ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

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PROVIDING WEAPONS TO UKRAINE: THE FIRST EXERCISE OF COLLECTIVE SELF-DEFENCE BY THE EUROPEAN UNION?

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ABSTRACT: The European Union's decision to supply weapons and military equipment to the Ukrainian army, which is engaged in repelling Russian aggression, could amount to an international use of force, albeit *minoris generis*. In this case, the question arises as to whether it is admissible under international law on the use of force. One possible legal basis is the legal regime of collective self-defence. However, according to the classical interpretation, international law only grants States the power to act in self-defence, and the assistance benefiting Ukraine provided under Council Decision 2022/338 does not seem to be attributable to the EU Member States, even if they have brought weapons onto Ukrainian territory. On the contrary, military support for the Ukrainian army seems entirely attributable to the Union, which would have adopted the conduct of its Member States as States and international organisations might do with the conduct of individuals under international law of responsibility. This *Article* argues that the Council's decision to supply weapons to the Ukrainian army can be regarded as a first attempt to amend customary law, precisely to allow international organisations to act in collective self-defence in certain limited cases.

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I. INTRODUCTION

One of the main international law issues raised by the Russian aggression against Ukraine is to determine the legal qualification of the role played by the European Union. As is well known, the European Union decided to provide the Ukrainian army with weapons and other military equipment to help repel the invasion. From the perspective of EU law, this assistance can be easily explained. It is grounded on a decision adopted by the Council on the basis of the provisions of the founding Treaties governing the Common Foreign and Security Policy. Far less clear is the qualification of EU action under international law. This *Article* aims at establishing whether it can be qualified as a measure of collective self-defence. Before turning to the examination of the applicable international law, it is necessary to analyse, albeit briefly, the relevant EU decisions.

II. THE EU DECISION TO ASSIST UKRAINE: A WATERSHED YET NOT UNPREDICTABLE MOMENT

By Council Decision (CFSP) 2022/338 of 28 February 2022 (hereinafter, Decision 338), an "assistance measure" to strengthen "the capabilities and resilience of the Ukrainian Armed Forces to defend the territorial integrity and sovereignty of Ukraine" was established.[1] As stated by art. 1(3), assistance would take the form of the provision of "military equipment, and platforms, designed to deliver lethal force" to the Ukrainian army. Then art. 4(4) specified that the determination of the military equipment and platforms to be delivered to Ukraine, as well as the transfer of the materials, should be carried out by the Member States.[2] The European Union would control the implementing activities of the Member States through its High Representative, who was requested to present six-monthly reports to an organ, the Political and Security Committee, composed by the Member States' diplomats: not the most effective control procedure, in all evidence.[3] Originally intended to last until 28 February 2024, the measure was funded with a budget of 450 million euros.[4]

[1] Art. 1(1)(2) of Decision (CFSP) 2022/338 of the Council 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.

[2] Art. 4(4) of Decision (CFSP) 2022/338 cit. Not all of them, to be precise: Austria, Ireland and Malta are not included in the list of States that "may" help Ukraine.

[3] Art. 7 of Decision 2022/338 cit. See also European Council, Council of the European Union, *Political and Security Committee (PSC)* www.consilium.europa.eu): the Political and Security Committee "is composed of member [S]tates' ambassadors based in Brussels".

[4] Arts 1(4) and 2(1) of Decision 2022/338 cit.

Over time, numerous amending decisions have been adopted by the Council.[5] The scope of the assistance measure was widened. No longer just "the provision of military equipment, and platforms, designed to deliver lethal force": from February 2023 the assistance also implies the "maintenance, repair and refit" of the provided supplies, "and of identical equipment", to be carried out "by military personnel in military sites, or in mixed forms of civil-military cooperation or in factories".[6] Moreover, both the duration and the budget allocated to the assistance measure were improved. The first was extended to five years and ten months, so that the measure is now due to expire at the end of December 2027, and the second was increased to 4,120 billion euros.[7] Finally, in April 2023, art. 2(4) was added to Decision 338: it detailed the timetable and the modalities for the European Union to compensate Member States for the costs of providing military materials to Ukraine.[8]

Even if Decision 338 marked a watershed moment for the European Union, as stressed by the President of the Commission, it was by no means unpredictable.[9] Decision 338 was adopted within the framework of the European Peace Facility, an instrument created on March 2021 by Council Decision (CFSP) 2021/509 (hereinafter, Decision 509) "for the financing by Member States of *Union actions* under the Common Foreign and Security Policy (CFSP) to preserve peace, prevent conflicts and strengthen international security".[10] An instrument that the European Union can use to give "material support" to third States in order "to contribute rapidly and effectively to [their] military response [...] in a crisis situation", *i.e.* also when an international armed conflict erupts.[11]

It should be underlined that the European Union has not unlimited leeway in supporting the armed forces of third States involved in an international armed conflict. Art. 56 of Decision 509 requires that all the measures established in the framework of the European Peace Facility must comply with international law. Furthermore, arts 3(5) and 21 TEU maintain that all "Union's action on the international scene [must] be guided by [...] international law" and "promote [...] the strict observance [...] of international law". Those provisions imply that the European Union cannot support belligerent States that

[5] The amending Decisions of the Council are: (CFSP) 2022/471 of 23 March 2022; (CFSP) 2022/636 of 13 April 2022; (CFSP) 2022/809 of 23 May 2022; (CFSP) 2022/1285 of 21 July 2022; (CFSP) 2022/1971 of 17 October 2022; (CFSP) 2023/230 of 2 February 2023; (CFSP) 2023/810 del 13 April 2023.

[6] Art. 1(3) of Decision 2022/338 cit., as amended by Decision 2023/230 cit.

[7] Arts 1(4) and 2(1) of Decision 2022/338 cit., as amended, respectively, by Decision (CFSP) 2022/1285 cit. and Decision (CFSP) 2023/810 cit.

[8] Art. 2(4) of Decision 2022/338 cit., as amended by Decision 2023/810 cit.

[9] See European Commission, *Statement by President von der Leyen on Further Measures to Respond to the Russian Invasion of Ukraine* (27 February 2022) ec.europa.eu: "For the first time ever, the European Union will finance the purchase and delivery of weapons and other equipment to a country that is under attack. This is a watershed moment".

[10] See art. 1 of Decision (CFSP) 2022/338 cit. and art. 1 of Decision (CFSP) 2021/509 of the Council of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528 (emphasis added).

[11] Cf. arts 4(c) and 56(1)(b) of Decision 2021/509 cit.

are using force in violation of international law: the EU power to enhance the military response of third States involved in international armed conflicts is limited to cases of legitimate use of armed force under international law.[12]

III. The international relevance of the EU assistance to Ukraine

As mentioned in the introduction, by entailing the transfer of large quantities of armaments from the Member States to the Ukrainian army, Decision 338 can produce effects not only under EU law, but also under international law.[13] For the purposes of this *Article*, international law on the use of force is particularly relevant.

In the case of *Military and Paramilitary Activities in and Against Nicaragua* (hereinafter, *Nicaragua*), the International Court of Justice made two holdings: on the one hand, it ruled out the possibility, for "assistance to rebels in the form of the provision of weapons", to fall within "the concept of 'armed attack'"; on the other, it admitted that the same conduct "may be [nevertheless] regarded as a threat or use of force".[14]

As is well known, the situation addressed by the International Court of Justice in the case was that of a State, namely the United States of America, allegedly supplying arms to private individuals fighting on the territory of another State, Nicaragua, with a view to overthrowing the government. This is clearly different from the supply of arms to a regular army, fighting on the territory of its own State, to repel an aggression, which is what Decision 338 is about. Yet, the *Nicaragua* holdings are relevant for the case being considered in this *Article*.

In the case of a provision of weapons to private individuals fighting to overthrow a foreign government it seems plausible to assume that the prohibition of the use of force

[12] A Hofer, 'The EU and Its Member States at War in Ukraine? Collective Self-defence, Neutrality and Party Status in the Russo-Ukraine War' (2023) European Papers www.europeanpapers.eu 1697, 1701 ff.

