

Arms Control, South African Style

The Dynamics of Post-1994 Arms Export Control Policy

Xolani Skosana
Institute for Security Studies

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INTRODUCTION

Anticipation is one of the strongest of human emotions, however, in it often lies the root of disappointment. The establishment of the South African National Conventional Arms Control Committee (NCACC) in August 1995 reflected both hope and disappointment. The NCACC was a major piece of new policy by the post-apartheid South African government. The purpose of the NCACC is to exercise political control over arms transfers—the import and export of conventional weapons into South Africa, and the transit of such weapons through South Africa. Furthermore, the NCACC evaluates against national considerations applications for arms-related research, development, manufacturing, marketing, contracting, and makes decisions on granting permits for these activities.

The NCACC is a consequence of a national embarrassment. The Armaments Corporation of South Africa (Armscor) was implicated in an aborted arms deal involving a consignment of small arms supposedly destined for Lebanon in 1994. The weapons had in fact been sold to Yemen, supposedly a prohibited destination for South African arms because of its civil war. The exposure of this sale is often referred to as the 'Wazan debacle.'¹ The incident had severe consequences for South Africa's international image and was a slap in the face to South Africa's emerging foreign policy. South Africa had been trying to throw off the stigma of a pariah state, a reputation indirectly linked to the operations of its arms industry during the apartheid era, in order to become a respected member of the international community.

On paper, the establishment of the NCACC presented a comprehensive commitment to limit the spread of conventional weapons by the South African government. There has, however, been a growing contradiction between South Africa's arms export practices and its stated foreign policy objectives. South Africa has been accused of selling arms to aggressive and

repressive regimes. For example, in September 1996 the South African government approved the sales of arms to Rwanda, despite the 1994 genocidal bloodshed in that country.² Incidents of this type added momentum to the desire for an effectively functioning arms control system, including putting into law current government policy as reflected in the NCACC.

To ensure compliance with the government's arms control policy, a draft National Conventional Arms Control Bill (NCACB) was tabled before parliament in September 2000 for discussion and amendments. The objectives of the Bill are to:

- establish in law the National Conventional Arms Control Committee;
- ensure the implementation of a legitimate, effective and transparent arms control system;
- foster national and international confidence in the control procedures;
- provide for an inspectorate to ensure compliance with the provisions of the legislation;
- provide guidelines and criteria to be used when assessing applications for permits made in terms of the act;
- ensure adherence to international treaties and agreements; and
- ensure proper accountability in the trade of conventional arms.³

There has been a growing contradiction between South Africa's arms export practices and its stated foreign policy objectives

Since the Bill was tabled in parliament in 2000, it has been withdrawn on two occasions for redrafting and amendment. It was recently accepted, however, by the Portfolio Committee on Defence and the National Assembly and is currently before the National Council of Provinces.

The aim of this paper is to conduct a critical examination of South Africa's arms export policy since 1994 by examining the dynamics pertaining to policy-making and policy execution in relation to arms export controls in South Africa.

This paper is framed within the context of how best to prevent the uncontrolled spread of conventional

weapons that has emerged subsequent to the 1991 Gulf War and post-apartheid debates in South Africa. South Africa's transition has led to the emergence of new norms, values and principles that are fundamentally altering the nature of South African society, forcing a re-examination of the foundation on which the defence production and arms export policies are based. This paper aspires to contribute to improving the understanding of the post-1994 debates on South Africa's arms export policy. It does not directly examine the South African arms industry but rather concentrates on the export and import control components of the industry, namely, the National Conventional Arms Control Committee and the National Conventional Arms Control Bill.

The paper presents a concise overview of the history of South Africa's pre-1994 arms industry, the post-1994 debates on arms exports policy and an update on current events. This is followed by an examination of a fitting arms transfer policy by focusing on the role of parliament in overseeing arms exports and ensuring transparency and accountability, while also attempting to understand how the NCACC can balance regulation and the industry for the benefit of the country. The final part reviews the main arguments and conclusions of the paper and makes a few recommendations for the implementation of the NCACB (once enacted) and the functioning of the NCACC.

SOUTH AFRICA'S ARMS INDUSTRY BEFORE 1994

Until 1961, South Africa was a British colony and a member of the Commonwealth. Its defence equipment and plans were therefore based on British systems and procurement. South Africa only established a defence industry in the early 1960s that expanded quite rapidly during the 1970s and 1980s.⁴ The rise in domestic unrest as a way of resisting apartheid policies culminated in the Sharpeville shooting in 1961. An international outcry followed, leading to a drop in investor confidence and hastening a large-scale flight of foreign capital from South Africa.

In August 1963 the United Nations Security Council called on all member states to cease the sale and shipment of armaments to South Africa, and, on 4 December 1963, it unanimously approved Security Council Resolution No.182, calling for a voluntary arms embargo against South Africa.⁵ A few months later a further resolution called for an end to the "sale and shipment of equipment and materials for the manufacture and maintenance of arms and ammunition in South Africa."⁶

In 1964 the Armaments Production Board was established under the Armaments Act No. 87. Its

immediate objective was to increase ammunition production and attendant infrastructure. In 1968, when the objective of laying the infrastructural foundations had been sufficiently realised, the Board's name was changed to the Armaments Board under the Armaments Development and Production Act, and its activities were substantially expanded to include control of production, procurement and the supply of armaments in the broadest sense.⁷ In the same year, Armaments Development and Production Corporation of South Africa (Armcor) was established as a fully-fledged state enterprise, taking over ammunition factories and subsidiary companies.

South Africa's defence industry was established in the context of the UN arms embargo as a way of circumventing the sanctions. Covert channels and networks allowed South Africa to smuggle military technology to improve its infant industry. These proved to be viable conduits for a South African weapons trade once domestic arms production started to exceed national requirements. As Laurie Nathan observed, "the (apartheid) government was intent on manufacturing and purchasing arms in order to secure the political survival of minority rule, and on exporting arms in order to secure the economic survival of the defence industry."⁹

The objective and tasks of Armcor, as defined by the Armaments Development and Production Act of 1968, were to:

Promote and co-ordinate the development, manufacture, standardisation, maintenance, acquisition, or supply of armament by collaborating with, or assisting or rendering services to, or utilising the services of, any person, body or institution or any department of the state... To develop, manufacture, service, repair and maintain, on its own account or as the representative of any other person to buy, sell or import and through advertising or otherwise, to promote the sale of, armaments required for export or firearms, ammunition or pyrotechnical products required for supply to members of the public...⁸

The political changes of the 1990s worldwide and in South Africa particularly, meant that Armcor's role had to change

Armcor thus was given, on the one hand, the power to develop, acquire, market and sell arms, while on the other hand, it was charged with the responsibility for controlling and regulating arms transfers. This conflict of interest distorted Armcor's objectives from the beginning, until its separation in 1992 with the establishment of a separate company, Denel. The political changes of the 1990s worldwide and in South Africa particularly, meant that Armcor's role had to change. To ensure the survival of the arms industry and its state-of-the-art technology, but also to reconcile the fact that

Armcor operated under an Armaments Act that specifically prohibited it from competing in the civilian

market, Armscor was split into two organisations—Armscor and Denel—in April 1992. The plan was to restructure the manufacturing arm into an economically independent industrial group, which would fall under the Minister of Public Enterprises and would operate under the Companies Act. This would enable Denel to manufacture military as well as civilian products while Armscor continued to perform its acquisition function under the Armament Act and report to the Minister of Defence.

By the 1980s, South Africa's arms industry under the leadership of Armscor, had transformed itself from an arms importer with a limited domestic arms production capacity into a relatively self-sufficient arms producer. While self-sufficiency in strategic industries, such as armaments, was seen as a necessity in the context of embargoes, it was also seen as a powerful expression of South Africa's independence from foreign interference.¹⁰

By the 1980s, Armscor had acquired across-the-board production capabilities and was able to supply the South African Defence Force (SADF) with the bulk of its equipment needs. Weapons and technology that could not be produced locally were acquired through covert and illegal practices. Front companies were established in order to obtain much needed inputs. Multinational companies in South Africa, particularly in the electronics and motor vehicle sectors, acted as conduits for acquisition of foreign technology and components. According to Landgren, the dual-use nature of much of this technology, particularly, electronics technology meant that it could be acquired without contravening the UN embargo.¹¹ In addition, multinational companies operating in South Africa provided crucial sources of military technology for the South African arms industry. For instance, British companies Marconi and EMI provided electronic components and material to Armscor, while other weapons were manufactured in South Africa under license from companies in other countries.¹²

In order to ensure the maintenance of technological transfers in the face of disinvestment while under the UN embargo, South Africa also invested overseas. An example of this was South Africa's financing of and participation in the Cactus missile project in France.¹³ In addition, many of the electronics companies operating in South Africa sold shares in their businesses to South African industries. Among the shareholders were Sanlam, which owned shares in Plessey Electronics (UK) and Barlow Rand, which owned 50% of Marconi (UK).

Due to its military technological advancement and production capabilities, Armscor emerged as one of the major industrial sectors of the economy, employing approximately 160,000 people, equalling 10% of total manufacturing employment.¹⁴ In 1989 the arms industry contributed 4.5% of GDP and 19.2% of the

value of total manufacturing production. Armscor also emerged as a major exporter with exports peaking at R454m in 1987, then again rising in the 1990s to reach R798m (US\$244m).¹⁵

By 1984, the relative successes of South Africa's arms export drives prompted the UN Security Council to unanimously adopt Resolution 558, which requested all states to refrain from purchasing arms manufactured in South Africa.

