



DIALOGUE AND DEBATE

Defending Ukraine with EU weapons: arms control law in times of crisis

Tomas Hamilton 

Assistant Professor, Faculty of Law, University of Amsterdam, Amsterdam, The Netherlands
Corresponding author. E-mail: t.f.b.hamilton@uva.nl

(Received 2 May 2022; revised 4 July 2022; accepted 3 August 2022)

Abstract

The wish from 24 February 2022 onwards to help Ukraine defend against Russian aggression has led to the provision of unprecedented lethal European Union (EU) military assistance. As the ‘taboo’ of supplying lethal assistance into non-EU conflicts is swept aside, what is the role of international arms control law? The legal requirements of the EU Common Position on arms exports and the Arms Trade Treaty compel EU Member States to assess various short- and long-term risks associated with arms exports. But it is unclear how arms control norms are being taken into account by the EU Council in its rapidly evolving role as a peacemaker.

The standards that are being used to shape EU decision-making on Ukraine matter both for their precedent-setting as reflecting the trajectory of EU normative power, as well as on the long-term blow-backs of proliferation on illicit arms trafficking. While from the EU Council, there has been limited public articulation of these risks, greater consideration thereof would serve as a reminder of the reality of post-conflict arms proliferation, ie. illicit arms trafficking of weapons leached from the conflict, and their subsequent misuse by undesirable actors. Geostrategic precedent is being set, with implications that extend far beyond Ukraine, including to other conflicts where the EU is already intervening. The EU’s delivering of massive lethal military assistance alters also the reflexive perception of its institutions.

Keywords: European Union Law; arms control law; Ukraine war; EU common position; arms trade treaty

1. EU ‘lethal military assistance’ to Ukraine

There are only three items on my agenda: Weapons. Weapons. Weapons.¹

Shortly after the Russian invasion of Ukraine, the EU Council issued a decision on 28 February 2022 to finance and supply 450 million euros of lethal military assistance and 50 million euros of medical supplies and other items to the Ukrainian Armed Forces.² A further 450 million euros was authorised in Decision 2022/741 on 23 March 2022 and further commitments have followed.³ The

¹“Weapons, Weapons, Weapons”: Ukraine issues plea to Nato’ (*The Guardian*, 7 April 2022) <<https://www.theguardian.com/world/video/2022/apr/07/weapons-weapons-weapons-ukraine-issues-plea-to-nato-video>> accessed 14 September 2022.

²Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force (2022) OJ L 60/1 (‘EU Decision to Assist Ukraine’).

³Council Decision (CFSP) 2022/471 of 23 March 2022 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force (2022) OJ L 96/43 (‘Amending Decision’).

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implementation of these EU decisions is carried out by individual Member States such that the EU provides a funding and coordination platform for joined-up military and security policy in relation to Ukraine, while it is ultimately for each country to determine whether there are domestic legal restrictions that prevent an arms export from taking place.

The EU has arguably the most stringent system for arms exports in the world, requiring careful assessment not only of short-term usage of weapons, but also long-term conflict risk and threats to regional stability.⁴ While the immediate short-term justifications for supporting Ukraine have been much discussed, there has been only limited scrutiny of the unprecedented nature of the EU Council's role in Ukraine and the potential for longer-term conflict risks while the quantity of lethal weaponry supplied to Ukraine continues to mount. Publicly, there has been limited explanation of the risk assessments underlying the EU's policy making in this respect, and the EU Council has not sought to engage with, or justify, its decisions to coordinate lethal military assistance, perhaps out of sense that the moral imperative is obvious and sufficient.

This article places the EU Council's pronouncements and decisions under the European Peace Facility and Member States' implementation of arms exports to Ukraine into the context of international arms control. It identifies the legal basis for the EU Council's decision-making on lethal military assistance and extrapolates the relevance of the EU Common Position and Arms Trade Treaty. It seeks to highlight some of the long-term risk factors relevant to the war in Ukraine that should be taken into account in the EU's legal analysis, and which are legally binding on Member States in their export criteria assessments. The discussion presents a timely opportunity to recall the normative underpinnings of international arms control law and to contribute to policy consideration of the changing role of European institutions in peacekeeping and conflict intervention that the Ukraine conflict may be anticipating and for which it may be setting precedent. The analysis of EU support for Ukraine thus raises broader concerns over the erosions of the rule of law that often loom in times of crisis, as well as the potentially morphing role of the EU as an intervenor in foreign armed conflicts.

2. The relevance of EU arms controls for decision-making on Ukraine assistance

There is limited evidence of how the EU Council is taking into account international arms control norms in its decision-making on lethal military assistance to Ukraine. The approach of the EU Council was inadvertently disclosed through a leaked confidential Concept Note dated 27 February 2022.⁵ This document refers – albeit succinctly – to some of the relevant long-term conflict risks inherent in supporting Ukraine. Yet it also demonstrates that the framework criteria of the EU Common Position and the applicable norms of the Arms Trade Treaty were not explicitly referenced as the EU Council formulated this unprecedented programme of lethal military aid, and that these legal frameworks were not the primary mediating language used in proposals at the Council.

As elaborated below, the text of the relevant decision-making framework demonstrates that international arms control law must be taken into account at the EU level in its military strategy in relation to Ukraine, even while individual Member States are responsible for blocking exports if they do not accord with licensing requirements, which may occur often in situations where national authorities have access to security intelligence unavailable to the EU Council. At the same time, it may be unsurprising, given the confidential national security interests at stake, that limited

⁴See I Romanyshyn, 'The EU in Multilateral Arms Negotiations: Shaping the Process or Outcome?' 41 (2019) *Journal of European Integration* 675–92.

⁵Council of the European Union, 'Concept Note for an Assistance under the European Peace Facility for the Supply to the Ukrainian Armed Forces of Military Equipment, and Platforms, Designed to Deliver Lethal Force' (6661/22, 27 February 2022), published by Statewatch (16 March 2022) <<https://www.statewatch.org/news/2022/march/eu-concept-note-on-providing-arms-to-ukraine>> accessed 14 September 2022. The note was made public at some point in March 2022.

explanation is given for inter-governmental decision-making at the EU Council. Even if the same normative standards of international arms control law underly the decision-making, *sotto voce*, greater legitimacy of the EU Council's decisions in the eyes of the public could be achieved if reference in the decision-making was made to the EU Common Position and the Arms Trade Treaty were better communicated by the Council.

Several concerns warrant attention to the legal grounds on which military support for Ukraine is being made. In policy circles, the main reluctance to arm Ukraine appears to have been the risk that Russia perceives and/or declares that EU military support to Ukraine is an act of aggression that warrants retaliation.⁶ There are other potential fallouts of supplying Ukraine with unprecedented levels of lethal military assistance: (i) the impact of long-term arms proliferation in the region that history shows can have catastrophic impacts on human security,⁷ (ii) increases in transnational organised and regular crime, (iii) the undermining of regional stability, whether by prolonging and/or exacerbating this armed conflict and fostering others, (iv) increased lethality of the conflict, particularly through the increased unintended consequences of more explosives for civilian casualties,⁸ (v) the undoubted massive environmental impacts that may be sufficiently grave and of international concern to constitute the emerging normative classification of 'ecocide',⁹ (vi) the risk of weapons falling into Russian hands or diversion to other non-allies who may be in the region or far-removed, including terrorist and extremist organisations who are undesirable to Western interests,¹⁰ (vii) the non-utility of weapons that Ukrainian forces cannot operate effectively, (viii) the reality and feasibility of guarantees from Ukraine, reliability of end-user certification, and efficacy of follow-up monitoring,¹¹ (ix) the (currently limited) potential for allegations of war crimes on the Ukrainian side,¹² and (x) well-documented risks of corruption in the arms industry that mean the ever-present risk of arms companies, brokers, and shipment companies profiteering from the Ukraine war in ways which serve neither the EU or Ukraine's interests.¹³

The starting point for analysis is to look at the legal grounds that enable EU Member States to individually support Ukraine against Russian aggression. In this regard, the right to collective self-defence under Article 51 of the UN Charter provides a fundamental legal basis for individual States to supply lethal military assistance to Ukraine. However, the specific legal provisions

⁶This is a possibility considered by politicians and military planners, according to J Landale, 'Ukraine: How Might the War End? Five Scenarios' (*BBC News*, 3 March 2022) <<https://www.bbc.com/news/world-europe-60602936>> accessed 14 September 2022.

⁷For a critique on the arms supply to Ukraine and a discussion on how it may fuel further conflict, see: N N Bhriain, 'The EU Is Wrong to Arm Ukraine. Here's Why' (*OpenDemocracy*, 3 March 2022) <<https://www.opendemocracy.net/en/economy/the-eu-is-wrong-to-arm-ukraine-heres-why/>> accessed 14 September 2022.

⁸For an overview of some of those consequences of explosives, see: United Nations Security Council, 'Protection of Civilians in Armed Conflict: Report of the Secretary General', S/2021/423 (3 May 2021), 3 (paras 10–13).

⁹As highlighted on behalf of 108 NGOs: 'Joint Statement by Global Civil Society Organizations to UNEA 5.2 on Ukraine' (1 March 2022) <<https://paxvoorvrede.nl/media/download/JointStatementUkraineUNEA.pdf>> accessed 14 September 2022.

¹⁰Putin has already claimed that '[a]s to the delivery of arms, especially western-made ones which have fallen into the hands of the Russian army, of course I support the possibility of giving these to the military units of the Luhansk and Donetsk people's republics.' M Chulov, 'Syria Recruiting Troops from Its Military to Fight with Russian Forces in Ukraine' (*The Guardian*, 11 March 2022) <<https://www.theguardian.com/world/2022/mar/11/putin-approves-russian-use-of-middle-east-fighters-against-ukraine>> accessed 14 September 2022.

¹¹The end-use monitoring of weapons sent to Ukraine by the United States did not meet the standards: Inspector General U.S. Department of Defense, 'Evaluation of Department of Defense Enhanced End-Use Monitoring for Equipment Transferred to the Government of Ukraine' (Report No. DODIG-2020-121, 27 August 2020).

¹²For example, allegations of war crimes on the Ukrainian side were made on the basis of a video circulating social media showing Ukrainian soldiers shooting Russian prisoners-of-war in the legs. See: 'Does Video show Russian Prisoners Being Shot?' (*BBC News*, 30 March 2022) <<https://www.bbc.com/news/60907259>> accessed 14 September 2022.

¹³For example, see: J Roeber, 'Hard-Wired for Corruption' (*Prospect*, 28 July 2005) <<https://www.prospectmagazine.co.uk/magazine/hardwiredforcorruption>> accessed 14 September 2022.

enabling the EU to finance and coordinate the provision of lethal military assistance to Ukraine are found in the new European Peace Facility ('EPF'), established in March 2021.¹⁴

Relevant to the use of this off-budget facility the standards of international arms trade norms, notably, the assessment criteria for arms exports in the EU Common Position¹⁵ and the Arms Trade Treaty.¹⁶ While the confidential leaked Concept Note of the EU Council does not state expressly how these considerations are taken into account at the EU-level, the binding nature of export regulation criteria at the national level means that Member States must carefully assess the impact of unprecedented and massive weapons flow into Ukraine. Interestingly in this regard, while states make their own separate and individual export assessments, they must nonetheless assess the risk associated with arms exports in the context of many other EU states making concurrent similar exports. Two other commentators, Elias Yousif and Rachel Stohl have discussed the strategic risks associated with assisting Ukraine in the context of short- and long-term American interests.¹⁷ These points have not been thoroughly examined in a legal context in relation to the European arms supplies.

