

OFFICIAL-SENSITIVE

From: [REDACTED]
Sent: 26 January 2016 17:03
To: SOSFA Action (Sensitive); [REDACTED]
Cc: Sarah MacIntosh (Sensitive); Neil Crompton * (Sensitive); Special Advisers Office (Sensitive); PUS Action (Sensitive); Peter Jones (Sensitive); Jessica Hand (Sensitive); Jane Marriott (Sensitive); [REDACTED]; [REDACTED]; Neil Bush (Sensitive); [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED] Cathy Adams * (Sensitive); Simon Collis * (Sensitive); Andrew Murdoch (Sensitive)
Subject: Saudi Arabia: Arms Export Policy OFFICIAL_SENSITIVE

[REDACTED] PS,

Issue

How should FCO recommend BIS respond to the request for specific action contained in the pre-action letter from Leigh Day, representing Campaign Against the Arms Trade, on arms exports to Saudi Arabia?

Recommendation/s

AEPD recommends that:

- The Foreign Secretary advises BIS not to suspend extant licences and not to suspend the processing of new licence applications for the export of arms to Saudi Arabia.
- The Foreign Secretary agrees that licences for arms exports to Saudi Arabia should continue to be assessed on a case-by-case basis, against the Consolidated Criteria.

Timing

As the letter from Leigh Day is a formal letter before claim, a reply is required within a reasonable time. A decision from the FS by Wednesday 27 January would be of great assistance with this.

Comment

Director, DDIS: *Seen and agreed in draft, noting that we need to continue to keep the situation under close review, including in the context [REDACTED] that the questions are finely balanced and given the significant proportion of 'dynamic targeting' strikes. The Saudis are giving relevant assurances, for example on post-incident investigations and applying lessons learned. These need to be followed through. We also need definitive assessment of the reports of alleged use of cluster munitions. Peter Jones*

Director, MENAD: *I support the view not to suspend extant licences/ new licence applications for two (MENA as opposed to legal) reasons:* [REDACTED]

[REDACTED] *We should, however, now update our list of lobbying the Saudis for change and map this against actual change to look objectively again at their actions. Jane Marriott*

Note: Annex B – IHL assessment – follows on CONF and hard copy.

