

## Developments

# The EU's Role in Restraining the Unrestrained Trade in Conventional Weapons

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### A. Introduction

The excessive availability of conventional weapons, small arms and light weapons (SALW)<sup>1</sup> in particular, and the unrestricted trade which make them available raise serious security, humanitarian and social-economic concerns of international nature. These weapons are the major tools of contemporary armed conflicts, abuses of human rights and humanitarian norms, violence, terrorism and criminality. This has led many, including the former United Nations (UN) Chief, Kofi Annan, to believe that these arms are the real weapons of mass destruction of our time, causing half a million deaths annually.<sup>2</sup> This is not to suggest that conventional weapons are not also useful for good causes. They are necessary for maintaining law and order and self-defence purposes. However, their proliferation and unrestricted transfer across borders, especially from the industrialized world to developing (and conflict-torn) countries, have not yet been addressed. In other words, their availability and supply have not been subjected to proper (legal and enforceable) restrictions.<sup>3</sup>

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<sup>1</sup> The paper is about the physical transfer of conventional armaments, both major and small and light weapons (SALW), with a focus on the latter. See The UN Register of Conventional Arms, GA Res. 46/36, Annex (Dec. 9, 1991) (describing major conventional weapons such as heavy mortars, tanks and war planes). See *UN Report of Group of Governmental Experts on Small Arms*, para. 25, submitted to the General Assembly, U.N. Doc. A/52/298 (Aug. 27, 1997) (GGE) (discussing small arms weapons as "those weapons designed for personal use, and light weapons are those designed for use by several persons serving as a crew").

<sup>2</sup> Kofi Annan, *Small Arms, Big Problems*, INTERNATIONAL HERALD TRIBUNE, July 10, 2001 at 1. See also Zeray Yihdego, *Irresponsible Arms Transfers and Humanitarian Norms: The Principles of Humanity and Public Conscience Perspective*, 2 (3) JOURNAL OF HUMAN SECURITY 29-42 (2006).

<sup>3</sup> ZERAY YIHDEGO, THE ARMS TRADE AND INTERNATIONAL LAW 9 (2007). It has to be noted that the 99 states and their 1000 companies which are involved in the manufacture and supply of conventional weapons by and large enjoy the freedom of arms supply to their favorite destinations, of course subject to permission from their respective governments.

The European Union (EU), together with the United States (US), supplies approximately 85% of the world arms trade, 53% of which is supplied by the latter and the rest by the former. According to a study conducted in 2006, "more than four hundred EU companies in twenty-three out of twenty-five EU countries" are engaged in manufacturing and supplying SALW, among which Germany, France, Italy, Sweden and the UK are the top arms exporters worldwide.<sup>4</sup> These figures do not offer a complete picture of the issue. Since the late 1990s, EU Member States have been taking positive steps in the form of a joint action, a code of conduct, arms embargoes and council common position as regional responses to the excessive proliferation of weapons and their negative impacts. These include reporting and consulting mechanisms as well as the adoption of legal and political national measures.

At the international level, EU Member States are party to the UN Register of Conventional Weapons (the Register) which is designed to foster transparency and confidence building among states relating to conventional arms transfer. They have also been active in the UN process to control illicit SALW trade. In the summer of 2006, the UN began an arms trade treaty process to address the problems associated with the manufacture, trade and transfer of conventional weapons in which the EU and its Member States are among the key players contributing to the success of the process. While these efforts are significant developments in the control of conventional weapons, the international community (including the EU) still lacks uniform, clear and authoritative standards and effective regulatory mechanisms applicable to the problem.<sup>5</sup>

It is thus necessary to examine the nature of the substantive and procedural measures taken at the regional level, the effectiveness of the measures, the role of the EU at the international (UN) level and the strengths and weakness of the framework in contrast to other regional measures (in particular the Economic Community of West African States (ECOWAS), the Organization of American States (OAS), and US frameworks). The 2006 ECOWAS Convention on small arms is the first of its kind in terms of expressly applying global (legal) norms to both the licit and illicit arms trade; however, the 1997 OAS Firearms Convention mainly addresses the problem of illicit trafficking in firearms.

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<sup>4</sup> Helen Hughes, *Europe's Deadly Business*, LE MONDE DIPLOMATIQUE, June 2006, <http://mondediplo.com/2006/06/11armscontrol> (pointing out that 'between 1994 to 2001 the EU exported nearly \$10bn of arms to developing countries-approximately one-third of all deliveries to such countries'). See also Zeray Yihdego, *Arms Sales and Parliamentary Controls: the Role of the Quadripartite Committee*, 61(4) PARLIAMENTARY AFFAIRS 661 (2008).

<sup>5</sup> This is not to deny the EU's role *inter alia*: in banning anti-personnel landmines and in restricting heavy conventional weapons in Europe. See Convention on The Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 [hereinafter Ottawa Mine Treaty]; Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, 30 I.L.M. 6.

These two regional responses to the problem at issue may offer some comparative lessons for the EU. The US arms export laws and national and international policies and practices are also believed to offer some comparative perspectives on the EU's role in dealing with the challenges of the unrestrained trade in conventional weapons.

This paper will identify the EU's major challenges and useful solutions necessary to transform and reinforce the EU's role in the fight against irresponsible conventional arms sales. The salient features of relevant EU measures are considered next.

## **B. The Nature of the Measures: principles**

In December 1998 (and later amended in July 2002), the EU adopted the 'Council Joint Action on the European Union's contributions to combating the destabilizing accumulation and spread of SALW' (EUJA), as a first legally binding response to the proliferation of conventional weapons. This was followed by the adoption of the EU Code of Conduct on Arms Exports (EU Code—which has recently been transformed into a legally binding instrument) of the same year, the main purpose of which was to implement the EUJA. These two important legal and political instruments constitute the twin pillars of the framework for arms transactions.<sup>6</sup> The *substantive* and *other* (such as transparency and international co-operation) aspects of this framework deserve further consideration, with emphasis on the former.

### *I. Core Contributions and Limitations of the Code and the EUJA*

The EUJA on small arms, as the title indicates, is aimed at reducing the proliferation of these weapons "to the level consistent with countries' legitimate security needs, and to help solve the problems caused by such accumulation".<sup>7</sup> It also aims to secure consensus and promote certain principles, at global and regional levels, including:

- (a) a commitment by all countries to import and hold small arms only for their legitimate security needs, to a level commensurate with their legitimate self-defence and security requirements, including their ability to participate in UN peacekeeping operations;
- (b) a commitment by exporting countries to supply small arms ... in accordance

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<sup>6</sup> However, there was Common Criteria agreed at the Luxembourg and Lisbon European Council sessions of 1991 and 1992 on the subject and in December 2008 the EU Code has been transformed into a Council Common Position (CCP). See Yihdego *et al*, 'The UK Arms Export Regime' below (fn 19) at 551-552 (providing detailed analysis of the Code); *Council Common Position Defining Common Rules Governing the Control of Exports of Military Technology and Equipment*, 2008 O.J. (L 335) 99 [hereinafter CCP]. What is clear, however, is that the essence of the Code and the CCP appears to be generally the same. See discussion *infra* Part E.

