THE INTERNATIONAL LEGAL ORDER AND THE WAR IN UKRAINE

THE CONFLICT IN UKRAINE AND ITS IMPLICATIONS FOR THE UNITED NATIONS SYSTEM OF COLLECTIVE SECURITY

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Abstract

The armed conflict following the decision of Russia to launch a "special military operation" in Ukraine has put under severe stress the whole system of collective security of the United Nations. The Security Council was deadlocked from the very beginning of the crisis by the Russian veto, and any operative decision by that organ proved impossible. The General Assembly was convened in emergency special session and, within the first year of the conflict, managed to adopt six resolutions, inter alia *determining that the Russian military operation against Ukraine constituted an aggression and declaring the invalidity of the attempts by Russia to alter the status of the Ukrainian territory under military occupation. The International Court of Justice was the only UN principal organ that proved able to issue a binding order on the matter, by indicating provisional measures demanding the immediate cessation of hostilities. The present article considers the impact of the conflict in Ukraine on the functioning of the UN organs involved, the legal implications of the actions attempted by these organs to manage the crisis, as well as the legal hurdles that impaired the effectiveness of such attempts.*

Keywords: use of force; collective security; United Nations; Security Council; General Assembly; International Court of Justice.

1. Introduction

To write about the conflict in Ukraine and its implications for the United Nations (UN) system of collective security can be perceived as a frightening exercise. This is so for the self-evident reason that that system, after more than one year of ongoing devastation in Ukraine, has proved unable to stop hostilities, thereby missing its basic purpose to maintain and restore peace. The Security Council has been deadlocked from the very beginning of the crisis, with the score of two draft resolutions defeated by the Russian veto.[1] The General Assembly, soon convened in its 11th emergency special session under the "Uniting for Peace" procedure, managed to adopt six resolutions on the conflict, some of which sustained by an overwhelming majority.[2] However, the bulk of these resolutions has a declaratory character and the General Assembly has so far refrained from recommending effective collective measures to respond to the Russian aggression against Ukraine. The only UN organ able to issue a

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[1] See *infra* Section 2.

[2] See *infra* Section 3.1.

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binding order to that effect was the International Court of Justice (ICJ), acting in the context of the dispute opposing Ukraine and Russia over the *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide*.[3] But Russia has so far refused to participate in the proceedings and has patently ignored the Court's order on provisional measures demanding the immediate suspension of military operations.

Nonetheless, there are some aspects of the UN involvement in the Ukrainian crisis which can be worth of consideration. In spite of the lack of any operative decision, the Security Council has devoted no less that 45 open meetings to the conflict in Ukraine during the first year of the crisis, an amount which, together with closed meetings and meetings convened under the Arria formula,[4] reaches the remarkable score of one meeting per week.[5] As for the General Assembly, one indisputable effect of the current crisis has been the revitalization of the "Uniting for Peace" procedure, as well as the elaboration of a new "standing mandate" procedure dealing with the case of a veto cast in the Security Council by permanent members. Finally, the conflict in Ukraine prompts questions on the role of the ICJ as an integral component of UN system of collective security and brings to the forefront the multilateral implications of disputes involving the use of force.

In the following sections, the main legal implications of the conflict in Ukraine for the UN system of collective security are tentatively explored following three strands of analysis, corresponding to the three principal UN organs involved in the crisis.

2. The Security Council: When Substance Gives Way to Procedure

The most evident (and obvious) consequence arising from the conflict in Ukraine for the Security Council was the deadlock that followed the veto cast by Russia on 25 February 2022 on a draft resolution condemning the "special military operation" launched the day before.[6] The veto was reiterated some months later, with reference to another draft resolution declaring the invalidity of the referenda organized in the

[3] See *infra* Section 4.

[4] The "Arria-formula" meetings, which were initiated in 1992 by the then-President of the Security Council, Ambassador Diego Arria of Venezuela, are informal meetings of the Security Council convened at the initiative of one of its members in order to hear the views of individuals, organizations or institutions on matters within the competence of that organ. See the so-called "Note 507" on the working methods of the Security Council, UN doc. S/2006/507, 19 July 2006, p. 11, para. 54.

[5] A useful account of Security Council meetings on the Ukraine conflict (open, closed or under the Arria formula) is available at: <www.securitycouncilreport.org/chronology/ukraine.php>. The score of 45 open meetings covers the period ranging from 24 February 2022 to 24 February 2023. Where appropriate, the text also refers to SC meetings held beyond that period.

[6] See UN Doc. S/2022/155, 25 February 2022, containing the text of a draft resolution submitted by three permanent members of the Security Council (France, United Kingdom, United States), three non-permanent members (Albania, Ireland and Norway), plus other 77 UN member States, deploring "in the strongest terms the Russian Federation's aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter" (operative para. 2). The draft resolution received 11 votes in favour, one against (Russia) and three abstentions (China, India, United Arab

Ukrainian regions under Russian occupation.[7] To put it starkly, this case has confirmed the impossibility – more or less explicitly anticipated by the drafters of the UN Charter – of any meaningful reaction by the Security Council when the alleged aggressor State is one of its permanent members.[8]

However, on 27 February 2022, the Security Council managed to adopt resolution 2623 (2022) notwithstanding the negative vote of Russia, owing to the fact that it dealt with a procedural issue and was therefore exempted from the veto rule.[9] Under this resolution, the Security Council, "taking into account that the lack of unanimity of its permanent members had prevented it from exercising its primary responsibility for the maintenance of international peace and security", decided to call an emergency special session of the General Assembly to examine the situation in Ukraine.[10]

As already mentioned, after this procedural move the Security Council devoted an impressive number of meetings to the situation in Ukraine.[11] The bulk of these meetings regards the humanitarian consequences of the conflict, which have been reviewed in light of routine briefings made by the under-Secretary-General for humanitarian affairs, the under-Secretary-General for political and peace-building affairs, the UN High Commissioner for Refugees and other UN special envoys invited to participate under rule 39 of the Council's provisional rules of procedure.[12] Some peculiar causes of concern arising from the hostilities, such as the situation concerning the nuclear power plant of Zaporizhzhya, have been considered in light of the hearings of the Director-General of the International Atomic Energy Agency.[13] Other hot-spot issues directly connected with the consequences of the hostilities on

Emirates) and failed to be adopted owing to the negative vote of a permanent member (see UN Doc. S/PV.8979, 25 February 2022, p. 6).

[7] See UN Doc. S/2022/720, 30 September 2022, containing the text of draft resolution submitted by Albania and the United States. The text received ten votes in favour, one against (Russian Federation) and four abstentions (Brazil, China, Gabon, India) and failed to be adopted owing to the negative vote of a permanent member (see UN Doc. S/PV.9143, 30 September 2022, p. 4).

[8] See Kelsen, *The Law of the United Nations, with Supplement*, New York, 1951, p. 986.

[9] See Zimmermann, "Article 27", in Simma et al. (eds.), *The United Nations Charter: A Commentary*, 3rd ed., Oxford, 2012, vol. I, p. 874 ff., pp. 891-892, and Klein and Schmahl, "Article 12", *ibid.*, p. 507 ff., p. 518. Resolution 2623 (2022) received 11 votes in favour, one against (Russian Federation) and three abstentions (China, India, United Arab Emirates): see UN Doc. S/PV.8980, 27 February 2022, p. 2.

[10] UN Doc. S/RES/2623 (2022), 27 February 2022, second preambular paragraph and first operative paragraph.

[11] *Supra* note 5 and accompanying text.

