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## zur Friedensforschung und Sicherheitspolitik

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### **Is the 1998 Code of Conduct on Arms Exports Adequate to Support the EU's Promotion of Human Rights?**

Assessing the effectiveness of Criterion 2 in curbing the exports of  
small arms to third countries

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## **Abstract**

The adverse consequences for human rights caused by the availability and misuse of small arms have been highlighted by many studies. This research sees it as a matter cutting across three different policy sectors of the EU: notably the promotion of human rights in its foreign policy, the control of arms exports, and the EU actions against the proliferation of small arms.

The EU has recently developed an important framework in order to avoid exports of arms that are likely to be used in violating human rights, the main instrument being criterion 2 of the 1998 Code of Conduct on Arms Exports. And yet, European countries are in fact among the biggest producers and exporters of arms, including of small arms and light weapons. The question is, therefore, how does and how should the EU deal with this delicate equilibrium? Has the Code had an impact in curbing the export of small arms to countries which violate human rights? Is the current small arms export control mechanism adequate to support the EU promotion of democracy and human rights?

Through the analysis of the exports from Belgium, Germany and Italy to thirteen countries selected on the basis of their very low human rights records, this study concludes that criterion 2 of the Code has not been effective. It goes on to explain this conclusion by highlighting the lack of coordination between arms export controls and other EU's policies, as well as the prevalence of other intervening factors, e.g. commercial and strategic interests, over human rights concerns.

Acknowledging that the contradiction deriving from this situation may seriously undermine the commitment of the EU in the field of human rights, this study calls for a reform of the exports control and gives recommendations in order to address the most urgent loopholes.

Keywords: arms export, small arms, European Union, human rights.

## 1. Introduction

Unfortunately, no great stretch of the imagination is necessary to comprehend the adverse impact that the misuse of small arms can have on human rights. Small arms are the most common “tool” for extrajudicial and political killings, and they can be used to intimidate, rape, torture, arbitrarily arrest, forcibly return children as combatant, or force people to flee their homes<sup>1</sup>. An Amnesty International document from 2001, for instance, reported that in at least 100 states, governments and non-state armed forces were using small arms and light weapons to abuse human rights<sup>2</sup>. But the impact of small arms on human rights goes beyond the threat of bodily harm alone. Small arms can indirectly violate a far wider range of rights: from the freedoms of assembly, association, movement, thought, speech and participation in government, to the right to education and other social, economic and cultural rights<sup>3</sup>.

In this scenario, the global weapons trade supplies small arms to many governments that use them to repress their own population. Obviously it is difficult to establish an empirical link between concrete human rights violations and the transfer and trade of arms. Nevertheless, some positive attempts in this direction have emerged in scholarly literature. Blanton found that the import of arms in a country appears “to contribute to repression by making violent political acts more feasible” and may play “a direct instrumental role in the infliction of human rights abuse”<sup>4</sup>.

The largest part of this trade is *legal*. That is, it is carried out by governments or their authorized agents in accordance with both international and national laws. In fact, although small arms have been recently referred to as the “weapons of mass destruction of the poor,”<sup>5</sup> there is not yet a non-proliferation regime for them akin to those for chemical, biological and nuclear weapons. In other words, at the international level there are no provisions which address the danger of transfer of small arms to governments which do – or may – use them to repress their own population and to abuse fundamental rights.

In this context the European Union shows itself as partly changing the rules. Based on its normative concern for human rights, the EU has developed a framework in order to stop those exports which may endanger human rights in the recipient countries. For this very reason, the respect of human rights in the country of destination of European exports of arms – thus also of small arms – has been included among the criteria of the 1998 EU Code of Conduct on Arms Exports. In the meantime the EU also developed a specific policy on small arms which intends to address the problem of their proliferation, focusing primarily on capacity-building programmes directed to helping third countries enhance the control over their spread.

Yet this *theoretical* framework faces several *real* challenges. On the one hand, European countries are among the largest producers and exporters of arms, including of small arms and light weapons. Economic interests, both national and European, drive against the noble aim of a high profile policy on human rights. But trade and business are not the only challenge to a genuine implementation of the Code of Conduct. Arms exports have always been considered a strategic tool of foreign policy and states are still reluctant to restrict their own freedom in this regard. Finally, while the EU seems to have adopted *new rules*, it still has to play a game in which the others – the United States, Russia and China above all – are jealous of the *old rules* and ready to cheat.

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1 International Committee of the Red Cross (ICRC), *Unregulated arms availability, small arms & light weapons, and the UN process*, Background paper, available on <http://www.icrc.org/web/eng/siteeng0.nsf/html/small-arms-paper-250506> (consulted on 10 July 2007)

2 Amnesty International, *Human Rights abuses with small arms, Illustrative cases from Amnesty International reports 2000-2001*, AI Index: POL 34/007/2001, 9 July 2001, available on <http://web.amnesty.org/library/Index/ENGPOL340072001?open&of=ENG-390> (consulted on 10 July 2007).

3 UN Sub-Commission on the Promotion and Protection of Human Rights, ‘Prevention of human rights violations committed with small arms and light weapons’, Preliminary report submitted by Barbara Frey, Special Rapporteur. E/CN.4/Sub.2/2003/29, 25 June 2003, chapter III.

4 Blanton, 1999, p. 241.

5 European Commission, ‘Communication from the Commission on Conflict Prevention’, Brussels, 11 April 2001, COM(2001) 211 final, p. 19. Also the former Secretary General of the United Nations stated that they “could well be described as weapons of mass destruction”, Annan, ‘Millennium Report of the Secretary General of the United Nations’, chapter 3, p. 52. Available via <http://www.un.org/millennium/sg/report/ch3.pdf> (consulted on 08 July 2007).

The question remains, how does and how should the EU deal with this delicate equilibrium between having a peculiar commitment in the field of human rights and traditional foreign policy interests which conflict with it. In other words, how do *idealist* issues find application in what has always been the realm of *realism*? To what extent can processes of Europeanisation highly informed by human rights concern “be expected to impact on member state behaviour in key areas of foreign and security policy”<sup>6</sup>?

Although this problem goes far beyond the matter of arms export controls, the area of small arms exports does seem to be an appealing avenue of inquiry. The contradictions described above demonstrate the differences between the EU and the other players and they allow one to evaluate how closely EU *rhetoric* approaches *reality*.

Tracing this line of analysis, the paper addresses the following concrete questions: has the Code had an effect in reducing exports of small arms to countries which violate human rights? To what extent do the small arms export policies of member states reflect the EU normative concern for human rights and democracy? Is the current small arms export control mechanism adequate to support the EU promotion of democracy and human rights?

This paper is the result of research corresponding to my Master’s Thesis during the period of study spent at IFSH within its program for the EIUC European Master’s Degree in Human Rights and Democratisation. The integral version of the Thesis will be published in Italy with the title ‘Assessing the European Control of Small Arms Exports in the light of the EU’s promotion of democracy and human rights: reality vs. rhetoric’, in *E.MA Awarded Theses for the academic year 2006/2007*, Ricerche, MARSILIO EDITORI, forthcoming ‘08.

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6 Bromley, Brzoska, 2007.

## 2. Methodology of the Research

The study of small arms presents many methodological challenges. The lack of a univocal definition of small arms and the insufficient availability of data are at the same time substantial obstacles for research and a clear indicator of the limited interest among governments and institutions to address small arms proliferation with clarity and rigor. Unfortunately, even though the EU has shown a strong commitment with regards to arms exports controls, it is still very far from providing exhaustive data and coherent information. Therefore, a proper approach to the matter requires careful methodological choices.

First, a cogent definition of small arms is severely lacking. For both methodological and practical reasons, constructing such a definition is a necessary preliminary step to further analysis: depending on the range of equipment that one looks at, in fact, the results can differ significantly.

In the 1998 Joint Action on small arms, the EU limited the definition to weapons designed for military use<sup>7</sup>. Similarly, the scope of the Code of Conduct on Arms Exports is limited only to the military equipment listed in the Common Military List (CML, *infra*, § 3.2.4). At international level, instead, a broader definition was adopted by the 1997 Report of the UN Panel of Governmental Experts on Small Arms. It included all lethal weapons designed for personal use or for use by several persons serving as a crew<sup>8</sup>. In this definition human rights and humanitarian organisations have seen fit to include commercial firearms into the range of small arms as well. They argue that violations of human rights are not limited to the misuse of military equipment – a perspective also endorsed by the UN Special Rapporteur on the prevention of human rights violations with small arms and light weapons<sup>9</sup>, and by most of the research programmes working on this issue.

A main concern regarding the EU definition is the exclusion of the equipment used by police agents and private security companies. This exclusion weakens control over a wide range of equipment that may be used to violate human rights and repress the population. Therefore, I decided to use a broad definition of small arms which is substantially in line with the 1997 UN Panel and many human rights NGOs, and yet not so broad as to include sporting or hunting equipment as suggested by some of them.

### *Operative definition of small arms*

Small arms and light weapons are all weapons, employable by an individual person or a unit of people serving as a crew, which are designed or modified for the purpose of lethal use or repression, including non-military and security equipment, but excluding equipment for sporting and hunting purposes.

While adopting a definition tightly bound to the 1998 EU Joint Action and to the Common Military List would make the analysis more consistent with the institutional framework in focus, the purpose of this study is to carefully explore the origin of the violations of human rights arising from the (mis)use of small arms. One cannot expect the Code to effectively control a broader range of

7 Council of the European Union, 'Joint Action on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons', 17 December 1998 (1999/34/CFSP).1999/34/CFSP. The Joint Action defines "(a) Small arms and accessories specially designed for military use:

- machine-guns (including heavy machine-guns),
- submachine-guns, including machine pistols,
- fully automatic rifles,
- semi-automatic rifles, if developed and/or introduced as a model for an armed force,
- moderators (silencers).

(b) Man or crew-portable light weapons:

- cannon (including automatic cannon), howitzers and mortars of less than 100 mm calibre,
- grenade launchers,
- anti-tank weapons, recoilless guns (shoulder-fired rockets),
- anti-tank missiles and launchers,
- anti-aircraft missiles/man-portable air defence systems (Manpads)".

8 United Nations document, A/52/298, 27 August 1997, par. 23-26.

9 UN Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2003/29, 25 June 2003, par. 4-16.

items than it actually mandates. And yet, limiting the scope of the analysis only to the 1998 definition would underestimate the danger for human rights created by the EU definition itself, attempting to solve on paper a contradiction that is rather significant in reality.

This research looks at the exports of small arms from three European countries (Belgium, Germany, and Italy) to thirteen recipients (Algeria, Belarus, Cameroon, Egypt, Iran, Kazakhstan, Oman, Pakistan, Saudi Arabia, Tunisia, United Arab Emirates, Uzbekistan, Vietnam). The choice of analyzing the exports of Belgium, Germany and Italy was determined mainly by the volume of their exports of small arms and the variety of their national legal framework concerning arms exports. These three countries indeed not only present an interesting mix of different national backgrounds and different dimensions of the defence industry, but they also comprise the three largest exporters of small arms for almost the whole period taken into consideration<sup>10</sup>.

The 13 recipient countries were selected on the basis of their very low human rights scores with the purpose to identify the recipients among the worst violators of human rights. Thus, EU member states would not have reason to doubt about the severity of the violations reported. Both physical integrity rights and civil and political rights have been considered directly according to the text of criterion 2 of the Code which makes explicit reference to the International Covenant on Civil and Political Rights (ICCPR)<sup>11</sup> as well.

I use two different codes concerning the physical integrity rights (the Political Terror Scale, or PTS, and the Cingranelli-Richards scale, or CIRI) and two codes for the civil and political rights (the Freedom House scale, or FH and Polity IV scale), having considered that each of them applies different criteria in scoring the respect of human rights and focuses on different kinds of violations.

In particular, the PTS<sup>12</sup> scores the level of respect/violation of personal integrity rights according to the description given both in the US State Department Country Reports and in the Amnesty International Annual Reports on a scale of 1 to 5 (1 representing secure rule of law, people are not imprisoned for their views and torture is rare or exceptional; a 5 indicating that murders, disappearances, and torture are a common part of life for the whole population). The two independent scores are added, and the final score ranges from 2 (best respect for human rights) to 10 (highest level of violation).

The CIRI scale, proposed by Cingranelli and Richards<sup>13</sup>, uses the same sources of information but distinguishes four different categories of personal integrity rights (torture, political imprisonment, extrajudicial killings and disappearances) and gives a score from 0 to 2 for each of them. The final score ranges from 0 (highest level of violations) to 8 (best practices).

The Freedom House scale<sup>14</sup> is based on a very wide assortment of sources<sup>15</sup> and gives two different sets of scores from 1 (best practices) to 7 (highest level of violation) for both civil liberties and political rights.

The Polity IV<sup>16</sup> scale combines multiple historical sources for each country with reference to a variety of standard sources and considers a wide set of variables to score the level of authority and democracy, in a range from -10 (highest level of authority) to +10 (highest level of democracy).

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10 Small Arms Survey 2003, p. 103, Small Arms Survey 2004, pp. 103-104, Small Arms Survey 2005, pp. 102-105, International Action Network on Small Arms (IANSA), '2006: Bringing the global gun crisis under control', 2006, p.5, available on <http://www.iansa.org/members/IANSA-media-briefing-low-res.pdf> (consulted on 10 July 2007).

11 Criterion 2, Code of Conduct: "(...) and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights". See also Bromley and Brzoska, 2007.

12 Gibney, 2004, *Political Terror Scale 1980-2005*, available on <http://www.unca.edu/politicalscience/DOCS/Gibney/Political%20Terror%20Scale%201980-2005>, (consulted on 20 March 2007).

13 Cingranelli and Richards, 1999, and available on <http://ciri.binghamton.edu/index.asp>. (consulted on 07 May 2007). The scale partly considers civil and political rights too, but only the scores of physical and integrity rights have been used.

14 Available online via <http://www.freedomhouse.org/template.cfm?page=15&year=2005>. (Last accession 07 May 2007).

15 The complete list is available at [http://www.freedomhouse.org/template.cfm?page=351&ana\\_page=336&year=2007](http://www.freedomhouse.org/template.cfm?page=351&ana_page=336&year=2007), (consulted on 05 July 2007).

16 Available online via <http://www.cidcm.umd.edu/inscr/polity>. (Last accession 07 May 2007).



The information gathered from these four codes had been combined in a database where the scores for all 151 recipient countries<sup>17</sup> for the period 1998-2005<sup>18</sup> were reported. To assure a proper comparability, each scale has been transformed into a percentage scale, whereby a score of 0% indicated the highest level of human rights violations and 100% was a sign of the full respect for human rights. Countries with at least three scores below 40% in all the years of the model have been isolated as the most problematic. 35 countries resulted from this selection. Among them, those under EU embargo have been excluded<sup>19</sup> in order to avoid skewing the data. Finally a further selection required a consistent import of small arms in the first year of the timescale<sup>20</sup>, a variety in the geographical distribution of the countries, and differences in the level of economic and political relations with the EU.

Algeria, Belarus, Cameroon, Egypt, Iran, Kazakhstan, Oman, Pakistan, Saudi Arabia, Tunisia, United Arab Emirates, Uzbekistan, Vietnam resulted to be the most significant countries in this regard.

The analysis assumes that the data about the export of small arms reflect the choices of the European policy-makers. Necessarily, this supposes that the many other conditions that may influence the exports, in particular from the demand side, have not changed during the period considered. Although this is a strong assumption, that the number of licences for small arms issued by the European countries has been rather stable in the last years suggests that the demand, at least in general terms, did not change significantly<sup>21</sup>.

The most significant indicators under scrutiny are the relative trend and total monetary value<sup>22</sup> of exports to the countries of concern, both aggregated and disaggregated for each one of the exporters observed. If the given assumptions hold, the effect of Code should appear as a distinguishable decrease in the exports to all (or most of) the countries of concern during the period. The trend for each one of the exporters, moreover, allows to detect, if any, different implementation of the Code at a national level.

The volume of export, that is the number of weapons or ammunition exported, is not considered because the data available is very scarce. Similarly, the number of licence denials motivated by a reference to criterion 2 is not considered sufficiently significant. The data for license denials is both scarce and somewhat biased because in most cases a company that can foresee refusal simply will not submit the application for the licence.

Finally, while acknowledging that a better understanding of the effect of the Code would be assured by extending the analysis to the period previous to its adoption, the scarcity of data for the years earlier than 1998 prompted limiting the timescale to the period 1998-2006. I assume, therefore, that the exports in 1998 still reflect the pre-Code trend.

The lack of data about small arms exports has been so far the main obstacle for scholars who wanted to study this subject, and finding a proper way to research on it has been the main challenge of this study from the methodological point of view. Indeed, while data about conventional arms are generally more exhaustive, data about small arms exports are very poor and this – considering that small arms are the most common tools of repression – is extremely critical from a human rights perspective.

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17 They are all the countries that were importing small arms from the EU in 1998 – including those countries that had no imports in 1998, but had imports in 1997 and 1999. The information was extracted from the NISAT database. The database is available online via <http://www.nisat.org>. (consulted on 24 March 2007).

18 For the year 2005 the availability is partial.

19 Afghanistan, China, DRC, Eritrea, Iraq, Libya, Myanmar, Somalia, Sudan, Zimbabwe. North Korea and Uzbekistan are considered as not under embargo since the embargo started too recently to be reflected on the data about arms trade.

20 This information was extracted from the NISAT database. Angola, Bhutan, Burundi, Cuba, Equatorial Guinea, Laos, North Korea, Rwanda, Syria, Turkmenistan were excluded on the basis of this criterion.

21 The information about licences of small arms is available only since 2003 and refers to the categories ML1-ML3 of the Common Military List. In 2003 the licences issued were 7760, in 2004 they were 7054, in 2005 they were 7353. Source: Sixth, Seventh and Eight Annual Report on the implementation of the Code of Conduct, years 2004, 2005, 2006.

22 All values are in current prices.

Whereas the primary point of reference to assess the effectiveness of the Code should be the EU Annual Report on the implementation of the Code, this resource is short of exhaustive data on small arms. First, only a few countries provide categorized data broken down by type and recipient at the same time (among them Germany, but neither Belgium nor Italy). And, those who do so only started recently. Second, the Report classifies the exports according to the categories of the Common Military List. The CML, however, does not have a specific category for all types of small arms. The only option, then, is to look at the aggregate figure of the categories ML1-ML3 of the CML, even though they do not merge completely with the definition of the EU itself nor with the one adopted by this study.

Although generally richer in information, the national reports on arms export suffer from the same lack of data existing in the EU report. Italy and Belgium do not categorize their data and Germany only began to provide a specific section of its report containing data about export of small arms disaggregated by recipient countries in 2002. Another option often used in studies dealing with arms export policies<sup>23</sup>, the SIPRI Arms Transfers Database, is not appropriate for this study because it does not include data about small arms.

Studies that have been looking at the trend in small arms exports<sup>24</sup>, therefore, have mostly relied on other sources of information such as national customs data, the UN Comtrade<sup>25</sup> or the Eurostat External Trade (COMEXT) database<sup>26</sup>. Paradoxically, as it has been said, national export reports, which are published for reasons of transparency, are less transparent than international customs data once one considers small arms transfers<sup>27</sup>. UN Comtrade and Eurostat Database are in fact the two main sources of the NISAT database already used for the selection of the recipient countries.

It is necessary to acknowledge that Eurostat data, as well as the other national and international custom data, differ significantly from arms export reports. First, the information collected does not merge with the categories considered by the Code. In particular, the three countries do not report their military exports to customs services, which are the only equipment covered by the Code<sup>28</sup>. Furthermore, the transfers reported by customs are not necessarily referring to a sale, but rather instances of provisions for peacekeeping operations or transfers of arms for reparations as well<sup>29</sup>. Customs similarly do not provide with information about the end-user. That is, a transfer from Belgium to Saudi Arabia does not always mean that the equipment ultimately remained in Saudi Arabia. Some countries (as is the case of Belgium) even report a portion of their exports under a “confidential trade” category, which does not disclose the nature of the item. Finally, customs provide information about effective deliveries while export reports mainly inform the value of licences granted.

In recognition of the limitations of each one of the sources mentioned here, adopting an “integrated approach” which combines the information from each of them seems to be the best – if only partial – solution for these deficiencies. This integrative approach provides an able toolset which can then be integrated with the operative definition of small arms given above. In order to be as consistent as possible with this definition, some of the categories reported by Eurostat (and their corresponding categories in the UN Comtrade) were not included in this analysis. In contrast with other more expansive studies<sup>30</sup>, I excluded the categories that referred to sporting and hunting rifles (930310, 930320, 930330, 9303S8, 930521, 930529) and the category 9307 (swords, lances, bayonets).

The categories considered are the following: 930100 (military weapons, incl. sub-machine guns - excl. revolvers and pistols of heading 9302); 930200 (revolvers and pistols - excl. those of heading 9030 and 9040 and submachine guns for military purposes); 930400 (spring, air or gas guns and pistols, truncheons, and other non firearms - excl. 9307); 930510 (part and accessories for revolvers

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23 Bromley, Brzoska, 2007.