A general expectation was that the new order would curtail the covert world of the apartheid era

Because of sanctions and its pariah status, secrecy was institutionalised by the South African state through various legislative measures. The Armaments Development and Production Act (No. 57 of 1968, as amended) prohibited the disclosure of any information regarding the acquisition, supply, marketing, import, export, development, manufacture, maintenance or repair and research on armaments. In addition, the Special Defence Account Act (No. 6 of 1974) ensured that the details of South Africa's procurement spending (both local and foreign) were

hidden from public scrutiny. Navias has commented that "there was no means of analysing the scale and scope of transfers, of openly debating arms production values, and of assessing sales and arms procurement policies. In essence, there were no public debates and scrutiny for and in which the benefits and costs of arms trade options could be thrashed out."¹⁶

South Africa's strategic environment changed dramatically after 1989 with the disintegration of the Soviet Union, which effectively put an end to the superpower rivalry in Southern Africa. Not only did South Africa honour its commitment to the implementation of the UN Security Council Resolution 435, by withdrawing its armed forces from Angola and Namibia in 1989, it also abandoned its policy of military destabilisation. This new ambitious diplomatic approach enabled South Africans to start the constitutional negotiations aimed at ending apartheid, ultimately culminating in the Country's first non-racial elections in April 1994.

Because the new government was faced with huge problems of a deeply divided and unevenly developed society, the arms industry was not a high priority on its agenda. A general expectation was that the new order would curtail the covert world of the apartheid era. However, in 1994, a ship, the *Arktis Pioneer*, refused to unload a consignment and returned to Port Elizabeth amid a furore about the violation of South Africa's new arms trade approach. Armscor's reputation as a pariah institution lingered on. This unloaded consignment contained arms that were supposedly destined for Lebanon, but were diverted to Yemen, a prohibited destination for South African arms because that country was in a state of civil war. The deal involved the supply of R2.4m worth of arms, including 10,000 AK47 assault

rifles, 15,000 G3 rifles and a million rounds of ammunition.¹⁷ The incident became known as the 'Wazan debacle', in reference to the involvement of a Lebanese agent known as Ali Wazan.

POST-1994 ARMS EXPORT POLICY

The Wazan debacle was a diplomatic embarrassment for a democratic South Africa and it triggered a political move by the new government to review South Africa's arms control policy. On 14 October, 1994 (Government Notice R1801), former president Mandela appointed Judge Edwin Cameron to lead a commission to "... comment—in the context of South Africa's national and international obligations and responsibilities—on the appropriateness of:

- (i) Components with reference to weapons and related material; and South Africa's current trade policy with regard to weapons, and
- (ii) Decision-making processes with regard to such trade."¹⁸

The appointment of the Commission marked a watershed in South Africa's view of its relationship with the outside world. It was echoed by President Mandela in his opening address at the Defence Exposition of South Africa in November 1994, when he said, "Our morality as a democratic government dictates that we have to act in accordance with internationally acceptable norms and standards.... In our approach to the sale of arms, we are resolved to act responsibly. Arms are for the purpose of defending the sovereignty and territorial integrity of a country; not to undermine any considerations of humanity nor to suppress the legitimate aspirations of any community."¹⁹

The report of the Commission, which was published in June 1995, concluded that "numerous acts of commission and omission by Armscor officials had contributed to the Wazan debacle. However, the most significant cause was a general, institutional lack of responsibility regarding the end destination of South African arms exports. This lack of responsibility was evident at policy, operational and organisational levels on the part of the previous Cabinet, Defence Foreign Policy Committee and Armscor."²⁰

The Commission's point of departure was that arms are not neutral commodities, and therefore, the decision to export them involves 'inescapable moral choices' on the part of the supplier state. It stated: "If these states deliberately or carelessly sell weapons to repressive or aggressive regimes, they bear a measure of culpability for the use to which their weapons are put."²¹

The Commission specifically recommended that the government should carefully consider whether the

proposed arms transfers would:

- promote the capabilities of the recipient country to meet its needs for legislative self-defence;
- serve as an appropriate and proportionate response to the threats confronting that country;
- enhance the recipient's capability to participate in collective arrangements consistent with the UN Charter or as requested by the UN; and
- be at risk of diversion to a third party.²²

The Commission recommended that South Africa's criteria for arms export be 'thoroughly overhauled' and be based on South Africa's commitment to democracy, human rights and international peace and security. In addition, it noted that South Africa should prevent 'the export of arms to repressive and authoritarian regimes'. The political, ethical, legal and strategic reasons for exercising restraint should take precedence over the economic and commercial motivation for selling arms.²³

In August 1995, after the publication of the Commission's first report, the South African Cabinet appointed an interdepartmental Cabinet committee called the National Conventional Arms Control Committee (NCACC) to study defence industry reforms, take charge of conventional mechanisms, and ensure political oversight of the industry and arms exports. As Minister Asmal, chairperson of the NCACC, argued, this was a necessary step. "We inherited an arms industry that was a Frankenstein. It was all-powerful and protected by the government in every way. It destabilised whole communities and countries—not only in our region, but also far from our borders."²⁴

The NCACC, in accordance with the Cameron Commission recommendations, is a thirteen-member committee that includes the Ministers of Defence, Trade and Industry, Arts, Culture, Science and Technology, Constitutional Affairs, Public Enterprises, Foreign Affairs, Safety and Security, the deputy minister of Intelligence Services, and the Minister of Agriculture and Land Affairs.

The NCACC operates by consensus, with matters unresolved being referred to Cabinet. In order to avoid conflicts of interests and promote restraint, the Cameron Commission proposed that the NCACC be chaired by a minister with no direct line function interest in arms transfers. It is currently chaired by Education Minister Kader Asmal.²⁵ The Minister of Defence retains ultimate responsibility for the issuance of export permits after consulting the NCACC.

The conventional arms control process

South Africa currently follows a process of arms export

The Commission's point of departure was that arms are not neutral commodities, and therefore, the decision to export them involves 'inescapable moral choices'

controls based on its White Paper on Defence of May 1996 and the Armaments Development and Production Act (1968, as amended). The policy stated that each arms export application is to be assessed by considering the recipient's record on human rights and fundamental freedoms, its security needs, and its record of compliance with international arms treaties. It also is explicit that South Africa will not transfer arms to countries that violate human rights.²⁶

The South African government has committed itself in principle to a policy of openness and transparency in its arms trade, a far cry from the secret nature of the trade in the past. Although the South African industry competes in the international arms market, the government has stated that the principle of openness and transparency relating to arms trade will only be limited by national interest and confidential bilateral agreements with other states, including commercial confidentiality.²⁷

The 1968 Act still regulates South Africa's arms trade while the new legislation is debated in parliament. Applications for arms export authorisation require a full process of assessment and scrutiny, based on four levels. At the initial level, the Department of Defence administers and processes the applications for arms exports. Then designated government departments receive certain applications individually for review and assessment. From there, a scrutiny committee, consisting of the Secretary of Defence and the Directors-General of Foreign Affairs, the South African Secret Service, and Trade and Industry, reviews the applications and submits a recommendation to the NCACC, which then provides the political oversight, with the Minister of Defence issuing the permits.

Individuals and companies have the right to obtain an explanation for decisions taken by the NCACC and to appeal against decisions that deny an application. This procedure ensures that the authority over arms trade and transfer policies is vested in the collective ministerial leadership of the NCACC, accountable to Cabinet.

The conventional arms control measures adopted by South Africa are based on the principles of the United Nations Charter, international law and recognised international arms control systems, including economic, ethical, political, military and security considerations. The controls put in place by South Africa are managed by the NCACC in a manner that is designed to ensure a responsible approach to arms transfers. The imports of arms into, the marketing and contracting for the supply of arms and the export of arms from South Africa, as well as transit of these arms through South Africa are controlled by the NCACC and approved by Cabinet.

Arms trade permits

In order to retain control over arms transfers, South Africa requires government approval for the different stages of the arms transfer process. These permits have been developed to ensure that a clear process is followed. The various types of permits required include:

- development and manufacturing;
- marketing;
- contracting authorisation;
- import;
- export; and
- transit.

Contracting means the process of a local entity entering into a firm commitment to supply armaments to another entity outside South Africa. A marketing permit does not constitute an authority to enter into contractual commitment with another party for the export of

arms. Contracting authorisation is only applicable when negotiating with non-South African buyers. In order to enter into contractual negotiations with the purpose of concluding a contract, companies have to apply for contractual authorisation. South Africa also requires that weapons shipped across South African territory in transit must be granted a permit by the NCACC.²⁸

Categories of weapons

South Africa groups its weapons into five categories for the purposes of issuing permits and providing public information on imports and exports.

South Africa has reported each year to the United Nations Register of Conventional Arms and has published public reports of its arms imports and exports for each year from 1997–2001. The report for 2000, however, was only published in 2002 at the same time as the 2001 report, although information had been provided to the United Nations on time.

