The EU’s Role in Restraining the Unrestrained Trade
In Conventional Weapons

Zeray Yihdego
(Research Fellow in Law, Oxford Brookes University, PhD., Dunelm, LLM, Cantab)

Abstract
The proliferation of conventional weapons and their unregulated transfer are today a real threat to peace and security, humanitarian principles and sustainable development in many parts of the world. This is partly because there has been no international regulation which restricts their transfer across borders. Of course these armaments are also useful for lawful purposes, if traded and used responsibly. The EU is not only a major trader in arms but also has been taking some measures which range from adopting guidelines which restrict arms supplies to trouble destinations to co-authoring a UN Arms Trade Treaty (ATT) process which was started in 2006. This paper considers: the nature of the EU measures at the regional level, the effectiveness of the measures and the role the Union has been playing at the global (UN) level in mitigating the problem at issue, in comparison to the actions and attitudes of other regional organizations and some major arms export states. While the EU has made significant progress on this, its measures are mainly of political character, as opposed to the efforts of ECOWAS (and to some extent the OAS). Yet, the Union has made a positive and responsible move to secure a global arms trade treaty regardless of the USA’s strong rejection to the process. The success of the Union’s endeavor will largely depend on addressing various regional and global challenges some of which have been identified in this paper.

Introduction

The excessive availability of conventional weapons, small arms and light weapons (SALWs)\(^1\) 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 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.\(^2\) This is not to suggest, that conventional weapons are not 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

\(^{1}\) The paper is about the physical transfer of conventional armaments, both major and small and light weapons (SALWs), with a focus on the latter. For description of major conventional weapons see The UN Register of Conventional Weapons, GA Res. 46/36L, 1991, Anex. The list include armaments such as heavy mortars, tanks and war planes; for SALW see the UN Report of Group of Governmental Experts on Small Arms, 27 August 1997 (GGE), para. 25. The Report said that ‘Broadly speaking, small arms are those weapons designed for personal use, and light weapons are those designed for use by several persons serving as a crew’.

\(^{2}\) Kofi Annan, ‘Small Arms, Big Problems’, International Herald Tribune (10 July 2001)
other words, their availability and supply have not been subjected to proper (legal and enforceable) restrictions.³

The EU along with the US supplies about 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 400 EU companies in 23 out of 25 EU countries’ are engaged in manufacturing and supplying of SALW, among which Germany, France, Italy, Sweden and the UK are the top arms exporters worldwide.⁴ 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, and arms embargoes as regional responses to the excessive proliferation of weapons and their negative impacts. These include reporting and consultation mechanisms and the adoption of national measures (of legal and political nature).

At international level, EU Member States have been parties to the UN Register of Conventional Weapons (the Register) which was 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 the illicit SALW trade. In summer 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.⁵

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 ECOWAS, OAS and US frameworks). The ECOWAS Convention on small arms of 2006 is the first of its kind in terms of expressly applying global (legal) norms to both the licit and illicit arms trade, as will be elaborated; however, the OAS Firearms Convention of 1997 mainly addresses the problem of illicit trafficking in firearms. 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.

The paper will identify the major challenges of the EU and useful solutions without which it may be difficult to transform and reinforce the role of the EU in the fight against the irresponsible conventional arms sales. The salient features of relevant EU measures are considered next.

The Nature of the Measures: principles

In December 1998 (as 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

---

³ Zeray Yihdego, The Arms Trade and International Law (Hart: Oxford, 2007) 9. 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.

⁴ Helen Hughes, ’Europe’s Deadly Business’, June 2006, at <http://mondediplo.com/2006/06/11armscontrol>. She pointed 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’.

⁵ This is not to deny the EU’s role inter alia: in banning anti-personnel landmines (Ottawa Mines Convention, 1997) and in restricting heavy conventional weapons in Europe (Treaty on Armed Forced in Europe, 1992), among others.
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) of the same year the main purpose of which was to implement the EUJA. These two important (legal and political instruments respectively) constitute the twin pillars of the framework for arms transactions. The substantive and other (such as transparency and international co-operation) aspects of this framework deserve further consideration, with emphasis on the former.

