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THE WAR IN UKRAINE AND THE INTERNATIONAL LEGAL ORDER: WHAT COMES AFTER THE BLUES?

1. Introduction

For any legal scholar, writing about the war in Ukraine cannot be but a source of frustration. There are some self-evident reasons for this. On the one hand, one of the basic pillars of the international legal order, i.e., the prohibition of the unilateral use of force in international relations set forth in Article 2(4) of the Charter of the United Nations (UN) (and in the parallel rule of customary international law[1]), has been severely challenged by the Russian "special military operation" of 24 February 2022. On the other hand, the reaction of the international community to this challenge has not only been controversial but also largely ineffective – and continues to be so after more than one year of ongoing devastation in Ukraine. This is especially true if one looks at the response attempted in the context of the UN collective security system. The UN body charged with the main responsibility for the maintenance of international peace, the Security Council (SC), has been deadlocked from the very beginning of the crisis, with two draft resolutions defeated by the veto of Russia.[2] The General Assembly (GA), soon convened in its eleventh emergency

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1 See ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), Judgment of 27 June 1986, *ICJ Reports 1986*, p. 14, pp. 99–100, paras. 188–190.

2 See UN doc. S/2022/155 (25 February 2022), containing the text of a draft resolution deploring the Russian aggression against Ukraine, which received 11 votes in favor, 1 against (Russia) and 3 abstentions, UN doc. S/PV.8979 (25 February 2022), p. 6; and UN doc. S/2022/720 (30 September 2022), containing the text of draft resolution declaring the invalidity of the referenda organized in the Ukrainian regions under Russian occupation, which received 10 votes in favor, 1 against (Russian Federation) and 4 abstentions, UN doc. S/PV.9143 (30 September 2022), p. 4. Both texts failed to be adopted owing to the negative vote of a permanent member, under the rule of Art. 27, para. 3 UN Charter.

special session under the "Uniting for Peace" procedure, has managed to adopt six resolutions on the issue.[3] But, after a first strong response entailing the qualification of Russia's military operation as an aggression,[4] the overall reaction by the GA has proved mainly vocal, and that body has recommended no effective collective measures to contain or counter the denounced aggression. The only UN body able to issue a binding order has been 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.[5] But Russia has refused to participate in the proceedings and has patently ignored the Court's order on provisional measures demanding the immediate suspension of military operations.

So far, the most evident reactions to the Russian military initiative have taken shape outside the UN system. They have consisted in the supply by individual States or a group of States of logistic assistance and military materials to Ukraine;[6] or in adoption by the same "third" States of economic sanctions against Russia.[7] As the legal basis of such non-institutional reactions remains debatable from the standpoint of general international law, their impact within the international community has proved to be no less divisive than the initiatives attempted within the UN.

The present editorial is intended to provide a brief overview of the main legal questions arising from the use of force by Russia against Ukraine and from the reactions articulated within the international community.

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3 See UNGA Resolution ES-11/1, Aggression against Ukraine, UN doc. A/RES/ES-11/1 (2 March 2022); UNGA Resolution ES-11/2, Humanitarian consequences of the aggression against Ukraine, UN doc. A/RES/ES-11/2 (24 March 2022); UNGA Resolution ES-11/3, Suspension of the rights of membership of the Russian Federation in the Human Rights Council, UN doc. A/RES/ES-11/3 (7 April 2022); UNGA Res. ES-11/4, Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations, UN doc. A/RES/ES-11/4 (12 October 2022); UNGA Resolution ES-11/5, Furtherance of remedy and reparation for aggression against Ukraine, UN doc. A/RES/ES-11/5 (4 November 2022); UNGA Resolution ES-11/6, Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace for Ukraine, UN doc. A/RES/ES-11/6 (23 February 2023).

4 UNGA Resolution ES-11/1, operative para. 2.

5 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 (http://www.icj-cij.org/sites/default/files/case-related/182/182–20220316-ORD-01-00-EN.pdf, 19. 05. 2023).

6 See Eichensehr, K.E. (ed.), 2022a, The United States and Allies Provide Military and Intelligence Support to Ukraine, *American Journal of International Law*, Vol. 116, pp. 646–652.

7 See Eichensehr, K. E. (ed.), 2022b, United States and Allies Target Russia and Belarus with Sanctions and Other Economic Measures, *American Journal of International Law*, Vol. 116, pp. 614–631.

