

FINAL REPORT

REVIEW OF EXPORT PERMITS TO SAUDI ARABIA

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FINAL REPORT – REVIEW OF EXPORT PERMITS TO SAUDI ARABIA

Introduction

1. In November 2018, the Minister of Foreign Affairs publicly announced that, following the murder of Saudi journalist Jamal Khashoggi, Canada was conducting a review of all export permits to the Kingdom of Saudi Arabia (KSA). The Minister further announced that, pending the completion of this review, no new permits would be issued for exports to KSA.

2. Accordingly, from November 2018 to December 2019, the Department conducted a review of all existing export permits for goods and technology controlled under the *Export and Import Permits Act* (EIPA) destined to KSA. In parallel, the Department has continued to assess each new individual export permit application received since November 2018 for such goods and technology on a case-by-case basis.

3. Under the EIPA, the *Export Control List* (ECL) identifies eight groups of specific goods and technology that are controlled for export from Canada to other countries, regardless of their means of delivery (physical shipment, electronic transfer, technical services, etc.). All currently valid permits and pending permit applications to KSA fall into Groups 1, 2 and 5, which cover:

- Group 1 - Dual-use items: electronics, navigation systems, sensors, aerospace and propulsion and related items;
- Group 2 - Munitions: full weapons systems (vehicles, aircraft, ships, small arms and light weapons, artillery) and components, control systems, countermeasures, military training equipment, and software and technology specially designed for military use; and
- Group 5 - Other military and strategic goods: items such as blinding laser weapons, anti-personnel mines and nuclear fusion reactors.

4. Specifically, permits and permit applications for exports to KSA are for the following goods and technologies: Light Armoured Vehicles (LAVs), electronic countermeasure systems for improvised explosive devices, flight simulators, satellite communications controllers, encryption radios, mobile communications demonstrators, handheld narcotics and explosives detection systems, and satellite technology.

5. The present report outlines the Department's final findings¹ regarding whether there is a "substantial risk" that Canadian exports of military goods and technology to KSA would result in any of the six negative consequences referred to in subsection 7.3(1) of the EIPA.

6. The review was conducted on the basis of the best and most comprehensive information available at the time. New or previously unknown information could alter the conclusions.

General Conclusion on Substantial Risk

¹ For the Department's interim findings, see: Memorandum for Information to the Minister of Foreign Affairs, "Update on export permits to Saudi Arabia", BPTS: 03575-2019, 17 September 2019.

7. Over the past year, the Department has put in place a robust inter-departmental system to assess permit applications on a case-by-case basis against the new mandatory Arms Trade Treaty (ATT) criteria (encapsulated in subsection 7.3(1) of the EIPA). The Department will continue to monitor the situation in KSA and Yemen closely; any developments on the ground will be reflected in the case-by-case assessments of substantial risk in connection with individual permit applications.

8. The Department has concluded that, based on current conditions in KSA and KSA's actions in the conflict in Yemen as assessed in the context of this review, there is a substantial risk that Canadian exports of certain types of military goods and technology (eg. air-to-surface missiles, bomber aircraft) for use in the conflict in Yemen would be used to commit or facilitate violations of IHL. This conclusion takes into account the Minister's obligation to consider whether any available mitigation measures could reduce the risk to below the substantial risk threshold. As Canada cannot enforce its export controls legislation extraterritorially, many of the mitigation measures listed in paragraph 17 may require consent or cooperation from the government of KSA, and therefore may not be feasible in the current context of the bilateral relationship. Should risk mitigation options become more readily available, this could impact the Department's assessment of substantial risk related to these types of goods and technologies. Of note, there are currently no export permits or permit applications ready for issuance that would fall into this category.

9. As regards other military items – including LAVs – the Department concludes that there is no substantial risk that these items would be used for any of the negative consequences specified in subsection 7.3(1) of the EIPA.

I. Legislative Framework

10. The EIPA is Canada's main piece of legislation for controlling the export and import of certain goods and technology. Among other objectives, the EIPA seeks to allow the Government of Canada to regulate, through the issuance of permits, the export of certain strategic goods and technology, in accordance with Canada's foreign, defence and security interests. In this regard, subsection 7(1) of the EIPA grants the Minister of Foreign Affairs the authority to issue or deny an individual export permit to any resident of Canada that has applied for it.

11. Until recently, the Minister had broad discretion to determine whether a proposed export was consistent with Canada's interests, provided the Minister's ultimate decision was supported by credible evidence, was based on relevant considerations, and was not made arbitrarily or in bad faith.

Mandatory Assessment Criteria

12. The Minister's discretionary authority has been partially narrowed as a result of Bill C-47, which amended the EIPA in order to enable Canada to accede to the ATT. As of September 1, 2019, the Minister is legislatively required, under subsection 7.3(1) of the EIPA, to consider

certain criteria in deciding whether to issue an export permit in respect of “arms, ammunition, implements or munitions of war”. Specifically, the Minister must now take into consideration whether the goods or technology specified in the application for the permit:

- would contribute to peace and security or undermine it; and
- could be used to commit or facilitate
 - a serious violation of international humanitarian law,
 - a serious violation of international human rights law,
 - an act constituting an offence under international conventions or protocols relating to terrorism to which Canada is a party,
 - an act constituting an offence under international conventions or protocols relating to transnational organized crime to which Canada is a party, or
 - serious acts of gender-based violence or serious acts of violence against women and children.

Substantial Risk

13. Furthermore, the Minister is now required, under section 7.4, to deny issuance of a permit in respect of “arms, ammunition, implements or munitions of war” if the Minister determines, after considering available mitigating measures, that there is a “substantial risk” that the proposed export would result in any of the negative consequences referred to in subsection 7.3(1). That said, the absence of a “substantial risk” does not mean the Minister is required to issue the permit, as there may be broader policy considerations that justify denying the permit.

14. “Substantial risk” is not defined under the EIPA. Based on the practice of other States Parties to the ATT and relevant Canadian and international jurisprudence, the Department’s position is that this concept requires a direct, present and foreseeable risk that the specific good or technology proposed for export would result in one or more of the negative consequences specified in subsection 7.3(1) of the EIPA. In order to be “substantial”, the risk must be well-grounded in the evidence and must be something more than mere possibility, theory or speculation; it does not however need to be highly likely. In most cases, the threshold of “substantial risk” will be satisfied when it is more likely than not that the export would result in any of the negative consequences specified in subsection 7.3(1) of the EIPA.

15. 

16. In a recent case, the U.K. Court of Appeals ruled against the U.K. Secretary of State for International Trade regarding the issuance of export licences for the sale of arms and military equipment to KSA. The Court found that the Secretary had failed to conduct a systematic assessment of alleged past violations of international humanitarian law (IHL) by the KSA-led

Coalition in Yemen before granting the export licences, which was, given the nature of the exports in question, a necessary part of the assessment in order to determine any future risk of violations.² Consequently, the Court ordered the Secretary not to grant new export licences to KSA until he had fully assessed KSA's past record of compliance with IHL. This judicial decision from another Commonwealth jurisdiction – with a very similar legal system to Canada – highlights the importance of conducting a thorough assessment of “substantial risk”.

