SEARCHING FOR A PLAN: DEMONSTRATING GENOCIDAL INTENT BEFORE THE ICJ

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I. Introduction

Take heed: one does not find what one does not seek. Wise words for expert commentators on the case of *South Africa v. Israel* before the International Court of Justice ("ICJ"). Many have complacently concluded that South Africa's allegations of genocide against Israel "would nowhere near suffice if the Court ever addresses the merits."[1] However, many of these same commentators have failed to consider the "state plan" method of proving Israel's genocidal intent.

The great difficulty of proving genocidal intent—the key element of the crime of genocide—lies at the heart of expert analyses forecasting that the charges of genocide faced by Israel will ultimately be dismissed by the ICJ.[2] However, as notoriously challenging as proving genocidal intent is,[3] the arduousness of this task is artificially inflated when key avenues for proving

1. Amichai Cohen & Yuval Shany, *Selective Use of Facts and the Gaza Genocide Debate*, Just Security (Jan. 2, 2024), https://www.justsecurity.org/90939/selective-use-of-facts-and-the-gaza-genocide-debate/.

2. *See, e.g., Id.*; Marko Milanovic, *ICJ Indicates Provisional Measures in South Africa v. Israel*, EJIL:Talk!, (Jan. 26, 2024), https://www.ejiltalk.org/icj-indicates-provisional-measures-in-south-africa-v-israel/#:~:text=On%20plausibility%2C%20the,that%20they%20made.

3. Kai Ambos, Treatise on International Criminal Law Volume II: The Crimes and Sentencing 23 (Oxford Univ. Press ed., 2d ed. 2022); Carsten Stahn, A Critical Introduction to International Criminal Law 37 (Cambridge Univ. Press ed. 2019); Enzo Cannizzaro, *When the Reasons are More Telling than the Ruling: The Order of the ICJ in South Africa v. Israel*, EJIL:Talk! (Feb. 7, 2024), https://www.ejiltalk.org/when-the-reasons-are-more-telling-than-the-ruling-the-order-of-the-icj-in-south-africa-v-israel/.

genocidal intent are ignored. It is therefore important to recognize that expert discourse concerning *South Africa v. Israel* has focused exclusively on a single method of demonstrating genocidal intent—that of inferring intent from indirect evidence that demonstrates a pattern of conduct.[4] Meanwhile, an alternative method of demonstrating genocidal intent by direct evidence of a state plan to commit genocide has been almost completely overlooked. Neither the expert commentary nor the Court itself has yet analyzed the available evidence in the context of considering whether an Israeli state plan to commit genocide can be identified. The existence of such a blind spot hardly justifies the confidence with which predictions have been made that the Court's decision on the merits will ultimately exonerate Israel of genocide.

The failure of experts and the presiding ICJ judges to consider the state plan method for proving genocidal intent in *South Africa v. Israel* may be symptomatic of the fact that the ICJ has yet to articulate a clear legal test for proving a state plan to commit genocide. This paper therefore constructs such a test based on ICJ jurisprudence supplemented, where necessary, by the genocide-related jurisprudence of the *ad hoc* international criminal tribunals and fundamental principles of the law of state responsibility. The framework developed in the first part of the paper for proving a state plan to commit genocide is then applied to the facts of *South Africa v. Israel* to determine whether the state plan method offers a viable means of demonstrating genocidal intent on the part of Israel at the merits stage of the proceedings.

This paper ultimately concludes that the evidence does not support the existence of an Israeli state plan to commit genocide. However, the true aim of this paper is to elaborate the elements of the state plan method for demonstrating genocidal intent. A clearer understanding of the contours of this method and its potential utility in proving the commission of genocide

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4. *See, e.g.*, Ryan Goodman and Siven Watt, *Unpacking the Int'l Court of Justice Judgment in South Africa v Israel (Genocide Case)*, Just Security (Jan. 26, 2024), https://www.justsecurity.org/91486/icj-judgment-israel-south-africa-genocide-convention/; Tom Buchwald, *Top Experts' Views of Int'l Court of Justice Ruling on Israel Gaza Operations (South Africa v Israel, Genocide Convention Case)*, Just Security (Jan. 26, 2024), https://www.justsecurity.org/91457/top-experts-views-of-intl-court-of-justice-ruling-on-israel-gaza-operations-south-africa-v-israel-genocide-convention-case/.

may help enhance the rigor and richness of associated expert commentary. A clear test may also ultimately improve the legal reasoning employed in adjudicating state responsibility for the crime of genocide. It is to these pursuits that this paper endeavours to contribute.

It is important to note that this paper addresses the Israel-Palestine situation from a narrow perspective as the subject matter of a dispute before the ICJ that falls to be decided by the Court in accordance with the sources of international law enumerated in Article 38(1) of Statute of the ICJ. This paper does not purport to address the situation from any other or any broader standpoint.

II. The ICJ's Genocide Judgments

The ICJ has rendered two merits decisions concerning state responsibility for the commission of genocide as defined in the *Convention on the Prevention and Punishment of the Crime of Genocide* ("Genocide Convention").[5] Both decisions concerned allegations of genocide in the context of the dissolution of the former Yugoslavia between 1991 and 1995. The first decision was issued in 2007 in response to an application by Bosnia and Herzegovina ("Bosnia") against Serbia ("*Bosnian Genocide Case*"), and the second in 2015 in response to an application by Croatia against Serbia ("*Croatian Genocide Case*").

A. *State Responsibility for the Commission of Genocide and the Definition of Genocide*

In the *Bosnian Genocide Case*, the ICJ determined that states have a binding legal obligation under the Genocide Convention not to commit genocide. This obligation is not explicit in the Convention, but is implied by Article I, by which states agree

5. Additional ICJ jurisprudence concerning the *Genocide Convention* includes matters that may yet produce merits decisions, as in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, and *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, as well as an advisory opinion on the treaty-law mechanics of the *Genocide Convention* rendered in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15.*

to categorize genocide as a "crime under international law" and "undertake to prevent" genocide. The obligation is also implicit in Article IX, which gives the ICJ jurisdiction over disputes between states parties "relating to the responsibility of a State for genocide."[6] These provisions, read in light of the object and purpose of the Genocide Convention,[7] impose an obligation on states not to commit genocide. Article IX also grants the Court jurisdiction to determine international responsibility for breaches of this obligation where it can be shown that "genocide as defined in the Convention has been committed."[8]

The Genocide Convention defines the commission of genocide as the commission of any of five underlying acts[9] against members a protected group[10] with the "intent to destroy, in whole or in part," the protected group "as such". This definition involves an act element as well as multiple mental elements. The associated mental elements include, firstly, the mental elements inherent in each underlying act—for example, the underlying act of killing requires the general intent to engage in the physical act of killing and the specific intent to cause the consequence of the victim's death.[11] Secondly, genocide

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6. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, ¶¶ 166, 169, 179 [hereinafter *Bosnian Genocide Case*].

7. The Court relied on its characterization of the object and purpose of the Genocide Convention as articulated in its 1951 Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28)*. The Court therein described the Convention as having the "humanitarian and civilizing purpose" of condemning and punishing genocide "as a 'crime under international law'", safeguarding "the very existence of certain human groups", and confirming and endorsing "the most elementary principles of morality." The relevant excerpt from the 1951 Advisory Opinion is reproduced in *Bosnian Genocide Case. Bosnian Genocide Case, supra* note 6, at ¶ 161.

8. *Bosnian Genocide Case, supra* note 6, at ¶ 180.

9. The underlying acts are set out in the subparagraphs to Article II of the Genocide Convention. They include: killing; causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about the physical destruction of the group; imposing measures to prevent births; forcibly transferring children of the group to another group. Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277.

10. The protected groups listed in Article II are: national, ethnical, racial or religious groups. *Id.*

11. International Criminal Court, *Rome Statute*, Art. 30, July 17, 1998, 2187 U.N.T.S. 3. *See also* William Schabas, *Genocide in International Law: the Crime of*

involves an additional mental element that constitutes the "distinguishing characteristic"[12] or "key element"[13] of genocide and that separates it from other international crimes.[14] This is the surplus or ulterior intent to produce, as an overall consequence of engaging in the underlying act, the destruction, in whole or in part, of a protected group as such. This has been referred to as "special" intent or *dolus specialis*;[15] it will be referred to in this paper as "genocidal intent".

The ICJ in the *Bosnian Genocide Case* ultimately determined that the Court is competent to hold a state internationally responsible for the commission of genocide where it is established that one or more of the underlying acts enumerated in the Genocide Convention has been committed by an organ of the respondent state or a person or group whose acts are attributable to that state and the underlying act was committed with the necessary genocidal intent.[16]

B. *ICJ Accepts the State Plan Method as One of Three Methods for Demonstrating Genocidal Intent*

The ICJ in the *Bosnian Genocide Case* considered three arguments by Bosnia for finding Serbia responsible for the commission of genocide. Each argument relied on a distinct method for demonstrating the existence of genocidal intent.

Bosnia's first argument was one of direct attribution. Bosnia alleged that the principal instances in the Yugoslav conflict of killings of Bosnian Muslims were carried out by perpetrators acting with a genocidal intent that was manifest in the commission of the underlying acts.[17] The conduct of those perpetrators, Bosnia argued, was attributable to Serbia, thereby engaging

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Crimes, 256-57, 263–64 (Cambridge Univ. Press ed. 2009); Ambos, *supra* note 3, at 21.

12. Schabas, *supra* note 11, at 261 (citing the 1996 ILC Code of Crimes Against the Peace & Security of Mankind).

13. Ambos, *supra* note 3, at 23.

14. Absent this special intent, conduct cannot constitute genocide, though it may still constitute a crime against humanity. *See* Schabas, *supra* note 11, at 261–62.