[13] Just to mention a few examples, to implement Decision 338 Italy has transferred missiles, anti-tank weapons and heavy machine guns. Poland has delivered tanks, portable air-defence weapons, ammunition, light mortars and drones. The Czech Republic has donated tanks, infantry fighting vehicles, portable anti-aircraft weapons, machine guns, assault rifles, machine guns, bullets, mortars. Germany has transferred anti-aircraft tanks, infantry fighting vehicles, anti-tank weapons, missiles, armoured howitzers to Ukraine. For this information, cf. S Clapp, 'Russia's War on Ukraine: Bilateral Delivery of Weapons and Military Aid to Ukraine' (European Parliamentary Research Service, May 2022) www.europarl.europa.eu; T Bolton, 'Which Countries are Sending Heavy Weapons to Ukraine, and Is It Enough?' (11 July 2023) EuroNews www.euronews.com; Al Jazeera, 'Weapons to Ukraine: Which Countries Have Sent What?' (5 June 2022) Al Jazeera www.aljazeera.com; J Gedeon, 'The Weapons and Military Aid the World Is Giving Ukraine' (22 March 2022) Politico www.politico.com. Only Bulgaria and Hungary have chosen not to transfer weapons: the former donated helmets, bulletproof vests and fuel, while the second delivered to Ukraine medical equipment alone (cf. S Clapp, 'Russia's War on Ukraine' cit.; T Bolton, 'Which Countries are Sending Heavy Weapons to Ukraine, and Is It Enough?' cit.; Al Jazeera, 'Weapons to Ukraine' cit.; J Gedeon, 'The Weapons and Military Aid the World Is Giving Ukraine' cit.).

[14] ICJ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [27 June 1986] para. 247.

is not breached according to the qualification of the entity receiving the arms. Rather, the element triggering the violation seems to be the objective of the providing State to damage another State with military means.[15]

As a consequence, it would be possible to assume, or at least not possible to exclude, that Decision 338, as well as the massive supply of weapons it implied, might amount to a use of force, of course *minoris generis*, to borrow the words of the *Nicaragua* ruling. This does not necessarily imply its unlawfulness: Decision 338 may indeed fall within the scope of one of the exceptions to the prohibition of using force, *i.e.* self-defence. It is precisely to the ascertainment of this possibility that the following analysis will be devoted.[16]

IV. A measure of collective self-defence?

As recognised in art. 51 of the UN Charter, the "inherent" right to self-defence is twofold: in addition to the well-known right to *individual* self-defence, there is the right to *collective* self-defence. The scenario of collective self-defence is "that Arcadia initiates an armed attack against Utopia (and only against Utopia), but Atlantica – although beyond the range of the attack – decides to come to the assistance of Utopia".[17] This is exactly what has happened in the present case: the Russian Federation initiated an armed attack against Ukraine (and only against Ukraine) but the European Union, that is well beyond the range of the attack, resolved to come to Ukraine's assistance.

Furthermore, Decision 338, as well as the delivery of weapons it triggers, meet the three conditions indicated by the International Court of Justice in *Nicaragua* for an action to be considered a measure of collective self-defence.

The first is an armed attack: as the Court specified, the right to collective self-defence "presupposes that an armed attack has occurred".[18] As confirmed by a resolution

[15] A confirmation of this functional interpretation of the prohibition of the use of force may be found in the reference to the "policy of force" made by the International Court of Justice in the *Corfù Channel* case, while explaining what, "in the past, given rise to most serious abuses", and therefore "cannot, whatever be the present defects in international organization, find a place in international law" (ICJ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Merits) [9 April 1949] 35). Further confirmation can be traced in the work of scholars. It has been argued that, in order to determine whether an action violates the prohibition of the use of force, formal elements must be ignored, while the focus must be on the intention "of a State using force against another" and on the gravity of the coercive action, that is "the sign of its author's intent". Cf. O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 124-125. For another "intentional" interpretation of the prohibition of the use of force, see M. Milanovic, 'The International Law of Intelligence Sharing During Military Operations' in R Buchan and I Navarrete (eds), *Research Handbook on Intelligence and International Law* (Elgar, forthcoming) available at papers.ssrn.com.

[16] Conversely, Decision 338 could not fall within the exception established in art. 42 of the UN Charter, namely the use of force authorized by the Security Council, as in this case there is no Security Council resolution authorizing resort to force in Ukraine.

[17] J Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press 2017) 303.

[18] *Military and Paramilitary Activities in and against Nicaragua* cit. para. 232.

adopted on 2 March 2022 by the UN General Assembly, this condition is unquestionably fulfilled.[19] In that resolution, the General Assembly first "[d]eplore[d] in the strongest terms the aggression of the Russian Federation against Ukraine" and then requested the Russian Federation to "immediately cease its use of force against Ukraine and to refrain from any further unlawful threat or use of force against any Member State".[20]

The second condition, entailed by the lack of a rule "of customary international law that allows another State to exercise the right to collective self-defence on the basis of its own assessment of the situation",[21] is that the attacked State declares itself to be the victim of an armed attack.[22] In our case this condition would also be fulfilled, as Ukraine has in more than one occasion described itself as the victim of an armed attack. One example can be found in the speech given by its president at the end of the first day of aggression, when he acknowledged that "[t]oday Russia has attacked the entire territory of our State".[23]

The third condition is "a request from the victim State of the alleged attack".[24] The preamble to Decision 338 demonstrates that in the present case the latter condition is satisfied as well: in its fifth alinea, it indicates that "[o]n 25 February 2022, the Ukrainian government addressed an urgent request to the Union for assistance in the supply of military equipment".

However, things are not so simple. What the International Court of Justice did in the *Nicaragua* judgement, when it established the three conditions listed above, was simply interpret customary law on the use of force. These conditions must, therefore, be read in the context of existing customary law. This means that for an action to be considered a measure of collective self-defence, not only must it fulfil the three conditions set out in the judgment but, even before that, it must also be carried out by a legal entity to whom customary international law confers the right to self-defence. The reason why things are not so simple with regard to Decision 338 is that, according to the traditional interpretation of customary law, the right to act in self-defence belongs to States, and the European Union is not a State.[25]

[19] General Assembly, Resolution of 2 March 2022, UN Doc. A/RES/ES-11/1.

[20] *Ibid.*

[21] *Military and Paramilitary Activities in and against Nicaragua* cit. para. 195.

[22] *Ibid.*

[23] President of Ukraine, 'Address by the President to Ukrainians at the End of the First Day of Russia's Attacks' (25 February 2022) www.president.gov.ua.

[24] *Military and Paramilitary Activities in and against Nicaragua* cit. para. 199.

[25] In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the right to self-defence has been described by the International Court of Justice as a consequence "of the fundamental right of every State to survival" (ICJ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [8 July 1996] para. 96). A wording that has been used by scholars as well (*ex multis*, see Y Dinstein, *War, Aggression and Self-Defence* cit. 204: the right to self-defence is "engendered by, and embedded in, the fundamental right of States to survival"). In the same vein, the Max Planck Encyclopedia of Public International Law affirms

There is, then, a risk that the supply of armaments carried out under Decision 338 will be qualified as an illegal, albeit minor, use of force. To rule this out, one option would be to prove that, according to international law, the assistance provided to Ukraine is entirely attributable to the EU Member States. In this way, as Member States are fully entitled to exercise the right to collective self-defence, the action could fall within the scope of relevant customary law.

However, as will be shown, this attribution is far from simple.

V. Attributing the assistance in favour of Ukraine to the EU Member States: the general criteria of arts 4 ARS and 6 ARIO

First of all, it cannot be carried out by applying arts 4 of the Draft Articles on Responsibility of States (ARS) and 6 of the Draft Articles on Responsibility of International Organizations (ARIO), which establish the general criteria for the attribution of conduct under international law.

Under these two provisions, "[t]he conduct of any State organ" must be considered the conduct of the State (art. 4(1) ARS) and "[t]he conduct of an organ or agent of an international organization" must be considered the conduct of the international organization (art. 6(1) ARIO).[26] Their joint application dictates that the material supply of weapons to the Ukrainian army, carried out by national Defence Ministries, must be attributed to States, whereas the decision to assist Ukraine with the delivery of weapons, *i.e. Council* Decision 338, can only be attributed to the European Union.

For the sake of completeness, it should be mentioned that the European Union often claims at the international level that when implementing its decisions Member States should be regarded as "EU agents", so that their conduct must ultimately be attributed to the European Union.

