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Verifying European Union Arms Embargoes

Verification Research, Training and Information Centre

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NOTE

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SUMMARY

Despite the 16 years of experience the European Union (EU) has in implementing sanctions, it too needs to address problems in ensuring compliance with its arms embargoes. There are a number of improvements that could be made to ensure that EU arms embargo sanctions are effectively drafted, implemented and enforced. One major improvement would be the establishment of an EU arms embargo monitoring system. Such a system could facilitate systematic information exchange among member states on the implementation and enforcement of EU arms embargoes, whether they are adopted autonomously or to duplicate UN arms embargoes. This system could also conduct or facilitate independent monitoring and verification to systematically identify violations of these arms embargoes.

The purpose of this paper is to identify the shortcomings of EU arms embargoes to date, and to suggest improvements in their drafting, implementation and enforcement in order to increase their effectiveness in achieving EU objectives. It also describes how an EU-specific monitoring system would contribute to making arms embargoes more effective.

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VERIFYING EUROPEAN UNION ARMS EMBARGOES

Verification Research, Training and Information Centre

INTRODUCTION¹

There are many reasons why sanctions—coercive measures undertaken by a group of nations in an effort to influence another nation into following international law or submitting to a judgment—may be adopted against a state. One of the most common is to improve the human rights situation in the sanctioned state by targeting the perpetrators of human rights abuses, be they individuals, non-state actors, government elites or the military. They are also used to change the behaviour of a state which is undermining democracy or the rule of law, or which has threatened the security of a particular region. Sanctions have become more effective since the late 1990s, when they were broadened to include arms embargoes, travel bans and financial freezes, as well as prohibitions on trade in lucrative natural resources. These more comprehensive sanctions are often referred to as “smart sanctions”. Arms embargoes are the most frequently applied United Nations (UN) sanction and have become a useful punitive tool in the diplomatic toolbox. However, the UN has routinely failed to establish monitoring systems to assess Member State compliance with sanctions until long after they were imposed. When allegations of violations have become rife, it has attempted to close the verification gap by belatedly instituting such systems.

Despite the 16 years of experience the European Union (EU) has in implementing sanctions, it too needs to address problems in ensuring compliance with its arms embargoes. There are a number of improvements that could be made to ensure that EU arms embargo sanctions are effectively drafted, implemented and enforced. One major improvement would be the establishment of an EU arms embargo monitoring system. Such a system could facilitate systematic information exchange among member states on the implementation and enforcement of EU arms embargoes, whether they are adopted autonomously or to duplicate UN arms embargoes. This system could also conduct or facilitate independent monitoring and verification to systematically identify violations of these arms embargoes.

The purpose of this paper is to identify the shortcomings of EU arms embargoes to date, and to suggest improvements in their drafting, implementation and enforcement in order to increase their effectiveness in achieving EU objectives. It also describes how an EU-specific monitoring system would contribute to making arms embargoes more effective.

ANALYSIS OF THE CURRENT SITUATION

In order to assess the current state of EU arms embargoes and provide a clear framework for recommendations to improve them, a number of questions need to be addressed, namely:

- What is the role of monitoring and verification in making arms embargoes effective?
- What are the current EU and UN arms embargoes, and how do they compare?
- How do EU member states currently implement EU and UN arms embargoes? and
- How is compliance with EU and UN arms embargoes monitored and enforced?

WHAT IS THE ROLE OF MONITORING AND VERIFICATION IN MAKING ARMS EMBARGOES EFFECTIVE?

Monitoring is the means by which information is obtained for verification purposes. It involves collecting information on a state's, or group of states', implementation of an obligation, in this case an arms embargo, in order for compliance to be verified. Monitoring is therefore an essential element of a verification system. A range of actors may be tasked with providing information on arms embargo compliance through a monitoring process, including UN peacekeepers and expert panels established pursuant to a United Nations Security Council Resolution. Other actors may volunteer such information, such as the media, non-governmental organizations (NGOs) and other members of civil society. Additionally, states may be required to submit declarations on their compliance with sanctions obligations for monitoring purposes. To prepare these declarations—as well as for good practice—states should routinely monitor their implementation and enforcement of sanctions obligations. This entails assessing the effectiveness of national laws, export control systems and border control procedures to prevent the import, export or transshipment of illicit military equipment or dual-use goods and technology. A monitoring body may obtain additional information through the collection and analysis of documents, including open source materials. Monitoring can also be undertaken during on-site activities, such as visits, consultations or inspections, although these are often viewed by states as overly intrusive—especially inspections which are conducted under challenging conditions.² Indeed, concerns about the intrusiveness of monitoring techniques may be one reason why the EU has not established an EU verification body or sanctions committee to assess member states' adherence to EU arms embargoes.

The use of remote monitoring methods, such as land-based surveillance (cameras transmitting data), aerial observation aircraft, unmanned aerial vehicles (UAVs) or even space-based surveillance (satellite imagery) may also be appropriate. Verification is the process of gathering and analysing information to make a judgement about a state's compliance or non-compliance with its obligations. It is conducted by designated bodies established pursuant to a framework agreement, treaty or sanction. Examples of sanctions verification bodies include the United Nations Special Commission (UNSCOM) and the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), which were tasked with monitoring, verifying and dismantling Iraq's weapons of mass destruction (WMD) capabilities from 1991–1999 and 1999 onwards, respectively.

Verification should result in a determination of a state's compliance or noncompliance with its legally binding obligations. The response to non-compliance may depend on the nature of the violation. States may be encouraged to rectify any technical or inadvertent breaches, often through technical cooperation and capacity-building activities, if they are willing to comply with sanctions. However, serious violations or deliberate non-compliance may result in enforcement action. The severity of enforcement measures will usually depend on the prevailing political appetite for securing compliance with particular obligations and could range from the withdrawal of benefits to the use of force against the state.