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’. It also aims (as stated in Arts 2 and 3 of the instrument) 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 with appropriate international and regional restrictive arms export criteria, as provided in particular in the EU code of conduct…

The Joint Action further (under Art 4) underlines the commitment of Member States to offer technical and financial support to victim countries in their efforts to disarm and destroy weapons. 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 conflict 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).

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.

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 concerns security based restrictions. Criterion 1(a) and (b) stated 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

---

6 However, there was Common Criteria agreed at the Luxembourg and Lisbon European Council sessions of 1991 and 1992 on the subject.
9 See Arts 3 (d) and 9 (2) of the EUJA; see also, SIPRI at <http://web.sipri.org/contents/expcon/eujointact.html>.
or conflicts in the 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, as stated in Criterion 6(b) requires that: ‘Member States take into account inter \(\textit{alia}\) 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’. This can be termed as a humanitarian law-based limitation on arms export.

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’; ‘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’; paying particular attention if the equipment ‘is intended for internal security purposes’, such assessment to be made on a case-by-case basis.

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 ‘recipient country’s relative levels of military and social expenditure’ (Criterion 8). Finally, preventing diversion of end-use and end-users of exports has been among the criteria for export decisions—this has to be read in 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.\(^\text{10}\)

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 (oper para 12).

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. 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 Organisation of American States (OAS) has only dealt with illicit firearms trafficking, the legal framework of which may well have some restraining impacts on the ‘legal’ trade, however,\(^\text{11}\) as we shall later see.

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

\(^{10}\) Yihdego, \textit{above} at 155; however, other regional organisations (notably the OAS) have taken clearer position than the EU on this issue, as will be discussed further.

\(^{11}\) The \textit{Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials} of 1997 (OAS Firearms Convention), see at \textit{<http://www.oas.org/juridico/English/treaties/a-63.html>}. Whilst 27 American states have ratified the Convention, the US and Canada are only signatories to it.
Convention expressly mentions only the principles of sovereignty and non-intervention (Art 3 (1) and (2)). There is no mention of other core values such as human rights in the Convention unlike the EU instruments.

As a third strength, the Code has spilled over into national law in Austria, Belgium, Finland and the UK and into other policy areas. It is also important to mention that the instruments of the EU (and the 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. 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.

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

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’. 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 (Art ix (2)).

It is encouraging, as noted in recent and earlier (EU) annual reports, however, that actual discussions have been ongoing for some years now to transform the code into [the?] common position of the Union. The Committee on Foreign Affairs of the European Parliament, for example, has ‘reiterated the call for the Code to be legally binding’, the practicality and the details of which remain to be seen.

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 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” of the dangers it referred to. 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

---

17Bauer, above (n 11).
the scope of national interpretation of the criteria'.\textsuperscript{18} The best practice guidelines which were deduced by the Working Group may also mitigate this potential problem.

Even so, other studies and recommendations including the ICRC study on the availability of arms and humanitarian norms of 1999\textsuperscript{19} proposed clearer indicators of 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;\textsuperscript{20} and (d) the unregulated excessive availability of small arms,\textsuperscript{21} 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,\textsuperscript{22} as elaborated in subsequent sections. This is not unique to the EU, the OAS Convention provides the same confidentiality clause (Art XII).

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.

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, issues of actual compliance with the standards and other relevant issues may show both the effectiveness and the shortcomings of the framework discussed above.

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,\textsuperscript{23} others, including France, Germany and Britain, have chosen to adopt the standards in the form of national policy for their arms export decision making.\textsuperscript{24} The UK Arms Control Act 2002 (ACA),\textsuperscript{25} 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, reporting.