Mitigating Measures

17. If it is determined that a proposed export poses a “substantial risk”, the Minister is required to consider “available mitigating measures” that could reduce the risk to below the threshold of “substantial”. Mitigation measures vary based on the circumstances of a particular application, and could include but are not limited to:

- end-use assurances provided by the end-user; or a more formal declaration regarding the intended use of the transferred goods or technology, accompanied by an undertaking not to use them for other purposes or in a manner that would run counter to the provisions of the ATT;
- post-shipment controls, such as delivery verification certificates or record-keeping requirements or checks;
- information exchange and transparency provisions between Canada and the government of the destination country, including the provision of information on weapons or items stolen, lost or otherwise unaccounted for; or
- training of relevant actors in the application of IHL or IHRL.

Ministerial Authority to Amend, Suspend or Cancel Existing Export Permits

18. In addition to the power to issue or deny export permits, the Minister has broad authority, under subsection 10(1) of the EIPA, to “amend, suspend, cancel, or reinstate any permit”. In this regard, it should be noted that the EIPA does not state that the Minister must apply the new criteria or the “substantial risk” test when exercising his or her authority to amend, suspend or cancel existing export permits under subsection 10(1), nor does it state that these new requirements apply retroactively to export permits issued prior to Bill C-47's entry into force. Rather, these new requirements only apply upon the issuance of a permit following Bill C-47's entry into force – namely September 1, 2019. Therefore, for the purpose of this review, the Department is not required to apply the new criteria with respect to existing export permits. Nevertheless, for the sake of policy coherence in this review, the Department has chosen to apply the new criteria both to existing export permits and export permit applications received during the course of the review.

II. “Substantial Risk” Determination

² Campaign Against Arms Trade (CAAT) v. the Secretary of State for International Trade – [2019] EWCA Civ 1020, paras. 132 to 145.

19. The following sections summarize the Department's analysis as to whether there exists a "substantial risk" that Canadian exports of military goods and technology³ to KSA would result in any of the negative consequences outlined in subsection 7.3(1) of the EIPA.

20. It should be noted that, particularly in respect of the conflict within Yemen, there are limitations on the Department's ability to gather and verify information from the region. As Canadian officials are not able to verify directly the use of Canadian military exports by KSA, the Department relies on intelligence assessments and reporting on Saudi force and equipment deployment provided by the Privy Council Office Security and Intelligence Unit and the Department of National Defence (DND), as well as information provided by Canadian missions in the region and by Five Eyes (FVEY) partners. In applying the assessment criteria, Canadian officials have also reviewed reports from international organizations, specifically, the United Nations and non-governmental organizations, as well as traditional and social media.

21. The section begins by assessing whether Canadian military exports to KSA contribute to or undermine peace and security. Next, it addresses whether there is a substantial risk that existing Canadian military exports to KSA would be used to commit or facilitate serious violations of IHL or IHRL; acts of terrorism or trans-national organized crime; or serious acts of gender-based violence or violence against women and children.

Criterion 1: Is there a substantial risk that Canadian exports of military goods and technology to KSA would undermine peace and security?

22. Taking into account the considerations set out in the sub-sections below, the Department concludes that there is no substantial risk that current Canadian exports of military goods and technology to KSA would undermine peace and security, either nationally or regionally.

23. Given that subsection 7.3(1) of the EIPA is modelled on Article 7 of the ATT, the Department has examined how "peace and security" is interpreted in the context of the ATT. In the Department's view, the concept of "peace and security" necessarily includes an assessment of the risk posed by the proposed export to Canada's national security.

Canada's National Security

24. The Department concludes that there is no substantial risk that Canadian military exports would pose a direct or indirect threat to Canada's national security.

³ As noted above, the Minister is required, pursuant to subsection 7.3(1) of the EIPA, to consider certain mandatory criteria in deciding whether to issue a permit in respect of "arms, ammunition, implements or munitions of war". In the view of the Department, "arms, ammunition, implements or munitions of war" should be interpreted as covering all goods and technology described in Group 2 of the Schedule to Canada's *Export Control List* (ECL), SOR/89-202. However, for the purpose of this review, the Department is reviewing all current exports of controlled goods and technology under the ECL, including dual-use items. As such, the term "Canadian exports of military goods and technology" includes all items controlled under the ECL destined to KSA.

25. KSA has not committed to the same standards as Canada with respect to exports or the use of certain weapons. Specifically, KSA is not a member of the four multilateral export control regimes (Nuclear Suppliers Group, Australia Group, Wassenaar Arrangement or Missile Technology Control Regime). It is also not a State Party to the Arms Trade Treaty, the Mine Ban Treaty (Ottawa Treaty), or the Convention on Cluster Munitions, but has signed and ratified the Biological Weapons Convention and the Chemical Weapons Convention.

26. However, KSA is a strong security and intelligence partner to Canada's key defence and security allies, including members of the FVEY and NATO. Because of this long-standing partnership, the likelihood that KSA would use Canadian exports of military equipment and technology against Canada, Canadians, or Canada's allies is low.

Regional and International Peace and Security

27. The Department assesses that, overall, Canadian exports of military goods and technology to KSA contribute to regional peace and security. As noted below, one of the principles referred to in the ATT is the inherent right of all States to individual or collective self-defence, as recognized in Article 51 of the Charter of the United Nations. As with any State, KSA has a legitimate security interest in protecting its territorial integrity and protecting itself from terrorist attacks. KSA shares a 1500 km land border with Yemen. In addition, Yemen sits at the intersection of the Red Sea and the Gulf of Aden, a major transportation corridor for Saudi and international shipping. Instability in Yemen poses a direct threat to KSA in terms of attacks on its territory by the Houthis as well as the potential that Yemen, as a failing state, could provide a safe harbour for terrorist organizations, such as Al Qaeda in the Arabian Peninsula (AQAP) and Daesh.

28. KSA has also proven instrumental in brokering an agreement between the Yemeni Government and the separatist Southern Transitional Congress, helping to reduce the potential of a new and bloody southern front in the civil war in Yemen, which would further complicate the UN's ability to negotiate an end to the conflict between the Yemen government and the Houthi rebels. KSA has shown a willingness to work with the UN Special Envoy to end that conflict. KSA is also one of the single largest donors of humanitarian assistance to Yemen, including USD 750 million for the 2019 UN Humanitarian Response Plan for Yemen.

Article 5(1) of the ATT

29. Article 5(1) of the ATT provides that States Parties must "implement the Treaty in a consistent, objective and non-discriminatory manner, *bearing in mind the principles referred to in [the] Treaty*". In this regard, the Preamble of the ATT specifies that States Parties are "[d]etermined to act in accordance" with a certain number of principles, including:

- The inherent right of all States to individual or collective self-defence, as recognized in Article 51 of the Charter of the United Nations;

- The settlement of international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered in accordance with Article 2(3) of the Charter of the United Nations;
- Refraining in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or any manner inconsistent with the purposes of the United Nations in accordance with Article 2(4) of the Charter of the United Nations;
- Non-intervention in matters which are essentially within the domestic jurisdiction of any State in accordance with Article 2(7) of the Charter of the United Nations;
- The respect for the legitimate interests of States to acquire conventional arms to exercise their right to self-defence and for peacekeeping operations; and to produce, export, import and transfer conventional arms.

