

INTERVENING TO MAKE AN INFERENCE: HOW STATES ARE ASKING THE ICJ TO REINTERPRET GENOCIDAL INTENT

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I. INTRODUCTION

According to the Genocide Convention (“GC”), for an act to constitute genocide, it must be “committed with intent to destroy” a protected group in whole or in part.¹ This special intent, termed *dolus specialis*, has been referred to by the International Court of Justice (“ICJ”) as the “essential characteristic of genocide, which distinguishes it from other serious crimes.”² To establish the special intent, a litigant could prove a clear state plan to enact genocide, which is extremely challenging. As an alternative, a litigant can rely on an inferential analysis, which has been the ICJ’s primary method to assess the special

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1. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S 277, art. II.

2. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 2015 I.C.J. 3, ¶ 132 (Feb. 3); *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment 2007 I.C.J. 43, ¶ 373 (Feb. 26).

intent.³ The ICJ stated that “in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question.”⁴ This precise language forms what has been dubbed the “only reasonable inference” (“ORI”) standard.

The ORI standard was developed in the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”) (collectively “the ad hoc tribunals”) and later adopted by the ICJ. In its seminal genocide decision in *Krstić* the ICTY held that “when the Prosecution relies upon proof of a state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.”⁵ The tribunals initially established that ORI could be proven in a number of ways, through inference⁶ based on the facts and circumstances of the case,⁷ and through a holistic assessment of evidence⁸ considering a variety of factors.⁹ In *Bosnia and Herzegovina v. Serbia and*

3. Human Rights Watch, *Extermination and Acts of Genocide, Israel Deliberately Depriving Palestinians in Gaza of Water*, Evidence of Genocidal Intent (Dec. 19, 2024).

4. *Croatia v. Serbia*, 2015 I.C.J. 3, ¶ 148.

5. *Prosecutor v. Krstić* (Appeal), Case No. IT-98-33-A, Judgment ¶ 41 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

6. Economic and Social Council, *Continuation of the consideration of the draft convention on genocide*, U.N. Doc. A/C.6/SR.86 (Oct. 28, 1948) (indicating that in negotiating the substance of the Genocide Convention, States recognized that obtaining official or explicitly genocidal plans by a perpetrator may be unrealistic, with the United Kingdom stating that it would be “practically impossible” to prove that an act was taken to encourage the perpetration of genocide).

7. *Prosecutor v. Gacumbitsi* (Appeal), Case No. ICTR-01-64, Appeals Judgment ¶ 40 (July 7, 2006); *Prosecutor v. Popović et al.*, Case No. IT-05-88, Judgment ¶ 823 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010); *Prosecutor v. Akayesu*, Case No. ICTR-96-04, Judgment ¶ 523 (Sept. 2, 1998); *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-01, Judgment ¶ 93 (May 21, 1999).

8. *See, Prosecutor v. Karadžić* (Appeal), Case No. IT-95-5/18-AR98bis.1, Judgment ¶ 56 (Int’l Crim. Trib. for the Former Yugoslavia July 11, 2013) (cautioning that “a compartmentalized mode of analysis may obscure the proper inquiry”); *see e.g., Prosecutor v. Stakić* (Appeal), Case No. IT-97-24-A, Judgment ¶ 55 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); *Prosecutor v. Tolimir* (Appeal), Case No. IT-05-88/2-A, Judgment ¶ 247 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015); *Prosecutor v. Mladić*, Case No. IT-09-92, Judgment ¶ 3435 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017) (noting that “consideration ought to be given to all of the evidence, taken together.”).

