

**Bernhard Moltmann**

# **A case for justice?**

**Reflections on the foundations  
and perspectives of the German  
arms export politics**

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## **Summary**

German arms export policies have proved to be an eternally emotive issue in political and social debate. Although the controversy does not, in the long run, illuminate, the vehemence with which it is time and again conducted indicates that all is not well. In a democracy based on the rule of law, should we not be able to assume that the apparent collisions between accepted norms and vested interests are governed by the law in a way that political and administrative actions do not produce any fundamental contradictions in terms? To meet this objective, the law must be universally valid and achievable, to ensure the maintenance of peace under the law. In reality, a glance at the system of legal norms and procedures that shape current German arms export politics leaves an impression of “extraordinary complexity” and reflects “an extremely unclear and interlocked structure of legal rulings with numerous origins” candidly admits a legal commentator.

This judgement is confirmed when these legal foundations, as they appear in their German sources, are considered in the context of the European Union and in view of the general global situation. Therefore, it is not surprising that the German political and administrative handling of arms exports gets tangled in inconsistencies that feed the controversy. In view of this awkwardness, the situation should be reviewed from the perspective that maintenance of the peace nationally also demonstrates the state’s ability to maintain peace at an international level, particularly if that state is a democracy.

Difficulties already start with the effort to define, in detail, what is meant by the phrase “arms exports.” Currently, a distinction is drawn between the cross-border transfer of arms, defence equipment, goods that promote war and dual-use goods. Most recently, the term “military equipment” has been used to summarise all these different categories of items. As a consequence, the Arms Control Law (Kriegswaffenkontrollgesetz) and the law ruling commercial relations with other states (Law for Foreign Trade, Außenwirtschaftsgesetz), including their detailed administrative regulations, apply. However, intervention is repeatedly required to ensure harmony between administrative acts and the changing parameters of political actions. This is demonstrated by the various editions of the “Principles of Government Policy in Relation to Arms Export,” the most recent of which was published in January 2000.

German law only applies, however, where it has not been superseded or complemented by EU regulations. This is true for the treatment of dual-use goods and for the growing consolidation of cooperation in arms manufacture within Europe. While decisions about arms export issues in the context of the EU still fall under the ultimate sovereignty of individual states, the EU member states agreed, in 1998, to a code of conduct concerning arms transfers. This agreement contains criteria to be applied to the decision making process of the individual member states. Special emphasis is given to the human rights standards, social and economic aspects of development and the regional and domestic stability of the receiver states. Also, the code of conduct commits EU member states to present a report annually on the previous year’s arms export activities to the European parliament and requires the member states to provide each other with information about their arms trade.

The EU code of conduct incorporates aims, formulated by the Organisation for Security and Cooperation in Europe (OSCE) at the beginning of the nineties, that also relate to the adjustment of export policies of Central and Eastern European states. The idea of agreeing to a code of conduct, when legally binding arrangements do not seem possible, also formed the basis of an agreement between the EU and the USA in December 2000, the goal of which was the realisation of a global code of conduct. In this context, the EU and the USA can make reference to similar initiatives of other regional alliances, in particular the Organisation of American States (OAS), the Organisation of African Unity (OAU) and some groups of states in South Asia. All these initiatives demonstrate that the international arms trade has become part of arms control politics.

In addition to being influenced by regulations within individual states and newly agreed political understandings, arms export politics takes into consideration informal consultation and coordination mechanisms, which are treated as “gentlemen’s agreements”. The best known of these is the 1994/5 “Wassenar Arrangement,” which followed the earlier Coordination Committee for Multilateral Exports Controls (COCOM). It aims to regulate the export of conventional arms and equipment, sensitive dual-use goods and plant. The arrangement has more than thirty participant states, including Russia and other states that formerly belonged to the Warsaw Pact. Despite the informal nature of this agreement, the resulting regime has a strong influence on national and European export controls.

The legal and political situation can, thus, be summarised as consisting of a “hard” core surrounded by “soft” regulations, instructions and procedures that together form the basis of decisions and are open to interpretation. Decisions are often made in an inconsistent manner, as political recommendations are influenced by conflicting economic and technological interests, not to mention cases of political opportunism with regard to the granting or refusal of individual arms export licences. Different levels of law, national, international and trans-national, are entwined, often leaving legislative loopholes and creating contradictions in terms. While lawyers might be used to dealing with different levels of law, politicians and the public find it much more difficult to cope with the resulting dilemmas. Exaggeratedly, the situation in Germany can be characterised as follows:

1. the prohibition *versus* the allowance of cross-border trade in defence equipment;
2. qualitative criteria for the decision making process *versus* lists of countries;
3. national *versus* international or trans-national restrictions;
4. governmental agreements *versus* cooperation in the private sector;
5. secrecy *versus* transparency.

The current state of affairs casts doubt on whether the general validity, clarity and enactment of present laws can be sufficiently guaranteed. This rocks the foundations of the legitimacy and legality of arms export politics – a situation or constellation that calls for a fundamental examination and reorientation of arms export politics, down to its very roots.

The plea for a revision of the foundations of the arms export politics and for a search for alternatives, aims to reconcile the legal norms and procedures with the political requirements and central trends of the social debate, which could remedy the deficits that can, in the long run, damage a democracy based on the rule of law. This should also include changes in the global arms market that have occurred in the meantime. This market can be divided into different segments:

The *first* segment relates to the predominantly uncontrolled distribution of the means of mass destruction, in the form of a multitude of so-called small arms. These can be characterised as being easy to transport, easy to handle without previous knowledge, low cost and long-lived. They are produced in many places and are available on open, grey and black markets.

The *second* segment relates to the transfer of technologically advanced and very expensive weapons systems, the purchase and deployment of which is only sensible in cooperation with modern, highly qualified forces.

In between these two segments exists a *third* segment that relates to the trade of weapons and defence equipment that are considered outdated by industrial states but which still have high value as status symbols or as part of the military politics of less demanding prospective buyers.

A German contribution to the first segment of the global arms market exists in form of German licences, which are openly used to produce and distribute weapons in an uncontrolled way, not to mention the transfer of plant of German origin that can be used to produce those weapons or their ammunition. Conventional legal instruments have become virtually ineffective for monitoring, as this segment is becoming more and more mixed up with cross-border criminal acts, international drugs trade and money laundering. Therefore, national as well as international measures are required to put an end to illegal deals. Also, in order to decrease demand for these weapons, it is imperative to strengthen international criminal law, cooperation between police and customs and initiatives in development policy regarding violent conflict-zones in the Third World.

As a consequence of the increasing integration of the foreign and security policies of the European Union, of the restructuring of the armed forces in many countries and the increasing cooperation or even merger of European defence industries, it will not be possible to control the second and third segment except in a European context. The six most important arms producing states in the European Union settled on a skeleton agreement in July 2000 that creates the basic conditions for such a European endeavour. It would be anachronistic if arms export politics continued as a remnant of national sovereignty, rather than becoming a component of this political and economical process. It would be consistent to restrict the transfer of weapons and defence equipment to the circle of states that are part of these developments. Also, the norms and qualitative criteria that are valid here should govern decisions about transfer of surplus weapons to countries that are not part of military or security alliances. If it were possible to reconcile the procedures involved in political direction setting with decisions about arms export, then the law would no longer have to serve as workshop, repairing the faults caused by political omissions and failures.

Although all options so far discussed assume that some form of arms export will continue to be carried out, the alternative of living without such deals should also be considered. This would place considerable emphasis on the proclaimed aim of a democracy to be recognised as a ‘civil power’ (*Zivilmacht*), including in their behaviour to other states. However, the most important suppliers of arms are still democracies that provide arms to the rest of the world. Without the supply of weapons and other defence equipment, the intensity with which brute force is used in the violent conflicts in which democracies are involved, would decrease. Thus, the costs of such a sudden change in policy need to be weighed against the burdens imposed by the current situation. This comparison might also reveal connections that would cast a different light on the pros and cons of arms transfer and might even convince current advocates of arms trade. One example of such a process is the successful campaign, 150 years ago, for the abolition of slavery. If democracy, law and peace are to go hand in hand, then the rejection of arms export is a good example to test this cause and a global advertisement for it.

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## **1. The arms export debate and the call for legislation**

### **1.1. The outline of the debate**

However you look at it, arms export remains an emotive issue in German political and social debate. All might appear calm for long periods, however, a deliberate or unintentional leak about the issue of another export licence for arms and defence equipment will cause the debate to flare up and lead to the reestablishment of familiar front lines. Although the exchange of views is almost routine, it is worth considering the structure of this particular debate in more detail. Two peculiar characteristics can be observed.

Firstly, it is revealing that no party claims that the transfer of arms and defence equipment serves to promote peace. Indeed, such a claim would contradict all the available evidence, for example, from statistical studies of the relationship between arms shipments and the number of wars.<sup>1</sup> As far this goes, a fundamental agreement can be assumed. Indeed, those in favour of arms transfer give different reasons: They say, for example, that only with the help of exports can the arms industries in Germany and Europe ensure sufficiently high level of sales of their products. They continue that this high level of sales is essential to maintain the defence capabilities that are required to preserve national sovereignty and to form alliances. A different argument amounts to the idea that arms exports are a normal part of daily economic and political life, which Germany cannot abandon on moral and historical grounds, unless it wishes to relinquish a relevant sector of foreign trade to its competitors. These competitors are said to be ready and waiting to fill the gap Germany would create if it were to pull out of arms export, following the motto: "If they do not supply, we will". Other advocates of arms export refer to the circumstances and needs of the recipients: No state could be refused the right to do everything in its power to defend itself. They argue that the refusal of a potential supplier amounts to an embargo or a negative intervention. The shipment of arms is said to contribute to stability in conflict zones – a perception that might have guided the extensive German deliveries to Greece and Turkey. In the case of Israel, arms exports are to be seen as proof that Germany supports a well equipped, if not over-equipped, but troubled partner state. Some voices persistently, though not quite as loudly, point out that arms exports help to secure jobs, particularly in economically weak areas and in endangered sectors of economy, such as the shipbuilding industry. Trade unions and workers representatives form, together with arms manufactures, a forceful lobby that aims to put political decision makers under pressure and to influence public opinion. This lobby finds support from some federal states, for example Bavaria.

The opponents of arms export are familiar with all these arguments and have, over many years, tried to refute them. They question whether a state's sovereignty still depends on the splendour of its armed forces and defence capabilities. Alternatively, a state's in-

<sup>1</sup> Conclusion by Cassidy B. Craft, Weapons for Peace, Weapons for War. The Effects of Arms Transfers on War Outbreak. Involvement and Outcome, New York (Routledge), 1999.

ternational standing may depend on other factors, such as its economic productivity, the efficiency of its administration, the foresightedness of its education system and – above all – whether there is a sound consensus of norms and values in society and politics. A state's right to defend itself may be beyond doubt and is enshrined in the UN charter, however, although they repeatedly justify their military actions with this right of self-defence, it is extremely doubtful that arms alone can ensure the protection of states and societies, particularly as, in many parts of the world, new paths have been trodden in the maintenance of security and of the well being of the people. The argument for increased regional stability through arms exports is countered by reference to regional arms races triggered by arms export and to the dangers of escalation. Opponents point to crisis areas, mainly in the Middle and Far East but also in Southeast Asia, where weapons of German origin have played a significant role. The argument that arms exports secure jobs is to some extent plausible, at least with reference to isolated sites and companies. However, the argument does not stand up in the light of long-term economic and employment trends, as defence industries are anyway always subject to strong fluctuations in the market for their products. These industries will only be able to secure their existence if, instead of focusing their efforts on defence equipment alone, they aim for a diversification of their product range. If one of them runs into difficulties, a fate that has in fact befallen many once renowned German arms manufactures, then business competence and foresight should be tested, instead of trying to turn employees into victims and seeking refuge in the export business.

