The impact of Germany's arms transfers on economic, social and cultural rights

Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights

Joint Submission to the 64th session of the Committee on Economic, Social and Cultural Rights

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EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS

WOMEN'S INTERNATIONAL LEAGUE FOR PEACE & FREEDOM

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THE IMPACT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF GERMANY'S ARMS TRANSFERS

GERMANY'S EXTRATERRITORIAL OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

I. Introduction

1. This joint submission by ECCHR and WILPF focuses on Germany's extraterritorial obligations under the International Covenant on Economic, Cultural and Social Rights, with a focus on violations arising from German arms transfers to third countries. This issue is addressed primarily through Germany's obligation to protect under the Covenant, including in relation to operations of German businesses in the arms industry both in Germany and abroad. It also highlights the gendered impacts of violations. In its last review of Germany, the Committee on Economic, Social and Cultural Rights (CESCR) recommended the German government to apply a human rights-based approach to its international trade policy and to ensure that its policies on investments by German companies abroad serve the economic, social and cultural rights in the host countries and do not violate them.[1] As illustrated in this report, arms transfers do not serve but, rather, undermine human rights in the receiving countries.

II. The human rights impacts of arms transfers

2. There has been a growing recognition by United Nations human rights bodies, including the Committee on Economic, Social and Cultural Rights (CESCR), the Human Rights Council, the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) and the Committee on the Rights of the Child (CRC), that arms transfers, including small arms and light weapons, can have a profound impact on the enjoyment of human rights, including economic, social and cultural rights.

3. Arms transfers to countries involved in conflicts can lead to the damage and destruction of civilian infrastructure, such as schools, hospitals, housing and water and sanitation infrastructure, directly impacting the population's enjoyment of their economic, social and cultural rights, such as the right to health, water, education, adequate food and adequate housing. For example, blasts and fragmentation of explosive weapons used in armed conflicts not only indiscriminately kill and injure civilians in the area where they detonate, but also damage objects vital to the civilian population, such as schools, hospitals, markets, residential areas, areas of religious and cultural significance, water and sanitation infrastructures and workplaces.[2] In addition, victims and survivors of explosive weapons can face long-term consequences including physical and psychological harm.[3]

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[1] E/C.12/DEU/CO/5, paragraphs 9, 10, 11, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fDEU%2fCO%2f5&Lang=en.

[2] A/HRC/35/8, paragraph 10, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/109/83/PDF/G1710983.pdf?OpenElement.

[3] Ibid, paragraph 11.

4. Arms transfers can also undermine economic and social rights through the diversion of public funds away from health, education and other social services as recognised in article 26 of the Charter of the United Nations, which provides the objective "to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources." Further, irresponsible transfer of arms can destabilise security in a region, which has serious implications for human rights protection.[4]

Gendered human rights impacts

5. Arms transfers can have serious consequences for the rights and safety of women in the countries that receive the arms, as well as in places where they are diverted to, especially in the case of small arms and light weapons. The proliferation of such weapons, both in wartime and non-conflict situations with significant political tensions and systemic gendered discrimination, may disproportionately affect women.

6. In his May 2018 Agenda for Disarmament, the UN Secretary General António Guterres, has drawn attention to the fact that "concerns relating to arms have clear gender dimensions. The ownership and use of arms is closely linked to specific expressions of masculinity related to control, power, domination and strength. Correspondingly, men constitute a massive majority of the owners of small arms and young men constitute the vast majority of perpetrators of armed violence. Weapons also have differentiated impacts on women and men, girls and boys. In 2016, men and boys accounted for 84 per cent of violent deaths, including homicides and armed conflict. Women, however, are more frequently the victims of gender-based violence facilitated by small arms, including domestic violence and sexual violence. Women can also bear indirect impacts of armed violence, including psychological and economic burdens. In many situations, when men are killed or injured, women must take on new or additional roles as income providers, often leading to impoverishment, exploitation and discrimination."[5]

7. The proliferation of arms has a negative impact on women's standing and bargaining power within the household, their mobility, and their participation in public and political life, and can hinder their access to and use of resources, business and employment opportunities.[6]

8. The CEDAW Committee has noted that the proliferation of conventional arms, especially small arms, including diverted arms from the legal trade, can have a direct or indirect effect on women as victims of conflict-related gender-based violence, as victims of domestic violence and as protestors or actors in resistance movements.[7] The Committee has also recommended that States address "factors that heighten

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[4] See www.un.org/disarmament/convarms/armstrade.

[5] "Securing our Common Future. An Agenda for Disarmament", May 2018, available at: https://front.un-arm.org/documents/SG+disarmament+agenda_1.pdf.

[6] See, for example, WILPF (2017) "Feminism at the Frontline: Addressing Women's Multidimensional Insecurity in Yemen and Libya", available at: https://wilpf.org/wp-content/uploads/2017/08/LIBYA-YEMEN-WEB.pdf, and "Gender-based Violence and the ATT", available at: http://www.reachingcriticalwill.org/resources/publications-and-research/publications/10112-gender-basedviolence-and-the-arms-trade-treaty.

