



ARTICLES

EXPORTING ARMS OVER VALUES: THE HUMANITARIAN COST OF THE EUROPEAN DEFENCE FUND

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ABSTRACT: Through the European Defence Fund (EDF) the EU will become involved for the first time in arms development. EDF funding is intended to contribute to the EU's strategic autonomy in defence. But arms developed with EDF funding may also be exported to non-EU States. International and EU norms meant to ensure a humane and responsible arms trade are insufficiently effective, leaving room for Member States to export arms even when there is a serious risk of their use in violations of international humanitarian law (IHL). On the basis of both legal and policy-based arguments, this *Article* argues that the EU has failed to properly take these IHL concerns into account in the EDF Regulation. The EU's commitments to international law and to consistency require it to refrain from contributing to activities prohibited under international and EU law. These commitments oblige the EU to act as a responsible arms financier. This would also be in line with EU soft power efforts to promote export norm adoption and compliance internationally. For such soft power efforts to be effective, the EU must visibly uphold those norms it is trying to promote. By failing to enact measures that could mitigate the risk of illegal exports of EDF-funded arms – such as a ban on financing certain high-risk activities or a financial clawback mechanism in case funding recipients export arms illegally – the EU is violating its commitments to international law and to consistency and jeopardising its reputation as an international norm entrepreneur.

KEYWORDS: Common Foreign and Security Policy – European Defence Fund – arms exports – EU values – international humanitarian law – consistency.

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I. INTRODUCTION

The EU sees defence-industrial integration as essential for developing the military capabilities required for its nascent defence policy.¹ But defence companies do not operate on a normal market. Their activities are closely intertwined with national security, which – despite the existence of an EU Common Foreign and Security Policy (CFSP) – remains a Member State competence.² Since purchasing defence products abroad may result in the loss of industrial capabilities considered essential for national security, there remains a strong tendency in the EU to purchase equipment domestically. This status quo has proven difficult to break, with both CFSP-based interventions³ and market-based interventions⁴ by the EU seeing limited success.⁵

In a new attempt to overcome Member States' reticence to cooperate, the EU has recently introduced another policy tool into the mix: The European Defence Fund (EDF).⁶ The EDF is a research and development (R&D) fund, based on the EU's industrial and research support competences.⁷ It is meant to stimulate industrial cooperation by providing funding for cross-border defence R&D projects. This, in turn, should promote cooperative procurement of military equipment, thereby tackling the issues of industrial duplication and under-investment that are currently plaguing the EU defence industry.⁸ R&D costs represent a significant proportion of defence equipment expenditures, and the EDF's eight billion euro budget for the years 2021-2027 will bring the EU into the top three of defence R&D investors in Europe.⁹

Though EU defence companies are essential for equipping Member States' armies, their activities extend beyond the EU's own borders as well. The EU defence industry is a significant arms exporter, selling products to governments across the globe. The EDF

¹ European Union Global Strategy, 'Shared Vision, Common Action: A Stronger Europe' (June 2016) eeas.europa.eu 9.

² Art. 4(2) TEU.

³ Including the activation of the Permanent Structured Cooperation Mechanism foreseen in art. 20 TEU.

⁴ Mainly the introduction of the Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending the Directives 2004/17/EC and 2004/18/EC.

⁵ See D Zandee, 'No More Shortfalls? European Military Capabilities 20 Years On' and L Béraud-Sudreau, 'Integrated Markets? Europe's Defence Industry after 20 Years' both in D Fiott (ed.), *The CSDP in 2020: The EU's Legacy and Ambition in Security and Defence* (EUISS 2020) www.iss.europa.eu 50 and 59.

⁶ Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092.

⁷ More specifically on arts 173(3), 182(4), 183, and 188(2) of the TFEU.

⁸ E Simon and A Marrone, 'Linking PESCO and EDF: Institutional Mechanisms and Political Choices' (April 2021) ARES Report 66.

⁹ Based on current annual R&D investment levels, only France and Germany will be spending more on defence R&D. See for the relevant figures per Member State the document titled 'EDA Collective and National Defence Data 2017-2019' which is available at eda.europa.eu.

Regulation acknowledges the existence of the industry's export function, proclaiming that its funding "shall not affect the export of products [...], and shall not affect the Member States' discretion as regards their policy on the export of defence-related products".¹⁰ Yet in industrial and commercial reality, domestic arms production and international exportation are strongly intertwined. Products developed to meet domestic demands are often made available for exportation, since such exports are considered an opportunity to keep domestic production affordable. Thus, even though EDF funding is earmarked for R&D activities that are in line with EU-strategic goals,¹¹ it can be expected to contribute to EU arms exports as well.¹²

The EU defence industry's role in the international arms trade is not without controversy. Arms exports are seen by many as critical enablers of violence against innocents around the globe.¹³ International humanitarian law (IHL), which regulates combatants' behaviour during armed conflict,¹⁴ requires States to refrain from exporting arms if they know or should know that those arms will be used in atrocities such as intentional or indiscriminate attacks against civilians.¹⁵ In addition, EU Member States are bound by the Arms Trade Treaty (ATT)¹⁶ and the EU Common Position on arms exports,¹⁷ which were both championed by the EU to foster a more responsible arms trade.¹⁸ However, the division of competences makes it difficult for the EU to act decisively in this area. Practice shows that Member States regularly disregard their international and EU obligations, allowing the economic and/or geopolitical interests involved in arms exports to prevail over humanitarian ones. This is particularly visible in the recent Yemen conflict, during which EU countries such as Spain and France have continued supplying armaments despite strong evidence of atrocities perpetrated by their recipients against the Yemeni civilian population.¹⁹

In light of these existing humanitarian concerns, the EU's defence funding initiative seems at odds with various EU Treaty provisions and underlying principles intended to

¹⁰ Art. 20(9) EDF Regulation.

¹¹ Art. 3(2) EDF Regulation.

¹² E Simon and A Marrone, 'Linking PESCO and EDF' cit. 21.

¹³ See for instance the European Network Against Arms Trade enaat.org.

¹⁴ IHL is the body of customary and treaty-based international law which regulates conduct during armed conflict, encompassing important treaties such as the Geneva Conventions. See more broadly M Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019).

¹⁵ *Ibid.* 528-529.

¹⁶ United Nations Arms Trade Treaty of 3 June 2013.

¹⁷ Common Position 2008/944/CFSP of the European Council of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

¹⁸ S Depauw, 'The European Union's Involvement in Negotiating an Arms Trade Treaty' (December 2012) Non-Proliferation Papers www.sipri.org 3-4.

¹⁹ L Ferro, 'Western Gunrunners (Middle-)Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?' (2019) *JC&SL* 503.

ensure that its actions support the international legal order and are compatible with EU action in other areas. The Treaty on the European Union (TEU) requires the EU to contribute to the *strict observance and development* of international law,²⁰ and to work actively to *consolidate* and *support* the principles of international law.²¹ This implies that the EU should not just adhere to international law itself, but should also make an effort to actively promote compliance with international law where possible. Furthermore, the EU is bound by the principle of *consistency*, which requires it to act in accordance with its own objectives and values across its competences.²² By introducing a fund that can contribute to arms exports which go against both international law and its own export norms, the EU appears to violate both of these commitments.

Though invoking the relevant principles and provisions in a court of law may prove difficult in relation to policy measures falling under the CFSP,²³ there is more at stake for the EU than legal obligations alone. The EU is also committed politically to a more responsible and humane arms trade and has built up a reputation allowing it to drive change by convincing other actors to embrace new norms.²⁴ But if the EU wishes to remain a credible actor in this area, it must demonstrate that it too acts to uphold those norms that it seeks to advance. For this reason, this *Article* seeks to answer the following research questions: Is the EU under an obligation to address the risk of EDF-funded armaments contributing to IHL violations outside of its own borders, taking into consideration its commitments to international law and to consistency? And if so, what measures could it have included in the EDF Regulation to fulfil this obligation?

The *Article* is divided into six parts. The first part explains the methodological approach taken in the analysis and provides the broader context in which the development of the EDF is to be seen (section II). The second part provides a brief introduction to the EDF and explains how its funding can lead to an increase in EU arms exports (Section III). The third part gives an overview of existing research on arms export controls in the EU, showing how they should work to reinforce IHL compliance yet fail to do so in practice (section IV). The fourth part sets out why the EU's commitment to international law and the principle of consistency oblige it to take these regulatory deficiencies into account in the context of the EDF (section V). The fifth part examines how the EU legislature could have addressed the EDF's humanitarian effects within the bounds of the EDF Regulation (section VI). Finally, the sixth part of the *Article* concludes (section VII).

