

**CANADA: HUMAN RIGHTS CHAMPION OR PAWN TO AUTOCRATIC REGIMES IN THE
GLOBAL ARMS TRADE?**

**Response to the “Final report: Review of export permits to Turkey” published by
Global Affairs Canada**

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I. INTRODUCTION

In its *Final report: Review of export permits to Turkey* (the “**Final Report**”) published in April 2021¹, Global Affairs Canada (“**GAC**”) concludes that Electro-Optical/Infra-Red imaging and targeting sensor systems manufactured by the Canadian company L3Harris Wescam (the “**Targeting Sensors**”) and exported to Turkey were found in Nagorno-Karabakh (also known as “Artsakh”) and used by the government of Azerbaijan to target and attack the Armenian population in the region, all of which was contrary to the end-assurances given by Turkey and to Canada’s foreign policy.²

Yet, the Final Report is conveniently silent on the question of the responsibility of the Minister of Foreign Affairs (the “**Minister**” or “**Ministry**”) in the matter. In our opinion, given the criteria imposed by the *Export and Import Permits Act* (the “**EIPA**” or “**Act**”), the Minister should not have approved the export permits of Canadian military technology destined to Turkey in May 2020. Thus, the Final Report errs in its approach in that: (i) it omits to analyze the Minister’s initial decision to issue the export permits to Turkey in light of the EIPA’s criteria and (ii) it ignores the facts and evidence demonstrating the illegal use of this military technology by Turkey as well as the substantial risk which continues to exist today. As explained below, had the Minister diligently analyzed the EIPA’s criteria in light of the available evidence, he would have concluded that the export of L3Harris Wescam’s technology to Turkey was, and is, contrary to the Act. The Final Report also contains numerous inconsistencies and contradictions that will be highlighted hereafter.

* The views expressed in the present response are the authors’ own and do not necessarily represent the views of any organization with which they may be affiliated.

¹ Global Affairs Canada, “*Final report: Review of export permits to Turkey*”, April 19, 2020: <https://www.international.gc.ca/trade-commerce/controls-controles/reports-rapports/exp-permits-turkey-licences-turquie.aspx?lang=eng>

² Statement from Minister Garneau to announce the cancellation of export permits to Turkey, April 12, 2020: <https://www.canada.ca/en/global-affairs/news/2021/04/statement-fromminister-garneau-to-announce-the-cancellation-of-export-permits-to-turkey.html>

II. PRELIMINARY REMARKS

In light of the recent amendments to the EIPA, and contrary to GAC's contention in the Final Report, the Minister no longer benefits from a broad discretionary power when analyzing export permit applications of military technology. In 2019, Canada amended the EIPA in anticipation of its adherence to the Arms Trade Treaty (the "ATT").³ As such, Canada incorporated the ATT's more stringent assessment factors to sections 7.3 and 7.4 of the EIPA pursuant to which the Minister *shall not* issue an export permit in respect of arms or ammunitions if he determines that there is a "substantial risk" that the export would result in any of the six (6) negative consequences (also referred to as "criteria") set out under section 7.3(1) of the EIPA, namely that the arms, ammunition, implements or munitions would undermine peace and security or could be used to commit or to facilitate a serious violation of international humanitarian law or of international human rights law, among others. Thus, contrary to GAC's contention, the addition of sections 7.3 and 7.4 to the Act have greatly limited, if not removed, the Minister's discretionary power in the analysis of an export permit application; a limit which did not exist under the previous version of the Act.

For example, in analyzing the Minister's discretion under the previous version of the Act, the Federal Court of Appeal stated that the Minister (i) had the discretion to consider the criteria provided in the Act such as the risk of violation of international humanitarian law and international human rights law and (ii) could decide to give these criteria more or less weight as compared to other external factors, such as economic considerations or potential impacts on relations with other States.⁴ Under the amended Act, however, the criteria under section 7.3 of the Act must mandatorily be considered and cannot be set aside in light of other external considerations. In fact, the only limit provided under section 7.4 of the EIPA is the existence of mitigating measures, in the absence of which the Minister must refuse to issue the permit. In fact, in their study of Bill C-47, which amended the EIPA, the *Standing Senate Committee on Human Rights* recommended that the government adopt the prohibition now found at section 7.4 of the EIPA in order to give more weight to the human rights violation criteria in the evaluation of export permit applications.⁵ According to the Committee, "Canada should not compromise human security for the benefit of its commercial interests".⁶

³ United Nations, Chapter XXVI, 8. ATT, April 2, 2013, <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>. The ATT, adopted by the UN General Assembly on April 2, 2013 and entered into force on December 24, 2014, is the "first legally-binding instrument ever negotiated in the United Nations to establish common standards for the international transfer of conventional weapons."

⁴ *Turp v. Canada (Foreign Affairs)*, 2018 CAF 133, paras. 54, 56, 58 and 62 (application to appeal to the Supreme Court of Canada dismissed, SCC, n. 38321, April 11, 2019)

⁵ Standing Senate Committee on Human Rights' Report, "Promoting Human Rights. Canada's Approach to its Export Section, June 2018, p. 21-22:

https://sencanada.ca/content/sen/committee/421/RIDR/reports/2018-06-04_ExportandImport_e.pdf

⁶ *Ibid*

Secondly, we note that the Minister erroneously describes five (5) of the six (6) criteria provided under the EIPA (referred to under criteria 2 to 6 of the Final Report).⁷ As such, necessary nuances are lost in the Final Report leading GAC to apply an incorrect and higher threshold to the substantial risk test for criteria no. 2 to 6, than what is actually provided by the EIPA. For example, the Minister phrases the second criteria as follows in the Final Report:

“Is there a substantial risk that **military goods and technology** exported to Turkey **would be used** to commit or facilitate serious violations of international humanitarian law (IHL)?”.

Yet, a correct reading of sections 7.3(1)(b)(i) and 7.4 of the EIPA (or of the second criteria of the Final Report) should be rephrased as follows:

“Is there a substantial risk that the export of military goods and technology to Turkey would result in a negative consequence referred to in subsection 7.3 (1), that is, whether there is a substantial risk that the **military goods or technology** **could be used** to commit or facilitate a serious violation of international humanitarian law (IHL)?”.

Therefore, the correct assessment pursuant to the EIPA is whether there is a substantial risk that the technology “**could**” be used to commit or facilitate “**a**” serious violation and not whether it “**would**” be used to commit or facilitate serious “violations”. These same comments apply to criteria no. 3 to 6 in the Final Report. As such, our analysis of the Final Report will describe the criteria based on the correct language and test as set out in the Act and will necessarily differ from the descriptions of criteria no. 2 to 6 of GAC’s Final Report.

As detailed below, an analysis of the six (6) mandatory criteria under the Act demonstrates that there was a substantial risk both in May 2020, and even today, that the military technology exported to Turkey could be used to commit or facilitate *a number* of the serious violations identified in the Act. Therefore, the Minister did not properly apply the EIPA’s new criteria when it concluded that no such risks exist under the Act.

III. GAC’S APPLICATION OF THE MANDATORY CONSIDERATIONS PROVIDED UNDER THE EIPA IS INCORRECT AND DEMONSTRATES A NUMBER OF INCONSISTENCIES

A. Criterion 1 – There was a substantial risk that the export of Canadian military technology to Turkey would undermine regional and international peace and security (section 7.3 (1) (a) EIPA)

Pursuant to sections 7.3 (1) (a) and 7.4 of the Act, when there is a substantial risk that the export in question would undermine peace and security, the Minister shall not issue a

⁷ Which corresponds to section 7.3 (1) (b) (i) to (v) of the EIPA.

permit. In fact, 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.”⁸ In other words, substantial risk does not have to be highly probable.⁹

It is therefore surprising that even after admitting that the exports to Turkey (i) “could be used to violate the general prohibition on the threat or use of force” and (ii) “could be used to illegitimately intervene in matters within the domestic jurisdiction of another State”, the Minister nonetheless concludes that there is no substantial risk “despite recent instances that warrant some concerns.” Yet, these assertions satisfy the substantial risk threshold in that it becomes more likely than not that the export of L3Harris Wescam’s technology will result in the negative consequence set out under the first criterion of section 7.3 of the Act.

As can be seen from Turkey’s track record and considering its interventionist and bellicose military policy, Turkey has and continues to intervene in conflicts which interfere with the national jurisdiction of other States, such as in Libya and in Syria and more recently in Artsakh. These actions undoubtedly cause a significant imbalance to regional peace and security.

In the Libyan armed conflict, numerous facts reveal that Turkey is among the main actors of this regional war. Despite a UN arms embargo on Libya¹⁰, Turkey is one of the main suppliers of arms and TB2 unmanned aerial vehicles (“UAV”) to the Government of National Accord (“GNA”)¹¹, one of the two factions in the Libyan civil war (the other being the Libyan National Army).¹² Both factions have been accused of serious international humanitarian law violations which, according to *Human Rights Watch*, could amount to war crimes.¹³

⁸ GAC, “Final report : Review of export permits to Saudi Arabia”: <https://www.international.gc.ca/trade-commerce/controls-controles/memo/annex-a-ksa.aspx?lang=eng#subs1> (“**Final Report on Saudi Arabia**”), para. 14

⁹ *Id*

¹⁰ S/RES/1970 (2011) imposes an arms embargo on arms, a travel ban as well as an asset freeze in relation to the situation in the Libyan Arab Jamahiriya: [https://www.undocs.org/en/S/RES/1970%20\(2011\)](https://www.undocs.org/en/S/RES/1970%20(2011))

¹¹ *Ibid.*, p. 26. See also, United Nations Security Council, S/2019/914, *Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council* (“**Panel of Experts on Libya**”), paras. 111 to 121, tables 5, 27.1 and 45: <https://undocs.org/S/2019/914>

¹² Kelsey Gallagher, *Killer Optics: Exports of WESCAM Sensors to Turkey – A Litmus Test of Canada’s Compliance with the Arms Trade Treaty*, “Ploughshares Report”, September 2020, p. 20 : <https://Ploughshares.ca/wp-content/uploads/2020/09/TurkeyWESCAMReportSept.2020.pdf> (“**Ploughshares Report**”)

¹³ Human Rights Watch, *Libya: Events of 2018*, <https://www.hrw.org/world-report/2019/country-chapters/libya>

As a main weapons supplier to the GNA¹⁴, (including TB2 UAVs)¹⁵, it is no wonder that the United Nations Security Council *Panel of Experts on Libya* concluded that Turkey “routinely and sometimes blatantly supplied weapons, employing little effort to disguise the source”¹⁶ and illegally transported military material to Libya.¹⁷ In their most recent report from March 2021, the same experts highlighted Turkey’s ongoing violation of the Libyan arms embargo.¹⁸

Furthermore, although GAC claims there is insufficient credible evidence indicating whether the UAVs supplied to the GNA during this period were equipped with Canadian Targeting Sensors, they nonetheless admit that they “most likely” were. This position is not only contradictory on its face, but also disregards the fact that the 13 Bayraktar TB2 drones exported from Turkey to Libya¹⁹ were equipped with Canadian military technology, as demonstrated by the photos and videos published on the GNA’s social networks displaying shot down Bayraktar TB2 drones equipped with the Targeting Sensors.²⁰ In the Final Report, the Minister also concedes that the drone manufacturer (the Turkish company Baykar) lists the Targeting Sensors as “the exclusive sensor technology for Baykar’s UAVs”, in their catalogue.