[7] CEDAW/C/GC/30, paragraph 32, available at: https://www.ohchr.org/documents/hrbodies/cedaw/gcomments/cedaw.c.cg.30.pdf; See, for example, "Gender-based Violence and the Small Arms Flow in the Democratic Republic of the Congo - a Women, Peace and Security Approach. Alternative Report by Members of the Civil Society of the DRC", available at: https://wilpf.org/wp-content/uploads/2013/07/CEDAW-DRC-shadow-report-WILPF-EMAIL.pdf and WILPF (2016) "The Impact of Firearms on Women", available at: https://wilpf.org/the-impact-of-firearms-on-women/.

women's risk of exposure to serious forms of gender-based violence, such as the accessibility and availability of firearms, including their exportation". [8]

III. States' obligations with regard to arms transfers

1) Obligations under the International Covenant on Economic, Cultural and Social Rights

9. The CESCR has stated that extraterritorial obligations of States to respect, protect and fulfil under the Covenant follow from the fact that the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction.[9] This approach has been reaffirmed by several UN human rights treaty bodies, including by the CRC and by the CEDAW Committee in relation to States' arms transfers to third countries.[10] The CESCR has also recently addressed this issue in its concluding observations to the United Kingdom recommending that "it conduct thorough risk assessments prior to granting licences for arms exports and refuse or suspend such licences when there is a risk that arms could be used to violate human rights, including economic, social and cultural rights".[11] In the context of the Universal Periodic Review (UPR), States have also recently made recommendations related to the human rights impacts of arms transfers.[12]

10. According to CESCR's General Comment 24 on States' obligations with regard to business activities, "States also are required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory/and or jurisdiction."[13] The Committee also emphasised that States Parties must

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[8] CEDAW/C/GC/35, paragraph 42, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf.

[9] E/C.12/GC/24, paragraph 27, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en

[10] See CRC/C/SWE/CO/5, paragraph 54; CRC/C/OPAC/NLD/CO/1, paragraph 24; CRC/C/OPAC/BRA/CO/1, paragraph 34; CRC/C/OPAC/TKM/CO/1, paragraph 24; CRC/C/DEU/CO/3-4, paragraph 77; CRC/C/OPAC/CHN/CO/1, paragraph 34; CRC/C/OPAC/UKR/CO/1, paragraph 26; CRC/C/OPAC/MNE/CO/1, paragraph 25; CRC/C/OPAC/MDA/CO/1, paragraph 15; CRC/C/OPAC/TUN/CO/1, paragraph 18; CRC/C/OPAC/GBR/CO/1, paragraph 33 and CRC/C/OPAC/USA/CO/1, paragraph 34. See also CRC/C/OPAC/BEL/CO/1, paragraph 21, in which the Committee on the Rights of the Child recommended that the State Party review its domestic law on small arms trade with a view to abolishing any trade in war materiel with countries where persons under 18 years of age take a direct part in hostilities, either as members of the national armed forces or as members of non-State armed groups; CEDAW/C/GC/30, paragraph 29, available at: https://www.ohchr.org/documents/hrbodies/cedaw/gcomments/cedaw.c.cg.30.pdf; CEDAW/C/SWE/CO/8-9, paragraphs 27 (h) and 35; CEDAW/C/DEU/CO/7-8, paragraph 28; CEDAW/C/ITA/CO/7, paragraph 20; CEDAW/C/NLD/CO/6, paragraph 46 (a); CEDAW/C/CHE/CO/4-5, paragraph 17 (c) and CEDAW/C/FRA/CO/7-8, paragraph 23.

[11] See E/C.12/GBR/CO/6, paragraph 12 (c).

[12] A/HRC/36/9, recommendation 132.134: "In the context of the defence of the right to life, carefully assess the transfer of arms to those countries where they are likely to be used for human rights abuses and violations (Peru)"; A/HRC/38/4, recommendation 145.31: " Refrain from transferring conventional weapons when these can be used to violate human rights or international humanitarian law, in line with its obligations under the Arms Trade Treaty and target 16.4 of the Sustainable Development Goals (Panama)"; A/HRC/39/9, recommendation 155.14: "Harmonize arms export control legislation in line with provisions of the Arms Trade Treaty and the Council of the European Union Common Position, and ensure that, before export licenses are granted, comprehensive and transparent assessments are conducted of the impact that the misuse of small arms and light weapons would have on women, including those living in conflict zones (Albania)"; A/HRC/37/16, recommendation 116.13: "Accede and adapt its national legislation to the Arms Trade Treaty and sign the Treaty on the Prohibition of Nuclear Weapons (Guatemala)".

[13] E/C.12/GC/24, paragraph 26, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en.

take all measures necessary to prevent and remedy violations of the rights recognised by the Covenant that take place beyond their borders, due to the activities of commercial entities over which they can exercise control, in particular in cases in which the domestic courts of the State where the harm took place are unavailable or ineffective.[14] It has noted that criminal or administrative sanctions should be imposed where companies have not acted with the required diligence.[15]

11. It is important to note that "the responsibility of the State can be engaged in such circumstances even if other causes have also contributed to the occurrence of the violation, and even if the State had not foreseen that a violation would occur, provided such a violation was reasonably foreseeable."[16] This would notably be the case in sectors with well-documented risks where particular due diligence is required, such as in the extractive industry.[17] By the same logic, States should hence exercise a higher duty of care in relation to the risk of human rights violations posed by the inherently lethal arms industry.

2) Arms transfer regime

a. The Arms Trade Treaty

12. The Arms Trade Treaty (ATT) is the first international legally binding instrument regulating the transfer of conventional arms with the reduction of human suffering as one of its long-term goals. It expressly incorporates human rights as a standard to restrict transfers. The preamble of the treaty also acknowledges that an increase in arms expenditure diverts resources from health, education and other social services.[18] Article 6(3) of the ATT prohibits any transfer of conventional arms when the State Party has knowledge, at the time of authorisation, that the arms would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party.[19]

13. In case an export does not fall within the prohibition of article 6, article 7 of the ATT stipulates that the exporting State must still assess prior to authorisation "in an objective and non-discriminatory way" the "potential" that the arms:

> (a) would contribute to or undermine peace and security;
> (b) could be used to:
> (i) commit or facilitate a serious violation of international humanitarian law;
> (ii) commit or facilitate a serious violation of international human rights law;
> (…).

14. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences stipulated in article 7(1) of the ATT, the exporting State Party shall not authorise the export.[20] Article 7 (4) of the ATT also

[14] Ibid, paragraph 26.