In the case of obligations, which are politically rather than legally binding, the verification process can only assess states' adherence to, rather than compliance or non-compliance with, the obligation. However this process may still involve a range of monitoring mechanisms, such as states' declarations on their implementation and enforcement of sanctions, open source information and remote monitoring (aerial surveillance). As existing EU arms embargoes are not legally binding for member states, any verification process is only intended to find whether states are adhering to the arms embargo. It cannot lead to determination of states' compliance, which

could result in enforcement action. At a minimum, a compliance system should require states to routinely provide information on their implementation and enforcement of arms embargoes to the European Council. Such reports should be made publicly available, to improve transparency and enhance confidence in states' implementation, although particularly sensitive material could remain confidential. As long as the system cannot determine compliance or non-compliance, with appropriate enforcement action for the latter, it must be made an effective monitoring system through which states are encouraged, persuaded and assisted to comply.

EU ARMS EMBARGOES AND UN ARMS EMBARGOES

As of 31 March 2005, EU arms embargoes were in force against Al-Qaeda, Osama Bin Laden and the Taliban; Bosnia and Herzegovina; Burma/Myanmar; China; Côte d'Ivoire; the Democratic Republic of the Congo (DRC); Iraq; Liberia; Sierra Leone; Somalia; Sudan; and Zimbabwe.³ The process for drafting and adopting arms embargoes in community law is as follows. Each embargo is first drafted at the political level by the Foreign Relations Counsellors Working Party (Directorate-General for External Relations) with input from the relevant geographical working parties and the Permanent Representatives Committee, among others. The embargo is then unanimously adopted by the Council as a Common Position, as part of the Common Foreign and Security Policy (CFSP) under Article 15 of the Treaty on European Union (also known as the Maastricht Treaty). The embargo is politically binding on EU member states once the CFSP is published in the *Official Journal of the European Union*.

As of 31 March 2005, UN arms embargoes were in force against Al-Qaeda, Osama Bin Laden and the Taliban; Côte d'Ivoire; DRC (Ituri and North and South Kivu); Iraq; Liberia; Rwanda; Sierra Leone; Somalia; and Sudan (Darfur region and Sudanese government). These embargoes were established through UN Security Council resolutions adopted under Chapter VII of the UN Charter and are legally binding on all UN Member States. The European Council has duplicated, or transposed, certain UN arms embargoes into community law by means of Common Positions and Council Regulations. Duplicated EU arms embargoes are in force against Al-Qaeda, Osama Bin Laden and the Taliban; Côte d'Ivoire; DRC; Iraq; Liberia; Sierra Leone; Somalia and Sudan. The EU has also adopted autonomous arms embargoes when the UN cannot or will not act. For example, there are autonomous EU arms embargoes against Bosnia and Herzegovina, Burma/Myanmar, China and Zimbabwe (see Box 1).

Box 1. Example of an autonomous EU arms embargo

The EU established an arms embargo⁴ against Bosnia and Herzegovina in 1996 due to the belief held by EU member states that such a sanction was still necessary after the UN had lifted its arms embargo against states of the former Yugoslavia under UN Security Council resolution 1021 (1995).⁵ This is an example of an autonomous EU embargo that was not implemented and maintained to mirror a UN action, but instead to promote an EU initiative of securing "arms control reduction to the lowest level" through enhanced confidence-building measures in the Balkans.⁶ EU member states are required to implement a "full-scope" arms embargo, which includes bans on providing spare parts and repairs as well as transferring military technology. Shipments of small arms and light weapons (SALW) to police forces in Bosnia and Herzegovina and equipment for demining activities are permitted.⁷

Several differences can be noted between UN and EU arms embargoes. First, the scope of EU arms embargoes can be wider than that of UN arms embargoes. Second, the EU has sometimes reacted to a crisis before the UN. For example, the EU arms embargo against the entire DRC began in April 1993 while the UN Security Council resolution against Ituri and the North and South Kivu districts of the DRC was not adopted until July 2003. Similarly, the EU arms embargo against Sudan was agreed in March 1994 while the UN Security Council resolution establishing an arms embargo against the Janjaweed and North, South and West Darfur regions of Sudan was not enacted until July 2004. In addition, the EU explicitly included a prohibition on providing financial assistance related to arms to Liberia in Common Position 2004/137/CFSP because this was not expressly stated in UN Security Council resolution 1521 (2003), which established the UN embargo against Liberia. This demonstrates that EU embargoes can have wider scope than UN embargoes.

Unlike Common Positions, which establish arms embargoes, Council of Europe Regulations establish prohibitions on providing ancillary services relating to embargoes and are legally, rather than only politically, binding. In contrast to embargoed military equipment, the implementation and enforcement of ancillary services—which include financial freezes, bans on technical assistance related to arms, bans on finances for the acquisition of arms, denials of export credit and bans on equipment that could be used for internal repression—are discussed by the “sanctions formation” of the Directorate-General for External Relations (DG RELEX).

The sanctions formation is a type of subcommittee where delegations discuss and compare sanctions of all kinds (not just arms embargoes).⁸ In comparison, the Working Party on Conventional Arms Exports (COARM) is where delegations endeavour to harmonize their arms export policies on the basis of the 2000 EU Code of Conduct.

