# Editorial

## Europe at War

On the 1st of March, speaking in front of the European Parliament, the President of the European Commission, Ms. Von der Leyen, delivered an engaging statement: "our Union, for the first time ever, is using the European budget to purchase and deliver military equipment to a country that is under attack" (European Commission, Speech by President von der Leyen at the European Parliament Plenary on the Russian aggression against Ukraine ec.europa.eu).

This statement follows a declaration released by the High Representative of the Union for Foreign Affairs and Security Policy who, even more explicitly, said: "[a]nother taboo has fallen. The taboo that the European Union was not providing arms in a war. Yes, we are doing it. Because this war requires our engagement to support the Ukrainian army" (European Commission, Further measures to respond to the Russian invasion of Ukraine: Press statement by High Representative/Vice-President Josep Borrell (27 February 2022) ec.europa.eu).

In a few days, we will learn whether this step has been successful and contributed to saving Ukraine from what appears its cruel fate, namely to succumb to the overwhelming Russian forces and to be dismembered, or to cease its existence as an independent State.

What is certain is that this decision, formally adopted by the Council on 28 February 2022 (Council Decision (CFSP) 2022/338 of 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, hereinafter the Decision), marks a significant turn in the international actorship of the Union. By implementing Council Decision 2021/509 of 22 March 2021, establishing the European Peace Facility, devoted "to contribute rapidly and effectively to the military response of third States […] in a crisis situation" (art. 56), and by accepting to respond to a war of aggression through forcible measures, in accordance to its values and objectives, the Union seems to accept new responsibilities in the management of major international crises.

Supplying lethal military equipment to a belligerent State is not a decision that can be taken lightheartedly. Under the classical law of armed conflicts, this conduct excludes the neutrality of the supplying entity (see art. 6 of the 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, largely regarded as a codification of customary law of war). While excluding that supply of arms to a State in-

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volved in an international conflict can be equated to an armed attack, in *Nicaragua* the ICJ qualified this conduct as a violation of the prohibition of the use of force, albeit *minoris generis* (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits) [27 June 1986] paras 230 and 247).

But is this measure legally justified in response to the aggression unleashed by Russia against Ukraine?

The most obvious response can be based on the doctrine of collective self-defence, grounded on customary law and recognized by art. 51 of the UN Charter. If the members of the international community are entitled, upon the request of the attacked State, to use massive military force to halt and repeal an aggression, they are entitled *a fortiori* to react through forcible measures *minoris generis*.

A further, and perhaps more appropriate, answer may come from the qualification of aggression as a violation of a fundamental interest of the international community as a whole, whose breach requires a collective response. Under the law of international responsibility, as emerging from the Articles on State responsibility (International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), hereinafter ASR) and from the Articles on the responsibility of international organizations (International Law Commission, Draft Articles on the Responsibility of International Organizations (2011), hereinafter ARIO), serious breaches of obligations established for the protection of collective interests of the international community entitle every member of that community, be it a State or an international organization, to invoke the responsibility of the wrongdoer (arts 48 ASR and 49 ARIO). The two sets of Articles also establish a duty on every State, and every international organization, to cooperate to bring to an end a serious breach of fundamental interests of the international community as a whole (*jus cogens*), among which, pre-eminently, the prohibition of the use of force (arts 41 ASR and 42 ARIO).

To implement this duty, the members of the international community must put into motion a coordinated chain of measures that should be ultimately able to put the breach to an end. The typology of measures ranges from loose forms of protest to strong, but lawful, actions appropriate to the circumstances. In case of aggression, minor forms of use of force, including the dispatch of military equipment, seems to be the perfect example of collective response, at least for those States which do not want to be directly involved in the armed confrontation. The Union's supply of arms to Ukraine to halt and repeal the Russian aggression, falls inside the scope of this law and contributes to its further development.

Its international personality assuredly empowers the Union to use its competences to implement the rights and to discharge the commitments flowing from international law. Pursuant to art. 24 TEU, the competence of the Union in the field of foreign and security policy covers "the progressive framing of a common defence policy that might lead to a

common defence". A major step in this progression was made with the adoption of the mentioned Decision of 22 March 2021. Ultimately, the pace was precipitously sped up in the "last six days" in which the European security and defence has evolved more … than in the last two decades", as metaphorically said Ms. Von der Leyen in the statement which opens this editorial.

But is it sufficient to conclude that the Union possesses, under the Treaties, the power to take forcible measures, albeit *minoris generis*, such as dispatch of military equipment to a belligerent State: a conduct capable to drag the EU and its MS in a forcible confrontation? Does the Union really possess the necessary panoply of powers and prerogatives to participate in the management of international crises on equal terms with States, full-fledged actors of international relations? Or is it acting as an agency of coordination of forcible actions attributable to its MS? Is this impetuous progression heralding a new phase in which the Union can use the means of actions, including minor use of force, necessary to implement its values and interests on the international sphere? Or is it simply an optical illusion, which will be exposed as soon as the occasional convergence of the MS toward a common strategic interest will fade away?

Providing an answer to these questions falls well beyond the scope of the present Editorial and remains open for scholarly debate. It would entail entering an insidious ground where new and old categories of international law and European law collide, evolve and interweave each other, creating an almost inextricable legal conundrum.

But the idea of a Common Defence and Security Policy rapidly evolving as an efficient tool for the implementation of the European values may serve as a comfort, in these bitter days, for those who believe, genuinely or ingenuously, in the capacity of integration as a powerful antidote to wars, in Europe and in the world.

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