[15] Ibid, paragraph 15.

[16] Ibid, paragraph 32.

[17] Ibid.

[18] See preamble paragraph 3, available at: https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2013/06/English7.pdf.

[19] Article 6.3 of the Arms Trade Treaty, available at: https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2013/06/English7.pdf.

[20] Article 7.3 of the ATT.

requires the exporting State Party to assess the risk of the exported goods being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.[21] It is important to underscore that risk assessments required by the ATT assess just that – the *risk* that the arms in question will be used in any of the ways prohibited by the treaty. It is not necessary to establish the direct presence of a transferred item as having been used in a specific act in order to prevent future transfers of the same item. If the risk alone is high enough, the transfer must be denied. The ATT makes States Parties responsible for the implementation of these obligations under domestic law.[22]

b. The European Union Council Common Position 2008/944 CFSP

15. The European Union Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (EU Common Position) provides obligations on EU Member States to assess arms export licence applications against eight criteria.[23] It sets high common standards, which should be regarded as the minimum for the restraint and management of transfers of military technology and equipment. Criterion two of the eight criteria deals with the consideration of "respect for human rights in the country of final destination as well as respect by that country of international humanitarian law". It provides that "having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall:

    a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;

    b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe; and

    c) 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 international humanitarian law."

16. Criterion five also mentions that consideration of defence and security interests "cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability".

17. Authorisation practices by respective EU Member States over the past years, especially in relation to arms exports to members of the Saudi-led coalition involved in the conflict in Yemen, show a worrying divergence of the 'high common standards' by the EU Common Position and illustrate a lack of implementation. Currently, the EU Common Position is being reviewed.

3) Obligations under the United Nations Guiding Principles on Business and Human Rights

18. Under the UN Guiding Principles on Business and Human Rights (UNGPs), States have the obligation to protect against human rights abuse within their territory and/or jurisdiction by business enterprises, and should clearly set out the expectation that enterprises respect human rights throughout their operations.[24]

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[21] Article 7.4 of the ATT.

[22] Article 14 of the ATT.

[23] European Union Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008E0944.

[24] See Guiding Principles 1 and 2, available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

It is important to underline that States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies, as it is often the case with companies in the arms industry.[25] Indeed, some of the top arms companies in the world are partly state-owned, major suppliers to their government and in some instances, receive substantial support from their government in the conclusion of contracts.[26]

19. Given the specific risks of gross human rights abuses posed by the arms industry, including by fuelling conflict, it is essential to recall that States have a specific obligation to ensure that business enterprises operating in conflict-affected areas are not involved in such abuses.[27] According to the UNGPs, States: "should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them."[28]

20. Under Guiding Principle 8, States are also to ensure policy coherence between their human rights obligations and the laws and policies they put in place that shape business practices.[29] States parties should hence duly identify the conflicts that may exist between their arms export control policies, their role in supporting commercial negotiations for arms companies and their international human rights obligations.

4) Commitments under the Sustainable Development Goals

21. States should also consider the consistency of their arms transfers with their commitments under the Sustainable Development Goals (SDGs), in particular SDG 16, Target 16.1, which requires States to significantly reduce all forms of violence and related death rates everywhere, and Target 16.4, which requires States to significantly reduce illicit financial and arms flows.[30] Furthermore, as recommended by the UN Secretary-General's Agenda for Disarmament, "as a contribution to Sustainable Development Goal 5 (Target 5.2), all States should refrain from authorising any export of arms and ammunition, including their parts and components, if there is an overriding risk that these items will be used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

22. All States should also incorporate gender perspectives in the development of national legislation and policies on disarmament and arms control, including consideration of the gendered aspects of ownership, use and misuse of arms; the differentiated impacts of weapons on women and men; and the ways in which gender roles can shape arms control and disarmament policies and practices."[31]

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[25] See Guiding Principle 4, available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[26] Lockheed Martin is for instance the U.S. government's largest contractor, see: https://www.investopedia.com/articles/personal-finance/081416/top-5-shareholders-lockheed-martin-lmt.asp; BAE systems is the U.K.'s biggest defence contractor, see: https://www.theguardian.com/business/2017/oct/10/bae-systems-job-cuts-eurofighter-typhoon-orders; the French government also provided support to the conclusion of arms sales to Airbus, see: http://www.arabnews.com/node/1336081/saudi-arabia and, the Italian Ministry of Economy and Finance holds 30.2% of the shares in Italian based arms manufacturer Leonardo, see: http://www.leonardocompany.com/en/investitori-investors/titolo-borsa-stock-quote/capitale-azionariato-share-capital-1-1.

[27] See Guiding Principle 7, available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[28] Ibid.

[29] Ibid.

[30] https://sustainabledevelopment.un.org/sdg16.

[31] https://front.un-arm.org/documents/SG+disarmament+agenda_1.pdf, page 39.

23. The German government has committed under its 2016 Sustainable Development Strategy to implement at least 15 projects a year by 2030 to secure, register and destroy small arms and light weapons carried out by Germany in affected regions of the world.[32] While this is a laudable commitment to fight the proliferation of small arms, further consistency should be ensured between Germany's policy on all arms exports, SDGs 16 and 5.

5) Commitments under Germany's National Action Plan on UN Security Council Resolution 1325

24. Under its 2017-2020 Action Plan of the Federal Government on the implementation of UNSCR 1325, Germany has committed to "more strongly integrate a gender perspective into planning and carrying out disarmament and arms control projects" and to continue to take "measures to prevent the proliferation of small arms and to combat the illegal trade in small arms, taking a gender perspective into account".[33] Gender-specific issues are integrated, especially regarding women in small arms control. The 2017-2020 Action Plan clearly addresses women's important role in disarmament efforts and recognizes arms as a risk to women's security. However, it fails to take into account the gendered human rights impacts of arms transfers in recipient countries.

