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Bill C-47

**An Act to facilitate arms exports to countries
which violate human rights?**

Michael Byers & Parmida Esmaeilpour



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Executive Summary

This report evaluates the Canadian government's proposed legislation to amend the Export and Import Permits Act and the Criminal Code to permit accession to the Arms Trade Treaty (ATT).

The proposed legislation, Bill C-47, has numerous flaws. This report focuses on the two most serious of these:

- 1) Bill C-47 does not impose hard legal limits on the Foreign Minister's discretionary power to approve arms exports. This will violate the ATT because Canadian governments could continue to authorize arms exports to countries which commit serious violations of international human rights or international humanitarian law. Bill C-47 will not curb or even constrain arms exports like those to Saudi Arabia authorized by then Foreign Minister Stéphane Dion in 2016.
- 2) Bill C-47 does not cover arms exports to the United States. This will violate the ATT, which requires that its rules be applied to all exports in a "consistent, objective and non-discriminatory manner". Canada cannot rely on US export controls, as demonstrated by the recent transfer of ground attack aircraft with Canadian-made engines from the United States to Nigeria notwithstanding a serious risk of the aircraft being used to violate international human rights and international humanitarian law.

This report makes the following recommendations:

- 1) Hard legal limits, based on the risk assessment criteria set out in Article 7 of the ATT, must be imposed on the Foreign Minister's discretionary power to approve arms exports.
- 2) These hard limits should be set out in a statute and not in regulations, which are easier for governments to change.
- 3) All military exports from Canada to the United States, including parts, components, subsystems and subcontracted shipments, must be made subject to the same approval process as arms exports to other countries.

Introduction

The Canadian arms trade industry is valued at about \$12 billion annually, as revealed by a secret briefing note presented to then Foreign Minister John Baird in June 2013.¹ According to the Canadian Association of Defence and Security Industries the sector was “responsible for about 109,000 jobs in Canada” in 2014.²

However, in April 2016 it was reported that Canada had authorized the sale of \$5.8 billion worth of military equipment and technology to countries with “deeply questionable human rights records.”³ Arms control experts complained, “three of the top 10 buyers of Canadian military goods now are countries with bad human-rights records [and] Ottawa won’t [even] tell Canadians exactly what was shipped, or which company sold the goods.”⁴ These numbers, and the lack of information about the sales, are indicative of a broader and deep-rooted problem with the Canadian arms export control regime.

Experts have long expressed concerns about the lack of publicly available data on the Canadian arms trade industry. As Lucas Powers of CBC News explained, “Those who closely monitor the Canadian arms trade say it lacks transparency, making forceful oversight nearly impossible.”⁵ Export permits are granted or denied based on “secretive risk assessments carried out by the government,” and though the government provides assurances that the risk assessments “are done to a high standard ... nobody knows the actual criteria.”⁶ According to the federal government, “details related to export transactions (for example, names of exporting companies, financial values of individual contracts and transactions) ... are protected due to the commercially confidential nature of such information.”⁷

¹ Lee Berthiaume, “Canada planning to sell guns and military equipment to developing countries to maintain domestic arms industry,” National Post, 5 January 2014, accessible at: <http://nationalpost.com/news/canada/canada-planning-to-sell-guns-and-military-equipment-to-developing-countries-to-maintain-domestic-arms-industry>

² Ibid.

³ Naël Shiab, “Ce que le gouvernement ne vous dit pas sur les ventes d’armes,” L’Actualité, 18 April 2016, accessible at: <https://lactualite.com/societe/2016/04/18/ce-que-le-gouvernement-ne-vous-dit-pas-sur-les-ventes-darmes/>

⁴ Steven Chase, “Three of top 10 buyers of Canada’s military goods have bad human-rights records,” Globe and Mail, 17 June 2016, accessible at: <https://beta.theglobeandmail.com/news/politics/three-of-top-10-buyers-of-canadas-military-goods-have-bad-human-rights-records/article30513943/>

⁵ Lucas Powers, “Canadian arms trade much larger than data suggests, expert says,” CBC News, 23 February 2017, accessible at: <http://www.cbc.ca/news/business/canada-arms-technology-trade-1.3458608>

⁶ Ibid.

⁷ Global Affairs Canada, “2016 Report on the Export of Military Goods from Canada,” accessible at: <http://www.international.gc.ca/controls-controles/report-rapports/mil-2016.aspx?lang=eng>

What we do know is that very few arms export permits are ever denied by the Canadian government.⁸ The latest annual report on Canadian arms exports indicates that 3,203 permits were approved while only 6 were denied.⁹

Enter the Arms Trade Treaty (ATT), which was adopted by the United Nations General Assembly in 2013 and came into force in 2014.¹⁰ The ATT is the first and only legally binding multilateral treaty designed to regulate and promote responsibility, transparency and accountability in the global arms trade. It already has 92 States Parties.¹¹

The Harper Government refused to sign the ATT, even though signing a treaty is a non-legally-binding step that precedes ratification or accession. Although the Harper Government said that its primary concern was with the treaty's implications for "lawful and responsible firearms owners,"¹² it also claimed that Canada's export regime was already among the "strongest in the world."¹³

During the 2015 election campaign, Liberal Party leader Justin Trudeau promised that Canada would accede to the treaty,¹⁴ with "accession" being the term for ratifying a treaty after it has come into force. On becoming Prime Minister, his mandate letter to the Foreign Minister included "acceding to the Arms Trade Treaty."¹⁵ Then, in April 2017, the Trudeau government introduced legislation to enable Canada to join the ATT.

Bill C-47, the proposed legislation, would establish controls over Canadians brokering in military goods between two countries outside of Canada, create a legal obligation for the Foreign Minister to consider several assessment criteria before authorizing export permits, and increase fines for summary conviction offences up to \$250,000.¹⁶ These, the Trudeau government claims, are the only changes needed before Canada accedes to the ATT. Liberal ministers have echoed their Conservative predecessors by asserting that Canada already has among the "strongest export controls in the world"¹⁷ and "[meets] the vast majority of obligations under the arms trade treaty."¹⁸

⁸ Naël Shiab, "Ce que le gouvernement ne vous dit pas sur les ventes d'armes," *L'Actualité*, 18 April 2016, accessible at: <https://lactualite.com/societe/2016/04/18/ce-que-le-gouvernement-ne-vous-dit-pas-sur-les-ventes-darmes/>

⁹ Global Affairs Canada, "2016 Report on the Export of Military Goods from Canada," accessible at: <http://www.international.gc.ca/controls-controles/report-rapports/mil-2016.aspx?lang=eng>

¹⁰ Arms Trade Treaty, accessible at: <https://www.un.org/disarmament/convarms/att/>

¹¹ Treaty Status, accessible at: <http://thearmstradetreaty.org/index.php/en/the-arms-trade-treaty>

¹² Murray Brewster, "Canada to join global Arms Trade Treaty under legislation tabled Thursday," *CBC News*, 13 April 2017, accessible at: <http://www.cbc.ca/news/politics/arms-trade-treaty-1.4070539>

¹³ Steven Chase, "Canada to join arms trade treaty, but will not raise export controls," *Globe and Mail*, 30 June 2016, accessible at: <https://www.theglobeandmail.com/news/politics/canada-to-join-global-arms-trade-treaty-in-2017-ottawa-announces/article30705056/>

