The collective dimension of bilateral litigation: The *Ukraine v Russia* case before the ICJ

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1. *Introduction*

The 'special military operation' launched by Russia against Ukraine on 24 February 2022 – which according to international law amounts to an act of aggression[1] – provides the factual background for at least two interstate disputes that Ukraine has brought before the International Court of Justice ('ICJ' or 'the Court') and the European Court of Human Rights (ECtHR). If we go back to the annexation of Crimea in 2014 and the subsequent conflict in Eastern Ukraine, litigation between the two States would include more cases before these two courts as well as before other international judicial bodies.[2] But it is the proceeding before the ICJ that will be the object of the present enquiry, together with the unprecedented, extraordinary number of declarations of intervention under Article 63 of the Court's Statute that it has triggered: twenty-six declarations as of the 24th of November 2022. The reason is that this case provides the perfect illustration of the collective dimension of the dispute opposing Ukraine and Russia, the collective interest that prompted the declarations of intervention under that provision, and the possibility for the Court to envisage the collective participation of third States despite the bilateral nature of its contentious jurisdiction.

Twenty-six declarations of intervention are certainly unprecedented. In the entire history of the two Courts – the ICJ and its predecessor, the

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[1] See the resolution adopted by the United Nations General Assembly on 2 March 2022 entitled 'Aggression against Ukraine', UN Doc A/RES/ES-11/1.

[2] See eg the *Dispute concerning coastal State rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russia)* instituted before an arbitral tribunal under Annex VII of the UN Convention on the law of the sea (information is available on the Permanent Court of Arbitration website).

Permanent Court of International Justice ('PCIJ') – requests to intervene under Article 63 have been submitted in six cases and in only three of them have those requests been declared admissible. A total of eight requests in a hundred years.[3] Even more extraordinary is the unsolicited filing of information from an international organization (the European Union) concerning that proceeding in accordance with Article 69, paragraph 2, of the Rules of Court.[4]

Traditionally, the reluctance of third States to use Article 63 is explained primarily with the binding effect of the Court's interpretation of the multilateral convention for all States having taken part in the proceedings. This explanation is confuted by the case under examination. The large majority of the States that have submitted requests to intervene in the *Ukraine v Russia* case have explicitly stated that they accept that binding effect. This limited binding effect seems to have been acknowledged as the necessary price to be paid for the protection of a general interest, that is, for the uniform and consistent application of the provisions that the Court has to interpret in a bilateral proceeding.[5]

In any case, the remarkable action of third States in the *Ukraine v Russia* case validates the original purpose of the drafters of Article 63, namely to protect general interests of third and litigating States.[6]

[3] See the request by Poland to intervene in the *SS Wimbledon* case (Judgment of 28 June 1923) (1923) PCIJ Rep Series A 11; the request by Cuba to intervene in the *Haya de la Torre* case (Judgment of 13 June 1951) [1951] ICJ Rep 74-77; the request by El Salvador to intervene in the *Military and paramilitary activities in and against Nicaragua* case (Judgment of 26 November 1984) [1984] ICJ Rep 430-431; the requests by Micronesia, the Marshall islands, the Solomon islands, and Samoa to intervene in the case concerning the *Request for an examination of the situation in accordance with Paragraph 63 of the Court's judgment of 20 December 1974 in the Nuclear Tests case* (Order of 22 September 1995) [1995] ICJ Rep 288; the request of New Zealand to intervene in the *Whaling in the Antarctic* case (Order of 6 February 2013) [2013] ICJ Rep 3. For different reasons, only Poland, Cuba and New Zealand actually did take part in the respective proceedings under Article 63 of the PCIJ/ICJ Statute.

[4] See the Press release No 2022/29 of 18 August 2022 on the Court's website. The contents of the document of the European Union have not been disclosed.

[5] See B Bonafé, *La protezione degli interessi di Stati terzi davanti alla Corte internazionale di giustizia* (Editoriale Scientifica 2014) 159 ff.

[6] It can be recalled that, at the beginning of the twentieth century, the uniform interpretation of multilateral conventions – that constituted the first attempts to codify general rules of international law – was an essential part of the protection of the general interest.

Interventions admitted under that provision in previous cases had often been criticized for having been motivated by the protection of private interests – the third party wanting to protect its individual position or simply to take sides with one of the litigants before the Court – and therefore for disrupting the equality of the parties. This criticism was implicitly addressed by the Court for example in the *Whaling* case.[7]