2. The Use of Force in Ukraine and the Reactions Thereto Under General International Law

On the very same day that the "special military operation" was launched in Ukraine, Russia forwarded to the UN SC the text of the address by President Vladimir Putin informing it about "the measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence".[8] As aptly noted, the Russian self-defense claim gathers, under the umbrella of Article 51 UN Charter, a combination of "multiple claims", which are drawn from different justifications developed in State practice over the past decades concerning the use of force.[9] First, a genuine self-defense claim builds upon the "expansion of the North Atlantic Treaty Organization (NATO) bloc to the east and the advance of its military infrastructure ever closer to Russia's borders", which is perceived as a "real threat not just to our interests, but to the very existence of our State and its sovereignty".[10] Hence, the argument of "anticipatory self-defense" against a perceived threat to the national vital interest of Russia is at stake here. Second, Russia's declaration calls into play consent for justifying the use of force, by citing the appeal for help coming from the secessionist people's republics in Donbass. This argument is combined with the previous one to become a claim of collective self-defense carried out under the treaties on friendship and mutual assistance concluded by Russia with the two secessionist republics of Donetsk and Lugansk, just days before the launching of the special military operation.[11] Third, there is what, in fact, amounts to the main legal justification for the military intervention in Ukraine, namely the need to save the Russophone people of Donbass from an incumbent genocide planned and executed by the Kyiv authorities.[12]

A complete discussion (and confutation) of the merits of the above justifications is beyond the scope of this note. For the present purposes, it suffices to note that insofar as the qualification of the Russian military operation as aggression is retained,[13] the same justifications appear inevitably doomed to fail. A good reminder is contained in Article 5 of the 1974 definition of aggression, according to which "no consideration of whatever

8 See UN doc. S/2022/154 (24 February 2022).

9 See Green, J. A., Henderson, C., Ruys, T., 2022, Russia's Attack on Ukraine and the *jus ad bellum*, *Journal on the Use of Force and International Law*, Vol. 9, p. 5, pp. 4–30.

10 See UN doc. S/2022/154, pp. 2 and 5.

11 *Ibid*., p. 6.

12 *Ibid*.: "[the] purpose [of the special military operation] is to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years".

13 See UNGA Resolution ES-11/1, operative para. 2 and *infra*, section 2.1.

nature, whether political, economic, military or otherwise, may serve as a justification for aggression".[14] Furthermore, one may only add that the Russian document under review backs the different justifications invoked by focusing mostly on pieces of practice from past – and legally controversial – armed interventions carried out by Western States in Kosovo, Iraq, Libya, and Syria.[15] The impression is that Russia's overall justification strategy is sustained, more than by cogency of the legal reasoning, by an implausible *tu quoque* argument.

By contrast, the legal stance taken by the target of the Russian military operation, *i.e.* Ukraine, is far more straightforward. In many instances, Ukraine has declared itself a victim of aggression by Russia and has claimed its right to defend itself.[16] Curiously enough, however, Ukraine has so far refrained from reporting to the SC the measures adopted in exercising the right to self-defense, thereby ignoring the requirement under Article 51 UN Charter.[17] This fact, especially if considered against the opposite attitude taken by Russia, seems to confirm the suggestion put forward by the ICJ in the *Nicaragua* case, according to which the absence of a report to the SC under Article 51 is one of the relevant factors indicating whether a State in convinced of acting in self-defense,[18] but is not *per se* decisive for qualifying the actions at stake.

Even more challenging is the legal assessment of the different reactions of third States following the outbreak of hostilities in Ukraine. As already outlined, a number of (mainly Western) States, acting individually or in the context of regional organizations (*i.e.*, the European Union), have provided logistical assistance and military materials to Ukraine.[19]

14 See UNGA Resolution 3314 (XXIX), Definition of aggression, UN doc. A/RES/3314 (XXIX) (14 December 1974), Annex, Art. 5.

15 UN doc. S/2022/154, p. 3.

16 See, for example, the statement of the representative of Ukraine at the SC meeting of 25 February 2022 (UN doc. S/PV.8979, p. 16) and the address of the President of Ukraine, Volodymyr Zelenskyy, to the 77th plenary session of the GA on 21 September 2022 (UN doc. A/77/PV.7, Annex I, at 50).