¹⁴ Bob Weber, "Justin Trudeau promises to sign global arms treaty," *Canadian Press*, 7 October 2015, accessible at: <http://www.ctvnews.ca/politics/election/justin-trudeau-promises-to-sign-global-arms-treaty-1.2599194>

¹⁵ Kenneth Epps and Mark Fried, "The Arms Trade Treaty: Implications for Canada," *The Ploughshares Monitor*, 37, no. 4 (2016), accessible at: http://www.ploughshares.ca/pl_publications/the-arms-trade-treaty-implications-for-canada/

¹⁶ Global Affairs Canada, "Backgrounder - A bill to enhance transparency and accountability in Canada's export controls and allow accession to the Arms Trade Treaty," 13 April 2017, accessible at: https://www.canada.ca/en/global-affairs/news/2017/04/a_bill_to_enhancetransparencyandaccountabilityincanadasexportcon.html

¹⁷ Steven Chase, "Canada to join arms trade treaty, but will not raise export controls," *Globe and Mail*, 30 June 2016, accessible at: <https://www.theglobeandmail.com/news/politics/canada-to-join-global-arms-trade-treaty-in-2017-ottawa-announces/article30705056/>

¹⁸ Global Affairs Canada, "Minister Dion statement on Canada's accession to Arms Trade Treaty and reform of export permit controls and reporting system," 30 June 2016, accessible at: <https://www.canada.ca/en/global->

The Harper and Trudeau governments' shared assessment of Canada's existing export control regime is rather generous, considering this country's opaque export control process¹⁹ and its history of controversial arms exports, including the authorization of a \$15 billion sale of LAV-III armoured-and-armed vehicles to Saudi Arabia ("Saudi Arms Deal") over the past three years.²⁰ Contrary to what successive governments have claimed, Canada's arms export regime is deeply flawed and belies our reputation as a country which complies with, and promotes, international human rights and international humanitarian law.

Arms control experts have already questioned whether Bill C-47 has been drafted in good faith with the goal of genuinely precluding problematic but lucrative sales like the Saudi Arms Deal from happening again,²¹ or whether the draft legislation is designed to enable governments – if and when they choose – to sidestep the obligations set out in the ATT.²²

Bill C-47 still has to be debated and voted on by the House of Commons and the Senate before it can receive Royal Assent and Canada is able to accede to the treaty. This means that there is still time to replace Bill C-47 with an entirely new stand-alone statute that complies fully with the requirements of the ATT.

[affairs/news/2016/06/minister-dion-statement-on-canada-s-accession-to-arms-trade-treaty-and-reform-of-export-permit-controls-and-reporting-system.html](https://www.theglobeandmail.com/affairs/news/2016/06/minister-dion-statement-on-canada-s-accession-to-arms-trade-treaty-and-reform-of-export-permit-controls-and-reporting-system.html)

¹⁹ Foreign Minister Stéphane Dion flat-out refused to disclose whether he had authorized Canadian-made military equipment to be exported to Thailand. See: Steven Chase, "Ottawa refuses to reveal decision on shipping military goods to Thailand," The Globe and Mail, 20 June 2016, accessible at: <https://www.theglobeandmail.com/news/politics/ottawa-refuses-to-reveal-decision-on-shipping-military-goods-to-thailand/article30519078/>

²⁰ For detailed overviews of the Saudi Arms Deal, see Globe and Mail, "Explainer - The Saudi arms deal: What we've learned so far, and what could happen next," 14 January 2016, accessible at: <https://beta.theglobeandmail.com/news/politics/the-saudi-arms-deal-what-weve-learned-so-far/article28180299/>; and Paul Christopher Webster, "The Silent Partner," Globe and Mail, 27 April 2016, accessible at: <https://beta.theglobeandmail.com/report-on-business/rob-magazine/the-inside-story-of-canadas-15-billion-saudi-armsdeal/article29761861/>

²¹ See, e.g.: Srdjan Vucetic, "What joining the Arms Trade Treaty means for Canada," Open Canada, 19 April 2017, available at <https://www.opencanada.org/features/what-joining-arms-trade-treaty-means-canada/>

²² See, e.g.: Asad Ismi, "There is a way to control arms exports, but does Canada have the will?," CCPA Monitor, January/February 2017, accessible at: <https://www.policyalternatives.ca/publications/monitor/there-way-control-arms-exports-does-canada-have-will>

Backgrounder on Canadian Arms Controls

On June 17, 2016, less than a year after taking office, the Trudeau Government tabled the issue of Canada's accession to the Arms Trade Treaty (ATT) in the House of Commons and, on June 30, 2016, then Foreign Minister Stéphane Dion issued a statement to that effect.²³ Canada would become a State Party to the ATT after passing legislation, implementing regulations and submitting an instrument of accession to the UN Secretary-General.

Canada already has domestic and international commitments to regulate arms exports, notably the 1996 Wassenaar Arrangement, a 41 member-state agreement on exports controls and information-sharing. However, the Wassenaar Arrangement is not a legally binding instrument, as is reflected in the fact that all measures under it "are taken in accordance with national legislation and policies and are implemented on the basis of national discretion."²⁴ The ATT is different in that it is a binding treaty and will create legal obligations for Canada upon accession. Under the ATT, the government will be *required* to control arms exports.

Canada is also a State Party to the United Nations Charter and therefore obligated to implement sanctions and arms embargoes when such measures are adopted by the UN Security Council acting under Chapter VII of the Charter. The implementation of UN sanctions and embargoes is done through the United Nations Act, which applies within Canada as well as to Canadian citizens and companies operating abroad.²⁵ The Arms Trade Treaty, however, will apply in all circumstances and not only after the adoption of a UN Security Council resolution.

Finally, Canada is a signatory to the Firearms Protocol to the United Nations Convention against Transnational Organized Crime (Organized Crime Convention).²⁶ The Firearms Protocol provides a framework for states to control and regulate licit arms and arms flows, prevent their diversion into the illegal circuit, and facilitate the investigation and prosecution of related offences without hampering legitimate transfers. However, the Protocol's focus is on stemming the illegal trade, not establishing standards for *legal* transfers. And Canada, in any event, is not a State Party to the Protocol.²⁷

On April 13, 2017, Foreign Minister Chrystia Freeland introduced Bill C-47, *An Act to amend the Export and Import Permits Act and the Criminal Code*, in the House of Commons with the stated purpose of

23 Global Affairs Canada, "Minister Dion statement on Canada's accession to Arms Trade Treaty and reform of export permit controls and reporting system," 30 June 2016, accessible at: <https://www.canada.ca/en/global-affairs/news/2016/06/minister-dion-statement-on-canada-s-accession-to-arms-trade-treaty-and-reform-of-export-permit-controls-and-reporting-system.html>

24 Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, quotation accessible at: <http://www.wassenaar.org/about-us/>

25 United Nations Act (R.S.C., 1985, c. U-2), accessible at: <http://laws-lois.justice.gc.ca/eng/acts/U-2/index.html>

26 United Nations, 2001 Firearms Protocol, accessible at: <http://www.unodc.org/unodc/en/firearms-protocol/the-firearms-protocol.html>

27 Canada has also signed but not ratified or acceded to the regional version of the treaty, namely the 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other related materials, accessible at: <http://www.oas.org/juridico/english/sigs/a-63.html>. In both cases the failure to ratify or accede is due to objections from the Canadian mining and construction industries to the inclusion of "explosives".

harmonizing Canadian laws with the ATT.²⁸ At the same time, she reiterated that Canada's export control regime already "meets most of the treaty's thresholds".²⁹

As Professor Srdjan Vucetic has noted, Freeland "omitted to mention that Canadian accession to the ATT is long overdue."³⁰ Indeed, Canada's late accession to the ATT fits a larger pattern of noncompliance with the international rules and norms regulating the global arms trade under both Conservative and Liberal governments. This pattern is worth reviewing because it seems to have shaped the approach being taken to Bill C-47 today.

