Canada’s Regulation of Weapons Exports: “Under-implementation” of the Arms Trade Treaty

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By: Justin Mohammed

On 17 September 2019, Canada acceded to the United Nations Arms Trade Treaty (ATT), an international convention that has two objectives: establishing the highest possible common international standards in the regulation of international trade in conventional arms, and the prevention and eradication of the illicit trade and diversion of conventional arms. At the time of writing, the ATT has 106 state parties and 130 signatories.

Canada's decision to ratify the treaty is an undoubtedly important step in contributing to its objective of better regulating the trade in conventional weapons. However, there are several important ways in which Canada's implementing legislation, Bill C-47, falls short of the treaty's requirements. The purpose of this article is to describe some areas of "under-implementation" and provide recommendations as to the ways in which these gaps may be addressed.

Getting to Ratification

The procedural history of Canada's ratification of the ATT is an important starting point because it provides insight into why Canada's implementing legislation is not in full compliance with the treaty.

In order to accede to the ATT, Canada has long taken the position that only minor modifications to the *Export and Import Permits Act* (EIPA) and the *Criminal Code of Canada* would be necessary to render Canada's arms control regime compliant with the treaty. As early as June 2016, the government's rationale for acceding to the ATT included the notion that Canada's export control systems already met all but two of the ATT's 28 provisions, notably Article 7 (import and export assessment) and Article 10 (brokering). Perhaps predictably, when Bill C-47 was introduced in the House of Commons on 13 April 2017, it largely focussed on these two issues. With respect to the export assessments, Bill C-47 introduced a new set of mandatory considerations to be taken into account by the Minister of Foreign Affairs before a permit can be issued. With respect to brokering, Bill C-47 created an entirely new regime to regulate the practice, which involves the arrangement or negotiation of import and export transactions of controlled goods in countries other than Canada.

The bill proceeded through the House of Commons and the Senate largely unamended and received royal assent on 13 December 2018. Canada then deposited its instrument of accession on 19 June 2019, without stipulating any declarations of interpretation or reservations to the ATT. On 1 September 2019, C-47 entered into force, with the date being fixed by way of an Order in Council.

The problem with this procedural history is that the originating premise is a falsehood: in addition to Articles 7 and 10, there are other provisions of the ATT that were not reflected in Canadian law prior to

the enactment of Bill C-47. Those deficiencies remain post-accession. There are two areas in which Canada's under-implementation of the ATT is particularly troublesome: the Article 6 obligation concerning prohibited transfers, and the Article 5 prohibition against discriminatory processes in issuing permits.

"Under-Implementation" of the Treaty

Prohibited Transfers

In adopting Bill C-47, Article 6 of the ATT was overlooked and, as a result, there is no absolute prohibition against the export of arms from Canada which could be used to commit serious international crimes. Although there are several prohibitions under Article 6, for the purpose of illustration one may consider the type of transfers included in Article 6(3) of the ATT, which reads as follows:

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.

As is clear from the above, Article 6 contains an absolute prohibition on the transfer of conventional arms, parts or components, if the transferring state has knowledge that the arms would be used to commit serious international crimes. When read in conjunction with Article 7, the distinct purpose of Article 6 becomes clear: while Article 7 concerns the process by which an evaluation of a proposed export or transfer may take place (a weighing of relevant factors, including the possibility of mitigating measures), the prohibition in Article 6 is absolute. This fact is emphasized by the opening words of Article 7: a state may only proceed to an Article 7 export assessment "[i]f the export is not prohibited under Article 6."

Regrettably, the clear prohibition in Article 6 is reflected nowhere in the EIPA as amended by Bill C-47, nor in any other part of Canadian law. When deciding to issue a permit under the EIPA, the Minister has a list of mandatory factors that must be considered, found at s. 7.3(1):

"7.3 (1) In deciding whether to issue a permit under subsection 7(1) or 7.1(1) in respect of arms, ammunition, implements or munitions of war, the Minister shall take into consideration whether the goods or technology specified in the application for the permit
(a) would contribute to peace and security or undermine it; and
(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,
(iii) an act constituting an offence under international conventions or protocols relating to terrorism to which Canada is a party,

(iv) an act constituting an offence under international conventions or protocols relating to transnational organized crime to which Canada is a party, or
(v) serious acts of gender-based violence or serious acts of violence against women and children".

Moreover, the Minister is prohibited from issuing a permit under the following circumstances:

"7.4 The Minister shall not issue a permit under subsection 7(1) or 7.1(1) in respect of arms, ammunition, implements or munitions of war **if, after considering available mitigating measures**, he or she determines that there is a substantial risk that the export or the brokering of the goods or technology specified in the application for the permit would result in any of the negative consequences referred to in subsection 7.3(1)

[Emphasis added]".