²⁰ Art. 21 TEU.

²¹ Art. 21(2)(b) TEU.

²² SEM Herlin-Karnell and T Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' (2013) CYELS 142.

²³ See section V of this *Article*.

²⁴ B Oliveira Martins and B Backhaus, 'Why and How the EU Should Act on Armed Drones' (2015) *Global Affairs* 261.

II. METHODOLOGY

This *Article* consists of a prospective evaluation of legislative effectiveness. Legislative effectiveness is an important aspect of legislative quality, along with criteria such as efficacy and efficiency.²⁵ It is a broad concept, which covers the causal relations between the law and its effects.²⁶ Evaluations of legislative effectiveness generally focus on the capacity of a piece of legislation to achieve its stated goals by bringing about changes in social reality.²⁷ But this is only one element of legislative effectiveness. Social reality is complex, and legislative interventions that are intended to achieve a particular result may have other (adverse, unintended) effects as well.²⁸ The legislature is obliged to take such potential effects into account when designing legislation. For legislation to be considered effective, it should “[minimise] to the extent possible and foreseeable the risk of adverse effects or no effects”.²⁹

This *Article* follows a prospective approach, which involves making predictions on the basis of causal relations.³⁰ A prospective evaluation of legislative effectiveness is generally conducted in order to ensure that a new piece of legislation is in accordance with existing laws and procedural principles, and to test its effects.³¹ While the EDF Regulation has already been adopted, a prospective approach is nevertheless most appropriate. Due to the EDF's nature and setup, a retrospective analysis will only be possible in several years when financed projects have reached a sufficiently advanced stage of maturity. Though the evaluation is prospective in nature, it is grounded as much as possible in empirical reality by taking into account existing research regarding the broader societal and legislative environment within which the EDF Regulation operates.

The focus of this *Article* is on a specific adverse side-effect of the EDF Regulation, namely the risk it entails for due compliance with IHL in conflict areas outside of the EU's own territory.

One could argue that there are also other fundamental EU values and objectives which may be jeopardised by the EU engaging in arms development funding, such as its commitments to human rights and the promotion of peace.³² Nevertheless, this *Article* covers only the humanitarian implications of the EDF. That is mainly because of limita-

²⁵ L Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation' (2001) *Statute Law Review* 126.

²⁶ M Mousmouti, 'Operationalising Quality of Legislation through the Effectiveness Test' (2012) *Legisprudence* 202.

²⁷ *Ibid.* 198.

²⁸ L Mader, 'Evaluating the Effects' cit. 129.

²⁹ M Mousmouti, 'Operationalising Quality of Legislation' cit. 203.

³⁰ L Mader, 'Evaluating the Effects' cit. 128.

³¹ *Ibid.* 119; M Mousmouti, 'Operationalising Quality of Legislation' cit. 199.

³² Arts 2, 3(1) and (5) TEU and the Charter of Fundamental Rights of the European Union.

tions of size and scope, but also because an analysis based on other values and objectives is not expected to generate different outcomes.

The adverse side-effect of the EDF Regulation addressed in this *Article* has its origin in another policy area, namely Member States' arms export practices. It is the ineffectiveness of national export controls that generates humanitarian concerns, which the EDF Regulation may in turn exacerbate. The most obvious solution would therefore be to address the problem at its root, by strengthening export controls and their enforcement. But practice shows that an EU-level solution to that effect is currently infeasible,³³ while potential victims of humanitarian violations and their advocates simultaneously face significant hurdles in their attempts to stimulate norm compliance at either the EU or the national level.³⁴ The causes of this – which shall be discussed in more detail further on in this *Article*³⁵ – are tied strongly to the specific EU legal basis under which arms export controls are regulated.

Though armaments qualify as goods under EU law, their export to States outside the EU is not governed by the EU's Common Commercial Policy. Instead, arms exports are considered a matter of foreign and security policy, thereby falling under the CFSP.³⁶ The CFSP's procedural rules and institutional arrangements differ greatly from those that characterise EU action in most of its other policy domains. CFSP decisions are taken by the European Council acting on the basis of unanimity.³⁷ Since CFSP decisions are simultaneously excluded from judicial review by the Court of Justice of the European Union (CJEU),³⁸ this greatly increases the influence of (individual) Member States over the decision-making process and limits the influence that other EU institutions (particularly the European Commission and Parliament) can exert.

Since the EDF Regulation was adopted under the ordinary legislative procedure,³⁹ its inception afforded the Commission and Parliament a unique opportunity to exert influence on the EU defence industry. This could be done by for instance attaching conditions to EDF funding, or by blocking that funding in the first place. This is particularly relevant considering Parliament's regular criticism⁴⁰ and scrutiny⁴¹ of Member States'

³³ D Cops and N Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (December 2019) Flemish Peace Institute Policy Brief vlaamsvredesinstituut.eu.

³⁴ L Ferro, 'Western Gunrunners, (Middle-)Eastern Casualties' cit.

³⁵ See Section IV.

³⁶ A decision that has been criticised in the literature, see M Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context* (Cambridge University Press 2014) 165-166.

³⁷ Art. 24(1) TEU.

³⁸ Save for a couple of narrowly defined exceptions; see art. 24(1) TEU (second part).

³⁹ See the preamble to the EDF Regulation.

⁴⁰ *E.g.*, Resolution 2021/2539(RSP) of the European Parliament of 11 February 2021 on the humanitarian and political situation in Yemen.

⁴¹ *E.g.*, Resolution 2018/2157(INI) of the European Parliament of 14 November 2018 on arms exports: implementation of Common Position 2008/944/CFSP.

arms export practices prior to the EDF Regulation's adoption. However, as this *Article* will show, both institutions have failed to make use of this opportunity, thereby sacrificing the interests of potential third State victims in favour of the interests of the Union.

III. IF YOU WANT PEACE, SELL MORE GUNS?

As explained in the introduction, the EU defence industry is currently faced with issues of industrial duplication and under-investment. These market characteristics, in turn, have negative effects on Member States' (joint) military capacities. They lead to *inefficiency* and cost increases, which – due to budget limitations – translate into fewer units in operation. They also cause issues of *interoperability* due to the great variety of national weapon systems that are in use.⁴²

Though the EU has an interest in addressing the aforementioned problems, prior attempts to solve them via the CFSP and market instruments such as public procurement law have had limited effects.⁴³ With the EDF Regulation, the EU is drawing upon another set of its competences – industrial and research support – in an attempt to entice Member States to cooperate through financial incentives.

The aim of the EDF is to enhance the competitiveness, innovation, efficiency and technological autonomy of the EU defence industry, and thereby contribute to the EU's *strategic autonomy*.⁴⁴ The inclusion of strategic autonomy among the EDF's aims has led to questions regarding the appropriateness of the legal basis on which the EDF Regulation was adopted.⁴⁵ Strategic autonomy is an objective of the CFSP/Common Security and Defence Policy (CSDP), while industrial and research support measures such as the EDF generally pursue aims like achieving growth of a particular industry or increasing its global competitiveness.⁴⁶ In the case of the EDF, fostering the competitiveness, efficiency and innovation capacity of the defence industry in the EU is not an end but a *means* to achieve a policy goal of the CFSP/CSDP.

The scope of the EDF is determined by art. 10 EDF Regulation, which delineates the entities and activities that can qualify for funding. Funding is made available for R&D projects⁴⁷ conducted by legal entities established in at least three different Member States,⁴⁸ which are aimed at the development of new defence products and technologies or the upgrading of existing defence products and technologies.⁴⁹ Funding is in-

⁴² M Trybus, *Buying Defence and Security in Europe* cit. ch. 1.

⁴³ L Béraud-Sudreau, 'Integrated Markets?' cit.

⁴⁴ Recital 5 and art. 3(1) of the EDF Regulation.

⁴⁵ A Fischer-Lescano, 'Legal Issues Relating to the Establishment of a European Defence Fund (EDF)' (30 November 2018) Expert Report for the GUE/NGL Parliamentary Group in the EP left.eu paras 17-21 and 25.

⁴⁶ *Ibid.* para. 17.

⁴⁷ See art. 10(3) EDF Regulation for the complete list of eligible R&D actions.

⁴⁸ Art. 10(4) EDF Regulation.