Canadian arms exports under successive governments

Successive Canadian governments have authorized the export of military equipment and technology to developing countries for reasons that include the maintenance of international alliances, national or regional economic development, and domestic politics. The Middle East features prominently as a destination for Canadian arms, with Canada being the second largest exporter to the region.³¹ Saudi Arabia, in fact, is Canada's largest arms export partner after the United States.³² For more than 25 years it has consistently received large amounts of military equipment and technology from Canada.³³ In 2015, it accounted for 19.81 percent of the total value of Canadian military exports.³⁴ And this was before the so-called "Saudi Arms Deal", a \$15 billion sale of LAV-III armed-and-armoured vehicles.

Human rights and disarmament groups have criticized successive Canadian governments for their willingness to export arms to Saudi Arabia, both out of concern for the country's poor human rights record and its military actions in the neighbouring countries of Bahrain and Yemen.³⁵ Canadian-made armoured vehicles were used by Saudi Arabia in 2011 "to help crack down on protesters in neighbouring Bahrain,"³⁶ and again (apparently) by Saudi Arabia against Houthi rebels in the war in

²⁸ Global Affairs Canada, "Canada prepares to join the Arms Trade Treaty," 13 April 2017, accessible at: https://www.canada.ca/en/global-affairs/news/2017/04/canada_prepares_tojointhearmstradetreaty.html

²⁹ Ibid.

³⁰ Srdjan Vucetic, "What joining the Arms Trade Treaty means for Canada," Open Canada, 19 April 2017, available at <https://www.opencanada.org/features/what-joining-arms-trade-treaty-means-canada/>

³¹ Steven Chase, "Canada now the second biggest arms exporter to Middle East, data show," Globe and Mail, 14 June 2016, accessible at: <https://www.theglobeandmail.com/news/politics/canada-now-the-second-biggest-arms-exporter-to-middle-east-data-show/article30459788/>

³² Lucas Powers, "Canadian arms trade much larger than data suggests, expert says," CBC News, 23 February 2016, accessible at: <http://www.cbc.ca/news/business/canada-arms-technology-trade-1.3458608>

³³ Steven Chase, "Human-rights advocate calls for guarantees about Saudi use of combat vehicles," Globe and Mail, 1 June 2016, accessible at: <https://www.theglobeandmail.com/news/politics/human-rights-advocate-calls-for-guarantees-about-saudi-use-of-combat-vehicles/article30243307/>

³⁴ Global Affairs Canada, "2016 Report on the Export of Military Goods from Canada," accessible at: <http://www.international.gc.ca/controls-controles/report-rapports/mil-2016.aspx?lang=eng>

³⁵ Srdjan Vucetic, "What joining the Arms Trade Treaty means for Canada," Open Canada, 19 April 2017, accessible at <https://www.opencanada.org/features/what-joining-arms-trade-treaty-means-canada/>

³⁶ Lee Berthiaume, "Canada planning to sell guns and military equipment to developing countries to maintain domestic arms industry," National Post, 5 January 2014, accessible at: <http://nationalpost.com/news/canada/canada-planning-to-sell-guns-and-military-equipment-to-developing-countries-to-maintain-domestic-arms-industry>

Yemen.³⁷ As recently as July 2017, videos and photographs emerged showing Canadian-made vehicles being used by Saudi Arabia against civilians in its Eastern Province.³⁸ There are also reports that Canadian-made sniper rifles may have fallen into the hands of the Houthis rebels, presumably after having been used against them.³⁹ All this has taken place in the context of reliable reports about systematic violations of international humanitarian law by the Saudi-led coalition; violations that could constitute war crimes or even crimes against humanity.⁴⁰

The Saudi Arms Deal has also been subject to a legal challenge. In March 2016, Professor Daniel Turp took the matter to the Federal Court of Canada, claiming that the “sale of armoured vehicles to Saudi Arabia ... would violate the obligation to respect and ensure the respect of human rights and international humanitarian law” and constitute an “intentionally wrongful act.”⁴¹ Professor Eric David, a leading Belgian authority on international human rights, provided an expert opinion in support of the allegations, concluding that “Canada is violating international law by shipping arms to a country already accused of massive human-rights violations in Yemen.”⁴² Yet the Federal Court upheld the legality of the Foreign Minister’s authorization of the permits, on the basis that it fell within the Minister’s wide scope of discretion under the Export Import Permits Act.⁴³

Meanwhile, both Human Rights Watch and Amnesty International have called for Canada to suspend arms exports until the Saudi-led coalition ceases air strikes in Yemen that would be considered unlawful under international law.⁴⁴

Canada also exports arms to Afghanistan, Egypt, Iraq, Israel, Jordan, Kazakhstan, Kuwait, Nigeria and Turkey.⁴⁵ China and Algeria, both of which have poor human rights records, are “within the top ten recipients of Canadian arms exports,” while Libya and Sudan have both purchased military equipment from Canadian-owned companies despite sanctions and UN arms embargoes.⁴⁶ The RCMP and a UN

³⁷ Steven Chase and Robert Fife, “Saudis appear to be using Canadian-made combat vehicles against Yemeni rebels,” *Globe and Mail*, 22 February 2016, accessible at: <https://beta.theglobeandmail.com/news/politics/saudi-arms-used-against-yemeni-rebels-seem-to-match-canadian-lavs/article28846678/?ref=http://www.theglobeandmail.com&>

³⁸ Steven Chase and Robert Fife, “Ottawa calls for probe into apparent Saudi use of Canadian-made armoured vehicles against citizens,” *Globe and Mail*, 28 July 2017, accessible at: <https://beta.theglobeandmail.com/news/politics/saudi-arabia-appears-to-be-deploying-canadian-made-armoured-vehicles-against-its-own-citizens/article35831864/?ref=http://www.theglobeandmail.com&>

³⁹ Nahlah Ayed et al., “Canadian rifles may have fallen into Yemen rebel hands, likely via Saudi Arabia,” *CBC News*, 22 February 2016, accessible at: <http://www.cbc.ca/news/canada/manitoba/canadian-rifles-may-have-fallen-into-yemen-rebel-hands-likely-via-saudi-arabia-1.3455889>

⁴⁰ Ewen MacAskill, “UN report into Saudi-led strikes in Yemen raises questions over UK role,” *Guardian*, 27 January 2016, accessible at: <https://www.theguardian.com/world/2016/jan/27/un-report-into-saudi-led-strikes-in-yemen-raises-questions-over-uk-role>

⁴¹ Steven Chase, “Canada violating international law with Saudi arms sale: expert,” *Globe and Mail*, 14 April 2016, accessible at: <https://www.theglobeandmail.com/news/politics/canada-violating-international-law-with-saudi-arms-sale-expert/article29640135/>