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To: 1. PS

From: [REDACTED]
Date: 26 January 2016

SUBJECT: SAUDI ARABIA: EXPORT LICENSING POLICY

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Background

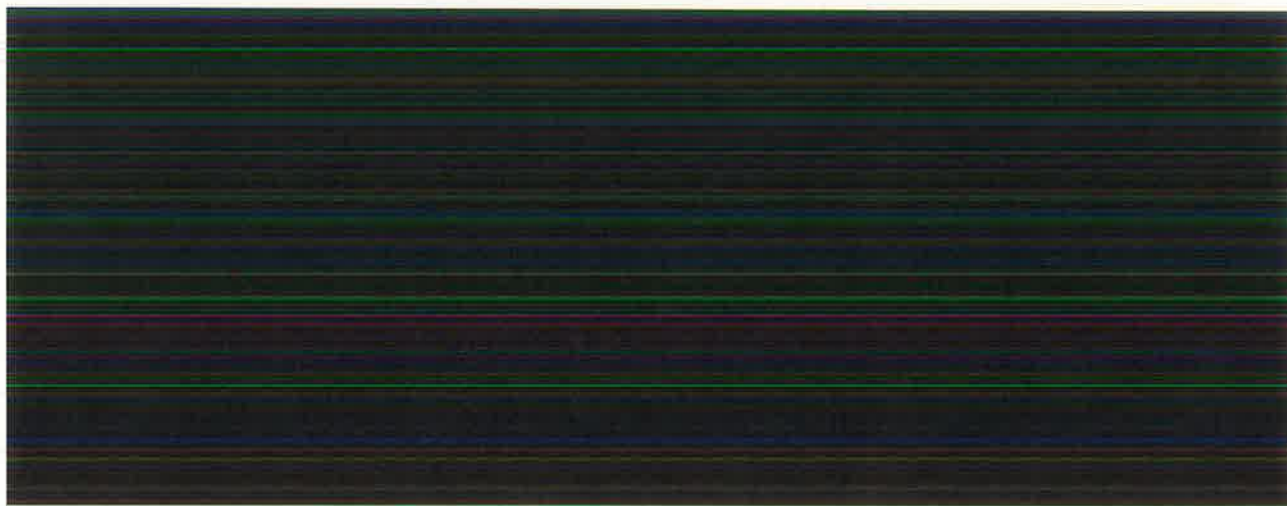
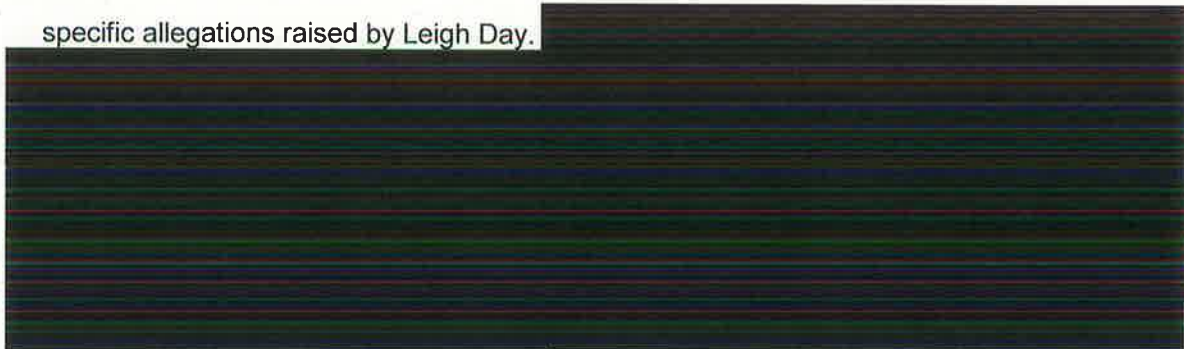
1. Leigh Day, representing the Campaign Against the Arms Trade (CAAT), wrote on 8 January 2016 to BIS (**Annex A**) asking for confirmation that, within 14 days, the Business Secretary:
 - i. *Agree to suspend extant licences for the export of military equipment and technology to Saudi Arabia for possible use in Yemen pending the outcome of a full review as to whether the export of military equipment pursuant to such licences is compatible with the requirements of the EU Common Position and the Consolidated Arms Export Licensing Criteria*
 - ii. *Agree not to grant further licences for the export of military equipment to Saudi Arabia pending the completion of such a review*
And
 - iii. *In addition, agree not to grant further licences (and to suspend existing licences) until you are in possession of sufficiently clear information to enable a proper assessment as to whether such licences can be granted lawfully¹.*
2. BIS Legal Advisers intend to put the above to the Business Secretary for decision once the Foreign Secretary has made a recommendation, following the usual arms exports licensing process of SSBIS' decisions being informed by FS' recommendations. Once we have the Business Secretary's decision, officials will prepare a draft reply to Leigh Day, informed by the Ministerial decisions, for clearance by Ministers, with the aim of issuing to Leigh Day in early February.
3. As the Foreign Secretary is aware, he would ordinarily remain sighted on relevant developments in Yemen through the regular IHL updates from MENAD /MoD. An up-to-date International Humanitarian Law (IHL) note is attached at **Annex B** to enable him to consider whether any change in policy is required as a result of developments on the ground.
4. In the context of the conflict in Yemen, MoD experts track all strike incidents they hear about. They are currently tracking 114 incidents of potential IHL concern which include all² of the

² MOD was already tracking all of the incidents referred to by Leigh Day with the exception of a generic allegation of strikes on schools and hospitals. MOD is aware of several allegations of strikes on schools and hospitals in Yemen but without more specific detail is unable to say if these are the ones Leigh Day is referring to.



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specific allegations raised by Leigh Day.



Argument

6. It is against the above background that the issues of (i) suspension and (ii) a moratorium on the granting of licences, must be considered.

