

Mr.  
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11019 Berlin  
Germany

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### Statement Regarding the Development of a new Arms Export Control Law by the German Government

Dear State Secretary Giegold,

It is with great pleasure that I respond to the request for a commentary of expectations toward a new German arms export control law.

By way of brief, relevant background: I am Executive Director of Shadow World Investigations (formerly known as Corruption Watch), a not-for-profit organisation based in London that researchers the global arms trade. I am the author of 'The Shadow World: Inside the Global Arms Trade' which the *Washington Post* describes as 'the most complete account [of the global arms trade] ever written.' It was published in Germany by Hoffman und Campe as "Waffenhandel". I was named amongst the 100 most influential people globally working on armed violence by AOA.V. I was previously a legislator, serving as an African National Congress Member of Parliament under President Nelson Mandela in South Africa.

Germany has the opportunity to embrace the foreign policy principles outlined in the coalition agreement, which recognizes that Germany must champion peace, freedom, democracy, the rule of law, and sustainability as principles of a credible foreign policy.

A key part of achieving this goal is to address challenges in arms export procedures that may contribute to an active undermining of these principles. The following represents a non-exhaustive outline of approaches, best practices, and rising issues that are thus-far insufficiently covered. I begin with some principles for effective legislation pertaining to arms exports, before elaborating on special requirements arising from the internationalisation of the arms industry and the prevalence of corruption in the arms trade.

I also want to point out the fact that the seemingly most robust arms export law is help less unless there is political will for responsible action. **I urgently call on decision makers** in the German government to understand their responsibility and to take seriously expert judgement from their own ministries but also humanitarian and human rights agencies **to consider carefully the real, lived, human consequences of their decisions.**

## Some Principles for Effective Legislation

### *What is effective legislation?*

An effective arms export control law is one that prevents German arms from ending up in contexts where they could be used to commit, facilitate, enable or support war, systems of oppression, human rights abuses, violations of international humanitarian law (IHL), or other forms of human harm. Any chance of this occurring is unacceptable. **The “do no harm” principle must be adopted.**

### *Judging risk of harm: What it is and what it is not*

In order to assess whether an arms export could potentially do harm, a comprehensive contextual analysis is indispensable. This must include, but not be limited to:

- The actual projected use of a given weapon taking into account the full record of behaviour of the recipient country
- The political system and context into which the weapon is being exported
- The lifespan of the given weapon and its risk of diversion not only today but also in the future, including models for a worst-case scenario
- **An analysis that looks for proof that it is safe to export** rather than one where government needs to be convinced that it is harmful to export
- The democratic nature of the procurement process, including a verified absence of corrupt behaviour
- Application of export principles to all countries including NATO

An effective risk assessment is **not** one that only includes the following considerations:

- Assurances by the recipient government or exporting companies
- An evaluation of risk that effectively excludes past experiences with the recipient country, its conflict and human rights record (for example if that country is involved in cycles of violence but currently appears peaceful)
- The narrow impact of the specific weapon to be exported

Thus, a comprehensive analysis implies that weapons should not be exported not only if they may be directly engaged in the commission of human harm but also where they become part of a system in which there is any evidence that this system broadly condones or commits violations of human rights or IHL. Military exports to repressive or warring regimes can help these regimes build legitimacy or replenish arsenals even if the specific weapons are not immediately used in harmful activities. In this sense, German legislation should adopt a narrow reading of the criteria outlined in article 2 of the European Council Common Position 2008/944/CFSP (CP) by coming to a holistic assessment of the human rights record, and conflict record of the country an export is destined for, instead of relying on narrow assurances about the potential uses of a specific weapon or weapon-type. The coalition agreement's rejection of arms sales to all countries directly involved in the Yemen war already implicitly acknowledges the need for such a holistic assessment.

To achieve this, effective legislation must go beyond the “clear risk” formulation adopted by the CP. In the United Kingdom, where I live, the clear risk formulation has been used as a legal loophole. This has included several strategies. Initially, experiences of past violations of basic principles like human rights, IHL, or conflict involvement are insufficiently integrated into

the present-oriented risk assessment that often [treats every round of violence](#) as separate from past experiences. Secondly, it is claimed that future violations with specific weapons cannot be clearly predicted. Finally, it is claimed that past violations cannot be seen as part of a pattern.