GAC’s position on the armed conflict in Syria is also contradictory. How can GAC claim that Turkey’s use of force was for the legitimate protection of its territorial integrity when Turkey’s unilateral military invasion of Syria in October 2019²¹ was severely condemned by Canada and the international community and led to the imposition of an arms embargo on Turkey – embargo which was also in effect when the Minister assessed the export

¹⁴ Amnesty International, *Libya’s Relentless Militia War: Civilians harmed in the battle for Tripoli, April-August 2019*, <https://www.amnesty.org/download/Documents/MDE1912012019ENGLISH.PDF>, p. 26

¹⁵ Panel of Experts on Libya, note 10

¹⁶ Panel of Experts on Libya, note 10, p. 2

¹⁷ *Id.*, paras. 60, 116 et 118. Of note, among the Canadian measures imposed against Libya, and as stated by GAC, the latter prohibits the supply, sale or transfer of arms and related material of all types to Libya.

¹⁸ United Nations Security Council, S/2021/229, *Letter dated 8 March 2021 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, paras. 57, 69, 76 : <http://undocs.org/en/S/2021/229>

¹⁹ Panel of Experts on Libya, note 10, par. 111 to 121, tables 5, 27.1 and 45.1

²⁰ *Ibid*, figure 13,. See also (i) the “tweet” from Harry Boone from December 13 2019, <https://twitter.com/towersight/status/1205527187086102530?s=20> (ii) the article from Almarsad from December 14 2019 titled “LNA Warns Civilian Ships and Cargo Aircraft Against Transporting Military Equipment”, <https://almarsad.co/en/2019/12/14/lina-warns-civilian-ships-and-cargo-aircraft-against-transporting-military-equipment/> and (iii) the article from Forbes from September 28 2020 intitled “Turkish Drones Over Nagorno-Karabakh – And Other Updates From A Day-Old War” <https://www.forbes.com/sites/sebastienroblin/2020/09/28/turkish-drones-over-nagorno-karabakh-and-other-updates-from-a-day-old-war/?sh=a75c67c70da7>

²¹ Of note, during Turkey’s military operations in Syria, Bayraktar TB2 drones equipped with Targeting Sensors did 382 trips and dropped weapons on 49 occasions. On another 680 occasions, they found and designated targets for ensuing kinetic action by Turkey’s T129 ATAK helicopters, F-4 and F-16 tactical fighters as well as artillery. See AIN Online, Vladimir Karnozov, “Turkey’s Use of UCAVs Over Syria Detailed”, May 1, 2018: <https://www.ainonline.com/aviation-news/defense/2018-05-01/turkeys-use-ucavs-over-syria-detailed>

permit applications? It was incumbent upon the Minister to take both the embargo and Turkey's past behaviour into account when assessing the substantial risk of repeat behaviour. Instead, the Minister discounted them based on an "additional" assurance from the Turkish Minister of Foreign Affairs who alleged that the Targeting Sensors would be used to "protect" civilians in Idlib (Syria), which was obviously not the case.

The Minister also did not consider the substantial risk to peace and security to Nagorno-Karabakh when making his decision in May 2020. GAC claims that it was only on October 5, 2020 that it was made aware of the possible transfer of UAVs equipped with Targeting Sensors to Azerbaijan. This statement simply does not hold water when considering the numerous red flags that should have warned the Minister of the existence of this risk.

First, GAC could not ignore that on February 25, 2020, Turkey and Azerbaijan signed a military cooperation agreement in Baku further to which Turkey would provide a total of 200 million Turkish lira (the equivalent of approximately \$34 million dollars) in military financial support to Azerbaijan for the purchase of military products from Turkey which, in all likelihood, was to purchase Bayraktar drones worth \$5 million each.²² During this same period, Turkey also continued its military offensive in the Syrian province of Idlib²³ and both Baykar and the Turkish government began actively lobbying the Canadian government, namely in February and April 2020,²⁴ seeking approvals for the export of the Targeting Sensors – facts which are all omitted from the Final Report.

Second, the majority of sources cited in the Final Report with regard to the use of Turkish drones during the conflict in Nagorno-Karabakh, such as articles in the Turkish press from June and July 2020²⁵ (indicating Azerbaijan's intent to purchase drones from Turkey) as

²² Nordic Monitor, "Azerbaijan to Purchase Turkish drones in line with growing defense industry ties", June 17, 2020: <https://nordicmonitor.com/2020/06/azerbaijan-to-purchase-turkish-drones-in-line-with-growing-defense-industry-ties/>. See also: National Interest, Caleb Larson, "Attack! Turkey and Azerbaijan Are Teaming Up on Drones", June 26, 2020: <https://nationalinterest.org/blog/buzz/attack-turkey-and-azerbaijan-are-teaming-drones-163615>

²³ *Ibid.*, Nordic Monitor

²⁴ CBC, Levon Sevunts "Disarmament group calls on Canada to ban exports of military drone tech used by Turkey", September 22, 2020: <https://www.cbc.ca/news/politics/drone-sensor-laser-turkey-syria-middle-east-plowshares-1.5734594>. See also: Globe and Mail, Steven Chase, "Canada issued permits for export of target acquisition gear to Turkey in May despite arms embargo", October 1, 2020:

<https://www.theglobeandmail.com/politics/article-canada-issued-permits-for-export-of-target-acquisition-gear-to-turkey/> and Ricochet, Jon Horler, "Feds won't say how Canadian drone tech wound up in Azerbaijan-Armenia war", November 27, 2020: <https://ricochet.media/en/3388/feds-wont-say-how-canadian-drone-tech-wound-up-in-azerbaijan-armenia-war>

²⁵ Daily Saba, "Azerbaijan to purchase Turkish-manufactured combat drones", June 23, 2020: <https://www.dailysabah.com/business/defense/azerbaijan-to-purchase-turkish-manufactured-combat-drones>; Defense News, "Azerbaijan to buy armed drones from Turkey", June 25, 2020: <https://www.defensenews.com/unmanned/2020/06/25/azerbaijan-to-buy-armed-drones-from-turkey/>. Daily Saba, "Turkish defense industry to back Azerbaijan with UAVs, tech, and knowledge", July 17, 2020: <https://www.dailysabah.com/business/defense/turkish-defense-industry-to-back-azerbaijan-with-uavs-tech-and-knowledge>. See also: The Guardian, "UK wants new drones in wake of Azerbaijan military

well as Project Ploughshares' report²⁶ (analyzing the substantial risk of EIPA violations created by the export of Targeting Sensors to Turkey), were published before October 5, 2020 and therefore were, or should have been, known by the Minister. In July 2020, international media also reported that Turkish drones, which exclusively use Targeting Sensors, were employed by Azerbaijan in military clashes with Armenia.²⁷ Moreover, Turkey sent military exports valued at more than \$123 million to Azerbaijan between January and September 2020 – a military export volume that was six (6) times greater than the previous year.²⁸ Most of these acquisitions of military equipment were made in the two (2) months prior to the military outbreak of September 27, 2020 (purchases worth \$36 million were made in August 2020 and \$77 million in September 2020).²⁹ In fact, the images of drones found in Nagorno-Karabakh showed Targeting Sensors with a June 2020 production date and drones with a September 2020 production date.³⁰

Furthermore, GAC evidently did not follow up on the use of the Targeting Sensors exported to Turkey in the summer of 2020 despite (i) the information at its disposal regarding the acquisition of Turkish Bayraktar drones by Azerbaijan (ii) the increasing tensions in the region and (iii) the use of Turkish drones during that same summer. Worse: the Canadian government recently admitted to the *Standing Committee on Foreign Affairs and International Development* of the House of Commons (“FAAE”) that it was aware of the “flare-up” between Azerbaijan, Armenia and Artsakh in July 2020 (which caused the death of 16 people), but that at the time, the “flare-up” “did not appear to be taking on what we would see down the road, a few months later”.³¹ Yet, tensions between these countries and Turkey had been increasing in recent months – tensions which approximately ten (10) days later in August 2020 culminated in large-scale military exercises organized by Turkey and Azerbaijan³² as well as the massive acquisition of military equipment, as detailed above.

success”, December 29, 2020: <https://www.theguardian.com/world/2020/dec/29/uk-defence-secretary-hails-azerbajians-use-of-drones-in-conflict>

²⁶ Ploughshares Report, note 12

²⁷ Forbes, “Azerbaijan threatens Chernobyl style ‘Catastrophe’ in Caucasus Drone War”, July 17, 2020: <https://www.forbes.com/sites/davidhambling/2020/07/17/threat-of-chernobyl-style-catastrophe-in-caucasus-drone-war/?sh=19f43f427946>

²⁸ Reuters, Ece Toksabay, “Turkish Arms Sales to Azerbaijan surged before Nagorno-Karabakh Fighting”, October 14, 2020: <https://www.reuters.com/article/uk-armenia-azerbaijan-turkey-arms-idUKKBN26Z22A>.

²⁹ *Ibid*

³⁰ ArmLur, “Le capteur du drone a été produit en juin 2020 au Canada” (in Armenian), October 20, 2020 : <https://armlur.am/1053763/>

³¹ Testimony of Ms. Sandra McCardell, Assistant Deputy Minister, Europe, Arctic, Middle East and Maghreb, Department of Foreign Affairs, Trade and Development, to GAC before the FAAE on April 13, 2021: <https://www.ourcommons.ca/DocumentViewer/en/43-2/FAAE/meeting-26/evidence#Int-11229790>

³² Declaration of the Ministry of Defence of the Republic of Azerbaijan, “Azerbaijani-Turkish Joint Large Scale Military Exercises Will be Held in Our Country”, July 27, 2020 :

Neither the violence of July 2020 nor the obvious military rapprochement between Turkey and Azerbaijan were taken seriously by GAC, which fails to mention the conflicts in the Caucasus in its briefing notes to the Minister before the latter's call with the Turkish Minister of Foreign Affairs on September 17, 2020.³³ In fact, the conflict is only mentioned, albeit too late, in a subsequent note to the Minister, after the outbreak of hostilities in Nagorno-Karabakh, which states that "concerning" information was published earlier that same year by Turkish media regarding the possible transfer of UAVs equipped with Targeting Sensors from Turkey to Azerbaijan.³⁴

It is also important to note that Azerbaijan was not, and is still not, an approved final end-user for the export of military technology by Canada as it is subject to an embargo from the OSCE (of which Canada is a State Party) due to the conflict in Nagorno-Karabakh.³⁵ Thus, GAC's statement in the Final Report that "[t]here are no sanctions in place in relation to the parties involved in the Nagorno-Karabakh conflict" is incorrect. Furthermore, considering the recent diversion of military equipment from Turkey to Azerbaijan and the existence of this embargo, Canada cannot, under these circumstances, rule out the substantial risk of violations of the Act's criteria by allowing the continued export of military equipment to Turkey. As demonstrated by Turkey's behaviour, the latter obviously does not respect the OSCE's embargo (of which it is also a State Party), as it sends military supplies, including drones equipped with Targeting Sensors, to Azerbaijan thereby completely destabilizing the peace and security in the region.

In view of the foregoing, what was the Minister waiting for and why did he not cancel or at least suspend the relevant permits earlier? Could he (or should he) have taken measures to investigate the use of the Targeting Sensors and/or request a follow-up from Turkey regarding their use?

Paradoxically, such follow-up measures are among those mentioned and recommended in the Final Report when dealing with an export that poses a substantial risk. The Final Report states that the Minister is required to consider all "available mitigating measures" that could reduce the substantial risk threshold, including obtaining an undertaking regarding the use of the exported goods, proceeding to post-shipment controls and executing intergovernmental agreements that include information exchange and transparency provisions.

