



What You Need to Know: Unpacking the Law in Russia's War Against Ukraine

U.S. Intervention in *Ukraine v. Russia* at the ICJ

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You've been following closely the International Court of Justice (ICJ) case *Ukraine v. Russian Federation*, brought under the Genocide Convention—including writing about it for *Just Security* several times. On Sep. 7, the United States filed a declaration of intervention in the case; a number of other States have done the same in recent months. Is the fact of the U.S. intervention notable? And what happens from here?

Yes, it's very notable—in fact, I'm not aware of any previous ICJ case in which the United States has sought to intervene. This case has served as a focal point for European and Five Eyes countries' legal support of Ukraine, as evidenced by their [May](#) and [July](#) joint statements in support of the proceedings. The recent flurry of interventions shows that the ICJ proceeding continues to serve as a rallying point for Ukraine's supporters.

The U.S. written intervention addresses both the jurisdictional question and the merits of the case. Ultimately, the ICJ will have to decide (1) whether the Genocide Convention gives the ICJ jurisdiction to adjudicate Ukraine's claim

that Russia unlawfully invaded it based (at least in part) on pretextual allegations of genocide; (2) whether Russia in fact unlawfully invaded Ukraine based on pretextual allegations of genocide (and, if so, whether Russia is responsible under the Genocide Convention for the harm it has inflicted on Ukraine); and (3) what Russia owes Ukraine as a result of its unlawful acts. Ukraine's [application](#) instituting proceedings in February did not accuse Russia of violating the Genocide Convention by committing genocide, although it noted that Russia appeared to be “planning acts of genocide in Ukraine,” and that the intentional killing and infliction of serious injury on Ukrainians “must be viewed together with Russian President Vladimir Putin's vile rhetoric denying the very existence of a Ukrainian people, which is suggestive of Russia's intentional killings bearing genocidal intent” (para. 24). So, it is possible that Ukraine will at some point in the ICJ proceedings formally accuse Russia of committing genocide, but it has not done so yet.

Like the other States seeking to intervene in this case, the United States relies on [Article 63 of the ICJ Statute](#), which gives any State party to the Genocide Convention “the right

to intervene in the proceedings,” with the caveat that “the construction given by the judgment will be equally binding” upon an intervening State, not just the States directly party to the dispute. This intervention mechanism is different from that provided in Article 62, under which a State may request to intervene in a case if it has “an interest of a legal nature which may be affected by the decision in the case.”

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A declaration to intervene doesn’t necessarily mean that the ICJ will take the views of the intervening State(s) into account—the Court must first rule on the admissibility of the intervention(s). Brian McGarry [noted](#) in September 2020 that the Court has admitted 20 percent of Article 62 applications and roughly 29 percent of Article 63 declarations, even though Article 63 is framed in terms of a State’s “right” to intervene. As a procedural matter, the parties to the case are [given an opportunity](#) to “furnish their written observations” on a declaration of intervention, and the Court then decides whether the declaration is admissible. The States that have sought to intervene in *Ukraine v. Russia* have offered their substantive legal views along with their declarations. Although the ICJ has not yet posted Ukraine’s memorial on its website (and will not do so [until](#) the opening of oral proceedings), it is [posting](#) declarations of intervention as they are filed. This means that the written interventions also serve to create an additional public record of arguments in support of Ukraine’s legal position.

So far, Russia has not formally participated in the case, although it did submit a [document](#) at the provisional measures stage that the Court has posted on its website. Even though Russia clearly does not accept that the Court has jurisdiction over Ukraine’s claims under the Genocide Convention, the Court [has not](#) bifurcated the proceedings, which means that it will address any jurisdictional objections

together with the merits. (Ukraine has already [submitted](#) its memorial, and Russia’s counter-memorial is due on Mar. 23, 2023.) The Court [found](#) at the provisional measures stage (without prejudging the questions of jurisdiction, admissibility of the application, or the merits themselves) that “Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine.” That is what gave the Court authority to issue its provisional measures [order](#).

Are there especially significant points in the U.S. submission?

Two significant points in the U.S. submission are (1) its position on jurisdiction and (2) what the United States says—and doesn’t say—about military intervention to prevent and punish genocide.