7. On the question of **suspension**, the FS will be aware that the suspension mechanism provides for the immediate suspension of pending and extant licence applications where conflict or crisis conditions change the risk suddenly, or make conducting a proper Consolidated Criteria risk assessment difficult. In this case the risk has not changed suddenly, and whilst there are clearly conflict conditions, it is AEPD's view that we remain able to conduct risk assessments against the Consolidated Criteria. Whilst it is important to be cognisant of the gaps in our knowledge identified above, it is also important to note that there are always some gaps in our knowledge when we are conducting Consolidated Criteria assessments, in relation to exports to any country. AEPD consider that it is currently in possession of sufficient information, despite not being in possession of complete information, to conduct a Consolidated Criteria assessment. AEPD receives regular flows of information from within government, through the Embassy in Riyadh, and from Saudi contacts via MENAD as well as open sources, including NGOs and international organisations and media that have placed this conflict under particular scrutiny. This information flow has thus far



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provided, and continues to provide, adequate detail and context to make an informed assessment against the Consolidated Criteria.

8. The most relevant Criterion (referred to in Leigh Day's letter) is Criterion 2(c). In conducting the 2(c) assessment, AEPD has had regard to available information and have taken into account all relevant considerations including the political and security situation, HMG's understanding of Saudi processes, training and attitude, who the items are likely to be used by and how. Based on all of that information and those considerations, AEPD consider that we remain in a position to be able properly to assess the 2(c) risk with respect to UK licensed items for export to Saudi Arabia.
9. In line with the relevant User's Guide³, an assessment for 'clear risk' here is identified as including an inquiry into Saudi Arabia's past and present record of respect for IHL, intentions as expressed through formal commitments, and capacity to ensure that the equipment or technology transferred is used in a manner consistent with IHL. In particular, the User Guide states that where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern.
10. As set out in **Annex B**, from the available information, we consider that the Saudi-led Coalition is seeking to comply with IHL and broadly has IHL-compliant processes in place. Having regard to all the available information, and in particular the MOD assessments, we have not reached the view that there has been a serious violation of IHL by Saudi Arabia. Importantly, (see **Annex B** and as addressed by earlier reporting and IHL update notes) we would note the views set out as to respect for IHL in the processes, practices and training of KSA armed forces as an indicator of future compliance with IHL, which is an important factor in considering the future-facing 2(c) "clear risk" test. Of most recent relevance here are the positive outcomes from the visit of the Vice Chief of the Defence Staff to Saudi Arabia on 23 January, the detail of which is included in **Annex B**. Finally, given the very small percentage of incidents which are considered as being of potential concern, it is not clear that a pattern of violations can be discerned. That said, it should be noted that we are actively working intensively with the Saudis to follow up on those areas where we think that further information around IHL compliance in targeting and lessons learned processes could be useful – were our information and understanding of processes, IHL compliance and/or incidents to change, we may need to react swiftly.
11. Past performance is often a helpful (though not necessarily determinative) indicator to include in a risk assessment. In a conflict that has been ongoing for 11 months and in which over [REDACTED] of the strikes have not given rise to known IHL concerns, it is arguable that whilst there is a risk here, that risk is not 'clear', particularly when assessing for a qualified risk, as

³ This is non-binding Guidance, but is nonetheless a helpful indicator of how to approach the assessment.



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required by the 2(c) test, whether the UK licensed items⁴ might be used in any incidents of potential concern, and whether those incidents of potential concern involve not just a violation, but a serious violation of IHL.

12. Criterion 1(b) should also be considered here. It mandates the Government to refuse a licence if to do so would be inconsistent with the UK's obligations under the Arms Trade Treaty. The relevant part of the ATT is Article 7, which provides inter alia that if the exporting state identifies an 'overriding risk' that the items could be used to commit or facilitate a serious violation of IHL or IHRL, it shall not authorise the export. The IHL considerations in relation to this provision are in line with those under Criterion 2(c) and as above, whilst the arguments are finely balanced, AEPD do not consider the mandatory refusal threshold to be met. In respect to International Human Rights Law (IHRL), which also forms part of Criterion 2(b), there is insufficient information of relevant human rights law violations to cross the threshold for refusal. If such information comes to light, this assessment will be reviewed.
13. Criterion 3, which states that the Government will not grant a licence for items which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination, may also be relevant. However, the coalition action in Yemen is at the request of the Government of Yemen, and being taken in order to stabilise that Government with a view to ending the conflict with the Houthis, and so AEPD conclude that the refusal threshold is not met for Criterion 3.
14. Criterion 6 may also be relevant. This provides that the Government will take into account inter alia, the record of the buyer country with regard to its compliance with its international commitments, in particular the non-use of force, including under IHL. These factors have been considered in making the assessment under Criterion 2(c).
15. AEPD also notes that the Consolidated Criteria (Annex C) set out that the government may, where appropriate, take into account 'Other Factors' in its licensing decision process, such as the effect of proposed exports on their economic, social, commercial and industrial interests and the potential effect on the UK's international relations, but that these will not affect the application of the Criteria. [REDACTED]
16. AEPD notes that when the question of export policies towards Saudi Arabia was last discussed with [REDACTED]