<https://mod.gov.az/en/news/azerbaijani-turkish-joint-large-scale-military-exercises-will-be-held-in-our-country-31623.html>

³³ See the documents submitted to the FAAE titled "Minister of Foreign Affairs- Documents submitted", March 12 2021, p. 137, available on line at :

<https://www.ourcommons.ca/content/Committee/432/FAAE/WebDoc/WD11171604/11171604/MinisterOfForeignAffairs-e.pdf>

³⁴ *Ibid*, p. 144

³⁵ Stockholm International Peace Research Institute, "OSCE Arms Embargo on Nagorno-Karabakh": https://www.sipri.org/databases/embargoes/eu_arms_embargoes/azerbaijan

What did the Minister do in the case at hand? Firstly, although the Act allows possible mitigating measures, the Minister erroneously contended himself with a simple written assurance from the Turkish government that it would not “divert, re-export or transfer” the Targeting Sensors to any third party but without requiring any additional verification, penalty or control mechanisms to support this assurance. How could the Minister be content with and rely on mere assurances from a government that unscrupulously violates international arms embargos, acts contrary to international law and poses a substantial risk to the export of arms and ammunitions?

Secondly, during its evaluation of the export permit applications to Turkey, GAC applies evaluation criteria that are external to those provided in the Act, namely that of “exceptional circumstances”.³⁶ In fact, in almost all of its charts analyzing permit applications, GAC refers to exceptional circumstance “D” to justify their approval, i.e. that “[t]here are grounds to think that there will be especially negative impacts on bilateral relations, which could impact Canada’s foreign policy, security, and/or defense interests.”³⁷ Respectfully, this is not a criterion under the law and cannot constitute a mitigating measure within the meaning of the Act nor is it cited as such in the Final Report.

Ultimately, it was not until October 5, 2020, more than one week after Azerbaijan’s attacks against Armenia and Artsakh (when it was already too late and Canada had already contributed to equipping Azerbaijan’s armed forces with weapons, destabilizing peace and security in the region and resulting in violations of international law), that Canada began addressing the consequences of its actions. Multiple correspondence published by the Canadian government demonstrate that even after the fact, Turkey refused to cooperate with the government and provide the requested information regarding the transfer of ammunition to Azerbaijan.

What’s worse is that even after the April 2021 announcement pursuant to which the Minister declared having cancelled the export permits that had previously been suspended (permits that would in any case have expired a few months later³⁸ and that related to goods that had already been exported), the only so-called measure announced by the Minister is a “dialogue mechanism [...] to build mutual confidence and greater cooperation” with Turkey.³⁹ The Minister makes no announcement regarding an investigation or the application of sanctions against Turkey or L3Harris. The Minister also does not announce the implementation of a process to review its own approval system and/or to understand why GAC erroneously issued the permits in May 2020. On the

³⁶ See the documents submitted to the FAAE titled “Minister of Foreign Affairs- Documents”, note 30, p. 57. See also GAC’s evaluation tables in the document titled “Department of Foreign Affairs- Documents submitted”, dated February 16, 2021 and published on March 12, 2021, p. 162 and following, available on line at: <https://www.ourcommons.ca/Committees/en/FAAE/StudyActivity?studyActivityId=11056320>

³⁷ *Ibid*, “Department of Foreign Affairs- Documents submitted”, p. 162 and following

³⁸ Globe and Mail, Steven Chase, “Ottawa suspends export permits for targeting gear allegedly used in Armenia-Azerbaijan conflict”, 5 octobre 2020: <https://www.theglobeandmail.com/politics/article-ottawa-suspends-export-permits-on-some-military-equipment-destined-for/>

³⁹ Statement from Minister Garneau, note 2

contrary, the approval of future export permits to Turkey remains possible, on a case-by-case basis (like before) without any specific monitoring or verification measures. Will Canada continue to solely rely on end-user certificates without any other surveillance measures, especially when such assurances are obviously not respected? How can we enforce the obligations of an importing or exporting government or of a Canadian company when there have been no consequences or acceptance of blame for any of these mistakes?

Moreover, if the Minister claims that there is not substantial risk that the export of Canadian military technology to Turkey undermines the national or regional peace and security, why did he cancel the export permits? This contradictory stance is even more aberrant given the fact that Turkey's implication in the Nagorno-Karabakh conflict completely changed the status quo in the region and that the conflict remains unresolved since the question at the heart of said conflict, i.e. the status of Artsakh, remains unresolved. The Final Report does not assess the future risks associated with the continued and disproportionate arming of Azerbaijan by Turkey and/or the risks that another conflict will erupt in Nagorno-Karabakh given the fragile November 9, 2020 ceasefire and/or the eventual withdrawal of Russian peacekeepers in five (5) years. In fact, even after the November cease-fire, Azerbaijan has continued to make threats of use of force against Armenia.⁴⁰

The Final Report also fails to mention the fact that Canada, through its actions, violated sections 7.3 and 7.4 of the EIPA since there was a substantial risk that the export of Canadian military technology would undermine the peace and security of the region, that the risk did in fact materialize and that it continues to exist considering Turkey's continued and unequivocal involvement in the conflicts in Libya and Syria. In that regard, we reiterate the European Parliament's remarks that Turkey's military operations constitute serious and recurrent attempts to compromise regional stability and its unilateral military actions have caused serious suffering among civilian populations, destabilization of the entire region and a decline in democracy.⁴¹ Moreover, Turkey also contributed to the escalation of the conflict in Libya and Nagorno-Karabakh by recruiting and sending Syrian

⁴⁰ Asbarez, "Aliiev threatens to take Zangezur by force 'Whether Armenia Wants it or Not', <https://asbarez.com/201904/aliyev-threatens-to-take-zangezur-by-force-whether-armenia-wants-it-or-not/>

⁴¹ Motion for resolution B-9-1027/2019 tabled following a statement from the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy: https://www.europarl.europa.eu/doceo/document/B-9-2019-0127_FR.pdf

jihadist mercenaries which was condemned by the United Nations' *Working Group on the use of mercenaries* both in June⁴² and in November⁴³ 2020.

For these reasons, and contrary to GAC's contention, there was a substantial risk that the export of L3Harris Wescam's technology to Turkey would undermine regional and international peace and security. As such, the Minister should have refused to issue the export permits to Turkey and to recognize the existence of a continuing and current substantial risk to peace and security.

B. Criterion 2 – There was a substantial risk that the Canadian military goods or technology exported to Turkey could be used to commit or facilitate a serious violation of international humanitarian law (“IHL”) (section 7.3 (1) (b) (i) EIPA)

IHL is comprised of a set of wartime rules that protect people who do not, or no longer, take part in hostilities. One of these rules prohibits indiscriminate attacks against civilian populations⁴⁴ protecting people who do not take part in combat, such as civilians and medical or religious personnel, as well as people who cease combat, such as wounded or sick combatants. Once more, in its evaluation as to whether there is a substantial risk that

⁴² “Turkey has engaged in large-scale recruitment and transfer of Syrian fighters to take part in hostilities in support of the GNA. These fighters were recruited through armed factions affiliated with the Syrian National Army that have been accused of serious human rights abuses in Syria [...]. We are concerned that these children come from an extremely vulnerable social and economic situation and are being exploited for the purpose of recruitment as mercenaries.” The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, “Libya: Violations related to mercenary activities must be investigated – UN experts”, June 17, 2020:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25970&LangID=E>

⁴³ “Moreover, reports indicate that Turkey engaged in large-scale recruitment and transfer of Syrian men to Azerbaijan through armed factions, some of which are affiliated with the Syrian National Army.” The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, “Mercenaries in and around the Nagorno-Karabakh conflict zone must be withdrawn – UN experts”, November 11, 2020:

https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26494&LangID=E&fbclid=IwAR0_JnkNB7eo-EgeedExyVrl0wruHYff4BwhgLDJDEQPSFAFDS9Ax3DBQxvo

⁴⁴ Pursuant to s. 51 4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I): <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument>. See also: UN Human Rights Office of the High Commissioner “Indiscriminate Attacks and Indiscriminate Weapons in International Humanitarian Law”, https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/in_discriminate_weapons_legal_note_-_final_new_format_-_en_3.pdf. Although Turkey is not a State party to Protocol I, customary law - which stems from the fact that over time, IHL's principles were erected as “a general practice accepted as law” – applies to all parties to a conflict. Customary law is comprised of 161 rules, included rule 11 which prohibits indiscriminate attacks. See Canadian Red Cross, “What is International Humanitarian Law”: https://www.redcross.ca/how-we-help/international-humanitarian-law/what-is-international-humanitarian-law?lang=en-ca&_ga=2.157983866.1347054213.1620004454-1205444547.1613930267

the export of the Targeting Sensors could be used to commit or *facilitate* a serious violation of international humanitarian law, GAC makes contradictory statements.

First, although GAC admits that the United Nations Office of the High Commissioner for Human Rights (“OHCHR”) asserts that there have been attacks on civilian areas in Nagorno-Karabakh in violation of IHL and that Armenia has published reports of such violations, notably caused by drone airstrikes, GAC surprisingly and briefly concludes that “there is no credible evidence that the UAVs have been used by Azerbaijan to commit or facilitate serious violations of IHL”. As detailed below, this conclusion demonstrates that the Canadian government (i) decided to ignore existing government and media reports⁴⁵ that indicate the substantial risk that this technology enabled and/or facilitated IHL violations and (ii) made no effort to collect additional information on the subject, preferring to state that no such information exists. In doing so, GAC essentially takes advantage of the fact that the population of Nagorno-Karabakh is knee-deep in a humanitarian crisis and that Armenia is grappling with a wave of migrants (85% of Artsakh’s population having been displaced during the conflict due to the incessant bombing of densely populated areas⁴⁶), thus limiting current resources and the ability to carry out additional investigations – not to mention the fact that neither Armenia nor Artsakh have received any help from Western NGOs to carry out such investigations, contrary to the involvement of UN expert panels consistently reporting on the conflicts in Libya and Syria.

