



Aisté Mickonytè\*

# Obligation to Mutual Assistance Under Article 42(7) TEU: The Conundrum of Intentional Ambiguity

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**Abstract:** The Russian invasion of Ukraine has had many ramifications beyond the immediate fallout of this egregious act of aggression. The blatancy of such unlawfulness at the EU's periphery has drawn attention to a somewhat understudied provision, which, however, holds significant relevance given Ukraine's recently awarded status as an EU candidate: The mutual assistance clause under Art 42(7) TEU. This clause will be examined by exploring its meaning and place in the European security architecture, on its own and in complementarity with Art 5 of the North Atlantic Treaty. It will be argued that both provisions of legally prescribed solidarity bear a curious and uncomfortable semblance to Schrödinger's cat, capable of appearing as strongly worded, hard-law obligations and as undetermined intentions simultaneously. In particular, both clauses entail intentional normative ambiguity in regard to the forms of assistance to be rendered. Reflecting on how Art 42(7) TEU fits into the EU constitutional framework, it is shown that the mutual assistance clause can be read as capable of holding space for flexible and creative approaches to the legal obligations of the Member States, while as yet falling short of representing an autonomous, EU-based architecture of defence and security.

**Keywords:** mutual assistance clause; Art 42(7) TEU; NATO; Ukraine; collective defence

## 1 Introduction

In response to the Russian invasion of Ukraine on 24 February 2022, the European Union (EU) assumed a bold stance vis-à-vis the Russian Federation, going beyond the

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\*Corresponding author: Aisté Mickonytè, Senior Scientist at the Institute of the Foundations of Law (Department of Global Governance) and the Centre for East European Law and Eurasian Studies, Faculty of Law, University of Graz, Graz, Austria, E-mail: aiste.mickonyte@uni-graz.at

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arguably lukewarm erstwhile responses to the annexation of Crimea in 2014.<sup>1</sup> The unlawful use of force – or more precisely, the act of aggression as enshrined in Art 39 of the UN Charter<sup>2</sup> – on the EU's eastern borders was countered with a range of measures at political, legal and even military levels.<sup>3</sup> In addition to the all-encompassing sanctions against the Russian Federation and Belarus,<sup>4</sup> the EU migration and asylum policy was likewise engaged with remarkable flexibility: The

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1 Note: Parts of the analysis and sources cited in this work have been used in Aistė Mickonyté, 'The Mutual Assistance Clause under Article 42(7) TEU. Considerations in Light of the Ukraine's Quest for Membership' (2022) Graz Law Working Paper Series No. 04/2022 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4097998](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4097998)> accessed 1 August 2023. The present contribution builds on that work but is comprehensively expanded and updated.

The EU sanctions in response to the annexation of Crimea have been criticized as too modest, being likened to 'appeasement' of Russia. See e.g. Armen Grigoryan, 'The war in Ukraine and western appeasement' (*New Eastern Europe*, 23 March 2022) <<https://neweasterneurope.eu/2022/03/23/the-war-in-ukraine-and-western-appeasement/>> accessed 1 August 2023; Oleksiy Goncharenko, 'The lesson of Crimea: Appeasement never works' (Atlantic Council, 27 February 2020) <<https://www.atlanticcouncil.org/blogs/ukrainealert/the-lesson-of-crimea-appeasement-never-works/>> accessed 1 August 2023.

2 The prohibition of the use of force as well as the threat thereof is enshrined in Art 2(4) of the UN Charter and is also part of customary international law. There are only two exceptions to this rule: Individual or collective self-defence in accordance with Art 51 of the UN Charter and the use of force authorized by the UN Security Council under Art 42 of the UN Charter. Neither of these exceptions apply here, even if Russia has indicated in the UN Security Council that it allegedly acts in self-defence. Countless scholarly works examine the use of force from the perspective of international law; see e.g. Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015); Jutta Brunnée and Stephen J. Toope, 'The Use of Force: International Law after Iraq' (2004) 53(4) *The International and Comparative Law Quarterly* 785; Jean Allain, 'The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union' (2004) 8 *Max Planck UNYB* 237; Christopher Greenwood, 'Self-Defence' (*Max Planck Encyclopedia of Public International Law [MPEPIL]*, April 2011) para 2 <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e401>> (accessed 1 August 2023); Erika de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020) (especially chapter 6 on individual or collective self-defence).

3 Frank Hoffmeister, 'Strategic Autonomy in the European Union's External Relations Law' (2023) 60 *Common Market Law Review* 667, 686 ff.

4 Broad-scale sanctions imposed by the EU target the Russian energy sector, involving also asset freezing, the so-called SWIFT ban aimed at the banking sector, major restrictions concerning import and export as well as the presence of the Russian and Belarusian aircraft and state-controlled media in the EU (Belarus is targeted as party to the unlawful aggression). For an overview of the sanction regime, see Council of the European Union, *EU restrictive measures against Russia over Ukraine (since 2014)* <<https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/>> accessed 1 August 2023; For recent analysis, see e.g. Elena Chachko and J. Benton Heath, 'A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield' [2022] *AJIL Unbound* 135–139.

Temporary Protection Directive was activated, waiving individualized asylum procedures and giving millions of Ukrainians the opportunity to lawfully seek refuge in EU States.<sup>5</sup> More controversially, Schengen restrictions were imposed vis-à-vis Russian nationals wishing to enter the EU.<sup>6</sup>

Even recalling the measures imposed and still in force after the annexation of Crimea,<sup>7</sup> the sheer extent of these most recent measures had surprised many, including Russia itself.<sup>8</sup> In particular, the sanctions regime was complemented by an unprecedented<sup>9</sup> provision of arms and other military equipment by the EU to a non-member State under military aggression, as the European bloc supplied weaponry and equipment to Ukraine worth of billions of euros by means of the European Peace Facility (EPF).<sup>10</sup>

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5 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001], OJ L 212. See more Marie De Somer Alberto-Horst Neidhardt, 'EU responses to Ukrainian arrivals – not (yet) a blueprint' (*Discussion Paper, European Policy Centre*, 14 October 2022) 4–5 <[https://epc.eu/content/PDF/2022/EU\\_response\\_to\\_Ukrainian\\_arrivals\\_DP.pdf](https://epc.eu/content/PDF/2022/EU_response_to_Ukrainian_arrivals_DP.pdf)> accessed 1 August 2023; Thomas Gammeltoft-Hansen and Florian Hoffmann, 'Mobility and legal infrastructure for Ukrainian refugees' (2022) *International Migration* 213, 215; Daniel Thym, 'Temporary Protection for Ukrainians' (*Verfassungsblog*, 5 March 2022) <<https://verfassungsblog.de/temporary-protection-for-ukrainians/>> accessed 1 August 2023.

6 See Sarah Ganty, Dimitry V. Kochenov, Suryapratim Roy, 'Nationality-Based Bans from the Schengen Zone: Dissecting a Populist Proposal and its Unlawful Implementation by Poland and the Baltic States' (*Oxford University COMPAS Working Paper 22–160*, September 2022) <<https://www.compas.ox.ac.uk/wp-content/uploads/WP-2022-160-Nationality-Based-Bans-from-the-Schengen-Zone.pdf>> accessed 1 August 2023. The authors present a convincing argument that a nationality-based ban is manifestly incompatible with EU law, considering the measures to be 'hateful citizenship-based retribution' (*ibid.*, 38). See also Sarah Ganty, Dimitry V. Kochenov & Suryapratim Roy, 'Unlawful Nationality-Based Bans from the Schengen Zone: Poland, Finland, and the Baltic States against Russian Citizens and EU Law' (2023) 48 *Yale Journal of International Law Online* 1.

7 For a recent analysis on the sanctions policy of the EU, see in particular, Paul James Cardwell and Erica Moret, 'The EU, sanctions and regional leadership' (2022) *European Security* 1–21, <<https://www.tandfonline.com/doi/epdf/10.1080/09662839.2022.2085997?needAccess=true&role=button>> accessed 1 August 2023.

8 Victor Jack, 'Sergey Lavrov admits Russia was surprised by scale of Western sanctions' (*Politico.eu*, 23 March 2022) <<https://www.politico.eu/article/lavrov-admits-no-one-could-have-predicted-scale-of-western-sanctions/>> accessed 1 August 2023.

9 Maia de la Baume and Jacopo Barigazzi, 'EU agrees to give €500M in arms, aid to Ukrainian military in "watershed" move' (*Politico.eu*, 27 February 2022) <<https://www.politico.eu/article/eu-ukraine-russia-funding-weapons-budget-military-aid/>> accessed 1 August 2023.

10 See Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, ST/5212/2021/INIT, OJ L 102. See also European Council, *Ukraine: Council agrees on further military support under the European Peace Facility* (Press release, 2 February

While these measures by and large align with the EU's objectives of contributing to peace, security and the observance of international law under Art 3(5) of the Treaty on European Union (TEU), their extent is striking in light of the EU's rather modest body of competences regarding security and defence. Traditionally, common defence sits atop the priorities of the North Atlantic Treaty Organization (NATO),<sup>11</sup> though complementarity and interoperability define the relationship between the two organizations.<sup>12</sup>

While the EU does not presently envisage a framework dedicated to common defence,<sup>13</sup> its constitutional framework rests on solidarity and mutuality in tackling security challenges. This approach operates in the frame of the Common Foreign and Security Policy (CFSP), wherein the Common Security and Defence Policy (CSDP) serves as an integral component.<sup>14</sup> Constituting branches of EU policy which embrace intergovernmental approaches, they exemplify how the EU's principled stance in the context of an armed conflict at its borders unfolds within a constitutional framework which perceives common European defence as potential future endeavour.