As can be seen, on paper South Africa has developed one of the world's more comprehensive commitments to limit the spread of weapons. But, in practice, while offering stricter controls, there are controversies around policy statements and actual practices. Since 1994 the government has approved arms transfers to Colombia, India, Rwanda, Pakistan and Israel. Some of these countries have controversial human rights records, while others are in a virtual state of war with neighbours or engaged in battles internally. While South Africa has respected all United Nations arms embargoes, some of its export decisions feed, in the words of Human Rights Watch, the perception that the government's foreign policy is haphazard and is leaning more towards economics and realpolitik.³⁰

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Table 1: Categories of Weapons

Category A	Category B	Category C	Category D	Category E
Sensitive, Major Significant Equipment (SMSE) which comprises of conventional implements of war that could cause heavy personnel casualties and/or damage and destruction to material, structures, objects and facilities. Examples are tanks, combat aircraft, large calibre artillery systems, attack helicopters, warships and armoured fighting vehicles. ²⁹	Sensitive Significant Equipment (SSE) that comprises all types of hand-held or hand-carried assault weapons of the calibre smaller than 12.7mm. All assault rifles, machine guns, pistols and related small arms and ammunition are included in this category.	Non-Sensitive Equipment (NSE) which comprises all support equipment usually employed in direct support of combat operations that have no inherent capability to kill or destruct, although, if employed in conjunction with SMSE, they could have multiple effect. Examples are radars, meteorological stations, radio equipment, support vehicles and aircraft and recovery equipment.	Non-Lethal Equipment (NLE) which is limited to purposely designated de-mining and mine clearing and mine detecting equipment, all non-lethal pyrotechnical and riot control products and related equipment. Examples are mine detectors, signal flares, baton rounds and teargas.	Not For Sale (NFS) NFS items comprises all those defence or related products that are not allowed to be sold, such as anti-personnel landmines.

Table 2: South Africa's Conventional Arms Export Report Statistics on Europe, South America and North America (1997–2001) (value in SA rands)

Country	CAT	1997	1998	1999	2000	2001
Canada	A	1,576,000	2,119,000	4,476,000	3,073,000	2,620,000
	C	180,000		999,000	3,874,000	
Denmark	A	2,000	12,500,000	177,000	4,390,000	899,000
	B					
	C					
Netherlands	A	20,993,000	7,508,000	12,522,000	4,160,000	
	C			5,141,000		
New Zealand	B	1,340,000				
Portugal	A		599,000	30,000	2,011,000	2,663,000
	B					
Sweden	A		7,462,000	4,549,000	181,000	3,877,000
	B				2,600,000	
	C					
Switzerland	A	97,309,000	64,960,000	7,580,000	8,511,000	25,211,000
	B	10,797,000	1,250,000		1,890,000	3,219,000
	C					
United Kingdom	A	764,000	1,260,000	20,210,000	4,382,000	6,696,000
	B	2,334,000	98,000	19,000	4,000	12,558,000
	C	996,000	2,777,000	5,972,000	26,048,000	24,086,000
Spain	A				6,211,000	166,000
	C				3,295,000	
Slovenia	A	1,400,000				
Slovakia	A	431,000				
Australia	A	144 000	10,514,000	8,286,000	41,806,000	5,836,000
	B			10,507,000	11,820,000	1,129,000
	C					
Austria	A	3,040,000			5,329,000	995,000
	B					

Country	CAT	1997	1998	1999	2000	2001
Belgium	A			900,000		704,000
	C	1,176,000		843,000		
France	A	917,000	1,872,000	2,003,000	41,000	770,000
	C			5,315,000	823,000	4,382,000
Germany	A	130,000		470,000		
	B	2,106,000	5,668,000	10,890,000	8,172,000	5,236,000
	C				572,000	125,486,000
Ireland	A	4,487,000	2,334,000	13,449,000	664,000	17,164,000
	B	74,000	33,000		77,000	
	C	329,000			4,988,000	
Greece	A		470,000	696,000	1,991,000	
	B		59,000	7,440,000	8,103,000	
	C			7,340,000		642,000 943,000
United Nations	A	809,000			27,512,000	9,296,000
United States	A				1,923,000	1,249,000
	B					141,000
	C	376,000	1,580,000	1,210,000	4,013,000	
Colombia	A	59,639,000	21,032,000	21,629,000	28,504,000	44,718,000
	B	9,793,000	13,549,000	7,405,000	9,880,000	17,714,000
	C		14,000		1,288,000	607,000

South Africa's Conventional Arms Export Report Statistics on Europe, South America and North America (1997-2001)
Source: Directorate Conventional Arms Control
www.mil.za/SecretaryforDefence/ConventionalArmsControl/ncacc1999/2000_2001.htm

Table 3: South Africa's Conventional Arms Exports Report Statistics to Countries in Asia and the Middle East (1997-2001) (value in SA rands)

Country	CAT	1997	1998	1999	2000	2001
India	A	572,225,000	7,324,000	205,047,000	307,605,000	117,993,000
	C	28,293,000	5,978,000		70,054,000	103,558,000
Israel	A	1,207,000	414,000	909,000		
	B	22,796,000	2,106,000	534,000	77,000	
	C	2,160,000	3,297,000	8,660,000	1,712,000	
Jordan	A	53,000	1,135,000	2,522,000		
	B	1,526,000				6,100,000
	C	19,000				
Kuwait	A	5,641,000	5,176,000	223,000		1,480,000
	B	439,000		319,000		
Malaysia	A	845,000		3,955,000	10,867,000	137,577,000
	B				5,627,000	
	C		298,000		3,955,000	36,058,000
Oman	A	10,443,000	3,745,000	910,000	27,737,000	7,360,000
	B				977,000	147,000
	C				1,352,000	
Pakistan	A	26,848,000	2,402,000	36,678,000	2,294,000	1,825,000
	B	3,780,000	383,000	5,313,000		
	C	3,088,000	7,263,000	7,263,000	39,481,000	43,779,000
Philippines	A			95,000		
	B	986,000	1,010,000	2,532,000	4,283,000	2,906,000
	C					
Republic of Korea	A			1,314,000	829,000	2,906,000
	C					1,050,000
Taiwan	A	18,706,000	1,035,000		6,663,000	9,886,000
	B	19,706,000			333,000	14,940,000
	C	215,000		6,955,000		

Country	CAT	1997	1998	1999	2000	2001
Thailand	A	34,510,00	66,665,000			
	B	1,737,000		1,488,000	1,930,000	
	C	230,000	429,000			
United Arab Emirates	A	527,000	16,709,000	98,686,000	17,645,000	156,186,000
	B		3,410,000		850,000	
	C	16,518,000	17,102,000	2,066,000	50,903,000	25,108,000

South Africa's Conventional Arms Exports Report Statistics to countries in Asia and the Middle East (1997–2001)
Source: Directorate Conventional Arms Control.
www.mil.za/SecretaryforDefence/conventionalArmsControl/ncacc1999/2000_2001.htm

Table 4: South Africa's Conventional Arms Exports Statistics to Countries in Africa (1997–2001)
(value in SA rands)

Country	CAT	1997	1998	1999	2000	2001
Algeria	A		83,349,000	84,341,000	127,611,000	363,867,000
	C		1,584,000	206,532,000	43,010,000	138,465,000
Angola	A		3,151,000	1,000,000		
	B					
	C		5,794,000			620,000
Botswana	A	119,000	127,000	177,000	387,000	208,000
	B	115,000		55,000	9,879,000	88,000
	C	227,000				71,000
Cameroon	A	13,763,000	2,953,000		1,704,000	
	B				2,053,000	871,000
	C	106,000	100,000	448,000		
Ghana	A			2,825,000		
	B	1,757,000	2,602,000			
	C	1,565,000				
Ivory Coast	A	83,000	101,000	3,337,000		
	B	399,000		925,000		
	C					
Lesotho	A				223,000	1,825,000
	B	1,55,000	1,655,000			
	C		4 000	219,000	58,000	43,779,000
Mozambique	A				59,000	
Republic of Congo	A	24,590,000				
	B	630,000				
	C	6,7000,000				
Republic of South Africa	A	868,000				
	B					
	C	706,000				
Rwanda	A	8,683,000	15,957,000			
	B	655,000	1,072,000			
	C	6,309,000	2,525,000			6,095,000
Swaziland	A	781,000				21,170,000
	B	667,000	1,081,000	136,000	254,000	
	C		3,239,000			423,000
Uganda	A	9,084,000				
	B					
	C		1,523,000			
Zimbabwe	A					
	B	6,000				
	C		3,817,000			

South Africa's Conventional Arms Exports Statistics to countries in Africa (1997–2001)
Source: Directorate Conventional Arms Control,
www.mil.za/secretaryfordefence/ConventionalArmsControl/ncacc1999/2000_2001.htm

DEVELOPING THE CONVENTIONAL ARMS CONTROL BILL

It has long been recognised that South Africa required a new arms control act that would update the existing Act to reflect the changed priorities. After a long delay, the National Conventional Arms Control Bill was tabled before the Defence Portfolio Committee in July 2000. The aim of the Bill is to set out South Africa's system of controlling the trade in conventional weapons, including giving statutory effect to the NCACC by establishing it as a permanent body and putting into law criteria for judging the potential impact of proposed arms exports.³¹

When the National Conventional Arms Control Bill was tabled before the Defence Portfolio Committee for the first time, the Defence Portfolio Committee rejected the Bill on the grounds that the draft Bill deviated from the provisions of the Constitution, the White Paper on Defence (1996) and the White Paper on the South African Defence Related Industries (1999), compromising the principles of responsibility and restraint in the arms trade.