The arguments of the advocates of arms exports aside, opponents refer to different problem areas, particularly concerning arms deliveries to states outside the industrial world. In this context, they ask whether it would make more sense to limit defensive efforts and to do without arms exports, rather than to provide aid during and after wars. This aid might ease immediate suffering, but, the causes of the suffering are not diminished. Also, it becomes increasingly apparent that armament and wars destroy decades of efforts to alleviate poverty. How can people and societies be convinced to support cooperation in development issues and to give money for development aid, if the militaristic behaviour of the industrial countries in international relations is found attractive and is imitated by many Third World countries. Therefore, it is mainly the opponents of arms export who point out the dangers to peace, which are linked to such export.

Apart from the exchange of arguments, there is an additional quality that characterises the debate over the pros and cons of arms export. This quality is connected to the atmosphere of this controversy and relates to fairness and, therefore, to the ability to realise basic democratic principles. Individuals and groups who have committed themselves to the fight against arms exports have acquired a certain knowledge of the subject, which they use to penetrate this opaque and often scandalous field of politics. This enables them to collect information, to fit these pieces of information together and to publish the knowledge so acquired and their conclusions, in order follow the trails of the background and interrelationships of the international arms trade and German participation therein. Meanwhile, in so doing, they have made contact with a lively international 'community', which has decided to demand more democracy in the name of the 'civil society' (Zivilgesellschaft). The arms export controversy has therefore become more fundamental.

In view of this, the credibility of the debate and of its participants is significantly affected when the arms export debate in Germany is misused as a platform for other controversies. Indeed, because the combatants on the political stage know about the sensitivity of this subject, they score political points by presenting their opponents with the irreconcilable contradiction in terms between conviction and practice. The opposition in the German parliament rightly senses here the possibility of splitting the governing coalition over this issue. The senior partner in government, the SPD, on the other hand asks the smaller coalition party, Bündnis 90/Die Grünen, to challenge its own followers and their pacifist convictions. Whereas the agreement of the coalition partners on other questions, for example the approval of German participation in the NATO mission against Yugoslavia, was considered self evident, the decision about the delivery of a test consignment of Leopard II tanks to Turkey, with the view to a later, more substantial, order, nearly caused the collapse of the coalition in 1999. A comparatively minor controversial issue became a matter of principle. At the same time, on an administrative level, some government departments try to influence bodies such as the Bundessicherheitsrat – the cabinet committee on security, which is responsible for discussing and making decisions about sensitive arms export licences. Often enough, the foreign office and the ministry for international development, responsible for the assessment and review of the human rights situation, the social condition and the developmental policies of the receiver state, loose out when they present their objections to the Ministries of Defence and Trade and Industry and the prime minister's vote becomes decisive.

Therefore, the debate over the pros and cons of arms export can be characterized by a certain asymmetry of arguments that cannot be balanced. The two aspects of the debate – on the one hand the insistence on a rational realpolitik, on the other, the plea for actions governed by and in concordance with established norms - lead to the question, why is it not possible to mediate between these two positions? The answer, it is assumed, is that this conflict provides a practical illustration of the incompatibility between vested interests and norms.

## **1.2. The hopes for a legislative solution**

What makes democracy different from other forms of government is, amongst other things, the tolerance, to the point of institutionalisation, of differences of opinion and expression of conflicting interests. In democracies, such disputes are considered to be efficient in controlling and limiting power. When these disputes reach a conclusion, this must be done in a way that is in agreement with accepted norms and which convinces the majority of citizens.

Without exploring further the historical background of this idea, 'norms' should be understood in the context of this article as being behavioural rules, which originate at a higher level than that of the individual, but which are binding for each member of society. These norms shape reality by confronting it with behavioural expectations. In norms, experiences and expectations are bundled together, the former resulting from the distillation of the past, the latter, a prediction of future actions and behaviour. Norms therefore

serve two purposes: On the one hand, they control the stability of social interactions. On the other hand, they form a bridge between often contrasting experiences and the wish to depict and formalise social consensus. Norms manifest themselves in the law, which tries to harmonise norms, procedures and practice.

“The law, seen ‘objectively’, is the epitome of normative, binding rules (norms, but also structures and procedures, as well as appropriate behaviour) that are valid for a specific community for a certain period of time and that formally govern communal life [...].”<sup>2</sup>

In a democracy, the law plays a key role, since it determines the behavioural rules that, ideally, enable opposing views to be debated in public, irrespective of the prevailing distribution of power.

The law manifests itself in legislation and in the on-going review of political action occurring therein. This aim can only be achieved if the following conditions are met: 1. The law has to be universally valid and should provide protection from arbitrary decisions. 2. The law should be enforceable, which includes the possible use of force in cases of non-compliance. 3. The effect of the law will only become socially acceptable if it is able to regulate conflicts between norms and vested interests so as to produce a result that is acceptable to all participants, a precondition for law and order. To achieve this purpose, the law has to be clear, i.e. an open and comprehensive system of norms, acts of law and procedures that can be applied in real life. Looked at from a different angle, this entanglement of expectations of the law and its terms and conditions can be solved in the following way: The law has to meet a higher ideal of justice that is repeatedly confirmed when it is applied. This should be complemented by reference to the legality of the process that leads to the law’s creation.<sup>3</sup> Then, political actions based on such law can claim legitimacy, accordingly. This legitimacy is an expression both of the link between the legal system and the law and of the recognition of social and political relationships that are formed and guaranteed as a result of the law.<sup>4</sup>

In its application, all law should enable and not hinder actions. It provides a scaffold of normative reference points and practical procedures that opens up a legitimised space for all participants who can claim the right to use it, provided they accept it at all. Once law has become established in a legal system comprising acts of law, then it is regarded as lasting and stable and cannot easily be challenged. It is only when the law and higher ideals of justice come significantly into conflict, in a social and political context, that change has to occur.<sup>5</sup>

2 Otfried Höffe, Recht, in: Höffe (ed.), Lexikon der Ethik, 5<sup>th</sup> edition, München (C. Beck) 1997, p. 242.

3 With reference to Wolfgang Huber, Gerechtigkeit und Recht. Grundlinien christlicher Rechtsethik, Gütersloh (Chr. Kaiser/Güterloher Verlagshaus), 1996, Chapter A II.

4 Discussion of the different understanding of legitimacy by Martin Greiffenhagen, Politische Legitimität in Deutschland, Gütersloh (Bertelsmann Stiftung), 1997, pp. 44.

5 Cf. Gustav Radbruch, Gesetzliches Unrecht und übergesetzliches Recht (1946), in: Gustav Radbruch, Rechtsphilosophie, 8<sup>th</sup> edition, Stuttgart (K. F. Koehler), 1973, pp. 339–350, p. 345.

### **1.3. The importance of the law in the context of arms export trade**

Not only does the Federal Republic of Germany declare itself to be a democracy, even describing itself as “belligerent”, Article 28, Paragraph 1 of the Basic Law (“Grundgesetz”) also specifically claims that it is “a state based on the rule of law and social justice”. The nature of the state is defined by the norms formulated in the constitution and the law governs all legislative, administrative and judicial powers. This is complemented by the constitutional separation of and balance between legislative and executive powers and by the legal protection of individual rights from state actions.<sup>6</sup> However, the rule of law is frequently threatened by everyday political life: Are laws executed in accordance with the norms that are laid down in them? Do “routine legal and bureaucratic procedures”<sup>7</sup> act as a substitute for the review of the law’s content and for the balancing of the legally protected rights in question? Can the courts review administrative actions and order changes if applicable? The German nation has already experienced how the principles of the rule of law can be undermined in the name of the law; therefore, the people are especially sensitive when the legitimacy of the state’s actions in daily political debate is questioned, as is happening in the case of the debate over arms export outlined above.

Is this suspicion correct? Do universal norms and particular vested interests collide and are they not reconciled, as peace under the law requires? If not, we have to ask for the origin of this on-going underlying conflict. In the following, an attempt is made to examine whether the law can resolve this conflict in an acceptable manner and, if not, why it seems unable to do so. Are the legal constructs to blame? Is the basic subject matter of such a nature, that it is not possible to apply an acceptable and democratic regulatory approach? What must be done to give the law, as a counterpart of peace, weight and recognition? The following survey of the system of norms, acts of law and procedures that currently apply to German arms export presents the existing framework, arranged according its German source, in the context of European and global initiatives. As a result, a picture is produced of several interconnected and interacting levels, leaving an impression of “extraordinary complexity” and reflecting “an extremely unclear and interlocked structure of legal rulings of numerous origins” as it was candidly summarised by a legal commentator.<sup>8</sup> Following this survey, a systematic reflection on the present legal situation will be presented, with reference to its irreconcilable contradiction in terms, followed by a discussion of different options available to counter the obvious dilemmas.

First of all, three exact definitions are introduced to place the following comments in context. Firstly, the recognition that the keeping of peace, internally, by the rule of law, demonstrates the ability of a state to exist peacefully internationally and is a prerequisite

6 Cf. Ernst Benda, Rechtsstaat, term in: Dieter Nohlen/Rainer-Olaf Schulz (eds.), Pipers Wörterbuch zur Politik, Vol. 1: Politikwissenschaft, 2<sup>nd</sup> edition, München/Zürich (Piper), 1987, pp. 837–840, p. 839.

7 Ernst Fraenkel, Rechtsstaat. Term in: id. /Karl Dietrich Bracher (eds.), Staat und Politik, new edition, Frankfurt /Main (Fischer), 1964, pp. 283-291, p. 288.

8 Ulrich Karpenstein, Europäisches Exportkontrollrecht für Dual-Use Güter, Stuttgart (Boorberg), 1998 (Schriften zum öffentlichen, europäischen und internationalen Recht, Vol. 7), p. 72.

for the intentions here and for the search for answers to the questions raised. If peace, democracy and the rule of law are supposed to go hand in hand, then the debate over arms transfers provides an opportunity to test the sincerity of this intent. However, the practice of arms exports repeatedly places democracies in a state of crisis, with regard to how they understand themselves, particularly as it is predominantly democracies that provide the world with arms. Germany is amongst these. Indeed, Germany came sixth in the global league table of arms export in the year 2000.<sup>9</sup> Over and above the export of arms to NATO-states, including Turkey, whose democratic status is controversial, more than 40 percent of Germany's arms exports (mainly warships and the materials required to manufacture them) and about 20 percent of transfers of defence equipment go to states with constitutions that have, at least, very different standards to Germany, if not being in complete contradiction in their guiding norms. The recognition of this awkwardness has already lead to the suggestions that Germany should only export weapons to other democracies<sup>10</sup> – a radical alternative that is impressive in its simplicity but which raises question about the comparability of democratic systems of government. Nevertheless, we will return to a modified version of this idea towards the end of this article. Before this, the search for a workable law for arms exports exists, if the transfer of arms and defence equipment is not to be abandoned completely.

