UNOFFICIAL TRANSLATION

Court File Number: T-462-16

FEDERAL COURT

BETWEEN:

DANIEL TURP

Applicant

AND

THE MINISTER OF FOREIGN AFFAIRS

Respondent

APPLICANT'S MEMORANDUM

INTRODUCTION

1. In becoming a party to the *Wassenaar Arrangement* and the *Geneva Conventions of August 12, 1949,* Canada committed to control the export of arms to countries where they risk being misused. To strengthen this commitment, Canada has adopted legislation that obliges arms manufacturers to request and obtain export permits before sending their merchandise abroad. Canada also has adopted policies that govern the issuance of these permits which takes into account fundamental rights and freedoms and international humanitarian law.
2. By issuing permits allowing the export of light armoured vehicles ("LAVs") to Saudi Arabia, the respondent has ignored the objectives of the *Export and Import Permits Act*,

the 1986 Cabinet policy *Guidelines*, the *Export Controls Handbook* that explains to the exporters the process involved in the decision to issue export permits, and the *Geneva Conventions Act*.

3. The respondent took into consideration irrelevant facts, and, for want of an exhaustive memorandum on relevant facts, could not ascertain the severity of international humanitarian law and human rights law violations that should have been at the core of his decision. Furthermore, his decision was based on the wrongful evaluation criterion.
4. For these reasons, the applicant believes that the respondent's decision is invalid and must be declared void.

PART I: STATEMENT OF FACTS

5. The Kingdom of Saudi Arabia ("Saudi Arabia") is an absolute Islamic monarchy that routinely, and in a consistent and systematic manner, breaches the fundamental rights of its citizens, notably the rights to life, liberty, security, equality, protection against torture and cruel, inhuman or degrading treatment or punishment, as well as the freedom of conscience and religion, of thought, of opinion and expression, including the freedom of the press, freedom of peaceful assembly, and the freedom of association with others.
6. Amnesty International's Report, which is recognized as credible by the Canadian government[1], confirms that the Saudi State, in a common, generalized, systematic manner and on a large scale, notably subjects its citizens to the following :
    a. The death penalty;
    b. The carrying out of this penalty by decapitation;
    c. Torture and other cruel, inhuman, and degrading treatment;
    d. Attacks on the freedom of expression, notably by the repression and the arrest of demonstrators.[2]
7. Saudi Arabia also heads a coalition now intervening in Yemen. A panel of experts mandated by the United Nations Security Council to examine the situation in Yemen reports that Saudi Arabia has intentionally used airstrikes, indiscriminate shelling, and

[1] Immigration and Refugee Board of Canada, *National Documentation Packages*, Applicant's affidavit of 29 April 2016, exhibit B, Applicant's record, p. 227.
[2] Amnesty International, *2015/2016 Report: annual assessment of human rights around the world*, Éric David's affidavit of 12 April 2016, exhibit B, Applicant's record, pp. 274-279.

artillery rockets against civilian populations and has also breached international humanitarian law.[3] The memorandum dated 21 March 2016, which constitutes the entirety of the tribunal record, indeed refers to this report and notes the intentional attacks against civilians and humanitarian organizations.[4] According to the Amnesty International Report and to an article published in *Business Insider,* the coalition headed by Saudi Arabia has also deployed ground troops on Yemenite territory.[5] Canadian-made LAVs have also been seen towards the end of 2015 near Najran, a city at the heart of the conflict, at the border of Saudi Arabia and Yemen.[6]

8. In spite of these serious and uncontested violations of international humanitarian law in Yemen and equally serious and admitted violations of fundamental rights of the Saudis, General Dynamics Land Systems Canada ("GDLS-C") applied through the Minister of Foreign Affairs (the "Minister") to obtain six export permits of LAVs and associated armaments, spare parts and technical data to Saudi Arabia.[7]
9. On December 21, 2015, the Minister of International Trade received a memorandum seeking his opinion and recommendations on the issuance of these permits before January,8, 2016.
10. The applicant filed his application for judicial review on March 21, 2016.
11. On that same day, the respondent received the memorandum regarding the decision to be taken on this question.
12. On April 8, 2016, almost three weeks after the filing of the application for judicial review and three days after the delay that the law affixes to produce requested documents according to Rule 317 of the *Federal Courts Rules,* the Minister took the decision to issue the permits requested by GDLS-C and contested by the applicant.

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[3] United Nations Security Council, *Final report of the Panel of Experts on Yemen established pursuant to Security Council resolution 2140 (2014)*, S/2016/73), 26 January 2016, Éric David's affidavit of 12 April 2016, exhibit D, Applicant's record, pp. 317-322.
[4] Global Affairs Canada, Memorandum for Action, 21 March 2016, para.17, Applicant's record, pp. 20-21.
[5] Amnesty International, *Report: annual assessment of human rights around the world*, p. 86, Éric David's affidavit, exhibit B, Applicant's record, p.275; Jeremy Bender, *Saudi Arabia's elite National Guard has been ordered to take part in the war in Yemen*, Business Insider, 21 April 2015, Daniel Turp's affidavit of 13 April 2016, exhibit H, Applicant's record, p.181.
[6] Steven Chase et Robert Fife, *Saudis appear to be using Canadian-made combat vehicles against Yemeni rebels*, *The Globe and Mail*, 22 February 2016, Applicant's affidavit, exhibit I, Applicant's record, p.188.
[7] Global Affairs Canada, Memorandum for Action, 21 March 2016, Applicant's record, p.17.