While there is an unprecedented imperative for the EU Council to provide weapons supplies to help Ukraine in this time of crisis, the resilience of the international system of arms control laws would be served by a more methodical approach that continues to respect and adhere to the regulatory frameworks, even in cases such as Ukraine where there appears *prima facie* to be an overwhelming moral and legal mandate in favour of providing support. With a view to enhancing the legitimacy of European involvement in the Ukraine conflict, foreign ministries of Member States could articulate the basis for providing military assistance with respect to existing EU and international legal frameworks for arms control.

3. Background: the types and quantities of EU military support for Ukraine since the 24 February invasion

The first indication of the types and quantities of weapons that would be sent to Ukraine came on 27 February, three days after the Russian invasion, when 'emergency delivery of defensive military equipment. Guns, ammunition, rockets and fuel' was announced by EU Council President Charles Michel.¹⁸ On the same day, the EU Commission issued a Statement by President von der Leyen on further measures to respond to the invasion,¹⁹ supplemented by a statement by High Representative/Vice-President Josep Borrell.²⁰ The measures outlined by Von der Leyen included 'financing the purchase and delivery of weapons and other equipment', to coincide with closing the EU airspace to Russians and further sanctions against Russia and Belarus. On 28 February, the EU Council under the EPF issued the EU Decision to Assist Ukraine, agreeing to fund the Member

¹⁴Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528 [2021] OJ L102/14 ('EPF Decision').

¹⁵Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (2008) OJ L 335/99 ('EU Common Position').

¹⁶Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS 269.

¹⁷E Yousif and R Stohl, 'Under Caution: Assessing Arms Transfer Risk in Ukraine' (*Stimson*, 7 March 2022) <<https://www.stimson.org/2022/under-caution-assessing-arms-transfer-risk-in-ukraine/>> accessed 14 September 2022.

¹⁸Address to the Ukrainian people by European Council President Charles Michel' (Statement 181/22, Council of the European Union, 27 February 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/02/27/address-to-the-ukrainian-people-by-european-council-president-charles-michel/>> accessed 14 September 2022.

¹⁹Statement by President von der Leyen on further measures to respond to the Russian invasion of Ukraine' (Statement/22/1441, European Commission, 27 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_1441> accessed 14 September 2022.

²⁰Further measures to respond to the Russian invasion of Ukraine: Press statement by High Representative/Vice-President Josep Borrell' (Statement/22/1463, European Commission, 27 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_1463> accessed 14 September 2022.

States' assistance to Ukraine through the supply of 'military equipment, and platforms, designed to deliver lethal force'.

In a video conference of Foreign Affairs Ministers on 27 February, Josep Borrell stated that, in response to a request of Ukrainian foreign minister Dmytro Kuleba, the EU was 'going to supply (...) even fighter jets'.²¹ The supply of fighter jets became a particularly controversial topic, however, and it seems the EU U-turned as of 1 March, when it became clear Borrell's statement had not been agreed upon within the EU as he explained the EU could not meet Ukraine's request due to insufficient financial means.²² Instead, individual EU countries could donate fighter jets, he proposed. Poland offered to donate its own MiG-29 jets to the United States, which could then be supplied to Ukraine.²³ The Pentagon commented that this would mean fighter jets flying from a US/NATO base in Germany 'into airspace that is contested with Russia over Ukraine' and that this 'raises serious concerns for the entire NATO alliance'.²⁴ The Polish proposal has so far been rejected by the US as untenable.²⁵ The Russian Defence Ministry has already warned that any country providing air fields for Ukrainian warplanes used against Russians will be considered by Moscow as being involved in the conflict.²⁶

Reportedly, by 6 March, more than 17,000 antitank weapons, including Javelin missiles, had crossed the borders of Poland and Romania, headed for Kyiv and other major cities.²⁷ As the EU began providing vital support for Ukraine's defence against Russian aggression, including Stinger air defence missiles, anti-tank weapons and artillery ammunition, the majority of commentators have urged the effectiveness of arming Ukraine, coalescing around a view that it is both obviously good from a strategic perspective, and unquestionably permissible from a legal perspective. In the tumult of the last weeks, it has not always been clear whether these arms are exported by unilateral action of individual Member States, or are made using financing under the EU Decision to Assist Ukraine to be implemented by the Ministry of Defence of an individual Member State.

Perhaps most striking and significant of the actions of individual Member States, Germany preempted the EU Council Decision by sending weapons to Ukraine almost immediately after the invasion.²⁸ This was notable since it reversed Germany's long-standing policy of not sending weapons to conflict zones. Until then, it had sent Ukraine 5,000 helmets and blocked the transfer

²¹Informal videoconference of Foreign Affairs Ministers: Remarks by High Representative/Vice-President Josep Borrell at the Press Conference' (*European External Action Service*, 27 February 2022) <https://eeas.europa.eu/headquarters/headquarters-homepage/111758/informal-videoconference-foreign-affairs-ministers-remarks-high-representativevice-president_en> accessed 14 September 2022.

²²H von der Burchard, J Barigazzi, L Bayer and Z Wanat, 'EU Countries Won't Send Ukraine Fighter Jets after All' (*Politico*, 1 March 2022) <<https://www.politico.eu/article/eu-promise-to-supply-fighter-jets-to-ukraine-gets-grounded/>> accessed 14 September 2022.

²³Statement of the Minister of Foreign Affairs of the Republic of Poland in Connection with the Statement by the US Secretary of State on Providing Airplanes to Ukraine' (Ministry of Foreign Affairs Republic of Poland, 8 March 2022) <<https://www.gov.pl/web/diplomacy/statement-of-the-minister-of-foreign-affairs-of-the-republic-of-poland-in-connection-with-the-statement-by-the-us-secretary-of-state-on-providing-airplanes-to-ukraine>> accessed 14 September 2022.

²⁴Statement by Pentagon Press Secretary John. F. Kirby on Security Assistance to Ukraine' (U.S. Department of Defense, 8 March 2022) <<https://www.defense.gov/News/Releases/Release/Article/2960180/statement-by-pentagon-press-secretary-john-f-kirby-on-security-assistance-to-uk/>> accessed 14 September 2022.

²⁵Ibid.

²⁶J Borger and P Wintour, 'US Dismisses Polish Plan to Provide Fighter Jets to be Sent to Ukraine' (*The Guardian*, 9 March 2022) <<https://www.theguardian.com/world/2022/mar/08/poland-mig-29-jets-us-ukraine>> accessed 14 September 2022.

²⁷D E Sanger, E Schmitt, H Cooper, J E Barnes and K P Vogel, 'Arming Ukraine: 17,000 Anti-Tank Weapons in 6 Days and a Clandestine Cybercorps' (*The New York Times*, 6 March 2022) <<https://www.nytimes.com/2022/03/06/us/politics/us-ukraine-weapons.html>> accessed 14 September 2022.

²⁸Bundesregierung liefert Waffen auf Bundeswehr-Beständen an die Ukraine' (*Pressemitteilung* 74, Die Bundesregierung (German Federal Government, 26 February 2022) <<https://www.bundesregierung.de/breg-de/themen/krieg-in-der-ukraine/bundesregierung-liefert-waffen-aus-bundeswehr-bestaenden-an-die-ukraine-2008214>> accessed 14 September 2022.

of military equipment from other European states to Ukraine.²⁹ Germany has subsequently pledged to deliver more anti-tank and other weapons (as well as to drastically increase its own domestic military spending in response to the Ukraine conflict).

Initial supplies of weaponry to Ukraine came from a number of EU States and has developed in scope and scale on an ongoing basis since the Russian invasion.³⁰ Even Switzerland is providing lethal assistance, and notably, it is the first time Sweden is sending weapons to a country at war since the Soviet invasion of Finland in 1939.³¹ A number of online resources have tracked the development of the supplies to Ukraine, notably the continuously updated data gathered by the Forum on the Arms Trade that contributes a timeline of the conflict together with an overview of pledged and/or delivered weapons from different supplier states.³² EU support is taking place in the context in which, outside of the EU, financial support from the US has increased rapidly into multi-billion figures, including stinger missiles, body armour, and other small arms, as well as

²⁹D M Herszenhorn et al., 'Germany to Send Ukraine Weapons in Historic Shift on Military Aid' (*Politico*, 26 February 2022) <<https://www.politico.eu/article/ukraine-war-russia-germany-still-blocking-arms-supplies/>> accessed 14 September 2022.

³⁰The Netherlands has sent Stinger missiles, as well as anti-tank missiles, rocket-propelled grenade launchers, sniper rifles and ammunition. However, the Dutch government has now indicated that it will no longer make public the specific details of arms deliveries to Ukraine. 'Antitankwapens, luchtdoelraketten en scherpschuttergeweren onderweg naar Oekraïne' (Ministerie van Defensie (Dutch Ministry of Defence), 27 February 2022) <<https://www.defensie.nl/actueel/nieuws/2022/02/27/antitankwapens-luchtdoelraketten-en-scherpschuttergeweren-onderweg-naar-oekraïne>> accessed 14 September 2022.; R van Erven, 'Kabinet: eventuele wapenlevering aan Oekraïne niet meer in detail gecommuniceerd' (*NRC Handelsblad*, 3 March 2022). Sweden (5,000 anti-tank weapons, helmets and body shields, plus 135,000 field rations), as well as Belgium and Finland, have sent anti-tank weapons, and the latter two have (respectively) sent at least 5,000 machine guns and assault rifles too. 'Sweden to provide direct support and defence materiel to Ukraine' (Government Offices of Sweden, 28 February 2022) <<https://www.government.se/articles/2022/02/sweden-to-provide-direct-support-and-defence-materiel-to-ukraine/>> accessed 14 September 2022.; 'Belgium says to deploy 300 troops in Romania, send machine guns to Ukraine' (*Reuters*, 26 February 2022) <<https://www.reuters.com/world/europe/belgium-says-deploy-300-troops-romania-send-machine-guns-ukraine-2022-02-26/>> accessed 14 September 2022.; 'Finland to Send Arms Assistance to Ukraine' (*Press Release*, Ministry of Defence of Finland, 28 February 2022) <https://www.defmin.fi/en/topical/press_releases_and_news/finland_to_send_arms_assistance_to_ukraine.12488.news#25ea1dfc> accessed 14 September 2022. France reportedly indicated that it would provide additional defence equipment to the Ukrainian authorities as well as fuel support. 'France to help Ukraine with Defensive Arms, Fuel – Elysee' (*Reuters*, 26 February 2022) <<https://www.reuters.com/article/ukraine-crisis-france-arms-idINS8N2TJ023>> accessed 14 September 2022. Denmark's armed forces indicated that trucks had left the day prior to deliver 2,000 protective vests and related equipment. 'Forsvaret donerer beskyttelsesudrustning til Ukraine' (Forsvaret (Danish Armed Forces), 26 February 2022) <<https://www.forsvaret.dk/da/nyheder/2022/forsvaret-donerer-beskyttelsesudrustning-til-ukraine/>> accessed 14 September 2022. Norway has sent 1,500 bulletproof vests and 5,000 helmets, while the Czech Republic has supplied at least 4,000 mortars, 30,000 pistols, 7,000 assault rifles, 3,000 machine guns, sniper rifles, and ammunition. 'Norge sender militærutstyr og våpen til Ukraina' (*Forsvaret*, Norwegian Armed Forces, 28 February 2022) <<https://www.forsvaret.no/aktuelt-og-presse/aktuelt/sender-militaerutstyr-og-vapen-til-ukraina>> 'Which Countries Are Sending Military Aid to Ukraine?' (*Al Jazeera*, 28 February 2022) <<https://www.aljazeera.com/news/2022/2/28/which-countries-are-sending-military-aid-to-ukraine>> accessed 14 September 2022. Spain has sent 20 tons of medical supplies, defensive, and personal protective equipment composing of helmets, flak jackets, and nuclear-biological-chemical protection suits. 'Ministry of Defence Sends 20 Tonnes of Personal Protective Equipment and Medical Supplies to Ukraine' (*La Moncloa*, Government of Spain, 27 February 2022) <https://www.lamoncloa.gob.es/lang/en/gobierno/news/Paginas/2022/20220227_aid-to-ukraine.aspx> accessed 14 September 2022. Portugal indicated that it would send military equipment such as vests, helmets, night vision goggles, grenades and ammunition, portable radios, analogue repeaters, and G3 automatic rifles, as well as hospital support. Romania stated it will send 3 million euros of fuel, bulletproof vests, helmets, ammunition, military equipment, and medical treatment. 'Press Statements by Prime Minister Nicolae-Ionel Ciucă at the Beginning of the Cabinet Meeting of February 27, 2022' (*Guvernul României*, Government of Romania, 27 February 2022) <<https://gov.ro/en/news/press-statements-by-prime-minister-nicolae-ionel-ciuca-at-the-beginning-of-the-cabinet-meeting-of-february-27-2022&page=12>> accessed 14 September 2022.