<sup>7</sup> Council Joint Action on the European Union's contributions to combating the destabilizing accumulation and spread of SALW (2002/589/CFSP), art. 1(1), 2002 O.J. (L 191) 1-4 (EU)[hereinafter EUJA].

with appropriate international and regional restrictive arms export criteria, as provided in particular in the EU code of conduct...<sup>8</sup>

The Joint Action further underlines the commitment of Member States to offer technical and financial support to victim countries in their efforts to disarm and destroy weapons.<sup>9</sup> In the interest of economy and priority only, these matters will not be addressed in this paper.

The EUJA has been pivotal in the fight against the proliferation of conventional weapons for a number of reasons. First, the Union and its Member States have recognized the fact that SALW are a major factor in armed conflicts and related human calamities. Second, it strives to build consensus on important principles applicable to arms transfer. Finally but most crucially, the EUJA is a legally binding instrument which was decided on the basis of Art. 14 of the EU Treaty, the Common Foreign and Security Policy (CFSP).<sup>10</sup> However, the Joint Action has no a direct impact on national systems and its implementation has largely been left to the will of Member States and the EU Code of Conduct.<sup>11</sup>

The Code's preambular paragraphs underline "the special responsibility of arms exporting states" and the need "to set high common standards ...for .., and restraint in, conventional arms transfers by all EU Member States." This includes measures of transparency. The Code also expresses the determination of Member States to prevent arms exports to repressors or conflict situations. This is notwithstanding "the wish of EU Member States to maintain a defence industry as part of their industrial base as well as their defence effort" and states' right to import arms for purposes of self-defence as enshrined in the UN Charter.

The substantive restrictions can be grouped into five clusters. The first cluster concerns security based restrictions. Criterion 1(a) and (b) of the Code states that: "An export licence should be refused if approval would be inconsistent with, *inter alia*: the international obligations of Member States and their commitments to enforce UN, OSCE and EU...arms embargoes, their commitment not to export any form of anti-personnel landmine." Criterion 3 adds that: "member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the

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<sup>8</sup> *Id.* Art. 3.

<sup>9</sup> *Id.* Art. 4.

<sup>10</sup> CRAIG AND DE BURCA, EU LAW: TEXT, CASES AND MATERIALS 25, 37 (3rd ed. 2003).

<sup>11</sup> See EUJA, *supra* note 7, at Arts. 3 (d) and 9 (2). See also Stockholm International Peace Research Institute, EU Joint Action on Small Arms, <http://web.sipri.org/contents/expcon/eujointact.html> (last visited on Mar. 6, 2009).

country of final destination." An adverse impact on regional peace and security of arms supplies is also one of the standards, as stated in Criterion 4.

The second cluster involves a humanitarian law-based limitation on arms export. As stated in Criterion 6(b), the Code requires that: "Member States take into account *inter alia* the record of the buyer country with regard to...its compliance with international commitments,..., including under international humanitarian law applicable to international and non-international armed conflicts."

Thirdly, as per Criterion 2, EU States will:

- (a) not issue an export license if there is a *clear* risk that the proposed export might be used for internal repression.
- (b) exercise special caution and vigilance in issuing licenses, on a case by case basis..., to countries where *serious violations of human rights* have been established by the competent bodies of the UN, the Council of Europe or by the EU (emphasis added).

Certain indicators have been set out which need to be considered to determine the (future) use of SALW for internal repression "where there is evidence of the use of this or similar equipment for internal repression by the proposed end-user" or "where there is reason to believe that the equipment will be diverted from its stated end-use or end-user and used for internal repression." Particular attention should be placed on determining if the equipment "is intended for internal security purposes", such assessment to be made on a case-by-case basis.<sup>12</sup>

Fourthly, EU exporters are required to "take into account...whether the proposed export would seriously hamper the sustainable development of the recipient country" in the context of the "recipient country's relative levels of military and social expenditure".<sup>13</sup>

Finally, the fifth cluster involves preventing diversion of end-use and end-users of exports has been among the criteria for export decisions. This criterion has to be read in

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<sup>12</sup> Stockholm International Peace Research Institute, EU Code of Conduct for Arms Exports, <http://www.sipri.org/contents/expcon/eucode.html>, Criterion 2 (last visited on Mar. 6, 2009) [hereinafter Code of Conduct].

<sup>13</sup> *Id.* at Criterion 8.

the light of the guiding principles of the EUJA which expressly avow to make arms transfer between states (through their authorised entities or agents) only.<sup>14</sup>

Aside from the substantive limitations, the Code requires that Member States report on their compliance with the criteria on an annual basis to the EU and consult information regarding refusals of export licenses, the practical developments and setbacks of which will be elaborated in a moment. It is interesting to note that the Code seeks wider cooperation with non-EU states to implement the values it intends to uphold.<sup>15</sup>

### *II. Positive Contributions of the Code and EUJA*

The core contributions and limitations of the Code (and the EUJA) have now been examined. As a first positive contribution, the Community regime requires that *any transfer* which risks contributing to aggression, conflict, and violations of humanitarian principles should not be authorised.<sup>16</sup> The requirements laid down clearly contribute to the development of substantive international standards applicable to arms trading. In other words, "licit" transactions have also been put under some restriction. It is worthy of note, in contrast to the EU, that the OAS has only dealt with illicit firearms trafficking. However, as we shall later see, the legal framework may also have some restraining impacts on the "legal" trade of firearms.<sup>17</sup>

The second is that the instruments' reference to international law norms (e.g. peace and security, human rights, humanitarian law, sustainable development) has been an encouraging step towards establishing a responsible weapon export regime by the EU. In contrast, the OAS Convention expressly mentions only the principles of sovereignty and non-intervention.<sup>18</sup> There is no mention of other core values such as human rights in the Convention unlike the EU instruments.

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<sup>14</sup> YIHDEGO, *supra* note 3, at 155. However, other regional organisations (notably the OAS) have taken clearer position than the EU on this issue, as will be discussed further.

<sup>15</sup> Code of Conduct, *supra* note 12, at Operative Provision 12.

<sup>16</sup> *Id.* at Criteria 3-6.

<sup>17</sup> *The Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials*, Nov. 14, 1997, available at <http://www.oas.org/juridico/English/treaties/a-63.html> [hereinafter OAS Firearms Convention]. Whilst 27 American states have ratified the Convention, the US and Canada are only signatories to it.