Also, given the availability of many reports describing the damages caused by Turkish drones to the civilian Armenian population and to civilian infrastructures, GAC apparently made very little or no effort to collect information on the situation, or perhaps worse, simply decided to ignore the available evidence. A phone call to the *Human Rights Ombudsman of the Republic of Artsakh* and/or the *Human Rights Defender of Armenia* or even a simple search on their respective websites would have enabled GAC to take cognizance of numerous reports regarding drone airstrikes and other weapons used to

⁴⁵ See for example, the following articles reporting the targeting of civilians and civilian infrastructures: **One civilian killed and two injured on October 1, 2020 by drone strike:** <https://artsakhpress.am/arm/news/133404/hakarakordy-hretani-e-kirarel-hh-gexarqunig-marzi-uxxutyamb-qaxaqaciakan-andz-e-zohvel-hh-pn-khosnak.html>. See also, the Human Rights Defender of the Republic of Armenia’s report, p. 2: <https://www.ombuds.am/images/files/de3634c257bb698735db318a33f280bf.pdf>; **A community high school in the province of Gegharkunik in Armenia was targeted by a drone:** <https://armlur.am/1053207/>; **A 14-year-old (Narek Arzoyan) was hit by a drone on October 14, 2020 while in a potato field in Armenia:** <https://armlur.am/1051924/>; <https://armlur.am/1054574/>; **A 13-year-old from the Martakert region in Artsakh was hit by a drone on September 27, 2020 while fleeing bombardments and was in a coma for five days:** <https://armlur.am/1051477/>; **A bus was targeted by drone attack:** <https://armlur.am/1045669/>; **Several bombings targeting civil areas and civil infrastructures:** <https://hetq.am/hy/article/124013>

⁴⁶ United Nations International Children’s Emergency Fund, “UNICEF statement on one month of fighting in and beyond Nagorno-Karabakh”, October 28 2020: <https://www.unicef.org/press-releases/unicef-statement-one-month-fighting-and-beyond-nagorno-karabakh>

launch indiscriminate attacks against the civilian Armenian population of Artsakh.⁴⁷ In doing so, GAC would have seen that Azerbaijani armed forces attacked more than 130 densely populated areas (such as the capital of Stepanakert as well as the towns of Shushi, Hadrut, Martuni, Askeran, Karvajar, Berdzor, etc.) with aerial, artillery and rocket fire strikes. These areas were targeted without any effort to distinguish civilians from military targets.⁴⁸

In fact, from September 27, 2020 until at least November 10, 2020, Azerbaijan used drones equipped with L3Harris Wescam's technology to carry out planned, targeted and deliberate attacks on civilians in densely populated residential areas, all of which were located far from any military target. In total, 72 civilians were killed, 41 of them from long-range airstrikes, and 163 civilians were injured.⁴⁹ The Ombudsman's report also confirms that at least three (3) civilians lost their lives due to a direct drone airstrike.⁵⁰

⁴⁷ https://artsakhombuds.am/en/ad_hoc_reports. See for example, *The Human Rights Ombudsman of the Republic of Artsakh ("HRORA")*, "Interim Report on the Azerbaijani Atrocities against Artsakh Population in September 2020", October 1, 2020 : https://artsakhombuds.am/sites/default/files/2020-10/Artsakh-Ombudsman-report-on-Azerbaijan-atrocities-01.10.2020_4.pdf; *The Human Rights Defender of the Republic of Armenia ("HRDRA")*, "Ad Hoc Report on Fact-Finding Activities in Villages of Gegharkunik Province of Armenia Damaged by Azerbaijani Military Attacks", September 30 – October 1, 2020: <https://www.ombuds.am/images/files/dc1b379419a1a9aaeec5191128277502.pdf>; HRDRA, "Ad Hoc Public Report on Azerbaijani Drones' Targeted Attacks against Peaceful Population of Armenia and Artsakh in Grave Breach of International Law", October 2020: <https://www.ombuds.am/images/files/de3634c257bb698735db318a33f280bf.pdf>; HRORA, "Updated Edition of the Second Interim Report on the Azerbaijani Atrocities against the Artsakh Population in September-October 2020", October 18 2020: https://artsakhombuds.am/sites/default/files/2020-10/new-Artsakh-Ombudsman-updated-second-interim-report-on-the-Azerbaijani-atrocities-in-September-October-2020-18.10.2020_3.pdf; HRORA, "Ad Hoc Public Report on the Azerbaijani Targeted Attacks against the St. Holy Savior Ghazanchetsots Cathedral of Shushi, Artsakh (Nagorno Karabakh) as a War Crime and Crime against Humanity", October 20, 2020: https://artsakhombuds.am/sites/default/files/2020-10/Report_Ghazanchetsots_Cathedral_20.10.2020.pdf; HRDRA, "Ad Hoc Report on Azerbaijani Military Attacks against Davit Bek and Agarak Villages of Syunik Province", October 30 – November 3, 2020: <https://www.ombuds.am/images/files/86cfd80eb354d0f2a600831371bb32c3.pdf>; HRDRA and HRORA, "Joint Ad Hoc Public Report on the Use of Incendiary Ammunition of Mass Destruction (Incendiary Weapon) Against Civilian Objects of Artsakh (Nagorno-Karabakh) by the Azerbaijani Armed Forces", November 2020: <https://artsakhombuds.am/sites/default/files/2020-11/Report-On-White-Phosphorus.pdf>; HRORA, "Ad Hoc Report on the Children's Rights Affected by the Azerbaijani Attacks against the Republic of Artsakh (Nagorno-Karabakh)", November 9, 2020: https://artsakhombuds.am/sites/default/files/2020-11/Artsakh-Ombudsman-report-on-children-rights-09.11.2020_0.pdf. HRDRA and HRORA also jointly and confidentially published the "Sixth Ad Hoc Report on Torture and Inhuman Treatment of Members of Artsakh Defence Army and Captured Armenians by Azerbaijani Armed Forces", a copy of which can be obtained by contacting HRORA directly.

⁴⁸ *Ibid.*

⁴⁹ HRORA, "Interim Report on the Cases of the Killing of Civilians in Artsakh by the Armed Forces of Azerbaijan (Updated on January 28, 2021)", January 28, 2021: <https://artsakhombuds.am/en/document/785>

⁵⁰ *Ibid*

The reports published during the conflict also demonstrate the wide range of damages caused by Azerbaijani armed forces in Artsakh. Azerbaijan intentionally destroyed more than 19,000 buildings and property,⁵¹ over 25 crucial energy and electricity stations,⁵² and several key communication stations and networks.⁵³ More than one third of all schools in Artsakh were shelled (71 schools and 14 kindergartens).⁵⁴ In light of the foregoing, how can one honestly believe that there is no substantial risk that Azerbaijan's Turkish drones were involved in carrying out serious damages in violation of IHL?

On 28 October 2020, Artsakh's Maternity and Child Health Center in Stepanakert was also bombed.⁵⁵ Patients (including children) had already sought refuge in the hospital's basement at the time. The Azerbaijani forces also intentionally attacked the 19th Century Holy Savior Ghazanchetsots Cathedral at the center of the city of Shushi⁵⁶ with the use of drones.⁵⁷ Civilians had taken refuge in the church basement at the time. The attack injured three journalists⁵⁸ and killed 28-year-old resident Grisha Narinyan who was

⁵¹ HRDRA and HRORA, "Ad Hoc Public Report on the Use of Incendiary Ammunition of Mass Destruction (Incendiary Weapon) Against Civilian Objects of Artsakh (Nagorno-Karabakh) by the Azerbaijani Armed Forces", November 2020, p. 4: <https://artsakhombuds.am/sites/default/files/2020-11/Report-On-White-Phosphorus.pdf> [Ad Hoc Report on the Use of Incendiary Ammunition]

⁵² *Second Interim Report on the Azerbaijani Atrocities*, p. 19 : https://www.mfa.am/filemanager/NKR_war_2020/nk_hr/3.pdf

⁵³ *Ibid.*, p. 21

⁵⁴ *Ad Hoc Report on Children's Rights*, p. 10: <https://artsakhombuds.am/sites/default/files/2020-11/Artsakh-Ombudsman-report-on-children-rights-09.11.2020.pdf>; See also: Unicef, "Unicef Statement on one month of fighting in and beyond Nagorno Karabakh", 28 October 2020 : <https://www.unicef.org/armenia/en/press-releases/unicef-statement-one-month-fighting-and-beyond-nagorno-karabakh>

⁵⁵ *Ad Hoc Report on Children Rights*, p. 15: <https://artsakhombuds.am/sites/default/files/2020-11/Artsakh-Ombudsman-report-on-children-rights-09.11.2020.pdf> See also video footages published October 28, 2020 by the Artsakh Ombudsperson, the Armenian Ministry of Defense and the Armenian Unified Info Center: <https://www.facebook.com/artak.beglaryan/videos/3668331173205093> ; <https://twitter.com/ShStepanyan/status/1321730287710121984> ; <https://www.facebook.com/ArmenianUnifiedInfoCenter/videos/636827646985319/>

⁵⁶ A violation of the UN Educational, Scientific and Cultural Organization (UNESCO) Convention for Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954: <https://www.refworld.org/docid/40422c914.html>

⁵⁷ "On 8 October 2020, Azerbaijani armed forces launched two intentional assaults on Holy Savior Ghazanchetsots Cathedral of Artsakh in the town of Shushi, which is the recognizable cultural and religious symbol of Artsakh. The Azerbaijani forces struck the cathedral for two times within a few hours with use of striking and manageable drones. This act of Azerbaijan is in line with its continuous practice of destroying Armenian cultural heritage of Artsakh.", HRORA, "Ad Hoc Public Report on the Azerbaijani Targeted Attacks Against the Saint Holy Savior Ghazanchetsots Cathedral of Shusho, Artsakh (Nagorno-Karabakh) as A War Crime and Crime Against Humanity", October 20, 2020: https://artsakhombuds.am/sites/default/files/2020-10/Report_Ghazanchetsots_Cathedral_-_20.10.2020.pdf

⁵⁸ Le Monde reporter Allan Kaval, who was severely wounded, described the attacks as a "bombing of the town" "in a rain of fire and metal." See Allan Kaval, "Ça a frappé fort. Mais je suis là", October 8, 2020 : <https://www.facebook.com/allan.kaval/posts/10158545812272226>

accompanying the journalists that day.⁵⁹ Such indiscriminate attacks against the civilian population and civilian infrastructures constitute undoubtedly serious violations of IHL.⁶⁰

Considering the above, we are of the opinion that the available evidence demonstrates that there was a substantial risk that L3Harris Wescam's technology could be used to commit or to facilitate serious violations of IHL, thus breaching section 7.3(1)(b)(i) of the EIPA.

We also find it unacceptable that GAC contends there is a lack of evidence when no real effort to collect such evidence appears to have been made. Under the Final Report's *Official accounts* heading, the only sources of information cited by GAC are a few tweets from the Armenian and Azerbaijani governments. It also appears that GAC did not request any drone acquisition information from Azerbaijan. Instead, GAC simply cites the Azerbaijani president's comments to the press in which he admits to "the use of Turkish drones by the Azerbaijani military against Armenian military assets in Nagorno-Karabakh", which begs the question: did GAC really expect Azerbaijan's president to publicly incriminate himself and admit to committing war crimes by targeting civilians and civilian infrastructures?

It has become increasingly apparent that it is ultimately not a question of lack of evidence, but rather of lack of will. In fact, none of the internal documents transmitted by GAC to the FAAE mention any effort to communicate with the Armenian authorities to obtain further evidence of damages caused by Turkish drones – contrary to the publication of many GAC documents which mention such exchanges and requests from GAC to the Turkish authorities (all of whom refused to cooperate with GAC).⁶¹

It was clearly much simpler for GAC to allege a lack of evidence than to conduct a thorough investigation of events impacting an ethnic minority located on the other side of the world, especially when the discovery of such additional information could have negative consequences on GAC as well as the Canadian government. Ms. Peggy Mason, President of the Rideau Institute on International Affairs and Former Canadian

⁵⁹ *Ibid.* A number of other journalists were also targeted and injured during the war. On October 1, 2020, four journalists (two French and two Armenian) were targeted by shelling in the town of Martuni. A local resident accompanying them was killed. On the same day the Azerbaijani armed forces targeted a car transporting journalists of the Agence France-Presse international news agency. On October 2, Azerbaijan again targeted a minibus with Armenian and foreign journalists in the town of Martakert. See: *Second Interim Report on Azerbaijani Atrocities*, p. 16:

https://www.mfa.am/filemanager/NKR_war_2020/nk_hr/3.pdf

⁶⁰ See s. 18 of the Geneva Convention IV, "Convention (IV) relative to the Protection of Civilian Persons in Time of War.", 12 August 1949, 75 U.N.T.S. 287

⁶¹ "A timely and detailed response through the Turkish Armed Forces/MOD is probably more than we can hope for at this point." See: "Department of Foreign Affairs- Documents submitted", note 36, p. 99 and 103, available at:

<https://www.ourcommons.ca/Committees/en/FAAE/StudyActivity?studyActivityId=11056320>

Ambassador to the United Nations, sums up the issue during her testimony before the FAAE on December 10, 2020:

“A reference has also been made to what kind of an investigation actually goes on. I think we should look at the Turkish example, where, within weeks, The Globe and Mail got an independent reporter on the ground to go and take pictures in Armenia of the equipment in question, demonstrating clearly that it was Canadian Wescam technology. When Global Affairs was asked if they had sent anybody, they hadn't. Then they were asked if they were going to send anybody to check it out, and they wouldn't commit to it.