Still, this somewhat modest framework entails Art 42(7) TEU, which prescribes a duty of mutual assistance among the Member States in the context of defence.<sup>15</sup> This

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2023) <<https://www.consilium.europa.eu/en/press/press-releases/2023/02/02/ukraine-council-agrees-on-further-military-support-under-the-european-peace-facility/>> accessed 1 August 2023.

11 The North Atlantic Treaty, Washington DC, 4 April 1949.

12 European Council, *Joint Declaration on EU-NATO Cooperation* (10 January 2023) <[https://www.consilium.europa.eu/en/press/press-releases/2023/01/10/eu-nato-joint-declaration-10-january-2023/?utm\\_source=dsms-auto&utm\\_medium=email&utm\\_campaign=Joint+Declaration+on+EU-NATO+Cooperation%2c+10+January+2023](https://www.consilium.europa.eu/en/press/press-releases/2023/01/10/eu-nato-joint-declaration-10-january-2023/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Joint+Declaration+on+EU-NATO+Cooperation%2c+10+January+2023)> accessed 1 August 2023; for more on EU-NATO cooperation, see Nele Marianne Ewers-Peters, 'Positioning member states in EU-NATO security cooperation: towards a typology' (2023) 32(1) *European Security* 22, <<https://www.tandfonline.com/doi/epdf/10.1080/09662839.2022.2076558?needAccess=true&role=button>>; For an overview of cooperation measures, see also North Atlantic Treaty Organization (NATO), *Relations with the European Union* (4 April 2023) <[https://www.nato.int/cps/en/natohq/topics\\_49217.htm](https://www.nato.int/cps/en/natohq/topics_49217.htm)> accessed 1 August 2023.

13 See Art 24(1) TEU and Art 42(2) TEU on the commitment to work towards a common defence policy, which 'may' (Article 24(1)) or 'shall' (Article 42(2)) lead to a common defence under the umbrella of the EU.

14 The CSDP, as laid down in Arts 42 to 46 TEU, aims at peacekeeping and the strengthening of international security, although all civilian and military means to achieve these objectives to be provided by the Member States, in accordance with a unanimous decision by the Council. The latter is thereby assisted by the European Defence Agency (EDA). See Elfriede Regelsberger and Dieter Kugelmann, 'EUV Art 42 EUV [Aufgaben und Tätigkeiten; Europäische Verteidigungsagentur]', in Rudolf Streinz (ed.), *EUV/AEUV* (C.H. Beck 3rd edn, 2018) para 4. See also Antonio Calcara, 'The Role of Experts in the European Defence Agency: An Emerging Transgovernmental Network' (2017) 22(3) *European Foreign Affairs Review*, 377.

15 Henna Virkkunen, 'The EU's mutual defence clause? Article 42(7) of the Treaty on European Union' (2015) 21(1) *European View* 22, 22.

provision, central to the present contribution, is commonly referred to as mutual assistance or defence clause,<sup>16</sup> and as such it entails a formal obligation to act in the face of an armed aggression against a Member State:

Art 42(7) TEU:

If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

Lying dormant for much of its existence, the provision had, at times, been perceived as symbolic,<sup>17</sup> having political implications but ‘not amount[ing] to a mutual defence clause’.<sup>18</sup> Under the largely peaceful conditions on the European continent during the post-Cold War Era, it may have been satisfactory to leave it at that. However, watershed moments usually warrant a closer analysis of provisions that reverberate in their context. With the full-scale Russian invasion into Ukraine, an associated and now a candidate state, military action has come dangerously close to home, such as when a missile landed on the territory of a Member State.<sup>19</sup> In today’s context, the normative substance of this legally prescribed solidarity demands attention in policy and scholarly analysis.

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**16** While Art 42(7) TEU does not refer to itself in this manner, the term ‘mutual assistance clause’ is widely used. See Ramses A. Wessel, Elias Anttila, Helena Obenheimer, Alaxandru Ursu, ‘The future of EU Foreign, Security and Defence Policy: Assessing legal options for improval’ (2020) 26 *European Law Journal* 371, 380; Aurel Sari, ‘The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats’ (2019) 10 *Harvard National Security Journal* 405, 408; Virkkunen (n 15) 22. See also Bob Deen, Dick Zandee, and Adaja Stoetman, ‘Uncharted and uncomfortable in European defence The EU’s mutual assistance clause of Article 42(7)’ (*Clingendael report*, January 2022) <<https://www.clingendael.org/sites/default/files/2022-01/uncharted-and-uncomfortable.pdf>> accessed 1 August 2023.

**17** See Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 51, as cited by Sari, *ibid*, 432; see also Niklas Helwig, Tuomas Iso-Markku, ‘All for one? EU’s toothless mutual defence clause’ (*Verfassungsblog*, 26 March 2014) <<https://verfassungsblog.de/all-for-one-eus-toothless-mutual-defence-clause/>> accessed 1 August 2023, as cited in Niklas I.M. Nováky, ‘The Invocation of the European Union’s Mutual Assistance Clause: A Call for Enforced Solidarity’ (2017) 22(3) *European Foreign Affairs Review* 357, 358.

**18** Piris (n 17).

**19** Jon Henley, ‘Missile that hit Poland likely came from Ukraine defences, say Warsaw and Nato’ (*The Guardian*, 16 November 2022) <<https://www.theguardian.com/world/2022/nov/16/poland-president-missile-strike-probably-ukrainian-stray>> accessed 1 August 2023.

The interest in Art 42(7) TEU was rekindled especially after Finland and Sweden sent a letter to their fellow Members with a reminder of their duties under Art 42(7) TEU, following the Russian invasion in Ukraine.<sup>20</sup> Yet, the fact that both States had promptly thereafter applied for NATO membership,<sup>21</sup> abandoning their decade-long policies of non-alignment, revealed their unwillingness to rely on the mutual assistance clause within the EU context alone.<sup>22</sup> Moreover, in June 2022 Denmark – a NATO member – voted in a referendum to end its long-standing opt-out from EU defence policies, thus becoming a full participant of the CSDP.<sup>23</sup>

Not only does the reversal of these long-held policies in Scandinavia indicate awareness that a threat of warfare on the territory of the EU has returned with acute urgency. Importantly, this turn of events highlights the elephant in the room: The somewhat undetermined normative substance of the mutual assistance clause under EU law. The main question in this respect is what obligations are associated with the mutual assistance clause under Art 42(7) TEU, given the lack of common defence at EU level and the perception of this clause as bearing a largely political or even symbolic meaning.

This question is far from theoretical: With Ukraine as an official candidate for EU membership since June 2022<sup>24</sup> and the perception of a military threat emanating

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20 ‘Sweden, Finland “Remind” EU of Mutual Defense Clause’ (*The Defense Post*, 9 March 2022) <<https://www.thedefensepost.com/2022/03/09/sweden-finland-eu-defense/>> accessed 1 August 2023.

21 Finland became NATO member in April 2023. North Atlantic Treaty Organization, *Finland joins NATO as 31st Ally* (4 April 2023) <[https://www.nato.int/cps/en/natohq/news\\_213448.htm](https://www.nato.int/cps/en/natohq/news_213448.htm)> accessed 1 August 2023. At the time of writing, Turkey and Hungary had not yet ratified Sweden’s membership. See Rikard Jozwiak, ‘Wider Europe Briefing: Sweden’s NATO Membership Is Still On A Knife-Edge’ (*RadioFreeEurope*, 1 August 2023) <<https://www.rferl.org/a/wider-europe-jozwiak-sweden-nato-membership/32475966.html>> accessed 1 August 2023.

22 Alice Tidey, ‘Like NATO, the EU has a mutual defence clause but trust appears low’ (*Euronews*, 8 June 2022) <<https://www.euronews.com/my-europe/2022/06/07/like-nato-the-eu-has-a-mutual-defence-clause-but-trust-appears-low>> accessed 1 August 2023.

23 European Union External Action, *Denmark: Statement by the High Representative on the outcome of the referendum on the opt-out in defence matters* (Press release, 1 June 2022) <[https://www.eeas.europa.eu/eeas/denmark-statement-high-representative-outcome-referendum-opt-out-defence-matters\\_en](https://www.eeas.europa.eu/eeas/denmark-statement-high-representative-outcome-referendum-opt-out-defence-matters_en)> accessed 1 August 2023; see also Carolyn Moser, ‘The war in Ukraine and its repercussions on Europe’s “security and defence constitution”’ (*Constitutionnet*, 22 September 2022) <<https://constitutionnet.org/news/war-in-ukraine-repercussions-europe>> accessed 1 August 2023.

24 European Council, *European Council conclusions on Ukraine, the membership applications of Ukraine, the Republic of Moldova and Georgia, Western Balkans and external relations* (23 June 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/06/23/european-council-conclusions-on-ukraine-the-membership-applications-of-ukraine-the-republic-of-moldova-and-georgia-western-balkans-and-external-relations-23-june-2022/>> accessed 1 August 2023.

from Russia by the Member States in Eastern and Northern Europe, we witness an increased probability that Art 42(7) TEU may transform from a dusty and forgotten backyard provision to a norm that may in fact be invoked. In this light, the present contribution relates to this provision from a substantive and a relational perspective. The inquiry into the emergence and the context of this obligation will thereby serve, first, to highlight the substance, or the normative content, of Art 42(7) TEU. The relational vantage point will, second, underline its relationship with Art 5 of the North Atlantic Treaty (NAT). Just as with the latter, the focus of the debate on mutual assistance under EU law is singular: The prime concern lies in the uncertainty about the nature and extent of the assistance owed to a State under attack. In practice, this relates to the requirement (or lack thereof) to provide military support, especially the deployment of armed forces. In regard to Art 42(7) TEU, these doubts may be reinforced by the exception applicable to neutral or non-aligned Member States and the deference to Art 5 NAT.

