

A DOMINANT INFERENCE: THE UNATTAINABLE EVIDENTIARY STANDARD FOR GENOCIDAL INTENT IN THE INTERNATIONAL COURT OF JUSTICE

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One major issue in genocide adjudication before the International Court of Justice is the evidentiary threshold required to prove genocidal intent. This article examines how the ICJ's requirement that genocide intent be the "only reasonable inference" imposes a near-impossible burden on applicants, particularly given the complex and often multi-motivated nature of state conduct. It finds that the coexistence of political, military or economic motives can prevent affirmative genocide judgments, even where evidence of genocidal intent exists. By taking a doctrinal and jurisprudential approach, this article analyses the ICJ's reasoning alongside judgments from other international courts and tribunals, relevant legal principles and state practice. It finds that the current evidentiary standard restricts the Court's ability to engage with the full evidentiary picture, effectively requiring the exclusion of all alternative motives — no matter how implausible — to affirm genocide. In response, this article proposes an adapted standard: a "dominant inference" test. This approach would permit the Court to consider coexisting motives holistically and require identification of genocidal intent as the prevailing driver behind an established genocidal act. It situates this proposal within broader debates about evidentiary burdens, the structure of intent and the role of inference in international legal reasoning. It concludes by arguing that amending the evidentiary threshold would better align legal doctrine with real world complexities, improve access to justice, increase state accountability and reinforce the deterrent function of the ICJ in genocide claims.

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I INTRODUCTION

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.¹

Despite the international community's commitment to prevent and punish genocide, the threshold for proving genocidal intent in the International Court of Justice ('ICJ') has become a near-impossible standard.² The *Convention on the Prevention and Punishment of the Crime of Genocide* ('Genocide Convention') defines genocide as

acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.³

As a general rule, the subjective mental element of an international crime requires proof of general intent, *dolus generalis*, where the individual is aware of an action's consequences.⁴ However, an additional subjective requirement of specific intent, *dolus specialis*, known as genocidal intent distinguishes genocide.⁵ This necessitates evidence that the perpetrator's intention was to commit an act with the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.⁶

For genocide claims before the ICJ, the Court has established that genocidal intent must be the sole reasonable inference to be drawn from the alleged acts.⁷ This evidentiary standard allows the ICJ to disregard proof of genocidal intent

¹ *The Crime of Genocide*, GA Res 96(I), UN GAOR, 1st sess, 55th plen mtg, UN Doc A/RES/96(I) (11 December 1946).

² See Amabelle C Asuncion, 'Pulling the Stops on Genocide: The State or the Individual?' (2009) 20(4) *European Journal of International Law* 1195, 1221. See generally Robin M Smith, 'State Responsibility and Genocidal Intent: A Three Test Approach' (2017) 34 *Australian Year Book of International Law* 87; Justin M Loveland, 'International Court-Driven Transitional Justice in Myanmar' (2023) 10(4) *Indonesian Journal of International and Comparative Law* 361.

³ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art II ('Genocide Convention').

⁴ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 30(2) ('Rome Statute').

⁵ Hans Vest, 'A Structure-Based Concept of Genocidal Intent' (2007) 5(4) *Journal of International Criminal Justice* 781, 782.

⁶ *Genocide Convention* (n 3) art II. See also Kai Ambos, 'What Does "Intent to Destroy" in Genocide Mean?' (2009) 91(876) *International Review of the Red Cross* 833, 837.

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 196–7 [373] ('Bosnian Genocide Case'); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Judgment)* [2015] ICJ Rep 3, 67 [148] ('Croatia v Serbia').

when determining judgment, if the Court can infer a plausible alternative intention, thereby preventing a finding of genocide.⁸

However, this approach contradicts the contemporary and emerging understanding of how multiple motives, which have been considered synonymous with intentions for the purposes of genocidal intent,⁹ often coexist in a state's military and political decision-making.¹⁰ As a result, the ICJ's evidentiary standard for genocidal intent becomes largely unattainable as states can invoke the mere presence of an alternative plausible explanation — such as a military or political objective — as a complete defence to *dolus specialis*.¹¹ The restrictive nature of this standard risks undermining the ICJ's capacity to adjudicate genocide claims effectively, potentially reducing the Court to a futile forum for the resolution of such allegations.¹² This concern is illustrated by the provisional measures orders in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* ('*South Africa v Israel*') where the Court deemed the plausibility of genocidal conduct sufficient to warrant interim protection.¹³ Yet, Israel's stated justification of self-defence is likely to serve as a credible alternative inference at the merits stage, potentially precluding the possibility of a finding of genocidal intent.¹⁴

Moreover, the perceived unattainability of the evidentiary standard for genocidal intent may discourage states from instituting proceedings, weakening the ICJ's role as a judicial organ capable of effective dispute resolution.¹⁵ A failure to facilitate a fair and equitable adjudication process would also limit the Court's adherence to the promotion of international peace, stability and justice, denying the deterrent value of ICJ judgments.¹⁶ If accountability is limited and justice for

⁸ 'Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland', *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (International Court of Justice, General List No 178, 15 November 2023) [50]–[51] ('Joint Declaration of Intervention'); *Prosecutor v Krstić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [41] ('*Krstić*').

⁹ Paul Behrens, 'Genocide and the Question of Motives' (2012) 10(3) *Journal of International Criminal Justice* 501, 509–10.

¹⁰ Ibid 514.

¹¹ See ibid 523; Asuncion (n 2) 1221.

¹² Cf Sumi Pant, 'Binding Value of the ICJs Order of Provisional Measures' (2022) 5(4) *International Journal of Law Management and Humanities* 1069, 1070. See also Rana Moustafa Essawy, 'The Attainability of the Evidentiary Standard for Genocidal Intent in Gaza', *EJIL:Talk!* (Blog Post, 3 May 2024) <<https://www.ejiltalk.org/the-attainability-of-the-evidentiary-standard-for-genocidal-intent-in-gaza/>>, archived at <<https://perma.cc/2JES-PBU9>>.

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (Provisional Measures)* [2024] ICJ Rep 3 ('*South Africa v Israel*').

¹⁴ See ibid 18–19 [40]; Nicholas Tsagourias, 'The Use of Force against Terrorist Attacks: The Two Facets of Self-Defence' (2024) 68(2) *Saint Louis University Law Journal* 327, 343.

¹⁵ See generally Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014) 42–52; Karen J Alter, 'The International Court of Justice in Comparison: Understanding the Court's Limited Influence' (2021) 21(3) *Melbourne Journal of International Law* 676.

¹⁶ Eti Best Herbert, 'The Role of the International Court of Justice in Actualising Global Peace' (2019) 59(1–4) *Indian Journal of International Law* 323, 326.

victims of genocidal acts is unachievable, a new standard must rectify these shortcomings in the Court's adjudication process.

This article aims to critically assess whether the current evidentiary standard for genocidal intent in the ICJ sufficiently promotes accountability and achieves justice for victims of genocidal acts. To achieve this, the article will answer the primary question: would a balanced approach to evidentiary standards for genocidal intent enhance legal certainty in contentious cases brought before the ICJ under the *Genocide Convention*?

A balanced approach to the evidentiary standard for genocidal intent would enhance the accountability function of the ICJ in the international community.¹⁷ Rather than retaining the "only reasonable inference" requirement, the Court could adopt a "dominant inference" threshold, which better reflects the complex and multi-motivated nature of international conflicts.¹⁸ By prioritising the relative weight of plausible explanations, this revised standard would allow the Court to exclude unreasonable alternatives and conduct an empirical assessment of the remaining factual possibilities.¹⁹ Accordingly, in cases where a reasonable motive such as political influence coexists with genocidal intent, the ICJ could assess whether the latter constitutes the "dominant inference" on the evidence. This would ensure that the presence of multiple motives is not logically incompatible within the Court's evidentiary standard.²⁰

The proliferation of genocide claims before the ICJ necessitates a critical reassessment of whether the current evidentiary standard for genocidal intent is an achievable threshold.²¹ Building on existing scholarship, this article expands the analysis of how genocidal intent operates in present and future ICJ proceedings, filling a gap in the literature by incorporating psychological insights into coexisting motives. By doing so, it demonstrates that a "dominant inference" threshold would more accurately reflect the multiplicity of motives inherent in international conflict. Three ongoing cases, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* ('*The Gambia v Myanmar*'), *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* ('*Ukraine v Russia*') and *South Africa v Israel* present opportunities for the Court to clarify how it applies this evidentiary standard at the merits

¹⁷ See generally Michael Ramsden, 'Accountability for Crimes against the Rohingya: Strategic Litigation in the International Court of Justice' (2021) 26(2) *Harvard Negotiation Law Review* 153, 156.

¹⁸ Kjell Anderson, 'Judicial Inference of the "Intent to Destroy": A Critical, Socio-Legal Analysis' (2019) 17(1) *Journal of International Criminal Justice* 125, 126.

¹⁹ Joint Declaration of Intervention (n 8) [54]; Brishna Gehani, 'Is the ICJ's Standard of Proof for Genocide Unattainable?', *Research Society of International Law* (Blog Post, 16 February 2024) <<https://rsilpak.org/2024/is-the-icjs-standard-of-proof-for-genocide-unattainable/>>, archived at <<https://perma.cc/BJ2Z-3AY7>>.

²⁰ Gehani (n 19).

²¹ Alexandre Skander Galand and Wim Muller, 'The ICJ's Findings on Plausible Genocide in Gaza and Its Implications for the International Criminal Court', *OpinioJuris* (Blog Post, 5 April 2024) <<https://opiniojuris.org/2024/04/05/the-icjs-findings-on-plausible-genocide-in-gaza-and-its-implications-for-the-international-criminal-court/>>, archived at <<https://perma.cc/EJ5F-SXEP>>.

phase.²² In addressing the nature of these proceedings, without attempting to reach any evidentiary conclusions, this article evaluates how an adapted threshold might reshape the Court's approach to genocide adjudication. It further assesses whether such a reframing could enhance legal certainty, consistency and accountability in the ICJ's jurisprudence.²³ More broadly, this article contributes to a currently underdeveloped area of scholarship by exploring the practical consequences of lowering the evidentiary threshold and examining alternative frameworks of proof.

The 2023 Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland ('Joint Declaration') amplified calls for alternative approaches to genocide adjudication — aimed at improving the ICJ's institutional function.²⁴ In that submission, the intervening states urged the Court to adopt a more balanced evidentiary standard for genocidal intent in light of the reasoning in the provisional measures order in *The Gambia v Myanmar*.²⁵ They argued that maintaining an unattainable threshold risks shielding states from accountability as it enables them to invoke alternative motives to overcome findings of genocidal intent.²⁶

Perpetuating the current approach may undermine the deterrent effect of genocide adjudication and weaken the broad legitimacy of the ICJ within the international community. In response, this article contributes to the evolution of international law by critically examining the inaccessibility of the current evidentiary standard for genocidal intent before the Court. By advancing a recalibrated approach — one that incorporates coexisting motives and contextual nuance — it promotes a more coherent and realistic understanding of genocidal intent. Such a framework is essential not only for ensuring fair and effective proceedings, but also for strengthening accountability mechanisms and delivering justice to victims.