⁴⁹ Art. 10(2) EDF Regulation.

tended in particular for innovative and disruptive technologies and should be consistent with defence capability priorities agreed upon by the Member States under the CSDP.⁵⁰

By interlinking the EDF with the EU's strategic goals under the CSDP, its funding may contribute to the EU's strategic autonomy in various ways. It can firstly aid in reducing industrial duplication. Simultaneously, it can help to align Member States' defence procurement practices, which can in turn lead to increased standardisation and interoperability of Member States' armed forces.⁵¹ And finally, the EDF can be used to stimulate the development of specific equipment and technologies that are required to meet capacity shortfalls identified at EU level.⁵² Whether these strategic aims will actually be achieved, however, will depend greatly on wider political developments regarding the future of the CSDP.⁵³

Though the EDF's strategic impact remains to be seen, the disbursement of EDF funding is in any future scenario expected to boost the EU defence industry's competitiveness. This, in turn, can increase the attractiveness of EU defence products on the global arms market.⁵⁴ The EU is already a sizable arms exporter at present, with many of the products developed by the EU defence industry seeing use in armies outside of the EU as well. Examples of this include France's Leclerc main battle tank, of which almost half the number produced have been exported outside of the EU,⁵⁵ and the Eurofighter jet plane, which has several non-EU operators.⁵⁶ The revenues generated via such exports play an important role in maintaining existing industrial capabilities by spreading R&D and production costs. In the words of a European Parliament member, the importance of exports for the EU defence industry is such that "without exporting arms there will not be a European defence industry".⁵⁷

It is this interrelation between domestic capabilities and foreign sales which causes the EDF to have an external dimension as well. Since the EU defence industry's export potential is intertwined with its domestic activities, a boost to its competitiveness can be expected to enhance its global market positioning too. That is especially so since the EDF supports R&D aimed at innovative and technologically advanced military products,

⁵⁰ Arts 10(1) and 3(2) EDF Regulation.

⁵¹ D Zandee, 'European Defence Fund: The Real Test is yet to Come' (February 2021) Clingendael Alert www.clingendael.org.

⁵² E Simon and A Marrone, 'Linking PESCO and EDF' cit. 15.

⁵³ See *ibid.* and S Brichet, H Chouarbi, M Dénoue, V Frossard, A Laurent, N Libert, AF Magnuszewski, P Millard and J Rolin, 'The Governance of the European Defence Fund' (20 April 2021) European Issues www.robert-schuman.eu.

⁵⁴ E Simon and A Marrone, 'Linking PESCO and EDF' cit. 21.

⁵⁵ 406 have been ordered by France and 390 by the United Arab Emirates. See Project, 'Leclerc Main Battle Tank' (16 July 2021) www.army-technology.com.

⁵⁶ Wikipedia, *Eurofighter Typhoon Procurement* en.wikipedia.org.

⁵⁷ A Brzozowski, 'Loiseau: Without Arms Exports, There Won't be a European Defence Industry' (7 October 2019) Euractiv www.euractiv.com.

for which there is a higher demand. As a result, it is foreseeable that EDF funding could serve not just to maintain foreign demand for EU defence products, but to increase it even further.⁵⁸ Thus, even though bolstering the EU defence industry's international market position is not an explicit policy aim for the EDF, it is nevertheless a foreseeable result of its design.

As indicated in the introduction, the production and trade of armaments raises humanitarian concerns. Though the EDF Regulation does not affect arms export policy, it is clear that the EU legislature has taken certain steps to address humanitarian concerns which may arise earlier on during the production phase. This follows from art. 10(6) of the EDF Regulation. Whereas the first paragraph of art. 10(6) does little more than pay lip service to international law – declaring only that no funding shall be made available for products and technologies that are already prohibited⁵⁹ – its second paragraph goes a step further by banning EDF funding for the development of lethal autonomous weapons (“killer robots”). Though lethal autonomous weapons are not necessarily considered illegal under IHL,⁶⁰ their design and functionality does carry various practical and moral hazards associated with removing the human element from lethal engagement decisions. Thus, their exclusion from EDF funding can be seen as a normative statement on the part of the EU, making clear that it does not wish to contribute to the development of systems the mere existence of which it considers undesirable from a humanitarian perspective.

While the foregoing shows that the EU has taken IHL concerns into account to a certain extent in the design of the EDF, it is generally acknowledged that the central regulatory challenge for achieving an IHL-compliant defence industry is controlling the exportation of the overwhelming majority of weapons that are not *per se* illegal to produce.⁶¹ The next section provides an overview of the international and EU norms that are intended to tackle this issue, and will explain why those norms have proven ineffective in practice. As a result, EU-produced weapons can (and *do*) end up being exported to States which can be expected to use them in a manner which violates IHL.

⁵⁸ D Cops and A Buytaert, ‘Sustainable EU Funding of European Defence Cooperation? Accountable and Transparent Coordination of Arms Export Policies Needed’ (3 December 2019) Flemish Peace Institute Policy Brief vlaamsvredesinstituut.eu.

⁵⁹ *E.g.* through the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

⁶⁰ N Davidson, I Nakamitsu, R C Arkin, A S Gill, A Lele, P Scharre and K Zawieska, ‘A Legal Perspective: Autonomous Weapon Systems under International Humanitarian Law’ (November 2017) UNODA Occasional Papers www.un.org.

⁶¹ M Sassòli, *International Humanitarian Law* cit. 529.

IV. FROM THEORY TO PRACTICE: THE INEFFECTIVENESS OF ARMS EXPORT CONTROLS IN THE EU

This section discusses the various sources of international and EU law which require EU Member States to ensure IHL compliance in the context of arms exports, and provides an overview of existing research demonstrating their shortcomings in practice.

The root of all States' obligations in relation to arms exports is found in IHL itself. As mentioned in the introduction to this *Article*, IHL protects civilians and other non-combatants during armed conflict by prohibiting various harmful acts such as intentional or indiscriminate attacks against civilian populations.⁶² Most norms of IHL, in particular the prohibitions of war crimes, crimes against humanity, and genocide, qualify as so-called peremptory norms or *ius cogens*.⁶³ These are non-derogable norms of customary international law which are binding for all States.⁶⁴ But State responsibility under IHL extends also beyond the State's own conduct in armed conflict. That is because customary IHL requires States to both respect and to *ensure respect* for IHL. This obligation is reflected in Common Article 1 of the Geneva Conventions, which requires States to cooperate to end serious violations of the peremptory norms of IHL. This duty to ensure respect encompasses both negative obligations, prohibiting active aid or assistance to IHL violations, and positive obligations, requiring States to take collective and individual measures to prevent or end such violations.⁶⁵ Possible individual measures include the imposition of an arms embargo.⁶⁶

It is this due diligence obligation contained in IHL which requires States to block arms exports if they *know* or *should have known* that those arms will be used by the recipient to commit serious IHL violations.⁶⁷ Thus, States are not only required to ensure IHL compliance when they themselves export arms, but are required also to regulate arms exports by entities operating within their territory.

In addition to the obligations that follow from IHL, EU Member States are bound by the ATT and by the Common Position. Both instruments require Member States to create an export licensing system under which arms exports must be individually assessed *ex ante* for IHL risks.⁶⁸ Materially, the level of protection offered by these instruments

⁶² As meant in arts 51 and 52 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

⁶³ International Criminal Tribunal for the former Yugoslavia Judgement/Sentence by Trial Chamber II of 14 January 2000 IT-95-16 *Prosecutor v Kupreskic et al* para. 520.

⁶⁴ M Sassòli, *International Humanitarian Law* cit. 47.

⁶⁵ *Ibid.* 125-131.

⁶⁶ International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para. 181.

⁶⁷ See M Sassòli, *International Humanitarian Law* cit. 528-529, for more information on the exact obligations regarding arms exports which follow from IHL.

⁶⁸ See arts 6 and 7 ATT, and art. 2, criterion 2 of the Common Position.

largely corresponds with what is already required from all States on the basis of customary IHL.⁶⁹ Therefore, their added value lies mainly in the supporting and transparency structures which they require States to enact, such as national control systems and record-keeping and reporting obligations.⁷⁰ Since the Common Position's substantive risk assessment criteria are somewhat more stringent than the ATT's,⁷¹ and since it directly incorporates arms export norms into the EU legal order, the focus of this section will primarily be on the Common Position.

