

## **The conflict in Ukraine and the hurdles of collective action**

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### *1. Introduction*

Several months after the launching of the Russian ‘special military operation’ of 24 February 2022<sup>1</sup> and the ensuing devastation in Ukraine, it is still hard to grasp what collective action can be organized within the international community to stop the conflict and restore international peace and security. The idea of a ‘collective’ reaction to armed attacks against the territorial integrity or political independence of a State was at the core of the system for the maintenance of international peace and security established in 1945 with the United Nations (UN). The outlawing of the unilateral use of force in international relations, enshrined in Article 2(4) of the Charter, was premised on ‘the acceptance of principles and the institution of methods’, aimed at ensuring ‘that armed force shall not be used, save in the common interest’.<sup>2</sup> At the same time, the awareness that occasional political hindrances may hamper the functioning of the ‘methods’ set forth to preserve common peace, led the drafters of the UN Charter to envisage the ‘escape clause’ of Article 51, significantly intended to safeguard the inherent right of self-defence of the State victim of an armed attack, in both its individual and collective dimension.<sup>3</sup>

The current situation in Ukraine serves to confirm the impossibility – more or less explicitly anticipated by the drafters of the Charter – of

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<sup>1</sup> See the letter from the permanent representative of the Russian Federation to the United Nations addressed to the Secretary-General, forwarding the text of the address of the Russian President, Vladimir Putin, to the citizens of Russia, ‘informing them of the measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence’ UN Doc S/2022/154 (24 February 2022).

<sup>2</sup> See UN Charter seventh paragraph of the Preamble and art 2(4).

<sup>3</sup> See UN Charter art 51.

any meaningful reaction by the Security Council when the alleged aggressor State is one of its permanent members.<sup>4</sup> At the same time, the very fact that the author of an act of aggression is a power endowed with nuclear military capacity, and one prepared to use it,<sup>5</sup> cannot but heavily affect the response by third States willing to assist the victim.

Not surprisingly, the reaction to the Ukrainian crisis in the international community has been so far largely based on the need to adjust the available legal framework to the circumstances of the case. At the UN institutional level, once it was recorded that there was an effective blockade of the Security Council due to the veto of Russia, the alternative, namely the General Assembly's involvement under the *Uniting for peace* resolution, was pursued. This led to resolutions which first vigorously censured the Russian military operation as an aggression and then called upon States not to recognize as legal the consequences thereof, all the while still refraining from taking any collective measure to maintain or restore peace and security (section 2). At the non-institutional level, a number of UN member States sympathetic with Ukraine discretely abstained from evoking the concept of collective self-defence and avoided any direct involvement in the conflict, by limiting their support to the victim of the aggression to the supply of military materials and other weaponries (section 3). The present contribution intends to explore the legal implications arising from these two strands of the collective action which have so far been elaborated in response to the Russian aggression against Ukraine.<sup>6</sup>

<sup>4</sup> See H Kelsen, *The Law of the United Nations, with Supplement* (Praeger 1951) 986.

<sup>5</sup> See in this regard the (unequivocal) threat contained in the above mentioned address of the President of the Russian Federation of 24 February 2022, UN Doc S/2022/154 (n 1) at 7: 'Now few important, very important, words to who may be tempted to intervene in the ongoing events from the outside. Whoever tries to stand in our way, and especially to threaten our country and our people, should know that Russia's response will be immediate and the consequences will be such as you have never faced before in your history. We are ready for any turns of events. All the necessary decisions have been made in this regard. I hope I have made myself clear'.

<sup>6</sup> See however, for a third strand of the 'collective' response to the Russian aggression against Ukraine, below section 4.



2. *The institutional reaction: From the Security Council to the General Assembly*

On 25 February 2022, the day after the triggering of Russia's special military operation, a draft resolution was introduced before the Security Council, the operative part of which deplored the Russian Federation's aggression against Ukraine and decided that Russia shall immediately cease its use of force against Ukraine and unconditionally withdraw all its military forces.<sup>7</sup> The text received 11 votes in favour, 1 against (Russia) and 3 abstentions (China, India, United Arab Emirates) and failed to be adopted owing to the negative vote of a permanent member.<sup>8</sup> At the subsequent meeting of the Security Council of 27 February 2022, the Russian representative explained his veto in this way:

'The United Nations and the Security Council were created in a post-war period to save succeeding generations from the scourge of a new war. To that end, global Powers decided to negotiate among themselves, ideally to achieve consensus. In any event, the objective was never to attempt to impose decisions on each other or to disregard the interests of any of the five permanent members. That is precisely why the Security Council grants its permanent members the right to veto decisions. It is not a privilege but a tool for ensuring the balance of interests, which is of paramount importance to the entire world. The balance of interests ensures global stability. Any attempt to circumvent or disregard the position of the Russian Federation undermines the bedrock of the Charter of the United Nations'.<sup>9</sup>

Not surprisingly, this argument imbued with a cold war logic was answered by another tool coming from the same era, namely, by triggering the substitutive power granted to the General Assembly in case of inaction by the Security Council under the famous *Uniting for peace* resolution of 1950.<sup>10</sup> At the same meeting of 27 February resolution 2623 (2022)

<sup>7</sup> See UN Doc S/2022/155 (25 February 2022) especially operative paras 2, 3 and 4. The draft resolution was sponsored by 3 permanent members (France, United Kingdom and United States) and 3 non-permanent members of the Security Council (Albania, Ireland and Norway), plus other 77 UN members States.