13. However, various facts demonstrate that the Minister's decision seemed to be already taken well before the reception of the memorandum, dated March 21, 2016, which informed him of certain ins and outs of an eventual favourable decision.

PART II: POINTS IN ISSUE

14. There is only one point in issue: did the respondent commit a reviewable error in issuing the export permits of LAVs to Saudi Arabia?

PART III: STATEMENT OF SUBMISSIONS

A- <u>The applicant's standing and the justiciability of the question</u>

15. Concerned with the respect of the principles of legality and the rule of law, and preoccupied by the many flagrant breaches of human rights and international humanitarian law by Saudi Arabia, the applicant acts out of public interest in order to have the decision of the Minister declared illegal and the nullity of the export permits issued as a result of this decision affirmed.
16. In the decision *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*,[8] the Supreme Court enumerated three factors to consider for the recognition of standing to act for a public interest group. These factors were reformulated in the decision *Canada (Attorney General)* v. *Downtown Eastside Sex Workers United Against Violence Society*[9] and now read as follows: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is *a* reasonable and effective way to bring the issue before the courts.[10] These factors must be interpreted purposively and flexibly.[11]
17. On the first factor, the applicant submits that the question that he raises is of the courts' jurisdiction, because it manifestly surpasses moral or political considerations.[12] In the decision *Downtown Eastside*, the Supreme court cites Le Dain J. who wrote, in the *Finlay* decision : "where there is an issue which is appropriate for judicial determination the

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[8] [1992] 1 S.C.R. 236.
[9] 2012 SCC 45 ["*Downtown Eastside*"].
[10] *Id.*, par. 37.
[11] *Id.*, par. 35.
[12] *Operation Dismantle v. The Queen*, [1985] 1 SCR 441, par. 38, 63.

courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government".[13] In essence, a real legal question arises here and deserves to be submitted to the authority of the Court.

18. With regards to the second factor, the applicant is an active citizen who, in his capacity as a professor in constitutional and international law, is concerned with the respect of the constitutional principle of the rule of law, but also with the respect of fundamental rights and international humanitarian law. For several years, he has demonstrated a real and constant stake in issues touching fundamental rights all over the world. He has the human and financial resources to have the question raised and resolved before the court.
19. Finally, on the third factor, the present judicial review is not only *one* of the reasonable and effective matters to submit the issue to the courts, but it is also, in practice, probably the only one. Having exhausted the non-judicial remedies by sending a letter of formal notice, there remains no other way to bring the matter to court in a legal challenge of this nature. No other Canadian citizen has a better interest than that of the applicant, except potentially a Canadian living in Saudi Arabia or in Yemen, in which case it is unlikely that such a person could submit a legal challenge similar to that of the applicant.
20. In consequence, the refusal to recognize the applicant's standing for the public interest would shelter the Minister's decision from judicial review, which would threaten the principle of legality and the larger constitutional principle of the rule of law.[14]

B- <u>The applicable statutory framework</u>

21. The applicable statutory framework is found in the *Export and Import Permits Act*, R.S.C. (1985), c. E-19 ["EIPA"]; the *Geneva Conventions Act*, R.S.C. (1985), c. G-3; the *Export Control List*, SOR/89-202; the *Guide to Canada's Export Controls – December 2013*; the *Guidelines concerning the export of military and strategic equipment* [the "Guidelines"]; the *Export Controls Handbook*; and the *Report on Exports of Military Goods from Canada*.

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[13] *Downtown Eastside*, par. 40.
[14] *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, par. 62.

Export and Import Permits Act:

3 **(1)** The Governor in Council may establish a list of goods and technology, to be called an Export Control List, including therein any article the export or transfer of which the Governor in Council deems it necessary to control for any of the following purposes:

[…]

(d) to implement an intergovernmental arrangement or commitment;

7 **(1)** Subject to subsection (2), the Minister may issue to any resident of Canada applying therefor a permit to export or transfer goods or technology included in an Export Control List or to export or transfer goods or technology to a country included in an Area Control List, in such quantity and of such quality, by such persons, to such places or persons and subject to such other terms and conditions as are described in the permit or in the regulations.

(1.01) In deciding whether to issue a permit under subsection, the Minister may, in addition to any other matter that the Minister may consider, have regard to whether the goods or technology specified in an application for a permit may be used for a purpose prejudicial to:

a) the safety or interests of the State by being used to do anything referred to in paragraphs 3(1)(a) to (n) of the *Security of Information Act*; or

b) peace, security or stability in any region of the world or within any country.

Geneva Conventions Act

2 **(1)** The Geneva Conventions for the Protection of War Victims, signed at Geneva on August 12, 1949 and set out in Schedules I to IV, are approved.

(2) The Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, which Protocols are set out in Schedules V and VI, respectively, are approved.

Common Article 1 to the four *Geneva Conventions*

1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Export Control List

2 The following goods and technology, when intended for export to the destinations specified, are subject to export control for the purposes set out in section 3 of the *Export and Import Permits Act*:

a) goods and technology referred to in Groups 1, 2, 6, and 7 of the schedule, except for goods and technology set out in items 2-1, 2-2.a. and 2-2.b., 2-3, 2-4.a., 6-1, 6-2, 7-2, 7-3, 7-12 and 7-13 of the Guide, that are intended for export to any destination other than the United States;

Group 2 of the schedule:

The following goods and technology:

a) goods and technology, as described in Group 2 of the Guide, the export of which Canada has agreed to control in accordance with the Wassenaar Arrangement and the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials; and;

b) firearms described in item 2-1.e. of the Guide.