³¹S Frijters, 'Na jarenlang weigeren sturen veel landen nu toch wapens naar Oekraïne: wie stuurt wat?' (*De Volkskrant*, 28 February 2022) <<https://www.volkskrant.nl/nieuws-achtergrond/oekraïne-rukt-verder-op-maar-tot-hoever-russische-aanval-in-de-flanken-is-het-gevaarlijkst~b43822d8/>> accessed 14 September 2022.

³²Forum on the Arms Trade, Overview of Pledged and/or Delivered Weapons (23 June 2022) <<https://www.forumarmstrade.org/ukrainearms.html>> accessed 14 September 2022.

humanitarian aid, defence assistance and funds for cybersecurity.³³ The UK, Australia, Canada, and several other countries have also rapidly increased their military assistance.³⁴ The logistics of transporting weapons to Ukraine are increasingly difficult, not least due to the reluctance of some states to be seen as involving themselves as potential targets by facilitating shipment across their territory.³⁵ Lastly in this regard, it is important to recognise the EU has been providing training and military support to Ukraine on an ongoing basis, specifically preparing Ukrainian armed forces for a Russian land invasion including techniques for unconventional warfare and disabling tanks.³⁶ Likewise, the US and UK have been providing provided assistance³⁷ and training for some time.³⁸

4. Identifying the legal basis for EU lethal military assistance to Ukraine

A. EU implications of collective self-defence under Article 51, UN Charter

As a Member of the United Nations under armed attack, Ukraine benefits from Article 51 of the UN Charter, such that any state in the EU is permitted to use force to help defend Ukraine (as it is neither a member of the EU or NATO, Ukraine cannot call for collective military assistance on the basis of those organisations' regional collective security arrangements). The EU's role in coordinating lethal military assistance is prohibited under regular EU budgetary rules set out in Article 41(2) of the Treaty on European Union, hence the extensive reliance on the European Peace Facility which operates as an off-budget instrument.

Article 51 provides for individual and collective self-defence right, such that States may come to the assistance of another State that is exercising its inherent right to self-defence ('Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken

³³S.3811, Ukraine Supplemental Appropriations Act 2022 (117th Congress, 2d session, introduced in Senate 10 March 2022); 'Memorandum on the Delegation of Authority Under Section 506(a)(1) and Section 614(a)(1) of the Foreign Assistance Act of 1961' (*The White House*, Presidential Actions, 25 February 2022) <<https://www.whitehouse.gov/briefing-room/presidential-actions/2022/02/25/memorandum-on-the-delegation-of-authority-under-section-506a1-and-section-614a1-of-the-foreign-assistance-act-of-1961/>> accessed 14 September 2022.; 'Fact Sheet on U.S. Security Assistance for Ukraine' (*The White House*, Statements and Releases, 16 March 2022) <<https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-on-u-s-security-assistance-for-ukraine/>> accessed 14 September 2022.

³⁴The UK is sending Starstreak anti-aircraft weapons to Ukraine, continuing previous UK deliveries of (anti-tank) missiles and Saxon armoured vehicles. 'Defence Secretary Statement to the House of Commons on Ukraine' (*Oral Statement*, 9 March 2022) <<https://www.gov.uk/government/speeches/defence-secretary-statement-to-the-house-of-commons-on-ukraine-9-march-2022>> accessed 14 September 2022. Canada announced an additional \$25M military assistance to Ukraine with 4,500 M72 rocket launchers, up to 7,500 hand grenades, and a contribution towards commercial satellite high resolution and modern imagery. 'Canada Sending Additional \$25M Military Aid to Support Ukraine' (*News Release*, Global Affairs Canada, 28 February 2022) <<https://www.canada.ca/en/global-affairs/news/2022/02/canada-sending-additional-25m-military-aid-to-support-ukraine.html>> accessed 14 September 2022.; 'Defence Minister Anand Announces Additional Military Support to Ukraine' (*News Release*, National Defence/Canadian Armed Forces, 3 March 2022) <<https://www.canada.ca/en/department-national-defence/news/2022/03/defence-minister-anand-announces-additional-military-support-to-ukraine.html>> accessed 14 September 2022.; 'Media Statement' (*Prime Minister and Minister for Defence of Australia*, 1 March 2022) <<https://www.pm.gov.au/media/australian-support-ukraine>> accessed 14 September 2022.

³⁵How Western Governments Are Getting Military Gear into Ukraine' (*The Economist*, 2 March 2022) <<https://www.economist.com/the-economist-explains/2022/03/02/how-western-governments-are-getting-military-gear-into-ukraine>> accessed 14 September 2022.

³⁶J Barigazzi, 'EU Reaches Deal on Military Training Mission in Ukraine' (*Politico*, 21 February 2022) <<https://www.politico.eu/article/eu-deal-military-training-mission-ukraine/>> accessed 14 September 2022.

³⁷E Yousif, 'U.S. Military Assistance to Ukraine' (*Stimson*, 26 January 2022) <<https://www.stimson.org/2022/u-s-military-assistance-to-ukraine/>> accessed 14 September 2022.

³⁸D London, 'The Coming Ukrainian Insurgency' (*Foreign Affairs*, 25 February 2022) <<https://www.foreignaffairs.com/articles/ukraine/2022-02-25/>> accessed 14 September 2022.; G Corera, 'Should the West Arm a Ukrainian Resistance?' (*BBC News*, 27 February 2022) <<https://www.bbc.com/news/world-europe-60530082>> accessed 14 September 2022.

measures necessary to maintain international peace and security’).³⁹ The right to individual or collective self-defence is an exception to the prohibition on the use of force in Article 2(4) of the UN Charter. From Article 51, it follows logically that EU Member States must also be allowed to carry out lesser military actions that would assist Ukraine in its self-defence, viz. the provision of lethal military assistance. The right to provide military assistance under Article 51 applies to weapons supplied by EU Member States, irrespective of whether arms are supplied as a unilateral measure devised by a single Member State, or as the result of coordination by the EU Council in the ‘pooling’ of each State’s individual right to collective self-defence. Indeed, the Recital 12 of the EU Common Position explicitly recognises that ‘States have a right to transfer the means of self-defence, consistent with the right of self-defence recognised by the UN Charter.’⁴⁰ There is thus a clear grounding in general international law for any EU Member State to exercise its right and come to the aid of Ukraine in defending against Russian aggression.

Since Ukraine is neither a member state of the EU or NATO (for now), the current situation does not trigger the rights and obligations set out in the collective defence arrangements of either the Treaty on European Union⁴¹ or the Washington Treaty of NATO.⁴² Under Article 42(7) of the Treaty on European Union, a Member State is under a positive obligation to assist any other Member State that is invaded or otherwise subjected to aggression: ‘If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.’ The fulfilment of this obligation must be consistent with the NATO collective self-defence provisions of Article 5 of the Washington Treaty. Indeed, EU collective self-defence is usually over-shadowed in discussions about Russia’s invasion of Ukraine by the analogous provision on NATO collective defence.⁴³ It is the collective self-defence exception in Article 51 of the UN Charter that provides the grounds for Member States to assist Ukraine since 24 February 2022, yet EU Council collective action to coordinate the exercise of Member State’s rights in this regard stems from EU law.

Notwithstanding the Article 51 right in the UN Charter, the EU is prohibited by Article 41(2) of the Treaty on European Union, from using its normal budget funds to provide lethal military assistance to Ukraine. And therein lies the rub. The text of Article 41(2) of the Treaty on European Union states that ‘[o]perating expenditure [...] shall also be charged to the Union budget, except for such expenditure arising from operations having military or defence implications [...]’. This means that under its regular on-budget measures, the EU Council would be unable to authorise the type of support that Ukraine has received in recent weeks. Since there was no analogous precedent for the extraordinary threat now facing Ukraine, the EU Council had never before sought to authorise lethal military assistance to a third State.⁴⁴

As a consequence, the EU has, for the first time, relied on the off-budget EPF financing instrument, created in March 2021 with a ceiling of €5 billion for its initial five-year funding period,⁴⁵ as

³⁹Charter of the United Nations (Signed 26 June 1945, Entered into Force 24 October 1945) 1 UNTS XVI.

⁴⁰Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (2008) OJ L 335/99 (‘EU Common Position’).

⁴¹Consolidated Version of the Treaty on European Union (2012) OJ C326/13 (Treaty on European Union), Art 42(7).

⁴²North Atlantic Treaty (Adopted 4 April 1949, Entered into Force 24 August 1949) 34 UNTS 243 (*Washington Treaty*), Art 5.

⁴³P Leino-Sandberg and H Ojanen, ‘Time for Military Integration in the EU? Armed Aggression and the Scope of Article 42 TEU’ (*Verfassungsblog*, 3 March 2022) <<https://verfassungsblog.de/time-for-military-integration-in-the-eu/>> accessed 14 September 2022.

⁴⁴As explained by Von der Leyen: ‘for the first time ever, the EU will finance the purchase and delivery of weapons and other equipment to a country that is under attack.’ See: ‘Statement by President von der Leyen on further measures to respond to the Russian invasion of Ukraine’ (*Statement/22/1441*, European Commission, 27 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_1441> accessed 14 September 2022.

⁴⁵EPF Decision Art 2.

the legal basis to provide lethal assistance to a third state engaged in armed conflict, namely Ukraine. The EPF was envisaged primarily for use in Sahel peace-keeping operations and EU missions such as the non-lethal assistance requested by, and provided to, Mozambique,⁴⁶ and the advent of the EPF coincided with the waning French presence in Mali. It was probably unforeseeable that 12 months after it was established, the EPF would be used to supply lethal military assistance to Ukraine in an international armed conflict with Russia. This is not to say that the EPF was not designed for use to supply lethal force to supply non-EU countries with conventional weapons. It was. But the one billion euros of lethal assistance that has been supplied to date to Ukraine was clearly neither the quanta envisaged nor the context in which it was expected that the EPF would function.