15. *See, e.g.*, the *Bosnian Genocide Case. Bosnian Genocide Case, supra* note 6, at ¶ 187.

16. *Bosnian Genocide Case, supra* note 6, at ¶¶ 167, 179.

17. *Id.* at ¶¶ 245-297.

Serbia's international responsibility.[18] This first argument could be called Bosnia's "orthodox" argument, relying on the constituent elements of genocide conventionally conceived as in an international criminal law setting—i.e. a genocidal act committed by a perpetrator acting with genocidal intent—supplemented by a public international law attribution analysis to arrive at state responsibility.[19]

Bosnia's second and third arguments took novel approaches to establishing genocidal intent tailored to the context of genocide viewed as conduct committed by a state rather than an individual. These arguments relied on the same act element as the first argument—various instances of killings of Bosnian Muslims. However, the arguments located genocidal intent either in an "overall plan to commit to commit genocide" (the second argument) or in a pattern of atrocities from which genocidal intent could be inferred (the third argument), rather than in the psychology of direct perpetrators, as in the "orthodox" argument.[20] The Court observed that in its second and third arguments, Bosnia "moves from the intent of the individual perpetrators of the alleged acts of genocide complained of to the intent of higher authority" within the military and political structures of the Serbian state.[21]

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18. *Id.* at ¶¶ 379, 385-412. International responsibility was described as follows by Judge Max Huber of the Permanent Court of International Justice in his report on the *Spanish Zone of Morocco* arbitration between the United Kingdom and Spain: "[r]esponsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation." *See* 1924 Reports of International Arbitral Awards, *Spanish Zone of Morocco Claims (United Kingdom v Spain)*, Vol. II, 615, 641. The law of international responsibility is largely codified in three works of the International Law Commission: the Articles on Responsibility of states for Internationally Wrongful Acts (2001), the Articles of Diplomatic Protection (2006), and the Articles on Responsibility of International Organizations (2011). *See* James Crawford, *Brownlie's Principles of Public International Law*, 9th Edition 523 (Oxford University Press ed. 2019).

19. The Court rejected this argument, however, finding that killings of the protected group were indeed committed with genocidal intent particularly (and exclusively) in the context of the massacre of Bosnian Muslim men and boys at Srebrenica in July 1994, but that the conduct of the Bosnian Serb perpetrators of those killings was not attributable to Serbia. *See Bosnian Genocide Case, supra* note 6, at ¶¶ 413–15.

20. *Id.* at ¶¶ 370–76.

21. *Id.* at ¶ 371.

In the *Croatian Genocide Case*, the Court consolidated the three-pronged approach to demonstrating genocidal intent into two prongs—the state plan method and the pattern of conduct method, considered sequentially. The "orthodox" method—that of establishing the commission of underlying acts by direct perpetrators possessing genocidal intent and attributing this conduct to the state—drops out of focus. Thus, the Court begins its discussion of the mental element of genocide by relating the parties' agreement that genocidal intent "is to be sought, first, in the State's policy," meaning in the form of a state plan to commit genocide.[22] "[A]lternatively," the Court continues, "the *dolus specialis* may be established by indirect evidence, i.e., deduced or inferred from certain types of conduct."[23] The Court endorses this bipartite sequential approach and conducts its *mens rea* analysis accordingly in its consideration of Serbia's counterclaim (Croatia did not make a state plan argument and so only its pattern of conduct argument was considered by the Court).[24]

Thus, in both the *Bosnian Genocide Case* and the *Croatian Genocide Case* (together, "the *Genocide Cases*") the ICJ accepted that a state's genocidal intent can be established by demonstrating the existence of a state plan to commit genocide. In neither case did the Court articulate a clear test for proving a state plan to commit genocide and in neither decision was such a plan found to exist. However, in both decisions the Court considered the parties' arguments concerning the existence of a state plan to commit genocide. Careful review of the Court's corresponding analyses helps illuminate the criteria that must be

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22. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Judgment, 2015 I.C.J. Rep. 3, ¶ 143 [hereinafter *Croatian Genocide Case*]. Note on terminology: In the ICJ's discussion of a state plan to commit genocide in the *Bosnian Genocide Case*, the Court referred alternatively to a "concerted plan," a "general plan," and "an overall plan" to commit genocide. *Bosnian Genocide Case*, *supra* note 6 at ¶¶ 376, 373, 370–71. Similarly, in the *Croatian Genocide Case*, the Court used the terms "State's policy" and "State plan expressing the intent to commit genocide" interchangeably. *Croatian Genocide Case*, *supra* note 22, at ¶¶ 143, 145. The Court did not appear to attach any meaningful distinction to these various designations, which should therefore all be understood to refer to the same legal concept, which concept will be expressed in this paper as "a state plan to commit genocide," or simply "a state plan".

23. *Croatian Genocide Case*, *supra* note 22, at ¶ 143.

24. *Id.* at ¶¶ 145, 148, 407–39, 501–07.

satisfied for the Court to find the existence of such a plan for the purposes of demonstrating a state's genocidal intent.

C. *The Elements of a State Plan to Commit Genocide: Form, Link with Underlying Acts, Substance, and Authority of Planners*

Based on a close reading of the *Genocide Cases*, conclusions may be drawn with respect to several factors that the Court will consider in determining whether a state plan to commit genocide is made out on the facts of a case. These factors are: 1. the form that such a plan may take; 2. the link that must exist between a state plan to commit genocide and underlying acts of genocide; 3. the substance of a state plan that renders it genocidal; and 4. the requisite authority or rank of those involved in the formulation of the plan.

1. *Form of a State Plan*

Insight into the acceptable form(s) of a state plan to commit genocide can be gleaned by considering the state plans proposed by the parties in the *Genocide Cases*. In neither case did the Court take issue with the form of the proposed state plan. Rather, in each case, the Court's finding against the existence of a state plan to commit genocide was based on its determination that the substance of the proposed plan did not adequately reflect genocidal intent.[25] Thus, the state plans proposed by the parties in the *Genocide Cases* remain instructive regarding the acceptable form(s) of a state plan to commit genocide.

The *Genocide Cases* suggest that the form requirements of a state plan to commit genocide are easily satisfied and are met by mere verbal statements of a plan made by an official or officials of the relevant state. The Court has not required that state plans to commit genocide be contained in official documents such as policy statements or legislation, contrary to arguments advanced by some scholars.[26]

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25. *Bosnian Genocide Case*, *supra* note 6, at ¶ 372; *Croatian Genocide Case*, *supra* note 22, at ¶¶ 504-506.

26. For example, Robin Smith, in his attempt to reengineer a test for a state plan to commit genocide from the *Genocide Cases*, argued that the ICJ required that a state plan be contained in an "official document." See Robin M.

It is true that, in the *Bosnian Genocide Case*, the form of the state plan proposed by Bosnia was an official document—a policy statement issued by the President of the National Assembly of the Bosnian Serb Republic ("Republika Srpska") and published in the *Official Gazette* of the Republika Srpska.[27] This policy statement, the "Decision on the Strategic Goals of the Serbian People in Bosnia" ("Strategic Goals"), set out six objectives, principal among which was the separation of the Bosnian Serbs from the other ethnic communities of Bosnia. The remaining objectives supported this aim.

However, the status of the Strategic Goals as formal state policy of the *Republika Srpska* played no apparent role in the Court's determination that the Strategic Goals could validly serve as a state plan of *Serbia*. Rather, the Court found that the Strategic Goals document was capable of serving as a Serbian state plan because "intercepted exchanges between President Milošević of Serbia and President Karadžić of the Republika Srpska" were "sufficient to show that the objectives defined [in the document] represented their joint view."[28] Thus, the Court found that the form requirements for a Serbian state plan to commit genocide were satisfied by the Serbian President's verbal agreement to the Strategic Goals, rather than by the document itself. The only feature of unequivocal importance attributable to the Strategic Goals is their elaboration of the substance of the Serbian President's agreement; that the Strategic Goals also happened to be contained in a document that bore the imprimatur of the formal political processes of the Republika Srpska was purely incidental.

This minimalist interpretation of the form requirements for a state plan to commit genocide is consistent with the Court's approach in the *Croatian Genocide Case*. The Court in that case accepted Serbia's argument that a state plan to commit genocide could be constituted by recorded statements of senior Croatian officials in the absence of any official document or formal statement of policy.[29] Serbia contended, and the Court appeared to accept, that a Croatian state plan to commit genocide could be based on "the actual language of

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Smith, *State Responsibility and Genocidal Intent: A Three Test Approach*, 34 AUSTL. Y.B. INT'L L., Jan. 1, 2016, at 105.

27. *Bosnian Genocide Case*, *supra* note 6, at ¶ 371.

28. *Id.*

29. *Croatian Genocide Case*, *supra* note 22, at ¶¶ 504-507.

the transcript of the meeting held at Brioni on 31 July 1995" between Croatia's President and top military leaders on the eve of a Croatian military attack on the proto state of Serbian Krajina in eastern Croatia.[30] It could be argued that the alleged Croatian state plan to commit genocide was contained in a sort of official document, being "[t]he full transcript of the discussions at that meeting, which were recorded."[31] However, the proposed state plan was only constituted by the transcript document in a superficial sense. The better view is that the state plan consisted of the statements made by the Croatian officials at the meeting—the "actual language" used by those officials, in Serbia's words.[32] The ICJ accepted that these statements could potentially constitute a state plan to commit genocide.

