

Submission by Above Ground to the Standing Senate Committee on Human Rights: The state-business nexus and the export of dual-use technologies
16 January 2016

Above Ground is a charitable initiative that promotes respect for human rights. We encourage the Canadian government to fulfill its legal duty to protect against human rights abuse by the private sector and to provide access to justice for those who are harmed by Canadian companies overseas. Through research, analysis, collaboration and outreach, Above Ground makes the links between transnational business and human rights abuse, and advances solutions for corporate accountability in Canada.¹

In light of the Committee's ongoing work on the human rights implications of the sale of dual-use technologies, we would like to bring to your attention Export Development Canada's recent decision to grant financial support to Canadian-based company Netsweeper Inc. for its activities in Bahrain.

Export Development Canada (EDC) is a federal Crown corporation, wholly owned by the Government of Canada. EDC was established in 1944 to support Canada's export trade and to develop Canadian capacity to respond to international business opportunities. EDC reports to Parliament through the Minister of International Trade.

On 15 July 2016, EDC approved a guarantee to the Royal Bank of Canada for financing it provided to support Netsweeper's business activity in Bahrain.² Netsweeper is a company based in Ontario that provides web filtering software and Internet security solutions.³

Internet filtering software can be used by governments to restrict public access to information by blocking Internet content, such as political content and content related to human rights. Governments can also use Internet filtering software and other types of dual-use technologies for surveillance purposes. These technologies can be used to collect and/or intercept data to target opponents, journalists, activists and lawyers, to curb dissent, to intimidate human rights defenders and to infringe on fundamental rights and freedoms. This can be done with the knowledge and active participation of the private companies that design, manufacture, sell and train private and public security personnel on the use of such technologies. According to the Coalition Against Unlawful Surveillance Exports, "in some cases, surveillance technologies are also used to subject entire populations to indiscriminate monitoring. In short, they are often part of a broader state apparatus of oppression, facilitating a wide variety of human rights violations including unlawful interrogation practices, torture and extrajudicial executions."⁴ The export of such technologies to countries where they are likely to be used in violation of human rights standards should therefore be urgently addressed.

¹ Above Ground is a project on Tides Canada's shared platform, which supports on-the-ground efforts to create uncommon solutions for the common good. Tides Canada is a national Canadian charity dedicated to a healthy environment, social equity, and economic prosperity. Online: Above Ground <<http://www.aboveground.ngo>>

² EDC's website indicates that the guarantee is valued at less than CDN\$1 million. EDC, "Individual Transactions Information", online: EDC <www.edc.ca>

³ Netsweeper, online: Netsweeper <<https://www.netsweeper.com>>

⁴ Coalition Against Unlawful Surveillance Exports (CAUSE), *A critical opportunity: bringing surveillance technologies within the EU Dual-Use Regulation* (Amnesty International, Digitale Gesellschaft, FIDH, Human Rights Watch, Open Technology Institute, Privacy International, Reports Without Borders, and Access, June 2015), online: Privacy International <<https://privacyinternational.org/sites/default/files/CAUSE%20report%20v7.pdf>> [CAUSE]

On 21 September 2016, the Citizen Lab at the University of Toronto published a report titled “*Tender Confirmed, Rights at Risk: Verifying Netsweeper in Bahrain.*” The report confirms that Netsweeper was granted a contract by the Bahraini government to provide it with a “national website filtering solution” and that its services were being used to filter access to the Internet in Bahrain. As documented in both the report and in testimony provided to this Committee by the director of Citizen Lab,⁵ “Netsweeper technology is being used by at least one key ISP (Internet Service Provider), Batelco, to filter content including critical political speech, news websites, human rights content, websites of oppositional political groups, and Shia-related content.”⁶ Citizen Lab also documented similar instances concerning the sale of services and products by Netsweeper “tailored specifically to filter speech protected by international human rights laws”⁷ to regimes with poor human rights records. Bahrain has been criticized by international institutions and human rights organisations for suppressing human rights defenders, in particular through online censorship and the use of arbitrary detentions and torture.⁸

As described below, Canada risks violating its international human rights obligations should it fail to effectively control the export of dual-use technologies. Moreover, through its financial support to Netsweeper via EDC, the Canadian government risks complicity as defined in international law in any foreseeable human rights harm associated with the Bahraini government’s use of Netsweeper technology and services.⁹

States have a duty under international law to ensure that businesses operating within their territory and/or jurisdiction respect human rights,¹⁰ including overseas.¹¹ As highlighted in the United Nations Guiding Principles on Business and Human Rights, Canada must take “appropriate steps to prevent, investigate, punish and redress [human rights] abuse through effective policies, legislation, regulations

⁵ The Citizen Lab is an interdisciplinary laboratory based at the Munk School of Global Affairs, University of Toronto. The Citizen Lab, “What to do about ‘dual use’ digital technologies?”, (Testimony to the Senate Standing Committee on Human Rights, 29 November 2016), online: The Citizen Lab <<https://deibert.citizenlab.org/2016/11/dual-use/>> [The Citizen Lab]