Guide to Canada's Export Controls – December 2013

2-6. Ground vehicles and components, as follows:

a. Ground vehicles and components therefor, specially designed or modified for military use;

Note 1

2-6.a. includes:

a) [...]

b) Armoured vehicles

[...]

Guidelines concerning the export of military and strategic equipment:

"The minister stressed that the government will no longer issue licenses for the export of military equipment to countries where citizens' rights are subject to serious and repeated violations of the government; unless it can be demonstrated that there is no reasonable risk that the military equipment to be used against the civilian population. Under the new policy on countries subject to serious problems in terms of human rights, it is clear that it is the exporter who will have the task of proving 'that there is no reasonable risk'."

"The minister said that the government exercises strict control over the export of military goods and technology to:

1) countries that pose a threat to Canada and its allies;
2) countries engaged in hostilities or who bears an imminent danger of conflict;
3) countries subject to UN Security Council sanctions; and
4) countries where citizens' rights are subject to serious and repeated violations of the government, unless it can be demonstrated that there is no reasonable risk that the material will be used against the civilian population."

Export Controls Handbook

"This Export Controls Handbook is intended as a reference tool for exporters and provides practical information about the administration of Canada's export controls which are administered pursuant to the Export Control List, the Area Control List and the Automatic Firearms Country Control List, under the authority of the Export and Import Permits Act." (p. 1)

"The principal objective of export controls is to ensure that exports of certain goods and technology are consistent with Canada's foreign and defence policies. Among other policy goals, export controls seek to ensure that exports from Canada:

- do not cause harm to Canada and its allies;
- do not undermine national or international security;
- do not contribute to national or regional conflicts or instability;

- do not contribute to the development of nuclear, biological or chemical weapons of mass destruction, or of their delivery systems;
- are not used to commit human rights violations; and
- are consistent with existing economic sanctions' provisions." (p.10)

"The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technology was established in 1996 to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technology, thus preventing destabilizing accumulations.

Participating States seek to ensure that transfers of these items do not contribute to the development or enhancement of military capabilities which undermine these goals, and to ensure that these items are not diverted to support such capabilities. The Wassenaar Arrangement is also intended to enhance co-operation to prevent the acquisition of armaments and sensitive dual-use items for military end-uses, if the situation in a region or the behaviour of a state is, or becomes, a cause for serious concern to the Participating States." (p. 6)

Report on Exports of Military Goods from Canada

"Canada has some of the strongest export controls in the world. A key priority of Canada's foreign policy is the maintenance of peace and security. To this end, the Government of Canada strives to ensure that Canadian military exports are not prejudicial to peace, security or stability in any region of the world or within any country." (p. 1)

"Once an application to export goods or technology has been received, wide-ranging consultations are held among human rights, international security and defence-industry experts at DFATD (including those residents at Canada's overseas diplomatic missions), the Department of National Defence and, as necessary, other government departments and agencies. Through such consultations, each export permit application is assessed for its consistency with Canada's foreign and defence policies. Regional peace and stability, including civil conflict and human rights, are actively considered." (p. 2)

C- <u>The applicable standard of review</u>

22. The main issue, namely whether the Minister committed a reviewable error by issuing export permits of LAVs to Saudi Arabia, raises a mixed question of fact and law reviewable by the standard of reasonableness.

23. The Supreme Court articulated what reasonableness means in the decision *Dunsmuir v. New-Brunswick*[15]:

> [46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
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> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, <u>reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law</u>." [emphasis added]

24. This norm has been reformulated and applied countless times by the courts, most notably by the Supreme Court of Canada. This Court must determine whether the Minister's

[15] 2008 SCC 9, L.C.J. Vol. 3, tab 18.

decision to issue the export permits in question was among the possible outcomes that, following the logic of the law as a whole, were rational.[16]

D- The Minister's decision was unreasonable in many ways

25. Under Article 7 (1) EIPA, the Minister has a discretion to issue export permits for goods included in the List of Export Control and technologies. Article 2a) of that list and paragraph 2-6.a. of *Canada's Export Control List* state that armoured vehicles are specifically subject to this requirement.
26. The applicant is aware that the decision maker has, in applying Article 7 (1) EIPA, a large discretion.
27. Such discretion, however, has its limits and, in this case, the Minister's decision to issue the export permits was unreasonable in two ways: (a) the decision was not a possible outcome and (b) the administrative process that led to this decision was flawed.

(a) The decision was not a possible outcome

28. According to professor Patrice Garant, "[t]he search for the rationality of the administrative act is often combined with that of the purpose of the law. The pursuit of a conclusion or an objective that is not in conformity with those of the legislator render the character of unreasonableness of the challenged administrative act plausible"[17] [free translation].
29. In the present case, the issuance of export permits for LAVs to Saudi Arabia was inconsistent with the objectives of the EIPA and the *Geneva Conventions Act*. The Minister's decision was not an acceptable outcome in light of the applicable law and the evidence that was public and available at the time of the making of the decision. It was unreasonable, both in terms of the EIPA and of the *Geneva Conventions Act*.

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[16] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, par. 38; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, par. 43, 44, 56; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, par. 41; *Dunsmuir v. New Brunswick*, 2008 SCC 9, par. 47, 72.
[17] Patrice GARANT, *Droit administratif*, 6th ed., Cowansville, Yvon Blais, 2010, p. 246. See also *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, par. 45-47.