The foregoing suggests that the form requirements of a state plan to commit genocide are satisfied simply where the proposed state plan has been conveyed in verbal statements by officials of the state accused of genocide. The question of *which* officials can make statements capable of serving as state plans will be discussed in subsection II(C)(iv). The important point at this juncture is that the relevant statements need not be expressed in any official document or formal statement of policy to be capable of constituting a state plan.

2. *Link Between the State Plan and Underlying Acts of Genocide*

Observable in both *Genocide Cases* is the Court's tacit requirement of a link between statements constituting an alleged state plan to commit genocide and the commission of underlying acts of genocide. This requirement is necessitated by the definition of genocide in the Genocide Convention, which speaks of an underlying act "committed with" genocidal intent. Thus, while the state plan method is one approach to establishing genocidal intent, to make out the crime of genocide, that intent must bear some relation to underlying genocidal acts such that a court may find those acts to have been "committed with" genocidal intent. Accordingly, where genocidal intent is established by a state plan to commit genocide, proving the

30. *Id.* at ¶ 500.
31. *Id.* at ¶ 501.
32. *Id.* at ¶ 500.

crime of genocide requires that the statements comprising the state plan be somehow linked with underlying genocidal acts.

It will be seen that the ICJ in the *Genocide Cases* required such a link, but that it failed to describe the requisite character of this link. Recourse must therefore be had to the genocide-related jurisprudence of the *ad hoc* international criminal tribunals. This jurisprudence furnishes a test for the link that must exist between statements reflecting genocidal intent and underlying acts of genocide—where the declarants and actors are distinct individuals—for the statements and acts together to give rise to the crime of genocide. That test is as follows: the declarant or author of the statements must have explicitly or implicitly requested the direct perpetrators of the underlying genocidal acts to commit those acts, or instigated, ordered, encouraged, or otherwise availed themselves of the direct perpetrators to commit the underlying acts.[33]

i. Such a Link was Present in the Genocide Cases

Although the ICJ in the *Genocide Cases* did not expressly discuss the requirement for a link between statements constituting a state plan to commit genocide and underlying acts of genocide, the statements comprising the state plans proposed by the parties in each case were clearly linked to the commission of underlying acts of genocide by direct perpetrators.

That the Strategic Goals[34] proposed by Bosnia as a state plan to commit genocide in the *Bosnian Genocide Case* were linked to the perpetration of underlying acts of genocide was confirmed by the International Criminal Tribunal for the former Yugoslavia ("ICTY") Trial Chamber in *Brdanin*. The ICJ cited this very decision in its discussion of the Strategic Goals.[35] The Strategic Goals, according to the ICTY Trial Chamber, were "transformed … into operational imperatives" for the Bosnian Serb

33. Prosecutor v. Popović, Case No. IT-05-88-A, Judgement in the Appeals Chamber, ¶ 1050 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015) [hereinafter *Popović Appeal*].

34. The reference to the Strategic Goals here refers to the substance of Milošević's verbal agreement which constituted Serbia's state plan to commit genocide, as entertained by the ICJ in the *Bosnian Genocide Case*.

35. *Bosnian Genocide Case*, *supra* note 6, at ¶ 372.

forces[36] and were "the driving factor behind the actions of the Bosnian Serb armed forces, shaping the events in [Bosnia and Herzegovina] from May 1992 onwards."[37] The Strategic Goals thus provided the impetus and direction for Bosnian Serb military action that included killings, forced population transfers, and other conduct capable of constituting various underlying acts of genocide. This connection was necessary for the Strategic Goals to qualify as a possible state plan to commit genocide.

That the statements of Croatian officials alleged by Serbia to constitute a state plan to commit genocide in the *Croatian Genocide Case* were also linked to the perpetration of underlying acts of genocide is evident from the fact that the statements arose in the planning and ordering of Operation Storm—the Croatian military's attack on Serbian Krajina. This connection between the relevant statements and killings by the Croatian military made it possible for those statements too to serve as a potential state plan to commit genocide.

The ICJ in both *Genocide Cases* may thus be seen as having implicitly required a link between statements constituting an alleged state plan to commit genocide and the commission of underlying acts of genocide. Such a link was necessary to allow the Court to conclude that the underlying acts were "committed with" the genocidal intent reflected in the statements, if indeed the Court were to have found that the content of the statements reflected genocidal intent.

ii. The Court Failed to Discuss the Necessity or Nature of the Link

The Court's failure to expressly articulate a requirement for the type of link discussed above affects the state plan method of proving genocidal intent uniquely among the three methods considered by the Court in the *Bosnian Genocide Case*. The lack of an express requirement has little effect on the first or "orthodox" method of proving genocidal intent because this method necessarily involves a clear link between the act and mental elements of genocide. The "orthodox" method, as discussed, seeks

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36. Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgement in the Trial Chamber II, ¶ 78 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) [hereinafter *Brdanin Judgment*].

37. *Id.* at ¶ 79.

firstly to establish the commission of underlying acts of genocide by direct perpetrators possessing genocidal intent and secondly to attribute this conduct to the state.[38] In the first step of this method, the Court perforce looks for the concurrent presence of both the act and mental elements of genocide and a link between them—the link being that the authors of the underlying acts commit those acts with genocidal intent.

However, the Court appears to lose sight of the necessary connection between the act and mental elements of genocide in turning from the "orthodox" method, concerned with individual perpetrators exhibiting both intent and act elements, to the state plan and pattern of conduct methods, concerned with the abstracted "state" and focused exclusively on the intent element of genocide. This singular focus on intent creates no issues for the pattern of conduct method for demonstrating genocidal intent, which inherently involves reference to both the act and mental elements of genocide, the latter being inferred from the former.[39] Conversely, the exclusive focus on intent does create potential complications for the state plan method because it is possible for the Court to consider the existence of a state plan reflecting genocidal intent independently of the underlying acts of genocide occasioned by that plan.[40] An additional step is then required to explicitly connect the statements constituting the state plan and representing genocidal intent with the associated underlying acts of genocide. The Court failed to address this second step in either of the *Genocide Cases*. Consequently, the Court failed to expressly articulate a requirement that a proposed state plan to commit genocide be linked to underlying acts of genocide. As discussed, the very definition of genocide necessitates that the Court nevertheless be viewed as having implicitly required such a link.[41] However, as the Court's treatment of the required link was implicit, the Court gave no direction regarding the requisite character of the link.

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38. *Bosnian Genocide Case*, *supra* note 6, at ¶¶ 245-297, 379, 385-412.

39. *See Bosnian Genocide Case*, *supra* note 6, at ¶¶ 373-376, and *Croatian Genocide Case*, *supra* note 22 at ¶¶ 508-514.

40. *See Bosnian Genocide Case*, *supra* note 6, at ¶¶ 371-372, and *Croatian Genocide Case*, *supra* note 22 at ¶¶ 501-507.

41. *See* Article II of the Genocide Convention: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: …" [Emphasis added.]

iii. Guidance from the ICTY Regarding the Nature of the Required Link

Given the ICJ's lack of guidance regarding the nature or character of the required link, recourse may be had to relevant principles of international criminal law as applied in the genocide-related jurisprudence of the ICTY. The law applicable before the ICTY is analogous to the law applicable before the ICJ for two reasons. Firstly, because the legal definition of genocide applicable in both fora derives from the Genocide Convention.[42] Secondly, because the ICJ in the *Genocide Cases* invoked the ICTY's genocide jurisprudence frequently, and not just for factual findings that the ICJ treated as highly persuasive,[43] but also for guidance on the law concerning genocide.[44]

Guidance in assessing the sufficiency of the link required between the genocidal intent embodied in statements comprising an alleged state plan to commit genocide and the commission of underlying acts of genocide can be found in a particular application of the joint criminal enterprise ("JCE") mode of liability developed by the ICTY. One specific application of the JCE mode of liability permits an accused to be found guilty of committing genocide where they are a member of a JCE that shares a common plan to commit genocide but where the underlying acts of genocide are carried out by direct perpetrators who are not part of the JCE and who do not necessarily share the genocidal intent of the JCE members.[45] The intent of the accused as a member of a JCE with a plan to commit genocide combines with the underlying acts of the direct perpetrators to establish the crime of genocide and the accused's responsibility for its commission. This combination requires demonstrating a certain

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42. Schabas, *supra* note 11, at 113–14.

43. *Bosnian Genocide Case*, *supra* note 6, at ¶ 223.

44. The ICJ in the *Bosnian Genocide Case* invoked ICTY jurisprudence in the Court's formulation of the special intent element of genocide. *Bosnian Genocide Case*, *supra* note 6, at ¶ 188. In the *Croatian Genocide Case*, the ICJ considered ICTY jurisprudence when modifying the test for inferring genocide from a pattern of conduct. *Croatian Genocide Case*, *supra* note 22, at ¶ 148.