Accordingly, this article begins by tracing the evolution of genocide adjudication in international law. It then turns to an analysis of the current evidentiary standard as reflected in ICJ jurisprudence, alongside prevailing interpretations of genocidal intent across international courts and tribunals, with particular focus on the construction and application of art II of the *Genocide Convention*. Then, this article explores the relationship between motive and intent and assesses how multiple coexisting motives may shape the commission of crimes against the international community. Building on this foundation, the article applies these findings to contemporary genocide claims before the ICJ, evaluating how a more balanced evidentiary threshold could affect their adjudication. This will involve consideration as to whether a "dominant inference"

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Provisional Measures)* [2020] ICJ Rep 3, 4–6 [1]–[5] ('*The Gambia v Myanmar (Provisional Measures)*'); *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) (Provisional Measures)* [2022] ICJ Rep 211, 212–14 [1]–[6] ('*Ukraine v Russia (Provisional Measures)*'); *South Africa v Israel* (n 13) 4–7 [1]–[5].

²³ See Claus Kress, 'The Darfur Report and Genocidal Intent' (2005) 3(3) *Journal of International Criminal Justice* 562, 566.

²⁴ Joint Declaration of Intervention (n 8) [51].

²⁵ Ibid [48]–[55]; *The Gambia v Myanmar* (n 22) 30–1 [86].

²⁶ Nimer Sultany, 'A Threshold Crossed: On Genocidal Intent and the Duty to Prevent Genocide in Palestine' (2024) *Journal of Genocide Research* 1, 12–16.

standard would resolve existing doctrinal and practical barriers to proving genocidal intent, without diluting the significance of the specific intent requirement. The final two sections consider the potential implications of this adapted standard for both current and future claims under the *Genocide Convention*. Through the use of hypothetical scenarios, the article examines how a more context-sensitive evidentiary framework might influence legal reasoning and the development of international jurisprudence.

II EVOLUTION OF GENOCIDE ADJUDICATION IN INTERNATIONAL LAW

Jurisprudential analysis of genocide has focused on the nature of genocidal intent and the practical challenges of proving it in international adjudication.²⁷ Scholars and courts have scrutinised the application of the “only reasonable inference” evidentiary standard due to its stringent requirements that lack flexibility in cases premised on circumstantial evidence.²⁸ Furthermore, the standard’s inability to reflect contemporary understandings of state motives has had varied interpretations within legal discourse as to its relevance.²⁹

Traditional understandings took a narrower approach by arguing for purpose-based intention, reflecting the judgments of international courts and tribunals which required *dolus specialis* to be unequivocally established.³⁰ This approach involved the deliberate and conscious choice to commit genocidal acts, often established by assessing factors such as the systematic nature of the attacks or the discriminatory motives of the actor.³¹

This was demonstrated by subsequent genocide trials within the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) and International Criminal Tribunal for Rwanda (‘ICTR’) which applied a purpose-based approach to determining genocidal intent.³² However, these tribunals referred to specific intent as an extended subjective element incorporating the overall context of the collective action.³³ This expanded the purpose-based approach by enabling judicial bodies to consider the role of different perpetrators within the broader context of the crime.³⁴ This contextual lens required substantial evidence that state circumstances irrefutably demonstrated an intent to act, or a verifiable general plan

²⁷ Vest (n 5) 782; Ambos (n 6) 838; Kress (n 23) 566; Smith (n 2) 87–8.

²⁸ Cf William A Schabas, ‘Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide’ (2008) 61(1) *Rutgers Law Review* 161, 185–7.

²⁹ Behrens (n 9) 523. See generally Smith (n 2) 121.

³⁰ *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [520] (‘Akayesu’); William A Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 1st ed, 2000) 206–16; Vest (n 4) 784–6.

³¹ *Akayesu* (n 30) [478]; Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, 2005) 210.

³² *Krstić* (n 8) [134]; *Prosecutor v Tolimir (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [744]–[745].

³³ *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [553] (‘Stakić’); *Prosecutor v Munyakazi (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-97-36A-T, 5 July 2010) [500]; *Prosecutor v Hategekimana (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-55B-T, 6 December 2010) [668]–[669] (‘Hategekimana’).

³⁴ Asuncion (n 2) 1218–20.

existed that explicitly indicated genocidal intent.³⁵ Hans Vest concluded that this expansion reduced the challenge of having to directly attribute an individual's actions to the state in ICJ proceedings.³⁶

The ICJ built upon this structure of specific intent in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ('*Bosnian Genocide Case*').³⁷ The Court noted three alternative tests that could be applied when attributing genocidal intent upon a state: intention manifested through a concerted plan, intention inferred from a consistent pattern of conduct and intention ascribed by the *Articles on Responsibility of States for Internationally Wrongful Acts*.³⁸ The first test requires direct evidence of a systematic attack and, thus, does not require an in-depth consideration of *dolus specialis*.³⁹ However, when direct evidence is unavailable, the ICJ turns to the second test to determine whether an inference of intention can be convincingly demonstrated by reference to the circumstances of the alleged genocidal act and surrounding context of the alleged event.⁴⁰

This test conformed with the rigorous evidentiary standard of other international criminal tribunals such as the ICTY and ICTR which required genocidal intent to be the only reasonable inference drawn from the genocidal acts in question.⁴¹ Scholars have criticised this high threshold, while intended to promote legal certainty, for its potential to inhibit accountability in cases where multiple motives or contextual complexities exist.⁴² Recent ICJ jurisprudence, such as *The Gambia v Myanmar*, highlights these concerns, as the Court considered the intention of undertaking military 'clearance operations' a reasonable inference at provisional measures.⁴³ Accordingly, where the Court cannot only infer genocidal intent from a pattern of conduct, it cannot establish a violation of art II of the *Genocide Convention*.⁴⁴

This evidentiary standard was initially challenged by the seminal work of Alexander KA Greenwalt who argued that intentional perpetration should fulfil the *dolus specialis* requirement if an individual acts in furtherance of a widespread

³⁵ *Prosecutor v Jelisić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-10-A, 5 July 2001) [45]–[48] ('*Jelisić*'); *Prosecutor v Krstić* (n 8) [134]; *Prosecutor v Gotovina (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-06-90-A, 16 November 2012) [93].

³⁶ Vest (n 4) 784; Asuncion (n 2) 1218.

³⁷ *Bosnian Genocide Case* (n 7) 121–2 [187]–[189].

³⁸ Ibid 198 [376]; *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Agenda Item 162, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex, art 4.

³⁹ *Bosnian Genocide Case* (n 7) 198 [376].

⁴⁰ Ibid 196–7 [373]; *Prosecutor v Musema (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-T, 27 January 2000) [927] ('*Musema*').

⁴¹ *Prosecutor v Kayishema (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-95-1-A, 1 June 2001) [148] ('*Kayishema*'); *Gacumbitsi v Prosecutor (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-64-A, 7 July 2006) [44]; Cécile Tournaye, 'Genocidal Intent before the ICTY' (2003) 52(2) *International and Comparative Law Quarterly* 447, 454.

⁴² Kress (n 21) 565–6; Dermot Groome, 'Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?' (2008) 31(4) *Fordham International Law Journal* 911, 921–5.

⁴³ *The Gambia v Myanmar (Provisional Measures)* (n 22) 10–11 [21], 23 [56].

⁴⁴ Groome (n 42) 942–4.

campaign targeting a protected group.⁴⁵ Greenwalt premised this extension of the principle on an individual's knowledge that the goal or effect of the campaign was the destruction of the group.⁴⁶ He characterised this as the knowledge-based intention approach which provided an objective and principled standard of liability that addressed the underlying issue of subordinate actors.⁴⁷ Michael P Scharf and Margaux Day supported this position by stating that a nuanced approach to adjudicating genocide would allow the incorporation of deeper contextual analysis and acknowledgement of auxiliary motives without restricting the Court's ability to meet the definition set out in the *Genocide Convention*.⁴⁸ Thus, the knowledge-based approach seeks to expand the evidentiary standard for genocidal intent to improve the level of accountability in genocide adjudication whilst protecting the high threshold that seeks to reflect the severity of the crime.⁴⁹

However, this conceptualisation of knowledge-based intention failed to incorporate the inevitable coexistence of motives and how the Court should determine *dolus specialis* when alternative motives to genocidal intent occur concurrently.⁵⁰ Paul Behrens has examined these limits of knowledge-based intention by assessing the psychological and sociological circumstances underlying genocidal behaviour.⁵¹ This reflects the contemporary understanding, as expressed by Behrens, that specific intent can be considered a motive for the purposes of attribution.⁵²

Therefore, ascertaining specific intent provides scope for the seminal psychological work of Craig Webber who expressed the complexities of human motives and behaviour in extreme contexts.⁵³ This contradicts the traditional legal framework of intention, often emphasised as a singular exclusive intention, for a progressive perspective that acknowledges the commonality of coexisting motives.⁵⁴ This understanding that motives can coexist is critical to genocide

⁴⁵ Alexander KA Greenwalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99(8) *Columbia Law Review* 2259, 2288. See also Veronika Bílková, 'A House with Four Rooms Only? The Protected Groups under the Definition of Genocide' in Pavel Šturma and Milan Lipovský (eds), *The Crime of Genocide: Then and Now* (Brill Nijhoff, 2022) 101, 101.

⁴⁶ Greenwalt (n 45) 2288–92; Harmen G van der Wilt, 'Genocide, Complicity in Genocide and International v Domestic Jurisdiction: Reflections on the *van Anraat* Case' (2006) 4(2) *Journal of International Criminal Justice* 239, 243.

⁴⁷ Greenwalt (n 45) 2288–92; Kress (n 23) 576.

⁴⁸ Michael P Scharf and Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences' (2012) 13(1) *Chicago Journal of International Law* 123, 149–51.

⁴⁹ Vest (n 5) 793–7.

⁵⁰ Stefan Kirsch, 'The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct' (2009) 42(3) *Creighton Law Review* 347, 352.

⁵¹ Behrens (n 9) 502–3.

⁵² *Ibid* 514–22.

⁵³ Craig Webber, *Psychology and Crime* (SAGE Publications, 1st ed, 2010) 6. See also Kerrilee Hollows and Katarina Fritzon, "'Ordinary Men" or "Evil Monsters"? An Action Systems Model of Genocidal Actions and Characteristics of Perpetrators' (2012) 36(5) *Law and Human Behaviour* 458, 466.

⁵⁴ See generally Clark McCauley, 'What Can Ideas about Genocide Tell Us about Terrorism' (2012) 4(3) *Global Responsibility to Protect* 363, 364; Ron Roberts, 'Psihološka objašnjenja, socijalne reprezentacije i genocid' [Psychological Explanation, Social Representations and Genocide] (2007) 6(3–4) *Kriminalističke Teme* [Criminal Justice Issues] 19, 32.

adjudication as perpetrators inevitably have mixed or layered motivations for an action.⁵⁵

The ICJ's only reasonable inference evidentiary standard for genocidal intent reflects a narrow and flawed interpretation of criminal intention as contained to a singular motive.⁵⁶ Recent literature has argued that an expanded consideration of both direct and circumstantial evidence would create a more fair system of judicial determination.⁵⁷ This would allow the Court to adopt a broader perspective that considers the totality of circumstances, drawing together all reasonable inferences for the genocidal action. This should not eliminate the element of specific intent, which would risk converting all acts of mass destruction into a form of genocide, but rather reframe the Court's interpretation of intention.⁵⁸ Accordingly, the Court could utilise an adapted "dominant inference" standard to determine the contrasting strength of inference between coexisting motives leading to the alleged genocidal act.⁵⁹

This emerging discourse reflects the multitude of secondary motives that may exist alternatively or cumulatively to a motive to destroy a group in whole or in part.⁶⁰ In recent ICJ jurisprudence, respondents have utilised these secondary motives to argue that genocidal intent is not the only reasonable inference to be drawn from the evidence.⁶¹ If states rely upon these motives during the merits phase of the respective proceedings, there will be no consideration of whether the strength of the primary motive should presuppose an alternative motive, or whether the claimed motive existed cumulatively with an intent to destroy.⁶² Moreover, if genocidal intent is the dominant inference and occurs concurrently with another intention, this would not be irreconcilable when the Court is determining appropriate orders.⁶³ Consideration of these factors by the Court would allow for the effective identification of factors leading to the commission of the offence and enable the Court to appropriately make the dominant inference by acknowledging patterns of conduct from all available evidence.