The reports say that they don't have any evidence or that there hasn't been any evidence on the ground that they could find, but so far as we can tell, they don't even make an effort to find that evidence. They certainly don't accept the documented evidence presented by international organizations like Amnesty International, Oxfam and so on.”⁶²

Moreover, by choosing to export military technology to high-risk zones, Canada has an additional responsibility to, at minimum, maintain an adequate and permanent representation on the ground in those countries particularly to be able to collect the necessary facts regarding the use of this technology as well as evaluate the risks of destabilization to peace and security in the region, as indicated by Professor Christian Leuprecht in his testimony before the FAAE:

“My reading (...) is that there was a high risk of this technology's being used for purposes that might not align with the assurances given, and that also might not align with Canadian interests over those of NATO and its partners, and we have the evidence already cited from northern Syria and from Iraq. (...) Canadian technology here fundamentally changed the geostrategic status quo [in Nagorno-Karabakh], and it changed it in a way that was not in Canada's interest and not aligned with NATO interests. (...) We thus need to ask ourselves harder questions about the export of technology that might have those sorts of implications and that run counter to Canadian and NATO interests. I think the risk assessment should have shown this. (...)”

What would have made a difference, however, is if we had embassies in the region. We are selling this technology to a region where we neither have embassies in Yerevan nor Baku. That meant that we had to rely on our embassies in Moscow and Ankara to provide us with the intelligence for the strategic assessment. I would say that if we're going to engage in these types

⁶² Testimony of Ms. Peggy Mason before the FAAE, December, 10 2020:

<https://www.ourcommons.ca/DocumentViewer/en/43-2/FAAE/meeting-12/evidence> See also: Rideau Institute, “Dicey trade agreements, the economics of nukes, Turkish drones and Canadian gun control”, November 2nd, 2020: <https://rideauinstitute.ca/2020/11/02/dicey-trade-agreements-the-economics-of-nukes-turkish-drones-and-canadian-gun-control/>

of exports into high-risk areas and regions, we need to make sure that we also have our own representation on the ground. I would say that it is embarrassing for the Government of Canada that The Globe and Mail sent a journalist to investigate, but we didn't have diplomats on the ground to investigate. That's why we need to ask ourselves some hard questions".⁶³

We now turn to GAC's assessment on Syria and whether there is a substantial risk that the exportation of L3Harris Wescam technology could be used to commit or *facilitate* a serious violation of IHL. Ultimately, based on a review of UN reports and other open-source documents, GAC concludes once again that "there is no clear evidence that suggests a deliberate targeting of civilians or civilian infrastructures and therefore of serious violations of IHL." As explained above, GAC applies a higher "substantial risk" threshold than the one they themselves outline in their *Final Report: Review of Export Permits to Saudi Arabia*⁶⁴ (the "**Final Report on Saudi Arabia**"). In the latter, GAC states that a risk will be considered serious if it is more likely than not that the export of goods or technologies would result in any of the negative consequences provided in section 7.3 (1) EIPA. By stating that that the evidence does not "clearly" demonstrate IHL violations, GAC modifies the substantial risk test by making it more onerous than it should be. GAC makes the same error when it states that there is a "lack of credible evidence" of IHL violations in Nagorno-Karabakh, as outlined above. Instead, Canada should be applying the "substantial risk" test as outlined in the EIPA, that is whether there is a substantial risk that the technology could be used to commit or to facilitate a violation, rather than looking for evidence that "clearly" demonstrates a violation or that would demonstrate it "beyond a reasonable doubt".

Similar to its analysis of the Nagorno-Karabakh conflict, GAC once again decides to ignore the available evidence demonstrating the existence of a substantial risk that military technology could be used to commit or *facilitate* IHL violations in the armed conflict in Syria. As highlighted in the UN's *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, dated August 19 2018, the Turkish armed forces attacked a number of civilians and civilian infrastructures including market places and a UNESCO world heritage site.⁶⁵ The main hospital in the region of Afrin was also reportedly attacked by Turkish drone aerial strikes.⁶⁶ It was in fact following this military operation

⁶³ Testimony of Professor Christian Leuprecht before the FAAE, April 13, 2020:

<https://www.ourcommons.ca/DocumentViewer/en/43-2/FAAE/meeting-26/evidence#Int-11230149>

⁶⁴ GAC, *Final Report: Review of Export Permits to Saudi Arabia*, <https://www.international.gc.ca/trade-commerce/controls-controles/memo/annex-a-ksa.aspx?lang=eng>

⁶⁵ United Nations General Assembly Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* dated August 9, 2018, <https://reliefweb.int/sites/reliefweb.int/files/resources/G1824615.pdf>, par. 13 et 17 à 19

⁶⁶ Article from investigative group Bellingcat, titled "Did Turkey Bomb Afrin's General Hospital?", March 19 2018, <https://www.bellingcat.com/news/mena/2018/03/19/did-turkey-bomb-afrin-hospital/>.

that many countries, including Canada, imposed an embargo on the sale of arms to Turkey in October 2019.⁶⁷

The impact of this unilateral military action was catastrophic. In this regard, the United Nations *Office for the Coordination of Humanitarian Affairs* stated that the unstable five-day cease-fire coupled with Turkey's aerial strikes and ground offensive against Kurdish areas in Syria had a significant humanitarian impact in that approximately 180,000 civilians, including 80,000 children, were forced to leave their homes and shelters – all in desperate need of humanitarian aid.⁶⁸ In December 2019, Airwars, an organization which monitors and assesses civilian damages caused by international military aerial strikes,⁶⁹ conservatively estimated that between 172 and 225 people had been killed in Syria by Turkish aerial, artillery and other attacks and estimated between 419 and 553 people were wounded.⁷⁰

As indicated in the *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*,⁷¹ other examples of aerial strikes which were indiscriminately launched by Turkish drones included : (i) the main market in the city of Maarret El-Nouman as well as surrounding areas (causing the death of 43 civilians, including 4 children and injuring at least 109 people, including 18 children)⁷²; (ii) a refugee camp in a rural zone (causing the death of 20 civilians, including 6 children and injuring at least 40 people)⁷³; and (iii) medical facilities, including a surgical “cellar hospital” in Kfar Noubl and a temporary medical post situated in a school of the Salihiyé district.⁷⁴

In February 2020, Turkey began its fourth incursion on Syrian soil in retaliation of the killing of 34 Turkish soldiers by the Syrian government forces.⁷⁵ The main component of this military operation (known as *Spring Shield*) was the use of drones, including the Bayraktar TB2 and Anka UAVs, to carry out aerial strikes.⁷⁶ A Targeting Sensor was in fact

⁶⁷ Ploughshares Report, p. 16

⁶⁸ UN Office for Coordination of Humanitarian Affairs, “Nearly 180,000 displaced by northeast Syria fighting as needs multiply: UN refugee agency”, October 22, 2019, <https://news.un.org/en/story/2019/10/1049761>. See also “Turkey’s Military Operation Has Displaced Thousands of Civilians, Worsened Syria’s Dire Humanitarian Crisis, Top Official Warns Security Council”, <https://www.un.org/press/en/2019/sc13994.doc.htm>

⁶⁹ <https://airwars.org/>

⁷⁰ Article from Airwars titled “Despite October ceasefires, the violence has continued with atrocities alleged on both sides”, December 24, 2019: <https://airwars.org/news-and-investigations/more-than-200-civilians-likely-killed-in-turkish-invasion-of-northern-syria/>

⁷¹ Report of the Independent International Commission on Inquiry on the Syrian Arab Republic, January 28, 2020, <https://undocs.org/en/A/HRC/43/57>

⁷² Id., par. 22

⁷³ Report of the Independent International Commission on Inquiry on the Syrian Arab Republic, January 28, 2020, <https://undocs.org/en/A/HRC/43/57>

⁷⁴ Id., par. 28 et par. 51

⁷⁵ Ploughshares Report, p. 17

⁷⁶ Article from YeniSafak titled “Turkey’s drone use puts forward new military doctrine”, March 5 2020: <https://www.yenisafak.com/en/news/turkeys-drone-use-puts-forward-new-military-doctrine-3513352>

found in the wreckage of an Anka UAV struck in February 2020 near Idlib.⁷⁷ This operation killed 6 civilians and injured 22 others following the bombing of the village of Aqiba by the Turkish army and allied forces.⁷⁸ Meanwhile that same month in Libya, Turkey and the GNA carried 15 aerial strikes by Turkish drones, causing the death of 5 civilians in the city of Castelverde.⁷⁹ In addition, according to the report published by the *United Nations Support Mission in Libya*, there were at least 358 civilian victims, 40 of whom were targeted by aerial strikes on civilian areas.⁸⁰ Witnesses even reported drone strikes, in support of the GNA, that targeted the city of Qasr Bin Ghashir on June 3, 2020 (resulting in the death of 17 civilians including 4 women and 4 children and injuring to 14 civilians).⁸¹

Furthermore, GAC acknowledges in the Final Report that the Syrian National Army (the “SNA”) on which Turkey “relied extensively” to conduct its ground offensive was accused of IHL and human rights violations. Nevertheless, GAC is of the view that none of these violations are attributable to Turkey, as the Turkish government has claimed that it does not exercise command and control functions over the SNA. Yet, GAC recognizes that Turkey funds, trains and arms the SNA. The OHCHR also contradicts GAC’s assertions. In fact, on September 18, 2020, the OHCHR called on the “Turkish authorities to respect international law and to ensure that violations committed by armed groups under Turkey’s effective control cease.”⁸² GAC therefore erroneously downplays Turkey’s active role in relation to IHL violations committed by the SNA – violations which are attributable to Turkey.

In light of the above, we are of the opinion that the evidence available both at the time of the export permit applications analysis (in May 2020) and at the time of writing the Final Report (in April 2021) indicate Turkey’s use of drones without discrimination against civilian populations as well as its effective control over armed group violating IHL. Consequently, the Minister could not issue the export permits to Turkey given the substantial risk that this technology could be used to commit or facilitate a serious violation of international humanitarian law, fulfilling the second criteria of section 7.3 (1) EIPA.