Instead of relying on determining clear risk of potential harm, the burden of proof in risk assessment must be designed in such a way as to create the necessity to **prove a given country has an exceptionally good human rights and IHL record, and no conflict-involvement** rather than creating the need to establish that violations are systemic. Otherwise, supposedly restrictive legislation can act as a justification and enabling device of harmful arms exports. An alternative formulation must make a positive statement that arms exports to war and crisis zones and to states that violate human rights and international law will not be approved.

#### *Holistic Assessment and Economics*

Furthermore, effective legislation is not one that strikes a “balance” between what is deemed economically beneficial and morally or even legally right. The ministry of economics is correct when they [state](#) that arms exports are not a matter of economic policy. Effective arms export control legislation must reflect this principle. Therefore, **economic arms exports must be banned as a matter of principle and any exceptions publicly justified** on the basis of established criteria such as those of the CP. These licences must be revocable if the assessment changes.

It is important to note that the banning of purely economically motivated arms exports would not hinder the government’s ability to act such as in the current situation surrounding the Russian invasion of Ukraine.

If arms exports are not primarily an economic decision, it should be considered which body be designated in the future to make risk assessments. This should not be the ministry for economics. A Ministry of Economics head of unit (*Referatsleiter*) made a very revealing [statement](#) on his perceived relationship of the ministry to the industry during the 2019 trial against Heckler and Koch for illegal arms exports to Mexico, by saying his ministry was called, “Ministry FOR Economics” [emphasis in original]. Assessments should be made by an authority competent in assessing the humanitarian and human rights dimensions in the destination country and region.

#### *Banning Certain Arms Exports*

The export of small arms and light weapons including their ammunition and components as defined by the United Nations should be generally banned to countries outside the European Union, as their end-use is virtually impossible to control, and they are very harmful when diverted as recent appearance of German small arms in conflicts such as Yemen, but also in Colombia and Mexico, have shown. It is extremely harmful to the image of Germany in the world when German arms are discovered in the hands of child soldiers, as has been the case in the past. Also, their presence can undermine the development and peace work undertaken by the German government and non-governmental organisations.

### *Transparency, Accountability, and Enforceability*

For any law to be effective, transparency, accountability and enforceability are key. Including such mechanisms in the arms exports control law is also important for any government seeking to implement a restrictive arms export policy and to ensure the longevity of this policy in future governments.

This section includes some examples from other countries that, while imperfect, can be seen as a positive example in certain areas.

**Transparency** is key to ensure public accountability and democratic legitimation of arms transfers. This is especially important given the levels of state subsidy of the defence sector and the impacts that the trade in weapons can have on the safety and security of German citizens around the world.

Generally, transparency includes at minimum the **publication of actual figures on arms exports, not just licences granted**. In the case of manufacturing equipment, software, technology, and licenses, it must be recorded for which military equipment they are intended. These must be made public at a higher frequency and allow for the possibility in principle for the public or parliament to object to licences. Moreover, it is crucial to give public, positive justification on the basis of the established criteria of licences issued. This must go beyond simple assertions that a given criterion has been met for the export of a given arms category and should include a comprehensive publicly available assessment of the human rights and humanitarian situation, as well as conflict status of the given country, as well as the potential impact of the specific weapon type to be exported. Transparent justification of decisions is important especially to justifying or challenging the issuing of licences in a judicial process. At least for such a process this information must be available and made accessible

Furthermore, the analytical process for licences granted must be made transparent and apply to all countries, including NATO countries. International legislation, including the Arms Trade Treaty and the CP do not provide for exemptions in applying licensing criteria to allies.

#### **Other Country Practices of Transparency**

##### **United Kingdom**

The United Kingdom publishes structured data on arms and dual-use exports through its annual report on export licensing, as well as through export licensing statistics on its website. The site allows users to search and export data related to specific fields including: Origin, Category, Destination and Number of Licences. While [the European Parliament reports](#) have described the UK as a leader in providing structured data on arms exports, it has also commented on the data's limited substance. The UK only reports on licenced exports, not actual goods exported. It also doesn't provide information on the companies involved nor information on the nature of the exports beyond the relevant "reference".