⁴² *Ibid.*

⁴³ *Daniel Turp v. The Minister of Foreign Affairs*, Federal Court of Canada, 24 January 2017, 2017 FC 84, accessible at: <http://cas-cdc-ww02.cas-satj.gc.ca/rss/T-462-16%20Daniel%20Turp%20v%20The%20Minister%20of%20Foreign%20Affairs%20ENGLISH%20FINAL.pdf>

⁴⁴ Steven Chase, “Human-rights advocate calls for guarantees about Saudi use of combat vehicles,” *Globe and Mail*, 1 June 2016, accessible at: <https://www.theglobeandmail.com/news/politics/human-rights-advocate-calls-for-guarantees-about-saudi-use-of-combat-vehicles/article30243307/>

⁴⁵ Global Affairs Canada, “2016 Report on the Export of Military Goods from Canada,” accessible at: <http://www.international.gc.ca/controls-controles/report-rapports/mil-2016.aspx?lang=eng>

⁴⁶ Steven Chase and Geoffrey York, “RCMP reviewing Canadian-owned firm over military exports to Sudan, Libya,” *Globe and Mail*, 8 September 2016, accessible at: <https://beta.theglobeandmail.com/news/politics/rcmp-reviewing-canadian-owned-firm-over-military-exports-to-sudan-libya/article31760344/>

panel independently investigated one Canadian-owned company, the Streit Group, which sold armoured vehicles to conflict-ridden Libya, Sudan, and South Sudan. The Streit Group denied wrongdoing and “noted the vehicles were manufactured and shipped from its plant in the United Arab Emirates.”⁴⁷ Global Affairs Canada absolved itself of responsibility, claiming there was “nothing the Canadian government could do because the sales took place offshore, outside of the jurisdiction of federal arms export regulations.”⁴⁸ The UN panel, however, reported that Streit’s shipment of armoured personnel carriers from its Middle East facilities to Libya “violated an international arms embargo” and that the incident “[raises] questions about how extensively Ottawa should be policing the defence and military trade conducted by its citizens abroad.”⁴⁹ Indeed, there is no doubt that the Streit Group’s sale of armoured vehicles to Sudan violated Canadian sanctions on Sudan, a fact which led Amnesty International to call for another investigation into the company’s activities.⁵⁰ Amnesty International was right: the Canadian owner of the Streit Group, Guerman Goutorov, should have been investigated and – if sufficient evidence of law-breaking emerged – prosecuted under the United Nations Act.⁵¹

In the latter years of the Harper Government, the Canadian arms industry saw a decline in sales due to the end of major combat operations in Afghanistan and a related reduction in US and UK defence spending. The Harper government responded by actively seeking out new markets in developing countries such as Colombia, India, Kuwait, Brazil, Chile, Peru and South Korea.⁵² At the same time, the Canadian Control Arms Coalition, represented by Oxfam Canada, Oxfam Quebec and Project Ploughshares, urged the Harper Government to sign and ratify the Arms Trade Treaty. “Disputes that once may have been resolved with fists or sticks are now fought with automatic rifles, grenades and bazookas, feeding a death toll that now stands at over 2,000 people every day,” the coalition told the House of Commons Foreign Affairs Committee.⁵³ Describing the continued export of weapons and ammunition to “known human rights abusers, sometimes in violation of U.N. arms embargoes” as “outrageous,” the coalition placed blame with the “many countries [which] do not maintain rigorous controls on their arms exports to ensure they do not get diverted into the wrong hands.”⁵⁴

⁴⁷ Murray Brewster, “Canada to join global Arms Trade Treaty under legislation tabled Thursday,” CBC News, 13 April 2017, accessible at: www.cbc.ca/news/politics/arms-trade-treaty-1.4070539

⁴⁸ Ibid.

⁴⁹ Steven Chase, “Arms deal by Canadian firm violated international embargo: UN report,” Globe and Mail, 5 April 2016, accessible at: <https://www.theglobeandmail.com/news/politics/arms-deal-by-canadian-firm-violated-international-embargo-un-report/article29536456/>

⁵⁰ Steven Chase and Geoffrey York, “RCMP reviewing Canadian-owned firm over military exports to Sudan, Libya,” Globe and Mail, 8 September 2016, accessible at: <https://www.theglobeandmail.com/news/politics/rcmp-reviewing-canadian-owned-firm-over-military-exports-to-sudan-libya/article31760344/>

⁵¹ Michael Byers, “Sanctions busters are bad for business,” Globe and Mail, 10 September 2016, accessible at: <https://beta.theglobeandmail.com/report-on-business/rob-commentary/sanctions-busters-are-bad-for-business/article31803291/>

⁵² A briefing note presented to then Foreign Affairs Minister John Baird in June 2013 detailed a plan to add Brazil, Chile, Peru and South Korea to the Automatic Firearms Country Control List as a direct response to reduced demand for Canadian-made weapons in “traditional markets” such as the US and UK. See: Lee Berthiaume, “Canada planning to sell guns and military equipment to developing countries to maintain domestic arms industry,” National Post, 5 January 2014, accessible at: <http://nationalpost.com/news/canada/canada-planning-to-sell-guns-and-military-equipment-to-developing-countries-to-maintain-domestic-arms-industry>

⁵³ Oxfam Canada, “Arms Trade Treaty: Comments to the House of Commons Foreign Affairs Committee,” 11 June 2012, accessible at: <https://unwrapped.oxfam.ca/blogs/general/arms-trade-treaty-comments-house-commons-foreign-affairs-committee>. See also: “Canadian Control Arms Coalition Submission to Foreign Affairs, Trade and Development Canada on Canada and the Arms Trade Treaty July 17, 2013,” accessible at: <http://go.oxfam.ca/docs/att/att-dfatd-submission-07-2013-en.pdf>

⁵⁴ Ibid.

Unlike 130 other countries, including all other NATO and G-7 members, Canada did not sign the Arms Trade Treaty once it was negotiated and adopted,⁵⁵ even though signature is only a first, non-legally-binding step towards ratification or accession. The Harper Government claimed the treaty could infringe on the rights of “lawful and responsible firearms owners,”⁵⁶ though the decision may also have been influenced by Stephen Harper’s “dislike of all things UN.”⁵⁷ The National Firearms Association, Canada’s largest advocacy organization promoting the rights and freedoms of gun owners and users, released a statement opposing the UN General Assembly’s adoption of “a flawed Arms Trade Treaty,” claiming the treaty would “set a dangerous precedent as a bad international agreement that will do nothing to prevent the misuse of major weapons systems and much to limit access of firearms and ammunition to legitimate users.”⁵⁸ However, the United States, home of the politically powerful National Rifle Association, was willing to sign the ATT, with Secretary of State John Kerry stating “This treaty will not diminish anyone’s freedom.”⁵⁹

During the nine years of the Harper Government, Canada receded from most of its involvement in the United Nations, withdrew from the Kyoto Protocol and the UN Convention to Combat Desertification, and saw the value of its arms exports double. Having refused to sign the ATT, the Harper government showed no inclination to either ratify or accede to it after it came into force in December 2014. But by late 2015, a new Liberal government raised the expectation of change, as NDP foreign affairs critic Hélène Laverdière explained: “After a decade of regressive policies from the Conservatives, many expected the Liberals to take a new, ethical approach to foreign affairs.”⁶⁰

A new direction under the Trudeau Government?