Secondly, reflection on this topic always raises the question whether and to what extent the law, as laid down in acts of law, actually meets general ideas of justice. It becomes clear that the law is talked about using two different codes: On the one hand, the law is understood as the way of expressing secularised morals, on the other, the law is seen as being the sum of all acts of law. Whereas one point of view continues to insist on a link between justice and law, the other does not require this, regardless of whether this link, which existed originally, is acknowledged. Every application of the law is performed in the name of justice. However, justice needs the law to transform general ideas into concrete instructions.<sup>11</sup> Following the principles expressed by Immanuel Kant, it could be said that the application of the law is accompanied by a requirement to act dutifully. The law takes advantage of the fact that its importance is founded on logic and the authority of logic, as was pointed out by Montaigne when he wrote: "The power of the law goes undisturbed not because it is just, but because it is law."<sup>12</sup> Lawyers will be less irritated by this double code of the law than politicians, since the latter not only have the duty to produce and maintain fixed rules, but they are also assessed by moral standards – and this assessment is the burden that can be felt in the debate about arms export.

<sup>9</sup> According to a survey by Richard Grimmet, for the US-Congressional Research Service, Conventional Arms Transfers to Developing Nations, 1993–2000, cited in: *The Guardian*, 21<sup>st</sup> August 2001.

<sup>10</sup> Cf. Katja Frank, *Nur an Demokratien liefern. Plädoyer für eine andere Rüstungsexportpolitik*, Frankfurt/Main 2000 (HSFK-StandPunkte 3/2000).

<sup>11</sup> Cf. Jacques Derrida, *Gesetzeskraft. Der „mystische Grund der Autorität“*, Frankfurt/Main (Suhrkamp), 1991/1996, p. 46.

<sup>12</sup> Michel de Montaigne, *Essais*, translated into German by Hans Stilett, Frankfurt/Main (Eichborn), 1998, 3<sup>rd</sup> book, 13<sup>th</sup> essay „Über die Erfahrung“, pp. 537–566, p. 541.

Thirdly, the following discussion cannot replace a thorough description of and commentary on the complex of problems from a legal point of view. However, questions about arms export law are only marginally dealt with in legal literature, in particular in the form of dissertations and single articles, a treatment that bears no relation to the intensity of the public debate.<sup>13</sup> The legal basis of German arms export politics is usually only questioned by those who are interested in the implications of arms transfers for peace and security politics.<sup>14</sup> The following thoughts are founded in the author's direct experiences<sup>15</sup> of the daily political debate on the pros and cons of arms export. They explain the need, discussed in detail in the following, to determine the foundations and premises on which decisions are made, which seems to continuously feed the debate about arms exports, and they indicate where new options could be found. Yet, the author is guided by confidence that the law gives the opportunity for this, following the rules of democracy.

## **2. The system of norms and legal and procedural rules for German arms export**

### **2.1. Definitions: Arms and defence equipment**

The term "arms export" sums up the cross-border transfer of a specific category of goods. To begin with, these goods can be characterised by the statement that they do not promote peoples' wellbeing but, rather, aim to disturb and destroy it. In contrast to other goods, the user benefits from the potential damage these goods can do to somebody

13 As assessed by Hubertus von Poser und Groß Naedlitz, *Die Genehmigungsentscheidung nach dem Kriegswaffenkontrollgesetz*, Frankfurt/Main (Peter Lang), 1999, p. 10. Details about the Arms Export Control Law see Klaus Pottmeyer, *Kriegswaffenkontrollgesetz. Ein Kommentar*, 2<sup>nd</sup> edition, Köln (Carl Heymanns) 1994.

14 Begin with Uli Jäger/Wolfgang Schwegler-Romeis/Wolfgang Berger, *Rüstung ohne Grenzen? Die bundesdeutsche Rüstungsexportpolitik und die Militarisierung der Dritten Welt*. Ein Hand- und Materialbuch, Tübingen (Verein für Friedenspädagogik), 1989 and frequently emphasized by the peace researcher Hans J. Gießmann, id. Die Regierung muss belegen, warum ein Waffenexport gewollt ist, in: *Frankfurter Rundschau*, 1<sup>st</sup> December 1999 and id., *Gute Waffen, schlechte Waffen? Streit um Rüstungsexporte*, in: Ulrich Ratsch, Reinhard Mutz, Bruno Schoch (eds.), *Friedensgutachten 2000*, Münster-Hamburg (Lit) 2000, pp. 158–167.

15 The author is member of the 'Arms Exports Committee' (Rüstungsexporte) that was founded by the Joint Conference Church and Development (Gemeinsame Konferenz Kirche und Entwicklung, GKKE) in 1997 and that produces an annual report on the newest developments. Gemeinsame Konferenz Kirche und Entwicklung (GKKE), *Rüstungsexportbericht*, published by the Arms Export Committee, Bonn (GKKE), annually since 1997. Also see: Bernhard Molmann, *Vor dem Sprung in eine neue Ära – Die deutsche Rüstungsexportpolitik*, Frankfurt/Main (HSFK-StandPunkte 1/2001).

else.<sup>16</sup> Therefore, the transfer of these goods always implies a judgement of the possible intentions of the user. This is obviously a group of goods that form their own class, the transfer of which have to be governed by special rules, if the supplier – usually a state – does not want to be suspected of putting peace at risk and of promoting war. This allegation demonstrates how difficult it is to objectively define what exactly is exported, as, from the start, a debate threatens to break out concerning the pros and cons of particular intentions and reasons. As these goods can also be used for the defence of states and societies, the debate about arms export and its legitimacy is also involved in triggering a fundamental political argument as to whether defence supported by arms is right. And in Germany in particular, this discussion is coloured by previous experiences of justifications and suspicions.

When this category of goods is investigated in detail, then it becomes clear that there are at least five different concepts in use, in context of German law and in the political debate linked to it.

(1) *Arms*: The Arms Control Law (Kriegswaffenkontrollgesetz, KWKG) defines these arms as 'destined to be used in war', i.e. they have the ability 'to cause destruction of or damage to people and things' and can 'be used as means of violence in armed conflicts between states'. What 'items, materials and organisms' are to be regarded as arms are specified by the 'List of Arms': The federal government is authorised to continuously update this list, according to § 1, Par. 2 of the KWKG.

At present, the List of Arms (appendix of the KWKG) contains 62 items that are grouped in the following way:

"Missiles; combat aircrafts and helicopters; warships and floating support vehicles; combat vehicles; light antitank guns, flame guns; mine laying and mine throwing systems; torpedoes; mines; bombs; independent munitions; other essential components; dispensers (for the systematic distribution of submunitions); laser weapons."<sup>17</sup>

So called 'arms (for war)' also appear in the export list defined by the Law for Foreign Trade (Außenwirtschaftsgesetz) and the equivalent decree (see below): List of arms, munitions and defence equipment. However, it does not contain vehicles, transport helicopters, training aircraft etc., even if these could be mounted with arms on-site. It also does not include armoured vehicles that could take arms but which, not being exclusively designed for this purpose, are not regarded as arms, as intended by the list.<sup>18</sup>

(2) *Defence equipment*: There are no general rules about defence equipment. Goods (including those that are regarded as arms for war) are classified as defence equipment according to the details of the list in the appendix of the Decree for Foreign Trade

<sup>16</sup> This is the assessment that forms the basis of the document, which has been published by the Pope's council *Justitia et Pax*: id., *Der internationale Waffenhandel. Eine ethische Reflexion*, Rom, 21<sup>st</sup> June 1994.

<sup>17</sup> List of Arms, version 26<sup>th</sup> February 1998.

<sup>18</sup> According to Jäger et al. (footnote 14), p. 38.

(Außenwirtschaftsverordnung, AWV). Goods are grouped with a different system to the one that is used for the List of Arms. Therefore, the lists cannot directly be related to each other.

(3) *Goods that promote arms and war*, e.g. plant and documentation for the manufacture of arms.

(4) *Dual-use goods*, that is those, which can serve both military and civil purposes. Therefore, it is not the intention of the manufacturer that is important but, rather, the value of the dual-use to the purchaser. Consequently – as Nikita Khrushchev aptly commented – even trouser buttons might be counted amongst dual-use goods. This is because, according to Khrushchev, soldiers would have only one hand free to shoot if they had to hold their trousers with the other one.<sup>19</sup>

(5) *Military equipment*. This term increasingly covers all goods that form part of the equipment of the armed forces. It can be found, for example, in the report of the Weizsäcker Commission<sup>20</sup>, but also appears in journalistic and political rhetoric. It was first used as a legal term in the skeleton agreement of six EU member states on the 27<sup>th</sup> July 2000. This agreement says: “Military equipment stands for all arms, arm systems, ammunition, aircraft, ships, land vehicles, boats and other means of warfare, as well as all their parts or components and accessory documents.” Much as it might be convenient to have such an all encompassing term at one’s disposal, it is also dangerous in that legal differences are smoothed out and the impression is created that all these items could be treated equally.

## 2.2. From norms to procedures

The system of norms, legal rules, practical procedures, political declarations of intent, bilateral and international agreements form a complex regime, in which arms exports are controlled. However, the term “control” leaves open the question as to whether mere monitoring or active and intentional limitation of arms export is intended. Which interpretation one accepts depends, in the end, on what is given priority – norms and legal interpretation or practical needs. Is one aspect overtaken by the other (dimension of time) or is one used against the other (dimension of argument or opportunism)? In Germany, one can assume that practical procedures are carried out in the light of restrictions on such deals laid down in norms and intended politically. At the same time, it can be assumed that the economic and technological dynamics inherent in the topic of arms export place the people involved under pressure to revise norms or even to rewrite them on the quiet. General bills loose their bite and their outlines become blurred. The deci-

19 Citation as in Karpenstein, as above (footnote 8), p. 112.

20 Gemeinsame Sicherheit und Zukunft der Bundeswehr. Report of the Commission („Weizsäcker-Kommission“) to the government, Berlin 2000, p. 118.

sion-making process becomes more and more difficult and every single case turns into a significant political issue.

This state of affairs is due to the above-mentioned problem that different, superimposed, levels of law apply, but is also due to the sensitive reactions of the public, which are difficult to predict. The norms of arms export politics have a variety of origins, claim to cover various areas and are binding to different degrees. Currently, arms export politics is governed by the framework of German rules and rules arising in the EU context.