30. In light of the above, the Department believes a proposed export would normally be found to undermine international or regional peace and security in the following circumstances:

- The proposed export would be used to violate the general prohibition on the threat or use of force, as provided under Article 2(4) of the Charter of the United Nations;
- The proposed export would be used to intervene in matters which are essentially within the domestic jurisdiction of another State;
- The proposed export would contribute to a destabilizing and excessive accumulation of arms – for example, affecting the regional balance of forces and the situation in the region.

Background on Conflict in Yemen

31. The conflict in Yemen has been intensifying for the last decade. In November 2011, the United Nations brokered the Gulf Cooperation Council Initiative and its implementation – an initiative aimed at assisting a peaceful political transition in Yemen from the former President, Ali Abdullah Saleh, to the current President, Abdrabbuh Mansur Hadi, who was elected as a consensus candidate to lead the transition. However, internal opposition grew against Mr. Hadi. In 2014, the conflict significantly escalated when the Houthis united with former President Saleh and staged a coup against the official government of Yemen, taking control of the Yemeni capital (Sana'a) and starting a march to take control of the entire country. In March 2015, the Houthis threatened to capture the southern city of Aden, the seat of the legitimate government after the fall of Sana'a. The UN Security Council condemned the actions of the Houthis and urged all parties to abide by the Gulf Cooperation Council Initiative.⁴ In 2016, the UN Security Council imposed an arms embargo on the Houthis and forces loyal to former President Saleh, and called upon Member States, in particular States neighbouring Yemen, to inspect all cargo to Yemen and seize any illegal shipments of arms.⁵ The official Yemeni Government requested the Gulf Cooperation Council and the League of Arab States to provide support, including military

⁴ United Nations Security Council, Resolution 2201 (2015), para. 4.

⁵ United Nations Security Council, Resolution 2216 (2015), paras. 14-17.

intervention. In response, KSA led the creation of a “Coalition to support legitimacy in Yemen” (“Coalition”), consisting of nine countries from the Middle East and Africa.⁶

32. The Coalition began military operations in Yemen in March 2015. Since that time, KSA’s participation has been primarily in the form of airstrikes. Saudi naval vessels have also undertaken operations in the Red Sea and the Gulf of Aden in order to interdict illegal shipments of arms, but also effectively blocking the delivery of food and relief supplies in Yemen for certain periods of time.⁷ These will be discussed in further detail under Criterion 2 below. In addition, [REDACTED] of Royal Saudi Land Forces are stationed in the south and west of KSA, on the border with Yemen, to protect KSA’s territory from Houthi incursions. A small number of Royal Saudi Land Forces and Ministry of National Guard personnel are also reportedly conducting operations in northern and central Yemen.

33. Since 2015, Houthi border incursions and missile attacks on Saudi border communities have escalated significantly. Between January 2015 and November 2019, KSA has been attacked over 400 times, the majority perpetrated by the Houthis.⁸ Since 2018, Houthi missile attacks into Saudi territory have averaged a missile strike nearly every week. The Houthis have often targeted heavily populated areas, such as the KSA capital of Riyadh, military bases, and public infrastructure such as airports and oil production facilities.

Prohibition on the Threat or Use of Force

34. The Department concludes that Canadian exports of military goods and technology to KSA, even if used in Yemen, would not be used to violate the general prohibition on the threat or use of force. As noted above, the legitimate Yemeni Government has explicitly requested the support of the Gulf Cooperation Council and the League of Arab States, including through military intervention. Moreover, the UN Security Council has condemned the actions of the Houthis and urged all parties to abide by the Gulf Cooperation Council Initiative. For these reasons, it cannot be said that the Coalition’s military intervention in Yemen is prohibited under Article 51 of the Charter of the United Nations. It does not constitute a war of aggression, nor an illegal invasion.

Intervention in Matters within the Domestic Jurisdiction of another State

35. The Department concludes that Canadian exports of military goods and technology to KSA, even if used in Yemen by KSA forces, would not be used to illegitimately intervene in matters within the domestic jurisdiction of another State. A stark example of illegitimate

⁶ In addition to KSA, Coalition members include: Bahrain, Egypt, Jordan, Kuwait, Senegal, Sudan, and the United Arab Emirates. Qatar left the Coalition in June 2017, while Morocco reportedly left in February 2019.

⁷ The World Food Programme (WFP) raised concerns to the UN Security Council about the blockade preventing food supply into Yemen in 2017. However by 2019 the issue raised by the WFP was the diversion of food by the Houthi and the lack of access provided to the WFP to vulnerable areas predominantly under Houthi control.

⁸ Jane’s Defence Database, “Number of Non-State Actors Attacks on Saudi Arabia Between January 2015 and November 2019”, retrieved 7 November 2019, online: www.janes.ihs.com.

intervention within the domestic jurisdiction of another State is the act of transferring weapons to a non-state armed group seeking to overthrow a legitimate government.⁹ KSA has not done so – on the contrary, it has intervened in support of the official Yemeni Government, not the Houthis rebels. In fact, the UN Security Council has imposed an arms embargo on the Houthis and forces loyal to former President Saleh.

Destabilizing or Excessive Accumulation of Arms

36. Canadian exports of military goods and technology to KSA are more likely to help ensure the stability of a key region for the global economy than to destabilize the region. Moreover, far from affecting the regional balance of forces and the situation in the region, Canadian arms exports help to protect the regional balance against the expansionist policies of Iran and the destabilizing actions of AQAP and Daesh.

37. The underlying rationale for supplying military equipment to partners in the Middle East is a direct consequence of the West's involvement in the first major Gulf War ("Operation Desert Storm") – an operation to expel occupying Iraqi forces from Kuwait. Following the significant military and economic costs arising from that conflict, Western governments have been encouraging KSA and other allied Gulf States to become more self-reliant for their own defence. This engagement was part of an effort to reduce future requirements for large scale Western military interventions, to ensure stability in the Gulf, to prevent a breakdown in regional order, and to prevent harm to the global economy.¹⁰

38. Furthermore, KSA has been the main bulwark against attempts by Iran to expand its influence in the region, through proxies in Syria, Lebanon and Yemen. Iran's nuclear ambitions threaten the region, most notably Israel.

KSA has also been a key partner to Canada and its allies in efforts to resolve the Syrian civil war and to contain AQAP and Daesh.

Criterion 2: Is there a substantial risk that Canadian exports of military goods and technology to KSA would be used to commit or facilitate serious violations of International Humanitarian Law (IHL)?

39. The Department has examined the situation in Yemen and KSA's role in the conflict, and has drawn on numerous sources, including intelligence assessments and reports from United Nations fact-finding missions, in particular those of the Group of Eminent Experts on Yemen

⁹ See: *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, [1986] I.C.J. 14.

¹⁰ Harm to the global economy could result if the delivery of petroleum products was significantly affected. Oil-exporting nations of the Gulf rely heavily on the Bab El-Mandeb Strait; approximately 57 giant oil vessels from these countries pass through the Strait each day, totalling over 21,000 each year. In 2018, an estimated 6.2 million barrels per day of petroleum products were shipped through the Bab El-Mandeb Strait towards Europe, the United States, and Asia. These shipments accounted for about 9% of total seaborne-traded petroleum products in 2017. All seaborne traffic transiting through the Suez Canal from the Mediterranean Sea to the Indian Ocean and vice versa, transit through the Bab El-Mandeb Strait.