17 Under Art. 51 UN Charter, second sentence, "Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council." The attitude of Ukraine in the present conflict can be compared to the different stance taken in the case of the occupation of Crimea by Russia in 2014. On that occasion, a letter to the President of the SC provided notification of an address by the Ukrainian Parliament declaring that "in accordance with the right of self-defence, acknowledged by the United Nations Charter (Article 51), Ukraine reserves the right to request to the States and the regional collective security systems to assist in restoring its sovereignty, territorial integrity and inviolability." See UN doc. S/2014/186 (13 March 2014), p. 2.

18 See ICJ, *Military and Paramilitary Activities in and against Nicaragua*, p. 105, para. 200.

19 See Eichensehr, K. E. (ed.), 2022a, pp. 646–652.

Interestingly, the third States involved have continuously refrained from qualifying their supply of lethal weapons to Ukraine as an exercise of a *collective right* to self-defense (an option that is also covered under Article 51 UN Charter). Instead, these States have insisted that the supply of armaments is a form of support to the *individual* right of Ukraine to defend itself against Russian aggression.[20] This overly subtle distinction rests on the intent of the States concerned to avoid being considered co-belligerents of Ukraine in the armed conflict with Russia.[21] Accordingly, the same States have precisely eschewed the qualification of their dealings under the category of *ius ad bellum*. They have occasionally preferred to rely on elusive categories inspired by *ius in bello* – such as "non-belligerency"[22] or "qualified neutrality"[23] – to prevent their provision of arms to Ukraine from being classified a breach of the law of neutrality. Should this be correct, it appears that the reluctance of qualifying the provision of military assistance to Ukraine as self-defense is derived not so much from some insurmountable legal hurdle but rather from the material constraint of preventing an escalation of the conflict with Russia.[24] However, how much these legal strategies will prove effective in the long run remains to be seen. This is especially so considering, on one hand, the increasing and currently huge amount of lethal weapons flowing from Western States to Ukraine, and, on the other hand, the

20 These arguments have been put forward especially in different meetings of the SC devoted to the issue of the supply of lethal weapons to Ukraine: see for example the statements of the United States and France in UN doc. S/PV.9127 (8 September 2022), respectively pp. 9 and 18. More recently, similar positions have been taken in the context of the SC meeting devoted to "Risks stemming from violations of the agreements regulating the export of weapons and military equipment", UN doc. S/PV.9301 (10 April 2023), especially the statements of the United States (p. 5), the United Kingdom (p. 7), France (p. 8), and Japan (p. 15). In the latter context, only Poland has openly invoked the concept of collective self-defense to qualify the common endeavor in support of Ukraine (p. 21).

21 See Talmon, S., 2022, The Provision of Arms to the Victim of Armed Aggression: The Case of Ukraine, *Bonn Research Papers on Public International Law*, No. 20/2022, p. 6, (http://ssrn.com/abstract=4077084, 19. 05. 2023).

22 See generally Gioia, A., Neutrality and Non-Belligerency, in: Post, H.H.G. (ed.), 1994, *International Economic Law and Armed Conflict*, Dordrecht, Martinus Nijhoff, pp. 51–110.

23 See Clancy, P., 2023, Neutral Arms Transfers and the Russian Invasion of Ukraine, *International and Comparative Law Quarterly*, Vol. 72, pp. 527–543.

24 See Eichensehr, K.E. (ed.), 2022a, pp. 650–651, reporting on the refusal of the US and its allies to provide certain types of military assistance to Ukraine, and in particular the decision to decline President Zelenskyy's request to establish a no-fly zone over Ukraine, the effect of which – in the words of the White House Press Secretary – "would be escalatory, [and] could prompt a war with Russia."

blunt statements by Russia that Western States are actually fighting a "proxy war" against Russia in Ukraine.[25]