⁷⁷ Image from Syria Alikhbaria, YouTube, February 25, 2020:

https://www.youtube.com/watch?v=A6q9JegaUwE&feature=emb_logo

⁷⁸ Airways Report titled, “Airways monthly assessment – February 2020, Major Conflict Monitoring”:

<https://airwars.org/report/airwars-monthly-assessment-february-2020/>

⁷⁹ Ibid

⁸⁰ United Nations Support Mission in Libya, “Civilian casualties Report- 1 April 2020- 30 June 2020”, July 29, 2020: <https://unsmil.unmissions.org/civilian-casualties-report-1-april-30-june-2020>

⁸¹ Ibid

⁸² United Nations Office of the High Commissioner on Human Rights, “Syria : Violations and abuses rife in areas under Turkish-affiliated armed groups – Bachelet”, September 18, 2020:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26258&LangID=E>

C. Criterion 3 – There was a substantial risk that the Canadian military goods or technology exported to Turkey could be used to commit or facilitate a serious violation of international human rights law (section 7.3 (1) (b) (ii) EIPA)

GAC begins its analysis of the third criterion under section 7.3 of the EIPA with a brief overview of the human rights situation in Turkey. In doing so, GAC tries to convince its reader (and perhaps ease its conscience) that “*despite* human rights challenges, Turkey is a country with strong democratic institutions and a culture of continued democratic resilience”. Yet, Turkey is experiencing a deepening human rights crisis coupled with a dramatic erosion of the rule of law and democracy.⁸³ Executive control as well as political influence over the judiciary system ensure that courts systematically accept false indictments and thus detain and convict individuals and groups whom the Turkish government considers to be political opponents, despite a lack of evidence in support thereof.⁸⁴ These individuals frequently include journalists, opposition politicians and human rights activists. In April 2020, the government banned a municipal donation campaign run by opposition parties.⁸⁵

According to Amnesty International, in March 2020 the government banned its citizens from organizing, for a second year in a row, a march for International Women’s Day, using tear gas and plastic bullets on peaceful protesters.⁸⁶ Also in 2020, a senior government official urged citizens to combat the “evil” of homosexuality, a statement President Erdoğan supported.⁸⁷

The NGO Reporters Without Border ranks Turkey 153rd out of a total of 180 countries in the world press freedom rankings for 2021, highlighting that authoritarianism has taken hold of the Turkish media.⁸⁸ As for the treatment of ethnic minorities, Turkey does not recognize the rights of minorities such as the Alevis, the Assyrians, the Kurds and the Rom, limiting the exercise of their political and cultural rights.⁸⁹ In fact, over the last 30 years, Turkey has abolished five (5) pro-Kurdish political parties.⁹⁰ The President of Turkey himself does not hesitate to make hateful remarks against Christian minorities whom he recently described as the “leftovers of the sword”.⁹¹ In its 2018 report, the OHCHR noted that between January 1st and December 31st 2017, hundreds of thousands of people suffered human rights violations, including cases of torture, ill-treatment, arbitrary

⁸³ Human Rights Watch, “Turkey”: <https://www.hrw.org/europe/central-asia/turkey>

⁸⁴ Ibid

⁸⁵ Amnesty International, « Turkey 2020 », <https://www.amnesty.org/en/countries/europe-and-central-asia/turkey/report-turkey/>

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Reporters Without Borders, “Subjugated Media”: <https://rsf.org/en/taxonomy/term/145>

⁸⁹ Minority Rights Group International, “Turkey”: <https://minorityrights.org/country/turkey/>

⁹⁰ Human Rights Watch, “Turkey: Erdoğan’s Onslaught on Rights and Democracy”: <https://www.hrw.org/news/2021/03/24/turkey-erdogans-onslaught-rights-and-democracy>

⁹¹ Genocide Watch, “Turkey: Erdoğan uses “Leftovers of the Sword” Anti-Christian Hate Speech”, May 11, 2020, <https://www.genocidewatch.com/single-post/2020/05/11/turkey-erdogan-uses-leftovers-of-the-sword-anti-christian-hate-speech>

detention and violations of freedom of association and expression due to the extended state of emergency.⁹²

In light of the above, it goes without saying that Turkey faces numerous human rights challenges which GAC should not be minimizing. As a result, it is unrealistic to affirm, at least credibly, that Turkey has “strong democratic institutions” when in reality, its democracy is in crisis.⁹³

GAC then launches into the analysis of the third criterion of section 7.3 of the EIPA based on the approach it outlined in its Final Report on Saudi Arabia. According to GAC, if an analysis of the third criterion of the EIPA reveals that the exported technology could pose a substantial risk of (i) internal repression in the country where the export is to be used or (ii) diversion from its stated end use or end user, the permit application must be refused. “Internal repression” includes, inter alia, the risk of “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”.⁹⁴

In Turkey’s case, the Minister could not ignore the fact that in the last decades, this country has committed a number of human right violations, particularly towards the Kurdish population, which continues to suffer from the Turkish government’s repressive acts that some even qualify as genocidal.⁹⁵ Although Turkey and GAC claim that aerial drone strikes are geared towards the eradication of members of the Kurdistan Workers Party (the “PKK”), these strikes do not distinguish between members of the PKK and the civilian population (who are ultimately victims of these strikes) as reported by Amnesty International⁹⁶ and Human Rights Watch.⁹⁷ The use of indiscriminate air strikes against

⁹² Office of the UN High Commissioner for Human Rights, “Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East”, March 2018, <https://www.refworld.org/docid/5ab146c14.html>

⁹³ Freedom House, “Democracy in Crisis: Corruption, Media and Power in Turkey” https://freedomhouse.org/sites/default/files/2020-02/SR_Corruption_Media_Power_Turkey_PDF.pdf

⁹⁴ Final Report on Saudi Arabia, footnote 45.

⁹⁵ Article from OpenDemocracy titled “*The looming genocide against the Kurds : history should repeat itself*”, July 17, 2020, <https://www.opendemocracy.net/en/north-africa-west-asia/looming-genocide-against-kurds-history-should-not-repeat-itself/>

⁹⁶ Amnesty International reported that between October 12 and 16 October 2019, it received the testimony of 17 witnesses, including doctors, journalists and members of the local community, indicating an overwhelming number of attacks without discrimination in residential areas in Syria. For example, the armed forces launched an aerial attack October 12, 2019 around 7:00 near a school where displaced civilians had taken shelter. See article by Amnesty International titled “Syria : Damning evidence of war crimes and other violations by Turkish forces and their allies”, October 18, 2019 <https://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/>

⁹⁷ Human Rights Watch stated that “A Turkish military attack on an Iranian armed group in the Kurdistan Region of Iraq in late June 2020 failed to take adequate precautions to minimize civilian casualties.” In fact, the attack which was targeting a member of the *Free Life of Kurdistan* Iranian Kurdish party, injured at least 6 civilians and damaged a famous beach resort. See article by Human Rights Watch intitled “Iraq:

civilians, including the Kurdish population, constitutes a human rights violation, as well as an IHL violation, as explained above. For all these reasons, there was a substantial risk that the export of Canadian military technology to Turkey could serve to facilitate internal repression.

Regarding the existence of a substantial risk that this technology could be diverted from its declared end-use or end-user, GAC first tries to minimize the issue by contending that “the Turkish Government’s transfers of Bayraktar TB2 UAVs (most likely equipped with Canadian sensors) to the Azerbaijani Armed Forces could be interpreted as being inconsistent with end-use assurances provided to the Government of Canada in March 2020.” Evidently, since Targeting Sensors were found in the wreckages of the Nagorno-Karabakh conflict, and were not destined to the Azerbaijani armed forces, Turkey’s transfer was an illegal diversion.

GAC also attempts to circumvent the issue by stating that the question of diversion would depend on who is responsible for the transfer of the technology and in what state the technology was transferred. According to GAC, Baykar (the Turkish company that manufactured the drones containing the Targeting Sensors) could not be held responsible for the actions of the Turkish government if it turns out that it was the Turkish armed forces, and not Baykar itself, who transferred the TB2 drones to the Azerbaijani armed forces. The separation that GAC tries to create between Turkey and Baykar, appears, at the very least, superficial. This argument ignores two important facts. First, Turkey has an autocratic regime led by an authoritarian ruler whose will easily dictates the actions of those around him. Second, the Chief technology officer of Baykar, Mr. Selçuk Bayraktar, is none other than the Turkish president’s son-in-law, having married his youngest daughter in 2016.

GAC also minimizes the risk of diversion when it states that even if Baykar had delivered the drones directly to the Azerbaijani armed forces, this would not necessarily constitute a diversion, since it was not the Targeting Sensors that were diverted per se, but rather the drones which contained the Targeting Sensors. Such a restrictive interpretation goes against the very purpose of the EIPA which, as mentioned, incorporates the more restrictive criteria of the ATT since 2019 to avoid, among other things, the diversion of arms and munitions.⁹⁸ It would have been obvious from the permit applications themselves that the Targeting Sensors were meant to be installed on the Turkish drones, of which they are an essential component. The Targeting Sensors are the “eyes of the machine [...] the central component in making these drones operative and effective”.⁹⁹ As described by L3 Harris, the Targeting Sensors have a clear stated purpose to, i.e.

Turkish Airstrike Disregards Civilian Loss”, July 22, 2020: <https://www.hrw.org/news/2020/07/22/iraq-turkish-airstrike-disregards-civilian-loss>

⁹⁸ https://www.international.gc.ca/trade-commerce/consultations/export_controls-controle_exportations/background-information.aspx?lang=eng

⁹⁹ Testimony of Professor Michael Byers before the FAAE, April 27th, 2021: <https://parlvu.parl.gc.ca/Harmony/fr/PowerBrowser/PowerBrowserV2/20210427/-1/35254?Language=French&Stream=Video>

“dominate the battlefield 24/7 with greater precision than ever before”.¹⁰⁰ In light of their intended purpose, Canada should have followed the example given by Belgium who, in 2019, cancelled permits to export turrets to Canada and avoid indirectly violating the arms embargo on Saudi Arabia, since these turrets were meant to be installed on Canadian light armoured vehicles destined for export to Saudi Arabia.¹⁰¹ Otherwise, GAC is claiming that for all intents and purposes, it can do indirectly what the Act prevents it from doing directly.

Furthermore, GAC’s *Export and Brokering Controls Handbook* provides that “applicants for export permits are required to identify the end-user of the goods or technology proposed for export if this will not be the consignee”.¹⁰² When the end-user is a foreign manufacturer which intends to incorporate the goods or technology in a new product to then sell it to a third party “this needs to be fully described in the Canadian export permit application.”¹⁰³ As such, if the end use of the Targeting Sensors was to incorporate them in drones to be sold to Azerbaijan, then the permit request should have described this process. Additionally, permit applications must contain at least one end-use assurance document, whether it be an end-use certificate or an end-use statement from the destination government.¹⁰⁴

GAC’s conclusion also ignores the fact that Turkey has diverted drones in the past. This risk already existed since 2019, when Turkey supplied drones equipped with Targeting Sensors to the GNA to further fuel the conflict in Libya, thus carrying out an “illicit transfer of arms systems to unauthorized users” in addition to acting in violation of an existing international arms embargo. As Mr. Kelsey Gallagher, Researcher at the Project Ploughshares NGO explained in his testimony before the FAAE:

“According to a UN report published last year, since at least May 2019 Turkey has been diverting drones to Libya, including the Bayraktar TB2, which is invariably equipped with Canadian-made Wescam sensors. These findings alone should have made clear the substantial risk associated with these arms exports.

