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Exploiting and constructing legal ambiguity. UK arms exports to Saudi Arabia during the war in Yemen

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ABSTRACT

While ambiguity is a common feature of international obligations, there is a strong theoretical anticipation that ambiguities may be exploited, and obligations circumvented, under competing interests. This article largely backs this anticipation. The article scrutinises how ambiguous arms export control obligations are handled under strong incentives for arms export. The empirical case explored is the UK government's arms exports to Saudi Arabia during the war in Yemen. Exports continued despite evidence that the Saudi-led coalition was violating international humanitarian law (IHL) in Yemen, and despite obligations not to export if there is a risk that the exported equipment can be used in IHL violations. A resulting legal challenge against the UK government provides valuable information about the role of ambiguity in the implementation of arms export controls. Drawing on primary sources from the legal process, this article argues that the UK government has taken advantage of linguistic ambiguity. The article also argues that the government has engaged in the continuous construction of ambiguity around events in Yemen and around the ideal parameters for arms trade risk assessment. Together, these strategies have facilitated continued arms exports to Saudi Arabia.

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Introduction

Ambiguity is a common feature of international political and legal obligations. The concept refers to multiple meanings, for instance, in that terms or events can be interpreted in different and even incompatible ways (Pehar 2001, p. 164, Best 2012). Scholars have long viewed the presence of ambiguity in international obligations as a potential source of legal weakness, as the combination of ambiguity and competing interests have proven to facilitate emphasis of the laxest possible reading of obligations in many policy areas (Abbott *et al*. 2000, Kagan 2007, Fischhendler 2008, Hansen 2016). Legal ambiguity "provides an opening for political exploitation" (Kagan 2007, p. 316), by acting as an enabler for governments to lend perceived legitimacy to policies others will view as unlawful.

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The policy area of conventional arms export control has been considered particularly sensitive to the dynamic of exploitation of ambiguity. States have adopted treaty obligations to refrain from exporting under certain circumstances, for instance if there is a clear risk that the exported equipment can be used in the commission of violations of international humanitarian law (IHL). Arms export control obligations are however ambiguously grafted, and ambiguity has had an instrumental role in facilitating these agreements (Hansen 2016, see also Fukui 2015 and Yanik 2006). In a previous article, I showed how ambiguity in the European arms export control regime, which is central to the current article, was a deliberate tool to reconcile contradictions and reach agreement (see Hansen 2016).

The suspicions about ambiguity in arms export control agreements, alongside the destructive merits of ambiguity in other policy areas, substantiates the necessity of empirically exploring whether ambiguity in arms export controls is indeed destructive. By destructive, like Kagan (2007) I mean that ambiguity is mobilised to legally enable policies that the obligations were not intended to permit. However, because arms export decisions are taken behind closed doors, information on the application of obligations is normally hard if not impossible to come by. A rare window upon how obligations are applied and interpreted in practice has nevertheless emerged in the UK. Here, a legal challenge against the UK government over the lawfulness of its continued arms exports to Saudi Arabia during the war in Yemen has generated an unusually generous amount of publicly available information on the application and interpretation of arms export control obligations in the decision-making on arms exports. This article exploits this window of opportunity in an attempt to say something about how ambiguity is treated in practice by the UK government. The article scrutinises how the UK government has applied and interpreted arms export control obligations in the arms export to Saudi Arabia during the Saudi-led war in Yemen. The article may aid our understanding of how states utilise ambiguity in arms export controls, and more generally of when ambiguity becomes destructive.

The basis for the legal challenge against the UK government began when a coalition of nine states led by Saudi Arabia on 26 March 2015 launched a military intervention on Yemen.[1] The coalition responded to a request for military assistance by reigning President Abdrabbuh Mansur Hadi, who had been ousted by the Houti rebel movement. Evidence soon accumulated that the coalition was violating IHL in Yemen through airstrikes on residential areas, markets, funerals, weddings, civilian boats and medical and detention facilities.[2] United Nations (UN) bodies have repeatedly concluded that the coalition has conducted "a substantial number of violations of international humanitarian law" and "attacks […] that may amount to war crimes" (UNHRO 2018, p. 14), and called on states to end arms exports to countries in the coalition (UNHRC 2020, p. 110). Arms exports that risk being used for IHL violation require a halt under international, regional and national arms export control obligations. The UK government nevertheless upheld and defended its arms export to Saudi Arabia. Illustrative of the government's position was former Foreign Secretary Boris Johnson's infamous January 2017 statement of having "received sufficient assurances from the Saudis about the incidents that have taken place so far to think that we are still narrowly on the right side of [the law]" (Select Committee on International Relations 2017). Ultimately, in March 2016 the UK-based NGO Campaign Against the Arms Trade (CAAT) initiated a legal process against the government, challenging the lawfulness of its export decisions. After losing in the Divisional

Court (first instance) in July 2017, CAAT appealed and won in the Court of Appeal (CoA, second instance), where the government's practice was in June 2019 deemed unlawful. A new legal challenge against the UK government was initiated by CAAT in 2021, after the government resumed its arms export to Saudi Arabia in July 2020. The hearings before the Divisional Court are scheduled to take place in January and February 2023. The current article focuses on the completed legal challenge, and the period 2015–2020.

The article relies on a close reading of primary textual sources connected to the legal process, such as letters, skeleton arguments from the hearings, transcripts, judgments and court orders. Some of the government's testimony before the court was for national security grounds presented in closed sessions exempt from the public, but the open sessions provide substantial and for our purpose sufficient information. The article also relies on hearings and debates in the UK Parliament, as well as other governmental statements.

The next section provides a theoretical background on ambiguity and identifies ambiguities in the relevant arms export control obligations. After shortly describing the UK-Saudi arms trade relationship, the article moves on to tracing how the UK government has applied ambiguous arms export obligations during the legal process. The article demonstrates how the government, in its export practice vis-à-vis Saudi Arabia, adopts a version of obligations and of incidents in Yemen that differs widely from that of its critics, and that creates substantial leeway for arms exports. Backing its version, the government takes advantage of linguistic ambiguity. It also engages in the construction of ambiguity around events in Yemen, and around the ideal parameters for arms export control risk assessment. The conclusion addresses implications for scholarship on ambiguity and arms export control.