24 Jackson, Marsh, Thurin, 2005, Lagrasta, 2005, Holm, 2006, Small Arms Survey.

25 Available via: [www.comtrade.un.org](http://www.comtrade.un.org).

26 Available via: <http://fd.comext.eurostat.cec.eu.int/xtweb/mainxtnet.do>.

27 Small Arms Survey, 2004, p. 101.

28 A partial solution to track flows of military equipment from customs data is to look at the UN Comtrade import statistics of the countries of concern. When possible, this is applied in the next chapter.

29 Small Arms Survey, 2004, p. 101.

30 Small Arms Survey, 2004, Jackson, Marsh, Thurin, 2005.

or pistols, N.E.S.); 930590 (part and accessories for weapons of the headings 9301, 9303, 9304); 930621 (cartridges for smooth-barrelled shotguns); 930629 (parts of cartridges for smooth-barrelled shotguns; lead shot for air rifles and pistols); 930630 (parts of cartridges and parts thereof for smooth-barrelled shotguns, revolvers and pistols); 930690 (bombs, grenades, torpedos, mines, missiles and other ammunitions and projectiles, and parts thereof): 93SSS8 and 93SSS9 (Confidential trade of Chapter 93)

### **3. The EU's Approach to the Exports Control of Small Arms to Countries which Violate Human Rights: A Target Across Three Policies**

The European Union stands out, in the context of the global trade in small arms, for its advanced framework to address the adverse consequences that its exports may have in foreign countries. Among other concerns, the respect of human rights plays a prominent role in the institutionalisation of criterion 2 of the 1998 Code of Conduct on Arms Export. This attention is the result of the unique place that human rights have found in the European foreign policy. Alongside with these developments, the EU has also elaborated a specific focus on small arms which found recent and more complete expression in the 2005 Strategy on small arms.

Three policies – promotion of human rights, arms export control and combat against the proliferation of small arms – are the basis of the European commitment to curb the exports of small arms to countries which violate human rights. An overview of each is given here in order to highlight sufficient information and instruments in order to assess the effectiveness of these efforts in the analysis to follow.

#### *3.1 The promotion of human rights in the EU external action*

The sustained attention of the EU on the promotion of human rights is often seen among scholars and in the EU's own view as *the* feature which distinguishes it from other international actors. In addition to opting for the term “soft power”<sup>31</sup> or for others such as “normative power” or “civilian power”<sup>32</sup> to refer to this peculiarity, there is wide agreement upon the fact that “the EU has gone further towards making its external relations informed by, and conditional on, a catalogue of norms which come closer to those of the European convention on human rights and fundamental freedoms (ECHR) and the universal declaration of human rights (UDHR) than most other actors in world politics”<sup>33</sup>.

The centrality of human rights in foreign policy has also been considered one of the crucial elements of the emerging concept of “human security”<sup>34</sup>, an approach whereby the attention of the foreign policy shifts from the state to the individual<sup>35</sup>. Although to date the EU has not officially incorporated the term in its external action, several scholars consider this idea as already shaping the Common Foreign and Security Policy (CFSP)<sup>36</sup>.

Human rights have been in fact increasingly incorporated in the official discourse of the EU. Progressively, the member states have placed the principles which underpinned their communal relations at the heart of their relation with the rest of the world<sup>37</sup> so that “the promotion of human rights and democracy has become an extremely well integrated element of EU external relations policy”<sup>38</sup>.

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31 Nye, 2002, p. 9.

32 Manners, 2002, Sijursen, 2006.

33 Manners, 2002, p. 241.

34 Kaldor, Martin, Selchow, 2007, p. 283.

35 Ehrhart, 2002, p. 23.

36 Kotsopoulos, 2006, p. 8, Kaldor, Martin, Selchow, 2007, p. 274. Also the European Commissioner for External Relations Benita Ferrero-Waldner referred to this concept as endorsed by the EU. See for instance Ferrero-Waldner, 2005: “Human security stands at the basis of a modern foreign policy. (...) There can be no long term peace and global security without *human* security”.

37 T. King, 1999, p. 314.

38 Crawford, 2002, p. 911.

With the adoption of the Treaty on the European Union (TEU) in 1992, human rights found their place in Art. 11 as one of the objectives of the new born CFSP<sup>39</sup>. Other mentions are found within the spheres of economical, financial, technical and development cooperation with third countries<sup>40</sup> as well. The positive and negative conditionality that the EU applies in its relations with third countries has been considered to be both the effect and the cause of human rights considerations applied to foreign policy-making<sup>41</sup>.

The Union enforces human rights in its foreign policy through a whole set of tools. They range from simple declarations to more binding and concrete common strategies; common positions and joint action; from guidelines on specific human rights themes to dialogues with third countries on human rights; from the inclusion of human rights clauses in all sorts of agreements with external partners to the funding of projects through the European Initiative for Democratisation and Human Rights (EIDHR).

All of these mechanisms exist at a different degree of implementation depending on the region concerned and are particularly forceful in the areas where the cooperation with the EU is stronger. Their role in the EU external policy towards some of the recipient countries considered by this paper will be further explored in chapter 5.

The complexity of the institutional structure of the EU, the cross-pillar nature of some of the areas concerned and the number of actors involved, however, contribute to regular problems of coordination and coherency. It was precisely the concern to ensure that these different instruments were used coherently and effectively which moved the European Commission in 2001 to call for a mainstreaming of human rights<sup>42</sup>. This call was received by the Council Conclusions of 25 June 2001<sup>43</sup> and fully answered by a document in June 2006 in which the Council recommends that all the actors involved make better use of the tools for raising human rights issue with foreign countries in order to achieve a more informed, credible, coherent and effective EU human rights policy<sup>44</sup>.

Among all the sectors in which human rights have been progressively included, the attention will now focus on the arms export control policy developed by the EU.

### *3.2 The increasing attention to human rights in the European control of arms export*

#### *3.2.1 The 1990s and the first connections between human rights and arms exports*

Partly as a result of pressure from human rights and humanitarian NGOs documenting the human costs of irresponsible arms transfers<sup>45</sup>, European governments have grown increasingly aware of the link between arms exports and human rights violations since the early 1990s. Consequently, they have agreed to strengthen their coordination in developing responsible export policies.

The first mention of human rights in connection with arms exports was in the Declaration on Non-proliferation and Arms Exports issued by the European Council in 1991. The document enlisted seven criteria (an eighth criterion was added in 1992) that the member states should consider in

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39 Treaty on the European Union, art. 11.1: “The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be: (...) to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”.

40 *Idem*, art. 177: “Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms”, and 181a (same provision).

41 Gropas, 1999, p. 19.

42 European Commission, ‘Communication on the European Union's Role in Promoting Human Rights and Democratisation in Third Countries’, COM(2001) 252, final, Brussels, 08 May 2001. In the 2002 Annual Report on Human Rights of the European Union defines mainstreaming as “the process of integrating human rights into all aspects of policy decision making and implementation”. Mainstreaming, it is said, “can thus make a significant contribution to the coherence and consistency of the EU's handling of human rights in external relations”, p. 19.

43 [http://ec.europa.eu/external\\_relations/human\\_rights/doc/gac\\_conc\\_06\\_01.htm](http://ec.europa.eu/external_relations/human_rights/doc/gac_conc_06_01.htm).

44 Council of the European Union, Mainstreaming human rights across CFSP and other EU policies, 10076/06, 7 June 2006.

45 Hughes, 2006.

shaping their export policies for all conventional weapons, and the criterion 2 referred to the respect of human rights in the recipient country<sup>46</sup>.

Although it was only a political declaration, it reflected a transformation that involved the whole defence sector following the end of the Cold War. Since the Treaty of Rome, the exports of arms had been left outside of the competencies of the Community, judging the matter to be too important for national security interests and for the concept of sovereignty itself<sup>47</sup>. The same provision has been incorporated in the Treaty on the European Union in Art. 296 and it is still valid<sup>48</sup>. Even if arms export control initially *had* been left outside the effective reach of the EU, the increasing Europeanization of the defence industry would have also required greater harmonisation in export policies<sup>49</sup> just as civilian (and dual-use goods to some extent as well) began to be regulated after the launch of the European Common Market in 1992<sup>50</sup>.

More contingent factors also helped to determine this shift in the minds of European policy makers. In the 1991 Gulf War, European states experienced the “boomerang effect” of witnessing their own arms (which were previously supplied to Iraq) being employed in combat against European soldiers<sup>51</sup>. In this context, the campaigning by a group of NGOs for the adoption of an EU Code contributed to bringing the issue under the spotlight of public discourse<sup>52</sup>.

The Council consequently established in 1991 the Ad Hoc Working Group on Conventional Arms Exports (COARM) with the task of enhancing the implementation and progressive elaboration of the criteria enlisted in the Declaration of Non-proliferation. Since 1995, the European Parliament has been raising the issue of human rights with respect to arms export control in several resolutions adopted, calling for the approval of a code of conduct on arms exports and stressing the importance of such a document for preventing the flows of arms to countries which violate human rights<sup>53</sup>. In addition to the growing emphasis that the CFSP was placing on conflict prevention<sup>54</sup>, committing to responsibility concerning arms exports was increasingly considered a powerful complement to the efforts in tackling illicit arms trafficking as well<sup>55</sup>.

### 3.2.2 *The 1998 Code of Conduct on Arms Exports*

A Franco-British proposal was the starting point for the negotiation between different national positions, intergovernmental interests and NGO pressures which led to the adoption of the Code of Conduct on Arms Export (the Code) in 1998<sup>56</sup>. As Bauer says: “The EU Code was, and continues to be, promoted by a coalition of interests whose members pursue differing or even contradictory objectives and priorities but share the common aim of harmonising arms export policies”<sup>57</sup>.

The Code covers the exports of all conventional weapons. Formally speaking, it is a Council Declaration agreed in the context of the CFSP. Therefore, it entails a political commitment at the inter-

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46 European Council, ‘Declaration on Non-proliferation and Arms Exports’, Luxembourg, June 1991 and European Council, ‘Additional Criteria’, Lisbon, June 1992, both available at [http://projects.sipri.se/expcon/eu\\_documents.html](http://projects.sipri.se/expcon/eu_documents.html) (accessed 27 April 2007).

47 Treaty establishing the European Economic Community, art. 223.

48 Art. 296 (1) of the TEU states: “(.) : (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security; (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; (...)”.

49 Bauer, 2004(a), pp. 130-131, Bromley and Brzoska, 2007, (unpublished manuscript).

50 Bauer and Bromley, 2004, p. 3.

51 Bromley and Brzoska, 2007, and Bauer, 2004(a), p. 131.

52 Bauer, 2004(a) p. 131, Holm, 2006, p. 213, UNESCO Chair on Peace and Human Rights, 1998.

53 European Parliament, Resolution of 20 February 1995, (OJ, C 43, pp. 89-90), ‘Resolutions on a code of conduct on arms exports’ of 15 January 1998 (OJ C 34, 2 February 1998, pp. 163-64) and 14 May 1998 (OJ C 167, 1 June 1998, pp. 226-27), Joint ACP-EU Assembly Resolution on the code of conduct on arms exports, anti-personnel mines and the Ottawa process of 21 of march 1998.

54 Ehrhart, 2002, p. 33.

55 Council of the European Union, ‘Common position on conflict prevention and resolution in Africa’, Decision 97/356/CFSP.OJL 153/1997.

56 For a more detailed report of the negotiation process of the Code see Bauer, 2004(b), pp. 32-34, Davis, 2002, pp. 83-110, and UNESCO, 1998.

57 Bauer, 2004(b), p. 34.

governmental level but it is neither legally binding nor enforceable by the European Court of Justice (ECJ)<sup>58</sup>. It is however the first agreement reached among the members of the EU in the field of conventional arms trade, and it is considered to be the most sophisticated and effective multilateral arms export control instrument in the world<sup>59</sup>. Some member states have entirely (Belgium) or partly (Austria, Finland, UK, Germany) adapted their national arms export legislation to the provisions of the Code<sup>60</sup>. It is however still debated to what extent the Code has led to a better harmonisation of the different legal systems.

Looking closer to the case of the three exporter countries considered by this study, Germany had already implemented strict controls on the export licences before the adoption of the Code. Since the “Weapons of War Control Act and the Foreign Trade and Payments Act” of 1961 the government is legally obliged to deny a permit if it can constitute a threat to peace or may be not in accordance with German responsibilities under international law<sup>61</sup>. “Political principles for the export of weapons” were established in 1971 and included a listing of countries of special concern<sup>62</sup>. In 2000, the criteria of the EU Code of Conduct were integrated in the “political principles”, with a particular emphasis on the respect of human rights in the countries of destination and end-use<sup>63</sup>.

The 1990 adoption of the Law No. 185 in Italy, defined by Amnesty International as a model on the international level for the importance that it attributes to the respect of human rights<sup>64</sup>, somewhat anticipated the debate that took place at the European level later in the 1990s. The law forbids, among other activities, any export of arms to countries where the government is responsible of gross violation of human rights (Art. 1 par. 6d)<sup>65</sup>. Moreover the law introduces a very strict control over end-users and obliges the government to submit yearly a very detailed report to the parliament. In 2007, a list of countries of special concern for their human rights situation was included in the export report. Nonetheless the Italian law only applies to a restrictive category of military equipment<sup>66</sup>, leaving all non-military weapons, which constitutes the 80% of Italian export of small arms<sup>67</sup>, completely unregulated. It has been noted that the Code had a positive effect in this regard because, although it does not cover a number of non-military items, it is more comprehensive than the Italian law. As a result, the Ministries of Foreign and Internal Affairs have started evaluating the compatibility of some civilian arms exports with the Common Military List<sup>68</sup>.

While traditionally Belgium has been regarded as a weak link in the implementation of export controls, since 2003 it has transposed the Code into Belgian law, thus giving to the eight criteria a binding value on a national level<sup>69</sup>. This move was partly a reaction to the scandal of the previous year when the Belgian government authorised an export of 5500 FN Herstal light machine guns to Nepal after Germany had denied the licence due to the widespread violations of human rights and the instability of the country<sup>70</sup>. Some doubt, however, has been cast on the validity of the new law due to a further reform introduced by the special law of 12 August 2003. This reform shifts respon-

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58 See art. 46 of the Treaty on the European Union.

59 UNIDIR, 2005, p. 23.

60 Anders, 2003, p. 5. Bauer, 2004(b), p. 35.

61 Davis, 2002, p. 163.

62 In 2002 Afghanistan, Angola, Bosnia and Herzegovina, Croatia, Cuba, Iran, Iraq, North Korea, Lebanon, Libya, Myanmar, Somalia, Syria and the Federal Republic of Yugoslavia. See Davis, 2002, note 45, p. 168.

63 Davis, 2002, pp. 169-172.

64 Amnesty International Italia, ‘Comunicato Stampa sul disegno di legge 1927’, available via: <http://lists.peacelink.it/news/msg01988.html> (consulted on 23 May 2007).

65 Legge 09/07/1990 n. 185, ‘Nuove norme sul controllo dell’exportazione, importazione e transito dei materiali di armamento’, in Gazz. Uff., 14 luglio, n. 163.

66 Legge 09/07/1990 n. 185, ‘Nuove norme sul controllo dell’exportazione, importazione e transito dei materiali di armamento’, in Gazz. Uff., 14 luglio, n. 163, art. 1 par. 11.

67 Bonaiuti, 2001, p. 103.

68 Holm, 2002, p. 223. See also Camera dei Deputati, ‘Relazione sulle operazioni autorizzate e svolte per il controllo dell’exportazione, importazione e transito dei materiali di armamento nonché dell’exportazione e del transito dei prodotti ad alta tecnologia (anno 2002)’, 27 marzo 2003, p. 29.

69 Chambre des Représentants de Belgique, ‘Loi modifiant la loi du 5 août 1991 relative à l’importation, à l’exportation, au transit et à la lutte contre le trafic d’armes, de munitions et de matériel devant servir spécialement à un usage militaire et de la technologie y afférente’, 26 Mars 2003. (GRIP Data, available on [www.grip.org](http://www.grip.org), consulted on 10 July 2007).

70 BBC News, 26 August 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/2216446.stm](http://news.bbc.co.uk/2/hi/south_asia/2216446.stm) (consulted on 23 May 2003).

sibility in the application of the export controls from federal to regional authorities. Unfortunately, none of the three regions has yet transformed the criteria into a positive legal norm<sup>71</sup>.

Overall, the effect of the Code in harmonising the different legal systems also depends on the criterion considered. With regard to criterion 2, Bromley and Brzoska conclude that “there has been no increase in harmonization with respect to arms exports to countries deemed problematic according to their PTS score”<sup>72</sup>. Conversely Holm finds that a collateral effect of the Code was a drive to a lowest common denominator: loosening the export controls where they were stricter and a strengthening where they were loose<sup>73</sup>.

Beyond national legislative frameworks, other binding documents such as the 2000 Framework Agreement<sup>74</sup> and the 2000 Council Regulation on export of dual-use goods<sup>75</sup> give the Code limited legal status by making reference to the Code as one criterion to be followed for exports of the equipments falling under their provisions.<sup>76</sup> As Bauer writes, the Code has become a policy coordination tool far beyond its scope as a result “of both an unintended ‘spillover’, and a deliberate strategy to develop the Code without revising the document but rather create the political equivalent of ‘case law’. This means that new norms emerge from current practice, rather than vice versa”<sup>77</sup>.

Finally, issues excluded by the Code in 1998 – such as the harmonisation of end-use procedures, EU companies operating in third countries, and the problem of brokering – have been progressively discussed by COARM<sup>78</sup>. For instance, some agreement has been reached on core elements to be contained in end user certificates<sup>79</sup>, and the discussion led the Council to adopt a Common Position in the case of brokering<sup>80</sup>.

### 3.2.3 The Criterion 2 of the Code

An indirect mention to human rights is present already in the preamble of the Code<sup>81</sup>, but the clearest reference to the danger that arms exports create for human rights is its criterion 2. It states that “member states will (a) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression; (b) exercise special caution (...) where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU”<sup>82</sup>. Like the other criteria of the Code<sup>83</sup>, criterion 2 is built upon language already adopted in 1991 and 1992. It differs however in that the text is divided into two sub-categories of varying strength. The language of the former, which conditions *issuance* of an export license on recipient state behaviour, strikes a seemingly sharp chord. In only asking for *special caution* with regard to human rights violations, the second subsection rings rather flat.

In fact, it is a problem which affects the whole Code, whereby two different categories can be distinguished across the eight criteria: for some of the provisions (1, 2a, 3, 4 when there is a “clear

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71 Flemish Peace Institute, 2007, p. 69.

72 Bromley, Brzoska, 2007.

73 Holm, 2006, p. 231.

74 The text of the treaty is available online via <http://projects.sipri.se/expcon/loi/indrest01.htm> (accessed 2 May 2007).

75 See art. 8 of Council Regulation (EC) No. 1334/2000 of 22 June 2000, OJ L 159 (30 June 2000) pp. 1-215

76 Brzoska, 2004, p. 89; Bauer, 2004(a), p. 132.

77 Bauer, 2004(b), p. 35.

78 Bauer, 2004(a), p. 138.

79 Anders, 2003, p. 5.

80 Council of the European Union, ‘Common Position on the control of arms brokering, 23 June 2003, 2003/468/CFSP.

81 Council of the European Union Code of Conduct on Arms Exports, document 8675/2/98 Rev 2, Brussels, 5 June 1998. Preamble: “Determined to prevent the export of equipment which might be used for internal repression”.

82 Council of the European Union, European Union Code of Conduct on Arms Exports, document 8675/2/98 Rev 2, Brussels, 5 June 1998, p. 4.

83 The other criteria concern: (1) respect for the international commitments of member states, including international and EU embargoes and non-proliferation treaties, (3) the internal situation in the country of destination, (4) preservation of international peace, security and stability, (5) the national security of the member states and of the allied countries, (6) the behaviour of the buyer with regard to the international community, (7) the risk of diversion or of re-export of the equipment from the buyer country and (8) the compatibility of arms export with the economic and technical development of the recipient country.

risk”), the Code makes obligatory for the state to deny a licence; for others (2b, 4a-d, 5, 6, 7, 8) it only requires consideration of the criteria before authorization of an export licence<sup>84</sup>. Furthermore, even in the case of criterion 2 (a) ( when the Code calls for a denial of the licence) much will depend on the recognition of a “clear risk of internal repression”<sup>85</sup>. The text of the Code thus leaves wide room for interpretation with regard to the respect of human rights in the country of final destination. Partly to address this problem, COARM has worked on the elaboration of a User’s Guide to the Code,<sup>86</sup> which it published for the first time in 2003. In its latest update in 2006, the User’s Guide included also a section of “Best practices for the interpretation of criterion 2”<sup>87</sup>.

According to the Best Practices, member states should consider on a case-by-case basis the current and past record with regard to respect for human rights of both the end-user and the recipient country in general. This includes the policy line of the government, the effective protection of human rights in the constitution, human rights training of law enforcement agencies, prosecution of human rights violations and the existence of independent monitoring bodies<sup>88</sup>. The Best Practices also give a list of indicators that should be taken into consideration in the assessment, including the implementation and ratification record of relevant international and regional human rights instruments<sup>89</sup>, the degree of cooperation with international and regional human rights mechanisms and the political will to discuss domestic human rights issues in bilateral or multilateral dialogues like the ones held by the EU.