The Common Position requires Member States to *assess* the buyer's attitude towards relevant principles established by IHL instruments and to *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 IHL.⁷² Yet existing research shows that Member States interpret and apply this standard in very different ways, with several Member States greenlighting exports even when there is overwhelming evidence of recent and ongoing IHL violations by the buyer. This is particularly visible in the Yemen conflict.⁷³ This conflict began in 2014 as a civil war between the Yemeni government and the Houthi movement of Shiite rebels. In 2015, a coalition of Sunni countries led by Saudi Arabia intervened,⁷⁴ primarily to prevent Iran (which provides support to the Houthis) from extending its influence over Yemen. Saudi Arabia has received aid in its efforts against the Houthis from the United States, the United Kingdom, and France, primarily in the form of arms supplies.

The conflict, which remains unresolved at present, has had a devastating impact on the Yemeni civilian population. In 2018, United Nations (UN) Secretary-General Guterres qualified the situation in Yemen as the worst humanitarian crisis in the world.⁷⁵

⁶⁹ See M Sassòli, *International Humanitarian Law* cit. 529-532 and L Ferro, 'Western Gunrunners, (Middle-)Eastern Casualties' cit. 518-521.

⁷⁰ L Ferro, 'Western Gunrunners, (Middle-)Eastern Casualties' cit. 518.

⁷¹ The ATT provides more leeway to states to let other (security and commercial) interests prevail when risks of IHL violations have been identified. See also BAA Martínez, 'A Balance of Risks: The Protection of Human Rights in International Arms Trade Agreements' (2018) *Security & Human Rights* 199.

⁷² Art. 2(2)(c) of the Common Position.

⁷³ Other examples of differences in approach include: Disunity in relation to arms exports for Syrian rebels during the recent Syrian civil war (S Besch and B Oppenheim, 'Up in Arms: Warring over Europe's Arms Export Regime' (10 September 2019) Centre for European Reform www.cer.eu); differences in licensing policies in response to the 2006-2010 Arab Spring (N Duquet, 'Business as Usual? Assessing the Impact of the Arab Spring on European Arms Export Control Policies' (24 March 2014) Flemish Peace Institute vlaamsvredesinstituut.eu); differing approaches to the 1989 arms embargo against China (S Gupta, 'EU Weapons Embargo and Current Chinese Foreign Policy' (2013) *Strategic Analysis* 581-583).

⁷⁴ Saudi Arabia, the United Arab Emirates, Bahrain, Kuwait, Qatar, Egypt, Morocco, Jordan, Sudan, Malaysia, Senegal, and Pakistan. See for a more comprehensive description of the conflict and its origins A Al Dosary and M George, 'Yemen War: An Overview of the Armed Conflict and Role of Belligerents' (2020) *Journal of Politics and Law* 53.

⁷⁵ Speech by United Nations Secretary-General A Guterres, 'Opening Remarks at Press Encounter on Yemen' (2 November 2018) United Nations www.un.org.

Throughout the duration of the conflict, there has been a continuous stream of reports by UN agencies⁷⁶ and Non-Governmental Organisations (NGO's)⁷⁷ of serious IHL violations on both sides of the fighting. In relation to the Saudi coalition, those reports detail a variety of IHL violations, including widespread and systematic attacks on civilian targets and a failure to appropriately distinguish between civilian and military objects. According to the Yemen Data Project, coalition air strikes have killed and injured more than 18.000 civilians since 2015.⁷⁸

International responses to the IHL violations in Yemen have varied greatly. The UN Security Council (UNSC) imposed an arms embargo on the Houthis,⁷⁹ thereby prohibiting all weapon exports to them in general.⁸⁰ But against Saudi Arabia and its allies no such UNSC measures were taken. As such, every State must individually assess the legality of its exports. This is where stark differences emerged within the EU. Though the European Parliament adopted resolutions calling on Member States to cease arms exports to Saudi Arabia and its allies no less than six times,⁸¹ several of the EU's most important weapons manufacturing States did not heed those calls. While a number of Member States took steps relatively early on to (partially) block arms exports, export data over the years 2014-2018 show that total EU arms exports to coalition members actually *increased* during the relevant time period.⁸² Certain countries, such as Germany and Italy, have since changed their position,⁸³ but other Member States – including prominent arms producers like Spain and France – have kept up their exports during the duration of the conflict. These exports include weapons and munitions that were used in prior military operations that caused civilian casualties in Yemen, such as fighter jets and aircraft bombs.⁸⁴

⁷⁶ See the annual reports of the UN Security Council Committee established pursuant to resolution 2140 (2014), available at www.un.org; the UN Human Rights Council, 'Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014: Report of the United Nations High Commissioner for Human Rights' (13 September 2017) A/HRC/36/33; and the ongoing reports from the UN Group of Eminent International and Regional Experts on Yemen, established on 3 October 2017 pursuant to resolution A/HRC/RES/36/31.

⁷⁷ See for example Human Rights Watch annual World Reports on Yemen over the years 2014-2020 (available at www.hrw.org) and Amnesty International's annual reports on The State of the World's Human Rights over the years 2014-2020 (available at www.amnesty.org).

⁷⁸ Yemen Data Project, available at www.yemendataproject.org.

⁷⁹ Security Council, Resolution 2216 of 14 April 2015, UN Doc S/RES/2216 (2015).

⁸⁰ See also art. 2(1) of the Common Position.

⁸¹ See recently Resolution 2021/2539(RSP) of the European Parliament of 11 February 2021 on the humanitarian and political situation in Yemen, which includes references to the earlier resolutions to that effect.

⁸² PD Wezeman and A Kuimova, 'Military Spending and Arms Imports by Iran, Saudi Arabia, Qatar and the UAE' (May 2019) SIPRI www.sipri.org.

⁸³ G Chazan and L Pitel, 'Germany Halts Arms Exports to Saudi Arabia after Khashoggi's Death' (22 October 2018) Financial Times www.ft.com; The Local, 'Italy Blocks Arms Sales to Saudi Arabia Permanently' (29 January 2021) www.thelocal.it.

⁸⁴ See M Bromly and G Maletta, 'The Conflict in Yemen and EU's Arms Export Controls: Highlighting the Flaws in the Current Regime' (16 March 2018) SIPRI www.sipri.org; and G Maletta, 'Legal Challenges to

The Common Position's failure to prevent problematic exports in situations like the one in Yemen can be traced back to two (interrelated) factors, which greatly affect its enforceability and its effectiveness in preventing contributions to IHL violations.

The first factor is its *limited harmonising effect*. National licensing systems continue to differ on important aspects such as their institutional framework, material scope, application of licenses and end-use controls, and transparency.⁸⁵ Furthermore, the Common Position's assessment criteria are open-ended in nature,⁸⁶ leaving room for divergent interpretations.⁸⁷ Initiatives intended to harmonise interpretations, such as the introduction of an interpretative Users' Guide, have not solved the issue thus far.⁸⁸ And since the European Council's recent review of the Common Position has resulted in only minor changes to it,⁸⁹ a further alignment of Member States' practices is not expected in the near future.⁹⁰

The second factor is *limited access to justice* at both the EU and the national level. As the Common Position has been adopted under the CFSP, it falls outside of the jurisdiction of the CJEU. This also prevents national courts from referring questions to it in order to resolve existing interpretative differences. Furthermore, as demonstrated by Ferro's (2019) study into legal challenges brought against export licenses granted to Saudi Arabia and its allies,⁹¹ there are simultaneously significant hurdles when it comes to bringing a case at the national level. For various reasons, such cases are most often brought by NGO's acting in the collective interests of victims of armed conflict. In some countries, national procedural rules prohibit NGO's from opening a court case in the first place.⁹² In jurisdictions which do allow NGO's to bring an action against export licenses,⁹³ national courts have so far displayed a strongly deferential attitude towards the assessments carried out by government authorities.⁹⁴ As a result, it has proven very

EU Member States' Arms Exports to Saudi Arabia: Current Status and Potential Implications' (28 June 2019) SIPRI www.sipri.org.

⁸⁵ D Cops, N Duquet and G Gourdin, 'Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States' (15 June 2017) Flemish Peace Institute vlaamsvredesinstituut.eu.

⁸⁶ See art. 2(2), second indent and under (c) of the Common Position, and in particular the "clear risk" element.

⁸⁷ BÁÁ Martínez, 'A Balance of Risks' cit. 214.

⁸⁸ European Council User's Guide to Council Common Position 2008/944/CFSP of 16 September 2019 n. 12189/19 defining common rules governing the control of exports of military technology and equipment.

⁸⁹ Conclusions 12195/19 of the European Council of 16 September 2019 on the review of the Council Common Position 2008/944/CFSP of 8 December 2008 on the control of arms exports.

⁹⁰ D Cops and N Duquet, 'Reviewing the EU Common Position on Arms Exports' cit.