Given Turkey's brazen behaviour in Libya, it should have come as no surprise to Global Affairs Canada that the same Canadian weapons would also be found illicitly fuelling the war in Nagorno-Karabakh. [...] To satisfy its obligations under international law, the Government of Canada should move to fully cease the

¹⁰⁰ L3 Harris, “Wescam MX-15D, Airborne Targeting and Designating”: <https://www.l3harris.com/all-capabilities/wescam-mx-15d-airborne-targeting-and-designating>

¹⁰¹ Article in La Presse, “Exportations d’armes vers l’Arabie Saoudite: un silence gênant”, August 13, 2019 : <https://www.lapresse.ca/debats/editoriaux/2019-08-13/exportations-d-armes-vers-l-arabie-saoudite-un-silence-genant>

¹⁰² GAC, *Export and Brokering Controls Handbook*, art. E.3.3.2, https://www.international.gc.ca/trade-commerce/controls-controles/reports-rapports/ebc_handbook-cce_manuel.aspx?lang=eng

¹⁰³ *Ibid.*, art. E.3.3.2, table 2

¹⁰⁴ *Ibid.*, art. E.4.2.

further export of such weapon systems to Turkey, or run the risk of non-compliance with the international arms control frameworks it has voluntarily acceded to”.¹⁰⁵

As outlined above, the military and strategic cooperation between Turkey and Azerbaijan was unequivocal and increased significantly in 2020, Azerbaijan being a strategic ally and conducting frequent joint military exercises with Turkey as well as purchasing increasingly more military equipment from the latter in 2020. The fraternal links between these two countries, which affirm working towards a common future as “one nation, two States”¹⁰⁶, were also highlighted by Erdoğan in the months leading up to the war against Artsakh.

The alliance between Turkey and Azerbaijan is unfortunately further fortified by their deep hatred of the Armenian population. Whether it be during the Armenian genocide of 1915, perpetrated by the Ottoman Empire (killing 1,5 million Armenians)¹⁰⁷, or during pogroms where Azerbaijanis attacked and killed minority Armenians living in Azerbaijan (Pogroms in Sumgait in 1988, Kirovabad in November 1988 and Baku in January 1990)¹⁰⁸ or during the spring 1991 massacres, notably in the villages of Getashen, and Martunashen where Armenians were violently attacked, raped killed and/or forced to leave their homes (also known as “Operation Ring”),¹⁰⁹ these heinous acts unmistakably demonstrate the armenophobic policies of Azerbaijan and Turkey as well as their stated objective to eliminate the Armenian presence from Artsakh.¹¹⁰ When the violence and oppression of Azerbaijan against Armenians reached their peak between 1988-1994 – resulting in a war where more than 30,000 perished and one million people were displaced – Turkey once again sided with its little brother.¹¹¹ It is therefore not surprising

¹⁰⁵ Testimony of Mr. M. Kelsey Gallagher before the House of Commons FAAE December 10, 2020:

<https://www.ourcommons.ca/DocumentViewer/en/43-2/FAAE/meeting-12/evidence>

¹⁰⁶ <https://baykardefence.com/haber-Baykar-CTO-Bayraktar-receives-Karabakh-Order-from-Aliyev.html>

¹⁰⁷ Canada House of Commons Resolution, April 21, 2004, https://www.armenian-genocide.org/Affirmation.291/current_category.7/affirmation_detail.html

¹⁰⁸ In June 1990, over 100 leading intellectuals including Jacques Derrida, Isaiah Berlin and Alain Finkelkraut penned “An Open Letter on Anti-Armenian Pogroms in the Soviet Union” in which they were “compelled to recognize that crimes against the Armenian minority have become consistent practice—if not official policy—in Soviet Azerbaijan.” According to the late Andrei Sakharov (New York Times, November 26, 1988), these pogroms constitute “a real threat of extermination” to the indigenous Armenian community in Azerbaijan and in the autonomous region of Mountainous Karabakh, whose inhabitants are 80 percent Armenian. See Jacques Derrida *et al.*, “An Open Letter on Anti-Armenian Pogroms in the Soviet Union” The New York Review, September 27, 1990 :

<https://www.nybooks.com/articles/1990/09/27/an-open-letter-on-anti-armenian-pogroms-in-the-sov/>.

¹⁰⁹ Caroline Cox and John Eibner, «Ethnic Cleansing in Progress. War in Nagorno Karabakh”, *Institute for Religious Minorities in the Islamic World*, Zurich, 1993, p. 45.

¹¹⁰ For more information on armenophobia in Azerbaijan and hate speech towards Armenians, See section IV B. ii. of “The Case for Canada’s Recognition of the Republic of Artsakh (Nagorno-Karabagh) as a Measure of the Responsibility to Protect”, November 25 2020: <https://armenianbar.org/2020/12/18/the-case-for-canadas-recognition-of-the-republic-of-artsakh-nagorno-karabakh-as-a-measure-of-the-responsibility-to-protect/>

¹¹¹ Article from BBC News titled “Nagorno-Karabakh : Nearly 5,000 dead in conflict, Putin says”, October 22, 2020, <https://www.bbc.com/news/world-europe-54652704>

that when Azerbaijani forces launched a large-scale attack against the Armenian population of Artsakh on September 27, 2020, they were backed by the armed forces of their Turkish “big brother”; Canada even having urged Turkey to stay out of the conflict.¹¹²

Considering the above, at the time of issuance of the export permits to Turkey, a substantial risk that the L3 Harris Wescam technology could be (i) used for internal repression (for example against the Kurdish population) and/or (ii) diverted to be used for illegitimate purposes did exist. As such, the Minister should have concluded that there was a substantial risk that the export of Canadian technologies to Turkey could be used to commit or facilitate a serious violation of international human rights law and should have refused to issue the export permits.

D. Criteria 4 & 5 – There was a substantial risk that the export of Canadian military technology to Turkey could be used to commit or facilitate acts of terrorism or transnational organized crime (section 7.3 (1) (b) (iii) and (iv) EIPA)

Following its analysis of the fourth and fifth criteria of the EIPA, GAC concludes that “there is no substantial risk that Canadian exports of military goods and technology to Turkey 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.” GAC bases this conclusion on the fact that Turkey participates in various organizations and conventions which aim at combatting terrorism. For the reasons set out below, we are of the view that GAC’s arguments in support of this conclusion are incorrect (and far from convincing) and demonstrate the Minister’s failure to take a firm position on a difficult subject.

First, GAC’s position is inconsistent with its own findings on the relationship and possible coordination between Turkey and the Hayat Tahrir Al-Cham terrorist group (the “HTC”). Surprisingly, GAC gives no weight to this fact. Instead, GAC sets it aside by stating that “it is highly unlikely that they will supply or support directly through the transfer of military goods and technology, although they may cooperate and/or work alongside this group, and/or may support opposition groups who cooperate more closely with HTC”. How can GAC make such a statement (i) without any supporting evidence (ii) in light of the admitted cooperation between Turkey and HTC and (iii) given its own admissions that Turkey has supplied arms to certain factions involved in civil wars in foreign countries?

Furthermore, when analyzing these two (2) criteria, GAC also omits to mention the recruitment of jihadist mercenaries by Turkey and Azerbaijan deployed to fight against the Armenian population of Artsakh, as denounced by the *Working Group on the Use of mercenaries* of the OHCHR.¹¹³ In fact, the UN working group affirms that Turkey was

¹¹² Statement by François-Philippe Champagne, Canadian Minister of Foreign Affairs, Twitter, November 11, 2020: https://twitter.com/FP_Champagne/status/1326690424237543425

¹¹³ “Mercenaries in and around the Nagorno-Karabakh conflict zone must be withdrawn – UN experts”, November 1st, 2020: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26494&LangID=E&fbclid=IwA>

engaged in the recruitment and large-scale transfer of Syrian men to Azerbaijan through armed factions. The Working Group also notes that Turkey's role is all the more worrying in light of similar allegations made in early 2020 regarding its role in the recruitment, deployment and financing of mercenaries in the Libyan conflict.¹¹⁴

As for GAC's assessment that the exported technology could not be used in the commission of transnational organized crime, the only argument set forth by GAC is that Turkey is a signatory of the *United Nations Convention Against Transnational Organized Crime*. That settles the question then! GAC concludes, on this basis alone, that "the majority of Canadian military goods and technology is being sold to the Turkish Armed Forces which is unlikely to provide these items to transnational criminal organizations". How can this one statement only reassure apprehensions when GAC fails to provide any analysis of information or facts demonstrating Turkey's respect or application of the said convention? GAC's conclusion also ignores Turkey's involvement in the recruitment, arming, payment and transfer of jihadist mercenaries and terrorist groups in the conflicts in Libya and Artsakh.

In light of the above, we are of the opinion that there was a substantial risk that the export of Canadian military technology to Turkey could be used to commit or facilitate acts of terrorism or transnational organized crime, given its recent actions.

E. Criterion 6 – There was a substantial risk that the export of Canadian military technology to Turkey could be used to commit or to facilitate serious acts of gender-based violence or serious acts of violence against women and children (article 7.3 (1) (b) (v) LLEI)

In view of the forgoing, it is not surprising that in its analysis of the sixth and final criterion of section 7.3 of the EIPA, GAC simply states that "it is not aware of credible evidence linking Canadian military goods and technology to gender-based violence within Turkey and the surrounding region". Yet, GAC could have been made aware that such risks exist. During the conflict in Artsakh, the press reported aerial attacks on the Nagorno-Karabakh's Maternal and Children's Hospital in Stepanakert as well as drone strikes on the Holy-Savior Ghazanchetsots Cathedral in which women and children had taken refuge

[RO_JnkNB7eo-EgeedExyVrl0wruHYff4BwhgLIDEQPSFAFDS9Ax3DBQxvo](#) ; See also, *Syrian Observatory for Human Rights* " Nagorno-Karabakh battles | Over 2,000 mercenaries sent to Azerbaijan, nearly 135 killed so far", October 18, 2020: <https://www.syriahr.com/en/188669/>

¹¹⁴ *Ibid*

from the strikes (as previously mentioned).¹¹⁵ In fact, on November 3, 2020, an opinion piece was also published on the topic in La Presse.¹¹⁶

Furthermore, the export of L3Harris Wescam's technology to Turkey contributed to the destabilization of the entire region of Nagorno-Karabakh given the use of drones which gave the Azerbaijan "a big advantage" and had "a big impact on the battlefield" putting them in a position of strength over Armenia.¹¹⁷ The Final Report makes no mention of the serious and known consequences that women and children faced in the conflict. Given the incessant bombardment of civilian centers in Artsakh, 85 % of the civilian population (around 130,000 people)¹¹⁸ were forced to flee including 40,000 children who took refuge in Armenia,¹¹⁹ many of whom were displaying signs of anxiety, depression and insomnia.¹²⁰ The civilian population (the majority being women and children) were deprived of both their physical and psychological security and continue to face this insecurity today¹²¹ particularly since Artsakh's cities and towns are heavily contaminated by explosive remnants of war, including rockets, missiles, artillery projectiles and cluster munitions,¹²² and are "pitted with bomb craters, burnt out cars, and shelled buildings".¹²³

¹¹⁵ Videos published October 28, 2020 by the Artsakh Ombudsman, Armenian Minister of Defense and the Unified Info Center: <https://www.facebook.com/artak.beglaryan/videos/3668331173205093>; <https://twitter.com/ShStepanyan/status/1321730287710121984> See also (i) the press release dated October 28, 2020 : <https://www.prnewswire.com/news-releases/regional-reporter-informs-azerbaijan-has-bombed-a-maternity-hospital-301162434.html> (ii) article from CTV news intitled "Hospital, residential areas hit in Nargorno-Karabakh fighting", October 28, 2020 : <https://www.ctvnews.ca/world/hospital-residential-areas-hit-in-nagorno-karabakh-fighting-1.5164050?cache=qpcupizl%3FclipId%3D104070> (iii) *Ad Hoc Public Report on the Azerbaijani Targeted Attacks Against the Saint Holy Savior Ghazanchetsots Cathedral of Shusho, Artsakh (Nagorno-Karabakh) as A War Crime and Crime Against Humanity*, October, 20, 2020: https://artsakhombuds.am/sites/default/files/2020-10/Report_Ghazanchetsots_Cathedral_-_20.10.2020.pdf and (iv) Article from du Greek City Times intitled "Azerbaijan targets Armenian Church and Cultural House in Artsakh (VIDEO)", October 9, 2020: <https://greekcitytimes.com/2020/10/09/azerbaijan-targets-armenian-church-and-cultural-house-in-artsakh/>

¹¹⁶ Opinion article of Ms. Maral Tersakian titled "Le 27 septembre, ma vie a basculé", November 3, 2020: https://plus.lapresse.ca/screens/7afb303c-013d-4a88-a1d3-8b9200ae2650_7C_0.html.