The Trudeau Government took a number of steps towards its “new, ethical approach to foreign affairs,” including a mandate letter for then Foreign Minister Stéphane Dion that included the directive to “Reenergize Canadian diplomacy and leadership on key international issues and in multilateral institutions. This would include ... acceding to the Arms Trade Treaty.”⁶¹ Bill C-47 was introduced with the stated intent of making Canada’s legislation and regulations consistent with the ATT in advance of accession.

⁵⁵ Srdjan Vucetic, “What joining the Arms Trade Treaty means for Canada,” Open Canada, 19 April 2017, accessible at: <https://www.opencanada.org/features/what-joining-arms-trade-treaty-means-canada/>

⁵⁶ Joanna Slater & Steven Chase, “Harper refuses to sign landmark arms trade treaty, presses for maternal-health reform,” Globe and Mail, 25 September 2013, accessible at: <https://www.theglobeandmail.com/news/world/harper-refuses-to-sign-landmark-arms-trade-treaty/article14539869/>

⁵⁷ Ibid.

⁵⁸ National Firearms Association, “Canada’s NFA Opposes Arms Trade Treaty,” n.d., accessible at: <https://nfa.ca/canadas-nfa-opposes-arms-trade-treaty/>

⁵⁹ Rick Gladstone, “Arms Treaty Now Signed by Majority of U.N. Members,” New York Times, 25 September 2013, accessible at: www.nytimes.com/2013/09/26/world/arms-treaty-now-signed-by-majority-of-un-members.html

⁶⁰ Hélène Laverdière, “When It Comes To Arms Exports, Canada Isn’t ‘Back’,” Huffington Post Canada, 4 October 2016, accessible at: http://www.huffingtonpost.ca/helene-laverdiere/canada-arms-exports_b_12322030.html

⁶¹ Justin Trudeau, “Minister of Foreign Affairs Mandate Letter,” Office of the Prime Minister, 15 November 2015, accessible at: <https://pm.gc.ca/eng/archived-minister-foreign-affairs-mandate-letter>

However, the Trudeau government also took steps that ran contrary to the goals of the ATT, including rewriting the policy rationale for Canada arms export controls so as to further promote arms exports.⁶² For instance, language indicating that export controls are meant “to regulate and impose certain restrictions on exports in response to clear policy objectives” was replaced with “to balance the economic and commercial interests of Canadian business with the national interest of Canada.”⁶³

Most significantly, in April 2016, Foreign Minister Stéphane Dion signed six export permits covering \$11 billion of the \$15 billion Saudi Arms Deal.⁶⁴ This move, which only came to light as the result of litigation, disproved the Trudeau Government’s previous assertions that they could not interfere with a “done deal” concluded before they came to power.⁶⁵

In advance of Dion signing the permits, Global Affairs Canada conducted a human rights assessment of Saudi Arabia. It concluded that, despite the country’s poor human rights record, “there was nothing to suggest the armed vehicles would be used for anything but their intended purpose – helping Saudi Arabia defend itself against the same Islamic State militants that Canada and its allies are fighting in the Middle East.”⁶⁶

The Harper Government defended arms sales to Saudi Arabia by emphasizing that they create jobs for thousands of Canadians. In contrast, the Trudeau Government argued that upholding the Saudi Arms Deal made by the Harper government would maintain Canada’s reputation as a reliable trading partner. When prompted to justify the decision in light of video footage of Saudi forces using armoured vehicles against civilians, the Prime Minister himself stated: “We need to be able to project [to] the world that when Canada agrees to something, it sticks to its word ... We need to make sure we are respected on the world stage by keeping our word.”⁶⁷

However, by allowing the Saudi Arms Deal to go forward, Trudeau may have been damaging another dimension of Canada’s reputation. During an election debate, he had said: “Canada needs to be once again a constructive actor on the world stage.”⁶⁸ In March 2016, when announcing that Canada would seek a non-permanent seat on the Security Council, the new prime minister said: “Since 1945, Canadians have accomplished extraordinary things in support of the UN’s mission to promote human rights, development, and peace and security around the world. We are determined to help the UN make even greater strides in support of its goals for all humanity.”⁶⁹ It is curious that Trudeau’s concern for Canada’s reputation did not extend to denying permits for the export of armed-and-

⁶² Steven Chase, “Ottawa rewrites mandate for screening arms exports,” *Globe and Mail*, 31 July 2016, accessible at: <https://www.theglobeandmail.com/news/politics/ottawa-rewrites-mandate-for-screening-arms-exports/article31216740/>

⁶³ *Ibid.*

⁶⁴ Steven Chase, “Dion quietly approved arms sale to Saudi Arabia in April: documents,” *Globe and Mail*, 12 April 2016, accessible at: <https://www.theglobeandmail.com/news/politics/liberals-quietly-approved-arms-sale-to-saudis-in-april-documents/article29612233/>

⁶⁵ *Ibid.*

⁶⁶ Peter Zimonjic, Catherine Cullen, and Tom Parry, “Stéphane Dion approves export permits for \$11B in LAVs to be sent to Saudi Arabia,” *CBC News*, 12 April, 2016, accessible at: <http://www.cbc.ca/news/politics/saudi-arms-deal-documents-1.3533082>

⁶⁷ Steven Chase, “Canada must ‘stick to its word’ on Saudi arms deal, Trudeau says,” *Globe and Mail*, 11 May 2016, accessible at: <https://www.theglobeandmail.com/news/politics/canada-must-stick-to-its-word-on-saudi-arms-deal-trudeau-says/article29981571/>

⁶⁸ Bob Weber, “Justin Trudeau promises to sign global arms treaty,” *Canadian Press*, 7 October 2015, accessible at: <http://www.ctvnews.ca/politics/election/justin-trudeau-promises-to-sign-global-arms-treaty-1.2599194>

⁶⁹ Kathleen Harris & Melissa Kent, “Trudeau unveils Canada’s plan to seek 2021 UN Security Council seat,” *CBC News*, 16 March 2016, accessible at: <http://www.cbc.ca/news/politics/canada-united-nations-security-council-1.3491917>

armoured vehicles to a country which has recently used them against domestic dissidents and other civilians and is accused of war crimes and crimes against humanity.