More generally, the multiple interventions submitted in the *Ukraine v Russia* case reveal one of the main (if not the main) tensions underlying international law: the challenge of developing rules for the protection of collective interests of the international community as a whole, while having at one's disposal only the means of a decentralized, horizontal society. On the one hand, international law is certainly moving beyond a set of legal rules confined to the protection of the private interests of its members. The protection of common interests is no longer the exclusive province of the decentralized, unilateral, subjective power of States to interpret, apply and ensure compliance with rules aiming at the protection of such interests. On the other hand, the international community is striving to create centralized mechanisms of reaction. This is first of all due to the lack of institutions having the effective power to centralize the establishment and the reaction arising from the breaches of the rules protecting those common interests. Two notable examples are: the success of the Vienna Convention on the law of treaties in centralizing (on paper) litigation over *jus cogens* as a cause for treaty invalidity or termination,[8] and the failure of the ILC to agree on an institutional mechanism for the determination of the commission of international crimes by States and the application of the consequences of such crimes in the framework of the codification of the regime of State responsibility for internationally wrongful acts.[9]

[7] See the somewhat contradictory statements in paras 18 and 22 of the *Whaling in the Antarctic case (Australia v Japan)* (Declaration of intervention of New Zealand) (n 3). The same criticism was already put forward with respect to Poland's request to intervene in the *SS Wimbledon* case and Cuba's request to intervene in the *Haya de la Torre* case.

[8] See especially article 65 and 66 of the Vienna Convention on the law of treaties. It must be admitted that the mechanism has never been triggered.

[9] See especially G Arangio-Ruiz, 'Fifth report on the State responsibility' (1993) II/1 YB Int'l L Commission 3, UN Doc A/CN.4/453 and Add 1 and 2; G Arangio-Ruiz, 'Seventh report on the State responsibility' (1995) II/1 YB Int'l L Commission 17, UN Doc A/CN.4/469 and Add 1 and 2, where the Special Rapporteur elaborates on the 'indispensable role of international institutions'.

Inevitably, the role of the international judge then becomes crucial. First, it is an institution that can deal with the protection of common interests in an authoritative way. Second, it can centralize, if not the adoption of collective reactions, then at least the preliminary establishment that rules protecting collective interests have been breached.

The massive recourse to Article 63, so-called 'interpretive intervention', in the case between Ukraine and Russia shows that even bilateral litigation can offer the opportunity to protect collective interests. The collective dimension that the ICJ's jurisdiction assumes thanks to Article 63 intervention can be examined from three different points of view. The two procedural aspects that are directly connected to the use of 'interpretive intervention' are addressed first, namely, the collective nature of the underlying interest (Section 3) and the impact of the collective dimension on the organization of contentious proceedings (Section 4). I will then turn to the substantive aspect of the dispute between Ukraine and Russia discussed in most intervention declarations showing the importance of centralized (and compulsory) dispute settlement when collective interests are at stake (Section 5). But before turning to these aspects a brief overview of the case is in order (Section 2).

2. *The dispute before the Court*

On 26 February 2022 Ukraine instituted proceedings against Russia before the ICJ. In its Application, Ukraine based the Court's jurisdiction on the compromissory clause of the Genocide Convention (Article IX) and raised two main claims. First, it asked the Court to make a *negative* establishment according to which Ukraine had not committed genocide in the Luhansk and Donetsk oblast of Ukraine. In other words, Ukraine maintained that it was not responsible for breaches of the Genocide Convention. The reason was that Russia had (at least partially) justified its 'special military operation' as an intervention necessary to stop acts of genocide committed in the region. Second, Ukraine requested a *positive* establishment according to which the Genocide Convention did not allow recourse to military force in order to prevent or punish genocide. In this respect, the claim was that Russia was responsible for having breached the Genocide Convention. Ukraine maintained that the

Russian aggression was based on a false claim of genocide having no basis in the Convention.

Ukraine's Application was accompanied by a request that the Court indicate provisional measures. Russia did not take part in the provisional measures proceedings but had send a written document to the Court in which it maintained that the Court lacked jurisdiction, that it should have terminated the proceedings and that it should have refrained from indicating provisional measures.[10] It is possible that Russia will take part in the subsequent proceedings as it submitted preliminary objections on 3 October 2022.[11]

In its order of 16 March 2022, the Court concluded that the conditions for the adoption of provisional measures were met and decided that 'Russia shall immediately suspend the military operations' commenced on 24 February 2022 and that Russia must make sure that other military actors under its control 'take no steps in furtherance of the special military operation'. The Court also ordered both parties to 'refrain from any action which might aggravate or extend the dispute'.[12]

In the subsequent months, the proceedings were directed at preliminary objections and third States started filing intervention declarations that focused on both jurisdictional issues and the merits of the case.

3. *The collective interest justifying intervention under Article 63*

The multiple intervention requests in the *Ukraine v Russia* case provide abundant evidence that Article 63 intervention is premised on the

[10] The 'Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case' was submitted on 7 March 2022, and it is available at <https://www.icj-cij.org/en/case/182/other-documents>.

[11] See ICJ, *Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russia)* (Order of 7 October 2022) available on the Court's website. The Court suspended the proceedings on the merits and fixed 3 February 2023 as the time-limit for the submission of written statements by Ukraine on preliminary objections.

[12] ICJ, *Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russia)* (Order for provisional measures of 16 March 2022) para 86 available on the Court's website.

existence of a *collective interest* in the interpretation of the Genocide Convention. This crucial aspect is sometimes misunderstood.