(GEEY) and the Panel of Experts on Yemen (PEY). Among these reports, the PEY's report of 25 January 2019 to the President of the Security Council,¹¹ as well as the GEEY's report of 9 August 2019 to the United Nations High Commissioner for Human Rights,¹² are the most comprehensive and up-to-date reports on the conflict.

40. In sum, UN fact-finding bodies have concluded that there are reasonable grounds to believe that KSA has committed serious violations of IHL in the context of the conflict in Yemen. As explained in further detail in Annex A1, in order for a controlled export to pose a "substantial risk", there must be a direct, present and foreseeable risk that the specific good or technology proposed for export would result in serious violations of IHL. Accordingly, the Department concludes that there is a substantial risk related to the export of certain types of military goods or technology (eg. air-to-surface missiles, bomber aircraft) for use in combat operations in Yemen, as such items directly give rise to IHL concerns. If the Minister agrees with the Department's assessment that there is a substantial risk that these items would be used to facilitate or commit serious violations of IHL despite any potential mitigating measures, then permit applications for these items must be denied. The Department has reviewed all valid existing permits and permits in queue for these end-users, and has concluded that none of these items pose a substantial risk of being used in serious violations of IHL. Noting that KSA and other neighbouring countries have been mandated by UNSCR 2216 (2014) to inspect cargo and seize shipments of illegal arms, with regard to any future applications for export to the Royal Saudi Naval Forces that could be used for the legitimate implementation of this mandate, the Department will assess carefully the risk that such items would be used in such a way as to result in a limitation on humanitarian supplies, as occurred in 2017.

41. As regards other military items – including the LAVs – the Department concludes that there is no substantial risk that these items would be used to commit or facilitate serious violations of IHL in Yemen, as further explained in paragraphs 54 to 58 below.

Report of the Panel of Experts on Yemen (PEY) dated 25 January 2019

42. The PEY was established by the United Nations Security Council with the mandate, among other objectives, to gather, examine and analyse information from States, relevant UN bodies, regional organizations and other interested parties regarding the implementation of the measures decided by the Security Council in Resolution 2140 (2014).¹³ In light of paragraph 9 of Resolution 2140 (2014), which called upon all parties to the conflict in Yemen to comply with their obligations under international law, the PEY investigated potential violations of IHL in its report of 25 January 2019.¹⁴

¹¹ PEY Report, *supra*.

¹² Report of the Group of Eminent International and Regional Experts as submitted to the U.N. Commissioner for Human Rights, "Situation of human rights in Yemen, including violations and abuses since September 2014", 9 August 2019, A/HRC/42/17 ("GEEY Report").

¹³ United Nations Security Council, Resolution 2140 (2014), para. 21.

¹⁴ PEY Report, para. 132.

43. The PEY investigated five Coalition airstrikes that affected civilians and civilian objects in 2018 in Houthi-controlled areas, as well as one case of shelling in a populated area that could be attributed either to the Coalition or the Houthis.¹⁵ The PEY found that, even though the Coalition had targeted military objectives for some of these attacks, it was “highly unlikely” that the IHL principles of proportionality and precaution were respected.¹⁶ Furthermore, the PEY found that, taken as a whole, the cumulative effects on civilians and civilian objects demonstrated that, even where precautionary measures were taken, they were largely inadequate and ineffective.¹⁷ In addition, the PEY found that, in 2018, the Coalition continued to obstruct commercial flights from Sana’a airport, which could have been used by Yemeni civilians to gain access to medical treatment outside the country.¹⁸

Report of the Group of Eminent Experts on Yemen (GEEY) dated 9 August 2019

44. The GEEY was established by the United Nations High Commissioner for Human Rights, at the request of the United Nations Human Rights Council, to monitor and report on the situation of human rights in Yemen.¹⁹ In its report of 9 August 2019, the GEEY addressed incidents and patterns of alleged violations of international law occurring between September 2014 and June 2019 as part of the ongoing conflict in Yemen. Due to the limited time and resources available to it, the GEEY prioritized certain incidents emblematic of the armed conflict, on the basis of the gravity of the allegations.²⁰ In terms of evidentiary standards, the GEEY adopted the “reasonable grounds to believe” standard of proof.²¹

45. As regards the conduct of hostilities by the KSA-led Coalition, the GEEY investigated a number of emblematic Coalition airstrikes carried out from June 2018 to June 2019.²² The GEEY found reasonable grounds to believe that there may have been violations of IHL in connection with these airstrikes, as they raised concerns about the proper identification of military objectives and respect for the principles of proportionality and precautions in attack.²³ The GEEY further noted that these patterns cast serious doubts about whether the targeting procedures adopted by the Coalition complied with fundamental principles of IHL.²⁴

46. In terms of the humanitarian situation in Yemen, the GEEY found that all parties to the conflict had conducted attacks against objects indispensable to the survival of the civilian population.²⁵ In particular, Coalition airstrikes were found to have destroyed or damaged farmland, water facilities, essential port infrastructure and medical facilities.²⁶ These attacks

¹⁵ Id., para. 135.

¹⁶ Id., para. 136.

¹⁷ Id., para. 137.

¹⁸ Id., para. 164.

¹⁹ GEEY Report, para. 1.

²⁰ Id., para. 3.

²¹ Id., para. 5.

²² Id., paras. 24 to 30.

²³ Id., para. 30.

²⁴ Id., para. 30.

²⁵ Id., para. 52.

²⁶ Id., para. 52.

considerably compounded the effects of what the GEEY termed the “world’s worst humanitarian crisis”²⁷ and, if perpetrated in order to deprive the civilian population of the sustenance value of these objects, would amount to violations of IHL.²⁸

47. The GEEY also noted that access restrictions imposed on Yemen by the Coalition, including the 2017 naval blockade and the closure of Sana’a International Airport, drastically limited imports and impeded the delivery of relief supplies, thereby significantly contributing to the deterioration of the economy in Yemen.²⁹ The GEEY concluded that these measures had a disproportionate impact on the civilian population, in violation of IHL, and could possibly amount to collective punishment, also in violation of IHL.³⁰ Additionally, the GEEY noted its deep concerns that starvation may have been used as a method of warfare by all parties to the conflict.³¹

48. In sum, the GEEY found reasonable grounds to believe that the parties to the armed conflict in Yemen, including KSA, had committed a substantial number of violations of IHL. Specifically, the GEEY found that individuals in the Coalition may have conducted airstrikes in violation of the principles of distinction, proportionality and precaution, and may have used starvation as a method of warfare, acts that may amount to war crimes.³²

Accountability Mechanisms and Efforts to Reduce Civilian Harm in Yemen

49. In light of increased international pressure, KSA has demonstrated efforts to reduce civilian casualties in Yemen. In August 2016, the Saudi-led Coalition established the Joint Incidents Assessment Team (JIAT) with the support of the United States. The JIAT was given the mandate to investigate alleged violations of IHL committed by the Coalition during operations in Yemen, examine incidents of concern, and identify lessons learned.³³ In its report of 25 January 2019, the PEY noted that, with respect to some of the incidents investigated by the PEY, the JIAT had identified errors in compliance with the rules of engagement.³⁴ The PEY also noted that the Coalition had recommended that legal measures be taken to hold perpetrators accountable.³⁵ In this regard, the PEY was informed that legal procedures could be undertaken under the Military Code of Justice of Saudi Arabia to prosecute those responsible for violations of IHL.³⁶

50. Nonetheless, in its report of 9 August 2019, the GEEY found there was a “pervasive lack of accountability” for violations of international law committed by all parties to the conflict in

²⁷ Id., para. 14.