Ambiguity and its presence in arms export control

The classical metaphor of ambiguity is optical illusions where different viewers see different objects, e.g. the illusion where one either sees a rabbit or a bird. One's vision, experiences, expectations, emphasis and interests will impact what one sees. Scholarship refers to ambiguity by different terms indicating lacking clarity, such as "indeterminacy", "flexibility" or "opaqueness". When ambiguity is linguistic, specific obligations can have more than one viable interpretation and admit more than one course of action (Pehar 2001, Best 2012). Ambiguous obligation is often portrayed as representing a threat to harmonised interpretation and rigorous implementation. In the words of Chayes and Chayes (1993, p. 189), the more general and ambiguous the language of an international legal obligation, "the wider the ambit of permissible interpretations to which it gives rise". Because differences in interpretation mean unequal implementation, successful implementation of treaties is generally believed to depend on treaty parties accepting the same meaning of the obligations (Fischhendler 2008, p. 113). If an unambiguous treaty was a roadmap, users should ideally arrive at the same destination.

When obligations become ambiguous, there is significant room for discretion and bureaucratic logic (Nicolai and Dautwiz 2010, Johansen and Rausand 2015). Equally, there is room for exploiting ambiguity as a political tool to build perceived legitimacy around a particular strategic policy at odds with the obligations (Kagan 2007). In arms export control, it is the governmental apparatus tasked to assess arms export licence requests and make export decisions that interprets ambiguous concepts and contexts, and reaches decisions on this basis. This governmental apparatus also considers a

range of other conditions – such as strategic and economic foreign policy goals, and defence-industrial interests – that have in practice proven to oftentimes outweigh restrictive export control norms (e.g. Brzoska and Pearson 1994, Erickson 2013, Hansen and Marsh 2015, Stavrianakis 2017, Perlo-Freeman 2021, Hansen 2022). The UK arms export control apparatus sits under the impact of powerful defence-industrial interests, domestic employment strategies, strategic foreign policy considerations, close ties with Saudi Arabia, and a strong norm on free trade (Davis 2002, p. 120, Wearing 2016, p. 15). These influences permeate sections of the national arms export licensing apparatus, sometimes very visibly, in ways that may facilitate the exploitation of ambiguous obligations. For instance, in February 2016 personnel within the UK licensing bureaucracy were, in an internal e-mail, instructed about the high political stakes of finding a "clear risk" for Saudi IHL violations in Yemen (Bell 2016). "Clear political interests in not knowing about […] potential IHL violations" (Stavrianakis 2020, p. 242) were evident. The problem for ambiguity arises exactly when such competing influences permeate bureaucratic decision-making in ways that systematically facilitate emphasis of laxer versions of obligations.

The causes of linguistic ambiguity provide important hints about subsequent handling of ambiguity. While linguistic ambiguity can be inadvertent and non-strategic (Chayes and Chayes 1993, Kulick 2016, pp. 6–7), it can also be deliberate for a variety of reasons. Ambiguity may for instance be strategically seized upon by states aiming to preserve decision-making autonomy (Downs *et al*. 1996, Abbott and Snidal 2000, Koremenos *et al*. 2001, D'Amato 2010). States fearing that precision can bind them to costly commitments may strategically opt for weak agreements or special treatment, to be capable of lawfully exploiting ambiguities at a later stage. This makes ambiguity a potential weakness by design at the implementation stage, introduced to enable business as usual when the obligations collide with other preferences.[3]

Deliberate ambiguity is particularly important here, because scholars have shown that deliberate ambiguity characterises arms export control agreements. In a previous article on the causes of ambiguity in EU arms export control, I showed how ambiguity at three stages of the evolution of the EU arms export control regime was traceable to major exporters' wish to maintain interpretative leeway, in order to enable arms exports when desirable (see Hansen 2016). For some exporters, ambiguity was, in other words, deliberate and strategic. I hypothesised that the resistance against precision "provides important clues about the prospects for efficient multilateral arms export control" (Hansen 2016, p. 192). Deliberate ambiguity is typical also beyond the European context, as demonstrated by negotiation processes for the UN Program of Action and the UN Arms Trade Treaty (Small Arms Survey 2002, pp. 202–233, Yanik 2006, Fukui 2015, p. 319, Stavrianakis 2019, p. 71). The pattern emerging is that major arms exporters generally resist precision and judicialisation in order to maintain political flexibility. Therefore, arms export control agreements contain ample room for interpretation, and substantial space for politics. Based on my own previous work, and considering the warnings of others pointing to strategic ambiguity in arms export control agreements, we may reasonably anticipate that ambiguity could be exploited under strong, competing incentives, as in the UK government's arms export to Saudi Arabia. This article explores this empirically.

As for the UK government in particular, I have previously showed how the UK government has balanced its support for European arms export controls with continuously

preferring ambiguity and generally weaker versions of obligations (Hansen 2016). The UK initiated the 1998 "EU Code of Conduct" on arms export during its European Council presidency. However, it opposed obligations that would bind it above the level of its national legislation, promoting multilateral arms export controls only on the condition that it would not further restrain its own arms exports.[4] Several other scholars have over the years analysed the UK's rather ambiguous attitude towards multilateral arms export controls, where "ethical" multilateral arms export control has been used by the UK to "level up" its own and more stringent arms export control commitments to its main European defence market competitors (e.g. Davis 2002, Erickson 2017). Illustratively, upon the adoption of the EU Code of Conduct, the Foreign and Commonwealth Office explicitly stated that the EU Code of Conduct "should be as restrictive as our national criteria, but not more so" and "should help to ensure a level playing field for UK exporters while ensuring that our own licensing policy should remain basically unchanged" (FCO 1998). How does this attitude carry into the application of the obligations?