<sup>18</sup> *Id.* at Arts. 3(1) and 3(2).

As a third strength, the Code has “spilled over into national law in Austria, Belgium, Finland and the UK, as well as into other policy areas”.<sup>19</sup> It is also important to mention that the instruments of the EU (and their criteria) have gained wider support from the international community. For instance, “the associated countries of Central and Eastern Europe, Cyprus, Malta and Turkey... have aligned themselves” with the EUJA.<sup>20</sup> UN member States have expressed their support for the Code and the EUJA, as clearly stated in the outcome document (Programme of Action) of the UN Conference on small arms of 2001. The USA has endorsed the Code’s criteria without any reservation.<sup>21</sup>

And lastly, as elaborated later, the reporting system and subsequent developments have created a better environment of transparency in arms dealings.

### *III. Criticisms of the Code*

The Code’s criteria have been criticised for a number of limitations. One of the obvious criticisms is that it is only a political code of standards, and therefore not binding on EU states. Member States have not, for example, chosen the word “shall” over “should”, as shown in Criterion 1. By way of contrast, the ECOWAS Convention of 2006 on SALW (which transformed the ECOWAS Moratorium of 1998) banned any importation and exportation of SALW in principle with the possibility of some exemptions as an exception; the latter is prohibited if a given “authorisation violates the obligations of the requesting states and those of Member States”.<sup>22</sup> The obligations referred to include the basic norms of international law such as fundamental human rights. Moreover, despite its emphasis on the term “illicit” the OAS Convention expressly outlaws any supply of weapons to non-state-actors (be it armed groups or business entities), without a “corresponding license or authorization” from a destination country in which they operate.<sup>23</sup>

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<sup>19</sup> S. Bauer, *The EU Code of Conduct on Arms Exports, much accomplished much to be done*, SIPRI 6 (2004). See also Zeray Yihdego and Ashley Savage, *The British Arms Export Regime: progress and challenges*, PUBLIC LAW 546-565 (Autumn 2008).

<sup>20</sup> *Third Annual Report on the Implementation of the EU Joint Action of 12 July 2002 on the European Union’s contribution to combating the destabilising accumulation and spread of small arms and light weapons (2002/589/CFSP)*, 2003 O.J. (C 312).

<sup>21</sup> See Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, July 9-20, 2001, *Programme of Action*, U.N. Doc. A/CONF.192/15 [hereinafter PoA]; EU-US Statement of Principles on Small Arms and Light Weapons, available at <http://www.useu.be/SUMMIT/arms1200.html>.

<sup>22</sup> *ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Related Materials*, June 14, 2006, Arts. 3, 4 and 6; See also *West African Arms Moratorium*, Oct. 31, 1998.

<sup>23</sup> OAS Firearms Convention, *supra* note 17, at Art IX(2).

It was encouraging, as noted in (EU) annual reports, however, that actual discussions have been ongoing for some years to transform "the code into [the] common position" of the Union.<sup>24</sup> The Committee on Foreign Affairs of the European Parliament, for example, has "reiterated [in 2003] the call for the Code to be legally binding".<sup>25</sup> These efforts have led to the adoption of the December 2008 CCP "Defining Common Rules Governing the Controls of Exports of Military Technology and Equipment".<sup>26</sup> The tone/wording of the criteria has now changed. Most notably, the word "should" has now been replaced by "shall" in all criteria.<sup>27</sup>

The second limitation concerns the threshold of risk required to restrict arms transfer. As per the Code, individual countries of the Union ought to interpret the phrase "clear risk" and take measures accordingly in the course of export authorization. As mentioned earlier, some tests, such as the previous use of similar weapons to repress citizens' rights and the possibility of diversion of end-uses, have also been developed for purposes of arms export decision making. Yet, the Code has been criticized for its emphasis on "a 'clear risk' rather than only a 'risk'"<sup>28</sup> of the dangers referenced. In other words, the threshold of risk envisaged has been unreasonably high. The danger of this approach is that countries may be able to authorize arms transfer even if there is some risk of misuse of the weapons to be supplied. However, regular meetings of the Council's Working Group on the subject and annual reports of implementation of Member States "have been used as tools to harmonise the Code's application and to narrow the scope of national interpretation of the criteria".<sup>29</sup> The best practice guidelines which were deduced by the Working Group may also mitigate this potential problem. It is of note that the recently adopted CCP has adopted the same phrase, "clear risk".<sup>30</sup>

Even so, other studies and recommendations, including the ICRC study on the availability of arms and humanitarian norms of 1999,<sup>31</sup> proposed clearer indicators of

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<sup>24</sup> *Annual Report on the Implementation of the EU Joint Action*, 2001 O.J. (C216) 1, at para. 3. See also *Second Annual Report on the Implementation of the EU Joint Action*, 2002 O.J. (C330) 1, at para. 27. See also YIHDEGO, *supra* note 3, at 124.

<sup>25</sup> *Fifth Annual Report According to Operative Provision 8 of the European Code of Conduct on Arms Transfers*, 2003 O.J. (C320) 1.

<sup>26</sup> CCP, *supra* note 6.

<sup>27</sup> See *id.* at Art 2 (2).

<sup>28</sup> Bauer, *supra* note 19.

<sup>29</sup> *Id.* at 4.

<sup>30</sup> See CCP, *supra* note 6, at arts. 2(2(a)), 2(2(b)) and 2(4).

<sup>31</sup> YIHDEGO, *supra* note 3, at 218-9.



risk than the EU: (a) stable authority and structure capable of ensuring human rights and humanitarian norms; (b) appropriate responses to violations and violators of such norms; (c) preventive measures;<sup>32</sup> and (d) the unregulated excessive availability of small arms,<sup>33</sup> in arms recipient states, may well be useful tests to assess potential risks of arms supply to the norms at issue.

Last but not least, the Code is limited in that detailed reasons for refusals of exports by Member States are not publicly available. This is due to the confidential nature of consultations on denials of arms export licenses between Member States as stipulated under the Code<sup>34</sup> and as elaborated in subsequent sections. This is not unique to the EU, the OAS Convention provides the same confidentiality clause.<sup>35</sup>

In brief, EUJA and the Code of Conduct have shown the aspirations of the EU to regulate the unrestricted arms trading from EU to other countries. The standards which have been set out are positive contributions to the fight against the excessive availability and proliferation of conventional weapons in the world. Many have, however, questioned whether these measures are adequate in light of the authoritative actions taken by other regional organisations. But one has to bear in mind that the EU measures are not limited to setting standards for arms transfer across borders. The Union has also been imposing arms embargoes on several destinations in response to various crises which will be examined along the successes and challenges of the application of the Joint Action and the Code.