It will be argued, however, that Art 42(7) TEU is not normatively empty. Rather, the deliberate open-endedness pertaining to the forms of assistance owed allows for different interpretations of solidarity within a single provision without compromising the general duty to help. To lean on Benedict Anderson's claim about nations as *imagined* but in no way *false or falsified* communities,<sup>25</sup> the substantive duties under the mutual assistance clause rest on a common perception and awareness of reciprocity among States, which may sound vague, but does not make it a non-real legal duty.

Against this background, the contribution will be structured as follows: following a glimpse into the context revolving around the main tenets of Art 42(7) TEU, the open-endedness of the duty of mutual assistance and the implications thereof are reflected upon, *inter alia* by comparison with Art 5 NAT (*Part 2*). Illustrating the practical relevance of the mutual assistance clause within the constitutional framework of the EU, its role in respect to Ukraine's quest for EU membership is then outlined, spotlighting the competing interests of Ukraine and the current Member States in the interpretation of the clause in question (*Part 3*). It is thereby shown that EU-led policies on defence are expected to continue along the lines of complementarity or even subsidiarity to NATO, intergovernmentalism and restraint. Whether Art 42(7) TEU will succeed in living up to its perceived normative substance, will, as outlined in the concluding remarks, is intimately connected with the willingness of the Member States to envisage a genuinely common European defence, as a realm of autonomous or even sovereign European action (*Part 4*).

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<sup>25</sup> Benedict Anderson, *Imagined Communities. Reflections on the Origin and Spread of Nationalism* (2nd edn Verso 1991) 6.

## 2 The Mutual Assistance Clause in Context

### 2.1 A Bird's Eye View

The constitutional framework of the EU is built on hard law guided by supranational rules and principles, yet without shedding core features of intergovernmental character. Weaving these elements together, one is confronted with a complex but well-calibrated system of constitutional-esque rules, with the principles of supremacy and direct effect of EU law, the obligatory jurisdiction of the Court of Justice of the European Union (CJEU) and a myriad of painstakingly detailed political and legal procedures for the enforcement of EU law, even against the will of a Member State.<sup>26</sup> Enshrined in treaties as classical instruments of international law, the obligations arising from EU membership operate within a constitutional-esque order based on a limited transfer of competences, a hierarchy of norms, a sophisticated system of legal remedies, and hard-law instruments for the enforcement of EU law, such as the infringement procedure or financial measures of coercion.<sup>27</sup>

Yet, the effectiveness of these rules and procedures is not disconnected from the voluntary commitment of the Member States to further EU objectives in good faith, supported by the principle of loyalty, or sincere cooperation, pursuant to Art 4(3) TEU.<sup>28</sup> Having created a meticulously defined supranational law umbrella, the EU framework has not entirely cut ties with the notion of reciprocal support – among the Member States themselves as well as in regard to EU action. One should not neglect to note here that the voluntary aspect of the mechanism behind the effectiveness of EU law operates in the context of the EU's path towards autonomous legal development, rather than in the frame of classic international law.<sup>29</sup> Still, the supranational character of EU law instruments has not diminished or replaced the notions of loyalty or sincere cooperation; rather, it has given them a particular expression by means of sophisticated legal mechanisms.

The principle-led approach underpinning the relationship between the EU and the Member States adds breadth and flexibility to the interpretation of Member State duties owed to the EU and to one another, without calling into question the existence

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26 Consider the sanctioning mechanism under Art 7 TEU, the infringement procedure under Art 258 TFEU or the preliminary ruling procedure Art 267 TFEU.

27 See in particular the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I.

28 For an in-depth analysis, see the volume by Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014).

29 For a recent analysis on the relationship between the EU and international law, see e.g. Jed Odermatt, *International Law and the European Union* (CUP 2021) 1–2, 7.



of these duties. The constitutional principle of sincere cooperation is thereby equipped to guide the conduct of the Member States in a more generalized manner, among others in the area of external relations of the EU.<sup>30</sup>

As a foreign policy actor, the EU oversees the Common Foreign and Security Policy (CFSP), with the Common Security and Defence Policy (CSDP) as its integral part.<sup>31</sup> The imperative of unanimous decision-making<sup>32</sup> preserves an intergovernmental nature of this EU field of action. The principle of sincere cooperation applies thereby to ensure that Member States undertake necessary, and refrain from unfavourable, action<sup>33</sup> from the perspective of the shared values and objectives of the EU. Art 24(3) TEU requires of Member States not only ‘a spirit of loyalty and mutual solidarity’ but also active and unreserved support for the EU’s external action and abstention from any action that may be ‘contrary to the interests of the Union’ or may impair the EU’s presence as a cohesive actor in international relations.

Some argue that the limits and concrete implications of mutual and sincere cooperation are unclarified,<sup>34</sup> not least because of a maze of rules and procedures governing the EU as a foreign policy actor<sup>35</sup> as well as the prominence or even dominance of individual Member States’ weight in the decision-making processes relating to this realm. Critique has been expressed towards Member States ‘run[ning] their own national foreign policies in parallel to the common one, often show[ing] insufficient commitment to joint action on the European level’.<sup>36</sup> Due to this pull of intergovernmentality, the EU’s role has been described to involve only ‘coordination of authority’<sup>37</sup> between the EU institutions and the Member States. The impression is

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**30** For more, see Peter Van Elsuwege, ‘The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations’ in Marton Varju (ed.), *Between Compliance and Particularism* (Springer Nature 2019) 283, 284ff.

**31** For a recent overview of the instruments see Wessel, Anttila, Obenheimer, Ursu (n 16).

**32** There are very few instances, in which CFSP decision do not require unanimity (Art 42(1)(2) TEU, Art 31(1) TEU). To illustrate, qualified majority is permitted when appointing a special representative in accordance with Art 33 TEU, as established by Art 31(2) TEU. Pursuant to Art 31(4) TEU, qualified majority is not allowed in matters bearing defence or military implications.

**33** See the wording of Art 4(3) TEU. See Klamert (n 28) 10.

**34** Van Elsuwege (n 30) 286.

**35** For critical accounts, with a focus on security and defence policies, see Wessel, Anttila, Obenheimer, Ursu (n 16); Julian Bergmann and Patrick Müller, ‘Failing forward in the EU’s common security and defense policy: the integration of EU crisis management’ (2021) 28(10) *Journal of European Public Policy* 1669.

**36** Stefan Lehne, ‘Making EU Foreign Policy Fit for a Geopolitical World’ (*Carnegie Europe*, 14 April 2022), <<https://carnegieeurope.eu/2022/04/14/making-eu-foreign-policy-fit-for-geopolitical-world-pub-86886>> accessed 1 August 2023.

**37** Kaija Schilde, *The Political Economy of European Security* (CUP 2017) 132.

reinforced if we consider that pursuant to Art 24(1) TEU the CJEU has very limited competences in respect to the CFSP.<sup>38</sup>

While the EU engages in foreign policy by means of the CFSP, one may observe restraint in regard to the coordination of defence: The CFSP includes merely a ‘progressive framing’ of a common defence policy pursuant to Article 24(1) TEU and Article 42(2) TEU.<sup>39</sup> A broad discretion is given to the Member States as to whether a common defence should be established at all.<sup>40</sup> It is against this background of rather complex relationship between EU-led common objectives and Member State interests that the mutual assistance clause under Art 42(7) TEU – manifesting reciprocity and intergovernmentality – is to be scrutinized.

## 2.2 Aims of Mutual Assistance

From the viewpoint of international law, mutual assistance clauses express individual and collective defence commitments; they relate, moreover, to self-defence as an exception to the prohibition of the use of force.<sup>41</sup> Recognition of the UN Charter-based international legal order is thereby expressed by both Art 42(7) TEU and Art 5 NAT, as they expressly refer to Art 51 UN Charter, permitting individual and collective defence in case of an armed attack against a State.<sup>42</sup> The references to Art 51 UN Charter underline the compliance of the mutual defence clauses with the

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**38** For more, see e.g. Panos Koutrakos, ‘Judicial Review in the EU’s Common Foreign and Security Policy’ (2018) 67(1) *International & Comparative Law Quarterly* 1, 5–6 ff.

**39** For more, see Luigi Lonardo, ‘Integration in European Defence: Some Legal Considerations’ (2017) 2(3) *European Papers* 887.

**40** See especially Art 3 of the Protocol on the concerns of the Irish people on the Treaty of Lisbon, L60/131.

**41** See the works on the use of force in n 2, especially Greenwood (n 2) para 2. In regard to NATO specifically, see Michael N. Schmitt, ‘The North Atlantic Alliance and Collective Defense at 70: Confession and Response Revisited’ (2019) 34 *Emory International Law Review* 85, 100.

**42** Art 42(7) TEU: ‘(...) an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter.’ Art 5 NAT: ‘(...) in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations (...).

Art 51 UN Charter provides: ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security’. UN Charter, San Francisco, 26 June 1945.

permissive use of force under the UN Charter, while also signalling the defensive character of these norms.

