

Joint submission by the Canadian Red Cross and the International Committee of the Red Cross to the Senate Committee on Foreign Affairs and International Trade regarding Bill C-47 (An Act to amend the Export and Import Permits Act (amendments permitting the accession to the Arms Trade Treaty and other amendments)

November 2018

States have agreed to the Arms Trade Treaty, or ATT¹, as an arms treaty with a humanitarian focus. Due to the devastating impact of conventional arms around the world, the Red Cross and Red Crescent Movement is committed to working with governments to improve regulation of the arms trade to reduce the harm caused by these weapons.

The International Committee of the Red Cross (the ICRC) and the Canadian Red Cross (the CRC) congratulate the Government of Canada for taking steps to accede to the ATT.

With a humanitarian mandate to protect the lives and dignity of persons affected by armed conflict, other situations of violence and natural disasters, both the ICRC and the CRC have an interest in working with the Government of Canada to ensure that International Humanitarian Law (IHL) is respected.

IHL is a body of law that seeks to protect those who are not or no longer participating in hostilities, as well as to restrict the means and methods of war. The regulation of conventional arms transfers around the world can increase the probability that weapons end up only with those who will use them in accordance with IHL and international human rights law (IHRL), which can have a great impact on the protection of civilians. For example, in article 7 of the ATT, if there is an overriding risk that transferred arms could be used to commit or facilitate serious violations of IHL or IHRL, including direct attacks on civilians, then this is listed as a reason to not authorize an export.²

This written submission outlines a series of issues with Bill C-47.³

1. Preventing diversion

Preventing the diversion of authorized arms transfers is crucial to ensuring the effectiveness of the ATT. Article 11(2) of the ATT requires an exporting State Party to assess “the risk of diversion of the export.”⁴ The treaty does not define the term “diversion,” but for the ICRC, it is understood to mean “the transfer of arms to unauthorized recipients, including diversion to the

¹*Arms Trade Treaty*, (entered into force 24 December 2014) Online: <<https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>> [ATT].

²*Ibid*, art. 7.

³Bill C-47, *An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments)*, 1st Session, 42nd Parl, 2017, s 7(3) (as passed by the House of Commons 11 June 2018) [*Bill C-47*].

⁴*Supra* note 1, art. 11(2).

illicit market.”⁵ Article 7 and 11 of the ATT are therefore interlinked in terms of preventing the diversion of weapons to end-users where there is a risk of their committing or facilitating violations or acts listed in article 7.⁶ The risk of diversion is not mentioned in s 7.3(1) of the Bill. We recommend that the risk of diversion be mentioned in the Bill’s list of risks as article 11(2) of the ATT requires it to be taken into account.

2. Prohibited arms transfers

Our second concern relates to the implementation of article 6(3) of the Treaty. The proposed legislation does not reflect the prohibition in that article which prohibits the transfer of conventional arms when a State Party “has knowledge at the time of the authorisation that the arms 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”.⁷ In order to comply with the treaty, text should be introduced into the proposed legislation to reflect this obligation.

Article 7(1) of the ATT which is the basis for s 7.3(1) of the Bill only comes into play if the export is not prohibited under Article 6.

3. Risk assessment

Our third concern is related to s 7.4 of the Bill. We are pleased that the text in s 7. 3(1) of the Bill reflects article 7(1) of the ATT. This section of the Bill obliges the Minister to assess whether the arms being considered for export would contribute to peace and security or undermine it *and* to assess whether the arms could be used to commit or facilitate the crimes listed, including serious violations of IHL and IHRL.⁸ The mandatory assessment process in the ATT (Art 7(3)) requires States Parties to prohibit the export of the arms under discussion when there is “an overriding risk of any of the negative consequences”.⁹ Article 7(3) of the ATT prohibits export when there is an overriding risk that the negative consequences listed in 7(1) **could** be committed.¹⁰ In Bill C-47, s 7.4 uses the language “would result in”,¹¹ which, in our opinion is an unnecessarily higher threshold and therefore recommend that the Bill adopts the language of “could”.

⁵*Understanding the Arms Trade Treaty: From a Humanitarian Perspective*, (Geneva: ICRC, 2016) at pp. 43—44 citing *The Arms Trade Treaty (2013): Academy Briefing No.3*, (Geneva: Geneva Academy, 2013) at p. 33, online: <www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/ATT%20Briefing%203%20web.pdf>.

⁶*Supra* note 1, arts. 7 and 11.

