Impacts of substance on procedure: Genocide litigation before the ICJ

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1. *Introduction*

The present article aims to address an issue that generally attracts little attention: the link between substantive obligations for the protection of collective interests of the international community and procedural rules that govern their implementation. This analysis has been prompted by the recent flood of intervention requests before the International Court of Justice (hereafter 'ICJ' or 'the Court') in cases relating to genocide, showing the impact that the structure of the substantive rules on genocide has on the procedural regimes applying to them.

Two preliminary remarks are in order. First, we will use the term 'procedure' in a very broad sense including not only rules governing judicial proceedings before international courts and tribunals but also, more generally, rules dictating the procedures to be followed for the interpretation, application and implementation of international substantive obligations for the protection of collective interests.[1]

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[1] For a distinction between substantive and procedural law see in general H Thirlway, 'The significance of procedure in the judicial settlement of international disputes' in J Gomula, S Wittich, M Stemeseder (eds), *Research Handbook on International Procedural Law* (Edward Elgar 2024) 21. It is commonly acknowledged that there is an overlap between substance and procedure. See in that regard S Rosenne, *The Law and Practice of the International Court 1920-2005* vol III (4th edn, Brill 2006) 1021; E Lauterpacht, 'Principles of Procedure in International Litigation' (2011) 345 Recueil des Cours de l'Académie de Droit International 403. On the interactions between substantive and procedural law see in general JW Salmond, *Jurisprudence* (4th edn, Stevens and Haynes 1913) 437-440; L Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17 L & Philosophy 19; S Talmon, '*Jus Cogens* after *Germany v. Italy*: Substantive and Procedural Rules Distinguished' (2012) 25 Leiden J Intl L 979.

Second, the substantive primary rules that we will consider are the obligations arising under the Genocide Convention, ie the prohibition to commit genocide and the duties to prevent, suppress and punish genocide.[2] The *erga omnes* character of those rules is the reflection of a particular normative structure devised for the purpose to protect a collective interest of the international community as a whole. This collective normative structure is not to be confused with *ius cogens* character, which concerns the place of the rules in the hierarchy of international sources. We are rather interested here in the relationship that *erga omnes* obligations create between the international community (or a group of States if they are *erga omnes partes*) and each one of its members and the implications of that relationship in terms of the procedures for their interpretation, the ways for establishing their violation, and the means for ensuring compliance with them.

It comes as no surprise that the main consequences of the *erga omnes* structure become apparent at the stage of the assessment of their respect or breach. This is because the legal relationship they entail is no longer confined to the narrow bilateral relationship between the duty-bearer State and the right-holder State but covers a much broader web of relationships between the former and all the other members of the international community. The settlement of the disputes that may arise in that regard would require to go beyond the traditional bilateral framework of international litigation.

The recognition of the existence of international law rules that protect collective interests inevitably raises the issue of their implementation in a horizontal society whose institutionalization depends on the will of its members. Immediately a tension is produced between the substantive

[2] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) (Judgment of11July 1996) [1996] ICJ Rep 595 para 31. The Court explicitly recognized the *erga omnes* character of the obligations of prevention/punishment in ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* [hereafter '*Gambia v Myanmar*'] (Preliminary Objections) (Judgment of 22 July 2022) [2022] ICJ Rep 477 para 107. Some declarations of intervention are explicit in that regard; see in particular ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* [hereafter '*South Africa v Israel*'] Declaration of Chile (12 September 2024) para 36 and Declaration of Maldives (1 October 2024) para 38.

protection of such interests and the procedures that should actually establish their existence and ensure their respect, those procedures being typically private and voluntary in character.[3]

The practice that will be examined below shows that, despite the reluctancy of States to accept organized, centralized or institutionalized procedures for the implementation of *erga omnes* obligations, their very structure inevitably entails some kind of procedural implications challenging the unilateral power of normative assessment that States have under international law.

The following analysis will be based on the positions of third States recently expressed in their requests to intervene in three genocide cases currently pending before the Court.

In *Ukraine v Russia*, 33 States submitted declarations of interventions under Article 63 of the ICJ Statute at the preliminary objections stage; the Court admitted all but one.[4] At the merits stage, 6 States have maintained the position expressed in their previous declarations, 8 States have updated their declarations, and 9 States have sent new declarations with two special situations: Poland requested to intervene under both Article 63 and Article 62 of the ICJ Statute (as a non-party), and Austria, the Czech Republic, Finland and Slovenia decided to submit a joint declaration of intervention in relation to the merits stage.[5]

In *The Gambia v Myanmar*, 2 declarations of intervention under Article 63 have been filed with the Court respectively by Maldives, on the one hand, and by a group of 6 States (Canada, Denmark, France, Germany, the Netherlands and the United Kingdom), on the other; they have both been declared admissible.[6]

[3] For a general analysis of the private and public components of the international legal order see R Kolb, 'Le droit international comme corps de « droit privé » et de « droit public »' (2021) 419 Recueil des Cours de l'Académie de Droit International 9.

[4] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* [hereafter '*Ukraine v Russia*'] (Admissibility of the Declarations of Intervention) (Order of 5 June 2023) [2023] ICJ Rep 354.

[5] See the Court's press release 2024/59 of 6 August 2024 <www.icj-cij.org/sites/default/files/case-related/182/182-20240806-pre-01-00-en.pdf>. The position of the 10 States that have submitted no new communication remains unclear.

[6] ICJ, *Gambia v Myanmar* (Admissibility of the Declarations of Intervention) (Order of 3 July 2024).