\textsuperscript{18}Id. at 4.
\textsuperscript{19}Yihdego, above, at 218-9.
\textsuperscript{20}The EU Code, in preambular paragraph 4, 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’.
\textsuperscript{21}See also UN GGE 1997 Report, paras 34, 35, 36 and 37(a), (b), and (c).
\textsuperscript{22}See EU Code operative para. 4; see also, SAS 2002: Continuing the Human Cost (Oxford University Press: Oxford) 117; see also Yihdego, above, at 257.
\textsuperscript{23}Austria− Legal Gazette I, No 57 of June 2001, para 28
\textsuperscript{24}Yihdego, above, at 128-9.
\textsuperscript{25}For details of the Act see at <http://www.parliament.uk/parliamentarycommittees/quad/quad1106pn09.cfm>
among other things. The reports are to be discussed and reviewed ‘within the framework of CFSP’—this 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 9 annual reports which are 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 5 issued by Belgium, 27 by Germany, 16 by the Netherlands, 43 by the UK and 50 by France. There are countries, moreover, which neither report the details of their exports nor declare any denial.

The quantity and quality of statistical data and policy aspects of reporting have significantly improved through time. The Ninth Report (of October 2007) which is 333 pages long shows both the drastic substantive and reporting developments and the challenges therein. 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—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, the view is widely shared 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, however, 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 before. But it’s a commonsense that the less transparency in government the more (advertent or inadvertent) flaws to occur. 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.

---

30 See e.g. the role of the UK Quadrupartite Committee on Arms Exports at <http://www.parliament.uk/parliamentary_committees/quad.cfm>
31 Note 28, above, at 8; See also, SAS 2002: *Continuing the Human Cost*, p 117.
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, on which controls and influences by governmental and non-governmental actors could be based on the (US) administration’s arms export policy and practice.

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’. This gave rise to a problem because Belgium had 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.

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

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 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’. It was an EU measure only (supported by the US).

Furthermore, in 2002 the European Council has assessed that the Government of Zimbabwe continues to engage in serious violations of human rights. 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.

---

33 SAS 2003, p 113, box 3.3 [emphasis added].
34 Id.
35 See e.g. Parliamentary Quadripartite Committee Report for 2004 and 2005 on Strategic Exports, UK, 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.
37 EU Declaration on China, Council of Ministers, 26–27 June 1989, Madrid [emphasis added], at <http://projects.sipri.se/expcon/euframe/euchidec.htm>
38 Council Common Position (CCP) of 18 February 2002 on Zimbabwe, para 4 [emphasis added].
At least five 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 CCP and therefore legally binding upon all member States. Unlike the Code’s implementation thus these bans have a direct impact at the national level; although the sanction against China was based upon political declaration.

The second concerns the range of human rights often considered in these measures. The phrase ‘brutal repression’ 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. 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. ‘Violent repression of the non-violent expression of political views’ was considered as a motive for the ban against the Federal Republic of Yugoslavia. So, terms like serious, continuous brutal and violent may suggest that the violations and abuses in mind are extreme cases.

The fourth and the most controversial issue concerns the termination of these sanctions. There are three situations where termination of EU Embargoes may occur: (A) 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. This happened in lifting the embargo against the FRY in 2001, for example. (B) 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. 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. (C) A 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, to be 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. 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’. 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 exist between China and the EU, but amongst EU member of the community. 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’. In contrast, the Nordic states, the Netherlands, Britain and Spain are either against or reluctant to

---

39 CCP on China, above, at para 1.
40 CCP on Zimbabwe, above, paras 1 and 4; see also CCP of 16 September 1999 Concerning Restrictive Measures against the Republic of Indonesia, para 1.
41 CCP on Burma/Myanmar, 28 October 1996, No 2; see also Council Regulation on Burma/Myanmar, 22 May 2000, para 1.
44 See, eg CCP on Zimbabwe, above, Art 7; see also CCP on Burma, above, Art 7.
45 Council Reg, above, Art 6.
46 Joint Statement of the 7th EU-China Summit, 8 December 2004, para 7.
47 Id, sub-para 2.
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.\(^{49}\)

In contrast, the EU arms embargo against Libya which was in place since 1986 was lifted in 2004 as part of the deal to abandon by Libya 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’. \(^{50}\) 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. In most cases transfers to state agencies and other persons have been proscribed. Instances of such bans have been occurring for many years. Even so, the assessment of situations, the scope of weapons and technologies, 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, 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.