30. In interpreting a statute, we must "read its terms [...] in their entire context and in their grammatical and ordinary sense in harmony with the spirit of the law, the purpose of the legislation and the legislative intent".[18]
31. In the present case, all the elements are pointing in the same direction: Parliament and the government wanted to ensure that Canadian weapons would not be exported to countries that could use them against their people or against civilians in the context of an armed conflict.
32. One of the objectives explicitly covered by the control of arms and military equipment exports is to "implement an intergovernmental agreement or commitment," according to Article 3 (1) d) EIPA. The *Export Control List*, enabled by the EIPA, refers specifically[19] to the *Wassenaar Arrangement*.[20]
33. Moreover, under Article 7 (1.01) b) EIPA, before approving or refusing the issuance of the permits requested, the decision maker may consider "whether the goods or technology specified in an application for a permit may be used for a purpose prejudicial to peace, security or stability in any region of the world or within any country."
34. It appears beyond doubt that Parliament had in mind, among others, the *Wassenaar Arrangement* in enacting Article 7 (1.01) EIPA, as well as, in the overall context, the *Geneva Conventions Act*.
35. Policies and guidelines adopted by the government also guide the exercise of discretion and, ultimately, help determining whether the decision maker's application of the lawwas reasonable. In *Agraira v. Canada (Public Safety and Emergency Preparedness),*[21] LeBel J. concluded that:

> [60] The Guidelines did not constitute a fixed and rigid code. Rather, they contained a set of factors, which appeared to be relevant and reasonable, for the evaluation of applications for ministerial relief. The Minister did not have to apply them formulaically, but they guided the exercise of his discretion and assisted in framing a fair administrative process for such applications. As a result, the Guidelines can be of assistance to the Court in understanding the Minister's implied interpretation of the "national interest".

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[18] E.A. DRIEDGER, *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983, p. 87.
[19] *Export Control List*, Group 2 of the Schedule.
[20] *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.*
[21] 2013 SCC 36.

36. Two documents of this nature were relevant to guide the respondent's decision. First, the *Guidelines concerning the export of military and strategic equipmen*t, which were adopted in 1986 and still are in force, provide that the export of military equipment must be subject to strict controls to "countries where citizens' rights are subject to serious and repeated violations of the government, unless it can be demonstrated that there is no reasonable risk that the material will be used against the civilian population".[22] They also provide that the government will exercise strict control over the export of military equipment "to countries engaged in hostilities or who bears an imminent danger of conflict."[23]
37. Moreover, the *Export Controls Handbook*, developed by the Minister of Foreign Affairs contains information for exporters on "how to comply with the requirements of the *Export and Import Permits Act* and its related regulations."[24] It is mentioned that:

> The principal objective of export controls is to ensure that exports of certain goods and technology are consistent with Canada's foreign and defence policies. Among other policy goals, export controls seek to ensure that exports from Canada:
>
> - do not cause harm to Canada and its allies;
> - do not undermine national or international security;
> - do not contribute to national or regional conflicts or instability;
> - do not contribute to the development of nuclear, biological or chemical weapons of mass destruction, or of their delivery systems;
> - are not used to commit human rights violations; and
> - are consistent with existing economic sanctions' provisions.[25]

38. The *Export Controls Handbook* also refers to the *Wassenaar Arrangement.*[26]
39. This *Arrangement* consists of a series of documents, one of which enumerates factors to consider before exporting arms. One of these factors reads as follows:

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[22] Minister of Foreign Affairs, *Guidelines concerning the export of military and strategic equipment*, 10 September 1986, pp. 1-2, Applicant's affidavit of 13 April 2016, exhibit B, Applicant's record, pp. 48-49.
[23] *Ibid*, p.1, Applicant's record, p. 48.
[24] Export Controls Division (Foreign Affairs, Trade and Development Canada), *Export Controls Handbook*, revised in June 2015, p. 3, Applicant's affidavit of 13 April 2016, exhibit C, Applicant's record, p. 60.
[25] *Ibid*., p.10, Applicant's record, p. 67.
[26] *Ibid.*, p.11, Applicant's record, p. 68.

> e. Is there a clearly identifiable risk that the weapons might be used **to commit or facilitate** the violation and suppression of human rights and fundamental freedoms **or the laws of armed conflict**?"[27] [emphasis in original]

40. When read together, these instruments, national and international, lead to an interpretation of the EIPA in which the Minister, before taking his decision, should assess and consider the risk that the weapons for which an export permit is sought be used to commit breaches of human rights or create instability or national or regional conflicts.

Geneva Conventions Act

41. The Minister must also ensure compliance with the *Geneva Conventions Act*, which incorporates into Canadian law the provisions of the four *Geneva Conventions of 12 August 1949*, the *Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, and the *Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts*.
42. As provided in their first common article, the four *Geneva Conventions* require Canada to "ensure respect of the agreements and additional protocols in all circumstances."
43. Despite the respondent's expert views , according to the majority of doctrinal sources, the commitment to ensure respect of the conventions in all circumstances applies equally to States engaged in a conflict and to those who are not.[28]
44. This strong doctrinal trend relies in part on the comments of the International Committee of the Red Cross, which read as follows :

> In addition, the High Contracting Parties undertake, whether or not they are themselves party to an armed conflict, to ensure respect for the Conventions

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[27] *Wassenaar Arrangement: Elements for objective analysis and advice concerning potentially destabilising accumulations of conventional weapons*, 3 December 1998, 1.e.