In *South Africa v Israel*, 10 States have submitted requests of interventions under both Articles 62 and 63 of the Statute. Nicaragua requested to intervene under Article 62 (as a party), and Palestine submitted two requests: one under Article 63 and the other under Article 62 (presumably as a non-party, because the requirement of a jurisdictional link is not even mentioned, even though the declaration is extremely succinct and vague as to the object of intervention). All other requests have been introduced under Article 63. The Court has not ruled on their admissibility yet.[7]

Taken as a whole, those declarations are remarkable. Not only for their number which is unprecedented. Most notably, they offer a unique collection of positions concerning the substantive character of the rules prohibiting genocide and the procedures ideally to be followed in the establishment of their violation. It goes without saying that the three disputes are different and, as a consequence, third States have focused on different aspects of the international regime concerning genocide. But there is an important convergence on certain aspects. They draw interesting consequences from the collective structure of primary rules that challenge States' unilateral power of appreciation. The main reason is that these rules call for collective, if not institutionalized, procedures ensuring their implementation and compliance with them. The contention prompted by this practice is that the normative structure of substantive obligations can hardly be constrained into the straight jacket of bilateralism and that sooner or later this substantive structure impacts the procedural regime that frames their implementation.

The following analysis is organized around a selection of the main arguments advanced by the third States in their requests for intervention. It is to be noted that these arguments are often closely linked one to the other so that a separation may occasionally appear artificial. This separation is nonetheless maintained as these arguments are raised individually in the requests for intervention. The most direct implications regard intervention itself, its scope and organization before the ICJ (Section 2). Beyond these implications that have a procedural character in the narrow sense, as they refer to the conduct of judicial proceedings, third States refer to procedural issues in a broader sense concerning the way in which

[7] The requests of intervention relating to the *South Africa v Israel* case (n 1) are published on the Court's website <www.icj-cij.org/case/192/ intervention>.

the substantive rules are to be ascertained: the need for an objective assessment of the breach (Section 3), the preferential recourse to independent sources (Section 4), and the involvement of international institutions (Section 5). Section 6 examines this practice and concludes.

2. *Implications for intervention before the Court*

The mentioned declarations and requests for intervention in genocide cases before the Court have one main aspect in common. Quite obviously they are all inspired by the need to protect a *collective interest* of the international community as a whole. Germany's document provides a good example of a recurring formulation: 'it follows from this *erga omnes* character of the obligations enshrined in the Convention that all States parties to the Convention have an interest of their own in the proper interpretation, application and fulfilment of those obligations'.[8] The statement of Luxembourg is more concise but no less effective: 'les États parties se sont engagés à supprimer le génocide dans le monde entier pour le bien de l'humanité dans son ensemble, et non pour protéger leurs propres intérêts'.[9] Almost all States refer to the *erga omnes* character of the rule prohibiting genocide and the rulings of the ICJ in their declarations or requests for intervention.[10]

[8] ICJ *Ukraine v Russia* Declaration of Germany (5 September 2022) para 13.

[9] ICJ, *Ukraine v Russia* Declaration of Luxembourg (13 October 2022) paras 10, 32, 45.

[10] ICJ, *Ukraine v Russia* Declarations of Lithuania (22 July 2022) para 17; USA (7 September 2022) para 9; Sweden (9 September 2022) paras 11-12; France (13 September 2022) para 8; Romania (13 September 2022) para 21; Italy (15 September 2022) para 33; Poland (15 September 2022) para 33; Denmark (16 September 2022) para 28; Ireland (19 September 2022) para 10; Finland (21 September 2022) paras 10, 32; Estonia (22 September 2022) para 36; Spain (29 September 2022) paras 28-29; Australia (30 September 2022) para 26; Australia (2 August 2024) para 9; Portugal (7 October 2022) paras 11-12; Greece (13 October 2022) paras 14, 39; Austria (12 October 2022) para 14; Croatia (19 October 2022) paras 10, 29; Czech Republic (1 November 2022) para 11; Bulgaria (18 November 2022) paras 11, 26; Malta (24 November 2022) paras 11, 29; Norway (24 November 2022) paras 7, 21; Belgique (6 December 2022) paras 9, 43; Canada and the Netherlands (7 December 2022) paras 11-12; Slovakia (7 December 2022) para 16; Slovenia (7 December 2022) para 28; Cyprus (13 XII 2022) para 10; Liechtenstein (15 December 2022) paras 9, 23. Similar statements in the ICJ, *Gambia v Myanmar* case can be found in the Joint declaration of Canada, Denmark, Finland, the

One procedural consequence of this normative structure is straightforward, that is, the generalization of the *locus standi* to the *omnes*. Every State can institute judicial proceedings for the protection of the collective interest. The question of *actio popularis* for *erga omnes* obligations has already been widely discussed, analysed and finally settled by the Court at first with respect to the Torture Convention[11] and more recently the Genocide Convention:

> 'The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes* partes.'[12]

More interestingly, the collective interest underlying *erga omnes* obligations is invoked by would-be intervening States with a similar purpose, that of opening not only the principal proceedings but also intervention to all the *omnes*. This generally raises no objection in relation to Article 63 and the purposes of 'interpretive intervention'. The novelty resides in the fact that the same argument is now used to claim that the *omnes* also possess the 'legal interest' required by 'protective intervention' under Article 62 so that they could intervene almost automatically at least as non-parties.[13] These two implications will be examined in turn.

Netherlands, Germany and the UK (15 November 2023) para 9; and the Declaration of Maldives (15 November 2023) para 7. Similar statements have been put forward by third States in the ICJ, *South Africa v Israel* case: see the Declarations of Colombia (5 April 2024) paras 16-18; Libya (10 May 2024) p. 3; Mexico (24 May 2024) paras 10-15; Spain (28 June 2024) paras 14, 41; Chile (12 November 2024) paras 20, 72; Maldives (1 October 2024) para 5 and 33; and Bolivia (8 October 2024) para 25.

[11] ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Judgment)* [2012] ICJ Rep 422 para 69 ('The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. … any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes* partes'.).

[12] ICJ, *Gambia v Myanmar* (n 1) para 108. For example, this position is put forward and this precedent is recalled by Maldives in their Declaration of intervention in the *South Africa v Israel* case (1 October 2024 para 34).