[12] UN Doc. S/PV.8983, 28 February 2022; UN Doc. S/PV.8988, 7 March 2022; UN Doc. S/PV. 8998, 17 March 2022; UN Doc. S/PV.9008, 29 March 2022; UN Doc. S/PV.9018, 19 April 2022; UN Doc. S/PV.9027, 5 May 2022; UN Doc. S/PV.9032, 12 may 2022; UN Doc. S/PV.9104, 29 July 2022; UN Doc. S/PV.9126, 7 September 2022; UN Doc. S/PV.9161, 21 October 2022; S/PV.9195, 16 November 2022; UN Doc. S/PV.9208, 6 December 2022; UN Doc. S/PV.9245, 17 January 2023; UN Doc. S/PV.9254, 6 February 2023.

[13] UN Doc UN Doc. S/PV.8986, 4 March 2022; UN Doc. S/PV.9109, 11 August 2022; UN Doc. S/PV.9114, 23 August 2022; UN Doc. S/PV.9124, 6 September 2022.

the ground (such as sexual violence,[14] war crimes[15] and the bombing of civilian infrastructures[16]) or dealing with the broader implications of the conflict (such as the supply of lethal weapons to Ukraine,[17] or the so-called Black Sea Grain initiative)[18] have also been debated, often with the participation of representatives of the civil society.

Against this background, one might be tempted to suggest that during the one-year development of the crisis the Security Council has continued to be the forum where substantive arguments relating to the conflict have been articulated. However, a cursory look at the hundreds of pages of summary records reveals that, for the most, the debates within the Security Council added very little to the substance of the issue. What these debates may instead reveal is that, after the Russian veto had shown the impossibility of any concrete action, the confrontation within the Council on substantive matters has often been turned into a struggle over procedural issues. Just to give some examples, on 5 April 2022 the delegation of Russia vehemently protested the way in which the British presidency had dealt with its requests to convene a meeting, by qualifying it as a blatant violation of the Council's provisional rules of procedure.[19] On 11 April 2022, a harsh exchange of views occurred between the representatives of Russia and the United States over the appropriate agenda item under which to consider the situation in Ukraine.[20] On 27 September 2022, after strong objections by the Russian representative, the proposal to invite Ukraine's President Zelenskyy to participate via video-conference to the meeting in accordance with rule 37 of the Council's provisional rules of procedure was put to the vote, and eventually adopted.[21]

Perhaps the most telling example of how matters of substance may spill over into procedure is provided by the Security Council meeting of 17 March 2023. On

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[14] UN Doc. S/PV.9056, 6 June 2022.

[15] UN Doc. S/PV.9069, 21 June 2022; UN Doc. S/PV.9135, 22 September 2022 (with the briefing of the Prosecutor of the International Criminal Court).

[16] UN Doc. S/PV.9080, 28 June 2022; UN Doc. S/PV.9202, 23 November 2022.

[17] UN Doc. S/PV.9127, 8 September 2022; UN Doc. S/PV.9216, 9 December 2022. See also the meeting held by the Security Council on the topic "Risks stemming from violations of the agreements regulating the export of weapons and military equipment", UN doc. S/PV.9301, 10 April 2023, and the concept note on the issue prepared by the Russian Federation in UN Doc. S/2023/243, 3 April 2023.

[18] UN Doc. S/PV.9176, 31 October 2022.

[19] UN Doc. S/PV.9011, 5 April 2022, p. 2.

[20] UN Doc. S/PV.9013, 11 April 2022, p. 2. Note that the early phases of the conflict in Ukraine were considered by the Security Council under the two agenda items already introduced in 2014 for dealing with the situation in Crimea and Donbass (respectively "Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council (S/2014/136)" and "Letter dated 13 April 2014 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council (S/2014/264)"). From 11 April 2022, the new agenda item "Maintenance of peace and security of Ukraine" was introduced. Occasionally, also the generic agenda item "Threats to international peace and security" is employed by the Council to deal with the Ukrainian crisis.

[21] UN Doc. S/PV.9115, 24 August 2022, pp. 2-3. The proposal to admit President Zelenskyy to participate via video-conference to the Security Council meeting was adopted with 13 voted in favour, one negative vote (Russia) and one abstention (China).

that occasion, the United States requested a procedural vote on the proposal to invite Ms. Daria Morozova as briefer under rule 39 of the Council's provisional rules of procedure. The United States representative recalled that Ms. Morozova has been presented as "an ombudsperson of the Donetsk People's Republic". She pointed out that allowing to speaking before the Council a person in that capacity would run against the call, addressed to States and international organizations with General Assembly resolution ES-11/4,[22] not to recognize any alteration of the status of the Donetsk region of Ukraine and to refrain from any dealings that might be interpreted as recognizing any such altered status.[23] The proposal to invite Ms. Morozova as a briefer was then put to the vote and, having failed to receive the required majority, was rejected.[24] Unsurprisingly, Russia strongly deplored this outcome and disquietingly announced that what happened with Ms. Morozova will set a precedent for dealing with future requests under rule 39 coming from Western members of the Council.[25]

Two rather trivial suggestions can be drawn from the foregoing developments. First, when substantive action of the Security Council is paralyzed by the veto of permanent members, the only alternative available to that organ is to focus on procedural issues. Second, nothing can prevent that the same political hindrances determining the deadlock in the Council's operative action be transferred into the procedural arena. At the end of the day, this is really nothing new, as it represented a well-known by-product of the Cold War era.[26] What is sad to recognize is that the crisis in Ukraine has brought the clock within the Security Council back in time.

Remarkably, the struggle over procedural matters that marked the meetings on the situation in Ukraine has been echoed in the open debate held on 28 June 2022 under the agenda item "Working methods of the Security Council".[27] In that setting, especially Russia and Western permanent members of the Council exchanged reciprocal accusations of exploiting the Security Council as a platform for propaganda and misinformation, and denounced the misuse of the rules governing the procedure within the Council.[28] Not by chance, the issue of the veto of permanent members, as well as the broader question of the reform of the Security Council, were repeatedly evoked during the debate, despite being formally absent from the agenda item under review.[29]

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[22] See *infra* Section 3.1.

[23] UN Doc. S/PV.9286, 17 March 2023, p. 2.

[24] The proposal received four votes in favour (Brazil, China, Ghana and Russian Federation), eight against (among which the United States) and three absentions (*ibid.*, p. 3).

[25] *Ibid.*, p. 4.

[26] Sievers and Daws, *The Procedure of the UN Security Council*, 4th ed., Oxford, 2014, p. 3.

[27] UN Doc. S/PV.9079, 28 June 2022. The meeting was convened at the initiative of Albania in its capacity as President of the Security Council for the month of June 2022 and was introduced by the concept note contained in UN Doc. S/2022/499, 21 June 2022.

[28] See UN Doc. S/PV.9079, *cit. supra* note 27, especially the harsh statements of Russia and the United Kingdom, respectively at p. 6 and p. 11. See also the statements of China and France concerning the misuse of the meetings convened under the Arria formula (*ibid.*, respectively p. 13 and p. 15).

[29] See for example the statements of Russia (*ibid.*, p. 6), Ireland (*ibid.*, p. 9), the United States (*ibid.*, p. 10), Brazil (*ibid.*, p. 12), China (*ibid.*, p. 14), France (*ibid.*, p. 14).

In short, the Ukrainian crisis confirms the dramatic impact that the veto mechanism may have on the overall functioning of the Security Council. This being said, it is interesting to turn the attention to responses that have been elaborated to cope with this reality in the different context of the General Assembly.