¹¹⁷ Testimony of Professor Besma Momani before the FAAE, <https://www.ourcommons.ca/DocumentViewer/en/43-2/FAAE/meeting-26/evidence#Int-11230064>

¹¹⁸ Unicef, "Unicef Statement on one month of fighting in and beyond Nagorno Karabakh", October 28, 2020: <https://www.unicef.org/armenia/en/press-releases/unicef-statement-one-month-fighting-and-beyond-nagorno-karabakh>

¹¹⁹ *Ad Hoc Report on Children's Rights*, p. 19: <https://artsakhombuds.am/sites/default/files/2020-11/Artsakh-Ombudsman-report-on-children-rights-09.11.2020.pdf>

¹²⁰ UN Office for the Coordination of Humanitarian Affairs, "Nagorno-Karabakh fighting leaves children who fled the conflict in distress", October 22, 2020: <https://reliefweb.int/report/azerbaijan/nagorno-karabakh-fighting-leaves-children-who-fled-conflict-distress>

¹²¹ Article from Hetq newspaper, "The children from Artsakh facing psychological effects from witnessing a war", (In Armenian) November 20, 2020: <https://hetq.am/hy/article/124548>

¹²² Joint Bipartisan letter by US Representatives to USAID Acting Administrator John Barsa, November 3^d 2020 : https://www.halotrust.org/media/7295/demining_uxo_letter-11320.pdf

¹²³ Halo Trust NGO, "From the Frontline: Nagorno Karabakh", November 2nd, 2020: <https://www.halotrust.org/latest/halo-updates/stories/from-the-frontline-nagorno-karabakh/>

Children are particularly vulnerable to injury or death in the “cluster munitions bear a cruel resemblance to toys”.¹²⁴

Thus, not only was GAC unable to prevent the realization of the negative consequences outlined in section 7.3 of the EIPA, but it did not even collect publicly available evidence or perform a diligent analysis of the realization of these consequences. GAC also does not mention any reports by various international organizations which looked at the prevalence of gender-based violence against women in the Syrian and Libyan conflict zones where Turkish drones are used.

Once again, GAC attempts to justify its conclusion by stating that Turkey participates in an international effort to prevent violence against women and domestic violence. In this respect, GAC mentions that Turkey was the first country to sign and ratify the *Istanbul Convention* of the Council of Europe on preventing and combatting violence against women and domestic violence in May 2012. Whether intentionally or not, GAC, however, fails to mention that on March 22, 2021, Turkey withdrew itself from the *Istanbul Convention*¹²⁵ on the grounds that the Convention “undermines family unity, encourages divorce and that its references to equality [are] used by the LGBT community to gain greater acceptance in society.”¹²⁶ All laudable arguments to justify the withdrawal from a convention aimed at protecting women in a country grappling with a serious problem of femicide.

For all these reasons, we believe there existed and still exists a substantial risk that the export of Canadian military technology to Turkey could be used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women or children.

IV. OBSERVATIONS AND RECOMMENDATIONS

As explained above, the Final Report contains a number of inconsistencies and factual omissions and does not analyze the Minister’s initial decision to approve export permits for Targeting Sensors to Turkey in May 2020. This lack of impartiality is not surprising as GAC uses the Final Report as a golden opportunity to try and justify its decision – as it also did in its Final Report on Saudi Arabia. To use an old saying: “No person should be a judge in their own case.”

¹²⁴ Halo Trust NGO, “From the Frontline: Nagorno Karabakh”, November 2nd, 2020:

<https://www.halotrust.org/latest/halo-updates/stories/from-the-frontline-nagorno-karabakh/>

¹²⁵ [https://www.coe.int/en/web/conventions/full-list/-](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=IyoNvDw3&coeconventions_WAR_coeconventionsportlet_enVigueur=false&coeconventions_WAR_coeconventionsportlet_codeNature=10&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconventionsportlet_codePays=TUR)

[/conventions/treaty/210/declarations?p_auth=IyoNvDw3&coeconventions_WAR_coeconventionsportlet_enVigueur=false&coeconventions_WAR_coeconventionsportlet_codeNature=10&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconventionsportlet_codePays=TUR](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=IyoNvDw3&coeconventions_WAR_coeconventionsportlet_enVigueur=false&coeconventions_WAR_coeconventionsportlet_codeNature=10&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconventionsportlet_codePays=TUR)

¹²⁶ Article from La Presse titled “La Turquie quitte une convention”, March 20, 2021 :

<https://www.lapresse.ca/international/europe/2021-03-20/violences-contre-les-femmes/la-turquie-quitte-une-convention.php>

In addition, there is the troubling lack of transparency in the process itself: permit approvals are not public, thus escaping scrutiny from the media and Canadians. In fact, GAC's memo to the Minister recommending the approval of license exports to Turkey, underlines the fact that the Minister's decision is not public and therefore "is not expected to garner media attention" and that given the current Covid-19 crisis "parliamentary scrutiny is expected to be limited".¹²⁷

GAC had all the necessary information in order to take an informed decision and to send a strong message to the international community, including Turkey, that pursuant to its obligations under the EIPA, Canada will not issue export permits if there is a substantial risk that technology made on Canadian soil would undermine peace and security in a region or could be used to commit or *facilitate* a serious violation of IHL or international human rights law, among other consequences. Instead of relying on the publicly available evidence to correctly apply the law, GAC preferred to rely on the "assurances" received from the Turkish Foreign Affairs Minister, without any concrete mitigation measures.

Why you ask? In a nutshell, the answer is to avoid ruffling the feathers of the Turkish government which continuously invokes the negative impact that such a friction would cause in their bilateral relations with Canada, particularly in terms of the economic impact on Turkey's long-term investment strategy in Canada, as highlighted in the internal documents recently released by GAC to the FAAE (see for example the exchanges between Mr. Jamal Khokhar, Canadian Ambassador to Turkey and Mr. Mike Ward, Executive director of the Canada-Turkey Business Council).¹²⁸ However, economic interest considerations can no longer be a factor that trumps the mandatory criteria provided in the EIPA.

Given the conflict between the two (2) opposing goals pursued by GAC, namely economic trade and arms control, several experts in the arms trade field, such as Ms. Peggy Mason, recommend the creation of an independent and impartial arms export control organization the whole as explained in her testimony before the FAAE on December 10, 2020:

"I ask the question: What is the point of Global Affairs investigating itself?"

There is an obvious conflict of interest, because Global Affairs Canada is pursuing two contradictory policy objectives: enabling sales of weapons to foreign buyers, on the one hand, and adhering to international and national obligations designed to protect human rights and international security that require strict limits on

¹²⁷ See the documents submitted to the FAAE, "Minister of Foreign Affairs- Documents submitted" March 12, 2021, p. 60, available at the following site : <https://www.ourcommons.ca/content/Committee/432/FAAE/WebDoc/WD11171604/11171604/MinisterOfForeignAffairs-e.pdf> "The approval of the specific permits mentioned in this memorandum is not expected to garner media attention, as the process is not public. (...) Parliamentary scrutiny is expected to be limited given the current COVID-19 crisis."

¹²⁸ Ibid, pp. 48 à 52.

those sales on the other. In addition, when the minister announces an investigation by Global Affairs, he or she is really asking officials to determine whether they gave him or her bad advice the first time round. How likely are they to do that?

The new regulatory framework in place that allowed Canada to accede to the Arms Trade Treaty puts hard legal limits on the discretion of the minister to approve exports, but the problem is not these provisions as written. The problem is the law as applied or, more accurately, as not applied.¹²⁹

In the end, if Canada wishes to continue to assert with credibility that it is a human rights champion and that it respects and applies a “robust export control regime”¹³⁰, then it must immediately rectify its application of the Act in order to act according to its own laws and to truly protect the lives and the rights of thousands of civilian victims who are killed and suffer each year at the hands of Canadian arms and munitions.

V. CONCLUSION

Since 2019, the *Export and Import Permits Act* has carved out a central place for its mandatory criteria which must be assessed in every decision to approve the export of Canadian arms and munitions and include the protection of international peace and security, of human rights law and of international humanitarian law. These criteria need to be applied objectively using the correct “substantial risk” test and not be discounted by external criteria not provided for in the Act, the whole with the aim of fulfilling the true objectives of the EIPA and the ATT. Unfortunately, Canada failed to apply these criteria correctly in its assessment of the export permits of Targeting Sensors to Turkey.

In April 2021 the Minister decided to cancel the export permits of Targeting Sensors to Turkey yet, at the same time, the Final Report inexplicably concludes that there is no substantial risk of violations of any of the criteria of the Act. In reality, given Turkey’s track record in Libya, Syria and Artsakh, there were and still are numerous indicators of substantial risks that the export of the Targeting Sensors to Turkey could be used to commit or facilitate serious violations of international humanitarian law and international human rights law as well as undermine peace and security.

Canada has described itself as a champion of human rights and leader in the promotion and protection of fundamental values such as freedom, justice, democracy and the rule of law, particularly since the creation of the United Nations in 1945 and the adoption of the Universal Declaration of Human Rights in 1948 (of which Canadian Mr. John Humphrey was one of the pioneers). According to Canada, its current approach to

¹²⁹Testimony of Ms. Peggy Mason, December 10, 2020:

<https://www.ourcommons.ca/DocumentViewer/en/43-2/FAAE/meeting-12/evidence>

¹³⁰ Statement from Minister Champagne on suspension of export permits to Turkey, October 5, 2020 :

<https://www.canada.ca/fr/affaires-mondiales/nouvelles/2020/10/declaration-du-ministre-champagne-sur-la-suspension-des-licences-dexportation-vers-la-turquie.html>

protecting human rights involves adopting a “consistently strong voice for the protection of human rights and the advancement of democratic values”.¹³¹ However, as noted by the *Senate Standing Committee on Human Rights* as early as June 2010, “there is a perception internationally that Canada’s reputation in this arena is slipping”.¹³² As such, Canada has to take action to ensure that it lives up to its reputation.¹³³

It goes without saying that Canada’s soft and capitular approach to the important issue of exports of arms and munitions falls short of its obligations under the Law which do not allow the Minister to issue export permits for military technology when this would result in any of the negative consequences outlined in the EIPA. Clearly, the shiny lure of economic gain from foreign countries, including Turkey, has taken precedence over Canada’s obligations under the EIPA.

To hell with the rule of law!

¹³¹ Government of Canada –Canada’s Approach to Advancing Human Rights:
https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/advancing_rights-promouvoir_droits.aspx?lang=eng

¹³² *Standing Senate Committee on Human Rights* “Canada and the United Nations Human Rights Council: Charting a New Course”, June 2010 ,p.25, available at the following link :
<https://sencanada.ca/Content/SEN/Committee/403/huma/rep/rep04jun10-e.pdf>

¹³³ *Ibid.*