The other major reaction to the use of force by Russia in Ukraine has been the adoption of a bundle of economic sanctions by individual States or group of States, against the aggressor State. The rationale of these economic sanctions must be grounded on the idea of "collective countermeasures", *i.e.* reactions imposed unilaterally by third non-injured States to respond to egregious breaches of peremptory norms and *erga omnes* obligations, rather than on the model of institutional measures adopted by competent UN organs to maintain peace and security.[26] However, the legality of such collective countermeasures in the current stage of development of international law rests on shaky ground.[27] In 2001, at the time of the adoption of the final version of the Articles on Responsibility of States for Internationally Wrongful Acts, the UN International Law Commission refrained from including a provision explicitly recognizing the right of third, non-directly injured States, to adopt countermeasures in case of a breach of *erga omnes* obligations.[28] The main reason for this choice was that "[p]ractice on this subject is limited[,] ... sparse and involves a limited number of States".[29] Undoubtedly, third-party economic sanctions imposed against Russia after the invasion of Ukraine add some important quantitative elements to the practice of collective countermeasures. However, they can hardly help overcome the criticisms related to the limited number of States involved in this practice. As already pointed out, economic sanctions against Russia were predominantly imposed by Western States and their allies. Conversely, their adoption raised reservations in different quarters of the

25 See for example the statements of the Russian delegate before the SC, UN doc. S/PV.9127 (8 September 2022), p. 5; UN doc. S/PV.9216 (9 December 2022), p. 6.

26 See Arts. 40, 41, 48 and 54 of the Articles on responsibility of States for internationally wrongful acts (ARSIWA) adopted in 2001 by the UN International Law Commission, Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001), UN doc. A/56/10 (2001), reprinted in 2001, *Yearbook of the International Law Commission*, Vol. II, part two, pp. 26–30 [hereinafter ILC Report 2001].

27 For a recent, masterly, overview of the issue see Alland, D., 2022, Les mesures de reaction à l'illicite prises par l'Union Européenne motif pris d'un certain intérêt général', *Rivista di Diritto Internazionale*, Vol. 105, pp. 369–406.

28 Consequently, the ambiguous formula included in Art. 54 ARSIWA was eventually agreed, leaving unprejudiced the right of third, non-directly injured, States to take "lawful measures" against the State responsible of a breach of an *erga omnes* obligation. See ILC Report 2001, p. 137.

29 See paras. 3 and 6 of the ILC commentary to Art. 54 ARSIWA, *ibid*., pp. 137 and 139.

international community,[30] including African States voicing concerns about the collateral impact on food supplies caused by the sanctions against Russia.[31]

Given the controversial character of the reactions to the use of force against Ukraine, undertaken unilaterally by States, it is interesting to turn the attention to the response elaborated within the institutional context of the UN.

3. The Issue Before the Political Organs of the United Nations

3.1. THE SECURITY COUNCIL

The most evident (and expected) effect of the conflict in Ukraine within the UN was the SC 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.[32] To put it starkly, the case confirmed the impossibility of any meaningful reaction by the SC when the alleged aggressor State is one of its permanent members.

Nevertheless, on 27 February 2022, the SC managed to adopt Resolution 2623 (2022), notwithstanding the negative vote of Russia, because it dealt with a procedural issue and was therefore exempt from the veto rule.[33] Under this resolution, the SC, "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 GA to examine the situation in Ukraine.[34] While this procedural move shifted the responsibility for action to the GA, the SC nonetheless kept the issue on

30 See, for example, the critical remarks expressed by the representative of China within the SC: UN doc. S/PV.9138 (27 September 2022), p. 11; UN doc. S/PV.9176 (31 October 2022), p. 13.

31 See Mallet, V., Bunds, A., African Union warns of "collateral impact" as EU's Russia sanctions hit food supplies, *Financial Times*, 31 May 2022, (http://www.ft.com/content/e558de33–6064–4b10-a784-eb344cb17915, 19. 05. 2023).

32 See UN doc. S/2022/155 (25 February 2022), containing the text of a draft resolution deploring the Russian aggression against Ukraine.

33 UNSC Resolution 2623 (2022), UN doc. S/RES/2623(2022) (27 February 2022). The text received 11 votes in favor, 1 against (Russian Federation) and 3 abstentions (China, India, United Arab Emirates). See UN doc. S/PV.8980 (27 February 2022), p. 2. See Art. 27, paras. 2 and 3, UN Charter.