“European law and national law cannot be summarised in *one* national law or in *one* national decree. The European law is immediately valid in the member states and has priority over national rulings. However, it covers export control only partially.”<sup>21</sup>

This mixture of national and European frameworks is embedded in a transeuropean-transatlantic context, as in the OSCE or in developing global initiatives that are situated a level above the single EU states. These frameworks mainly indicate political intentions but are not legally binding rulings and their impacts are therefore limited.

### *2.2.1. Frameworks of German origin*

#### *Article 26, Paragraph 2 (GG (Basic Law))*

The normative roots of German export politics are found in the Basic Law. Article 26, Par. 2 says: “The manufacture, the transport and distribution of arms that are designed for war can only be carried out with approval of the federal government. Further details are given in an act of Federal Law.” One of the founding fathers of the Basic Law, Carlo Schmid, commented on this article that “the intention was to give [...] a clear and simple declaration, that canons were never more to be built in Germany, neither for German nor for foreign use.”<sup>22</sup> More than fifty years have passed since Carls Schmid spoke these words and Germany has grown to be one of the biggest global arms exporters.

#### *The Arms Control Law (KWKG, Kriegswaffenkontrollgesetz) of 1961*

The Arms Control Law (KWKG) sees itself as the law responsible for executing the ruling in the Basic Law. The KWKG repeats the ban on ABC arms and defines the conditions for the manufacture, the transport and the distribution of arms. In detail, advance approval is needed for the following:

- the manufacture, purchase and transfer of arms;
- the transport of arms within the territory of the Federal Republic of Germany, including import and export, but also the transit or trans-shipment of arms that have not been manufactured or stored in Germany.

<sup>21</sup> Grundzüge des Exportkontrollrechts, Grundwerk February 1997, Handbuch des Exportkontrollrechts (HADDEX), published by Bundesausfuhramt, Eschborn 1997, Number 10.

<sup>22</sup> Citation as in Jäger, see above (footnote 14), p. 36.

- the transport of arms outside the territory of the Federal Republic with boats or planes that are registered in Germany;
- the agreement or negotiation of contracts for the purchase of arms that are located outside the territory of the Federal Republic.

The federal Ministry for Trade, Industry and Technology is responsible for the issue of licences (the Exchequer, the Home and Defence Ministries also deal with arms and issue licences, in cases that fall within their portfolios.) Therefore, the power to grant licences was given to an authority that is really dedicated to promoting exports and that is not interested in restricting, let alone stopping them. According to § 6 KWKG, nobody is entitled to be granted a certain licence.

"Permission must not be granted if there is a danger that the arms might be used in a way that endangers peace, if duties of the Federal Republic of Germany under international law are compromised or if the applicant can not be relied upon to act responsibly. In all other cases, the federal government decides on the issue of export licenses at their own discretion, following the guideline laid down in the 'Political Principles for Arms Export and the Export of Other Defence Equipment'. Since mid 1998, decisions made also take into account the criteria of the EU code of conduct that has now become the core of the newly drafted 'Political Principles'.<sup>23</sup>

The KWKG applies to dealings in "arms". In practice, this means that

"firstly, approval according to the KWKG ('Permission for Transport for the Purpose of Export') is needed for the export of arms, secondly, an export licence according to the Law for Foreign Trade (AWG/AWV); this applies equally for the transport into other EU states."<sup>24</sup>

#### *The Law for Foreign Trade (AWG)*

The Law for Foreign Trade (AWG) contains the basic regulations for trade with other countries. It does not contain any prohibitions or licence requirements, but authorises the federal government to regulate these questions by decree. In so doing, the government has to take into account two important limitations. For every regulation, the freedom of trade with other countries has to be weighed against a necessary prohibition or licence. The AWG is strongly influenced by the idea of a free market economy and considers free trade as a priority because, according to § 1, par. 1 AWG, trade with other countries is free as a matter of principle. Exports are inhibited or require approval only when determined by the AWG itself or by a decree. The type and extent of prohibitions and licence requirements have to be designed in a way that minimises the impact on the free trade (§ 2, par. 3 AWG Principle of Minimal Impact on the Freedom of the Citizen). Given the choice between prohibition and licence requirement, the latter is the more lenient measure. Also, the federal government is authorised to restrict the trade with other countries only for a given set of reasons. These reasons are given in the regulations

<sup>23</sup> Federal government report on their export policies for conventional defence goods in 1999 (Rüstungsexportbericht 1999), dated 20<sup>th</sup> September 2000, p. 3–4.

<sup>24</sup> Ibid., p. 3.

that authorise the issue of decrees: In export control law, § 7 AWG is instrumental in authorising the issue of decrees:

“Accordingly, prohibitions and licence requirements can be introduced in order to ensure the safety of the Federal Republic of Germany and to prevent disturbances of the peace nationally or disturbances of the relationship between the Federal Republic of Germany and other countries.”<sup>25</sup>

The Decree of Foreign Trade (AWV) contains individual prohibitions and licence requirements, in so far as they have not meanwhile been covered by EU regulations.

“Therefore, there are licence requirements for the export of defence equipment and for dual-use goods that appear on the export list under special national items and to certain degree for those not listed. Additionally, according to the AWV, transfer of defence goods that are contained on the common EU export list requires a licence if the sender is aware that the final recipient is located outside the EU.”<sup>26</sup>

“Export of so-called other defence goods has to meet the requirements of the export regulations of the AWG/AWV. On the basis of the principle of freedom of trade that is inherent in the AWG, every applicant has the fundamental right to be granted an export licence (§ 1 together with § 3 AWG) if this does not present an infringement of legally protected rights as given in § 7 par. 1 AWG, in which case a licence must not be granted. [...] The Federal Export Department is in charge of the granting or refusing of export licences according to the AWG/AWV. It will present sensitive cases to the Federal Government for political judgement.”<sup>27</sup>

#### *The “Political Principles of the Government in Relation to the Export of Arms and other Defence Equipment”*

Having restarted in the late 1950's and 1960's, arms production in Germany quickly needed to exploit all the latitude for producing regulations given to the federal government by the legislature. This was the aim of the so called “Political Principles”, the first version of which passed through parliament in 1971, followed by a amendment in 1982. Currently, the Political Principles of the 19<sup>th</sup> January 2000 are in force. The wording of the current version tries to bridge between:

- the necessary limitations of economic activities in this field and the pressure of economic and technological expansion, as well as constraints of political circumstances at home and abroad;
- the originally restrictive German regulations and the later commitment to Germany's alliances in the fields of security- and military politics;
- the aim of the government in power at the time to follow policies in arms export that are in harmony with foreign, security and development policies and the pressure of the German arms industry to allow participation in the expanding global arms market and for maintained or increased competitiveness;

<sup>25</sup> HADDEX, see above (footnote 21), number 14.

<sup>26</sup> Ibid., number 15.

<sup>27</sup> Federal government report, see above (footnote 23), p.4.

- the maintenance of national sovereignty in questions of arms export politics and the increasing trans-national cooperation, to the point of merger, of arms manufacturers;
- the continuation of known decision-making procedures that can be predicted, to a certain degree, by those involved and the permanently changing debate in society and politics that is reflected in different lists of priorities and in the consequent controversies.

In the view of the dilemmas inherent in political practice, it is inevitable that every version of the “Political Principles” is characterised by compromises between different interests and is not only interpretable but, in fact, in need of interpretation itself. The basic aim of the “Political Principles” is not to restate the prohibition of arms transfers. Rather, the Political Principles describe the different conditions that are prerequisite for the granting, the limitation and the prohibition of arms exports. Prohibition is only one of several possible actions. On the one hand, in the current version, which determines the decision-making process today, decisions are made on the basis of new criteria, with new contents that have been defined in the 1998 EU code of conduct. On the other hand, more than in previous versions, barriers have been erected that should ensure a safe final destination for the arms transferred. Decisions about the delivery of individual pieces of defence equipment are made according to stricter standards than those that apply within the scope of defence cooperations.

The “Political Principles” attempt to do justice to the fundamental dilemmas mentioned, by introducing a further central distinction, over and above the lists of goods that are laid down in law. Distinction is made between states that can be given arms as a matter of principle and without limitations and those for which the further restrictions continue to apply. The “Political Principles” distinguish between:

1. NATO member states (for which the NATO Contract, Art. 6 applies), EU member states and states that have NATO equivalent status (Australia, New Zealand and Switzerland). Export of arms and other defence equipment into these countries is not to be restricted as a matter of principle, unless special political reasons apply in individual cases, which might demand a limitation.
2. Other countries: Should the receivers of deliveries of arms and other defence equipment be located in other countries, permission is granted in a restrictive manner. The export of arms is allowed only in individual exceptional cases that are in the interests of the security of Germany and her allies. Transfer of defence equipment is only allowed if German security, national peace and foreign relations are not endangered. Additionally, the human rights situation and the developmental perspectives of the receiving country have to be taken into account, including the regional stability and the danger of internal conflicts. In the decision-making process, these restrictions are to be more highly regarded than the economic interests of Germany in free and unrestricted trade.

### *2.2.2. EU-Frameworks*

The legal character of the European Union has been discussed at great length: Is the EU a federation of states with an authority that is derived from the renunciation of the member states' sovereignties? Does the execution of economic, political and social cooperation, as well as integration in the EU create a legal entity that can demand its own authority and legitimacy?<sup>28</sup> The impression of such a two-faced approach is also found in the field of arms export politics within the context of the European Union. On the one hand, the member states insist on their national prerogatives. They plead their sovereignty and try to continue with their traditional policies with respect to arms export practices in a way as unrestricted as possible. On the other hand, EU-states find it impossible to withstand tendencies towards cooperation on the questions of requirement for armament, manufacture and marketing, in order to reduce costs and increase the strength of shared military and technological capabilities, but also in order to compete with US American rivals. Finally, the EU member states, together with other states, cannot avoid the necessity of acting against the distribution of arms and goods that are globally regarded as particularly dangerous, such as missiles and nuclear, biological and chemical arms and their components (dual-use goods).

#### *The EU agreement as given in the Amsterdam Treaty of 1997*

According to Art. 296, Par. 1, Letter b of the Amsterdam Treaty, the arms export policies of the EU member states a matter of national sovereignty. The original passage reads:

“Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security, which are connected with the production of or trade in arms, munitions and war material; [...]”<sup>29</sup>

Both, the Weizäcker Committee, in its report on the future of the Federal army, and the government itself make efforts to initiate changes in this situation. These efforts are designed to include arms export politics in the EU Catalogue of Competences that describes the common tasks of the EU.

#### *Dual use goods*

By contrast, dual-use goods fall under the aegis of the Community Law of the European Union. The EU regulations for dual-use goods of 1<sup>st</sup> July 1995 represent an important step towards harmonisation of export control in the EU member states. Meanwhile, there are standardised procedures for the issue of export licences for such goods. The member states have agreed on common control lists, developed criteria for the decision-making process and created lists of countries that can be the subject of simplified control procedures. Moreover, the individual EU member states can issue even more restrictive regulations within their own spheres of activity. Export control experts have since reported that

<sup>28</sup> For details about this debate see: Klaus Dieter Wolf (ed.), *Projekt Europa im Übergang? Probleme, Modelle und Strategien des Regieren in der Europäischen Union*, Baden-Baden (Nomos), 1997.