After shedding light on the concept of interpretation of the term “serious” violation, the Best Practices address the aforementioned ambiguity of the term “clear risk”, noting that “the combination of ‘clear risk’ and ‘might’ in the text (...) requires a lower burden of evidence than a clear risk that equipment will be used for internal repression”<sup>90</sup>. The final remarks implore states to properly consider the nature of the equipments, the legitimate need of the end-user for specific equipment and the risk of diversion<sup>91</sup>.

As it is still too early to determine if the adoption of this Best Practices will improve the implementation of criterion 2, it must be noted that this study focuses on a timeframe in which they were not yet adopted.

### *3.2.4 The Operative Provisions and the Annual Reports*

The operative provisions comprise the second part of the Code and they are vitally linked to the Code’s efficacy. Because the Code is not a legally binding document, these operative provisions are effectively the primary means of enforcing the Code criteria<sup>92</sup>.

The consultation mechanism as outlined by provision 3 obliges a member state to communicate the reason for the denial of a licence to the others. In particular, it requires any state that wants to authorize an export within three years after a licence for the same transaction has been denied by another state to consult bilaterally<sup>93</sup> with the latter. Eventually the state is free to grant the licence, but it is clear that “the consultation mechanism means that an undercut carries a political price, and has thus added political costs to be factored into the decision-making”<sup>94</sup>.

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84 Bauer, 2004(a), pp.133-134.

85 Holm, 2006, p. 214.

86 Council of the European Union, ‘User’s Guide to the EU Code of Conduct on Arms Exports’, updated version, Brussels, 18 December 2006, 16440/06.

87 Calls in this directions were present, for instance, in the Seventh annual report, (2005/C 328/01), p. 4.

88 Ibid., p. 25.

89 A list of the main international and regional human rights instruments the member states should consider is included as an annex to the Guide (p. 31-32).

90 Ibid., p. 27.

91 Ibid, p. 28.

92 Holm, 2006, p. 215.

93 Since 2000 the member states agreed to share ‘information on the undercut decision not only (as specified in the operative provisions) with the State responsible for the relevant denial, but, in the context of COARM deliberations, with all Member States’. See Council of the European Union, ‘Third Annual Report according to operative provision 8 of the European Union Code of Conduct on Arms Exports’, OJ C 351 (11 December 2001), p.4.

94 Bauer, 2004(b), p. 41. The political price has been evident in the case concerning the export from Belgium to Nepal in 2002 to which we referred above, leading even a minister of the Belgian government, Magda Aelvoet, to resign.



In June 2000 the Council agreed on a Common Military List according to operative provision 5 to which the Code is applied and a separate list concerning dual-use items. However, although the aim of the CML was to reflect “current international security and human rights concerns”<sup>95</sup> and notwithstanding the calls from the EP not to limit to the lowest common denominator<sup>96</sup>, non-military security and police equipment were excluded from the List and therefore from the scope of the Code<sup>97</sup>.

According to operative provision 8 the national reports on arms exports were meant to circulate only confidentially among the member states, but thanks in part to the pressure of the European Parliament, NGOs and the Finnish presidency, they have been collected under a consolidated version publicly available since 1999<sup>98</sup>. The Annual Report contains not only information about the amount of exports in all conventional arms, but it also mentions discussions, consultations and decisions held within the COARM. The quantity and the quality of the data included in the Annual Report have increased over the years. However, the document ultimately depends on the quality of the national reports themselves: the lack of uniformity in the national standards of reporting has created large amounts of muddled data that is not always comparable. The confusion has been progressively addressed<sup>99</sup> and a measure of this improvement in the document is appreciable in that it has grown from the 4 pages in its first year to the 346 pages of the Eight Annual Report issued in October 2006. This progress aside however, as already discussed in the methodological remarks, the problem of data availability is far from being solved.

A final mention should be reserved for operative provision 11, which states that European member states will encourage other arms exporters to subscribe to the principles of the Code. Besides the countries which entered the Union in 2004, for which adherence to the Code criteria was a *sin qua non* for accession, similar efforts have also been directed at other countries such as Turkey, Croatia and Canada<sup>100</sup>. In this light one can better appreciate the ‘Declaration by the European Union and the United States on the Responsibilities of States and on Transparency regarding Arms Exports’ of December 2000<sup>101</sup> and other similar efforts undertaken in international fora<sup>102</sup>.

### 3.2.5 The criticism about the effectiveness of the Code

Notwithstanding the progress in European control of arms exports, concerns about the effectiveness of the Code with regards to human rights violations have been raised by several actors. Critics particularly stress the absence of legally binding measures.

A 2004 report by Amnesty International found that EU weapons were being exported to countries where the EU standards for democracy and human rights were clearly not respected.<sup>103</sup> In the same year, the European Parliament stressed that “EU human rights policies have been undermined by

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95 Council of the European Union, ‘1st Annual Report in conformity with Operative Provision 8 of the European Union Code of Conduct on Arms Exports’, 1999/C 315/01, p. 2.

96 European Parliament, ‘Report on the Council’s 1999 Annual Report on the Implementation of the EU Code of Conduct on Arms Exports’, 18 July 2000, A5-0211/2000, p. 15.

97 Since 2001 the Commission have been working on a proposal for a Community Regulation which would create a third list covering security and police equipment. See Council of the European Union, ‘Fourth Annual Report according to operative provision 8 of the European Union Code of Conduct on Arms Exports’, 11 November 2002, 13779/02, p. 4.

98 Bauer and Bromley, 2004, p. 5.

99 Ibid., 2004, p. 5, Bauer, 2004(a), pp.141-143.

100 See also Anders, 2003, p. 5, and Bauer, 2004(b) p. 41.

101 Available on <http://www.sipri.org/contents/expcon/euus2000.html/view?searchterm=european+policies> (consulted on 28 June 2007).

102 For instance in the framework of the 2001 ‘UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects’: ‘Note verbal transmitting the text of the EU Plan of Action’, 28 December 2000, A/Conf. 192/PC/21, Discussion paper, 27 July 2000, A/Conf. 182/PC/18, ‘Elements for consideration in the preparation for the Conference’, 10 March 2000, A/Conf. 182/PC/6. Important, also, have been the resolutions of the European Parliament promoting the negotiation of an Arms Trade Treaty: European Parliament, ‘Resolution on small arms’, 13 June 2002, OJ C 140 E, p. 587, Resolution of 19 March 2004, OJ C 69 E, p. 136, Resolution of 26 May 2005, P6\_TA(2005)0204 and Resolution of 21 June 2007, P6\_TA-PROV(2007)0282.

103 Amnesty International, *Undermining Global Security: the European Union’s arms exports*, 2004, Index AI: ACT 30/003/2004, available on <http://web.amnesty.org/library/Index/ENGACT300032004> (consulted on 10 July 2007).

(...) Member States systematically not maintaining a restrictive application of the EU Code of Conduct on Arms Exports”<sup>104</sup>.

The European Parliament has also annually noted that a strict arms export control regime is critical to the fundamental principles underlying the EU’s external policy<sup>105</sup>. Calls to enforce the system with special attention to human rights have been present in all the European Parliament resolutions on the Annual Report. They press for more stringent controls, for legally binding provisions, and for greater transparency<sup>106</sup>. Similar proposals for the adoption of a legally binding document have come also from human rights NGOs.

The major obstacles against such a progress are, however, worthy of note. First, a transformation of the Code into European law would require a revision of article 296 of the TEU, any radical change of which seems unlikely in the near future<sup>107</sup>. The transfer of such national prerogatives to supranational authorities can only be the last stage in a long evolutionary process preceded by various transitional stages. Each attempt so far has produced protests from both industrial groups and from governments with a strong defence industrial base to protect<sup>108</sup>.

Second, the question carries a strong political meaning which has been particularly emphasized by some countries. The clearest example in this sense has been the request forwarded by France that approval of a binding document be dependant on removal of the EU arms embargo to China<sup>109</sup>.

The question thus remains quite far from resolution. It would appear that Bauer’s argument in 2004 is still valid today: “At this point in time, a step-by-step integration of the criteria into national norms and laws may be more feasible than a transformation of the Code into European law”<sup>110</sup>.

### 3.3 *The EU and small arms: from the 1998 Joint Action until the 2005 Strategy*

While the arms export control policy of the EU does address the export of small arms among all other conventional weapons, a more specific policy focus on small arms has been developed by the EU since 1998. It aims at tackling both the proliferation and misuse of small arms on the one hand, as well as helping third countries in dealing with the problem on the other<sup>111</sup>.

In 1998, a few months after the adoption of the Code, the first “Joint Action on the European Union’s contribution to combating the destabilising accumulation and spread of small arms and light weapons” was adopted. It owed much to the preceding 1997 “Programme for preventing and combating the illicit trafficking in conventional arms”, which created a legally binding document while narrowing the scope of action only to small arms. The Action established the EU’s definition of small arms (supra, Chapter 2) and provided for financial and technical assistance (a) to combat the illicit trafficking into EU territories, (b) to provide capacity building in this sector to other countries, and (c) to develop measures to reduce the existing stockpiles of small arms<sup>112</sup>. Identical in the

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104 European Parliament, ‘Resolution on human rights in the world in 2003 and the European Union’s policy on the matter’, 22 April 2004, P5\_TA(2004)0376, paragraph 30.

105 For instance, European Parliament, ‘Report on the Council’s 1999 Annual Report on the Implementation of the EU Code of Conduct on Arms Exports’, 18 July 2000, A5-0211/2000, p. 12: “In the field of arms exports this consistency [between protection of human rights in EU’s external action and EU’s commercial policy] cannot be said to exist fully, which weakens the CFSP and diminishes the credibility of a European Defence policy”

106 The EP resolutions and reports on the Annual Report are available at <http://www.nisat.org/EU/European%20Parliament/European%20Parliament%20and%20Small%20Arms.htm> (consulted on 10 July 2007). See also D’argenzio, ‘Armi, l’Europarlamento vuole il Codice’, in *Il Manifesto*, 18 January 2007.

107 Bauer, 2004(b), p. 39, Davis, 2002, p. 109.

108 Davis, 2002, p. 110.

109 “France blocking plan for EU code on arms exports”, 18 January 2007, [www.euobserver.com](http://www.euobserver.com) (consulted on 20 February 2007).

110 Bauer, 2004(b), p. 39.

111 European Commission, ‘Small arms and light weapons, The response of the European Union’, 2001, p. 7.

112 Council of the European Union, ‘Joint Action on the European Union’s contribution to combating the destabilising accumulation and spread of small arms and light weapons’, 17 December 1998 (1999/34/CFSP). Since 1998 eighteen joint action concerning CFSP small arms programmes have been taken to start or continue programmes in various countries and regions. For a complete list see UNIDIR, 2005, pp. 37-39.

objectives and structure, a successive Joint Action was adopted in 2002 with the purpose of including ammunition in the scope of action<sup>113</sup>.

It should be observed, however, that the concern for human rights is less evident in the EU policy on small arms than in the arms export control policy. While small arms are seen as a threat to security and stability in third countries for their contribution to the *outbreak* of armed conflict, they are not explicitly acknowledged as a potential tool to violate human rights in peace time. This is reflected by the fact that the largest portion of small arms assistance programmes are implemented within clear frameworks for conflict resolution such as peace-building or Disarmament, Demobilisation and Reintegration (DDR) programmes in *post*-conflict situations<sup>114</sup>.

Over the years small arms actions have in fact become a part of the broader conflict prevention policy and have been integrated into relevant cooperation frameworks. The EU Development Council, for instance, stressed in 1999 the importance of including the small arms issue in the political dialogue with African, Caribbean and Pacific (ACP) States and other development cooperation partner countries of the EU<sup>115</sup>. Moreover, the mention of small arms in Art. 11 of the Cotonou Agreement made possible the launch of a number of projects relevant to controlling the illicit spread of small arms<sup>116</sup>. The focus on conflict prevention became even clearer with the mention of small arms as the “weapons of mass destruction” of the poor in the 2001 European Commission communication on Conflict Prevention<sup>117</sup>.

A better understanding of the means of effective policy on small arms was reached by the 2005 EU Small Arms Strategy, which aims at approaching the proliferation of small arms in all its aspects. The document stresses that any reactive strategy has to be supplemented by preventive actions which tackle the illegal arms supply and strengthen the controls on arms exports<sup>118</sup>. The strategy acknowledges that the control on exports requires a more comprehensive approach based “on the recognition, formulated in the ESS [European Security Strategy], that human security and human development are interdependent”<sup>119</sup>.

Still, not even the Strategy considers the danger of small arms outside the context of conflict or post-conflict situations, and it reiterates the same understanding of small arms proposed by the Joint Actions<sup>120</sup>. Looking at the Strategy from the perspective of arms export controls, finally, it has to be noticed that it did not go far enough as to redress the limits that are contained in the 1998 definition of small arms.

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113 Council of the European Union, ‘Joint Action on the European Union’s contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP’, 12 July 2002 (2002/589/CFSP).

114 UNIDIR, 2005, pp. 37-39.

115 European Commission, ‘Small arms and light weapons, The response of the European Union’, 2001, p. 17.

116 UNIDIR, 2005, p. 30, and Cotonou Agreement (ACP/CE/en) art. 11.

117 European Commission, ‘Communication from the Commission on Conflict Prevention’, Brussels, 11 April 2001, COM(2001) 211 final, p. 17.

118 Council of the European Union, ‘EU Strategy to combat illicit accumulation and trafficking of Small Arms and Light Weapons (SALW) and their ammunition’, Brussels, 13 January 2006, 5319/06, par. 14 and 15 (a).

119 *Ibid.*, par. 17.

120 *Ibid.*, par. 10.

## 4. The Exports Control in Practice: Is the Code of Conduct Effective?

### 4.1 Preliminary information

Several studies have already pointed out that the application of the Code has been different depending on the country, the situation and the criterion concerned<sup>121</sup> – this is also confirmed by the differences in the frequency with which each criterion has been invoked for the denial of a licence<sup>122</sup>.

While no research to date has specifically addressed the effectiveness of criterion 2 in curbing European export of small arms to countries which violate human rights, some studies do provide important information. According to Bromley and Brzoska, there has been a significant policy change after the adoption of the Code with regards to export of conventional arms to countries with very low human rights scores. As they claim, “those states with very bad human rights records had, on average, significantly lower shares in arms exports from EU member countries after the adoption of the EU Code”<sup>123</sup>. Whereas they found this trend in relation with gross human rights violations (physical integrity rights), the same trend was not evident when they looked at the respect of political and civil rights. But, their analysis did not take small arms into account. Hence, although we could expect a trend in small arms exports consistent with their findings, this is not necessarily endorsed by their analysis.

Other studies focusing more specifically on the efficacy of the Code in controlling the export of small arms find rather divergent trends. None of them, though, looked exclusively at criterion 2. Holm, for instance, analyses the impact of the Code on the national legal frameworks of three European countries and found significant differences in exporting trends, established national frameworks, and the effects of Europeanisation of the Code<sup>124</sup>. Jackson, Marsh and Thurin, on the other hand, analyze the application of the Code with regard to armed conflict situations and find that, compared to the strong language of criterion 3, the observed effects are at best marginal. They further conclude that “the introduction of the Code has certainly not stopped the export of arms to countries in which there is protracted civil war”<sup>125</sup>. These projects, moreover, exclusively use Eurostat data as source of information about arms exports. As it has been pointed out in the methodological section, customs data do not merge with the scope of action of the Code and do not usually report information about military equipment.

Starting from these significant but not exhaustive findings, and integrating customs data with all other sources available, this chapter analyses the exports from Belgium, Germany and Italy to the thirteen countries of concern.

### 4.2 The customs data

Putting the first piece of a jigsaw puzzle into place is always a tricky game. The difficulty is that one is forced to select one tiny piece from a myriad of possibilities that is nevertheless indicative of the greater picture. In the case of this study there is a similar hazard, most notably the prospect of looking at some data trends that are actually inconsistent with small arms exports on the whole. Taking a lesson from the jigsaw puzzle, a practical starting point would be to find “the four corners and the border” of the data at hand: the Eurostat data on the exports from Belgium, Germany and Italy to the countries of concern. Of course, it only provides a broad image in which the colours and the actors are still a blur; but it does frame the area of interest adequately enough to enable further analysis.

Table 4.1 and graph 4.1 show the value of the aggregate exports from each exporter to all the recipients in the period 1998-2006.

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121 See Jackson, Marsh, Thurin, 2005, Bauer, 2004(b), p. 40, Holm, 2006, Bromley, Brzoska, 2007.

122 Bauer, 2004(b), p. 41, reports that criterion 2 has been invoked less frequently than others.

123 Bromley, Brzoska, 2007.

124 Holm, 2006, p. 229.

125 Jackson, Marsh, Thurin, 2005, p. 74.

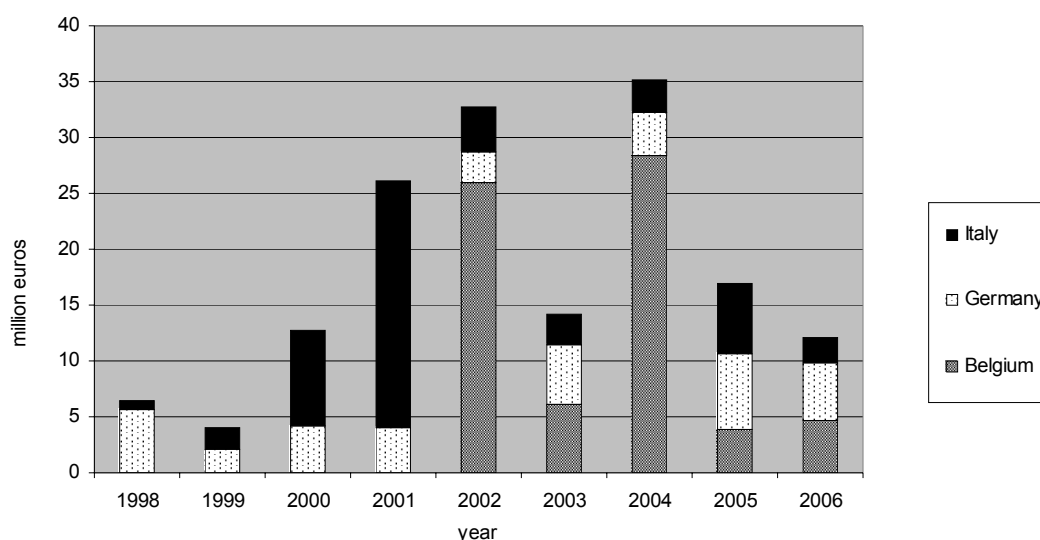
Table 4.1: Exports from Belgium, Germany and Italy to the countries of concern, 1998-2006  
(Values are in euro)

	1998	1999	2000	2001	2002	2003	2004	2005	2006
<b>Belgium</b>	nd	11.185	nd	5.675	26.014.140	6.101.575	28.462.336	3.802.063	4.662.749
<b>Germany</b>	5.566.630	2.126.593	4.257.094	4.011.227	2.669.205	5.402.880	3.862.518	6.831.726	5.207.744
<b>Italy</b>	946.515	1.939.735	8.486.430	22.130.604	4.093.214	2.624.075	2.836.914	6.296.869	2.146.416
<b>TOTAL</b>	<b>6.513.145</b>	<b>4.077.513</b>	<b>12.743.524</b>	<b>26.147.506</b>	<b>32.776.559</b>	<b>14.128.530</b>	<b>35.161.768</b>	<b>16.930.658</b>	<b>12.016.909</b>

Source: Eurostat COMEXT database (accessed 28 May 2007).

Notes: (a) No data are available for Belgium in 1998 and 2000, and very poor data are available in 1999 and 2001. Therefore the total for the period 1998-2001 is certainly underestimated. (b) The extremely high amount of export from Belgium in 2002 largely consist of “confidential trade” exports to United Arab Emirates, and in 2004 to Saudi Arabia. From a double-check in the UN Comtrade database it results that it consisted in export of the category 930690. (c) A large amount of the export from Italy in 2001 were classified under category 930690 and directed to United Arab Emirates.

Graph 4.1: Exports from Belgium, Germany and Italy to the countries of concern, 1998-2006  
(Values are in million euros)



Source: Eurostat COMEXT database (accessed 28 May 2007).

The incompleteness of the data and the recurrent change in the tendency of the exports do not allow the identification of a clear trend. We observe a decrease in the last three years, but a similar trend already appeared between 2002 and 2003 and changed dramatically in 2004. Moreover, the decrease is determined exclusively by a serious reduction of Belgian exports, while in the same year both Italian and German exports increased. Finally, the outstanding amount of exports from Belgium in the years 2002 and 2004, as well as from Italy in 2001, confuse the picture more than they clarify it. The lack of data on Belgium for the first years makes it difficult to estimate if at least the total amount of export in the most recent years has been lower than in the first years of the period.