##### **Switzerland**

Switzerland publishes a detailed annual report on arms exports, which includes itemised details of licences. Switzerland doesn't aggregate the data unlike most Western countries, and publishes one row per transaction. It also publishes details of its post-shipment inspections.

### **The Netherlands**

Monthly statements on the Dutch Government site include key information on arms sales, such as weapon type, end-recipient, end user and licence type. It also publishes an annual report, which while limited to the EU's list of equipment, contains details of rejected licence applications along with government replies to questions on licences from MPs. Also available are monthly reports on exports of dual-use goods and transit of military goods through the country.

**Accountability and enforceability** require that there must be a way to challenge licensing decisions. In Germany, this is currently effectively impossible. At minimum, there should be parliamentary control over the most controversial licences. Moreover, the possibility to legally challenge a licensing decision must be granted to at least some entity of the German public in the form of a *Verbandsklagerecht*.

Accountability also requires a revamping of the German decision-making process on arms exports, which is currently untransparent and lacks democratic control. While some secrecy in decision making about military questions may be justifiable, especially when it comes to reasons for rejecting a given licence application, the current degree of secrecy is not.

### **Other Country Practices of Accountability**

#### **United Kingdom**

Campaign Against Arms Trade (CAAT), a UK-based NGO, was able to challenge the Secretary of State for International Trade on the lawfulness of the decision not to suspend but continue to grant licences for the export of arms and military equipment to Saudi Arabia, despite a credible body of evidence suggesting that the country had been committing serious violations of IHL in Yemen. While the initial case was dismissed on the basis that the Secretary of State's risk assessment was appropriate, CAAT on appeal in 2019 won on the grounds that the government's decision-making was fundamentally deficient in its consideration of Saudi Arabia's actions past and present in respect of IHL. The Court ordered that licences to the country be suspended while the department completed a review of its licensing process. In 2020, the Secretary of State announced a resumption of licences on the basis that IHL violations were "isolated incidents" and did not amount to a pattern, which is currently subject to appeal by CAAT. While court action in the UK is limited by the constraints of judicial review, which only allows the courts to evaluate whether a government action is "lawful" according to one of a number of long-established grounds and not on an evaluation of the merits of a government decision, the system at least allows civil society action on such issues.

#### **Belgium**

In 2017, several NGOs challenged the Walloon Regional Government over several licences for arms exports to Saudi Arabia, on the grounds that there was a risk the country would use the goods to commit violations of IHL, along with concerns about the country's impact on regional stability. Initially their application to have the licences suspended was rejected on the grounds that they did "not make every effort to refer the matter to the Council of State in the shortest possible time", after waiting 23 days from being informed of the licences. Eventually however they were able to have six licences suspended, and eight annulled via different procedures. This was primarily done on the basis that the government had failed to adequately justify its decision that the weapons would not be used for violations of IHL by the Saudi National Guard. Similar to the UK case, there were no means available to challenge the broader policy, while the case concerned individual decisions taken on the

part of the Walloon Government. The Court did, however, hold that the government's assessment could be based on the use of exports more generally in Yemen, without needing to show that Belgian arms had been used in specific violations of IHL. After the court's decision new licences were granted which the NGO coalition challenged on similar grounds, with mixed results.

## **Other Country Practices of Decision Making**

### **The Netherlands**

In line with the EU Common Position, in situations which contain a degree of risk, the Dutch Government must be able to justify arms sales. This will include situations when Parliament questions the government on its decision to grant a licence, or when it issues a licence for a country that has already been turned down by another EU country. The government is also required to demonstrate that the licences it grants do not contravene previously denied applications.

### **United States**

In the US, the State Department approves arms exports on behalf of the President. When the monetary value of an export exceeds a certain threshold, the government must formally notify the Senate Foreign Relations Committee and the House of Representatives Foreign Affairs Committee which have thirty days to respond. If both the House and Senate vote against the proposed arms export, this resolution is sent to the President who has the power of veto, which Congress can then override on the basis of a two-thirds majority of both chambers.

### *Post-Shipment Monitoring*

A final principle of effective legislation is the need for efficacious post-shipment controls to verify end-use. At the same time, it must be recognized that post-shipment controls can never justify a sale where diversion is seen as a risk from the beginning. Effective post-shipment controls also serve as a deterrent, as violations of end-use agreements should exclude countries from further transfers. Crucially, post-shipment controls must be applied to small arms and light weapons but also to larger weapons systems.