3. The General Assembly: Between Substance and Procedure

Following the request made by the Security Council with resolution 2623 (2022), the 11th emergency special session of the General Assembly was convened on 27 February 2022 under the procedure of the "Uniting for Peace" resolution.[30] The action taken by the Assembly in that context can be assessed at two different levels: one, which is more substantive, pertains to the content of the resolutions adopted in the framework of the 11th emergency special session and their legal impact (Section 3.1); the other is procedural and regards the mechanisms for prompting the General Assembly's intervention when the Security Council is deadlocked (Section 3.2).

3.1. The resolutions adopted in the framework of the 11th emergency special session

The General Assembly has so far devoted six resolutions to the conflict in Ukraine. On 5 March 2022, a few days after the opening of the 11th emergency special session, resolution ES-11/1 emblematically entitled "Aggression against Ukraine" was adopted.[31] In the following weeks, two further resolutions were passed, dealing respectively with the "Humanitarian consequences of the aggression against Ukraine" (ES-11/2)[32] and the "Suspension of the rights of membership of the Russian Federation in the Human Rights Council" (ES-11/3).[33] On 13 October 2022, after the organization of local referenda in the regions of Ukraine under Russian occupation, resolution ES-11/4 entitled "Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations" was adopted, declaring the invalidity of the said referenda.[34] In turn, on 15 November 2022, resolution ES-11/5, devoted to "Furtherance of remedy and reparation for aggression against Ukraine", was passed.[35] Finally, on 23 February 2023, almost to mark the first anniversary of the conflict, resolution ES/11-6 was ad-

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[30] See the note by the Secretary-General "Convening of the session", in UN Doc. A/ES-11/1, 27 February 2022; and GA Res. 377 (V) "Uniting for Peace", 3 November 1950, operative para. 1.

[31] GA Res. A/RES/ES-11/1, 2 March 2022. The resolution was adopted with 141 votes in favour, five against and 35 abstentions: see UN Doc. A/ES-11/PV.5, 2 March 2022, pp. 14-15.

[32] GA Res. ES-11/2, 24 March 2022. The resolution was adopted with 140 votes in favour, five against and 38 abstentions: see UN Doc. A/ES-11/PV.9, 24 March 2022, p. 12.

[33] GA Res. ES-11/3, 7 April 2022. The resolution was adopted with 93 votes in favour, 24 against and 58 abstentions: see UN Doc. A/ES-11/PV.10, 7 April 2022, pp. 13-14.

[34] GA Res, ES-11/4, 12 October 2022. The resolution was adopted with 143 votes in favour, five against and 35 abstentions: see UN Doc. A/ES-11/PV.14, 12 October 2022, pp. 11-12.

[35] GA Res. ES-11/5, 14 November 2022. The resolution was adopted with 94 votes in favour, 14 against and 73 abstentions: see UN Doc. A/ES-11/PV.15, 14 November 2022, p. 30.

opted under the title "Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine".[36]

Among the achievements of the 11th emergency special session, the most remarkable is arguably represented by resolution ES-11/1, which deplores "in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter".[37] The plain qualification of the Russian military operation as an aggression was uncontested by the majority of the almost 130 States having taken the floor during the relevant meetings of the General Assembly. Moreover, a huge majority of 141 positive votes sustained the adoption of the text.

Resolution ES-11/1 brings to the forefront an old bone of contention, concerning the competence of the General Assembly to make determinations that are reserved to the Security Council under Article 39 of the UN Charter.[38] The question, occasionally raised in past practice concerning the "Uniting for Peace" resolution,[39] has been expressly evoked also in the context of the present crisis.[40] Strictly speaking, the issue can be subsumed within the broader problem of the legality of the "Uniting for Peace", which addresses the permissibility of the General Assembly's power to act *in lieu* of the Security Council.[41] Nonetheless, specific explanations for the General Assembly's entitlement to proceed to determinations similar to those made under Article 39 UN Charter have been elaborated in legal scholarship. According to some, Article 11(2), final sentence, of the UN Charter does provide a basis to that effect. As the latter provision sets forth a duty of the General Assembly to refer any question on which (coercive) action is necessary to the Security Council, it would imply the power of the Assembly to assess the background situation.[42] In a different vein, it has been suggested that a General Assembly's power to make an unspecific determination of the existence of a threat to the peace, breach of the peace or act of aggression can be implied when the Security Council has referred the matter to the Assembly under the "Uniting for Peace" procedure (as it happened in the case at hand with resolution 2623 (2022)). In such circumstances, upon delegation by the Security Council, the General Assembly will be vested with the authority to make the appropriate determination in order to define the parameters of its substitutive power in accordance

[36] GA Res. ES-11/6, 23 February 2023. The resolution was adopted by 141 votes in favour, seven against, 32 abstentions: see UN doc. A/ES-11/PV.19, 23 February 2023, pp. 7-8.

[37] GA Res. ES-11/1 cit., operative para. 2.

[38] See the classic presentation of the issue in Kelsen, cit. supra note 8, pp. 973 and 977-978; see also discussion in Stone, *Legal Controls of International Conflict*, London, 1954, pp. 274-275.

[39] See for example the statement made by the representative of India before the General Assembly in 1951, in the framework of the discussion of a draft resolution concerning the intervention of the Central People's Government of the People's Republic of China in Korea: UNGA, Fifth Session Official Records, UN Doc. A/PV.327, 1 February 1951, pp. 694-695.

[40] The point has been raised by the representative of Iran in the aftermath of the adoption of Res. ES-11/1 (UN Doc. A/ES-11/PV.5, *cit. supra* note 31, p. 19) and Res. ES-11/5 (UN Doc. A/ES-11PV.15, *cit. supra* note 35, p. 25).

[41] See generally Reicher, "The United for Peace Resolution on the Thirtieth Anniversary of Its Passage", Columbia JTL, p. 1 ff.; Ramsden, "'Uniting for Peace' in the Age of International Justice", Yale JIL, 2015-2016, p. 1 ff.; Carswell, "Unblocking the UN Security Council: The *Uniting for Peace* Resolution", Journal of Conflict & Security Law, 2013, p. 453 ff.

[42] Klein and Schmahl, "Article 11", *cit. supra* note 9, p. 491 ff., p. 501.

with the "Uniting for Peace" resolution.[43] Finally, an argument based on the subsequent practice developed by the General Assembly has been put forward. It has been observed that the Assembly, acting either within or outside the framework of the "Uniting for Peace" procedure, has taken the liberty of characterising a given situation as inconsistent with the maintenance of international peace and security.[44]

Whatever their legal foundation, these arguments suggest that the question of the competence of the General Assembly to qualify a certain situation can be addressed separately from the issue of the legality of its action under the "Uniting for Peace". A separate consideration would be particularly appropriate for an assessment under general international law of those situations, such as the Ukrainian conflict, where a serious breach of a rule protecting fundamental interests of the international community is at stake. It is worth recalling that in the 1990s, during the work of the UN International Law Commission (ILC) on the codification of the law of State responsibility, proposals were put forward by the special rapporteur Gaetano Arangio-Ruiz for assigning to the General Assembly a substantive role in the determination of serious breaches of international law (at the time called "crimes of States").[45] Those proposals were not retained, but the underlying issue remains critical.

The ILC's "Draft Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)", adopted on second reading in 2022, cover the consequences arising from serious breaches of *jus cogens* obligations, without addressing the issue of the organ competent for their determination. Conclusion 19 recalls a general obligation of States to cooperate to bring to an end through lawful means any serious breach, as well as the obligation not to recognize as lawful the situation created by a serious breach.[46] During the final stages of elaboration of the draft, the customary character of such obligations was severely challenged

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[43] See Carswell, *cit. supra* note 9, p. 475.