This use of the EPF is potentially a signal of a dramatic shift in the powers of the EU Council to intervene in overseas military conflicts, particularly given the scale, immediacy and polarised nature of the military assistance provided in reaction to Russian aggression. This startling shift will, increasingly (if it continues in the same direction of travel), call into question the EU's normative authority as a bloc that ostensibly has limited the extent of its foreign intervention in overseas military armed conflicts and security situations, and has not played a role in providing lethal military assistance in the past. While this new use of the EPF opens-up the possibility of greater sensitivity to a broader repertoire of different forms of strategic support that could be tailored to given situations. But, once the Pandora's box of lethal military assistance has been opened, the most obvious outcome of the precedent set by Ukraine is that future interventions in situations such as Mali under the EPF (or on the basis of other similar future European funding and coordination mechanisms) could be far larger in scale, therefore more influential in their impact, and more far-reaching in the sense in which they potentially contribute to the exacerbation of intensity of violence in armed conflict. As the Ukraine conflict unfolds, the broader ramifications of a dramatic expansion of EU norms on military intervention are not currently being widely discussed.

These considerations, specifically in the Ukraine context as it currently stands, might cause us to question whether the EPF is fit-for-purpose in the current circumstances of an intercontinental arms race between the Russian aggressor and the EU and US-backed Ukraine. With that in mind, we can now look at some issues in the background of the EPF and the legal mandate provided by its terms.

B. Financing arms supplies under the new European Peace Facility adopted on 22 March 2021

The EPF was established by Council Decision CFSP 2021/509 (the 'EPF Decision') adopted on 22 March 2021 to provide funding for the period 2021–2027 based on ringfenced contributions from Member States specifically for the EPF.⁴⁷ Additional contributions are possible beyond these initially agreed amounts, in order to fund specified assistance measures under the EPF.

In relation to Ukraine, it is important to note that Article 1(2)(b) of the EPF Decision permits the EU Council to coordinate the financing of such assistance measure, which means the EPF can fund: (i) actions to strengthen the capacities of Ukraine relating to military and defence matters; or (ii) support to military aspects of peace support operations by Ukraine. Such assistance may consist of financial, technical or material support.⁴⁸ The strategic priorities and orientation for assistance measures are required by Article 9 to follow 'the strategic priorities set by the European Council and the Council, including in their relevant conclusions, for Union actions under the [Common Foreign and Security Policy]'. This is of course quite a broad wording and means that

⁴⁶Council Decision (CFSP) 2021/2032 of 19 November 2021 on an assistance measure under the European Peace Facility to support military units trained by the EU Training Mission in Mozambique (2021) OJ L 415/25.

⁴⁷Council Decision (CFSP) 2021/509 (n 14).

⁴⁸EPF Decision Art 4(c).

the EPF is loosely determined by EU ‘strategic priorities’ but can clearly be deployed in a wide range of contexts.

The objectives, principles, and procedures for the adoption of assistance measures are further set out in Article 56. The main objectives of assistance measures under subsection include strengthening ‘military and defence matters and resilience of third States’⁴⁹ and contributing to the military response of ‘third States in a crisis situation’,⁵⁰ as well as contributing to ‘conflict prevention, stabilisation and peace consolidation’.⁵¹

The Integrated Methodological Framework (IMF)

There is a stipulation in the EPF Decision in Article 9(3) that a ‘risk and safeguards methodology’ should be put in place for assistance measures. It appears that this requirement is provided for by the existence of a subsidiary instrument to the EPF that contains such a methodology: the IMF. It is also required in the EPF Decision that the risk and safeguards methodologies include a number of possible routes to respond to risks that are posed by the arms exports, which in the terms of Article 9(5) are described as ‘possible mitigating and flanking elements, arrangements for monitoring and evaluation, and controls and safeguards, including for assistance measures involving items on the Common Military List of the Union’. Furthermore, any EPF assistance measure must be assessed by the High Representative in relation to ‘conflict sensitivity and context analysis, and a risk and impact assessment’.⁵² Since the IMF is not itself a public document, it is necessary to base the following analysis on EU commentary documents, which do include express aspects of the Framework document, and other publicly available sources.

These aspects of the IMF are significant for present discussion purposes because they also refer outwards to the standards of the existing body of international arms control laws. There is an express requirement for assistance measures under the EPF to comply with existing arms control laws, as set out in Article 56(3) of the EPF Decision: ‘Any assistance measures involving the export or transfer of items on the Common Military List of the Union shall respect the principles laid down in Common Position 2008/944/CFSP and shall be without prejudice to the procedure to be followed by Member States regarding such export or transfer in accordance with that Common Position, including in terms of assessment. Furthermore, such assistance measures shall not affect the discretion of Member States regarding policy on the transfer within the Union, and the export of, military equipment.’

Specifically in relation to the risks of diversion of weapons from their intended end-user(s), and in addition to what is provided by arms control laws in that regard, Article 62 of the EPF Decision requires arrangements with the beneficiary of the assistance to ensure ‘proper and efficient use of assets for the purposes for which they were provided’, ‘sufficient maintenance of the assets to ensure their usability and their operational availability over the life-cycle of the assets’ and ‘that the assets will not be lost, or transferred to users other than those intended, at the end of their life-cycle or at the expiry or termination of the assistance measure’.⁵³ In the Ukraine conflict, there appears to have been little attention given to the potential for accurate weapons tracing systems to be insisted upon when supplier states send weapons. If EU supplier states were to adopt the latest technological innovations in weapons training, they would likely reduce the ongoing risks of diversion and could assist in strengthening cross-border checks coming out of Ukraine. Weapons tracing is notoriously complex, but particularly for larger heavy weapons, missile systems, and man-portable air defence systems (‘MANPADS’) there are numerous possibilities for tracing that would limit long-term diversion risks. These types of arms also hold increased

⁴⁹*Ibid.*, Art 56(1)(a).

⁵⁰*Ibid.*, Art 56(1)(b).

⁵¹*Ibid.*, Art 46(1)(c).

⁵²*Ibid.*, Art 56(4).

⁵³*Ibid.*, Art 62(2)(a)–(c).

potential to cause future havoc, providing a further incentive to prioritise tracing technologies. That said, historical examples of some of the worst instances of post-conflict weapons proliferation involved small arms and light weapons ('SALW') such as the AK-47. It is well-documented that following the fall of the former-Yugoslavia and associated armed conflicts, it was virtually impossible to prevent the massive quantities of small arms that had flooded into the conflicts from being diverted to other undesirable parties. Notable amongst these weapons sent to the Balkans ended up feeding a black market through which the Ndrangheta, among other mafia networks, armed itself. The war economy of that period further exacerbated the illicit arms trafficking market, since attempts at regulation only served to increase incentives to carry out further weapons smuggling.

With these provisions in mind, and in terms of how the EPF functions, a plain reading of its terms shows that decisions on the financing of assistance measures through the EPF are made collectively by a Committee of Representatives of each Member State. This must be on the basis of a proposal or initiative 'following a request from a prospective beneficiary'.⁵⁴ As is clear in Ukraine's case, these requests have been made informally and repeatedly through public media, but were also formally lodged with the EU prior to the assistance measures being announced, as is acknowledged in the EU Decision to Assist Ukraine. As well as reporting and follow-up measures in Article 63, an assistance measure 'may' be suspended under Article 64 if the beneficiary breaches international human rights or humanitarian law, or 'if the situation in the country or area of concern no longer allows for the measure to be implemented whilst ensuring sufficient guarantees'.⁵⁵ This is 'without prejudice to the competences of authorities of Member States concerning the suspension of export licences where such a licence is required'.⁵⁶

The implementation of a decision, under Article 33(2), can then take place through, *inter alia*, indirect management by Member States' ministries of defence based on a contract between the EPF and the Member State. This underlines that competence of export licensing ultimately rests with the individual countries' national export systems of control. As such, individual EU Member States can be the implementing actors for an EU Council Decision that specifies the beneficiary, scope and nature of the assistance measure.⁵⁷ A comprehensive European Parliament briefing note on the EPF explains: 'The aim of the facility is, essentially, to work around restrictive rules on the use of the EU budget. The EU budget cannot be used to finance expenditure with military or defence implications. Pursuant to Article 41(2) of the Treaty on European Union, operating expenditure arising from the implementation of the CFSP can only be charged to the Union budget if it does not result from operations having military or defence implications. However, Article 41(2) of the Treaty on European Union also provides that such expenditure can be charged to the Member States. This allows Member States to create off-budget funds to fund activities that are carried out jointly, in the EU's name'.⁵⁸

As such, the structure of the EPF means that the European Commission is not providing weapons itself. Nonetheless, and contrary to some reporting,⁵⁹ the use of the EPF has enabled the EU Council to take a leading role in financing and coordinating the authorisation of arms exports to Ukraine. Lethal military assistance supplied under the EPF is not simply coming from a Member

⁵⁴*Ibid.*, Art 6 and 59(1).

⁵⁵*Ibid.*, Art 64(1)(a)(iii).

⁵⁶*Ibid.*, Art 64(1).

⁵⁷EU Decision to Assist Ukraine, Art 4(4).

⁵⁸B Immenkamp, 'European Peace Facility: Investing in International Stability and Security' (Briefing, European Parliamentary Research Service, PE 690.641, October 2021) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)690641](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)690641)> accessed 14 September 2022.

⁵⁹S Erlanger, 'NATO Countries Pour Weapons into Ukraine, Risking Conflict with Russia' (*The New York Times*, 2 March 2022) <<https://www.nytimes.com/2022/03/02/world/europe/nato-weapons-ukraine-russia.html>> accessed 14 September 2022.

State on an independent unilateral basis, but is also collectively decided by Ministries of Defence at the EU Council, and then implemented by the Ministries themselves.

This means that while the EPF may be a source of normative directioning for the EU's military assistance policy at a holistic level, it is through the arms export regulations of national states that ultimately compliance with international arms control law will be determined by individual states. In addition, of course, the coordinating role of the EU Council through the EPF is a positive decision-making mechanism to allow provision of assistance, in determining Common Security and Defence Policy, and it is without prejudice to any other arms exports that Member States may wish to make – unilaterally. Indeed, some of the supplies since 24 February (such as those announced by Germany prior to the EU Decision to Assist Ukraine) have been made in this way. Unilateral arms exports of this nature are subject to the regular national export procedures consistent with the legally binding criteria set forth in the EU Common Position.⁶⁰ In the event that arms supplies lead to undesirable outcomes, the legal basis for decision-making under the EPF thus implicates the EU Council, collectively, as well as the individual Member States involved in implementing the EU Decision to Assist Ukraine.