Within the constitutional framework of the EU, the mutual assistance clause aligns, more specifically, with the Union's objective to contribute to peace and security as well as to the observance of international law pursuant to Art 3(5) TEU. The duty of mutual assistance under EU law pursues in this regard the aims of individual and general character: Alongside providing support for the Member State under attack, it represents an instrument for restoring the international law-based order of peaceful co-existence of states in accordance with the principles of the UN Charter. To achieve these goals, the duty of mutual assistance rests on an internal and an external pillar. Internally, Art 42(7) TEU expresses a legal commitment of the signatories to surpass a non-binding, 'political' promise to aid a State under attack, mirroring Art 5 NAT as part of the international-law repository; externally, the notion of deterrence is inherent to such clauses, conveying readiness to offer a concerted and thus, presumably, stronger response to a third State that could act as a potential aggressor.<sup>43</sup>

Art 42(7) TEU requires, accordingly, that the Member States engage 'all the means in their power'. At first sight, the duties thus envisaged somewhat resemble the solidarity clause enshrined in Art 222 of the Treaty on the Functioning of the European Union (TFEU).<sup>44</sup> This clause prescribes a duty of solidarity, which is aimed at both the EU and the Member States, and which may be activated in case of a terrorist attack or a disastrous, natural or human-made occurrence in a Member State.<sup>45</sup> In response to a catastrophic event, para 1 of this provision imposes upon the

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<sup>43</sup> Sari (n 16) 406.

<sup>44</sup> Art 222 TFEU:

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:
  - (a) — prevent the terrorist threat in the territory of the Member States;
    - protect democratic institutions and the civilian population from any terrorist attack;
    - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
  - (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.
2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council. (...)

<sup>45</sup> For more see e.g. Peter Hilpold, 'Filling a Buzzword with Life: The Implementation of the Solidarity Clause in Article 222 TFEU' (2015) 42(3) *Legal Issues of Economic Integration* 209.

EU the duty to ‘mobilise all the instruments at its disposal, including the military resources made available by the Member States’, partly echoing the wording of Art 42(7) TEU.

However, this provision is to be distinguished from the mutual assistance clause in regard to scope and implementation. While Art 222 TFEU and Art 42(7) TEU may be invoked simultaneously, the former aims at threats below the gravity of an armed aggression.<sup>46</sup> The focus of the solidarity clause lies on, as argued, ‘more diffuse’<sup>47</sup> threats. Not least, the inclusion of natural disasters – e.g. effects of climate change such as prolonged draughts or floods<sup>48</sup> – into the scope of Art 222 TFEU highlights the distinction between the two provisions. The latter implies, moreover, an assumption that the challenges encompassed by the solidarity clause may typically be dealt with by the affected Member State; the EU and the Member States are to act only when the affected State is not capable to address the crisis on its own.<sup>49</sup> Art 222 TFEU entails in this regard no less than three references to providing European assistance ‘at the request of [the Member State] political authorities’. Importantly, Art 222 TFEU is complemented by a Council Decision on the arrangements for the implementation by the Union of the solidarity clause.<sup>50</sup> No such decision exists with regard to Art 42(7) TEU. Importantly, the said Council Decision is without prejudice to Article 42(7) TEU<sup>51</sup> and is deemed to have ‘no defence implications’.<sup>52</sup>

In sum, it is reasonable to differentiate between Art 222 TFEU as manifestation of a broader obligation of solidarity on the one hand, and the narrower emphasis on defence against an armed aggression, which constitutes the core of Art 42(7) TEU, on the other.<sup>53</sup> Therefore, we are now directing our focus towards thoroughly examining the scope and context of this particular provision. As reflected in the section below, this Article traces its origins to the Cold War, expressing concerns of renewed pertinence rather than a snapshot from a bygone era.

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<sup>46</sup> Ibid 217.

<sup>47</sup> Ibid 216.

<sup>48</sup> Steven Blockmans, ‘L’union fait la Force: Making the Most of the Solidarity Clause (Article 222 TFEU)’ in Inge Govaere, Sara Poli (eds.), *EU Management of Global Emergencies* (Brill 2018) 111.

<sup>49</sup> Hilpold (n 45) 215.

<sup>50</sup> See Arts 2–4, Council Decision of 24 June 2014 (2014/415/EU) on the arrangements for the implementation by the Union of the solidarity clause [2014] OJ L 192.

<sup>51</sup> Ibid Recital No 14.

<sup>52</sup> Ibid Art 2(2).

<sup>53</sup> On the debate relating to the term aggression, see e.g. Elisabeth Wilmhurst, ‘Definitions of Aggression’ (*United Nations Audiovisual Library of International Law* 2008) <[https://legal.un.org/avl/pdf/ha/da/da\\_e.pdf](https://legal.un.org/avl/pdf/ha/da/da_e.pdf)> accessed 1 August 2023.

## 2.3 Context and Scope

It is a commonplace to approach a legal provision with a brief inquiry into the circumstances surrounding its emergence, without becoming overly entangled in a detour. Exploring the background story of Art 42(7) TEU is all the more pertinent, as it may on initial examination appear sorely out of place in the law of an organization that has little to no competences in the area of defence and locates its *raison d'être* in civilian realms of economic, legal and monetary integration, as illustrated profoundly by the aims pertaining to Art 3 TEU.

Far from being misplaced in the Treaties, however, Art 42(7) TEU stems from the initial periods of European integration during the early phases of the Cold War, which witnessed failure in establishing a European defence community.<sup>54</sup> Thus, the spiritual predecessor of Art 42(7) TEU originates from the Brussels Treaty of 1948, which underwent significant revisions in the Modified Brussels Treaty of 1954 establishing the Western European Union (WEU).<sup>55</sup> The Modified Brussels Treaty essentially aimed to compensate for the failed attempt to create a European Defence Community in the 1950s.<sup>56</sup> Art V of the said Treaty had laid down the following duty of mutual assistance:

If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power.

Together with NATO, the WEU represented the Western laterally reversed response to the developments leading up to the USSR-led so-called Warsaw Pact.<sup>57</sup> It is worth mentioning that Art V of the Modified Brussels Treaty expressly referred to 'all the military and other' aid, involving even stronger wording than Art 5 NAT, which, as discussed below, refers to 'action as it deems necessary, including the use of armed force'. With the dissolution of the Soviet Union through the Alma Ata Accords of December 1991 and the disbanding of the Warsaw Pact – both acts figuratively marking the end of the Cold War – NATO remained the sole and primary forum for

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<sup>54</sup> Schilde (n 37) 132.

<sup>55</sup> Modified Brussels Treaty, 23 October 1954, Paris.

<sup>56</sup> Kevin Ruane, *The Rise and Fall of the European Defence Community: Anglo-American Relations and the Crisis of European Defence, 1950–55* (Springer 2000) 5.

<sup>57</sup> This treaty was referred to as 'Treaty of Friendship, Cooperation and Mutual Assistance' of 14 May 1955. Its very own mutual assistance clause pursuant to Art 4 also made express reference to Art 51 of the UN Charter. Yet, the dictatorial environment of this entire setting is evident, not least due to the lack of any specific treaty provision for the denunciation of this treaty. See: John N. Washburn, 'The Current Legal Status of Warsaw Pact Membership' (1971) 5(1) *The International Lawyer* 129, 131.

collective defence. This did not, however, terminate the European interest in the realm of regional and global politics relating to common approaches to foreign policy and defence.<sup>58</sup> The Treaty of Maastricht of 1992 marked thereby a profound shift by the reimagining of the European project not only as an economic union but also increasingly as a platform for political unity.<sup>59</sup> Likewise, the Balkan wars in the 1990s compelled the Union to assume more responsibilities in regional security.<sup>60</sup>

The creation of the CFSP<sup>61</sup> as a consequence was accompanied by the aspiration of a common defence policy, envisaged as a future springboard for a common defence. As a result of the EU's commitment to this sphere, the WEU competences were gradually incorporated into the EU structures. This transition culminated in the formal dissolution of the WEU in 2011.<sup>62</sup> Through this process the mutual assistance clause was incorporated into the Treaty of Lisbon; the prior Art V emerged as Art 42(7) TEU under Title V on the General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy.

The contemporary clause emerged with a new wording. Instead of referring to an armed attack as enshrined in Art 5 NAT (echoing the wording of Art 51 UN Charter), it re-emerged with the term 'armed aggression'. Some terminological diversity exists between 'aggression' and 'attack',<sup>63</sup> whereas the notion of 'aggression' under Art 42(7) TEU is perceived as encompassing a broader spectrum of hostile action, which may lie under a threshold of an armed attack.<sup>64</sup> While this implies that, in principle, Art 42(7) TEU could be invoked by a State facing a situation of lesser

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58 For an overview of the development of European defence policies, see e.g. Kato van de Veire, 'Common European defence policy: the discussion on the European army' (2016) 1(3) *International Journal of Latest Research in Humanities and Social Science* 1.

59 Michael J. Baun, 'The Maastricht Treaty as High Politics: Germany, France, and European Integration' (1995–1996) 110(4) *Political Science Quarterly* 605, 605.

60 Kostas A. Lavdas, 'The European Union and the Yugoslav Conflict: Crisis Management and Re-Institutionalization in Southeastern Europe' (1996) 24(2) *Journal of Political & Military Sociology* 209, 227.

61 On the CFSP from a current perspective after the Treaty of Lisbon, see e.g. Panos Koutrakos, 'The European Union's Common Foreign and Security Policy after the Treaty of Lisbon' (*SIEPS Report No. 3* 2017) <[https://www.sieps.se/en/publications/2017/the-european-unions-common-foreign-and-security-policy-after-the-treaty-of-lisbon-20173/sieps\\_2017\\_3](https://www.sieps.se/en/publications/2017/the-european-unions-common-foreign-and-security-policy-after-the-treaty-of-lisbon-20173/sieps_2017_3)> accessed 1 August 2023.

62 See more Alyson JK Bailes and Graham Messervy-Whiting, 'Death of an Institution. The end for Western European Union, a future for European defence?' (2011) *Egmont Paper 46* <<http://aei.pitt.edu/32322/1/ep46.pdf>> accessed 1 August 2023.