This idea was upheld by the Commission before the International Tribunal for the Law of the Sea. The occasion was an advisory proceeding on the consequences ensuing from the law on international responsibility in the case of violation of an international

that in customary international law "long-established" is the "right of a State to use force in self-defence" (C Greenwood, "Self-Defence", in Max Planck Encyclopedia of Public International Law, 2011, para. 1). Some attempts have been made to broaden the scope of international law on self-defence. In the aftermath of the September 11, 2001 attacks, the right of any State to use force in reaction to large-scale terrorist attacks was suggested. To this day, however, the hypothesis is still being debated and there is no unanimity on its validity. Works that address the problem in a general way, and not strictly related to the 9/11 attacks and the US reaction, include: O Corten, *The Law Against War. The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 126 ff.; C Gray, *International Law and the Use of Force* (Oxford University Press 2018) 200 ff.; T Ruys, 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?' (2014) AJIL 159, 191 ff.

[26] International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) UNYBILC (vol. II, Part Two) 30; Draft Articles on the Responsibility of International Organizations, with Commentaries (2011) UNYBILC (vol. II, Part Two) 46.

fisheries agreement.[27] In particular, the Tribunal was called upon to determine the entity liable *vis-à-vis* a third State in a situation in which a ship flagging a Member State's flag infringes a fisheries agreement concluded by the European Union.[28]

In a public hearing the Commission held that all vessels flying the flag of an EU Member State should be considered "Union vessels", with the consequence that, in the event of a breach of one of these agreements, responsibility would fall exclusively on the international organization. Indeed, "[s]hould the Union fail to meet the obligations set out in its fisheries agreements [...], the Union would be liable under international law".[29]

Such a centralization of responsibility can only be achieved through a *fictio iuris*, namely that all the actions of vessels flying the flag of EU Member States be incorporated into the overall conduct of the European Union. This is to say that the conduct of these vessels would only be relevant, for the purposes of the fisheries agreements, insofar as it is attributable to a legal entity these agreements recognise. In this sense, the Commission held that although fisheries agreements "may contain provisions referring to the EU Member States' authorities", "such provisions do not, of course, render the EU Member States contracting parties".[30] The consequence is that the European Union must exercise its rights and obligations under the treaty also for the actions of its Member States.

Although not expressly stated, the centralization of responsibility on the European Union can only be triggered by a process of coalescence of the Member States' legal personality into that of the Union.[31] A legal phenomenon that is very close to that characterising the relationship between a State and its organs would arise. The legal personality of the organs, which exists internally, *i.e.* in the national legal order, ceases to exist externally, *i.e.* in the international legal order. Similarly, the legal personality of the Member States, which exists internally, *i.e.* in the EU legal order, would cease to exist in the international one.

However, it is one thing to consider the Member States as organs of the European Union in the context of an agreement concluded by the Union on the basis of an exclusive competence, while it is another to make the same claim in the context of the international law on

[27] International Tribunal for the Law of the Sea *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries* Commission *(SRFC)* (Advisory Opinion) [2 April 2015] www.itlos.org.

[28] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries* Commission *(SRFC)* cit. para 151.

[29] International Tribunal for the Law of the Sea *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Public sitting) [4 September 2014] www.itlos.org, 38-39. For a comment to the Advisory Opinion, see L Gasbarri, 'Responsabilità di un'organizzazione internazionale in materie di competenza esclusiva: attribuzione e obbligo di risultato secondo il Tribunale internazionale del diritto del mare' (2015) RivDirInt 911.

[30] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Public sitting cit. 39-40.

[31] As is well known, the possibility for an entity to be subject to legal rules, and to exercise certain rights and duties, is a prerequisite both for it to be considered the author of a conduct and for it to be held accountable. In the present case, since the exclusion of the Member States' responsibility stems from their lack of legal personality in the fisheries agreement, it is very difficult to conceive that, within the same legal system, they could be considered the author of a conduct, whether lawful or unlawful.

the use of force. This is because the Member States, unlike the fisheries competence, by joining the European Union have not divested themselves of the power to use armed force. This is confirmed by EU law. One example is art. 42(7) TEU, which provides that "[i]f a Member State is the victim of armed aggression on its territory", not the Union but "the other Member States[,] shall have towards it an obligation of aid and assistance by all the means in their power", in accordance with the right to collective self-defence. It follows that when the Member States use force at the international level, they cannot be regarded as EU agents or organs, and their actions cannot be attributed to the European Union under art. 6 ARIO.

VI. Attributing assistance in favour of Ukraine to the EU Member States: the control-based criteria

The other criteria provided by international law, *i.e.* the control-based criteria, may not determine the attribution of support to Ukraine to the Member States. In the following sub-sections, attention will be devoted to the foremost of these criteria: the effective control test and the overall control test.

VI.1. The effective control test

Arts 6 ARS and 7 ARIO establish a system of crossed attribution. The first provision refers to inter-State relations: the conduct of a State organ "placed at the disposal" of another State "shall be considered an act of the [second] if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed". The second one relates to the case of a State organ "lent" to an international organisation: "[t]he conduct of an organ of a State [...] that is placed at the disposal of [an] international organization shall be considered under international law an act of the [...] organization if the organization exercises effective control over that conduct".

Even the hypothesis of organs of international organisations placed at the disposal of States, as would be the case with the Council adopting Decision 338 under the control of the EU Member States, although not expressly mentioned, seems to fall within the scope of art. 6 ARS. The lack of reference to this hypothesis in the provision, as the International Law Commission explained, is not due to legal reasons, but only to the absence of relevant practices: since there were no "convincing examples of organs of international organizations which have been 'placed at the disposal of' a State in the sense of [art.] 6", there was "no need to provide expressly for the possibility".[32]

Of course, one could argue that, nevertheless, the practice that did not exist in 2001 might have come into existence in 2022: for example, when the Council adopted Decision 338. If this were the case, taking this argument further, it could be argued that the adoption of Decision 338 should be attributed to the Member States by virtue of their effective control over the Council.

[32] Draft Articles on the Responsibility of States, with Commentaries cit. 142.

However, substantiating and applying the notion of "effective control over conduct", it becomes clear that this is not the case.[33] It would be hard to affirm that the Council, when adopting Decision 338, was "appointed to perform functions appertaining to the State[s] at whose disposal it [was] placed": Decision 338 was adopted in the framework of Decision 509, itself adopted in the framework of the Common Foreign and Security Policy, governed by the founding Treaties.[34] Similarly, it cannot be argued that, "in performing the functions entrusted to it by the beneficiary State[s]", the Council was acting "in conjunction with the machinery of th[ose] State[s]": Decision 338 was adopted in the seat of the Council, using the EU machinery.[35] Finally, it cannot be stated that, in adopting Decision 338, the Council was under the "exclusive direction and control" of the EU Member States, "rather than on instructions from the" European Union.[36]

VI.2. The overall control test

The broader control-based criterion, *i.e.* the "overall control test" does not appear to be more promising, either. Established in the *Tadić* case by the International Criminal Tribunal for the Former Yugoslavia, this criterion aims to attribute to a State, or an international organisation, the conduct of individuals over which it did not exercise effective control.[37]

The reason why this criterion would not be applicable in our case lies within its scope. As the Tribunal explained, the overall control test can be used to determine the attribution of conduct of individuals and groups of organised individuals.[38] In all evidence, the

[33] The expression is used by art. 7 ARIO. However, art. 6 ARS and art. 7 ARIO have the same normative content. The commentary to art. 7 ARIO indicates that it reproduces art. 6 ARS, "although it is differently worded" because of the specific characteristics of the international organizations: for instance, part of the wording of art. 6 ARS could not be "replicated" in art. 7 ARIO "because the reference to 'the exercise of elements of governmental authority' is unsuitable to international organizations" (Draft Articles on the Responsibility of International Organizations, with Commentaries cit. 57). Draft Articles on the Responsibility of International Organizations, with Commentaries cit. 57.

[34] Draft Articles on the Responsibility of States, with Commentaries cit. 44.