In order to integrate these disparate figures and add some pieces to the centre of the puzzle, we can look at the same phenomenon from the point of view of the recipient countries. That is, we can compare the export data of Belgium, Germany and Italy with the import data of the countries of concern. The UN Comtrade database allows us to do just that. In principle at least, the two figures should merge. Unfortunately, as table 4.2 and graph 4.2 show, the results are extremely different.

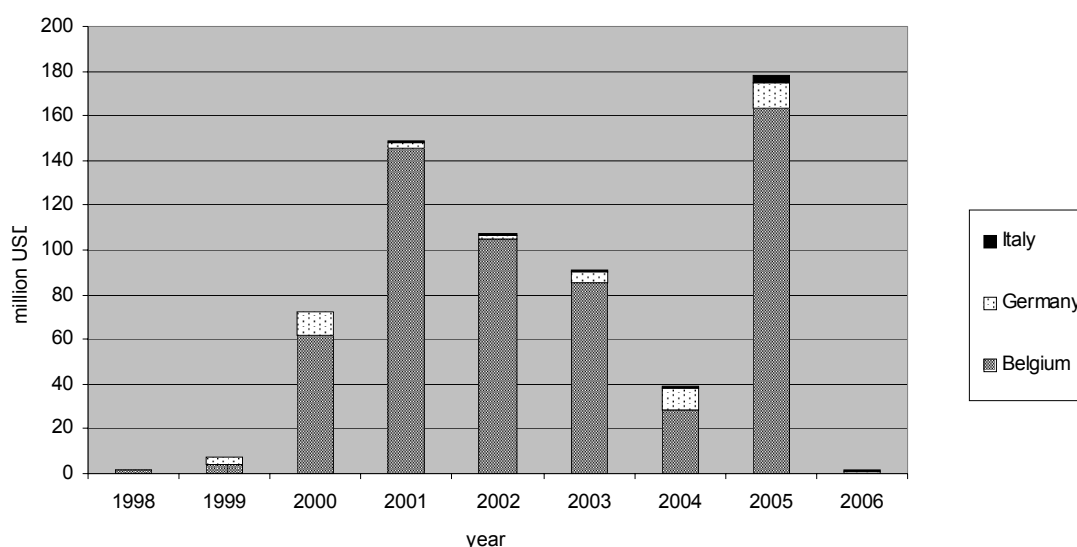
Table 4.2: Imports in the countries of concern from Belgium, Germany and Italy, 1998-2006  
(Values are in USD)

	1998	1999	2000	2001	2002	2003	2004	2005	2006
<b>Belgium</b>	1.264.763	4.171.890	61.508.950	145.610.256	104.553.659	85.140.751	28.355.376	163.205.908	368.106
<b>Germany</b>	163.598	3.124.541	10.541.807	2.438.937	1.670.674	4.698.719	9.767.085	11.368.969	69.764
<b>Italy</b>	160.100	55.113	394.493	559.127	771.431	1.034.922	997.842	3.612.480	926.904
<b>TOTAL</b>	1.588.461	7.351.544	72.445.250	148.608.320	106.995.764	90.874.392	39.120.303	178.187.357	1.364.774

Source: UN Comtrade database (accessed 28 May 2007).

Notes: (a) Not all the countries of concern report their import to the UN Comtrade. In particular Algeria, Egypt, Uzbekistan and Vietnam did not report any data in the period considered. (b) To date only Pakistan reported the data concerning 2006. Therefore the figure should not be considered significant.

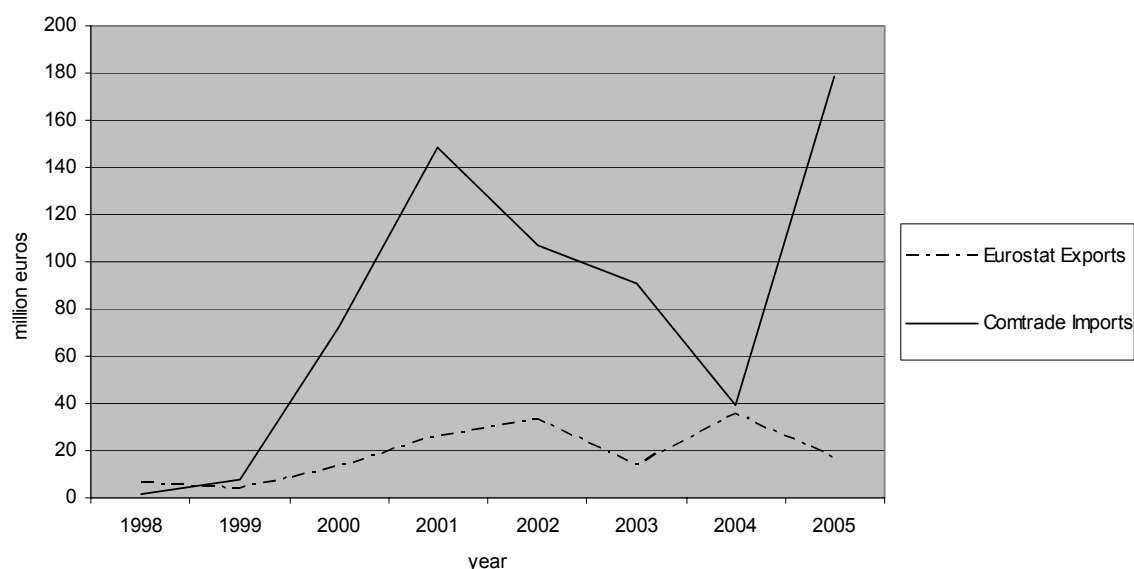
Graph 4.2: Imports in the countries of concern from Belgium, Germany and Italy, 1998-2006  
(Values are in million USD)



Source: UN Comtrade database (accessed 28 May 2007).

The markedly higher amount of flows reported by Comtrade is largely determined by the exceptional quantity of imports from Belgium. The disaggregated data shed some light on the picture. First, the largest part of the imports from Belgium consists of exports to Saudi Arabia. This single export market is so comparatively large that if we consider the picture excluding Saudi Arabia, the total figure even falls below the export figures reported by Eurostat. Furthermore, whereas we said that Belgium, Germany and Italy do not report to Eurostat their military exports (9301, in the category used both by Eurostat and Comtrade), part of those flows are reported as imports by the recipient countries. This can explain, somewhat, why the data of table 4.2 are so much higher than those of table 4.1. Indeed, a portion of the exports to Saudi Arabia from Belgium are reported under the 9301 class: in 2005, for instance, they were almost 18 million dollars. This does not explain everything however: in the same year Saudi Arabia declared another 145 million dollars of imports from Belgium under other headings, while Belgium reported exports for only 3.5 million dollars. Not only are the values of the trade flows very different according to the two sources, but the trend described by UN Comtrade diverges from the one illustrated by Eurostat as well. (graph 4.3)

Graph 4.3: Export and import from Belgium, Germany and Italy, 1998-2006



Source: UN Comtrade, Eurostat COMEXT (accessed 28 May 2007).

Notes: (a) The data about total export are in €, the data about total import are in USD; (b) the data about 2006 have been omitted due to their incompleteness.

While the two trends run roughly parallel until 2003, since that year they begin to run along opposite tracks. In 2004, the two figures approach each other quite closely, but this is true only with regard to the total amount. The data reported by each country differ significantly.

Due to the frequent overlap of the data, it is obviously not possible to sum the two figures. However, we can partially integrate the two statistics by taking the information from one when it is absent in the other. In the case that both databases report information, the highest value is taken. In this rule of thumb, it is assumed that a country may have interest in hiding parts of its export/import, but it would not have any reason to declare more than it actually trades. Table 4.3 shows the results of this exercise while graph 4.4 illustrates it.

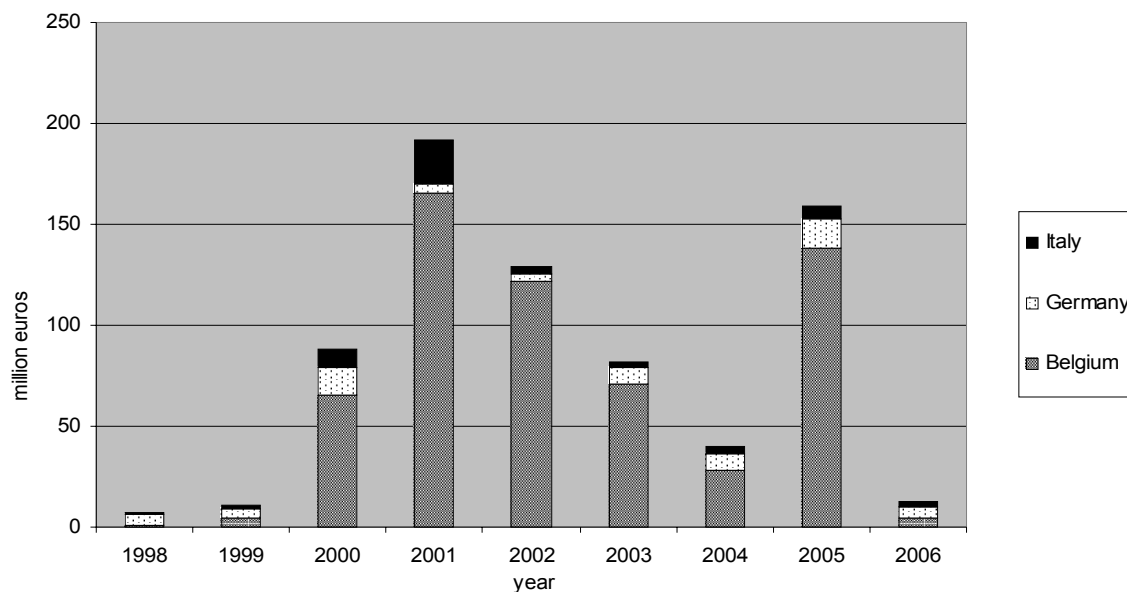
Table 4.3: Aggregate value of exports from Belgium, Germany and Italy to the countries of concern, 1998-2006 (Values are in €)

	1998	1999	2000	2001	2002	2003	2004	2005	2006
<b>Belgium</b>	1.076.060	4.153.116	65.519.333	165.054.900	121.680.004	70.859.562	28.462.336	137.990.827	4.941.663
<b>Germany</b>	5.566.630	4.728.548	13.900.428	4.641.095	3.441.468	7.795.120	8.227.632	15.030.619	5.207.744
<b>Italy</b>	1.060.182	1.941.198	8.567.333	22.219.392	4.132.375	2.719.184	3.034.398	6.448.018	2.370.187
<b>TOTAL</b>	<b>7.702.872</b>	<b>10.822.862</b>	<b>87.987.094</b>	<b>191.915.387</b>	<b>129.253.847</b>	<b>81.373.866</b>	<b>39.724.366</b>	<b>159.469.464</b>	<b>12.519.594</b>

Source: UN Comtrade, Eurostat COMEXT (accessed 28 May 2007).

Notes: (a) The figures taken from UN Comtrade have been transformed into € by using the official exchange rate of the last working day of the year concerned (available online via [www.x-rates.com/cgi-bin/hlookup.cgi](http://www.x-rates.com/cgi-bin/hlookup.cgi), accessed 03 June 2007). (b) the data concerning 2006 cannot be considered very relevant due to the lack of information in the UN Comtrade database (see note (b) table 3.2).

Graph 4.4: Aggregate export to the thirteen countries of concern, 1998-2006 (values are in million euros)



Source: UN Comtrade, Eurostat COMEXT (accessed 28 May 2007).

Notes: (a) the data concerning 2006 are very partial and therefore can not be considered significant.

This aggregate result seems therefore to be the most complete picture we can obtain from the customs data. The trend, evidently, is similar to the one described by Comtrade (graph 4.2) and again it is largely explained by exports from Belgium to Saudi Arabia. In fact, if we exclude Saudi Arabia from the analysis, the picture is rather different and Italy emerges as the largest exporter with over 50 million euros in the whole period<sup>126</sup>. And yet the trend remains irregular, with peaks in 2001 and 2002 largely determined by exports to United Arab Emirates. While the total value of exports is much lower, this does not necessarily imply an effect of the Code, especially considering that the value in 2005 is more than three times that of 1998. Only the decrease of Belgian exports since 2003 may be indicative of a partial effect of the incorporation of the Code into national law (supra, § 3.2.2), but the astonishing amount of exports to Saudi Arabia refutes this argument across the board. Conversely, it may be suggestive of other factors – perhaps the strategic importance of energy supplies – that are influencing the export policies of the member states more than the consideration of human rights in the country of destination.

Bearing this in mind, it is possible to confront the aggregate figure obtained in table 4.3 with the human rights scores of each recipient country in order to see whether a correlation exists between the level and the trend of violations of human rights and the level and the trend of small arms exports. The regression analysis to follow treats physical integrity rights (PIR) and civil and political rights (CIVPOL) as independent variables, and takes the aggregate export (in euro) of Belgium, Germany and Italy as the dependent variable<sup>127</sup>.

The results show that only 15% of the variance in the exports can be explained by PIR and CIVPOL (rsquare=0.154), but surprisingly this influence is determined exclusively by the scores of civil and political rights and it operates counter-intuitively, i.e. the higher the violations of these rights in a given country, the more arms are exported to it (PIR: Beta=0.00, p=.99), (CIVPOL: Beta=-0.39, p<.001)<sup>128</sup>.

126 Belgium accounted for nearly 30 million euros and Germany for 33 million.

127 To create the independent variables a mean score for PIR was based on an aggregation of PTS and CIRI scores. Similarly the CIVPOL score was based on a mean of FH and Polity IV scores. The scores of different years have been considered separately.

128 The Beta coefficient, or standardized coefficient, is done to answer the question which of the independent variables have a greater effect on the dependent variable, that is, which variable, between PIR and CIVPOL influences more



It should be recognized once more, however, that a large part of the exports were directed to one single country (Saudi Arabia) with very low CIVPOL scores and not so low PIR scores<sup>129</sup>. In fact, performing the regression analysis absent Saudi Arabia, the picture differs significantly. It confirms that Saudi Arabia has received a “special treatment” from the three exporter countries. CIVPOL no longer have a significant influence on exports (beta=0.07,  $p=.48$ ), whereas PIR have predictive power over the exports (beta=0.25,  $p=.02$ ), suggesting in general terms that small arms exports from Belgium, Germany and Italy decrease when the violations of physical integrity rights are more severe. However, the predictive power of the model has decreased considerably. It now only explains 6% of the variance in exports (rsquare=0.060), a value that should be considered nearly insignificant.

This correlation between PIR and arms exports seems in line with the findings of Bromley and Brzoska<sup>130</sup>. Nonetheless, we should notice that their model explained a rather larger portion of the exports (rsquare=0.21), which may indicate that the human rights situation of the recipient country is more significant for exports of conventional weapons other than small arms (Bromley and Brzoska’s model)<sup>131</sup>.

More generally, this analysis shows that many other factors (which account for the remaining 94% of the model) are coming into play to determine the exports of small arms. This suggests that criterion 2 of the Code has had a marginal effect on the three exporter countries considered and that only violations of physical integrity rights have been partially taken into account by policy makers. Importantly, it confirms that the strategic importance of a country strongly influences the decision behind the export of small arms. The astonishing level of export to Saudi Arabia, indeed, shows that even very low scores for civil and political rights are not deemed to constitute a reason to curb the exports to the country.

#### *4.3 Provisional conclusions*

The analysis of customs data showed that Belgium has been by far the largest exporter of small arms to the countries of concern during the period 1998-2006 and that Saudi Arabia, by being the main recipient of Belgian exports, has also been the largest recipient from the three European countries considered. Conversely, depending on the year and the data source, Italy is shown to be a larger exporter than Germany or vice versa.

Particular to the case of Belgium, the dramatic decrease witnessed since 2002 seems consistent with the growing attention that the issue of arms exports received from public opinion in that period and the subsequent transposition of the Code into national law in 2003. While the data without Saudi Arabia are suggestive of this interpretation, the fact that in 2005 Saudi Arabia again received over 130 million Euros of small arms shows how minimal the effect has been, and how strategic factors prevailed over human rights concerns. The inversion of the trend in 2005 may also be a delayed consequence of the aforementioned shift of competencies in export control from the federal to the regional level.

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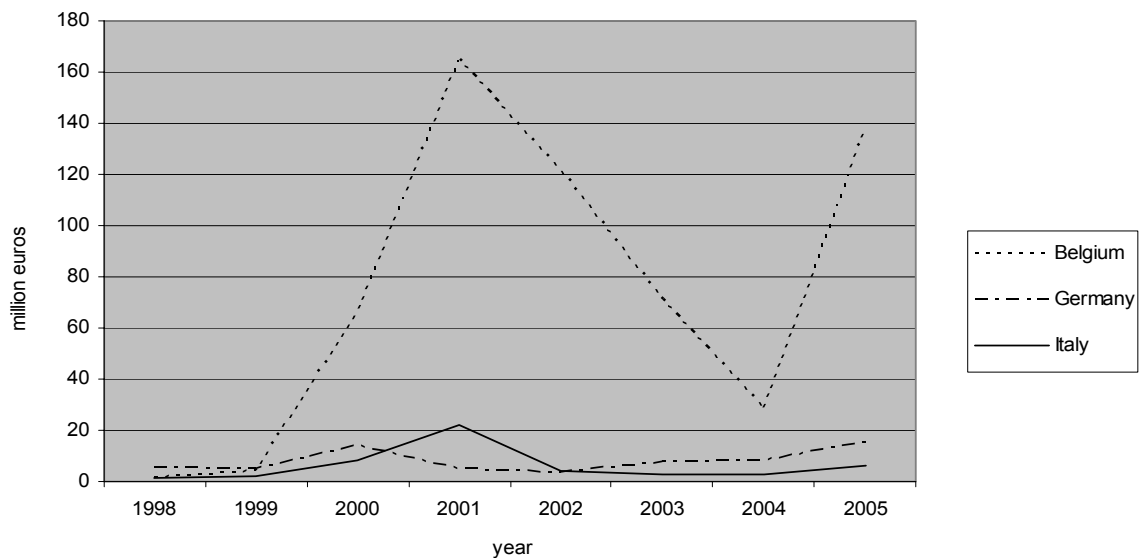
the exports. The higher is the Beta the more influence the independent variable has on the dependent variable. The sign, instead, indicates the sense (positive or negative) of the influence. The coefficient  $p$ , instead, is the result of the  $t$  test and it indicates the reliability of each coefficient in describing the model. It ranges from -1 to +1 and the closer is to zero the most reliable is the result.

129 According to the percentage scale I elaborated for the selection of the recipient countries (supra, chapter 2) the mean score for CIVPOL in the period 1998-2005 had been 1%, while for PIR had been 53%.

130 Bromley, Brzoska, 2007. In their analysis the score for physical integrity rights is given by the PTS score.

131 Yet other factors are likely to have an influence on this divergence, primarily the difference in the countries and the timescale analysed.

Graph 4.5: The trend of exports disaggregated by exporter country, 1998-2006



Source: UN Comtrade, Eurostat COMEXT

The decrease marked by the German export after 2000 could similarly be a consequence of the inclusion of the criteria of the Code in the “political principles” for the export of weapons. Nonetheless, the increasing trend that both Germany and Italy exhibit since 2002 could indicate the absence of a long lasting effect of the Code in shaping the export policies of the two countries, or possibly the inverse effect of the Europeanisation as argued by Holm<sup>132</sup>. The disaggregated data, moreover, confirm that the exports to some recipients, e.g. Pakistan, have increased considerably of late.

More generally, it does not seem possible to distinguish a clear effect of the entrance into force of the Code beyond the “indirect” and “partial” as in the cases of Belgium and Germany. The regression analysis above confirms that human rights concerns explain the decision making of the member states only minimally; that even where influential, human rights are less significant for small arms than for other conventional arms; and it highlights the greater priority given to physical integrity rights relative to civil and political rights in deeming a recipient country significantly problematic. The analysis also reflects the disparate weight that the text of the Code affords these two categories of rights (supra, paragraph 3.2.3). We should therefore conclude that the exports depended mainly on other factors such as existent national frameworks, commercial and strategic interests rather than compliance with the Code.

To go back to the metaphor used in the beginning of the chapter, we can say that we now have the basic outline of the picture along with some miscellaneous pieces scattered in the centre. This is not enough, though, to bring the whole image into focus. With the help of other sources, notably the national and the EU annual report, the next section attempts to bring greater clarity to our jigsaw puzzle and to evaluate the validity of the provisional conclusions above.

#### 4.4 The export reports: some new pieces of the puzzle

The national and the EU Annual report, with the partial exception of Germany, are poor in data on small arms. But, they can provide useful information to appraise the conclusions arrived in the previous section. The German case, in particular, constitutes a unique chance to compare the different sources and to understand extent to which they differ.