[13] On the use of these expressions see B Bonafé, 'La participation des tiers aux procédures devant la Cour internationale de Justice' (2023) 69 Annuaire français de droit international (forthcoming).

a) Interpretive intervention

Admissibility of intervention under Article 63 is premised on the existence of a collective interest shared by the members of the multilateral convention to be interpreted by the Court. Even if this interest needs not be ascertained by the Court – because 'is presumed by virtue of its status as a party thereto'[14] – it plays an important role.

First, the decision of the Court in *Ukraine v Russia* that ruled on the admissibility of all declarations of intervention, except for that of the US, clarified the character and role of the collective interest under Article 63. The lack of this interest may be ascertained by the Court and lead to the inadmissibility of the declaration of intervention: 'the legal interest that the United States is presumed to have in the construction of the Genocide Convention, as a party to that instrument, does not exist in respect of Article IX'[15] because it had entered a reservation to that provision.

The declarations of intervention show that some States were hesitant in that respect and carefully underlined that from the collective interest they could draw a corresponding 'direct interest' in the prohibition of genocide. It is true that, lacking representative bodies, action in the name of the collective interest mostly occurs when there is an overlap (of the collective interest) with a private interest and that private interest is often the triggering factor for action in the name of common interests. Indeed, the condition of a legal interest that is *implicit* under Article 63 and *explicit* under Article 62 may be confusing. However, the Court made it clear that a general interest is sufficient under Article 63.

The second impact of the collective character of rules prohibiting genocide concerns the spirit of cooperation that, according to many States, should inspire incidental proceedings under Article 63. A number of States inferred from that character a 'duty to assist the Court'.[16] Some referred, more broadly, to a duty of cooperation among States.[17] Isolated

[14] ICJ, *Ukraine v Russia* (n 2) para 27.

[15] ibid para 95.

[16] ICJ, *Ukraine v Russia* Declaration of Latvia (26 July 2024) para 14; Declaration of Germany (5 November 2022) para 14; Italy (15 November 2022) para 16; Slovakia (7 December 2022) para 17. See also ICJ *South Africa v Israel* Declaration of Maldives (1 October 2024) para 6; whereas Bolivia (8 October 2024) para 27 considers that requesting to intervene is part of its 'responsibility to condemn the crime of genocide'.

[17] ICJ, *Ukraine v Russia* Declaration of Colombia (5 April 2024) paras 19 and 186.

positions brought back the duty to cooperate with the Court to Article IX of the Genocide Convention.[18]

In any case, this spirit of cooperation may have various practical implications. The main one put forward by many third States was their readiness to accept 'grouping this intervention with similar interventions from other States for future stages of the Proceedings, should the Court deem such a move useful in the interest of good and expedient administration of justice'.[19] This procedural adjustment would ensure at the same time an effective protection of the collective interest (by allowing participation to a considerable number of third States) and sound administration of justice.

It is to be noted that this willingness has already been put into practice. Substance has already had an impact on procedure. Some States decided to institute proceedings jointly, to submit joint declarations of interventions and to present joint observations during the oral phase of preliminary objections proceedings.

Canada and the Netherlands have jointly instituted proceedings against Syria for widespread use of torture on the basis of the common interest underlying the Torture Convention.[20] In *Ukraine v Russia*, Canada and the Netherlands have acted jointly from the beginning of the proceedings: they have submitted a joint declaration and presented their common position together at the preliminary objection stage. Joint oral

[18] ICJ, *Ukraine v Russia* Declaration of New Zealand (30 July 2024) para 27.

[19] ICJ, *Ukraine v Russia* Declaration of Sweden (9 September 2022) para 16. That suggestion is repeated in the letter accompanying the updated declaration of intervention that Sweden has submitted on 31 July 2024. For similar proposals, made with very similar formulations, see ICJ, *Ukraine v Russia* Declarations of Germany (5 September 2022) para 19; Poland (15 September 2024) para 12; Denmark (16 September 2022) para 14 (reiterated in the declaration of 2 August 2024 para 14); joint Austria Czechia Finland Slovenia (2 August 2024) para 11; Estonia (22 September 2022) para 21; Spain (29 September 2022) para 15; Luxembourg (13 October 2022) para 17; Greece (13 October 2022) para 19; Austria (12 October 2022) para 8; Croatia (19 October 2022) para 15; Czech Republic (1 November 2022) para 16; Bulgaria (18 November 2022) para 15 (reiterated in the letter accompanying the new declaration of intervention 2 August 2024 para 17); Malta (24 November 2022) para 16; Norway (24 November 2022) para 11; Slovakia (7 December 2022) para 19; Slovenia (7 December 2022) para 15; Cyprus (13 December 2022) para 12.

[20] ICJ, *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v Syrian Arab Republic)* (Joint application) (8 June 2023) <www.icj-cij.org/case/188>.

statements at that stage were presented by two groups of States: Austria, Liechtenstein, Czech Republic and Slovakia, on the one hand, and Belgium, Croatia, Denmark, Estonia, Finland, Ireland, Luxembourg, Romania and Sweden, on the other hand.[21] At the merits stage, a new joint declaration of intervention has been submitted by Austria, the Czech Republic, Finland and Slovenia. In *Gambia v Myanmar*, a joint declaration of intervention has been submitted by Canada, the Netherlands, Denmark, France, Germany and the United Kingdom. The Court praised 'the joint presentation of shared views [that] can advance the good administration of justice.'[22]

b) Protective intervention

The three requests of intervention under Article 62 – submitted by Poland in the *Ukraine v Russia* case and by Nicaragua and Palestine in the *South Africa v Israel* case, respectively – have in common the fact of relying on the *erga omnes* character of the prohibition of genocide to justify the possession of an essential requirement, that is, the legal interest susceptible of being affected by the future decision of the Court.