Despite this scholarship on genocidal intent, there is limited understanding of how a balanced approach would practically impact genocide adjudication. Reframing the evidentiary standard to lower the threshold for genocidal intent could diminish the equitable nature of ICJ judgments, fundamental to the

⁵⁵ Leonard S Newman, 'What is a "Social-Psychological" Account of Perpetrator Behavior? The Person Versus the Situation in Goldhagen's *Hitler's Willing Executioners*' in Leonard S Newman and Ralph Erber (eds), *Understanding Genocide: The Social Psychology of the Holocaust* (Oxford University Press, 2002) 43.

⁵⁶ Behrens (n 9) 521–3; Robert Weisberg, 'Norms and Criminal Law, and the Norms of Criminal Law Scholarship' (2003) 93(2) *Journal of Criminal Law and Criminology* 467, 590.

⁵⁷ Scharf and Day (n 48) 151.

⁵⁸ Ibid; Greenawalt (n 45) 2287–8.

⁵⁹ Asuncion (n 2) 1220–2.

⁶⁰ Katherine Goldsmith, 'The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach' (2010) 5(3) *Genocide Studies and Prevention* 238, 253–5.

⁶¹ *The Gambia v Myanmar (Provisional Measures)* (n 22) 20–1 [53]; *Ukraine v Russia (Provisional Measures)* (n 22) 220 [32]; *South Africa v Israel* (n 13) 18–19 [40].

⁶² See *ibid*.

⁶³ Kurt Mundorff, 'Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)' (2009) 50(1) *Harvard International Law Journal* 61, 109–10.

international community's trust in the just operation of the Court.⁶⁴ Furthermore, the incorporation of psychological analysis within the Court raises questions of whether the ICJ is a suitable forum to consider and adjudicate on the intricacies of human behaviour and motive without expanded powers of evidence admissibility.⁶⁵

III LEGAL AND THEORETICAL FRAMEWORK OF GENOCIDAL INTENT

A Operation of Evidentiary Standards in the ICJ

The allocation of the burden of proof, *actori uncumbit probatio*, applies as a general principle of international law in the ICJ.⁶⁶ This derives from the maxim *reus in exception fit actor* which premises the establishment of elements of fact and law on the party putting forward the claim or contention.⁶⁷ Accordingly, the party bringing a claim in the ICJ has the burden of providing sufficient facts to support the allegation.⁶⁸ This is not an evidentiary burden, rather art 62 of the ICJ's *Rules of Court* informs the Court and the respondent of the case being presented.⁶⁹ In practice, the ICJ places a duty on litigants to cooperate in all matters relating to proof as an extension of the general duty to act in good faith in international judicial adjudication.⁷⁰

The ICJ has provided multiple alternative thresholds in determining the standard required for a party to establish its case.⁷¹ Generally, the Court has applied a 'balance of probabilities' standard of whether it is more likely than not that a particular event occurred.⁷² This Court expressed this standard in *Corfu Channel (United Kingdom v Albania)* under three different descriptions: 'decisive

⁶⁴ Geert De Baere, Anna-Luise Chané and Jan Wouters, 'International Courts as Keepers of the Rule of Law: Achievements, Challenges and Opportunities' (2016) 48(3) *New York University Journal of International Law and Politics* 715, 738–9; Leo Park, 'The International Court and Rule-Making: Finding Effectiveness' (2018) 39(4) *University of Pennsylvania Journal of International Law* 1065, 1065–6.

⁶⁵ Groome (n 42) 922–4.

⁶⁶ Shabtai Rosenne, *The Law and Practice of the International Court: 1920–2005* (Martinus Nijhoff Publishers, 4th ed, 2006) vol 1, 1039–40; Caroline E Foster, 'Burden of Proof in International Courts and Tribunals' (2010) 29 *Australian Year Book of International Law* 27, 35.

⁶⁷ Foster (n 66) 35.

⁶⁸ *Statute of the International Court of Justice* art 38(1)(c); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Rep 392, 437 [101]; *Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment)* [2004] ICJ Rep 12, 41 [55]; *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14, 71 [162] ('Pulp Mills').

⁶⁹ International Court of Justice, *Rules of Court* (adopted 14 April 1978) art 62. See also Mark Brealey, 'The Burden of Proof before the European Court' (1985) 10 *European Law Review* 250, 251.

⁷⁰ JC Witenberg, 'Onus probandi devant les juridictions arbitrales' [The Burden of Proof before the Arbitral Jurisdictions] (1951) 55 *Revue Générale de droit international public* [General Review of Public International Law] 321, 331–3; Robert Kolb, 'General Principles of Procedural Law' in Andreas Zimmerman, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 1st ed, 2006) 793, 828.

⁷¹ Andrea Gattini, 'Evidentiary Issues in the ICJ's Genocide Judgment' (2007) 5(4) *Journal of International Criminal Justice* 889, 893–9.

⁷² *Pulp Mills* (n 68) 230 [26] (Judge Greenwood).

legal proof', 'conclusive evidence' and a 'degree of certainty'.⁷³ However, in *Oil Platforms (Islamic Republic of Iran v United States of America)*, the Court employed standards of *sufficiency of the evidence* and *conclusive evidence*.⁷⁴ The reasons for adopting an alternative standard were not expressed, causing uncertainty regarding the required standard of evidence for different sets of facts.⁷⁵

In cases involving grave violations of international law, such as genocide, the ICJ has applied an enhanced standard of proof to reflect the seriousness of the allegation.⁷⁶ In the *Bosnian Genocide Case*, the Court stated that 'claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive'.⁷⁷ This is consistent with the standard associated with the failure to prevent the commission of genocidal acts where the Court required 'proof at a high level of certainty appropriate to the seriousness of the allegation'.⁷⁸ Accordingly, the standard of proof in the ICJ must be appropriate and proportional to the gravity of the claim before the Court.⁷⁹ Therefore, in genocide claims, the Court must be 'fully convinced' as to the existence of a genocidal act committed with genocidal intent.⁸⁰

There are limited rules and procedures governing the admissibility of evidence in the ICJ. This has led the ICJ to consider various forms of direct and indirect evidence when evaluating claims.⁸¹ Indirect, or circumstantial evidence, is valuable in cases concerning state responsibility where crucial correspondence or documents are unavailable.⁸² Moreover, where documents are under the exclusive control of another party, circumstantial evidence may be permitted so long as it does not contradict direct evidence.⁸³ The admissibility of this evidence, even if it does not directly prove the alleged facts, allows the Court to critically assess the material value of the evidence.⁸⁴ This involves weighing the reliability and relevance of each piece of evidence to assist in constructing the contextual framework where the allegation lies.⁸⁵ Thus, the ICJ has the ultimate discretion to

⁷³ *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 16–17 ('*Corfu Channel*') (emphasis added).

⁷⁴ *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161, 195 [71], 198 [76] ('*Oil Platforms*').

⁷⁵ James A Green, 'Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58(1) *International and Comparative Law Quarterly* 163, 168–9.

⁷⁶ *Bosnian Genocide Case* (n 7) 129–30 [209]–[210]. See also Chittharanjhan F Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers, 2005) 373–5.

⁷⁷ *Bosnian Genocide Case* (n 7) 129 [209].

⁷⁸ *Ibid* 130 [210]. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 263–4 [282] ('*Armed Activities*').

⁷⁹ Simone Halink, 'All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the *Armed Activities Case*' (2008) 40 (Special Issue) *New York University Journal of International Law and Politics* 13, 24–6.

⁸⁰ *Bosnian Genocide Case* (n 7) 129 [209].

⁸¹ Scharf and Day (n 48) 149–51.

⁸² Paul Behrens, 'Between Abstract Event and Individualized Crime: Genocidal Intent in the Case of Croatia' (2015) 28(4) *Leiden Journal of International Law* 923, 926.

⁸³ *Corfu Channel* (n 73) 18–32. See also *Bosnian Genocide Case* (n 7) 130–1 [211]–[213].

⁸⁴ *Armed Activities* (n 78) 200–1 [57]–[61]; *Pulp Mills* (n 68) 72 [166]–[167]; Keith Highet, 'Evidence, the Court and the Nicaragua Case' (1987) 81(1) *American Journal of International Law* 1, 9.

⁸⁵ International Law Commission, *Report of the International Law Commission on the Work of its Forty-Eighth Session: 6 May – 26 July 1996*, UN GAOR, 51st sess, Agenda Item 146, Supp No 10, UN Doc A/51/10(SUPP) (1996) 45 ('*ILC Report 48th Session*'); Highet (n 84) 46.

determine the admissibility of evidence; however, the limits of this power are undetermined, allowing states to submit any evidential basis for their claims.⁸⁶

B *Adjudication of Genocide Claims*

States may bring a genocide claim under the ICJ's contentious jurisdiction, often through art IX of the *Genocide Convention* which grants the ICJ jurisdiction over disputes relating to the interpretation, application or fulfilment of the Convention.⁸⁷ For a state to be responsible for genocide under the *Genocide Convention*, three elements must be established: the commission of genocidal acts (*actus reus*), the general intention to commit the act (*mens rea*) and the existence of genocidal intent (special *mens rea*).⁸⁸ The Court can rely upon direct or indirect evidence to determine whether the evidence satisfies these elements.⁸⁹

Direct evidence such as the massacre of a protected group or indirect evidence such as government records can establish genocidal acts.⁹⁰ This is demonstrated in the *Bosnian Genocide Case* where the examination of military operations, mass killings and force expulsions resulted in the conclusion that the Srebrenica massacre constituted genocide.⁹¹ For genocidal intent, a party may present direct evidence through statements of motive by military or political officers or indirect evidence through inferring government records, consistency of behaviour or ideology.⁹² In *Prosecutor v Krstić* the Appeals Chamber noted that 'genocidal intent may be inferred, among other facts, from evidence of "other culpable acts systematically directed against the same group"'.⁹³

The genocidal act element is satisfied where any of the acts in art II of the *Genocide Convention* are established.⁹⁴ This is an exhaustive list and, and each act must be committed with an intent to destroy, in whole or in part, a protected group.⁹⁵ Membership of a protected group on national, racial, ethnic or religious grounds must be stable and permanent.⁹⁶

⁸⁶ Siyuan Chen, 'Re-Assessing the Evidentiary Regime of the International Court of Justice: A Case for Codifying Its Discretion to Exclude Evidence' (2015) 13(1) *International Commentary on Evidence* 1, 34.

⁸⁷ *Statute of the International Court of Justice* art 36; *Genocide Convention* (n 3) art IX.