34 See UNSC Resolution 2623 (2022), the second preambular paragraph and first operative paragraph, respectively.

its agenda. As a matter of fact, during the first year of the crisis, the SC devoted no less than forty-five open meetings to the situation in Ukraine, which, together with closed meetings and meetings convened under the Arria formula, reached the remarkable score of one meeting per week.[35] Against this background, one might be tempted to suggest that the SC 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 part, the debates within the SC added very little to the substance of the issue. What they may reveal is that, after the Russian veto established the impossibility to adopt any concrete action, the confrontation within the Council on substantive matters often turned into a struggle over procedural issues. The most telling example of how matters of substance may spill over into procedure is the SC meeting of 17 March 2023. On that occasion, the United States requested a procedural vote on the proposal to invite as a briefer, under rule 39 of the Council's provisional rules of procedure, Daria Morozova, who had been presented as "an ombudsperson of the Donetsk People's Republic".[36] The United States representative pointed out that to admit before the Council a person in that capacity would run against the call 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, addressed to States and international organizations by GA Resolution ES-11/4.[37] 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.[38] Not surprisingly, Russia strongly deplored this outcome and disquietingly announced that this episode would set a precedent for dealing with future requests under rule 39 coming from Western members of the Council.[39]

35 A useful account of SC meetings on the situation in Ukraine is found at http//:www.securitycouncilreport.org/chronology/ukraine.php. The score of 45 open meetings covers the period ranging from 24 February 2022 to 24 February 2023.

36 See UN doc. S/PV.9286 (17 March 2023), p. 2.

37 See UNGA Resolution ES-11/4, preambular paras. 2 and 4, operative para. 4; Art. 41 ARSIWA, ILC Report 2001, pp. 113–114. See generally Dawidowicz, M., The Obligation of Non-Recognition of an Unlawful Situation, in: Crawford, J., Pellet, A., Olleson, S. (eds.), 2010, *The Law of International Responsibility*, Oxford, Oxford University Press, pp. 677–686; UNGA Resolution ES-11/5, operative paragraph 2 and accompanying text.

38 The proposal received 4 votes in favour (Brazil, China, Ghana and Russian Federation), 8 against (among which the United States) and 3 absentions (UN doc. S/PV.9286, p. 3).

39 *Ibid*., p. 4.

Two suggestions can be drawn from these developments. First, when the veto of permanent members paralyzes the substantive action of the SC, the only alternative available to that organ is to focus on procedural issues. Second, nothing can prevent the same political hindrances causing the deadlock in the Council's operative action from pouring into the procedural arena. At the end of the day, this is in fact nothing new and a well-known byproduct of the Cold War era.[40] What saddens is the recognition that the crisis in Ukraine has set back the SC clock.

3.2. THE GENERAL ASSEMBLY

Following the request made by the SC with Resolution 2623 (2022), the eleventh emergency special session of the GA was convened on 27 February 2022 under the procedure of the "Uniting for Peace" resolution.[41] In that context, as already mentioned, the GA adopted six resolutions on the conflict in Ukraine.[42] Among these, the most remarkable is arguably 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".[43] The plain qualification of the Russian military operation as aggression was uncontested by the majority of the almost 130 States taking the floor at the relevant GA meetings. Moreover, a huge majority of 141 positive votes sustained the adoption of the text. In light of this wide support, it can be maintained that, in the case at hand, the determination made by the GA was authoritative enough to fill the gap left by the lack of a SC qualification under Article 39 UN Charter. Similarly, Resolution ES-11/1 can be regarded a decisive piece

40 See Sievers, L., Daws, S., 2014, *The Procedure of the UN Security Council*, 4th ed., Oxford, Oxford University Press, p. 3.

41 See the note by the Secretary-General "Convening of the session", in UN doc. A/ES-11/1 (27 February) 2022; and UNGA Resolution 377 (v), "Uniting for Peace" (3 November 1950), operative para. 1.

42 See UNGA Resolution ES-11/1, Aggression against Ukraine, UN doc. A/RES/ES-11/1 (2 March 2022); UNGA Resolution ES-11/2, Humanitarian consequences of the aggression against Ukraine, UN doc. A/RES/ES-11/2 (24 March 2022); UNGA Resolution ES-11/3, Suspension of the rights of membership of the Russian Federation in the Human Rights Council, UN doc. A/RES/ES-11/3 (7 April 2022); UNGA Res. ES-11/4, Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations, UN doc. A/RES/ES-11/4 (12 October 2022); UNGA Resolution ES-11/5, Furtherance of remedy and reparation for aggression against Ukraine, UN doc. A/RES/ES-11/5 (4 November 2022); UNGA Resolution ES-11/6, Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace for Ukraine, UN doc. A/RES/ES-11/6 (23 February 2023).

