Written Submission of Peggy Mason further to oral testimony on 10 Dec 2020 and 27 April 2021

I want to briefly look at how Canada assesses "substantial risk" looking first at Saudi Arabia and then Turkey.

Many allies have now suspended, or banned their arms exports to Saudi Arabia because of their potential use in the devastating Yemen conflict, with the Biden administration being the latest example.

Grave HR abuses by Saudi-led ground forces

Going by Canada's now infamous April 2020 report (ending the ban on *new* export permits for LAVs to Saudi Arabia just when the *existing* permits were running out) Canada would no doubt respond (if they had publicly responded, which they did not) that the U.S. case is different because they were providing weapons being *used* in the Saudi air strikes that are implicated in so many HR abuses up to and including war crimes; conveniently ignoring all the evidence of grave HR abuses against innocent civilians involving *ground* forces, including Saudi-led forces.

See, for example, page 66, paragraph 247 of the Sept 2020 UN Expert Panel Report on the specific role of Saudi Arabia in the recruitment and use of children in combat units in Yemen. And see paragraph 294 for the legal finding of a war crime by the coalition forces in this regard. See also paragraph 418 for the overall finding of culpability of the government of Saudi Arabia for human rights violations including arbitrary deprivation of life, enforced disappearances, arbitrary detention, gender-based violence, including sexual violence, torture and other forms of cruel, inhuman or degrading treatment, the recruitment and use in hostilities of children,

How does Canada explain the 2019 Belgium government ban on the export to Canada of gun turrets (extended in February 2020) because they were destined for incorporation into Canadian armoured vehicles (LAVs) headed for Saudi Arabia. Clearly Belgium does not subscribe to Canada's cynical analysis of substantial risk.

Assessing substantial risk

Canada is trying to ignore the meaning of a "substantial *risk*" of *facilitating* serious HR violations, pretending that there must be direct evidence of *the use* of a Canadian export to commit an atrocity rather than direct evidence of a *substantial risk* that Canadian exports will be used to commit or to *facilitate* such atrocities.

To help export control agencies in their national assessments, there is a growing body of international best practices being developed including recent, collaborative work, in which GAC officials were consulted, resulting in a report by The Stimson Centre and International Human Rights Clinic at Harvard Law school, entitled The Arms Trade Treaty's Gender-Based Violence Risk Assessment.

On page 29 of that report the following example is given:

> Example: The export application covers armored combat vehicles. Intelligence reports state that armored combat vehicles are often used to transport female prisoners to a notorious detention facility where rape and other forms of sexual violence are known to be prevalent

Then on page 31 it is stated:

> "Facilitate" is a broader concept than commission. To facilitate GBV means to make an act of GBV easier to commit or occur. Facilitation can encompass a wide range of acts, in some cases several steps removed from the harm itself.

In sum, it is hard to imagine how Canadian LAVs could *not* have been used by Saudi forces implicated in torture, forced disappearances, recruitment of child soldiers (including transport to Saudi Arabia for training) and GBV in Yemen.

But faced with this argument, GAC officials would no doubt say that only *older* LAVs were implicated, not the newer version that is the subject of the 2014 contract with Saudi Arabia. This argument conveniently ignores that the *ongoing* provision by General Dynamics Land Systems (GDLS) Canada of maintenance and related servicing for all exported LAVs, of whatever type, would be stopped by a ban on existing permits, with significant consequences for the utility of those vehicles in combat.

Canada's fundamental misunderstanding of what is required for a proper assessment of substantial risk in relation to human rights violations is glaringly indicated by this response given by Associate ADM Bruce Christie on 13 April before this committee regarding the WESCAM exports to Turkey: I quote:

> However, when we assessed the permit applications and whether they had contributed [to HR violations], we didn't look at whether human rights violations had been impacted in the region. We looked at whether the Canadian technology contributed to any human rights violations, or any violations of international humanitarian law. In the Export and Import Permits Act and the Arms Trade Treaty criteria that are now enshrined in the act, *we do not have the legal right to look into human rights violations writ large. We look at whether human rights violations were caused as a result of the Canadian export of military technologies*. [emphasis added]

That is completely wrong: it is absolutely necessary in assessing risk to look at the overall situation of HR violations. Without doing this, it is impossible to assess the risk of potential Canadian violations. All Canada is doing is assessing evidence of direct past use and this is NOT the proper test. It is like trying to determine if Canadian exports will be destabilizing in a vacuum without looking at the overall conflict situation.

Of course, in a review of a permit already granted (as with WESCAM), one will first look for evidence of use or facilitation. But that is not the end of it. Just as one should have assessed the *risk* of such use or facilitation at the time of the assessment of the original export permit, so

should this be included in the review, to meet the ATT test of determining if there is an overriding (substantial) risk.

To further make this point, let us consider again the Harvard/Stimson Centre Risk Assessment Guide referenced earlier. In their introduction (p.3) they state that their paper "outlines key questions that licensing officers should ask of their information sources" with the following goal:

> Its goal is to assist licensing officers in obtaining the best information relevant to the GBV risk assessment, thereby enabling them to make well-informed and ATT-compliant decisions on export applications.

They then outline the three categories of interrelated questions in their questionnaire, including not only the human rights record of the individual exporter but the incidence of GBV in the recipient state. A sample question provided is:

"What is the extent and severity of GBV, prior and current, in the recipient State?"