## **An Example of Post Shipment Controls**

The Arms Export Control Act (AECA) required the United States government to provide reasonable assurance that the recipients of arms transfers will comply with conditions pertaining to the use, transfer and security of US exports and services. There are two programs, the Golden Sentry program and the Blue Lantern program, which are responsible for government-to-government sales and commercial transfers respectively. The focus of both programs is to confirm the physical location of exported goods and to protect technology from diversion. However, the programs do not generally monitor the use of the exports, which would include evaluating whether US weapons are being used to commit human rights abuses and IHL violations.

## Legislating for the Internationalisation of the Industry

The arms industry has been a truly international business for several decades. This internationalisation takes multiple forms, including but not limited to:

- Offshoring of production through joint ventures and subsidiaries
- Transfer of qualified personnel, expertise and technology
- Licensing of production to third countries
- Government to government cooperation in arms development and production

Several of these elements are insufficiently regulated or unregulated. This must be urgently rectified.

Several major German arms manufacturers have **subsidiaries or joint-ventures abroad**, including Rheinmetall, Heckler & Koch and SigSauer. These overseas arrangements can and have been used to circumvent German legislation both legally and illegally. For example, small arms maker SigSauer illegally exported pistols made in Germany to Colombia via a subsidiary in the United States. Meanwhile, Rheinmetall has apparently used its South African joint-venture Rheinmetall-Denel Munitions (RDM), of which Rheinmetall owns 51%, as well as its full subsidiary RWM Italia in Italy to continue exporting to Saudi Arabia despite the German ban on arms exports to the country. Weapons manufactured by these companies have been found in Yemen. For example, a suspension lug made by Rheinmetall Italia was [identified](#) at the site of a bombing of a residential property in Yemen, where a family of six, including a pregnant mother and four children, were killed. Remnants of Rheinmetall Italia-made bombs were [identified](#) at further sites of bombings in civilian areas. RDM-made mortars are also [suspected](#) to have been used in Yemen, including in the deadly offensive on Hodeida in June 2018.

Germany must effectively regulate these exports and the founding of subsidiaries abroad. One option could be to subject to German legislation any arms export that is conducted by any company in which a German company holds a controlling share.

A part of this issue is also the **transfer of qualified personnel and expertise**, which is currently not regulated. It is, for example, known that the Lürssen group maintained a [physical presence](#) in Saudi Arabia beyond the export ban, including the training of Saudi personnel. Senior German personnel have also directly transferred into Saudi Arabia's state-owned defence company, SAMI: most prominently, former Rheinmetall senior manager Andreas Schwer headed SAMI between 2017 and 2020. Other former senior defence managers are also [suspected](#) of having joined SAMI. Such transfer of German expertise for arms production and maintenance must be regulated.

Meanwhile, the **licensing of production to third countries outside of shared production should be prohibited**. The negative effects of production licences granted decades ago are felt today. Once a re-production licence has been granted there is no way of controlling these weapons. For example, both Saudi Arabia and Iran have in the past received licences to produce the G3 rifle. Saudi Arabia has been [known to airdrop](#) these weapons into Yemen. Whether these weapons are or will be used in contravention of Grundgesetz Article 26 cannot be controlled and such licensing must, therefore, be prohibited.

Government to government cooperation in arms production is a difficult arena. Generally, for any shared production, Germany should not surrender its right to control the export of equipment. The 2019 [agreement](#) between Germany and France on shared arms exports was a worrying step in this direction, as both parties committed to not opposing arms exports desired by the other party, unless in the exceptional case that exports would contravene undefined direct interests or national security. This represented a complete reversal of the German principle of only exporting weapons to third countries in exceptional circumstances. Potentially such a commitment could lead to the circumvention of German law. The problem was also evident when Germany imposed the export ban on Saudi Arabia, where the status of joint products such as the Eurofighter, was long contested. Germany must reserve the right in all cases to exercise its sovereign export control over shared arms products in line with national and international laws, unless a comprehensive supranational shared export mechanism is established that would require the surrender of national sovereignty to a higher entity like the European Union.