The specific legal obligations and their ambiguity

The UK's legal obligations to abstain from exporting if there is a risk that the exported weapons might be used in the commission of IHL violations are derived from a layer of international customary and treaty law, regional law, and domestic law.[5] The legal process against the UK government focuses on a specific obligation in common EU and UK arms export control. As an EU member the UK was part of developing the EU's common policy on arms export control, including the EU Code of Conduct, and later the legally binding *Council Common Position 2008/944/CFSP of 8 December 2008 Defining Common Rules Governing Control of Exports of Military Technology and Equipment* (hereafter "Common Position"). The UK was obliged by the Common Position throughout the legal process, although it has since moved away from this commitment following Brexit (Trevelyan 2021). Under the Common Position, exports must *inter alia* not take place if there is a "clear risk" that the equipment might be used in IHL violations or aggressively against another country (Council 2008, pp. 100–101). In the UK, the Common Position was largely replicated in the "Consolidated EU and National Arms Export Licencing Criteria" (hereafter "Consolidated Criteria"). Adopted as guidance under the UK Export Control Act, which provides the legal framework for arms exports from the UK, the Consolidated Criteria was to be assessed in the national export licensing process.

Criterion 2c of the Common Position sits at the core of the legal process against the UK government. Here, signatories have agreed that they "shall […] deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of [IHL]" (Council 2008, p. 101). The criterion is almost identically replicated in the Consolidated Criteria, which states that "the Government will […] not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of [IHL]" (Parliament 2014). In December 2021, the Consolidated Criteria was replaced by the "Strategic Export Licencing Criteria". In addition to removing references to the EU and the Common Position, criterion 2c was rephrased. Now the government will "not grant a licence if *they determine there is* a clear risk that the items might be used to commit or facilitate a serious violation of [IHL]" (Trevelyan 2021, emphasis added). The addition of "they determine" reminds that risk evaluation

is a governmental business. In one way, it clarifies, by hinting that under ambiguity, it is the government's version of the situation that matters. The change can however also be a way of widening the legal scope for governmental discretion towards any future legal challenges. Indeed, the change has been criticised for enabling the government to ignore inconvenient evidence (Stavrianakis 2022, p. 14).

When applying criterion 2c, several ambiguous terms concerning the clarity and seriousness of risk must be operationalised and set up against available information. First, assessing the clarity of risk is a textbook example of ambiguity; where some see a "clear risk", which requires an end to exports, others may see merely a "risk", which does not require an end to exports. The conclusions to questions about risk hinge on the nature of the evidence, how it is assessed, and how it is weighed against other factors. The legal challenge demonstrates this clearly: CAAT concluded on a "clear risk", the UK government on a "risk", based on very different assessments of the evidence.

Second, in the assessment of whether there is a clear risk that the military technology or equipment might be used for serious violations of IHL, there is an ambiguous relationship between the terms "clear risk" and "might". The use of "clear risk" implies a relatively high risk threshold and means that there must be more than a mere "risk" (Yihdego 2009, p. 288). "Clear risk" also denotes certainty about the presence of the risk in question, and thus requires a high burden of evidence. In contrast, the term "might" implies a low risk threshold in that there must be *possibility* and not *certainty* that the equipment will be used in a serious IHL violation. The combination of certainty ("clear risk") and possibility ("might") constitutes an introduction of linguistic ambiguity. Interpreters emphasising "clear risk" may set the risk threshold and the burden of evidence higher than those emphasising "might". As returned to, these nuances sat at the core of the legal case.

Third, exporters must also determine whether IHL violations are likely to be "serious". Agreement has developed among signatories and organisations that "serious" violations at a minimum refer to grave breaches of the Geneva Conventions and war crimes under the Rome Statute of the International Criminal Court (Council 2019, p. 52, ICRC 2016). Although there is agreement as to what constitutes a serious risk, classifying the seriousness of risk remains complicated, partly because the empirical context itself can be ambiguous. Disagreement about how to assess the seriousness of risk stood at the centre of the legal dispute.

Significant work has been conducted to establish guidance for criteria application to compensate for the potential weaknesses above. EU countries have developed a "User's Guide" to the Common Position, which compiles agreed best practice standards that "shall serve as guidance for the implementation of [the] Common Position" (Council 2008, p. 103). The intention of the guide, that played a significant role during the legal process, is to aid government bureaucracies and narrow the scope for interpretation. For instance, to gauge the clarity of risk in the context of criterion 2c, the guide establishes standards for what *sources* and *categories* of information governments should address in risk assessment.

Regarding sources, the User's Guide identifies trustworthy sources of information on risk. Trustworthy information sources include EU HOMs reports, EU human right country strategies, EU Council statements, reports and concerns from relevant international organisations like the UN and the European Parliament, as well as national sources and reports from international and local NGOs and civil society (Council 2019,

pp. 41–42). The guide states that the establishing of risk by "the competent bodies of the UN, the EU or the Council of Europe" is "a major factor in the [risk] analysis" (Council 2019, p. 47), whereas governmental sources constitute "additional information" (Council 2019, pp. 41–42). It thus establishes a hierarchy of information sources, with international organisations atop the hierarchy.

Regarding categories of information, three key information categories must according to the User's Guide be part of risk assessment: the importer's (i) past and present record of respect for IHL, (ii) intentions as expressed through formal commitments and (iii) capacity to ensure that the equipment is used in a manner consistent with IHL (Council 2019, p. 55). Whereas all three factors must be assessed, the User's Guide places more weight on the first. It is widely undisputed also in the NGO community that the first category of information – the receiver's past and present record of respect for IHL – is most vital for reaching a conclusion about risk. As returned to, the UK government has however sought to create ambiguity around ideal informational sources and categories.