⁹¹ L Ferro, 'Western Gunrunners (Middle-)Eastern Casualties' cit.

⁹² See for example, Tribunal Administratif de Paris judgment of 9 July 2019 1807203/6-2 *Exportation d'armes vers le Yemen*.

⁹³ Such as the UK, see London Court of Appeal of 20 June 2019 T3/2017/2079 *Campaign Against Arms Trade (CAAT) v The Secretary of State for International Trade*.

⁹⁴ L Ferro, 'Western Gunrunners (Middle-)Eastern Casualties' cit. 531.

difficult to substantively challenge export licenses related to the Yemen conflict, even though these decisions “so flagrantly breach international law”.⁹⁵

V. DON'T FUEL THE FIRE: THE EU'S DUTY TO ACT AS A RESPONSIBLE ARMS FINANCIER

Having covered the Member States' obligations in arms export controls, it is now time to examine more closely the obligations of the EU in this area in light of the EDF. At the outset, the EU's role in arms export controls is a markedly different one compared to that of its Member States. After all, the EU is not an *addressee* of arms export legislation: It is neither an arms exporter nor an export licencing authority. But as this section will show, the ineffectiveness of international and EU arms export controls is nevertheless a legally relevant fact for the EU in the context of the EDF. Firstly because of the EU's commitment to the international legal order, which requires it to actively stimulate compliance with international law where possible (subsection V.1). And secondly because of the principle of consistency, which requires it to refrain from contributing through the EDF to behaviour that it is trying to prevent under the Common Position (subsection V.2). Though the EU's commitments to international law and to consistency can both support the existence of a legal duty for the EU to act as a responsible arms financier, it must be noted that the CFSP-specific context of arms export controls may make it difficult for this duty to be enforced judicially (subsection V.3).

V.1. THE EU AS A GUARDIAN OF THE INTERNATIONAL LEGAL ORDER

International law can affect the EU in different ways. Firstly, the EU itself can be liable for violating international law. For such liability to occur, the EU's actions have to qualify as an internationally wrongful act according to the customary rules on liability of international organisations. This part of customary international law is still in development. The International Law Commission (ILC) has proposed a set of Draft Articles on the Responsibility of International Organizations (DARIO),⁹⁶ but these have not yet been adopted. Nevertheless, they represent the first authoritative attempt to formulate a coherent system of responsibility for international organisations based on general principles of customary international law,⁹⁷ which can provide inspiration for examining the extent of EU liability in this area.⁹⁸

⁹⁵ *Ibid.* 533-535.

⁹⁶ UN, *Yearbook of the International Law Commission* (2011) legal.un.org.

⁹⁷ M Möldner, 'Responsibility of International Organizations - Introducing the ILC's DARIO' (2012) *Max Planck Yearbook of United Nations Law Online* 281, 285-288.

⁹⁸ See also D Sehnalek, 'The Responsibility of the European Union under International Law' in AJ Bělohávek and N Rozehnalová (eds), *Czech Yearbook of International Law* (2018) 289.

Based on the DARIO, adopting the EDF Regulation without including additional safeguards surrounding arms export compliance would not appear to lead to international liability on the part of the EU. As the EU will at most contribute *indirectly* to illegal arms exports, it could only be held liable if its funding would qualify as aid or assistance to an internationally wrongful act. For this, two requirements must be met. The first requirement is that the act to which aid is given would be internationally wrongful if it were committed by the EU itself.⁹⁹ Since the EU is itself not a signatory to the ATT, this means that it cannot be held liable for aiding or assisting in violations of the ATT by others. This could be different as far as IHL is concerned, since IHL generates obligations that are customary in nature. Nevertheless, EU liability for aiding in a violation of IHL export obligations is similarly unlikely. That is because of the second requirement for liability: knowledge of the circumstances of the internationally wrongful act to which the aid is given.¹⁰⁰ Such knowledge would be very difficult to prove in relation to the EDF. Its funding is limited to the R&D phase of arms development, at which point it will often not be clear whether end products will be exported at all. Thus, when the EU grants funding for a particular project, there will usually be no concrete indications that the products to be developed will be exported unlawfully. Since knowledge that the EDF may contribute to illegal arms exports *in abstracto* is insufficient, the EDF will most likely not give rise to direct international liability for the EU.

The second way in which international law can affect the EU is through application of international norms within the EU legal order. Depending on the nature of the norm in question, international law may have effect in the EU legal order directly or through harmonious interpretation.¹⁰¹ Customary international law generally has direct effect, as was reaffirmed by the CJEU in *ATAA*: “when [the EU] adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union”.¹⁰² Treaties have direct effect only if certain requirements are met, including firstly the requirement that the EU must be bound by the treaty in question.¹⁰³ But since the EU will not actually be violating international law through its funding, this second form of legal effect would also not appear to bar the EU from introducing a measure such as the EDF.

⁹⁹ Art. 14(b) DARIO.

¹⁰⁰ Art. 14(a) DARIO. See specifically on financing as aid or assistance also A Reinisch, ‘Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts’ (2010) *IntOrgLRev* 7, 66-72.

¹⁰¹ K Ziegler, ‘The Relationship between EU Law and International Law’ in D Patterson and A Södersten (eds), *A Companion to European Law and International Law* (John Wiley & Sons 2016) ch. 4.

¹⁰² Case C-366/10 *Air Transport Association of America and Others* ECLI:EU:C:2011:864 para. 101.

¹⁰³ Case C-308/06 *Intertanko and Others* ECLI:EU:C:2008:312 para. 44.

However, based on the text of the TEU, I argue that there is also a third layer to the EU's commitment to international law.¹⁰⁴ This consists of an obligation for the EU to use its influence to stimulate compliance with international law by others. This obligation follows firstly from art. 3(5) TEU, which commits the EU to the *strict observance and development* of international law. It is expanded upon further in art. 21 TEU, which sets out the objectives for external EU action. Art. 21(1) TEU states that EU external action shall be guided by respect for the principles of international law, while art. 21(2)(b) TEU states that the EU shall work towards *consolidating and supporting* those principles. These commitments also affect internal EU measures such as the EDF Regulation. This follows from art. 21(3) TEU, which proclaims in its first paragraph that the EU must respect the CFSP's objectives also in relation to the external aspects of its other policies. This means that when the EU enacts internal policy measures that have external effects, it must ensure that those measures too respect the EU's aim of consolidating and supporting the principles of international law.

Interpreting arts 3(5) and 21 TEU as provisions with concrete, substantive meaning is in line with Wessel's reading of those articles. According to Wessel, arts 3(5) and 21 TEU require EU international relations to be guided by the fundamental objectives included in those provisions.¹⁰⁵ Support for this approach to art. 21(2)(b) TEU specifically can be found also in EU jurisprudence regarding restrictive measures (sanctions) against individuals. In cases such as *Al Matri and Tomana*,¹⁰⁶ the General Court has confirmed that the objectives listed in art. 21(2)(b) TEU such as advancing democracy and the rule of law grant the EU competence – when read in conjunction with art. 29 TEU – to impose restrictive measures against individuals abroad in pursuit of those objectives. Thus, the EU's objective to work towards consolidating and supporting the principles of international law can also be regarded as a justification for concrete EU action in support of that goal.

Based on the foregoing, I argue that art. 21(2)(b) TEU – read in conjunction with art. 21(3) TEU – imposes an obligation on the EU to ensure that its internal actions with an external dimension do not run contrary to its objective of consolidating and supporting the principles of international law. Since arms export controls are rooted firmly in customary IHL, and since the EDF Regulation can be expected to contribute to arms exports which may contravene customary IHL (see Section IV), art. 21 TEU would thus require the EU to take steps to ensure compliance with customary IHL by the recipients of its funding.

¹⁰⁴ See for a similar line of reasoning in relation to the EU's external human rights obligations L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) EJIL 1071.

¹⁰⁵ *eJournal*: RA Wessel, 'Lex Imperfecta: Law and Integration in European Foreign and Security Policy' (2016) European Papers www.europeanpapers.eu 444.

¹⁰⁶ Case T-200/11 *Al Matri v Council* ECLI:EU:T:2013:275 and Case T-190/12 *Tomana and Others v Council and Commission* ECLI:EU:T:2015:2222. See L Lonardo, 'Common Foreign and Security Policy and the EU's External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union' (2018) EuConst 14 and 591-595 for a more in-depth discussion.