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<sup>32</sup>The *EU Code* has also affirmed the determination of member States 'to prevent the export of equipment which might be used for internal repression, international aggression, or contribute to regional instability'. Code of Conduct, *supra* note 12, at preambular para. 4.

<sup>33</sup> See also The Secretary-General, *Report of the Panel of Governmental Experts on Small Arms*, paras. 34, 35, 36 and 37(a), (b), and (c), *delivered to the General Assembly*, Un. Doc. A/52/298 (Aug. 27, 1997).

<sup>34</sup> See Code of Conduct, *supra* note 12, at operative para. 4. See also, *Small Arms Survey 2002: Continuing the Human Cost* (Oxford University Press: Oxford) 117 [hereinafter SAS]; YIHDEGO, *supra* note 3, at 257.

<sup>35</sup> OAS Firearms Convention, *supra* note 17, at Art. XII.

### C. The Principles in Practice: progress and challenges

The status of the EUJA and the Code in national systems, the mechanisms available to monitor uniformity at the regional level, and issues of actual compliance with the standards and other relevant issues may show both the effectiveness and the shortcomings of the framework discussed above.

#### *I. National Treatment of the Code*

The treatments of the two instruments in national systems greatly vary among European States. For example, whilst Belgium and Austria have adopted legislation which incorporates the major criteria of the EU Code,<sup>36</sup> others, including France, Germany and Britain, have chosen to adopt the standards in the form of national policy for their arms export decision making.<sup>37</sup> The UK Export Control Act 2002 (ACA),<sup>38</sup> for instance, emphasises the need for adhering to the national guidelines (which entirely endorses the criteria of the EU Code). It is true that these differences are largely differences in commitment, although it may not necessarily be the case that those who adopted policies are less responsible than those who introduced laws when it comes to actual practices, as will be illustrated.

Reporting and consultation at the EU level are among the most important mechanisms to monitor implementation and ensure cooperation among EU States. Article 8 of the Code, as briefly mentioned earlier, requires Member States to circulate annual reports "in confidence" to other states on their arms export licence decisions, actual deliveries and details of refusals, among other things (this rule has been reiterated in the 2008 CCP as shown in Art 8). The reports are to be discussed and reviewed "within the framework of CFSP," which leads to the publication of EU annual reports on arms export. They unveil information regarding the quantity, type, value and destination of arms exports authorised (licensed) and actually delivered by Member States. The quantity, type and destinations of denied licenses and other policy issues are also subject to reporting. Until 2007, the EU published nine annual reports<sup>39</sup> which are

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<sup>36</sup> *Kriegsmaterialgesetz [KMG] [War Material Act] Bundesgesetzblatt Teil I [BGB1 I] No. 57/2001, para. 28 (Austria).*

<sup>37</sup> YIHDEGO, *supra* note 3, at 128-9. However, as indicated in Articles 1 and 12 of the 2008 CCP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment, member states are now required to have an appropriate legal framework reflecting the criteria and other related procedures.

<sup>38</sup> See Press Notice 9, Session 2005-06, available at [http://www.parliament.uk/parliamentary\\_committees/quad/quad1106pn09.cfm](http://www.parliament.uk/parliamentary_committees/quad/quad1106pn09.cfm), for details of the Act. See also Yihdego and Savage, *supra* note 19, at 548-550.

<sup>39</sup> See Council of the European Union, *Security-related export controls II – Military Equipment*, available at [http://consilium.europa.eu/cms3\\_fo/showPage.asp?id=408&lang=en](http://consilium.europa.eu/cms3_fo/showPage.asp?id=408&lang=en), for details of the reports. See Yihdego and Savage, *supra* note 19, at 557-563, for detailed analysis of the Act and its practicality.

based on information provided in national reports. The first report (for 1999) stated that "a large number of denial notifications have been circulated and Member States have engaged in active consultations on specific export licensing issues." Some of the denials of the licensing of exports of weapons included five issued by Belgium, twenty-seven by Germany, sixteen by the Netherlands, forty-three by the UK and fifty by France. There are countries, moreover, which neither report the details of their exports nor declare any denial.<sup>40</sup>

The quantity and quality of statistical data and policy aspects of reporting have significantly improved through time.<sup>41</sup> The Ninth Report (of October 2007) which is three hundred and thirty-three pages long shows both the drastic substantive and reporting developments and the challenges therein.<sup>42</sup> On the positive side, most EU weapon exporters have supplied comprehensive data on their arms export licenses, deliveries and details of refusals. The EU Secretariat also runs a database on which details of every refusal is kept and updated regularly—this is only accessible by Member States. Unlike earlier annual reports, the refusals refer (in general terms) to the Code's criteria; *inter alia*, human rights, security and the risk of diversion.

One may therefore draw the (general) conclusion that the annual reports are detailed. They show the quantity, value, exporter and destination country and type of military items, from which it may well be possible to deduce conformity or otherwise of countries with the Code's substantive guidelines. Transparency among states has also improved either in the form of consultations or exchange of refusal details.

Refusal details are not publicly available, however, as they are not published in the reports. The problem of confidentiality seems a serious challenge for the EU and its objectives on arms export controls. While national parliaments and civil societies within Member States (such as Amnesty and Oxfam) have been vital in scrutinising their respective governments relating to arms trading decisions,<sup>43</sup> the view is widely shared

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<sup>40</sup>Annual Report, *European Union Code of Conduct on Arms Exports*, para 7, No 6, available at <http://projects.sipri.se/expcon/eucodear1999.htm>. See also Yihdego *supra* note 19, at 551-552.

<sup>41</sup>Sibylle Bauer and Mark Bromley, *The EU Code of Conduct on Arms Exports: improving the annual report*, SIPRI Policy Paper # 8 (Nov 2004) 6, available at [http://www.smallarmssurvey.org/files/portal/issueareas/transfers/transfers\\_pdf/2004\\_Bauer\\_Bromley.pdf](http://www.smallarmssurvey.org/files/portal/issueareas/transfers/transfers_pdf/2004_Bauer_Bromley.pdf).

<sup>42</sup>*Ninth Annual Report According to Operative Provision 8 of the European Code of Conduct on Arms Exports*, 2007 O.J. (C 253) 1.