It can be usefully recalled that Article 63 of the ICJ Statute, which replicates verbatim Article 63 of the PCIJ, was inspired by a provision already included in the 1899 and 1907 Hague Conventions for the pacific settlement of international disputes. That provision envisaged the only exception to the relative *res judicata* value of arbitral awards: the interpretation of multilateral conventions adopted by the Permanent Court of Arbitration was also binding for the third States that had intervened in the proceedings for interpretive purposes.[13] The drafters of the PCIJ Statute decided to generalize recourse to intervention and elaborated two separate provisions that were rendered autonomous from the issue of *res judicata*. These were Article 62 and Article 63 of the PCIJ (and later ICJ) Statute. The latter provision covered the already known form of intervention and was intended to ensure the interpretation of 'collective treaties' and their general and uniform interpretation:

> 'Where collective treaties are concerned, general interpretations can thus be obtained very quickly, which harmonise with the character of the [multilateral] Convention.'[14]

The existence of a collective interest was certainly implicit but nonetheless essential in Article 63. This is even more evident where the multilateral convention is intended to protect a paramount, public interest of the international community as a whole, where it embodies *jus cogens* rules, and it sets *erga omnes* obligations respect for which can be invoked by any contracting party. Thus, Article 63 intervention is meant to allow participation in the proceedings of third States that share with the parties the *collective* interest in the uniform interpretation of a multilateral convention. That interest is crucial to understand the notion of interpretive intervention, its scope and the difference between Article 63 and Article 62 intervention.

[13] See respectively Article 56 of the 1899 Convention and Article 84 of the 1907 Convention.

[14] League of Nations Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee June 16th – July 24th 1920 with annexes* (Van Langenhuysen Brothers 1920) 746.

First, the collective interest at the basis of this form of international is implicit. It needs not be demonstrated for third States' participation to be admitted in the proceedings, because all States parties to the multilateral convention – all States being bound by its provisions – are considered as having a collective interest in its uniform interpretation.

Second, Article 63 intervention has a limited scope: it cannot go beyond the interpretation of the provisions of the multilateral convention that are necessary to settle the dispute before the Court. The basic requirement of Article 63 intervention then is the status of Contracting party to the multilateral convention, that is, the third State must be bound by the provisions the Court has to interpret. If for instance the State has withdrawn from the convention, it no longer shares the common interest in its interpretation.

Third, as opposed to Article 63 intervention, Article 62 of the ICJ Statute allows intervention for the protection of a *private* interest of the State asking to intervene. The admissibility of intervention depends on the proof of the existence of that interest. In the case of Article 62, intervention in the proceedings is justified because it is essential to put the third State in the position to avoid its own private interest being affected by the Court's future judgment.

Unfortunately, the notion of interpretive intervention and its main characters have not been clearly illustrated in the admittedly scant case-law of the PCIJ and ICJ, and State practice suggests there still remains some uneasiness in that regard. Any further clarification the Court will provide in the decisions concerning the declarations submitted in the *Ukraine v Russia* case will be much welcomed.

First, the case-law of the two Courts has been essentially silent on the qualification of the interest underlying Article 63 intervention. It expressly indicated that no legal interest has to be shown by the third State asking to intervene.[15] This confirmed the implicit nature of the common interest at the basis of Article 63 but not much more was said about it. However, the proper construction of Article 63 as being based on the existence of a general interest could be crucial to deciding whether certain requests to intervene are admissible.

The declaration of intervention filed by the United States of America ('USA') in the *Ukraine v Russia* case stands out because it also deals with

[15] PCIJ, *SS Wimbledon* (n 3) and ICJ, *Whaling in the Antarctic* (n 3).

the interpretation of Article IX of the Genocide Convention despite the fact that the USA made a reservation to that provision. The footnote justifying the admissibility of that request precisely argues that the USA intervention must be admitted because Article 63 does not require the existence of a legal interest. However, this is not entirely correct: the provision is premised on the existence of an 'implicit' collective interest. And that interest cannot be said to exist with respect to obligations having made the object of a reservation. Accordingly, the request of the USA seems only partially admissible – to the extent that it relates to provisions of the Genocide Convention that are binding for the USA – and it should not be admissible for the part relating to Article IX.

Second, all intervention declarations submitted in the *Ukraine v Russia* case explicitly mention the special character of the Genocide Convention and the collective interest of the international community as a whole on which they are premised. In that regard, all declarations quote or make reference to the relevant passages of the 1951 Advisory Opinion in which the Court spelled out for the first time the collective character of the interest that the Genocide Convention intended to protect.[16] All invoke the *jus cogens* and/or *erga omnes* character of the prohibition of genocide.[17] In other words, the declarations confirm the original intention of the drafters that introduced Article 63 to protect a common, general interest. The other aspects of those declarations that will be examined below – especially the openness to organizing a collective intervention procedure and the need for a centralized establishment of the commission of genocide – go in the same direction.

