



# Arms Transfers and International Law

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The ongoing conflicts between Russia and Ukraine and between Israel and Hamas have prompted [questions](#) about the [international legal obligations](#) of states that provide arms to parties to a conflict. Several cases, for example, have been brought in [international](#) and [domestic courts](#) (including one in a U.S. district court) alleging that countries' provision of arms to Israel since it launched its [military campaign](#) in Gaza in response to the October 7, 2023, Hamas terrorist attack violates those countries' obligations under the [Convention on the Prevention and Punishment of the Crime of Genocide](#) (Genocide Convention) and the [Geneva Conventions](#). The questions raised about the extent to which these international law obligations apply to arms transfers may be of interest to Congress because of its roles in determining whether and how the United States implements its international legal obligations and in authorizing, restricting, and overseeing executive branch decisions regarding the provision of U.S. arms to foreign states. This Legal Sidebar (1) discusses the obligations under the Genocide and Geneva Conventions that may be relevant to arms transfers, (2) explicates the extent to which these obligations are incorporated into the U.S. legal and policy framework governing the process of providing U.S. weapons to foreign states, and (3) highlights some issues raised by the foregoing of relevance for Congress in light of its legislative and oversight authorities regarding the provision of U.S. weapons to foreign states.

## International Law Obligations and Arms Transfers: The Geneva and Genocide Conventions

[International humanitarian law](#) (IHL) is the body of treaties and customary international law that govern states' conduct during armed conflicts. The four Geneva Conventions, which are among the major components of IHL, provide various [protections](#) for civilians and others not actively participating in hostilities. The United States is a party to [all four Geneva Conventions](#). The Conventions direct parties to criminalize certain violations of Convention requirements listed as "grave breaches." Congress [implemented this obligation](#) through the [War Crimes Act of 1996](#) (codified as amended at [18 U.S.C. § 2441](#)). The Act also criminalizes additional IHL violations that may be applicable both to conflicts between states and to conflicts involving both state and non-state actors.

[Common Article 1](#) of the four Geneva Conventions obligates states parties "to respect and to ensure respect for the present Convention in all circumstances." Recent conflicts have [prompted](#) questions

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among commentators about how common Article 1 obligations apply to states that are not parties to an armed conflict, particularly those third-party states that are providing arms to states that are engaged in the conflict. More specifically, questions have arisen as to the extent to which states are obligated to assess whether there is a risk that the arms will be used in violation of the Conventions and, if so, whether states are obligated to refrain from or otherwise restrict transfers. The International Committee of the Red Cross, for example, has taken the position that Common Article 1's obligation to "ensure respect" for the Conventions requires that "arms-transferring State[s] . . . assess whether the recipient is likely to use the weapons to commit IHL violations," and, "[i]f there is an expectation that this will happen, based on facts or knowledge of past patterns . . . refrain from transferring the weapons."

While the Geneva Conventions apply only in the context of armed conflict, the Genocide Convention's obligations apply at all times. The Genocide Convention defines genocide as the committing of certain acts "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," including killing members of or causing serious bodily or mental harm to members of the group and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. The United States ratified the Genocide Convention in 1988, and Congress passed legislation implementing the treaty's requirements to criminalize genocide offenses that same year. Codified in 18 U.S.C. § 1091, the Genocide Convention Implementation Act draws on the language of the Convention to criminalize genocide by reference to the two essential elements of genocide under the Convention—a specific mental state and an act.

In addition to prohibiting the commission of genocide, the Genocide Convention prohibits complicity in genocide and requires states "to prevent" genocide. The International Court of Justice (ICJ) has held that a "State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a *serious risk* that genocide will be committed" (emphasis added). Once a state knows or should know of a serious risk that genocide will be committed, its duty to prevent it requires that, if a state "has available to it means likely to have a deterrent effect on" the suspected potential offender, "it is under a duty to make such use of these means as the circumstances permit."

A recent case brought before the ICJ could eventually lead that tribunal to issue an opinion addressing states' obligations under the Genocide and Geneva Conventions when providing arms to other states. In April 2024, Nicaragua filed a case against Germany alleging that Germany's provision of arms to Israel for use in its military campaign in Gaza violated the Genocide Convention and IHL as codified in the Geneva Conventions. In support of its allegations, Nicaragua argued that Germany "continues to provide political, financial and military support to Israel with full knowledge of the ongoing plausible commission by Israel of serious breaches of international law facilitated by that support." In response, Germany argued that it had a "robust legal framework that assesses export licensing requests on a case-by-case basis, and that ensures compliance with . . . Germany's international obligations." Germany further maintained that its provision of "war weapons" to Israel had decreased since Israel began its military operations in Gaza on October 7.

The ICJ denied Nicaragua's request for a preliminary order requiring Germany to stop transferring weapons, observing that, before exporting weapons, the German government conducts "an assessment . . . to ascertain whether there is a clear risk that the particular item . . . would be used in the commission of genocide, crimes against humanity or grave breaches of the four Geneva Conventions," and that "there has been a significant decrease since November 2023 in the value of material for which . . . licences were granted" to Israel. The ICJ further stated that it "considers it particularly important to remind all States of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate the [Genocide or Geneva] Conventions." The case remains pending on the ICJ's docket.

The ICJ's decisions are **binding only** on the parties to a given case, and thus in that sense *Nicaragua v. Germany* does not have direct implications for the United States. The ICJ's decisions are, however, **considered** to be highly authoritative and thus can contribute to the interpretation and development of international law. The ICJ's decisions in *Nicaragua v. Germany* thus may impact the United States in the sense that they may provide the ICJ's interpretation of international legal obligations that *are* binding on the United States as a party to the Genocide and Geneva Conventions and as a matter of customary international law.