⁸⁸ *Genocide Convention* (n 3) art II; Kai Ambos, *Treatise on International Criminal Law* (Oxford University Press, 2nd ed, 2022) 5.

⁸⁹ Scharf and Day (n 48) 149–51.

⁹⁰ Andrew B Loewenstein and Stephen A Kostas, 'Divergent Approaches to Determining Responsibility for Genocide: The Darfur Commission of Inquiry and the ICJ's Judgment in the *Genocide Case*' (2007) 5(4) *Journal of International Criminal Justice* 839, 854–5.

⁹¹ *Bosnian Genocide Case* (n 7) 155–66 [278]–[297].

⁹² Milena Sterio, 'The Karadžić Genocide Conviction: Inferences, Intent and the Necessity to Redefine Genocide' (2017) 31(2) *Emory International Law Review* 271, 272.

⁹³ *Krstić* (n 8) [33], quoting *Jelisić* (n 35) [47]. See also *Semanza v Prosecutor (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-20-A, 20 May 2005) [261]–[262].

⁹⁴ *Genocide Convention* (n 3) art II.

⁹⁵ *Ibid*; Mahnoor Khan, 'The Broken Promise of "Never Again": Myanmar's Genocide Analyzed under the UN Genocide Convention and the International Criminal Tribunal for Rwanda's Interpretation of the Convention' (2020) 53(4) *Cornell International Law Journal* 799, 806–8.

⁹⁶ *Akayesu* (n 30) [516], [701].

The first genocidal act listed in art II involves killing members of a protected group which must be intentional, but does not need to be premeditated.⁹⁷ The second act concerns causing serious bodily and mental harm which must reach a seriousness threshold that poses a threat of destruction as illustrated in *Prosecutor v Akayesu* which involved acts of sexual violence and rape.⁹⁸ Third, deliberately inflicting conditions of life that cause physical destruction such as denying vital needs, medical care or shelter, resulting in the eventual elimination of the group, is considered a genocidal act.⁹⁹ Fourth, imposing conditions to prevent births such as physical sterilisation and forced abortion, and also mental threats if conception occurs.¹⁰⁰ The final act concerns the forced transfer of children to another group.¹⁰¹

Genocidal acts must occur with general intent to commit the genocidal act and specific intent to destroy a group in whole or in part.¹⁰² Specific intent, known as genocidal intent or *dolus specialis*, distinguishes genocide from other crimes as the Court cannot infer intent solely from the commission of the act.¹⁰³ Instead, *dolus specialis* requires proof through direct or indirect evidence that the perpetrator acted with the goal of destroying the targeted group.¹⁰⁴ This reflects a purpose-based approach to *mens rea* where the offence is ‘characterized by a psychological relationship between the physical result and the mental state of the perpetrator’.¹⁰⁵ The challenges in establishing this are demonstrated in the *Bosnian Genocide Case* where although Serbia was found to have committed grave violations of international law, it did not find sufficient evidence to establish Serbia’s direct responsibility for genocide beyond the events at Srebrenica.¹⁰⁶ This is due to the evidentiary standard for proving genocidal intent, with such intent needing to be the ‘only reasonable inference’.¹⁰⁷

This Court reaffirmed this standard in *The Gambia v Myanmar*, accepting Myanmar’s submission that evidence of the required specific genocidal intent must be the only reasonable inference.¹⁰⁸ Therefore, where a state can provide an alternative explanation for the commission of a genocidal act, and it is reasonably based on inferences drawn from the exhibited evidence, the Court cannot meet the specific intent element.¹⁰⁹

⁹⁷ *Genocide Convention* (n 3) art II(a); *Prosecutor v Kayishema (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999) [91], [104] (*Kayishema Trial Chamber*).

⁹⁸ *Genocide Convention* (n 3) art II(b); *Akayesu* (n 30) [706].

⁹⁹ *Genocide Convention* (n 3) art II(c); *Kayishema Trial Chamber* (n 97) [114]–[116].

¹⁰⁰ *Genocide Convention* (n 3) art II(d); *Akayesu* (n 30) [507]–[509].

¹⁰¹ *Genocide Convention* (n 3) art II(e).

¹⁰² *Ibid* art II; Payam Akhavan, ‘The Crime of Genocide in the ICTR Jurisprudence’ (2005) 3(4) *Journal of International Criminal Justice* 989, 992–3.

¹⁰³ Rafael Leme, ‘Individual Criminal Liability and State Responsibility for Genocide: Boundaries and Intersections’ (2018) 34(1) *American University International Law Review* 89, 106.

¹⁰⁴ *Akayesu* (n 30) [521]–[523].

¹⁰⁵ *Akayesu* (n 30) [518].

¹⁰⁶ *Bosnian Genocide Case* (n 7) 198 [376].

¹⁰⁷ *Croatia v Serbia* (n 7) 66–7 [147]–[148]. See also *Bosnian Genocide Case* (n 7) 196–7 [373].

¹⁰⁸ *The Gambia v Myanmar (Provisional Measures)* (n 22) 19 [47].

¹⁰⁹ Oliver Windridge, ‘Assessing Circumstantial Evidence and Inference at the ICTR’ (2015) 26(3–4) *Criminal Law Forum* 403, 413–14.

C Interpreting Genocidal Intent

Intention in crimes against humanity or ethnic cleansing only requires general intent, *dolus generalis*, which occurs where the material elements of a crime are committed with intent and knowledge.¹¹⁰ This intent exists if the person means to engage in the conduct or means to cause the consequence.¹¹¹ However, genocide requires not only this general intent to commit a genocidal act, but also a specific intent to destroy the group itself.¹¹² In the ICTY, the Trial Chamber rejected a claim of genocide in *Prosecutor v Jelisić* ('*Jelisić*') as the arbitrary nature of the killings failed to demonstrate a 'clear intention to destroy a group'.¹¹³ Moreover, in *Prosecutor v Blagojević*, the Trial Chamber held that '[i]t is not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group'.¹¹⁴ Therefore, the general intent, coupled with knowledge of the consequences, is not sufficient to meet the specific intent threshold.¹¹⁵

The ICJ recognised this distinction in the *Bosnian Genocide Case* where it noted the crime as distinct from other serious violations of international humanitarian law.¹¹⁶ The Court referred to specific intent as an 'extreme form of wilful and deliberate acts designed to destroy a group or part of a group'.¹¹⁷ Accordingly, the Court required the perpetrator to consciously desire the prohibited acts they committed to result in the destruction of the protected group, and have knowledge that their acts would achieve this aim.¹¹⁸ Therefore, the Court cannot presume genocidal intent from the scale or severity of the acts committed; instead, the evidence must clearly outline the perpetrator's intention.¹¹⁹ However, this evidence of genocidal intent must be the 'only reasonable inference' to be drawn.¹²⁰

Establishing genocidal intent requires direct evidence of the perpetrator's intention, or indirect evidence by drawing inferences from patterns of behaviour, policy directives and the broader context of the alleged genocidal acts.¹²¹ Direct evidence can include official state documents, government orders or

¹¹⁰ *Rome Statute* (n 4) art 30.

¹¹¹ *Ibid.*

¹¹² *Genocide Convention* (n 3) art II; *Prosecutor v Kambanda (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-97-23-S, 4 September 1998) [16].

¹¹³ *Jelisić* (n 35) [50].

¹¹⁴ *Prosecutor v Blagojević (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-60-T, 17 January 2005) 242 [656].

¹¹⁵ Akhavan (n 102) 922.

¹¹⁶ *Bosnian Genocide Case* (n 7) 123 [190].

¹¹⁷ *Ibid* 121-2 [188].

¹¹⁸ *Letter Dated 31 January 2005 from the Secretary-General Addressed to the President of the Security Council*, UN SCOR, UN Doc S/2005/60 (1 February 2005) annex ('*Report of the International Commission of Inquiry on Darfur to the Secretary-General*') 132 [491].

¹¹⁹ Tilman Blumenstock, 'The Judgment of the International Criminal Tribunal for the Former Yugoslavia in the *Brđanin* Case' (2005) 18(1) *Leiden Journal of International Law* 65, 69-70.

¹²⁰ *Croatia v Serbia* (n 7) 67 [148]; *Bosnian Genocide Case* (n 7) 196-7 [373]; *Prosecutor v Karadžić (Public Redacted Version of Judgement Issued on 24 March 2016)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-5/18-T, 24 March 2016) vol 2, [2592] ('*Karadžić Trial Chamber*').

¹²¹ See *Stakić* (n 33) [553].

correspondence between high-ranking officials instructing the destruction of a particular group.¹²² This is demonstrated in *Prosecutor v Karadžić* where the ICTY relied upon ‘statements made by Karadžić and other alleged JCE members ... that explicitly threatened, approved of, encouraged, praised, and attempted to justify the destruction of Bosnian Muslims’ to the Bosnian Serb assembly.¹²³ However, this type of evidence is rarely accessible as states can control the production of evidence, highlighted by the *Bosnian Genocide Case* where the Court did not discover any explicit order directing Serbian forces to destroy the Bosnian Muslim population.¹²⁴

Instead, in the absence of direct evidence of intent, the Court requires circumstantial evidence to draw logical inferences from the broader factual context.¹²⁵ This can include the existence of discriminatory policies, patterns of systematic violence and targeted attacks on members of a particular group.¹²⁶ In the *Bosnian Genocide Case*, the organised and deliberate killing of 7,000 people who were all Bosnian Muslim men suggested a clear plan to destroy the group, at least in part.¹²⁷ Furthermore, where the governing party controls the media, the utilisation of media campaigns and political rhetoric to diminish the validity of a particular group can assist in determining genocidal intent.¹²⁸ In *South Africa v Israel*, South Africa’s application instituting proceedings relied upon statements made by the Israeli President, Prime Minister and military officials to infer genocidal intent.¹²⁹ In *Ukraine v Russia*, Ukraine’s application submits that Russia’s military rhetoric, exacerbated by President Vladimir Putin, conveys an intent to destroy the Ukrainian population.¹³⁰ Yet, the high evidentiary threshold means that even persuasive indirect evidence is unlikely to be sufficient in establishing genocidal intent without every other source reaching the same conclusion.¹³¹

¹²² See, eg, *Prosecutor v Bagilishema (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-95-1A-T, 7 June 2001) (*‘Bagilishema’*).

¹²³ *Prosecutor v Karadžić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-06-90-A, 11 July 2013) [91]; See also *Karadžić Trial Chamber* (n 120) vol 1, [56]–[67].

¹²⁴ *Bosnian Genocide Case* (n 7) 194–8 [370]–[376].

¹²⁵ *Karadžić Trial Chamber* (n 120) vol 1, [550], vol 2, [2592]; *Prosecutor v Popović (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-88-A, 30 January 2015) [468]; *Hategkimana* (n 33) [133]–[137].

¹²⁶ *Kayishema* (n 41) [148]; *Jelisić* (n 35) [46]; *Bagilishema* (n 122) [63]; *Akayesu* (n 30) [728].

¹²⁷ *Bosnian Genocide Case* (n 7) 155–6 [278].

¹²⁸ See, eg, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) (Preliminary Objections)* [2024] ICJ Rep 1, 32 [42] (*‘Ukraine v Russia (Preliminary Objections)’*).