As is evident from the export assessment regime that has been adopted in Canadian law, there is no absolute prohibition of exports which meet the criteria listed in Article 6(3) of the ATT. While it is true that the Minister must consider the factors listed in s. 7.3 of the EIPA, and may be constrained by the "substantial risk" test in s. 7.4 (where no mitigating measures – such as registration systems, adequate training, monitoring conduct, end-use assurances, and recipient certificates – would suffice), the nature of the prohibition in Canadian law is not equivalent to that which is included in Article 6.

A number of rationales have been offered to justify the absence of a clear prohibition in Canadian law. First, it is suggested that Canadian law complies with the ATT because the acts in Article 6(3) of the ATT (genocide, crimes against humanity, grave breaches of the Geneva Conventions, etc.) are captured by s. 7.4 of the EIPA. Second, it is posited that the prohibition in Article 6(3) is covered by other Canadian statutes, such as the *Crimes Against Humanity and War Crimes Act* and the *Geneva Conventions Act*.

These arguments are unconvincing. The *Crimes Against Humanity and War Crimes Act and the Geneva Conventions Act* are part of Canadian criminal law, and these domestic laws implement Canada's international legal obligations under the Rome Statute of the International Criminal Court, the Geneva Conventions and their Additional Protocols. They establish individual criminal liability for certain international crimes, but neither statute has anything to do with the regulation of arms.

The idea that the prohibited acts in Article 6 are covered by s. 7.4 of the EIPA is equally unconvincing. This reading obscures the fact that Articles 6 and 7 of the ATT are conceptually distinct: while the former is a prohibition, the latter sets out an assessment process (which includes the possibility of considering mitigating measures, found at Articles 7(2) and 7(3) of the ATT). The EIPA conflates these two concepts, because s. 7.4 is drafted in a way that undermines the absolute nature of the prohibition reflected in Article 6 of the ATT. This formulation is also contrary to the presumption against redundancies when engaging in international treaty interpretation: it must be presumed that the drafters had one purpose for specifying particular crimes that would disqualify arms transfers under Article 6, and another purpose for using broader language when delineating the violations

referred to in Article 7.

Discriminatory Processes

A second area in which Canadian law has under-implemented its obligations under the ATT is with respect the issuance of general permits. Under s. 7(1.1) of the EIPA, the Minister is empowered to issue general export permits for controlled goods and technologies, permitting all residents of Canada to "export or transfer to any country specified in the permit any goods or technology included in an Export Control List that are specified in the permit." Importantly, the Minister's discretion under this provision is entirely unrestrained; there are no criteria that must be met in order to issue a general permit, a loophole which empowers the Minister to completely circumvent the entire risk assessment procedure. This power runs contrary to Article 5(1) of the ATT, which requires that it be implemented "in a consistent, objective and non-discriminatory manner."

This concern is not merely theoretical. On 17 June 2019, Minister Freeland opted to issue General Export Permit No. 47. This general permit allows for the export of certain small calibre weapons and ammunition, as well as various full-system conventional arms, to the United States. In issuing the General Export Permit, there was no need for the Minister to take into account the mandatory considerations s. 7.3 of the EIPA, nor is the Minister constrained by the substantial risk test in s. 7.4. In other words, the individualized permit application process is inapplicable to broad categories of arms exports to the US, in breach of Articles 5 and 7 of the ATT.

The Way Forward

The discussion above illustrates that several areas of the ATT remain under-implemented as a matter of Canadian law. Nevertheless, by taking a handful of relatively straightforward measures, Canada can bring its laws into compliance with the treaty.

The issue with Canada's compliance with Article 6 of the ATT could be remedied by simply removing the caveat pertaining to mitigating measures, which would reflect the absolute nature of the prohibition in Article 6. Indeed, in this regard, Canada would go beyond the strict requirements of the treaty because of the progressive language that the revised EIPA contains with respect to serious acts of violence against women and children. While Article 7(4) of the ATT mentions that such acts should be "taken into account" as part of the risk assessment, inclusion of such acts under the absolute prohibition of Article 6 (alongside genocide, war crimes, and other atrocities) would be a welcome approach, albeit one that goes beyond the requirements of the ATT.

With respect to the discriminatory process for US exports, in the immediate term Canada should consider revoking the general export permit. As mentioned above, this approach seriously undermines Canada's compliance with the treaty by exempting US exports from the assessment process envisioned by Article 7, in a manner which violates Article 5 of the ATT. However, in the longer term, the provision of the EIPA which gave rise to the general export permit should be repealed or, at the very minimum, some criteria constraining the Minister's unchecked discretion in the issuance of such

permits should be introduced. This could include setting minimum standards concerning the further transfer of such weapons, as well a requirement for regular reporting and review of the recipient country's use of the weapons. In any event, the almost completely unrestrained ability for Canadian arms to be exported to the US, and potentially other countries as the Minister sees fit, is a major gap in Canada's compliance with the ATT.

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