V.2. THE EU AS A CONSISTENT LEGISLATOR

Consistency is a legally binding principle of EU law, which features prominently in both the EU Treaties and the CJEU's case law. It has various implications for both the horizontal and vertical levels of EU governance.¹⁰⁷ Horizontal (that is, inter-EU) consistency is included in art. 13(1) TEU among the general aims of the EU institutions, while art. 7 TFEU makes clear that the EU must "ensure consistency between its policies and activities, taking all of its objectives into account". According to most authors, the EU is bound by a horizontal consistency obligation that extends beyond merely ensuring that one EU legal instrument does not contradict another. Herlin-Karnell and Konstadinides argue for instance that "when it comes to legal drafting, consistency can be interpreted not only as consistency of content (ie, coordination and avoidance of contradiction) but also as consistency of logic (consolidation) and goals".¹⁰⁸

The consistency principle is of such prominence that it may qualify as one of the foundational legal principles of the EU, since it is a *legally binding, overarching normative frame of reference* for all primary law.¹⁰⁹ As such, it has been given an explicit place in the CFSP as well. The second paragraph of art. 21(3) TEU requires the EU to "ensure consistency between the different areas of its external action and between these and its other policies". Thus, the EU is under an explicit obligation to ensure consistency between EU internal policies such as the EDF and EU external policies such as the Common Position.¹¹⁰

The consistency principle allows for a relatively straightforward line of argumentation connecting together the EDF Regulation and export control compliance. As the EU is fully aware of the deficiencies of Member States' arms export regimes, and there are numerous signals that Member States continue to export arms in violation of the EU's own Common Position, increasing arms industrial funding without including safeguards relating to export controls runs contrary to the consistency principle. After all, without such safeguards it is reasonably foreseeable that EDF funding will end up contributing to – or even stimulating – behaviour which the EU is actively trying to prevent in another area of action.

V.3. THE NATURE OF THE EU'S DUTY TO ACT AS A RESPONSIBLE ARMS FINANCIER

As explained in the previous subsections, the EU's commitment to international law and the consistency principle both support the existence of a duty for the EU to act as a re-

¹⁰⁷ See SEM Herlin-Karnell and T Konstadinides, 'The Rise and Expressions of Consistency in EU Law' cit. for an in-depth analysis of those functions.

¹⁰⁸ *Ibid.* 146.

¹⁰⁹ A von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) *Revus* 35 para. 25 and 35.

¹¹⁰ See also RA Wessel, 'Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?' (2015) *European Foreign Affairs Review* 129.

sponsible arms financier. However, due to the specific characteristics of the CFSP, enforcing this duty is not a straightforward matter.

The main barrier to enforcement is the CJEU's lack of jurisdiction over the CFSP. Though CFSP decisions are considered to bind the Member States, there are significant limitations when it comes to challenging their effects through the CJEU or a national court.¹¹¹ CJEU jurisdiction is limited to guarding the lines of EU competence (such as between the CFSP and other forms of EU external action¹¹²) and providing protection against restrictive measures against individuals.¹¹³ Though the EDF Regulation is itself reviewable on the basis of art. 263 TFEU, it seems unlikely that the CJEU would be able to rely on the consistency principle or the EU's commitment to international law to review that Regulation's compatibility with EU obligations falling under the CFSP. After all, these lines of argumentation do not concern the demarcation of EU competence or the application of individual measures. They would inevitably require the CJEU to substantively review art. 21 TEU and (the implementation of) the Common Position, which it may not do on the basis of art. 24(1) TEU. As the CJEU acknowledges, EU law is simply such that "certain acts adopted in the context of the CFSP fall outside of the ambit of judicial review by the Court of Justice".¹¹⁴ This jurisdictional gap is unlikely to be closed by the national courts, who are as a rule precluded from declaring EU acts invalid.¹¹⁵

On top of this, the most likely parties to bring a case before the CJEU against the EDF Regulation – NGO's and the third-state persons they represent – would face other formal obstacles as well. Art. 263(1) TFEU restricts appeals to acts that are of direct and individual concern to the applicant. This requirement is applied strictly by the CJEU and bars actions by public interest groups,¹¹⁶ meaning that NGO litigation is excluded at the EU level. Furthermore, a legal act challenged under art. 263(1) TFEU must be intended to produce legal effects *vis-à-vis* the applicant. Based on the available case law, there is a good chance that the CJEU would rule that the EDF Regulation is not intended to produce legal effects in relation to third-state applicants. This follows from the Court of First Instance's verdict in *Commune de Champagne*, in which it ruled that "[...] an act of an institution adopted pursuant to the Treaty, as a unilateral act of the Community, cannot create rights and obligations outside the territory thus defined".¹¹⁷ While this line of reasoning has been criticised

¹¹¹ *Ibid.*

¹¹² Case C-263/14 *Parliament v Council* ECLI:EU:C:2016:435.

¹¹³ Case C-134/19 *Bank Refah Kargaran v Council* ECLI:EU:C:2020:793.

¹¹⁴ Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 252.

¹¹⁵ P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) ICLQ 1.

¹¹⁶ *E.g.* Case C-565/19 *Carvalho and Others v Parliament and Council* ECLI:EU:C:2021:252. See also the report by DG Internal Polices, *Standing up for your right(s) in Europe* (2012) www.europarl.europa.eu/https 39-40.

¹¹⁷ Case T-212/02 *Commune de Champagne and Others v Commission* ECLI:EU:T:2007:194 para. 90.

in the literature,¹¹⁸ if upheld it would serve to bar actions against the EDF Regulation brought by the potential victims of illicit arms exports.

Based on the foregoing, it appears unlikely that the EDF Regulation could be challenged judicially over failure on the part of the EU to act as a responsible arms financier. But does this mean that the EU can simply ignore its obligations? I would argue the contrary. From an EU-constitutional perspective, it merely means that the responsibility to ensure that the EDF Regulation is compatible with the EU's obligations in relation to international and EU arms export controls falls on the shoulders of the EU legislator. After all, it is firstly the legislator that must transpose the EU's objectives and values "into justiciable norms or principles as part of a legal discourse and political-societal choice".¹¹⁹

Furthermore, it is clear from the EU's efforts on the international scene that it has also committed itself *politically* to fostering a more responsible arms trade. EU soft power has been a strong driving force behind the adoption of the ATT¹²⁰ and of more stringent standards in relation to the proliferation of small arms and light weapons¹²¹ and Weapons of Mass Destruction (WMD's).¹²² Because of these efforts the EU has been referred to as a *norm entrepreneur* in arms controls, as the EU is able to put issues on the agenda and to convince others to embrace new norms by advancing normative interpretations of fundamental values.¹²³ But successful norm advocacy requires the norm entrepreneur to demonstrate strong notions regarding appropriate or desirable behaviour.¹²⁴ For the EU to remain a credible actor, it must – in other words – act in line with those fundamental convictions it seeks to advance in the wider world. A failure by the EU to grasp opportunities to enhance norm compliance in the area of export controls may thus jeopardise its position as norm entrepreneur, since this could be perceived by other actors as the EU failing to uphold those norms that it is promoting others to follow. This, too, forms a reason for the EU to ensure that it does not contribute to arms exports that run contrary to its own export control norms.

It follows then that the EU is both legally obliged and politically committed to stimulating a more responsible arms trade. Though judicial enforcement of the relevant legal

¹¹⁸ L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' cit. 1087-1088.

¹¹⁹ O Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law' (2019) *Hague Journal on the Rule of Law* 133.

¹²⁰ See for instance Conclusions 12514/1/05 of the European Council of 3 October 2005 on an International Treaty on the Arms Trade.

¹²¹ Conclusions 13581/18 of the European Council of 19 November 2018 on the Adoption of an EU Strategy Against Illicit Firearms, Small Arms & Light Weapons & Their Ammunition.

¹²² Conclusions 15708/03 of European Council of 9 December 2003 on an EU strategy against proliferation of Weapons of Mass Destruction.

¹²³ B Oliveira Martins and B Backhaus, 'Why and How the EU Should Act on Armed Drones' cit. 261.

¹²⁴ M Finnemore and K Sikkink, 'International Norm Dynamics and Political Change' (1998) *International Organization* 896 and 904.

obligations seems unlikely, this does not release the EU from its responsibilities. The next section examines how this legal-political commitment to a responsible arms trade could be put into practice in the context of the EDF.