⁴ Annex B provides a list of extant licences for the export of arms to Saudi Arabia since March 2015 when the conflict in Yemen began. Of most relevance here are those for Paveway, Brimstone and military aircraft components for export to the Saudi Air Force and which are likely to have / continue to be deployed in the conflict in Yemen.



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17. On the question of a **moratorium**, the FS will be aware that AEPD approaches licence applications on a case-by-case basis and conduct each assessment in accordance with the Consolidated Criteria. If there are concerns such as to meet the threshold for refusal set out in any of the mandatory Criteria, these will be picked up in that assessment and the application refused. A decision to not even consider applications for the export of these type of items against our well-established policy, which reflects the EU Common Position and is in line with our legal obligations, would leave us open to legal challenge from exporters who had their applications refused or delayed because of a decision not to grant any further licences at this stage.

Agreement and/or dissent

18. MENAD and Riyadh agree with AEPD's assessment.

Risk

19. There is a very strong risk that Leigh Day will apply for a judicial review of the Government's export licensing policy towards Saudi Arabia if the Government does not comply with the requests set out above at paragraph 1. It should be noted that the threat of legal proceedings is not a reason to suspend licences or disapply the usual case by case approach to export licence assessments.
20. It must be emphasised that the issues covered by the following paragraphs are separate from the discrete and central issue which is whether there is a clear risk that the items might be used in the commission of a serious violation of IHL and hence whether it is lawful to maintain the extant licences.

21.



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[REDACTED]

22.

[REDACTED]

Resources

23. A judicial review challenge would likely have resource implications for the FCO, including around disclosure and costs. Depending on the scope of the challenge, it would impact MENAD, Post, AEPD and Legal Advisers.

Implementation and evaluation

24. AEPD and MENAD will advise BIS of the Foreign Secretary's views on the Leigh Day request, and provide regular updates as required. Counsel has been instructed on this issue and will be appropriately sighted in order to advise as matters develop.

[REDACTED] **Arms Export Policy Department**
[REDACTED]

Cc list: PS/PUS, PS/SPADs, Sarah MacIntosh, Peter Jones, Neil Crompton, Jane Marriott, Jessica Hand, Neil Bush, [REDACTED], Simon Collis, Cathy Adams, Andrew Murdoch, [REDACTED]
[REDACTED]

Attachments list:

- A. Leigh Day Letter
- B. IHL assessment
- C. Consolidated Criteria

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YEMEN – Saudi led Coalition compliance with IHL

Summary:

- **Summary of incidents.** Up until 10 January, MOD has tracked 114 alleged incidents of potential concern of which over a third are assessed as probable Coalition strikes. Annex 1 outlines the incidents since the last update note of October 2015 and information note of 11 November. Of these probable Coalition strikes, MOD has been unable to identify a legitimate military target for the majority of strikes. There have been 3 allegations of the Saudi led Coalition striking MSF hospitals (26 October Hayden, 2 December Taiz, 10 January Sa'ada

What has changed since October 2015?

- **Saudi targeting.** MOD remain of the view that the Saudi targeting process for pre-planned targeting complies with NATO standards including a clear definition of what constitutes an acceptable military target, a recognisable process to assess potential civilian casualties (including tests of proportionality) and post incident battle damage assessment. However Saudi processes governing dynamic targeting are less robust than those governing their pre-planned targeting and we have little insight into these. It is assessed that an increased proportion of airstrikes now involve dynamic targeting.