The reasoning is simple and based on two prongs. First, there is the assumption that the prohibition of genocide protects a collective interest.[23] Intervention under Article 62 is regarded as aimed at the protection of that interest because the interveners may present their views not only on the interpretation of abstract rules, as provided by Article 63, but may also discuss the application of those rules to the facts of the case. Second, it is maintained that if the collective interest is sufficient to justify that the *omnes* have *locus standi* in relation to the principal proceedings, that same interest must necessarily suffice to justify the existence of a qualified legal interest under Article 62.[24] Provided that the other conditions are met, intervention under Article 62 should thus be generalized to all the *omnes*.

[21] ICJ, *Ukraine v Russia*, CR 2023/15 of 20 September 2023.

[22] ICJ, *Ukraine v Russia* (n 2) para 88.

[23] ICJ, *South Africa v Israel* Requests of Nicaragua (23 January 2024) paras 18-19, and of Palestine (3 June 2024) paras 24-25; ICJ, *Ukraine v Russia*, Request of Poland (23 July 2024) paras 10-13.

[24] ICJ, *Ukraine v Russia* Declaration of Poland (23 July 2024) para 14. The way in which the may-be-affected condition of the legal interest requirement is demonstrated is not entirely convincing because it is conflated with the general interest requirement of

The argument according to which the *erga omnes* character (substance) has this impact on Article 62 intervention (procedure) is not new. It has been supported by members of the Court[25] and international law scholars.[26] Views challenging that possibility have remained isolated.[27] The Court will hopefully soon clarify that issue when ruling on the admissibility of the mentioned intervention requests.

One specific aspect of the request of Nicaragua deserves to be outlined here because it implies a broader interrelation between substance and procedure. The multilateral dimension of genocide is said to entail a duty of cooperation according to which States should have recourse to all procedural means of prevention and protection. Accordingly, recourse to intervention would become the object of an obligation:

> 'The only effective mean available to Nicaragua to implement its obligation to prevent and likely to have a deterrent effect on the ongoing genocide, is recourse to the Court. South Africa's Application has not relieved Nicaragua of this obligation. South Africa is not acting as sole representative of the international community, and its Application has not excluded the intervention of other Parties to the Convention, not only in the interpretation of the Convention but also in its application to the present situation. Nicaragua's request for intervention under Article 62 is to be considered within that legal context.'[28]

3. *The need for an objective assessment of the breach*

The conditions surrounding unilateral claims of genocide and action that can be taken in that regard are at the heart of *Ukraine v Russia*. Third

Article 63 (see in particular paras 37, 39 and 42). See also ICJ, *South Africa v Israel*, Declaration of Nicaragua (23 January 2024) para 16; and Declaration of Palestine (3 June 2024) paras 26 and 31.

[25] G Gaja, 'The Protection of General Interests in the International Community' (2013) 364 Recueil des Cours de l'Académie de Droit International 119.

[26] B Bonafé, *La protezione del terzo davanti alla Corte internazionale di giustizia* (Editoriale scientifica 2014) 199-205.

[27] B McGarry, 'Obligations Erga Omnes (Partes) and the Participation of Third States in Inter-State Litigation' 22 (2023) The Law & Practice Intl Courts and Tribunals 273.

[28] ICJ, *South Africa v Israel* Declaration of Nicaragua (23 January 2024) para 17. See also paras 11, 15, 16.

States interventions in that case are particularly relevant, but views expressed in the framework of other cases will also be taken into account.

As clarified in its preliminary objections' decision, the Court has jurisdiction to hear the part of the dispute between Ukraine and Russia that relates to the existence of 'no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine.'[29] The purpose of the claim of Ukraine is obviously to preclude Russia the possibility to invoke genocide as a lawful basis for its 'special military operation' of February 2022. Thus, the Court must decide whether Ukraine had committed genocide before that attack.

Third States having submitted declarations of intervention largely focused on two aspects, namely, the interpretation of the definition of genocide and the way in which claims of genocide should be substantiated. One of the positions on which there is clear consensus among them is that a State cannot be accused of genocide lightly. Such a serious claim is to be made in good faith and needs strong evidence before using the commission of genocide or the risk thereof as a justification for action (especially military action) against the alleged wrongdoer. The most striking point that is explicitly made by many States is that the assessment of the commission/risk of genocide must be made *objectively*.

The UK considered that

> 'a Contracting Party cannot invoke Article I in order to render lawful conduct that would otherwise be unlawful under international law if it has not established, on an *objective basis* and pursuant to a good faith assessment of all relevant evidence, that genocide is occurring or that there is a serious risk of genocide occurring.'[30]

The objective character of the assessment is not clarified further, but it is justified by the multilateral character of the prohibition of genocide and the cooperation at the basis of the Genocide Convention (see below).

[29] ICJ, *Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation: 32 States intervening)* (Preliminary objections) (Judgment of 2 February 2024) para 149.

[30] ICJ, *Ukraine v Russia* Declaration of the UK (5 August 2022) para 58 (emphasis added).

Similar statements are to be found in the declarations of Italy,[31] Belgium[32] and Luxembourg[33]. According to the latter, 'pour qu'il y ait genocide en vertu de l'article II, il est necessaire d'établir objectivement et de bonne fois un "acte" et une "intention" de génocide'.

The declaration of Chile submitted in the *South Africa v Israel* case adds an interesting element: the objective assessment of the Court prevails over the unilateral assessment of Israel. It seems obvious that once the Court has established certain requirements of genocide the respondent State can no longer deny them.[34] The interesting aspect is that the third State refers to the provisional measures stage when the Court's assessment is only made *prima facie*. It shows the importance accorded to the centralized establishment of the Court, at least pending the final decision.

It must be recalled that the precise contours of the 'objective determination' are rarely provided, and generally the body that is supposed to provide such an objective assessment is not identified. However, the statements can hardly be taken as unintended to hint at the need for some form of centralized or organized assessment, especially when coupled with other explicit positions expressed against the *subjective* establishment of the commission/risk of genocide.