Summary of findings

In total, there are 14 EU and UN arms embargoes in force as of 31 March 2005. One is an autonomous UN arms embargo, two are EU embargoes with wider scope than their UN counterparts, seven are EU arms embargoes that duplicate UN arms embargoes and four are autonomous EU arms embargoes. None of the EU arms embargoes have specific monitoring provisions, although there are diplomatic representatives or EU Heads of Mission who report on implementation of EU crisis management tools in destabilized and embargoed states. These crisis management tools include “forms of political coordination and financial assistance such as declarations, demarches, joint actions and sanctions”.⁹ There have been no moves to supplement these diplomatic missions with EU missions on the ground. However, during the conflict in the Balkans, certain EU member states participated in monitoring the arms embargo and economic sanctions against the former Yugoslavia. Operation Sharp Guard was carried out by the Western European Union (WEU) and the North Atlantic Treaty Organisation (NATO) in the Adriatic. Twelve ships carried out over 6,000 vessel inspections between 1992 and 1995.¹⁰ Six ships were found to be breaking the embargo. Additionally the WEU—in cooperation with Bulgaria, Hungary and Romania—enforced the arms embargo on the Danube, finding 422 infringements in the course of the 6,748 inspections.¹¹ This suggests that the EU is capable of monitoring sanctions in the region, including providing logistical support, when it is politically motivated to do so. Yet, these types of actions may not be appropriate, or politically viable, in regions outside of Europe, especially in the case of monitoring an autonomous EU arms embargo.

Autonomous EU embargoes are particularly significant because the EU has used them as crisis management tools. This has reinforced the notion that the EU has an “identity separate from

the identity of its member states” and, indeed, separate from the UN in some cases.¹² For example, the provision in the 2002 autonomous EU arms embargo against Zimbabwe—prohibiting travel to or from the EU by individuals listed in the Annex of Common Position 2002/145/CFSP who are engaged in activities that undermine democracy, respect for human rights and the rule of law in Zimbabwe—has proven to be a comparatively effective sanction on the Zimbabwe regime.¹³ Therefore, EU arms embargoes are not merely symbolic gestures of disapproval. However, the arms embargo against Zimbabwe has been and will remain an ineffective sanction because that state has an indigenous arms manufacturing capability, including companies such as the Zimbabwe Defence Industry.

Furthermore, due to the absence of an explicit ban on dual-use equipment in the Common Position establishing the embargo against Zimbabwe, the Austrian company, SteyrMotors GmbH, delivered 66 four-wheel drive vehicles to the Zimbabwe National Army in November 2001.¹⁴ According to Amnesty International, this was in direct violation of criteria Two, Three and Four of the EU Code of Conduct.

In addition to the inconsistent treatment of dual-use equipment, there is a lack of consistency in providing cancellation or review dates for embargoes and also for stating whether arms brokering is prohibited. The lack of cancellation or review dates can be explained in part by the nature of the EU duplication process for UN embargoes. EU embargoes that duplicate UN embargoes do not contain a review clause unless the corresponding UN embargo has one. This is evident in the provision of review dates in the UN and corresponding EU embargoes against the Côte d’Ivoire and Liberia. Other duplicated embargoes do not include new review clauses as it is considered a violation of international law to add or amend a provision before the UN does so.¹⁵ Alternatively, as in the case of the embargo against Sudan, the EU may include a review clause in its embargo where none exists in the corresponding UN embargo because the embargoes differ in scope. For example, the UN embargo applies to the Sudanese government as well as certain territories and groups in Sudan, while the EU embargo applies to the entire state. Generally, it is not clear why there are not provisions against brokering in all EU arms embargoes, regardless of whether the UN inserts them in its embargoes or not. Prohibiting arms brokering to embargoed states would seem an obvious inclusion in all Common Positions because it would ensure that weapons were not brokered to embargoed states by citizens of EU member states whether residing in the EU or operating outside of it.

Arms embargoes established by an EU Common Position, unless they are autonomous EU sanctions, often contain the same language and cover the same equipment as the UN Security Council resolution arms embargo that they duplicate. There appears to be a one-way link between EU embargoes and UN embargoes: if the UN adopts an arms embargo, the EU follows suit. However, the EU is not prevented from developing or deepening an embargo when the UN fails to act. This is illustrated by comparing the start dates of EU and UN embargoes on the DRC and Sudan, respectively, as well as the additional prohibitions contained in the EU embargo against Liberia.

HOW EU MEMBER STATES CURRENTLY IMPLEMENT EU AND UN ARMS EMBARGOES

The EU is not as open to discussing the effectiveness of arms embargoes as it is to discussing the efficacy of bans on ancillary services related to arms embargoes. For example, the EU considers it easier to police financial freezes than to monitor member states’ implementation of arms embargoes.¹⁶ The EU regards efforts to harmonize methods for monitoring arms embargoes as outside the scope of community jurisdiction because these relate to member states’ internal

security and defence. Therefore, in order to obtain comprehensive information concerning EU member states' implementation and enforcement of EU and UN arms embargoes, member states must be contacted directly.

There are no EU databases or clearinghouses providing information on the national measures adopted by member states to implement arms embargoes or other means by which they have sought to prohibit illicit arms reaching an embargoed state. Instead, each state must be contacted individually. The forms of national measures to implement embargoes vary greatly from state to state and depend upon whether the state's legal system is common law, as in the United Kingdom, or civil law, as in France and the Netherlands. A common law state must transform its international law obligations into national legislation in order for them to apply in its territory. This is often done by adopting an Act to give effect to UN Security Council resolutions or sanctions generally, followed by secondary legislation (such as a regulation) to give effect to a specific embargo. The regulation can establish the offences committed in breaking the embargo and consequent penalties. In contrast, civil law states have a monist tradition, whereby the adoption of an international law instrument serves to automatically incorporate it into the state's domestic law. The monist tradition can be problematic as offences and penalties are found in the state's penal code and, consequently, may not be directly tied to that state's implementation and enforcement of each individual arms embargo.