[28] Maya BREHM, "The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law", (2008) 12(3) Journal of Conflict & Security Law 359, 370 and 371; Alexandre DEVILLARD, "L'obligation de faire respecter le droit international humanitaire: l'article 1 commun aux *Conventions de Genève* et à leur premier *Protocole additionnel*, fondement d'un droit international humanitaire de coopération?", (2007) 20.2 Revue québécoise de droit international 75, 82. See also: Knut DÖRMANN and Jose SERRALVO, "Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations", (2014) 96 International Review of the Red Cross, 707, exhibit MS-4; Luigi CONDORELLI and Laurence BOISSON DE CHAZOURNES, "Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'", in Christophe SWINARSKI, *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet,* Geneva, International Committee of the Red Cross, 1984, 17, p. 24 ss.

> by other High Contracting Parties and non-State Parties to an armed conflict. The interests protected by the Conventions are of such fundamental importance to the human person that every High Contracting Party has a legal interest in their observance, wherever a conflict may take place and whoever its victims may be. Moreover, the proper functioning of the system of protection provided by the Conventions demands that States Parties not only apply the provisions themselves, but also do everything reasonably in their power to ensure that the provisions are respected universally. The Conventions thus create obligations *erga omnes partes*, i.e. obligations towards all of the other High Contracting Parties.[29] [emphasis added]

45. The respondent's expert erroneously asserted that the Red Cross has changed its mind on this issue. It is based on the English version of both texts by Jean Pictet, which read as follows:

> "It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should [*et doivent-elles*], endeavour to bring it back to an attitude of respect for the Convention"[30] [emphasis added].
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> "This applies to the respect of each individual State for the Convention, but that is not all: in the event of a Power failing to fulfil its obligations, each of the other Contracting Parties (neutral, allied or enemy) should [*doit*] endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally."[31] [emphasis added]

46. Questioned on this, he could not explain the impact of the difference between the English and French versions, although he was able to say earlier that "pourrait servir" means "could be used" when questioned about the discrepancies between the English and French versions of Article 6 of the *Arms Trade Treaty.*[32]

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[29] INTERNATIONAL COMMITTEE OF THE RED CROSS, "Convention (I) de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, 12 août 1949. COMMENTAIRE OF 2016 : ARTICLE 1 : RESPECT FOR THE CONVENTION", para. 119.

[30] Jean PICTET, "Commentaire de 1952 sur la Convention (I) de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, 12 août 1949", p. 27.

[31] Jean PICTET, "Commentaire de 1960 sur la Convention (III) de Genève relative au traitement des prisonniers de guerre, 12 août 1949", p. 24.

[32] Cross-examination of Michael N. Schmitt, p.68, Applicant's record, p. 520.

47. The advisory opinion issued in 2004 by the International Court of Justice (ICJ) on the construction of a wall by Israel in Palestinian territory also underpins the majority doctrinal current. The ICJ declared:

> **158.** The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in al1 circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.
>
> **159.** Given the character and the importance of the rights and obligations involved, the Court is of the view that al1 States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for al1 States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, al1 the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[33] [emphasis added]

48. The respondent's expert confirmed that the ICJ had given no further opinion or rendered any other judgment contradicting the views expressed in the advisory opinion on the

[33] *Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory opinion, ICJ Reports 2004, p. 136. By thirteen votes to two, the ICJ declared that: "Al1 States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; al1 States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation. while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention" (p. 200) [emphasis added]

construction of a wall on Palestinian territory.[34] He also claimed not to know why he had used the word "suggested" in his affidavit, when stating the *ratio* of the ICJ in this advisory opinion.[35]

49. The respondent's expert interpretation of common Article 1 clearly fits into the minority current. One may wonder if he had the independence and the distance necessary to assist the Court in the light of the links that he had in the past, and still has, with the US Army.[36] A distorted quotation also discredits the seriousness of his expertise.[37]
50. His opinion does not carry any weight in light of jurisprudence and doctrine.

Application to the facts and conclusion

51. Not only *could* the LAVs be used for the purpose of harming the peace, security or stability within and outside its borders, but unchallenged evidence shows that there is at least a reasonable risk, if not a high risk, that the LAVs exported to Saudi Arabia would be used to harm the security of the Shiite minority in Eastern Saudi Arabia and to undermine the peace, security or stability of the Arabian Peninsula.
52. In fact, Saudi Arabia is directly involved in hostilities in Yemen through a coalition that it heads. That would be enough, under the *Guidelines*, to justify a refusal to issue a permit for arms export towards Saudi Arabia.
53. But there is more: according to the panel of experts appointed by the United Nations Security Council and according to Amnesty International, Saudi Arabia breached international humanitarian law (IHL) in Yemen by intentionally attacking civilian

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[34] Cross-examination of Michael N. Schmitt, p. 101, Applicant's record, p. 553.
[35] Cross-examination of Michael N. Schmitt, p. 100, Applicant's record, pp. 552-553:
Q- So, you say at paragraph sixty-nine (69) of your Affidavit that, "The International Court of Justice suggested..." yes, you can turn to it. So, you say that, "The International Court of Justice suggested that other States were obliged to act to influence Israel to respect its IHL obligations pursuant to Article 1." Why did you use the word "suggested"?
A- I don't know the answer to that question, I just wrote it that way.
Q- Okay.
A- I meant nothing by it. I take your point.
[36] Cross-examination of Michael N. Schmitt, p.7, Applicant's record, p.459 He also testified about an incident when he was still in service during which he made a decision that was proven wrong and that cost the lives of 26 innocent people (Cross-examination of Michael N. Schmitt, p.47, Applicant's record, p. 499). Far be it from us to call into doubt that it was a mistake; this incident casts a shadow on his ability to testify freely on matters related to the responsibility of States in time of war.
[37] Cross-examination of Michael N. Schmitt, pp.90-96, Applicant's record, pp.542-548.

targets.[38] Saudi Arabia is thus always susceptible to violate IHL and to commit war crimes.