Arms exports to Saudi Arabia

It may not be incidental that the importer in the legal challenge is Saudi Arabia. Saudi Arabia is the UK's leading strategic ally in the Middle East, and biggest arms customer, consistently receiving almost half of UK arms exports (Wezeman 2020). The two Al Yamamah contracts (1985 and 1988) kickstarted the UK arms industry's longstanding reliance on Saudi Arabia. These contracts involved the sale of aircraft that have been operative in operations in Yemen, and the commitment by the UK to undertake all future developments of the aircraft, systems and exported weapons (Wearing 2016, p. 15). The more recent 2005 Al Salam deal was considered "the start of an enhanced strategic alliance" between the UK and Saudi Arabia (Jane's Defence Weekly 2007). All contracts are government-to-government contracts between the UK and Saudi Arabia, with British defence-industrial giant BAE Systems the main contractor. BAE, enjoying a revolving door into government, repeatedly warns against placing arms exports to Saudi Arabia under more stringent export guidelines: "Reduced access to export markets could have a material adverse effect on [BAE's] future results and financial condition" (BAE 2018a, p. 70) "and we are liaising closely with the UK government in working to reduce the impact of any such occurrence" (BAE 2018a, p. 59).

After the launch of the military operation on Yemen in 2015, Foreign Secretary Philip Hammond announced that the Saudis were "flying British-built aircraft in the campaign over Yemen and we have a significant infrastructure supporting the Saudi air force generally and if we are requested to provide them with enhanced support – spare parts, maintenance, technical advice, resupply – we will seek to do so. We'll support the Saudis in every practical way short of engaging in combat" (cited in Mwatana 2018). While such statements were later adjusted, the Foreign Office admitted that UK military personnel remained in the Coalition command room, with access to the list of targets (Hansard 2017). Defending its military support, UK officials frequently pointed to UN Security Council Resolution 2216, which reaffirms President Hadi's administration as the legitimate government and condemns Houti insurgencies. Since then, UK-manufactured weapons have played a significant role in the war, with UK-built and licensed Typhoon and Tornado aircraft and a variety of bombs and missiles deployed in Yemen by the Royal

Saudi Air Force. As late as March 2018 the kingdoms signed a Memorandum of Intent for the UK's delivery of 48 Eurofighter Typhoon aircraft (BAE 2018b), and UK arms exports to Saudi Arabia exponentially increased during the war (Stavrianakis 2022, pp. 26–27). Indeed, the devotion to maintain exports to Saudi Arabia even during the war in Yemen plays into the longstanding reliance on this trade relationship in order for the UK to remain a military power (Wearing 2018, p. 156).

The UK government faced massive international and domestic criticism for its continued arms export and support. On a visit to London in February 2016, UN Secretary General Ban Ki-Moon reminded that "[w]e need states that are party to [the] Arms Trade Treaty to set an example in fulfilling one of the treaty's main purposes – controlling arms flows to actors that may use them in ways that breach international humanitarian law" (cited in Wintour 2016). Domestically, activists and NGOs demonstrated against the government, and critical sentiment frequented media headlines. Concerns were repeatedly raised also in Parliament, where the government on several occasions had to account for its arms export to Saudi Arabia. After witnessing how protests and criticism did not alter governmental practice, CAAT ultimately embarked upon a legal challenge against the government.

Legal challenge and ambiguity

The legal challenge against the UK government was a "judicial review", in which CAAT challenged the lawfulness of the government's decisions not to suspend existing licenses and continue to grant new licenses for the sale or transfer of arms and military equipment to Saudi Arabia. Judicial review is not concerned with the merits of governmental decisions (e.g. whether arms export control criteria required a halt to exports), but with the lawfulness of the decision-making *process*. The public law principle of rationality is key for judicial review and obliges the government to base decisions upon all relevant evidence. Applying for judicial review on 9 March 2016, CAAT claimed the export decisions were at odds with rationality, that the government had not assessed all relevant evidence, and had failed to properly assess risk for the use of licenced items in IHL violations (CAAT 2016, 2017). Being a rationality challenge, the nature of the government's evidence and its assessment of it stood at the core of the legal process.

The following sections demonstrate how ambiguity featured in four key discussions during the process; in discussions on the presence of IHL violations, on the nature of information sources, on the nature of information categories, and on the level of obligation to CAEC norms and guidance.

Ambiguity about the presence of IHL violations

Before and during the legal challenge there have been widely different and entirely incompatible narratives between the parties as to whether coalition airstrikes in Yemen constituted IHL violations. As British arms exports to Saudi Arabia attracted negative attention at the outset of the war, the UK government immediately embarked upon a strategy of denying that Saudi Arabia was violating IHL in Yemen. In the UK Parliament on 20 July 2015, the then Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs, Tobias Ellwood, expressed on behalf of the government that "we

have not seen any credible evidence that suggests that the coalition has breached the law" (Ellwood 2015a). Three months later, in a parliamentary debate on the situation in Yemen on 22 October, 2015, Mr. Ellwood stated that "if there are human rights violations, they must absolutely be looked into, but I am not aware of any such evidence at the moment. We need to be careful about hearsay. If NGOs have evidence, they must bring it forward" (Ellwood 2015b). In the narrative of the government, the nature of the incidents in Yemen was simply not compatible with a "clear risk" for "serious" IHL violations, and hence there was no obligation on the government to halt arms exports in compliance with criterion 2c.

Meanwhile, both NGOs and the UN had brought numerous events that amounted to both actual and possible IHL violations to the government's attention. The discussions throughout the legal process highlighted how the very same events that the UK government deemed not to be IHL violations were interpreted very differently by CAAT. The position of CAAT – and the NGOs intervening on CAAT's side – was that IHL was systematically being violated by the coalition in Yemen, and that the threshold of "clear risk" for "serious" violations and hence export licence denial was met. The positions of the UK government and CAAT could not have differed more.