⁶ The Citizen Lab, “Tender Confirmed, Rights at Risk: Verifying Netsweeper in Bahrain” (The Citizen Lab, Toronto, 21 September 2016), online: The Citizen Lab <<https://citizenlab.org/2016/09/tender-confirmed-rights-risk-verifying-netsweeper-bahrain/>>

⁷ *Ibid.*

⁸ Amnesty International, *Behind the Rhetoric: Human rights abuses in Bahrain continue unabated*, (London: Amnesty International, 16 April 2015), online: Amnesty International <<https://www.amnesty.org/en/latest/news/2015/04/bahrain-hopes-of-reform-crushed-amid-chilling-crackdown-on-dissent/>> ; Human Rights Watch, *World Report 2017*, (New York: Human Rights Watch, January 2017), online: Human Rights Watch < <https://www.hrw.org/world-report/2017> >; United Nations Human Rights Office of the High Commissioner, “Bahrain, Recent news”, online: UN OHCHR <<http://www.ohchr.org/EN/Countries/MENARegion/Pages/BHIndex.aspx>> European Parliament, “European Parliament Resolution on Bahrain”, 2016/2808(RSP) (6 July 2016).

⁹ Karyn Keenan, “Export Credit Agencies and the International Law of Human Rights”, (Ottawa: Halifax Initiative, January 2008), online: Halifax Initiative < <http://www.halifaxinitiative.org/content/export-credit-agencies-and-international-law-human-rights-january-1-2008>>

¹⁰ UN SGSR on Business and Human Rights, “United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”, UN Document A/HRC/17/31, at 3 [UNGP]

¹¹ See for example Human Rights Committee, “Concluding observations on the sixth periodic report of Canada”, CCPR/C/CAN/CO/6, (13 August 2-15), at para.6 [Human Rights Committee Concluding Observations]; CESCR, “Concluding observations on the sixth periodic report of Canada”, advanced unedited version, E/C.12/CAN/CO/6 (4 March 2016), at para.16; Committee on the Elimination of Racial Discrimination, “Concluding observations of the Committee on the Elimination of Racial Discrimination”, CERD/C/CAN/CO-19-20 (4 April 2012), at para.14.

and adjudication.”¹² UN treaty bodies have explicitly called on Canada to regulate business enterprises to ensure they respect human rights in their global operations.¹³

As part of its legal duty to protect against human rights violations, Canada has the obligation to ensure that EDC’s operations neither contribute to nor ignore human rights abuses by the corporations whose activities it supports.¹⁴ The UN Guiding Principles on Business and Human Rights confirm that “States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.”¹⁵

To uphold these legal obligations, Canada must adopt regulatory and policy measures to effectively assess export applications for dual-use technologies and must deny export permits where there is a clear risk that these technologies will be used in the commission of human rights violations. Moreover, the Canadian government must take additional measures that complement export controls to mitigate the human rights risks associated with dual-use technologies.¹⁶ These measures would assist in fulfilling Canada’s international legal duty to protect against human rights abuse. Such measures must include:

- Enforceable requirements to ensure that EDC and other public institutions undertake mandatory human rights due diligence prior to providing any kind of financial support, whether direct or through an intermediary, to companies exporting dual-use technologies. Due diligence measures should include human rights impact assessments, which should be made public. Due diligence processes should evaluate:
 - o The human rights record of the end user of the technology;
 - o The potential for the technology to be used in an unlawful manner, that is, in a manner that is inconsistent with international human rights standards;
 - o The adequacy of the legal framework regulating dual-use technology by the end user.
- Enforceable requirements that EDC and other public institutions refrain from providing any form of public support for the export of dual-use technologies when their use poses a clear risk to human rights, such as in the case of Bahrain. Existing support that satisfies this condition, such as EDC’s guarantee involving Netsweeper, should be withdrawn.
- Legal mechanisms that establish an explicit duty of care on the part of EDC and other public institutions towards the individuals and communities whose human rights are affected by their clients’ operations.

¹² UNGP, *supra* note 10, at 3.

¹³ Human Rights Committee Concluding Observations, *supra* note 11, at para.6: “The State party should (a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations under its jurisdiction, in particular mining corporations, respect human rights standards when operating abroad; (b) consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad; and (c) develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad.”

¹⁴ Halifax Initiative, Both Ends, CounterCurrent, Fórum Suape and Ríos Vivos, *Export Credit Agencies and Human Rights: Failure to Protect* (Halifax Initiative, Both Ends, CounterCurrent, Fórum Suape and Ríos Vivos, 2015), online: Above Ground < <http://www.aboveground.ngo/recent-works/export-credit-agencies-and-human-rights-failure-to-protect/>>

¹⁵ UNGP, *supra* note 10, at 6.

¹⁶ On the limitations of export controls and recommendations for complementary measures, see The Citizen Lab, *supra* note 5. See also CAUSE, *supra* note 4.