45. For a summary of JCE as a mode of liability, see Robert Cryer et al., An Introduction to International Criminal Law and Procedure, 344–50 (Cambridge Univ. Press ed., 2019). For JCE liability in circumstances where the direct perpetrator is not a member of the JCE, see Prosecutor v. Brdanin, Case No. IT-99-36-A, Judgement in the Appeals Chamber, ¶ 410–13 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007) [hereinafter *Brdanin Appeal*].

connection between the genocidal intent of the accused JCE member and the underlying acts of the direct perpetrators—the very sort of connection also required in state responsibility proceedings between a state plan reflecting genocidal intent and the commission of underlying acts of genocide by direct perpetrators. Regarding the nature of this connection or link, the ICTY has held that the underlying acts must be shown to be part of the JCE's common plan to commit genocide.[46] This is established where the underlying acts can be imputed to a JCE member, meaning that "this member – when using the principal perpetrators – acted in accordance with the common objective."[47] Factors considered in determining whether this test is met include "evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime."[48]

Establishing genocide via this application of the JCE mode of liability and establishing genocide via the state plan method of proving genocidal intent both require linking a discrete locus of genocidal intent with the conduct of direct perpetrators of genocidal acts. In light of this key similarity and the analogousness of the law of genocide applicable before the ICTY and the ICJ, the same factors considered by the ICTY in assessing the sufficiency of the link between an accused JCE member possessing genocidal intent and the commission of genocidal acts by direct perpetrators may usefully be considered by the ICJ in assessing the sufficiency of the link between statements constituting an alleged state plan to commit genocide and the commission of genocidal acts by direct perpetrators. Thus, for statements of officials to constitute a state plan to commit genocide capable of grounding a finding of genocide (assuming all other criteria relating to form, content, and authorship are met), the author or declarant of the statements must have explicitly or implicitly requested the direct perpetrators of the underlying genocidal acts to commit those acts, or instigated, ordered, encouraged, or otherwise availed themselves of the direct perpetrators to commit the underlying acts.

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46. *Brdanin Appeal*, *supra* note 45, at ¶ 410.
47. *Id.* ¶ 413; *Popović Appeal*, *supra* note 33, at ¶ 1050.
48. *Popović Appeal*, *supra* note 33, at ¶ 1050.

3. *What Makes a State Plan Genocidal*

The ICJ's analyses in the *Genocide Cases* provide guidance as to the content requirements that officials' statements must satisfy to constitute a state plan to commit genocide. In particular, the Court's reasoning regarding why statements comprising the proposed state plans did not adequately demonstrate genocidal intent provides insight into the Court's expectations for finding such intent.

i. The Court's Findings Against Genocidal Intent in the *Genocide Cases*

The Court in the *Bosnian Genocide Case*, in finding that the Strategic Goals did not reflect genocidal intent, noted that the Strategic Goals' objectives "do not include the elimination of the Bosnian Muslim population,"[49] and "were capable of being achieved by the displacement of the population and by territory being acquired…"[50] The Court also noted that the Strategic Goals had previously been before the ICTY and were not found to exhibit genocidal intent.

In the *Croatian Genocide Case*, the Court engaged in contextualizing the more potentially inculpatory statements to neutralize indications of genocidal intent. Thus, the Court found that the most provocative statement, in which the Croatian President asserted that "[w]e have to inflict such blows that the Serbs will to all practical purposes disappear", when read in light of the sentence's second clause—"that is to say, the areas we do not take at once must capitulate within a few days"—was "more indicative of the designation of a military objective, rather than of the intention to secure the physical destruction of a human group."[51] Similarly, the Court found the President's statement that "if we had enough [ammunition], then I too would be in favour of destroying everything by shelling prior to advancing," could not be interpreted as reflecting genocidal intent because it was "made in the context of a discussion on the need to use the military resources available to those forces with restraint."[52]

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49. *Bosnian Genocide Case*, *supra* note 6, at ¶ 372.
50. *Id.*
51. *Croatian Genocide Case, supra* note 22, at ¶ 504.
52. *Id.*

The Court in the *Croatian Genocide Case* found that other statements contained "a certain ambiguity" as to their genocidal nature that could not be dispelled by context, but which the Court nevertheless found did "not represent sufficiently persuasive evidence of a genocidal intent."[53] This was the Court's conclusion regarding a reference by one of the Croatian officials to "clear[ing] the entire area" of Serbian Krajina once Serb forces had pulled out.[54] Still other statements were found to lack genocidal intent even without the need for contextualization. This was the case with the President's entreaty to the military leaders that they "remember how many Croatian villages and towns [had] been destroyed."[55] Finally, the Court pointed to statements in the transcript that militated against an intent to destroy the protected group as evidence that the surrounding, seemingly provocative statements, also did not reflect genocidal intent. The Court made such use of the Croatian President's assertion that "the Serb civilians should be left with accessible escape routes," which the Court viewed as expressing concern that "in no way suggests any intent to destroy the Serb group as such."[56]

ii. Takeaways for the Content of a State Plan

Three conclusions may be drawn from the Court's textual analyses of the proposed state plans in the *Genocide Cases*. First, the statements comprising a state plan to commit genocide must call for the elimination of a protected group or express objectives that necessitate the elimination of a protected group. This conclusion proceeds from the two principal bases for the Court's determination in the *Bosnia Genocide Case* that the Strategic Goals did not demonstrate genocidal intent: (i) the objective of eliminating the protected group was not explicitly stated in the document; and (ii) the stated objectives were capable of being achieved by means other than the elimination of the protected group.

Secondly, a call for the elimination of a protected group may be inferred from oblique references. This conclusion proceeds from the Court's apparent acceptance in the *Croatian*

53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

Genocide Case that the Croatian President's call for "the Serbs" to "disappear" and his stated preference of "destroying everything" would have conveyed genocidal intent but for the surrounding context that revealed they did not.

The role context may play in mitigating potentially genocidal statements gives rise to a third conclusion. Namely, for a statement calling for the elimination of a protected group to adequately demonstrate genocidal intent, such intent must remain clear when the statement is considered in the context of surrounding statements.

4. *Which Officials Can Make a State Plan*

Any state official can make statements capable of constituting a state plan to commit genocide. While this is not expressly affirmed by the ICJ in the *Genocide Cases*, it is a rule that can be derived from basic principles of state responsibility and is supported by the definition of the crime of genocide.

A state may be internationally responsible for the conduct of any of its officials. The general rule is that conduct attributable to the state includes the conduct of all organs of government,[57] where "organ" is "intended in the most general sense," and includes officials "of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy,"[58] when those officials "are acting in their official capacity,"[59] including when they act in breach of the rules governing their official position.[60] Thus, in considering which officials are capable of formulating a state plan to commit genocide, and setting aside for the moment any genocide-related qualifier to the notion of a "state plan", it is clear that the formulation of a plan by *any* state official acting in their official capacity is conduct attributable to the state under international law. Accordingly, *any* state official may author or declare a plan that constitutes a "state plan" in the sense that its formulation attracts the international responsibility of the state. In other words, there is no limit on the range of officials capable of forming a state plan to

57. Int'l Law Comm'n, *Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, at Chapter II, ¶ 2 (ARSIWA).

58. *Id*, Art. 4, at ¶ 6.

59. *Id*, Art. 4, at ¶ 7.

60. *Id*, Art. 4, at ¶ 13.

commit genocide grounded in the rules of state responsibility generally or the doctrine of attribution specifically.

The proposition that any official can form a state plan to commit genocide is also supported by the elements of the crime of genocide. The definition of genocide in the Genocide Convention does not contain any counterpart to the leadership clause in the Rome Statute's definition of the crime of aggression which restricts the possible perpetrators of the latter crime to officials "in a position effectively to exercise control over or to direct the political or military action of a State."[61] By contrast, there is nothing in the Genocide Convention (or the Rome Statute) that limits the ability to commit genocide, and *a fortiori* to plan to commit genocide, to any particular group of officials defined *ex ante* by rank, functional responsibility, or other quality. As Carsten Stahn observes, "[g]enocide is not a leadership crime. It is the targeting of protected groups rather than the quality of the agent that characterizes its essence."[62]

Some scholars have nevertheless argued that the ICJ in the *Genocide Cases* sought to limit the ability to form state plans to commit genocide to the "leadership" of the state, meaning either the head of state or "[s]enior officials at the policy level."[63] However, this argument lacks a sound legal basis and is based solely on superficial observations of the identity and status of the declarants of the statements comprising the alleged state plans in the *Genocide Cases*. In the *Bosnian Genocide Case*, the operative statement was made by Serbia's head of state, President Milošević. In the *Croatian Genocide Case*, the relevant statements were made by the Croatian President, Franjo Tudjman, along with Croatian General Ante Gotovina and the President's son Miroslav Tudjman, then serving as Chief of the Croatian Foreign Intelligence Agency.[64] It is clear from the source of the statements in each case that the ICJ considered that the group of officials capable of formulating a state plan to commit genocide *includes* heads of state and senior military and intelligence

61. Rome Statute, Art. 8*bis*(1).

62. Stahn, *supra* note 3, at 41.

63. Smith, *supra* note 26 at 108.

64. Piotr Smolar, *Miroslav Tudjman, pâle héritier du "père de la Croatie indépendante", est candidat à la présidentielle*, Le Monde (Nov. 12, 2009, 3:15pm), https://www.lemonde.fr/europe/article/2009/11/12/miroslav-tudjman-pale-heritier-du-pere-de-la-croatie-independante-est-candidat-a-la-presidentielle_1266220_3214.html.

officials. However, the ICJ did not *restrict* that capability to these officials or to any group of officials defined *ex ante* by rank or other quality. Nor did the Court allude to any rationale for such a restriction, which finds no support in the rules of state responsibility or the definition of the crime of genocide.

Thus, apart from the requirement that the author or declarant of a state plan to commit genocide be an official—any official—of the state in question, there is no legally principled limit on which officials, assessed *ex ante*, can make qualifying statements. This remains true notwithstanding that there may be a correlation between those statements, assessed *post facto*, that are sufficiently linked to the commission of underlying acts of genocide to constitute a state plan to commit genocide, and a certain cadre of high-ranking officials with *de jure* authority to order the commission of genocidal acts. This cadre would typically include military and security officials with command authority and political officials of sufficiently high rank to direct the military and state security apparatus. Despite a logical correlation between this group of high-ranking officials and statements that are sufficiently linked to genocidal acts, it is important to recognize that there is no necessary relationship between these two considerations. Nothing legally precludes other officials from making statements that are sufficiently linked to genocidal acts to constitute a genocidal plan, though practicalities may dictate that they are far less likely to make such statements, which would typically fall outside the scope of their official responsibilities.