²⁸ Id., para. 52.

²⁹ Id., para. 53.

³⁰ Id., para. 53.

³¹ Id., para. 56.

³² Id., para. 96.

³³ Id., para. 90.

³⁴ PEY Report, para. 138.

³⁵ Id., para. 139.

³⁶ Id., para. 140.

Yemen.³⁷ As regards the Coalition specifically, the GEEY raised concerns with respect to the independence, impartiality and transparency of the JIAT. The GEEY noted the lack of available information regarding the JIAT's functioning, methodology and policies, and the insufficient legal analysis presented in its public findings.³⁸ The GEEY was particularly concerned with the JIAT's assessment of the Coalition's targeting procedures, as it implied that an attack hitting a military target was legal notwithstanding civilian casualties, hence ignoring the IHL principle of proportionality.³⁹ Additionally, while the JIAT acknowledged human errors in the targeting process and some technical errors in a few cases, it did not expressly hold the Coalition responsible for any violation.⁴⁰ Similarly, in its report of 25 January 2019, the PEY noted that it was unaware of any prosecution by KSA in relation to the conduct of hostilities in Yemen, despite the Coalition having recommended that legal measures be taken to hold perpetrators to account.⁴¹

51. Canadian allies – such as the United States and the United Kingdom – have been providing KSA with training and advice to improve targeting and attack approval procedures in order to reduce the risk of IHL violations. In the CAAT case (referred to in paragraph 16), the U.K. government contended that it had conducted a rigorous, robust and multi-layered assessment of the risks associated with military exports to KSA (a position accepted by the Court of Appeal) and concluded that there was no clear risk of IHL violations. In reaching these conclusions, the U.K. government stated that it had considered the information provided by the United Nations and non-governmental organizations, but that it had access to a much wider range of information than could be available to these organizations, including classified material. Nonetheless, because the exports in question were closely tied to the violations of IHL, the Court of Appeal in that case indicated that the U.K. government should have done a more systematic assessment in order to determine whether the training and support to KSA, and the latter's assurances, were having a positive effect. The U.K. government sought and obtained permission to appeal to the Supreme Court.

Violations of IHL Using Similar Military Exports

52. As noted in the Department's interpretation of "substantial risk" in Annex A1, a key element of the determination of "substantial risk" is whether the country of end-use has shown a pattern of repetitive behaviour with respect to any of the negative consequences specified in subsection 7.3(1) of the EIPA in relation to similar military exports. As noted above, the U.K. Government recently lost a court case precisely because it had failed to conduct a thorough assessment of past violations of IHL by the KSA-led Coalition in Yemen.

53. In the present circumstances, it must therefore be assessed whether KSA has shown a pattern of repetitive behaviour with respect to serious violations of IHL using any military exports similar to those specified in permits and applications under consideration in this report. KSA's

³⁷ GEEY Report, para. 88.

³⁸ Id., para. 90.

³⁹ Id., para. 90.

⁴⁰ Id., para. 90.

⁴¹ PEY Report, para. 140.

military intervention in the conflict in Yemen – as described in the preceding section – is directly relevant to this assessment.

Canadian Exports of Military Goods and Technology and IHL

54. Canadian exports of controlled items to KSA comprise mainly ground equipment, including light armoured vehicles (LAVs) and sniper rifles. As explained in paragraph 70, Canada has been exporting this type of equipment to KSA since the 1990s. There have been reports of older Canadian-made LAVs being deployed along the Saudi-Yemeni border to protect against incursions by the Houthis into KSA territory. Intelligence reports also suggest that the KSA army has used older Canadian-made LAVs in cross-border operations into Yemen. There have also been reports of the Houthis capturing what appear to be Canadian-made LAVs. In late September 2019, the Houthis claimed that three “Saudi brigades” had surrendered following a 72-hour operation that the Houthis claim they conducted inside KSA. Amongst the captured were allegedly thousands of Coalition forces and hundreds of armoured vehicles. Photos have been published in which there appear to be several LAVs, some of which are burned out or flipped over. DND experts believe that some of the vehicles pictured are likely to be LAV-25s produced in Canada and purchased by KSA for the Saudi Arabian National Guard (SANG) in the 1990s, with possible upgrades in the mid-2000s. However, Canadian officials have been unable to confirm where or when these photos were taken. The Department’s assessment is that these are likely to be “battlefield losses” arising from border skirmishes, and not as a result of the illegitimate diversion of SANG military equipment to proxy forces within Yemen. Moreover, in the Department’s assessment, any purported use of LAV-25s by the Saudi army for the protection of KSA’s territorial integrity is consistent with the intended use of the vehicle.

55. There have also been reports of “battlefield losses” of Canadian-made sniper rifles to Houthi forces, but this is not considered a ground for denying an export permit, as such losses do not represent an intentional diversion of an item. Sniper rifles are intended to support precision-targeting, and as such are considerably less vulnerable to being used in a way that would result in unintentional civilian casualties.

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57. In its report of 9 August 2019, the GEEY observed that the continued supply of weapons to parties involved in the conflict in Yemen by a certain number of third States was perpetuating the conflict and the suffering of the population. The GEEY explicitly questioned the legality of arms transfers by France, the United Kingdom and the United States.⁴³ Notably, however, the GEEY report did not question the legality of Canadian arms transfers to KSA, likely because these have not been items used in operations in respect of which IHL violations have been alleged.

58. To date, there is no credible evidence that Canadian exports of military goods and technology are being used by the KSA-led Coalition in Yemen. There are no incidents of IHL violations identified by UN fact-finding missions that implicate the types of military equipment being exported from Canada.

Criterion 3: Is there a substantial risk that Canadian exports of military goods and technology to KSA would be used to commit or facilitate serious violations of International Human Rights Law (IHRL)?

59. The Department concludes that there is no substantial risk that current Canadian exports of military goods and technology to KSA would be used by KSA to commit or facilitate serious violations of IHRL, including “internal repression”.

60. For the purposes of assessing the risk that exports of military goods or technology will be used to commit or facilitate serious human rights violations, the European Council has adopted a framework that assesses the risk that such military goods or technology might be used for “internal repression” in the country of final destination.⁴⁴ This involves an assessment of whether there is evidence of the use of this or similar technology or equipment for internal

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⁴³ GEEY Report, para. 92.

⁴⁴ Council Common Position 2008/944/CFSP defining common rules governing the control of military technology and equipment, O.J. L. 335, 8 December 2008, Article 2.

repression by the proposed end-user, as well as an assessment of the likelihood that the technology or goods will be diverted from its stated end-use.⁴⁵

61. The European framework makes sense. “Internal repression” is a useful concept for identifying the types of human rights violations relevant to the export of military goods and technology. In applying this approach, the Department has been unable to identify any credible evidence that the Saudi government has used Canadian-made military goods or other items controlled under the EIPA to commit violations of IHRL, including internal repression, either within KSA or in neighbouring countries.