The Defence Committee also found that the Bill was confusing. The chairperson of the Defence Portfolio Committee, Thandi Modise, recounted initial discussions on the Bill, saying that when the Bill came before the Committee, it was riddled with shortcomings. She remembered that the language was bad and rendered the Bill extremely hard to read and understand. In addition, there appeared to be gaps in the Bill that were not in line with political commitments made by the government.³²

A second draft of the Bill was tabled in August 2001. However, this draft was also withdrawn because certain parts of the text needed reworking. The third draft was tabled before the Parliamentary Committee in September 2001. In the first of a series of altercations with the NCACC, the amendments made to the second draft by the Parliamentary Committee were rejected by the NCACC chairperson. The specific amendment was related to a prohibition on the disclosure of certain information on arms exports. The rejection of the amendment was based on the fact that the government was concerned that premature disclosure could have negative effects on commercial transactions, as well as denying the ability of individuals to protect their interests. A related section, which dealt with accountability to parliament, was also rejected. The Bill was withdrawn again for amendments. This time the Committee established a working group that incorporated outside experts to work with the state law advisors on revisions to the Bill.

The Committee considered the new recommendations in February 2002. The Parliamentary Committee

largely agreed with the changes to the Bill, with a few exceptions relating to, among other issues, the disclosure of information (parliament has pushed for a larger role in reviewing applications for permits prior to a decision being taken by the government, while the government has maintained that such a role for parliament is inappropriate). The Bill was adopted by the committee in March and was due to be tabled before the National Assembly. However, at the eleventh hour it was withdrawn, without any reason given by the NCACC at the time. It later transpired that the NCACC disagreed with the amendments made to the Bill and the Minister of Defence undertook to find compromises on the outstanding issues. A revised version of the Bill was submitted to the Portfolio Committee for Defence in June 2002 and the Bill was adopted by the committee for the second time in mid-August 2002. An analysis of the merits and limitations of the Bill appears in the next section, while a copy of the Bill as published in March 2002 appears as an appendix to this paper.

ASSESSING THE CONVENTIONAL ARMS CONTROL BILL

The government was concerned that premature disclosure could have negative effects on a commercial transaction, as well as denying the ability of individuals to protect their interests.

The National Conventional Arms Control Bill is welcome, as it is evidence of the commitment by the government to put into law a transparent and accountable system of control on conventional arms transfers. The Bill is a vast improvement from the first draft that was submitted by the executive to the parliamentary committee in September 2000. The Bill contains several provisions that put South Africa at the leading edge of international efforts to regulate the arms trade, and the country should be praised for its efforts.

The principle of human rights is dominant in the Bill as part of the 'Guiding Principles and Criteria' which outline conditions that should be taken into account when a permit for an arms sale is being considered. The other principles include:

- assessing each application on a case-by-case basis;
- avoiding contributing to internal repression, including the systematic violation or repression of human rights and fundamental freedoms;
- safeguarding the national and security interests of the Republic and those of its allies;
- avoiding contributing to terrorism and crime;
- avoiding the export of conventional arms that may be used for purposes other than the legitimate defence and security needs of the recipient country;
- avoiding the export of conventional arms to a government that has violated an end-user certificate undertaking;
- avoiding the transfer of conventional arms that are likely to contribute to the escalation of regional conflicts, to endanger peace by introducing

- destabilising military capabilities into a region, or otherwise contribute to regional instability;
- adhering to international law, norms and practices and the international obligations and commitments of the Republic, including United Nations arms embargoes; and
- considering the nature and cost of the arms to be transferred in relation to the legitimate security and defence needs of the recipient country.³³

In addition, the Bill makes explicit the process of controlling South Africa's arms trade, with detail on the steps to be followed in authorising a permit, and the levels of decision-making and accountability. The Bill requires the registration of all persons (as opposed to companies) involved in the arms trade, and makes it clear that without a permit there can be no transaction or transit. The Bill also requires permits for all goods controlled by the Bill for import, export or transit through South African territory and makes provision for permits to be cancelled, amended or suspended if it is in the interest of maintaining and promoting international peace or avoiding repression and terrorism.

The Bill also takes into consideration whether or not someone trading in arms has a conviction for stated crimes either in South Africa or abroad. In addition, the Bill gives authority to the South African government to have complete extraterritorial control over the activities of anyone registered to sell arms in South Africa, as well as to take action against non-South Africans who contravene the Bill within South Africa.

The issue of accountability and oversight is very important in relation to the transfer of conventional arms. Although the executive objected to parliament having a role in reviewing pending applications of arms sales (see the following section), the Bill places annual parliamentary and public reports on a statutory basis, signalling greater government commitment to accountability in the arms trade.

Weaknesses of the Bill

Although the Bill has many strengths, there are elements that could have been strengthened to ensure a more stringent arms control process. These include the following.

The Inspectorate

The Bill codifies the establishment of an inspectorate to investigate any irregularities in the arms licensing process in South Africa. However in the Bill the inspectorate reports to the NCACC, even if an inspection is focused on the Committee itself or on one

of its members. The line of accountability between the NCACC and the inspectorate could compromise the independence of the inspectorate. The fact that the inspectorate is appointed by the Minister of Defence in consultation with the NCACC, is accountable to the NCACC, and must be paid as determined by the minister, could weaken its independent role. For example, if the inspectorate were investigating an action of the Committee or Committee member, its ability to function as proposed in the legislation could possibly be compromised.

Disclosure and non-disclosure of information

The issue of accountability is very important in relation to the transfer of conventional arms. The absence of a parliamentary role is one of the weaknesses of the Bill, as is, more importantly, the limited access to information for the public. While the main provisions of the current Bill apply to the *post facto* review of information (which in itself should be welcomed as a large step forward from earlier practice), the possibility remains for parliament to play a role in the review of applications for permits at some future date.

Control over conventional arms and provision of service

The Bill refers to 'persons' trading in conventional arms, which raises the question how transfers between South Africa and another country on a state-to-state basis, (i.e. not commercial transactions), will be regulated in terms of the provisions set out in the Bill. The Bill should regulate all conventional arms trade related to South Africa and any state-to-state transfers should follow the same licensing practice and be subject to the same guiding principles and criteria as the commercial trade.

These transfers should be included in annual reports to parliament and in public reports.

End-user certificate

While the Bill makes an end-user certificate a requirement as part of the licensing process, the legislation could have more explicitly stated the exact provisions to be contained in the certificate, including:

- the signature of the person accepting responsibility for end use;
- information on the use of the equipment, specifying compliance with international humanitarian law and other international law instruments, as relevant;
- making provision for the Republic of South Africa to verify the delivery of the goods and make follow-up monitoring visits; and
- allowing for the revocation of further contractual obligations if the terms of the certificate are violated.

The absence of a parliamentary role is one of the weaknesses of the Bill, as is, more importantly, the limited access to information for the public.

This would bring South Africa's legislation in line with ongoing discussions in other countries and regions on improving the controls over weapons once they reach their final destination.

Regulations

Once the Bill has been approved by the National Assembly, government will draft the regulations which will underpin the new legislation. The regulations should not in any way significantly change the provisions of the Bill without a parliamentary process of review. Regulations that give clearer definition to the Bill or its provisions should be presented to parliament with adequate time for review and debate prior to their adoption. In addition, the regulations should be made available for public comment with an acceptable period of time for this to occur.

Firearms and small arms

The fact that firearms and light weapons—Africa's biggest killers—were excluded from the definition of 'conventional arms' in the first draft of the conventional arms Bill, is one of the thorny issues that delayed the adoption of the Bill. The Department of Foreign Affairs was against the inclusion of small arms and light weapons in the Bill, saying the issue could be covered in separate legislation. However, the parliamentary committee insisted that the draft legislation was to regulate all arms, and that centralised arms control was of utmost importance. The parliamentary committee agreed that they would do away with the 'gentlemen's agreement' that existed between the NCACC and the National Commissioner of Police as provided for in Chapter 8 of the Firearms Control Act of 2000, which allows the Commissioner to authorise exports of firearms to foreign governments or their approved entities. To ensure proper control mechanisms, all sections of the Bill that refer to arms should include firearms and light weapons.

Courting controversy: oversight and transparency of arms sales

The National Conventional Arms Control (NCAC) Bill debate in parliament in the last two years has become the catalyst for a far-reaching examination of the question of foreign policy, economics and ethics in the arms trade, and conveys a vivid portrayal of the tensions between entrenched secrecy on arms issues within the country and the responsibility to provide greater transparency and accountability. According to the chairperson of the Portfolio Committee on Defence, "for the first five years since the existence of

the NCACC, there has been a problem of the parliamentary committee being shut out of the NCACC processes. So when the Bill was tabled before the committee in July 2000, it was the first time ever for them to interact."³⁴

To ensure proper control mechanisms, all sections of the Bill that refer to arms should include firearms and light weapons.

The NCAC Bill was withdrawn by the committee in 2000 and again in 2001 on the grounds that, in several respects, the Bill deviated from the provision of the Constitution as endorsed in the White Paper on Defence and therefore compromised the principles of transparency, responsibility and restraint. After withdrawals and amendments, several important aspects of the Bill, such as the absence of small arms in the definition of conventional arms, the centralisation of all arms exports, the absence of an independent inspectorate, and the inclusion of principles and criteria for decision-making in arms

licensing were improved to the satisfaction of both the Committee and the NCACC. The main contentious issue between the Portfolio Committee and the government remains the issue of parliamentary participation in the review of applications for permits to engage in issues related to the transfer of arms (clause 23(1) of the Bill).