National measures can include primary legislation (acts and statutes), secondary or subordinate legislation (regulations), as well as administrative orders, decrees, government orders or rules. In Denmark, arms exports to states under a UN or EU embargo are prohibited by the Royal Decree Act no. 156 of 10 May 1968.¹⁷ Estonia passed the International Sanctions Act in December 2002.¹⁸ All UN and EU sanctions are implemented in Estonia under this Act, in addition to any sanctions established by other international organizations of which Estonia is a member as well as those that Estonia adopts unilaterally. Estonia's clearly stated objective in implementing and enforcing arms embargoes is to monitor or restore peace, security and stability as well as to combat violations of human rights. The International Sanctions Act lays down penalties for violating its provisions, which can result in a fine and up to five years imprisonment.

In Hungary, Government Decree no. 16/2004 of 2 June 2004 serves to implement embargoes in Hungary's legal jurisdiction. The process of licensing arms exports and transshipments undergoes intensive scrutiny. The application is examined to assess the conduct of the state that will receive arms and related material under the licence. This is carried out first by the Hungarian Inter-Ministerial Committee on the Foreign Trade in Military Equipment. Then the Committee on Licensing of Foreign Trade in Military Equipment forms an expert opinion on licensing. This committee comprises ministers from the Prime Minister's office, the Ministries of the Interior, Defence, Economy and Transport, Foreign Affairs and Finance as well as the Director of the Hungarian Trade and Licensing Office (who also chairs the Committee). The Hungarian Customs Service is tasked with enforcing embargoes, and non-compliance with laws dealing with controlled goods is dealt with in Section 287 of the Penal Code. Violators can receive prison terms of up to five years.

Enforcement may be carried out by a variety of different organizations in member states. In Latvia, for example, the Department of Customs and Security Policy conducts investigations and seizures, initiates criminal procedures and provides confidential information to the relevant authorities.¹⁹ The Ministry of Economy undertakes enforcement in Slovakia. In Belgium, police, customs and excise personnel and officers from the General Economic Inspectorate of the Ministry for Economic Affairs all have enforcement responsibilities.²⁰ Most EU countries appear to

have legislation in place to punish violations of export control policy, which can include fines and imprisonment. However, it is not apparent in Slovenia, for instance, what the penalties are for violating an arms embargo or which government ministry enforces sanctions policy. Furthermore, it is difficult to decipher if there are any laws or regulations in place to incorporate arms embargoes into national law in Slovenia.

Most EU member states refer to the 1996 Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies for guidance on which equipment should be controlled through export control lists, including those EU member states which are not party to the Wassenaar Arrangement—Estonia, Latvia, Lithuania and Malta. However the Wassenaar list is only a minimal common standard which can be interpreted differently in national lists of controlled exports. Overall, information on national laws to implement and enforce arms embargoes in EU member states is difficult to obtain for a number of reasons, primarily the lack of a database of national measures on the EU website and the fact that some member states appear to publish this information only in their national languages. An in-depth study assessing the status of EU member states' sanctions legislation, investigations and prosecution of alleged non-compliance and enforcement is needed to close this gap. This information would be useful for developing best practice for proposed and new EU member states and for others requiring technical assistance in implementing and enforcing arms embargoes. It would also enhance transparency over the effectiveness of implementation of arms embargoes by EU member states. Furthermore, it could be a useful confidence-building measure.

MONITORING AND ENFORCING EU AND UN EMBARGOES

Unlike EU arms embargoes, which do not have any monitoring or verification provisions, UN arms embargoes usually contain provisions for monitoring their implementation. Since 1996 the UN has begun to rely on committees to monitor the implementation of sanctions. The committees were tasked with collecting and analysing state reports on compliance and with considering evidence of suspected violations. Due to the ineffectiveness of these committees, an Expert Panel model was instigated. These panels are charged with investigating serious suspected violations or allegations of non-compliance. For example, the March 2000 Fowler Report on violations of sanctions against the União Nacional para a Independência Total de Angola²¹ (UNITA), exposed the direct involvement of Burkina Faso, Togo and Zaire in sanctions-busting.²² The Fowler Report was groundbreaking in its scope and candour.

Many UN monitoring bodies have been considered to be ineffective in the past due to their perceived partiality, longevity—or conversely, brevity—and lack of political will to ensure the success of the sanctions. This has been compounded by insufficient implementation and enforcement of arms embargoes by UN Member States. In order to improve the effectiveness of UN embargoes and deter sanctions-busting, certain NGOs, such as the Bonn International Center for Conversion (BICC), have urged the UN to establish a Sanctions Unit, which would develop monitoring expertise and place trained observers on the ground to monitor embargoes.²³ Encouragingly, former UN Under-Secretary-General for Disarmament Affairs, Nobuyasu Abe, has acknowledged that important progress in the implementation of sanctions and embargoes has been achieved through the establishment of monitoring mechanisms, assessment of sanctions implementation, provision of technical advice to the sanctions committees established by the Security Council and the adoption of measures to punish violators.²⁴ The following section gives an overview of UN monitoring provisions, suggesting specific improvements that could be made in order to limit or deter violations.

Security Council sanctions committees, expert panels and NGOs frequently report that sanctions are ineffective. The reasons given are widespread lack of political will to support enforcement, ineffective border controls between the state under sanctions and its neighbours, and the failure to incorporate arms embargoes into national legislation, often because states do not have the technical or financial capacity to do so. The UN Analytical Support and Sanctions Monitoring Team established pursuant to UN Security Council resolution 1526 (2004) to monitor the embargo against Osama Bin Laden, Al-Qaeda and the Taliban found the embargo to be largely ineffective in its August 2004 report to the Chairman of the 1267 Committee (1999).²⁵ Only 34 Member States reported freezing assets, while no state reported stopping anyone on the 1267 Committee Consolidated list from travelling, or prohibiting arms transfers to them.²⁶

Indeed, it is very difficult to monitor the effectiveness of an embargo against individuals or groups that have no fixed base and no organizational structure. UN Security Council resolution 1533 (2004) established a four-person Panel of Experts to examine the effectiveness of the embargo against armed groups operating in the provinces of North and South Kivu and Ituri of the Democratic Republic of the Congo. The panel reported that the embargo has had little effect due to poor border control, ineffective customs practices and lack of control over airspace. Burundi, Rwanda and Uganda are suspected of violating the embargo by using vessels flying flags of convenience²⁷ for arms shipments or by employing unauthorized ad hoc aircraft movements.²⁸ Therefore, the Panel has recommended “greater regional and international coordination of air traffic control... and greater support for the principle of a joint verification mechanism involving the African Union and the United Nations”.²⁹ The Panel also recommended that the UN Organization Mission in the DRC (MONUC) deploy more troops to monitor³⁰ the border between the DRC and Rwanda and airports as these were not sufficiently controlled to prevent violations.