132 Holm, 2006, p. 231.

#### 4.4.1 Comparing the export reports with the customs data: the case of Germany

Germany is one of the world's major producers of conventional weapons, being the second largest exporter of small arms in the EU. While more than 30 companies are active in manufacturing small arms, the most important are Heckler & Koch, Rheinmetall DeTec, JP Sauer & Sohn, and Carl Walther<sup>133</sup>. German small arms are also manufactured under licence in a wide range of countries, among which there are countries with very low human rights records such as Pakistan, Saudi Arabia, Iran and Myanmar<sup>134</sup>.

Since 2002, the German export report has included a paragraph about the export of small arms, demonstrating, at least on paper, a better understanding of the importance of this sector in the control of arms exports. According to the national export report in 2002, small arms and ammunitions accounted for only the 2,3% of all arms exports<sup>135</sup>. Nonetheless, this figure is clearly underestimated because it refers only to a part of all small arms exports reported by the German government. In fact, the same report uses small arms in two meanings, both to indicate a class of its Export List (A 0001 – “Small Firearms”) including also civil equipment and sporting and hunting rifles (438,9 million €), and to indicate a more restrictive category (“Small Arms”) in line with the EU 1998 Joint Action (61,6 million €)<sup>136</sup>. If we consider the first meaning, then, the share of small arms (including ammunition, EL-A 0003) to total exports becomes 17.6%.

However, besides the confusion that may arise from these two different categories, the information contained in the Report is certainly the most significant to assess the effectiveness of the Code with regards to the respect of human rights. In fact, as opposed to the customs data, the category of “Small Arms” refers exclusively to the equipment included in the Common Military List and covered by the Code; we should therefore assume that any effect of the implementation of the Code, if existing, would be manifest in this case. The figures concerning the export to the countries of concern are reported in table 4.4.

Table 4.4: Individual licences for the export of Small Arms and Ammunitions to the countries of concern, 2002-2005 (Values in €)

	2002	2003	2004	2005
<b>Egypt</b>	20.721	2.952.030	1.034.160	1.350
<b>Kazakhstan</b>	2.796	0	331.000	4.752
<b>Oman</b>	0	0	32.700	4.595
<b>Saudi Arabia</b>	2.134.470	1.445.259	3.578.086	5.811.297
<b>UAE</b>	607.230	552.468	737.405	291.213
<b>TOTAL</b>	<b>2.765.217</b>	<b>4.949.757</b>	<b>5.713.351</b>	<b>6.113.207</b>

Source: German national export report, years 2003, 2004, 2005, 2006.

Notes: (a) Germany did not report any export to Algeria, Belarus, Cameroon, Iran, Pakistan, Tunisia, Uzbekistan, Vietnam in the period 2002-2005; (b) the data for Egypt shift back and forth between millions of Euros (years 2003 and 2004) and only few thousands of Euros (years 2002 and 2005). Unfortunately a full understanding of the reasons behind these shifts requires an analysis of the commercial bilateral relations and in particular of the trends from the demand side which are not provided by this study.

Although the Report stresses that “Germany does not allow any deliveries of small arms to countries where such deliveries might be conducive (...) to human rights infringements”<sup>137</sup>, the total value of the licences to the countries of concern increased constantly since 2002 to 2005. This is determined in large part by a definite increase of licences to Saudi Arabia. Whereas the licences to Egypt suffered a clear reduction, the UAE has been a steadily important recipient for the whole period. Furthermore, in 2004 two other countries began (or resumed) to import. These data confirm

133 Small Arms Survey, 2002, p. 34.

134 Abel, 2000, p. 90 and Small Arms Survey, 2002, pp. 49-53.

135 ‘Report of the Federal Republic of Germany on its Policy on Exports of Conventional Military Equipment covering the year 2002’, Berlin, 17 December 2003, pp. 25-33.

136 See also Bauer, 2004(b), note 17, p. 47

137 ‘Report of the Federal Republic of Germany on its Policy on Exports of Conventional Military Equipment covering the year 2000’, Berlin, 23 November 2001, pp. 19-20.

the trend reported by Holm that the German exports of small arms to countries<sup>138</sup> in breach of criteria 2, 3, and 4 of the Code actually increased after its implementation<sup>139</sup>.

Additionally, the EU Annual Report has included since 2003 data disaggregated both by categories of the Common Military List as well as by recipient country.<sup>140</sup> Germany is once again the only country among those considered to report this information to its European partners. Lacking an apposite category referring to small arms and for the purpose of the analysis at hand, the data are considered with respect to categories ML1-ML3. The information available for the years 2003-2005 is shown in table 4.5.

*Table 3.5:* Licences issued by Germany for the export of items of categories ML1-ML3 to the countries of concern, 2003-2005 (Values in €)

	<b>2003</b>	<b>2004</b>	<b>2005</b>
<b>Belarus</b>	231.437	140.047	128.086
<b>Egypt</b>	4.446.406	10.801.018	1.350
<b>Kazakhstan</b>	493.655	729.487	913.057
<b>Oman</b>	80.318	350.108	352.553
<b>Pakistan</b>	9.822	5.200	7.160.842
<b>Saudi Arabia</b>	3.909.160	9.891.076	6.210.446
<b>UAE</b>	9.574.137	8.618.675	8.304.964
<b>Vietnam</b>	10.760	0	0
<b>TOTAL</b>	<b>18.755.695</b>	<b>30.535.611</b>	<b>23.071.298</b>

*Source:* Sixth, Seventh, Eighth Annual Report According to Operative Provision 8 of the Code of Conduct, years 2004, 2005, 2006.

*Notes:* The document did not report any export to Algeria, Cameroon, Iran, Tunisia, Uzbekistan in the period.

The figures are markedly higher than those recorded by the German report due to the fact that the categories ML1-ML3 encompass a broader list of small arms than the one considered by Germany. Although categories ML1-ML3 do not merge precisely with the definition adopted by this study, one should consider these figures to be nevertheless strongly indicative of the target measurement and the author's concern for the regrettably small portion of this data reported as small arms exports by the German authorities. Three years are not enough to detect a clear tendency, but if one can assume that the exports to countries of concern have not dropped dramatically, one can safely conclude that the Code has not had a significant effect on small arms exports.

At this point we can follow the suggestion of Jackson, Marsh and Thurin and compare the data of the national and the European reports with those of the customs data<sup>141</sup>.

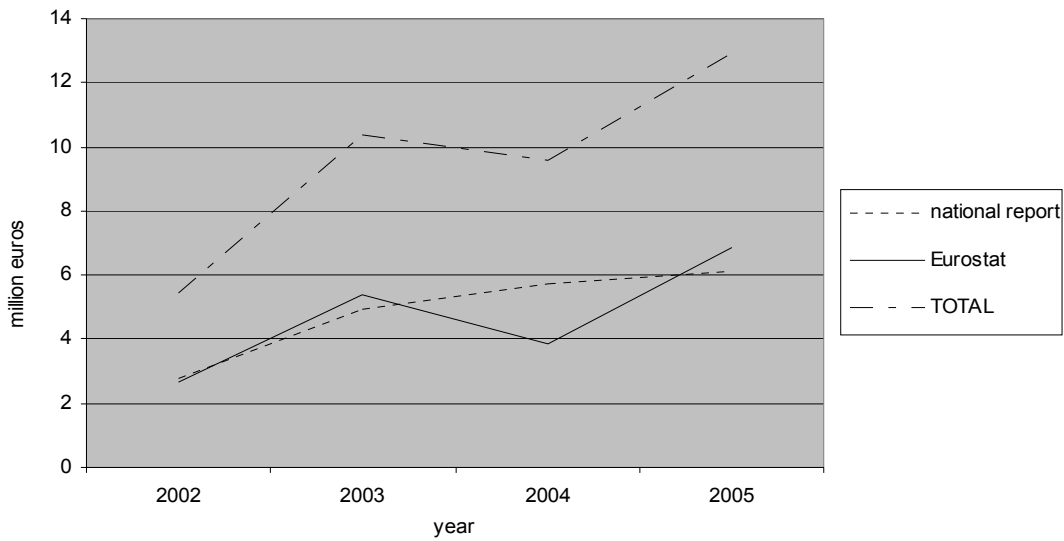
138 The 20 recipient countries considered by Holm are partially the same of this study. For a complete list see Holm, 2006, note 9, p. 231.

139 Holm, 2006, pp. 229-230.

140 Council of the European Union, '6th Annual Report in conformity with Operative Provision 8 of the European Union Code of Conduct on Arms Exports', 11 November 2004, 13816/04.

141 Jackson, Marsh, Thurin, 2005, p. 53.

Graph 4.6: German exports of small arms and ammunitions to the countries of concern, 2002-2005



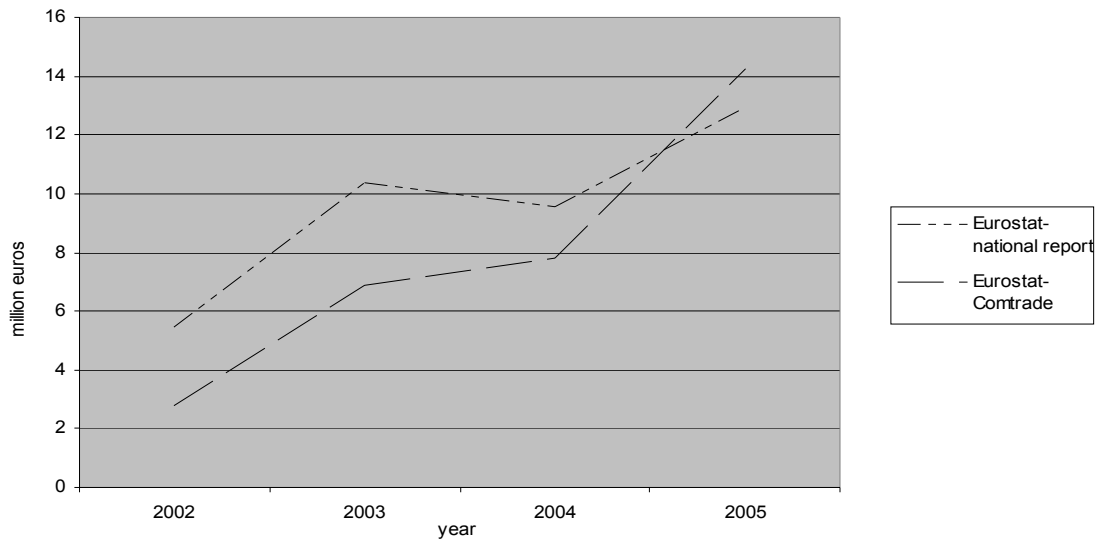
Source: German national export report, years 2003, 2004, 2005, 2006, Eurostat COMEXT database.

Graph 4.6 starts by comparing the data reported by the German export report and by Eurostat. The two figures do not appear altogether disparate. Although the slope of the Eurostat graph is less consistent, both indicate a general increase. However, the apparent resemblance can be misleading. First, the data taken from the German export report only refer to 5 countries, while the Eurostat reports exports to all the thirteen countries of concern. Second, if the data is considered disaggregated by country, the differences are significant. According to Eurostat, for instance, in 2002 Germany exported €631,448 of small arms to Saudi Arabia, while in its own export report the flow amounted to €2.13 million. In fact, the discrepancies run both ways: while according to Eurostat €271,277 were exported from Germany to Kazakhstan in 2002, the national export report only mentioned components for submachine guns for €2,796.

Such a divergence is largely explained by the fact that Eurostat does not report military exports. On the contrary, the German export report does exclude all civil firearms. The “total” shown in the graph thus assumes that the two data can be summed up. Although this is not very consistent statistically and underestimates the fact that in the German report we are looking at the licences issued while Eurostat refers to actual exports, it can at least be considered an indicator of the average trend.

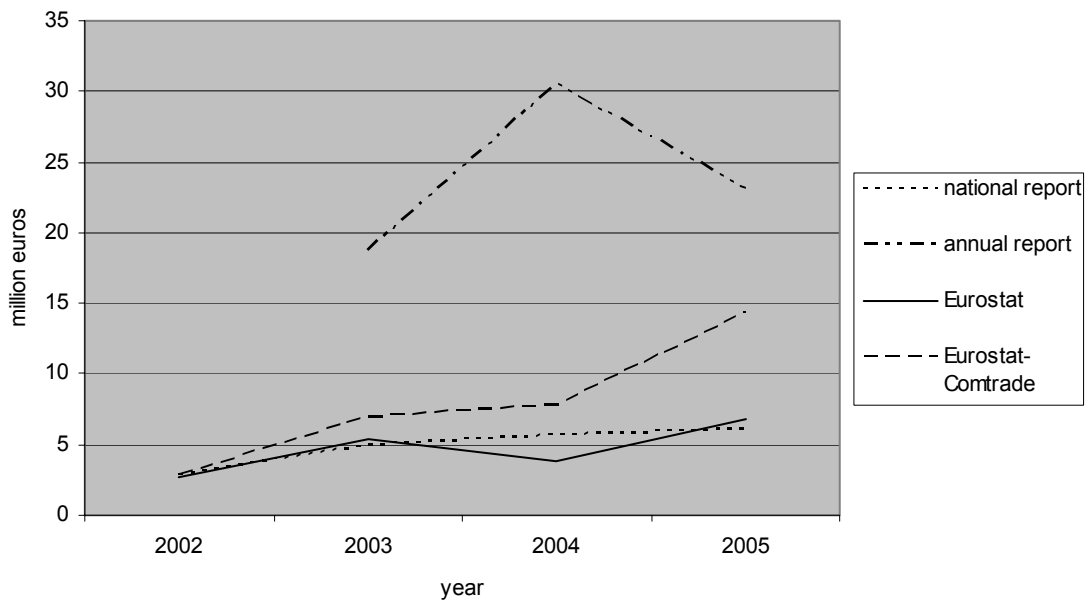
Recalling that Comtrade reports part of the military exports as “imports” in the recipient countries, we can compare the total of graph 4.6 with the aggregate value of Eurostat and Comtrade obtained in table 4.3. Unsurprised by the discrepancy in their values, we can also point out that in this case the trends are similar and indicate an increase (graph 4.7).

Graph 4.7: Comparison between the total of graph 4.6 and the aggregate from Eurostat and Comtrade



Source: German national export report, years 2003, 2004, 2005, 2006, Eurostat COMEXT database, UN Comtrade.

Graph 4.8: Comparison between export reports and customs data



Source: German national export report, years 2003, 2004, 2005, 2006, Eurostat COMEXT database, UN Comtrade, Sixth, Seventh, Eighth Annual Report According to Operative Provision 8 of the Code of Conduct, years 2004, 2005, 2006.

Notes: (a) Eurostat and Eurostat-Comtrade refer to actual exports; the national and the EU Annual Report refer to licences issued.

Finally, Graph 4.8 introduces the trend drawn by the EU annual reports. While the national report and all customs data have given the univocal indication of an increase in exports during the last years, albeit with different intensities, the EU annual reports sketch a different picture. This is even more significant considering that the annual reports are documents released according to the Code of Conduct and should be of primary importance for this study. They report a noticeably higher value of exports that it is difficult to explain with the data available. The general trend is less clear and somewhat contradictory to the other data, but the increase from 2003 to 2005 is nonetheless confirmed.

By comparing the German and European export data with the customs data, the pieces in the centre of the puzzle are now linked to the outline. As such, the integrated information thus far provides a better understanding of the trend of German export of small arms. Overall, an increase of export to the countries of concern can be detected, showing that the Code has not been effective in curbing the export to countries with very bad records on human rights.

In truth, this conclusion is indirectly confirmed by the fact that in recent years the licences for exports to third countries (non-EU and non-NATO) have dramatically increased both in the absolute value and in the relative share, passing from the 2.1% of the small arms exports reported by the German government in 2000<sup>142</sup> to the 24% in 2005<sup>143</sup>. This relative growth in share of German exports assumes even more significance considering that the export licences to the countries concerned in this study constitute a large (perhaps increasing) part – over 30% - of the total amount of licences<sup>144</sup>.

#### *4.4.2 The geographical distribution of the small arms exports of Italy*

Unfortunately, an assessment as detailed as in the case of Germany is not possible with regard to Italy and Belgium due to the lack of information about small arms contained in their national reports. Italy reports information on the exports of every single company, but this in fact confuses the picture more than it aids our understanding it. The data provided are not broken down by category and recipient country at the same time, and they do not even allow any delineation of the proportion of small arms to the total military exports. Notwithstanding this incompleteness, the geographical distribution of their small arms exports can indirectly provide an indication of the trend of exports likely to end up in the countries of concern.

Italy is a major exporter of conventional weapons and the largest European exporter of small arms. Of the over 40 companies involved in the production of small arms, the most familiar is certainly Beretta S.p.a., which in 2000 had sales for over \$290 million US. Also, Italian companies allow their products to be manufactured under licence in foreign countries including Indonesia and Egypt.

According to the Small Arms Survey in 2001, the main recipient of the at least \$298 million of Italian exports of small arms were the United States, Belgium, France, Germany and the UK<sup>145</sup>. This relative distribution can also be confirmed in a recent study by Lagrasta, who found that in the period 1999-2003 80% of Italian exports of weapons ended in western countries<sup>146</sup>. These data, however, only refer to civil equipment and do not provide a basis for conclusions about the effectiveness of the Code.

The information about military exports contained in the national export report does not completely confirm these findings, although it should be noted that the latter refers to the exports of all categories of arms and not small arms specifically. Asia, North Africa and the Middle East have accounted for almost one third of the Italian military export during most of the years considered. This is interesting because they represent the areas where most of the countries of concern are situated.

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142 Report of the Government of the Federal Republic of Germany on its Policy on Exports of Conventional Military Equipment in 2000, 2001, p. 19. The total takes into account the export of both small arms and their ammunitions.

143 Report of the Government of the Federal Republic of Germany on its Policy on Exports of Conventional Military Equipment in 2005, 2006, pp. 37-42.

144 'Report of the Federal Republic of Germany on its Policy on Exports of Conventional Military Equipment covering the years 2002, 2003, 2004, 2005.

145 Small Arms Survey, 2001, p. 104. It is worthy to be reminded that in this amount, taken by UN Contrade, are not reported military weapons.

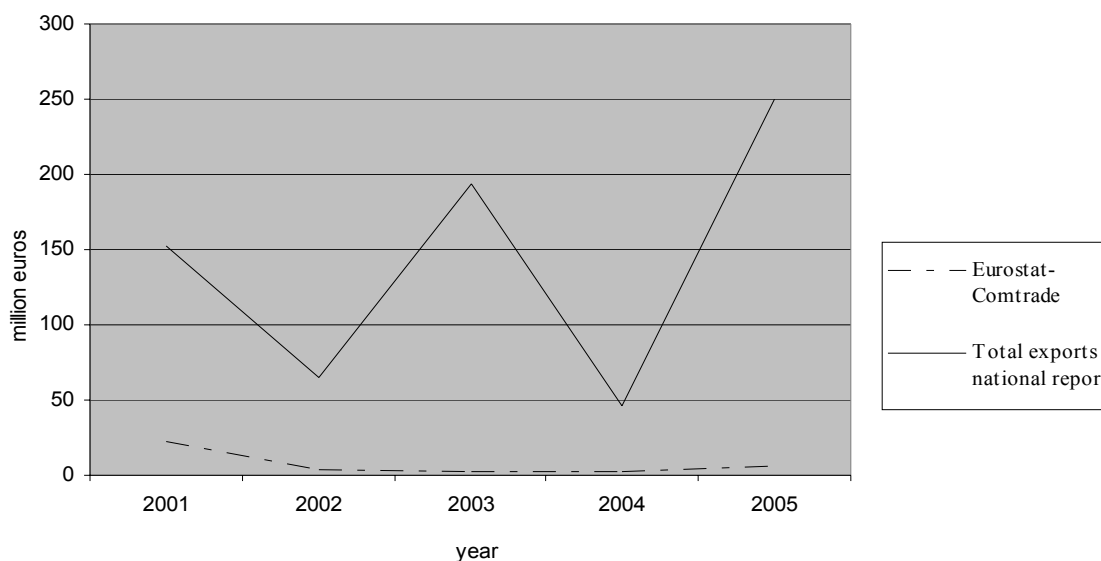
146 Lagrasta, 2005.

Saudi Arabia, in particular, was in 2001 the second largest recipient of Italian exports for an amount of over 119 million euros, confirming the argument above that strategic importance often trumps human rights and other concerns<sup>147</sup>.

The share of exports directed to North Africa and the Middle East decreased from almost 18.6% in 2001 to less than 4% in 2004, but it inverted dramatically in 2005 (15.3%)<sup>148</sup>. It is difficult, though, to estimate if the decrease had been partly due to the implementation of the Code – specifically criterion 2. Assuming so would be consistent with the findings of Bromley and Brzoska<sup>149</sup>, but the fact that their analysis, like the data discussed here, refers to all military exports is inescapable. Consequently, there is no way to corroborate the validity of this assumption with regard to small arms. Examining the absolute values of exports and narrowing the analysis to the countries of concern that are in these three areas, the increase at the end of the period is more intense (and alarming), but the frequent change in the tendency seems to suggest the absence of a durable pattern. Graph 4.9 shows this figure and compares it with the trend of exports of small arms as they emerged by the aggregate Eurostat-Comtrade since they are referring to the same group of countries.