The UK government also actively constructed a distracting fog of ambiguity around its own risk assessment process, by going back and forth as to whether it had indeed assessed IHL violations at all.[6] In July 2016 the Foreign and Commonwealth Office corrected its previous denial of Saudi IHL violations, now stating that it had "not assessed that there has been a breach of IHL by the coalition", had "been unable to assess" such a breach, and had "not assessed that the Saudi-led coalition is targeting civilians" (Ellwood 2016). Later, the government nevertheless informed that incidents of possible IHL violations *were* indeed documented and assessed in the government's confidential "Tracker" database. This is a database administered by the Ministry of Defence, where a selection of coalition airstrikes is documented and assessed. Facing ambiguous messages about what the government had assessed, both courts spent considerable time reconstructing what the government had done. The government's conclusion of absence of evidence for a clear risk however remained stable throughout its changing narrative on whether it had assessed IHL violations (e.g. Secretary of State for International Trade 2017, p. 3).

A specific discussion before and during the legal challenge revealed how linguistic ambiguity was part of the explanation for the different conclusions about evidence and risk. Indeed, the parties adopted widely different versions of terminology concerning how to gauge the clarity and seriousness of risk. Criterion 2c asks exporters to assess whether there is a "clear risk" that exported material "might" be used in the commission of serious IHL violations. There is ambiguity and even contradiction in the requirement, with "clear risk" denoting certainty, "might" possibility; the two invite different risk thresholds. Conversations during the legal process have demonstrated how the UK government and CAAT disagreed on the relationship between "clear risk" and "might". CAAT interpreted the risk threshold necessary for a licence denial as low based on "might" indicating possibility rather than certainty (see CAAT 2016, para. 56). The UK government however criticised the approach of relying on "might", arguing instead that the test of "clear risk" sets a higher risk threshold and standard of assessment than asserted by CAAT (Secretary of State 2017, para. 30). The UK government has maintained that there

was no obligation to halt exports upon mere risk and possibility, and that evidence showed no "clear risk" for IHL violations. Overall, the discussion on the risk threshold, with the contradiction between "might" and "clear risk" central, demonstrated how the opposing parties based their contradictory positions on events in Yemen on different readings of linguistic features of an ambiguous obligation. This is not to say that ambiguity *caused* the different conclusions about risk or continued arms exports. However, ambiguity functioned as an enabler for adopting a position that was largely compatible with continued arms exports, at the same time as the government could make claims that it was considering (its own version of) the obligations. This serves to support my anticipation about the destructive potential of ambiguity in arms export control.

The government's eventual treatment of the order from the CoA demonstrates how another linguistic ambiguity was handled in ways permitting conclusions compatible with continued arms exports. Because judicial review is concerned with the lawfulness of the governmental process and not with the merits of political decisions, the government was not ordered to revoke or suspend existing licenses, but to reconsider and retake past decisions and approve future licenses in accordance with the correct legal approach (Court of Appeal 2019b, 2019c). Facing the court order, the government committed to not granting any new licenses to Saudi Arabia for items that might be used in Yemen, until it had completed an internal investigation aimed at "considering the design of the process for licensing to ensure compliance with the judgment" (Stuart 2019). Key for the internal investigation was reaching a conclusion as to whether incidents recorded in the Tracker database were IHL violations. The internal investigation resulted in the July 2020 conclusion that the total of 516 incidents constituting possible IHL violations recorded in the database had now been assessed, but that the identified violations amounted not to a "pattern" of IHL violations but to "isolated incidents", because they "occurred at different times, in different circumstances and for different reasons" (Department for International Trade 2020, Deverell and Mulready 2021). On this basis, the government announced that it would lawfully resume arms exports to Saudi Arabia (Department for International Trade 2020).[7]

The terminology of "pattern" and "isolated incidents" stems from the User's Guide, which instructs that whereas "a certain pattern of violations […] should give cause for serious concern", "[i]solated incidents of [IHL] violations […] may not by themselves be considered to constitute a basis for denying an arms transfer" (Council 2019, p. 55). The User's Guide however is ambiguous concerning *when* incidents move from isolated to a pattern – the guide does not establish this, nor attempt to do so – which opens for different approaches to categorising evidence. The UK government seems to have taken advantage of this ambiguity when mobilising the term "isolated incidents" as part of its justification for continued exports. In criminal law, in comparison, repeated "incidents" caused by the same person would most clearly be considered a pattern of highly related incidents; that is exactly why first-time offenders can sometimes be treated more mildly than multiple and repeat offenders (Drápal 2021). Alternatively, absent a pattern, the sum of isolated incidents could still indicate a "clear risk".

Ambiguity about authoritative information sources

Another major discussion in the run-up to and throughout the legal dispute centred around contrasting approaches to information sources. Defending the argument that

events in Yemen were not IHL violations, and that violations amounted not to a pattern but to isolated incidents, the government claimed to posit better information than CAAT, other critical NGOs and the UN on incidents in Yemen. Central to the claim was the argument that the government had access to intelligence and other publicly unavailable but arguably superior sources of information "to which the third parties cited by the Claimant simply do not have access" (Secretary of State for Business, Innovation and Skills 2016, p. 22). Adding to its superior information was a deep understanding of Saudi military processes and procedures, ongoing engagement with the Saudi government and military, repeated reassurances by Saudi officials of IHL compliance, and post-incident dialogue (Secretary of State for International Trade 2017). The Secretary of State sought to convince first the Divisional Court and later the CoA that governmental information is more accurate and sophisticated than information available to CAAT.

CAAT on the other hand relied heavily on information from organisations working on the ground in Yemen, including the UN, Amnesty International and Mwatana for Human Rights, as well journalistic reporting from Yemen. These actors typically made on-site inspections and eyewitness interviews after airstrikes, documenting both the arms used, fatalities and the presence of a military target. The UK government stated that it could not treat such information as evidence. It argued that the evidence available to CAAT, in contrast to its own, was "often limited in scope" and "may not be reliable" because it relied *inter alia* on witness interviews, whereas "witnesses may draw conclusions without sufficient insight into all relevant information" (Secretary of State for Business, Innovation and Skills 2016, p. 24). Nevertheless, the message to the court was that the government *considered* "the views expressed" by organisations such as the UN and Amnesty International (Secretary of State for International Trade 2017, pp. 3, 44). The government's discrimination against non-governmental sources has been broadly criticised in the NGO community.