Finally, this conclusion is not affected by a certain confusion in certain declarations of intervention between the 'collective interest' notion

[16] ICJ, *Reservations to the Convention on Genocide* (Advisory opinion of 28 May 1951) [1951] ICJ Rep 23 ('In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.'). One notable exception is the Declaration of Lithuania which is nonetheless based on 'the common interest' that Lithuania shares with the other contracting parties on the uniform interpretation of the Genocide Convention (para. 17).

[17] The Declaration of France constitutes an exception in that regard but largely conforms to the spirt of the other declarations concerning the special character of the collective interests protected by the Genocide Convention and even goes beyond the previously submitted declarations when it makes reference to the need for international institutionalized cooperation in the execution of the Convention's obligations (*infra*).

underlying Article 63 and the specific requirement of a 'legal interest' required under Article 62 intervention. Some declarations submitted in the *Ukraine v Russia* case specified that, in addition to the collective interest, the third State had a 'direct interest' or an 'interest of its own' that justified its request. One might get the impression that those States felt the need to ground their right to intervene also on the basis of an individual interest, which in reality was not required by the Statute. The following formulation was used for the first time in the UK declaration:

> 'As a Contracting Party to the Genocide Convention, the United Kingdom has a *direct interest* in the construction that might be placed upon the provisions of the Convention by the Court in these proceedings. For that reason, the United Kingdom is exercising its right to intervene…'.[18]

Those statements prompt two remarks concerning the requirement of an individual interest in the proceedings and, most importantly, the different ways in which the collective interest can be conceptualized.

First, at closer look those statements are not necessarily to be understood as pointing at the existence of a separate requirement of interpretive intervention, namely, an individual legal interest. For example, the 'direct' interest is merely derived from the status of contracting party, it is said to exist also on the basis of the 'particular nature' of the Genocide Convention,[19] and it is derived from the third State 'active commitment to a rule-based international order'.[20] In other words, the private interest dissolves into the collective interest in the uniform interpretation of the Genocide Convention and finally does not seem to be regarded as an additional requirement of Article 63 intervention.

[18] Declaration of the United Kingdom (para 14, emphasis added). All declarations of third States in relation to the ICJ case concerning *Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russia)* are available on the Court's website. See also the Declarations of Sweden (para 18), Ireland (para 10), Finland (para 11), Estonia (para 16), Portugal (para 13), Luxembourg (para 12), and Norway (para 13). It is unclear why 'given its own past' Germany considers itself to have a 'specific interest' in the case at hand under Article IX' of the Genocide Convention (para 14) nor what legal consequences are to be drawn from that 'specific interest'.

[19] See the declarations of Luxembourg (para 12) and Bulgaria (para 11).

[20] See the Declaration of Portugal (para 13).

More generally, the references to the existence of a 'direct interest' reveal two opposite ways in which the 'collective' interest can be understood under international law: either it is regarded as *common* to all States, as being shared by the collective bound by the rules created for its protection or it can be understood as merely the *sum of individual* interests. Only the former corresponds to the protection of *public* interests of the entire community of States, as opposed to *private* interests of each of its members. As explained by the ICJ in the already mentioned 1951 Advisory Opinion:

> 'Consequently, in a convention of this type [Genocide Convention] one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties'.[21]

That the collective interest at the basis of Article 63 intervention is to be understood as a public interest is demonstrated by two additional factors examined in the following sections. The first is a procedural aspect concerning the role that the ICJ can play in centralizing the settlement of the disputes arising in relation to the regime of the Genocide Convention. The second is a substantive aspect relating to the interpretation of the duty to prevent genocide and the preliminary assessment that must be carried out before taking preventive action. In this case, intervention is nothing else, but the instrument that catalyzes the debate over such primary obligations of the Genocide Convention.

4. *Unsettled procedural aspects of interpretive intervention*

The *Ukraine v Russia* case and the declarations of intervention submitted so far raise two procedural issues that the case-law of the two courts has not had the occasion to clarify in the past.

The first is whether declarations of intervention can be submitted at all at the stage of preliminary objections, or better whether intervention can relate to preliminary jurisdictional and admissibility issues that are raised by the parties. Issues such as the existence of a jurisdictional basis,

[21] See (n 16).

its scope or the existence of specific conditions for its exercise may depend on the interpretation of jurisdictional clauses inserted in multilateral conventions.

The fact that the Court dismissed the request to intervene under Article 63 made by El Salvador in the *Nicaragua* case is not conclusive in that regard. The Court held that request inadmissible inasmuch as it related to the preliminary objections' phase of the proceedings because:

> 'the Declaration of Intervention of the Republic of El Salvador … addresses itself also in effect to matters, including the construction of conventions, which presuppose that the Court has jurisdiction to entertain the dispute between Nicaragua and the United States'.[22]

Thus, the declaration of El Salvador related to the merits of that case and was not dismissed because interpretive intervention as such can never be made in relation to the discussion of preliminary objections.[23] In addition, it can be recalled that the declaration of El Salvador was pretty ambiguous: it made only a vague reference to the existence of multilateral conventions and it did not indicate which provisions had to be interpreted nor which interpretation was supported by El Salvador.