The clause that has caused so many problems reads: "No person may disclose information in relation to the acquisition, supply, marketing, importation, exportation, design, brokering, development, manufacturing, production, maintenance, and research in connection with conventional arms, where such disclosure could be detrimental to the interests or security of the Republic, or the commercial interests of the manufacturer, or otherwise without the written permission of a competent authority".³⁵

The secrecy provisions of this clause meant that information on the weapons exported by South Africa and their final destination would be confidential or reported under conditions of secrecy to parliament. This provision came under fire from the parliamentary committee and was identified as diverting from stated government policy and the recommendations of the Cameron Commission. The clause is also inconsistent with the White Paper on Defence, which states that 'the principle of openness and transparency relating to arms trade shall apply,' with the caveat that this openness and transparency can be curtailed due to national security interests.³⁶

In brief, clause 23 was viewed as inconsistent with the principles of executive accountability, parliamentary oversight and open government, which require transparency and adequate provision of information on matters of public concern. Many felt that it was inappropriate for the South African public to be denied information on South Africa's role in the arms trade,

especially under a government committed to a responsible and accountable method of governance.

The amendments made by the Portfolio Committee on Defence were rejected by the chairperson of the NCACC, Minister Kader Asmal, on the grounds that premature disclosure could have a negative effect on the deal as well as on certain individuals desiring to protect their interests. The Bill was withdrawn and redrafted. It now reads as follows:

Disclosure and Non-disclosure of Information

1. The Committee (referring to the NCACC) must:
 - a) Ensure compliance with the annual reporting requirements of the United Nations Register of Conventional Arms and present parliament with a copy of South Africa's annual report to the United Nations.
 - b) Make quarterly reports to Cabinet and a committee of parliament determined by parliament on all conventional arms exports concluded during the preceding quarter.
 - c) Make quarterly reports to the parliamentary committee contemplated in paragraph (b) on all pending applications which the committee is likely to approve, and consider any recommendations by the parliamentary committee that a permit ought to be denied in a particular application on the grounds that the export would be inconsistent with section 15.
 - d) At the end of the first quarter of each year, present to parliament and release to the public an annual report on all conventional arms exports approved during the preceding calendar year.
2. a) Subject to paragraph (b), the reports referred to in (1)(b)(c) and (d) must contain such information as may be prescribed and must set out the names of the importing countries and the type, quantity and value of all the conventional arms in question.
 - b) Information concerning the technical specifications of conventional arms may be omitted from a report in order to protect military and commercial secrets.
3. No person may disclose any confidential information concerning the business of the committee except with the permission of a competent authority or as required in terms of the promotion of access to Information Act, 2000 (Act No.2 of 2000).³⁷

In its new drafting the emphasis of the clause was shifted from protecting the industry to focusing on the need for making information regularly available to parliament and the public. Parliament also auda-

ciously—in the view of the government—tried to write in a function for itself in reviewing applications prior to a decision being taken by the NCACC. In addition the clause provides a larger role for parliament to monitor South Africa's arms trade in a timely manner (rather than current practice which has seen parliament failing to receive copies of South Africa's reports to the United Nations Register of Conventional Arms).

While a brave attempt by the parliamentary committee, there was little to suggest any support for parliament being involved in the decision-making process of the arms trade. The NCACC rejected clause 23(1)(c) and added a new clause (clause 23(2)(c) which reads: "the report referred to in 23(1)(d) shall only reflect the country, category of armaments and the total value per category exported to the country for the year."³⁸

Information will be withheld from the public because of strategic and commercial confidentiality to South African clients.

The deletion of clause 23(1)(c) and the addition of clause 23(2)(c) have played out an ongoing debate between government and parliament as to whom South Africa should be selling arms to, the criteria to be used, who should know about it (transparency) and a role for parliamentary oversight in arms sales. During the debate on the Bill in July 2002, the NCACC rejected out of hand the demand by the parliamentary committee for oversight of arms sales before they take place and for information on pending transactions. The Minister of Defence, Mosiuoa Lekota, argued that "the suggestion that at the end of every quarter the NCACC must provide parliament with a list of all pending applications is abrogating the role of the executive. If we do as we are told by the legislator, that is not oversight but ... making parliament into an executive organ and that violates the separations of power [under the South African Constitution]."³⁹

The minister also objected to increasing the amount of detail provided to the public on South Africa's arms trade. According to the minister, the executive is compelled to tell parliament the quantities of arms involved in a transaction but it must not go beyond parliament because of bilateral agreements between South Africa and the purchasing country. Information will be withheld from the public because of strategic and commercial confidentiality to South African clients.⁴⁰ The minister promised a two-part report, one for the public and another to parliament with precise details of the type, quantity, value and destination of weapons. The second part of the report will be restricted to parliament. As the minister said, "There is no information that the executive can keep from parliament. Otherwise parliament cannot scrutinize the work of the executive. If it is classified information, it will not be available to the person in the street, and divulging such information would breach the oath of office."⁴¹ This last sentence raises the possibility of parliament being bound by confi-

dentiality agreements to not make available to the public information it receives from government.

The objections of the NCACC to a greater role for parliamentary oversight on arms sales and increased transparency on information regarding the type, quantity, value and country of arms transfers contradicts the recommendations of the Cameron Commission, which were endorsed by the 1996 White Paper on Defence and the 1999 White Paper on Defence Related Industries. The Commission strongly advocated parliamentary oversight at all stages of the export decision-making process and the adoption of enabling legislation comprising guidelines for arms exports and the code of conduct.⁴² Specifically, the Commission argued that the Cabinet submit a list of proposed exports to a parliamentary sub-committee on arms control at least thirty days before the intended date of export, and that the sub-committee be empowered to request parliament to consider the appropriateness of a prospective export if it had reason to believe that such export did not comply with the code of conduct.⁴³

On the question of transparency, access to information is enshrined in article 32 of the 1996 South African Constitution, which reads: "everyone has the right of access to (a) any information held by the state and (b) any information that is held by another person and that is required for the exercise or protection of any rights."⁴⁴ In accordance with this principle, the Cameron Commission stated "The public has the right to know as much as is reasonably and practically possible about armaments transactions. This is not only an intrinsic right in a society committed to openness and democracy, the Constitution proclaims that it is also an important instrument in furthering human rights concerns, both locally and internationally, which underlie our new constitutional order."⁴⁵

In the 1996 White Paper on Defence, following recommendations of the Cameron Commission, the South African government stated: "Parliament and public scrutiny and debate will only be meaningful if there is sufficient transparency on military matters. A measure of secrecy will undoubtedly be necessary in order to safeguard national security interests, the lives of military personnel and the integrity of military operations. However, the governing constitutional principle is 'freedom of information'."⁴⁶

The secrecy provisions in the Conventional Arms Bill, coupled with the fact that South Africa is continuing to sell arms to countries that are reported to commit human rights violations, wholly contradict the government's keen interest to shed South Africa's reputation as rogue trader in the international arms market. Transparency and accountability were the

new South Africa's buzzwords, but the government has been faced with pressure from manufacturers and buyers to keep the lid on the arms trade, while the South African public has not raised enough concerns about the lack of information available on the arms trade. As Ronnie Kasrils, then Deputy Minister of

Defence, justifiably said in an interview: "We wanted a perfect [transparency] instrument but then we realised that the world works differently. In the real world, officials maintain confidentiality on arms transaction details, because that is what makes deals possible".⁴⁷ This statement contradicts the 1999 White Paper on Defence Related Industries, which explains that the purpose of arms control is to ensure that arms trade and transfer policies are not unduly influenced by commercial interests and pressures, and that the guidelines and principles, and criteria are observed.

The major problem with the Bill is the lack of commitment to transparency and political oversight that forms the cornerstone of democratic South Africa's policies

CONCLUSION

The main objective of this paper has been to examine the difficult process of policy-making and policy execution on arms controls in the context of the new South Africa. As a subsidiary objective, it also sought to evaluate how consequences of the past order are likely to impact on the policy position of the South African democratic government. Almost seven years ago the government created the National Conventional Arms Control Committee due to ethical concerns about the arms trade. Currently, the NCACC still acts without legally defined powers or constraints, and it abides by guidelines that are subject to political rather than legal interpretation. It is now more than two years since the National Conventional Arms Control Bill was tabled before parliament to place the NCACC on proper grounding by giving it legal effect, and while the Bill is making progress through parliament, it is not yet law.

The major problem with the Bill is the lack of commitment to transparency and political oversight that forms the cornerstone of democratic South Africa's policies on the arms trade. South Africa has been entering into trade with nations with perceivably poor human rights records, such as Israel, Rwanda, Colombia and Algeria. Some of these transactions may be a far cry from the principles guiding the NCACC that state that South Africa shall not transfer arms to countries that systematically violates or suppress human rights and fundamental freedoms.⁴⁸

Some signs of confusion remain over where democratic South Africa's foreign policy lies, yet the new classification contrasts sharply with arms control arrangements in the final years of apartheid. The issue of human rights and restraint in arms transfer is so high on the govts agenda that the eleven NCACC ministers meet monthly to discuss issues relating to

arms exports. South Africa has become a leader internationally when it comes to conventional arms regulation.

But, as Minister Kader Asmal argued, there is place for sentiment but not sentimentality. The executive is reluctant to allow transparency and political oversight by the parliamentary committee. This could be attributed to the lack of trust between the executive and a parliament that is accountable to the voting public. This was evident during the final debate on the Bill, when the Minister of Defence reminded parliamentarians that they took an oath to keep information that is meant for Members of Parliament in the House.

The debate on the regulation of the arms industry is not confined to South Africa alone; it is an international phenomenon. Political, moral, strategic and economic considerations are central to each country's policy approaches and practices, in a very competitive global arms market. The controversy around the Conventional Arms Bill in South Africa pits moral arguments against economic arguments that utilise different norms and assumptions—and this has resulted in a political impasse.