<sup>43</sup>Zeray Yihdego, *Arms Sales and Parliamentary Controls: the Role of the Quadripartite Committee*, 61 (4) PARLIAMENTARY AFFAIRS 661-680 (2008), for the UK practice. See also the *Quadripartite Committee on Arms Exports* at [http://www.parliament.uk/parliamentary\\_committees/arms\\_committees.cfm](http://www.parliament.uk/parliamentary_committees/arms_committees.cfm); See e.g. Zeray Yihdego, *Arms Trade and Public Controls: the Right to Information Perspective*, 59(4) NORTHERN IRELAND LEGAL QUARTERLY 387 (2008), for in-depth analysis on the role of citizens and civil societies.

that the EU regime lacks transparency, which is also a bar for those who may want to oversee the genuine implementation of the Code's substantive restrictions. Whilst it may be argued that without such secrecy the cooperation among EU States would be impossible to achieve, lack of openness and hence accountability may seriously hamper the observance by governments of the substantive parameters for weapon exports. One may also submit that EU governments are representatives of the people and therefore trustworthy of upholding the regional values reflected in the instruments discussed above. But it is commonsense that the less transparency in government the more (advertent or inadvertent) flaws occur.<sup>44</sup> Therefore, it seems that the demerits of confidentiality in arms exports outweigh its advantages, if one adopts a broader and transparent solution to the problem.

Moreover, reports on actual deliveries have not been uniform among Member States. Different from other members, Denmark, Germany and the UK did not, for example, supply information on actual delivery in the Ninth Report referred to earlier.<sup>45</sup> It is interesting to note, in comparison to some top EU arms exporters, that the USA publishes not only arms export licenses issued by authorities but also details of actual deliveries,<sup>46</sup> on which controls and influences by governmental and non-governmental actors could be based.

Thanks to the media and domestic politics, however, we have one relevant publicised case available. The military firearms deal between some EU countries and Nepal showed both hope and difficulty with regard to the application of the EU Code. This gave grounds for hope in relation to the genuine application of the Code because the German Government disapproved of the contract of supply of arms, between Heckler & Koch and Nepal in 2001, due to the concern about "supplying weapons to a country both at war and charged with violations of human rights."<sup>47</sup> This gave rise to a problem because Belgium transferred arms to Nepal in 2003, regardless of the possibility of the use of the guns for abuses of human rights, "such as extra-judicial killings of innocent civilians suspected of being Maoist sympathisers," and the existence of prior German refusal of such a deal.<sup>48</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Third Annual Report*, *supra* note 20, at 8. See also *SAS*, *supra* note 34, at 117.

<sup>46</sup> *Fiscal Year 2004: "Section 655" Report*, available at <http://www.fas.org/asmp/profiles/655-2004/6552004.html#DOD>, for reports on actual deliveries of arms to specific countries; SIPRI database on conventional weapons transfer contains, available at [http://www.sipri.org/contents/armstrad/atlinks\\_gov.html](http://www.sipri.org/contents/armstrad/atlinks_gov.html). See also Yihdego and Savage, *supra* note 19, at 555-556.

<sup>47</sup> *SAS*, *supra* note 34, at 113, box 3.3 [emphasis added].

Other publicly known controversial deals between EU States and others include arms supply to Saudi Arabia,<sup>49</sup> Myanmar, Sudan, DRC Congo and China,<sup>50</sup> the details of which are only known either by the governments involved or perhaps by their EU partners.

## *II. European Union Implementation of the Code*

The EU standards for arms supply are not entirely left to national implementation, as the Union has also been imposing arms embargoes, the targets of which include preventing human security threats and the need not to contribute to human suffering. The nature, strengths and failings (if there are any) of these regional embargoes will now be considered.

The EU arms embargoes, for example, against Myanmar, the Federal Republic of Yugoslavia, Afghanistan, China and Zimbabwe have been imposed as a response to human rights violations. The embargoes may follow UN Security Council arms embargoes<sup>51</sup> or may only be measures of the EU. Following the use of military force by the Chinese Government in 1989 to suppress student demonstrations in Beijing, for instance, the European Council strongly condemned such a "brutal repression" and responded by adopting various measures, including "interruption by the Member States of the community of military cooperation and an embargo on trade in arms with China."<sup>52</sup> It was an EU measure only, though also supported by the US.

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<sup>48</sup> *Id.*

<sup>49</sup> See e.g. Yihdego, *supra* note 43, at 671-673. See also QUADRIPARTITE COMMITTEE, FIRST REPORT, 2005-6, H.C. 873 at para. 152. The Committee clearly challenged the compatibility of arms supplies to Saudi Arabia with Criterion 2 of the EU Code (human rights), noting that while the suppression of fundamental freedoms and the use of executions are widespread in Saudi Arabia, Britain supplies weapons to the country.

<sup>50</sup> The G8: *global arms exporters, Failing to prevent irresponsible arms transfers*, CONTROL ARMS, June 22, 2005, available at <http://www.controlarms.org/en/documents%20and%20files/reports/english-reports/g8-global-arms-exporters>. The report refers to French's arms supply to Myanmar and Sudan, Italy's arms sales to Congo and China and German's military equipment destined in Myanmar. The report also slams others such as the US, Russia and Canada for their 'irresponsible' arms transfer.

<sup>51</sup> See e.g. Zera Yihdego, *The Role of the UN Security Council Arms Embargoes in Stemming Destabilizing Transfers of Small Arms and Light Weapons: Recent Developments and Challenges*, LIV NETHERLANDS INTERNATIONAL LAW REVIEW 115 (2007).

<sup>52</sup> Council of Ministers, *EU Declaration on China*, June 26-27 1989, available at <http://projects.sipri.se/expcon/euframe/euchidec.htm> [emphasis added].

Furthermore, in 2002 the European Council “assessed that the Government of Zimbabwe continues to engage in serious violations of human rights.”<sup>53</sup> Article 1(1) of the common position asserts:

The supply or sale of arms and related material of all types including weapons and ammunition,...and spare parts for the aforementioned to Zimbabwe by nationals of Member States or from the territories of Member States shall be prohibited whether originating or not in their territories.

At least three key issues arise with regard to these measures. The first is that most of the embargoes have been adopted by the Council of Europe as a Council Common Policy (CCP) and therefore legally binding upon all Member States. Unlike the Code’s implementation, these bans have a direct impact at the national level; although the sanction against China was based upon political declaration.

The second issue concerns the range of human rights often considered in these measures. The phrase “brutal repression”<sup>54</sup> was used in the embargo against China. Continued, serious and systematic violations of human rights by authorities, violence and intimidation of political opponents and harassment of the independent press were among the grounds that led to the ban against Zimbabwe.<sup>55</sup> In the case of Myanmar, factors such as the practice of torture, summary and arbitrary executions, forced labour, political arrests and abuses against women were mentioned.<sup>56</sup> “Violent repression of the non-violent expression of political views” was considered as a motive for the ban against the Federal Republic of Yugoslavia.<sup>57</sup> So, terms like serious, continuous brutal and violent may suggest that the violations and abuses in mind are extreme cases.