IV. Germany's arms sales to third countries

1) Germany's arms export control system

a. Germany's legal framework on arms export control

25. Germany is a State Party to the Arms Trade Treaty.[34] It is further bound by the EU Common Position. Germany's arms export control is based on the German War Weapons Export Act and the foreign trade law, in conjunction with the "Political Principles of the Government of the Federal Republic of Germany for the Export of War Weapons and Other Military Equipment".[35] The determination of licensing processes and compliance with the binding EU Common Position is regulated by these non-binding political principles. This set of laws and principles makes Germany's regulation of arms export control fragmented and unsystematically codified.[36] In January 2016, the Minister for Economic Affairs announced his intentions to set up a commission of exports for a new and single harmonised law on arms export control.[37] This initial proposal, however, has been watered down to a consultation process about the future of arms export control.[38]

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[32] https://www.bundesregierung.de/Content/DE/_Anlagen/Nachhaltigkeit/2017-06-20-nachhaltigkeit-neuauflage-engl.pdf?__blob=publicationFile&v=2.

[33] https://www.auswaertiges-amt.de/blob/291640/864e87add0b30ed41ea5b9eaf6b8a653/aktionsplan-1325-2017-2020-en-data.pdf, pages 19 and 24.

[34] Germany ratified the Arms Trade Treaty on 2 April 2014, http://www.thearmstradetreaty.org/images/Status_lists/List_of_ATT_States_Parties_alphabetical_order25_June_2018.pdf

[35] Arms Trade Treaty – Baseline Assessment Project, "Country Profiles: Germany", available at: http://www.armstrade.info/countryprofile/germany/, the *Kriegswaffenkontrollgesetz* and *Außenwirtschaftsgesetz*; GKKE, *Rüstungsexportbericht* 2016, page 15.

[36] Namely, the K*riegswaffenkontrollgesetz* and *Außenwirtschaftsgesetz*; GKKE, *Rüstungsexportbericht* 2016, page 15.

[37] Proposal of the German Green Party for a new law on arms export control, 16.02.2016, documents of the German parliament, *Drucksache* 18/7546.

[38] See the webpage of the Federal Ministry for Economic Affairs and Energy: http://www.bmwi.de/DE/Themen/Aussenwirtschaft/Ruestungsexportkontrolle/transparenz.html.

26. This normative basis for arms export control takes into account, among other aspects, the following criteria for arms export: the situation of human rights in the country of destination, the risk that the weapons might facilitate regional instability and the possibility that the weapons can be a factor to exacerbate violence in the country of destination. In its submission to the ATT Baseline Assessment Project, Germany also outlined that "the preservation of human rights is of particular importance for every export decision, irrespective of the envisaged recipient country. Military equipment exports are therefore fundamentally not approved where there is "sufficient suspicion" of misuse of the military equipment for internal repression or other ongoing and systematic violations of human rights. The human rights situation in the consignee country plays an important role in connection with this question".[39]

27. Germany finally stated that the German Principles are, legally, more restrictive than both the EU Common Position and the ATT.[40] In March 2015, Germany adopted its "Small Arms Principles" governing the export of small arms and light weapons, corresponding ammunition, and production equipment to third countries.[41] Nowhere in these principles is the issue of human suffering (ATT Article 1, stated purpose of the Treaty) featured as an explicit reason to deny an export license.[42]

a. Gaps in Germany's arms export control system

i. Lack of transparency

28. The 2016 Transparency Barometer identifies Germany as one of the three most transparent major small arms exporters. Recent improvements on e.g. timeliness of the reporting have to be noted positively.[43] A lack of transparency, however, is inherent in the German decision-making process for granting export licenses.

29. On 21 October 2014, a judgment of the German Constitutional Court spelled out the limits of access to information about decisions of the *Bundessicherheitsrat* - the competent institution for granting complex or doubtful export licenses - including for the German Parliament.[44] As a result, information to be provided to parliament is restricted to the type of goods, volume of the deal, and the receiving State.[45] Information on reasons for granting or rejecting a license is therefore in principle never provided, which renders control of export decisions virtually impossible. While the submission of annual reports by ATT States Parties regarding their arms transfers may increase transparency, there is no obligation to report on the decision to grant or deny a license.

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[39] Ibid.

[40] Ibid.

[41] Federal Republic of Germany (n.d.), "Initial Report on Measures undertaken to implement the Arms Trade Treaty, in accordance with its article 13(1)", available at: http://thearmstradetreaty.org/images/ATT_Initial_Report_Germany.pdf .

[42] Principles of the German Federal Government governing the export of small arms and light weapons, corresponding ammunition and production equipment to third countries, available at: https://www.bmwi.de/Redaktion/EN/Downloads/small-arms-export-principles-german-federal-government.pdf?__blob=publicationFile&v=1.

[43] See Amnesty International Germany's position on the impact of Germany's arms exports on human rights, *Konsultationsprozess "Zukunft der Rüstungsexportkontrolle",* 07.10.2016, page 5.

[44] Judgment of the Constitutional Court, 2 be 5/11, 21.10.2014, *Leitsatz* 2.