Turning to the declarations of intervention in the *Ukraine v Russia* case, they are unanimous in considering that the intervention of third States under Article 63 includes jurisdictional issues. Interestingly, while the first declarations are quite detailed in that regard, the last ones seem to take that point almost for granted.[24] Some of the early arguments appear to have been later abandoned. For instance, many States emphasized the fact that the Registrar of the Court in its notification under Article 63, paragraph 1, had specified that the Genocide Convention was

[22] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Order of 4 October 1984) [1984] ICJ Rep 216.

[23] See Bonafé (n 5) 32. For a similar conclusion on the possibility that interpretive intervention concerns jurisdictional aspects, see MN Shaw (ed), *Rosenne's Law and Practice of the International Court 1920-2015* (5th edn, Vol III, Brill Nijhoff 2016) 1533; A Miron, C Chinkin, 'Article 63' in Zimmermann, Tams, Oellers-Frahm, Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed, OUP 2019) 1741, at 1763, n 46.

[24] See for instance the declarations of Greece (para 17), Austria (para 16), the Czech Republic (para 12), Malta (para 13), and Norway (para 24).

invoked by Ukraine both to found its claims and as jurisdictional basis,[25] while that (necessary) reference was hardly conclusive. Other arguments gained widespread support and consolidated in what has become standard argumentation of third States asking to intervene. These are: the textual interpretation of the Statute and the Rules of Court covering interpretive intervention on both substantive and jurisdictional clauses, the lack of statutory bar to interventions on purely jurisdictional issues, the previous case-law of the Court, and the purpose of intervention (to assist the Court in the construction of a multilateral convention) which may apply to both substantive and jurisdictional issues.[26]

The second procedural issue that needs to be addressed is whether a special arrangement is necessary to deal with multiple interventions. The procedural rights of the States intervening in accordance with Article 63 are listed in Article 86 of the Rules of Court. The intervening State – ie each intervening State – has the right to submit its 'observations on the subject-matter of intervention' during the written and oral proceedings. If there are twenty-six intervening States one can only imagine the time that this would require and the repetitions that this will entail especially if all the intervening States share substantially the same conclusions.

For this reason and with the commendable purpose of simplifying and rendering more effective the intervention of third States in the *Ukraine v Russia* case, many declarations explicitly express consent to a collective procedure that the Court may be willing to organize.[27] Essentially one reason is mentioned in support of that possibility: the effective and sound administration of justice. Some declarations accept the possibility of grouping 'similar' or 'like-minded' interventions.[28] Others limit

[25] See especially the declarations of intervention of Latvia (para 10), New Zealand (para 7), Italy (para 13) and Ireland (para 9).

[26] See in particular the declarations of intervention of Germany (paras 25-26), Sweden (para 22-23), Italy (para 23), Poland (para 11), Denmark (para 13), Estonia (para 15), Spain (para 12), Australia (para 10), Portugal (para 18), Luxembourg (para 14) and Croatia (para 12).

[27] See the declarations of Germany (para 19), Sweden (para 16), Poland (para 12), Denmark (para 14), Estonia (para 21), Spain (para 15), Luxembourg (para 17), Greece (para 19), Austria (para 8), Croatia (para 15), the Czech Republic (para 16), Bulgaria (para 15) and Malta (para 16).

[28] See the declarations of Germany (para 19), Sweden (para 16), Poland (para 12), Denmark (para 14), Austria (para 8), the Czech Republic (para 16), Bulgaria (para 15), and Norway (para 11).

that possibility to interventions of other member States of the European Union.[29] For example, Luxembourg said to be:

> 'disposé à l'aider en regroupant son intervention avec des interventions identiques ou essentiellement comparables d'autres États membres de l'Union européenne ayant choisi d'adopter une approche commune pour les étapes ultérieures de la procédure, si la Cour juge une telle démarche utile dans l'intérêt d'une bonne administration de la justice.'[30]

As with all suggestions to bring innovation to the procedure, the envisaged collective procedure also raises a number of issues. What does that collective procedure exactly imply? Has the Court the power to adopt such a procedure? Is the Court bound by the conditions set in the declarations of intervention? Who decides if two or more interventions are similar and can be grouped? Can the Court adopt a collective procedure that applies to all twenty-three States requesting to intervene in the *Ukraine v Russia* case, even those that have not expressly consented to it? Can the Court adopt a collective procedure for future cases of mass intervention under Article 63?