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<sup>53</sup>*Council Common Position of 18 February 2002 on Zimbabwe*, 2002 O.J. (L50) 1, at para. 4 [emphasis added][hereinafter CCP Zimbabwe].

<sup>54</sup> Council of Ministers, *supra* note 52, para 1.

<sup>55</sup> CCP Zimbabwe, *supra* note 53, at paras. 1 and 4. See also *Common Council Position of 16 September 1999 Concerning Restrictive Measures against the Republic of Indonesia*, 1999 O.J. (L 245) 53, at para 1.

<sup>56</sup> *Common Council Position on Burma/Myanmar*, 1996 O.J. (L 287) 1, at No. 2 [hereinafter CCP Burma]; See also Council Regulation No. 1081/2000 of 22 May 2000, Prohibiting the Sale, Supply and Export to Burma/Myanmar of Equipment which might be used for Internal Repression or Terrorism, 2000 O.J. (L122), at para 1.

<sup>57</sup> *Common Council Position of 19 March 1998 against the Federal Republic of Yugoslavia*, 1998 O.J. (L 95) 1, at preamble and para 1 [hereinafter CCP FRY].

The third and most controversial issue concerns the termination of these sanctions. There are three situations where termination of EU Embargoes may occur. The first is where embargoes of the UN Security Council (SC) are lifted (i.e. when the regional action is taken following a UN SC embargo); in such cases the EU may terminate its actions in line with the decisions of the UN SC. Lifting the embargo against the FRY in 2001 is one such example.<sup>58</sup> The second situation is based on the expiry date of a measure. The embargoes often indicate that they will be enforced for a renewable 12 or 6-month period from the date of their adoption.<sup>59</sup> Afterwards, either they have to be renewed by another CCP or they will not have legal effect. The embargo against Indonesia, for example, expired in January 2000.<sup>60</sup> The third problematic situation regarding termination arises when the Council takes an indefinite action. This mainly depends on a change of circumstances in a target country concerning improvements in human rights conditions, as assessed and decided by the EU Council. The question of lifting the arms ban against China is a good case in point. The EU-China Summit of 2004 revealed the political will of the EU "to continue to work towards lifting the embargo", a positive signal which was welcomed by China.<sup>61</sup> The latter, however, added that "political discrimination on this issue was not acceptable and should be immediately removed." The EU, on the other hand, "reaffirmed that work on strengthening the application of the EU Code of Conduct on arms exports was continuing."<sup>62</sup> The Code's criteria appeared to have been given a priority over the political desire to lift the measure, as things stand now.

Such a split in views and interests not only exists between China and the EU, but amongst the EU Member States as well. Countries such as France, Germany, Italy and Portugal have explicitly supported the move to revise and terminate the 15-year-old embargo. It has been said that the human rights condition in the country "has improved significantly since 1989."<sup>63</sup> In contrast, the Nordic states, the Netherlands, Britain and Spain are either against or reluctant to drop the ban, due to continuing concerns of human rights violations in China and the need to uphold the values of the EU Code on arms exports<sup>64</sup>.

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<sup>58</sup> *Common Council Position* of 8 October 2001 amending *Common Position 96/184/CFSP*, 2001 O.J. (L268) 49.

<sup>59</sup> See, *i.e.* *CCP Zimbabwe*, *supra* note 53, at Art. 7. See also *CCP Burma*, *supra* note 56, at Art 7.

<sup>60</sup> Council Regulation, *supra* note 56, at Art 6.

<sup>61</sup> Press Release, Council of the European Union, *Joint Statement of the 7th EU-China Summit* (Dec. 8 2004) at para 7.

<sup>62</sup> *Id.* at sub-para 2.

<sup>63</sup> *EU Wants Action in China*, ASIAN TIMES, Mar. 26, 2004. See also *EU Split on China arms ban, but "tide turning" towards lift*, AGENCE FRANCE PRESS, Dec. 8, 2004.

<sup>64</sup> *Id.* See also *UKMIL 73* BRITISH YBK INT L 827 (2002).

In contrast, the EU arms embargo against Libya, which was in place since 1986, was lifted in 2004 as part of Libya's agreement to abandon its WMD programmes and to compensate the Lockerbie victims. It was unconvincingly "denied that the EU was giving up its leverage over Libya on human rights."<sup>65</sup> Questions of discrimination and inconsistency may therefore arise if one scrutinizes the standards the embargoes are meant to uphold closely.

Despite (these) criticisms, the Union has established a model system of arms embargoes in response to breaches, or to prevent violations of human rights and other norms; they include conventional arms in their ambit. Gross and systematic violations of civil and political rights are usually emphasised and in most cases transfers to state agencies and other persons have been proscribed. Even though instances of such bans have been occurring for many years, the assessment of situations, the scope of weapons and technologies, and questions of termination and compliance continue to cause controversies.

In a nutshell, the real implementation of the EU standards and objectives on trans-boundary arms transactions has shown both encouraging improvements and continuing challenges. Taking the standards very seriously at the national level, denying transfers on the basis of the Code (which has now been adopted as a CCP), the progress on reporting and transparency, and the total bans imposed to repressors and trouble destinations are all important measures which have to be welcomed. However, inconsistency in commitment, application of the principles (including on the arms bans), reporting and lack of transparency are real concerns which deserve a swift response. The efforts of the Union are, however, beyond regional measures, and it would be difficult to have a full picture of the issue without having a look at the EU's role at the global level.

#### **D. EU's Global Contribution**

Three UN endeavours, the Firearms Protocol of 2001 (the Protocol), the UN Programme of Action on small arms of 2001, and the UN arms trade treaty process which was commenced in 2006 could reasonably show the EU's global role in addressing the problem under discussion.

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<sup>65</sup> *The EU Lifts weapons Embargo on Libya*, BBC NEWS, Nov. 10, 2004.



*I. Firearms Protocol of 2001*

The Protocol endorses the seriousness of the illicit manufacture and trafficking of small arms and their security, humanitarian and economic impacts on affected countries, and calls upon states to adopt legislation to criminalise such activities and ensure that they put in place domestic regulations pertaining cross-border sales, marking and tracing of firearms.<sup>66</sup>

The European Commission signed the Protocol in 2001 on behalf of the EU. In 2007, with further studies by, and proposals of, working groups on the subject in line with the terms of the Protocol, the EU Council recommended detailed rules applicable to illicit trafficking of weapons within the EU and called upon Member States to tighten their controls on illegal weapons and their circulation in the context of tackling organised crime and international terrorism.<sup>67</sup> The Protocol has been a legally binding instrument on states Parties as of July 2005. It is notable that while countries such as Italy, Belgium and Poland have ratified the Protocol, Sweden and the UK are only signatories.