Now that the Bill has been debated in the National Assembly it has been referred to the NCOP for debate. A final National Assembly debate will take place at a later stage and South Africa's new law on regulating arms exports will then be enacted.

ENDNOTES

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24. Batchelor, P. 1998, p.59
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30. Human Rights Watch, 2000, p. 36
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32. Author's interview with Ms. Thandi Modise, Chairperson of the Portfolio Committee on Defence, Cape Town, 12th June, 2002
33. See the National Conventional Arms Control Bill (B50-2000) Clause 15
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Appendix A

NATIONAL CONVENTIONAL ARMS CONTROL BILL (Second draft) (5 March 2002)

Bill

To establish the National Conventional Arms Control Committee; to ensure compliance with the policy of the Government in respect of arms control; to ensure the implementation of a legitimate, effective and transparent control process; to foster national and international confidence in the control procedures; to provide for an inspectorate to ensure trade compliance; to provide criteria to be used when assessing applications including consideration of human rights and fundamental freedoms; to ensure adherence to international treaties and agreements; to ensure proper accountability in the trade and export of conventional arms; and to provide for matters connected with the work and conduct of the committee and its secretariat; and to provide for matters connected therewith.

Preamble

SINCE the adequate protection of rights to life and security of the person against acts of aggression is fundamental to the well-being and to the social and economic development of every country;

AND SINCE it is the duty of every government to protect and safeguard the rights of its people;

AND SINCE every responsible country has the right to acquire arms to equip itself against acts of aggression;

AND SINCE the Republic is playing an increasingly important role in the manufacturing and export of conventional arms;

AND SINCE it is vitally important to ensure accountability in all matters concerning conventional arms and services provided in connection with conventional arms;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

Chapter I Definitions, Committee and Secretariat

Definitions

1. In this Act, unless the context indicates otherwise-

- (i) 'brokering services' means-
- (a) acting as an agent in negotiating or arranging a

contract, purchase, sale or transfer of conventional arms for a commission, advantage or cause, whether financially or otherwise;

- (b) acting as an agent in negotiating or arranging a contract for the provision of services for a commission, advantage or cause, whether financially or otherwise;
- (c) facilitating the transfer documentation, payment, transportation, freight forwarding, or any combination of the aforementioned, in respect of any transaction relating to buying, selling or transfer of conventional arms; and
- (d) acting as intermediary between any manufacturer or supplier of conventional arms, or provider of services, and any buyer or recipient thereof;
- (ii) 'Committee' means the National Conventional Arms Control Committee established by section 2;
- (iii) 'competent authority' means the Minister, the Chairperson of the Committee or the Committee, or any subcommittee to which, or any member of the Committee, a subcommittee, the secretariat or the inspectorate to whom, a power has been delegated or a duty has been assigned in terms of section 11;
- (iv) 'conventional arms' includes-
 - (a) weapons, munitions, explosives, bombs, armaments, vessels, vehicles and aircraft designed or manufactured for use in war, and any other articles of war
 - (b) any component, equipment, system, processes and technology of whatever nature capable of being used in the design, development, manufacture, upgrading, refurbishment or maintenance of anything contemplated in paragraph (a); and
 - (c) dual-use goods, but does not include a weapon of mass destruction as defined in the Non-proliferation of Weapons of Mass Destruction Act, 1993 (Act No.87 of 1993), or an arm regulated in terms of the Arms and Ammunition Act, 1969 (Act No.75 of 1969);
 - (v) 'convey', in relation to conventional arms, means to transport conventional arms through or over the territory of the Republic, its territorial waters or its airspace to any other place or destination outside the Republic, whether or not such conventional arms are off-loaded, and 'conveyance' must be interpreted accordingly;

- (vi) 'Department' means the Department of Defence;
- (vii) 'dual-use goods' means products, technologies, services or other goods which, besides their normal use and application for civilian purposes, can also be used for the furtherance of general military capability, and which are contained in a list published by the Minister by notice in the Gazette;
- (viii) 'end-user certificate' means a certificate contemplated in section 17;
- (ix) 'export', in relation to conventional arms, includes-
 - (a) the entering into a commitment by a person in the Republic to supply another person outside the Republic with conventional arms, whether or not it is done in exchange for currency or any other commodity or to advance a cause; and
 - (b) the transfer of conventional arms from the Republic to any place outside the Republic in cases where such conventional arms are to be returned to the Republic at a later date, whether or not the transfer is in exchange for currency or any other commodity or to advance a cause, and 'exportation' must be interpreted accordingly;
- (x) 'import', in relation to conventional arms, means to bring conventional arms into any part of the Republic, irrespective of whether it is done in exchange for currency or any other commodity, and 'importation' must be interpreted accordingly;
- (xi) 'inspectorate' means the inspectorate established in terms of section 9(1);
- (xi) 'manufacture', in relation to conventional arms, includes the design, development, production and assembly thereof, and 'manufacturing' must be interpreted accordingly;
- (xii) 'marketing', in relation to conventional arms, includes the promotion of conventional arms, and any negotiations, offer, tender, advertising, shows, exhibitions or giving of information relating to conventional arms, and 'market' when used as a verb, must be interpreted accordingly;
- (xiv) 'Minister' means the Minister of Defence;
- (xv) 'permit' means any permit issued in terms of section 14(2);
- (xvi) 'prescribe' means prescribe by regulation;
- (xvii) 'record' includes any book, document, account,

deed, plan, instrument, trade list, stock list, affidavit, certificate, photograph, map, drawing, computer printout as defined in section 1 of the Computer Evidence Act, 1983 (Act No. 57 of 1983), microfilm, computer program, computer data and other data;

- (xviii) 're-export' in relation to conventional arms, means to export imported conventional arms, or to cause imported conventional arms to be exported to any place other than that from which they were originally imported, whether or not it is done in exchange for currency or any other commodity, and 're-exportation' must be interpreted accordingly;
- (xix) 'secretariat' means the secretariat contemplated in section 8;
- (xx) 'Secretary' means the Secretary for Defence appointed in terms of section 7B of the Defence Act, 1957 (Act No.44 of 1957);
- (xxi) 'services' means any services of whatever nature or form to any institution of a foreign country relating to the provision of-
 - (a) aid;
 - (b) advice;
 - (c) assistance;
 - (d) training; or
 - (e) product support, and includes brokering services, but excludes contractual after sales and warranty services performed by virtue of a permit;
- (xxii) 'subcommittee' means any subcommittee established in terms of section 7;
- (xxiii) 'technology' includes any technique, expertise or know-how that can be utilised in the design, development, manufacture, upgrading, refurbishment or maintenance of conventional arms;
- (xxiv) 'this Act' includes any regulation made in terms of section 26;
- (xxv) 'trade', in relation to conventional arms, includes any activity relating to the marketing, importation, exportation, conveyance, manufacturing or re-exportation of conventional arms, whether or not it is done in exchange for currency or any other commodity.

Establishment of National Conventional Arms Control Committee

2. There is hereby established a committee to be

known as the National Conventional Arms Control Committee.

Objects of Committee

3. The objects of the Committee are to-

- (a) implement Government policy regarding conventional arms control and the control of services, in order to establish, apply and ensure a legitimate, effective and transparent conventional arms and service control process in and for the Republic, which
 - (i) conforms to international law, norms and practices;
 - (ii) is binding on the Republic, and
 - (iii) is applicable to the control and regulation of trade in conventional arms and of the provision of services;
- (b) protect and promote the economic and national security interests of the Republic by facilitating trade in conventional arms and the provision of services, in accordance with the policy referred to in paragraph (a); and
- (q) foster national and international confidence in the Committee's procedures for control over conventional arms and the provision of services.

Functions of Committee

4. (1) The Committee must-

- (a) determine processes and structures necessary for effective conventional arms control and for the regulation of services;
- (b) establish guidelines, structures and processes necessary for the scrutiny and assessment of an application for the issue of a permit'
- (c) where necessary, liaise with relevant Government agencies regarding the enforcement of this Act;
- (d) ensure that the conditions under which a permit is issued, are complied with;
- (e) keep a register in the prescribed form of persons involved in trade in conventional arms and the provision of services;
- (f) keep a register of every permit issued; and
- (g) make quarterly reports to the Cabinet and the appropriate parliamentary oversight committee concerning the control and regulation of conventional arms and the provision of services.

(2) The Committee may-

- (a) inside or outside the Republic, conduct any investigation into, inspection of and research in connection with-
 - (i) any trade relating to conventional arms; and
 - (ii) the provision of any service;
- (b) consult with the Minister with regard to any aspect that falls within the powers of the Minister in terms of this Act;
- (c) evaluate and comment on conventional arms trade and the provision of services;
- (d) make recommendations to the Cabinet concerning the provision of services and control processes and structures in respect of conventional arms;
- (e) recommend to the Cabinet and obtain the Cabinet's approval on whether conventional arms and the regulation of services should be changed with a view to improving them in accordance with its objects referred to in section 3; and
- (f) direct any subcommittee to make information which it has in its possession available to the Committee, the Cabinet, Parliament or any committee of Parliament.

Composition of Committee

5. (1) (a) The Committee consists of such Ministers and Deputy Ministers as the President may appoint.

(b) The President may appoint such other persons to the Committee as the President may deem necessary.

(2) (a) The President must make the appointment of the members contemplated in subsection (1) known by notice in the Gazette and must specify the period for which each member is appointed.

(b) The President may renew the appointment of a member of the Committee when the period for which the member was appointed expires.

(3) The President must designate one member of the Committee as the chairperson and another as the deputy chairperson.