Furthermore, the Panel recommended that the embargo be extended to apply to the entire country, not just Ituri and North and South Kivu. Similarly to the embargo in the DRC, the arms embargo against Rwanda is consistently violated due to porous borders, inefficient implementation and the lack of enforcement, which is aggravated by sustained regional conflict. Sanctions-busting in Rwanda has further destabilized the region by contributing to illicit arms flows in an area already oversupplied with SALW.

Enforcement can also prove difficult due to the nature of the embargoed weapons, particularly SALW, which are easily concealed, relatively inexpensive, long lasting, easy to use and highly proliferated worldwide. The situation is aggravated by ineffective customs regimes as well as non-existent or deficient control of borders, air space and waterways. Due to these characteristics, SALW are the ‘usual suspects’ that circumvent UN arms embargoes. Thus building the capacity to enforce embargoes is an essential component of technical cooperation, particularly for states that are unable (as opposed to unwilling) to comply even partially with embargoes.³¹ However, improving capacity for implementation is not a panacea, particularly when there is a lack of political will to implement the embargoes. Furthermore, it does not take into account instances where states are unwilling to comply with embargoes due to national interest or support for one side or another in a conflict. Despite these factors, certain embargoes have succeeded in reducing arms flows. For example, the arms embargo against Liberia seems to have been effective in stopping arms shipments to that state, although this may be because Liberia has already obtained the weapons it needs and therefore is not seeking to acquire more. Additionally, it is apparent that the travel ban is being violated and it is unknown whether the UN plan to increase transparency in the Liberian timber and diamond trade is feasible. Without the political will by Liberia or the Security Council to ensure compliance, this UN measure is unlikely to improve transparency. Former Under-Secretary-General Abe, in addition to praising the increased

effectiveness of arms embargoes, has stated the need for increased action to disrupt and prevent further links between illicit SALW trafficking and the exploitation of natural resources, such as diamonds and timber.³²

For autonomous EU arms embargoes, such as the one against Burma/Myanmar, to be effective, the EU must ensure that all 25 EU member states comply, thus making certain that the embargoes are not merely symbolic gestures. For example, an embargo should actually reduce the number of SALW on the ground and provide for the means to measure these reductions. There is no monitoring system whereby the EU collects or analyses reports on states' adherence, or which enables states even to exchange information concerning implementation, enforcement and violations of arms embargoes on a systematic (as opposed to ad hoc) basis. By comparison, all EU member states are also members of the Organization for Security and Co-operation in Europe (OSCE), which has a model for information exchange under the 2000 OSCE Document on Small Arms. Unfortunately, there is great variance in what states choose to report, although the OSCE document is an important confidence-building measure, which is "stimulating the provision of quality information by states".³³ Without a similar model for exchanging information on EU arms embargoes it is difficult to determine when, or if, states have prosecuted violations of arms embargoes and as a result actually halted the flow of SALW to targeted states.

By strengthening autonomous EU arms embargoes through smart sanctions such as travel bans, asset freezes, and halts on trade in valuable resources, it is hoped that such sanctions will impact the government, military or armed groups who perpetrate crimes that lead to destabilization and conflict, instead of the population at large. For example, a bilateral EU and United States oil embargo on Sudan could be very effective. It would be impossible to achieve similar cooperation in the Security Council due, in part, to Chinese interests in Sudanese oil. That said, UN arms embargoes must also be strengthened. This touches upon the argument made by some Member States, academics and NGOs that the Security Council should be reformed. That issue is beyond the scope of this paper but, nonetheless, is an important factor in efforts to strengthen those EU arms embargoes which duplicate UN Security Council resolutions. Due to lack of political will in the Security Council and the vested defence interests of the permanent five Security Council members, it is unlikely that the necessary changes will be made in the near future, if at all. Nevertheless, the EU could strengthen those UN arms embargoes it duplicates without violating international law. In particular, EU arms embargoes that duplicate UN Security Council resolutions could and should contain stricter monitoring and enforcement provisions.

The only guidance for EU member states on their implementation of autonomous EU arms embargoes is contained in two texts: the Common Position establishing the arms embargo; and the 2000 Code of Conduct on Arms Exports. The Code does not refer to monitoring provisions (such as information exchange about national implementation measures adopted, violations of the embargo or decisions handed down by national courts). Yet Common Positions are not legally binding on EU member states and the Code of Conduct is not sufficiently comprehensive to be effective.³⁴ NGOs, such as the UK-based Saferworld, have recommended that the EU develop Common Positions or Council Regulations which explicitly require member states to adopt national legislation to give effect to EU arms embargoes.³⁵ This is particularly appropriate for autonomous EU arms embargoes because member states have no binding UN arms embargo to comply with, only the politically binding Common Position. Furthermore, without any official EU information exchange specifically about arms, there is no "naming and shaming" deterrent against non-compliance, which is a feature of some UN Committees and Expert Panels. For example, according to one analyst the Fowler Report was a "watershed for monitoring UN sanctions" because the Panel attracted a lot of media attention and put pressure on sanctions violators.³⁶