43 See UNGA Resolution ES-11/1, operative para. 2.

of evidence for concluding that the GA, as an organ representing "the collective conscience of humankind",[44] is fully entitled to proceed to objectively determine that an aggression has been committed.[45]

A more delicate question regards the role of the GA in outlining the legal consequences of aggression. Resolution ES-11/4 was apparently a step in that direction, with the GA 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".[46] 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 recognized 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".[47] Accordingly, the call made in Resolution ES-11/4 to all States and international organizations "not to recognize 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 dealing that might be interpreted as recognizing any such altered status"[48] represents nothing more that the application of the legal consequences ordinarily attached under customary international law to serious breaches of obligations protecting the fundamental interests of the international community of States.[49] This simple constatation may explain why the action of the GA at this juncture proved to be uncontroversial, with Resolution ES-11/4 obtaining a huge support of 143 positive votes – a score even higher than that which accompanied the previous determination of the Russian aggression against Ukraine.

By contrast, subsequent Resolution ES-11/5, proved much more problematic in dealing with the issue of remedy and reparation for the aggression

44 See the expression aptly used by the President of the eleventh special emergency session of the GA, in UN doc. A/ES-11/PV.1 (28 February 2022), p. 3.

45 While apparently trivial, the question of the competence of the GA to make determinations that would fall within the competence of the SC under Art. 39 UN Charter has been (and still is) occasionally raised when the "Uniting for Peace" procedure is triggered. In the present case, this objection was raised by Iran in the aftermath of the adoption of resolutions ES-11/1 (UN doc. A/ES-11/PV.5 (2 March 2022), p. 19) and ES-11/5 (UN doc. A/ES-11/PV.15 (14 November 2022), p. 25.

46 See UNGA Resolution ES-11/4, operative para. 3.

47 *Ibid*., preambular paras. 2 and 4.

48 *Ibid*., operative para. 4.

49 See Art. 41 ARSIWA, ILC Report 2001, pp. 113–114. See generally Dawidowicz, M., The Obligation of Non-Recognition of an Unlawful Situation, in: Crawford, J., Pellet, A., Olleson, S. (eds.), 2010, *The Law of International Responsibility*, Oxford, Oxford University Press, pp. 677–686.

against Ukraine. With remarkably 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".[50] As a concrete action, the GA recommended the creation, by Member States and 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".[51] Unusually, at the relevant meetings, several delegations criticized this as an unprecedented action overstepping the mandate and the responsibilities of the GA.[52] Beyond such criticisms, what is notable is the immediate political effect that Resolution ES-11/5 determined within the Assembly. In fact, the wide majority (more than 140 States) that sustained the previous resolutions concerning the aggression against Ukraine and the invalidity of referenda in Donbass had drastically dropped, being reduced to slightly more than 90 votes. It would take several months (and a far more innocuous text) for the GA to recover from the latter divisive outcome. The threshold of 140 votes sustaining the Assembly's action was reestablished only in March 2023, with the adoption Resolution ES-11/6, which 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".[53]

4. The Case Before the International Court of Justice

On 26 February 2022, in the aftermath of the launching of the Russian "special military operation", Ukraine filed an application with the Registry of the ICJ against the Russian Federation, based on the 1948

50 See UNGA Resolution ES-11/5, operative para. 2.

51 *Ibid*., operative para. 4.

52 In particular, concerns were expressed about the exercise of functions that are of a judicial nature, going beyond the purview of the GA: see for example the statement of China, UN doc. A/ES-11/PV.15, pp. 19–20; see also the statements of Eritrea, on behalf of a group of 16 like-minded States (*ibid*., p. 6), South Africa (*ibid*., p. 22) and Venezuela (*ibid*., p. 29).