Justifying its own source hierarchy, the government has correctly claimed that it is not *legally obliged* by any arms export control agreements to assess other sources than its own. Placing its own, governmental sources atop the information hierarchy however departs from agreed, though legally non-binding, guidance: As described above, the User's Guide establishes a hierarchy of information sources, where governmental information constitutes "additional information" to information from international organisations, NGOs and civil society (Council 2019, pp. 41–42). The establishing of risk by "the competent bodies of the UN, the EU or the Council of Europe" is meant to be "a major factor in the [risk] analysis" (Council 2019, p. 47). This is not ambiguous in the User's Guide, but quite clear. Hence, in this case, the UK government is not exploiting extant linguistic ambiguity. Rather, it is engaging in constructing ambiguity around what information sources qualify for proper arms trade risk assessment, promoting a narrative of the superiority of governmental sources. This demonstrates how ambiguity is not only linguistic but can be continuously constructed through practice.

The two courts hitherto assessing the case have landed at very different judgments concerning the source hierarchy. The Divisional Court agreed that the information posited by the government was part of a "highly sophisticated" assessment process, whereas NGO reports "suffer from a number of […] methodological weaknesses" (Divisional Court 2017, para. 201). In contrast, the CoA concluded that the assessment by the government had to be based on *all* available sources of evidence that could indicate

violations of IHL. Indeed, criticising the decision in the Divisional Court, the CoA stated that "[i]t was wrong to […] treat the information available to the Secretary of State as displacing or fully discounting the evidence available from the Interveners and the UN" (Court of Appeal 2019a, para 92).

Ambiguity about information categories

Related to ambiguity about ideal information sources, ambiguity about the appropriate categories of information upon which to base risk assessment has also been central to the dispute. Like the discussion on authoritative information sources, this discussion was not about linguistic ambiguities, but once again about constructing ambiguity through practice, this time about appropriate information.

As described above, the User's Guide to the Common Position deems three key categories of information to be crucial for determining risk of IHL violations; (i) past and present records of respect for IHL, (ii) intentions as expressed through formal commitments, and (iii) capacity to ensure that the equipment is used in a manner consistent with IHL (Council 2019, p. 55). Whereas all three categories of information must be assessed, more weight is generally placed on the first category. The UK government has however actively denigrated the value of assessing the receiver's past IHL record, i.e. the first category of information. Instead, the second and third categories of information – the receiver's expressed intentions and capacity to avoid IHL breaches – have featured more prominently in the government's justification strategy. This manifests through the government's strong emphasis on Saudi reassurances and engagement with the Saudi.

Speaking to the second information category, a key strategy of the UK government from the very outset was emphasising *Saudi reassurances of good intentions*. The government has claimed that IHL was not – at least not *intentionally* – violated in Yemen, and that Saudi authorities took unintended civilian losses very seriously. When the case came up before the Divisional Court, the Secretary of State repeatedly emphasised Saudi *intentions* to comply with IHL, Saudi *reassurances* that IHL was not violated, and the *undeliberate* nature of the documented violations (Secretary of State for International Trade 2017). To the UK government, "the attitude" of Saudi Arabia was key, and expressed through reassurances (Court of Appeal 2019a, para 130, Secretary of State for International Trade 2019, para 28–35). Curiously, the government's view of Saudi intentions even seemed unaffected by the fact that the Saudi-led coalition in January 2016 had used old, UK-manufactured cluster munitions in Yemen (Amnesty International 2016). The munitions were exported to Saudi Arabia in the 1990s, but both the use and stockpiling of cluster munitions have since become prohibited by the 2010 Convention on Cluster Munitions, to which the UK is a state party. Instead of sanctioning the use of cluster munitions in Yemen and treating it as lacking Saudi commitment to IHL, the UK government accepted Saudi reassurances that using them had been accidental and would not again occur (Secretary of State for International Trade 2017, p. 3).

Speaking to the third information category, another key strategy of the government was the emphasis on British engagement and training with the Saudi to foster compliance with IHL. The government claimed that there was no risk that arms exported to Saudi Arabia would be used in IHL violations in Yemen, because the UK had close engagement

with the Saudis and organised targeting training aimed specifically at increasing Saudi *capacity* to avoid IHL violations. Before both the Divisional Court and the CoA, the government argued that its continuous engagement, capacity building, training and support of the Saudi military was a key basis for concluding that assessment of past violations were unnecessary for determining the risk of future violations, as this engagement ensured that the equipment exported would not be used to violate IHL (Secretary of State for International Trade 2017, para 115).

The emphasis on Saudi good intentions and capacity to avoid IHL breaches ran through the public communication of the government from the very outset. For instance, in a response to Parliament on 20 July 2015, the then Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs, Tobias Ellwood, emphasised the second and third categories of information when stating that "[w]e have received explicit assurances from the Saudi Arabian authorities that they are complying with [IHL]. […] We continue to engage with the Saudi Arabian authorities on their assurances and urge all parties to the conflict to adhere to [IHL]" (Ellwood 2015a). The government defended its approach on the basis of the argument that case-by-case assessments of possible IHL violations was practically impossible during ongoing military operations where one is not a part, due to lacking inside information (Court of Appeal 2019a, para 127).

While emphasising the second and third, the Secretary of State has systematically downplayed the status of the first information category, claiming that "even if there were established serious violations of IHL, that would not automatically be a helpful indicator of attitude towards IHL and of future behaviour" (Secretary of State for International Trade 2017, p. 41). This amounts to a problematic application of criterion 2c; determining the risk of IHL violation *solely* based on the receiver's "intentions" for the future or "capacity" is simply not in line with agreed guidance.