[45] Ibid.

ii. Loopholes in the control of joint ventures and subsidiaries in third countries

30. Supplies of components, direct deliveries of war weapons and other military equipment in the context of cooperative ventures between German companies and companies in NATO countries, EU Member States, and countries with NATO-equivalent status, which are not covered by intergovernmental agreements, are in principle not restricted and thus, not subject to the same export controls.[46] The German government indicated however in 2017 that it would "bring its influence to bear in the matter of exports resulting from cooperative ventures between commercial companies. To that end it will require German cooperative venture partners to enter a contractual obligation that, should they supply components of a quantity or type that could be relevant to the manufacture of war weapons, they will inform the Federal Government in good time as to their partners' export intentions and seek legally binding arrangements on end-use."[47]

31. As such, German companies which export arms or their components to subsidiaries or business partners in NATO countries, EU Member States, countries with NATO-equivalent status, are only subject to an obligation of information "in good time" to the German government regarding their partners' export intentions. German companies are also supposed to enter into "legally binding arrangements on end-use" with their partners, which is very unclear and below the standards imposed by German authorities.

b. Gaps in Germany's business and human rights framework

32. Germany adopted its first national action plan (NAP) on the implementation of the UNGPs for 2016-2020.[48] In accordance with the UNGPs, the NAP expects due diligence to apply to all enterprises, regardless of their size, the sector in which they operate, or their operational context within a supply or value chain with an international dimension. Such obligation of due diligence hence also applies to companies in the arms industry. The NAP also provides that businesses which activities pose a particularly high risk of adverse impacts should issue regular public reports on that subject.[49] The NAP has a specific section dedicated to business activities in conflict zones that largely focuses on initiatives linked to the extractive industry. However, this section and the NAP as a whole overlook the specific challenges posed by the arms industry.

33. The NAP provides that an interministerial committee be established to verify the coherence and implementation of the adopted measures.[50] It is essential that the relevant authorities within the Ministry of Economic Affairs and Energy (BAFA) in charge of enforcing arms transfer controls be duly sensitised about the UNGPs and develop specific measures with regard to the implementation of due diligence obligations by companies in the arms industry.

2) Germany's arms exports raising human rights concerns

34. According to the Stockholm International Peace Research Institute (SIPRI), between 2013-2017 Germany was the world's fourth largest exporter of arms after the U.S., Russia and France.[51] In 2017, Germany

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[46] 2017 Military Equipment Export Report, page 29; Non-NATO equivalent countries are Australia, Japan, New Zealand, Switzerland.

[47] Ibid.

[48] National Action Plan Implementation of the UN Guiding Principles on Business and Human Rights 2016-2010, available at: https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf

[49] Ibid, page 9.

[50] Ibid, page 27.

[51] https://www.sipri.org/sites/default/files/2018-03/fssipri_at2017_0.pdf.

approved arms exports worth 6.24 billion Euros ($7.23 billion).[52] Recipient countries in 2017 notably included Saudi Arabia, the United Arab Emirates, Israel, Egypt, Algeria, Qatar and Turkey.[53] A review of German arms exports from a human rights perspective indicates deficiencies in the current export control system and implementation of Germany's obligations under the ATT and the EU Common Position, in particular with regard to arms transfers in the context of relations between German companies and their subsidiaries in third countries, as well as in cooperative ventures. Concerns over Germany's arms exports were also expressed by the CEDAW Committee in 2017 and in the UPR of Germany in 2018.[54]

a. Arms exports to members of the coalition involved in the Yemen conflict

35. In the context of arms exports where there is a clear risk that these arms might be used to violate international humanitarian law, it has to be taken into account that these violations of international humanitarian law also result in violations of economic, social and cultural rights. The Yemen conflict is a clear illustration thereof. Since March 2015, a Saudi-led coalition of countries, including the U.A.E., has been involved in the Yemen conflict.[55] Coalition airstrikes have been in violation with international humanitarian law, targeting schools, hospitals, food markets, storage sites, weddings, funerals, and cultural heritage sites. These airstrikes and the imposition of a partial de facto aerial and naval blockade, claimed by the coalition to enforce UN Security Council resolution 2216, impact as well on a range of economic and social rights of the Yemeni people, including the right to food and water (articles 11 (1) and 11 (2) ICESCR)[56], the right to adequate housing (article 11 ICESCR), education (article 13 ICESCR), and the right to health (article 12 ICESCR).[57]

36. The closure of Sana'a International Airport by the coalition for the civilian population has a significant impact for those in need of immediate care.[58] The Ministry of Health in Sana'a has estimated that more than 13,000 people had died from health conditions that could have been treated abroad but could not due

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[52] 2017 Military Equipment Export Report, available in German at: https://www.bmwi.de/Redaktion/DE/Publikationen/Aussenwirtschaft/ruestungsexportbericht-2017.pdf?__blob=publicationFile&v=6.

[53] Ibid.

[54] CEDAW/C/DEU/CO/7-8, paragraph 28: "The Committee recommends that legislation regulating arms export control be harmonized in line with article 7 (4) of the Arms Trade Treaty and the Council Common Position 2008/944/CFSP of the European Union. It also recommends that, before export licences are granted, comprehensive and transparent assessments be conducted of the impact that the misuse of small arms and light weapons has on women, including those living in conflict zones." And UPR recommendation to "harmonize arms export control legislation in line with provisions of the Arms Trade Treaty and the EU Council Common Position and that, before export licenses are granted, comprehensive and transparent assessments be conducted of the impact that the misuse of small arms and light weapons would have on women, including those living in conflict zones." Recommendation 6.14, in A/HRC/WG.6/30/L.4.

[55] In March 2015, Saudi Arabia formed a coalition with Bahrain, Egypt, Jordan, Kuwait, Morocco, Senegal, the Sudan and the United Arab Emirates. Qatar was a member of the coalition until June 2017. Hereafter the Saudi-led coalition will be referred to as the "Coalition".

[56] CESCR, General Comment No. 15, "The right to water (articles. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)", E/C.12/2002/11, 20 January 2003, available at: http://www.undocs.org/e/c.12/2002/11.

[57] A/HRC/39/43, paragraph 47.