[35] *Ibid.*

[36] *Ibid.*

[37] International Criminal Tribunal for the Former Yugoslavia *The Prosecutor v Dusko Tadić* (Merits) [15 July 1999]. In order to ascertain the international character of the conflict in the former Yugoslavia, the Tribunal had to assess whether the actions of the Bosnian Serb forces in Bosnia and Herzegovina were attributable to the Federal Republic of Yugoslavia (para. 87). To make this determination, the Tribunal applied art. 4 of the 1949 Third Geneva Convention, which provides that if a group of individuals "belong" to a particular State, they may be considered legitimate combatants even if they are not part of the regular national army (para. 92). Since a group of individuals would belong to the armed forces of a State if that State exercises "control over them", it was "imperative", in *Tadić*, "to specify what degree of authority or control must be wielded by a foreign State over armed forces fighting on its behalf" (paras 94 and 97).

[38] While accepting that for the attribution to the State of the conduct of private individuals international law requires "that the State exercises control over the individuals", the Tribunal claimed that the control-threshold cannot be uniform: on the contrary, "[t]he degree of control may [...] vary according to

Council cannot be considered an individual. But it does not even fit into the definition of group of organised individuals.[39] The Council does not bring together individuals, but high-ranking State organs, on which the founding Treaties confer a role in carrying out the functions of the Institution. In other words, the condition of the unofficial character of the members of the group, which seems implicit in the Tribunal's reasoning when the term "individual" is used, is not be fulfilled for the overall control criterion to be applicable in the case.[40]

VII. Attributing the assistance in favour of Ukraine to the European Union: the adoption criterion

The analysis carried out so far has revealed the difficulty of attributing, with any degree of plausibility, military assistance benefiting Ukraine to EU Member States. Before concluding that it cannot be considered a legitimate use of force, another option, of course heterodoxic, should be explored.

In particular, it seems appropriate to investigate the possibility of attributing military assistance to Ukraine entirely to the European Union. In this regard, the recognition and adoption criterion, established by art. 9 ARIO, must be considered. Then, in the event of a positive answer, how customary law would regulate such a situation will have to be established: *i.e.* whether, in addition to the classical interpretation according to which only States can act in self-defence, it permits exceptions.

Art. 9 ARIO points out that a conduct "which is not [otherwise] attributable to an international organization [...] shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own". The commentary specifies that art. 9 ARIO mirrors its twin provision, namely art. 11 ARS, "which is identically worded but for the reference to a State instead of an international organization",[41] and which is tailored on the basis of a famous case in international practice, namely the *Hostages in Teheran* case.[42]

The facts of the case may help grasp the very essence of the attribution by adoption test. On 4 November 1979, an armed group composed by private individuals raided the US

the factual circumstances of each case" (*The Prosecutor v Dusko Tadić* cit. para. 117). Two categories of situations were then distinguished: the situation of groups of organised individuals, on the one hand, and the situation of individuals and unorganised groups, on the other. Whereas for groups of organised individuals "an overall control test" would suffice, for single individuals and unorganised groups a much stricter test, defined as a "specific instructions" test, would be required (*Ibid.* para. 141).

[39] *Ibid.* para. 120: it is a "hierarchically structured group, such as a military unit", that "normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority".

[40] *Ibid.*

[41] Draft Articles on the Responsibility of International Organizations, with Commentaries cit. 62.

[42] ICJ *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Merits) [24 May 1980].

Embassy in Teheran, taking hostage the diplomatic and consular staff they found inside the buildings.[43] At the time, the International Law Commission was working on the ARS and none of the criteria developed so far could have attributed such conduct to Iran.[44]

However, on 17 November 1980 Iran adopted as its own the conduct of the armed group by means of a decree issued by the Ayatollah Khomeini.[45] The decree prevented the hostages from leaving the embassy: "[t]he noble Iranian nation will not give permission for the release [...] of them" until the United States fulfilled certain conditions, such as returning to Iran the deposed Shah to whom they had granted asylum.[46]

In its judgment, the International Court of Justice attributed an innovative legal effect to these declarations. They "fundamentally [...] *transform*[*ed*] *the legal nature of the situation* created by the occupation of the Embassy and the detention of its [...] staff".[47] The adoption of the conduct by Iran "translated continuing occupation [...] and detention [...] *into acts of that State*".[48] To this effect, the individuals constituting the armed group became "agents of the Iranian State".[49]

There is another, less well known case, that contributed significantly to the drafting of art. 9 ARIO, namely the *Nikolić* case, decided by the International Criminal Tribunal for the former Yugoslavia.[50] Dragan Nikolić was illegally arrested by "unknown individuals" then surrendered to the stabilisation force and eventually transferred to the Tribunal for trial.[51] During the proceedings, the defence argued that the illegal action of the unknown individuals had to be attributed to the stabilisation force because, by agreeing to receive Nikolić from them, it had adopted their conduct.[52] Therefore, the Tribunal was called upon to evaluate the "possible attribution of the acts of the unknown individuals to [the stabilization force]".[53]

To decide on the issue, it resorted to the "principles laid down in the Draft Articles of the International Law Commission [...] on the issue of 'Responsibilities of States for Inter-

[43] *Ibid.* para. 17.

[44] Under international law, only the violation of the obligation to prevent such action and to repress it would have been attributable to the State. Cf. arts 22-27 of the 1961 Vienna Convention on Diplomatic Relations, ICJ *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (order on provisional measures) [15 December 1979] para. 41 and *United States Diplomatic and Consular Staff in Tehran* cit. para. 18.

[45] *United States Diplomatic and Consular Staff in Teheran* cit. para. 73 ff.

[46] *Ibid.* para. 73.

[47] *Ibid.* para. 74 (emphasis added).

[48] *Ibid.* (emphasis added).

[49] *Ibid*.

[50] *The Prosecutor v Dragan Nikolić* (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal) [9 October 2002] www.icty.org, referred to by Draft Articles on the Responsibility of International Organizations, with Commentaries cit. 62.

[51] *The Prosecutor v Dragan Nikolić* cit. para. 57.

[52] *Ibid.* para. 56 ff.

[53] *Ibid.* para. 61.

nationally Wrongful Acts'", although they were, "as can be deduced from [their] title", "primarily directed at the responsibilities of States and not at those of international organisations or entities".[54] Most relevant to the Tribunal's analysis was art. 11 ARS, which was used, "as [a] general legal guideline", to ascertain whether the actions of the unknown individuals had been "recognised and adopted" by the stabilisation force.[55]

As evident, the *Nikolić* decision is grounded on an innovative application of the adoption criterion. Until then, it was only applicable to States. Yet the Tribunal, being persuaded of the similarity between the concrete cases, applied the general principles that can be inferred from art. 11 ARS to international organisations, implicitly recognising their capacity to adopt a certain conduct. Several years later, the drafting of art. 9 ARIO would only acknowledge, and confirm, the logical reasoning developed by the International Criminal Tribunal for the former Yugoslavia in the *Nikolić* case.[56]

VII.1. The legal features of the adoption criterion

Two distinctive features characterise the adoption criterion.

First, the chronological hiatus: the moment when the conduct carried out does not coincide with the moment when it becomes attributable to its "putative" author. In cases where arts 4 ARS and 6 ARIO are applicable, as well as when the control-based criteria are applicable, when the conduct is realised, it can be attributed to its author. Vice versa, the commentary to art. 11 ARS emphasises that the provision entails "the attribution to a State of conduct that was not [...] attributable to it at the time of commission".[57] Since art. 9 ARIO has the same normative content, this statement also applies to it.

Second, the *animus adottandi*: that is, the *animus* the State or the international organisation possesses when it adopts a conduct performed by someone else. Both the criteria provided by arts 4 ARS and 6 ARIO and those based on control are built on a presumption: the entity to which the conduct is attributed meant it to occur. Since it was realised by one of its organs or agents *de jure*, or by another person or entity controlled by it, the

[54] *Ibid.* para. 60.

[55] *Ibid.* para. 64.