⁷*Ibid*, art. 6(3).

⁸*Supra* note 3, s 7.3(1).

⁹*Supra* note 1, art. 7(3).

¹⁰*Ibid*.

¹¹*Supra* note 3, s 7(4).

4. Transfers of parts and components

Our fourth point is that we would encourage the Government of Canada to specifically interpret “arms, ammunitions, implements or munitions of war” in s 7.3(1) as to include parts and components, in order to be in compliance with the ATT (article 4).¹² At the moment, the Bill does not include parts and components.

5. Reassessments

Article 7(7) of the ATT requires that “after an authorization has been granted, [that if] an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.”¹³ Section 10(1) of the Export and Import Permits Act (the EIPA) currently includes provisions for when an export permit can be revoked.¹⁴ However, neither the EIPA nor Bill C-47 include the revocation of a permit if conditions in the importing country change such that exporting arms to the importing country would create a substantial risk of the negative consequences found in s. 7.3(1).¹⁵ In order to ensure the legislation reflects the object and purpose of the ATT, an option to revoke an export permit based on these grounds is needed. A sub-section could be added to reflect the Treaty language found in art 7(7) and the ICRC and CRC suggest the following alternative language:

“If the Minister becomes aware of new relevant information which would change the export permit after an authorization has been granted, the Minister may reassess the authorisation after consultations, if appropriate, with the importing State”.

6. Serious violations of IHL

Our sixth recommendation is that when interpreting this section of the Bill ((s 7.3(1)), we urge the Government of Canada to interpret “a serious violation of IHL” as any war crime recognised under customary IHL. Violations of IHL are considered serious, and are war crimes, if they endanger protected persons (such as civilians, or wounded or captured combatants) or protected objects (such as civilian buildings or infrastructure), or if they otherwise breach important values.¹⁶ Therefore, the CRC and ICRC recommend that Canada adopt a broad interpretation of serious violations in its legislation to implement the transfer prohibitions of Article 6(3).

7. Exports to the United States

¹²*Supra* note 1, art. 4.

¹³*Supra* note 1, art. 7(7).

¹⁴*Export and Import Permits Act*, RSC 1985, c E-19, s 10(1).

¹⁵*Supra* note 3, s 7.3(1).

¹⁶For further explanation of serious violations, genocide, war crimes and crimes against humanity, please see *The Arms Trade Treaty (2013): Academy Briefing No.3*, (Geneva: Geneva Academy, 2013) at pp. 30-34, online: <www.geneva-academy.ch/joomla-tools-files/docman-files/Publications/Academy%20Briefings/ATT%20Briefing%203%20web.pdf>.

Our final concern is related to our understanding that the proposed legislation will not apply to most military exports to the United States (the US) (which in turn can be exported to third states). Article 5(1) of the Treaty states that States Parties must implement the treaty in a consistent, objective and non-discriminatory manner.¹⁷ In addition, one of the objects of the Treaty is to promote transparency.¹⁸ This object is restated in article 5(5) which obliges States Parties to have an effective and transparent national control system.¹⁹ The treaty does not contemplate exemptions to any of these obligations. What is currently being proposed is not in line with these treaty obligations nor do they respect the treaty's object and the purpose of transparency. As it is our understanding that most arms exports to the US do not require export permits, Bill C-47 in its current form does not apply to arms exported to Canada's largest trading partner. As Global Affairs Canada does not collect data on most military exports to the US, it is impossible to quantify the scale of this lacuna in the proposed law.²⁰ Even if the US is considered to have a robust arms export system, Canada cannot rely on the US to undertake the analysis that Canada is bound to do to meet its legal obligations as a State Party to the ATT. In order to meet the obligations in the ATT, there must be no exemptions.

In conclusion

One of the three purposes of the Arms Trade Treaty is to reduce human suffering which we hope effective incorporation of the Treaty into Canadian law, policy, and practice will do.

We are hopeful that the Government of Canada will take our suggestions into consideration and we look forward to ongoing dialogue on this very important piece of legislation as well as its implementation.

¹⁷*Supra* note 1, art. 5(1).

¹⁸*Ibid*, art. 1 at para 2ff.

¹⁹*Ibid*, art. 5(5).

²⁰Canada, Export Controls Division, *Report on Exports of Military Goods from Canada – 2017*(Ottawa: Global Affairs Canada, 2017) at p. 4, online: < www.international.gc.ca/controls-controles/assets/pdfs/reports/mer-2017-eng.pdf>.