[44] Klein and Schmahl, "Article 11", *cit. supra* note 42, p. 503. See for example GA Res. 498 (V), 1 February 1951, finding that the Central People's Republic of China, by giving direct aid and assistance to North Korean troops, had itself committed aggression against Korea (operative para. 1); GA Res. 1573 (XV), 19 December 1960, considering that the situation in Algeria constituted a threat to international peace and security (seventh preambular para.); GA Res. 41/39 A, 20 November 1986, reiterating that the continuing occupation of Namibia by South Africa constituted an act of aggression against the Namibian people (13th preambular para.); GA Res. 49/10, 3 November 1994, stressing that the armed hostilities and continued aggression against Bosnia and Herzegovina constituted a threat to international peace and security (third preambular para.).

[45] See Arangio-Ruiz, "Seventh Report on State Responsibility", UN doc. A/CN.4/469 and Add.1-2, 9, 24 and 19 May 1995, YILC, Vol. II, Part One, 1995, especially p. 21, paras. 91-93 and pp. 25-26, paras. 118-120. According to the proposals of the special rapporteur, a resolution by the General Assembly (concurrent or alternative to the Security Council) resolving that the allegation that a crime (say, an aggression) has been committed is sufficiently substantiated would represent a preliminary condition for triggering a judicial determination by the ICJ (see *ibid.*, p. 30, the proposed text of draft Art. 19).

[46] See the text of the Draft Conclusions in GAOR, 77th Session, Report of the International Law Commission, Seventy-third session (18 April-3 June and 4 July-5 August 2022), UN doc. A/77/10, p. 11 ff., in particular Conclusion 19, paras. 1 and 2, p. 70. The general obligations mentioned in Draft Conclusion 19 are modelled on Art. 41 of the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts (*infra* note 54).

by some States in their written comments.[47] Referring to the obligation to cooperate to bring to an end a violation of a peremptory norm, one State recommended the ILC to expand the commentaries with examples of State practice as regards the customary status of the rule.[48] Following this input, an entirely new paragraph was added to the ILC final commentary to Conclusion 19, covering examples of cooperative action undertaken by States in an institutional setting to bring to an end serious breaches of peremptory norms. This paragraph refers to a number of General Assembly resolutions condemning such serious breaches and, not surprisingly, it also includes resolution ES-11/1 concerning the Russian aggression against Ukraine.[49]

At the end of the day, in light of the wide support that sustained it, the assessment made by the General Assembly with resolution ES-11/1 was authoritative enough to fill the gap left by the absence of a Security Council's determination under Article 39 UN Charter. At the same time, resolution ES-11/1 provides further evidence of the entitlement of the Assembly, as an organ representing "the collective conscience of humankind",[50] to declare that a breach of a norm protecting the fundamental interests of international community (i.e., the norm outlawing acts of aggression) has occurred. Needless to say, this conclusion overcomes the legal subtleties surrounding the "constitutionality" of the "Uniting for Peace" procedure.

The preceding remarks concern the possibility for the General Assembly to provide some sort of objective determination of the situation in which an act of aggression has been committed. Quite another issue is the role of the General Assembly in defining the *legal consequences* arising from the aggression. A step in that direction was apparently made by the Assembly with resolution ES-11/4, declaring that the unlawful actions of Russia with regard to the referenda held in the regions of Donbass under its military control, and the subsequent attempted illegal annexation of these regions, "have no validity under international law".[51] The preamble of the resolution clarifies that the above declaration flows from "the principle of customary international law [...] that no territorial acquisition resulting from the threat or use of force shall be regarded as legal" and that, in the case at hand, the specific source of illegality lies in the fact that the contended regions "are or have been under the temporary military control of the Russian Federation, as a result of aggression".[52] Accordingly, the call in resolution ES-11/4 to all States and international organizations "not to recognize

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[47] See Peremptory norms of general international law (*jus cogens*). Comments and observations received from Governments, UN doc. A/CN.4/748, 9 March 2022, in particular the comments to draft conclusion 19 made by Israel (pp. 85-86), the United Kingdom (p. 89) and the United States (pp. 89-90).

[48] *Ibid.*, the comments by the Netherlands, p. 87; in a similar vein, see also the comments by Japan (*ibid.*).

[49] *Ibid.*, pp. 73-74, note 250. For the argument that one way by which States can fulfil their obligation to cooperate to put to an end serious breaches of peremptory norms is to use the General Assembly for condemning such serious breaches, see Barber, "Cooperating though the General Assembly to End Serious Breaches of Peremptory Norms", ICLQ, 2022, p. 1 ff., pp. 25-28.

[50] See the expression aptly used in its opening statement by the President of the 11th special emergency session of the General Assembly, UN Doc. A/ES-11/PV.1, 28 February 2022, p. 3.

[51] GA Res. A-ES-11/4 cit., operative para. 3.

[52] *Ibid.*, preambular paras. 2 and 4.

any alteration by the Russian Federation of the status of any or all of the [...] regions of Ukraine, and to refrain from any action or dealings that might be interpreted as recognizing any such altered status"[53] represents nothing more that the application of the legal consequences ordinarily attached under customary international law to serious breaches of obligations protecting fundamental interests of the international community of States.[54] This simple observation may explain why the action of the General Assembly at this juncture was uncontroversial, with resolution ES-11/4 obtaining a huge support of 143 positive votes – a score even higher than that accompanying the previous determination of the Russian aggression against Ukraine.

By contrast, subsequent resolution ES-11/5, dealing with the issue of remedy and reparation for the aggression against Ukraine, proved problematic. With a particularly strong language, this resolution recognizes

> that the Russian Federation must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations, [...] and that it must bear the legal consequences of all its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts.[55]

As a concrete action, the General Assembly recommended the creation by member States, in cooperation with Ukraine,

> of an international register of damage to serve as a record, in documentary form, of evidence and claims information on damage, loss or injury to all natural and legal persons concerned, as well as the State of Ukraine, caused by internationally wrongful acts of the Russian Federation in or against Ukraine, as well as to promote and coordinate evidence-gathering.[56]

At the relevant meetings several delegations criticized this resolution as an unprecedented action, going beyond the mandate and responsibilities of the General Assembly. In an unusually blunt statement made before the vote, the representative of China was prominent in underscoring that the General Assembly was overstepping the role previously played in the context of the Ukrainian crisis:

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[53] *Ibid.*, operative para. 4.

[54] Art. 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted by the UN International Law Commission in 2001 and endorsed by the General Assembly Res. 56/83 of 12 December 2001 (UN Doc. A/RES/56/83, 28 January 2002, Annex, p. 9). See generally DAWIDOWICZ, "The Obligation of Non-Recognition of an Unlawful Situation", in CRAWFORD et al. (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 677 ff.

[55] GA Res. ES-11/5, *cit. supra* note 35, operative para. 2.

[56] *Ibid.*, operative para. 4.