Statements constituting a state plan to commit genocide can therefore be made by any state official acting in their official capacity. Neither the ICJ, nor the rules of attribution, nor the elements of the crime of genocide, suggest otherwise. The crucial limiting factor concerns not which officials, assessed *ex ante*, can make statements capable of constituting a state plan to commit genocide, but which statements, assessed *post facto*, are sufficiently linked with the commission of underlying acts of genocide to permit the statements to constitute a state plan to commit genocide.

D. *Standard of Proof*

The final element of the legal test for demonstrating a state plan to commit genocide is the standard of proof for determining the existence of such a plan. The best interpretation of the

ICJ's practice is that the Court requires proof beyond a reasonable doubt for each element of genocide—the act and mental elements and the mode of liability or its equivalent in the state responsibility context—as well as for all findings of fact indispensable to establishing each element of genocide.

Before turning to the *Genocide Cases* and international criminal jurisprudence to support this proposition, it is helpful to acknowledge that "[t]here is a limit as to how much one can make sense of the standards of proof used in the case law of the Court."[65] So cautions Katherine Del Mar, author of one of the few comprehensive studies of standards of proof in ICJ proceedings.[66] Del Mar explains that there are no firm rules governing the standard of proof in ICJ adjudication. No guidance on the applicable standards (for parties or the Court) can be found in the Statute of the ICJ,[67] the Rules of Court, or the Court's Practice Directions.[68] This void has given the Court considerable discretion and flexibility in evidentiary matters generally and in determining and applying the standard of proof specifically.[69]

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65. Katherine Del Mar, *The International Court of Justice and Standards of Proof*, in THE ICJ AND THE EVOLUTION OF INTERNATIONAL LAW: THE ENDURING IMPACT OF THE CORFU CHANNEL CASE, 98, 100 (Karine Bannelier et al. eds., 2011).

66. *Id.* Other notable research on standards of proof in ICJ proceedings can be found in: A. Riddell & B. Plant, *Evidence before the International Court of Justice,* 125–29 (Brit. Inst. of Int'l and Compar. L. ed., 2009); C. Brown, *A Common Law of International Adjudication*, 98–101 (Oxford Univ. Press ed., 2007).

67. The only relevant reference is in Article 53, which states that in situations where one of the parties to a dispute does not appear before the court, the Court must satisfy itself that the "claim is well founded in fact and law" before deciding in favour of the claimant. Statute of the International Court of Justice, art. 53, June 26, 1945, 33 U.N.T.S. 993.

68. Del Mar, *supra* note 65, at 100.

69. Amanda Bills, *Revisiting the Standard of Proof for Charges of Exceptional Gravity before the International Court of Justice,* in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW ONLINE, 108, 111 (2023). Some ICJ Judges have reasoned that restrictive rules of evidence typical of domestic proceedings are "[not] appropriate to litigation between governments." Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Separate Opinion of Judge Fitzmaurice, 1970 I.C.J. Rep. 1, ¶ 58. However, other Judges have expressed reservations at the Court's unmoored approach to the standard of proof. Judge Higgins in her separate opinion in *Oil Platforms* took the view that "[t]he principal judicial organ of the United Nations should [] make clear what standards of proof it requires to establish what sorts of facts," observing that "it is impossible to know, in the absence of any articulated standard or further explanation, why the Court reached [a] conclusion." Judge Higgins continued that, "[b]eyond a general agreement that the graver the charge

In principle, the ICJ is free to determine its approach to the standard of proof on a case-by-case basis.[70] In practice, throughout its jurisprudence the Court has invoked a wide range of standards—sometimes more than one in the same decision—in a seemingly haphazard manner.[71] Del Mar has compiled the following standards of proof variously relied on by the ICJ in its case law:

> 'a degree of certainty', 'no room for reasonable doubt', and proof that does not 'fall . . . short of conclusive evidence' … 'on the basis of a balance of evidence', 'on a balance of probabilities', 'in all probability', 'consistent with the probabilities', proof 'to the Court's satisfaction', 'with a high degree of probability', 'beyond any reasonable doubt', 'beyond possibility of reasonable doubt', 'no reasonable doubt', 'little reasonable doubt', 'sufficient certainty', 'with any degree of certainty', 'with certainty', 'with the necessary degree of precision and certainty', 'conclusive' evidence, and 'evidence that is fully conclusive'.[72]

Some of these standards can intuitively be located higher or lower relative to one another on a spectrum of least to most stringent; some defy definite placement. From where along this spectrum the Court chooses to draw the standard of proof that it applies in a given case typically depends on three factors: the stage of proceedings,[73] whether the Court is being called on to exercise a declarative or determinative function,[74] and the gravity of the claims at issue.[75] Considerations bearing on the gravity factor include whether the norm at issue was allegedly violated by omission or commission (higher standards apply to commission), and the importance of the norm allegedly violated.[76] The rationale for the application of a higher standard of

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the more confidence must there be in the evidence relied on, there is thus little to help parties appearing before the Court … as to what is likely to satisfy the Court." Oil Platforms (Iran v. U.S.), Separate Opinion of Judge Higgins, 2003 I.C.J. Rep. 4, ¶¶ 33, 36.

70. Bills, *supra* note 69, at 114.

71. Del Mar, *supra* note 65, at 99–100.

72. *Id.* Footnotes omitted.

73. The standard of proof is consistently higher in decisions on merits relative to decisions on provisional measures, for example.

74. The standard of proof is typically higher where the Court determines state responsibility relative to where the Court declares, for example, the proper territorial boundary between two states.

75. Del Mar, *supra* note 65, at 106.

76. *Id*, at 106, 108.

proof to charges of exceptional gravity has never been explicitly addressed by the Court but likely relates to the stigma attached to judicial confirmation of such charges[77] and the legal implications of the Court finding a state in violation of a peremptory norm.[78]

The circumstances of the *Genocide Cases* were such as to attract the Court's most stringent standard of proof: both were decisions on the merits involving the determination of state responsibility for alleged violations by commission of a peremptory norm of the gravest character. It can therefore be assumed that the standard applied by the Court in both cases represents the highest standard of proof applicable in proceedings before the ICJ. What was that standard? The Court in each case indicated that, given the "charges of exceptional gravity" at issue, claims had to be proved by "evidence that is fully conclusive".[79] Elaborating on this standard, the Court explained that it had to be "fully convinced" that allegations of genocide and attribution were "clearly established."[80] To prove genocidal intent via a state plan to commit genocide, such a plan had to be "convincingly demonstrated to exist."[81] To infer intent from a pattern of conduct, the conduct had to be such that "the only inference that could reasonably be drawn" was the existence of genocidal intent.[82]

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77. The Court in the *Bosnian Genocide Case* emphasized this consideration. *Bosnian Genocide Case, supra* note 6, at ¶ 293.

78. Del Mar, *supra* note 65, at 107. Article 41 ARSIWA sets out the consequences of a serious breach of a peremptory norm law. States are obligated to cooperate to bring an end the breach and are under obligations of non-recognition and non-assistance with respect situations created by the breach. Int'l Law Comm'n, *supra* note 57, at 113–14.

79. *Bosnian Genocide Case*, *supra* note 6, at ¶ 209; *Croatian Genocide Case*, *supra* note 22, at ¶¶ 177-179.

80. *Bosnian Genocide Case*, *supra* note 6, at ¶ 209.

81. *Id.* at ¶ 373.

82. *Id.* at ¶ 148. This constitutes the only significant difference in the standard of proof articulated by the Court in the *Croatian Genocide Case* relative to the *Bosnian Genocide Case*. In the latter, the Court stated that inferring genocide intent from a pattern of conduct required the conduct "to be such that it could *only* point to the existence of such intent." See *Bosnian Genocide Case*, *supra* note 6, at ¶ 373 (emphasis added). In the *Croatian Genocide Case*, by contrast, the Court explained that the test does not require that a pattern of conduct could "only point to" genocidal intent; it is sufficient if "the only inference that could *reasonably* be drawn" from the pattern of conduct is the

Regarding the specific facts that had to be proved on the "fully conclusive evidence" standard, the Court merely indicated that the standard applied to its consideration of whether genocide had been committed and to the attribution of genocide to the state in question.[83] Additional guidance on what exactly must be proved on this standard to establish the commission of genocide is furnished by the case law of the *ad hoc* international criminal tribunals. That jurisprudence is unanimous in holding that, to establish the commission of any crime, including genocide, the standard of proof must be satisfied with respect to each element of the crime, each element of the mode of liability, and any fact indispensable to obtaining a conviction.[84] This suggests that, in the context of proving state responsibility for genocide before the ICJ, the "fully conclusive evidence" standard must be met in establishing the act and mental elements of genocide, the mode of liability or its equivalent in the state responsibility context,[85] and all findings of fact indispensable to establishing each element of the crime and the mode of liability or its equivalent.

The Court's equation of the "fully conclusive evidence" standard with the "only reasonable inference" standard in the context of inferring genocidal intent from a pattern of conduct allows an important conclusion to be drawn regarding the standard of proof as it applies to demonstrating a state plan to commit genocide. First, however, it must be recognized that the "only reasonable inference" standard is simply an alternative formulation of the standard of proof beyond a reasonable doubt.[86] Secondly, one must assume that the ICJ intended to apply the "fully conclusive evidence" standard consistently in its

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existence of genocidal intent. See *Croatian Genocide Case, supra* note 22, ¶ 148 (emphasis added).