First, Ukraine bases jurisdiction on the Genocide Convention’s compromissory clause—that is, the clause by which parties have agreed to submit to dispute resolution. In its submission, the United States argues that, because “the provisions of the Convention are obligations *erga omnes*,” “all States Parties have a significant interest in ensuring the correct interpretation, application, or fulfilment of the Genocide Convention” (para. 9). In other words, unlike most contentious cases involving bilateral disputes, a dispute arising under the Genocide Convention implicates the interests of (at least) the 153 States party to the Convention. The U.S.’ declaration also highlights “the United States’ long history of supporting efforts to prevent and punish genocide” (para. 10). (This also raises the question whether the United States might seek to intervene in other cases involving genocide. To date, only Canada and the Netherlands have [indicated](#) an intention to intervene in the other pending [case](#) concerning the Genocide Convention brought by Gambia against Myanmar, which the ICJ found [admissible](#) in July 2022.)

The U.S. submission identifies the jurisdictional question whether Article IX provides the ICJ with jurisdiction over a dispute “where a Contracting Party commits aggression against another Contracting Party *on the pretext* of preventing or punishing genocide” (para. 16, emphasis added).

In other words—as I’ll discuss more in response to the next question—the issue is whether Russia’s pretextual misuse of genocide allegations creates jurisdiction under the Genocide Convention. It’s notable here that the United States—which is generally cautious about ceding jurisdiction to international courts—has joined other intervening countries to advocate for broader jurisdiction and encourage the Court to answer “yes.”

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The submission also identifies the question “relevant to the merits” of whether the treaty obligations to prevent and punish genocide, and to punish persons committing genocide or any other enumerated acts, “permit[] one Contracting Party to commit aggression against another Contracting Party on the pretext of preventing or punishing genocide” (para. 16). The U.S. answer to the latter question is clearly “no,” given that the Genocide Convention “expressly provides Contracting Parties recourse where they believe another Contracting Party is responsible for genocide”—namely, calling upon “the competent organs of the United Nations” (para. 27). The United States does not further explore what recourse States might have if those organs (notably, the United Nations Security Council) fail to act.

Interestingly, the underlying questions alluded to here—whether and to what extent the Genocide Convention authorizes intervention to prevent and punish genocide—is one on which various States intervening on the side of Ukraine have different views. The United States has not endorsed a doctrine of humanitarian intervention, while the [United Kingdom](#), among others, has.

However, because Russia’s genocide allegations were so obviously pretextual, in this case the Court can—and likely will, if the order on preliminary measures is any indication—avoid that broader question here. Indeed, the United Kingdom, in its [submission](#) to the ICJ, advocates for exactly that approach, arguing that, “in construing the Genocide Convention the Court is not called upon to engage in any broader analysis of the international legality of uses of force in response to, for example, grave humanitarian crises, including under the doctrine of humanitarian intervention” (para. 62). The United States offers the (hopefully indisputable) view that “[n]o provision of the Genocide Convention, properly interpreted in good faith, explicitly or implicitly authorizes a Contracting Party, acting on the pretext of preventing or punishing genocide, to commit aggression, including territorial acquisition resulting from aggression” (para. 29). In addition, the submission presents U.S. views on the applicable principles of treaty interpretation, as well as its interpretation of other articles in the Convention.

As previewed above, the United States argues for the more expansive view of jurisdiction in this case. What might some of the considerations be behind adopting this view? If the ICJ does adopt the broader view, what might the potential results be in future cases, whether arising under the Genocide Convention or under other treaties with similar compromissory clauses?

Typically, applicants in treaty-based contentious cases argue for broad constructions of compromissory clauses, whereas respondents argue for narrow constructions. In recent years, the United States has more often found itself in the respondent’s position.

An important factual predicate to the existence of a dispute about the “interpretation, application, or fulfillment of the Genocide Convention” in this case is the extent to which Russia’s February 2022 invasion of Ukraine was actually based on the pretext that Ukraine was in the course of committing genocide. To be sure, Ukraine has amassed an impressive catalog of Russian statements to that effect, including by Putin. Those statements practically handed Ukraine a jurisdictional hook for its case, which would likely

not exist otherwise given that ICJ jurisdiction is based on State consent. The ICJ's willingness to impose provisional measures suggests that the Court is willing to take Putin's rhetoric at face value, perhaps especially since other U.N. organs appear to be unwilling or unable to act decisively in the face of Russian aggression.