According to Global Affairs Canada, the Saudi Arms Deal is exempt from the ATT “as Canada is not yet a state party to the Arms Trade Treaty” and it will take time to “[undertake] internal legislative and policy reviews in order to identify those changes that might be necessary for Canada to accede to the ATT” and to “put in place domestically all legislation or regulations that would be required to ensure that we can fully meet the obligations of the treaty.”⁷⁰ However, it is standard practice for countries to comply with the rules of treaties once they make it clear they intend to ratify or accede to them. Under Article 18 of the 1969 Vienna Convention on the Law of Treaties, a country that signs a treaty “is obliged to refrain from acts which would defeat the object and purpose of a treaty” during the interim period before ratification or accession. Canada is not legally bound under Article 18 because the Harper Government never signed the ATT. But as former Canadian Ambassador for Disarmament, Paul Meyer, has explained, “normal conduct in diplomacy is if a government says it intends to adhere to a treaty, that it conducts itself in accordance with those provisions.”⁷¹

Moreover, the ATT at its core is designed to enforce fundamental rules of customary international law – rules that are already binding on Canada – by denying arms to states that engage in serious violations of international human rights or international humanitarian law.⁷² For instance, Article 6 of the treaty prohibits arms transfers if the transferring country knows they will 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.” In the absence of such knowledge, Article 7 requires the transferring country to assess the potential of the arms being used to “commit or facilitate a serious violation” of international human rights or international humanitarian law, and to block the transfer if “there is an overriding risk” of any of these “negative consequences.” Again, these provisions support fundamental rules of customary international law, insofar as they prohibit states from facilitating the commission of serious human rights violations or war crimes or crimes against humanity. This means that the Trudeau Government, by providing export certificates for armoured vehicles destined for Saudi Arabia, may have violated international law – through complicity in Saudi Arabian violations – even though it has not yet acceded to the ATT.⁷³

One can also question the Trudeau government’s repeated assertion that “Canada already meets most of the obligations of the Arms Trade Treaty.”⁷⁴ As experts have already observed, Canada’s existing export control laws are nowhere near as strong as the provisions of the ATT. Current export guidelines – not firm rules – only oblige the federal government to “closely control” arms exports to countries

⁷⁰ Steven Chase, “Saudi arms deal exempt from global treaty, Ottawa says,” *Globe and Mail*, 9 February 2016, accessible at: <https://www.theglobeandmail.com/news/politics/saudi-arms-deal-exempt-from-global-treaty-ottawa-says/article28688598/>

⁷¹ *Ibid.*

⁷² See, e.g.: Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005).

⁷³ On complicity in the wrongful act of another state, see Article 16, in James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002).

⁷⁴ Steven Chase, “Canada to join arms trade treaty, but will not raise export controls,” *Globe and Mail*, 30 June 2016, accessible at: <https://beta.theglobeandmail.com/news/politics/canada-to-join-global-arms-trade-treaty-in-2017-ottawa-announces/article30705056/?ref=http://www.theglobeandmail.com> & Steven Chase, “Saudi arms deal exempt from global treaty, Ottawa says,” *Globe and Mail*, 9 February 2016, accessible at: <https://www.theglobeandmail.com/news/politics/saudi-arms-deal-exempt-from-global-treaty-ottawa-says/article28688598/> & Global Affairs Canada, “Canada prepares to join the Arms Trade Treaty,” Press Release, 13 April 2017, accessible at: https://www.canada.ca/en/global-affairs/news/2017/04/canada_prepares_tojointhearmstradetreaty.html

with a persistent record of human-right violations.⁷⁵ Indeed, as will be explained in the next section of this report, the Minister's discretion to approve arms exports is not subject to legally-binding limits. The Saudi Arms Deal illustrates the absurdity of the situation, with the Trudeau Government claiming there was "no legal basis to cancel [the permits]."⁷⁶

⁷⁵ Steven Chase, "Saudi arms deal exempt from global treaty, Ottawa says," *Globe and Mail*, 9 February 2016, accessible at: <https://www.theglobeandmail.com/news/politics/saudi-arms-deal-exempt-from-global-treaty-ottawa-says/article28688598/>

⁷⁶ "Zimonjic, Peter, Catherine Cullen, and Tom Parry, "Stéphane Dion approves export permits for \$11B in LAVs to be sent to Saudi Arabia," *CBC News*, 12 April 2016, accessible at: <http://www.cbc.ca/news/politics/saudi-arms-deal-documents-1.3533082>

Time for a New Start

Canada's proposed accession to the ATT and the adoption of implementing legislation present an opportunity for the Trudeau government to strengthen Canada's existing arms export controls by bringing them fully into line with the requirements of the treaty. However, Bill C-47 itself is fatally flawed. It should be scrapped, and the legislative process be started over again – with a new bill that both imposes hard legal limits on the Foreign Minister's discretion to approve exports and includes exports to the United States.

Hard limits on the Minister of Foreign Affairs' discretion to approve arms exports are required

Instead of proposing a new stand-alone statute to fully implement the ATT, Bill C-47 tweaks existing provisions of the Export Import Permits Act (EIPA).⁷⁷ Subsection 7(1.01) of the EIPA identifies the factors to be taken into account by the Minister in deciding whether to issue an export permit:

In deciding whether to issue a permit under subsection (1), the Minister may, in addition to any other matter that the Minister may consider, have regard to whether the goods or technology specified in an application for a permit may be used for a purpose prejudicial to (a) the safety or interests of the State by being used to do anything referred to in paragraphs 3(1)(a) to (n) of the Security of Information Act; or (b) peace, security or stability in any region of the world or within any country.

The language used in Subsection 7(1.01) is extremely permissive and there are no legal limits placed on the Foreign Minister's discretion to approve arms exports.

Moreover, the EIPA refers only to "peace, security or stability" and not to international human rights or international humanitarian law. Indeed, the words "human rights" are not found anywhere in the existing legislation. In other words, under the EIPA, the Foreign Minister may have regard to the possible effects on "peace, security or stability" and, under policy guidelines⁷⁸, will look to whether there is no "reasonable risk" that the arms "might be used" against civilians. But the Foreign Minister is not required by law to refuse a permit, even if there are serious concerns that violations of international human rights or international humanitarian law might occur.

The Saudi Arms Deal was legal under the EIPA. In approving the six export permits in April 2016, Minister Dion relied on a memorandum prepared by officials in Global Affairs Canada following

⁷⁷ Export and Import Permits Act (R.S.C., 1985, c. E-19), accessible at: <http://laws-lois.justice.gc.ca/eng/acts/E-19/index.html>

⁷⁸ Global Affairs Canada, Export Controls Handbook, accessible at: http://www.international.gc.ca/controls-controles/export-exportation/exp_ctr_handbook-manuel_ctr_exp-p4.aspx?lang=eng#f_5

consultations and expert assessments done internally and with other departments. The memorandum acknowledged concerns about Saudi Arabia's human rights record, noting "the reported high number of executions, suppression of political opposition, the application of corporal punishment, suppression of freedom of expression, arbitrary arrest, ill-treatment of detainees, limitations of freedom of religion, discrimination against women and the mistreatment of migrant workers."⁷⁹ However, the memorandum affirmed that Global Affairs Canada was "not aware of any reports linking violations of civil or political rights in the kingdom with proposed military exports."⁸⁰ It stated: "Canada has sold thousands of LAVs to Saudi Arabia since the 1990s, and, to the best of the department's knowledge, there have been no incidents where they have been used in the perpetration of human rights violations."⁸¹

Professor Daniel Turp contested the government's assessment in the Federal Court of Canada, claiming that "[t]he issuance of the permits to export LAVs to Saudi Arabia runs counter to the objectives of the EIPA" and "the Minister ignored the principles that should have guided his discretion under the EIPA."⁸² The government responded that the EIPA includes guidelines and policies that "provide for strict controls over the export of goods such as LAVs, but contain no prohibitions."⁸³ The Minister's "sole obligation" is "to take into account all the relevant factors having regard to the existing legislative framework, its purpose and the circumstances of the case."⁸⁴

The Federal Court ruled in favour of the government, declaring: "These factors guide the Minister. It is for him to decide how to assess them and how much weight to give to each, as long as he exercises his power in accordance with the object and in the spirit of the EIPA."⁸⁵ The Court observed that even a "plain reading of the language chosen in the EIPA ... indicates that the Minister has broad discretion in issuing export permits for controlled goods."⁸⁶ The ruling concluded: "The role of the Court is not to pass moral judgment on the Minister's decision to issue the export permits but only to make sure of the legality of such a decision. Of course, his broad discretion would have allowed him to deny the permits."⁸⁷

The Federal Court's judgment that the Minister acted within his discretion demonstrates that the discretionary power under the EIPA is too broad – and that there is a need for hard legal limits on that power. This conclusion is highly relevant in the context of Canada's planned accession to the ATT, since both the EIPA and the Saudi Arms Deal are inconsistent with the treaty.