53 See UNGA Resolution ES-11/6, operative para. 3.

Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[54] The dispute concerns allegations made by Russia that acts of genocide had occurred in certain Russophone's areas of Donbass and the claim that the special military operation against Ukraine was a measure purported to prevent such a genocide. Ukraine asked the Court to declare that, contrary to Russian allegations, no genocide had been committed by Ukraine and the Russian military operation had no basis in the Genocide Convention. Contextually, Ukraine also submitted an urgent request for indicating provisional measures under Article 41 of the ICJ Statute, aimed at ordering the immediate suspension of Russian military operations.[55]

The ICJ issued its order on provisional measures on 16 March 2022.[56] Regretting Russia's decision not to appear before it,[57] the Court affirmed its *prima facie* jurisdiction under Article IX of the Genocide Convention[58] and found that Ukraine had a plausible right not to be subjected to military operations by the Russian Federation aimed at preventing and punishing an alleged genocide in the territory of Ukraine.[59] By thirteen votes to two, the Court determined that Russia was 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. The Court unanimously held that both parties had to refrain from any action that might aggravate or extend the dispute.[60]

For the present purposes, the order of 16 March 2022 is interesting because it contributes to the clarification of the attitude of the ICJ in

54 The text of the Ukrainian application, (https://www.icj-cij.org/sites/default/files/case-related/182/182–20220227-APP-01-00-EN.pdf, 19. 05. 2023).

55 The text of the Ukrainian request for the indication of provisional measures, (https://www.icj-cij.org/sites/default/files/case-related/182/182–20220227-WRI-01-00-EN.pdf, 19. 05. 2023).

56 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 (http://www.icj-cij.org/sites/default/files/case-related/182/182–20220316-ORD-01-00-EN.pdf, 19. 05. 2023).

57 See ICJ, Order of 16 March 2022, paras. 20–22. On 7 March 2022 the Russian Federation filed in the Registry of the Court a document setting out its position regarding the alleged lack of jurisdiction of the Court, asking the Court not to indicate provisional measures and to remove the case from the list (https://www.icj-cij.org/sites/default/files/case-related/182/182–20220307-OTH-01-00-EN.pdf, 19. 05. 2023).

58 See ICJ, Order of 16 March 2022, para. 48 and paras. 24–47 for the reasoning supporting this conclusion.

59 See *ibid*, para. 60 for this conclusion, and previous paras. 56–59 for the reasoning in support thereto.

60 See *ibid*., para. 86.

respect of disputes involving the use of force and the role played by the Court in the UN system of collective security. Useful insights on these matters can be gathered from incidental proceedings concerning provisional measures. It is indeed very frequent that, when litigating questions on the use of force before the ICJ, the parties request as a first step the indication of provisional measures under Article 41 of the ICJ Statute. In addressing these requests, the Court demonstrated special rigor when assessing a crucial requirement for the exercise of its power to indicate provisional measures, namely, the existence of *prima facie* jurisdiction.[61] At the same time, the Court also paid special attention to the requirement of urgency, which, especially in cases involving the use of force, may render the indication of provisional measures exceptionally compelling for the protection of the rights of the parties to the dispute.[62] These opposite trends reveal a tension in the special role that the Court may play with respect to disputes over the use force; when such issues are at stake, the expectation could be so high that the Court, through the indication of provisional measures, would fill the gap left by the missing action of UN political organs.[63]

These tensions have resurfaced in the context of the order on provisional measures made by the ICJ in the *Allegations of genocide* case. At the outset, the Court affirms to be "acutely aware of the extent of the 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 issues of international law".[64] These expressions of concern have substantially affected the reasoning leading the Court to conclude that, in the case at hand, the indication of provisional measures was justified as a matter of urgency.[65] One cannot

61 See Bonafé, B., 2021, ICJ Jurisdiction in Incidental Proceedings, *Rivista di Diritto Internazionale*, Vol. 104, pp. 90–96.

62 See, for example, the order on provisional measures rendered by the ICJ on 18 July 2011 in the case concerning the 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, especially at para. 61.

63 See Gray, C., 2003, The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after *Nicaragua*, *European Journal of International Law*, Vol. 14, pp. 867–905, especially pp. 897–905.

64 See ICJ, Order of 16 March 2022, paras. 17 and 18.

65 See *ibid.*, paras. 77 and 74, where the Court, in assessing whether there is a risk of irreparable prejudice to the rights at stake, underscores that "any military operation, in particular one on 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 property and to the environment."

exclude that the gravity of the conflict has greatly influenced the rather generous interpretation of the scope of the Genocide Convention, which allowed the Court to affirm its *prima facie* jurisdiction and deem "plausible" the right of Ukraine under the same Convention not to be subject to any military operation.[66]

These conclusions may be explained also in light of the Court's awareness of its institutional role in the UN system of collective security.[67] The Court explicitly refers to this role in the introductory part of the Order of 16 March 2002, where it proclaims 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*".[68] Similar statements can be found in previous orders on provisional measures made by the ICJ in cases involving the use of force.[69] However, the italicized words in the quotation reveal that the Court remains attached to its function as a judicial organ mandated to the peaceful settlement of international disputes under the terms of its Statute.