[56] For the sake of completeness, it should be pointed out that the decision of the Tribunal was in the negative: the conduct of the individuals could not be attributed to the stabilization force. In particular, the Tribunal noted that "[o]nce a person comes 'in contact with' [the stabilisation force], like in the present case, [the stabilisation force] is obliged under Art. 29 of the Statute and Rule 59 bis to arrest/detain the person and have him transferred to the Tribunal. The assumed facts show that [the stabilisation force], once confronted with the Accused, detained him, informed the representative of the Prosecution and assisted in his transfer to The Hague. In this way, [the stabilization force] did nothing but implement its obligations under the Statute and the Rules of this Tribunal" (*The Prosecutor v Dragan Nikolić* cit. para. 67). However, since the negative answer was only determined by the procedural rules governing the action of the stabilisation force, the significance of the Tribunal's ruling as for our analysis is not diminished.

[57] Draft Articles on the Responsibility of States, with Commentaries cit. 52.

State or the international organisation undoubtedly intended to express its legal personality through such conduct. On the contrary, the adoption criterion considers only the will of the State or the international organisation: the will to embrace someone else's conduct, which could not be presumed at all, but which is manifested by the "adopting" State or international organisation.

VII.2. Assessing the *animus adottandi*

The commentary to art. 11 ARS explains that: "adoption of conduct by a State might be express (as for example in the [*Hostage in Tehran*] case, or it might be inferred from the conduct of the State in question".[58] There are then two categories of "adoption": explicit and implicit adoption, characterised, respectively, by an explicit *animus adottandi* or an implicit one.

Acknowledging an explicit *animus adottandi* is quite simple.[59] Conversely, an implicit *animus adottandi* is quite difficult to assess, as it must be inferred from relevant conducts of the State or the international organisation. In this regard, the main issue is to determine what conduct, *i.e.* what behaviour, is relevant.

In *Makuchyan and Minasyan* the European Court of Human Rights clarified the methodology appropriate for this logical inference.[60] The case concerned the conduct of an Azerbaijani soldier who, while in Hungary, had killed an Armenian colleague on racial grounds. Arrested, convicted, and detained in Hungary for years, the soldier was ultimately transferred to serve his sentence in Azerbaijan. But, once the soldier was back in its hands, Azerbaijan "took measures in the form of a pardoning [and] releasing him immediately upon

[58] *Ibid*. 54.

[59] A clear example comes from the decision of the Permanent Court of Arbitration (PCA) Case No. 2009-04 *Clayton e Bilcon of Delaware Inc. c. Canada* (award on jurisdiction and liability) [17 March 2015] www.italaw.com. The case stems from Canada's refusal to approve the plaintiffs' plan to build a quarry in Nova Scotia. The refusal followed a report by a commission of experts appointed by the Ministries of the Environment and Labour that, for various reasons, had not worked properly (para. 47 ff.). Among the question the arbitral tribunal was called upon to answer, there was whether the conduct of the commission of experts was attributable to Canada. It was resolved in the affirmative: "Canada [...] adopted [the report's] essential findings in arriving at the conclusion that the project should be denied approval" (para. 321). Not that the adoption of the commission's conduct by the State resulted from the mere overlapping of the State's conviction with the commission's determinations: if a government came to the same conclusions as an advisory commission "by pursuing investigations and reasoning that are so distinctly its own", then "it might not be viewed as acknowledging and adopting the conduct of the recommendatory body" (para. 322). However, in *Clayton* the situation was different and art. 11 ARS "would establish the international responsibility of Canada" (*ibid.*). In deciding on the approval of the plaintiffs' project, the government had indeed specified that "Canada accepts the conclusion of the [panel] that the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances" (para. 323). Moreover, there was a complete lack of evidence that the government had developed its own line of enquiry as to whether the project should be approved. It was not possible to find "a level of independent fact-finding, legal analysis or other deliberation by the Government of Canada that would be inconsistent with the view that Canada was acknowledging and adopting the essential reasoning and conclusions of the [panel]" (*ibid.*).

[60] ECtHR *Makuchyan and Minasyan v Azerbaijan and Hungary* App. n. 17247/13 [26 May 2020].

his return".[61] Moreover, it allocated to him a house, gave him a promotion in the military hierarchy and all the salary he had accumulated during the previous eight years spent in detention.[62] Finally, "a special section had been set up on the webpage of the President of Azerbaijan labelled 'Letters of Appreciation regarding [the soldier]', where individuals could express their congratulations on his release and pardon".[63]

The State's behaviour certainly betrays a certain approval of the soldier's conduct. In the assessment of the European Court, "those measures can be interpreted [...] as having the purpose of publicly addressing, recognising, and remedying [the soldier]'s adverse personal, professional, and financial situation": "by their actions various institutions and highest officials of the State of Azerbaijan "approved" and "endorsed" the criminal acts of [the soldier]".[64]

However, at the international level Azerbaijan has done nothing to adopt as its own, or even approve of, the soldier's conduct. When he was arrested, tried and sentenced, Azerbaijan did not notify Hungary that it recognised his conduct as its own, even though, being the soldier a *de jure* organ of the Azerbaijani State, it would have had robust argument to do so. It did not challenge the jurisdiction of the Hungarian judge, nor did it request the soldier's extradition. On the contrary, during the criminal proceeding, Azerbaijan entered into relations with the Hungarian judge and informed him that, in its opinion, the reasons behind the murder were not only racial.[65] Only in 2012, six years after the first application by the soldier to Hungary to be returned to Azerbaijan, and five years after his conviction, the Azerbaijani State asked Hungary to hand him over.[66] Moreover, requested by the European Court, the Azerbaijani government "strongly denied [...] that Azerbaijan had acknowledged and accepted the conduct of [the soldier] as its own. On the contrary, it had made clear that it did not approve [...] the criminal act": in this sense, the government recalled several "statements denying that [the soldier's] actions had been approved or justified at an official level".[67]

It was precisely the lack of international acts indicating the support of Azerbaijan for the soldier's conduct that led the European Court to exclude that art. 11 ARS was applicable to the case: "applying the very high threshold set by art. 11 the Court cannot but conclude that, on the facts of the case, [...] it has not been convincingly demonstrated that the State of Azerbaijan 'clearly and unequivocally' 'acknowledged' and 'adopted' 'as its own' [the soldier]'s deplorable acts".[68]

[61] *Ibid.* para. 115.
[62] *Ibid*.
[63] *Ibid.* para. 25.
[64] *Ibid.* para. 118.
[65] *Ibid.* para. 10 ff.
[66] *Ibid.* para. 18 ff.
[67] *Ibid.* para. 106.
[68] *Ibid.* para. 118. The Court's finding raised mixed doctrinal feelings. It was approved by M Milanovic, '*Makuchyan and Minasyan v Azerbaijan and Hungary*' (2021) AJIL 294 and criticised by G Fedele, 'Sulla responsabilità internazionale per condotte individuali riconosciute e fatte proprie da uno Stato: in margine alla

From the practice, albeit scant, it seems to emerge that the *animus adottandi* requires one of two conditions. The first is the clear-cut adoption which materialised in an explicit and unequivocal declaration to this effect.[69] The second consists of an action which unequivocally expresses to the international community the willingness of the State, or the international organisation, to adopt as its own someone else's conduct : that would be the case of the "[a]cknowledgement and adoption of conduct [...] inferred from the conduct of the State in question".[70]

The notion of *animus adottandi* is now clearer. It does not consist in an inherent adherence of a State, or an international organisation, to a particular conduct, its approval or even its celebration. The *animus adottandi* only derives from the unequivocal manifestation of willingness, on the part of a State or an international organisation, to be regarded by the international community as the author of a conduct that could not otherwise be attributed to it. It is not necessary that the conduct adopted be ideally shared by the putative author. Nor is it necessary that the conduct adopted be unlawful. The International Law Commission itself has pointed out that: "[t]he principle established by art. 11 governs the question of attribution only. [Only once] conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful".[71]

VII.3. The adoption made by Decision 338

The adoption criterion was developed in strict reference to the facts which gave origin to it, namely in the relations between States, or international organisations, and individuals. However, one can wonder whether its scope is larger than it may appear at first sight. In other words, this test could be conceived of as the implementation of a general principle in force of which a conduct could be attributed to an entity not possessing strong ties with its material author if that entity expressly adopts it for the purposes of the international responsibility.

This is precisely what happen with regard to the Decision 338.