The hearing in the CoA demonstrated in detail *how* past and present IHL violations were taken out of the government's assessment equation. According to the government, the Tracker database was a key tool in its risk assessment. However, as also observed by Stavrianakis (2020, p. 242), it was also a tool to *not* assess risk. The Tracker database contained a column asking "IHL break?" where the presence of an IHL breach could be determined on a case-by-case basis. However, the CoA, given access to the database in closed legal sessions, noticed that this column was *never* used and that there was no documentation of a case-by-case assessment of IHL in *any* incidents (Court of Appeal 2019a). Even more so, around July 2016 the "IHL break?" column had been removed from the database (Secretary of State for International Trade 2017, p. 25, Court of Appeal 2019a). The CoA concluded that the government appeared unprepared to make case-by-case assessments of possible IHL violations.

Also in this case, the two courts landed at very different conclusions. The Divisional Court largely backed the government's approach to information categories, appreciating the value of Saudi reassurances and the government's knowledge of the situation through close engagement (Divisional Court 2017). The judgment has since been criticised for its deferential and uncritical approach to governmental information (Comyn 2017, Stavrianakis 2018). In contrast, the CoA argued that granting licenses based on reassurances and engagement was inadequate given the amount of possible IHL violations:

> The question whether there was a historic pattern of breaches of IHL on the part of the Coalition, and Saudi Arabia in particular, was a question which required to be faced. Even

> if it could not be answered [in] every incident of concern […] it could properly be answered in respect of many such incidents […]. At least the attempt had to be made (Court of Appeal 2019a, para 138).

The CoA concluded that the government had "made no concluded assessments of whether the Saudi-led coalition had committed violations of international humanitarian law in the past, during the Yemen conflict, and made no attempt to do so" (Court of Appeal 2019b). The court found this practice "[i]rrational and therefore unlawful" (Court of Appeal 2019a, para 145).

Ambiguity about the status of obligations

Last, the government has also sought to construct ambiguity about what it was obliged to do. This discussion was not about the parties' treatment of extant linguistic ambiguity, but about different approaches to how obliging the arms export control criteria, guidance and judgment were on the government's practice. A key part of this strategy was downplaying the status of the User's Guide. Before the Divisional Court, the government reminded that it was not legally obliged to do what the User's Guide articulated, maintaining that the

> EU User's Guide is non-binding guidance. […] Those guidance factors […] are simply designed to assist in addressing […] whether there is a clear risk. They are not expressly or impliedly identified in the Secretary of State's policy as matters that must be taken into account. (Secretary of State for Business, Innovation and Skills 2016, p. 34)

Also before the CoA, the government reminded that the User's Guide was not legally binding and not "legally relevant" (Secretary of State for International Trade 2017, pp. 34–35).

The User's Guide clearly is not a legal document, but an unbinding guide to support the application of the Common Position. The Common Position itself is adopted under the intergovernmental (as opposed to supranational) Title V of the EU Treaty and therefore does not have a direct effect on domestic law and is exempt from European Commission and European Court of Justice proceedings. Nevertheless, what is notable here is that in the context of the above analyses, the strategy of downplaying the User's Guide comes forward as an attempt to obscure and diminish the importance of and UK obligation to agreed parameters for arms trade risk assessment under the Common Position.

Curiously, after consistently downplaying the status of the User's Guide, the government nevertheless leaned on it to back its conclusion that the situation was compatible with continued arms exports. Most notably, by referring to the concepts of "pattern" and "isolated incidents" when taking up its arms exports after losing in the CoA, the government drew on the User's Guide. The guide instructs that whereas "a certain pattern of violations […] should give cause for serious concern", "[i]solated incidents of [IHL] violations […] may not by themselves be considered to constitute a basis for denying an arms transfer" (Council 2019, p. 55). This demonstrates a selective and strategic utilisation of the User's Guide, and how the government engaged in the construction of ambiguity around what it was obliged to do.

After the government lost in the CoA, another strategy of constructing ambiguity around obligations materialised, through the new strategy of trivialising the CoA judgment. Specifically, the government reminded that the judgment was on procedural

matters, not on the lawfulness of its arms exports, and may not change practice. As explained by then Secretary of State for International Trade, Liam Fox: "This judgment is not about whether the Government made the right or wrong decisions, but is about whether the decision-making process was rational, and […] changing the process as set out by the Court does not necessarily mean any of the decisions would be different" (Fox 2019). The trivialisation of the verdict appears as yet another tool to back the government's interpretation of obligations and approach to Saudi activity in Yemen.

Conclusion

This article set out to explore how the UK government has handled and interpreted ambiguous arms export control obligations in its arms exports to Saudi Arabia during the Saudi-led war in Yemen. The article shows how ambiguity has played a prominent role in four central discussions throughout the legal process. First, discussions on the presence of IHL violations showcased how linguistic ambiguities concerning how to set the risk threshold and arrange evidence have been mobilised by the UK government to back its version of events in Yemen. In this version, there is no clear risk for the use of UK-exported armaments in Saudi IHL violations in Yemen, and hence no basis upon which to halt arms exports. Second, in discussions on the nature of information sources, the UK government has sought to construct ambiguity around ideal information sources, placing its own, arguably superior governmental information atop the source hierarchy. Third, and similarly, in discussions on the nature of information categories, the UK government has sought to construct ambiguity around ideal information categories, essentially eliminating the present and past IHL records from the equation. Last, after losing the case, the government has engaged in creating ambiguity about the obligation to arms export control norms and guidance.

The article empirically responds to a growing body of scholarship addressing the potential downside of ambiguity, in and beyond scholarship on conventional arms export control (e.g. Fischhendler 2008, Fukui 2015, Hansen 2016, Stavrianakis 2019). A particularly important observation is that the case points to what appears to be a very clear continuum between the preference for ambiguity, flexibility and soft legal design in international obligations, and the later exploitation of the resulting leeway. Indeed, the case demonstrates how deliberate ambiguity is an important mechanism for exploitation under strong, competing interests. The findings empirically support my previously expressed suspicion that a preference for ambiguity and flexibility in arms export control agreements, particularly that developing between EU countries, may eventually prove harmful to implementation and compliance (Hansen 2016). But these findings also extend on my previous work, by empirically demonstrating *how* ambiguity can be mobilised in permissive rather than restrictive manners, and *how* it can become problematic.