Let us assume that 'collective procedure' means that observations under Article 86 of the Rules of Court will be submitted collectively. In other words, instead of a plurality of written observations prepared by a plurality of intervening States the Court will direct them to submit only one document prepared together by those States. Similarly, the oral submissions may be presented collectively by one counsel on behalf of the plurality of third States. For instance, the victims of the 2016 Nice terrorist attack decided to present their views before the French criminal court through a new procedure of 'collective pleading'.[31]

Two things are certain. First, the Court is in control of the procedure. Under Article 47 of its Rules, the Court has the power to direct common action at the written and oral stage of the proceedings and, I would add, independently of any specific acceptance of the third States. Second, under Article 30 of the Statute the Court that lays down the rules of procedure and therefore can amend them. Thus, the Court can envisage a

[29] See the declarations of Spain (para 15), Luxembourg (para 17), Greece (para 19), Croatia (para 15), and Malta (para 16).

[30] See the Declaration of Luxembourg (para 17).

[31] See the explanation provided at <https://www.barreaudenice.com/presse/>.

collective procedure applicable to mass intervention in future contentious cases. As a result, the problems mentioned above essentially concern the case at hand because it is governed by the existing Rules of Court.

While it is clear that a new collective procedure could be envisaged by the Court for the third States that have expressly accepted it in advance, it is more doubtful that such collective procedure could be applied to all States requesting to intervene. The main obstacle is Article 86 of the Rules of Court which establishes individual procedural rights for each intervening State. That provision in principle applies and has to be respected also by the Court. When one also takes into account the fact that intervening States will be bound by the interpretation given by the Court, it becomes all too predictable that they could oppose their procedural rights being narrowed down and could try to maintain control over the organization of the collective procedure (Who takes part in it? When is the collective observations to be presented? How would the collective observations be presented? …).

From the standpoint of the Court, the very first necessity that pleads in favour of a collective procedure is judicial economy. It is manifest that all twenty-six declarations of intervention submitted so far support the same conclusion both on jurisdictional (yes, the Court has jurisdiction on the basis of Article IX of the Genocide Convention) and substantive aspects (yes, Russia has breached the Convention by adopting forcible action in order to prevent/punish the alleged commission of genocide). They largely rely on the same legal arguments. The presentation of collective (written and oral) submissions instead of individual submissions will represent a significant time saving. Not to mention the fact that space/time allocated to a collective intervention – instead of the same amount of space/time divided between all intervening States (something the Court is perfectly capable of deciding without encroaching on the procedural rights conferred by Article 86 of the Rules) – could render intervention much more effective. It offers the opportunity properly to submit a plurality of legal arguments in support of the interpretation of the intervening States, instead of each one of them repeating a brief summary of the same main points twenty-six times. More generally, it seems that the decisions concerning the scope and organization of a collective procedure, if any, have to be centralized by the Court in the name of

better administration of justice.[32] In the end the recognized purpose of the declarations of intervention is 'to assist the Court'. It is on the basis of 'sound administration of justice' and 'procedural efficiency' that, at the end of October 2022, the Court urged States to submit further declarations of intervention under Article 63 before 15 December 2022.[33]

No matter what will be decided by the Court in that regard, the mere fact of having envisaged the possibility of such a collective procedure reveals the collective dimension of Article 63 intervention in the *Ukraine v Russia* case.

5. *The collective dimension of the substantive duty to prevent genocide*

Eighteen of the third States who submitted declarations of intervention in the *Ukraine v Russia* case also focused on the merits of the case and especially the interpretation of substantive clauses of the Genocide Convention invoked as a grounding for Ukraine's principal claims. Eight declarations, including the last six declarations, are limited to the jurisdictional aspects discussed above, while the drafters reserve their right to present further observations on the merits. This may possibly reflect the growing confidence of third States in the likelihood of the admission of their requests at the preliminary stage.

Concerning the views expressed on the merits, all declarations of intervention put a great emphasis on the special character of the Genocide Convention and the need to interpret its substantive provisions in light of its purpose of protecting collective interests. Even France, which does not once use the term '*jus cogens*', makes explicit reference to the 'nature particulière de la convention … et les fins supérieures qui sont [sa] raison d'être'.[34]

More specifically, when discussing the second claim of Ukraine[35] – ie that the forcible action taken by Russia to prevent/punish genocide

[32] This applies to objections of States concerning their individual procedural position or rulings on disagreements among intervening States. Inevitably, it would be for the Court to take a decision that balances all the different interests at stake.

[33] See the Declaration of Bulgaria (para 14) and Norway (para 11).

[34] See the Declaration of France (para 8).

[35] The first claim, concerning the negative assessment of genocide, will not be discussed here.

constitutes a violation of the Genocide Convention – the declarations of third States focus on two aspects. On the one hand, they exclude that force can be used to enforce the obligations of the convention.[36] On the other, the overwhelming majority of declarations hold that a superficial and unilateral assessment of genocide (or of the risk of genocide being committed) is not enough to justify the adoption of measures aimed at preventing/punishing it. In other words, they consider that the *unilateral* assessment made by Russia is problematic.