The declaration of New Zealand refers to both aspects: 'whether acts amount to "genocide" so as to trigger the application of Article I is not simply a matter of a party's *subjective* interpretation … the Court must

[31] ICJ, *Ukraine v Russia* Declaration of Italy (15 September 2022) para 47 ('a State cannot invoke the "undertak[ing] to prevent" genocide in Article I of the Convention as a justification for its conduct fi it has not carried out an *objective* and documented assessment of the occurrence or the risk of occurrence of genocide', emphasis added).

[32] ICJ, *Ukraine v Russia* Declaration of Belgium (6 December 2022) para 24 ('une Partie contractante ne saurait invoquer l'article I de la Convention pour rendre licite un comportement qui serait autrement illégal en droit international si elle n'a pas établi, sur *une base objective* et à la suite d'une évaluation de bonne foi de tous les éléments de preuve substantiels provenant de sources indépendantes, qu'un génocide est en train de se produire ou qu'il existe un risque sérieux qu'un génocide se produise', emphasis added).

[33] ICJ, *Ukraine v Russia* Declaration of Luxembourg (31 July 2024) para 20 (emphasis added).

[34] ICJ, *South Africa v Israel* Declaration of Chile (12 September 2024) paras 44-45 ('After the issuance of the provisional measures, and considering the Court's finding that the right of the Palestinians in Gaza to be protected from acts of genocide was plausible, Israel cannot claim that it was not aware of the existence of this risk.').

look to the party taking measures to prevent genocide under Article I of the Convention to prove the *objective* basis for its determination'.[35] Other States merely exclude that the establishment of genocide could be left to the subjective determination of one interested party.[36]

In accordance with these positions, the *erga omnes* character of the rule has a clear procedural implication. Just as the interest at the basis of the substantive rule is collective in character, the procedure leading to the establishment of its violation cannot be subjective. The risk of abuse is too high. The assessment can only be made objectively.

4. *The preferential recourse to independent sources*

In the same vein, the declarations and requests for intervention in the three cases under examination show a clear preference accorded to the use of independent sources. Again, third States do not identify the entity that should carry out the 'objective' assessment, but the relevant statements add another piece of the puzzle in that respect.

The explicit reference to the need to have recourse to independent sources is to be found with a first formulation in the Declaration of Lithuania:

> 'States parties to the convention have the obligation, pursuant to Article I, to act diligently to collect credible evidence from *independent* sources either that genocidal acts are being perpetrated or that there exists "a serious risk that genocide will be committed".'[37]

The position in that regard found a definitive formulation in the Declaration of Sweden: '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

[35] ICJ, *Ukraine v Russia* Declaration of New Zealand (28 July 2022) paras 32-33, emphasis added. The Declaration of Italy in the same case also contains a rejection of the possibility that genocide be established subjectively (15 September 2022) para 52.

[36] ICJ, *Ukraine v Russia* Declaration of Portugal (7 October 2022) para 36.

[37] ICJ, *Ukraine v Russia* Declaration of Lithuania (24 July 2024) para 11, emphasis added.

Convention.'[38] This statement is present in many other declarations of intervention with an almost identical wording.[39]

The joint declaration of Canada, Denmark, Finland, the Netherlands, Germany and the UK provides a good example of the link between the *erga omnes* character of the substantive rule and the need to establish its violation in the most impartial way:

> 'it is particularly important for the Court to consider the evidentiary value of certain documents in its construction of Article II of the Genocide Convention, bearing in mind the *erga omnes partes* nature of the obligations under this convention. […] the Declarants submit that reports generated by the United Nations, such as reports produced by fact finding missions, commissions of inquiry, and reports that the Secretary-General of the United Nations may prepare for the United Nations Security Council or General Assembly, can have special importance. Indeed, such reports can be particularly credible because they emanate from a "disinterested witness," namely "one who is not a party to the proceedings and stands to gain or lose nothing from its outcome."'[40]

5. *The involvement of international institutions*

Declarations and requests of intervention plead in favour of a third procedural implication. The breach of *erga omnes* obligations not only must be established objectively and by having recourse to independent sources, but it should also be carried out collectively, if not entrusted with international institutions.

As stated by Sweden:

[38] ICJ, *Ukraine v Russia* Declaration of Sweden (9 September 2022) para 46, emphasis added. The same statement is included in the Declaration submitted by Sweden on 31 July 2024 para 8.

[39] See ICJ, *Ukraine v Russia* Declarations of Denmark (2 August 2024) para 20; Austria, Czech Republic, Finland and Slovenia (2 August 2024) para 38; Estonia (2 August 2024) para 21; Spain (2 August 2024) para 21; Luxembourg (31 July 2024) para 12; Bulgaria (2 August 2024) para 23. See also ICJ, *South Africa v Israel* Declarations of Colombia (5 April 2024) para 35; Spain (28 June 2024) para 30; Turkey (7 August 2024) para 39.

[40] ICJ, *Ukraine v Russia* Joint declaration of Canada, Denmark, Finland, the Netherlands, Germany and the UK (15 November 2023) para 76.

> 'the prevention and suppression of genocide is not a domestic matter but concerns the international community as a whole. […] The object and purpose of Article VIII is to underline the *preferability of collective* over unilateral measures.'[41]

Most declarations focus on Articles VIII and IX of the Genocide Convention and interpret these provisions as expressions of the collective character of the prohibition of genocide. The first recommends recourse to UN political bodies; the second is the compromissory clause establishing compulsory jurisdiction of the ICJ.[42] These provisions are interpreted as evidence of this collective character because they translate the need to act first of all (if not exclusively) at the collective level and possibly by having recourse to institutions able to speak in the name of the entire international community, some with binding force.

Some States underline the duty of cooperation that is implicit in the said provisions[43] and the collective assessment that should be preferred in the case of genocide.[44] Other States, explicitly prone recourse to international institutions.