The EU Code of Conduct should be strengthened to require member states to improve national regulation of SALW, in particular to harmonize their national export control policies for SALW. The case study below (see Box 2) highlights inefficiencies within the present EU Code of Conduct, using the example of the highly controversial announcement that EU member states have agreed “in principle” to lift the 16-year arms embargo on China.³⁷

Box 2. China and the EU Code of Conduct

The UK Foreign Minister, Jack Straw, cited the robust measures in the EU Code of Conduct to allay fears over the lifting the autonomous EU embargo against China. Others, including the US, the German Parliament and human rights groups such as Amnesty International and Human Rights Watch, assert that the Code of Conduct is not sufficiently robust, citing its politically rather than legally binding status and its failure to deter transfers of non-lethal and dual-use technologies (such as helicopters, radar and satellite technology) to China, mainly from France, Italy and the United Kingdom.³⁸ When questioned about its transfer of 90 or more used Spey jet engines to China, the United Kingdom replied that such old technology did not pose a threat and that the transfer did not violate the arms embargo.³⁹ These sales are permitted as the 1989 Madrid Declaration on China—which prohibits military cooperation between EU member states and China, in addition to establishing an embargo on trade in arms with China—is only politically binding and is interpreted by EU member states in various ways because it does not have any corresponding CFSP regulation. What has not been addressed is whether the EU arms embargo has actually affected China’s ability to acquire arms.

Furthermore, it is difficult if not impossible to assess whether EU member states are abiding by the embargo, due to the lack of monitoring provisions and the absence of a common interpretation agreed by EU member states to define the exact scope of the embargo.⁴⁰

The Preamble of the EU Code of Conduct states that the Council is:

Determined to set high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers by all EU member states, and to strengthen the exchange of relevant information with a view to achieving greater transparency, [and] Determined to prevent the export of equipment which might be used for internal repression or international aggression, or contribute to regional instability.⁴¹

The continuation of transfers by unregulated brokers and the lack of a coherent EU policy on licensed production overseas (LPO) detracts from these clearly stated goals. These loopholes need to be closed to prevent potential, or actual, violations of EU or UN arms embargoes. Furthermore, in Javier Solana’s 2003 speech on the European Security Strategy, he explicitly mentioned strengthening verification provisions and export controls: “The EU is committed to achieving universal adherence to multilateral treaty regimes, as well as to strengthening the treaties and their verification provisions”⁴², and “Proliferation may be contained through export controls and attacked through political, economic and other pressures while the underlying political causes are also tackled.”⁴³

These statements are important for two reasons. First, they recognize that these issues must be addressed and that they have not been effectively dealt with in the past. Second, they reiterate the EU's determination to promote the strengthening of treaties. These statements should encourage strengthening of the EU Code of Conduct and the Common Position on Brokering and the drafting of appropriate EU legislation to regulate LPO to prevent indirect violations of arms embargoes.

Furthermore, the statements provide impetus for developing a monitoring system for EU arms embargoes in the sanctions formation of the DG RELEX counsellors. This system should facilitate the development and promulgation of best practice on arms embargo implementation and enforcement, proffer technical assistance and monitor states' compliance with arms embargoes. Such guidance and assistance may particularly benefit new EU member states, as well as states hoping to join the EU in the future.

RECOMMENDATIONS

Improvements should be made in the drafting, implementation and monitoring of arms embargoes, particularly those adopted by the EU. The effectiveness of embargoes has been scrutinized over the past decade and numerous recommendations have been developed in comprehensive seminars and conferences such as the German-led "Bonn–Berlin Process" on arms and travel related sanctions (2000) and the "Interlaken Process" initiated by Switzerland on targeted financial sanctions (1999–2000). This section provides specific recommendations for increasing the long-term effectiveness of arms embargoes, seen here as a primary component of smart sanctions. These recommendations are intended to enhance key EU objectives, in particular to improve the effectiveness and efficiency of EU activities focused on SALW. Because the illicit trade in SALW commonly circumvents embargoes, it is clear that strengthening arms embargoes in this way could help mitigate this problem.

DRAFTING EU ARMS EMBARGOES

Only with the recent adoption of the European Council's December 2003 "Guidelines on sanctions" have EU arms embargoes specifically included *at least* all those goods and technologies included in the 2000 Common List of Military Equipment.⁴⁴ Previously, there was no standard list of equipment to guide member states' implementation of arms embargoes as part of a larger sanctions regime. This list should be cited in, or annexed to, each EU arms embargo to stipulate what is to be embargoed. The embargo should also provide explicit definitions of other banned services and materiel, in particular: technical assistance, paramilitary equipment, dual-use equipment and equipment used for internal repression. For example, all Common Positions should use the definition of 'technical assistance' provided in the Council Joint Action of 22 June 2004 concerning the control of technical assistance related to certain military end-uses (2000/401/CFSP). Furthermore, if the Common Position has no cancellation date, it should contain a revision clause requiring member states to discuss the effectiveness of the embargo and a provision mandating states to exchange information on implementation. This could be done every six to twelve months and should not occur less than once every year. This is essential for two reasons. First, sanctions should be revised if they are perceived (or determined) to be ineffective. Second, arms embargoes prove less effective over time as illicit traffickers find ways to circumvent them.⁴⁵

The 2003 Guidelines are an improvement as they provide standard wording for provisions imposing arms embargoes; suggest bans on arms export financing as a means of strengthening arms embargoes; and recommend that prohibitions, including of the supply of brokering services, are included in the wording of a standard provision. They also outline the importance of stating clearly any exemptions to the arms embargo. The Council's ability to stipulate a variety of exemptions to arms embargoes is a positive attribute, as it demonstrates the EU's awareness of the unique situation in each targeted state and illustrates EU arms embargoes' inherent flexibility which, due to the exercise of *realpolitik* by the five permanent members of the UN Security Council, is often unapparent in UN Security Council resolutions.