On the basis of these provisions, the EPF Decision provides a legal basis for the EU's strategic supply of lethal military assistance to a beneficiary third state such as Ukraine. However, the EPF Decision makes explicit reference to the need for such assistance to comply with existing arms control export criteria including the risk of diversion, recipient guarantees, breaches of human rights and international humanitarian law, effectiveness of the support, as well as risk assessments on conflict prevention, peace and stability.⁶¹ A long-term assessment of the risks of supplying weapons is required. It was on the basis of such risks that the creation of the EPF was criticised as enlarging the EU's political role in intervening in non-EU states.⁶² Even on the basis of its envisaged use in African conflicts, 40 civil society organisations signed a Joint Civil Society Statement in 2020 warning the EU of the risks of the EPF in fuelling conflict and human rights abuses around the world.⁶³ Of course, these critical statements did not envisage the Ukraine invasion, yet many of the same concerns may apply to the developing Ukraine conflict and, as I will develop, those concerns are legally relevant to arms export assessments under the EPF.

C. Assessment under the Integrated Methodological Framework

The IMF is the subsidiary guidance document to the EPF containing the assessment tools for determining military assistance provided under the EPF. Notably, unlike the detailed criteria set out in the EU Common Position, the IMF is not a public document.

As the exact provisions of the IMF, also referred to as the safeguards paper, are unknown, a Q&A document of the EU External Action Service provides probably the best insight into the IMF's guidance. The IMF sets out 'guiding principles and possible concerns to be addressed when assisting partners in the military and defence areas in pursuit of the objectives of the EU Common Foreign Security Policy (CFSP) and of the EU Common Security and Defence Policy (CSDP)'.⁶⁴

⁶⁰EU Common Position Art 2.

⁶¹For example, see EFP Decision Arts 9(3) and 56(2)–(3).

⁶²See, for example: G Maletta and EG Bergman, 'The Transfer of Weapons to Fragile States through the European Peace Facility: Export Control Challenges' (*Stockholm International Peace Research Institute (SIPRI)*, 10 November 2021) <<https://www.sipri.org/commentary/blog/2021/transfer-weapons-fragile-states-through-european-peace-facility-export-control-challenges>> accessed 14 September 2022.; EH Frisell and E Sjökvist, 'To Train and Equip Partner Nations: Implications of the European Peace Facility' (*FOI (Swedish Defence Research Agency) Memo 7468*, February 2021).

⁶³European 'Peace' Facility: Causing Harm or Bringing Peace?' (*Joint Civil Society Statement*, November 2020) <<https://www.nhc.nl/assets/uploads/2020/11/Joint-CSO-Statement-on-the-European-Peace-Facility.pdf>> accessed 14 September 2022.

⁶⁴Questions and Answers on the European Peace Facility's Integrated Methodological Framework' (*European External Action Service*, 22 March 2021) <https://eeas.europa.eu/delegations/honduras/95400/questions-and-answers-european-peace-facility%E2%80%99s-integrated-methodological-framework_en> accessed 14 September 2022.

It specifically addresses the issue of compliance, as well as control and accompanying measures, in relation to assistance measures.

It is notable that the IMF appears to largely provide for EPF decisions to be made in accordance with existing arms export controls standards, but does so without the same oversight or scrutiny, and may provide a more limited basis for judicial review than a national export decision based on the EU Common Position criteria. According to the Q&A document of the EU External Action Service, the ‘key principles’ underpinning the IMF are as follows.⁶⁵

1. Compliance with all relevant legal instruments and best practices based on national, international, and EU rules, standards and policies in the area of the supply of military equipment, and respect for international law, including international human rights law and International Humanitarian Law (by the beneficiary. This includes compliance with all Union, national and applicable international arms export control laws and with the international standards established by the Arms Trade Treaty, including by the beneficiary.
2. Protection of the EU and of local populations, which underscores the need for robust, qualitative, informed risk assessments of destination contexts and end-users ahead of decisions on transfers, based on the understanding that transfers to conflict or emergency contexts pose heightened risks;
3. Proportionality, so that only the necessary amount of goods/equipment is transferred in the context of an assistance measure, to avoid the risk of destabilising accumulations in sensitive contexts;
4. Post-delivery controls, to the extent required in the relevant provisions of the Council decision establishing the EPF, subsequent Council decisions on assistance measures and by the relevant exporting States’ policy.

These key principles largely reflect norms of international arms control law, yet they are less specific than the criteria of the EU Common Position. The IMF allows for significant flexibility, since it ‘will be applied in a proportionate and risk sensitive manner. Political oversight, assessment, conditions and control will allow for a tailored-made approach according to specific circumstances.’⁶⁶

The IMF process for assessing EPF arms exports identifies risks and benefits, and it seeks to prevent diversion or abuse of equipment. According to the public Q&A document: ‘The IMF comprises a number of elements including a context sensitive analysis, verification of compliance, identification of control measures and required commitments from the beneficiary, as well as identification of post-delivery monitoring and control requirements.’⁶⁷ The IMF process follows two-phases, firstly a context assessment that would involve a conflict analysis and screening of the Ukraine war, and an impact assessment of ‘the foreseen assistance measure on the situation on the ground’.⁶⁸ In the second phase, the EU Council will arrange verification of compliance and identification of required control measures to implement the assistance to Ukraine. The language used in this documentation means that these steps would involve ‘improving the governance and hands-on management’ of conventional ammunitions and arms by Ukraine and general implementation of international arms control standards, which it seems, in more plain English, to boil down to the following types of aspects:

- Identification and assessment of the potential risks and benefits associated with the provision of equipment to military and defence actors;

⁶⁵Ibid.

⁶⁶Ibid.

⁶⁷Ibid.

⁶⁸Ibid.

- Compliance with export control criteria;
- Respect of international law, in particular international human rights law and international humanitarian law;
- Detailed appraisal of the beneficiary country context, including absorption capacity;
- Physical security and stockpile management;
- Traceability: for instance, sensitive equipment provided through the EPF shall be marked according to international standards prior to delivery, with import markings identifying the end-user and traceability of most sensitive items throughout the lifecycle of the item;
- Stockpile management and reduction: EPF assistance could be conditioned on the disposal of excessive stocks;
- Ownership, sustainability and preservation of EPF-provided equipment, which requires that checks are carried out, and systems put in place, to ensure that ownership remains with that specified by the beneficiary and that equipment is maintained for usage.

These measures are to be agreed with the beneficiary, Ukraine, and subjected to monitoring and control, including specific measures to avoid diversion or disappearance. Breaches may entail suspension or termination of the assistance. Here then, is certain scope for the EU to insist on greater follow-up and control mechanisms based on the latest weapons tracing technologies. Moreover, scope should also be built-in to the supply decisions to ensure that subsequent to the conflict, there are mechanisms in place for post-conflict gun amnesties and disarmament attempts to recover weapons from civilians.

While the compliance of the EPF process with existing arms control standards is a ‘principle’ of the IMF, the (confidential) content of this methodology leaves the legally binding obligation on Member States to conduct EU Common Position assessments by their national regulatory authorities. Even so, the fact that the EU Council is taking a steering role in determining arms export policy in relation to Ukraine only amplifies the potential normative shift that could be taking place if the rapid and unprecedented action to support Ukraine sets a major precedent for the EU Council to, in future, support other non-EU states in foreign conflicts. The EU Council’s decision-making must not be taken as determinative of the legality of arms exports, without the same scrutiny as a Member State’s regular export assessments. However, it would be misleading to view the EPF as meaning that the EU Council can bypass arms control laws. As set out above, Article 56(3) of the EPF Decision explicitly requires assistance measures to ‘respect the principles’ laid down in the EU Common Position.

Under the IMF, the regular legal restrictions on the EU’s provision of weapons under the Arms Trade Treaty and the EU Common Position are, in effect, observed by the EU Council during its assessment of whether assistance under the EPF is appropriate. The key principles of the IMF indicate that Assistance Measures should be ‘compliant with all Union, national and applicable international arms export control laws and with the international standards established by the Arms Trade Treaty, including by the beneficiary.’⁶⁹ While ultimately it is for national licensing authorities to decide whether a shipment is compliant with domestic regulation, which in turn implements the assessment criteria in the Arms Trade Treaty and in the EU Common Position, the position in the EPF means that the EU’s decisions to provide weapons to Ukraine should nonetheless have taken into account the standards of those assessment criteria in the Arms Trade Treaty and in the EU Common Position. Notably, these include the risk of the commission of international crimes, risks of diversion and contributing to regional instability.

The phrase of the IMF’s key principles that refers to compliance with ‘EU, national and international arms export control laws’⁷⁰ can be distilled to the requirements of the EU Common Position, since the legally binding assessment criteria of the EU Common Position are arguably

⁶⁹*Ibid.*, Key Principle 1.

⁷⁰*Ibid.*

‘the most structured, comprehensive and explicit legal rules governing arms export operating anywhere in the world’.⁷¹ This underlines that although the language of ‘compliance’ is used in the IMF, it does not call for the same procedural process of scrutiny as a national system of control of a Member State would require in authorising its arms exports.

D. Coordinating Member States’ lethal military assistance policies through the EU decision to assist Ukraine

Another taboo has fallen. The taboo that the European Union was not providing arms in a war.⁷²

The EU’s decision-making on Ukraine takes place in the broader context of expanding norms on arms control, yet the EU Decision to Assist Ukraine does not expressly account for the legal standards in the EU Common Position or the Arms Trade Treaty. The EU Council has not framed its announcements about Ukraine in terms of legal rules or principles on weapons exports, but has instead described its decisions in pure policy terms, such as a moral duty, or breaking a ‘taboo’, as the EU foreign policy chief Josep Borrell put it.⁷³ Similarly, the German announcement of weapons’ supplies was accompanied by the statement that ‘It is our duty to support Ukraine to the best of our ability in defending against Putin’s invading army.’⁷⁴ The EU Council does not appear to have made any reference to the relevance of arms trade laws or its own hard-fought-for system of arms controls. These are imminently important considerations given the impact that could accrue from the EU Council coordinating lethal military assistance in conflict situations around the world.

In contrast, earlier EU Council Decisions on military assistance imposed greater risk mitigation measures, tended to give more context, and were accompanied by greater justification and explanation for their use. For example, the EU Council Decision to Assist Ukraine and the Decision to Assist Mali both establish that the ‘High Representative shall ensure monitoring of compliance by the beneficiary’ with its obligations.⁷⁵ It is true that these earlier decisions under the EPF were much smaller in value (averaging around 10 million euros, compared to the billions of euros for Ukraine). Yet, the provision on monitoring, control and evaluation of the latter is more detailed than the former, and its requirements are more extensive. It specifies how equipment and supplies must be subject to controls even after the export has taken place. These are the so-called ‘post-shipment’ controls that must be organised to ensure that the delivery of the material is verified to have actually taken place as expected, that a proper inventory of the delivered items is taken, and that the agreed-upon conditions for the storage of the items on arrival is carefully controlled and monitored. Details for each of these stages (referred to as ‘delivery

⁷¹Lustgarten, *Law and the Arms Trade: Weapons, Blood and Rules* (Hart Publishing 2020) 69. Whether the Arms Trade Treaty is more restrictive than the EU Common Position is debatable. Lustgarten argues that ‘for EU Member States at least none of the export restrictions found in the [Arms Trade] Treaty are as demanding as those found in the EU Common Position’ (Lustgarten *Ibid.*, 434), and that the EU Common Position ‘goes considerably beyond the Arms Trade Treaty – it contains a greater number of Criteria and requires a higher level of confidence that they have been satisfied before exports are supposed to be approved.’ (L Lustgarten, ‘The Arms Trade Treaty: Achievements, Failings, Future’ (2015) *International & Comparative Law Quarterly* 569, 592).