In the vast majority of cases, such recourse is not regarded as compulsory. The point is clearly made by Portugal:

> '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. As a consequence, the fulfilment of the obliga-

[41] ICJ, *Ukraine v Russia* Declaration of Sweden (9 September 2022) para 54 (emphasis added).

[42] The Court clarified the distinct areas of application of these two provisions in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections) (Judgment of 22 July 2022) [2022] ICJ Rep 477 paras 88-90.

[43] ICJ, *Ukraine v Russia* Declarations of the UK (5 August 2022) paras 56-7; France (13 September 2022) para 45; Denmark (16 September 2022) para 34; Luxembourg (13 October 2022) para 43; Canada and the Netherlands (7 December 2022) para 35.

[44] ICJ, *Ukraine v Russia* Declarations of New Zealand (28 July 2022) para 30; Romania (13 September 2022) para 44; Norway (24 November 2022) para 29; Canada and the Netherlands (7 December 2022) para 14.

> tion of prevention of genocide in good faith would require favoring co-operation, in particular in the context of the United Nations organs and of peaceful settlement of disputes, over any unilateral military action.'[45]

The link with the collective nature of the interest protected by genocide primary rules is explicitly discussed in a number of declarations.[46] In the end, all these positions agree on an interpretation of the Genocide Convention as expressing a priority of collective enforcement over unilateral enforcement.[47] Which does not rule out the latter.

A few States make further steps towards the recognition of a *duty* to assess genocide by having recourse to collective/institutional means. The Czech Republic considers that:

> 'Whenever a Contracting Party believes that another Contracting Party acts in violation of any provision of the Genocide Convention, *the only remedial action available, on a bilateral basis*, to the former Contracting Party under the Genocide Convention would be the initiation of the dispute relating to the interpretation, application or fulfilment of the Genocide Convention under Article IX of the Genocide Convention.'[48]

If litigation before the ICJ is the only available, bilateral means, other types of unilateral assessments are then to be excluded, and the remaining possibility is recourse to collective/institutional means.

On a different vein Estonia considers that 'the legality of any extraterritorial unilateral preventive measure is contingent on the prior seizing of competent United Nations organs pursuant to Article VIII'.[49] Institutional reaction becomes a pre-condition for having recourse to unilateral action.

[45] ICJ, *Ukraine v Russia* Declaration of Portugal (7 October 2022) para 41. See also ICJ, *Ukraine v Russia* Declarations of Sweden (9 September 2022) para 47; Belgium (6 December 2022) paras 27-28.

[46] See ICJ, *Ukraine v Russia* Declarations of Sweden (9 September 2022) para 53; Estonia (22 September 2022) para 50; Czech Republic (1 November 2022) para 29.

[47] See ICJ, *Ukraine v Russia* Declarations of France (13 September 2022) paras 46-47; Denmark (16 September 2022) para 34 and 42; Luxembourg (13 October 2022) para 43; Norway (24 November 2022) para 29.

[48] ICJ, *Ukraine v Russia* Declaration of the Czech Republic (1 November 2022) para 29, emphasis added.

[49] ICJ, *Ukraine v Russia* Declaration of Estonia (22 September 2022) para 51.

Finally, Poland starts by considering that originally Article VIII did not provide for an obligation to consult UN organs. However, it concludes that, due to subsequent practice, a *duty* has emerged to 'call upon the competent organs of the UN before they decide on unilateral action' and that today the Genocide Convention 'directs States to multilateral institutions to properly assess the situation in an unbiased fashion'.[50] Unfortunately, the declaration lacks precision on two aspects: the relevant subsequent practice and the agreement between the members of the Genocide Convention that it indirectly shows. These are both required under the Vienna Convention.[51] Nonetheless, this position is interesting because it relies on the idea that gradually the procedural implications of *erga omnes* substantive obligations may crystallize into general international law obligations.

6. *Impacts of substance on procedure before and beyond the ICJ*

Taken as a whole the views expressed by third States before the ICJ in the three genocide cases under review support a number of procedural implications entailed from the particular structure of the substantive rules prohibiting genocide. They are inspired by a common thread, ie the abandonment of the unilateral approach to the implementation of international rules protecting collective interests.[52] Third States seem to realize how dangerous the unilateral assessment of their existence/compliance can be and the risk of abuse that such an assessment could lead to.

[50] ICJ, *Ukraine v Russia* Declaration of Poland (15 September 2022) para 30.

[51] Art 31(3)(b) of the Vienna Convention allows treaty interpretation in light of subsequent practice, provided that those two requirements are met. The Convention did not codify the possibility of a modification of the treaty in light of subsequent practice. See in that regard the ILC 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties' (2018) II/2 YB ILC.

[52] J Combacau, 'Le droit international : bric-à-brac ou système ?' (1986) 31 Archives de philosophie du droit 97-98 ('La souveraineté des Etats impose l'établissement d'un ordre dans lequel ce sont eux qui confrontent des faits légalement pertinents aux règles desquelles ils tirent leur signification juridique : chaque Etat atteste celle-ci pour lui-même, sans plus de pouvoir d'imposer aux autres la signification qu'il attribue subjectivement à un fait que tout autre n'a le pouvoir de lui imposer la sienne ; à moins qu'une autorité extérieure se voie attribuer par eux la fonction de dire objectivement le droit à leur place').

The concrete risks of the lack of a centralized assessment for rules protecting community interests have been largely voiced in the past in the works of international law scholars.[53]

Third States plead for a generalization of intervention when *erga omnes* breaches are at stake and for an objective assessment, based on independent sources and carried out at the collective level, if not the involvement of international institutions. In other words, substantive rules created for the protection of collective interests have procedural impacts both for the conduct of proceedings before the Court and, beyond judicial settlement, for the way in which States appreciate and ensure compliance with substantive obligations.