EU embargoes can complement UN embargoes, but could also usefully extend them to provide more comprehensive sanctions. Therefore, EU duplication of UN arms embargoes should not be seen as lacking merit. However, the drafting of EU arms embargoes needs to be improved. For example, EU arms embargoes should include prohibitions on the sale, supply or transfer of embargoed goods from the territories of member states using their flag vessels or aircraft. This loophole was present for many years before the EU modified the Common Positions on the DRC and Sudan and it is still the case in the Common Positions that established arms embargoes against Bosnia and Herzegovina, Sierra Leone and Somalia. Furthermore, a prohibition on brokering services is often not included in EU embargoes, for example in the embargoes against Al-Qaeda, Osama Bin Laden and the Taliban; Bosnia and Herzegovina; China; DRC; Iraq; Sierra Leone; and Somalia. This enables illicit traffickers to circumvent the embargoes. If the UN Security Council resolution fails to include brokering prohibitions, the EU should broaden the scope of the embargo through a Common Position or Regulation in order to close this loophole.

The EU should then inform the UNSC of its actions and encourage it to take similar action. Member states' implementation of bans on ancillary services is already discussed in the sanctions formation of the DG RELEX counsellors. Questionnaires are distributed to collect information that will assist in developing best practice in these areas.⁴⁶ For instance, best practice guidance for national implementing legislation to halt the financing of terrorists was developed by this group. Prohibitions on ancillary services are strengthened through legally binding EC Regulations. These wield more political clout with member states than arms embargoes that are merely politically binding. Despite Community support for smart sanctions which include financial freezes, travel bans and trade embargoes (especially on arms), this divergence in the way specific elements of embargoes are implemented is a fatal flaw because sanctions regimes are on uneven legal footing at their inception. This can lead to insufficient implementation and a multitude of interpretations, resulting in disjointed and ineffective policy. It can be argued that arms and munitions fall under community jurisdiction as tradable goods. However, subjecting these goods to more binding legislation, such as a Council Regulation, would violate Article 296 of the Treaty Establishing the European Union, which provides that member states retain authority for laws and regulations on the handling of military equipment. An alternative route to strengthen implementation and enforcement of EU arms embargoes is to adopt them through Council Regulations, rather than Common Positions, which would make them as binding as those adopted by the UN.

Drafting recommendations

- Use a standard definition of technical assistance in each embargo that prohibits it;
- Provide standard lists of paramilitary equipment, dual-use equipment and technology and equipment that could be used for internal repression;
- Institute a revision clause for EU arms embargoes (for example, every six to twelve months);

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- Include a ban on financing, or providing financial assistance for, arms exports to the embargoed state in each embargo;
 - Include a prohibition on the sale, supply or transfer of embargoed arms, ammunition and related materiel from the territories of member states using their flag vessels or aircraft in each embargo;
 - Include a prohibition on brokering to the embargoed state in each embargo; and
 - Make arms embargoes legally binding through Council Regulations.

MONITORING AND ENFORCEMENT

EU arms embargoes require member states to implement national measures to prohibit the supply or sale of arms and related materiel of all types, by nationals of member states or from the territory of member states—whether or not the goods originate in their territories.⁴⁷ Of all available measures, legislation is preferable, especially legislation establishing penal sanctions which have a clearly defined offence and penalty. Arms embargoes should explicitly require states to apply these national measures against their citizens (“natural persons”) and companies registered in their territory (“legal persons”) for actions in their territory or abroad (“extraterritoriality”) which would cover citizens or companies involved with broking as well as LPO. There is a notable, even critical, lack of monitoring and enforcement provisions in EU arms embargoes. For example, there is no mandatory reporting or information exchange concerning implementation, violations or decisions handed down by national courts. There is no model or template provided for new member states or those seeking to join the EU on how to address allegations or proven instances of non-compliance with arms embargoes. The voluntary exchange of information is established through vague clauses such as that in the Common Position establishing the arms embargo against the DRC: “Member states shall immediately inform each other and the Commission of the measures taken under this Common Position and shall supply each other with any other relevant information at their disposal in connection with this Common Position”.⁴⁸

It is unlikely that the effectiveness of EU arms embargoes can be truly assessed without the systematic, standard and consistent exchange of information concerning implementation. To rectify this deficiency, the EU could establish a monitoring system for EU arms embargoes which would facilitate meetings of states to discuss and exchange information relating to compliance, or even create a body tasked with assessing state declarations on their implementation and enforcement of autonomous EU arms embargoes and with resolving alleged violations. It would be helpful to establish a transparent, up-to-date and accessible database to collate and categorize information obtained through data exchanges or states’ declarations to assist the process. This would make such information more transparent and accessible, as well as facilitating technical cooperation and capacity-building for implementation. Significantly, it would perform an important confidence-building function, as it would enable member states to demonstrate their compliance with the embargo in an “open, official, systematic and continuing way”.⁴⁹ At a minimum, states should be requested to provide the texts of their national legislation to implement Common Positions for this database. They should also report any suspected violations of the arms embargo and problems encountered during implementation. If states are sensitive to making this information public, access could be limited to the monitoring body for technical cooperation, capacity-building, compliance assessment and enforcement purposes, however this opacity would have a detrimental effect on public confidence in the embargo and possibly the monitoring system itself. It would be hoped that any such restriction was temporary, limited to the purpose of gaining member states’ trust in the effectiveness of the monitoring system.