<sup>8</sup> See UN Doc S/PV.8979 (25 February 2022) at 6.

<sup>9</sup> See UN Doc S/PV.8990 (27 February 2022) at 7.

<sup>10</sup> See UNGA Res 377 (V) 'Uniting for peace' (3 November 1950) especially para 1.

was adopted, by which the Security Council, taking into account that the lack of unanimity of the permanent members had prevented it from exercising its responsibility for the maintenance of international peace and security, called an emergency special session of the General Assembly to examine the situation in Ukraine.<sup>11</sup>

The eleventh emergency special session of the General Assembly was convened the following day and, after five plenary meetings, on 2 March 2022, it adopted resolution ES-11/1 by 141 votes to 5, with 35 abstentions.<sup>12</sup> This resolution – which recalls in its preamble the *Uniting for peace* resolution, as well as resolution 3314 (XXIX) on the definition of aggression – essentially reproduces the same text that had previously failed before the Security Council. In particular, it deplores ‘in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter’.<sup>13</sup> Remarkably, resolution ES-11/1 did not contain any of the recommendations for collective measures that would have been available to the General Assembly under the *Uniting for peace* provisions.

In the subsequent meetings held in the framework of the eleventh emergency special session, two further resolutions were adopted, dealing respectively with the ‘Humanitarian consequences of the aggression against Ukraine’<sup>14</sup> and with the ‘Suspension of the rights of membership of the Russian Federation in the Human Rights Council’.<sup>15</sup> After the organization of local referendums in the regions of Ukraine under Russian occupation, a fourth resolution entitled ‘Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations’ was adopted, declaring the invalidity of the said referendums.<sup>16</sup> Finally, a fifth resolution devoted to ‘Furtherance of remedy and reparation for

<sup>11</sup> See UNSC Res 2623 (27 February 2022) UN Doc S/RES/2623. The resolution received 11 votes in favour, 1 against and 3 abstentions (China, India, United Arab Emirates); due to its procedural nature, it was not subject to the rule of unanimity of permanent members.

<sup>12</sup> See UN Doc A/ES-11/PV.5 (2 March 2022) at 14-15.

<sup>13</sup> See UNGA Res ES-11/1 (2 March 2022) UN Doc A/RES/ES-11/1 fifth and seventh preambular paras and operative para 2.

<sup>14</sup> See UNGA Res ES-11/2 (24 March 2022) UN Doc A/RES/ES-11/2. The resolution was adopted with 140 votes in favour, 5 against and 38 abstentions.

<sup>15</sup> See UNGA Res ES-11/3 (7 April 2022) UN Doc A/RES/ES-11/3. The resolution was adopted with 93 votes in favour, 24 against and 58 abstentions.

<sup>16</sup> See UNGA Res ES-11/4 (12 October 2022) UN Doc A/RES/ES-11/4 esp paras 3 and 4. The resolution was adopted with 143 votes in favour, 5 against and 35 abstentions.

aggression against Ukraine' was adopted by the resumed eleventh emergency special session.<sup>17</sup>

Given the apparently modest content of these texts, one may legitimately ask whether the high hopes that, in its early moments, accompanied the convening of the General Assembly eleventh emergency special session were justified.<sup>18</sup> On this score, it is worth recalling the opinion recently expressed by one author, who has poignantly questioned the usefulness of the *Uniting for peace* resolution, by suggesting that the choice of having recourse to its terms and procedure responds more to a policy question than to a matter of substance.<sup>19</sup> The latter suggestion may bear some pertinence, especially considering that in the past the General Assembly, acting under the 'ordinary' procedure and without invoking the terms of the *Uniting for peace*, had occasionally recommended to UN members States to take collective measures for maintaining peace and security.<sup>20</sup>

This notwithstanding, one might not overlook the policy impact of the *Uniting for peace* to the effect of orienting the law and the procedure of the United Nations, as well as the practice of its members States. This impact can be analyzed from two different standpoints, one bearing on the internal procedures and the functioning of the main UN political organ (2.1),

<sup>17</sup> See UNGA Res ES-11/5 (14 November 2022) UN Doc A/RES/ES-11/5. The resolution was adopted by a recorded vote of 94 in favour to 14 against, with 73 abstentions (see UN Press Release GA/12470 of 14 November 2022).