To be sure, the analysed State practice can hardly evidence more than a 'common thread', maybe a 'tendency'. Nonetheless, to our mind it is somehow revolutionary. This for two main reasons. First, it shows a radical change of attitude of States. It suffices to compare it with the traditional opposition they had with respect to any form of centralized means for ensuring the application of and compliance with *erga omnes* obligations to realize how significant this common call for collective action is. Second, this remarkable emphasis on the need for collective mechanisms balances the first attempts to afford a procedural protection to *erga omnes* obligations that relied on a logic of pure bilateralization in framing specific rules in responsibility regimes and judicial dispute settlement.

a) Abandoning unilateral assessment and entering the uncertain ground of collective assessment

The 'common thread' brought to the surface by these positions corresponds first to a growing consensus against the traditional power States have to assess unilaterally the existence/breach of obligations having an *erga omnes* character and the consequences thereof. Rules created for the protection of collective interests call not only for collective reactions, but firstly for a collective assessment of their existence/breach. The genocide cases discussed above seem to have raised States' awareness on the risks

[53] See for various views in that regard A Cassese (ed), *Realizing Utopia. The Future of International Law* (OUP 2012).

of purely decentralized reactions to the (alleged) breach of *erga omnes* obligations.

This is something that had been vividly discussed and strongly opposed by States in the past. Especially at the International Law Commission (ILC), when formal proposals had been made to centralize the decision establishing compliance with or the breach of *erga omnes* obligations, they have systematically been rejected by States that were extremely reluctant to relinquish their unilateral power of assessment and enforcement of international rules. It suffices here to mention the position of Special Rapporteur Gaetano Arangio-Ruiz concerning 'the indispensable role of international institutions' in the implementation of international crimes and his proposal to create a special procedural framework for the establishment of their commission.[54] The proposal met such strong an opposition that it was finally excluded from the draft articles on State responsibility adopted on first lecture in 1996.[55] The times were not ripe for such a procedural development.

Instead, current genocide cases before the ICJ show that States seem now ready to acknowledge the need for an 'organized' determination[56] of the commission of this crime and that the structure of the underlying obligation is crucial in maintaining such procedural claims. Maybe in the future the same position will be taken with regard to other collective obligations. In our opinion, this generalization is made possible by the normative structure of these obligations and not the specific provisions of treaty regimes, such as Articles VIII and IX of the Genocide Convention.

Yet the 1995 proposal made by Special Rapporteur Arangio-Ruiz deserves to be recalled. It provided for a first political step: it was the task of the political organs of the United Nations to assess whether an allegation that an international crime had been committed was 'sufficiently substantiated'. In the affirmative, there was a second, judicial step: any member State of the UN could bring the matter – ie the commission of

[54] G Arangio-Ruiz, 'Seventh Report on State Responsibility' UN Doc A/CN.4/469 and Add.1 and 2 (1995) II/1 YB ILC 3.

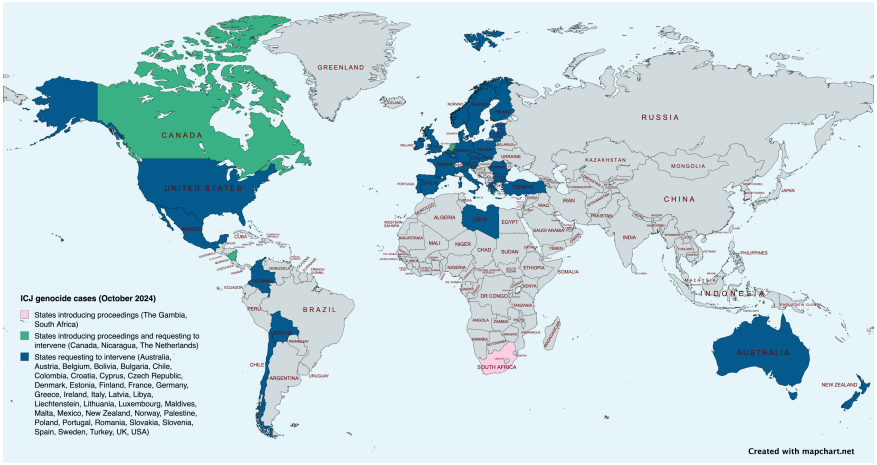
[55] See especially the summary of the debates in the General Assembly sixth committee concerning that proposal, UN Doc A/CN.4/479/Add.1 (1 May 1997) paras 77 ff.

[56] G Arangio-Ruiz (n 48) 20 ff.

the international crime – to the Court's attention. In addition, it was provided for the possibility that 'any other member State' could join the proceedings before the Court.[57]

It is quite astonishing to see how much overlap there is between this proposal and the positions put forward by the third States in their declarations and requests of intervention examined above. It is clearly impossible to speak of the abandonment of State's unilateral power of assessment of international law rules. Neither is it claimed that this assessment must always be centralized at the international level.

The positions of third States having intervened or requested to intervene in the three genocide cases are too few and their geographical representation is too limited in certain areas of the world (see the map below designed by the author).



Apart from Turkey, Asia remains silent, and there are only isolated voices coming from Africa (The Gambia, Libya, South Africa) and a minority of Latin American requests (Bolivia, Chile, Colombia, and Mexico, Nicaragua). However, the role played by African States is crucial (two had the initiative to institute contentious proceedings before the Court) and certain American States have been very active before the Court (eg

[57] ibid 30.

Nicaragua and Canada). Most importantly, this collective effort to intervene before the Court in cases of common concern is striking when compared to the previous silence of third States. In the first century of the history of the two courts (PCIJ and ICJ), 1920-2020, they had received 18 requests and only 6 States actually intervened either under Article 62 or Article 63 of the Statute.[58]

As noted above, the unprecedented number of interventions in the genocide cases is largely inspired by the goal of protecting a collective interest. They represent a collective effort based in many regards on close coordination of third States in the drafting of the declarations and in requesting to intervene.[59] Third States have clearly tried to ensure, at least before the Court, a common reaction.