[58] Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts on Yemen and a summary of technical assistance provided by the Office of the High Commissioner to the National Commission of Inquiry (A/HRC/39/43), 28 August 2018, page 32, available at: https://www.ohchr.org/EN/HRBodies/HRC/YemenGEE/Pages/Index.aspx.

to the airport closure.[59] Further, through the de facto naval blockade, which is enforced in an unlawful manner by the coalition and constitutes violations of international humanitarian law and international human rights law[60], the coalition has imposed excessive restrictions on the entry of essential goods and aid into Yemen over the past three years.[61] The restrictions by the coalition on commercial imports have impacted the access by Yemenis to food and have aggravated the existing food insecurity.[62] Necessary fuel for hospital generators and water and sanitation systems has been restricted from entering the country, as such depriving Yemenis from clean water and necessary health care in times of the world's worst cholera outbreak.[63]

37. Since 2015 the German Federal Security Council (*Bundessicherheitsrat*) has authorised the export of several German manufactured patrol boats to Saudi Arabia.[64] According to the Federal Government, the boats are intended for border control, and, due to their nature, the boats are not suitable for longer missions in a hostile environment.[65] However, it is unclear whether this assumption is verified by the Federal Government. Such verification is essential given that, for example, vessels that were intended to disembark in Yemen were delayed due to restrictions imposed by the coalition, or ordered to redirect to ports located in the South of Saudi Arabia.[66] In these cases where boats were delayed by Coalition ships or redirected to other ports, such as in the South of Saudi Arabia, it needs to be clarified whether or not the German patrol boats are being used to facilitate and enable the system of naval restrictions operated by the Coalition by for example escorting ships that are diverted to Saudi ports.

38. In 2017, German authorities continued to authorise arms exports to Saudi Arabia, the U.A.E. and Egypt, the value of arms exports authorised has risen by more than 70% compared to 2016.[67] Such transfers

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[59] Ibid, page 32.

[60] Ibid, page 29.

[61] According to article 102 (b) of the San Remo Manual 102 a blockade is prohibited if:
"*the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade*". This is clearly the case in relation to the de facto blockade enforced on Yemen. Furthermore, based on article 18(2) of the Additional Protocol II to the Geneva Conventions, in the event that the civilian population is suffering owing to a lack of supplies essential for its survival, relief actions for the population are to be conducted without any adverse distinction. In addition, Common article 3 of the Geneva Conventions provides that persons not taking actively part in hostilities should be treated humanely, and prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment"

[62] Amnesty International, Stranglehold, Coalition and Huthi obstacles compound Yemen's humanitarian crisis, 2018, p. 10, available at: https://www.amnesty.org/download/Documents/MDE3185052018ENGLISH.pdf.

[63] https://www.reuters.com/article/us-yemen-security-blockade/three-yemen-cities-run-out-of-clean-water-due-to-lack-of-fuel-for-pumps-icrc-idUSKBN1DH1Q2

[64] *Antwort der Bundesregierung auf die Kleine Anfrage* 18/12431, 18/12788 19 June 2017, available at: http://dip21.bundestag.de/dip21/btd/18/127/1812788.pdf, and *Antwort der Bundesregierung auf die Kleine Anfrage* 19/3475, 19/3695, 2 August 2018, available at: http://dipbt.bundestag.de/dip21/btd/19/036/1903695.pdf

[65] *Antwort der Bundesregierung auf die Kleine Anfrage* 19/3475, 19/3695, 2 August 2018, available at: http://dipbt.bundestag.de/dip21/btd/19/036/1903695.pdf.

[66] See Amnesty International, "Stranglehold: Coalition and Huthi Obstacles compound Yemen's Humanitarian Crisis",2018, page 11. As mentioned in the report vessels were redirected to the port of Jizan, which is located in the South of Saudi Arabia.

[67] See 2017 Military Equipment Export Report, page 29, licenses issued for exports to Egypt (445 mil), Saudi Arabia (152 mil), and the U.A.E. (45 mil), compared to 2016 Military Equipment Export Report, page 23, licenses issued for exports to Egypt (337 mil), Saudi Arabia (21 mil) and the U.A.E. (13 mil.), available at:

continued despite clear risks that German weapons may be used in acts that constitute violations of international humanitarian law and international human rights law, in particular in the Coalition airstrikes which continue to be the leading cause of civilian casualties in Yemen.[68]

39. On 8 October 2016, an airstrike allegedly by the Saudi-led military coalition struck the village of Deir Al-Hajari in Northwest Yemen. The airstrike killed a family of six, including the pregnant mother and four children. At the site of the airstrike, remnants of the bomb were found, including a suspension lug manufactured by RWM Italia S.p.A., a subsidiary of the German arms manufacturer *Rheinmetall* AG.[69] Civil society organisations have filed a criminal complaint with the public prosecutor of Rome against managers of RWM Italia S.p.A. and senior officials of Italy's national authority for the export of armament (UAMA). [70]

40. This case also raises the issue of the parent company's responsibility *Rheinmetall* AG, vis-à-vis its subsidiary RWM Italia S.p.A. An export licence that would likely have been denied to *Rheinmetall* AG by the German government was authorised by the Italian authorities for its subsidiary. This in effect could lead to companies using corporate structuring (e.g. their subsidiaries or partners in joint ventures) to circumvent their obligations under the German arms export control regime to benefit from more lenient export control standards in third countries.[71] The issue of German arms companies using their corporate structure via subsidiaries or joint ventures with entities in third countries has notably been raised by German parliamentarians in April 2018.[72]

41. Under Pillar I of the UN Guiding Principles on Business and Human Rights (UNGPs) and General Comment 24 of the Committee, the German government should ensure that German arms companies act with due diligence to identify, prevent and address abuses to the Covenant by their subsidiaries and business partners, wherever they may be located.[73] It is hence essential that the German government take specific measures to ensure the implementation of stringent human rights due diligence obligations by German arms companies, including in relation with their subsidiaries and contractual partners. A preliminary assessment of publicly available information regarding *Rheinmetall* AG's Corporate Social Responsibility

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https://www.bmwi.de/Redaktion/DE/Publikationen/Aussenwirtschaft/ruestungsexportbericht-2016.pdf?__blob=publicationFile&v=8 (in German).