The findings of this article may indeed aid our understanding of how states utilise ambiguity. A particularly important observation concerns how ambiguity has operated in different and intertwining ways. On the one hand, *extant linguistic ambiguity* has played an important role, through enabling different positions on obligations. A notable example is how the unsettled contradiction between "might" and "clear risk",

and the ambiguity surrounding "pattern" and "isolated incidents", has facilitated entirely incompatible conclusions about risk. The UK government has strategically mobilised linguistic ambiguities to back its position on risk.

On the other hand, the analyses also demonstrate how the UK government has engaged in a *continuous construction of ambiguity* about the ideal informational parameters for applying conventional arms export control norms in practice, and about the obligation to these norms. This demonstrates how ambiguity is not only linguistic, but continuously produced through practice, negotiation and criticism. Hence, in addition to attentiveness to linguistic ambiguity, in order to fully understand how ambiguity operates scholars need to also look to the continuous reproduction of ambiguity through practise.

As to arms export control scholarship more broadly, the article largely backs the findings of scholars that are critical of the depth of states' commitments to arms export control norms, both during treaty negotiation and in arms trade practice (e.g. Cooper 2000, Erickson 2013, Hansen and Marsh 2015). It particularly dovetails with Anna Stavrianakis' (2020) argument that the case of arms transfers to Yemen demonstrates how placing risk-based regulations on the arms trade facilitates rather than restrains arms transfers, because states may *choose* not to see or know about the risks that require a halt to exports. This article however also extends on her argument, by illuminating how the linguistic features of law is an important mechanism in not finding risk. Indeed, the ability to exploit the linguistic ambiguity it has itself been part of creating is a vital tool in the risk assessment toolbox of the UK government, a tool that comes in handy when restrictive export practices are at odds with the export strategy of the government.

What may we hope for in the future? One response to the destructive ability of legal ambiguity in arms export control is to strengthen judicial mechanisms for authoritative interpretation, so as to produce clarity (Kagan 2007, p. 317). The findings of this article could easily be mobilised by advocates for stronger international judicial mechanisms for interpreting arms export control law. However, states have carefully resisted supranational governance in this policy area, and more binding and more unambiguous arms export control agreements have never been achievable (Fukui 2015, Hansen 2016).

Are legal challenges then the solution to hold governments accountable for their arms export decisions and enforce compliance with arms export control law? This article illustrates how a strategy of turning to the courts for compliance is not without difficulties. First, legal processes take time; the process against the UK government lasted several years, and is now followed by a new legal challenge. The new challenge is against the government's decision to *resume* arms exports to Saudi Arabia. The challenge is per October 2022 scheduled to come up before the Divisional Court in January and February 2023, and the new legal process may take years. Second, legal processes may leave the enforcement of international arms export control obligations entirely dependent upon more general clauses in the specific national legal system. In the current case, prosecution in the CoA relied upon a procedural investigation (judicial review) into whether the government had successfully pursued a domestic public law principle (rationality). The CoA decided that the government had to change its *administrative procedures*, not its arms export practice. This of course is attributable to the nature of judicial review, but the very choice of judicial review and a rationality challenge in the first place connects to the low ability and willingness of courts to judge on the merits of governmental policy. Not all national legal systems enable bringing a legal challenge of governmental arms export decision-making

before the courts (Lustgarten 2020, p. 126). Although this was possible in the UK, and although the practice of the government was deemed unlawful, the rationality challenge did little to alter export practice: Indeed, once the government was satisfied that it was following administrative procedures correctly and had concluded that 516 IHL violations were not a "pattern" but "isolated incidents", exports proceeded. It is difficult to envision how the upcoming legal challenge over the decision to resume exports can do more to alter the export practice of the government. Indeed, the only long-term consequences of legal challenges for UK arms export control may simply be more bureaucratic theatre to tick the necessary procedural boxes in arms export control "risk assessment".

Notes

1. The coalition also included Egypt, Morocco, Jordan, Sudan, the United Arab Emirates, Kuwait, Bahrain and until 2017 Qatar.
2. IHL prohibits the targeting of civilians and civilian objects, attacks that fail to discriminate between military and civilian targets, and attacks that disproportionately affect civilians.
3. Portraying ambiguity as a potential weakness by design is not to say it emerged by accident, as Byers (2021) seems to suggest. As I show in Hansen (2016), ambiguity can be highly deliberate and strategic at the treaty construction stage, yet the chosen textual ambiguities or other unsettled issues may emerge as design weaknesses at the implementation stage. Indeed, it is at the implementation stage ambiguity has the potential of becoming destructive (Kagan 2007, Fischhendler 2008), regardless of the purposes it otherwise serves, e.g. facilitating dialogue.
4. The EU Code of Conduct was based on norms that the UK itself had adopted in 1997–1998 following the "arms to Iraq" scandals and New Labour's commitment to a more ethical arms export (Cooper 2000, Davis 2002, pp. 150–154).
5. In international customary law, the UK is obliged under Common Article 1 to the 1949 Geneva Conventions to "ensure respect" for IHL. This reads as an obligation to prevent IHL violations from taking place where they *may* occur and preventing further violations where they *have* occurred (David *et al.* 2019, p. 78). In international treaty law, the UK is a state party to the legally binding UN Arms Trade Treaty. Article 7 *prohibits* exports if there is "an overriding risk" that exports could "contribute to undermine peace and security" or be used to "commit or facilitate a serious violation" of IHL and international human rights law (United Nations 2013).
6. Stavrianakis (2017, 2020) describes this doublespeak as a defensive measure against the judicial review.
7. By then, an export scandal had already emerged in the aftermath of the CoA judgment, after the government was found to have breached the court order on three occasions, having approved new export licenses to Saudi Arabia (Leigh Day 2019a, 2019b). This led to apologies from then Secretary of State for International Trade, Elizabeth Truss, as well as calls for her resignation (Department for International Trade 2019, Sabbagh 2019).

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