<sup>29</sup> Citation as in Karpenstein, see above (footnote 23), p.10.

the regulation has been successful in practice and that the mutual agreements on common control procedures work well. This should serve as evidence for the non-fulfilment of negative expectations with respect to community actions.

*The EU Code of Conduct for Arms Exports, 1998*

In view of the evident lack of common arms export policies and urged on by public debate in the member states, in particular the UK and the Scandinavian countries, the EU member states adopted a common code of conduct in the form of a government resolution with respect to this field on the 8<sup>th</sup> June 1998. It lists a number of criteria that national governments should take into account when deciding on approval or denial of licences. These include:

- existing embargoes decreed by international organisations such as the UN or OSCE;
- the recipient's country's situation with respect to human rights;
- the internal situation in the country of final destination;
- danger to regional peace and security;
- aspects of the social and economic development of the recipient country.

It is due to both the change of the political climate and the pressure of many non-governmental organisations that the human rights aspect now ranks highly in the catalogue of criteria. Organisations involved in classical development work are already starting to fear that other aspects relevant here – for example the relationship between military and social spending – are losing importance, particularly as they represent long term parameters which are often beyond the immediate scope of political arms export decisions.

Moreover, the Code intends there to be a consultation procedure for cases when licences for arms deliveries are refused in one EU member state and therefore a second application is made in a different member state. Additionally, the European parliament will be informed annually about national arms deliveries, particularly as most EU states have meanwhile adopted the practice of presenting national “arms export reports”.

Still, flaws remain: Transactions via agents are not covered, the result of the consultation procedures remains vague, and there are no strict and enforceable rules about the final destination. Nevertheless, the effects of the EU Code of Conduct have been received positively by experts and the public alike. Meanwhile, some EU member states, such as Germany, have adopted the Code in their national control regime. Since 1998, a further seventeen states outside the EU have already stated their intent to adopt the listed criteria as the basis for their own decisions about arms exports. However, only in the long run will application of the Code of Conduct show whether this instrument, this “contrat de confiance,”<sup>30</sup> is sufficient to build confidence amongst the EU member states with respect

30 Karpenstein, see above (footnote 8), p. 91.

to each other's national control practices and in the mutual exchange of information, so that it can be made into an efficient tool for common actions.

*European harmonisation of military cooperation and arms export policies*

For some time, the arms industry has pressed for uniform legal and political conditions in the EU. Arms manufactures demand a common market for military goods, standardisation of arms export policies and financial, as well as political support for the process of consolidation within the sector. These demands are a consequence both of increasing pressure from US-American arms manufactures in the international arms market and of the imminent modernisation of the armed forces of the European states which expect the manufactures to provide arms at minimal costs in order to improve their efficiency. The arms supply to individual national armed forces by their own arms industry does not guarantee sufficient income, particularly as arms manufacturers increasingly specialise or merge to become international companies.<sup>31</sup>

The defence ministers of Germany, France, the UK, Italy, Sweden and Spain signed a skeleton agreement that initiates the restructuring and common activities of the European arms industry on 27<sup>th</sup> July 2000. This contract in international law contains regulations for secured supply, procedures relating to export matters, the handling of information relevant to security, the promotion of common research, the control of technology transfer and – finally – the harmonisation of the military needs. All in all, all aspects of arms transfer between the participating states are facilitated. For the export of jointly produced military goods to recipients outside the EU, so called white lists, prepared in advance, will be in force for export into safe countries. This is the end of the existing principle that responsibility for arms export lies with the country in which the final assembly takes place. Up to now, key German components were often exported to France, the UK or Italy who then had to decide about the export of the final product. Germany only took part in the process via the consultation procedures and had no right to veto.

Sooner or later, the contract of 27<sup>th</sup> July 2000 will replace the web of bilateral arms co-operation agreements that have existed, at a governmental level, between many EU and NATO states since the sixties. One of the best known of these was the Schmidt-Debré Agreement between Germany and France, adopted in 1972. The advocates of the new contract hope to create harmony between politically approved declarations of intent and the technological and industrial cooperations that can lead to the merger of companies. It is evident that the contract aims to promote military cooperation in Europe and to stand up to US-American competition. In contrast, the accompanying harmonisation of export policies appears as a side effect. For the moment, it remains unclear if the interests of the signatory states in participating in this extensive military cooperation have priority over the intention of continuing the practice of restrictive issue of arms export licences, al-

31 Hartmut, Küchle, Rüstungsindustrie im Umbruch. Strategien deutscher Unternehmen und Ansätze einer europäischen Neuorientierung, Baden-Baden (Nomos), 2001 (BICC Schriften zu Abrüstung und Konversion, Vol. 4).

though the text of the agreement emphasises its relationship with the EU Code of Conduct.<sup>32</sup> Meanwhile, the outline contract has come into force in Germany. In view of Amsterdam Treaty, which remains in force, the skeleton agreement of 27<sup>th</sup> July 2000 in a sense presents a new, intermediate, stage of cooperation between the state and the private economy, because individual states have given up national prerogatives in favour of politically determined, trans-border cooperation within the arms industry.

### *2.2.3. Developments on international level*

The developments outlined in the German and the European systems for control of international arms transfer did not come out of the blue. They are the result of academic and journalistic debates and public initiatives. Frequently, they were initiated by non-governmental organisations<sup>33</sup>, academic institutions<sup>34</sup> or by journalists and met with a good response in a variety of international platforms.<sup>35</sup> Additionally, industry and military politicians have tried to influence permanently the policies, in their own interests. At the same time, forces are encountered that are working against such developments. It can be assumed that such forces arise from the defence industry, which is often still under national control, as in France. They also arise from politically motivated reservations about the handing-over of responsibilities in the field of arms export politics from the sphere of national sovereignty to the one of common European actions. The example of the EU member states demonstrates, in particular, how different the political cultures are and how politics, public and economic interests work together.

A potentially swiftly arising insight that is based on economic and political logic and that requires changes in the decision-making criteria and structures does not necessarily lead to an immediate change of policy in the political reality of the EU. On the contrary, delaying tactics are widely employed, even in Germany, and are used to obstruct objective and political developments and to force compromises to be made, which detract from the original impetus. Therefore, it would make sense to use the field of European arms export politics as an example in order to publicly criticise the agonizingly slow reorientation of

32 Gemeinsame Konferenz Kirche und Entwicklung (GKKE), Rüstungsexportbericht, published by the 'Arms Exports Committee', Bonn: GKKE 2000, pp. 39, and Michael Brzoska/Hartmut Küchle, Folgen, Auswirkungen und Gestaltungsmöglichkeiten internationaler Abkommen für eine restriktive deutsche Rüstungsexportpolitik. Gutachten für den Wissenschaftlichen Dienst beim Deutschen Bundestag, Bonn/Berlin 2001.

33 For example: Saferworld and Amnesty International.

34 For example: Stockholm International Peace Research Institute/SIPRI, and Bonn International Centre for Conversion/BICC in their annual hand books and in „Friedensgutachten“ published annually, since 1987, by three German peace research institutes – Forschungsstätte der Evangelischen Studiengemeinschaft, Hessische Stiftung Friedens- und Konfliktforschung, Institut für Friedensforschung und Sicherheitspolitik, University of Hamburg.

35 To be mentioned here for example the initiative of Peace Nobel Price winners around the former president of Costa Rica, Oscar Arias. See id., introductory speech in: Deutsche Stiftung für Internationale Entwicklung (DSE)/ Entwicklungspolitisches Forum, Entwicklung und Abrüstung. Internationaler Politikdialog, Bonn/Petersberg, 31<sup>st</sup> October–1<sup>st</sup> November 2000, Berlin: DSE 2000, pp. 37–44.

political thinking and action. It might be ultimately more efficient to warn against a critical acceleration of political, technological and economic processes in many cases and to insist on a “healthy” slowness, which is particularly characteristic for democracies. However, those tendencies are fatal in a field like the arms export politics, where delays have consequences that cannot later be repaired. Such negatively rated developments can be observed *inter alia* in the arms dynamics in the Middle East, which are supported by arms exports, in the corruption scandal cases that were based on unclear and contradictory legal norms and procedures or in the obscure competition of suppliers that leave gaps sufficient to allow wealthy and powerful buyers to obtain the goods they want.

Therefore, the progress that is reached in forums on international cooperation has an even greater importance than the above-mentioned social, academic and political initiatives. Frequently, the initiatives are taken into account when decision criteria, mechanisms of transparency, definitions of arms and categorisation of countries or suggestions for procedural handling are formulated. These then indirectly find their way into concrete regulatory frameworks such as the ones of the EU. In contrast to the German and EU frameworks for arms export mentioned above, which are in force in their respective territories, they have no legally binding effect. The forums express political intentions but do not possess any authority to put them into force. Therefore, they appeal to states and governments to voluntarily take up their ideas and use them to direct their own practice, when the occasion arises. With such a perspective in mind, the following instruments are mentioned:

#### *The Wassenaar Arrangement*

This arrangement developed out of the COCOM regime (Coordinating Committee for Multilateral Exports Control) in 1994/1995 and is named after the Dutch town where it was negotiated. The COCOM was founded by the western states in 1949, to prevent the members of the then Warsaw Pact from having access to new defence technologies. However, the Wassenaar Arrangement is no longer directed to particular target countries, as was the case with the COCOM, but meets current needs for controlling the transfer of certain goods. Therefore, its strength lies in having coordinated goods lists that are taken into consideration by the participating states. They predominantly include conventional arms and dual-use goods. More than thirty countries now belong to this successor to the COCOM regime, including Russia and other states of the former Eastern bloc. The foundation of the regime and the goods lists are not based on international treaties. Rather, the Arrangement belongs amongst the so-called “gentlemen’s agreements” and is implemented by the participating states on a voluntary basis.

The Wassenaar Arrangement has become an integral component of the international control regime that is described by HADDEX 1997 as follows:

“The international control regimes have a strong influence on the European and national export control by means of creation of common goods lists, permanent exchange of information about sensitive recipient countries and projects and mutual consultations about questions of a technical, procedural and licensing nature among the members. These regimes are indispensable for efficient export control as they permanently push forward its necessary harmonisation.”

*Declaration of the OSCE about criteria for the transfer of conventional arms of 24<sup>th</sup> November 1993*

With its declaration in 1993, the OSCE served as a pacemaker for the EU Code of Conduct. The declaration describes the efforts to regulate arms transfers to the Middle East and to prevent the increase in arms capability that was regarded as direct threat to global peace. The declaration already contained a link between a criteria catalogue for the licensing of arms exports and a mutual obligation for consultation amongst member states and also includes the obligation to permanently adjust the regulations in the light of current needs. As might be expected, these elements are also found in the EU Code of 1998, as its formulation was based on the format that had been successful in the OSCE five years before, even if the EU Councils of 1991 (Luxembourg) and 1992 (Lisbon) had already set the course.