We continue to engage with KSA to better understand the dynamic targeting processes and to help to improve any processes (as may be necessary). Most recently, VCDS Sir Stuart Peach visited Riyadh on 23 January.

- **Saudi investigations and lesson learning.** The Saudis have publically announced an investigation into the MSF incident on 2 December.

- **Cluster munitions.** MOD are aware of multiple reports of the alleged use of cluster munitions by the Coalition, including the most recent allegation that the Coalition may have used cluster munitions over a residential area in western Sana'a on 6 January. MOD has received NGO reports, including photos of the munition and damaged area,

MOD Monitoring

- When MOD learn of a new incident, MOD investigate to determine whether they can verify the incident as being a likely coalition strike and then attempt to identify a legitimate military target in the area. They 'track' all of these incidents once they come to their attention, and add to the picture of individual incidents as new evidence comes to light.

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[REDACTED]

Such a small percentage of potential incidents of concern does not of course diminish the seriousness of the individual incidents. The figure is included to provide a quantifiable context in which risk assessments can be conducted, in particular to assist with analysis in relation to any allegations of systemic or process based failure by the Saudis to adhere to IHL.

- The monitoring of this conflict and the resulting risk assessment for arms exports purposes is an ongoing task, as new evidence emerges contributing to the picture on existing allegations, new allegations are made, and new insight into Saudi thinking and likely future behaviour is gained. The most recent developments in that regard are as follows:
- On **22 January** MOD completed a preliminary analysis of the UN Panel of Experts Report which included a total of 119 allegations of violations of IHL by both the Coalition and also Houthi / Saleh forces. Analysis is ongoing but at present it appears likely MOD will be adding a further 18 incidents of potential concern to their list to be tracked and another two which require a closer look, as a result of this report. Whilst just 18 of the 119 allegations are considered incidents of potential IHL concern, [REDACTED]

[REDACTED] MOD have also alerted us to the addition to their list of seven historical allegations, from NGOs, of cluster munitions use, and some further open source reports which have come in the past few days and require further analysis. This predicted increase in incidents of concern, which will take the total to approximately 145, is not due to a recent change in Coalition behaviour but due to the way in which MOD learns about historical incidents.

UK action to date

- Continued lobbying through diplomatic, intelligence and military channels. Following the 12 December update, we have continued to engage at Ministerial and Senior Official levels with the Saudis. [REDACTED]

[REDACTED]

VCDS Sir Stuart

Peach visited on 23 January [REDACTED]

[REDACTED]

the Saudis are responsible for

the majority of Coalition airstrikes.

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[REDACTED]

- Training and best practice. MOD have engaged in sharing best practice with the Saudis. Advice from UK Chief Air Staff Liaison Officer (CASLO) on NATO standard procedures for civilian casualty management has been taken by Saudi legal advisors and worked up into a Saudi equivalent.

[REDACTED] Following Saudi requests for greater assistance with border security MOD offered a package of Short Term Training Teams to provide advice on the condition that the UK also provided further advice and training on IHL compliant processes, including IHL compliant targeting processes.

[REDACTED] On training, the RAF has run two courses on targeting for RSAF personnel; one in the UK, one in Saudi Arabia, with a third underway (in the UK).

- MSF/ Saudi engagement.

[REDACTED]

US position

-

[REDACTED]

Overall assessment of Saudi compliance with IHL.

- From all of the information available, we have not reached the view that there has been a violation (including a serious violation) of IHL by Saudi Arabia. In relation to some incidents, there is insufficient information to conclude that KSA have violated IHL in relation to any individual strikes in the Yemen conflict. However, we nonetheless have significant concerns around IHL compliance in relation to some KSA processes and the judgement as to whether the threshold has been met is finely balanced.

[REDACTED]

[REDACTED] We will need to both monitor and follow up on these closely - in line with the [REDACTED] about vigilant monitoring and doing all we can, using all channels available, actively to seek to address any concerns we may have.

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[REDACTED]

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[REDACTED]

- IHL assessment of incidents of concern. [REDACTED]

However, this increasing number is only a small percentage of a large number of air strikes. [REDACTED]

- Dynamic targeting, no strike lists, investigations and lesson learning. [REDACTED]

[REDACTED]

- Cluster Munitions. Whilst the use of cluster munitions by KSA is not prohibited in and of itself as they have not signed or ratified the Cluster Munitions Convention, the use of Cluster Munitions in certain circumstances in residential areas is likely to be a violation of IHL.