Overview of Human Rights in KSA

62. While some progress has been made in certain areas, KSA’s overall human rights record remains troubling, particularly for civil and political rights. Various human rights reports note that KSA continues to perpetrate grave human rights violations. These include arbitrary and unlawful killings, torture and other cruel and inhumane treatment (e.g. corporal punishment), arbitrary arrest and detention and denial of minimum international standards of due process. These reports state that in order to maintain social and political control, KSA imposes significant limitations on freedom of expression, assembly and religion. Furthermore, according to a UN Special Rapporteur, KSA employs extensive surveillance, criminalizes dissent, and prosecutes political opponents, human rights defenders or critics of the regime, often under the false guise of counter-terrorism.⁴⁶ The ongoing trials and detention of women’s rights activists is a stark illustration of the unwillingness of the ruling elite to provide space for personal expression. Although party to some of the main international human rights conventions,⁴⁷ KSA has ratified neither the *International Covenant on Civil and Political Rights* nor the *International Covenant on Economic, Social, and Cultural Rights*. KSA also abstained on the *Universal Declaration on Human Rights*.

63. The most high-profile example of the disregard for human rights is the direct involvement of Saudi officials in the murder (and subsequent attempted cover-up) of Saudi journalist and critic Jamal Khashoggi. [REDACTED]

⁴⁵ Article 2(2) provides that “technology or equipment which might be used for internal repression will include, *inter alia*, technology or equipment where there is evidence of the use of this or similar technology or equipment for internal repression by the proposed end-user, or where there is reason to believe that the technology or equipment will be diverted from its stated end-use or end-user and used for internal repression. [...] [T]he nature of the technology or equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, *inter alia*, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms [...]”

⁴⁶ U.N. Human Rights Council, “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism”, 13 December 2018, A/HRC/40/52/Add.2, Section B.

⁴⁷ These include: the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *International Convention on the Elimination of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), and the *Convention on the Rights of the Child*.

██████████ A KSA court sentenced five of the eleven indicted suspects to death for the murder and three others were sentenced to a total of 24 years in prison. The most senior officials indicted were not convicted. ██████████

64. According to a U.S. State Department report, the legal system in KSA does not meet minimum international standards in many respects.⁴⁸ Detainees are often denied access to legal counsel at critical stages of the judicial process, particularly during the pre-trial/investigation stage. Individuals can be held indefinitely in unofficial detention until a formal registration process takes place, allowing authorities to skirt regulations on the length of time an individual can be held without charge. There is no requirement for judges to publish the reasons for their decisions. Judges have discretion to close hearings to the public, preventing scrutiny of the judicial process. Through mid-October 2018, some foreign diplomats were able to obtain permission to attend non-consular court proceedings; however, this access has since been denied by the Ministry of Foreign Affairs.

65. Since the spring of 2018, KSA has announced several important social reforms. The Government continues to ease restrictions imposed on women and to open public spaces for culture and sports. Despite some quiet pushback from conservative elements of society, these developments have, overall, been well received. In addition, the powers of the Commission for the Promotion of Virtue and the Prevention of Vice (a semi-autonomous body that monitors and regulates social behavior and public interactions) have recently been curtailed, including the removal of the power to pursue and arrest individuals. This has contributed to a more open culture and individual social freedom.

66. For decades, the guardianship system (a set of ministerial policies and practices which require women to have the permission of a male guardian before undertaking daily activities) has deprived Saudi women of their most basic rights, including freedom to make their own health decisions or marrying, freedom of movement, and economic independence. In the last year, there have been significant changes to allow greater independence for women, starting with the lifting of the ban on women driving in June 2018. Most recently, in August 2019, King Salman issued a decree removing a range of restrictions on women aged 21 and above, including the need for a guardian's consent for adult women to obtain a passport and/or travel. The new law will also improve women's protection against employment discrimination and grant a greater degree of autonomy over family matters, enabling them to register births, marriages or divorces and increased rights on child custody issues, which were previously the purview of male relatives. While legal prohibitions have been removed, women will still face internal family and social challenges as the government works to confront deep cultural biases against women's equality. Employment opportunities for women and economic independence have been significantly enhanced. "Vision 2030" looks to radically change the Saudi economy and the social contract between the government and the people. A number of Canada's likeminded

⁴⁸ U.S. Department of State, Bureau of Democracy, Human Rights and Labour, "Country Reports on Human Rights Practices for 2018 – Saudi Arabia", pp. 15 to 20 ("U.S. Department of State Country Report").

partners are looking at KSA's "Vision 2030" as a roadmap to broader economic and social reforms, and are working with KSA to achieve those goals.

67. [REDACTED]

Canadian Exports of Military Goods and Technology and IHRL

68. In 2017, media sources reported that Canadian-made Terradyne armoured vehicles were being used to suppress an uprising by the Shi'a minority in Al Qatif, a governorate in KSA's Eastern Province. The Department suspended the export permits for these products, pending a thorough review of the allegations by the Canadian Embassy in Riyadh.⁴⁹ After conducting extensive on-the-ground interviews, the Department concluded that the media reports were inaccurate and that the Terradyne vehicles had not been used to commit human rights violations. Based upon this assessment, the Department reinstated the export permits.

69. In March 2011, at the request of the Government of Bahrain and under Gulf Cooperation Council security assistance provisions, KSA and the UAE sent military and police forces into neighbouring Bahrain as part of the so-called Peninsula Shield Force. As the "Arab Spring" spread across the Middle East and North Africa, Bahrain faced escalating demands for political, social and economic reforms. However, protests increasingly became violent, resulting in the death of civilians and security personnel. Saudi troops did not engage in suppressing peaceful protests in the country. While the Saudis did send Canadian-made LAVs into Bahrain, according to open-source and other reporting, the vehicles were not used against protestors, but rather to protect public infrastructure.⁵⁰

70. Canada has permitted the export of military goods and technology to KSA for several decades.⁵¹ In particular, Canadian suppliers have exported, directly or indirectly through the United States Foreign Military Sales program, light armoured vehicles to KSA for over 25 years. During this time period, there has been no credible evidence that KSA has used LAVs to commit or facilitate serious violations of IHRL, including through "internal repression". While it is possible that Canadian-made military equipment could one day be used to repress internal dissent, the lack of evidence of the use of these or similar vehicles or other Canadian equipment by the KSA military in such a way suggests that the likelihood is low. Moreover, the distinction between internal repression and the legitimate protection of public safety is not always clear. It cannot be assumed that any use of military equipment to control protests is an illegitimate use,

⁴⁹ Memorandum for Action to the Minister of Foreign Affairs, "Export permit suspension: Munitions list item to Saudi Arabia", 10 October 2017, BPTS: 03120-2017, available online at: <https://www.international.gc.ca/controls-controles/memorandum-for-action-memoire-pour-decision.aspx?lang=eng>.

⁵⁰ New York Times, "Saudi Troops Enter Bahrain to Help Put Down Unrest", 14 March 2011.

⁵¹ KSA was first added to the *Automatic Firearms Country Control List*, SOR/91-575, established under the EIPA, in 1992 (SOR/92-113).

rather than a legitimate public security operation. Moreover, in the case of the LAVs, there is no credible information that the end-user in question – [REDACTED] – would use the LAVs for internal repression. [REDACTED]

Criteria 4 and 5: Is there a substantial risk that Canadian exports of military goods and technology to KSA would be used to commit or facilitate acts of terrorism or transnational organized crime?