### **Recognizing and Countering Corruption**

A further significant issue in the global arms trade is corruption. For instance, the UK's National Anti-Corruption Strategy 2017-2022 acknowledged that 'corruption threatens our security and prosperity, both at home and overseas. In particular, corruption undermined the capacity of national security institutions to fulfil their roles and, in certain cases, underpinned and facilitated an increased threat of terrorism.'

According to [estimates](#) by Transparency International analyst Joe Roeber in the 1990s, corruption in the arms trade made up 40% of corruption in all global transactions. Corruption can be a motivating reason why arms deals are concluded in the first place, replacing legitimate national security concerns in procurement decisions. This, in turn, can contribute to significant damage both to development as well as national security. In India, for example in the scandal known as "Choppergate", [it was alleged](#) that helicopter procurement criteria, including the altitude at which the machines could fly, were scrapped following bribery of officials in order to make a British-Italian bid eligible. In my own country, South Africa, more than USD 5bn were spent on fighter jets that we did not need, and that were significantly more expensive than those jets the military actually wanted to buy. In the years following the arms deal, a [study](#) by Harvard University found that over 330'000 people died avoidable deaths from HIV/AIDS because a timely and effective antiretroviral drug treatment program was not implemented, due to a lack of financial resources. **Corruption in the arms trade is not a victimless crime.**

As I detail in 'The Shadow World', the South African deal also involved lesser-known German dimensions. For example, 'Chippy' Shaik, the head of procurement in the Defence force, had to flee the country after evidence emerged that he had received USD 3m from Thyssen Krupp, who won a contract to build frigates in highly controversial circumstances. This involved reopening the tender for the deal already effectively awarded to a Spanish company after a visit by then Deputy President Thabo Mbeki to Germany. Another brother of Shaik was briefly deployed to Hamburg, the city where the German Frigate Consortium was headquartered, as Consul General. Eventually, the consortium was awarded the contract, having allegedly paid USD 25m in bribes. Moreover, the parliamentary chief whip of the ruling African National



Congress and former Chair of Parliament's Defence Committee at the time of the deal, served a brief prison sentence for offences linked to gifts from EADS, a French-German company. The awarding of a submarine deal to a consortium led by Ferrostaal was also contentious and allegedly involved corrupt payments.

This reflects that Germany is not free of corruption in the arms trade. Just this month, the investigative journalism platform CORRECTIV [published](#) insights from German judicial documents obtained through freedom of information requests, that suggest Germany investigated at least 15 arms related corruption cases between 2015 and 2020.

Corrupt practices do not only include classic bribery. Increasingly, the arms trade makes use of so-called offset agreements, whereby a certain amount of money spent on weapons is reinvested in the country. The resulting investments are not inherently corrupt but are often even less transparent than the initial arms deal and help build and sustain corrupt patronage networks in recipient countries. In a number of instances the companies involved in offset arrangement are utilised to pay bribes to key decision-makers on arms deals. An example close to home occurred in Austria in relation to a Eurofighter acquisition, where several employees of companies involved in offset agreements are still under investigation for financial crimes linked to the deals.

Intermediation - the use of dealers, agents and/or brokers, and/or companies not directly involved in the transaction - is responsible for a significant amount of corruption in arms deals. In 2014, the OECD conducted a review of foreign bribery between 1999 and 2014 and found that in 75% of the cases it examined, the bribery was 'carried out by an agent or an intermediary.'

To address corruption in the arms trade more effectively, the new arms export control law should make explicit reference to existing anti-corruption legislation, include control provisions for offset deals and make provisions for far greater transparency. Transparency must especially target the use of offsets and intermediaries. A new German law should give serious consideration to the creation of a compulsory register of intermediaries – as is the case in many European countries - as well as the requirement that details should be made available to an appropriate body of any use of intermediaries, and details of both how much they are paid and for what specific work.

## **Conclusion**

The new German government has a great opportunity to significantly improve the country's arms export regime in order to prevent human harm, be it caused by the weapons themselves or through corruption in the procurement and/or trading process. To achieve this a new law must include strong provisions on how risk of harm is assessed and communicated. Transparency, the ability of civil society and legislators to hold decision makers to legal and ethical account, as well as special provisions to regulate for the internationalisation of the industry and its notorious corruption, are crucial dimensions of any new law.

I reiterate my appreciation for this opportunity and am at your disposal for any further inquiries, information or input.

Sincerely,

Andrew Feinstein

London, March 18th, 2022