The views of third States are not revolutionary when it comes to the definition of the means for the recommended 'objective' assessment of genocide. They advocate the use of independent resources, cooperation and the involvement of international institutions. Centralization is not at the core of their positions. Recourse to existing institutions – such as the UN political bodies or the ICJ – is neither seen as compulsory nor as exclusive. At best, institutional assessment is a precondition for unilateral assessment.

This is why 'collective' is possibly the best word to describe the 'common thread' of third States' views. They reject a purely unilateral assessment of the commission of *erga omnes* violations: such an assessment alone cannot justify the decision to take measures in response. On the other hand, the 'collective' assessment does not necessarily imply to relinquish State power of unilateral assessment. It calls for a multilateral action but falls short of creating a representative organ proceeding on behalf of the *omnes*. From this perspective, third States positions are very cautious.

This indirectly confirms their awareness that they are stepping on uncertain ground and that middle-ground solutions between unilateral and collective action are extremely difficult to envisage. What is revolutionary in the end is that States are trying to be creative.

[58] See in general B Bonafé (n 26).

[59] See J McIntyre, 'Consenting to Be Bound or Co-Operative Condemnation? Article 63 Interventions at the International Court of Justice' (2022) 29 Australian Intl L J 1.

b) Balancing bilateralization and centralization of the response

The underdevelopment of procedural rules relating to the protection of *erga omnes* obligations was, at least a decade ago, unchallenged: 'the development of substantive principles for the protection of common interests has so far gone unmatched with the development of procedural rules.'[60] Today, procedural developments are undeniable. They can be elaborated according to two main logics[61] that are not mutually exclusive but rather complementary.

On the one hand, the logic of isolation entails that the entitlement to the protection afforded by *erga omnes* obligations is extended to all the members of the relevant community, ie either the international community as a whole or treaty members. This substantially leads to the bilateralization of obligations conceived for the protection of the entire collective. The lack of common organs entails the recognition that every member can enforce *erga omnes* obligations. This logic has typically been applied in the codification of State responsibility (Article 48 ARSIWA) and dispute settlement before the ICJ (*locus standi*). Some States plead for a corresponding development in intervention under Article 62. The bilateralization of community obligations is the reflection of the horizontal character of the international legal system. It has traditionally been seen as the only way to develop at the international level the protection for common interests.[62]

On the other hand, the logic of inclusion would rather call for collective action. It is precisely the path towards the development of 'orga-

[60] A Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23 Eur J Intl L 791.

[61] B Bonafé, 'Adjudicative Bilateralism and Community Interests' (2012) AJIL Unbound 164.

[62] See in particular B Simma, 'From bilateralism to community interest in international law' (1994) 250 Recueil des Cours de l'Académie de Droit International 217; M Benzing, 'Community Interests in the Procedure of International Courts and Tribunals' (2006) 5 The Law and Practice of International Courts and Tribunals 377 ff; S Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 Eur J Intl L 409-410; B Bonafé, 'La violation d'obligations envers la communauté internationale dans son ensemble et la compétence juridictionnelle de la Cour internationale de Justice' in E Cannizzaro (ed), *The Present and Future of Jus Cogens* (Sapienza Università Editrice 2015) 148 ff.

nized' means for the establishment of the breach of *erga omnes* obligations. Collective and centralized reaction are possible in certain specific fields of international law, such as the regional protection of human rights. However, the creation of institutional enforcement mechanisms or compulsory jurisdiction at the universal level has been largely seen as utopistic. This is also due to the structure of the international community.

In this regard, the practice analysed above and the positions of third States seem to support the feasibility of at least a certain degree of organization. The practice of intervention itself shows that States can be willing to cooperate or actually act jointly before the Court. The positions discussed above reveal in addition the attempt at devising new forms of coordination, collective action, and recourse to existing institutional means. One is tempted to consider that at least the collective assessment of these *erga omnes* obligations is less utopistic today.

More generally, the positions of third States advocating objective assessment, independent resources and forms of centralized decision plead for the existence of some limit to the pure logic of isolation in the protection of collective interests. In the framework of institutional judicial settlement of international disputes, it can be perfectly acceptable that they be litigated by all the *omnes* and legal standing or intervention be generalized. The risk inherent in unilateral action is counterbalanced by the decision being ultimately in the hands of the Court. This was precisely the logic behind the 'necessity argument' invoked to plead *actio popularis* in the *South West Africa* cases: the ultimate safeguard for the sacred trust was the Court's decision and the unilateral right of action of each League member was just its triggering mechanism.[63]

However, when action is taken outside institutionalized mechanisms – such as in the case of third-party countermeasures or other unilateral responses – the assessment of its lawful basis should not be left to the sole unilateral, subjective appreciation of every State; some form of organization is necessary to avoid abusive uses of rules meant to protect public

[63] ICJ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) (Judgment of 21 December 1962) [1962] ICJ Rep 28-29; *South West Africa (Second Phase)* (Judgment of 18 July 1966) [1966] ICJ Rep 6 paras 80-98. When the Court finally accepted to generalize *locus standi* in relation to *erga omnes* obligations' litigation, the same logic justified individual action being put at the service of the collective interest. See ICJ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment 20 July 2012) [2012] ICJ Rep 422 para 69.

interests. What the intervening States seem to be advocating is at least a combination of the two logics and the balancing of the need for some degree of inclusion (knowing that this may prevent any action from being taken at all) and isolation (knowing that abusive responses can defeat the very purpose of public interests' protection). To find this balance is at the same time very important and very difficult.

The recent flood of intervention requests has shown that devising effective procedures for the protection of collective interests of the international community has become an urgent matter and possibly that States are ready to make a step in the direction of collective action, whatever this may concretely mean. This is essential to ensure that not just law-making but also law-application be open to all members of the international community. This is all the more so for States that 'rel[y] for [their] security on the global rules-based order with the United Nations Charter and adherence to international law as its core.'[64]

[64] ICJ *Ukraine v Russia* Declaration of Cyprus (13 December 2022) para 11.