The declaration of the OSCE goes beyond the EU framework in that it asks the member states, true to the mission of this transatlantic/European organisation, to provide mutual support, with respect to the planning of restrictive arms export controls. This support might include the exchange of information, the training of personnel or the setting-up of technical installations to enable the monitoring of compliance with the regulations. These initiatives should primarily benefit Central European and CIS states. This aspect, in particular, demonstrates that efficient control of arms export has a price. Therefore, apart from political will and the creation of internal legal conditions, substantial financial backing is needed to give such policies a long lasting and sustained effect.

*EU/US joint declaration of 18<sup>th</sup> December 2000:*

Currently, the EU and the US are the starting point for two thirds of all arms exports. Much as business might flourish, both sides find themselves compelled to react to the fact that other players, such as Russia, in its most recent arms deals with Iran and India, want to play a more important role in this field. So, the EU and the US have now paved the way, in a joint declaration, towards an international code of conduct for arms export ("international arms sales code of conduct"). On the one hand, the EU cite the positive effects of their code of conduct, which has been in force since 1998. On the other hand, the US are proud of the efficiency of their strict control regime that can be characterised by its tight regulation of the final destinations of arms, compliance with which is regularly controlled.

The EU and the US appeal to all states to be aware of their special responsibilities with regard to the respect of basic human rights, of freedom, of national and international peace and the right to fight against terrorism. Additionally, it is stated that the distribution of the means of mass destruction and its carriers, missiles in particular, are to be counteracted. In order to advertise their intentions, the EU and the US are prepared to lead by example and to stand-up for their goal: They declare their intent to increase their responsibilities, to make the decision-making process for arms export increasingly conditional on the internal situation of the buyer country and to provide greater transparency. Both initiators mention further suitable instruments already in existence, such as the UN register of conventional arms transfers, the OSCE and the Wassenaar Arrangement. How-

ever, they do not mention the importance of a critical public that could be involved, in the form of academic/scientific expertise, journalism or non-governmental organisations.

The progress of this initiative, started by the joint declaration of the EU and the US, is currently an open question. The declaration relies on the weakest internationally valid instrument, since a code of conduct, with its voluntary character, depends heavily on the goodwill of the participating states to accept the norms. The code of conduct is not legally binding in international law and it can neither be enforced nor can non-compliance be punished. Also, governments do not have to ask for the approval of their parliaments and therefore avoid difficult internal political controversies. Therefore, the repeated claims, made by the US and the EU, of greater transparency in arms export politics should be critically reviewed, to check whether they are actually realised in practice. In view of already tense transatlantic relations, it is doubtful whether either side would wish to risk initiating another argument about arms exports.

However, this initiative of the largest arms exporters globally indicates that international arms control politics has moved on from its preoccupation, in recent decades, with proliferation and problems of regional stability, particularly in Europe, to global threats that are linked to the transfer of conventional arms. The EU and the US make this plain in the declaration, by referring to the current debate about the prohibited trade in small and light weapons and by suggesting arrangements to bring the dissemination of such weapons under control. However, the US has given its national prerogative priority over support for an international control regime for small weapons at the UN small weapon conference in July 2001.<sup>36</sup>

The EU and the US will be able to obtain the general support of other trans-national organisations (for example the Organisation of American States (OAS) and the Organisation for African Unity (OAU)) for the introduction of an “International Code of Conduct for Arms Exports”, particularly as these have already developed similar regional initiatives and are waiting for support, mainly from the major arms suppliers. Most of the member states and governments belonging to these organisations suffer from the uncontrolled proliferation of small weapons but do not have the means to counter this phenomenon without the help of the very states that are home to the important manufacturers or forwarding agents. It will be more difficult to respect human rights and to make the fundamental right of freedom the status of a detailed precondition for arms deliveries, as the interpretation of these rights is controversial in the global context. If the transatlantic community were to lead here, then they would at least take up the cudgels for their own ideas.

36 For details on positions held and the course of the UN conference on small weapons see: GKKE-Rüstungsexportbericht 2001, see above (footnote 15), Chapter 7.

### 3. Arms export and the law: a web of contradictions

In view of the system of regulations, described here, which currently exist in relation to both national and international arms export policies, the impression is given that legal and procedural regulation and interpretation is excessive rather than a limiting resource. This does not result in the highest possible certainty of one's legal position; rather, the contrary is true. Certainty regarding one's legal position is one of the central aims of any legal system, a point which Germany has had to relearn in view of the argument around compensation for convicts used in forced labour.

The aim that is described by the term "certainty of one's legal position" (Rechtssicherheit) is clear, simple and correct. The definition of this aim deals with the certainty within law, that is, it deals with the law itself. It means that the law should bring about the highest ideal of justice, in the sense of maintaining peace under the law. The law then provides protection from arbitrary interference and rules the behaviour of different parties in a way that is predictable and directed towards the objective of a profitable common life. This is achieved by the law being precisely and definitely laid down (*positivism*), applicable with certainty (*practicality*) and stable (*invariability*).<sup>37</sup> Here again, the ambiguous meaning of the German term for law ("Recht" means either law or right/just) comes into play. The meeting of a legal obligation does not yet mean the achievement of justice. For example, the concept of "Pacta sunt servanda," which is central to the constitution and to stability in international relations, does not make any statements as to whether the content of treaties is just or not. Also, an act of law that applies corporal or capital punishment can be regarded as positive, in the sense of certainty of law, if it excludes arbitrariness, even if it does not meet the requirements of justice.

The system of norms, laws, regulations and procedures that is valid for arms export politics is also part of this tense double meaning of law and justice and of the intention to achieve peace under the law that is based on it. On the one hand, the nature of the subject itself is characterised by politically and economically motivated interference. At the same time, technological innovation and market changes work against the intention of peace under the law, in the sense of certainty. On the other hand, contradictions, uncertainties of definitions and jurisdiction that are inherent in the regulations, as well as ambiguities of material and political transactions, create a condition that cannot fully be mastered by legal actions, let alone controlled. From a legal point of view, the situation is commented on as follows:

"It is, indeed, remarkable that the flood of acts of law that has become necessary, due to the increase in the number of the state's duties and the legal integration of all state's activities, has not lead to an increase, but rather to a decrease, in knowledge of the law and certainty of one's legal position. This uncertainty is caused by the permanently increasing

<sup>37</sup> For information about the current German debate see: Rainer Erlinger, Einigkeit und Recht und Sicherheit, in: Süddeutsche Zeitung, 28<sup>th</sup> March 2001.

number of acts, the complexity of the respective subject matter and the difficulty of the legal language.<sup>38</sup>

As long this situation remains unchanged, the aim of achieving certainty of one's legal position, in both a narrow and wider sense, will be far from realisation and this will continue to spark off regular political controversies. The people and authorities that are directly involved in the execution of control cannot change anything, much as they might try to review each single case in a way that meets the requirements of justice and law. A serious flaw is indicated by the fact that current practice and the authorisation of that practice fail to rely on rules that meet the need for justice.

With respect to the national and international regulatory frameworks presented, this deficit is revealed by a number of contradictions. These contradictions form a web, in which politics and various control regimes are caught time and again. This leads to a devaluation of existing law. The profile of these contradictions is raised as they result in a dogmatically excessive contrasting of positions, which illustrate the dilemma from one point of view, when really one of two options should be chosen, even though the faults of both are recognised. Every decision will provoke resistance in one way or another, the consequences of which have to be taken into account by politicians when selecting one of the options. Reference to the law does not aid the decision-making process. Five of these contradictions are to be listed in the following in order to illustrate the argument made:

*The prohibition versus allowance of international arms trade.*

Article 26, Par. 2 of the Basic Law and the Arms Control Law of 1961 assume the unequivocal prohibition of the international arms trade. By contrast, the Law for Foreign Trade postulates the primacy of unlimited free trade. In practice, the German arms export politics attempts to escape from this dilemma by introducing the distinction between "arms" and "(other) defence equipment". There is no right to obtain an export licence for "arms". For "defence equipment" however, there is legally accepted expectation to trade, albeit under restricting conditions.

The demand for legality is met by the fact that, in addition to the general licence proviso, a special licence is required for the "arms" trade in order to transfer such goods both within and outside German territory. The original prohibition of the arms trade has therefore been reduced to the problem of "moving" such products and services.

*Qualitative Criteria versus formal country lists: Double standards.*

The decision-making process in the issue of arms export licences is governed by competing qualitative and regional points of view. Apart from aspects of security and peace, the qualitative criteria reflect the importance of human rights and developmental considerations in the recipient country. The country lists make distinctions between buyer countries, exports to which are regarded as safe, and countries for which the qualitative criteria

38 Herbert Schambeck, Über Grundwerte und Grundprinzipien europäischer Verfassungen, in: Österreichische Juristenzeitung, Vol. 47, No. 22, 1992, pp. 745–755, p. 754.

are to be used. The distinction between “good”, “doubtful” and “bad” potential buyers of German arms and defence equipment leads to a reduced importance of the qualitative criteria, as it is assumed that they are only valid for a certain fraction of trade partners, whereas others are exempt from the outset. This “double standard” succeeds more in confusing rather than clarifying the situation. At least, this is true as long as the inherent scope for interpretation is used in a politically opportunistic way or if there is suspicion that it might be.

The example of the controversial German arms exports to Turkey illustrates again and again how quickly such a two-faced practice can give rise to self-made dilemmas. A similar conflict opens up when the potential for changing circumstances is taken into account when making political arms export decisions: As a rule, decisions are made on the basis of short term, if not current, conditions. However, they do not take into account that arms and defence goods are long-lived, unless they are exposed to the risk of destruction in current conflicts. Defence goods that are delivered today can be used in internal conflicts tomorrow, can be transferred to others or may be a threat to regional security and stability in an unknown future and that is without mentioning the long-term social and economical consequences of large-scale defence programs that burden the majority of developing countries. Again, Turkey provides, as Indonesia once did, an impressive example. Eighteen months ago, German politicians debated an enormous export deal concerning German tanks. Today, Turkey is at the edge of economic and financial collapse and will not be able to pay for the costs of such arms purchases. Sooner or later, this will also be true for the transfer of German submarines and associated technology that has already begun. Even though Turkey’s fundamental difficulties were already known, this argument did not appear in the German internal political debate, except for information about the dire consequences of the earth quake that had hit the country shortly before. A similar fate might befall the arms deals with South Africa that are, moreover, linked to the promise to finance extensive measures for the improvement of infrastructure. This is because accusations of corruption have since been made that include German suppliers and that undermine confidence in the execution of arrangements made.

#### *National versus international restrictions*

Decisions on the approval or denial of permission for arms exports belong to the classic prerogative of every state and government. The export of arms, defence equipment and military aid is recognised as an accepted instrument of foreign and security policies. This principle has survived all the more easily as the production and marketing of arms was under governmental control, or at least close to it, in the majority of states and in some still is. Accordingly, single states have developed acts and procedures to control their arms export policies that reflect their own historical experience and political priorities. Art. 296 of the EU Treaty also reflects such a situation, as it insists on taking this part of the economic activities out of what is covered by regulations in the Common Market and leaves them under national sovereignty.