<sup>18</sup> Delegates in the plenary meetings of the emergency special session underscored the exceptionality of this move, holding that it was the first time in 40 years that the provisions of the *Uniting for peace* resolution have been evoked: see for example the statements of the representative of Bulgaria, UN Doc A/ES-11/PV.1 (28 February 2022) at 23 and Bhutan, UN Doc A/ES-11/PV.5 (n 12) at 3.

<sup>19</sup> L. Johnson, "Uniting for Peace": Does It Still Serve any Useful Purpose? (2014) 108 AJIL Unbound 106 ff especially at 108 and 115.

<sup>20</sup> See the example of UNGA Res 2107(XX) (21 December 1965) concerning the Territories under Portuguese administration, quoted by S. Talmon, 'The Legalizing and Legitimizing Effect of UN General Assembly Resolutions' (2014) 108 AJIL Unbound 123. One may also add that on 27 March 2014 the General Assembly adopted, under its 'ordinary' procedure, resolution 68/262 devoted to the territorial integrity of Ukraine, in which it called upon States not to recognize the consequences of the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol: see UN Doc A/RES/68/262 (1 April 2014). Also at that juncture, the Security Council had previously failed to adopt a similar text due to the veto of Russia (UN Doc S/2014/189 (15 March 2014) and UN Doc S/PV.7138 (15 March 2014) at 3).

the other more substantive, concerning the legal significance of the resolutions adopted by the GA in the context of the present crisis (2.2.).

### 2.1. *Procedural issues*

A cursory overview of the relevant proceedings that led to the adoption of resolution ES-11/1 reveals that representatives gathered in the eleventh emergency special session of the GA agreed on the unequivocal condemnation of the exercise of veto by Russia in the case at hand: a fact that was plainly qualified as unacceptable or abusive.<sup>21</sup> Remarkably, the latter statements were associated with the more general issues of the responsible use of veto by permanent members<sup>22</sup> and of the appropriateness of the veto system in the Security Council to govern vital questions concerning world peace.<sup>23</sup>

In all likelihood, the debates occasioned by the Ukrainian crisis before the eleventh emergency special session fuelled the adoption by the plenary of the General Assembly, 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 text, 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’.*<sup>24</sup>

<sup>21</sup> See for example the statements of the representative of Denmark, speaking on behalf of eight Nordic-Baltic Countries (UN Doc ES-11/PV.1 (n 18) at 14) and of Slovakia (UN Doc A/ES-11/PV.2 (28 February 2022) at 2).

<sup>22</sup> See in particular the statement by the representative of Mexico, UN Doc A/ES-11/PV.2 (n 21) at 11.

<sup>23</sup> See for example the statements by the representatives of Austria (UN Doc A/ES-11/PV.1 (n 18) at 17) and Kenya (UN Doc A/ES-11/PV.2 (n 21) at 12), with the latter delegate evoking the broader issue of Security Council reform.

<sup>24</sup> See UNGA Res 76/262 (26 April 2022) UN Doc A/RES/76/262 operative para 1. Furthermore, under operative para 3 of the resolution, the GA ‘invites the Security Council, in accordance with Article 24 (3) of the Charter of the United Nations, to submit

The resolution was adopted without a vote,<sup>25</sup> even if some delegations expressed their dissatisfaction.<sup>26</sup> But, apart from occasional criticisms, most of the delegates in the GA hailed the text as a major achievement and a way to enhance transparency and accountability in the decision-making process of the Security Council. Not surprisingly, some also viewed the new procedure introduced by resolution 76/262 (hereinafter ‘standing mandate procedure’) as a slant for revitalizing the deadlocked question of Security Council reform.<sup>27</sup>

If considered for its potential contribution to accountability and transparency, the new standing mandate procedure is certainly commendable. Some perplexity may arise if one gives a closer look to its relationship with the *Uniting for peace* procedure. As pointed out by the proponents of resolution 76/262, the intent of the standing mandate procedure is not to substitute *Uniting for peace*, but to complement it.<sup>28</sup> This is also made clear by the last sentence of the above-quoted first operative paragraph of resolution 76/262, which intends to set aside the standing mandate procedure in the case where the GA 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 former procedure, the GA will limit itself to hearing from the Permanent Members having vetoed a Security Council draft resolution and to holding a general debate on the question.<sup>29</sup> Conversely, when convened in an

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’.

<sup>25</sup> See UN Doc A/76/PV.69 (26 April 2022) 7-8.

<sup>26</sup> For Russia, in particular, the resolution was an attempt to create an instrument of pressure on the Permanent Members of Security Council (ibid 15). See also the critical remarks by Brazil, holding that the resolution had not been ‘properly discussed’ (ibid 6-7), India, holding that the provisions of the resolution ‘tend to relitigate the provisions of the Charter of the United Nations’ (ibid 9-10) and China, maintaining that the new procedure would be ‘likely to cause procedural confusion and inconsistency’ (ibid 8-9).

<sup>27</sup> See for example ibid the remarks of the representatives of Colombia (ibid 16), Luxembourg (ibid 18), Mexico (ibid 20-21), Canada (ibid 22-23).