71. Based on the information below, the Department concludes that there is no substantial risk that current Canadian exports of military goods and technology to KSA would be used to commit or facilitate acts of terrorism, or to commit or facilitate offences under international conventions and protocols relating to transnational organized crime.

Terrorism and Terrorist Financing in KSA

72. KSA is a valued Canadian security partner in the battle against AQAP and Daesh. [REDACTED]

73. KSA is an active member of the Global Coalition to Counter Daesh, including the associated military campaign, with the second highest number of airstrikes carried out after the U.S. KSA also co-chairs, with the United States and Italy, the Counter-Financing Working Group.⁵² Additionally, KSA is one of the founding members of the Global Counterterrorism Forum (GCTF), which Canada currently co-chairs with Morocco.

74. KSA has been accused of laxity in the fight against terrorist financing, in particular with respect to funds raised within its territory to support terrorist entities outside KSA. The Financial Action Task Force (FATF) – the main international body for combating money-laundering and terrorism financing – has assessed that KSA faces a “high and diverse risk” of terrorism financing.⁵³ This risk is linked to numerous factors: the lack of political stability in the region; the presence of terrorist groups neighbouring KSA; the presence of terrorist cells within KSA, notably Al Qaida, Daesh, and affiliated groups; as well as the high number of foreign terrorist fighters of Saudi nationality, estimated at over 3000 between January 2000 and January 2018.⁵⁴ In February 2019, the European Commission recommended adding KSA to its “blacklist” of high-risk third countries with “strategic deficiencies” in their anti-money laundering and counter-terrorist financing regimes, although the proposal was rejected by the European Council in March 2019.

⁵² Global Coalition Against Daesh, “Partners: Saudi Arabia”, retrieved 13 November 2019, available online at: <https://theglobalcoalition.org/en/partner/saudi-arabia/>.

⁵³ Financial Action Task Force, “Kingdom of Saudi Arabia – Mutual Evaluation Report”, September 2018, para. 42 (“FATF Report”).

⁵⁴ Id., paras. 42, 43 and 47.

75. Despite the above, allegations of terrorism financing from KSA generally do not relate directly to KSA state authorities, but rather to non-profit organizations (NPOs) operating within the country.⁵⁵ U.S. think-tanks have made similar assessments, while noting that Saudi authorities have in the past turned a blind eye to these activities,⁵⁶ or been seen to tacitly approve them when the NPOs or individuals are linked to members of the Royal family.⁵⁷ In addition, the FATF notes that the risk of terrorism fundraising through NPOs has been “significantly mitigated” over the last decade, in large part due to the strict measures imposed on the whole NPO sector, as well as the active supervision of NPOs by KSA authorities.⁵⁸

76. Financing aside, there is no credible evidence that KSA state authorities have directly supplied military goods or technology to terrorist organizations within KSA, in the region, or beyond the region. Unconfirmed media reports by CNN in February 2019 alleged that U.S.-made weapons sold to KSA and UAE may have been diverted to various military elements waging war in Yemen, including to AQAP though their alliances with pro-Saudi militia operating in Yemen.⁵⁹

77. Senior Saudi government and religious leaders have issued strong public statements denouncing violent acts perpetrated by global terrorist organizations. Furthermore, KSA has been active in recent years in countering violent extremism. The U.S. State Department’s 2018 Country Report on Terrorism for Saudi Arabia indicates that the Saudi government operates rehabilitations programs for individuals with past “extremist involvements”, is active in counter-messaging initiatives globally, and has enacted religious sector reforms to promote a more “moderate Islam”. Despite this, the Report acknowledges that Saudi support for intolerant views in third countries has persisted, and that Saudi textbooks still sometimes contain extremist, intolerant, and violent rhetoric.⁶⁰

78. Neither Canada nor the U.S. has listed KSA as a state supporter of terrorism.

Transnational Organized Crime

79. KSA has been a Party to the *United Nations Convention against Transnational Organized Crime* (CTOC) since 2005.

80. The majority of existing Canadian-made military goods and technology is being sold to the Saudi Armed Forces or related security forces. Based on a review of available information, there is no credible evidence that these forces provide military goods and technology to transnational criminal organizations.

⁵⁵ FATF Report, para. 47.

⁵⁶ Council on Foreign Relations, “Terrorist Financing”, October 2002, available online at: https://cdn.cfr.org/sites/default/files/pdf/2002/10/Terrorist_Financing_TF.pdf

⁵⁷ Brookings Institution, “Saudi Arabia and Terrorism Today”, 29 September 2016.

⁵⁸ FATF Report., paras. 42 and 47.

⁵⁹ CNN, “Sold to an Ally, Lost to an Enemy”, 5 February 2019.

⁶⁰ U.S. Department of State, “Country Reports on Terrorism 2018”, October 2019, available online at: <https://www.state.gov/reports/country-reports-on-terrorism-2018/>, pp. 149-152.

Criterion 6: Is there a substantial risk that Canadian exports of military goods and technology to KSA would be used to commit or facilitate serious acts of gender-based violence, or serious acts of violence against women and children?

81. Serious acts of gender-based violence or serious acts of violence against women and children are not defined in the EIPA. However, according to the United Nations Office of Disarmament Affairs (UNODA), one of the indicators that State Parties to the ATT should take into consideration in assessing these risks is:

[w]hether or not there is evidence that the type of arms described in the export authorization application or a similar type has been used repeatedly in the commission of serious acts of violence against women or serious acts of gender-based violence or the commission of serious acts of violence against children, in particular recruitment of child soldiers in the recipient state.⁶¹ (emphasis added)

Gender-Based Violence in the Context of the Conflict in Yemen

82. Based on a review of the available information, the Department has found no credible evidence linking Canadian-made military goods or technology to gender-based violence by KSA personnel in relation to the conflict in Yemen and no evidence of repeated use of such equipment for such acts. Consequently, the Department assesses that there is no substantial risk that current Canadian exports of military goods and technology to KSA would be used by KSA to commit or facilitate serious acts of gender-based violence or serious acts of violence against women in the Yemeni conflict.

83. Undoubtedly, the conflict in Yemen has exacerbated a dire humanitarian crisis. The UN Secretary-General has noted that this humanitarian catastrophe has increased the incidence of sexual violence by increasing the vulnerability of women and girls and creating widespread impunity, resulting from the breakdown in law and order. In his report to the Security Council, the Secretary-General concluded:

After four years of continuous violence, more than 80 per cent of the population requires humanitarian assistance and protection. There was increased reporting of sexual violence in 2018, in particular during the last quarter of the year. Reports include cases of physical or sexual assault, rape and sexual slavery. While a few cases are directly attributable to parties to the conflict, most are the result of increased risks that women and children face, against a backdrop of pre-existing gender inequality, exacerbated by the chronic incapacity of Government institutions to protect civilians. Women and children are increasingly at risk of trafficking, sexual violence and exploitation, particularly in the context of displacement.⁶²

⁶¹ United Nations Office of Disarmament Affairs (UNODA), Arms Trade Treaty Implementation Toolkit, Module 6, Export, p. 20.

⁶² Report of the Secretary-General, "Conflict-related sexual violence", S/2019/280, 29 March 2019, para. 94.