Decision 338 pursues two goals. First, it aims at notifying the new course undertaken by the Union. It addresses the international community and makes it aware of the European Union's intention to militarily support Ukraine through the material action of its Member States. In other words, with Decision 338 the Union announced to the international community an action that it intended to pursue and explained how it would be carried out, *i.e.* through the material support of other entities. Second, Decision 338 aims

sentenza della Corte europea dei diritti dell'uomo nel caso *Makuchyan e Minasyan c. Azerbaijan e Ungheria*' (2022) RivDirInt 523. K Istrefi and C Ryngaert, '*Makuchyan and Minasyan v Azerbaijan and Hungary*: Novel Questions of State Responsibility, Presidential Pardon, and Due Diligence of Sentencing Transfer Meet in a Rare Case of the Right to Life' (2021) European Convention on Human Rights Law Review 263 instead contested art. 11 ARS.

[69] See Draft Articles on the Responsibility of States, with Commentaries cit. 54.

[70] *Ibid.*

[71] *Ibid.* 53.

at delimiting the respective roles of itself and its Member States. It addresses the Member States and explains to them what they can do to implement it, *i.e.* provide Ukraine with military equipment and platforms designed for the lethal use of force, as well as maintain, repair and adapt such equipment and platforms. Decision 338 thus delimits the scope of the material actions it requests the Member States to enforce. If an action falls within these limits, Decision 338 will be applicable and the conduct of the Member States should be regarded, at the international level, as an implementation of the European Union's decision.[72] If the States' action falls outside this scope, Decision 338 would not be applicable, and the conduct cannot but be regarded as a member States' initiative.[73]

It seems reasonable to regard Decision 338 as a manifestation of *animus adottandi* by the European Union. From an international law perspective, it reveals the European Union's will to be recognised as the author of the supply of weapons to Ukraine, which incidentally takes place through the executive material action of someone else, *i.e.* the Member States. In this sense, the Member States are nothing more than an executive agency. Consequently, the legal effect of Decision 338 is to affect the legal qualification of the action of providing weapons to the Ukrainian army: although concretely carried out by the Member States, such action would have to be considered by the international community as a part of the European Union's conduct of supporting Ukraine.

Furthermore, there would inevitably be a temporal hiatus between the European Union's adoption of the material action of the Member States, which took place on 28 February 2022 with the approval of Decision 338, and the material realisation of the deliveries by the States, which would necessarily take place at a later stage.

As previously mentioned, the *animus adottandi* over the conduct, and the temporal hiatus between the moment the action is realised and the moment it becomes attributable to its putative author, are the main features of the adoption criterion.[74]

[72] By Decision 2023/810 cit., the Council established a mechanism for the reimbursement, by the European Union, of the supply of military equipment and platforms carried out in execution of Decision 2022/338 cit. (see supra, section II). This means that ascertaining that an action of the EU Member States falls within the scope of Decision 2022/338 cit. implies that it can be reimbursed by the Union.

[73] As a consequence, as the action of the Member States falls outside the scope of Decision 2022/338 cit., it will not be reimbursed by the European Union under art. 2 of Decision 2022/338 cit.

[74] Admittedly, in the case of Decision 2022/338 cit., the terms of the temporal hiatus would be reversed. In the cases previously examined, the conduct was first realised and then adopted. Conversely, by Decision 2022/338 cit. the European Union would adopt a conduct not yet realised. From a strictly formalist perspective, the applicability of the adoption criterion to Decision 2022/338 cit. would have to be excluded. However, a functional interpretation would produce very different results. The purpose of the criterion established by arts 11 ARS and 9 ARIO is to allow every State and every international organisation to become the author of a conduct concretely produced by someone else: a conduct that otherwise, *i.e.* in the absence of the adoption criterion, would not be attributable to them. Of course, becoming the author of a conduct that has already taken place is not the same thing as becoming the author of a conduct not yet occurring. In the first case, the putative author would know everything about the conduct and could assess every consequence of it, also in terms of international responsibility. In the second case, the putative author may have only minimal knowledge of the conduct

In conclusion, it is not unreasonable to argue that Decision 338 aims at triggering the application of the adoption criterion.

VII.4. The characteristics of the adoption of State conduct

A difficulty in this line of reasoning is that, in the cases examined so far, the adopted conduct was carried out by individuals: those composing an armed group in the *Hostage in Tehran* case, unknown individuals in *Nikolić*, a soldier in *Makuchyan and Minasyan*. Yet, for the purposes of the adoption test one cannot superficially equate the conduct of individuals and the conduct of a State, an entity endowed with its own legal personality.

The main difference lies in the effect produced by the application of the adoption test: applying the test to an individual conduct entails the transformation of an action irrelevant for international law into a conduct which potentially engenders international liability.[75] The case of Decision 338 would be very different. In this case the adopted conduct, *i.e.* the military support benefitting a belligerent State, is in itself relevant for international law and potentially engenders international responsibility; therefore, the application of the adoption test entails only a transfer of "authorship", *i.e.* of attribution, and of responsibility, from the Member States to the European Union.

All in all, the transfer of attribution and responsibility could have far-reaching effects. Suffice it to say that the dispatch of weapons to a belligerent State is conduct forbidden, in the context of an international armed conflict, by the law of neutrality, and would result in the renunciation by its author to the neutral status.[76] This means that, by renouncing

and less ability to foresee every consequence of it. However, the degree of knowledge about the conduct does not seem to be one of the essential elements, *i.e.* those closely related to the function, of the adoption criterion. It has no role in ascertaining the *animus adottandi*, for instance. It follows that, from a functional point of view, there is nothing preventing the adoption of a conduct that has not yet taken place. Furthermore, it can be emphasised that the adoption realised by means of Decision 2022/338 cit. would concern a conduct largely predetermined. According to its art. 1(3), the Union would merely provide the Ukrainian army with "military equipment, and platforms designed to deliver lethal force", as well as with their "maintenance, repair and refit". It follows that a real prognostic assessment is not alien to the *animus adottandi* of the European Union.

[75] Irrelevant except with regard to the obligation of States to prevent and repress them, as was the case, for example, with the act of interrupting the activity of an embassy in *United States Diplomatic and Consular Staff in Tehran* (see footnote 44) or depriving of life in *Makuchyan and Minasyan* (see art. 2 of the European Convention on Human Rights).

[76] Cf. art. 6 of the 1907 Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War, which forbids the supply of "war material of any kind whatever" to a belligerent. As is well-known, the term "neutrality" refers to the status given by international law to any State not party to an armed conflict, as soon as it breaks out, to ensure that it will not be drawn into the conflict by the belligerents. Cf., *ex multis*, Y Dinstein, 'The Laws of Neutrality' (1984) IsraelYHumRts 80, 80: "The laws of neutrality are based on two fundamental rationales which are closely interlinked: a) the desire to guarantee to the neutral State that it will sustain minimal injury as a result of the war; b) the desire to guarantee to the belligerents that the neutral State will be neutral not only in name but also in fact – that is to say, that it will not aid and abet one of the belligerents against its adversary". Cf. P Seger, 'The Law of Neutrality', in A Clapham and P Gaeta (eds), *The Oxford*

their neutrality status, the EU Member States would have been exposed to the reaction of the other belligerent, the non-favoured one, *i.e.* the Russian Federation.

But the European Union, by adopting though Decision 338 the conduct of its Member States, would have taken on the legal consequences. The renunciation of the neutral status would thus have concerned the European Union and not Italy, Germany, France and the other member States, to the effect that the international organisation, and not its Members States, would become the only counterpart, namely the only potential target, of the Russian Federation's right to countermeasures.

As a consequence, the Russian Federation's right to countermeasure would be significantly restricted. According to art. 49(1) ARS, a State that considers itself injured by the unlawful conduct of others may only take countermeasures against the author(s) of the conduct.[77] Therefore, the European Union being an international organisation, *i.e.* a legal entity with limited competences, the Russian Federation would only be allowed to adopt countermeasures in a limited area, namely that covered by EU competences.[78]
As evident, the adoption by the European Union of the conduct of its Member States would unilaterally alter the legal relations flowing from a possible unlawful conduct to the exclusive detriment of the counterpart. This is a problematic situation; one which does not arise when a State, for the purposes of attribution, adopts individual conducts. The following sub-sections will focus on the oddities created by this peculiar situation.