<sup>28</sup> See for example the statement of the representative of Japan (ibid 23).

<sup>29</sup> Such a debate was carried out by the General Assembly on 8 June 2002, under the agenda item ‘Strengthening the United Nations System’, when the standing mandate procedure was triggered following the veto cast by two Permanent Members of the Security Council on a draft resolution of the topic ‘Non-proliferation/Democratic Republic of Korea’. See UN Doc A/76/PV.77 and A/76/PV.78 (8 June 2022) for the



emergency special session under the *Uniting for peace* resolution, the GA will have the power ‘to consider the matter immediately with a view to making appropriate recommendations to Members for collective measures’ – something which evidently involves much more than mere discussion. Even if the case is not expressly provided, one may comfortably suppose that when the standing mandate procedure is triggered first (and this will happen as a matter of automaticity in the event a veto is cast before the Security Council), the further convening of the GA under the *Uniting for peace* will be, in all likelihood, prevented.<sup>30</sup> Consequently, in such a case the power of the General Assembly to intervene in a situation supposed to endanger peace and security could be drastically curtailed.

Furthermore, the risk of the two procedures being unduly confused or overlapped cannot be underestimated. This possibility materialized at the meeting of the Security Council of 30 September 2022, when a veto was cast by Russia on a draft resolution condemning the referendums organized in the regions of Ukraine under Russian occupation.<sup>31</sup> On that occasion, some of the delegates in the Council evoked the standing mandate procedure for bringing the case before the GA,<sup>32</sup> and urged in particular the production of a special report by the Security Council on the veto, in accordance with the relevant part of resolution 76/262.<sup>33</sup> In the following, these suggestions were disavowed and the GA properly took up the matter in the context of its resumed eleventh emergency special session, eventually adopting resolution ES-11/4 on the illegal referendums in Donbass.<sup>34</sup>

relevant proceedings of the GA; UN Doc S/2022/431 (26 May 2022) and UN Doc S/PV.9048 (26 May 2022) for the text of the vetoed draft resolution and the relevant debates in the Security Council.

<sup>30</sup> This, of course, unless the Security Council itself expressly decides to call an emergency special session of the GA on the question: see for instance UNSC res 2623 (2022) quoted above (n 11). Even more unlikely is the hypothesis that, after having completed the standing mandate procedure, the majority of the Members of the United Nations will call an emergency special session according to section A para 1 of the *Uniting for peace* resolution.

<sup>31</sup> See UN Doc S/PV.9143 (30 September 2022) at 4 and UN Doc S/2022/720 (30 September 2022) for the text of the draft resolution introduced by Albania and the United States.

<sup>32</sup> See in particular the statements of Norway and Ireland, UN Doc S/PV.9143 (n 31) respectively at 6 and 7.

<sup>33</sup> See above (n 24).

<sup>34</sup> See above (n 16).





Be that as it may, it cannot be excluded that, if correctly interpreted and applied in a logic of genuine complementarity, the new standing mandate procedure may strengthen the rationale behind the old *Uniting for peace* procedure. This way, the vitality of the latter in the law of the United Nations, as well as the critical role played by the GA when the Security Council is paralyzed, would be confirmed.

## 2.2. *Substantive issues*

Besides the procedural developments above, there are some substantive aspects of the action undertaken by the eleventh emergency special session of the General Assembly that are worthy of consideration. The first and most remarkable aspect relates to the explicit qualification of the use of force by Russia against Ukraine as an aggression, which emerges from the title and the operative part of resolution ES-11/1, as well as from subsequent resolutions adopted by the GA.<sup>35</sup> In fact, this qualification was uncontested and sustained by the huge majority of the almost 130 States having taken the floor during the early meetings of the eleventh emergency special session. This seems pertinent in order to settle an old bone of legal contention, concerning the competence of the General Assembly to proceed to determinations that are in principle reserved to the Security Council under Article 39 UN Charter.<sup>36</sup> While this may appear to be a trivial issue, it is to be recalled that the point has been, and still is, occasionally evoked when the *Uniting for peace* procedure and the substitutive role of the General Assembly are triggered.<sup>37</sup> In light of the huge majority of States that has sustained the adoption of resolution ES-11/1, one can comfortably maintain that a determination that an act

<sup>35</sup> See UNGA Res ES-11/1 (n 13) operative para 2; UNGA Res ES-11/2 (n 14) operative para 1; UNGA Res ES/11-3 (n 15) preamble para 2; UNGA Res ES-11/4 (n 16) preamble para 4; UNGA Res A/ES-11/5 (n 17) operative para 2.

<sup>36</sup> See the presentation of the issue by Kelsen, *The Law of the United Nations* (n 4) 973, 977-978.

<sup>37</sup> See for example, in terms of past practice, 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) 694-695. In the current case, 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 (n 12) at 19.

of aggression has been committed was made by a body representing ‘the collective conscience of humankind’<sup>38</sup> and was authoritative enough to fill the gap left by the absence of a Security Council qualification.