> the draft resolution seeks to address the issue of international legal responsibility directly through the General Assembly, thereby overstepping the Assembly's authority. The Charter of the United Nations clearly stipulates the mandates of the principal organs of the United Nations. The General Assembly is not an international judicial body and therefore has no right to legally define or assign accountability for internationally wrongful acts. The resolutions previously adopted at the eleventh emergency special session do not constitute solid legal basis for remedy and reparation.[57]

Notably, this statement did not call into question the legality of the previous action undertaken by the General Assembly under the "Uniting for Peace" procedure, and especially the determination that an aggression against Ukraine had been accomplished. Rather, it was intended to censure the assumption by the Assembly of functions of a judicial or quasi-judicial nature, concerning the determination, under the law of State responsibility, of the legal consequences arising from an internationally wrongful act. It is evident that this assertion goes beyond the issue of the separation of powers between the main political organs of the UN, as it could be equally applied to the General Assembly and the Security Council itself.[58]

What is remarkable is the immediate political effect that resolution ES-11/5 has determined within the General Assembly. In fact, the wide majority of more than 140 States that sustained the previous resolutions concerning aggression against Ukraine and the invalidity of referenda in Donbass drastically dropped, being reduced to little more than 90 votes. It would take several months (and a far more innocuous text) for the General Assembly to recover from that divisive outcome. The threshold of 140 votes endorsing the Assembly's action has been re-established only in March 2023 with the adoption resolution ES-11/6. In this text, the General Assembly very timidly called upon States and international organizations "to redouble support for diplomatic efforts to achieve a comprehensive, just and lasting peace in Ukraine, consistent with the Charter".[59]

3.2. From "Uniting for Peace" to "standing mandate"

Beyond the lights and shadows surrounding the action of the General Assembly, it is indisputable that the resolutions just reviewed, as well as the debates bringing to their adoption, had the merit of revitalizing the old and controversial mechanism of the "Uniting for Peace" resolution. This is far from being irrelevant, especially if one

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[57] UN Doc. A/ES-11/PV.15, *cit. supra* note 35, pp. 19-20. See also the critical remarks in the same sense expressed by Eritrea on behalf of a group of 16 like-minded States (*ibid.*, p. 6); South Africa (*ibid.*, p. 22); Venezuela (*ibid.*, p. 29). Brazil, also abstaining from the vote, pointed out that by recommending the mechanism provided under Res. ES-11/5 "the General Assembly encourages the fragmentation of our collective responsibility in promoting peace" (*cit. supra* note 35, p. 2).

[58] See Arangio-Ruiz, "On the Security Council's Law Making", RDI, 2000, p. 609 ff.

[59] Res. ES-11/6, *cit. supra* note 36, operative para. 3.

considers that also very recently the usefulness of the "Uniting for Peace" resolution has been put into question, by pointing out that the decision to have recourse to its terms and procedure responds more to a policy choice than to a matter of substance.[60] However, the high hopes and appreciation that have accompanied the convening of the 11th emergency special session of the General Assembly confirms the impact that the "Uniting for Peace" mechanism may have on the law and procedure of the United Nations, as well as the practice of its member States.[61]

A manifestation of this impact can be detected in the unequivocal condemnation of the veto cast by Russia in the Security Council, which was almost unanimously expressed by delegates in the early meetings of the 11th emergency special session. In this context, not only the Russian veto was plainly qualified as unacceptable or abusive,[62] but also more general issues, such as the responsible use of veto by permanent members[63] and the appropriateness of the veto system in the Security Council to govern world peace,[64] were evoked. In all likelihood, the debates occasioned by the Ukrainian crisis fuelled the adoption by the plenary of the General Assembly, convened in its ordinary session on 26 April 2022, of a text that had been previously under negotiation for over two years, namely, resolution 76/262 entitled "Standing mandate for a General Assembly debate when a veto is cast in the Security Council". According to the operative part of this resolution, the General Assembly

> *Decides* that the President of the General Assembly shall convene a formal meeting of the General Assembly within 10 working days of the casting of a veto by one or more permanent members of the Security Council, to hold a debate on the situation as to which the veto was cast, *provided that the Assembly does not meet in an emergency special session on the same situation*.[65]

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[60] JOHNSON, "'Uniting for Peace': Does It Still Serve any Useful Purpose?", AJIL Unbound, 2014, p. 106 ff., especially pp. 108 and 115. See also the response by TALMON, "The Legalizing and Legitimizing Effect of UN General Assembly Resolutions", AJIL Unbound, 2014, p. 123 ff.

[61] In the early meetings of the emergency special session many State delegates underscored the exceptionality of this event, holding that it was the first time in 40 years that the provisions of the "Uniting for Peace" resolution had been evoked: see for example the statements of the representative of Bulgaria, UN Doc. A/ES-11/PV.1, *cit. supra* note 50, p. 23, and Bhutan, UN Doc. A/ES-11/PV.5, *cit. supra* note 31, p. 3.

[62] See for example the statements of the representative of Denmark, speaking on behalf of eight Nordic-Baltic Countries (UN Doc. ES-11/PV.1, *cit. supra* note 50, p. 14) and of Slovakia (UN Doc. A/ES-11/PV.2, 28 February 2022, p. 2).

[63] See in particular the statement by the representative of Mexico, UN Doc. A/ES-11/PV.2, *cit. supra* note 62, p. 11.

[64] See for example the statements by the representatives of Austria (UN Doc. A/ES-11/PV.1, *cit. supra* note 50, p. 17) and Kenya (UN Doc. A/ES-11/PV.2, *cit. supra* note 62, p. 12), with the latter delegate evoking the broader issue of Security Council reform.

[65] GA Res. 76/262, 26 April 2022, operative para. 1, emphasis added. Furthermore, under operative para. 3 of the resolution, the Assembly "invites the Security Council, in accordance with Article 24(3) of the Charter of the United Nations, to submit a special report on the use of veto in question to the General Assembly at least 72 hours before the relevant discussion in the Assembly".

The resolution was adopted without a vote,[66] even if some delegations expressed their dissatisfaction.[67] Apart from sporadic criticisms, most of the delegates hailed the text as a major achievement and a way to enhance transparency and accountability in the decision-making process of the Security Council. Unsurprisingly, some also viewed the new procedure introduced by resolution 76/262 (hereinafter "standing mandate procedure") as an occasion for revitalizing the deadlocked question of Security Council reform.[68]

If considered for its potential contribution to transparency and accountability, the new standing mandate procedure is certainly commendable. Perplexity may arise if one gives a closer look to its relationship with the "Uniting for Peace" procedure. As pointed out by its proponents, the intent of the standing mandate procedure is not to substitute "Uniting for Peace", but to complement it.[69] This is made clear by the last sentence of the first operative paragraph of resolution 76/262, which sets aside the standing mandate procedure when the General Assembly is already convened in an emergency special session on the same question. However, one cannot fail to note that the scope of the standing mandate procedure and that of the "Uniting for Peace" procedure are far from equivalent.

Under the standing mandate procedure, the General Assembly can question permanent members' reasons for having vetoed a Security Council draft resolution and hold a general debate on the issue. This was exactly the course of action taken when, on 26 May 2022, a draft resolution on non-proliferation of nuclear weapons and the Democratic People's Republic of Korea was blocked in the Security Council by the veto of two permanent members (China and Russia).[70] After a special report submitted by the Presidency of the Security Council on the matter,[71] the standing mandate procedure was triggered and the General Assembly convened under the agenda item "Strengthening of the United Nations System". A debate followed in the Assembly, without however any official document being issued or other action taken.[72]

The outcome may be very different when the General Assembly is convened under the "Uniting for Peace" procedure. According to resolution 377 (V), the Assembly is entitled "to consider the matter immediately with a view to making appropriate

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[66] UN Doc. A/76/PV.69, 26 April 2022, pp. 7-8.