VII.5. The requirement of injured States' or integrational organisations' consent

The problem with this situation derives from the fact that both actors, *i.e.* the European Union and its Member States, are legal persons under international law. Therefore, the exercise of the power by an international organisation to adopt the conduct of its Member States would impinge on a third State, without its consent. A consequence that cannot be accepted superficially. In fact, there is no rule of international law that allows an international actor to unilaterally release another from a legal relation of liability arising from a wrongful act. As the Permanent Court of International Justice explained in 1927,

Handbook of International Law in Armed Conflict (Oxford University Press 2014) 248; M Bothe, 'Neutrality, Concept and General Rules' (2015) Max Planck Encyclopedia of Public International Law paras. 1 and 19 ff.; J Upcher, *Neutrality in Contemporary International Law* (Oxford University Press 2020). On art. 6 of the 1907 Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War cf. Y Dinstein, *War, Aggression and Self-Defence* cit. 29; P Seger, 'The Law of Neutrality' cit. 254 ff.; M Bothe, 'The Law of Neutrality' in D Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford University Press 2021) 602 ff.; M Bothe, *Neutrality, Concept and General Rules* cit., para. 36; J Upcher, *Neutrality in Contemporary International Law* cit. 77 ff.

[77] See Draft Articles on the Responsibility of States, with Commentaries cit. 130: "Countermeasures may not be directed against States other than the responsible State".

[78] Furthermore, one can imagine that the Russian Federation would be precluded from determining a situation of "differentiated damage" between the Member States on the basis of its own political convenience, a situation that it could have instead determined had the conduct been perpetrated by States.

international rules binding States cannot but "emanate from their own free will", so that "[r]estrictions [...] cannot [...] be presumed".[79]

As a general principle of international law, the principle of consent plays a role in the configuration and development of the adoption criterion. In particular, it can play a major role when both the material author and the putative one are full-fledged subjects of international law. Indeed, the principle of consent may affect the adoption by a full-fledged subject of international law of the conduct of another, when it alters *in peius* the legal position of a third party. In such a case, the third party's consent would be a precondition for the effectiveness of the adoption.

With regard to our case, this means that the adoption by the European Union of the conduct of its Member States in support of Ukraine, potentially affecting the legal personality of the Russian Federation, will not produce any legal effect vis-à-vis Russia without its consent.

Remarkably, this consent may have been expressed.

By blaming the European Union for the unfavourable consequences of military support to Ukraine, the Russian Federation seems to have recognised that its author is the Union itself. The Russian Foreign Minister's statement of 28 February 2022 points unequivocally in this direction: "EU structures and individuals involved in supplies of lethal weapons and fuels to the Ukrainian army will bear responsibility for any consequences of such actions amid the ongoing special military operation. They cannot but understand the seriousness of these consequences".[80] Relevant in itself, this statement becomes even more important in light of Decision 338, which assigned to the Member States the task of concretely transferring armaments to Ukraine. In other words, there would be no "EU structures" or "EU individuals" involved in arms deliveries, but only "Member State structures" and "Member State individuals". Even more clearly, on the same day, the Russian Foreign Minister's qualified the supply of weapons and fuel as "actions of the European Union", which "will not go unanswered".[81]

A few months later, the attribution to the European Union of support to Ukraine was reiterated by the Russian Foreign Ministry spokesperson. At the end of October 2022, she stated that the assistance of the European Union benefiting Ukraine "undoubtedly makes it part of the conflict".[82] She explained that "the European Union is not prepared to resolve the conflict by peaceful methods [but is] protracting hostilities".[83] Then, once emphasised

[79] Permanent Court of International Justice *Lotus* (Merits) [7 September 1927] 18.

[80] Tass, 'EU Structures Involved in Arms Supplies to Ukraine to Be Responsible for Consequences' Tass (28 February 2022) tass.com.

[81] AlArabiya News, 'Russia Lashes Out at Countries Arming Ukraine: Understand Danger of Consequences' (28 February 2022) english.alarabiya.net.

[82] Tass, 'Diplomat Says EU Military Assistance Mission to Kiev Makes It Party to Ukrainian Conflict' (20 October 2022) tass.com.

[83] Permanent Mission of the Russian Federation to the European Union, Russian Foreign Ministry Spokeswoman Maria Zakharova's Reply to a Media Question on the Results of the EU Summit Held on 20-21 October 2022 (22 October 2022) russiaeu.ru.

that "[i]n effect, the European Union will train Ukrainian militants and provide them with lethal weapons. These militants will continue to kill the civilian population and to destroy the civilian and critical infrastructure", she finally asked: "[i]s the European Union prepared to share responsibility for these crimes?".[84]

Again in August 2023, enumerating the entities which were helping Ukraine, the Russian Foreign Ministry mentioned the European Union but not its Member States: "[t]oday the United States and NATO as well as the European Union [...] are pumping ever more sophisticated weapons into Ukraine, thus fueling the conflict and provoking uncontrolled spread of weapons around the world".[85]

Admittedly, there are statements by the Russian Foreign Minister that seem to regard the Member States as agents of the European Union, such as those pointing out that their actions will have consequences for the Union. Once affirmed that "[*t*]*he European Union* has 'lost' Russia" and that "[h]owever, it is *its own making*", the Foreign Minister explained that these consequences were provoked "[e]xactly [by] the European Union member-States and leaders of the Union, [who] openly state the need of inflicting the strategic defeat to Russia, as they say".[86] In particular, "[t]hey are filling the criminal Kiev regime with weapons and munitions and send instructors and mercenaries to Ukraine. These are the reasons why we consider *the European Union* to be the unfriendly association".[87]

However, the attribution of support to Ukraine to the European Union would not be prevented by these statements. It should be considered that the adoption of a conduct carried out by someone else gives rise to a *fictio iuris*, but does not erase the factual reality. In the *Hostage in Teheran* case, for example, the adoption of the conduct by Iran does not erase the fact that the material authors of the kidnapping of the US officials were private individuals. The adoption just determined a *fictio iuris* whereby the international community was required to consider the conduct as attributable to the Iranian state. Then any censure of the hijackers' action made by a State or by an international organisation would not imply a denial of its attribution to Iran but should be considered as legally addressed to the Iranian state.

Similarly, in the present case, the adoption by the European Union of the conduct of the Member States would not have removed the factual reality, that is clearly described by arts. 1 and 4 of Decision 338: the Member States, and not the European Union, decided which military equipment were to be transferred and then provides to Ukraine. But Decision 338, as well as the consent to the adoption of the Members States' actions by the European Union that can be inferred from the various statements of the Russian government referred to above, contributed to creating a *fictio iuri*s whereby the international

[84] *Ibid*.

[85] Tass, 'West ignores Russia's warning weapons supplied to Kiev may spread – Lavrov' (15 August 2023) tass.com.

[86] Tass, 'European Union Unfriendly to Russia, Lavrov Says' (4 April 2023) tass.com (emphasis added).

[87] *Ibid.* (emphasis added).

community is required to consider those actions as a conduct of the European Union. In this case, therefore, the condemnations levelled at the tangible conduct of the Member States, including those expressed by the Russian Federation, must be interpreted, in legal terms, as referred to the conduct of the European Union.

VIII. The effects of Decision 338 on international law on collective self-defence

Once ascertained that nothing in the international discipline concerning the attribution of conduct prevents the European Union from adopting its Member States' conduct by means of Decision 338, it remains to be determined whether, and to what extent, such adoption is acceptable under international law on self-defence. It is apparent that the recognition of international legal effects of the adoption would unavoidably result in the recognition of the possibility for the European Union to act in collective self-defence. Not a foregone conclusion since, as previously seen, the traditional interpretation of international law only expressly provides for the power of States to act in self-defence.

Nor can it be taken for granted that the practices of the European Union have an impact on the customary discipline of collective self-defence. It is well known that, in identifying the content of customary law, international courts normally pay attention to the practice and the *opinio iuris* of States. An example can be found in the aforementioned *Nicaragua* judgment, where the International Court of Justice explicitly admitted that in order to ascertain the content of customary rules on the use of force, it will have to "direct its attention to the practice and *opinio juris* of States".[88] Equally, however, it must be emphasised that it would be a mistake to draw from this circumstance the absolute irrelevance of the practice of international organisations. On the contrary, it is no longer disputed that the practice of international organisations, if accompanied by an *opinion iuris*, can contribute to the formation and development of customary law.[89] In order to determine customary law, the conduct of an international organisation is simply less relevant, but still of some relevance, than that of the States.