The international community must address the illicit arms trade and associated concerns as global problems. In this regard the Protocol would be useful to foster cooperation among states in controlling and punishing illicit arms transfer. However, the Protocol has been criticised for adopting a transnational crime approach and for entirely ignoring the "licit" trade which has been widely accepted, including by EU States, as a major source of the illicit trafficking in weapons.<sup>68</sup>

*II. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in SALW in All Its Aspects*

Similarly, the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons of July 2001 adopted a "Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in SALW in All Its Aspects" (PoA).<sup>69</sup> The PoA recognises, *inter alia*, that the illegal trade in SALW

in all its aspects sustains conflicts, execrates violence,  
contributes to the displacement of civilians,

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<sup>66</sup> Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, G.A. Res. 55/255, U.N. Doc. A/RES/55/255 (June 8, 2001).

<sup>67</sup> Council of Europe, *Proposal for a Council Recommendations*, 2, May 25, 2007, available at <http://register.consilium.europa.eu/pdf/en/07/st10/st10000.en07.pdf>.

<sup>68</sup> YIHDEGO, *supra* note 3, at 105.

<sup>69</sup> See PoA, *supra* note 21.

undermines respect for international humanitarian law, impedes the provision of humanitarian assistance to victims of armed conflict and fuels crime and terrorism.<sup>70</sup>

Consequently, the PoA sets out measures that should be taken at national, regional and global levels. At the domestic level, for example, participant States pledged to "put in place...adequate laws, regulations and administrative procedures to exercise effective control over" manufacture and transfer of SALW in their respective jurisdictions.<sup>71</sup> They also pledged "to cooperate with the United Nations system" in respect of effective implementation of SC arms embargoes, the UNPoA (including reporting on national compliance with the Program) and to render technical and financial help to most affected states.<sup>72</sup> The implementation process embraces not only national reporting but also holding biennial meetings of states (BMS) and Review Conferences (RC).<sup>73</sup>

The EU's contributions to this process could be described as follows: first, it was among the initiators of the process (in effect the adoption of the PoA);<sup>74</sup> secondly, Member States have been reporting their activities in response to the recommendations contained in the PoA;<sup>75</sup> thirdly, the Union has been actively engaged in the BMS and RC;<sup>76</sup> and finally, it has been financially assisting other countries and regions in their efforts to implement the terms of the PoA.<sup>77</sup>

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<sup>70</sup> *Id.* at Preambular para. 5

<sup>71</sup> *Id.* at Part II, para. 2.

<sup>72</sup> *Id.* at parass 32-34. See also Yihdego, *supra* note 51.

<sup>73</sup> The First BMS was held in 2003 and the Second in 2005. The review conference was held in 2006 which was concluded without any common position or declaration.

<sup>74</sup> For example, on April 27, 1999, German, on behalf of the EU, expounded that: "The European Union is strongly in favour of a wide and comprehensive scope for the international conference.... The conference should deal with both the preventive and reactive aspects of the small arms problem and envisage effective ways and means to combat and contribute to ending the destabilizing accumulation and spread of small arms; to contribute to the reduction of existing accumulations of these weapons to levels consistent with the legitimate security needs of countries; and to help solve the problems caused by such accumulations." The Secretary-General, *Report of the Secretary General on the Convening of an international conference on the illicit arms trade in all its aspects*, U.N. Doc. A/54/260 (Aug. 20, 1999), available at [http://disarmament.un.org/cab/smallarms/docs/260\\_ger.htm](http://disarmament.un.org/cab/smallarms/docs/260_ger.htm).

<sup>75</sup> Although national reporting (including from EU States) seems to be declining, some EU states have been reporting since 2002 in accordance with the requirements of the PoA. See The United Nations Office for Disarmament, Conventional Arms Branch, National Reports, available at <http://disarmament.un.org/cab/salw-nationalreports.html>.

<sup>76</sup> During the Second BMS of 2005 to consider the implementation of the PoA, the UK, on behalf of the EU underlined that "the easy availability of SALW act as a major barrier to development' and therefore 'the implementation of the PoA should be further monitored and enhanced.'" *Statement of H.E. Ambassador John*

This process appears wider in scope and relatively more effective in implementation than the Protocol, in that it tends to address the problem "in all its aspects", there is a reporting process to the UN Disarmament Commission and reviewing process every few years. However, it is similar to the Protocol because its emphasis has been on the "illicit" aspect of the issue and doesn't deal with *substantive* restrictions on arms transactions in general. In fact, it may well be considered as a weaker arrangement than the Protocol as it is only a voluntary (or political) commitment.

*III. Arms Trade Treaty Process: General Assembly Resolution 61/89 of 6 December 2006*

However, General Assembly Resolution 61/89 of 6 December 2006 (Resolution) (voted 153-1-23), entitled "towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms", refers to "respect for international law, including international human rights law and international humanitarian law, and the Charter", and acknowledges "the absence of common standards" on the trade in conventional arms as a contributory factor to instability, conflict, terrorism and the displacement of people. The Resolution requested the Secretary-General: (i) "seek the views of Member States on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common standards for the import, export and transfer of conventional arms"; and (ii) "establish a group of governmental experts" to carry out a study on the issue including "draft parameters" for the treaty, beginning in 2008.<sup>78</sup>

Nearly one hundred states (as of February 2008) from various regions responded to the Secretary-General's call based on the Resolution. Germany, on behalf the EU and in respect of the feasibility of the Treaty submitted that:

based on existing responsibilities of UN Member States under relevant international law, there is solid good reason for establishing binding international standards for the import, export and transfer of conventional

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*Freeman on behalf of the European Union, available at <http://www.un.org/events/smallarms2005/memberstates-pdf/UK.pdf>.*

<sup>77</sup>See *id.* at para. 13 (discussing that the report submitted that 'from 2003-2005, the EU allocated in total nearly 6 million euros for actions undertaken by affected countries to deal with' the availability and proliferation of SALW).

<sup>78</sup>G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec.18, 2006), for further details on responses of states including the composition of the Panel; *Note by the Secretary-General*, U.N. Doc. A/63/334 (Aug. 26, 2008).

arms on a global level...A binding universal instrument is not only feasible, but urgently needed.<sup>79</sup>

It was also proposed that the EU Code's criteria including human rights, peace and security, and other international law obligations have to be considered as parameters for arms transfer. It goes without saying that "irresponsible and illicit arms trade" ought to be addressed in the treaty. This is not withstanding states' rights to self-defence, security and other lawful interests, their right to receive and supply arms in particular.