83. *Bosnian Genocide Case, supra* note 6, at ¶ 209.

84. Colleen M Rohan, *Reasonable Doubt Standard of Proof in International Criminal Trials,* in Principles of Evidence in International Criminal Justice, 650, 656 (Karim Kahn et al. eds., 2010).

85. Modes of liability are "linking principles" used to connect, *inter alia*, an accused with particular actions and past decisions with consequences. *See* Wayne Jordash & Natacha Bracq, *The African Court of Justice and Human and Peoples' Rights in Context*, 744 (Cambridge Univ. Press ed., 2019). The "mode of liability" concept applicable *mutatis mutandis* to this paper's analysis is the connection required between the state plan to commit genocide and the commission of underlying acts of genocide by direct perpetrators.

86. Rohan, *supra* note 84, at 661–62.

assessment of each element of genocide and all findings of fact indispensable to establishing each element of genocide. If these two premises are accepted, it follows that the "fully conclusive evidence" standard requires proof beyond a reasonable doubt for each element of genocide and all findings of fact indispensable to establishing each element of genocide, including the existence of state plan to commit genocide where the state plan method of proving genocidal intent is pursued.

This conclusion falters if either of its premises proves erroneous. While the first premise is nigh incontrovertible, the second would be incorrect if the Court conceived of the "fully conclusive evidence" standard not as a single uniform standard, but as itself embracing multiple different standards of which proof beyond a reasonable doubt was but one. In that case, the "fully conclusive evidence" standard would not necessarily require proof beyond a reasonable doubt for all elements of genocide and all facts indispensable to establishing an element of genocide. It may be that proof beyond a reasonable doubt is only required when proving an element of genocide or a fact indispensable to establishing an element of genocide requires the drawing an inference from indirect or circumstantial evidence.[87]

Either of these two lines of reasoning can be defended. The first line of reasoning, according to which the "fully conclusive evidence" standard constitutes a single standard commensurate with proof beyond a reasonable doubt, may be too analytic and expect too much internal consistency of the ICJ's approach to the standard of proof, particularly given the historically chaotic nature of that approach. However, the second line of reasoning, according to which the "fully conclusive evidence" standard of proof itself admits of different standards, assumes the ICJ's application of standards within standards without notice and without any sort of explanation or systematization. Such an approach to the standard of proof would be convoluted and opaque and strain the limits of coherence. This interpretation of the *Genocide Cases* should be rejected.

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87. Note that *Corfu Channel* exhibited the same combination of the "fully conclusive evidence" standard, formulated as a criminal-esque standard with respect to drawing inferences from indirect evidence: "The proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt." Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, at 18) (emphasis added).

This paper therefore proceeds on the basis that the "fully conclusive" standard is a uniform standard commensurate with proof beyond a reasonable doubt. This conclusion will be followed notwithstanding criticism in the expert commentary regarding the perceived inappropriateness of the ICJ's application of a criminal standard of proof in interstate proceedings concerned with determining state responsibility for breaches of international obligations rather than individual criminal responsibility for criminal conduct.[88] The reality is that the ICJ unquestionably *did* rely on a criminal standard of proof with respect to inferring genocidal intent from a pattern of conduct. The preceding analysis has shown on principled grounds why that same standard of proof should be taken to inform the "fully conclusive evidence" standard more generally to avoid incoherence. That the "fully conclusive" standard is commensurate with proof beyond a reasonable doubt is thus a defensible *descriptive* conclusion regarding the standard of proof as applied by the ICJ in the *Genocide Cases*; it is not a *normative* conclusion as to how the standard of proof should have been applied or should be applied in the future.

Equating the "fully conclusive evidence" standard with proof beyond a reasonable doubt brings some much-needed clarity to the standard of proof analysis but does not, of course, eliminate all ambiguity. The expression "reasonable doubt" itself eludes precise and universal definition.[89] The formulation of the proof beyond a reasonable doubt standard most relied on in the jurisprudence of the *ad hoc* tribunals derives from the following quote from Lord Denning, initially cited by the ICTY in *Delalic* (*Celebici*):

It need not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, 'of course it is possible, but not

88. *See, e.g.*, P. Tzeng, *Proving Genocide: The High Standards of the International Court of Justice*, 40 Yale J. of Int'l L. 419 (2015); D. Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?*, 31 Fordham Int'l L. J. 911 (2007); A. Gattini, *Evidentiary Issues in the ICJ's Genocide Judgment*, 5 J. of Int'l Crim. Just. 889 (2007).

89. Rohan, *supra* note 84, at 661–62.

in the least probable,' the case is proved beyond a reasonable doubt, but nothing short of that will suffice.[90]

This is the definition of the proof beyond a reasonable doubt standard—and, by extension, the "fully conclusive evidence" standard—that will be relied on in the remainder of this paper.

E. *Stating the Test: The Criteria and Standard for Proving a State Plan to Commit Genocide*

From the preceding analysis, one may construct a test of the evidentiary requirements for demonstrating a state plan to commit genocide in state responsibility proceedings before the ICJ. This test is as follows:

The plan must be attributable to the state: It must be established beyond a reasonable doubt that the author or declarant of statements comprising an alleged state plan to commit genocide is a government official of the state in question and that the statements were made in their official capacity.

The plan's language must reflect genocidal intent: It must be established beyond a reasonable doubt that the statements comprising the alleged state plan call explicitly or impliedly for the elimination of a protected group in whole or in part as such, where "part" means "at least a substantial part of the particular group."[91] Where the relevant statements contain explicit language calling for the elimination of a protected group, that language must retain its genocidal meaning beyond a reasonable doubt when read in the context of proximate statements. Where the relevant statements are characterized by oblique language, it must be established beyond a reasonable doubt that the language does in fact reflect an intention to destroy a protected group in whole or in part as such, including when read in context. Finally, where any of these determinations requires the drawing of an inference—which will be necessary, for example, in determining whether oblique language calls for the elimination of a group—the inference necessary to establish genocidal intent must be the only reasonable inference available based on the content of the statements read in context.

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90. *Id.*

91. *Bosnian Genocide Case, supra* note 6, at ¶ 198; *Croatian Genocide Case, supra* note 22, at ¶ 142.

The plan must be linked to underlying acts: It must be established beyond a reasonable doubt that the statements constituting the alleged state plan to commit genocide are sufficiently linked to the commission of underlying acts of genocide. This link will be made out where it is shown beyond a reasonable doubt that the author or declarant of the relevant statements, in making those statements, explicitly or implicitly requested the direct perpetrators of the underlying genocidal acts to commit those acts, or that the author or declarant instigated, ordered, encouraged, or otherwise availed themselves of the direct perpetrators to commit the underlying acts.

Satisfying the above requirements is sufficient to establish the existence of a state plan to commit genocide according to the guidance provided by the ICJ in its discussion of the state plan method of proving genocidal intent in the *Genocide Cases* supplemented, where necessary, by guidance from the genocide-related jurisprudence of the *ad hoc* international criminal tribunals and fundamental principles of the law of state responsibility. Below, this test is applied to the facts of *South Africa v. Israel* to determine whether a state plan to commit genocide can be made out on the evidence in that case. First, however, a brief overview of the relevant aspects of those proceedings is apposite.

III. ICJ Proceedings in *South Africa v. Israel*

A. *South Africa's State Plan Argument is Ignored by the Court and Expert Commentators*

On December 29, 2023, South Africa filed an application with the ICJ alleging, *inter alia*, that Israeli actions in Gaza following Hamas's attacks on Israel of October 7, 2023, amounted to genocide within the meaning of the Genocide Convention. South Africa in its application appears to argue that Israel's genocidal intent can be established by direct evidence of a state plan to commit genocide.[92] South Africa relies on a number of highly provocative statements by Israeli political

92. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Verbatim Record, 32–36 (Jan. 11, 2024, 10 a.m.), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240111-ora-01-00-bi.pdf.

and military officials which, South Africa contends, "indicate in and of themselves a clear intent to destroy Palestinians in Gaza as a group 'as such.'"[93] The most incendiary statements relied on by South Africa—and the statements most likely to qualify as state plans to commit genocide—are reproduced below, as reported and contextualized by South Africa in its application:

- **Prime Minister of Israel:** … On 28 October 2023, as Israeli forces prepared their land invasion of Gaza, the Prime Minister [Benjamin Netanyahu] invoked the Biblical story of the total destruction of Amalek by the Israelites, stating: "you must remember what Amalek has done to you, says our Holy Bible. And we do remember" … The relevant biblical passage reads as follows: "Now go, attack Amalek, and proscribe all that belongs to him. Spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses".
- **Israeli Minister for National Security:** On 10 November 2023, Itamar Ben-Gvir clarified the government's position in a televised address, stating: "[t]o be clear, when we say that Hamas should be destroyed, it also means those who celebrate, those who support, and those who hand out candy — they're all terrorists, and they should also be destroyed."
- **Israeli Minister of Energy and Infrastructure:** 'Tweeting' on 13 October 2023, Israel Katz stated: "All the civilian population in Gaza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world."
- **Deputy Speaker of the Knesset and Member of the Foreign Affairs and Security Committee:** On 7 October 2023, Nissim Vaturi 'tweeted' that: "[n]ow we all have one common goal — erasing the Gaza Strip from the face of the earth."
- **Israeli Army Reservist Major General, former Head of the Israeli National Security Council, and adviser to the**

93. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Application Instituting Proceedings, ¶ 103 (Dec. 29, 2023), https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf.