Another noteworthy aspect regards the impact that such a determination by the General Assembly may have in respect of the legal consequences of an act of aggression. This point emerges when considering resolution ES-11/4, adopted on 12 October 2022 in the framework of the resumed eleventh emergency special session. In the operative paragraphs of that resolution, the GA declares that the unlawful actions of Russia with regard to the illegal referendums held in the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine ‘have no validity under international law and do not form the basis for any alteration of the status of these regions of Ukraine’.<sup>39</sup> In addition, the GA calls upon all States and international organizations ‘not to recognize any alteration by the Russian Federation of the status of any or all of the [mentioned] regions of Ukraine, and to refrain from any action or dealing that might be interpreted as recognizing any such altered status’.<sup>40</sup> In fact, these statements represent nothing more than the application of the legal consequences provided for under general international law for the breach of obligations protecting fundamental interests of the international community of States.<sup>41</sup> In that respect, the preamble of resolution ES-11/4 recalls ‘the principle of customary international law... that no territorial acquisition resulting from the threat or use of force shall be recognized as legal’.<sup>42</sup> On the other hand, the same preamble also underscores that the source of illegality in the current circumstances lies in the fact that the regions of Ukraine interested by the referendums ‘are... under the temporary military control of the Russian Federation, *as a result of aggression...*’.<sup>43</sup> Hence, the General Assembly in the case at hand seems to have accomplished a key function in providing the objective characterization of the

<sup>38</sup> See to this effect the opening statement made the President of the eleventh emergency special session of the General Assembly, UN A/ES-11/PV.1 (n 15) at 2.

<sup>39</sup> UNGA Res ES-11/4 (n 16) operative para 3.

<sup>40</sup> *ibid* operative para 4.

<sup>41</sup> See art 41 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) annexed to GA Res 56/83 of 12 December 2001 (UN Doc A/RES/56/83 (28 January 2002) 9. On the issue see the contribution of A Tancredi in this Zoom-out.

<sup>42</sup> UNGA Res ES-11/4 (n 16) second paragraph of the preamble.

<sup>43</sup> *ibid* fourth paragraph of the preamble (emphasis added).

situation to which general international law attaches the particular legal consequences of invalidity and non-recognition.

The action of the General Assembly has proved much more controversial with regard to the adoption, on 14 November 2022, of resolution ES-11/5, dealing with the issue of remedy and reparation for aggression against Ukraine. In a remarkably strong language, the General Assembly here 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’.<sup>44</sup> 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, 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’.<sup>45</sup> At the relevant meetings, several delegations have criticized the resolution as an unprecedented action, going beyond the mandate and the responsibilities of the General Assembly.<sup>46</sup> Beyond the merit of such criticism (with which one may also agree with as a matter of principle), what is remarkable is however the political effect that the resolution has provoked within the Assembly. In fact, the huge majority of more than 140 States that have sustained the recent resolutions concerning the aggression against Ukraine and the invalidity of referendums in Donbass has been drastically reduced to little more than 90 votes. In consideration of this outcome, one can legitimately wonder why in the context of the eleventh emergency special session less divisive avenues to cope with the current conflict have not been explored.

It is at this juncture that the limits of the General Assembly action in the Ukrainian conflict dramatically emerge. In fact, the General

<sup>44</sup> See UNGA Res ES-11/5 (n 17) operative para 2.

<sup>45</sup> *ibid* operative para 4.

<sup>46</sup> In particular, concerns were shared about the assumption of functions of a judicial nature going beyond the purview of the General Assembly: see for example the statements of Eritrea, Sri Lanka, China, South Africa, Iran, and Venezuela summarized in UN Press Release GA/12470 (n 17).

Assembly has so far refrained from recommending effective collective measures to suppress the Russian aggression against Ukraine. Arguably, for the adoption of these measures, one must turn to the other provision of the Charter which refers to a possible collective (albeit non-institutional) response to the use of force, namely, Article 51 and the notion of self-defence herein mentioned.

### 3. *The non-institutional reaction: Collective self-defence through military assistance?*

When the UN machinery for maintaining peace is deadlocked, self-defence under Article 51 provides the alternative tool for coping with an act of aggression. The extent to which Article 51 may cover a genuine ‘collective’ reaction to an unlawful use of force – going beyond the regional mechanisms of mutual defence that were originally envisioned by drafters of the Charter – has long been a matter of contention among legal scholars. According to a restrictive view, collective self-defence would amount to an inaccurate expression, as its admissibility would be subordinate to the fact that each of the intervening States has been injured in its own right by an armed attack.<sup>47</sup> This view is famously epitomized by the words of Derek Bowett, according to whom ‘the term “collective self-defence”, as used in the Charter, does no more than recognize that members may exercise collectively what is their individual right’.<sup>48</sup> Conversely, a broader interpretation of the notion of collective self-defence was prominently defended by Ian Brownlie, who moved from the plain assumption that ‘[t]here is a customary law right or, more precisely, a power, to aid third States which have become the object of an unlawful use of force’.<sup>49</sup>

<sup>47</sup> See JL Kunz, ‘Individual and Collective Self-defense in Article 51 of the Charter of the United Nations’ 41 (1947) *AJIL* 872, 875; H Kelsen, ‘Collective Security and Collective Self-Defense under the Charter of the United Nations’ 42 (1948) *AJIL* 783, 792; R Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 208-209. See also the dissenting opinion of Judge Jennings attached to the ICJ judgment in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 545-546.