[68] See "Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights", Human Rights Council 36th Session, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041. See also "Yemen: An "entirely Man-made Catastrophe" – UN Human Rights Report urges International Investigation", available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22025&LangID=E.

[69] https://www.ecchr.eu/en/case/european-responsibility-for-war-crimes-in-yemen/ and https://www.rheinmetall-defence.com/en/rheinmetall_defence/company/divisions_and_subsidiaries/rwm_italia/index.php

[70] These civil society organisations are Mwatana Organization for Human Rights, O.P.A.L., Rete Disarmo, and the European Center for Constitutional and Human Rights. See: https://www.theguardian.com/world/2018/apr/18/italian-officials-and-german-firm-face-legal-action-over-saudi-arms-sales.

[71] https://urgewald.org/medien/tod-jemen-made-rheinmetall and http://magazine.ufmalmo.se/2018/04/29/masters-of-war/

[72] *Antrag* 21 March 2018, *Drucksache* 19/1339, available at: http://dipbt.bundestag.de/doc/btd/19/013/1901339.pdf. In 2017 the Academic Office (*Wissenschaftliche Dienste*) of the *Bundestag* researched the possibility to, in relation to the armament industry, subject the foreign incorporation of corporate units/subsidiaries to authorisation, available at: https://www.bundestag.de/blob/531968/6e5cf75c7a041909359a7de8ec73f9dd/wd-3-183-17-pdf-data.pdf .

[73] General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, paragraph 33, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en.

Report 2017 indicates no mentioning of human rights. In addition, the company's code of conduct only refers to human rights in very broad terms and solely in the context of employment practices.[74] RWM Italia S.p.A's code of ethics does not address either in any meaningful terms its corporate responsibility to respect human rights.[75]

42. Finally, it is important to note that in January 2018, the German Coalition government between the CDU, CSU and SPD agreed in its Coalition agreement to stop approving arms exports to any country directly participating in the war in Yemen and to stop exporting small arms to third countries, being countries that are not members of the European Union or NATO or have similar status.[76] However, this approach has not been fully implemented by the Federal Government, although it has approved significantly fewer arms deliveries to Saudi Arabia since the start of the new government on 14 March to 30 June 2018.[77] In addition, it is clear that exports to countries involved in the Yemen war can still go ahead under licenses that had been already granted prior to the Coalition agreement. Yet, this could be a violation of section 7(2) of the War Weapons Control Act that imposes a duty on the Federal government under certain situations to suspend or revoke existing licences.[78]

b. Arms exports to Mexico

43. In 2015, an investigation by the *Zollkriminalamt* (German Customs Investigation Bureau, ZKA) revealed that German arms manufacturer Heckler & Koch had been selling German G36 firearms illegally to Mexico from 2006-2008.[79] These arms were eventually used by police in the forced disappearance of 43 Ayotzinapa students in 2015.[80] The process through which this transaction occurred is complex and is believed to have circumvented German export law and processes which in turn, exposed loopholes in the system. The criminal proceedings against employees of the company for the violation of German export laws are ongoing at the *Landgericht* Stuttgart.[81] In 2016, Heckler & Koch adopted a new policy pledging to no longer

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[74] https://www.rheinmetall.com/en/media/editor_media/rheinmetallag/group/corporategovernance/codeofconduct/conduct_flyer_englisch.pdf;https://www.rheinmetall.com/media/editor_media/rheinmetallag/csr/csr_bericht/Rheinmetall_Corporate_Responsibility_Report_2017.pdf.

[75] https://www.rheinmetall-defence.com/media/editor_media/rm_defence/pdfs/divisions/RWMI_MO231_CODICE_ETIO_03062014_ENG.pdf.

[76] *Ein neuer Aufbruch für Europa, Eine neue Dynamik für Deutschland, Ein neuer Zusammenhalt für unser Land , Koalitionsvertrag zwischen CDU, CSU und SPD 19. Legislaturperiode*, see page 149, available at: https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1 (in German).

[77] https://www.ohne-ruestung-leben.de/nachrichten/article/deutscher-ruestungsexport-zahlen-erstes-halbjahr-2018-trendwende-in-sicht-252.html and http://www.aufschrei-waffenhandel.de/daten-fakten/informationen/#c10507 .

[78] Section 7(2) of the *Kriegswaffenkontrollgesetz* sets out that a license shall be revoked among other if "there is a reason to assume that the granting of a license would violate the international obligations of the Federal Republic of Germany or endanger their fulfillment." The latter could for example be a possible violation of the ATT or the EU Common Position.

[79] Carlos Perez Ricart, "*Deutsche in Mexiko: Der Fall des exports von Heckler & Koch G36" Gewehren nach Mexiko,* February 2014, available at: http://mexicoviaberlin.org/wp-content/uploads/2014/02/MVB-AG-2014-002.pdf (in German).

[80] Martin Reischke, "How German Firearms Ended Up at the Mexico Student Massacre" 5 February 2016, available at: http://www.insightcrime.org/news-analysis/how-german-firearms-ended-up-at-the-mexico-student-massacre.