[REDACTED]

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[REDACTED]

Summary of incidents. MOD is currently tracking 114 alleged incidents of potential concern [REDACTED]

Of these [REDACTED] around a third are assessed as probable Coalition strikes. The MOD has not identified a legitimate military target for the majority of these strikes. It is assessed Saudi Arabia is responsible for a significant proportion of Coalition strikes.

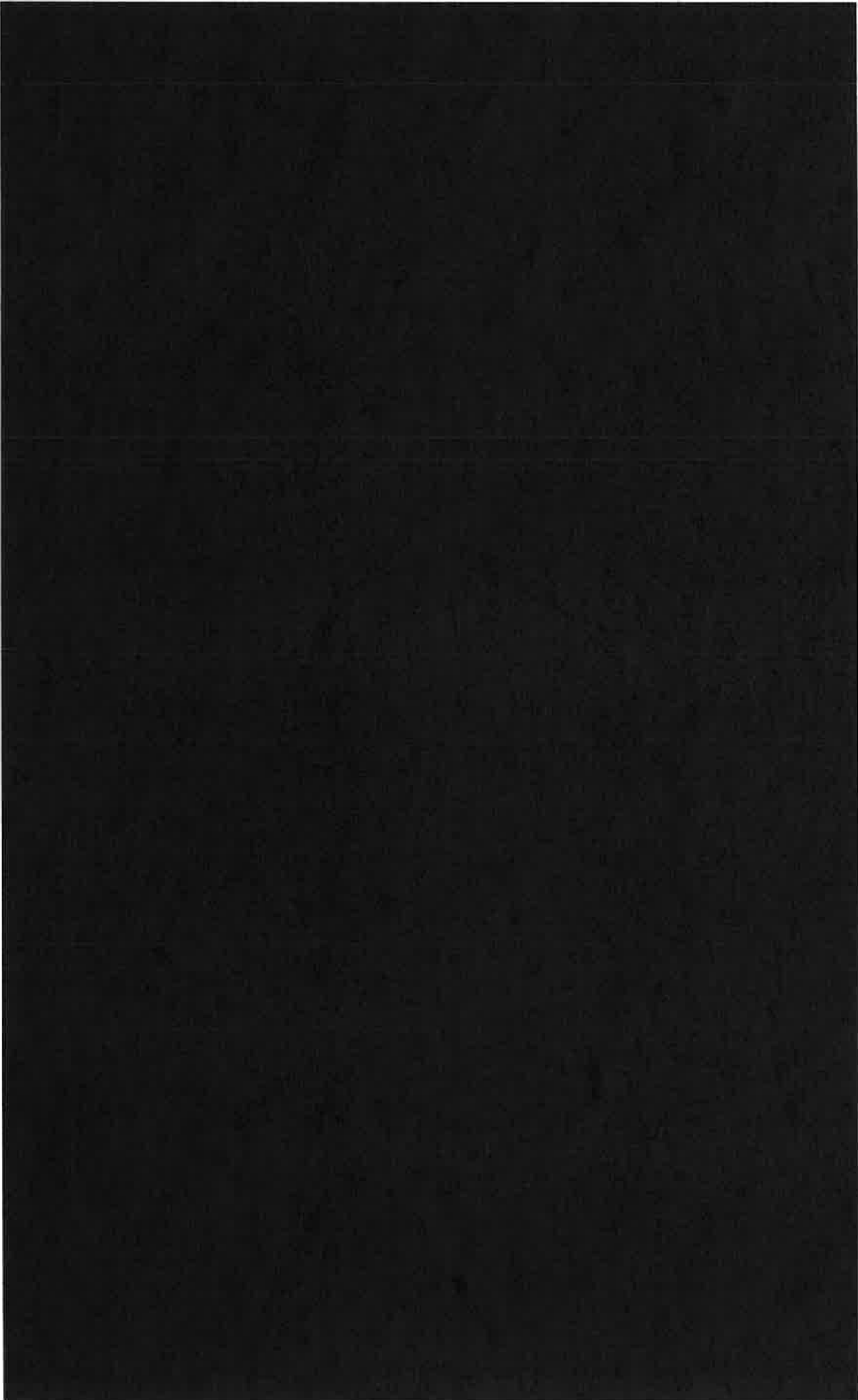
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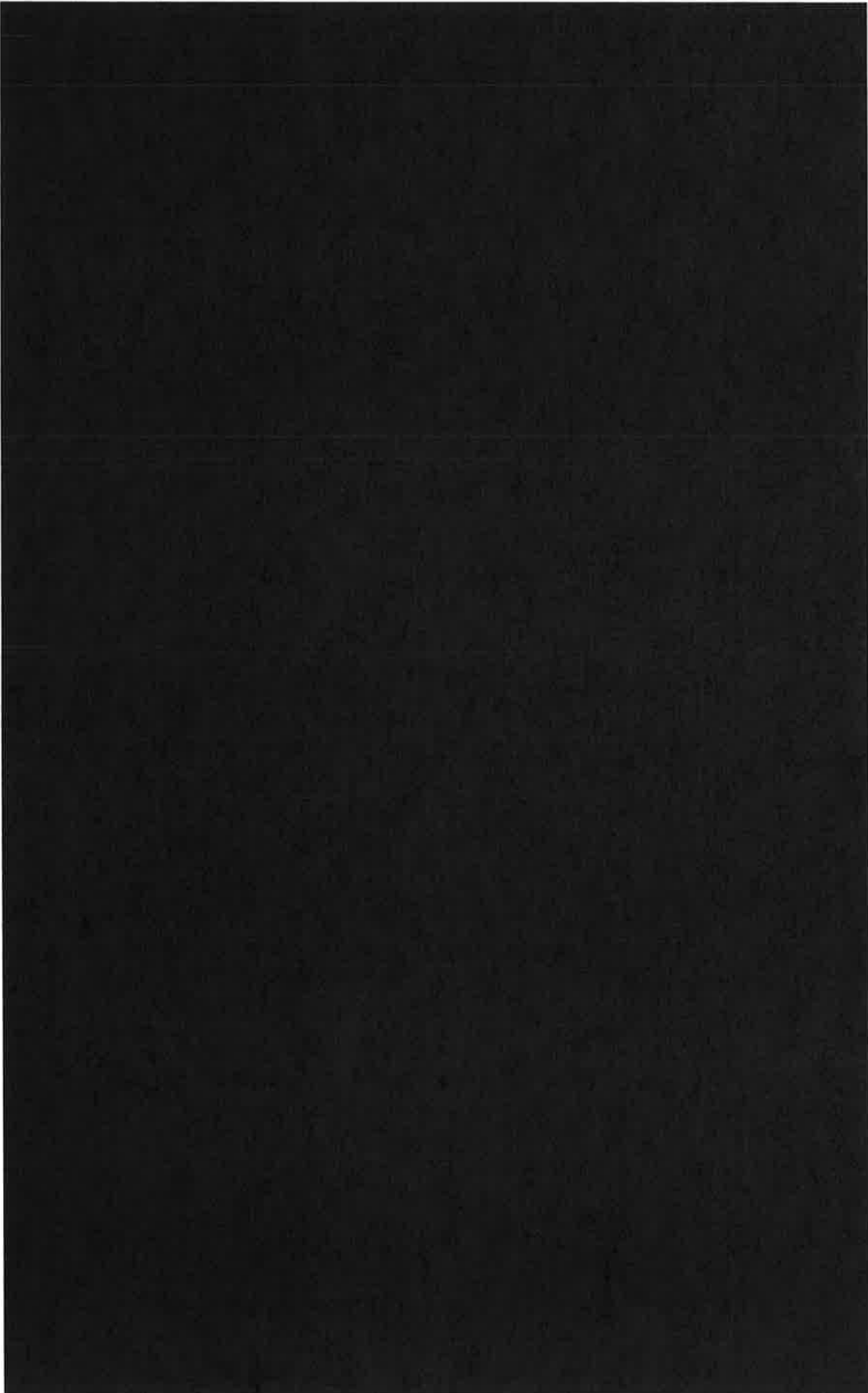
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