Although the differences in the source material (and most important, the items concerned) necessitate caution, it warrants notice that the trend in small arms exports as reported by customs data has been definitely more consistent and decreasing (except in the last year). Looking at the variability of the figures provided by the national report and considering that the exports reported by Eurostat-Comtrade are actually not covered by the Code, we can assume that the trend of exports of small arms reported in the customs data has not been shaped by the effect of the Code. Otherwise, it would be evident in the national data too.

Graph 4.9: Trend of exports of small arms in comparison with all military export, 2001-2005



Source: Italian national export report, years 2002, 2003, 2004, 2005, 2006, UN Comtrade, Eurostat COMEXT.

147 Camera dei Deputati, 'Relazione sulle operazioni autorizzate e svolte per il controllo dell'esportazione, importazione e transito dei materiali di armamento nonché dell'esportazione e del transito dei prodotti ad alta tecnologia (anno 2001)', 28 marzo 2002, p. 35.

148 Camera dei Deputati, 'Relazione sulle operazioni autorizzate e svolte per il controllo dell'esportazione, importazione e transito dei materiali di armamento nonché dell'esportazione e del transito dei prodotti ad alta tecnologia', years 2002, 2003, 2004, 2005, 2006.

149 Bromley, Brzoska, 2007.



#### 4.4.3 *The danger of the regionalisation in Belgian export controls*

Despite a rather small defence industry, Belgium is a major exporter of small arms that accounted for more than one third of the total value of its military exports in 2002<sup>150</sup>. There are at least 15 companies involved in the industry of small arms, but the production is dominated by FN Herstal, which since 1997 is entirely owned by the Walloon regional government<sup>151</sup>. FN Herstal's products are exported to more than 90 countries and they have been manufactured under licence in more than 20 countries, including Kenya, Nigeria and South Africa<sup>152</sup>.

According to Comtrade in 2001, the largest recipient of the €234 million of Belgian small arms exports was Saudi Arabia, preceding the United States, France, Portugal and the UK<sup>153</sup>. On the other hand, according to the Belgian export report, the licences for exports in small arms in 2001 were definitely lower – accounting for only €82 million<sup>154</sup>. Although the export report does not isolate the information about the geographical distribution of small arms exports, the data about the total military exports reported in the Belgian official document seem to confirm the centrality of Middle East in Belgian exports. In 2001, Saudi Arabia was reported to be the largest recipient of military equipment for an amount of €101 million. Whereas it is not possible to define the exact amount of small arms, 12 of the 18 licences granted for that year did concern small arms<sup>155</sup>. The Middle East, in general, has always been the primary (or secondary) area of destination of Belgian exports, although the total value decreased significantly in 2002<sup>156</sup>.

The Belgian export report also does not provide data on small arms exports broken down into recipient countries. However, the total export of small arms has been rather constant during the same period. In 1998, it amounted for over 112 million Euro, and despite a slight inflection in the following years it rose again up to almost 104 million in 2002<sup>157</sup>.

Evidently, it is not possible to link this figure with the data about the geographical distribution discussed above or to deduce a trend in small arms exports to the areas of main concern, notably the Middle East. It is, however, possible to assume that, if existing, a clear reduction of exports in small arms to Middle East should appear in both statistics. It thus seems reasonable to conclude that exports have not reduced significantly. The reduction of exports to Middle East in 2002 mentioned above can however be seen as a partial explanation of the observed decrease in Belgian exports of small arms to countries of concern for the same year obtained in paragraph 4.2 (see graph 4.4).

Unfortunately, due to the reform of the Belgian law in 2003 which transferred control of military exports to the regional level, it is not possible to have an aggregate figure after 2002. The data are reported in three different documents and are neither complete nor homogeneous.

The 2005 Wallonian report shows that the Middle East is still an important recipient area of Belgian exports, accounting for over €100 million from Wallonia alone<sup>158</sup>. But, it does not provide any

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150 Rapport du Gouvernement Belge au Parlement sur l'application de la loi du 5 août 1991 sur les importations, les exportations et les transferts d'armes, de munitions et de matériel pouvant servir à un usage militaire ainsi que les technologies y afférentes', du 1er Janvier 2002 au 31 Decembre 2002, (GRIP Data, available on [www.grip.org](http://www.grip.org), consulted on 10 July 2007).

151 Small Arms Survey, 2002, p. 31.

152 Ibid., 2002, p. 43.

153 Small Arms Survey, 2004, p. 103.

154 'Rapport du Gouvernement Belge au Parlement sur l'application de la loi du 5 août 1991 sur les importations, les exportations et les transferts d'armes, de munitions et de matériel pouvant servir à un usage militaire ainsi que les technologies y afférentes', du 1er Janvier 2001 au 31 Decembre 2001, (GRIP Data, available on [www.grip.org](http://www.grip.org), consulted on 10 July 2007), pp. 15-16.

155 Ibid., p. 9.

156 'Rapport du Gouvernement Belge au Parlement sur l'application de la loi du 5 août 1991 sur les importations, les exportations et les transferts d'armes, de munitions et de matériel pouvant servir à un usage militaire ainsi que les technologies y afférentes', years 1999, 2000, 2001, 2002, 2003.

157 'Rapport du Gouvernement Belge au Parlement sur l'application de la loi du 5 août 1991 sur les importations, les exportations et les transferts d'armes, de munitions et de matériel pouvant servir à un usage militaire ainsi que les technologies y afférentes', du 1er Janvier 2002 au 31 Decembre 2002, (GRIP Data, available on [www.grip.org](http://www.grip.org), consulted on 10 July 2007).

158 Rapport au Parlement Wallon sur l'application de la loi du 5 août 1991, modifiée par les lois du 25 et 26 mars 2003, relative à l'importation, à l'exportation, au transit et à la lutte contre le trafic d'armes, de munitions et de matériel

information about the amount of small arms exported. These facts allow the supposition that the decrease of 2002 is not a durable trend, an assumption which is also in line with the customs data showed in graph 3.5.

The government of the Brussels region in the period 2004-2005 issued only one licence for export of small arms to Pakistan in 2004<sup>159</sup>.

The most complete document is issued by the Flemish government, and since 2005 it has organized the data by both categories and recipients. By analysing the information for the period 2004-2006, no issued licences for exports of small arms to the countries of concern are to be found<sup>160</sup>. More generally, the issuance of licences for any other military equipment by Flanders to the countries of concern have been sporadic in the last three years, accounting for €580,000 to Algeria, € 240,000 to Oman and €340,000 to Pakistan in 2004, 2.4 million to Algeria, €20,000 to Iran, €60,000 to Pakistan in 2005, and over €500,000 to Pakistan in 2006<sup>161</sup>. However, looking at the actual deliveries, in 2004 reported exports for more than €1 million to UAE and more than €2 million to Saudi Arabia<sup>162</sup>.

Finally, by comparing the total exports of the three regions, Wallonia appears to be the largest exporter during the whole period. This suggests that the Belgian case is characterised by strong differences in export controls at the regional level. Although the lack of information about the Wallonian exports of small arms does not allow the adoption of a definitive position, it seems reasonable to suppose that most of the Belgian exports of small arms to the countries of concern are originating in Wallonia. In this sense, there is serious potential for a conflict of interest in the localized export control regime: recall that the largest Belgian company producing small arms, FN Herstal, is directly owned by the Wallonian government.

#### *4.5 Conclusions: an incomplete picture*

Detailed analysis conducted on a vast range of sources allows us to construct a picture from all the pieces available. Unfortunately, though, we suffer from the same frustration of approaching the finish of a jigsaw puzzle only to realize that a number of pieces are missing from the box. Unable to solicit for the missing pieces, we are left with no choice but to draw our conclusions from an incomplete picture.

The conclusions based on the customs data were those of a non-effect of criterion 2 of the Code. The trends experienced by the three countries were found to be mainly dependant on other factors, e.g. existent national frameworks, commercial and strategic interests.

With the exception of Germany (and Flanders since 2005) the national and EU annual report are far from exhaustive in their data on the export of small arms. Despite this limitation, however, the comparison between the different sources (in the case of Germany) and the analysis of the geographical distribution of arms exports reinforce the argument that the criterion 2 of the Code did not play a clear role in shaping the exports of small arms to the countries of concern. Evidence in support is to be found in the German case, in which the exports to the countries of concern actually increased according to the national report, suggesting of an even inverse effect of the Europeanisation of arms controls. The high variability of the total Italian exports to the regions where the countries of concern are situated further corroborates the story. Finally, in the case of Belgium, the data

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devant servir spécialement à un usage militaire et de la technologie y afférente. Rapport annuel 2005 (GRIP Data, available on [www.grip.org](http://www.grip.org), consulted on 10 July 2007), p. 39.

159 Rapport du Gouvernement de la Région de Bruxelles Capitale au Parlement concernant l'application de la loi du 5 août 1991, Période du 1er Janvier 2004 au 31 décembre 2004, p. 20. The amount is not specified, although together with a licence in another category the total amount of export licensed to Pakistan accounted for 8 millions €.159 For 2005 data are available only for the period 1st July-31st December.

160 Jaarlijks Verslag van de Vlaamse Regering over de verstrekte en geweigerde vergunningen voor wapens, minitie en speciaal voor militair gebruik of voor ordehandaving dienstig materieel en daaraan verbonden technologie, years 2004, 2005 and 2006. The only export, in fact, is a transfer in 2005 from Czech Republic to Egypt of items of the category ML1 for an amount of 438.294 €.

161 Ibid.

162 Verslag NBB, Daadwerkelijke uitvoer van Vlaanderen in 2004, available on [http://www.sipri.org/contents/armstrad/atlinks\\_gov.html#BEL](http://www.sipri.org/contents/armstrad/atlinks_gov.html#BEL) (consulted on 10 July 2007).

until 2002 are absent any significant decrease. Moreover, the most recent data showed that the differences in the regional export policies might have increased after the regionalisation of export controls in 2003. In particular, the increase of exports to Saudi Arabia in 2005 (from Wallonia) confirms that the intended effect of incorporating of the Code into national law may have been diluted by the regionalisation of Belgian export controls as well as other factors.

The high amount of exports reported by customs and excluded by national export reports shows that, while the Common Military List (and therefore the Code) does not cover civil equipment, the countries considered by this study are exporting a significant amount of weapons (under the category of *non-military* weapons, that is) to areas where violations of human rights are widespread. This suggests that the existing framework is inadequate to properly address the problem of proliferation of small arms and violations of human rights. A solution must therefore acknowledge that civilian equipment can be as dangerous as military equipment in the repression of fundamental rights.

All the data analyzed indicated the Middle East (the Gulf Region in particular) as the main recipient area of the small arms exports of the three exporters considered<sup>163</sup>. The national data also confirmed the importance of strategic factors in influencing the exports, Saudi Arabia being the clearest example. Whereas it has already been noted that the problem of civilian equipment currently falls outside the scope of the Code, the fact that even items covered by the Code keep being exported in high amounts to this region indicates that criterion 2 of the Code has not been effective even on the merits of its original intent.

A final remark goes to the need for more accuracy and attention to small arms in the production of national and European export reports. The discrepancies between the customs, the national, and the EU data on German exports of small arms, for instance, substantiates what has been already pointed out in the methodological section: information is incomplete, contradictory, and overlapping. Furthermore, it confirms the need for an agreed definition of small arms which will enable future studies to look at the complete picture. The plea, in other words, is to enable scholars and policy makers to complete the puzzle with all its pieces.

## **5. A Closer Sight: The Ineffectiveness of the EU's Small Arms Export Control From a Human Rights Perspective**

### *5.1 Our old Saudi friends: traditional foreign policy interests win over human rights*

The importance of commercial and strategic interests emerged in chapter 4 as one of the main reasons behind the issuance of a licence for small arms export. Member states were shown to hold these considerations in higher regard than respect for human rights in the recipient country. Obviously this is not the ideal forum for exploring the conflict between the traditional foreign policy interests and the EU's promotion of human rights in its external action at great length<sup>164</sup>, but it is nevertheless useful to highlight some aspects of the debate with regard to arms exports which may aid our understanding of why the export controls have been so ineffective.

In fact, although the mainstreaming of human rights in all EU's policies has involved the arms export controls, the Union has a limited influence on the member states in this field, which remains at the intergovernmental level. It is sufficient to note that the Code is not legally binding and that any decision, eventually, is taken autonomously by each member state. The effectiveness of criterion 2 is therefore limited by its very nature. The "continuing vitality"<sup>165</sup> of Art. 296 of the TEU (supra, § 3.2.1) is the main obstacle for any progress in the coordination between the member states export policies and the EU's human rights concerns. In practice, this may generate what can be called a sort of schizophrenia, whereby the EU is taking action in one direction (promotion of hu-

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163 See also Le Monde Diplomatique, 'The legal trade in light weapons', June 2006, available on <http://monde-diplo.com/maps/lightarms> (consulted on 10 July 2007).

164 See for instance Gropas, 1999.

165 Davis, 2002, pp. 109-110.

man rights) while the member states are undermining its action by reiterating their traditional foreign policy orientations.

It would, however, be too simplistic to sketch a picture in which the EU is always right and the member states are always wrong. In fact, even the decision by the EU to deem a country in violation of international standards for human rights is highly dependant on political, strategic and commercial interests. Human rights issues, for instance, are neither central in the agenda with the Gulf countries nor are they raised in the context of small arms exports to those countries. In this sense, taking a closer look at the “special treatment” granted to Saudi Arabia provides the best example about the predominance of strategic reasons – both in the member states’ view and in the EU’s view – over human rights concerns.

In 2000, Amnesty International summarized the international community’s response to human rights violations in Saudi Arabia by one word – silence. Its strategic position and vast oil reserves, it was argued, have led governments and businesses around the world to subordinate human rights to economic and strategic interests<sup>166</sup>. The EU has followed this same pattern in its relations with the Kingdom. Energy<sup>167</sup> and trade<sup>168</sup> were the main interests behind the adoption of the Cooperation Agreement between the Gulf Cooperation Council (GCC) and the EU in 1989<sup>169</sup> and the long lasting negotiation – not yet ended at the time of this writing – of a Free Trade Agreement.

It is true that the EU has expressed its concern over the human rights situation in Saudi Arabia in all the Annual Reports on Human Rights, in several Démarches and Declarations, and in Common Positions to the UN General Assembly and the UN Commission on Human Rights<sup>170</sup>. However, no concrete mechanisms have been set up and human rights are a very marginal issue in the bilateral relations, demonstrating a lack of will and instruments to open a serious confrontation on the matter. In the words of the former EU commissioner for external relations, Chris Patten: “We [the Commission], do not have any representation in Saudi Arabia, nor do we have any representation in the Gulf. Nor do we have any competence to take any particular steps or to make a stand on an individual level in these particular cases [discrimination against Saudi women]”<sup>171</sup>. The free trade agreement, for instance, will not mention human rights, while the Strategic Partnership for the Mediterranean and the Middle East with regard to the GCC members only affirm the “desire to move more rapidly on issues of concern”<sup>172</sup>.

The human rights situation is very serious in Saudi Arabia.<sup>173</sup> Although one must recognize some distinctions – such as for between physical integrity rights, for which the violations are not as severe as in other countries of concern<sup>174</sup> – civil and political rights in Saudi Arabia are utterly non-

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166 <http://www.amnesty.org/ailib/intcam/saudi/issues/mspr.html>.

167 The importance of the Gulf countries in this context was stressed by the European Commission, Green Paper, ‘A European Strategy for Sustainable, Competitive and Secure Energy’, COM(2006) 105 final, Brussels, 8 March 2006.

168 Mandelson, 2007, available on [http://trade.ec.europa.eu/doclib/docs/2007/february/tradoc\\_133369.pdf](http://trade.ec.europa.eu/doclib/docs/2007/february/tradoc_133369.pdf) (consulted on 10 July 2007).

169 [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21989A0225\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21989A0225(01):EN:HTML). The members of the GCC are: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

170 Council of the European Union, Annual Reports on Human Rights, years 2001, 2002, 2003, 2004, 2005. Particular concern was directed to torture, public execution, arbitrary detention, rule of law, the restrictions of the freedom of expression, religion, assembly, association, and the systematic discrimination against women.

171 The EU is the first trading market for the countries of the Gulf area, while 70% of EU’s total import from them consists of fuels and derivatives [http://ec.europa.eu/external\\_relations/news/patten/epsitting03\\_04\\_01.pdf](http://ec.europa.eu/external_relations/news/patten/epsitting03_04_01.pdf).

172 European Council, Final Report on a EU Strategic Partnership for the Mediterranean and the Middle East, June 2004, p. 9. Available via <http://consilium.europa.eu/uedocs/cmsUpload/Partnership%20Mediterranean%20and%20Middle%20East.pdf>.

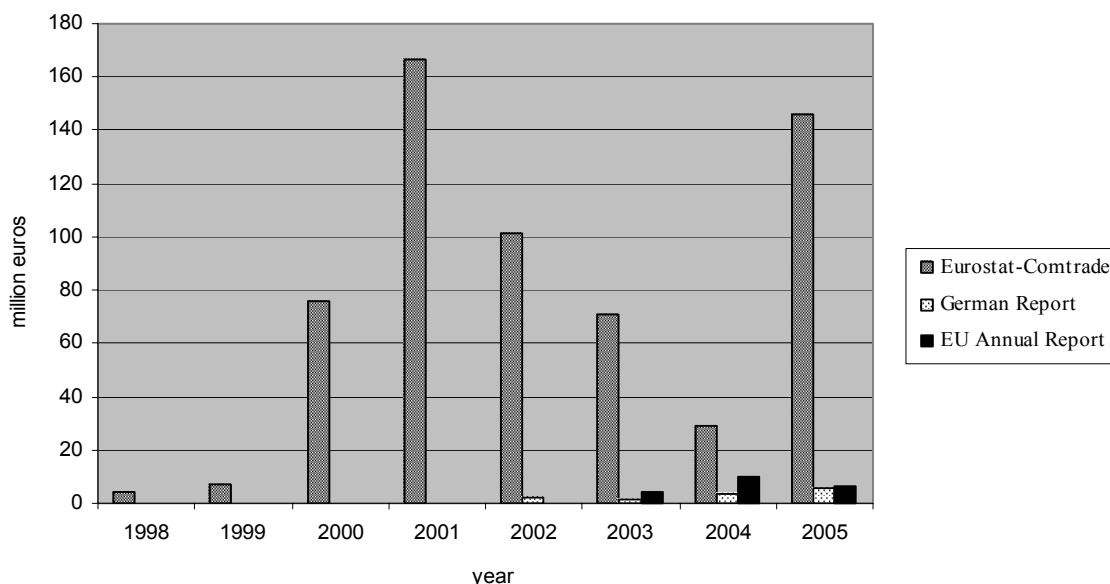
173 In the past Saudi Arabia’s human rights record has also been subject to some scrutiny by the UN Commission on Human Rights under a “1503” confidential procedure for consideration of complaints of a “consistent pattern of gross human rights violations”. See <http://www.amnesty.org/ailib/intcam/saudi/report.html> (consulted on 19 June 2007).

174 However, corporal punishments, torture, arbitrary arrest, and public execution are frequent, and until recently unlawful killings by security forces and armed groups have been a serious problem. (US State Department, Country Report, 2006. AI, Annual Report, 2006). See also UN Committee against Torture, 28th session (Geneva, 29 April to 17 May 2002) [http://www.ishr.ch/hrm/tmb/treaty/cat/reports/cat\\_24-35/CAT\\_28.htm](http://www.ishr.ch/hrm/tmb/treaty/cat/reports/cat_24-35/CAT_28.htm) (consulted on 8 July 2007).

existent<sup>175</sup>. In fact, the Islamic law (Sharia) under the doctrine of Wahabism is theoretically the only limit to the king's powers and the Kingdom is one of the few countries that have not ratified the ICCPR (which is mentioned expressly by criterion 2 of the EU Code of Conduct). So far, the Kingdom has avoided any sort of cooperation with the international community in the field of human rights, rejecting any "interference" in its legal system and asserting that its actions are based on its adherence to Islamic law<sup>176</sup>.

The danger of arms flows to this country has been already pointed out by Amnesty International years ago: "Saudi Arabia's human rights record shows why stringent national and international controls are needed for the arms and security industry – controls that guarantee public accountability and ensure that weapons never fall into the hands of those likely to use them for torture or other human rights abuses"<sup>177</sup>. Of particular concern are the violent and arbitrary actions of the Committee to Promote Virtue and Prevent Vice (Mutawwa'in), or religious police, which is a semiautonomous agency that enforces adherence to strictly conservative Islamic norms by monitoring public behaviour<sup>178</sup>.

Graph 5.1: Exports of small arms to Saudi Arabia



Source: Eurostat, UN Comtrade, German export report, EU Annual Report

Notes : (a) the German Report and the EU Annual Report only cover, respectively, the period 2002-2005 and 2003-2005.

Nonetheless, as already said, small arms are left free to flow in Saudi Arabia without raising particular concern to the European policy makers. As a result, the Kingdom is the largest recipient among the countries of concern to this study, importing small arms in amounts over 600 million Euros from 1998 to 2005<sup>179</sup>.