Now recall again the fact that Bruce Christie, the Associate ADM for Trade Policy and Negotiations, stated in his testimony that "we do not have the legal right to look into human rights violations writ large".

What stronger evidence could there be of the need for a full revamping of Canada's risk assessment process on export applications?

In summation, I refer members of the Committee back to my first appearance before you on this study on 10 Dec 2020 where I concluded my oral presentation with a call for an independent, *expert* agency to impartially administer our arms exports in full accordance with Canadian and international law while, in the meantime immediately:

- Beginning consultations on the creation of an "arms-length advisory panel of experts" as promised in April 2020, and
- Mandating an independent expert *legal opinion* on compliance with Canada's international legal obligations as an integral part of the *current* GAC export permit application process.

Conflicts of Interest, Balancing of trade versus Human Rights and the ATT

In the question time following my oral presentation, some Committee members raised the problem of GAC officials having to "balance" conflicting priorities; namely, trade promotion versus ATT and EIPA compliance regarding human rights and peace and security.

I had argued in my original oral submission in December 2020 (a copy of which is attached hereto) that GAC officials were being put in an impossible position given these contradictory mandates. In raising this point, *I did not mean to suggest that seeking to balance these priorities*

was a legitimate consideration during the risk assessment process for arms export application. To be compliant with the ATT criteria, as set out in Canada's amended EIPA, no such balancing is permitted. Under Article VII (of the ATT and of the EIPA as amended) the only considerations are (1) is there a substantial risk that the proposed export will be used in the commission of, or to facilitate the commission of, grave HR violations, GBV or to undermine peace and security; and (2) are there factors that could satisfactorily mitigate this risk?

See: EIPA: **Substantial risk**

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

To repeat, other considerations, such as the broader impact on a trading relationship of a decision to refuse an export permit, *are not relevant to the assessment of substantial risk.* And if a substantial risk is found that cannot be satisfactorily mitigated, then the permit *shall* be denied whatever the trade implications. This is why it is so very important for the Government of Canada, and specifically the Canadian Commercial Corporation, to do its due diligence before entering into contracts which might subsequently give rise to refusals of permits.

Thank you.

(See attached, copy of oral submission on 10 December 2020)

Remarks by Peggy Mason, President of the Rideau Institute to the Standing Committee on Foreign Affairs.

10 December, 2020

Thank you very much for inviting me here today. Merci pour cette invitation.

Canada needs an independent impartial Canadian Arms Export Control Agency

Since I became President of the RI in June 2014, we have been tracking the long and sordid saga of our continuing arms exports to Saudi Arabia, no matter what.

These exports have continued despite heinous internal repression in the Saudi kingdom, state-planned assassinations potentially reaching onto Canadian territory and, the ultimate black eye, a UN Human Rights Expert Report explicitly naming and shaming arms exporters, including Canada, Iran and the UK, "perpetuating the conflict in Yemen" and the almost incalculable human suffering it has engendered.

But, alas, there is more, much more.

As you have heard, Project Ploughshares has exhaustively documented evidence of Canadian drone technology exported to Turkey being used in conflicts in Libya, Syria and Iraq. The allegations of Turkey transferring this equipment to armed groups in Libya, contrary to a decade-long UN Security Council-imposed mandatory arms embargo, are particularly shocking. And then there is Nagorno-Karabakh.

We have seen a cynical pattern of Global Affairs suspending *new* export permits under the glare of media scrutiny, announcing an internal investigation and then lifting the suspension when the media hype dies down, all the while in most cases continuing the actual exports anyway under existing permits.

The GAC report, justifying the lifting of the latest Saudi arms permit suspension, even argued that, despite repeated calls by UN experts for *all* countries to cease their arms exports, Canadian arms were somehow not implicated. This in turn led the UN Expert Group in their *next* report to explicitly name Canada. Never, as a former Ambassador, did I ever imagine seeing the name of Canada in such a report.

So 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 those sales, on the other. In addition, when the

Minister announces an investigation by Global Affairs, he is really asking officials to determine whether they gave him 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 export permits.

But the problem is not *these* provisions as written. The problem is the law as applied, or more accurately, as not applied.

How can the Government of Canada be compelled to act in accordance with Canadian law?

Currently the only recourse citizens have (aside from the court of public opinion) is to take the Government of Canada to Federal Court.

But such legal proceedings are lengthy and expensive and necessarily after the fact. **That is why we need a new independent agency to impartially administer our arms exports in full accordance with Canadian and international law.**

The arguments in favour include:

- No conflict of interest on the part of the administrators between trade promotion and respecting human rights, UN arms embargoes and other Canadian legal obligations;
- Officials not being asked to review their own past recommendations;
- Independent expert legal advice based on all available evidence together with other requisite expertise guiding the decisions.

And, a House of Commons Committee, could be mandated to provide parliamentary oversight as recommended by Project Ploughshares here today.

And the ultimate benefit for elected officials is taking the domestic politics out of the equation.

In the meantime, there are **two immediate steps** that Global Affairs Canada (GAC) can take to help improve its current dismal record:

- Begin consultations on the creation of an “arms-length advisory panel of experts” as promised in April 2020, and
- Mandate an independent expert legal opinion on compliance with Canada’s international legal obligations as an integral part of the *current* GAC export permit application process.

Thank you