[67] For Russia, the resolution was an attempt to create an instrument of pressure on the permanent members of the Security Council (*ibid.*, p. 15). See also the critical remarks by Brazil (holding that the resolution had not been "properly discussed", *ibid.*, pp. 6-7), India (holding that the provisions of the resolution "tend to relitigate the provisions of the Charter of the United Nations", *ibid.*, pp. 9-10) and China (maintaining that the new procedure would be "likely to cause procedural confusion and inconsistency", *ibid.*, pp. 8-9).

[68] See for example the remarks of the representatives of Colombia (*ibid.*, p. 16), Luxembourg (*ibid.*, p. 18), Mexico (*ibid.*, pp. 20-21), Canada (*ibid.*, pp. 22-23).

[69] See for example the statement of the representative of Japan (*ibid.*, p. 23).

[70] See UN Doc. S/2022/431, 26 May 2022, for the text of the vetoed draft resolution and UN Doc. S/PV.9048, 26 May 2022, for the relevant debates in the Security Council.

[71] UN Doc. A/76/853, 3 June 2022. The special report is very succinct, as it merely reproduces the result of the vote in the Security Council on the (vetoed) draft resolution.

[72] See the relevant summary records in UN Doc. A/76/PV.77, 8 June 2022 and UN Doc. A/76/78, 7 June 2022.

recommendations to Members for collective measures".[73] Although the latter has been a somewhat exceptional outcome for the "Uniting for Peace" procedure,[74] it is evident that it involves much more than mere discussion. It is then evident that if the standing mandate procedure is used *in lieu* of the "Uniting for Peace", the room for the General Assembly to intervene in a situation supposed to endanger peace and security is drastically curtailed.

The risk that recourse to the standing mandate procedure may end in watering down the action of the General Assembly is suggested by the statement made by the United States before the Security Council, in the context of the (apparently unrelated) debate held in June 2022 under the agenda item "Working methods of the Security Council". Referring in general to the subject of veto, the United States' representative welcomed as "innovative" the procedure introduced with resolution 76/262. He appreciated "the smooth implementation of resolution 76/262" in the above-mentioned case of the vetoed resolution on the Democratic People's Republic of Korea, and then added:

> The General Assembly meeting provided an opportunity for those casting a veto to explain themselves and for the States Members of the United Nations to react to the veto. We noted that almost 80 Member States participated in the debate. We also observed that the convening of a General Assembly meeting does not necessarily mean that the General Assembly *needs to adopt a resolution on the subject of the vetoed draft resolution*. All in all, resolution 76/262 demonstrated a healthy balance between the Security Council and the General Assembly.[75]

Notwithstanding the suggestions above, nothing prevents the new standing mandate procedure from being used to enhance, rather than weaken, the functioning of the venerable "Uniting for Peace" mechanism. This may happen, for example, with regard to the preliminary conditions required under the "Uniting for Peace" for convening an emergency special session of the General Assembly. Indeed, many scholars argue that the mere fact that a veto has been cast in the Security Council is not sufficient for triggering the "Uniting for Peace" procedure.[76] The terms of the "Uniting for Peace" resolution would instead require a further, objective determina-

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[73] Res. 377 (V), *cit. supra* note 30, section A, para. 1.

[74] GA Res. 500 (V), "Additional measures to be employed to meet the aggression in Korea", 18 May 1951, para. 1(a)-(c), recommending to apply an embargo on the shipment of weapons to areas under the control of the Central People's Government of the People's Republic of China and of the North Korean authorities. This resolution, albeit not formally adopted in the framework of an emergency special session of the General Assembly, was however premised on the logic of the "Uniting for Peace" procedure.

[75] UN Doc. S/PV.9079, *cit. supra* note 27, p. 10, emphasis added.

[76] To this effect, it is submitted that the exercise of veto by permanent members is not per se illegal and does not necessarily connotes a Security Council's failure: see RAMSDEN, *cit. supra* note 41, pp. 5-7; CARSWELL, *cit. supra* note 41, p. 469; BARBER, "Uniting for Peace Not Aggression: Responding to Chemical Weapons in Syria Without Breaking the Law", Journal of Conflict and Security Law, 2019, p. 71 ff., pp. 105-106.

tion: namely that "because of the lack of unanimity of the permanent members" the Security Council has failed "to exercise its primary responsibility for the maintenance of international peace and security" in a case where that action was needed. This objective assessment can be provided by the Security Council itself when (as in the case of the Ukrainian conflict) this body decides to call for an emergency special session of the General Assembly.[77] However, the same assessment can prove to be more problematic where a specific determination by the Security Council is lacking and the initiative to call the emergency special session is left to a majority of the members of the United Nations. In this case, a discussion of the circumstances in which a veto was cast, carried out within the General Assembly convened under the new standing mandate procedure, could pave the way for the support by members which is necessary to trigger the "Uniting for Peace" procedure.

Only future practice will tell whether the two mechanisms are implemented in a logic of genuine complementarity. For the present purposes, the case can be made that the conflict in Ukraine has confirmed the vitality of the "Uniting for Peace" in the law of the United Nations, as well as the critical role played by the General Assembly when the Security Council is deadlocked.

4. The International Court of Justice: Contributing to the UN System of Collective Security

On 26 February 2022, in the aftermath of the launching of the Russian "special military operation", Ukraine filed with the Registry of the ICJ an application against the Russian Federation on the basis of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[78] The dispute concerns allegations by Russia that acts of genocide have occurred in certain Russophone's areas of Donbass and the claim that the special military operation against Ukraine was meant to prevent such a genocide. Ukraine asked the Court to declare that, contrary to Russian allegations, no genocide had been committed by Ukraine and that the Russian military operation had no legal basis in the Genocide Convention. Contextually, Ukraine also submitted an urgent request of indication of provisional measures under Article 41 of the ICJ Statute aimed at ordering the immediate suspension of Russian military operations.[79]

The ICJ issued its order on provisional measures on 16 March 2022.[80] Regretting the decision of Russia not to appear before it,[81] the Court affirmed its *prima facie* ju-

[77] See *supra* notes 10 and 43 with the accompanying text.

[78] The text of the Ukrainian application is available at: <www.icj-cij.org/sites/default/files/case-related/182/182-20220227-APP-01-00-EN.pdf>.

[79] The text of the Ukrainian request for the indication of provisional measures is available at: <www.icj-cij.org/sites/default/files/case-related/182/182-20220227-WRI-01-00-EN.pdf>.

[80] See ICJ, *Allegations of Genocide under the Genocide Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*), Request for the indication of provisional measures, Order of 16 March 2022.

[81] See *ibid.*, paras. 20-22. On 7 March 2022, the Russian Federation filed with the Registry of the Court a document setting out its position regarding the alleged lack of jurisdiction of the Court,

risdiction under Article IX of the Genocide Convention[82] and found that Ukraine had a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine.[83] Then, by 13 votes to two, the Court determined that Russia had to immediately suspend the military operations commenced on 24 February 2022 and ensure that armed units directed or supported by Russia take no steps in furtherance of these military operations; and, unanimously, that both parties had to refrain from any action which might have aggravated or extended the dispute.[84]

For the present purposes, the Order of 16 March 2022 is interesting for its contribution to the clarification of the attitude of the ICJ in respect of disputes involving the use of force between States, as well as for the role the Court may play in the UN system of collective security. As to the broader issue, it is a fact that since the 1986 *Nicaragua* case, the number of cases involving the use of force brought before the Court has grown remarkably. In a landmark study on the topic dated 2003, Christine Gray recalled that 16 out of the 25 cases forming the docket of the Court at the time related to disputes directly or indirectly involving questions of use of force.[85] Twenty years after, the record is less impressive, as among the 16 cases currently pending before the Court only 4 bear on issues of use of force.[86] On the other hand, a significant feature of these disputes is that they have been brought before the Court on the basis of jurisdictional clauses included in instruments (e.g., the Convention for the Suppression of the Financing of Terrorism, the Convention on the Elimination

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asking the Court not to indicate provisional measures and to remove the case from the list: the text is available at: <www.icj-cij.org/sites/default/files/case-related/182/182-20220307-OTH-01-00-EN.pdf>.