In political reality, however, the further the imperatives of foreign, security, economic and technological policy are withdrawn from the domain of national decisions, the stronger becomes the demand for integration of arms export politics in unified regula-

tions and procedures. It becomes obvious, however, that despite the growing understanding of such necessities, the single states find it still difficult to be led into this. In the context of the EU, at least the steps of agreeing on a code of conduct for arms export and acceptance of the Wassenaar Arrangement as “gentlemen’s agreement” indicate a trend for abandoning national prerogatives and towards a supranational understanding.

The price we have to pay for the current coexistence of national and international frameworks is the growing number of loopholes that arise and that can be used by clever arms traders to make deals that lie right at the edge of legality. They take advantage of the fact that the arms market has become a “buyers’ market” in which the potential purchasers determine the conditions under which deals are made. States attempt to counteract the public dilemma that is opening up by agreeing on mutual consultations and by making various lists of goods that are to be subject to controls. The suspicion remains that governments cannot keep up with developments, in view of the dynamics of defence technologies and of the global arms trade.

#### *Governmental agreements versus cooperation in the private sector*

Trans-border cooperation in the production and marketing of arms is usually realised on the basis of previous governmental agreements. In the Schmidt-Debré Agreement of 1972, Germany and France assigned each other fundamental jurisdiction in this field by defining the conditions for a cooperation between German and French arms manufacturers and by determining the procedures that regulate the handling of jointly produced goods when they are to be exported elsewhere. As a rule, the country in which the final assembly took place was responsible for decisions on re-export. This relieved the supplier of the burden of responsibility but also seriously undermined the supplier’s ability to influence final decisions.

Meanwhile, the wind has changed: Arms manufactures merge; the costs of development and production of defence equipment increase; the European manufactures face growing competition; the global arms market is divided into the marketing of high quality and cutting edge goods and of goods that have been manufactured under licence or developed outside the industrial countries, not to mention the increasing trade in second-hand but still long-lived and operational arms. Under the shadow of these factors, it is in fact the arms industry that is placing pressure on states to create politically determined general conditions, covering legal and financial aspects of defence cooperations.

In the Europe of the EU, the governments of six of the most important arms producing states gave way to this pressure when they signed an appropriate agreement in July 2000. Changes that are to be welcomed from the point of view of promoting European defence cooperation give rise to substantial suspicions if they serve a policy of restrictive arms export, as is demanded in the EU Code of Conduct or in the EU/US joint declaration. Here, attempts are again made to escape from the dilemma by using “white lists” of irreproachable recipient countries. However, it remains to be seen whether the qualitative criteria continue to have priority in the common arms export policies or if they have gone to the dogs in the interests of a favoured industrial and political defence cooperation.

*Secrecy versus transparency*

Everything that is linked to arms exports remains shrouded in mystery. This is, in part, due to the way such arms transfers are carried out: Frequently, the whole process, including the first expression of interest in a particular item of defence equipment, the national or private supplier's undertaking to deliver the item, the granting of the appropriate licences, the actual start of the transfer and its completion, including financial transactions and possible training, may take several years. This is in part because of the practice that decisions on the approval of export licences are held within the sphere of the political mandate of the executive. The fact that political decisions about arms exports become known only after their execution obstructs public debate on the pros and cons of these exports.

The same applies to the legal system that enforces the law, which can only investigate cases of non-compliance with legal regulations after transfers have been completed. With this in mind, it is not surprising that German courts are only now trying to get to unravel the political and personal constellations that lead to the transfer of armoured vehicles to the Middle East in the early nineties, a transfer that went against the "Political Principles" then in force and against the security interests of Germany, as expressed by the military leadership. Important individuals involved in these events have since left the political stage or have died; others, like a former secretary of state in the Ministry of Defence, have gone into hiding in South East Asia. Even if this scandal has, in the meantime, undermined the moral and political foundations of one of the major German parties, the component elements that caused such erosion do not lack the quality of a gripping political thriller that contrasts with the respectability that is constantly being claimed for arms exports, particularly as corruption has not yet been ruled out.

In view of this, churches and other non-governmental organisations have frequently demanded that the whole complex of arms export politics be made more transparent, i.e. more comprehensible. A first step in this direction was taken when the United Nations responded to what was not least a German initiative and created an international register for transfers of conventional arms in the beginning of the nineties. However, not all the relevant supplier and receiver countries take part and the notifications received annually cannot be used as a standard for comparative purposes. Additionally, there are no instruments in place that can be used to check the contents of voluntarily given notifications.<sup>39</sup>

Nevertheless, the concept of transparency has since entered the political mainstream. It can be found in the EU Code of Conduct, as well as in the joint declaration on arms exports of the EU and the US. Many European states have started to publish annual "arms export reports" to inform their parliaments and the public about transactions involving arms exports. The German federal government presented the first such report in

<sup>39</sup> Compare Harald Müller, Früherkennung von Rüstungsrisiken in der Ära der „militärisch-technischen Revolution“. Ein Register für militärische Forschung und Entwicklung, Frankfurt/Main (HSFK-Report 7/2000), pp. 4–5.

the year 2000, so fulfilling the promise given by the ruling parties, when their coalition was formed, three years ago.

Much as this development must be welcomed, since it promotes confidence in political actions and opens up the political debate, the withholding of some relevant pieces of information must be condemned. This applies, for example, to the clear naming of the relevant suppliers and recipients and of the financial details of the arms transfers. In Germany, the cause of such flaws is explained by reference to the regulations of the law determining administrative procedures. According to this law, the authorities do not have the right to publish information concerning the business secrets of participating companies, which have been made available during the course of the licensing procedure. However, exemptions are possible, as demonstrated by the regulations created to permit German notification to the UN Arms Register. Even the suggestion of involving a parliamentary body in the process of making decisions on arms exports, similar to the existing control of the secret services, is far from being realised. To date, it also remains unclear whether the on-going intensification of arms cooperation in Europe will satisfy demands for increasing transparency. At the very least, it cannot be predicted if and to what extent parliament will be involved in the execution of agreements, having not been involved in their ratification. As long the contradictions between secrecy and transparency are not harmonised in direction of greater openness, doubts as to the trustworthiness of arms export politics will remain and will continue to look bad in a democracy.

The five contradictions distilled-down above can be characterised as having different degrees of "severity". They evidently arise partly from gaps in the legal regulations, that are the result of many intertwining national and EU regulations; they are partly due to the incompatibilities that come from several equally valid systems of legislation with contradicting aims that are in competition with each other. Even if one norm is given priority, in case of such contradictions, it does not mean that the other norm has become obsolete. This situation is known from moral theory and from the world of theatrical tragedy.

Finally, constellations can be found in the net of contradictions where two irreconcilable principles face each other, both claiming to be right and the ultimate conclusion but which, when applied, actually annihilate each other. The first contradiction listed has the character of such an irreconcilable inconsistency in that it consists, on the one hand, of the prohibition of arms transfers and, on the other, of the principle of free trade. The distinction made in German law between arms and defence equipment may meet practical and modern requirements but it is unsatisfactory from a systematic point of view and with regard to the arms trade control carried out by controlling the transfer of such goods in practice. This is also true of the double standards that are applied to countries receiving German defence goods, no matter whether they are categorised as allies or as the so-called 'rest of the world'.

In comparison, contradictions based on national prerogatives and on the interests of the defence industry in an easing of arms transfers can be handled in a more relaxed way. In both cases, developments are about to occur that will overtake the stated contradictions and replace them with new facts. They will become dated and become part of the

collection of rhetorical scenery. The main question, about the relationship between law, peace and democracy, will be more heavily influenced by the problem of transparency, which has accompanied arms export politics from the outset. To neutralise the inherent contradiction, actions will be necessary at both a national and a trans-national level. These actions would be the change of direction, demanded by many, to harmonise events in the field of arms exports with democratic standards. However, this assessment prepares us for the following options.

#### **4. What must be done, what can be done?**

The current system of norms, pieces of legislation, agreements and procedures that control arms export and the system's inherent contradictions give an impression that is anything but satisfactory. The political conflicts, which have accompanied German arms export politics in the past and which arise again and again, clearly indicate that all is not well. The law seems to be incapable of regulating the virulent contradictions between norms and interests, of setting predictable procedures and of punishing violations in an effective way. On the contrary, the present state of affairs casts doubt as to whether the general validity, clarity and enactment of current laws can be sufficiently guaranteed. This rocks the foundations of the legitimacy of arms export politics – the question arises as to whether this is a situation that calls for a fundamental examination and reorientation of arms export politics. At this point, with regard to the law, Johann Wolfgang Goethe, who formulated the following insight based on his legal expertise, is frequently cited: "It is better to experience injustice than to live in a world without law. Therefore, everybody should obey the law." Thus, a legally determined situation is regarded more highly than one that is characterised by irreconcilable contradictions. This has validity only in the circumstances of a democracy, where the functioning of the law is put to the test every day and is confirmed by the persons involved, by the on-going renewal of society's unwritten contract that is the foundation of the law's rule.<sup>40</sup> With decreasing confidence in the ruling power of the law, a major component of its efficacy is lost. In the following, a plea for a revision of the foundations of arms exports will be presented. In so doing, the current circumstances of international arms transfer have to be taken into account.<sup>41</sup>

Therefore, a scenario for German arms export politics will be presented below, which takes into account the obvious differentiation of the global arms trade. Long-term options are the aim of these considerations. They should reduce the dilemma of the current arms export politics and correspond to the normative targets of policies founded on peace, security and the promotion of development that is anchored in the principles of

40 Cf. Höffe, see above (footnote 2), p. 243–244.

41 See also Roger Williamson, *Moving in Vicious Circles: The Moral Dilemmas of Arms Trade and Weapons Manufacture*, in: Jonathan Moore (ed.), *Hard Choices. Moral Dilemmas in Humanitarian Intervention*, Lanham (Rowman & Littlefield Publ.), 1998, pp. 251–268, p. 256–257.

democracy, that is itself based on the rule of law.<sup>42</sup> The scenario should meet targets that are valid for political utopias in a positive sense: it should be conceivable, possible and attainable and suggestions should be made as to "how to act beyond the present day".<sup>43</sup>

#### **4.1. The current situation**

Although the "cold war" might have come to an end, war, as the means of violent struggle for power within and between societies, has not ceased to exist. However, the number of states at war with others is in decline. Rather, most armed conflicts take place within the limits of national borders, even if external interference occurs. In many parts of the world, the state itself threatens the safety and well being of humans and society by exploitation and repression. Following the events of 11<sup>th</sup> September 2001, the world witnessed how a state can regard itself as the victim of an attack carried out by a non-governmental organisation.

The state's monopoly on the use of force can be regarded as a major development in civilisation. The downside of this, however, is the concentration of the means of force in one hand, when the necessary conditions of law and peace may not be present. Consequently, minorities within a state declare themselves as independent states and the resulting conflicts lead to new wars. The right to autonomy, which, for a long time, was the guiding maxim in the process of political emancipation, is now presenting its destructive side – it serves as justification for the destruction of a social order without replacing it with something equivalent. A similar situation can be observed with the right to self-defence, accepted by international law. The insistence on this right increases the demand for arms and impedes the search for non-violent alternatives, to defuse threats and for settling current conflicts.