> **Defence Minister:** On 7 October 2023, Giora Eiland, describing the Israeli order to cut off water and electricity to Gaza, wrote in an online journal: "This is what Israel has begun to do — we cut the supply of energy, water and diesel to the Strip . . . But it's not enough. In order to make the siege effective, we have to prevent others from giving assistance to Gaza . . . *The people should be told that they have two choices; to stay and to starve, or to leave.* If Egypt and other countries prefer that these people will perish in Gaza, this is their choice." (Emphasis in South Africa's application.)[94]

If none of these statements appear on their face to constitute unambiguous state plans to commit genocide, neither are they so innocuous as to warrant outright dismissal as state plans without serious consideration. However, up to the present point in the proceedings, neither the Court nor the expert commentary has engaged with South Africa's state plan argument and assessed the challenged statements for their potential value as state plans to commit genocide.

The Court sidestepped the issue in its Order of January 26, 2024, granting South Africa's request for provisional measures. In the process of reaching its conclusion that Israel has plausibly engaged in genocide[95] (a finding based on the low "plausibility" standard of proof applicable at the provisional measures stage), the Court controversially declined to conduct a discrete analysis of Israel's genocidal intent.[96] This

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94. *Id.* at ¶ 101.

95. The ICJ found that the rights asserted by South Africa—the right of Palestinians in Gaza to be protected from genocide and the right of South Africa to seek Israel's compliance with its obligations under the Genocide Convention—were plausible and at real and imminent risk of irreparable harm before the ICJ could render a decision on the merits. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order of Provisional Measures, 2024, ¶¶ 35–37 (Jan. 26, 2024), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf. Given the "correlation between the rights of members of groups protected under the Genocide Convention, [and] the obligations incumbent on States parties thereto", the corollary of the ICJ's determination on plausibility was that Israel was found to have plausibly violated its obligation under the Genocide Convention not to commit genocide. *Id.* at ¶ 43. In other words, Israel was found to have plausibly engaged in the commission of genocide.

96. Order of Provisional Measures, *supra* note 95 at ¶¶ 46–54. Judge Nolte takes the majority to task for its approach, arguing that intent must be directly

complicates any assessment of the Court's treatment of the Israeli statements identified by South Africa. However, the Court appears to have considered the statements as merely one of several components of indirect, circumstantial evidence from which genocidal intent could be inferred (the pattern of conduct method), and not considered their potential value as direct evidence of a state plan to commit genocide reflecting genocidal intent (the state plan method).

The entirety of the Court's synthesized, holistic analysis in support of its conclusion that genocide was plausibly established consisted of the following: observations on the scale of and destruction caused by Israel's military operation; reproduction of three of the provocative Israeli statements identified by South Africa; and invocation of a UN press release voicing alarm over the latter statements.[97] The Court proceeded from these bases, without additional analysis or explanation, directly to the conclusion that the right of the Palestinian people to be protected from genocide was plausible, meaning that Israel had plausibly violated its obligation not to commit genocide.[98] The Court's brief analysis, which eschewed any mention of a possible state plan to commit genocide, suggests that the Court inferred Israel's genocidal intent from a mixture of the enumerated conduct, circumstances, and statements, and did not consider the statements as direct evidence of a state plan to commit genocide.

That the statements of Israeli officials were considered exclusively for their indirect value in grounding inferences of intent rather than their direct value in establishing a state plan to commit genocide is clearer still in the separate opinions of various judges. Judge Ad Hoc Barak, for instance, stated that "[t]he declarations made by the President of Israel and the Minister of Defence of Israel are not a sufficient factual basis

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addressed. In his view, the indispensability of specific intent to grounding a claim of genocide makes a discrete assessment mandatory, as does ICJ jurisprudence indicating that the test of plausibility must be applied to key elements of the definition of the right at issue, including essential mental elements. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Declaration of Judge Nolte, I.C.J., ¶¶ 10–12 (Jan. 26, 2024), https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-04-en.pdf.

97. Order of Provisional Measures, *supra* note 95, at ¶¶ 46–53.

98. *Id.* at ¶ 54.

for *inferring* a plausible intent of genocide" and "*to infer* an intent to commit genocide from these statements … is plainly implausible."[99] Like the Court majority, the individual judges writing separately failed to acknowledge the potential significance of the Israeli officials' statements as direct evidence of a state plan to commit genocide.

Much expert commentary on the *South Africa v. Israel* proceedings has committed the same oversight. Experts have focused almost exclusively on the question of whether, on the merits, the ICJ will or will not infer Israel's genocidal intent from an amalgam of indirect evidence comprised of conduct or a mix of conduct and statements. The possibility of establishing intent by demonstrating that the statements of one or more Israeli officials constitute a state plan to commit genocide has been largely ignored. Indeed, many experts, in stating the test that the Court will ostensibly apply on the merits for determining the existence of genocidal intent, simply state the test for inferring intent from a pattern of conduct and omit mention of the state plan method of proving intent altogether.[100] Such deficient accounts of the possible avenues for proving genocidal intent have inevitably led to correspondingly deficient analyses. Marko Milanovic, for example, giving his prediction of the likely outcome on the merits, states that, "absent extraordinary factual developments, on the evidence as it exists today it will be highly unlikely for a majority of the Court to *infer* genocidal intent on the merits of this case."[101]

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99. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Separate Opinion of Judge *ad hoc* Barak, 2024 I.C.J., ¶¶ 36, 37 (Jan. 26) (emphasis added).

100. Just Security, *Top Experts' Views of Int'l Court of Justice Ruling on Israel Gaza Operations (South Africa v Israel, Genocide Convention Case),* Just Security (Jan. 26, 2024), https://www.justsecurity.org/91457/top-experts-views-of-intl-court-of-justice-ruling-on-israel-gaza-operations-south-africa-v-israel-genocide-convention-case/; Ryan Goodman & Siven Watt, *Unpacking the Int'l Court of Justice Judgment in South Africa v Israel (Genocide Case),* Just Security (Jan. 26, 2024), https://www.justsecurity.org/91486/icj-judgment-israel-south-africa-genocide-convention/; Marko Milanovic, *ICJ Indicates Provisional Measures in South Africa v. Israel,* EJIL:Talk!, (Jan. 26, 2024), https://www.ejiltalk.org/icj-indicates-provisional-measures-in-south-africa-v-israel/#:~:text=On%20plausibility%2C%20the,that%20they%20made; Amichai Cohen & Yuval Shany, *Selective Use of Facts and the Gaza Genocide Debate,* Just Security (Jan. 2, 2024), https://www.justsecurity.org/90939/selective-use-of-facts-and-the-gaza-genocide-debate/.

101. Marko Milanovic, *supra* note 100 (emphasis added).

Milanovic does not even consider that genocidal intent could potentially be established not by inference from indirect evidence but by direct proof of a state plan to commit genocide constituted by one or more of the statements of Israeli officials identified by South Africa.

To determine whether the ICJ and expert commentators have ignored a potentially viable method of demonstrating genocidal intent and ultimately proving genocide on the merits in *South Africa v. Israel*, this paper will conclude by considering the statements of Israeli officials challenged by South Africa against the framework for proving a state plan to commit genocide developed in this paper.

B. *The State Plan Test Applied to South Africa v. Israel*

1. *Whether the Statements Are Attributable to Israel*

The first component of the test for demonstrating a state plan to commit genocide developed in this paper requires establishing that the statements constituting the proposed state plan are attributable to the state in question by demonstrating beyond a reasonable doubt that the author or declarant of the statements is a government official of that state and that the statements were made in the official's official capacity.

These criteria are met beyond a reasonable doubt for most of the impugned statements reproduced above. All the statements were made by Israeli officials, and most were *prima facie* made in the author's or declarant's official capacity, having been made in official addresses to televised or other media. These statements therefore pass the first element of the test.

This conclusion is unaffected by arguments made by Israel and some expert commentators that certain statements cannot reflect the genocidal intent of Israel because they are "not in conformity with government policy," or because they are made by officials who are "completely outside the policy- and decision-making processes in the war."[102] There is no authority in

102. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Verbatim Record, 2024 ¶ 40 (Jan. 12, 2024). https://www.icj-cij.org/sites/default/files/case-related/192/192-20240112-ora-01-00-bi.pdf.

the rules of state responsibility, the definition of genocide in the Genocide Convention, or the ICJ's decisions in the *Genocide Cases* to suggest that such considerations can disqualify statements from constituting state plans to commit genocide.

Conduct attributable to the state includes the conduct of all officials "of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy,"[103] so long as the official is "functioning as such," even if the conduct is *ultra vires*.[104] Extraneous considerations concerning the statements' conformity with government policy or the rank or function of the authors or declarants are irrelevant at this or any other stage of the analysis. As discussed, the sole importance of an official's rank or function (including their proximity to the "policy- and decision-making processes in the war") is not legal but practical, as it affects the likelihood that the official's statements will possess the necessary link to the commission of genocidal acts by direct perpetrators. However, as neither rank, function, nor proximity is a prerequisite for such a link, these considerations cannot justify excluding officials *ex ante* from the capability of making statements that constitute a state plan to commit genocide. Thus, none of the impugned statements fail this stage of the test on account of the rank or functional role within government of the officials who made them.