⁷²A Brzozowski, Euroactiv website, ‘EU breaks ‘taboo’ to finance purchase and delivery of weapons to Ukraine’, 28 Feb 2022 <<https://www.euractiv.com/section/europe-s-east/news/eu-breaks-taboo-to-finance-purchase-and-delivery-of-weapons-to-ukraine/>> accessed 14 September 2022.

⁷³*Ibid.*

⁷⁴*Ibid.*

⁷⁵EU Decision to Assist Ukraine, Art 6; Council Decision (CFSP) 2021/2137 of 2 December 2021 on an Assistance Measure under the European Peace Facility to support the armed forces of the Republic of Mali in conjunction with the EU Training Mission in Mali (2021) OJ L 432/67 (‘EU Decision to Assist Mali’), Art 5.

verification', 'inventory reporting', and 'on-site control', respectively, are supposed to be given in EPF decisions,⁷⁶ whereas the Decision to Assist Ukraine only states that 'the post-shipment control of equipment shall be organised in a manner consistent with the IMF for assessing and identifying the required measures and controls for assistance measures under the EPF'.⁷⁷

The significance of the current EPF precedent-setting can be seen by looking to existing situations in which the EU Council has been intervening. By way of contrast, in the Decision to Assist Mali, there are references to various arrangements on accountability for breaches of rights and obligations of both the beneficiary and implementing actors, including, for example, the return of assets provided under the Assistance Measure and the possibility to suspend or terminate the assistance.⁷⁸ The EU Decision to Assist Ukraine only refers to the possibility to suspend or terminate support under the Assistance Measure if the beneficiary is found in breach of its obligations.⁷⁹ Similarly, the EU Decisions to Assist Moldova, Georgina, Bosnia and Herzegovina, the African Union, and earlier assistance to Ukraine required arrangements on proper and efficient use of transferred assets, sole use by the intended recipients of the national armed forces, and maintenance and training.⁸⁰

The established restriction on arms exports over humanitarian concerns in the EU Common Position have not been a matter of taboo, or selective policy, but of legally binding standards to which all EU Member States have mutually agreed. The risk assessments pursuant to the IMF underlying the EU Decision to Assist Ukraine have not been made publicly available. The (perhaps necessary) rapidity of the decision-making since the invasion has not left time for discussion of the precedent that may be set by the rapid supply of unprecedented levels of military assistance in times of existential threat such as these. It may be that what has happened in the early days of the Ukraine invasion is that the EU and member states were forced to act swiftly and on multiple strategic fronts, such that there was limited time to carefully articulate the legal basis underlying the weapons supplies or to explain the military assessments that would have needed to have taken place. Of course, part of these assessments would be subject to national security concerns and so would not have been communicated in any case, but it is clear that the lack of explanation in the EU Decision to Assist Ukraine may come as much from expedience as from confidentiality requirements. This means, also, that subsequent decision-making may come to be more accurately expressed and even that the EU may take a more active role in explaining its mitigation procedures for doing as much as possible to avoid the long-term negative impact of the arms supplies.

The recitals note the Russian Federation's unprovoked invasion of Ukraine and that, on 25 February 2022, the Government of Ukraine made an urgent request to the Union for assistance in the provision of military equipment.⁸¹ It recalls the need for compliance with the EU Common Position.⁸² Furthermore, the objective of the Assistance Measure is to 'contribute to strengthening the capabilities and resilience of the Ukrainian Armed Forces to defend the territorial integrity

⁷⁶*Ibid.*, Art 5(2)(a)–(c).

⁷⁷*Ibid.*, Art 6(2).

⁷⁸EU Decision to Assist Mali, Arts 3(3), 3(4), 7(1), 7(2).

⁷⁹EU Decision to Assist Ukraine, Art 3(2).

⁸⁰Council Decision (CFSP) 2021/2136 of 2 December 2021 on an Assistance Measure under the European Peace Facility to support the Armed Forces of the Republic of Moldova (2021) L 432/63; Council Decision (CFSP) 2021/2134 of 2 December 2021 on an assistance measure under the European Peace Facility to support the Georgian Defence Forces (2021) L 432/55; Council Decision (EU) 2021/1923 of 4 November 2021 on an Assistance Measure under the European Peace Facility to support capacity building for the Armed Forces of Bosnia and Herzegovina (2021) L 391/45; Council Decision (EU) 2021/1210 of 22 July 2021 on an assistance measure taking the form of a general programme for support to the African Union under the European Peace Facility in 2021 (2021) L 263/7; Council Decision (CFSP) 2021/2135 of 2 December 2021 on an assistance measure under the European Peace Facility to support Ukrainian Armed Forces (2021) L 432/59.

⁸¹EU Decision to Assist Ukraine, Recitals (3) and (5).

⁸²*Ibid.*, Recital (6).

and sovereignty of Ukraine and protect the civilian population against the ongoing military aggression'.⁸³ Accordingly, the Assistance Measure will finance the provision of military equipment, and platforms, designed to deliver lethal force to the Ukrainian Armed Forces for a period of 24 months.⁸⁴ This assistance is conditional on the Ukrainian Armed Forces' compliance with international human rights and international humanitarian law.⁸⁵

In terms of implementation, Article 4(2) provides that 'the type and quantity of support' will be determined by the Facility Committee taking into account the priorities recommended by EU Military Staff to meet the needs of the Ukrainian Armed Forces. The support funded by the EPF will then be implemented by the defence ministries of Member States.⁸⁶ Meanwhile, Article 5 imposes on EU Member States an ongoing obligation to permit the transit of military equipment provided under the EPF, including accompanying personnel, through their territories, including their airspace.

Lastly, the follow-up monitoring, control and evaluation of lethal military assistance to Ukraine, as provided for in Article 6, requires the High Representative to ensure the monitoring, *inter alia*, in order to 'provide awareness of the context and risks of breaches of [obligations] including violations of international human rights law and international humanitarian law' by units of the Ukrainian Armed Forces supported under the Assistance Measure. Furthermore, post-shipment control of equipment must be consistent with the IMF.

The EU Decision to Assist Ukraine is short, and it does not set out assessments made under existing arms control laws. A key aspect of the IMF, which does not appear explicitly in the Arms Trade Treaty and EU Common Position, is that, according to the EU External Action Service, 'Context analysis will consider, in addition to the risks of providing any particular kind of assistance, thorough considerations on the risks raised by inaction, which might be far greater.'⁸⁷ Does this differ from the risk assessment criteria of the Arms Trade Treaty and EU Common Position?⁸⁸ In relation to certain factors, an export *must* be refused by national licensing authorities in the event that certain clear risks are established. While there is a duty to take into account relevant factors in the Arms Trade Treaty, the explicit proportionate balancing exercise in the IMF, between the risks and benefits of arms supply, is eminently appropriate to articulating the legal basis for weapons supplies to Ukraine.

The EPF, as a newly created mechanism, has provided a legal basis for the EU Council to take a coordinating role in the collective decision-making of Member States to supply weapons to Ukraine, outside of the EU regular budget, consistent with the Article 41(2) of the Treaty on European Union prohibition on doing so with regular EU funds. Nonetheless, existing arms control laws apply to EPF exports. Irrespective of the question whether or not it is wise or good for the EU to supply weapons to Ukraine, there is a lack of attention to the norms of international arms controls in EPF decision-making. This is significant as it impacts the EU as a polity in terms of what it might mean for the EU's role in setting military intervention policy going forward. Is this not a moment for the EU to reassert both the normative value of the international arms control framework and to express the underlying rationales for military support to Ukraine in terms of the existing legal rules for EU arms exports?

⁸³*Ibid.*, Art 1(2).

⁸⁴*Ibid.*, Art 1(3)-(4).

⁸⁵*Ibid.*, Art 3(1).

⁸⁶*Ibid.*, Art 4(4).

⁸⁷Questions and answers on the European Peace Facility's Integrated Methodological Framework' (*European External Action Service*, 22 March 2021) <https://eeas.europa.eu/delegations/honduras/95400/questions-and-answers-european-peace-facility%E2%80%99s-integrated-methodological-framework_en>

⁸⁸Arms Trade Treaty Art 7; EU Common Position Art 2.

E. Placing the EU decision to assist Ukraine in an arms control context

The import of the analysis of the EU Council's decision-making on Ukraine is that new powers wielded under the European Peace Facility are enabling a precedent for massive military support to suddenly emerge without being strictly attached to existing norms of international arms control. There is limited evidence of how the long-term risks of the Ukraine conflict have been assessed and taken into account: the EU Decision to Assist Ukraine only briefly recalls the need for compliance with the EU Common Position in its preliminary recitals, but it does not articulate its assessment in this regard or acknowledge the risks reflected therein.⁸⁹ The reasons given for the assistance measure are short, do not set out assessments under existing arms control laws, and while mentioning the risk of violations of human rights and international humanitarian law, do not impose detailed monitoring or follow-up obligations. The fact that the EU's public announcements have not engaged with the substance of the EU Common Position leaves several questions about its compliance unaddressed.

Some light was shone on the EU's decision-making in the leaked confidential Concept Note of the EU Council dated 27 February 2022, which contains the summary proposal that led to the EU Decision to Assist Ukraine.⁹⁰ The Concept Note refers to conflict sensitivity, context and risks together with initial considerations for an impact assessment, as well as safeguards and mitigating measures. It states that:

The proposed assistance measure, like any comparable policy or intervention, carries a general risk of driving violence and conflict. Similarly, there may be a risk of facilitating violations of IHRL/IHL even if there is minimal credible evidence of transgressions by the UAF in the recent period. Against this should be measured the cost of inaction in the face of the severe threat to Ukraine's security, territorial integrity and civilian population.⁹¹

The Concept Note lists a number of potential risks and benefits of the assistance, including 'the equipment provided ends up in the wrong hands', and 'supported units commit or are accused of violations of IHRL/IHL'.⁹² It also lists proposed safeguards to mitigate these risks, such as the measure that '[t]he equipment will [not] be transferred to any Ukrainian bodies outside the UAF (...) without the prior approval of the High Representative'.⁹³

While the confidential Concept Note provided a starting point for a discussion of conflict risk, it contains no substantive in-depth factual analysis of the Ukraine scenario in relation to these risks. The analysis set out is not only superficial and inadequate, but it also did not make its way into the final version of the EU Decision to Assist Ukraine. Importantly, it does not articulate the legal basis in the EU Common Position (and the Arms Trade Treaty) for the assessment of the risks in supporting Ukraine.

There is a solid legal basis for the EU and its Member States to support Ukraine. Doing so would be enhanced by public communications referring to the legal-binding criteria of the EU Common Position and the Arms Trade Treaty.⁹⁴ This is especially so in the context where arms control norms are increasingly enforced at the domestic level, including where there is a risk of

⁸⁹EU Decision to Assist Ukraine, Recital (6).

⁹⁰EU Council Concept Note.

⁹¹Council of the European Union, 'Concept Note for an assistance under the European Peace Facility for the Supply to the Ukrainian Armed Forces of Military Equipment, and Platforms, Designed to Deliver Lethal Force' (27 February 2022, 'EU Council Concept Note'), 4.

⁹²EU Council Concept Note, 5.

⁹³*Ibid.*, 6.