63 United Nations General Assembly Resolution 3314 (XXIX), Definition of Aggression. On the debate on the differences of the terms used, see also Sari (n 16) 416–419, 422–423; Monica Hakimi and Jacob Katz Cogan, 'The Two Codes on the Use of Force' (2016) 27(2) *The European Journal of International Law* 257, 270, as cited in Laurie R. Blank, 'Irreconcilable Differences: The Thresholds for Armed Attack and International Armed Conflict' (2020) 96(5) *Notre Dame Law Review* 249, 254.

64 Sari (n 16) 422.

gravity insufficient to trigger Art 5 NAT, it may be argued that the differences between the two terms do not have decisive legal or practical implications.<sup>65</sup> What is more, Art 42(7) TEU does not indicate who is to determine whether an armed aggression has occurred, leaving some discretion to the Member States in this respect.<sup>66</sup>

The new wording has, moreover, replaced the strong formulation ‘all the military and other aid and assistance in their power’ under Art V with a more open-ended ‘all the means in their power’. Additionally, it resurfaced as a clause granting priority to NATO-based obligations in regard to EU Members that also hold NATO membership. While the new provision continues to allow military aid, these changes are not merely cosmetic as they reflect the institutional transition from the WEU as a military alliance to the EU-based setting. By embracing a more open-ended wording, Art 42(7) TEU accomplishes the task of accommodating the plurality of defence policies among the Member States. It thereby bridges the defence policies of the neutral Member States<sup>67</sup> with those whose defence priorities are rooted in the framework of NATO.

Before examining its relationship with the obligations emanating from the North Atlantic Alliance, however, it pays to take a glimpse into the practice relating to Art 42(7) TEU. While Art V of the Modified Brussels Treaty had never been invoked, its successor provision has been activated once. France triggered this provision in the aftermath of the Bataclan terrorist attacks of 2015.<sup>68</sup> This is considered the deadliest terrorist attack in Europe in the history of the EU, leaving 130 people dead and over three hundred injured.<sup>69</sup>

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<sup>65</sup> In particular, *ibid* 422–423.

<sup>66</sup> *Ibid* 419–420.

<sup>67</sup> The Protocol on the concerns of the Irish people on the Treaty of Lisbon expounds further on the non-prejudice enshrined in Art 42(7) TEU. It is thereby for the Members, ‘acting in a spirit of solidarity ... to determine the nature of aid or assistance to be provided’. Not least, any move towards a common defence is thereby conditional on unanimity in the European Council, also allowing the Member States to decide to whether to adopt a common defence, take part in a ‘permanent structured cooperation’ or participate in any military operation. See Protocol on the concerns of the Irish people on the Treaty of Lisbon, OJ L 60.

<sup>68</sup> Nováky (n 17), 357; J.F.R. Boddens Hosang, P.A.L. Duchéine, ‘Implementing Article 47.2 of the Treaty on European Union: Legal Foundations for Mutual Defence in the Face of Modern Threats’ (2020) Amsterdam Law School Legal Studies Research Paper No. 2020/71 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3748392](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3748392)> accessed 1 August 2023. See also European Parliament, *The EU’s mutual assistance clause First ever activation of Article 42(7) TEU* (Briefing, November 2015) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572799/EPRS\\_BRI\(2015\)572799\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572799/EPRS_BRI(2015)572799_EN.pdf)> accessed 1 August 2023.

<sup>69</sup> Nováky (n 17) 357.

Theoretically, the repository of EU law available to the French government in this context would have also entailed the aforementioned Art 222 TFEU, which expressly provides for a duty of solidarity in case of a terrorist attack. Yet, France chose to activate the defence clause instead.<sup>70</sup> This choice has been interpreted as being driven by considerations of both legal and political nature: From the territorial perspective, Art 222 TFEU encompasses aid relating to the territory of the Member States, whereas France sought assistance for its antiterrorist operations in the Middle East and Africa.<sup>71</sup> Member States have consequently supplied military resources for numerous French operations in Mali and Syria, described by some as lukewarm,<sup>72</sup> whereas others were more generous in their assessment.<sup>73</sup> Not least, the activation of Art 222 TFEU may have been seen as politically unfavourable, as it could have implied that the French government lacked the capacity to manage this situation autonomously.<sup>74</sup>

Aside from this, France had been said to prefer Art 42(7) TEU as part of a broader vision for creating a genuinely common, more autonomous and self-reliant European defence in lieu of the dependence on the United States (US) for security guarantees.<sup>75</sup> The rhetoric of the European Council which, shortly after the invasion in Ukraine, underscored the EU's commitment to assuming more responsibility for the EU's security and even sovereignty<sup>76</sup> reflects this vision. It must not go unnoted, however, that the aptness of Art 42(7) TEU to address contemporary conflicts has been profoundly questioned by some authors, most particularly in light of the unlawful and destabilizing actions by Turkey – a NATO member – in the Eastern

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70 For more on the requested support and the responses by the Member States, see European Parliament, Activation of Article 42(7) TEU. France's request for assistance and Member States responses (*European Council Briefing*, July 2016) [https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581408/EPRS\\_BRI\(2016\)581408\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581408/EPRS_BRI(2016)581408_EN.pdf) accessed 1 August 2023.

71 Carolyn Moser, 'Awakening dormant law – or the invocation of the European mutual assistance clause after the Paris attacks' (*Verfassungsblog*, 18 November 2015) <<https://verfassungsblog.de/awakening-dormant-law-or-the-invocation-of-the-european-mutual-assistance-clause-after-the-paris-attacks/>> accessed 1 August 2023.

On the requested support, see also European Parliament, Activation of Article 42(7) TEU (n 65). On the scope of Art 222 TFEU, see Council Decision of 24 June 2014 (n 50), as emphasized by Moser (ibid).

72 Moser (n 71).

73 Elie Perot, 'Annex 1 France and Article 42(7) TEU: great expectations, in Deen, Zandee, Stoetman (n 16) 38; Moser (n 67).

74 Sari (n 16) 424, where he also cites Nováky (n 17) 367; see also Hilpold (n 45) 215, who argues that the solidarity duty is particularly relevant when the Member State facing an event encompassed by Art 222 TFEU is unable to resolve the crisis on its own.

75 Perot (n 73) 38; Moser (n 71).

76 Frank Hoffmeister (n 3) 670, where he cites the European Council, Informal meeting of the Heads of State or Government, Versailles Declaration (10 and 11 March 2022) <<https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf>> accessed 1 August 2023.



Mediterranean, regarding a dispute over exclusive economic zones involving the Republic of Cyprus and Greece.<sup>77</sup> Overall, the relationship between Art 42(7) TEU and its counterpart Art 5 of the North Atlantic Treaty is best described – as shown below – as one of complementarity or even subsidiarity, whereas normatively speaking, the Articles bear strong similarities.

## 2.4 Relationship with Art 5 NAT

The EU mutual assistance clause recognizes Art 5 NAT as the primary basis for collective defence for the Member States which are NATO members. In practice, 22 out of 27 EU Member States are, therefore, entitled in accordance with the wording of Art 42(7) TEU to prioritize their commitments under the NATO framework. Today only Austria, Ireland, Cyprus, and Malta remain neutral or non-aligned, whereas Sweden is expected to join the Alliance shortly. If we only look at the numbers, NATO is dominated by EU States, but the US and, to a lesser extent, the UK represent the heavyweights of the Alliance.

As shown in this section, the two norms of collective defence largely overlap not only in regard to their beneficiaries but also concerning the scope and normative content. By granting priority to the NATO provision, Art 42(7) TEU speaks in a vocabulary of complementarity vis-à-vis Art 5 NAT. It pays, therefore, to briefly draw the parallels between the two norms. The wording pertaining to the collective defence mechanism under Art 5 NAT is well known:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

(...).

Parallels between Art 42(7) TEU and Art 5 NAT are apparent in a number of respects. With largely corresponding scopes,<sup>78</sup> the two provisions share the aim of aiding a fellow signatory State under a military attack thereby contributing to the restoration

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<sup>77</sup> For a detailed analysis, see Constantinos Adamides, 'Annex 3. Article 42(7) as an insufficient tool of last resort for Eastern Mediterranean stability', 46 ff, as part of the Clingendael Report by Deen, Zandee, and Stoetman (n 16).

<sup>78</sup> Sari (n 16) 425.

of peace. The variation in terminology, with the EU using the term ‘armed aggression’ and the North Atlantic Treaty employing ‘armed attack’ does not, as discussed above, alter the prevailing consensus that both Art 42(7) TEU and Art 5 NAT may be invoked in response to a spectrum of events ranging from state-on-state warfare, as well as terrorist or even cyber- and hybrid attacks.<sup>79</sup> The practice of invoking these provisions reveals further parallels, as Art 5 NAT had, too, been activated once and in response to international terrorism, when the US invoked this norm following the tragic attacks of 9/11.<sup>80</sup> Whereas the territorial scope of application is unsurprisingly not identical, it is common to both the Alliance<sup>81</sup> and the EU<sup>82</sup> to define the notion of territorial application in broad strokes, extending beyond the territory of the signatory States in order to include also state infrastructure.

It is noteworthy that the NATO provision does not outline an automatic mechanism for discharging of the duty entailed therein. Art 11 NAT refers thereby to the implementation of the NAT provisions in accordance with the ‘constitutional processes’ of the allied States. For instance, in the US as the leading member of the Alliance this process would likely require the US President to seek congressional authorization or at least support for measures in response to an activation of Art 5 NAT.<sup>83</sup> The reliance on national political processes for implementation under the

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79 Deen, Zandee, Stoetman (n 16) 20.