The only statements warranting closer examination at this stage of the test are those expressed in social media posts, as such statements could potentially qualify as "purely private conduct" not attributable to the state of Israel.[105] First to be considered in this regard is the statement posted on social media site X (formerly known as Twitter) by the Israeli Minister of Energy and Infrastructure that begins with the declaration that "[a]ll the civilian population in Gaza is ordered to leave immediately," and ends with the ominous assertion that Gazans "will not receive a drop of water or a single battery until they leave

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See also Amichai Cohen & Yuval Shany, *supra* note 100; Chimène Keitner, *Understanding South Africa v. Israel at the International Court of Justice,* Lawfare (Jan. 16, 2024, 2:28pm), https://www.lawfaremedia.org/article/understanding-south-africa-v.-israel-at-the-international-court-of-justice.

103. Int'l Law Comm'n, *supra* note 57, at 40 (Discussed in paragraph six of Article 4).

104. *Id.* at 42. (Discussed in paragraph thirteen of Article 4).

105. *Id.* at 42 (Discussed in paragraph thirteen of Article 4).

the world."[106] The statement opens with the giving of an order to the civilian population of Gaza, indicating that the Minister was acting as a Minister with governmental authority in composing and transmitting the statement rather than as a private citizen. It does not matter that the Minister certainly lacked the *de jure* authority to issue such an order because an official's conduct remains attributable to the state so long as the official is "functioning as such", regardless of whether the conduct exceeded the official's instructions or powers. The Minister's presumption to begin the tweet with a peremptory order to the civilians of Gaza indicates that the Minister was functioning as a Minister, even if his conduct exceeded his formal authority. Accordingly, the tweet in question is a statement made by an Israeli official in their official capacity and is attributable to Israel under the rules of state responsibility.

The second social media post to be considered is that of the Deputy Speaker of the Knesset calling for "erasing the Gaza Strip from the face of the earth."[107] This statement is more ambiguous than the first with respect to whether it was sent in an official or private capacity as there is no comparable invocation of state authority. Such ambiguity precludes attribution of this statement to Israel on the beyond a reasonable doubt standard. This statement then, alone among the statements challenged by South Africa reproduced above, fails the attributability stage of the test and may not constitute an Israeli state plan to commit genocide.

2. *Whether the Language Reflects Genocidal Intent*

The second component of the test for proving a state plan to commit genocide considers whether the language of the statements comprising the alleged state plan demonstrates beyond a reasonable doubt the author's or declarant's intent to destroy a group in whole or in part as such when the statements are read in the context of proximate statements.

It must first be observed that none of the statements at issue explicitly calls for the elimination of the Palestinians of Gaza in the sense of naming the targeted group and expressly calling for its elimination. Even the Deputy Speaker of the Knesset's social

106. Application Instituting Proceedings, *supra* note 93, at ¶ 101.
107. *Id.*

media post that advocates "erasing the Gaza Strip from the face of the earth" is ambiguous regarding whether the author is calling for the elimination of the Palestinians of the Gaza Strip as such or merely the flight of the Palestinians and the erasure of the Gaza Strip as a cartographical feature.[108] (Though this statement failed at the attribution stage of the test, it is considered here to illustrate how even seemingly clear and direct calls for the elimination a target group may be susceptible of multiple reasonable interpretations.)

Because all the impugned statements use oblique language, they must be considered against the formulation of the beyond a reasonable doubt standard applied by the ICJ when drawing inferences of genocidal intent from indirect evidence—genocidal intent must be the only reasonable inference available. Several statements clearly fail this test because proximate statements suggest alternative fates to elimination for the Palestinians of Gaza. This is the case, for example, with the statement of the Minister of Energy and Infrastructure that "[t]hey will not receive a drop of water or a single battery until they leave the world."[109] Though this statement may appear to call for the elimination of the Palestinians of Gaza when viewed in isolation, a preceding statement by the Minister suggests that Palestinians may be spared that fate if they "leave immediately". This suggestion means that genocidal intent is not the only reasonable inference that can be drawn from the Minister's statement about Palestinians "leav[ing] the world"; the statement could be seen as an inducement for the Palestinians of Gaza to leave rather than a genocidal call for their elimination.

The statement of the Army Reservist Major General would fail the "only reasonable inference" test for similar reasons.[110] The statement asserts that Palestinians of Gaza should be told that "they have two choices; to stay and to starve, or to leave." South Africa's application renders this text in italics, suggesting South Africa viewed the statement as particularly potent direct evidence of a genocidal plan. However, the very mention of Gazans' option "to leave" necessarily means that the declarant's intent to destroy the group is not the only reasonable inference that can be drawn from the statement.

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108. *Id.*
109. *Id.*
110. *Id.*

The statement of the Minister of National Security fails this stage of the test for a different reason: it does not call for the elimination of all Palestinians in Gaza as such, but only discrete components. The statement calls for the destruction of Hamas and those who celebrate and support Hamas (as well as those who "hand out candy").[111] Consequently, in the ensuing statement, which asserts that "they're all terrorists, and they should also be destroyed," the reference to "all" can reasonably be interpreted as applying exclusively to the identified groups rather than to Palestinians in Gaza as such.

The last statement remaining as a prospective state plan to commit genocide is perhaps the most infamous. This is the statement by the Prime Minister of Israel, Benjamin Netanyahu, in a televised press conference on October 28, 2024, one day after the beginning of Israel's invasion of Gaza,[112] in which he told his audience "you must remember what Amalek has done to you, says our Holy Bible."[113] South Africa's application asserts that the Prime Minister's reference to Amalek alludes to the following biblical passage: "Now go, attack Amalek, and proscribe all that belongs to him. Spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses."[114]

Assuming the biblical passage proffered by South Africa is indeed the passage referred to in the Prime Minister's statement and is not merely one of several possible passages, and considering the Prime Minister's statement first in isolation, it could be defensibly argued that the only reasonable inference that can be drawn from the statement is the Prime Minister's intent to destroy the Palestinians of Gaza as such. However, considering the statement in context reveals that genocidal intent is not the only reasonable inference. The Prime Minister begins the press conference in which the impugned statement was made with the declaration that "the goals of this war are very clear: to completely eliminate the military capabilities of

111. *Id.*

112. Aaron Boxerman, *Israel Confirms Deaths of 15 Soldiers in Ground Invasion of Gaza,* The New York Times (Nov. 1, 2023), https://www.nytimes.com/2023/11/01/world/middleeast/israel-ground-invasion-gaza-soldiers.htm.

113. Application Instituting Proceedings, *supra* note 93, at ¶ 101.

114. *Id.*

Hamas and to bring back the captives home."[115] Later in the press conference, shortly after uttering the impugned statement, the Prime Minister asserts that "the IDF is the most moral and ethical military in the world. It is doing everything it can in order to prevent harming those who are uninvolved." He then "call[s] upon those who are noncombatants in the Gaza strip to go further south." These proximate statements suggest that the Prime Minister's Amalek comment was made in the context of his description of a military campaign whose non-genocidal goals are expressly stated. He also evinces a clear intent to avoid harm to Gazans who are "noncombatants" and "uninvolved". While none of these proximate statements can completely eliminate the genocidal implications of the Prime Minister's reference to Amalek, they inject more than sufficient ambiguity for the statement to fail to establish genocidal intent on the stringent standard of proof beyond a reasonable doubt.

3. *Whether the Statements Are Linked to Underlying Acts of Genocide*

The final component of the test for proving a state plan to commit genocide involves considering whether the required link between the statements constituting the proposed state plan to commit genocide and underlying acts of genocide is established beyond a reasonable doubt. This requires determining whether it is established beyond a reasonable doubt that the author or declarant of the statements explicitly or implicitly requested the direct perpetrators of the underlying genocidal acts to commit those acts, or that the author or declarant instigated, ordered, encouraged, or otherwise availed themselves of the direct perpetrators to commit the underlying acts.

None of the statements alleged by South Africa to constitute an Israeli state plan to commit genocide have proceeded beyond the first two stages of the test for demonstrating a state plan to commit genocide. There are therefore no remaining statements to subject to the final stage of the test. However, it may be noted that the Prime Minister's notorious statement referring to Amalek would likely have passed the final stage of the test, even on the most stringent standard of proof. The

115. *Israel-Hamas war: 'We will fight and we will win', says Benjamin Netanyahu*, Skynews (Oct. 28, 2023), https://news.sky.com/video/israel-hamas-war-we-will-fight-and-we-will-win-says-benjamin-netanyahu-12995212.

comment can easily be seen as encouraging the direct perpetrators of underlying acts of genocide—soldiers of the Israeli Defense Forces who were or would soon be in Gaza and engaged in killings—to engage in killing.

IV. Conclusion

The framework advanced in this paper for proving a state plan to commit genocide suggests that none of the statements made by Israeli officials that underpin South Africa's state plan argument will be found to constitute a state plan to commit genocide by the ICJ when it rules on the merits in *South Africa v. Israel*. The framework developed above holds that the following must be established beyond a reasonable doubt to demonstrate the existence of a state plan to commit genocide: (1) statements constituting the plan must be attributable to the state; (2) the plan's language must reflect genocidal intent including when considered in context; and (3) the plan must be linked to underlying acts of genocide. None of the Israeli statements challenged by South Africa proceed beyond the second stage of this test.

Notwithstanding this conclusion, the inattention shown to the state plan method for establishing genocidal intent—a neglect of which both the Court and expert commentators are guilty—is a thing to be lamented and hopefully remediated in future judicial and expert commentary on *South Africa v. Israel* and in genocide-related state responsibility proceedings generally. Increased awareness and utilization of the state plan method in both judicial and theoretical contexts will better serve the collective interest in more fulsome legal analyses and better respond to the imperative of leaving no stone unturned and no path untested in adjudicating state responsibility for the gravest breaches of states' international obligations.