<sup>48</sup> DW Bowett, *Self-defence in International Law* (Frederick A Prager 1958) 216.

<sup>49</sup> I Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 330. See also J Crawford, *Brownlie’s Principles of Public International Law* (9<sup>th</sup> edn,

Arguably, these two positions are inspired by different visions, the first based on a strictly bilateral understanding of the legal relationship arising from a breach of the prohibition to use force, the second privileging the shared nature of the interest protected by the prohibition and, consequently, the collective dimension of the response to its breach.

Whatever the merits of the theoretical positions just mentioned, it is a fact that the (not abundant) practice has so far offered little by way of contribution in clarifying the nature and scope of collective self-defence.<sup>50</sup> Hence, it is interesting to consider whether additional hints are provided by the current conflict in Ukraine. For the present purposes, it is critical to assess whether, among the various manifestations of political, economic, humanitarian and material assistance offered by third States to Ukraine, the particular form consisting of the provision of military and intelligence support, as well as in the delivery of (lethal or non-lethal) weapons<sup>51</sup> might fall under the category of collective self-defence.

At the outset, it must be observed that the lack of a formal report by third States to the Security Council under Article 51 UN Charter is not *per se* decisive.<sup>52</sup> One must of course keep in mind the suggestion given by the ICJ in the *Nicaragua* case, according to which the absence of a report to the Security Council is *one* of the relevant factors indicating whether a State is convinced of acting in self-defence.<sup>53</sup> However, in the case at hand the reliability of this factor is strongly relativized if one considers the radically different approach taken by the two main players involved in the conflict. Rather paradoxically, it was Russia that first sent a letter on 24 February 2022 to the Secretary-General invoking self-

OUP 2019) 722-723. The idea that a right of collective self-defence is recognized under general international law is shared by R Ago, 'Addendum to the eighth report on State Responsibility' UN doc A/CN.4/318/Add. 5-7 (29 February, 10 and 19 June 1980) 1980 II/1 YB ILC 68.

<sup>50</sup> See C Gray, *International Law and the Use of Force* (4<sup>th</sup> edn, OUP 2018) 176-179.

<sup>51</sup> For an overview of these various forms of military support see 'Contemporary Practice of the United States relating to International Law – The United States and Allies Provide Military and Intelligence Support to Ukraine' 116 (2022) AJIL 646-652.

<sup>52</sup> See S Talmon, 'The Provision of Arms to the Victim of Armed Aggression: the Case of Ukraine' Bonn Research Papers on Public International Law No 20/2022 (6 April 2022) available at <<http://ssrn.com/abstract=4077084>> 5-6, arguing that the failure by States delivering arms to Ukraine to report those measures to the Security Council under art 51 UN Charter would bar the qualification of collective self-defence.

<sup>53</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua* (n 47) 105 para 200.



defence, also in its collective dimension, in order to justify its special military operation in Ukraine.<sup>54</sup> On the other hand, while unambiguously declaring itself to be the victim of the Russian aggression and claiming to exercise its right to defend itself,<sup>55</sup> Ukraine refrained from reporting to the Security Council the measures in self-defence adopted under Article 51.<sup>56</sup> Beyond these elements, in the present case the failure by third States to report to the Security Council can also be explained by their awareness that this formal requirement is pointless because of the paralysis of the Security Council.

If the lack of a formal report to the Security Council is not determinative, one can hope to draw more clues from a closer look at the justifications provided by States assisting Ukraine. In this regard, it is noteworthy that third States have constantly refrained from qualifying their supply of military materials to Ukraine as an exercise of a *collective right* to self-defence: instead, they have insisted that the supply of weapons was a form of support to the *individual right* of Ukraine to defend itself against the Russian aggression. For example, the following position was put forward by the US representative at the meeting of the Security Council of 8 September 2022, specifically devoted to the issue of the supply of lethal weapons to Ukraine:

‘the United States is proud to stand with Ukraine and our allies and partners from more than 50 countries in providing vital security assistance in support of Ukraine’s defence of its sovereignty and territorial

<sup>54</sup> See the address of the President Putin annexed to UN Doc S/2022/154 (n 1) at 6. See also UN Doc A/76/740-S/2022/179 (7 March 2022) containing the texts of the treaties of friendship, cooperation and mutual assistance concluded between the Russian Federation and the Donetsk and Lugansk People’s Republics, as well the letters of the leadership of the two mentioned entities to the President of the Russian Federation for assistance in defence against the aggression of Ukraine (ibid Annex I to IV).