¹²⁹ ‘Application Instituting Proceedings Containing a Request for the Indication of Provisional Measures’, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (International Court of Justice, General List No 192, 29 December 2023) [101]–[103] (*‘South Africa v Israel (Application Instituting Proceedings)’*).

¹³⁰ ‘Application Instituting Proceedings’, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (International Court of Justice, General List No 182, 26 February 2022) 14 [24] (*‘Ukraine v Russia (Application Instituting Proceedings)’*).

¹³¹ See Cécile Aptel, ‘The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda (2002) 13(3) *Criminal Law Forum* 273, 291.

IV CONTEMPORARY ISSUES IN ESTABLISHING GENOCIDAL INTENT

A *Multitude of Motives*

The ICJ has consistently held that genocidal intent must be the only reasonable inference when proving the specific intent of destroying a group.¹³² Accordingly, where alternative motives such as political influence, military objectives or resource acquisition drive the actions of a state, these intentions inhibit the realisation of *dolus specialis*.¹³³ In the *Bosnian Genocide Case* the Court found that the mass killings and forced displacement perpetrated by Serbian forces to destroy the Bosnian Muslim group were concurrently motivated by an attempt to achieve political and military objectives.¹³⁴ The Court concluded that even evidence of specific intent is not sufficient where there are other reasonable inferences, emphasised by only finding genocide in the Srebrenica massacre where the sole aim was to destroy the Bosnian Muslim population.¹³⁵

This is a critical issue in establishing genocidal intent as the nature of armed conflict inherently involves the interplay of motives.¹³⁶ In the preliminary proceedings of *The Gambia v Myanmar*, Myanmar argued that the evidence of mass killings of the Rohingya population were due to military objectives titled ‘clearance operations’ rather than an intent to destroy the Rohingya as a group.¹³⁷ Moreover, Israel’s justification in *South Africa v Israel* relies upon their ‘right to self-defence’ as their asserted primary responsibility to protect Israeli civilians from the 7 October 2023 attacks.¹³⁸ The cautious approach applied by the Court through the high evidentiary standard fails to acknowledge the full scope of motives within international conflict.¹³⁹ This allows states to evade responsibility for genocide by framing their actions within broader geopolitical goals.¹⁴⁰

Therefore, due to the “only reasonable inference” evidentiary standard, distinguishing genocidal intent from other motives that may cause genocidal acts is a significant challenge.¹⁴¹ Where a state can establish that any other motive explains their actions, this automatically inhibits the availability of an affirmative genocide judgment.¹⁴² Although this high evidentiary threshold aims to ensure that the seriousness of genocide is not wrongly attributed to other forms of

¹³² *Bosnian Genocide Case* (n 7) 196–7 [373]; *Croatia v Serbia* (n 7) 66–7 [147]–[148].

¹³³ Windridge (n 109) 413–14.

¹³⁴ *Bosnian Genocide Case* (n 7) 196–7 [372]–[373]. See also Sam Clearwater, ‘Holding States Accountable for the Crime of Crimes: An Analysis of Direct State Responsibility for Genocide in Light of the ICJ’s 2007 Decision in *Bosnia v Serbia*’ (2009) 15 *Auckland University Law Review* 1, 37–8.

¹³⁵ *Bosnian Genocide Case* (n 7) 196–7 [372]–[373].

¹³⁶ William A Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2nd ed, 2009) xiii–xiv, 305–6.

¹³⁷ *The Gambia v Myanmar (Preliminary Objections)* (n 43) 490–1 [28].

¹³⁸ *South Africa v Israel* (n 14) 18–19 [40].

¹³⁹ See Behrens (n 9) 507–10.

¹⁴⁰ Jennifer Kirby-McLemore, ‘Settling the Genocide v Ethnic Cleansing Debate: Ending Misuse of the Euphemism Ethnic Cleansing’ (2022) 50(2) *Denver Journal of International Law and Policy* 109, 118.

¹⁴¹ Greenawalt (n 45) 2288–91.

¹⁴² *Ibid* 2885–8.

violence,¹⁴³ it enables states to escape scrutiny for their actions, denying accountability and justice for victims.¹⁴⁴

B Coexistence of Motives

Similarly, the requirement of a sole motive neglects the reality of motives coexisting when leading an individual or group to take a particular action.¹⁴⁵ This contradicts the nature of genocidal intent as a psychological relationship between a state's intentions and the physical result.¹⁴⁶ When an alternative motive exists alongside the intent to destroy a group, the ICJ has found that this renders specific intent unattainable.¹⁴⁷ In the *Bosnian Genocide Case*, the Court did not find genocidal intent in the broader actions of the Serbian state, only in the Srebrenica massacre where an intent to destroy was overwhelmingly clear.¹⁴⁸ This cautious approach demonstrates that although the Court does not preclude the presence of genocidal intent where other motives exist, the practice of the Court has been to deny that such circumstances satisfy *dolus specialis*.¹⁴⁹

Although this approach similarly prioritises the severity of the crime of genocide, it significantly limits the ability of the Court to produce an affirmative judgment.¹⁵⁰ The coexistence of motives is inevitable in international conflict as membership of a protected group is rarely the sole possible reason for targeting individuals in international conflicts. The ability of a state to rely on one alternative reason for their actions, even where an inference of genocidal intent exists, diminishes the Court's ability to deliver equitable decisions that reflect the international community.¹⁵¹ This is a pertinent consideration in *The Gambia v Myanmar* where scholars have argued that Myanmar's military junta has formed its own internalised moral code and forced it into the nation's belief system.¹⁵² This demonstrates how moral compasses can transform over time, inherently causing certain motives to coexist between individuals or within a group.¹⁵³ Additionally, this highlights how a stringent standard fails to appreciate the flexibility of motives.

Thus, a more balanced evidentiary threshold that still requires proof of intent to destroy a protected group would ensure that the coexistence of motives does not automatically deny an affirmative verdict.¹⁵⁴ It would allow greater inferences from the totality of the available evidence, rather than the largely impossible burden of proving that genocidal intent was the only reasonable explanation for

¹⁴³ William A Schabas, 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes' (2007) 2(2) *Genocide Studies and Prevention* 101, 108–9.

¹⁴⁴ See *ibid.*

¹⁴⁵ Newman (n 55) 45–51.

¹⁴⁶ *Akayesu* (n 30) [518].

¹⁴⁷ *Bosnian Genocide Case* (n 7) 196–7 [373]; *Clearwater* (n 134) 34–8.

¹⁴⁸ *Bosnian Genocide Case* (n 7) 198–201 [377]–[384].

¹⁴⁹ *Ibid.*

¹⁵⁰ *Essawy* (n 12).

¹⁵¹ *Behrens* (n 8) 504–9.

¹⁵² Afroza Anwar, 'Interethnic Conflict and Genocide in Myanmar' (2020) 24(1) *Homicide Studies* 85, 87.

¹⁵³ *Ibid.*

¹⁵⁴ Cf Jaakko Heiskanen, 'In the Shadow of Genocide: Ethnocide, Ethnic Cleansing and International Order' (2021) 1(4) *Global Studies Quarterly* 1, 6.

the act.¹⁵⁵ It would also reflect a knowledge-based approach to adjudication, overcoming the limitations associated with the current purpose-based approach.¹⁵⁶

C Purpose-Based Approach

International jurisprudence highlights the utilisation of a purpose-based approach (or traditional approach) to establishing genocidal intent.¹⁵⁷ This approach prioritises the volitional nature of *mens rea* as it requires a conscious desire to destroy a protected group.¹⁵⁸ This desire is intrinsically complex as it plainly requires evidence of a person's internal thoughts.¹⁵⁹ Although this is more relevant for subordinates charged with genocide, it indicates how the strict requirement of genocidal intent can be exploited by reference to alternative intentions.¹⁶⁰

The limitations of the purpose-based approach are demonstrated by contrast to the knowledge-based approach which expands the scope of liability by considering whether perpetrators were aware of the broader circumstances of their actions.¹⁶¹ This is consistent with the International Law Commission's 1996 report which stated that

[t]he extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide.¹⁶²

This reflects an attribution of knowledge approach which recognises the complexity of conflict and ensures that courts can hold individuals involved in executing genocidal liable.¹⁶³ Thus, the limitations of the purpose-based approach illustrate the need to find a more balanced standard which ensures the evidentiary standard for genocidal intent remains attainable in the ICJ.

¹⁵⁵ Frédéric Gilles Sourgens, 'Truths in Translation' (2020) 44(1) *Fordham International Law Journal* 101, 143–5.

¹⁵⁶ See generally Gregory Kent, 'Genocidal Intent and Transitional Justice in Bosnia: Jelusic, Foot Soldiers of Genocide and the ICTY' (2013) 27(3) *East European Politics and Societies and Cultures* 564.

¹⁵⁷ *Musema* (n 40) [165]; *Prosecutor v Krstić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [595]; *Ambos* (n 6) 839, citing *Prosecutor v Al Bashir (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009).

¹⁵⁸ *Akayesu* (n 30) [523].

¹⁵⁹ Elizabeth Plajzer, 'Does the International Crime of Genocide Always Require a Genocidal Policy?' (2018) 3 *Perth International Law Journal* 88, 91.

¹⁶⁰ *Ibid.*

¹⁶¹ Chanthima Neth, 'The Issue of Mens Rea in the Crime of Genocide and Why It Needs to Be Amended' (2019) 7(1) *Legal Issues Journal* 15, 23.

¹⁶² *ILC Report 48th Session* (n 85) 89–90.

¹⁶³ See Fred Grünfeld and Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (Martinus Nijhoff Publishers, 2007) 25.

V ADAPTING THE EVIDENTIARY STANDARD FOR GENOCIDAL INTENT

A A Balanced Approach — The Dominant Inference

The “only reasonable inference” standard is principally an unattainable evidentiary threshold.¹⁶⁴ Although it seeks to preserve the gravity of the crime of genocide, its practical application renders claims in the ICJ futile.¹⁶⁵ Even where perpetrators commit systematic atrocities with genocidal intent, the unrealistic standard of proof in the ICJ has diminished the possibility of affirmative judgments.¹⁶⁶

A balanced approach to genocidal adjudication would improve the attainability of genocidal intent by lowering the evidentiary standard.¹⁶⁷ This approach could involve adapting the current standard to a “dominant inference” standard. This would enable the Court to liberally consider genocidal intent as one of several plausible inferences based on the totality of the evidence.¹⁶⁸ Accordingly, where a state’s motives drawn from the evidence includes military objectives, political aims and an intent to destroy a group, if the Court considers the latter motive dominant based on a holistic and comprehensive review of the evidence, the state would meet the *dolus specialis* element. This evaluation would allow the ICJ to consider genocidal intent the significant factor contributing to the genocidal act without requiring it to be the sole factor.¹⁶⁹

A “dominant inference” standard shares similarities with the ‘substantial factor’ test which enables Courts in tort law to determine causation even where multiple causes contributed to harm suffered by a plaintiff.¹⁷⁰ Under this approach, a defendant’s conduct does not need to be the sole cause of harm; it is sufficient that the conduct was a material or meaningful contribution to the injury.¹⁷¹ The “substantial factor” test ensures that courts hold individuals who contributed significantly to harm accountable in situations where the traditional “but-for” causation would fail, such as in cases involving concurrent causes or evidentiary uncertainty. This provides flexibility in assessing evidence where complex contextual circumstances would otherwise limit the ability of a judicial officer to consider which actions had a real and operative impact on the outcome.¹⁷² Acknowledging the significant limitations and caution that should be placed when applying civil law criteria to evidentiary standards in a criminal international law context, the “dominant inference” test in genocide adjudication would similarly allow the ICJ to acknowledge the coexistence of motives without denying genocidal intent where it is the dominant inference from the evidence. This would also prevent unjust results by ensuring that states acting with genocidal intent

¹⁶⁴ Joint Declaration of Intervention (n 8) 13 [54]; *Gehani* (n 19).