84. However, neither the Secretary-General nor the GEEY have documented specific cases of KSA military personnel committing sexual or gender-based violence. The Secretary-General has not cited KSA or its allies in Yemen for patterns of sexual violence in conflict. In its August 2018 report to the United Nations Human Rights Council, the GEEY found “reasonable grounds to believe that [Yemeni] government personnel and Security Belt Forces have committed rape and other forms of serious sexual violence targeting vulnerable groups [...], including women and children”.⁶³ The GEEY raised these concerns directly with the Coalition, who asserted that it had never received allegations accusing its personnel of sexual or gender-based violence.⁶⁴ Nonetheless, the GEEY called on members of the Coalition, including KSA, to conduct thorough, impartial and transparent investigations.

85. In its most recent review of KSA in 2018, the Committee established under the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) expressed concerns that through its military operations in Yemen, KSA had been responsible for violations of the rights of Yemeni women and girls, although the Committee appears to be referring to potential violations of IHL (distinction, proportionality and precaution), which have been canvassed above.⁶⁵

Gender-Based Violence in the KSA Domestic Context

86. The Department has found no credible evidence linking Canadian-made military goods or technology to gender-based violence within KSA and no evidence of repeated use of such equipment for such acts. Consequently, the Department concludes that there is no substantial risk that existing Canadian-made military goods or technology would be used by KSA to commit or facilitate serious acts of gender-based violence or serious acts of violence against women within its territory.

87. KSA's 2013 *Protection from Abuse Act* criminalizes domestic violence and provides a framework for the government to prevent and protect victims of violence in the home. Although rape is a criminal offence, due to legal and social obstacles, authorities have brought few cases to trial.⁶⁶ The prevalence of gender-based violence against women, in particular domestic and sexual violence, remains largely underreported and undocumented.⁶⁷ According to the 2018 U.S. State Department Saudi Arabia Human Rights Report, the National Family Safety Program (NFSP), a quasi-governmental organization under the Ministry of National Guard, was founded

⁶³ Report of the U.N. High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts on Yemen, “Situation of human rights in Yemen, including violations and abuses since September 2014”, A/HR/39/43, 17 August 2018, paras. 86 to 94.

⁶⁴ Report of the detailed findings of the Group of Eminent International and Regional Experts on Yemen, “Situation of human rights in Yemen, including violations and abuses since September 2014”, A/HRC/42/CRP.1, 3 September 2019, para. 663.

⁶⁵ U.N. Committee on the Elimination of Discrimination Against Women, “Concluding observations on the combined third and fourth period reports of Saudi Arabia”, CEDAW/C/SAU/CO/3-4, 9 March 2018, para. 17 (“CEDAW Concluding Observations”).

⁶⁶ U.S. Department of State Country Report, pp. 15 to 20.

⁶⁷ CEDAW Concluding Observations, para. 31.

in 2005 to spread awareness of and combat domestic violence, including child abuse, and continued to report abuse cases.⁶⁸ Sources in the expatriate community have indicated significant challenges in accessing government support services in these situations. In short, despite some recent progress, women continue to face significant discrimination under law and in Saudi society.⁶⁹

Violence against Children in the Context of the Conflict in Yemen

88. Based on a review of the available information, the Department has found no credible evidence that the Saudi government is directly engaged in the recruitment and use of child soldiers or is supplying Canadian-made military goods or technology to armed groups in Yemen who may use such goods or technology in the recruitment or supply of child soldiers.

89. As the Secretary General has noted, “[c]hildren did not start the war in Yemen, but they are paying the highest price”.⁷⁰ From 2013 to 2018, the UN has verified almost 12,000 grave violations against children committed in Yemen. These include recruitment of child soldiers, deprivation of liberty for alleged association with armed forces or armed groups, killing and maiming, rape and other forms of sexual violence, attacks on schools and hospitals, abduction and denial of humanitarian access.⁷¹

90. Many of the specific violations against children are a direct consequence of violations of IHL. The Secretary-General has listed members of the Coalition as a party to the conflict that perpetrates grave violations affecting children in situations of armed conflict, specifically with regards to the killing and maiming of children, resulting from airstrikes on schools and hospitals.⁷² The Department’s assessment of violations of IHL is found above under Criterion 2 (page 12).

91. Turning to the recruitment and use of child soldiers, the Secretary-General reported that the UN has verified the recruitment and use of approximately 3,000 children by parties to the conflict in Yemen. Approximately two-thirds were by the Houthis, with the Yemeni government and various other armed militias and terrorist organizations responsible for the remainder.⁷³

[REDACTED]

However, the report does not refer to the Coalition when reporting on the recruitment of child soldiers in Yemen.

⁶⁸ U.S. Department of State Country Report, p. 43.

⁶⁹ U.S. Department of State Country Report, pp. 45-47; CEDAW Concluding Observations, paras. 15-16, 19, 27-30.

⁷⁰ Report of the Secretary-General, “Children and armed conflict in Yemen”, S/2019/453, 3 June 2019, p. 1.

⁷¹ Id., p. 1.

⁷² Id., paras. 1 and 33-39.

⁷³ Id., paras. 17 to 28.

92. In March 2019, the Coalition signed a Memorandum of Understanding (MoU) with the Special Representative to the Secretary-General of the UN on children and armed conflict.⁷⁴ The agreement includes the development of specific time-bound activities aimed at preventing grave violations against children in the context of Coalition military operations in Yemen.⁷⁵ However, the content of this MoU is not public.

⁷⁴ The Secretary-General removed Coalition members from the list of parties that have not put in place measures to improve the protection of children in 2018. The Coalition was then added to the list of parties that have put in place measures aimed at improving the protection of children: Report of the Secretary-General, "Children and armed conflict", S/2018/465, 16 May 2018, Annex I, pp. 40-41.

⁷⁵ *Id.*, para. 70.

Annex A1: Explanation of Substantial Risk

1. Given that the *Export and Import Permits Act* ("EIPA") does not define the concept of "substantial risk" as it appears in section 7.4, the Department must adopt a definition of that term for the purpose of its review of arms exports to KSA.

2. In developing a working definition of "substantial risk", the Department has examined a wide variety of sources, including : the relevant jurisprudence of international bodies; Canadian legislation employing the concept of "substantial risk" or similar concepts; Canadian jurisprudence interpreting the concept of "substantial risk" or similar concepts; Canadian policy instruments using the concept of "substantial risk" or similar concepts; as well as the practice of other States Parties to the ATT in implementing the concept of "overriding risk" as it appears in the ATT.

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4. In light of the above, the Department is of the view that the concept of "substantial risk" should be interpreted and applied as follows:

"Substantial risk" means a direct, present and foreseeable risk that the specific good or technology proposed for export would result in one or more of the negative consequences specified in subsection 7.3(1) of the EIPA.

In order to be “substantial”, the risk must be well-grounded in the evidence and must be more than mere possibility, theory or suspicion; however, it does not need to be highly likely. In most cases, the standard of “substantial risk” will be satisfied when it is more likely than not that the export would result in any of the negative consequences specified in subsection 7.3(1) of the EIPA.

“Substantial risk” is an absolute concept, not a relative one. Even where the predictable positive consequences of the arms export outweigh its negative consequences, the Minister must refuse to issue a permit if she finds there is a “substantial risk” that the export would result in any of the negative consequences specified in subsection 7.3(1).

A key element of any determination of “substantial risk” is whether the country of end-use has shown a pattern of repetitive behaviour with respect to any the negative consequences specified in subsection 7.3(1) in relation to similar arms exports.