54. By issuing permits for the export of LAVs, the respondent has disregarded the principles that should have guided his decision following the EIPA, as well as the *Guidelines*, but he has also contravened the *Geneva Conventions Act* by not meeting the commitments made by Canada under these conventions.

(b) The administrative process that led to this decision was flawed

55. As the Supreme Court stated in *Prince George v. Payne*, "[i]t is not a judicial exercise of discretion to rest decision upon an extraneous ground".[39]

56. The administrative process leading to the decision may be flawed in different ways, especially if irrelevant considerations are taken into account, if relevant factors are not, or if the mind of the decision maker was closed to any other possibility.[40]

57. As reminded by this Court in *Centre Québécois du droit de l'environnement v. Canada (Environment)*[41] : "[t]he Minister is not bound by departmental policy. However, the specific reasons for deviating from such policies should be made clear" [free translation].

58. In the present case, the reasons given by the Minister to depart from the factors prescribed in the EIPA, the *Guidelines* and the *Handbook* are all irrelevant considerations:

    a. Maintaining thousands of employees in Ontario[42];
    b. The fact that his political party had promised during its electoral campaign to follow up on an already-agreed contract[43];
    c. A so-called penalty for Canada if the contract did not go ahead[44];

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[38] United Nations Security Council, *Final report of the Panel of Experts on Yemen established pursuant to Security Council resolution 2140 (2014)*, S/2016/73), 26 January 2016, pp. 35-40, Éric David's affidavit, exhibit D, Applicant's record, p.317-322; Amnesty International, *2015/2016 Report: annual assessment of human rights around the world*, p.86, Éric David's affidavit, exhibit B, Applicant's record, p.275.
[39] [1978] 1 S.C.R. 458, 463. See also: *Roncarelli c. Duplessis*, [1959] S.C.R. 121.
[40] Patrice GARANT, *supra* note 17, pp. 219-220.
[41] 2015 FC 773, par. 73 [*CQDE*].
[42] Global Affairs Canada, Memorandum for Action, 21 March 2016, para. 2, 13, Applicant's record, pp.18, 20; Agnès Gruda, *La responsabilité à géométrie variable*, *La Presse*, 4 April 2016, Applicant's affidavit of 13 April 2016, exhibit A, Applicant's record, p. 43.
[43] National Post, *How the 'light-armoured vehicles' Canada is selling to Saudi Arabia compare to what Canadian Forces use*, 8 January 2016, Applicant's affidavit of 13 April 2016, exhibit F, Applicant's record, p. 178.

d. The fact that Canada's international reputation would be tainted if it did not respect its contracts[45]; and

e. The fact that other States will provide Saudi Arabia with LAVs if Canada does not[46].

59. It is not a question here to ensure a balance between economic considerations and considerations involving fundamental rights and humanitarian rights. According to Éric David, "the mandatory standards violated by Saudi Arabia trumps any consideration of political or economic nature" [free translation].[47] This assertion is not contradicted by the respondent's expert.

60. The respondent's decision was guided by considerations other than respect for fundamental rights and international humanitarian law. The Minister was not informed of the evidence the government had in its possession or evidence that was publicly available and that clearly demonstrated that there is a reasonable risk, if not a higher risk, that the LAVs could be used against civilians. Thus, according to the tribunal record, the respondent issued the export permits without having in front of him the devastating reports of human rights experts, including one from Amnesty International,[48] while these reports were publicly available and demonstrated the clear existence of a risk that the LAVs could be used against civilian populations. Yet the government, in the *Report on Exports of Military Goods from Canada*, had formally committed itself to "wide-ranging consultations […] held among human rights, international security and defence-industry

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[44] Global Affairs Canada, Memorandum for Action, 21 March 2016, para. 5, Applicant's record, p. 18; Mélanie Marquis, *Blindés pour Riyad : au nom de la « conviction responsable », justifie Dion*, *La Presse* canadienne, 29 March 2016, Applicant's affidavit of 13 April 2016, exhibit A, Applicant's record, p. 36; Agnès Gruda, *La responsabilité à géométrie variable*, *La Presse*, 4 April 2016, Applicant's affidavit of 13 April 2016, exhibit A, Applicant's record, p.43.

[45] Agnès Gruda, *La responsabilité à géométrie variable*, *La Presse*, 4 April 2016, Applicant's affidavit of 13 April 2016, exhibit A, Applicant's record, p. 43.

[46] Mélanie Marquis, *Blindés pour Riyad : au nom de la « conviction responsable », justifie Dion*, *La Presse* canadienne, 29 March 2016, Applicant's affidavit of 13 April 2016, exhibit A, Applicant's record, p. 36; Agnès Gruda, *La responsabilité à géométrie variable*, *La Presse*, 4 April 2016, Applicant's affidavit of 13 April 2016, exhibit A, Applicant's record, p. 44.

[47] Éric David's affidavit of 29 April 2016, par. 11 (références omises), Applicant's record, p. 444.