¹⁶⁵ *Asuncion* (n 2) 1221.

¹⁶⁶ Joint Declaration of Intervention (n 8) 12 [51].

¹⁶⁷ *Essawy* (n 12).

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ Russell B Mamone, ‘Negligence: Substantial Factor Test’ (1964) 15(4) *Western Reserve Law Review* 807, 807–11.

¹⁷¹ *Ibid.*

¹⁷² But see Joseph Sanders, Michael D Green and William C Powers Jr, ‘The Insubstantiality of the “Substantial Factor” Test for Causation’ (2008) 73(2) *Missouri Law Review* 399, 416–20.

cannot rely upon peripheral evidence of alternative motives to evade responsibility.

This adapted standard reflects the objects and purposes of the *Genocide Convention* as outlined in art I which states that '[t]he Contracting Parties confirm that genocide ... is a crime under international law which they undertake to prevent and to punish'.¹⁷³ By seeking to find a balance between protecting states from trivial accusations and condemning genocidal conduct when it occurs, an attainable evidentiary threshold allows for the prevention and punishment of genocide.¹⁷⁴ Therefore, a "dominant inference" threshold is still a robust evidentiary standard that preserves the significance of the crime of genocide whilst providing a route for affirmative judgments.

B Improving the Attainability of Affirmative Genocide Judgments

This approach to genocide adjudication would likely improve the attainability of affirmative judgments, enabling the ICJ to maintain a deterrent function in global conflicts.¹⁷⁵ The adapted standard would force the Court into emphasising qualitative evidence such as patterns of behaviour, statements by leaders and evidence of systemic planning.¹⁷⁶ Although the current standard requires this circumstantial evidence, a "dominant inference" standard would allow judges to holistically analyse whether genocidal intent formed the most significant reason for a state's actions. This assessment of evidence would provide a practical application of the law rather than an examination of the theories of intent.¹⁷⁷

The Appeals Chamber in *Jelisić* emphasised that the existence of personal motives, such as personal economic gain or political advantages, do not preclude a perpetrator's specific intent.¹⁷⁸ This also overcomes claims that a state official's perturbed personality may justify an action.¹⁷⁹ Instead, states claiming an alternative motive would have to justify how that intention was the dominant reason for committing the alleged genocidal acts. This would ensure justice for injured states and victims of genocidal acts, enabling them to obtain compensation from states who cause damage from this internationally wrongful act.¹⁸⁰

The improved attainability of the evidentiary standard for genocidal intent would ensure the ICJ acknowledges the suffering experienced by victims and

¹⁷³ *Genocide Convention* (n 3) art I; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1); V Crnic-Grotic, 'Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties' (1997) 7(1) *Asian Yearbook of International Law* 141, 156.

¹⁷⁴ Mark Gibney, 'Genocide and State Responsibility' (2007) 7(4) *Human Rights Law Review* 760, 760–3.

¹⁷⁵ Dawn L Rothe, 'The Realities of International Criminal Justice' (2013) 13(1) *International Criminal Law Review* 1, 1.

¹⁷⁶ Tania Voon, 'Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law' (2015) 18(4) *Journal of International Economic Law* 795, 805.

¹⁷⁷ *Prosecutor v Sikirica (Judgement on Defence Motions to Acquit)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-8-T, 3 September 2001) [58]–[59].

¹⁷⁸ *Jelisić* (n 34) [46]–[52].

¹⁷⁹ *Ambos* (n 6) 837.

¹⁸⁰ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, 81 [152].

provides accountability for state perpetrators.¹⁸¹ The deterrent impact of reducing the evidentiary standard would also provide the international community with greater confidence in the capacity of the ICJ to recognise and address genocidal events.¹⁸²

C Creating a Consistent and Just Standard

Lowering the evidentiary bar from the stringent “only reasonable inference” to a “dominant inference” test would ensure that genocidal acts are not unjustly dismissed. This is fundamental as evidentiary standards must serve to protect from frivolous prosecutions or unjust outcomes.¹⁸³ The unattainability of the current standard fails to achieve this purpose, negatively impacting past, present and future victims of genocide. A “dominant inference” threshold better acknowledges the complexities of genocide and would create a more consistent and just standard of proof that encourages states to carefully consider their decisions and understand the reasoning of judgments.¹⁸⁴

Litigation in the ICJ is increasingly seen by states as a viable dispute resolution option.¹⁸⁵ The ICJ has defined its role as facilitating ‘bilateral dispute resolution and supporting the attainment of collective goods’.¹⁸⁶ The lack of admissibility requirements in the Court enables states to present comprehensive submissions without the evidentiary bars that exist in other international courts and tribunals.¹⁸⁷ However, the high evidentiary standard of genocidal intent significantly detracts from this by potentially denying judgments that acknowledge the multifaceted nature of genocidal conduct. Lowering the evidentiary standard is within the rules of the Court,¹⁸⁸ demonstrated by *The Gambia v Myanmar* where the ICJ lowered the threshold due to the stage of the proceeding at which the states sought judgment.¹⁸⁹ Accordingly, the Court employing a balanced approach to the evidentiary standard for genocidal intent would resolve issues of multiple and coexisting motives, resolving the unattainability of the current standard.¹⁹⁰

A defined standard could also limit the ambiguity surrounding plausibility at the provisional measures stage of a genocide proceeding.¹⁹¹ In *The Gambia v Myanmar* provisional measures judgment, the Court considered the plausibility of

¹⁸¹ Cf Michael Ramsden, ‘Strategic Litigation in Wartime: Judging the Russian Invasion of Ukraine through the Genocide Convention’ (2023) 56(1) *Vanderbilt Journal of Transnational Law* 181, 209–10.

¹⁸² See generally Ram Prakesh Anand, ‘Enhancing the Acceptability of Compulsory Procedures of International Dispute Settlement’ (2001) 5(1) *Max Planck Yearbook of United Nations Law* 1.

¹⁸³ See Advaya Hari Singh Singh, ‘A Clear Standard of Proof in Disputes Before the ICJ: Are We There Yet?’, *Cambridge International Law Journal* (Blog Post, 5 March 2021) archived at <<https://cilj.co.uk/a-clear-standard-of-proof-in-disputes-before-the-icj-are-we-there-yet/>> archived at <<https://perma.cc/7GC3-G7KZ>>.

¹⁸⁴ Noora Arajärvi, ‘The Core Requirements of the International Rule of Law in the Practice of States’ (2021) 13(1) *Hague Journal on the Rule of Law* 173, 185–91.

¹⁸⁵ Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013) 1155–62.

¹⁸⁶ Ramsden (n 181) 198.

¹⁸⁷ Scharf and Day (n 48) 149–51.

¹⁸⁸ *Statute of the International Court of Justice* art 59.

¹⁸⁹ *The Gambia v Myanmar (Provisional Measures)* (n 22) 18 [43]

¹⁹⁰ Essawy (n 12); Gehani (n 19).

¹⁹¹ *The Gambia v Myanmar (Provisional Measures)* (n 22) 65 [2] (Judge ad hoc Kress).

the factual claims in determining provisional measures rather than an assessment of the legal claims under the *Genocide Convention*.¹⁹² However, it was uncertain whether the plausibility requirement was satisfied because the alleged facts were capable of proving genocide, or because the evidentiary basis of the claim was sufficient.¹⁹³ This unclear burden, although premised on flexibility, reduces the predictability of decision-making for inferential claims and a clearer evidentiary standard would assist decision-making by informing provisional measures judgments.¹⁹⁴

VI IMPACT ON PRESENT CLAIMS

A *The Gambia v Myanmar*

Filed on 11 November 2019, The Gambia's application to the ICJ alleges that Myanmar perpetrated genocide by committing acts of 'mass murder, rape and other forms of sexual violence' against the Rohingya in the Rakhine province of Myanmar.¹⁹⁵ The application instituting proceedings also refers to the 'systematic destruction by fire of their villages, often with inhabitants locked inside burning houses' under the name of 'clearance operations' against the Rohingya group.¹⁹⁶

Myanmar's commission of genocidal acts against the Rohingya is widely accepted.¹⁹⁷ The Independent International Fact-Finding Mission on Myanmar ('FFM') released a report in 2018 referring to 'clearance operations'¹⁹⁸ which resulted in the 'enforced disappearance',¹⁹⁹ 'mass gang rape'²⁰⁰ and '[l]arge-scale massacres'.²⁰¹ Moreover, international diplomatic representatives have also explicitly labelled Myanmar's acts as genocidal in nature, such as the then United States Secretary of State, Antony J Blinken, stating that the Rohingyas in the

¹⁹² Ibid 32 [2] (Vice-President Xue).

¹⁹³ See Massimo Lando, 'Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice' (2018) 31(3) *Leiden Journal of International Law* 641, 644; Cameron Miles, 'Provisional Measures and the "New" Plausibility in the Jurisprudence of the International Court of Justice' (2018) *British Yearbook of International Law* bry011:1–46 (advance), 2–3.

¹⁹⁴ Cf *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation) (Provisional Measures)* [2017] ICJ Rep 104, 131–2 [75]–[76], 135 [82]–[83]; Iryna Marchuk, 'Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russia)' (2017) 18(2) *Melbourne Journal of International Law* 436, 445–55.

¹⁹⁵ 'Application Instituting Proceedings and Request for Provisional Measures', *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (International Court of Justice, General List No 178, 11 November 2019) 4 [2], 6 [6] ('*The Gambia v Myanmar (Application Instituting Proceedings)*').

¹⁹⁶ Ibid 6 [6].

¹⁹⁷ Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, 39th sess, Agenda Item 4, UN Doc A/HRC/39/CRP.2 (17 September 2018) 353–4 [1392] ('FFM'); Ariella Victoria Levine, 'A Modern Day Holocaust: The Genocide of the Rohingya Muslims of Myanmar' (2018) 19(3) *Rutgers Journal of Law and Religion* 398, 403–5; Anwary (n 152) 99; Khan (n 95) 834.

¹⁹⁸ FFM, UN Doc A/HRC/39/CRP.2 (n 197) 180 [755].

¹⁹⁹ Ibid 57 [220].

²⁰⁰ Ibid 189 [790].

²⁰¹ Ibid 347 [1364].