When the obligation breached is established for the protection of a collective interest, when it is an obligation *erga omnes*, the unilateral, decentralized assessment of its breach – especially when that assessment entails a reaction – is always problematic. The risk of abuse is clearly high. The application of a rule meant to protect a collective interest should in principle be carried out by the collective as such, based on the assessment of the entire collective. When this is not possible, and the legal order accepts that unilateral action may be taken to protect a collective interest, at the very least the assessment of the breach should be centralized. This was the success of the Vienna Convention and the failure of the Articles on State responsibility recalled at the beginning of this article.

Very interestingly, third States submitting declarations of intervention in the *Ukraine v Russia* case have gradually reached the position according to which the assessment of genocide should be more reliable and, to that end, it should be carried out in a more 'objective' manner or by having recourse to 'cooperation' and 'institutional action'. It is possible to say that they mainly take three approaches in that regard.

A first approach focuses on the more demanding burden of proof that may be required to show the commission (or the risk of commission) of genocide for the purpose of taking preventive/retributive action under the Genocide Convention. The application of the obligations of Article I is not regarded as simply a matter of *subjective* interpretation.[37] It is maintained that a Contracting State cannot invoke Article I 'if it has not established, on an *objective* basis and pursuant to a good faith assessment

[36] See in particular the declarations of Latvia (paras 51-52), New Zealand (para 31), the United Kingdom (paras 59-61), the USA (para 29), Sweden (paras 48 and 54), Poland (para 39), Denmark (para 35), Estonia (para 47), Australia (para 52), Portugal (para 40), Luxembourg (para 46) and Norway (para 30).

[37] See in particular the declarations of New Zealand (para 32), Italy (para 52), and Portugal (para 36).

of all relevant evidence that genocide is occurring and that there is a serious risk of genocide occurring'.[38] Some declarations add that such evidence must be obtained 'from independent sources'.[39] More specifically, preventive or retributive action is regarded as necessarily based on 'compelling evidence',[40] 'substantial evidence that is fully conclusive',[41] 'sufficient and fully conclusive' evidence,[42] 'fully conclusive evidence from independent sources',[43] 'significant' and 'serious evidence',[44] or 'genuine and credible evidence'.[45]

Second, a significant group of declarations takes the view that the assessment of the commission (or the risk of commission) of genocide should be carried out preferably by having recourse to 'multilateral cooperation', a concept on which the Genocide Convention places heavy emphasis.[46] Articles VIII[47] and IX[48] of the Genocide Convention are commonly cited as provisions that speak in favour of a duty to employ multilateral and institutional frameworks to prevent/punish genocide.[49]

[38] See the Declaration of the United Kingdom (para 58, emphasis added). See also the Declaration of Estonia (para 48), Italy (para 47), Denmark (para 36) and Luxembourg (para 44).

[39] See the Declaration of Estonia (para. 46).

[40] See the declarations of New Zealand (para 33) and Portugal (para 36)

[41] See the declarations of Sweden (para 45) and Luxembourg (para 40).

[42] See the declarations of Romania (para 41) and Finland (para 22).

[43] See the Declaration of Italy (paras 46 and 52) and Norway (para 27).

[44] See the Declaration of Poland (para 38).

[45] See the Declaration of Australia (para 51).

[46] See the declarations of the United Kingdom (para 56-57), France (paras 45-47).

[47] Article VIII of the Genocide Convention reads: 'Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.'

[48] Article IX of the Genocide Convention reads: 'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.'

[49] See the declarations of the USA (para 29), Sweden (paras 53-54), France (para 46), Denmark (para 34), Estonia (para 45), Australia (para 53), Portugal (paras 39-40), Luxembourg (para 43).

This *preference* to be accorded to multilateral action is also said to be consistent with the object and purpose of the Genocide Convention.[50]

> 'It therefore constitutes good practice to rely on the results of independent investigations under UN auspices before qualifying a situation as genocide and taking any further action pursuant to the Convention. The fact that the prohibition of genocide is a peremptory norm, from which no derogation is allowed, does not, in other words, legitimise all efforts to punish its violators.'[51]

The statement of Norway in that regard deserves to be also mentioned:

> 'The prevention of genocide is a worldwide task for the benefit of humankind, not a matter for the protection of national interests. The object and purpose of Article VIII is to underline the preferability o f collective over unilateral measures.'[52]

Finally, some declarations of intervention go so far as to hold that a subjective assessment of (or the risk of) genocide is totally to be excluded and that the Genocide Convention can be interpreted as providing for the *duty* to obtain (or at least to try to obtain) an objective assessment of genocide before taking preventive/retributive action. Otherwise, that action would amount to a violation of the good faith duty to execute the Convention.

> 'All this speaks in favour of a duty to employ multilateral and peaceful means to prevent genocide, where all Contracting Parties must act within the parameters of international law and preferably through established common institutions such as the UN. … Sweden underlines that all States Parties are engaged in the mission to prevent genocide worldwide for the benefit of humanity, and not in order to protect their own national interests.'[53]

[50] See the declarations of Latvia (para 49), Lithuania (para 22), Romania (para 44), Denmark (para 42), and Norway (paras 28-29).