The mandate of the DG RELEX sanctions formation provides authority for establishing an EU arms embargo monitoring mechanism. According to the Guidelines, the sanctions formation has the mandate to:

- Exchange information on the implementation of restrictive measures with member states, third parties and international organizations;
- Exchange views on the ways and means to ensure the effective management of restrictive regimes, in addition to their humanitarian provisions;
- Contribute to the development of best practice;
- Collect information on alleged sanctions-busting of EU and other international sanctions regimes;
- Assist in evaluating information about implementation and difficulties with implementation of restrictive measures; and
- Examine technical issues related to the implementation of restrictive measures.

Unfortunately, information on “arms” is not discussed in the sanctions formation because it is considered to be outside community jurisdiction. There is a strong argument to require reporting to the sanctions formation on controlled goods, such as WMD and dual-use goods and technology at a minimum, to which information on arms should ideally be added. This could be done in the spirit of UN Security Council resolution 1540 (2004) which requires UN member states to report on steps they have taken to implement and enforce national laws to prevent non-state actors from acquiring, manufacturing, developing or transferring chemical, biological and nuclear weapons and their means of delivery. Moreover, dual-use goods and technology could be discussed in this forum in the spirit of abiding by Council Regulation No. 1334/2000 which established a community regime for the control of dual-use goods and technology.

On 7 June 2004, the Council of Europe requested the EU Secretary-General/High Representative, in association with the European Commission, to develop a framework for more effective use of sanctions. These “Basic Principles on the Use of Restrictive Measures (Sanctions)” are not as in-depth as the Guidelines, but they nonetheless illustrate the Council’s resolve to coordinate its actions on sanctions with the UN, to apply autonomous sanctions on non-state actors and to refine the sanctions system so that it is able to adapt to the new security environment.⁵⁰ This further reinforces the argument that a monitoring system for EU arms embargoes should apply not only to conventional weapons but to all controlled goods. Unfortunately, there is no mention of a regime for monitoring trade in arms once sanctions are lifted—a post-sanctions regime—in the Guidelines or the Basic Principles. There is discussion within the EU on a post-embargo plan for China, which would require enhanced information on exports granted, including the type and number of arms transferred and the end-user. It is envisaged that this information would be shared every three months. It is curious that these provisions are not required for the existing embargoes. Indeed, post-sanction regimes could be developed for both autonomous EU embargoes and EU embargoes which duplicate UN arms embargoes.

Monitoring and enforcement recommendations

- Establish a transparent, up-to-date and accessible database containing information on items such as: the domestic legislation member states have adopted to implement Common Positions (ideally, the legislative text itself with translations in official EU languages); the dates the measures were implemented; how non-compliance or violations of the arms embargo are dealt with; and what problems member states have had with implementation;

- Develop a monitoring system for EU arms embargoes through the sanctions formation of DG RELEX to include information related to chemical, biological and nuclear weapons and dual-use equipment and technology;
- Make information concerning revision meetings transparent and accessible; and
- Establish post-sanction regimes.

ADDITIONAL RECOMMENDATIONS

- Discuss the possibility of implementing secondary sanctions on third parties if they are determined to be violating autonomous EU embargoes;
- Establish a Common Position setting out a requirement for member states to implement the prohibitions established in all autonomous EU embargoes;
- Strengthen the EU Common Position on Arms Brokering to include the establishment of a system of denial notifications for arms brokers similar to the denial notifications found in the EU Code of Conduct. This would function as a “test of good character” whereby arms brokers who have violated sanctions, whether through deals brokered in the EU or when working outside of EU territory, would be refused a brokering licence permanently;
- Negotiate a Common Position that prohibits individuals that have violated sanctions from working in the European defence industry;
- Establish a harmonized and preferably legally binding policy on LPO to prevent indirect violations of embargoes;
- Close loopholes in the EU Code of Conduct and require that information be more transparent;
- Recognize the link between illicit trafficking of humans, drugs and high-value resources and the illicit trafficking of SALW;
- Include illicit SALW trafficking in the remit of the European Police Office (Europol) to strengthen European security; and
- Fund measures to reduce the level of SALW, including verification and monitoring provisions, through the EU’s Development Budget.

Notes

¹ This paper was written by Vanessa Shields, a VERTIC Consultant, who consulted with the following experts in its preparation: Ian Anthony, Rosemary Chabanski, Anne Clunes, Ian Davis, Alun Howard, Oliver Rentschler, Klavs Sniedze, Roy Isbister, Alex Vines and Chris Yvon. It was edited by Angela Woodward, VERTIC’s Acting Director.

² United Nations Institute for Disarmament Research and Verification Research, Training and Information Centre, *Coming to Terms with Security: a Handbook on Monitoring and Verification*, 2003, p. 21.

³ United Nations Security Council resolutions use the alternative spellings “Usama Bin Laden” and “al-Qaida”.

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⁵ Those being the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia; Security Council, UN document S/RES/1021, 22 November 1995.

⁶ Council of the European Union, *Council Common Position of 26 February 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union concerning arms exports to the former Yugoslavia*, EU document 96/184/CFSP, 26 February 1996, para. 2(ii).

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ACRONYMS

BICC	Bonn International Center for Conversion
CFSP	Common Foreign and Security Policy
COARM	Working Party on Conventional Arms Exports
DG RELEX	Directorate-General for External Relations
DRC	Democratic Republic of the Congo
EU	European Union
LPO	licensed production overseas
MONUC	United Nations Organization Mission in the DRC
NATO	North Atlantic Treaty Organisation
NGO	non-governmental organization
OSCE	Organization for Security and Co-operation in Europe
SALW	small arms and light weapons
UAV	unmanned aerial vehicle
UN	United Nations
UNIDIR	United Nations Institute for Disarmament Research
UNITA	<i>União Nacional para a Independência Total de Angola</i>
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UNSCOM	United Nations Special Commission
VERTIC	Verification Research, Training and Information Centre
WEU	Western European Union
WMD	weapon of mass destruction