<sup>55</sup> See, the statement of the representative of Ukraine at the Security Council meetings of 25 February 2022 (UN Doc S/PV.8979 at 16) and the address of the President of Ukraine, V Zelenskyy, to the 77<sup>th</sup> plenary session of the General Assembly on 21 September 2022 (UN Doc A/77/PV.7, Annex I, at 50).

<sup>56</sup> This can be compared with the different stance taken by Ukraine in the case of the occupation of Crimea by Russia in 2014. On that occasion, a letter to the President of the Security Council provided notification of an address of 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) 2.

integrity in the face of Russian aggression... It bears repeating that all countries have an inherent right of self-defence, consistent with Article 51 of the Charter... Let me be clear that the *United States is not using force against Russia*... We have provided *security assistance to enable Ukraine to defend itself* and to restore its control over its sovereign territory'.<sup>57</sup>

If taken literally, this subtle *mise au point* seems to come close to the narrow vision of collective self-defence quoted above, which would confine this category to the extreme situation in which each of the intervening States is individually affected by a case of unlawful use of force.<sup>58</sup>

At the same time, one cannot lightly assume that States willing to back Ukraine in its struggle against the Russian aggression have done so without being conscious that their actions are part of a collective endeavour. The latter aspect emerges from the following statement, made by the representative of France at the aforementioned meeting of the Security Council:

'France has resolved to help Ukraine defend its sovereignty and territorial integrity. We did so as Ukraine now fights for the values and principles *that we all share*. Those values and principles are also outlined in the Charter of the United Nations – territorial integrity, the independence and sovereignty of States, the prohibition of territorial conquest by the use of force and condemnation of wars of aggression. It is our duty, and it is within the purview of the Council, to uphold those rules, as they alone allow for international peace and stability'.<sup>59</sup>

The apparent inconsistencies characterizing the above statements can be explained in light of the intent of the States concerned to avoid being considered as co-belligerents of Ukraine in the latter's armed conflict with Russia.<sup>60</sup> Coherently with that intent, the same States have accurately eschewed the qualification of their dealings under the available category of *ius ad bellum*. In this vein, they have for example preferred to rely on the elusive category of 'non-belligerency', inspired by the *ius in bello*, to

<sup>57</sup> See UN Doc S/PV.9127 (8 September 2022) 9 (emphasis added). See also, along the same lines, the statement of the representative of France *ibid* at 18.

<sup>58</sup> See above (n 47-48) and accompanying text.

<sup>59</sup> UN Doc S/PV.9127 (n 57) 18 (emphasis added).

<sup>60</sup> Talmon 'The Provision of Arms' (n 52) at 6.



prevent that their provision of arms to Ukraine being censured as a breach of the law of neutrality.<sup>61</sup>

If this is correct, it becomes evident that the difficulty of qualifying the provision of military assistance to Ukraine under the category of self-defence arise, more than from some insurmountable legal hurdle, from the material constraint of preventing an escalation of the conflict with Russia,<sup>62</sup> with all the ensuing impacts this may have on global peace. As to the tension between the two different visions of collective self-defence, respectively (and masterfully) outlined by D Bowett and I Brownlie, it can be concluded that this tension is probably inescapable and intrinsic to the notion itself. In collective self-defence, the ‘bilateral’ dimension of the reaction taken by the victim against the author of an unlawful attack is deemed to coexist with the ‘communitarian’ dimension involving the response of third, non-directly injured, States willing to protect a shared interest. This communitarian dimension may explain the contiguity existing between collective self-defence and collective action managed under the authority of UN organs, and it may justify why collective self-defence can work as a temporary substitute for UN action, when the latter is deadlocked.<sup>63</sup> The current crisis has dramatically brought to the forefront a dark side of this relationship. The conflict in Ukraine is here to prove that the same political and material hurdles which can paralyse the functioning of the UN system of collective security may also hamper the viability of collective self-defence in international law.

<sup>61</sup> *ibid* 12 ff. See generally on the issue A Gioia, ‘Neutrality and Non-Belligerency’ in HHG Post (ed), *International Economic Law and Armed Conflict* (Martinus Nijhoff 1994) 51.

<sup>62</sup> See ‘Contemporary Practice’ (n 34) at 650-651, reporting on the US and its allies refusal to provide certain types of military assistance to Ukraine, and in particular the decision to decline President Zelensky’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’.

<sup>63</sup> See on this issue DW Bowett, ‘Collective Security and Collective Self-Defence: The Errors and Risks in Identification’, in M Rama Montaldo (ed), *International Law in an Evolving World. Liber Amicorum in Tribute to Professor Eduardo Jiménez de Aréchaga* (Fundacion de Cultura Universitaria 1994) 425; and, more recently, M Wood, ‘Self-defence and Collective Security: Key Distinctions’ in M Weller (ed), *Oxford Handbook on the Use of Force* (OUP 2015) 649.