VI. DESIGNING A MORE RESPONSIBLE EUROPEAN DEFENCE FUND

It is clear from the final text of the EDF Regulation that potential non-compliance with EU export norms by funding recipients will not affect the disbursement of EDF funding. Yet as this section will demonstrate, it would certainly have been possible for the EU to draft the EDF Regulation in such a way so as to reduce the chance of export control violations involving EDF-funded products. Several measures to that effect were proposed by the European Parliament during the EDF's legislative process.¹²⁵ However, during the (non-public) inter-institutional negotiations for the EDF, Parliament ultimately acquiesced to the wishes of the Council and Commission not to include them in the final Regulation.¹²⁶ The measures originally proposed by Parliament, as well as other potential solutions to the challenge of designing a more humane defence-industrial financing instrument, will be examined in this section. But before doing so, it is necessary to determine the relevant *benchmark* against which such measures should be assessed. In other words, what are the critical parameters for determining whether the EU has met its obligations as identified in the previous subsection?

VI.1. OPERATIONALISING THE EU'S DUTY TO ACT AS A RESPONSIBLE ARMS FINANCIER

It is important to note as a point of departure that the relevant obligations identified in section V are rather open ended. This implies the existence of a relatively wide margin of appreciation for the EU legislator. From this perspective, consistency and consolidating and supporting international law can be seen as public policy objectives that are to be taken into account while drafting legislation and which must be balanced against other relevant interests that are at stake. The relative "weight" of these obligations ought to reflect the EU's appreciation of the acceptable level of risk of its actions in one area contributing to activities which it considers undesirable in another. This can be regarded as a sliding scale. At one extreme of the scale would be an EU which considers export norm compliance of absolute importance. This EU would consider *any* risk of its funding contributing to illegal arms exports unacceptable, and would thus only engage in defence-industrial funding if it would have certainty that its funding would not contribute to such activities.

¹²⁵ Resolution 2018/2157(INI) cit. paras 21 and 41.

¹²⁶ Proposal for a Regulation COM(2018)476 of the European Parliament and of the Council of 13 June 2018 establishing the European Defence Fund. For details of the legislative process see eur-lex.europa.eu for an overview of the EDF Regulation's development from proposal to final text.

At the other extreme of the scale would be an EU that would allow all other (geopolitical, economic) interests to prevail in case of conflict with its humanitarian export obligations. An EU positioned in the middle ground between these two extremes would make an effort to reduce risks to a reasonable level. In effect, this corresponds with a proportionality test *stricto sensu*: Is there an adequate balance between the benefits of a measure in relation to one public interest, compared to the harm inflicted on another?¹²⁷ Based on the nature of the relevant EU legal obligations and the EU's constitutional commitment to proportionality,¹²⁸ such an approach would seem most appropriate.

Next, the limitations to the EU's legislative toolbox must be kept in mind. Any protective measures that the EU may wish to implement would have to be in line with the *division of competences*. As is clear from this *Article*, defence-industrial policy is a complex terrain which requires addressing various geopolitical, economic and humanitarian issues. But the EU is currently not able to adopt such an integrated approach. It is a limited foreign and security actor, and it does not possess the competences to strengthen arms export controls and their enforcement. The most direct and effective solution to the problem identified in this article would therefore be to enhance the EU's competences in this area. Yet political realities are such that this is not likely to occur any time soon. That being the case, it must be recognised that any attempt to address the issue of arms export non-compliance as an ancillary effect under the EDF Regulation will always be indirect, and therefore imperfect.

The ancillary nature of the issue also implies that any instrument intended to address export control compliance within the context of the EDF Regulation ought to respect the *primary* policy goal of the EDF of contributing to strategic autonomy by stimulating industrial cooperation. Otherwise, such an instrument would defeat the purpose of instituting the EDF in the first place.

Taking the foregoing considerations into account, the EU's duty to act as a responsible arms financier within the context of the EDF could be operationalised as an obligation to include in the EDF Regulation any measures that *i)* are suitable to prevent EU funding from contributing to illegal arms exports, *ii)* fall within the scope of the EU's competences regarding industrial and research support, and *iii)* do not jeopardise the EDF's primary policy objectives.

VI.2. ANALYSING THE EU'S POLICY TOOLBOX

In order to determine in what manner the EU could have acted against illegal arms exports in the EDF Regulation, this subsection will examine a number of different policy options. These are *i)* introducing a dedicated export control regime for EDF-funded products,

¹²⁷ Compare A Barak, 'Proportionality *Stricto Sensu* (Balancing)' in H Spector and B Bix (eds), *Rights: Concepts and Contexts* (Routledge 2017) 507.

¹²⁸ Art. 5(4) TEU.

ii) restricting EDF financing for certain products that carry increased IHL risks, *iii)* increasing transparency regarding exports of arms developed with EDF funding, and *iv)* creating a “clawback mechanism” through which funding recipients can be ordered to reimburse funding under certain conditions. The first three instruments were tabled by the European Parliament during the legislative process. Inspiration for the fourth instrument was found in the EDF Regulation itself, as such a mechanism is already included in it in order to address a different type of undesirable behaviour by funding recipients.

a) Introducing a dedicated control regime for EDF-funded products.

The first policy option to be discussed was tabled by the European Parliament in a resolution which it adopted following a parliamentary evaluation of the Common Position. In this resolution, Parliament “calls on the Council and Parliament to agree on a detailed interpretation and implementation regime including a supervisory body, a sanctioning body and an ethical committee, to ensure that the criteria of the Common Position are applied at least to the products financed under [...] the EDF”.¹²⁹

The measures proposed by Parliament are quite far-reaching and would go a long way in addressing the main issues plaguing EU arms export policy identified in section IV of this *Article*. Thus, these measures would certainly seem suitable to prevent EU funding from contributing to illegal arms exports. However, they are simultaneously problematic from the perspective of both the division of competences and the EDF's primary policy effectiveness.

As regards competence, Parliament's proposal would effectively amount to partial harmonisation of Member States' export control policies. It would thus have to be adopted on the basis of the CFSP rather than the industrial support competence on which the EDF Regulation is based. Furthermore, the proposal would essentially entail the creation of an additional, separate and parallel EU export regime that only applies to EDF-funded products. The resultant (financial and procedural) burdens for arms producers could disincentivise them from participating in EDF programmes, thereby jeopardising its primary policy objectives. This proposal is therefore ill suited for addressing export issues in the specific context of the EDF.

b) Restricting financing up front.

Since the EDF is a funding instrument, the principal way in which its influence is determined is the scope of its financing: which activities qualify for funding, and which do not? Therefore, one way to address humanitarian concerns could be to restrict funding for particular activities. As explained in section III of this *Article*, it is clear from the final text of the EDF Regulation that the legislature implemented certain such restrictions by prohibiting in art. 10(6) EDF Regulation funding for products and technologies that are banned by international law and for lethal autonomous weapons. But the EU could have chosen to expand this provision also to other types of weaponry of which the ex-

¹²⁹ Resolution 2018/2157(INI) cit. para. 41.

portation generates particularly serious humanitarian risks. Parliament proposed for example excluding from financing small arms and light weapons that are “mainly developed for export purposes, i.e. where no Member State has expressed a requirement for the action to be carried out”.¹³⁰

Since small arms and light weapons are particularly associated with IHL violations,¹³¹ excluding those weapons from funding could in theory serve to reduce the IHL concerns surrounding the EDF. Yet such measures can only go so far without simultaneously jeopardising the EDF’s primary policy goals. In this context, it must be recalled that the problems in relation to Yemen are not caused by weaponry mainly developed for export purposes, but by high-tech major weapon systems such as (munitions for) jet planes. As long as EDF financing is available for any such “hard” defence products, there will always be a risk of those products being used to conduct IHL violations by their recipients. And since excluding all hard defence products from funding would severely hamper the EDF’s scope and functionality, funding restrictions can only be regarded as partially suitable for addressing export issues in the specific context of the EDF.

c) Increasing transparency.

The third and final proposal tabled by Parliament concerns the introduction of a mechanism increasing the transparency of EDF funding in relation to arms exports. In this context, Parliament suggested listing exports of EDF-funded products separately in the export data submitted to COARM, in order to ensure a close monitoring of those products.¹³² COARM – the Council Working Party on Conventional Arms Export – gathers, registers, and publishes EU Member States’ arms exports data in fulfilment of art. 8 of the Common Position.

While Parliament’s chosen solution would necessitate adapting the Common Position, it would also appear possible to include a similar mechanism in the EDF Regulation itself. Such a mechanism could be seen as a financial accountability tool in support of the EDF Regulation’s primary functions, comparable to the monitoring and reporting obligations currently laid down in art. 28 EDF Regulation. Additionally, the EDF Regulation already foresees in a number of arrangements regarding information, communication and publicity surrounding EDF funding, including a duty for recipients to “*acknowledge the origin of those funds and ensure the visibility of the Union funding*” (art. 32(1) EDF Regulation). However, whether such a transparency mechanism would be suitable to promote export control compliance is another matter. In theory, enhanced transparency could enable both the EU and NGO’s to make better use of their soft power in relation to arms exports. Yet COARM already reports on arms exports, and

¹³⁰ Document A8-0412/2018, proposed art. 11(6).