⁷⁹ Peter Zimonjic, Catherine Cullen, and Tom Parry, "Stéphane Dion approves export permits for \$11B in LAVs to be sent to Saudi Arabia," CBC News, 12 April 2016, accessible at: <http://www.cbc.ca/news/politics/saudi-arms-deal-documents-1.3533082>

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² *Daniel Turp v. The Minister of Foreign Affairs*, Federal Court of Canada, 24 January 2017,

2017 FC 84, accessible at: <http://cas-cdc-wwww02.cas-satj.gc.ca/rss/T-462-16%20Daniel%20Turp%20v%20The%20Minister%20of%20Foreign%20Affairs%20ENGLISH%20FINAL.pdf>

⁸³ Ibid., p. 6.

⁸⁴ Ibid., p. 6.

⁸⁵ Ibid., p. 14.

⁸⁶ Ibid., p. 13.

⁸⁷ Ibid.

Article 1 of the ATT reads:

The object of this Treaty is to:

- Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms;
- Prevent and eradicate the illicit trade in conventional arms and prevent their diversion;

for the purpose of:

- Contributing to international and regional peace, security and stability;
- Reducing human suffering;
- Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.⁸⁸

Article 1 is entitled “Object and Purpose”, a term that carries legal significance because Article 31(1) of the 1969 Vienna Convention on the Law of Treaties stipulates: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁸⁹ As a result, any ambiguities or uncertainties in the ATT must be interpreted in favour of the meaning that best promotes the treaty’s object and purpose by “contributing to international and regional peace, security and stability” and “reducing human suffering”.

Article 6(3) of the ATT then reads:

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.

It is not anticipated that any Canadian foreign minister would approve military sales knowing that the equipment in question would be used to commit genocide, crimes against humanity, or war crimes. The pertinent question, however, is not knowledge (Article 6) but rather evidence of risk (Article 7).

Article 7 reads:

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking

⁸⁸ Arms Trade Treaty, accessible at: <https://www.un.org/disarmament/convarms/att/>

⁸⁹ Vienna Convention on the Law of Treaties, accessible at:

<https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

(a) would contribute to or undermine peace and security;

(b) could be used to:

(i) commit or facilitate a serious violation of international humanitarian law;

(ii) commit or facilitate a serious violation of international human rights law;

...

3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export. ...

Canada's implementing legislation for the ATT must meet all of the treaty's requirements, interpreted in a manner consistent with its object and purpose—notably including “contributing to international and regional peace, security and stability” and “reducing human suffering”. The words “shall not authorize the export” in Article 7(3) must, therefore, be given their full and intended effect. This requires hard legal limits on the discretion of the Minister of Foreign Affairs—limits that are absent from Bill C-47.

Again, with the Federal Court having ruled that it is currently within the discretionary power of the Minister of Foreign Affairs to approve arms exports to countries that are undermining international peace and security or engaging in serious violations of international human rights or international humanitarian law, a key step in bringing Canadian law into line with the ATT involves placing hard limits on this discretion. If Canada is to comply with the treaty fully and in good faith, the Minister must be legally obligated – under Canada's implementing legislation – to deny exports that carry an “overriding risk” of contributing to undermining international peace and security or committing or facilitating serious violations of international human rights or international humanitarian law.

Bill C-47 obscures and then sidesteps this central issue. Although the bill includes a proposed amendment to section 7 of the EIPA, the amendment would not create a legal obligation for the minister to deny permits, but would simply repeal Section 7 (1.01) and replace it with a new paragraph containing the exact same language. The proposed change, by not imposing hard legal limits on the Minister's discretion, fails to meet that key requirement for compliance with the ATT.

In the same vein, Bill C-47 proposes to amend the EIPA to “authorize the making of regulations that set out mandatory considerations that the Minister is required to take into account before issuing an export permit or a brokering permit.” Note that Bill C-47 does not itself establish any mandatory considerations; it only authorizes the making of regulations that will include them.

Even the idea of “mandatory” considerations at the regulatory stage is misleading since the considerations will not actually be mandatory or prohibitive, only “mandatory ... to take into account.” This amendment does not result in any change in the scope of the Minister's discretion,

which raises the question of why the amendment was included in the first place, if not to give the misleading impression that Bill C-47 addresses the problem of the Minister's discretion.

The absence of any real substance to these requirements renders Bill C-47 incompatible with the ATT. Under Article 7 of the treaty, Canada will be obligated to "assess the potential that conventional arms ... could be used to commit a serious violation of international human-rights law", and if there is an "overriding risk of any of the negative consequences," it "shall not authorize the export." The legal obligation under the ATT goes far beyond the "consideration" of certain factors; it is an obligation to refuse permits in certain high-risk circumstances. By leaving the decision to approve or disapprove a permit to the Minister's discretion, as opposed to creating hard legal limits on that discretion, Bill C-47 is – in terms of ATT implementation – a failure.

As a point of comparison, the Government of New Zealand partnered with the Small Arms Survey (an NGO) to develop a "Model Law" for implementation of the ATT.⁹⁰ Section 5(3) of the Model Law reads:

If on the basis of the assessment conducted under subsection (2) the Authority determines that there is a substantial risk that the conventional arms, ammunition, or parts and components:

- (a) would undermine peace and security; or
- (b) could be used to commit or facilitate:
 - i. a serious violation of international humanitarian law;
 - ii. a serious violation of international human rights law; ...

and the risk cannot be mitigated, the Authority shall refuse the application for an export licence.

The key language here is "shall refuse"; firm and binding language of a kind that is strikingly and fatally missing from Bill C-47.

Finally, even if the government were to place hard legal limits on the Minister's discretion, as required by the ATT, the deferment of such criteria to the regulatory stage would be inappropriate. Unlike statutes, regulations are easily amended, with requirements being removed or added by the government without any need for Parliamentary involvement or approval. Leaving any mandatory elements of the implementing legislation to the regulatory stage would also deprive Parliamentarians of the opportunity to scrutinize the wording to ensure compliance with the ATT.

⁹⁰ Arms Trade Treaty: Model Law, accessible at: <http://www.smallarmssurvey.org/about-us/highlights/highlights-2014/att-model-law.html>

The scope of export controls must be extended to include the United States

Military goods exported from Canada to the United States, which Global Affairs Canada estimates account for “over half of Canada’s exports of military goods and technology each year,”⁹¹ are largely unregulated, do not generally require export permits, and are thus omitted from publicly available reports and data.⁹² This is due in large part to the Defence Production Sharing Agreement (DPSA) between Canada and the United States, a memorandum of understanding concluded in 1963 to boost market accessibility.⁹³ Canada is essentially relying on US arms export controls to regulate any forward transfer of Canadian-made arms from the United States.⁹⁴ However, the United States has different rules from Canada and applies them in different ways.