[81] Press release, *Landgericht Stuttgart* (2016), available at: http://www.landgerichtstuttgart.de/pb/,Lde/Startseite/Aktuelles/Akkreditierung+im+Wasserwerfer_Verfahren/?LISTPAGE=1195716 (in German); https://www.reuters.com/article/us-germany-trial-heckler/heckler-koch-employees-on-trial-over-exports-to-mexico-idUSKCN1IG31F and https://www.dw.com/en/german-arms-firm-hks-ex-staff-on-trial-over-mexico-gun-deal/a-43797078.

sell arms into warzones or to countries that violate corruption and democracy standards.[82] It will now only sell to "green countries," which it defines according to three criteria: being a NATO-member or "NATO-equivalent" (Japan, Switzerland, Australia and New Zealand); Transparency International's corruption perceptions index and the Economist Intelligence Unit's democracy index.[83] Among the countries to which the company has pledged not to sell arms are Saudi Arabia, Israel, Egypt, the United Arab Emirates, Turkey, Malaysia, Indonesia, or any African countries. The new strategy was included in Heckler & Koch's yearly financial report,[84] and confirmed at an annual general meeting in August 2017.[85] Whilst it remains to be seen if implementation follows these pledges, it has been noted that "the move makes Heckler & Koch the first arms company to have a more ethical export control policy than its own government".[86]

44. While the Heckler & Koch policy is a welcome development, it is not a human rights-based approach in accordance with the corporate duty to respect of the UNGPs. The German government should ensure that all arms companies develop human rights policies in line with the requirements of the UNGPs, including through heightened due diligence obligations across their corporate structure and business relationships, wherever they may be located and with appropriate monitoring and accountability procedures to ensure effective prevention and enforcement.

V. Recommendations

45. As highlighted in this report, arms transfers, including small arms and light weapons, can have a devastating impact on the enjoyment of human rights, including economic, social and cultural rights. To abide by its extraterritorial obligations under the Covenant, Germany should:

46.1. Fully and immediately stop arms transfers to all countries involved in the Coalition in Yemen and to any country where there is a clear risk that these arms might be used to violate of international human rights law and/or of international humanitarian law, in line with what has been repeatedly recommended by the UN High Commissioner for Human Rights and recently reiterated by the Human Rights Council Group of Eminent Experts on Yemen;[87]

46.2. In implementing its national action plan on business and human rights, take specific measures to analyse and tackle specific human rights risks posed by the arms industry, including through heightened human rights due diligence obligations, capacity-building of arms companies on human rights, the imposition of transparency and monitoring measures, and of adequate accountability measures;

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[82] https://www.theguardian.com/global-development/2017/sep/08/germany-deadliest-company-stop-selling-guns-crisis-regions-heckler-and-koch;

[83] Heckler & Koch AG Annual Report 2016, see page 8, available at: https://www.heckler-koch.com/en/ir/annual-accounts.html (available in German).

[84] See page 11 of the Heckler & Koch AG Annual Report, available at: https://www.heckler-koch.com/en/ir/annual-accounts.html (in German):"*Heckler & Koch will künftig kein Neugeschäft mehr mit Staaten außerhalb der NATO-Einflusssphäre generieren, es sollen nur noch sogenannte "grüne Länder" beliefert werden, die also demokratisch, nicht korrupt sowie NATO-Staaten oder deren Gleichgestellte sind."*

[85] https://www.theguardian.com/global-development/2017/sep/08/germany-deadliest-company-stop-selling-guns-crisis-regions-heckler-and-koch.

[86] Ibid.

[87] A/HRC/39/43, paragraph 112 b.

46.3. Adopt legislation imposing mandatory human rights due diligence throughout business operations, with specific consideration for high-risk sectors such as the arms industry;

46.4. Strengthen the standards and scrutiny of German arms exports licenses and their consistency with international human rights standards, including for transfers in the context of cooperative ventures between German companies and companies located in third countries and in German companies' subsidiaries located in third countries;

46.5. Proceed with a review of the existing laws and guidelines regulating the control of arms export in Germany and adopt a single and harmonised law on arms export control, which comprises provisions in line with article 7(4) of the Arms Trade Treaty;

46.6. Before export licenses of small arms and light weapons are granted, carry out comprehensive and transparent assessments of the impact that the misuse of small arms and light weapons has on women, including those living in conflict zones;[88]

46.7. Improve transparency around arms transfer decisions, including the rationale for allowing transfers to States with poor human rights records, and creating opportunities for public debate and input, as well as possibilities for judicial review of export licenses;

46.8. Take a leading role with a strong human rights-based approach within the European Council working group on conventional arms exports (COARM) with regard to the revision of the text of the EU Common Position. Several recommendations can be made in this respect, among others: (i) include a reference to the ATT in article 1 of the EU Common Position, (ii) ensure alignment with article 7(4) of the Arms Trade Treaty, (iii) criterion 7 of the EU Common Position discusses the possibility of a risk of diversion, this criterion should include a requirement that in case of a clear risk of diversion the State shall deny the export license, (iv) include an explicit reference in the EU Common Position that obliges governments to carry out an assessment of the criteria of article 2 when the situation in a recipient country changes based on which the government shall carry out the risk assessment and shall suspend or revoke should any of the prohibition criteria under article 2 be met. Lastly, to discuss in the review process the problem of transfer of production capacity, which provides third countries with the opportunity to produce and export their own military technology and equipment[89]; and

46.9. Ensure policy coherence between its arms trade policy and its commitments under Sustainable Development Goal (SDG) 5 on gender equality, including Target 5.2 on eliminating violence against women, and under SDG 16 on peaceful societies, including Targets 16.1 on significantly reducing all forms of violence and related death rates everywhere and 16.4 on significantly reducing illicit arms flows.

[88] CEDAW/C/DEU/CO/7-8, paragraph 28. For this assessment, as well as for the risk assessment under article 2 of the EU Common Position and article 7(4) of the ATT, see "Guidelines for the conducting of an arms export risk assessment of gender-based violence" provided by the European Center for Constitutional and Human Rights and the Women's International League for Peace and Freedom to the German Federal Foreign Office in 2017, available at: https://www.ecchr.eu/fileadmin/Kommentare_Konferenzberichte_Weiteres/Guidelines_Arms_Export_GBV.pdf.

[89] These recommendations were included in a paper drafted by Saferworld based on input from civil society organisations and were discussed during the NGO COARM Conference in June 2018.

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