Rakhine Province were subject to ‘crimes against humanity and genocide’²⁰² and the United Nations stating that Myanmar’s leaders must face genocide charges.²⁰³

The FFM affirmatively concluded the pertinent question of whether Myanmar committed these actions with genocidal, citing the persistent abuse of Rohingya civilians as indicative of an intent to destroy the group.²⁰⁴ The FFM referred to the ‘long-standing, extreme and systemic discrimination’ of the Rohingya population which was ‘rooted in Myanmar’s laws, policies and practices’.²⁰⁵ This was reflected in The Gambia’s application, stating that the ‘systematic denial of legal rights’ and Myanmar’s ‘support for, and participation in, pervasive hate campaigns’ aimed at demonising and dehumanising the Rohingya as a group substantiated genocidal intent.²⁰⁶

In the provisional measures stage of the proceeding, the Court held that the high evidentiary standard is not applicable despite the ‘exceptional gravity of the allegations’ as the role of provisional measures ‘is to protect the respective rights of either party pending its final decision’.²⁰⁷ Instead, the Court was satisfied that Myanmar’s breach of obligations under the *Genocide Convention* were plausible and indicated provisional measures against the nation.²⁰⁸

The plausibility of establishing genocidal intent, as expressed by the Court, highlights that specific intent likely exists within the alleged genocidal acts.²⁰⁹ However, if the Court maintains an evidentiary threshold of the “only reasonable inference” in the merits phase of the proceedings, The Gambia’s claim will inevitably fail.²¹⁰ Myanmar has contended that genocidal intent did not exist because it would be inconsistent with its ‘initiatives aimed at bringing stability to Rakhine State’ and holding ‘accountable those responsible for past violence’.²¹¹ This reflects their argued military objective of eliminating Rohingya insurgents, the Arakan Rohingya Salvation Army, rather than an intent to destroy the Rohingya population.²¹²

At merits, if the Court is satisfied that any of these alternative motives can be inferred from the evidence, *dolus specialis* could not be established, and Myanmar

²⁰² Antony J Blinken, ‘Secretary Antony J Blinken on the Genocide and Crimes Against Humanity in Burma’, *US Department of State* (Speech, Holocaust Memorial Museum, 21 March 2022) <<https://2021-2025.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/>>, archived at <<https://perma.cc/552Y-PPQP>>.

²⁰³ ‘Myanmar Military Leaders Must Face Genocide Charges: UN Report’, *UN News* (online, 27 August 2018) <<https://news.un.org/en/story/2018/08/1017802>>, archived at <<https://perma.cc/D6WH-SAD8>>.

²⁰⁴ FFM, UN Doc A/HRC/39/CRP.2 (n 197) 365–6 [1440]–[1441].

²⁰⁵ Ibid 360 [1419].

²⁰⁶ *The Gambia v Myanmar (Application Instituting Proceedings)* (n 195) 22 [31].

²⁰⁷ *The Gambia v Myanmar (Provisional Measures)* (n 22) 23 [56].

²⁰⁸ Ibid 23 [56], 30–1 [86].

²⁰⁹ See ibid 22–3 [55]–[56]; Michael A Becker, ‘The Plight of the Rohingya: Genocide Allegations and Provisional Measures in *The Gambia v Myanmar* at the International Court of Justice’ (2020) 21(2) *Melbourne Journal of International Law* 428, 438.

²¹⁰ Becker (n 209) 448–9.

²¹¹ *The Gambia v Myanmar (Provisional Measures)* (n 22) 25 [68].

²¹² Angelique Rael, ‘Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v Myanmar*): The International Court of Justice’s First Binding Decision to Hold Myanmar Accountable for Committing Genocidal Acts against the Rohingya Group’ (2021) 29(2) *Tulane Journal of International and Comparative Law* 377, 386.

would not be liable for genocidal acts committed against the Rohingya population.²¹³ If the Court employed the “dominant inference” threshold as the evidentiary standard for genocidal intent, this would allow for a comprehensive consideration of whether genocidal intent was the primary or significant factor causing Myanmar to commit atrocities against the Rohingya. This standard would prevent Myanmar from relying on the high evidentiary standard to absolve it of responsibility even where genocidal intent exists.²¹⁴ Accordingly, a balanced approach to adjudication in *The Gambia v Myanmar* through a “dominant inference” evidentiary standard may enable an affirmative finding that Myanmar violated their obligations under the *Genocide Convention*.²¹⁵

B *Ukraine v Russia*

Ukraine instituted proceedings against Russia on 26 February 2022 seeking to ‘establish that Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide’ and accusing Russia of planning ‘acts of genocide in Ukraine’.²¹⁶ This case initially concerned Russia’s claim that Ukraine committed genocidal acts against Russian civilians in the ‘Luhansk and Donetsk oblasts of Ukraine’, justifying a ‘special military operation’ to ‘prevent[...] and punish[...] purported acts of genocide’.²¹⁷ However, Ukraine’s application to the Court stated that ‘Russia is intentionally killing and inflicting serious injury on members of the Ukrainian nationality’.²¹⁸ This was supported by reference to the immeasurable harm suffered from Russia’s military invasion,²¹⁹ and the excessive human suffering and destruction caused on Ukrainian civilians.²²⁰ The harm cited included mass crimes committed by the Russian Armed Forces such torture, executions and rape as part of a larger pattern of war crimes in Ukraine.²²¹

Ukraine has supported these assertions of genocidal acts with references to political rhetoric and statements demonstrating genocidal intent.²²² The application refers to ‘President Putin’s vile rhetoric denying the very existence of

²¹³ See generally Md Rizwanul Islam and Naimul Muquim, ‘*The Gambia v Myanmar* at the ICJ: Good Samaritans Testing State Responsibility for Atrocities on the Rohingya’ (2020) 51(1) *California Western International Law Journal* 77, 109.

²¹⁴ Becker (n 209) 448–9.

²¹⁵ Islam and Muquim (n 213) 109.

²¹⁶ *Ukraine v Russia (Application Instituting Proceedings)* (n 130) 4 [3], 14 [24].

²¹⁷ Ibid 4 [2].

²¹⁸ Ibid 14 [24].

²¹⁹ Ibid 14 [23].

²²⁰ ‘As Security Council Meets on Ukraine Crisis, Russia Announces Start of “Special Military Operation”’, *UN News* (online, 24 February 2022) <<https://news.un.org/en/story/2022/02/1112592>>, archived at <<https://perma.cc/6EYL-W9JS>>.

²²¹ Lily Muelrath, “‘Never Again’ Yet Another Genocide: Russia’s Unlawful Forced Transfer and Adoption of Ukrainian Children” (2024) 41(2) *Wisconsin International Law Journal* 219, 244–51; Chris Galarza, ‘Into the Valley of the Shadow of Death: War Crimes Committed in Service of Russia’s Crusade to Destroy Ukraine’ (2023) 13(2) *National Security Law Brief* 35, 65–74.

²²² *Ukraine v Russia (Application Instituting Proceedings)* (n 130) 14 [24]; Denys Azarov et al, ‘Understanding Russia’s Actions in Ukraine as the Crime of Genocide’ (2023) 21(2) *Journal of International Criminal Justice* 233, 237.

a Ukrainian people',²²³ demonstrated by his insistence that Ukraine was an 'inalienable part of [Russian] history, culture and spiritual space'.²²⁴ Moreover, statements of other Russian politicians have indicated an intent to destroy the Ukrainian population, such as Deputy Chairman of the Security Council of Russia, Dmitry Medvedev, stating that '[w]ho said that in two years Ukraine might exist on the world map at all?'²²⁵ Even Russian media have called for the full destruction of the Ukrainian state and national identity through the essay 'What Should Russia Do with Ukraine?' published by RIA Novosti, a Russian state-owned news agency.²²⁶

Although the Court indicated provisional measures requiring the Russian Federation to 'suspend the military operations ... in the territory of Ukraine',²²⁷ an assessment of genocide was not conducted.²²⁸ Furthermore, Ukraine's claims relate wholly to Russia's abuse of the *Genocide Convention* to justify its invasion rather than allegations of responsibility for genocide.²²⁹ If the scope was widened to include such allegations, the Court would be open to reject a finding of genocide in the merits phase if Russia relied upon their 'special military operation'²³⁰ to justify any established genocidal acts.²³¹ Moreover, Russia has argued that any contrary statements by military officials were merely declarations that had no legal relation to the *Genocide Convention*.²³² An empirical consideration of the evidence may indicate that the dominant inference to be drawn is the destruction of the Ukrainian population. In this scenario, a lower evidentiary threshold would enable the Court to acknowledge Russia's military objectives without negating the possibility of establishing *dolus specialis*. Accordingly, if the ICJ determined that

²²³ *Ukraine v Russia (Application Instituting Proceedings)* (n 130) 14 [24].

²²⁴ Patrick Wintour, 'Putin's Rambling Ukraine Speech Leaves Western Diplomats Scrambling', *The Guardian* (online, 23 February 2022) <<https://www.theguardian.com/world/2022/feb/22/putin-russian-president-ukraine-speech-western-diplomats-scrambling>>, archived at <<https://perma.cc/5DGK-UCFM>>; Muelrath (n 221) 248. See also Claudio Grossman, 'The Invasion of Ukraine: A Gross Violation of International Law' (2022) 25(2) *Human Rights Brief* 74, 77–8.

²²⁵ David Child, Arwa Ibrahim and Sasha Petrova, 'Russia–Ukraine Latest: Ukraine May Soon "Not Exist on World Map"', *Al Jazeera* (online, 30 May 2023) <<https://www.aljazeera.com/news/2022/6/15/ukraine-russia-live-news>>, archived at <<https://perma.cc/A88H-J9LT>>, quoting @medvedev telegram (Dmitry Medvedev) (Telegram, 15 June 2022, 5:20pm MSK) <https://t.me/medvedev_telegram/111>, archived at <<https://perma.cc/SHX9-MEQX>>.

²²⁶ Susanne Sternthal, 'Manifesto Published in Russian Media Reflects Putin Regime's Ruthless Plans in Ukraine', *The Conversation* (online, 15 April 2022) <<https://theconversation.com/manifesto-published-in-russian-media-reflects-putin-regimes-ruthless-plans-in-ukraine-181006>>, archived at <<https://perma.cc/BS9L-NCCG>>.

²²⁷ *Ukraine v Russia (Provisional Measures)* (n 22) 230–1 [86].

²²⁸ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates) (Provisional Measures)* [2018] ICJ Rep 406, 421–2 [43]; Prabhath Ranhan and Achyuth Anil, 'Russia-Ukraine War, ICJ, and the Genocide Convention' (2022) 9(1) *Indonesian Journal of International and Comparative Law* 101, 112.

²²⁹ Ramsden (n 181) 206.

²³⁰ *Ukraine v Russia (Provisional Measures)* (n 22) 220 [32]–[33].

²³¹ Katy Malloy, 'Ukraine v Russia: A Case for Change in International Enforcement' (2024) 65(5) *William and Mary Law Review* 1231, 1248–9.

²³² 'Preliminary Objections Submitted by the Russian Federation', *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (International Court of Justice, General List No 182, 1 October 2022) 40 [80].

a coexistence of motives occurred, but specific intent was the dominant motive, this would enable an affirmative judgment of genocide.²³³

C *South Africa v Israel*

On 29 December 2023, South Africa submitted an application instituting proceedings against Israel in the ICJ concerning ‘acts threatened, adopted, condoned, taken and being taken by the Government and military of the State of Israel against the Palestinian people, a distinct national, racial and ethnical group, in the wake of the attacks in Israel on 7 October 2023’.²³⁴ South Africa’s claim states that Israel’s acts, including intentionally directing attacks against the civilian population, civilian objects and buildings dedicated to religion, education and art were ‘genocidal in character, as they [were] committed with the requisite specific intent ... to destroy Palestinians in Gaza as a part of the broader Palestinian national, racial and ethnical group’.²³⁵ Moreover, South Africa’s application aims to establish that Israel ‘has failed to prevent genocide’, ‘has failed to prosecute the direct and public incitement to genocide’, and ‘has engaged in, is engaging in and risks further engaging in genocidal acts against the Palestinian people in Gaza’.²³⁶

The evidence of genocidal acts is undisputable, epitomised by the 11 consecutive weeks of bombings in the Gaza Strip, killing over 21,110 Palestinians and injuring over 55,243 others.²³⁷ Other actions falling within art II of the *Genocide Convention* include the forced displacement of Palestinians from their homes, deprivation of access to services vital to life and measures intended to prevent Palestinian births.²³⁸

However, the challenge of characterising Israel’s specific intent as the only reasonable inference to be drawn from the evidence remains.²³⁹ South Africa’s application relied upon direct evidence of genocidal intent through statements made by Israeli officials such as the Israeli Prime Minister asserting on 26 December 2023 that ‘[w]e are not stopping, we are continuing to fight and we are deepening the fight in the coming days, and this will be a long battle and it is not close to being over’.²⁴⁰ The application cited indirect evidence by inferring genocidal intent from the nature and conduct of Israel’s military operation which failed to provide essential food, water and shelter to Palestinians, creating

²³³ See generally Ranhan and Anil (n 228) 114.