#### 4. *Concluding remarks*

At the end of this (admittedly incomplete) overview of the reactions prompted by the Russian ‘special military operation’ in Ukraine, one is left with feelings of disappointment. Due to the political deadlock of the UN Security Council, the main response expressed at the universal level within the organized international community remains the explicit qualification of the Russian initiative as an aggression, as well as the statement that the territorial consequences of this act can in no way be recognized or validated by States, both expressed by the GA convened in emergency special session. These vocal reactions are critical as a matter of principle, but stand in stark contrast with the absence of effective collective measures taken or recommended by the UN organs to contain the Russian aggression.

As a matter of fact, the most evident response in the case at hand was seen in a bundle of economic measures taken against Russia by individual States or group of States acting outside the UN system.<sup>64</sup> The rationale of these ‘sanctions’ has to be identified, more than on the model of collective institutional measures to maintain peace and security, on the idea of generalized countermeasures adopted unilaterally by third non-injured States to respond to egregious breaches of peremptory norms.<sup>65</sup> However, the fact remains that the legality of such ‘collective countermeasures’ in the current state of development of international law rests on rather shaky ground.<sup>66</sup> One is therefore left with the doubt whether, after the high hopes raised by the convening of the eleventh emergency special session of the GA, the occasion has not been lost to bring some clarity to the issue. Possibly, such clarity could have been provided by the legitimizing effect associated with a GA recommendation, adopted under the *Uniting for peace* procedure, intended to cover and coordinate the economic sanctions taken by UN members States.<sup>67</sup>

<sup>64</sup> On this strand of the collective response to the Russian aggression, see the contribution of G Adinolfi in this Zoom-out.

<sup>65</sup> See arts 41, 48 and 54 ARSIWA (n 41) 9-13.

<sup>66</sup> On this issue see, recently, the masterly overview by D Alland, ‘Les mesures de réaction à l’illicite prises par l’Union Européenne motif pris d’un certain intérêt général’ (2022) 105 *Rivista di Diritto Internazionale* 369.

<sup>67</sup> See Talmon ‘The Legalizing and Legitimizing Effect’ (n 20) 127-128 arguing that, while it is doubtful whether collective sanctions taken at the recommendation of the GA

Similar considerations are also in order for the other legal tool available to deal with the current armed conflict, ie collective self-defence under Article 51 of the Charter. Also due to political-military hindrances, collective self-defence has been largely overshadowed, to the extent that it prompts serious doubts about its function and opportunity in the present circumstances. In this case, it can also legitimately be wondered whether the delicate legal issues raised by the measures adopted by States seeking to avoid a direct involvement in the conflict – ie the provision of military materials to Ukraine – could have been more appropriately addressed in some recommendation of the GA attempting to coordinate the various forms of assistance. In this regard, one cannot refrain from noting a significant loophole left in the current articulation of the UN system of collective security. Unquestionably, the *Uniting for peace* procedure envisages a substitutive power of the GA to recommend collective measures when the Security Council is deadlocked. However, the correlative but equally critical question of the control, in such a case, over the initiatives taken unilaterally by UN Member States (that is, under the cover of self-defence) remains unsettled.

At the end of the day, the most significant reactions expressed by the United Nations system to cope with the Russian aggression against Ukraine are those occurring before the International Court of Justice. As a matter of fact, the ICJ has been the only UN organ which, in the framework of the contentious case between Ukraine and Russia over the interpretation of the Genocide Convention, has been able to issue a binding order demanding that Russia immediately suspend its military operations.<sup>68</sup> Moreover, in the context of the same case more than twenty declarations of intervention have been filed by third States interested in the interpretation of the Genocide Convention which is at stake before the Court.<sup>69</sup> Eventually, we are left in a rather paradoxical situation, where the collective responses to an act challenging the common interest of all

would qualify as ‘lawful measures’ under art 54 ARSIWA, ‘there is, however, room for development in this direction’.

<sup>68</sup> See ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* Order 16 March 2022 para 86 available at <[www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf](http://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf)>.

<sup>69</sup> See <[www.icj-cij.org/en/case/182](http://www.icj-cij.org/en/case/182)>. On this aspect see the contribution by B Bonafé in the present Zoom-Out.



UN members are being articulated in the strict bilateral context of an interstate dispute.

If there is a lesson to be learned from the current conflict in Ukraine, it is that a reform of the UN system of collective security cannot be procrastinated over any longer. A small, but significant, signal of the urgency of such a reform has been the introduction of a standing mandate for a General Assembly debate when a veto is cast in the Security Council.<sup>70</sup> One can only hope that, in order to avoid another foreseeable deadlock in the process, the relevant discussions will be extended beyond the functioning of the political organ entrusted with the ‘principal responsibility’ for the maintenance of peace and security, and will address the roles and contributions of all the main institutional players of the system, including the judicial one.

<sup>70</sup> See above section 2.1.