The U.S. more expansive approach to the compromissory clause in this case is likely informed by its desire to support Ukraine's legal efforts and show solidarity with other like-minded countries, as well as the limited legal risk that an expansive interpretation of the compromissory clause in the Genocide Convention would result in a case proceeding against the United States in the ICJ. This is both because the United States is unlikely to invade another country on the pretext that the country is committing genocide (with due acknowledgment of the thin legal rationale for the Iraq War), and because the United States entered a [reservation](#) upon ratifying the Genocide Convention that, "with reference to article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case." For this reason, the ICJ [found](#) that it lacked jurisdiction when Yugoslavia sought to bring an action against the United States under the Genocide Convention for acts associated with the intervention in Kosovo. One could argue that, because of this reservation, the United States would not be affected directly by the Court's eventual interpretation of the compromissory clause in *Ukraine v. Russia*, although it could be affected (and would be bound, subject to its treaty reservations) by the interpretation of other treaty provisions. And persuading the ICJ that it has jurisdiction in this case is not necessarily inconsistent with arguing that it lacks jurisdiction under other similarly worded compromissory clauses. That said, if the ICJ finds that it has jurisdiction here, States might think twice before using another State's alleged violation of a multilateral treaty as a pretext for invading that State.

Even though the United States does not endorse the doctrine of humanitarian intervention, it has participated in cross-border military activities that were either arguably (Iraq) or clearly (Kosovo) not authorized by the Security

Council. The U.N. Charter itself does not have a compromissory clause, and the United States withdrew its limited consent to the ICJ's so-called "compulsory" jurisdiction in 1985. Two of the current pending cases against the United States were brought under a bilateral treaty (by Iran), whereas the third was brought under a multilateral treaty to which the United States does not recognize the applicant as a party (Palestine). Whether Ukraine's case widens the aperture for ICJ cases under multilateral treaties remains to be seen, but the extraordinary circumstances prompting this case suggest that the floodgates will not open.

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Whether, if the Court ends up reaching the merits, it will interpret provisions of the Genocide Convention in ways that are not congenial to the intervening States also remains to be seen. It seems unlikely that the Court's pronouncements one way or the other will dramatically affect the U.S. legal framework for ascertaining when and whether to characterize particular acts as amounting to genocide, although ICJ jurisprudence certainly plays an important role in shaping States' legal understandings of both treaties and customary international law.

There have been a number of proposals for accountability and reparations owed to victims of Russia's aggressive war. How does the ICJ case, and decisions by members of the international community to throw weight behind it via these interventions, fit within that broader conversation?

Countries that support Ukraine have been pursuing multiple avenues for potential reparations, some of which might ultimately compete with each other and with [domestic](#) reparations judgments. The establishment of some sort of [claims commission](#) strikes me as the most promising way forward, although it is far from straightforward to implement. If the ICJ finds that it has jurisdiction over the

dispute between Ukraine and Russia, and that Russia has violated the Genocide Convention, then the Court would have the legal authority to order some form of compensation. Although the ICJ itself ultimately lacks coercive power to enforce such an order, and although Russia's total disregard for the ICJ's preliminary measures order does not bode well for potential future compliance, the approach at the moment seems to be to create as many legal fora as possible to adjudicate the legal responsibility of Russia and its officials. Ukraine has been fighting this war on many fronts—on the battlefield, in the court of public opinion, in the ICJ, and more. Although the military battle will likely prove the most decisive, these parallel fights are also an important part of Ukraine's broader strategy.

One of the biggest challenges for a claims commission will be obtaining assets for the commission to distribute. It is impossible to foresee the duration of this war, or whether the current political leaders will be the ones to negotiate an eventual resolution. An ICJ judgment could offer an opportunity for a future Russian regime to restore relations with

its European neighbors and obtain some certainty about liability, if the ICJ accepts Ukraine's invitation to adjudicate the lawfulness of Russia's invasion. That said, the sheer scale of damage that has been—and is still being—inflicted on Ukraine will inevitably make any eventual award seem utterly inadequate. In theory, however, it could provide an additional legal basis upon which to obtain title over Russian assets located in countries that would treat an ICJ decision as enforceable domestically, subject to [other applicable laws](#).

In the meantime, we will have to wait and see if Russia submits a counter-memorial (which is unlikely), or whether it circulates another unofficial "response" to Ukraine's arguments and those of the intervenors. If the Court schedules oral hearings, there will be another opportunity for Ukraine and like-minded States to excoriate Russia on the world stage—although unfortunately, to date, Putin seems to take such criticism as a badge of honor, rather than a reason to change course. 🌐