As the dramatic increase of exports in 2005 shows, the trend does not suggest any clear effect of the entrance into force of the Code. In graph 5.1 an observable discrepancy exists between the cus-

175 This emerges from the very low scores (a mean of 1%) received from Freedom House and Polity IV (supra, paragraph 2.3). In particular the state arbitrary interferes with privacy, family, home, and correspondence and restricts all civil liberties; the rule of law is minimal (US State Department, Country Report, 2006).

176 A fact-finding mission of Human Rights Watch was eventually permitted in December 2006. See Human Rights Watch, "Saudi Arabia: Despite Restrictions, Visit Uncovers Abuses", 17 February 2007, available on <http://hrw.org/english/docs/2007/02/17/saudia15353.htm> (consulted on 19 June 2007).

177 <http://www.amnesty.org/ailib/intcam/saudi/issues/mspr.html>.

178 US State Department, Country Report, 2004, 2005, 2006

179 The country also manufactures the G3 and ammunition under licence from the German firm Heckler & Koch. See Small Arms Survey, 2002, p. 18.

toms data and the export reports, which at first sight indicates a prevalence of non-military equipment (thus not reported in the export reports). This astonishing figure confirms that European countries do not perceive any contradiction between such high flows of arms to Saudi Arabia and the poor situation regarding human rights. The findings of the regression analysis, moreover, show that the prevalence of violations of civil and political rights over the violations of physical integrity rights has rendered the country more legitimate to receive arms in the collective eyes of the EU member states. The 2002 Italian arms export report, for instance, gives a detailed description of the exports to Saudi Arabia while stressing, few pages before, the full compliance with all the Criteria of the Code<sup>180</sup>. Even clearer was the answer of the Belgian Minister for Foreign Affairs in 2000 to a parliamentary consultation questioning the deliveries of arms to Saudi Arabia in the light of the severe human rights situation:

“Pour qu’une licence soit refusée, il doit donc exister un lien clair entre l’exportation d’armes et la violation des droits de l’homme. Les armes exportées en Arabie saoudite sont destinées au département saoudien de la Défense nationale. Pour tout pays de cette région, il est vital de disposer en permanence d’une capacité de défense réelle”<sup>181</sup>.

Acknowledging that it is very difficult to establish a direct link between a weapon – a Belgian weapon in this case – and a concrete violation of human rights, recall that “the combination of ‘clear risk’ and ‘might’ in the text [of the Code] (...) requires a lower burden of evidence than a clear risk that equipment will be used for internal repression”<sup>182</sup>.

### *5.2 The missing links between arms export controls, human rights and small arms initiatives*

A significant finding of the statistical analysis, and in particular of the regression analysis, was that the effectiveness of criterion 2 had been weaker with regards to small arms than to other conventional arms. This cannot be explained just by referring to the prevalence of strategic interests over human rights concerns because the influence of foreign policy issues should be assumed to have an impact on all sort of military exports, regardless of their size or type. The reasons for this failure should thus be sought somewhere else.

In fact, some of the elements shaping the EU’s approach to the small arms export controls implicitly provide an explanation of this weakness.

A first essential limit lies in the 1998 definition of small arms. The consideration of exclusively military equipment set a large part of the exports reported by customs data outside the scope of the Code<sup>183</sup>. Moreover, the definitions used by the three exporters partly differ from the one adopted by the EU, and the Italian one includes an even shorter list of items. Even more problematic, from the point of view of the effectiveness of the Code, is that the categories ML1-ML3 of the CML do not merge with the definition adopted by the Joint Action. The result of this “normative confusion” is that the Code lacks the basic tools of enforcing controls over small arms. Regrettably, the 2005 small arms Strategy has highlighted neither the need for enlarging the definition nor the need for strengthening consistency within the CML.

This inconsistency is also indicative of the serious lack of data availability with regards to small arms, the second important element of weakness for an effective small arms export control policy. While the Code has increased transparency and data availability about arms exports over the last

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180 Camera dei Deputati, ‘Relazione sulle operazioni autorizzate e svolte per il controllo dell’esportazione, importazione e transito dei materiali di armamento nonché dell’esportazione e del transito dei prodotti ad alta tecnologia (anno 2001)’, 28 marzo 2002, pp. 43-45.

181 Chambre des Représentants de Belgique, *Compte rendu analytique de la reunion publique de Commission de Relations Extérieures* du 5 Juillet 2000, p. 6.

182 Council of the European Union, ‘User’s Guide to the EU Code of Conduct on Arms Exports’, updated version, Brussels, 18 December 2006, 16440/06, p. 27.

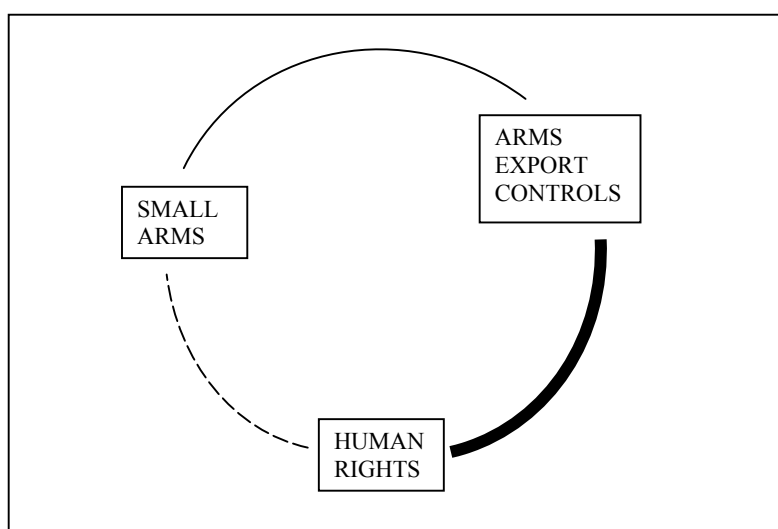
183 Calls to strengthen the control of small arms exports have come from the EP. In particular in European Parliament, ‘Report on the Council’s Seventh and Eighth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, 30 November 2006, A6-0439/2006 FINAL, par. 33, the Parliament warned about the danger encompassed by the difference between military and non-military arms which can be used by arms exporters to bypass the controls.

few years, the scarcity of data about small arms both in the national and in the EU export report severely limits the monitoring of small arms exports from a human rights perspective.

A third obstacle seems to be the fact that the small arms Strategy considers small arms principally under a “conflict” perspective and not from a “human rights” one. In other words, the few times that human rights violations are mentioned with regards to small arms they are considered as an outcome of armed conflicts and not also as a consequence of the misuse of small arms in peace time<sup>184</sup>.

These elements, among others, suggest that there are problems of coordination and coherency between the policy areas of arms export controls, human rights and small arms initiatives. Picture 5.1 illustrates this assumption by marking the difference in strength of the links between these three policies.

Picture 5.1: the (missing) links between the three EU's policies



In fact, the connection between arms export controls and human rights is the strongest (at least on paper) in the EU's policy action: the arms export control policy acknowledges the impact on human rights that European weapons may have in third countries, and does so primarily through criterion 2 of the Code of Conduct; from the perspective of the EU human rights policy, on the other hand, arms export control has been recognized as an important step of the process to mainstreaming human rights.<sup>185</sup> European institutions have repeatedly called to strengthen the control and enlarge it over a broader range of equipment<sup>186</sup>.

The link between arms export controls and small arms appears instead to be less clear. The arms export policy lacks of a sufficient attention to small arms, primarily due to the absence of an univocal definition of small arms. The small arms policy, from its side, recognizes that the combat against small arms proliferation requires the adoption of restrictive export policies<sup>187</sup> and an harmonised application of the Code<sup>188</sup>, but is affected by the same shortcomings in the EU definition.<sup>189</sup> Compared to the focus on the illegal trade in small arms and on the destruction of existing stockpiles, it does not give sufficient attention to the impact of legal exports to foreign countries.

184 Council of the European Union, 'EU Strategy to combat illicit accumulation and trafficking of SALW and their ammunition', Brussels, 13 January 2006, 5319/06.

185 Council of the European Union, 'EU Annual Report on Human Rights 2002', p. 20.

186 See for instance the European Parliament Reports and Resolutions on the Annual Report on the implementation of the Code, all available on <http://www.nisat.org/EU/European%20Parliament/European%20Parliament%20and%20Small%20Arms.htm> (consulted on 10 July 2007). See also Council of the European Union, Annual Reports on the implementation of the Code, years 2001, 2002, 2003, 2004.

187 Anders, 2003, p. 5.

188 Council of the European Union, 'EU Strategy to combat illicit accumulation and trafficking of SALW and their ammunition', Brussels, 13 January 2006, 5319/06.

189 UNIDIR, 2005, p. 22.

The connection between small arms and human rights is probably the weakest one. The EU small arms initiatives are almost exclusively focused on conflict prevention and consider small arms proliferation as a threat to stability in third countries rather than a threat to human rights. Similarly human rights policy has not given enough importance to small arms outside the context of armed conflicts<sup>190</sup>. A broader consideration has been promoted by the EP, but has not had a tangible impact on these two EU policies<sup>191</sup>.

These missing links are a very serious shortcoming of the EU's approach, especially considering that small arms are the weapons the most involved in the violation of human rights. A proper response to this threat should elaborate a specific attention to small arms, stronger – if possible – than on other conventional arms. The picture that comes out from this analysis, instead, shows that the EU is going exactly in the opposite direction. The huge effort of the EU in the field of human rights – all the projects funded through the EIDHR and the implementation of the instruments that have been mentioned in paragraph 3.1 – risk being undermined by this loose control over small arms exports. Egypt is a strong case in point.

### *5.2.1 Much efforts for dubious results: the cooperation between the EU and Egypt*

Egypt is good example of how the coordination among the various European policies and the consistency of the member states behaviour with them are far from effective. The EU has a strong cooperative relationship with Egypt in the area of human rights, both through their bilateral relations and within the regional cooperation framework of the Euro-Mediterranean partnership (so called Barcelona Process).<sup>192</sup> These institutions have been subsequently reinforced by the EU Neighbourhood policy<sup>193</sup> and the Strategic Partnership for the Mediterranean and the Middle East<sup>194</sup>. At the same time, though, these efforts have been supported neither by strict small arms export controls nor by any initiative in the field of the small arms strategy even though a large amount of the human rights violations reported in Egypt involve the use of small arms. Although the human rights situation in the country depends on many other factors, the absence of any progress suggests that most of the efforts of the EU have been in vain.

The human rights situation in Egypt remains severe and is aggravated by the uninterrupted implementation of the Emergency Law since 1981, which also generated the protests of the EU<sup>195</sup>. The human rights reports consulted<sup>196</sup> draw particular attention to, among others, the use of violent methods by the police to disperse peaceful demonstrations (often involving killings)<sup>197</sup>; the arbitrary arrest and detention without charge or trial for political opponents and alleged supporters of banned Islamist groups (thousands of people remain in detention, some have been held for more than a decade); the systematic use of torture and degrading treatment by the police<sup>198</sup>; and the recourse to extrajudicial killings. The means of protection and monitoring of violations of human rights are weak and in the majority of torture cases the perpetrators are not brought to justice even

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190 Council of the European Union 'EU Guidelines on Children and armed conflicts', 15634/03.

191 European Parliament, 'Report on the Sixth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, 12 October 2005, A6-0292/2005 FINAL; 'Resolution on small arms and light weapons', P6\_TA(2005)0204, par. C.

192 See [http://ec.europa.eu/external\\_relations/euromed](http://ec.europa.eu/external_relations/euromed).

193 See [http://ec.europa.eu/world/enp/index\\_en.htm](http://ec.europa.eu/world/enp/index_en.htm).

194 Council of the European Union, Final Report on a EU Strategic Partnership for the Mediterranean and the Middle East, June 2004, available via <http://consilium.europa.eu/uedocs/cmsUpload/Partnership%20Mediterranean%20and%20Middle%20East.pdf>.

195 European Commission, Country Report, Egypt, COM(2005) 72 final, p. 7. Moreover a recent reform in the constitution has been deemed to "entrench the long-standing system of abuse under Egypt's state of emergency powers and give the misuse of those powers a bogus legitimacy". See 'Egypt: Proposed constitutional amendments greatest erosion of human rights in 26 years, 18 March 2007, AI Index: MDE 12/008/2007 (Public), available on <http://web.amnesty.org/library/Index/ENGMDE120082007?open&of=ENG-2D3> (consulted on 10 July 2007).

196 Amnesty International, Annual Reports, 1999-2009, Human Rights Watch, Annual Reports, 2004-2007, US State Department, Country Reports, 1999-2007.

197 Also the EU, in a Presidency Statement of May 2006, expressed its criticism for the harsh treatment of peaceful demonstrators, see [http://ec.europa.eu/external\\_relations/egypt/intro/index.htm](http://ec.europa.eu/external_relations/egypt/intro/index.htm) (consulted on 10 July 2007).

198 As also stated by the UN Committee against Torture, "torture is a frequently used method of interrogation and punishment in Egypt, particularly in connection with political and security matters". *Agiza v. Sweden*, CAT/C/34/D/233/2003, 24 May 2005, par. 3.3.



though several UN and EU institutions reproached Egypt for not fully cooperating with international human rights mechanisms – including for refusing visits from several UN Special Rapporteurs<sup>199</sup>.

The EU has acknowledged the gravity of the human rights situation in several *Démarches*, Declarations and other documents;<sup>200</sup> it has concurrently tried to promote progress through the different human rights instruments at its disposal. Hence, within the framework of the Neighbourhood policy, the EU started a dialogue in 2004 on human rights with Egypt and has financed several projects in the country through the European Initiative for Democracy and Human Rights. Moreover, the Euro-Mediterranean Association Agreement of 2001 already included the respect of human rights as an essential clause of the partnership<sup>201</sup>, although it has not been implemented so far<sup>202</sup>. Finally, in March 2007 the EU and Egypt adopted an Action Plan in the framework of the Neighbourhood policy designed to support the Egyptian reform agenda. It includes the establishment of eight sub-committees, including one on “Political Issues: Human Rights and Democracy.” Almost 600 millions Euros have been budgeted for its implementation<sup>203</sup>.

Human rights and democratisation issues in the dialogue with Egypt have witnessed very little action beyond the rhetoric and even then only partial successes. As Youngs states, strong security and commercial interests prevailed on the EU’s declared holistic approach to democracy promotion in the Mediterranean, and the European policy failed to fully adhere to the logic of its own philosophy<sup>204</sup>.

According to the aggregate figure derived by Eurostat-Comtrade, in the period 1998-2006 Egypt imported over 6,5 million euros of small arms, primarily from Germany and Italy. However, as graph 5.2 shows, the amount reported by the national and the European export report are even bigger, thus suggesting that the largest portion of exports to Egypt consisted of military equipment<sup>205</sup>.

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199 European Commission, Country Report, Egypt, COM(2005) 72 final, p. 10, Amnesty International, Annual Report, 2007, US Department of State, Country Report, 2006

200 European Commission, Country Report, Egypt, COM(2005) 72 final, p. 9. Council of the European Union, EU Annual Report on Human Rights 2001, 2003, 2004, 2005.

201 European Commission, ‘Euro-Mediterranean Agreement establishing an association between the European Communities and their member states, of the one part, and the Arab Republic of Egypt, of the other part’, COM (2001) 184 final, art. 2.

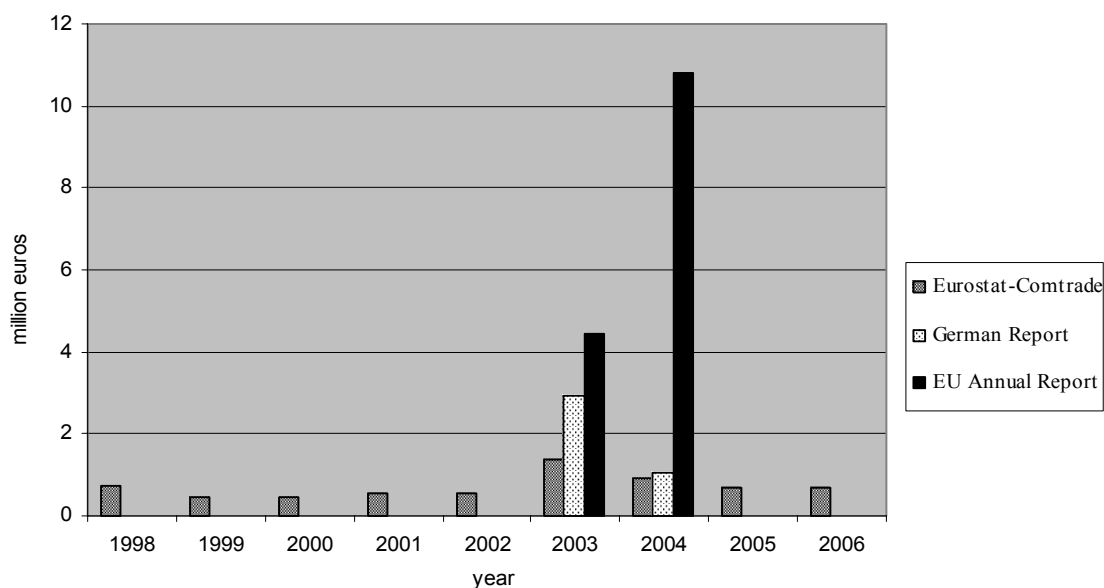
202 In more than one occasion the EP called on an implementation of the clause. See for instance European Parliament, Resolution on Egypt: Violence against Sudanese refugees, 19 January 2006, P6\_TA(2006)0031, par. 12, European Parliament, Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, 14 February 2007, P6\_TA-PROV(2007)0032, par. 225, European Parliament, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, 30 January 2007, A6-0020/2007, par. 223.

203 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/284&format=HTML&aged=1&language=EN&guiLanguage=en> and Schäfer, ‘The EU and Egypt, stability or human rights?’, 2007, in *Quantara.de*, [http://qantara.de/webcom/show\\_article.php/\\_c-476/\\_nr-752/i.html](http://qantara.de/webcom/show_article.php/_c-476/_nr-752/i.html).

204 Youngs, Gillespie, 2002, p. 41.

205 Egypt also manufactures the 7.62mm FN MAG under licence from the Belgian firm FN Herstal. See Small Arms Survey, 2002, p. 45.

Graph 5.2: Exports of small arms to Egypt



Source: Eurostat, UN Comtrade, German export report, EU Annual Report

Notes : (a) the German Report and the EU Annual Report only cover, respectively, the period 2002-2005 and 2003-2005.

A full understanding of the reasons for the high amount of 2003-2004 should take into consideration other factors such as the demand side. Nonetheless, even though the exports have dropped after 2004, the flows are still higher than the pre-2002 level.

This is not determined by the “wrong” behaviour of member states and their non-compliance with the provisions of the Code alone. Conversely, the picture is more complex and reflects the lack of coordination of the three EU policies. Arms export controls and small arms programs, in fact, are not seen as a necessary complement for the realisation of the objectives in the field of human rights. The EU has never stated that the export of arms to Egypt (and North Africa in general) may constitute a threat to the respect of human rights, and has only addressed this question with regard to security reasons, organized crime, proliferation of weapons of mass destruction<sup>206</sup> or referring to the illegal trade in arms<sup>207</sup>. This, unfortunately, clearly contradicts the EU’s own commitment in promoting progress with respect to human rights and underestimates the systematic involvement of small arms in the most serious violations occurring in Egypt. While close attention to small arms export is lacking, the UNIDIR 2005 Report on the EU Strategy on Small Arms has highlighted that an enhanced European action on small arms in North Africa is as a necessary complement in order for peace and security as endorsed by the Barcelona Process to be realized<sup>208</sup>.

### 5.3 Strengthening the ties with Pakistan: the mix of conflicting priorities

The case studies analysed above – Saudi Arabia and Egypt – have been taken as examples of two different aspects explaining the ineffectiveness of the small arms export controls, notably the prevalence of foreign policy interests over human rights concern and the lack of coherency between the three EU policy sectors involved in this matter.

These two elements have been considered separately in the analysis for sake of clarity. In reality, though, as the case of Egypt itself already suggested, it is difficult to distinguish exactly where one ends and the other begins to play. If the EU is not clear enough in implementing its own policies, member states certainly take advantage of these missing links in order to pursue their own foreign

206 Barcelona Declaration, adopted at the Euro-Mediterranean Conference, 27-28 November 1995.

207 European Commission, Communication on the European Neighbourhood Policy, Strategy Paper , COM(2004) 373 final, p. 13.

208 UNIDIR, 2005, p. 39.

policy interests<sup>209</sup>. Pakistan, to look at a third case, is in this sense a good example of how a rather structured but not coordinated cooperation in the field of human rights goes together with an emerging importance of strategic factors.

Although the regional cooperation framework with the South Asian Association for Regional Cooperation (SAARC) is less structured than with the Mediterranean partners<sup>210</sup>, the EU has been more active in the field of human rights here than, for instance, with Saudi Arabia. At the same time, the strategic importance of Pakistan has recently increased: the boost of Islamic Fundamentalism in the region has turned into a matter of security for the EU as well, and it is likely to have necessitated at least “indirect support” to the Pakistani regime in its fight against terrorism. If this assumption is correct, it can explain why the export of small arms had been minimal or not existent until 2004, and why they have increased significantly since then.