80 The attacks of 9/11 triggered enormous political and academic dispute as to whether they constitute an ‘armed attack’ and subsequently legitimate self-defence pursuant to Art 51 UN Charter; yet, already on 12 September 2001 the NATO Council concluded: ‘The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty ...’ See: North Atlantic Treaty Organization (NATO), *Statement by the North Atlantic Council (Press Release, 12 September 2001)* <<https://www.nato.int/docu/pr/2001/p01-124e.htm>> accessed 1 August 2023. For more, see Schmitt (n 41) 97–98; Philipp H. Gordon, ‘NATO After 11 September’ (2007) 43(4) *Global Politics and Strategy* 89, 86.

81 For the geographical scope of Art 5, see Art 6 NAT; it encompasses the state territory in the North Atlantic area north of the Tropic of Cancer, also including ‘the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer’.

82 See Art 2 of Council Decision of 24 June 2014 (n 39), which defines the term ‘territory’ in broad terms encompassing also the infrastructure of the Member States, if it is situated in the territorial sea, the exclusive economic zone or the continental shelf of the Member State.

83 For a brief overview, see Katherine Yon Ebright, ‘NATO’s Article 5 Collective Defense Obligations, Explained’ (*Brennancenter*, 4 March 2022) <<https://www.brennancenter.org/our-work/research-reports/natos-article-5-collective-defense-obligations-explained>> accessed 1 August 2023; on the shared prerogatives between the US President and Congress in respect to NATO obligations, see e.g. Douglas L. Kriner, ‘The Contemporary Presidency: Obama’s Authorization Paradox: Syria and Congress’s Continued Relevance in Military Affairs’ (2014) 44(2) *Presidential Studies Quarterly* 309; Stanley R. Sloan, ‘Managing the NATO Alliance: Congress and Burdensharing’, (1985) 4(3) *Journal of*

NATO clause bears similarities to certain aspects of Art 42(7) TEU; without a mechanism for the implementation of this clause, e.g. through a Council decision or a clear role for EU institutions, the activation of Art 42(7) TEU is also contingent upon internal processes and dependent on them.

Importantly, Art 42(7) TEU expresses a relationship of complementarity or even subsidiarity, being without prejudice to the NATO-based commitments. The necessity to ensure that any action taken under the EU clause is ‘consistent with commitments’ under NATO serves as mechanism that States participating in both organizations can reconcile their obligations under EU law and the North Atlantic Treaty. This is particularly significant given that Art 8 NAT prohibits its signatories from participating in any agreements which may contradict the NAT.<sup>84</sup> Accordingly, assuming that both of the provisions are activated, the EU provision generally would defer to Art 5 NAT, entitling NATO members to prioritize their obligations within the Alliance.<sup>85</sup> Hence, collaboration, rather than a normative competition, describe the relationship between the two blocs.<sup>86</sup> The most recent NATO Summit of 2023 in Vilnius emphasized the common intent of ‘complementary and interoperable defence capabilities’.<sup>87</sup>

Yet aside from the general similarities and interrelations between Art 42(7) TEU and Art 5 NAT, an investigation into these two Western pillars of collective defence necessarily involves attention to the elephant in the room characteristic to both of the norms: The tension between the legal demand towards the signatory States to take, in essence, all the steps in their power to assist the State under attack on the one hand, and the restraint with which States interpret the forms of assistance emanating from collective defence obligations, especially the use of armed forces, on the other.

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Policy Analysis and Management 396; Michael N. Schmitt, ‘The North Atlantic Alliance and Collective Defense at 70: Confession and Response Revisited’ (2019) 34 *Emory International Law Review* 85, 114; Louis Fisher, ‘Sidestepping Congress: Presidents Acting under the UN and NATO’ (1997) 47(4) *Case Western Reserve Law Review* 1237.

84 Sari (n 16) 435.

85 Ibid 439.

86 Joint Declaration on EU-NATO Cooperation, 10 January 2023 <<https://www.consilium.europa.eu/en/press/press-releases/2023/01/10/eu-nato-joint-declaration-10-january-2023/#:~:text=The%20NATO%2DEU%20strategic%20partnership,in%20the%20Euro%2DAtlantic%20area>> accessed 1 August 2023. See also European Council, *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union’s Foreign And Security Policy* (June 2016), 20 <[https://www.eeas.europa.eu/sites/default/files/eugs\\_review\\_web\\_0.pdf](https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf)> accessed 1 August 2023; European Council, *The European Union’s Global Strategy. Three Years On, Looking Forward* (2019), <[https://www.eeas.europa.eu/sites/default/files/eu\\_global\\_strategy\\_2019.pdf](https://www.eeas.europa.eu/sites/default/files/eu_global_strategy_2019.pdf)> accessed 1 August 2023.

87 North Atlantic Treaty Organization, *Vilnius Summit Communiqué*, 11 July 2023, Pt no 73.

The following section delves deeper into the legal and political vocabulary behind this tension. It will be shown that both Art 42(7) TEU and Art 5 NAT embody in this regard intentional ambiguity and restraint. This obscures the normative substance of the norms concerned and exposes them to political bargaining at national and intergovernmental level. Importantly though, as argued below, this normative ambiguity facilitates the acceptance of mutual assistance obligations by States holding vastly different defence policies and capacities.

## 2.5 Mutual Assistance and the Value of Ambiguity

It is fair to argue that at present the two provisions spotlighted in this contribution retain an uncomfortable semblance to the Schrödinger's cat: Existing as a legally established safeguards and yet, so far – as fortune has it – untested in an event comparable in nature and extent to the current full-scale military aggression against Ukraine. However, the main culprit of ambiguity is not only or primarily the lack of testing in practice; rather, a broad room for manoeuvre for the States has been deliberately built into the normative content underpinning mutual assistance. The investigation of Art 42(7) TEU, on its own and in light of Art 5 NAT, shows that the precise content of mutual assistance in the realm of defence is relatively undetermined but not normatively empty. In regard to both norms, the absence of automaticity in implementation along with the myriad of interpretations associated with the concept of assistance provides considerable leeway for individual State discretion.

This is not to say that mutual assistance clauses are fictitious or only masquerading as legal obligations. However, explicit obligations to supply military assistance<sup>88</sup> would likely fail to garner support by domestic actors in the first place, considering the risk of becoming a direct party of an armed conflict. Sari has emphasized in regard to Art 5 NAT that during the negotiations on what would become the North Atlantic Treaty, the US had outright rejected 'an automatic commitment to provide all military and other aid, since under the U.S. Constitution, congressional action is required prior to entering into a state of war'.<sup>89</sup> Although in a

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<sup>88</sup> Sari (n 16) 426–427.

<sup>89</sup> Ibid, 427, where Sari cites *Memorandum of the Ninth Meeting of the Working Group Participating in the Washington Exploratory Talks on Security, 9 August 1948* (Foreign Relations of the United States, 1948, Vol III) <<https://history.state.gov/historicaldocuments/frus1948v03/d135>> accessed 1 August 2023. In the Memorandum, it is stated: 'A commitment such as that contained in Article IV of the Brussels Pact, which binds each country to provide all military and other aid and assistance in their power, is unacceptable under the U.S. Constitution in view of the fact that Congressional action is required prior to entering into a state of war. Furthermore, the U.S. could not be a party to any Pact

more recent practice, military affairs are often governed by the executive powers of the US President, Congress remains influential in steering the US foreign policy.<sup>90</sup> In light of complex and changing power-sharing structures at the domestic level, it is arguably the open-endedness of duties attached to collective defence structures that enables the very adoption and ratification of collective defence structures. This is equally relevant in the context of the EU: It is questionable whether the mutual assistance clause could have been incorporated into the Treaty of Lisbon without the caveats regarding neutral and non-aligned Member States, NATO-based commitments, or omitting the reference to ‘all the military aid’ emanating from Art V of the Modified Brussels Treaty.

Whether a norm of mutual assistance based on the aforementioned ambiguity is perceived as ‘strong or ‘weak’ depends on the lens through which it is viewed: Whereas a State seeking security guarantees will value legal certainty and, by the same token, bear an expectation of tangible help in case of armed aggression, the States called to discharge of their duties of assistance may be expected to emphasize the open-endedness regarding the forms of solidarity required. Likewise, ambiguity underlying the normative substance may appear a sound concept as long as the norm in question remains dormant. Once it has been invoked, its credibility depends on the commitment of the States to, proverbially speaking, pierce the veil of ambivalence and to actually provide the measures capable of effectively helping the State under attack.

While the above considerations apply equally to both Art 42(7) TEU and Art 5 NAT, in today’s geopolitical environment it is not outlandishly far-fetched to state that these dilemmas will arise in particular with regard to the EU provision, in the accession negotiations between the EU and Ukraine. While this clause permits, as shown above, ample room for State manoeuvre, it nevertheless comprises a hard-law norm and Ukraine would become entitled to invoke it upon accession.<sup>91</sup> The following section thus sheds the high beams on Art 42(7) TEU in the contemporary setting relating to Ukraine’s candidacy. Profound challenges associated with this process extend, as argued, in particular to the practical application of the mutual assistance clause.

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which would provide that the United States would automatically be at war as a result of an event occurring outside its border, or by vote of other countries without its concurrence.’

<sup>90</sup> See the analysis by Kriner (n 83) 310–311.

<sup>91</sup> Jed Odermatt, ‘Options for a Peace Settlement for Ukraine: Option Paper IV – Ukrainian Pathways to the European Union’ (*OpinioJuris*, 13 May 2022) <<http://opiniojuris.org/2022/05/13/options-for-a-peace-settlement-for-ukraine-option-paper-iv-ukrainian-pathways-to-the-european-union/>> accessed 1 August 2023.