(4) A member must vacate office if that member-

(a) resigns by written notice addressed to the President;

- (b) is removed from office by the President; or
- (c) was appointed in terms of subsection (1)(a), and ceases to be a Minister or Deputy Minister.
- (5) The resignation of a member of the Committee in terms of subsection (4)(a) only comes into effect after acceptance by the President.
- (6) If a member of the Committee vacates office before the expiry of his or her period of office, the President may appoint a new member for the unexpired portion of that period.

Meetings of Committee

- 6. (1) The chairperson of the Committee must determine the time and place of a meeting and make it known to the other members of the Committee timeously.
- (2) (a) The Committee may determine its own procedure for meetings.
- (b) Four of the members, who must include the chairperson or deputy chairperson of the Committee, constitute a quorum.
- (3) The Committee must cause minutes to be kept of its proceedings.
- (4) The Committee may refer any matter to be considered by it to the Cabinet for a resolution, which resolution binds the Committee.
- (5) A decision of the Committee or an act performed in terms of a decision of the Committee, is not invalid merely by reason of a vacancy in the Committee, or by reason of the presence of any person not entitled to sit as a member, at the time when the decision was taken.

Subcommittees

- 7. (1) The Committee may establish one or more subcommittees, which must perform such functions as the Committee may direct.
- (2) A subcommittee must consist of one or more members of the Committee designated by the Committee and, if it is deemed necessary, one or more other persons appointed in terms of subsection (3) for such period as may be determined by the Committee.
- (3) The Minister may, with the concurrence of the Committee, appoint persons who are not in the full-time employment of the State to a subcommittee and may grant those persons such allowances and remuneration as the Minister, with the concurrence of the Minister of Finance, may determine in general or in a specific case.

- (4) The Committee must designate a chairperson for every subcommittee and, if necessary, a deputy chairperson.
- (5) When a subcommittee has performed its functions contemplated in subsection (1), it must submit a written report with recommendations to the Committee for consideration.
- (6) The Committee may at any time dissolve a subcommittee.
- (7) A subcommittee may determine its own procedure for meetings.
- (8) The Committee is not absolved from responsibility for the performance of any function assigned to any subcommittee in terms of subsection (1).
- (9) A decision of a subcommittee or an act performed in terms of a decision of a subcommittee, is not invalid merely by reason of a vacancy in the subcommittee, or by reason of the presence of any person not entitled to sit as a member, at the time when the decision was taken.

Secretariat

- 8. (1) (a) The work incidental to the performance of the functions of the Committee or a subcommittee must be performed by a secretariat consisting of administrative personnel.
- (b) The members of the secretariat must be designated by the Minister, after consultation with the Secretary, from among the employees of the public service.
- (2) The Minister may, with the concurrence of the Committee, appoint a person who is not in the full-time employment of the State to the secretariat on such conditions of service and at such remuneration and service benefits as the Minister may determine, with the concurrence of the Minister of Finance.

Inspectorate

- 9. (1) The Minister must establish an inspectorate separate from the secretariat.
- (2) The object of the inspectorate is to ensure that trade in conventional arms and the provision of services are conducted in compliance with this Act.
- (3) (a) The inspectorate consists of the persons appointed as inspectors by the Minister, with the concurrence of the Committee.
- (b) An inspector must be suitably qualified and must possess the necessary expertise to enable

him or her to perform the functions of an inspector efficiently.

- (4) (a) Every inspector must be issued with a document, signed by the Minister, confirming that person's appointment as an inspector.
- (b) When performing functions as an inspector, the inspector must show the document mentioned in paragraph (a) to any person who requests it.

Secondment

10. The Minister may, with the concurrence of the Committee and after consultation with the Department of Public Service and Administration, have members of the public service seconded to the secretariat, any subcommittee or any other structure that may be created under this Act, in terms of any law regulating such secondment.

Delegation and assignment

11. (1) (a) The Minister may, with the concurrence of the Committee and subject to such conditions as he or she may impose, delegate any power or assign any duty conferred or imposed upon the Minister by or under this Act to any member of the Committee, a subcommittee, the secretariat or the inspectorate, except the power-
- (i) to appoint members to a subcommittee and to grant them allowances and remuneration as contemplated in section 7(3); and
- (ii) to make regulations as contemplated in section 26.
- (b) The Committee may, subject to such conditions as it may determine, delegate or assign to any subcommittee, member of the secretariat or member of the inspectorate any power or duty conferred or imposed upon the Committee by or under this Act.
- (c) A subcommittee may, subject to such conditions as it may determine, delegate or assign to any member of the secretariat or inspectorate any power or duty conferred or imposed upon that subcommittee by or under of this Act. (2) The Minister, Committee and subcommittee are not divested of any power or exempted from any duty delegated or assigned by any of them, and may amend or set aside any decision taken by any person in the exercise of a power or performance of duty so delegated or assigned.

Costs and expenses of Committee, and audit

12. (1) The costs and expenses connected with the application of this Act must be defrayed from money appropriated by Parliament to the Department for that purpose.

- (2) In addition to the audit of the financial statements of the Department in terms of the Public Finance Management Act, 1999 (Act No.1 of 1999), the Auditor-General must audit the registers and processes contemplated in section 4.

Chapter II Control and Inspection

Control over conventional arms and provision of service

13. No person may-

- (a) import, export, re-export, convey, manufacture, market or trade in any conventional arms unless that person is registered with the secretariat and in possession of a permit authorising such importation, exportation, re-exportation, conveyance, manufacture, marketing or trading, as the case may be; or
- (b) in relation to conventional arms, provide a service unless that person is registered with the secretariat and in possession of a permit.

Permits

14. (1) Any person who wishes to obtain a permit contemplated in section 13 must apply to the Committee in the prescribed manner.
- (2) The Committee may issue a permit subject to such conditions as it may decide upon, or refuse to issue a permit.
- (3) The Committee may, by notice in writing to the person who has been issued a permit in terms of subsection (2), cancel, amend, suspend or withdraw the permit-
- (a) if any condition of the permit has not been or is not being complied with;
- (b) if the person who has been issued a permit is convicted of an offence in terms of this Act;
- (c) in the interest of the protection of the security of the Republic; or
- (d) in the interest of maintaining and promoting international peace.
- (4) A permit issued under subsection (2) may prescribe-
- (a) the quantity or value of conventional arms which may be exported, re-exported, marketed, imported, conveyed, manufactured, traded or brokered thereunder;
- (b) the period within which, the harbour, port or airport through or from which, the person, country or territory from or to which, the route

along which and the manner in which the conventional arms in question may be exported, re-exported, marketed, imported, conveyed, manufactured or traded; and

- (c) such other conditions as the Committee may determine.
- (5) An application for a permit for the re-exportation of conventional arms must be accompanied by a notification of the person from whom such conventional arms were originally imported, indicating the person's consent that such conventional arms may be so re-exported.
- (6) A permit issued under subsection (2) expires-
 - (a) when the particulars of the holder no longer correspond with that person's particulars as entered in a register contemplated in section 4(1)(f);
 - (b) upon the take-over, de-registration, insolvency or liquidation of the business concern in respect of which the permit was issued; or
 - (C) upon the death of the person to whom the permit was issued.
- (7) A permit issued under this section may not be transferred.

Guiding principles and criteria

- 15. When considering applications contemplated in section 14 the Committee must-
 - (a) assess each application on a case-by-case basis;
 - (b) safeguard the national and security interests of the Republic and those of its allies;
 - (c) avoid contributing to internal repression, including the systematic violation or suppression of human rights and fundamental freedoms;
 - (d) avoid endangering regional and international peace and stability by introducing destabilising military capabilities into a region, which could aggravate or prolong any existing armed conflicts;
 - (e) adhere to international law, norms and practices and the international obligations and commitments of the Republic, including United Nations arms embargoes;
 - (f) consider the nature and cost of the arms to be transferred in relation to the legitimate security and defence needs of the recipient country;
 - (g) avoid contributing to terrorism and crime;

- (h) consider the commitment of the recipient country to, and their record of compliance with, End User Certificate undertakings; and
- (i) take into account the inherent right of individual and collective self-defence of all sovereign countries in terms of the United Nations Charter.

Accountability when conventional arms are exported
16. Where conventional arms or dual-use goods are exported, and-

- (a) ownership thereof is transferred, the Committee must satisfy itself that the recipient country has given an undertaking, reflected in an end-user certificate, that the conventional arms in question will not be transferred, re-sold or re-exported to any other country without the prior approval of the Committee, acting on behalf of the Government of South African;
- (b) transfer of ownership does not take place, the Committee must-
 - (i) obtain a letter of invitation from the recipient country stating that the arms in question are intended for demonstration or evaluation purposes and whether they will be returned; or
 - (ii) obtain a letter from the applicant stating that the arms in question are being exported for repair or integration only and will be returned.
- (c) there is an undertaking that the arms in question are to be returned, the Committee must satisfy itself that the conventional arms have been returned to the Republic in accordance with the undertaking;
- (d) the arms in question have been expended during demonstration, the Committee must obtain a certificate from the applicant verifying that fact.

End-user Certificate

17. Whenever conventional arms are exported, a person authorised by the government of the country to which the arms are exported must issue a certificate-

- (a) setting out the name and address of the declared end-user;
- (b) giving a description of the conventional arms and quantities involved;
- (c) undertaking that the conventional arms will not be transferred or re-exported to any other party or country without the authorisation of the South African Government;
- (d) undertaking that proof of importation will be

supplied, by way of a Delivery Verification Certificate;

- (e) containing the authorisation to issue the certificate in question; and
- (f) containing such other matters as may be prescribed.