One may conclude that, if the current conflict in Ukraine has severely challenged the role of the ICJ, the Court has demonstrated readiness to assume and discharge its responsibilities as an integral component of the UN system of collective security. At the same time, the risk remains high for the Court to be "used and abused" in the context of disputes involving the use of force. This may explain why, in the case at hand, the Court has made its best efforts to exercise those responsibilities with great circumspection, acting within the limits of its mandate and jurisdiction. At the end of the day, it must not be forgotten that the ICJ has proved the only UN organ able to issue a binding decision to stop armed force in Ukraine. In the present circumstances, this is the most one can expect from the "principal judicial organ" of the UN.

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66 See *ibid*., 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."

67 See Forlati, S., 2022, Il ruolo della funzione giudiziaria internazionale nel conflitto armato in Ucraina: l'ordinanza della Corte internazionale di giustizia sulle misure cautelari, *Rivista di Diritto Internazionale*, Vol. 105, pp. 536–537.

68 See ICJ, Order of 16 March 2022, para. 18 (italics added).

69 See the orders on provisional measures made in the cases involving the Federal Republic of Yugoslavia and different NATO member States over the *Legality of Use of Force*: for example *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, para. 18.

5. Concluding Remarks

Similarly to what happened with the major crisis of the last decades involving the use of force (Kosovo, Afghanistan, Iraq, Libya, Syria and so on), after having considered the conflict in Ukraine from an international law perspective, one is left with a sense of discomfort. No legal justifications can plausibly conceal the fact that the cardinal rule governing the prohibition of the use of force in international relations has been brutally breached and that (with the exception of the claim of individual self-defense maintained by the victim State) the reactions elaborated by the main players involved have proven to be controversial, to say the least. What adds disillusion to discomfort in the present case is the realization that the principal political organs of the UN have exhausted all space for action. The paralyzing effect of the veto mechanism has affected the SC beyond any reasonable expectation, up to the point that this organ currently looks entrapped in pure Cold War logic. The high hopes raised by the convening of the eleventh emergency special session of the GA have also turned into disenchantment following declaratory resolutions that, although important as a matter of principle, fell short of producing any substantive effect.

Against this demoralizing background, the question seems appropriate: what comes after the blues? One may try and find a glimpse of hope by looking at the handling of the issue by the ICJ. It is true that Russia has manifestly ignored the order on provisional measures in the case of the *Allegations of Genocide*. However, it is perhaps comforting to see the same order quoted in the preamble of the latest resolution adopted by the GA, as one of the indispensable norms on which a "comprehensive, just and lasting peace in Ukraine" must be based.[70] Beyond the admittedly limited practical effect of the order on provisional measures, further positive news is hinted by the developments of the proceedings before the Court. In this context, 32 declarations of intervention, under Article 63, para. 2 of the ICJ Statute, have been filed by third States interested in the interpretation of the Genocide Convention at stake before the Court.[71] Notably, a number of intervening States have expressed their willingness to assist the Court

70 See UNGA Resolution ES-11/6, sixth preambular paragraph.

71 See Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) – Intervention (https://www.icj-cij.org/case/182/intervention, 19. 05. 2023). On this aspect of the case before the ICJ, see generally Bonafé, B., 2022, The Collective dimension of Bilateral Litigation: The Ukraine v. Russia case before the ICJ, *QIL-Questions of International Law*, 96, pp. 27–47 (https://www.qil-qdi.org/wp-content/uploads/2022/12/03_Ukraine-Russia-case_BONAFE_FIN-3.pdf, 19. 05. 2023).

in grouping their respective interventions with similar interventions from other States for future stages of the proceedings.[72] Ultimately, we are left in a somewhat paradoxical situation where the collective responses to an act challenging the common interest of all UN members are articulated in the strict bilateral context of an interstate dispute.

This can sound as a very modest consolation in a context where the lion's share is still played by bombs, but this is also the best we currently have for sustaining our belief that justice will be an inescapable factor for durable peace in Ukraine.

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