[82] ICJ, Order of 16 March 2022, *cit. supra* note 80, para. 48 and paras. 24-47 for the reasoning supporting this conclusion.

[83] *Ibid.*, para. 60 for this conclusion and paras. 56-59 for the reasoning in support thereto.

[84] *Ibid.*, para. 86. In his declaration, Judge ad hoc Daudet regretted this conclusion of the Order, contending that the measure of non-aggravation of the dispute should have been directed solely at Russia, in view of the fact that Russia is designated by the General Assembly as the perpetrator of aggression against Ukraine and it is the party responsible for the aggravation of the conflict (see Declaration of Judge ad hoc Daudet, paras. 1-7). This conclusion in the Ukraine/Russia case does not seem at variance with the ICJ's practice and with the discretion the Court enjoys in indicating non-aggravation measures especially in cases involving the risk of military escalation. As it has been appropriately noted, in the latter situations general non-aggravation measures lay at the borderline with the function of preserving international peace and security, and their indication by the Court can represent a way out from the impasse when no action is taken by the Security Council due to the veto exercised by permanent members, see Oellers-Frahm and Zimmermann, "Article 41", in Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed., Oxford, 2019, p. 1135 ff., pp. 1147-1148.

[85] Gray, "The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after *Nicaragua*", EJIL, 2003, p. 867 ff.

[86] Namely, the two cases between Ukraine and Russia concerning *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (<www.icj-cij.org/case/166>) and *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (<www.icj-cij.org/case/182>); and the two separate yet parallel cases involving Armenia and Azerbaijan over the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (<www.icj-cij.org/case/180> and <www.icj-cij.org/case/181>).

of Racial Discrimination, or the Genocide Convention) dealing with subject-matters that are apparently fairly remote from the use of force. This may confirm that States continue to look at the Court as the appropriate forum for adjudicating vital legal issues arising from recourse to force in international relations.[87]

An important yardstick to understand the attitude of the Court in respect of these issues can be provided by incidental proceedings concerning provisional measures. Indeed, it is very frequent that, when litigating questions of use of force before the ICJ, the parties as a first step require the indication of provisional measures under Article 41 of the ICJ Statute. In answering to these requests, the Court has displayed a special rigour in the assessment of a crucial requirement for the exercise of its power to indicate provisional measures, namely, the existence of *prima facie* jurisdiction. This may be explained by an intent to avoid that incidental proceedings on provisional measures become a shortcut for circumventing the principle of the consent of the Parties which lies at the basis of the ICJ jurisdiction.[88]

At the same time, the Court has paid special attention to the requirement of urgency which, notably in cases involving the use of force, may render the indication of provisional measures compelling for the protection of the rights of the Parties to the dispute.[89] Case law provides at least one exceptional example of proceedings in which, after the indication of provisional measures in urgent situations marked by massive recourse to armed force, the ICJ has finally denied to have jurisdiction on the case.[90] In this vein, one may also record the separate or dissenting opinions of individual judges of the Court who have defended the opportunity that the requirement of *prima facie* jurisdiction at the stage of indication of provisional measures be evaluated more flexibly in cases involving the use of force.[91]

These elements show that a tension exists as to the special role that the Court may play in respect of disputes over the use of force: when such issues are at stake, the expectation could be very high that the Court, especially through the indication of provisional measures, fill the gap left by the missing action of UN political organs.[92]

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[87] This conclusion seems confirmed by the fact that, out of 73 States having accepted the optional clause under Art. 36(2) of the ICJ Statute, only eight (Djibouti, Greece, Honduras, Hungary, India, Nigeria, Pakistan and Romania) have made a reservation excluding the jurisdiction of the Court over disputes relating to armed conflicts or the use of force: see Multilateral Treaties Deposited with the Secretary General, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&clang=_en>.

[88] See Bonafé, "ICJ Jurisdiction in Incidental Proceedings", RDI, 2021, p. 67 ff., pp. 90-96.

[89] See for example the order on provisional measures rendered by the ICJ on 18 July 2011 in *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*), ICJ Reports 2011, p. 537 ff., especially para. 61.

[90] See the order on provisional measures of 15 October 2008 in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*), ICJ Reports 2008, p. 353 ff., and the subsequent judgment on preliminary objections of 1 April 2011, ICJ Reports 2011, p. 70 ff.

[91] See for example the declaration of Judge Elaraby appended to the order on provisional measures of 10 July 2002 in *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v. Rwanda*), ICJ Reports 2002, p. 219 ff., pp. 260-262.

[92] See Gray, *cit. supra* note 85, pp. 889-892 and 904.

These tensions have resurfaced in the context of the order on provisional measures made by the ICJ in *Allegations of Genocide*. At the very outset, the Court affirmed to be "acutely aware of the extent of human tragedy that is taking place in Ukraine and is deeply concerned about the continuing loss of life and human suffering" as well as "profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious questions of international law".[93] Whatever legal effect may be attributed to these expressions of concern,[94] their impact appears to be decisive in the reasoning that brought the Court to conclude that, in the case at hand, the indication of provisional measures was justified as a matter of urgency.[95] One cannot exclude that the gravity of the conflict has also been influential in the rather generous interpretation of the scope of the Genocide Convention, which allowed the Court to affirm its *prima facie* jurisdiction and to deem "plausible" the right of Ukraine under the same Convention not to be subject to any military operation.[96]

These conclusions may also be explained in light of the Court's awareness of the institutional role that it is playing in the UN system of collective security.[97] The Court explicitly referred to this role in the introductory part of the order of 16 March 2002, where it proclaimed to be "mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of international peace and security *as well as in the peaceful settlement of disputes under the Charter and the Statute of the Court*".[98] To be sure, similar statements can be found in previous orders on provisional measures made by the ICJ in cases involving the use of force.[99] However, the italicized words in the foregoing quotation reveal that the Court remains attached to its function of a judicial body entrusted with the peaceful settlement of international disputes under its Statute. Perhaps to emphasize the Court's concern, the subsequent paragraph of the order recalled that the ongoing conflict had been addressed in the framework of several international institutions, in particular by the General Assembly through the adoption of resolution ES-11/1, "referring to

[93] See Order of 16 March 2022, *cit. supra* note 80, paras. 17 and 18.

[94] See D'Aspremont, "The Recommendations Made by the International Court of Justice", ICLQ, 2007, p. 185 ff., pp. 188-191.

[95] Order of 16 March 2022, *cit. supra* note 80, para. 77 and para. 74, where the Court, in assessing whether there was a risk of irreparable prejudice to the rights at stake, underscored that "any military operation, in particular one of the scale carried out by the Russian Federation on the territory of Ukraine, inevitably causes loss of life, mental and bodily harm, and damage to the property and the environment".

[96] See *supra*, text accompanying notes 78-79. See also Order of 16 March 2022, *cit. supra* note 80, para. 59, where the Court opines that "it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide".

[97] Forlati, "Il ruolo della funzione giudiziaria internazionale nel conflitto armato in Ucraina: l'ordinanza della Corte internazionale di giustizia sulle misure cautelari", RDI, 2022, p. 533 ff., pp. 536-537; Id., "The Judicial Activity of the International Court of Justice in 2021", IYIL, 2021, p. 337 ff., pp. 351-353.

