardian.com/world/2003/may/19/indonesia>. Human Rights Watch, “Indonesia: Military Must

items to be lethal, due to their role in making “significant military equipment”<sup>7</sup> operational. Repressive governments may import such items, that do not threaten U.S. military advantage, but which would be useful in carrying out local atrocities and mass violence.<sup>8</sup>

Now the administration plans to move such items to the CCL and allow U.S. companies to export these parts and components without a license to all but a handful of countries (China, Cuba, Iran, North Korea, Syria, and Sudan.)<sup>9</sup> As a result, the U.S. government could lose its ability to review and put additional restrictions on exports of highly relevant parts and components to 20 countries where the State Department says security forces committed unlawful killings or other abuses.<sup>10</sup>

Unlike items on the USML, these military parts and components will also be exempt from many State Department and UN Security Council mandated arms embargoes when they are exported from the United States.<sup>11</sup> U.S. companies will be able to export them almost as if they were regular commercial trade, including to countries like Belarus, DRC, Eritrea, Somalia, Venezuela, and Zimbabwe—each of which poses a grave risk of these items being used in human rights violations or in support of groups considered by the U.S. government to be terrorists.<sup>12</sup>

According to current and former U.S. government officials, many countries in the developing world have older versions of U.S. military aircraft and military vehicles sitting inactive in military stockyards.<sup>13</sup> Lifting restrictions on these items could help these countries put armored vehicles and military aircraft back into operation. For example, supposedly mundane military aircraft spare parts are in high demand in Eritrea. In 2011 a UN Monitoring Group investigating possible violations of the UN Security Council-mandated arms embargo on Eritrea reported that Eritrea received foreign technical assistance and spare parts for the maintenance of its military

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Control Conduct in Aceh,” Press Release, December 25, 2003, online at

<http://www.hrw.org/news/2003/12/23/indonesia-military-must-control-conduct-aceh>.

<sup>7</sup> According to the International Traffic in Arms Regulations (ITAR), “significant military equipment” means defense articles “for which special export controls are warranted because of their capacity for substantial military utility or capability”. ITAR also identifies those items by an “\*” in the U.S. Munitions List online at [http://www.pmdetc.state.gov/regulations\\_laws/itar.html](http://www.pmdetc.state.gov/regulations_laws/itar.html).

<sup>8</sup> Brittany Benowitz, Barry Kellman, “Rethink Plans to Loosen U.S. Controls on Arms Exports,” *Arms Control Association*, April 2013, [http://www.armscontrol.org/act/2013\\_04/Rethink-Plans-to-Loosen-US-Controls-on-Arms-Exports](http://www.armscontrol.org/act/2013_04/Rethink-Plans-to-Loosen-US-Controls-on-Arms-Exports).

<sup>9</sup> Bernard Kritzer, “Export Control Reform: Reshaping the Control Lists, Implications for Universities,” U.S. Department of Commerce,” slide 5, March 26, 2013, online at

<http://www.upenn.edu/researchservices/Export%20Controls%20Conference/Bernard%20Kritzer.pdf>. Federal Register, July 8, 2013, pp. 40892 to 40919, see 40912 in particular, Part III, online at <http://export.gov/ecr/>

<sup>10</sup> According to a review of authorized U.S. exports in 2009 and State Department’s annual human rights reports for 2009, the United States authorized the export of military vehicle parts and components to these 20 countries: Angola, Azerbaijan, Colombia, Djibouti, Egypt, Indonesia, Jamaica, Jordan, Madagascar, Malaysia, Mexico, Morocco, Nigeria, Pakistan, Philippines, Saudi Arabia, South Africa, Thailand, Turkey, and Yemen.

<sup>11</sup> For a list of countries in which the U.S. government has restrictions, including related to UN Security Council mandated arms embargoes, see [http://www.pmdetc.state.gov/embargoed\\_countries/index.html](http://www.pmdetc.state.gov/embargoed_countries/index.html). Federal Register on July 8, 2013.

<sup>12</sup> For human rights concerns, see the State Department’s annual human rights reports at <http://www.state.gov/j/drl/rls/hrrpt/>.

<sup>13</sup> Open Society Policy Center phone conversations with current U.S. government officials in August 2013 and with former State Department official in charge of regulating U.S. commercial arms transfers in August 2013.

aircraft. According to the Monitoring Group, the Eritrean Air Force “is currently operating a fleet of at least 10 helicopters and 22 fighters from six different manufacturers,” including four U.S. designed Bell 412 helicopters delivered to Eritrea by Italy. “The fleet requires regular and high-level maintenance operations by trained personnel with specific and high-tech maintenance equipment, capacity for intermediate and minor repairs, and access to spare parts supply.”<sup>14</sup>

For other military items being moved to the CCL that will require a license to be exported, it remains unclear whether these items will continue to receive human rights vetting in the future. Although the Obama Administration has stated it will continue as a matter of policy to conduct human rights reviews on exports of military items moving to the CCL that require a license, the Commerce Department has not established specific regulations or proposed new laws mandating such a review.<sup>15</sup> Subsequent administrations may decide to change or abandon such a policy.

The Commerce Department has indicated that the legal requirements for USML items are not applicable for military items on the CCL in several situations.<sup>16</sup> Commerce has so far neglected to add regulations to the CCL restricting foreign recipients of military items on the CCL to use such items for self-defense purposes only, as is required by U.S. law for USML items.<sup>17</sup>

### **Congressional Action Needed to Protect Human Rights**

Congress risks losing many critical safeguards it put in place to protect U.S. interests and promote global security. In order to minimize the foreseeable consequences of reduced human rights screening of U.S. arms transfers, Congress must legislate the following:

- Require the administration to adopt a phased approach. U.S. military items long-recognized as “significant military equipment” and their related major components (e.g. airframes, tail sections, transmissions, tank treads, and hulls) shall remain on the USML until the U.S. Congress has had sufficient time to assess the risks of the move of USML items to the CCL;
- Pass law requiring the U.S. government to conduct human rights reviews when evaluating proposed export licenses of military items on the CCL, as is currently required by the Foreign Assistance Act and annual State and Defense authorization and appropriations bills for items on the USML;
- Require all potential foreign end-users of military items on the CCL to sign an agreement that they will comply with the conditions on the use of military items as established in the Arms Export Control Act, including that these items will only be used in self-defense.

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<sup>14</sup> United Nations, “Report of the Monitoring Group on Somalia and Eritrea,” July 2011.

<sup>15</sup> Items on the CCL are governed by their reason for control. None of the military items moving to the CCL will be controlled for human rights reasons. Currently, only crime control equipment requires a human rights review, but military items will not be controlled under crime control. For more information, see “Control Policy—CCL Based Controls” online at <http://www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear>.

<sup>16</sup> In the April 16, 2013 rule in the Federal Register, the Commerce Department notes that it is not required by law to submit advanced congressional notification for exports of high-value major defense equipment; that is a legal requirement only for items on the USML. As a result, the Commerce Department creates a regulation for such congressional notification making the requirements parallel.

<sup>17</sup> Federation of American Scientist’s “U.S. Arms Transfer Eligibility Criteria”.