**EU’s Global Contribution**

Three UN endeavours, the Firearms Protocol of 2001, 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. The Protocol\(^ {51}\) 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.

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.\(^ {52}\) The Protocol is now 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 Firearms Protocol would be useful to foster cooperation

---

\(^{49}\) *Id*, see both articles; see also UKMIL (2002)73 British Ybk Int L., p 827.


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.53

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’54 (PoA). The Programme (in preambular paragraph 5) recognises, *inter alia*, that the illegal trade in SALW

in all its aspects sustains conflicts, excrates violence, contributes to the displacement of civilians, undermines respect for international humanitarian law, impedes the provision of humanitarian assistance to victims of armed conflict and fuels crime and terrorism.

Consequently, the Programme sets out measures that should be taken at national, regional and global levels. At the domestic level, for example, participant States (as enshrined in Part II, paragraph 2 of the PoA) 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. 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 (as stipulated under paras 32-34). The implementation process embraces not only national reporting but also holding biennial meetings of states (BMS) and Review Conferences (RC).55

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);56 secondly, member States have been reporting their activities in response to the recommendations contained in the PoA;57 thirdly, the Union has been actively engaged in the BMS and RC;58 and finally, it has been helping other countries and regions in financial terms in their efforts to implement the terms of the Programme.59

This process appears wider in scope and relatively more effective in implementation than the Firearms 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.

---

53 Yihdego, *above*, at 105.
54 See UN Doc A/Conf.192/15.
55 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.
56 Germany, on 27 April 1999, for example, 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’, at <http://disarmament.un.org/cab/smallarms/docs/260_ger.htm>.
57 Although national reporting (including from EU States) seems to be declining, some EU states are still doing it since 2002 in accordance with the requirements of the PoA, at <http://disarmament.un.org/cab/salw-nationalreports.html>.
58 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’, at <http://www.un.org/events/smallarms2005/memberstates-pdf/UK.pdf>.
59 See e.g. *id.*, para. 13, 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.
However, General Assembly Resolution 61/89 of 6 December 2006 (voted 153-1-23), entitled ‘towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms’, referring to ‘respect for international law, including international human rights law and intentional humanitarian law, and the Charter’, and acknowledging ‘the absence of common standards’ on the trade in conventional arms’, as contributory factor’ to instability, conflict, terrorism and the displacement of people has requested the Secretary-General to: (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 2008. 60

Nearly one hundred states from various regions responded to the Secretary-General’s call based on Res 61/89. 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 arms on a global level...A binding universal instrument is not only feasible, but urgently needed.61

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. Notwithstanding 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.62 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.63

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’. 64

Analysts have questioned the persuasiveness of this argument. For example, Rachel Stohl has observed that ‘Such statements doomng 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.65
It is interesting that the US (Russia and China which abstained during the GA’s vote) have now been represented in the Group of Governmental Experts which was established in accordance with Resolution 61/89 to draft the parameters of the (arms trade) treaty, along with representatives of other 27 countries, including Britain, Germany and France. This could be a good opportunity which may be seized to embrace the US and others (as major arms exporters) in the process and/or a serious impediment for securing consensus among members of the Panel also.

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, the process has been supported by 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.

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 (as the EU has been working, for example, with the Wassennar and OSCE arms export partners, and on questions of brokerage and marking and tracing of firearms). 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, although surrounded by serious challenges, as indicated earlier.

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 has to be transformed into a legally binding instrument (or Council Common Position) without a delay. Some of the parameters should be tightened. 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 and arms embargoes.

---

66 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.
(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 USA 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.

And (4) Arms control initiatives are not usually successful without embracing the main players, either supplier or recipient of armaments. The EU in general and those member States who have been chosen to serve in the UN Panel 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 at best and to not compromise at worse the core values behind the process on which the overwhelming majority of states have been firm. These 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, without defeating global norms, in particular peace and security, humanitarian and human rights norms (which embraces concerns of sustainable development).