It thus appears necessary to examine whether, in our specific case, the adoption made through Decision 338 can have an impact on the customary law on collective self-defence. To this end, attention should be addressed to the Draft Conclusions on Identification of Customary International Law, issued by the International Law Commission and endorsed by the General Assembly in resolution 73/203 of 20 December 2018.

[88] *Military and Paramilitary Activities in and against Nicaragua* cit. para. 183.

[89] Cf. K Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) EJIL 201.

VIII.1. Conclusion n. 4(2) and Decision 338: the conditions for relevance

Conclusion n. 4(2) of the Draft Conclusions on Identification of Customary International Law (hereinafter, "Conclusion n. 4(2)"), acknowledges that not only States' practice, but "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law".[90]

The expression "in certain cases" requires some clarification and, to this end, the commentary elaborated by the International Law Commission may be helpful. It pointed out that, as "[i]nternational organizations are not States", their practice has a different relevance in determining customary law.[91] In particular, international organisations' practice "will not be relevant to the identification of all rules of customary international law", but "may count as practice" only with regard to those rules *1*) "whose subject matter falls within the mandate of the organizations, and/or" *2*) "are addressed specifically to them".[92]

It is not always easy to ascertain whether the above-mentioned conditions are met. In this regard, the commentary specified that the relevant international organisations' practice "arises most clearly where member States have transferred [to it] exclusive competences, so that the [international organisation] exercises some of the public powers of its Member States and hence the practice of the organization may be equated with the practice of those States": significantly, the International Law Commission emphasised that "this is the case, for example, for certain competences of the European Union".[93] Moreover, the relevant practice of the international organisations may "arise where Member States have not transferred exclusive competences, but have conferred competences upon the international organization that are functionally equivalent to powers exercised by States": in such cases, "the practice of international organizations when concluding treaties, serving as treaty depositaries, in deploying military forces (for example, for peacekeeping) [...], may contribute to the formation, or expression, of rules of customary international law in those areas".[94]

Thus, for the purpose of the current analysis, Decision 338 could only "count as practice" if the regime of collective self-defence fulfils one of the following conditions: *1*) it has an object that falls within the remit of the European Union; or *2*) its obligations are specifically addressed to the Union. Although it is evident that the latter condition is not met, since customary law on self-defence is not specifically addressed to the European Union, it seems plausible to argue that the first condition is fulfilled, at least in part.

Admittedly, when the founding Treaties established obligations related to collective self-defence, they only addressed the Member States. As already mentioned, Art. 42(7)

[90] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, 2018, UN Doc. A/73/10 130.

[91] *Ibid.* 131.

[92] *Ibid.*

[93] *Ibid.*

[94] *Ibid.*

TEU maintains that, should a Member State be "the victim of armed aggression on its territory", "the other Member States" have "an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter".

Yet, art. 42(7) TEU is not the sole relevant norm. There are other treaty provisions which may be interpreted as conferring to the European Union competence in the field of the use of force. Arts 28(1), 41(2), 42(4) and 30(1) TEU can be considered. But a major role is played by art. 21(2)(c) TEU, which provides that "Common Foreign and Security Policy [...] pursues inter alia the objective of preserving peace, preventing conflicts and strengthening international security, in accordance with the purposes and principles of the Charter of the United Nations". This provision, even not directly giving the European Union the power to militarily assist an attacked State, was the legal basis for the adoption of Decision 509. Then it grounded the establishment of the European Peace Facility and, by way of it, the attribution to the Union of the power to militarily assist third States acting in self-defence.[95]

The mentioned EU law seemingly demonstrates that the Member States intended to provide the European Union with a part – only a part, but still a part – of their wider power to use armed force. This part would only include the power to support, through the supply of armaments, the self-defence of third States. Then it would be a part of the power to act in collective self-defence.[96]

It follows that the European Union was attributed powers "functionally equivalent to powers exercised by States", by which it may contribute "to the formation, or expression, of rules of customary international law" as envisaged by the International Law Commission in Conclusion 4(2).[97]

VIII.2. Conclusion n. 4(2) and Decision 338: the conditions for great relevance

Having clarified that the practice of international organisations can be relevant for the developing customary law, the commentary to Conclusion n. 4(2) dealt with the impact of such a practice. The International Law Commission explained that "[a]s a general rule", there is a relationship between the degree to which the practice is shared between the organisation and its Member States and the degree of influence of the practice.[98] In particular, "the more directly a practice of an international organization is carried out on behalf of its Member States or endorsed by them, and the larger the number of such Member States, the greater weight it may have in relation to the formation [...] of rules of

[95] A conferral entailed by art. 56 of Decision 2021/509 cit. Cf. also section II.

[96] Cf. art. 24(2) TEU: "The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously".

[97] Draft Conclusions on Identification of Customary International Law, with Commentaries cit. 131.

[98] *Ibid.*

customary international law".[99] Moreover, the commentary underlined that particular relevance shall be attributed to "whether the conduct is consonant with that of the Member States of the organization".[100]

These arguments may shed light on the impact Decision 338 can have on customary law on self-defence. It may indeed not be marginal. Not only has Decision 338 been adopted unanimously by the Member States of the European Union, but it has also been implemented by them. Therefore, Decision 338 could be the best example both of a practice of an international organization "carried out on behalf of its Member States or endorsed by them" and of a practice of an international organization "consonant with that of the Member States of the organization", namely the cases of major relevance of international organisations' practice.[101] As a consequence, following the reasoning of the International Law Commission, Decision 338 would have "the greater weight [...] in relation to the formation [...] of rules of customary international law" on collective self-defence.[102]

IX. Concluding remarks

While under EU law Decision 338 marked a watershed albeit not unpredictable moment, it could mark a moment that is both watershed and unpredictable under international law.

To be clear, it does not seem possible *today* to consider that Decision 338 determined the purchase by the European Union of all the prerogatives to act in collective self-defence under international law. Nevertheless, the analysis carried out so far could clarify the meaning of the terms used by the Council of the European Union in the Strategic Compass, unanimously approved in March 2022. In that document the Council declared not only the will to "enhance the EU's strategic autonomy", to make the Union "stronger and more capable [...] in security and defence" as well as "complementary to NATO" and to increase its contribution to "global and transatlantic security".[103] It also specified that those objectives were to be achieved precisely by reproducing the scheme of Decision 338 in other crisis situation: in particular, "[by operating] as in the case of the assistance package to support the Ukrainian armed forces".[104] At the end of the analysis it seems possible to read those words as alluding specifically to the Union's acquisition of the right to act in collective self-defence by provoking the development of customary international law on the use of force. If this strategy succeeds, *in the future* Decision 338 would be considered the first case of the European Union, an entity without its own armed forces, exercising collective self-defence.

[99] *Ibid.*
[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid.*
[103] Council of the European Union, *A Strategic Compass for Security and Defence* (20 March 2021) 23 and 26.
[104] *Ibid.* 23 and 26.

Thus, the question arises as this practice might suffice alone for qualifying the European Union as an actor under the law of armed conflicts. Being the Union an entity that does not possess the material means for the exercise of all the prerogatives of collective self-defence, which means at least an army and weaponry, the only possibility to have its actorship recognised in this field relies on the use of the adoption criterion. Only through it could the European Union be recognised as the putative author of the supply of armaments that, as the Strategic Compass implicitly admits, will continue to be materially carried out by Member States in other conflict situations.

Yet, as pointed out above, the adoption by the European Union of conducts effectively performed by its Member States cannot, per se, produce the transfer of attribution from the effective author to the putative one. Indeed, the consent to such a transfer by the harmed State, that can only be the State which assaulted the third State acting in self-defence, is indispensable. This means that the consent of the aggressor States paradoxically is a condition for attributing to the European Union the conduct of its Member States in such situations. Perhaps this is not the most effective strategy to "enhance the EU's strategic autonomy", to make the European Union "stronger and more capable [...] in security and defence" and "complementary to NATO", as well as to increase its contribution to "global and transatlantic security", as the Council might well expect.