[98] Order of 16 March 2022, *cit. supra* note 80, para. 18 (emphasis added).

[99] See the orders on provisional measures made in the cases involving the former Federal Republic of Yugoslavia and different NATO members States over the *Legality of Use of Force*, for example, see *Case concerning the Legality of Use of Force* (*Yugoslavia v. Belgium*), Request for the indication of provisional measures, Order of 2 June 1999, ICJ Reports 1999, p. 132 ff., para. 18.

many aspects of the conflict"; but an immediate *mise au point* followed to the effect that "[t]he present case before the Court, however, is limited in scope" as Ukraine had instituted proceedings only under the Genocide Convention.[100]

In sum, one may conclude that, even if its role has been severely challenged by the current conflict in Ukraine, the ICJ has demonstrated readiness to assume and discharge its responsibilities as an integral component of the UN system of collective security. At the same time, as the risk remains high for it being "used and abused" in the context of disputes involving the use of force, there can be no wonder that the Court has exercised those responsibilities with great circumspection, so to act within the limits of its mandate and jurisdiction. At the end of the day, it must not be forgotten that the ICJ has been the only UN organ able to issue a binding decision ordering to stop the use of armed force in Ukraine. In the present circumstances, this is the most one may expect from the "principal judicial organ" of the UN.

5. Concluding Remarks

Similarly to the major crisis involving the use of force which have troubled the international community in the last decades (Kosovo, Afghanistan, Iraq, Libya, Syria and so on), in the case of the conflict in Ukraine one is left with the same, critical question: what can the United Nations (with their system of collective security) do to stop the fighting? What in the present case adds disillusion to discomfort is the realization that especially the principal political organs of the UN appear to have exhausted any room for action. The paralyzing effect of the veto mechanism has affected the Security Council beyond any reasonable expectation, up to the point that this organ currently looks entrapped in a pure Cold War logic, being unable even to decently manage its own procedure. The high hopes raised by the convening of the 11th emergency special session of the General Assembly have also turned into disenchantment, after the adoption of some declaratory resolutions which, however important as a matter of principle, fell short of producing any substantive effect.

In fact, the main drawback of the UN system of collective security in the case at hand has been the failure of political organs to coordinate and organize any meaningful collective reaction to counter the Russian aggression. As a result, the most meaningful responses to the aggression have been shaped outside the UN system, and consisted in the adoption of economic sanctions against Russia by individual States or group of States (mainly Western);[101] or in the supply of logistic assistance and military materials to Ukraine by the same "third" States.[102] Unsurprisingly, as the legal basis of such unilateral and non-institutional reactions remains debatable (also) from the

[100] Order of 16 March 2022, *cit. supra* note 80, para. 19.

[101] See "Contemporary Practice of the United States Relating to International Law – United States and Allies Target Russia and Belarus with Sanctions and Other Economic Measures", AJIL, 2022, p. 614 ff.

[102] See "Contemporary Practice of the United States relating to International Law – The United States and Allies Provide Military and Intelligence Support to Ukraine", AJIL, 2022, p. 646 ff.

standpoint of general international law,[103] their implications have proved to be no less divisive than the initiatives attempted within the United Nations in the eyes of the international community.

Against this demoralizing background, one may try and find a glimpse of hope by looking at the handling of the issue by the ICJ. It is true that the Court's order on provisional measures in *Allegations of Genocide* has been starkly ignored by Russia. However, it can perhaps be comforting to see the same order referred to in the preamble of the latest General Assembly resolution as one of the indispensable yardsticks upon which a "comprehensive, just and lasting peace in Ukraine" must be grounded.[104] Beyond the admittedly limited practical effect of this order, further positive news is announced by the developments of the proceedings before the Court. Thirty-two declarations of intervention under Article 63(2) of the ICJ Statute have been filed by third States interested in the interpretation of the Genocide Convention which is at stake before the Court.[105] Notably, a number of intervening States have expressed their willingness to assist the Court in grouping their respective interventions with other similar interventions from other States for future stages of the proceedings.[106] Eventually, we are left in a rather paradoxical situation, where the collective responses to an act challenging the common interest of all UN members are being articulated in the strictly bilateral context of an interstate dispute.

Some final words can be added concerning a ghost that has haunted almost all the debates on the Ukrainian crisis within the UN, namely, that of the reform of the Security Council. If there is a lesson to be learned from the current conflict, it is that such a reform cannot be procrastinated over any longer. A small, yet significant, signal of this urgency has been the introduction of a standing mandate for a General Assembly debate when a veto is cast in the Security Council. This is however just a piece of a much larger puzzle, involving the respective contributions of the principal UN organs in the functioning of the UN system of collective security. The crisis in Ukraine has demonstrated that the interactions between the principal organs in a vital case concerning the maintenance of international peace and security may go well beyond the close relationship between the Security Council and the General Assembly, and that also the ICJ has a substantial part to play. It is therefore a pity that not all the implications of the relationship between the political and judicial organs

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[103] See the contributions by Gestri as well as by Bartolini and Pertile in this Volume; Lim and Martínez Mitchell, "Neutral Rights and Collective Countermeasures for *Erga Omnes* Violations", ICLQ, 2023, p. 361 ff.; Clancy, "Neutral Arms Transfers and the Russian Invasion of Ukraine", ICLQ, 2023, p. 527 ff.

[104] Res. ES-11/6, *cit. supra* note 36, sixth preambular para.

[105] See <https://www.icj-cij.org/case/182/intervention>. In its order of 5 June 2023, the ICJ has declared as admissible thirty-one declarations of intervention, the only exception being that submitted by the United States: see <https://www.icj-cij.org/sites/default/files/case-related/182/182-20230605-ORD-01-00-EN.pdf>. On the topic, see generally, Bonafé, "The Collective Dimension of Bilateral Litigation: The *Ukraine v. Russia* case before the ICJ", QIL, Zoom-out 96, 2022, p. 27 ff.

[106] See for example the declarations of intervention by Germany, Sweden, Poland, Denmark, Austria, Czech Republic, Bulgaria, and Norway.

have been fully explored in the case at hand.[107] It is interesting to note that one of the most quoted UN documents on collective security issued at the dawn of the present millennium, the Report of the High-Level Panel on Threats, Challenges and Change, was premised on the statement that "[c]ollective security institutions are rarely effective in isolation".[108] Ironically, in the more than 100 pages of the document, the ICJ was incidentally mentioned just once,[109] few paragraphs were organically devoted to the General Assembly,[110] while most of the attention focused on the Security Council and the proposals for its reform.[111] Everybody knows that such proposals have met with little success in the following years. In order to avoid a further deadlock in the process, it is to be hoped that relevant discussions will be pursued but extended beyond the functioning of the Security Council, so as to address the role of all the main institutional players of the system of collective security, including its judicial branch.

[107] For example, one may wonder about the possibility to explore ways, grounded in or alternative to Art. 94 UN Charter, to bring the case of non-compliance by Russia with the "obligations" arising from the ICJ's Order of 16 March 2023 before the UN political organs. See generally, Tams, "Article 94 UN Charter", in Zimmermann et al. (eds.), *cit. supra* note 84, p. 234 ff., pp. 239-242 and 252-257.

[108] See "A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change", UN doc. A/59/565, 2 December 2004, p. 22, para. 33.

[109] *Ibid.*, p. 18, para. 11.

[110] *Ibid.*, p. 65, paras. 240-243.

[111] *Ibid.*, in particular pp. 66-69, paras. 244-260.