⁹⁴Interestingly, in their (short) letter to the Dutch Parliament announcing the delivery of weapons to Ukraine, the Dutch Ministers of Foreign Affairs and Defence say a careful but less in-depth than usual assessment showed that 'arms export criteria' had been met, and that a more in-depth assessment of, inter alia, the EU Common Position will follow soon. M van Buitenlandse Zaken, 'Kamerbrief inzake aanvullende levering militaire goederen Oekraïne' (BZDOC-17438436-48,

war crimes. As litigation before English courts has shown, when, on 20 June 2019, the Court of Appeal found that it was ‘irrational and therefore unlawful’ for the Secretary of State for International Trade of the UK to have granted licences for the export of arms to Saudi Arabia for use in Yemen without making any assessment as to whether violations of International Humanitarian Law had taken place. Accordingly, the UK government was temporarily ordered to retake all decisions to export arms to Saudi Arabia in accordance with the law and to stop issuing new arms export licences to Saudi Arabia.⁹⁵

The criteria of the EU Common Position are legally binding on Member States in their export licensing, by virtue of the status of the EU Common Position as a ‘decision defining a position taken by the Union’ within the meaning of Art 25(b)(ii) of the Treaty on European Union. Pursuant to Article 29 of the Treaty on European Union, Member States *shall ensure that their national policies conform* to such a position. It is submitted that the binding nature of the EU Common Position pertains even if arm exports are financed and coordinated at a collective level by the EFP.

In the recitals to the EU Common Position (which are not legally binding), we find references to the prevention of regional instability, and the destabilising accumulation and spread of small arms and light weapons. It is a foundational aspect of arms control laws in the EU system that longer-term risks are intended to be avoided by responsible arms export policies, and export decisions are not intended to be assessed only with a view to the short-term impact of a certain shipment of weapons. Recitals (4) and (7) of the EU Common Position make clear the ‘big picture’ that must be kept in mind when assessing EU arms exports:

- (4) Member States are determined to prevent the export of military technology and equipment which might be used for internal repression or international aggression or contribute to regional instability.
- (7) [...] the European Union’s contribution to combating the destabilising accumulation and spread of small arms and light weapons

The legally binding criteria for export assessments are set out in Article 2 of the EU Common Position, of which, it appears, Criterion Three and Criterion Seven are of greatest relevance to the situation in Ukraine.

Criterion Three of the EU Common Position: ‘aggravating an armed conflict’

The criterion of most relevance to the risks posed by the Ukraine situation is probably Criterion Three concerning the ‘Internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts.’ Under the text of Criterion Three:

Member States *shall deny* ‘an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.’

Clearly, an international armed conflict is taking place in Ukraine as the country of final destination, far exceeding the level of an ‘existing tension’. The supply of lethal assistance is expressly

26 February 2022) <<https://www.rijksoverheid.nl/documenten/kamerstukken/2022/02/26/kamerbrief-inzake-aanvullende-levering-militaire-goederen-oekraine>> accessed 14 September 2022.

⁹⁵Campaign Against the Arms Trade, ‘Court Of Appeal Finds Government Broke Law Over Saudi Arabia Arms Sales’ (20 June 2019) <<https://caat.org.uk/news/2019-06-20-2/>> accessed 14 September 2022.

directed at taking sides in this conflict (as detailed in the EU Decision to Assist Ukraine).⁹⁶ The term ‘would’ in Criterion Three, applied to the question of whether EU arms supplies ‘would’ lead to the aggravation or prolongment of the Russia-Ukraine armed conflict, is more demanding than a ‘might’ standard found in some other criteria, but it is probably lower than a ‘will lead to’ standard.

On a *prima facie* reading, the wording of Criterion Three could suggest that a denial of lethal military assistance to the Ukrainian Armed Forces is necessary, since it could be argued that EU supplies ‘would aggravate’ this existing conflict, for the simple reason that more weapons lead to a more lethal conflict, hence an aggravated conflict. Simply on the basis of collective self-defence, states are clearly permitted to ‘prolong’ or ‘aggravate’ a conflict understood in this sense, since they are able to provide military support in order to prevent a (swift) defeat. This follows from the right of a state to self-defence when faced with another state’s aggression, as guaranteed by Article 51 of the UN Charter, and the collective self-defence rights that flow from that. Moreover, the role of weapons in the Ukraine conflict is of course more complex than this, and arming Ukraine may just as easily be analysed as mitigating or reducing the severity of the conflict. It is a question of military strategy whether arms supplies will tend to lengthen or shorten the duration of an armed conflict, or to make it more lethal or less.

Whether supplying lethal military assistance to the Ukrainian Armed Forces ‘would prolong’ the armed conflict with the Russian Federation is not clear either. Depending on strategic assessment of the conflict as it stands, the assistance provided could support regional stability and curtail Russia’s advance by strengthening Ukraine’s defences and enabling it to effectively resist the Russian attack, forcing a quick retreat, and thus shortening, rather than prolonging, the armed conflict. On the other hand, the assistance could fail to live up to expectations of stopping Russia and instead foster a protracted conflict in Ukraine, an arms race, and the emergence of heavily armed non-state groups.

The absolute ‘shall deny’ character of Criterion Three could be a significant barrier to an assessment were it made on this basis alone. A similar long-term conflict risk assessment is required by Article 7(1)(a) of the Arms Trade Treaty as to whether the weapons exports would either ‘contribute or undermine’ international peace and security. Under the IMF, however, a broader strategic assessment is made taking into account a host of contextual factors, as well as the additional broader risk and strategic assessments described by the IMF.

This is a point worthy of further scrutiny, raising the question whether international arms control laws have developed sufficiently with respect to situations where the recipient State is under unprovoked attack from another State, and thus whether the current situation in Ukraine was what was envisaged by the drafters of Criterion Three. Lawrence Lustgarten, for example, argues that Criterion Three was envisaged to avoid the risk of EU Member States supplying weapons that would stoke nascent internal armed conflict in the recipient countries and it may be that the Criterion requires revision, or clarification, in order to address situations of international armed aggression such as Ukraine.⁹⁷

Indeed, a contextual reading of Criterion Three suggests that ‘internal situation in the country of final destination’ refers to civil wars or armed conflicts between the government and rebel forces, although this interpretation was not clarified in the drafting of the EU Common Position. Interestingly, the possibility of an act of aggression from an invading State does not seem to have been widely considered in the commentary on the EU Common Position. The terms have been left by the EU Council for Member States to interpret, but to date, there has been limited opportunity to define the impact of external acts of aggression on a country’s ‘internal situation’. Overall, there is no reason to believe that the scope of Criterion Three extends beyond negative

⁹⁶EU Decision to Assist Ukraine Art 1(2): ‘The objective of the Assistance Measure is to contribute to strengthening the capabilities and resilience of the Ukrainian Armed Forces to defend the territorial integrity and sovereignty of Ukraine (...)’.

⁹⁷Lustgarten, *Law and the Arms Trade: Weapons, Blood and Rules* (n 71) 89, 452.

prohibitions based on the internal status of a country, to situations of external armed attack. These prohibitions are thus not triggered in the Ukraine case, and a license would not be prevented by Criterion Three on the basis of international armed aggression. In short, Criterion Three was not envisaged by the EU Council as imposing a substantive obstacle to exports of this kind.

Criterion Seven of the EU Common Position: ‘diversion to undesirable end-users’

The risk of diversion from the intended recipient, in this case the Ukrainian Armed Forces, is expressly addressed by Criterion Seven (‘Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions.’). Criterion Seven stipulates, *inter alia*:

‘In assessing the impact of the military technology or equipment to be exported on the recipient country and the risk that such technology or equipment might be diverted to an undesirable end-user or for an undesirable end use, the following shall be considered:

- (a) the legitimate defence and domestic security interests of the recipient country
[...]
- (b) the risk of such technology or equipment being diverted to terrorist organisations or to individual terrorists;’

The risk of diversion under Criterion Seven is the most frequent basis for refusal of export licenses.⁹⁸ At least three possibilities have already been raised in commentary on the Ukraine conflict that would need to be taken into account under Criterion Seven – (i) the risk of inadvertently arming Russia if it overpowers Ukrainian forces and captures their weapons, (ii) the very clear risk that small arms supplied to Ukrainian Armed Forces will be diverted to loyal civilian fighters, and (iii) the wide range of allied and non-allied militia groups that may get their hands on weapons if the war devolves into unconventional warfare across Ukraine, which may include designated terror groups and individuals with far-right extremist ideologies. In relation to this third possibility, it is well-established that the proliferation and diversion of arms from armed conflicts has a global reach and arms trafficking being increasingly a pan-continental phenomena.

In relation to (ii), the fact that Ukrainian authorities are currently providing small arms to any citizen in the general population who requests a weapon⁹⁹ (as well as, reportedly, legalising the right of any civilian to kill invading Russian soldiers),¹⁰⁰ Article 5 of the EU Common Position requires that ‘Export licences shall be granted only on the basis of reliable prior

⁹⁸Lustgarten, *Law and the Arms Trade: Weapons, Blood and Rules* (n 71) 95.

⁹⁹Ukraine’s Zelenskiy Calls on Citizens to Fight, Promises Weapons’ (*Reuters*, 24 February 2022) <<https://www.reuters.com/world/europe/ukraines-zelenskiy-calls-citizens-fight-promises-weapons-2022-02-24/>> accessed 14 September 2022.; see also the Nominal Vote on the draft Law on the Right to Civilian Firearms (No. 5708, Verkhovna Rada of Ukraine, adopted 23 February 2022) <http://w1.c1.rada.gov.ua/pls/radan_gs09/ns_golos?g_id=19137> accessed 14 September 2022.

¹⁰⁰As indicated by the Ukrainian Parliament on Twitter (in Ukrainian): Verkhovna Rada of Ukraine [@verkhovna_rada], ‘Набув чинності Закон України “Про забезпечення участі цивільних осіб у захисті України”, який дає право цивільним особам чинити спротив збройній агресії РФ, використовуючи будь-яку зброю Документ діє на період військового часу #Вистоїмо #StopRussianAggression’ [tweet] (*Twitter*, 9 March 2022) <https://twitter.com/verkhovna_rada/status/1501665567891238918?t=Qn49W73LxNn0dIrwz5jdVQ&s=19> accessed 14 September 2022, referring to Draft Law on the Participation of Civil Persons in the Protection of Ukraine (No. 7120, adopted 3 March 2022) <[#](https://www.rada.gov.ua/news/hpz9/page/2)>; see also B Cole, ‘Ukraine Bill Makes It Legal for Anyone to Kill Russian Soldiers’ (*Newsweek*, 10 March 2022) <<https://www.newsweek.com/russia-ukraine-decree-zelensky-shooting-soldiers-putin-1686696>> accessed 14 September 2022.

knowledge of end use in the country of final destination. This will generally require a thoroughly checked end-user certificate or appropriate documentation and/or some form of official authorisation issued by the country of final destination'. This is an unusual situation, distinct from the usual scenario where an initial purchaser of weapons is unable to restrict 'leakage' of weapons, through carelessness or corruption, from the recipient state to other end users.¹⁰¹ Here there is deliberate distribution of weapons by the Ukrainian Armed Forces. Again, the absolute nature of Criterion Seven and article 5, read in isolation, could suggest a denial of arms export to Ukraine in current circumstances, absent reliable assurance that the weapons will be used only by the Ukrainian Armed Forces and are not at risk of diversion. At the very least, the EU decision-making on Ukraine should recognise the risks of diversion, as a means to engage with the on-the-ground reality of sending weapons to Ukraine at present. Doing so would lead to a more nuanced and well-reasoned export policy, even if it is ultimately determined by the EU Council that the risks are justified, and that arming Ukrainians who are not part of the regular armed forces is not 'undesirable end-use' in the sense of Criterion Seven, since they are fighting against Russia on behalf of Ukraine. These long-term risks are very well, and borne out by past experience of armed conflict – eg the Kalashnikov AK-47 in African conflicts, the US training and arming the *mujahedeen* in Afghanistan who subsequently fought in the Balkans, or the existing US support to the far-right Azov regiment in Ukraine that may have boosted Putin's domestic pretext for an 'anti-fascist' war.¹⁰²

Criterion Two of the EU Common Position: potential relevance to Ukrainian war crimes

We should also note the potential relevance of Criterion Two of the EU Common Position on 'Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law' for supplies to the Ukrainian Armed Forces, which stipulates:

'Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall: (c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law'

In recent days, the first credible allegations have emerged that Ukrainian Armed Forces may have committed war crimes against Russian prisoners-of-war.¹⁰³ While at present, there are no widely accepted allegations of Ukrainian war crimes, to our knowledge, it could be argued that the threshold for denial under Criterion Two is quite low – it would be sufficient for such allegations to amount to a 'clear risk' that arms supplied to the Ukrainian Armed Forces 'might' be used in the commission of serious violations of international humanitarian law.