These trends feed on the continuous influx of arms. This influx is, however, increasingly complex. Today, mobile arms, such as machine guns and pistols, sniper rifles, anti-tank grenade launchers, mortars, land mines and others, cause most fatalities in armed conflicts, of which 90 percent are civilian. These arms were once developed in and distributed by the industrial states. These states have, however, lost control over their trade; they are produced under licence in other places – currently in 70 countries – or they wander from one theatre of war to the next. These tools of war have a life expectancy of several decades and are, like other mass-produced goods, comparatively cheap. Their handling does not require any specialist knowledge.

42 The following considerations are based on the wording of Chapter 8 of the GKKE-arms export report 2001, for which the author is also responsible. In this report, numerous ideas of the members of the GKKE 'Arms Exports Committee' have been incorporated.

43 Martin Seel, Drei Regeln für Utopisten, in: Zukunft denken – Nach den Utopien, Merkur, Vol. 55, No. 9/10, 2001, pp. 747–755, p. 749.

Yet, the industrial states still lie at the source of this stream of arms. They give away their own surplus stock unwisely, do not control the disarmament programs they initiate in a sufficiently strict manner and are not capable of preventing arms trade and the financing of projects within their own territory. How else could it be explained that, at the end of the nineties, arms from Albanian depots made their way, via Cyprus and Lebanon, into the hands of Irish Republican groups, old Argentinean arms appear in Croatia and arms traders offer for sale defence items, of various origins but mainly from the former states of the Warsaw Pact, in the capital of Slovakia?

The ambivalent nature of technical instruments and the ever-present risk of a non-intended use became apparent when civil aircraft were used as weapons in the attacks of 11<sup>th</sup> September. Here too, the nature of the danger, like that linked to dual-use good transfers, became evident: In the end, it is the user who decides the purpose of the instruments in his hands. The assassins themselves might regard it as a cynical triumph to have implemented this thought, using classical guerrilla tactics to hurt the enemy at his most sensitive spot, using means that belong to the enemy's daily life.

The arms transfer of industrial states, including Germany, consists of technically advanced, high-quality and expensive defence goods, suitable for armed forces in other industrial states, in emergent nations or in oil-producing countries. Germany is the global leader in the export of specialised warships, in particular submarines, and is the leading supplier of medium-sized and heavy tanks and artillery to other NATO states. Over and above this, there is the German offer to supply electronic components, various items of technical military equipment, plant and technical knowledge – the infamous 'blueprints'. Moreover, small weapons and guns that have a high status abroad are on offer, as is an extensive range of dual-use goods.

#### **4.2. Options**

The mass distribution of small weapons requires a different control approach to cutting-edge defence products, just as different structures of arms markets and trade require different responses. Rightly, the first problem is increasingly seen as part of the fight against trans-border crime, that is linked to the drugs trade and to money laundering, and attempts are being made to put a stop to such illegal deals. Nevertheless, it becomes clear that the supervision and control of this weapon stream can no longer be dealt with using the classical instruments provided by the Arms Control Law and the Law for Foreign Trade. Instead, they fall increasingly under the aegis of existing, or soon to be extended, national and international criminal laws. Besides, appropriate policies relating to social and economic development should be intensified, to stem the demand for such weapons.

International conferences, like, for example, the successful conference on the illicit trafficking in firearms in Vienna in spring 2001, have worded practical suggestions, which, however, still await realisation. This failure can be put down to the lack of sufficiently powerful instruments, not to mention that the decisive legal regulations have not yet been implemented in the respective national law. In the meantime, governmental and non-governmental development aid workers struggle on in places where suffering gives

rise to demand for arms. Apart from disarmament and conversion campaigns, programs for mine-clearance and for reform of the police, armed forces and the justice system, grouped in the 'sector of security,' are on the agenda.<sup>44</sup> Despite the evident destruction of economic, ecological and social foundations caused by wars in many parts of the world, the financial means to deal with these have so far been limited. For example, the German Ministry for Economic Cooperation and Development spend 34 million German Marks<sup>45</sup> on relieving the consequences of past wars in Angola, Cambodia, Laos and Vietnam. Although declarations were quickly made, following the events of 11<sup>th</sup> September 2001, it is not possible to foresee whether efficient measures, with rapid impact, can be taken.

No matter how urgent these initiatives might be, they do not decrease the pressure to become active in other sectors of international arms transfer. To ensure a positive outcome in this respect, possibilities on a political level should be exploited, which are already provided by existing control and transparency regimes, such as the Wassenaar Agreement or the UN Arms Register. The rectification of their shortcomings would not require a great deal of effort. This rectification should be achieved in accord with appropriate international or at least regional initiatives and should take into account the development of trans-national norms, as is emerging with respect to the demand for human rights and for the punishment of war criminals.

All in all, the perspectives of alternative options for arms export politics should spread beyond national borders. In the European context, only initiatives relating to EU issues have any chance of succeeding and of leading to an efficient control regime for arms exports. The skeleton agreement of 27<sup>th</sup> July 2000, in combination with steps designed to create a European defence and safety identity, show the direction arms export policies have to take. Despite the guarantees given in the Amsterdam Treaty, national prerogatives have, in reality, become obsolete. Certainly, the process should be started by altering the corresponding passages in EU treaties, in order to include arms exports in EU wide politics. Should this alteration of EU treaties not occur, the present prerogatives should be reinterpreted. This would open up the possibility of giving the EU Code of Conduct of 1998 a more legally binding character. In this context, attention should, in due course, be paid to strengthening the European parliament's function as recipient of information and as a control authority.

This should also include long over-due efforts to remove the air of mystery and the odour of corruption surrounding arms export politics. This would be in the interests not only of the public, who demand explanations, but also of governments, if they do not want to risk to be dragged once again into the whirlpool of individual criminal acts and

44 Cf. Herbert Wulf, Reform des Sicherheitssektors in Entwicklungsländern. Eine Analyse der internationalen Diskussion und Implementierungsmöglichkeiten der Reform mit Empfehlungen für die Technische Zusammenarbeit, Eschborn (Deutsche Gesellschaft für Technische Zusammenarbeit/GTZ), 2000.

45 Communication between Dr. Uschi Eid, parliamentary secretary of state in the Ministry for Economical Cooperation and Development, and the head of the parliamentary Committee on Economical Cooperation and Development, 25<sup>th</sup> January 2001.

the influence of lobby groups. Further emphasis could also be placed on imposing quick-acting sanctions on individuals involved in arms export deals and suspected of being involved in corruption. This promises to reduce the obvious negative attendant symptoms in the political culture of democracies.

In relation to the current problems faced by national and European arms export politics, these suggestions certainly appear to be optimistic, driven as they are by the vision of mastering the problems by a radical break with the past. It is already easy to imagine how difficult the executive and legislative forces of the EU member states will find the task of realising such a change in responsibilities. However, the pressure brought about by the europeanisation of the defence industry and by the constraints imposed by reduction and reformation of the armed forces might be even more effective than the plea of non-governmental organisations. The former want legal norms to be harmonised and politics in this field to be made reliable on pragmatic grounds, whereas the latter demand a change of course for reasons of principle. All in all, the long term success of such efforts will only occur if it is possible to establish a framework of rules that avoids the shortcomings of the many rules and regulations currently in force, that promises to be more predictable for the persons involved and that increases the degree of transparency.

Finally, the possibility is pointed out of restricting the transfer of arms and defence equipment to cases where an existing cooperation in security and defence questions exists or even to do without them altogether. Germany, like the majority of industrial states, forms part of international alliances and systems of alliances. Despite all claims to national sovereignty, these alliances have, meanwhile, taken over a central position in international and security policies. At the same time, they claim to establish and defend common guiding values in politics and society. Therefore, the priority of national sovereignty in decisions about arms export policies appears an anachronism, as the ways of cooperation and integration are increasingly preferred when it comes to the organisation of armed forces and the production of arms. At the moment, excessive political energy is used in working on the negative consequences of these discrepancies. It would be more obvious to transfer arms and defence equipment only to recipients that share norms and are integrated in security structures that are also valid for the supplier countries. The control of arms and defence equipment supplied would be maintained in the context of the alliances. Even in the North Atlantic Alliance, practical politics is far away from such aims, as the argument concerning the German arms export to Turkey indicates – Turkey is a state with democratic and legal status of which doubt has been cast time and again. The suggestions outlined here also include security policies that are not defined from a military point of view, that lead to a decrease in the demand for arms and defence equipment and that create a link between arms export policies and global initiatives in arms export control and disarmament.

In Anglo Saxon discussions in particular, parallels are repeatedly drawn between the dilemmas of the international arms trade and the campaign that lead to the abolition of

slavery at the end of the 19<sup>th</sup> century.<sup>46</sup> Allegedly, this campaign suffered from being out of touch with reality, despite its emotional and rhetorical force. Ultimately, however, the concerns were spread throughout society and – in connection with certain economic developments – became acceptable and prevailed. Regarding the ban on wars of aggression, the community of states reached a point, at the end of the 1920's, that enabled it to enter into the Briand-Kellog Pact in 1928.

From a German point of view, in the two decades that followed this pact, the inclination to pick up the thread of this success story, of a once potent and politically powerful movement in society, was lost. The reproach that this form of pacifism and blindness to the evil forces of reality planted the seeds for the later explosion of violence still has some impact and paralyses thinking about the renunciation of the transfer of arms and defence equipment. Indeed, this option – the fundamental renunciation of German arms transfers – was there when Art. 26, Par. 2 of Basic Law was originally discussed in the constitutional assembly in Herrnchiemsee in 1948 and led to the inclusion of this section into the German Basic Law, which is unique when compared with other constitutions worldwide. However, this was soon interpreted differently, not in the least due to the simple argument that it would not be possible to equip the police with revolvers otherwise.<sup>47</sup> The idea that German police would have to do without arms was not taken into account.

Nevertheless, the idea of a limitation, if not complete cessation, of arms exports is fascinating, particularly with respect to the precariousness of current arms export politics and their frequently fatal results. The most important suppliers of arms are democracies that provide defence equipment to the rest of the world. Without the supply of weapons and other defence equipment, the many violent conflicts involving those democracies might not cease to exist but would decrease in the intensity with which brute force is used. Thus, the costs of such a sudden change in policy need to be weighed against the current situation. This comparison might also reveal connections that would cast a different light on the pros and cons of arms transfer and might even convince current advocates of arms trade. Democracies that stand up to other countries in the name of peace increase their international credibility and can only profit from doing so.

46 For example: Antony Sampson, *The Arms Bazaar in the Nineties: From Krupp to Saddam*, London (Hodder & Stoughton), 1991; John Mueller, *Changing Attitudes to War. The Impact of the First World War*, in: *British Journal of Political Science*, Vol. 21, No. 1, 1991, pp. 25–50; Williamson, see above (footnote 40); Craft, see above (footnote 1).

47 Cf. von Poser und Groß Naedlitz, see above (footnote 13), p. 25.