Routine inspections

18. An inspector may during normal office hours enter any premises other than a private dwelling occupied or used by a person in possession of a permit, in order to determine whether the specifications and conditions of the permit are being complied with.

Entry and search of premises with warrant

19. (1) An inspector may, on the authority of a warrant issued in terms of subsection (3), enter any premises specified in the warrant, including a private dwelling, and-

(a) inspect, photograph, copy, test and examine any document, record, object or material which he or she suspects might contribute to the investigation authorised by the warrant, or cause it to be inspected, photographed, copied, tested and examined;

(b) seize any such document, record, object or material if he or she has reason to suspect that it might be useful as evidence in a criminal trial; and

(c) examine any activity, operation or process carried out on the premises;

(2) Upon the request of an inspector acting in terms of a warrant issued in terms of subsection (3), the occupant and any other person present on the premises must-

(a) make available or accessible or deliver to the inspector any document, record, object or material which pertains to the investigation and which is in the possession or under the control of the occupant or other person;

(b) furnish such information as he or she has with regard to the matter under investigation; and

(c) render such reasonable assistance as the inspector may require to perform his or her functions in terms of this Act efficiently;

(3) A warrant contemplated in subsection (1) may be issued by a judge or a magistrate-

(a) in relation to premises on or from which there is reason to believe that conventional arms are being developed, manufactured, imported,

exported, re-exported or marketed or services being provided in contravention of this Act; and

(b) if it appears from information on oath or solemn declaration that there are reasonable grounds to believe that there is evidence available in or upon that premises of a contravention of this Act.

(4) The warrant may impose such restrictions on the powers of the inspector as the judge or magistrate may deem appropriate in the circumstances.

(5) The inspector executing a warrant in terms of this section must immediately before commencing the inspection, identify himself or herself to the person in control of the premises, if such person is present, and hand to such a person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises.

Entry and search of premises without warrant

20. An inspector may without a warrant exercise any power referred to in section 19(1) if-

(a) the person who is competent to do so consents; or there are reasonable grounds to believe that a warrant would be issued in terms of section 19(3) and that the delay in obtaining the warrant would defeat the object of the warrant.

Disposal of items seized by inspector

21. (1) The inspector must deliver anything seized in terms of section 19 or 20 without delay to a police official contemplated in section 30 of the Criminal Procedure Act, 1977 (Act No.51 of 1977), who must deal with and dispose of the seized item as provided for in Chapter 2 of that Act.

(2) When a police official acts in terms of section 30(a) or (b) of the Criminal Procedure Act, 1977 (Act No.51 of 1977), in respect of an item contemplated in subsection (1), he or she must do so after consultation with the inspector.

Furnishing of information

22. (1) Upon the written request of any competent authority, any person who provides a service in respect of conventional arms or who manufactures, maintains, markets, imports, exports, re-exports, supplies, stores or conveys conventional arms in the course of his or her business, or trades in or otherwise handles or disposes of any conventional arms, or in any other way exercises control over conventional arms, must furnish the competent authority, within a specified period or at specified intervals, with such information at his or her disposal as may be specified in the request.

- (2) The information referred to in subsection (1) must be accompanied by such data and documents as may be indicated in the request.

Prohibition of disclosure of certain information

23. (1) No person may disclose any information in relation to the acquisition, supply, marketing, importation, exportation, design, trade, brokering development, manufacture, production, maintenance, repair of or research in connection with conventional arms, where such disclosure would be detrimental to the national interest or the security of the Republic or to the commercial interests of the manufacturer, or otherwise, without the written authority of a competent authority.

(2) Subsection (1) does not prohibit the disclosure of information-

- (a) by any person in so far as it is necessary for the performance of that person's functions in connection with the acquisition, supply, marketing, importation, trade, exportation, design, development, manufacture, production, maintenance or repair of conventional arms, or provision of a service, by, for, on behalf of or for the benefit of the South African National Defence Force or the South African Police Service; and
- (b) released after due consideration and notification to that person, Force or Service, for publication by the Minister, the Committee or any person authorised thereto by the Minister or the Committee.

Chapter III General

Offences and penalties

24. (1) A person is guilty of an offence if he or she-
- (a) imports, exports, re-exports, conveys, manufactures, markets or trades in conventional arms in contravention of section 13(a); (provides a service in contravention of section 13(b);
- (c) fails to comply with or contravenes any specification or condition stated in a permit issued to that person;
- (d) furnishes any false information in complying with a request in terms of section 22 or refuses to submit any information required in terms of that section;
- (e) contravenes or fails to comply with section 23(1);

(f) hinders or obstructs any inspector in the performance of any function in terms of this Act;

(g) knowingly makes any false statement regarding a matter regulated in terms of this Act to any competent authority;

(h) pretends to be an official of a competent authority or a person authorised by such competent authority;

(i) refuses or fails to comply with any lawful request or order of a competent authority in terms of this Act; or

(j) purports to transfer a permit.

(2) Any person convicted of an offence contemplated in subsection (1) is liable-

(a) in the case of an offence referred to in subsection (1)(a), (b) and (c), to a fine, or to imprisonment for a period not exceeding 15 years, or to both such fine and imprisonment;

(b) in the case of an offence referred to in subsection (1)(d) and (e), to a fine, or to imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment;

(c) in the case of an offence referred to in subsection (1)(f) to (j) to a fine, or to imprisonment for a period not exceeding 5 years, or to both such fine and imprisonment.

(3) A court convicting any person of an offence referred to in subsection (1)(a) or (c) may, in addition to any other penalty which it may impose, order seizure of any goods, or any other article, or any material or substance in respect of which the offence was committed, and the goods, article, material or substance so seized must be disposed of as the Secretary either generally or in any particular case may order.

Extraterritorial Application of the Act

25. (1) Any court of law in the Republic may try any citizen or permanent resident of the Republic or any juristic person incorporated or registered in the Republic for an offence contemplated in section 24, despite the fact that the act or omission to which the charge relates was committed outside the Republic.

(2) Any court of law in the Republic may try a foreign citizen for an offence contemplated in section 24 committed within the Republic.

Regulations

26. (1) The Minister may make regulations,

with the concurrence of the Committee, regarding-

- (a) the procedure to be followed when applying for any permit in terms of this Act and the disclosure of information relating thereto;
 - (b) the conditions under which a permit may be issued and the disclosure of information relating thereto;
 - (c) matters which must be contained in an end-user certificate;
 - (d) the keeping of records, minutes, registers and financial statements by any person who is the holder of a permit in terms of this Act;
 - (e) the format of reports to be furnished to the Minister, the Committee, the Cabinet or Parliament in terms of this Act;
 - (f) the procedure to be followed in connection with requests for reasons for decisions by a competent authority; and
 - (g) any other matter which it may be necessary or expedient to prescribe in order to achieve the objects of this Act or which may or must be prescribed in terms of this Act.
- (2) A regulation may prescribe a penalty of a fine or of imprisonment for a period not exceeding five years, or both a fine and such imprisonment, for any contravention thereof or any failure to comply therewith.
- (3) Any regulation which is likely to result in state expenditure must be made with the concurrence of the Minister of Finance.

Repeal and savings

27. (1) Sections 3(2) (IAA), 4C, 4D and 4E of the Armaments Development and Production Act, 1968 (Act No. 57 of 1968), are hereby repealed.
- (2) Any permit issued in terms of a law repealed by subsection (1)-
- (a) must be regarded as having been issued in terms of section 14 of this Act; and
 - (b) remains valid until the expiry of that permit or until it is dealt with in terms of this Act.
- (3) Any application for a permit, which had been submitted before the date of commencement of this Act in terms of a law repealed by subsection (1), must be finalised in terms of that law.

- (4) Any notice issued by the Minister in terms of any law repealed by subsection (1), remains in force until repealed or replaced in terms of this Act.

Short title and commencement

28. This Act is called the National Conventional Arms Control Act, 2001, and takes effect on a date determined by the President by proclamation in the Gazette.

The ISS mission

The vision of the Institute for Security Studies is one of a stable and peaceful Africa characterised by human rights, the rule of law, democracy and collaborative security. As an applied policy research institute with a mission to conceptualise, inform and enhance the security debate in Africa, the Institute supports this vision statement by undertaking independent applied research and analysis; facilitating and supporting policy formulation; raising the awareness of decision makers and the public; monitoring trends and policy implementation; collecting, interpreting and disseminating information; networking on national, regional and international levels; and capacity building.

About this paper

In the last two years, the debate surrounding the conventional Arms Control Bill in the South African Parliament has become the catalyst for a far-reaching examination of South Africa's foreign policy. The Bill portrays a government in transition but trapped between entrenched secrecy and the need for transparency and accountability. This paper examines South Africa's arms export policy since 1994 by examining the dynamics pertaining to policy-making and policy-execution in relation to arms export control. The central focus of this paper is the debate in parliament between the National Conventional Arms Control Committee and the Parliamentary Committee on Defence regarding the regulation of South Africa's arms imports and exports.

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About the author

Xolani Skosana is a researcher in the Arms Management Program at the ISS who specializes in conventional arms.

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Tel: +27-12-346-9500/2 • Fax: +27-12-460-0998
Email: iss@iss.co.za • <http://www.iss.co.za>

67 Roeland Square • Drury Lane • Gardens • Cape Town • 8001 • SOUTH AFRICA
Tel: +27-21-461-7211 • Fax: +27-21-461-7213
Email: issct@iss.co.za



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