¹³¹ See A Boivin, ‘Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons’ (2005) IRRIC international-review.icrc.org 467.

¹³² European Parliament Resolution of 14 November 2018 cit. para. 41.

there are various actors who regularly sound the alarm over exports to recipients with a poor humanitarian record. While making EDF funding specifically visible in this context could serve to put the spotlight on the issue, without an actual “stick” to properly act against problematic exports the added value may be limited indeed.

d) Introducing a clawback provision.

As mentioned earlier in this subsection, the EDF's main impact comes from its financial influence. It is the “pull” of its financing which is supposed to nudge the defence industry into a particular direction. But the EDF's influence may also extend beyond the moment when its funding has been disbursed. As arts 20(4) and 23(4) of the EDF Regulation show, it is possible to design an *ex post* enforcement mechanism which allows funding to be clawed back in case the recipient of that funding acts contrary to the EU's interests. These provisions are intended to ensure that EDF funding is used in a manner that is consistent with the security and defence interests of the EU and its Member States. They impose a duty on recipients of funding to notify the Commission prior to transferring intellectual property and/or ownership of the results of EDF-funded actions to a third State or a third State entity. If this transfer is found to contravene the security and defence interests of the Union and its Member States or the objectives of the EDF, the financial support provided from the EDF must be reimbursed. Thus, while the EDF does not affect arms exports *officially*, it does impose financial consequences on funding recipients if their exports run contrary to security interests.

A comparable clawback mechanism could be designed to ensure that EDF-funded products are exported in a manner compliant with the Common Position. Taking arts 20(4) and 23(4) as templates, a provision could be designed requiring funding recipients to notify the Commission prior to exporting products resulting from EDF-funded R&D actions. If the Commission were to conclude that an export is not compliant with the Common Position, the recipient could then be required to reimburse (part of) the funding it received. Such a mechanism could prove effective in preventing EU funding from contributing to illegal arms exports, since it would make it possible for an EU body to carry out an independent review of the compatibility of EDF-funded exports with humanitarian standards. And since such a mechanism would tie export control compliance directly to the EDF's main purpose and function (industrial funding), its effectivity would be intertwined with the EDF's general effectivity as well. Thus, if EDF funding were to book significant results, the threat of reimbursement may also prove an effective incentive pushing both companies and Member States to be more critical in their export practices. And since such a mechanism imposes no additional obligations on companies – after all, they are required only to adhere to the already-existing rules of the Common Position – the EDF's primary policy objectives would not appear to be jeopardised.

Finally, it would seem possible to argue that such a mechanism would fall within the legal basis of the EDF Regulation. In this context it is useful again to draw a comparison with arts 20(4) and 23(4) EDF Regulation. Under those articles, the Commission will be-

come responsible for assessing military security interests, even though it is neither competent to develop European military security policy¹³³ nor to develop national military security policy.¹³⁴ In both cases, the mechanism can be considered necessary to ensure the proper disbursement of funding in relation to the EU's public interests.

VII. CONCLUSION

This *Article* sought to discover whether the EU is under an obligation to address the risk of EDF-funded armaments contributing to IHL violations outside of its own borders, taking into consideration its commitments to international law and consistency, and if so, what measures it could have included in the EDF Regulation to fulfil this obligation.

On the basis of an EU legal-constitutional analysis, this *Article* concludes that the EU was indeed required to address the risk of EDF-funded armaments contributing to IHL violations. This obligation has two separate sources, namely the EU's duty to consolidate and support the principles of international law – including customary IHL – and its duty to act in a manner that is consistent with its own Common Position on arms exports. Though the specific procedural and institutional arrangements governing the CFSP likely prevent this obligation from being enforced in a court of law, the EU legislature cannot simply ignore it either. Firstly, because it is an obligation rooted in EU primary law which the EU legislature is required to observe. And secondly, because it reflects certain core values the promotion of which the EU has committed itself to at a political level as well. Since such value-promoting activities rely on soft power, the EU must be seen to uphold its values itself as well if it wishes to remain a credible actor.

As demonstrated through an analysis of the legislative toolbox available to the EU when drafting the EDF Regulation, the EU could have used a number of instruments to address the risk of EU funds contributing to illegal arms exports without violating the division of competences or jeopardising the EDF's primary policy objectives. One option would be to exclude more product types from funding that pose a high risk for humanitarian violations, while at the same time having little to no EU-strategic value. Another would be to introduce an *ex post* enforcement mechanism allowing the European Commission to claw back funding in case EDF-funded weapons are exported in violation of the Common Position. Though such measures are by no means a perfect solution to the issue of illegal arms exports, they can be seen as a next-best option in lieu of enhancing the EU's competences regarding arms exports.

By failing to enact any measures to address the problem of illegal arms exports in the context of the EDF, the EU has neglected its obligations in relation to the international legal order and its duty to ensure consistency. Furthermore, the EU's inaction

¹³³ Which falls, as part of the CSDP, under the purview of the Council.

¹³⁴ Which remains a Member State prerogative, under art. 4(2) TEU.

risks jeopardising its soft power role in the realm of arms controls, which it has actively developed and made use of over the years to reduce the suffering brought about by the proliferation of arms across the globe.

As evidenced by the European Parliament's input during the legislative process, the EU legislature was clearly aware of the humanitarian concerns accompanying the EDF. The absence of export-related measures in the EDF Regulation thus reflects a conscious choice to sacrifice the interests of victims of armed conflict abroad in favour of other foreign policy priorities. This is starkly at odds with the EU's foreign policy rhetoric, in which it stylises itself as an ethical actor and as a 'force for good' on the international scene.¹³⁵

While the EDF is certainly not the first example of disparity between the EU's rhetoric and its external action,¹³⁶ such issues have often been attributed in the past to the EU's dependence on soft power to propagate its values internationally.¹³⁷ Since EU foreign policy relies on Member State action for its implementation, and largely excludes EU institutions such as the European Parliament from the process, refusal by Member States to prioritise EU norms and values over national policy interests certainly limits the EU in its ability to actually influence the behaviour of other States.¹³⁸ Yet the example of the EDF raises questions regarding the EU's own commitment to its values as well. By signing the EDF Regulation into law in its current form, the EU institutions – including the European Parliament – have made a conscious choice to accept the risk of EU funds fuelling illicit arms exports. Thus, when presented with an opportunity to actually *enforce* its own values, the EU too failed the litmus test.

The EDF is not the only new CFSP instrument which raises questions regarding the EU's commitment to upholding its values abroad. The newly-minted European Peace Facility (EPF),¹³⁹ which will allow the EU for the first time to supply weapons to non-EU military forces, has attracted similar criticisms. Like the EDF, the EPF has been prompted by geopolitical concerns – mainly a desire to increase stability in the Sahel and other (North-)African regions. Yet shipping weapons to governments in those regions is not without risks, especially considering their poor human rights records. For this reason, the EPF has received widespread criticism from various actors who claim that it will increase harm to civilians rather than bring peace to the region.¹⁴⁰

¹³⁵ L Aggestam, 'Introduction: Ethical Power Europe?' (2008) *International Affairs* 1.

¹³⁶ A Skolimowska, 'The European Union as a "Normative Power" in International Relations. Theoretical and Empirical Challenges' (2015) *Yearbook of Polish European Studies* 111.

¹³⁷ See, for instance, I Manners, 'Normative power Europe: A Contradiction in Terms?' (2002) *JCom-MarSt* 235.

¹³⁸ R Noureddine, 'Normative Power Europe in Field of Human Rights: Is the EU a Force for Good in the World?' (2016) *Australia and New Zealand Journal of European Studies* 111.

¹³⁹ Decision (CFSP) 2021/509 of the European Council of 22 March 2021 on establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528.

¹⁴⁰ Z Campbell, C Chandler and C Jones, 'Hard power: Europe's Military Drift Causes Alarm' (19 May 2021) *The Guardian* www.theguardian.com.

Developments such as these indicate that the EU's gradual transition to hard power in the realm of security and defence creates a real risk of sacrificing the core values that it was originally founded on. If the EU wants those values to represent more than just empty words, it will have to make serious efforts to put them into action as well.