Complicating matters, most of Canada’s arms production is made up not of guns or ordnance, but component parts of larger weapons systems, both hardware and software. When the government grants an export permit for military equipment, it assumes that the country listed on the application will be where the component part is eventually used. In reality, the part can be incorporated into a larger weapons system and exported again. “This is a significant loophole that basically undercuts Canada’s ability to know where its military equipment ends up,” explains Kenneth Epps of Project Ploughshares. “We’ve documented many instances when, if a company had applied to export directly to a particular country, it would have been denied. An obvious example is Pakistan. Canada has not exported military goods to Pakistan since it tested a nuclear weapon in the 1990s, yet, Canadian components end up there in weapons systems built in the U.S.”⁹⁵

Bill C-47 will not change the EIPA or the practice under the Defence Production Sharing Agreement so that arms exports to the US will require permits. This will put Canada in violation of the ATT, because Article 5(1) states: “Each State Party shall implement this Treaty in a consistent, objective and non-discriminatory manner, bearing in mind the principles referred to in this Treaty.” The universally-accepted rules on treaty interpretation, set out in Article 31 of the Vienna Convention on the Law of Treaties, do not allow for a good faith interpretation of the words “consistent, objective and non-discriminatory” that exempts the majority of a country’s arms exports from its export control regime.⁹⁶

Nor is the exemption of arms exports to the United States permitted by Article 26(2) of the ATT, which states: “This Treaty shall not be cited as grounds for voiding defence cooperation agreements

⁹¹ Global Affairs Canada, “2016 Report on Exports of Military Goods from Canada,” accessible at: <http://www.international.gc.ca/controls-controles/report-rapports/mil-2016.aspx?lang=eng#5.2>

⁹² Ibid.

⁹³ Defence development sharing agreement between Canada and the United States of America, 1963, accessible at: <https://www.ic.gc.ca/eic/site/ad-ad.nsf/eng/ad01691.html>

⁹⁴ Innovation, Science and Economic Development Canada, “Canadian access to the United States defence market,” accessible at: <https://www.ic.gc.ca/eic/site/ad-ad.nsf/eng/ad00271.html>

⁹⁵ Lucas Powers, “Canadian arms trade much larger than data suggests, expert says,” CBC News, 23 February 2016, accessible at: www.cbc.ca/news/business/canada-arms-technology-trade-1.3458608

⁹⁶ Article 31(1) stipulates: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, accessible at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

concluded between States Parties to this treaty.” This is because the United States, which has only signed but not ratified or acceded to the ATT, is not a State Party to the treaty.

The Parliamentary Secretary for Foreign Affairs, Matt DeCoursey MP, misled the House of Commons when he stated:

Madam Speaker, what is important about the ATT is that it recognizes that there is no one-size-fits-all system that countries who accede to it need to adopt. It meets the needs of all states and allows for the use of expedited procedures for low-risk countries, similar to the system we have in place between Canada and the U.S. As well, it recognizes that we have a deeply integrated military procurement and production system, and that where there are low-risk countries and there is not a one-size-fits-all system, countries can accede to this treaty and meet the standard.⁹⁷

The ATT says nothing to this effect. Instead, it states that its provisions must be applied in a “consistent, objective and non-discriminatory manner.” One cannot read in an exemption for Canadian arms exports to the United States on the basis that such an exemption is not specifically prohibited.

In testimony before the House of Commons Foreign Affairs Committee, officials from Global Affairs Canada were also misleading on this point when they cited the fact that arms exports within the “Benelux” countries (Belgium, the Netherlands and Luxembourg) are exempt from the export control regimes of those countries.⁹⁸ Unlike the United States, these countries are all States Parties to the ATT.

The problem of the US exemption is highlighted by the recent transfer of A-29 Super Tucano ground attack aircraft from the United States to Nigeria.⁹⁹ The sale had been blocked by the Obama Administration because of reports of international human rights and international humanitarian law violations being committed by the Nigerian military during its operations against Boko Haram.¹⁰⁰ However, the sale was approved by the Trump Administration in August 2017.¹⁰¹

The engines on the A-29 Super Tucano aircraft are manufactured by Pratt & Whitney Canada, which supplies them to US-based Sierra Nevada Corp. for installation on the aircraft. The engines would thus fall within the scope of Article 4 of the ATT, which states:

Each State Party shall establish and maintain a national control system to regulate the export of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2 (1) and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such parts and components.

However, the export of the engines to the United States is exempt from review under the EIPA and would remain exempt under Bill C-47. This constitutes a fatal flaw in the draft legislation— one that will bring Canada into violation of the ATT.

⁹⁷ Accessible at: <https://openparliament.ca/debates/2017/9/21/matt-decoursey-4/only/>

⁹⁸ Meeting No. 75 FAAE - Standing Committee on Foreign Affairs and International Development, 17 October 2017, audio available at: <https://www.ourcommons.ca/DocumentViewer/en/42-1/FAAE/meeting-75/minutes>

⁹⁹ Geoffrey York, “Canadian firms part of arms sales to Nigeria,” *Globe and Mail*, 13 September 2017, accessible at: <https://beta.theglobeandmail.com/news/world/canadian-firms-part-of-us-arms-sales-to-nigeria/article36256222/>

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

Recommendations

- 1) Hard legal limits, based on the risk assessment criteria set out in Article 7 of the ATT, must be imposed on the Foreign Minister's discretionary power to approve arms exports.
- 2) These hard limits should be set out in a statute and not in regulations, which are easier for governments to change.
- 3) All military exports from Canada to the United States, including parts, components, subsystems and subcontracted shipments, must be made subject to the same approval process as arms exports to other countries.

Conclusion

This report has evaluated the Canadian government's proposed legislation to amend the Export and Import Permits Act and the Criminal Code to permit accession to the Arms Trade Treaty (ATT). It has found that the proposed legislation, Bill C-47, has numerous flaws. This report focused on the two most serious of these flaws, both of which violate the Arms Trade Treaty (ATT).

First, Bill C-47 does not impose hard legal limits on the Foreign Minister's discretionary power to approve arms exports. Throughout successive governments, foreign ministers have used their broad discretionary powers to authorize arms exports to countries which commit serious violations of international human rights or international humanitarian law. Bill C-47 will not curb or even constrain the Foreign Minister's discretionary power, so Canada will continue to export arms to Saudi Arabia and countries like it.

Second, Bill C-47 does not cover arms exports to the United States, even though the ATT requires that its rules be applied to all exports in a "consistent, objective and non-discriminatory manner". Canada cannot rely on US export controls, as demonstrated by the recent transfer of ground attack aircraft with Canadian-made engines from the United States to Nigeria notwithstanding a serious risk of the aircraft being used to violate international human rights and international humanitarian law.

In light of these findings, this report recommends that hard legal limits, based on the risk assessment criteria set out in Article 7 of the ATT, be imposed on the Foreign Minister's discretionary power to approve arms exports; that these hard limits be set out in a statute and not in regulations; and that all military exports from Canada to the United States, including parts, components, subsystems and subcontracted shipments, be made subject to the same approval process as arms exports to other countries. These necessary changes are so very significant that Bill C-47 should be replaced with an entirely new stand-alone statute that fully complies with the requirements of the ATT.

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