### 3 Mutual Assistance in the Ukrainian Context and Legal Flexibility

It needs no mention that only the membership in the EU or NATO allows a State to invoke either of the two assistance norms under scrutiny in this contribution. Ukraine, being member of neither of them, has, however, solemnly received a membership perspective in both organizations precisely in light of the security risks emanating from Russia. Having received EU candidate status in June 2022, it has held a NATO membership perspective since 2008, reiterated in 2023.<sup>92</sup> While common defence is chiefly located in the framework of the North Atlantic Alliance, EU membership is likewise perceived by Ukraine as a security guarantee in parallel to NATO membership.<sup>93</sup> With a 2019 amendment, the objective of a ‘full-fledged’ membership in both organizations has been incorporated in the Ukrainian constitution, elevating it from a political objective to legally binding commitment according to the supreme law of the land.<sup>94</sup> Having received neither an invitation nor a roadmap towards NATO membership in the 2023 summit in Vilnius,<sup>95</sup> Ukraine may thus be expected to strengthen its efforts to join the Union.

To recall, the EU sustains a long-standing and close engagement with Ukraine. In the framework of EU Eastern Neighbourhood Policy (ENP) entailing the regional flank of Eastern Partnership (EaP), the EU conferred the associated status to Ukraine in 2014,<sup>96</sup> alongside with Georgia and Moldova.<sup>97</sup> The Association Agreements thus signed with the former Soviet republics aim at their partial integration into the

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92 The promise of NATO membership, first laid down in the Bucharest Summit of 2008 (3 April 2008), has been reiterated in the Vilnius Summit of 2023: Vilnius Summit Communiqué (n 87).

93 Borja Lasheras, ‘Ukraine’s Second Frontline: The Battle for EU Membership’ (*Cepa*, 28 June 2023) <<https://cepa.org/article/ukraines-second-frontline-the-battle-for-eu-membership/>> accessed 1 August 2023; Eric Ciaramella, ‘Envisioning a Long-Term Security Arrangement for Ukraine’ (*Carnegie Endowment for International Peace*, 8 June 2023) <<https://carnegieendowment.org/2023/06/08/envisioning-long-term-security-arrangement-for-ukraine-pub-89909/>> accessed 1 August 2023.

94 See the Preamble as well as Art 85(5), 102, 116(1) of the Constitution of Ukraine, 28 June 1996, with amendments <<https://www.refworld.org/pdfile/44a280124.pdf>> accessed 1 August 2023.

95 The Vilnius Summit Communiqué (n 87) reiterates the perspective of membership in the vaguest of terms, as Point 11 provides: ‘We will be in a position to extend an invitation to Ukraine to join the Alliance when Allies agree and conditions are met.’ The nature of the conditions is thereby not elaborated.

96 See a detailed analysis by Guillaume Van Der Loo and Peter Van Elsuwege, ‘The EU–Ukraine Association Agreement after Ukraine’s EU membership application: Still fit for purpose’ (2022) European Policy Center Discussion Paper <[https://www.epc.eu/content/PDF/2022/Ukraine\\_DP.pdf](https://www.epc.eu/content/PDF/2022/Ukraine_DP.pdf)> accessed 1 August 2023.

97 For comprehensive analysis of the EU-Ukraine Associated Agreement: Guillaume Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area* (Brill 2016).

internal market,<sup>98</sup> though a membership perspective has not explicitly been granted.<sup>99</sup> The conferral of the candidate status upon Ukraine shortly after being attacked by Russia has, therefore, prompted some authors to speak of ‘accession through war’.<sup>100</sup>

In light of the ongoing Russian aggression against Ukraine, Art 42(7) TEU may face a serious stress test. As of the current writing, there are not indications of a relaxation of tensions in the geopolitical climate let alone a ceasefire, a retreat of the Russian forces or a peace agreement. From today’s perspective, moreover, even following the conclusion of hostilities, Ukraine will likely continue to face security challenges originating from Russia. It is in this context of aspired membership that the flipside of the rather open-ended nature of the mutual assistance clause may become apparent: While the Member States may wish to retain the rather broad discretion as to the forms of assistance required, Ukraine is seeking unequivocal and hard security guarantees.

The EU’s reaction to the invasion of Ukraine offers certain clues as to how mutual assistance could operate in practice. From the outset of the invasion, Ukraine requested military assistance from all of its Western partners. While the fear of escalation had prevented the US as well as NATO from enforcing a so-called no-fly zone,<sup>101</sup> arms, including tanks and artillery, had been and continue to be supplied to Ukraine by the EU as well as the US and the United Kingdom (UK) on a massive scale. While military equipment worth billions of euros has been supplied to Ukraine, its Western allies are exercising caution in regard to fulfilling requests to enforce a no-fly zone or supply particularly heavy machinery such as fighter planes.<sup>102</sup> The aid is notably provided on condition that it is not used on the Russian territory.<sup>103</sup>

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**98** Antoaneta L. Dimitrova and Rilka Dragneva, ‘How the EU-Ukraine Association Agreement and its Consequences Necessitated Adaptation and Drove Innovation in the EU’ (2022) *Journal of Common Market Studies* 1, 6 <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/jcms.13425>> accessed 1 August 2023.  
**99** Van der Loo (n 97) 2–3, 24.

**100** Roman Petrov, Christophe Hillion, ‘Accession through war’ (2022) 59 *Common Market Law Review* 1289. See also Dimitry Kochenov and Ronald Janse, ‘Admitting Ukraine to the EU: Article 49 TEU is the “Special Procedure”’ (*EU Law Live*, March 30, 2022) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4083111](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4083111)> accessed 1 August 2023.

**101** On this request see a brief by Grace Hwang, Christopher Reid, Matthew Strohmeier, ‘Considering the No-Fly Zone Prospects in Ukraine’ (*Center for Strategic and International Studies (CSIS)*, 30 March 2022), <<https://www.csis.org/analysis/considering-no-fly-zone-prospects-ukraine>> accessed 1 August 2023.

**102** On the amounts of aid supplied to Ukraine, see Ukraine Support Tracker, Kiel Institute for the World Economy, <<https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/>> accessed 1 August 2023. On the reluctance of the Western allies to send heavy machinery: Paul McLeary, ‘Ukraine’s defense minister ‘optimistic’ about new tanks, fighter jets from allies’ (*Politico*, 25 October 2022) <<https://www.politico.com/news/2022/10/25/oleksii-reznikov-ukraine-war-russia-weapons-tanks-00063370>> accessed 1 August 2023.

**103** David Hastings Dunn, ‘Ukraine 12 months at war: why Kyiv’s western allies must rethink the limits of their military aid’ (*The Conversation*, 16 February 2023) <<https://theconversation.com/>>

A broad discretion of States rather than strictly defined duties can thus be observed as a salient feature of collective defence. Likewise, a creative and differentiated approach to the law can be observed, especially in regard to the requirement of unanimity for the actions of the EU as a foreign policy actor. This may be illustrated by the differentiated, yet engaged approach of the neutral Member States – Austria, Malta, and Ireland – to common EU measures such as the delivery of weapons to Ukraine by means of the European Peace Facility (EPF).<sup>104</sup> This instrument which allows the Union to support third States in preserving peace and international security under the CFSP, has been invoked to provide military aid to Ukraine. The evident military implications of this instrument raise the question of the (non)participation of neutral and non-aligned Member States. At first sight, the diversity of defence policies among the Member States could thus undermine a common European response to security challenges. The practice shows, however, that this does not present an obstacle, as EU law expressly provides for a possibility of abstention in the Council, so as to adopt the desired decisions and still respect the diverging positions of the Member States.<sup>105</sup>

Austria, Ireland and Malta have in regard to the Council Decision on the supply of arms to Ukraine relied on Art 31(1) TEU as part of the CFSP, which provides for a constructive abstention, whereupon a Member State in question is not obliged to apply the Council decision; it refrains, however, from any action that may be at odds with this decision.<sup>106</sup> Declaring commitment to mutual solidarity, the aforementioned Member States had thus noted vis-à-vis the Council, by means of formal declarations, that they will refrain from any steps that could impede EU action, while at the same time not contributing funds for the military equipment in question.<sup>107</sup>

This legal flexibility allows the EU to adopt decisions as an autonomous foreign policy actor without undermining the vital national interests of individual Member

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ukraine-12-months-at-war-why-kyivs-western-allies-must-rethink-the-limits-of-their-military-aid-200028> accessed 1 August 2023.

**104** See (n 10).

**105** For more, see Maria Eugenia Bartoloni, ‘Simple Abstention and Constructive Abstention in the Context of International Economic Sanctions: Two Too Similar Sides of the Same Coin?’ (2022) 7 *European Papers* 1121, 1124.

**106** See Council of the European Union, *Summary Record, Extraordinary meetings of the Permanent Representatives Committee* (16 March 2022) <<https://data.consilium.europa.eu/doc/document/ST-7282-2022-INIT/en/pdf>> accessed 1 August 2023. See also Hoffmeister (n 3) 686–687.

**107** This aptly exemplifies that neutrality of some Member States is seen as a multifaceted concept. In regard to Austria’s neutrality, its active approach to security policies – not least within the EU’s CFSP – has been described as ‘engaged neutrality’ in the scholarship. See Heinz Gärtner, ‘Austria: Engaged Neutrality’, in Andrew Cottey (ed.), *The European Neutrals and NATO Non-alignment, Partnership, Membership?* (Springer 2018) 129, 129.