The EU and Member States could thus be considered as the main architect (s) of this process.<sup>80</sup> In September 2006, the UK, in the UN First Committee debate for example argued that:

we must see a step change in efforts towards an international Arms Trade Treaty that will end the irresponsible transfer of arms that fuel conflict and facilitate the abuse of human rights. That is why the United Kingdom, with six other countries, will introduce a resolution in the First Committee to establish a process working towards a legally binding treaty on the trade in conventional arms.<sup>81</sup>

Even so, the US, through its UN spokesman, Richard Grenell, said, on the rejection of the Resolution (and the proposed treaty), that "the only way for a global arms trade treaty to work is to have every country agree on a standard. For us, that standard would be so far below what we are already required to do under U.S. law that we had to vote against it in order to maintain our higher standards."<sup>82</sup> Analysts have questioned the persuasiveness of this argument. For example, Rachel Stohl has observed that "[s]uch statements dooming the ATT [Arms Trade Treaty] before the feasibility study has even begun seem illogical and irresponsible." She added that the US position is legally, politically and practically unjustified.<sup>83</sup> It is interesting that the US, Russia, and China (the latter two abstained during the GA's vote) have now been represented in the Group of Governmental Experts which was established in accordance with Resolution

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<sup>79</sup> *Id.* at Germany's submission, 1-2.

<sup>80</sup> *Id.* at UK submission, 1.

<sup>81</sup> Margaret Beckett's statement, UN First Committee debate on 22 Oct, 2006, available at <http://www.reachingcriticalwill.org/political/1com/1com06/disarmindex06.html>.

<sup>82</sup> Richard Norton-Taylor, *UN vote paves way for arms treaty*, THE GUARDIAN, Oct. 28, 2006

<sup>83</sup> Rachel Stohl, *United Nations to Consider an Arms Trade Treaty – U.S. Opposes*, CDI, Nov. 15, 2006.

61/89 to draft the parameters of the (arms trade) treaty, along with representatives of other twenty-seven countries, including Britain, Germany and France.<sup>84</sup> This was either a good opportunity to embrace the US and others (as major arms exporters) in the process or present a serious impediment for securing consensus among members of the Panel.

To end with, the arms trade treaty process is a major development for several reasons: first, unlike the aforementioned instruments, it is meant to cover both "licit" and "illicit" arms transfer. Secondly, all conventional weapons, with the possibility of excluding some exceptional weapons (such as inhumane weapons), may be covered. Thirdly, it seems that it will not be about regulatory or transparency measures alone, the focus has been on substantive standards. And finally, while the EU (and Member States) has been playing a key role from its inception and the process has been supported by an overwhelming majority of countries, the reluctance of some top arms exporters such as China and Russia, along the objection of the US, remains a real challenge to the success of the process and in effect the EU. It has to be said, in general terms, that considerable progress has been made since the start of the process.<sup>85</sup>

## E. Conclusion

Recognizing the threat posed by the excessive availability and proliferation (including their unregulated international trade) of conventional weapons to human security and development, the EU and Member States have taken important regional and global steps to halt irresponsible and illicit arms transfer. The adoption of the EUJA, Code of Conduct, common positions in regard to arms embargoes and close cooperation among EU States have been considered as significant measures to alleviating this global crisis. These are the main but certainly not the only measures taken in response to the problem.<sup>86</sup> The recently adopted CCP, as a legally binding instrument on Member States, must be praised as an important step forward, although its practical impact and implementation remain to be seen. The Union's attitude towards global legal and political instruments such as the UN Protocol and the UNPoA has been very positive. In particular, the launch of the Arms Trade Treaty process has been perhaps the most significant achievement.

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<sup>84</sup> Algeria, Argentina, Australia, Brazil, China, Colombia, Costa Rica, Cuba, Egypt, Finland, France, Germany, India, Indonesia, Italy, Japan, Kenya, Mexico, Nigeria, Pakistan, Romania, Russian Federation, South Africa, Spain, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland, and United States.

<sup>85</sup> The Panel has submitted its Report in August 2008 (as indicated earlier); the General Assembly, taking into account the Panel's Report decided to establish an Open-Ended Working Group to further consider the matter. See UN Doc A/C/63/L.39, 17 Oct 2008. See [controlarms.org](http://www.controlarms.org), The Arms Trade Treaty Process, <http://www.controlarms.org/en/arms-trade-treaty/the-arms-trade-treaty-process> (last visited Mar. 9, 2009).

<sup>86</sup> The EU has been working, for example, with the Wassenaar and OSCE arms export partners, and on questions of brokerage and marking and tracing of firearms.

The major endeavors of the European Union regarding substantive restrictions and actions are, however, largely political and focused on illicit transactions. There are also serious questions of consistency, transparency and disparity in commitment. While it appears that the EU wishes to resolve the major global issues attached to the problem with other global partners (including Russia, China and the US), the lack of commitment from non-EU countries cannot be a convincing ground for not taking adequate legal measures at the European level. The following small but not insignificant steps may help the EU to step up its leading role in restraining the excessive availability and unrestrained trade in conventional weapons:

(1) The EU Code's restrictions have now been adopted as CCP and thus Member States must act upon this development without a delay. Some of the parameters should be tightened and strictly interpreted in favour of the norms that need to be safeguarded. In this respect important lessons can be learned from the firm and authoritative stance of ECOWAS (and OAS) on the issue. This will not only mitigate the problems associated with uniformity, strictness and transparency on EU arms export practices but will also send an exemplary message to the rest of the world.

(2) The existing framework must address the problems of inconsistency and discrimination in applying and using the Code (now the CCP) and arms embargoes.

(3) Notwithstanding the improvements in openness and reporting on arms exports and deliveries, the EU weapon export regime is not transparent enough to hold Member States accountable to European citizens and other important actors of democracy. The US arms export regime on transparency certainly offers invaluable lessons, especially on actual deliveries of weapons, although this is not to suggest that the US arms export regime is more responsible and restrained than European countries or vice versa.

(4) Arms control initiatives are not usually successful without embracing the main players, either the supplier or recipient of armaments. The EU, in general, and those Member States who have been chosen to serve in the UN Panel (and in the Open-ended Working Group) dealing with the ATT therefore have a responsibility, on the one hand, to positively engage the US, Russia and China in the process - it is important that these top players are embraced in the framework - and on the other hand, to defend or, at the very least, not compromise the core values behind the process on which the overwhelming majority of states have been firm. The new US administration may (or may not) now join the majority camp on this matter, this depends on various political and diplomatic factors, however. And,

(5) Research and further debate is particularly vital on the CCP which replaced the Code of Conduct, with the aim of identifying the strengths and weak spots of the instrument, and its implementation and monitoring mechanisms at the national and EU levels.

These steps imply that the Union has to do more, both practically and diplomatically, to achieving global consensus on the principle that arms may only be traded for lawful and responsible purposes. This must be done without defeating global norms, in particular peace, security, and humanitarian and human rights norms.