## The U.S. Legal Framework Governing the Provision of U.S. Arms to Foreign States

The U.S. domestic statutes governing arms transfers provide the executive branch with broad discretion in making arms-transfer decisions and do not explicitly require consideration of whether recipient countries are or may be in violation of IHL or genocide prohibitions. The two principal statutes governing the executive branch's provision of arms to foreign states are the **Arms Export Control Act** (AECA) and **part of the Foreign Assistance Act** (FAA). The AECA provides the President with broad authority to exercise discretion in making decisions about U.S. arms exports within the **general guidelines** specified in the Act. Although some of those guidelines **arguably address** human-rights-related concerns, none include consideration of recipient countries' compliance with international law. The FAA does, however, **restrict** the arms-provision authorities granted to the President in the AECA by prohibiting the provision of weapons to "**any country** the government of which engages in a consistent pattern of gross violations of internationally recognized human rights" (Subsection 502(a), codified at 22 U.S.C. § 2304(a)). This prohibition is qualified by permitting the President to waive it by providing Congress with a **certification** "that extraordinary circumstances exist warranting provision of such assistance."

Both the AECA and the FAA also establish **mechanisms** for facilitating congressional oversight of the executive branch's implementation of these statutory arms-provision authorities and restrictions in the form of **notification** and **reporting** requirements coupled with **expedited procedures** for congressional actions. The AECA requires the President to **notify** Congress of proposed weapons sales above certain values and establishes **expedited procedures** for congressional consideration of joint resolutions prohibiting a given proposed arms sale before the time at which the President is **authorized to go forward** with the transaction after notification (15 days for NATO and major non-NATO allies and 30 days for all other countries).

The FAA's mechanisms for enforcing its prohibition of arms transfers to countries that are in gross violation of international human rights law include a requirement that the Secretary of State submit an annual report to Congress on the human rights compliance of countries proposed as recipients of U.S. security assistance, which "shall include [any] information regarding the commission of war crimes, crimes against humanity, and evidence of acts that may constitute genocide" (in Subsection 502B(b) of the FAA, found at 22 U.S.C. § 2304(b)). Additionally, Subsection 502B(c) provides for more targeted reporting by **requiring** the Secretary of State to submit a report on a specific recipient country's international human rights compliance if directed to do so by a simple resolution of either house or by request from the House Foreign Affairs Committee (HFAC) or Senate Foreign Relations Committee (SFRC), and prohibits delivery of the security assistance until the Secretary submits the report. President George H.W. Bush **claimed** that this provision is unconstitutional in light of *INS v. Chadha*, a 1983 Supreme Court decision **invalidating** a statutory provision in an unrelated statute that allowed one chamber to invalidate an agency's action by majority vote on the ground that it was "legislative in its character and effect," and thus subject to the bicameralism and presentment requirements of Article I. Some **commentators** have maintained, however, that Subsection 502B(c) is not impacted by *Chadha* because the statute's prohibition of arms sales is automatically triggered by the failure of the Secretary to

submit a report, rather than any specific action by one chamber or committee. Notwithstanding any disagreement about *Chadha*'s applicability, however, the circumstances where such a dispute would be [justiciable](#) are unclear. Finally, Subsection 502B(c) also [establishes expedited procedures](#) for congressional consideration both of a simple resolution requiring the report and of a joint resolution terminating, restricting, or continuing assistance after a report is submitted.

Although the FAA requires that annual recipient country human-rights reports include information on the commission of war crimes and genocide, there are no explicit prohibitions or other restrictions in the FAA related to the provision of U.S. arms to foreign states that are or may be committing war crimes in violation of the Geneva Conventions or that are or may be perpetrating genocide or crimes against humanity. Accordingly, current law grants the executive branch broad discretion in determining whether to consider actual or potential violations of the Geneva and Genocide Conventions in making arms-transfer decisions and, if it does consider such violations, how much weight to give them. The Biden Administration has, to some extent, incorporated such considerations into its nonbinding [policy-guidance documents](#), which a subsequent administration would be free to revoke or otherwise change to reflect its policy priorities.

## Congressional Considerations

Like many treaties, the Geneva and Genocide Conventions require parties to enact legislation to fulfill certain obligations. As a matter of U.S. law, the Supreme Court has recognized that Congress may pass [legislation implementing U.S. treaty obligations](#) as well as [legislation that modifies or is contrary](#) to those obligations, which if enacted would be the governing *domestic* law even if in conflict with the treaty (although another treaty party may have a valid [claim under international law](#) in the event that the United States breached its treaty obligations). As noted, Congress has implemented U.S. obligations under the Geneva and Genocide Conventions to criminalize certain violations of their prohibitions. In determining whether and how to exercise its legislative and oversight authorities in relation to the executive branch's decisions about the provision of arms and any relevant U.S. obligations under international law, including under the Geneva and Genocide Conventions, Congress could consider, for example,

- restricting or broadening the executive's branch's discretion to provide arms to countries that are or are likely engaging in violations of international law, including by explicitly including or excluding bodies of international law such as IHL or obligations related to genocide (as [some recent bills](#) would do), or by removing, limiting, or expanding the President's waiver authority;
- adding or removing reporting requirements on recipient countries' compliance with international law;
- amending Subsection 502B(c) of the FAA to also provide expedited procedures for consideration of a joint resolution requiring a targeted report and prohibiting arms transfers until it is submitted and/or for a joint resolution terminating, restricting, or continuing assistance to a country if the Secretary of State does not provide a requested report in light of the constitutional questions raised by *Chadha*; or
- by engaging in further oversight of the executive branch implementation of arms-provision laws.

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