States. By analogy, it may be expected that in the case that Art 42(7) TEU is invoked, the existence of diverse approaches to defence among the Member States would not necessarily undermine concerted action. At the same time, it is safe to assume that the Member States will seek to minimize the chances of the mutual assistance clause being activated. The application of Art 42(7) TEU to Ukraine may, therefore, present a point of contestation at the accession negotiations. This is where the EU's capacity for differentiation, as demonstrated by the possibility of abstention, may serve as a source of inspiration.

The likelihood of this Treaty provision being invoked by Kyiv may be particularly pertinent and likely in respect to Ukraine's eastern regions: With the unlawful annexation of the four Ukrainian oblasts Kherson, Donetsk, Luhansk and Zaporizhzhia<sup>108</sup> as well as the ongoing fighting in the east and south of the country, the effective control by the Ukrainian government over parts of Ukrainian territory is compromised or limited, as well as subject to rapid changes depending on the developments on the battlefield. Unless the territorial disputes are resolved, the question may arise as to the scope of the duty under Art 42(7) TEU in respect to occupied regions. A partial application of Art 42(7) TEU comes to mind as a possibility to reconcile Ukraine's European aspirations with the security interests of the existing Member States as well as those of the EU as a whole. For example, a precisely limited application (or non-applicability) of the mutual assistance clause could be included into the prospective EU-Ukraine accession treaty.

An analogy drawn from an already existing EU document could be availed of: The EU-Georgia and EU-Moldova Association Agreements (AA) from 2014 do not apply to the breakaway territories of Georgia and Moldova (Abkhazia and South Ossetia, and Transnistria, respectively) as long as the associated countries do not exercise effective control over these territories pending an additional approval by the Association Council(s).<sup>109</sup> The disputed territories which currently exist as unrecognized state-like territorial entities<sup>110</sup> are thus outside the scope of the AA. Accordingly, the existence of a so-called frozen conflict in the region does not preclude Georgia's or Moldova's integration into European structures. It should be

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**108** Lauri Mälksoo, 'Resolution ES-11/4 Territorial Integrity of Ukraine: Defending the Principles of the Charter of the United Nations (U.N.G.A.)' [2023] *International Legal Materials* 1.

**109** Guillaume Van Der Loo, Peter Van Elsuwege, Roman Petrov, 'The EU-Ukraine Association Agreement:

Assessment of an Innovative Legal Instrument' (2014) 2014/09 EUI Working Papers 23 <[https://cadmus.eui.eu/bitstream/handle/1814/32031/LAW%20\\_WP\\_2014\\_9%20.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/32031/LAW%20_WP_2014_9%20.pdf?sequence=1&isAllowed=y)> accessed 1 August 2023.

**110** For in-depth analysis, see Gaga Gabrichidze, 'The Legal Systems of Georgia's Breakaway Regions', in Benedikt C. Harzl and Roman Petrov (eds.), *Unrecognized Entities. Perspectives in International, European and Constitutional Law* (Brill Nijhoff 2022) 229.

added that while the EU-Ukraine AA does not include a corresponding provision in respect to Crimea, goods originating from Crimea and Sevastopol are subject to restrictive measures.<sup>111</sup> To be sure, the situation in Georgia is far from analogous let alone identical with that of Ukraine, with the ‘hot phase’ of the conflict regarding the South Caucasus republic lying as far back in the past as August 2008.<sup>112</sup>

Still, a differentiated approach regarding the territorial application of EU agreements based on the effective control may present a viable option in containing the concerns relating to Ukraine’s prospective membership. If implemented, this compromise could, however, be at odds with the principle of equality of the Member States as stipulated in Art 4(2) TEU, not to mention contrary to the aspiration of Ukraine for a full-fledged membership encompassing security guarantees. While Ukraine’s path towards accession is in an early stage, it is safe to suggest that the heightened risk of Art 42(7) TEU will present a long-term and far from secondary issue for the negotiations.<sup>113</sup> In light of the above, the Ukrainian quest for security guarantees by means of EU and NATO accession serves as a keen reminder of the Janus-faced nature of the mutual assistance clause: Deliberate ambiguity and discretion underpinning the scope of obligation is thereby balanced with a legal commitment to preserve a tangible security guarantee.

## 4 Concluding Remarks

The notion of intentional ambiguity, the centrepiece of this article, arises in this context from the assumption that matters pertaining to international solidarity and the use of force are profoundly complex and that corresponding solidarity clauses inherently recognize this reality.

Drawing all threads together, the reflections of this article have unearthed that Art 42(7) TEU boasts a legal duty with a stronger wording than the corresponding NATO provision, requiring the Member States to mobilize ‘all the means’ in their power. Still, Art 42(7) TEU openly acknowledges its somewhat secondary character in respect to Art 5 NAT. This aspect may sit uneasily with the EU’s aspiration towards

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**111** It must be recalled that the EU-Ukraine Association Agreement has been initialed prior to the Euromaidan events and the annexation of Crimea. For a comprehensive look, see Council of the European Union, EU restrictive measures against Russia over Ukraine (n 4).

**112** Much has been written on the 2008 Russo-Georgian war. For more, see e.g. Gregory Hafkin, ‘The Russo-Georgian War of 2008: Developing the Law of Unauthorized Humanitarian Intervention after Kosovo’ (2019) 28 Boston University International Law Journal 219; Benedikt Harzl, *Der Georgisch-Abchasische Konflikt. Eine rechtliche und politische Analyse* (Nomos 2016).

**113** Van der Loo, Van Elsuwege (n 96) 6.

European autonomy and sovereignty<sup>114</sup> in light of the current geopolitical tensions in the region. With the two caveats relating to neutral and non-aligned Member States as well as to the priority of NATO-based commitments, this EU provision discloses to possess a merely complementary character. This reading appears to be reinforced by the most recent Joint Declaration on EU-NATO cooperation of January 2023. This Declaration reiterates NATO's primary role in the European framework for defence; while it emphasizes cooperation and the 'decision-making autonomy' of each of the organizations,<sup>115</sup> it remains difficult to assert the existence of an autonomous EU-based mechanism which could lead to collective defence.

Still, a reductionist view of the mutual assistance clause as symbolic would not be justified. Similar to its counterpart Art 5 NAT, differentiation and intentional ambiguity – even legally creative flexibility – as to the forms of assistance required is essential for the acceptance and, thus, existence of a norm such as Art 42(7) TEU. The decision for a State to engage in warfare is probably the most weighty and consequential choice a government can take, which implies careful consideration and explains why intentional ambiguity is not a bug, but a deliberately chosen feature of such provisions. This applies particularly within a legal framework that brings together widely diverse individual State-based perspectives on defence and the security architecture as a whole. It is the deference to state discretion which lays the groundwork for the establishment of a legally binding mechanism for common defence. The cautious approach in regard to the use of military means underscores, moreover, not its weakness but the last-resort character attributed to such action as well as the constraints imposed by international law on the use of force. At the same time, the circumstances surrounding Ukraine's quest for membership have demonstrated that the entitlement to assistance cannot be brushed off as a mere theoretical possibility; this deliberate ambiguity notwithstanding, the content of this legal duty thus warrants clarification.

How does ambiguity play out in practice? The multifaceted responses by the EU to the unlawful aggression against Ukraine have thereby offered a glimpse into the measures which may be associated with mutual assistance in case of an armed aggression. One can observe that assistance exists along a spectrum rather than exemplifying a stark binary division between either military or strictly non-military aid: in the quiver of the EU's arrows, we find sanction packages, flexibilization of asylum-related rules to aid the nationals of the country under attack as well as supply

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114 Hoffmeister (n 3) 670, referring to the European Council, 'Council adopts conclusions on strategic autonomy of the European economic and financial sector' (*Press Release*, 5 April 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/04/05/council-adopts-conclusions-on-strategic-autonomy-of-the-european-economic-and-financial-sector/>> accessed 1 August 2023.

115 EU-NATO Joint Declaration (n 12) Pt 8, 13.

of military equipment, with constructive abstention of Member States holding a neutral or non-aligned status. It is equally evident that measures that could be perceived as a declaration of war against the aggressor, e.g. enforcement of a no-fly zone, are considered with enormous restraint on the part of the States.

Ultimately, one caveat must not be swept under the carpet. The perception of Art 42(7) TEU as a robust and solid legal duty is intimately tied to the willingness of the Member States to envisage a genuinely common European defence that rests upon the foundations of autonomy of European action. As the Union takes great pains to reconcile this objective with the pluralist and intergovernmental approaches to defence by the Member States, at present the EU's role can be expected to continue along the lines of restraint and subsidiarity vis-à-vis NATO as illustrated by the normative substance of Art 42(7) TEU. This pertains not only to a point in the future provided that Ukraine accedes to the EU. Alongside the Ukrainian question, another relevant test case may have already arrived: If Turkey, which holds NATO but not EU membership, continues to deny the right of the EU member Cyprus to drill in its own exclusive economic zone (EEZ),<sup>116</sup> it will not suffice to send 'strong messages' to Turkey; Art 42(7) TEU may play a key role in the call for the Union to take action.

These points of contestation will continue to call attention to the inner conflict inherent to Art 42(7) TEU as to whether the ambivalence of its normative content is about holding space for flexible and creative approaches to the legal obligations of the Member States or whether it in fact signifies a lack of vision for an autonomous, EU-based architecture of defence and security.

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**116** Adamides (n 77) 46 ff; see also Benjamin Fox, Nikos Lampropoulos and Sarantis Michalopoulos, 'The Brief – What to do about Article 42 as Greek-Turkish tensions escalate' (*Euractiv*, 23 March 2018), <<https://www.euractiv.com/section/politics/news/the-brief-what-to-do-about-article-42-as-greek-turkish-tensions-escalate/>> accessed 1 August 2023.