Violations of human rights are widespread and severe, especially after General Pervez Musharraf took power in a military takeover in 1999. Small arms have been particularly involved in extrajudicial killings, including political rivals, disappearances of provincial activists and political opponents, as well as arbitrary arrest and torture<sup>211</sup>. Likewise, civil and political rights suffer serious restrictions and not even Pakistan has ratified the ICCPR. Moreover the ready availability of small arms has increased the intensity of violence perpetuated against and between all communities and groups<sup>212</sup>.

While expressing its concern for this situation<sup>213</sup>, the EU has increased its commitment to promoting respect for human rights in Pakistan. The EU-Pakistan cooperation agreement includes a clause related to the commitment of both partners to human rights<sup>214</sup>, and the EU Head of Mission conducts a regular dialogue on human rights with the Government of Pakistan focusing on the misuse of the blasphemy laws, violence against women, minority rights, police behaviour, torture, the death penalty, and freedom of expression<sup>215</sup>. Moreover several projects in the field of police behaviour, rule of law, illicit traffic in arms, strengthening the role of civil society have been financed through the EIDHR.<sup>216</sup> In a joint declaration in February 2007, the EU and Pakistan went on to stress their reciprocal interest for strengthening their cooperation in human rights field<sup>217</sup>.

Notwithstanding these efforts, small arms flows have increased in the recent years even if the human rights crisis has generally become more severe – they accounted for almost seven million Euros only in the last three years.<sup>218</sup> Even still, this region has not been a priority for the EU’s small arms assistance and found little attention in the EU 2005 Small Arms Strategy<sup>219</sup>. The high amount of flows reported by the EU annual report suggests that the equipment has been in large part of a “military” nature, and thus in accordance with the political situation so sketched.

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209 In 2004, for instance, the Italian government defended its exports to Algeria by referring to the fact the EU has not condemned Algeria for its violations of human rights. See Luigi Mantica, undersecretary for Foreign Affairs, reported by Amnesty International Italia, <http://www.amnesty.it/campagne/controlarms/documenti/g8/italia.html>.

210 European Commission, Strategy Paper and Indicative Programme for Multi-Country Programmes in Asia 2005-2006, p. 6. Available via [http://ec.europa.eu/external\\_relations/asia/rsp/rsp\\_asia.pdf](http://ec.europa.eu/external_relations/asia/rsp/rsp_asia.pdf) (consulted on 19 July 2007).

211 US State Department, 2007. Only in 2006, for instance, have been reported 1,513 cases of torture in custody by security force personnel.

212 Banerjee, Muggah, 2002, p. 27.

213 Council of the European Union, Annual Reports on Human Rights, years 2001, 2002, 2003, 2004, 2005.

214 European Commission, ‘Cooperation agreement between the European Community and the Islamic Republic of Pakistan on partnership and development’, available on [http://ec.europa.eu/external\\_relations/pakistan/intro/coop\\_agree\\_11\\_01.pdf](http://ec.europa.eu/external_relations/pakistan/intro/coop_agree_11_01.pdf) (consulted on 10 July 2007).

215 Council of the European Union, Annual Reports on Human Rights 2005.

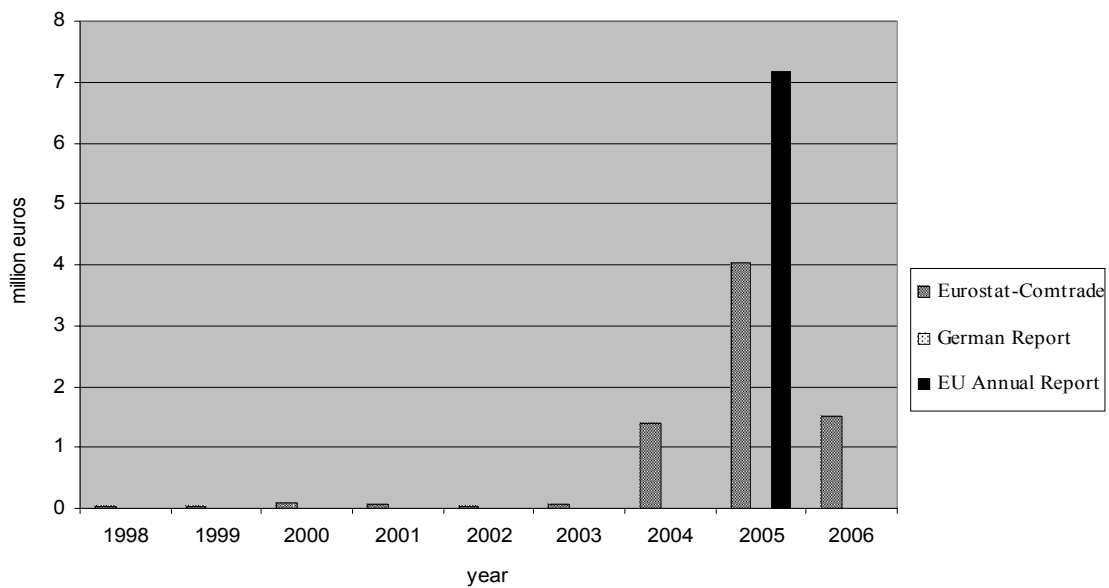
216 Council of the European Union, Annual Reports on Human Rights, 2001, 2002, 2003, 2004, 2005.

217 Council of the European Union, EU-Pakistan Joint Declaration, Brussels, 8 February 2007, 6174/07 (Presse 21).

218 Pakistan also manufactures arms and ammunition under licence from the German firm Heckler & Koch. See Small Arms Survey, 2002, p. 50.

219 In fact, the UNIDIR recently called the EU to give Asia more attention in its small arms action (UNIDIR, 2005, p. 42).

Graph 5.3: Exports of small arms to Pakistan



Source: Eurostat, UN Comtrade, German export report, EU Annual Report

Notes : (a) the German Report and the EU Annual Report only cover, respectively, the period 2002-2005 and 2003-2005.

This reflects the assumption that the exports have been primarily driven by foreign policy interests and that the Code has not been properly applied. As a direct consequence, it follows that the action of the EU in promoting, for instance, police behaviour might have been undermined by an uncontrolled proliferation of small arms and by the political support to the regime that the trade in arms represents.

In general, the lack of coordination between different policies, along with the difference between the EU rhetoric and the real behaviour of member states, is likely to limit the effectiveness of the EU's promotion of human rights in foreign countries. On a very direct level, the export of small arms openly conflicts with the efforts of the EU in the field of human rights and democracy. Also, where the EU's efforts are more sustained, as in the case of the Mediterranean countries, the EU's commitment (also in terms of financial assistance) in areas such as the rule of law, police behaviour or political reforms<sup>220</sup> can be undermined by the simple proliferation of small arms. Confirmation that the discord of these policies deprives the action of promoting human rights of an important support has also come from the European Parliament. It has stressed that "on several occasions EU human rights policies have been undermined by (...) Member States not maintaining systematically a strict application of the EU Code of Conduct on Arms Exports" and emphasised that "firm political action against the proliferation of all types of weapons, both conventional and WMD, both heavy arms and light weapons, is essential to the success of any EU campaign on human rights"<sup>221</sup>.

On a political level, moreover, this lack of coherency generates contradictory messages which may seriously damage the credibility of the EU's commitment in promoting human rights. While this problem concerns many different mechanisms of the EU's promotion of human rights and primarily the effective use of the human rights clauses contained in the cooperation agreements, the contradictory messages sent by the member states and their significant autonomy in setting export policy give authoritarian regimes many reasons and opportunities to disregard human rights conditions set by the EU. In other words, without ensuring that the diverse range of European external actions is pursued in a coherent manner with an overarching strategy, the EU efforts for the promotion of human rights may turn out to be very costly and ineffective in the long run.

220 See for instance EU-Egypt Association Council, 'EU-Egypt Joint Action Plan', 6 March 2007.

221 European Parliament, 'Resolution on human rights in the world in 2003 and the European Union's policy on the matter', 22 April 2004, P5\_TA(2004)0376, paragraph 30.

## 6. Conclusions and Recommendations

The aim of this study was to assess the effectiveness of criterion 2 of the Code of Conduct in curbing the European export of small arms to countries which violate human rights. In the spirit of advancing public policy, a brief review of the findings will help illuminate possible solutions to the most significant problems identified.

### Main Findings

- *The lack of comprehensive and detailed data on small arms severely limits the monitoring of small arms exports from a human rights perspective. Without data there is no means of control or enforcement.*

The European Annual Report is very poor in data regarding small arms exports. The same is true for national export reports (with the partial exception of Germany), while the other sources available (Eurostat, Comtrade) do not constitute valuable alternatives to fully observe export trends in small arms because they mainly provide data about non-military exports. The fact that data are missing, especially with regards to small arms, is of particular concern.

- *The export controls are not working efficiently. Other priorities influence the exports.*

The analysis showed that there has not been a clear effect of the Code and that the trend of export could be better explained primarily in terms of bilateral relations, strategic importance of the recipient country, and national interpretation of the provisions of criterion 2 of the Code. As a result, most of the countries of concern have kept their traditional flows and in some cases even increased them. In general, the recognition of a country in violation of human rights standards is highly dependant on the political, strategic and commercial interests of the EU and of the member states. To answer the question posed in the introduction: *reality* in the field of arms export control is still far from the *rhetoric*, and the *real* challenges prevail over the *theoretical* framework.

- *The Middle East, and in particular the Gulf region, resulted to be the largest recipient area among the countries considered.*
- *Member states neither comply with the provisions of the Code nor are they obliged to by the current framework.*

The Code is just a political document and any decision, eventually, is taken autonomously by each state. By being not legally binding, there is no mechanism of enforcement.

- *A significant portion of the exports consisted of non-military equipment.*

Export to countries of concern included also small arms classified under the category of non military weapons (which falls outside the current scope of the Code), in particular in the case of Belgium. This suggests that the actual framework is inadequate to address properly the problem of proliferation of small arms and violations of human rights, the solution of which passes also through the acknowledgment that civil equipment can be as dangerous as military one in the repression of fundamental rights.

- *The lack of a univocal definition of small arms constitutes one of the biggest threats to the effectiveness of export controls and to the protection of human rights.*

First, the definitions used by the three exporters and the one adopted by the EU differ. Second, all of them fall short of the definition proposed by the 1997 UN Panel of experts. In the case of the EU, the definition is limited to those arms and accessories specifically designed for military use and it omits those weapons used by law enforcement agencies. The export of police equipment therefore falls outside the definition of small arms and even the scope of the Code. Moreover, the Common Military List does not reflect the definition of the 1998 Joint Action, the result being that

the weapons entailed by the Joint Action are mixed with other arms in the categories ML1, ML2, ML3.

- *The EU's policies on the promotion of human rights, on arms export controls and on small arms are not enough coordinated and integrated*

Recent studies show that the Code had an effect in curbing the European arms exports to countries with very low human rights records. Nonetheless, this study, in line with other recent works, finds that this effect is not clear with regards to small arms. This study considers that this is partly due to the fact that the three policies concerned (human rights, arms export control, small arms) are not well coordinated and integrated. The intersection between the three policy sectors, which could be a point of strength of the EU action, appears to be instead a point of weakness. In particular:

- the arms export control policy does not give enough attention to the issue of small arms;
  - the initiatives undertaken in the framework of the Small Arms Strategy are mainly focused on conflict prevention, illegal trade and destruction of existing stockpiles, while they are less cognisant of the impact of legal exports to the human rights situation of third countries;
  - Even where the EU action for human rights is stronger and more articulated (e.g. in the framework of the Euro-Mediterranean Partnership), the arms export controls and small arms programs are not seen as a necessary complement for the realisation of the objectives.
- *The export of small arms to countries which violate human rights undermines the efforts of the EU in promoting democracy and the respect for human rights in the world.*

The low level of coordination of the three policies mentioned above generates contradictory messages and creates what can be called a sort of schizophrenia, whereby the EU is taking action in one direction while the member states are undermining its action. These contradictory messages and decisions openly conflict with the efforts of the EU in the field of human rights and democracy and with the principles of the European Security Strategy, and they weaken the programmes of the EU in contrasting small arms proliferation. The risk, therefore, is to reduce the positive conditionality that the EU is seeking in its external action and to undermine the effectiveness of the EU promotion of human rights in third countries.

## **Recommendations**

- *There is a need for greater transparency. Data availability should be enhanced through more efficient and compulsory data records.*

Member states should publish transparent information about small arms in the national and the European report. In particular, they should report the data disaggregated by category and recipient country at the same time. Meanwhile member states should commit themselves to communicate all small arms exports, including military exports, to customs authorities. A reform of the reporting system (thus of operative provision 8) which makes communication of the data disaggregated by category and recipient countries compulsory may be more easily achievable than making the whole Code of Conduct legally binding. In fact, while in principle the simple disclosure of information sensible to the essential interests of a member state is protected by Art. 296 of the TEU, this may be considered a good compromise by member states between the current situation and a full revision of the Code.

It is true that the accuracy of the German report does not prevent this country to export small arms to countries which this study considered clearly in breach of the most basic respect of human rights. Nonetheless, the German report is more transparent and therefore conducive to inquiry, as in the case of this paper, that can systematically address anomalies that emerge. Obviously, it would be very important to be able to do the same with other European exporters such as Italy and Belgium.

- *A more inclusive definition of small arms is urgently needed at the European level. The definition, in particular, has to include also those items of non-military equipment which are relevant to major human rights violations.*

The EU should recognise that the current definition of small arms is inadequate to properly address the problem of proliferation of small arms and violations of human rights. The solution requires that policy makers acknowledge that civilian equipment can be as dangerous as military equipment in the repression of fundamental rights. Together with the elaboration of a new definition, perhaps adopted as an update of the small arms Strategy, the categories of the CML should be reviewed in order to make the change operative in the practical impact of the Code.

Commenting on this proposal, the vice-president of the EP Luisa Morgantini said that “the EP may push for a re-definition of small arms through a resolution calling for a reaction of the international community”<sup>222</sup>, while Ernst Guelcher seemed convinced that the EP can “push for a definition to include the controversial elements in the small arms issue” but also stressed that unfortunately “there is no good definition because all elements of such definition are the outcome of political interests”<sup>223</sup>.

- *A crucial improvement would be the adoption of a legally binding document which would strengthen the influence of the EU over the member states in the field of arms exports and set up a mechanism to investigate the alleged violations of the Code.*

This will not only assure the compliance of the national export policies with the European criteria, but will also guarantee more consistency with the EU promotion of human rights in foreign countries. This reform has both political and legal obstacles, the latter mainly existing in article 296 of the TUE. Even assuming that a reform will be achieved, much will depend on the kind of change that such a reform will introduce. The ineffectiveness of the controls is not only due to its non binding nature, but also to other loopholes, primarily the discretion that states have found in the definition of small arms. A recent study proved that member states have shown only partial compliance even with regards to legally binding EU arms embargoes, thus suggesting that not everything can be solved by a binding document<sup>224</sup>. Moreover, it should be clear to the member states that, in the process of negotiating such a document, its full effectiveness would eventually depend on giving the Union – and not the member states – the competence and the final word about the licence authorisation/denials.

- *The EU should compliment its action on human rights issues with efforts in other policies areas, including arms export controls.*

The process of mainstreaming is severely handicapped if other policies such as arms exports do not support the efforts of the EU. This much has even been recognized by the EP on many occasions. Especially in areas such as the Mediterranean, the EU should acknowledge that conditionality in arms exports can enhance rather than diminish its influence over human rights issues. In this regard, future research should analyze whether some correlation exists between the effectiveness of EU programs in the field of human rights and the amount of arms flows to specific region and country. Similar considerations could be executed as well with regard to the correlation between exports of small arms and the effectiveness of non-proliferation programs undertaken within the small arms strategy.

- *The EU should acknowledge the missing links between human rights, arms export controls and the small arms policy and it should work to enhance the coordination among them.*

Further research is needed to identify potential solutions and suggest how to restructure the interaction between these three policies, but it is possible to indicate at least the main directions that the EU should undertake.

222 E-mail from Luisa Morgantini, vice-president of the European Parliament, 5 July 2007.

223 E-mail from Ernst Guelcher, Green/EFA advisor on security and defence at the European Parliament, 3 July 2007.

224 Jackson, Marsh, Thurin, 2005, pp. 56-73.

The small arms strategy should be reviewed and should consider human rights violations as a central issue, also on the operative ground. Projects funded within the Small Arms Strategy can be efficiently integrated with existing projects of the EIDHR, thus generating joint initiatives which cut across the two policies and exploit the action-oriented nature of these two programs. On the other hand, arms export controls should be more aware of the specific danger of small arms for human rights violations and, as already said, adopt a broader definition of small arms and reform consequently the CML. Third, this stronger engagement in the field of small arms export controls should not be seen as a policy isolated from the others. Conversely, it can be only one component of a stronger and more effective action of the EU in the field of human rights.

- *To push for the necessary steps in terms of coordination and transparency, greater institutionalisation of mechanisms addressing the export of small arms to countries which violate human rights may be helpful.*

In this sense the role of the Personal Representative for Human Rights of the High Representative of the EU for the CFSP and the Personal Representative for non-proliferation (who is also responsible for the implementation of the EU Small Arms Strategy and for the coordination of the national controls of arms export) may be important. Their cooperation on this issue may lead to concrete proposal and to a better coordination of action between the promotion of human rights, the arms export controls and the small arms strategy. They could also think about the appointment of a figure who could have competencies across these fields and who could work specifically on the harmonisation of these policies at the European level, perhaps on the model of the “UN Special Rapporteur on the prevention of human rights violations committed with small arms”.

Similarly, important pressures may come from the European Parliament, which so far has been the most astute actor involving these issues and has already stressed in its exchange of views with the Commission and the Council the need for more policy coherence. Besides continuing in the role of a watchdog among the European institutions, the Parliament may also think of appointing a working group on the prevention of human rights violations committed with small arms in order to study and elaborate possible reform in this sense.

These proposals have been forwarded and discussed with some members of the EP and received a rather positive feedback. In particular Luisa Morgantini strongly agreed on the “need for a greater institutionalisation of the problem in order to give more transparency and coherence between the behaviour of the EU and the member states. Many member states, in fact, take advantage of the lack of attention on this matter to keep selling arms to states which violate human rights”<sup>225</sup>. She found interesting the proposal of appointing a special Rapporteur, stressing at the same time the “need to start a constant coordination at all levels among the all the Directorates-General (DG) of the Commission and in particular DG Trade and DG Development”<sup>226</sup>. She also received with interest the proposal of creating a working group of the EP, suggesting that there is room to promote also other initiatives such as resolution and reports and to involve more the Commission and the Council in the EP debates on this issue. Also Ernst Guelcher received the appointment of a Special Rapporteur as a “good idea, as long as it is recognised that the issue of arms exports is not only linked to human rights issues”<sup>227</sup>. Concerning the role of the EP, he stressed that “only since recently the EP has a bit more access to what is discussed in the COARM, but so far we still have very little real impact in the field of implementation, in particular not as far as this is at the competence-level of national states”<sup>228</sup>. Therefore on paper, he said, the establishment of a working group of the EP is a good idea, but it is not sure if that would really improve the work and the impact of the parliament.

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225 E-mail from Luisa Morgantini, vice-president of the European Parliament, 5 July 2007.

226 Ibid.

227 E-mail from Ernst Guelcher, Green/EFA advisor on security and defence at the European Parliament, 3 July 2007.

228 Ibid.



- *In order to make these reforms really effective and to reduce the perception that it will be extremely costly for the EU defence industry, it is necessary to involve the other main producers and exporters of small arms in this process. The success of the negotiation of an Arms Trade Treaty, therefore, should be a primary concern of the EU.*

Several reasons suggest that if the EU plays alone, it will turn out into a very costly policy which will not have a definite impact on the proliferation on small arms around the world. In fact, other major exporter countries (USA, Russia, China) are ready to take over the place of European countries in providing countries of concern with small arms. Such a policy would be both ineffective and would only result in an economic loss for the European defence industry. Certainly, this would not be acceptable by any national government. It is therefore necessary to promote stricter arms export control in the international arena. Both member states and the EU have already undertaken steps in this sense, primarily by actively supporting the negotiations of an Arms Trade Treaty.

The EU, in particular, should act in two directions. On the one hand it should use all its political weight to involve the other major exporters in this process, which so far have opposed any progress – especially the USA, Russia and China. However, even without these actors involved, a good and representative core group of nations who accede to the treaty can actually push the others into the process by convincing, shaming and blaming them. On the other hand, this study showed that the EU controls, which are considered the most advanced framework in the world, still allowed export to countries which violate human rights. While advocating an international treaty, therefore, the EU should be fully aware of the loopholes of its framework and should encourage more far reaching solutions at international level. In this respect, the findings of this study can be a useful guide.

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- Periode du 1<sup>er</sup> Janvier 1998 au 31 Decembre 1998;
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