²³⁴ ‘Application Instituting Proceedings Containing a Request for the Indication of Provisional Measures’, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (International Court of Justice, General List No 192, 29 December 2023) 6 [1] (*South Africa v Israel (Application Instituting Proceedings)*).

²³⁵ Ibid 8 [2].

²³⁶ Ibid 10 [4].

²³⁷ Ibid.

²³⁸ Michael Plachta, ‘Genocide, Crimes against Humanity and War Crimes’ (2024) 40(1) *International Enforcement Law Reporter* 16, 17. See generally Hassan Habareen and Suhad Bishara, ‘The Jewish Nation-State Law’ (2019) 48(2) *Journal of Palestine Studies* 46, 48.

²³⁹ Sultany (n 26) 12–16.

²⁴⁰ *South Africa v Israel (Application Instituting Proceedings)* (n 129) 14 [8]. See also Francesca Albanese, Special Rapporteur, *Anatomy of a Genocide: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, 55th sess, Agenda Item 7, UN Doc A/HRC/55/73 (1 July 2024).

conditions ‘calculated to bring about their physical destruction as a group’.²⁴¹ Accordingly, the genocidal acts committed by the Israeli army may create an inference that the statements by Israeli officials were being directly implemented against the Palestinian people.²⁴²

Even if the Court concludes that there is sufficient evidence of genocidal acts and intent, the current standard means an affirmative judgment is unlikely.²⁴³ This is demonstrated by Israel’s utilisation of self-defence as justification.²⁴⁴ If the Court accepted this alternative intention, it would deny *dolus specialis*.²⁴⁵

Although the Court has considered South Africa’s claim as plausible by indicating provisional measures for Israel to comply with its obligations under the *Genocide Convention*,²⁴⁶ at merits, the Court would need to make a definitive finding on Israel’s intent.²⁴⁷ A lower evidentiary threshold may result in an affirmative judgment of Israel’s genocidal acts in the Gaza Strip by acknowledging Israel’s self-defence as a relevant motive.²⁴⁸ The “dominant inference” test would allow the Court to compare and contrast any military objectives against any evidence of genocidal intent. This would enable consideration of the actual impact on Palestinians rather than volitional justifications that would automatically preclude the inference of genocidal intent. Therefore, if the Court found that the dominant inference to be drawn from the evidence was the destruction of the Palestinian population, this would enliven an affirmative genocide judgment. This result would assist in eradicating the gap in accountability that the present standard facilitates, turning the unattainable evidentiary standard for genocidal intent into a threshold that promotes the achievement of justice.²⁴⁹

VII IMPACT ON FUTURE CLAIMS

Notwithstanding the impact that a “dominant inference” evidentiary standard for genocidal intent would have on present claims within the ICJ, there would be other significant implications on future genocide claims before the Court. The proliferation of genocide claims within the ICJ, and other international courts and tribunals, demonstrates a pressing need to consider the advantages of an alternative evidentiary standard.

First, adopting a dominant inference standard would increase the Court’s flexibility in considering evidence by encouraging greater weight on

²⁴¹ Ibid.

²⁴² Sultany (n 26) 13–16.

²⁴³ Essawy (n 12).

²⁴⁴ *South Africa v Israel (Application Instituting Proceedings)* (n 129) 70 [42].

²⁴⁵ Essawy (n 12); *Genocide Convention* (n 3) art II.

²⁴⁶ *South Africa v Israel* (n 13) 30–1 [86].

²⁴⁷ See Lando (n 193) 644.

²⁴⁸ Jinan Bastaki and Harun Halilović, ‘Genocide at the ICJ: The Bosnia Case and Implications for Gaza’, *OpinioJuris* (Blog Post, 8 October 2024) <<http://opiniojuris.org/2024/10/08/rethinking-international-law-after-gaza-symposium-genocide-at-the-icj-the-bosnia-case-and-implications-for-gaza/>>, archived at <<https://perma.cc/N7WG-687G>>.

²⁴⁹ See Sultany (n 26) 15–16.

circumstantial evidence when drawing inferences of intention.²⁵⁰ The “only reasonable inference” standard favours direct evidence as explicit proof of alternative motives create the required element of doubt to prevent affirmative genocide determinations.²⁵¹ A “dominant inference” standard would enable the Court to overcome this exploitable barrier by establishing genocidal intent as a primary or significant reason for a genocidal act, even if it is not the sole motive. Accordingly, this balanced approach to genocidal intent would promote a holistic consideration of direct and indirect evidence, contributing to a fairer and more equitable adjudication process.²⁵² This would also improve the likelihood of the Court concluding the existence of genocide for claims that lack direct evidence of intent, but contain substantial circumstantial evidence where the dominant inference is the intention to destroy a group. Therefore, the attainability of this new standard would deliver justice for victims while holding states accountable in circumstances where, under the current standard, they would otherwise evade responsibility.

Lowering the evidentiary threshold for genocidal intent to a “dominant inference” would also reduce the ability of states to utilise the coexistence of motives as a defence to genocidal acts.²⁵³ Instead, states that submit that their actions were motivated by military objectives, political considerations or strategic advancements would fail to deny genocidal intent if these motives are not the dominant inference drawn from the evidence. This would transform merits hearings before the ICJ as states would be less inclined to present such defences, and instead, be required to provide thorough justification for their actions. This would have a deterrent impact on the international community and increase accountability for states who engage in genocidal acts.²⁵⁴

However, a lower threshold may discourage states from accepting the jurisdiction or judgment of the Court in genocide proceedings.²⁵⁵ The non-binding nature of judicial decisions in the ICJ requires states to voluntarily consent to the Court’s jurisdiction.²⁵⁶ If a state believes that the evidentiary threshold has been lowered to an extent where it becomes too easy to be found in violation of the *Genocide Convention*, this may impact the willingness of states to cooperate. Moreover, although states are compelled to abide by the ICJ measures, a state may be less likely to comply if it believes a decision has been determined without evidential certainty. A clear indication by the Court through the upcoming merits hearings concerning the standard of proof required for genocide consent would

²⁵⁰ Sydney Smith, ‘Evidentiary Issues Associated with Establishing Attribution in a Claim of Self Defence: Is a Consistent Standard of Proof Desirable?’ [2021] *UNSW Law Journal Student Series* No 41:1–16, 3–5.

²⁵¹ Kendra Wergin, ‘Problematic Precedents: The Conflicting Legacies in the Genocide Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’ (2014) 54(2) *Virginia Journal of International Law* 463, 491.

²⁵² See Herbert (n 16) 326.

²⁵³ Behrens (n 9) 507–10.

²⁵⁴ Rothe (n 174) 1; Ramsden (n 181) 209–10.

²⁵⁵ See also Mahasen M Aljaghoub, ‘The Absence of State Consent to Advisory Opinions of the International Court of Justice: Judicial and Political Restraints’ (2010) 24(2) *Arab Law Quarterly* 191, 206.

²⁵⁶ Irene Miano, ‘Inherent Jurisdiction in the Practice of the International Court of Justice: A Tool to Trespass on or to Protect States’ Consent’ (2023) 22(3) *Law and Practice of International Courts and Tribunals* 463, 466–70.

alleviate these concerns as it would form a predictable and just threshold for future dispute resolution.

VIII CONCLUSION

The proliferation of genocide claims in the ICJ demands immediate consideration of the unattainability of the current evidentiary standard for genocidal intent. This article has argued that the ICJ must adapt the only reasonable inference standard to reflect the reality of intent within conflict. The stringent evidentiary bar has resulted in the ICJ inadvertently creating a near-insurmountable barrier to proving genocide claims, allowing states to evade responsibility for genocidal acts. This inhibits the achievement of justice for victims and injured states whilst discouraging other states from initiating claims.

The evidentiary threshold should be lowered to a “dominant inference” standard which enables the ICJ to establish genocidal intent where it is a dominant or significant motive. This resolves the issue of multiple coexisting motives as even where other motives such as military or political objectives exist, this would not automatically deny meeting the *dolus specialis* requirement. This would provide the Court with a more balanced and flexible approach to genocide adjudication that ensures the achievement of justice for victims whilst enhancing accountability for states.²⁵⁷

Lowering the evidentiary threshold for genocidal intent is a necessity. Although the international community has continuously recognised genocide as the gravest of international crimes, the current legal framework makes it almost impossible to prove. Three cases are currently before the ICJ: *The Gambia v Myanmar*, *Ukraine v Russia* and *South Africa v Israel*. By adopting a more realistic standard, violations of the *Genocide Convention* may be easier to argue, if genocidal intent is established.²⁵⁸ Moreover, if cases relating to these events are initiated in other international courts and tribunals, such as the International Criminal Court, an adapted standard would encourage these courts to take a proactive approach to genocide adjudication.²⁵⁹

Ultimately, the failure to introduce a balanced approach to the evidentiary standard for genocidal intent risks reducing the ICJ to a passive observer of global atrocities, powerless to issue judgments that its very mandate compels.²⁶⁰ An affirmative genocide judgment should not be an unattainable result, locked behind an insurmountable wall of evidentiary formalism. Instead, the Court must promote processes that allow justice to be accessible.²⁶¹ By lowering the evidentiary threshold for genocidal intent, the ICJ would not be lowering the significance of the crime; rather, it would allow judicial practice to reflect the objects and purposes of the *Genocide Convention*.²⁶² To acknowledge the gravity of genocide,

²⁵⁷ See Ramsden (n 181) 210.

²⁵⁸ Allan Mukuki, ‘The Sacrosanct? The Challenge in Holding the United Nations Responsible for the Failure to Prevent Genocide’ (2020) 4(1) *Strathmore Law Journal* 109, 138.

²⁵⁹ Fabián O Raimondo, ‘The International Court of Justice as a Guardian of the Unity of Humanitarian Law’ (2007) 20(3) *Leiden Journal of International Law* 593, 608–10.

²⁶⁰ AO Adede, ‘International Law from a Common Law Perspective: A Second Look’ (1980) 60(1) *Boston University Law Review* 46, 74–6.

²⁶¹ See generally Richard Falk, ‘The Role of the International Court of Justice’ (1984) 37(2) *Journal of International Affairs* 253.

²⁶² *Genocide Convention* (n 3) art I.

the Court must be willing to see through the fog of complex motives and recognise the dominant forces behind the destruction of entire groups.