[48] Notably, Amnesty International, *2015/2016 Report: annual assessment of human rights around the world*, Éric David's affidavit, exhibit B, Applicant's record, p. 272.

experts"[49]. Amnesty International is clearly an international organization specializing in issues of human rights and recognized as such by the government.[50]

61. There is nothing in the tribunal record pertaining to evidence that Canadian-manufactured LAVs were seen in Najran, at the Yemeni border. There is nothing in the tribunal record pertaining to evidence that LAVs were used to suppress demonstrations by the Shiite minority in eastern Saudi Arabia. Yet, such information was accessible on well-known and credible news sites before the Minister made his decision.[51]
62. The Minister therefore omitted to consider crucial factual elements before making his decision.
63. In any case, the declarations made by the Minister, his representatives and the Prime Minister before the memorandum confirm that the Minister had already made his decision well before reading the tribunal record, or felt compelled to take this decision. For example, on January 4, 2016, the respondent's communications director said: "A private company is delivering the goods according to a signed contract with the government of Saudi Arabia. The government of Canada has no intention of cancelling that contract"[52]. Even during the election campaign, Justin Trudeau, now the Prime Minister of Canada, affirmed that he would not cancel or block this contract.[53]
64. Therefore, the government considered the decision that the Minister had to take to be a decision to cancel or not to cancel a contract, whereas this contract was or should have been conditional to the issuance of export permits. By his actions and his statements, it is clear that the Minister thought he could not do anything other than giving his approval to the issuance of permits. His mind was closed to any other possibility.
65. Moreover, the criterion used by the Minister was not the appropriate one. In order to fulfill the EIPA objectives, as provided in particular in the *Guidelines* and *Handbook*, it

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[49] Global Affairs Canada, *Report on Exports of Military Goods from Canada 2012-2013*, p.2, Applicant's affidavit of 29 April 2016, exhibit A, Applicant's record, p. 194.
[50] Immigration and Refugee Board of Canada, *National Documentation Packages*, Applicant's affidavit of 29 April 2016, exhibit B, Applicant's record, p. 227.
[51] James Jones, *Saudi Arabia Uncovered*, PBS, 29 March 2016, Applicant's affidavit of 13 April 2016, exhibit G, Applicant's record, p.179 (video); Steven Chase and Robert Fife, *Saudis appear to be using Canadian-made combat vehicles against Yemeni rebels*, *The Globe and Mail*, 22 February 2016, Applicant's affidavit, exhibit I, Applicant's record, p.188.
[52] Steven Chase, *Ottawa going ahead with Saudi arms deal despite condemning executions*, *The Globe and Mail*, 4 January 2016, Applicant's affidavit of 13 April 2016, exhibit D, Applicant's record, p. 171.
[53] National Post, *How the 'light-armoured vehicles' Canada is selling to Saudi Arabia compare to what Canadian Forces use*, 8 January 2016, Applicant's affidavit of 13 April 2016, exhibit F, Applicant's record, p.178.

suffices that there exists a reasonable risk that arms will be used against civilians to justify a refusal to issue permits.

66. In the memorandum submitted to the Minister on the basis of which he made his decision, concerns about human rights and international humanitarian law violations are rejected out of hand on the grounds that there is no evidence that Canadian-built weapons have been used to commit such breaches so far:

> "Canada has sold thousands of LAVs to Saudi Arabia since the 1990s, and, to the best of the Department's knowledge, there have been no incidents where they have been used in the perpetration of human rights violations".[54]
>
> "[t]here has been no indication that equipment of Canadian origin, including LAVs, may have been used in acts contrary to international humanitarian law".[55]

67. Not only are these statements misleading given that such evidence exists and was available at the time of the Minister's decision[56], but what is more, there is absolutely no need to get such evidence to meet the reasonable risk criterion. Obviously, such evidence would demonstrate a very high risk of recurrence, but a host of other factors can demonstrate a reasonable risk. Here, the past and present conduct of Saudi Arabia within and outside its borders shows that there is a reasonable risk, if not a higher risk, that the LAVs could be used against civilians (Saudi or Yemeni) as has been demonstrated in the previous section.
68. Moreover, in the tribunal record, no conclusion is reached to the effect that there is no reasonable risk that the LAVs could be used in the violation of fundamental rights of Saudi citizens and international humanitarian law in Yemen.
69. The distinction between risk and evidence is particularly important in the current context where it is virtually impossible to verify how LAVs already exported to Saudi Arabia are

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[54] *Ibid.,* para.15.
[55] *Ibid.*, para.17.
[56] James Jones, *Saudi Arabia Uncovered*, PBS, 29 March 2016, Applicant's affidavit of 13 April 2016, exhibit G, Applicant's record, p.179 (video); Steven Chase and Robert Fife, *Saudis appear to be using Canadian-made combat vehicles against Yemeni rebels*, *The Globe and Mail*, 22 February 2016, Applicant's affidavit, exhibit I, Applicant's record, p.188.

being used[57] and where Saudi Arabia will never admit that it is committing violations of international humanitarian law.

70. In addition, the memorandum on which the Minister's decision is based includes a semantically empty phrase, which shows once again that the test he used was not good: "The Department is not aware of any reports linking violations of civil and political rights to the use of the proposed military-purposed exports".[58] It is more than obvious that no human rights violation has been committed with weapons that have not yet been exported.
71. Finally, the gap between the factual finding that no violation has ever occurred involving *Canadian-built* LAVs delivered to Saudi Arabia[59] and the belief that the LAVs that are to be exported will not be used to breach fundamental rights in Saudi Arabia[60], merely adds to the unreasonableness of the decision. This belief is motivated by no other factual conclusion, while the first proposal does not lead to the second without other corroborating elements.
72. This, in addition to the simultaneity between the filing of the judicial review and the time of the challenged decision, demonstrates that the decision was made from scratch, just to respond to the judicial review. As stated in *CQDE*, "the Minister seems to have "put the cart before the horse", […] as her reasoning in the letter dated March 27, 2014 seems to have been shaped by the specific outcome sought".[61]
73. As the administrative process leading to the impugned decision was flawed, it is subject to revision.