But even if a small number of allegations of Ukrainian war crimes are proven, it is unlikely that Criterion Two would bar EU arms exports to Ukraine in the current circumstances of the international armed conflict. Isolated war crimes are insufficient, on their own, to fatally prejudice a country's existing record of 'respect for international humanitarian law' such as to generate a 'clear risk', particularly where the allegations are taken seriously, investigated, and court-martialed through military tribunals as appropriate. The Ukrainian government appears to be investigating the situation and has stated: 'If this turns out to be real, this is

¹⁰¹Lustgarten, *Law and the Arms Trade: Weapons, Blood and Rules* (n 71) 94.

¹⁰²'Profile: Who are Ukraine's far-right Azov regiment?' (*Al Jazeera*, 1 March 2022) <<https://www.aljazeera.com/news/2022/3/1/who-are-the-azov-regiment>> accessed 14 September 2022.

¹⁰³'Does Video Show Russian Prisoners Being Shot?' (*BBC News*, 30 March 2022) <<https://www.bbc.com/news/60907259>> accessed 14 September 2022.

absolutely unacceptable behaviour'.¹⁰⁴ Criterion Two invokes a general assessment of a country's record of adherence to, and attitude towards, international standards, including, expressly, international humanitarian law as *jus in bello*, yet interestingly it does not contain an express provision referring to the risk of use in acts of aggression or other violations of the separate area of law of *jus ad bellum* as to the legality of the international armed conflict with another state. As such, a small number of isolated rights violations during an armed conflict would not trigger a prohibition on each and every arms export to the country. This understanding of Criterion Two can be seen in the arms exports assessments litigated before Dutch courts on the basis of Egypt's poor human rights record.¹⁰⁵

Nonetheless, the Criterion Two risks associated with arms exports to Ukraine is an aspect of the conflict that EU lawyers will be monitoring closely. In the event numerous allegations of Ukrainian war crimes start to surface, the compliance of the EU's arms policy with Criterion Two would be in jeopardy and require reconsideration. It should be noted here that such risks of 'Ukrainian war crimes' would not be limited to perpetration by the Ukrainian Armed Forces. They would also extend to other potential recipients, such as Ukrainian militia and armed civilians, provided that the risks are clear at the time of export assessment that weapons would be used in war crimes.

Criterion Four and Criterion Five

The other criteria of Article 2 of the EU Common Position are of limited immediate relevance to decision-making under the EPF in relation to Ukraine. The title of Criterion Four, 'Preservation of regional peace, security and stability', might sound like it is relevant to the Ukraine situation, yet its specific application is to the recipient country's 'aggressive use against another country, or use to assert by force a territorial claim, neither of which applies in the Ukraine situation (unless the position of the Russian Federation is accepted that Ukraine is, in effect, asserting a territorial claim over the breakaway regions of Luhansk and Donetsk). However, based on the internationally recognised territory of Ukraine, Criterion Four is not immediately relevant and relates to aggressive recipient countries.

Criterion Five, also not of immediate relevance, is entitled 'National security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries.' Criterion 5(a) provides that Member States 'shall take into account' (ie no clear prohibition): (a) the potential effect of the military technology or equipment to be exported on their defence and security interests as well as those of Member State and those of friendly and allied countries, while recognising that this factor cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability'.

The Arms Trade Treaty

Compliance with the Arms Trade Treaty is expressly called for in the IMF's key principles (in addition to EU, national and international arms export control laws).¹⁰⁶

¹⁰⁴D Boffey, 'UN Official Concerned over Videos Showing Apparent Abuse of PoWs in Ukraine' (*The Guardian*, 29 March 2022) <<https://www.theguardian.com/world/2022/mar/29/un-official-concerned-over-videos-showing-apparent-abuse-of-pows-in-ukraine>> accessed 14 September 2022.

¹⁰⁵Judge recognizes serious human rights violations in Egypt, but still allows arms exports to take place' (*The Public Interest Litigation Project*, 23 November 2021) <<https://pilpnjcm.nl/en/judge-recognizes-serious-human-rights-violations-in-egypt-but-still-allows-arms-exports-to-take-place/>> accessed 14 September 2022.; referring to the verdict (in Dutch): District Court The Hague 23 November 2021, ECLI:NL:RBDHA:2021:12810.

¹⁰⁶Questions and Answers on the European Peace Facility's Integrated Methodological Framework' (*European External Action Service*, 22 March 2021) <https://eeas.europa.eu/delegations/honduras/95400/questions-and-answers-european-peace-facility%E2%80%99s-integrated-methodological-framework_en> accessed 14 September 2022., Key Principle 1.

Probably the most relevant provision of the Arms Trade Treaty for the Ukraine conflict is Article 7(1) of the Arms Trade Treaty, according to which the relevant factors to be taken into account in the assessment include the potential that the conventional arms or items:

- a. would contribute to or undermine peace and security;
- b. could be used to:
 - (i) commit or facilitate a serious violation of international humanitarian law;
 - (ii) commit or facilitate a serious violation of international human rights law;
 - (iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
 - (iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organised crime to which the exporting State is a Party.

Article 7(1)(a) could provide a useful legal test for application in the EU context. The provision calls for a balancing act as to whether exports to Ukraine would ‘contribute to’ or ‘undermine’ international peace and security. The assessment under this provision may provide a justification for the EU Council’s exports, on the grounds that, on the one hand, arming Ukraine to help it defend itself offers a potential contribution, and that this outweighs the negative risk, on the other hand, of exacerbating the war, and thus of undermining international peace and security). Recourse could be had to Article 7(1)(a) of the Arms Trade Treaty, since a legal basis in the EU Common Position for such a justification, based on this ‘balancing approach’, is less clear. Article 7(3) dictates that ‘if the exporting State Party determines there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorise the export.’ It is important to note that an ‘overriding risk’ imposes a particularly high standard. Meanwhile, Article 7(1)(b) requires an assessment of the possibility that arms sales could be used in violations of international humanitarian or human rights law. Read jointly with Article 7(3), this standard largely mirrors the standard of Criterion Two of the EU Common Position. Also resembling the EU Common Position criteria, Article 6(3) prohibits a State from authorising arms transfers where ‘it has knowledge at the time of authorisation that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.’ Article 6(3) is a ‘shall not’ mandatory provision, meaning that States have no discretion: if they have the relevant knowledge, they must refuse the arms export. It can be seen that in general, the Arms Trade Treaty obligations reinforce the EU Common Position requirements, and further underline the need for greater attention to the standards of global arms control law in deciding whether and how to assist Ukraine as the conflict develops.

5. Conclusion on arms control laws in EU lethal military assistance to Ukraine

It is unlikely, at the time of writing, that a Member State will find any arms shipment coordinated by the EU Council to be prohibited under national export criteria requirements, despite concerns over some of the criteria in Article 2 of the EU Common Position. Furthermore, the legality of the EU Council’s actions in assisting Ukraine is clear on an Article 51 self-defence basis, permitting the EU Council to coordinate and fund assistance measures. Nonetheless, the provision of lethal military assistance under the EPF, read in conjunction with the IMF, calls for a broader strategic assessment of conflict risk that goes beyond the strict requirements of the criteria.

The possible risks entailed by the unprecedented and massive flow of weapons into Ukraine include long-term arms proliferation, regional stability and the exacerbation of conflict, increased lethality of the conflict, massive environmental impacts, the risk of diversion to Russia, other undesirable non-allies or to powerful criminal networks, violations of international human rights law and international humanitarian law committed with arms supplied to the Ukrainian Armed Forces,¹⁰⁷ the non-utility of weapons that Ukrainian forces cannot operate effectively, and the limited feasibility of guarantees from Ukraine, reliability of end-user certification and efficacy of follow-up monitoring, risks of corruption in the arms industry, and the potential for profiteering from an arms race in the Ukraine conflict.

A close scrutiny of these legal factors might lead to a rejection of (some) arms exports to Ukraine, or, more pointedly, to a more careful supply of weapons with conditions attached, such as greater use of tracing technologies to attempt to follow the use of the weapons. Exports of smaller types of arms might be rejected on the basis that they carry a greater risk of diversion and subsequent blowback, or the export of MANPADs that pose particular dangers if they may find their way onto the black market. At the same time, if the applicable criteria lead to denial of many arms exports, this may call into question whether existing EU arms controls are fit for purpose in a time of crisis, where there is an international security threat to Member States, especially where military assistance is being provided under a new legal instrument, the EPF, never before used for this purpose. Could the Arms Trade Treaty, EU Common Position and/or EPF require amendment in light of recent developments? Exceptions could be drafted into the EU Common Position criteria (particularly Criterion Three) to expressly provide for situations where a democratically elected government is defending itself against external aggression.

Bringing arms control standards into greater prominence in decision-making on Ukraine would help to clarify the ways in which the EU is taking an unprecedented position in a war. This use of the EPF for lethal assistance sets precedent for the EU effectively ‘taking sides’ in armed conflict situations in every respect short of putting boots on the ground. It would also clarify the long-term risks that are at play, history demonstrating that when conflict regions are flooded with weaponry, unintended consequences and blowbacks result. This would help the EU Council defend its decision-making by recognising, and accepting, the concerns about sending weapons to conflict zones that are reflected in international arms control legal frameworks. Supplying weapons to Ukraine without careful reflection on the normative values contained in international arms control laws will set a precedent for future transfers without adequately accounting for the risk of diversion to unintended end-recipients, and the implications of widespread arms proliferation for post-conflict stability, thus heightening the need to uphold and reinforce a rules-based system of arms exports.

Acknowledgements. I am very grateful to Chris Deckers for her research assistance and editorial eye while preparing this article for submission.

Disclosure statements. This research was conducted while the author was funded as a post-doctoral fellow on the Dutch national research council (Nederlandse Organisatie voor Wetenschappelijk Onderzoek) VICI project ‘Rethinking Secondary Liability for International Crimes’ at the University of Amsterdam.

Competing interests. The author has no conflicts of interest to declare.

¹⁰⁷This was the only risk explicitly recognised in the EU Decision to Assist Ukraine, Art 6(1).