[51] See the Declaration of Sweden (para 46, footnotes omitted). See also the declarations of Romania (para 40), Finland (para 26) and Luxembourg (para 41).

[52] See the Declaration of Norway (para 29).

[53] See the Declaration of Sweden (para 47). See also the declarations of Denmark (para 34), Estonia (para 51) and Luxembourg (paras 43 and 45)

Independently of the solution that will be adopted by the Court, those declarations of intervention reveal that the preference for an objective assessment of the breach of obligations aimed at the protection of collective interests is a fundamental aspect in the development and protection of those rules.[54]

They also show that two aspects can be usefully separated: the assessment of their breach and the adoption of preventive/retributive action. Obviously, it is not the function of the Court to centralize the reaction against the serious breach of obligations protecting the collective interest of the entire international community. But it seems that the third States asking to intervene under Article 63 in the *Ukraine v Russia* case regard the Court as capable of centralizing the 'objective' assessment of that serious breach. And they are ready to recognize the authority of the Court's assessment.

6. *Conclusion*

It is not easy to say why the *Ukraine v Russia* case in particular has prompted such a flood of intervention requests. Other cases in the past did raise similar concern because they involved the protection of collective interests, even though the vast majority of disputes brought to the Court's attention admittedly could have been characterized as mainly bilateral. One may especially think of the *nuclear tests* cases against France, the cases concerning the *legality of the use of force* in FRY or the *non-proliferation* cases instituted by the Marshall Islands. For different reasons these cases were dismissed at an early stage, and recourse to intervention at that preliminary stage was (and to a certain extent still is) uncertain. This might have dissuaded or prevented third States who were willing to intervene. On the other hand, the case between Ukraine and Russia arguably stands out as it concerns the most serious breach of the prohibition of the use of force, the opposing views of the parties on the interpretation of the Genocide Convention have a potential impact well

[54] For instance, the Declaration of Portugal maintains that: 'The prevention and suppression of genocide is therefore not purely a domestic matter but it concerns the international community as a whole.' (para 39) and that: 'there is a collective dimension of the obligation to prevent genocide and that collective dimension is related to Articles VIII and IX and the preamble of the Convention.' (para 41).

beyond the bilateral dispute, the case involves a permanent member of the Security Council and the risk of nuclear escalation, and it can hardly be brought before another binding dispute settlement mechanism. This combination of factors could justify the sudden reaction of many States that have thrown caution to the wind and decided that the moment has come to make the most of Article 63 intervention.

It must be recalled that this is not the only collective reaction prompted by the Russian aggression of Ukraine. While legitimate self-defence remains in the background, the adoption of collective countermeasures has largely been the result of, if not of institutional decisions,[55] at least of extensive consultations among States.[56] One may also contend that the time seems ripe for a more mature recourse to intervention in contentious ICJ cases. The intention expressed by some States – The Maldives, Canada and The Netherlands – to intervene in another pending case bearing on the protection of collective interests[57] may add ground to the conclusion that intervention can indeed constitute a viable procedural tool for the protection of general interests before international courts and tribunals.

Intervention declarations have provided third States with the opportunity to stress their 'continued commitment to the rules-based international order' and to recognize 'the vital role the Court plays in this regard, as the principal judicial organ of the United Nations, particularly in relation to the peaceful settlement of disputes.'[58] It may come as a surprise that the Court in the exercise of its contentious function, which has a fundamentally bilateral character, is finally the only UN organ having adopted a binding decision in the context of the Russo-Ukrainian war. Together with the centralized establishment by the General Assembly that the Russian armed attack did amount to an act of aggression, the Court will establish – in a binding manner – whether another

[55] The lack of General Assembly recommendations in that regard is notable, especially the most recent resolution that deals with (some of) the consequences of the Russian invasion. See UN GA Resolution A/RES/ES-11/4 adopted on 12 October 2022. In that regard, see the contribution by M Arcari in this Zoom-Out.

[56] See in particular the contribution by G Adinolfi in this Zoom-Out.

[57] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* Judgment on Preliminary Objections of 22 July 2022 available on the Court's website.

[58] See the Declaration of Australia (para 5).

fundamental international law rule for the protection of the collective interests of the international community, namely genocide, has been breached. This shows all the importance – called for by the third States requesting to intervene in the proceedings – of centralizing the assessment of the breach of *erga omnes* obligations, even though the reaction to their commission remains decentralized. That objective/institutional assessment represents an essential (even if insufficient) guarantee against abuse.

The practice of mass intervention requests so far submitted, on the other hand, provides an example of the form that non-institutional coordination of the reaction to serious breaches of *erga omnes* obligations can take. The declarations submitted by third States clearly reveal that some kind of communication and collective reflection has taken place behind the scenes on both the procedural aspects of intervention under Article 63 and the substantive aspects of the *Ukraine v Russia* case.