Conclusion

74. The decision should be annulled because it did not constitute a possible and rational outcome, and that the decision-making process was tainted by irrelevant considerations, use of the wrong test and the closed mind of the decision maker.

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[57] United Nations Security Council, *Final report of the Panel of Experts on Yemen established pursuant to Security Council resolution 2140 (2014)*, S/2016/73), 26 January 2016, pp. 2, 8, Éric David's affidavit, exhibit D, Applicant's record, p. 284, 290.
[58] Global Affairs Canada, Memorandum for Action, 21 mars 2016, para.15, Applicant's record, p.20.
[59] Itself contested.
[60] Global Affairs Canada, Memorandum for Action, 21 mars 2016, para.15, Applicant's record, p.20.
[61] Par. 73.

PART IV: ORDERS SOUGHT

FOR THESE REASONS, THE APPLICANT RESPECTFULLY DEMANDS THIS COURT TO:

i) **DECLARE** that the issuance of export permits of light armoured vehicles made by GDLS-C to Saudi Arabia is illegal because it contravenes the *Export and Import Permits Act*, R.S.C. (1985), c. E-19, the regulation respecting its application, and the *Policy Guidelines concerning Exports of Military and Strategic Material*;

ii) **DECLARE** that the issuance of export permits of light armoured vehicles made by GDLS-C to Saudi Arabia is illegal because it contravenes the *Geneva Conventions Act,* R.S.C. (1985), c. G-3;

iii) **DECLARE** that the Minister acted without jurisdiction or beyond his jurisdiction by issuing export permits for light armoured vehicles manufactured by GDLS-C to Saudi Arabia, knowing that in this country the fundamental rights of citizens are being seriously and repeatedly violated and knowing or having known that there is a risk that the vehicles could be used against a civilian population;

iv) **DECLARE** that the Minister has taken on April 8, 2016, a decision not based on evidence or a proof that there was no reasonable risk that the light armoured vehicles are being used against the civilian population, but rather on a simple belief, regardless of the relevant material which was before him or which was accessible;

v) If this application is rejected, **ORDER** that the applicant will not be obliged to pay the costs of the respondent, in conformity with rule 400 of the *Federal Courts Act*;

vi) **ORDER** any other reparation that the Court esteems appropriate and just in view of the circumstances;

vii) **THE WHOLE**, with costs.

September, 15, 2016

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PART V: LIST OF AUTHORITIES

Federal laws and regulations

1. *Geneva Conventions Act*, R.S.C. (1985), c. G-3, article 2
2. *Export and Import Permits Act*, R.S.C. (1985), c. E-19, articles 3, 7, 12, 13
3. *Export Control List*, SOR/89-202, article 2, and Schedule

International treaties

4. *Wassenaar Arrangement: Elements for objective analysis and advice concerning potentially destabilising accumulations of conventional weapons,* 3 December 1998, 1.e.
5. *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949*, articles 1 and 3

Jurisprudence

6. *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36
7. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45
8. *Centre Québécois du droit de l'environnement v. Canada (Environment)*, 2015 FC 773
9. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236
10. *Legal consequences of the construction of a wall in the occupied Palestinian territory*, International Court of Justice, Advisory opinion of 9 July 2004, I.C.J. Reports 2004, p. 136
11. *Dunsmuir v. New Brunswick*, 2008 SCC 9
12. *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29
13. *Lake v. Canada (Minister of Justice)*, 2008 SCC 23
14. *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307
15. *McLean v. British Columbia (Securities Commission),* 2013 SCC 67
16. *Montréal (City) v. Montreal Port Authority,* 2010 SCC 14
17. *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441
18. *Prince George v. Payne*, [1978] 1 S.C.R. 458

19. *Roncarelli v. Duplessis*, [1959] S.C.R. 121

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21. INTERNATIONAL COMMITTEE OF THE RED CROSS, "Convention (I) de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, 12 août 1949. COMMENTAIRE OF 2016: ARTICLE 1 : RESPECT FOR THE CONVENTION"
22. CONDORELLI, Luigi and Laurence BOISSON DE CHAZOURNES. "Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'", in Christophe SWINARSKI, *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet,* Geneva, International Committee of the Red Cross, 1984, 17
23. DEVILLARD, Alexandre. "L'obligation de faire respecter le droit international humanitaire: l'article 1 commun aux *Conventions de Genève* et à leur premier *Protocole additionnel*, fondement d'un droit international humanitaire de coopération?", (2007) 20.2 *Revue québécoise de droit international* 75
24. DÖRMANN, Knut and Jose SERRALVO. "Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations", (2014) 96 *International Review of the Red Cross*, 707
25. DRIEDGER, Elmer A. *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983
26. GARANT, Patrice. *Droit administratif*, 6th ed., Cowansville, Yvon Blais, 2010
27. PICTET, Jean. "Commentaire de 1952 sur la Convention (I) de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, 12 août 1949"
28. PICTET, Jean. "Commentaire de 1960 sur la Convention (III) de Genève relative au traitement des prisonniers de guerre, 12 août 1949"