9. *See e.g., Akayesu*, ICTR-96-04, *supra* note 7 ¶ 523; *Kayishema and Ruzindana*, ICTR-95-01, *supra* note 7 ¶ 93; *Prosecutor v. Jelisić* (Appeal), Case No. IT-95-10-A, Judgment ¶ 47 (Int’l Crim. Trib. for the Former Yugoslavia July 5, 2001); *Prosecutor*

Montenegro (“Bosnia v. Serbia”), the ICJ adopted the ORI test by holding that “for a pattern of conduct to be accepted as evidence of [a state plan’s] existence, it would have to be such that it could only point to the existence of such intent.”¹⁰ It further clarified in *Croatia v. Serbia*, that such an inference must be reasonable.¹¹

Historically, under the ORI standard, genocidal intent has been the most difficult element to establish in proving a claim of genocide. The ICJ has been widely critiqued for applying the ORI standard too strictly.¹² Such critiques are particularly pertinent as the ICJ begins to review three pending cases on the commission of genocide by states: *The Gambia v. Myanmar*,¹³ *Ukraine v. the Russian Federation*,¹⁴ and *South Africa v. Israel*.¹⁵

Numerous third-party states have intervened across these cases advocating for a less restrictive standard to infer genocidal intent. In doing so, these third-party state interventions have renewed the prior challenges to the ORI standard¹⁶ and driven a sharp uptick in Article

v. Krstić, Case No. IT-98-33, Judgment ¶ 536, 544-48 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); *Prosecutor v. Rutaganda* (Appeal), Case No. ICTR-96-03-A, Judgment ¶ 525 (May 26, 2003); *Prosecutor v. Tolimir*, Case No. IT-05-88/2, Judgment ¶ 745 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012) (including the general context; the perpetration of other culpable acts systematically targeted at the same group; the scale of the atrocities committed; the number of victims; the targeting of members of the group without distinction of age and gender; the attempt to conceal evidence of crimes; the repetition of destructive and discriminatory acts; the use of derogatory language toward members of the targeted group; and the general political doctrine which gave rise to the culpable acts).

10. *Bosnia v. Serbia*, 2007 I.C.J. 43, ¶ 373.

11. *Croatia v. Serbia*, 2015 I.C.J. 3, ¶ 148.

12. Brishna Gehani, *Is the ICJ’s standard of proof for genocide unattainable?*, RSIL (Feb. 16, 2024), <https://rsilpak.org/2024/is-the-icjs-standard-of-proof-for-genocide-unattainable/>; Tara Zivkovic, *An Impossible Standard of Intent?: Croatia v. Serbia at the International Court of Justice*, 40 Yale J. Int’l L. 423, 426 (2015).

13. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), Application instituting proceedings and Request for the indication of provisional measures, 2019 I.C.J. (Nov. 11).

14. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*), Application instituting proceedings, 2022 I.C.J. (Feb. 27).

15. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Application instituting proceedings and request for the indication of provisional measures, 2023 I.C.J. (Dec. 29).

16. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), Joint declaration of intervention of

63¹⁷ engagement with the Court's docket.¹⁸ This phenomenon of "mass interventions" is a novel pattern that has not occurred in the ICJ's past contentious cases. Whether these interventions are successful and how the ICJ responds to their critique of the ORI standard will have an enormous impact on the Court's future determination of whether a genocide has occurred.

II. SIGNIFICANCE OF INTERVENTIONS BEFORE THE COURT

Article 63 interventions allow third-party states to weigh in on matters of treaty construction before the ICJ if they are a state party to the treaty at issue.¹⁹ This serves a number of important functions, such as avoiding repetitive litigation, achieving harmony of principle²⁰ and contributing to the progressive development of international law.²¹ Others have noted that by engaging broader state participation in treaty construction, interventions cement the normative legitimacy of the Court's judgments, and their *res interpretata* effects.²² From the perspective of intervening states, Article 63 interventions protect their right to be heard. This is especially important because the ICJ's interpretation of multilateral treaties can significantly affect the legal interests of all states parties.²³ Despite this, Article 63 interventions

Canada, Denmark, France, Germany, the Netherlands and the United Kingdom, 2023 I.C.J. ¶ 467 (Nov. 15); Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Declaration of Intervention of Spain, 2024 I.C.J. ¶ 24 (June 28); Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Application for permission to intervene and declaration of intervention submitted by Belize, 2025 I.C.J. ¶ 61 (Jan. 30).

17. United Nations, Statute of the International Court of Justice, 18 April 1946, art. 63(2).

18. Haris Huremagić, *Intervening for the community?—The law and politics of third-party intervention before the International Court of Justice*, 17:1 J. Int'l Disp. Settlement 1, 1 (2026).

19. Statute of the ICJ, art. 63.

20. Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment 2001 I.C.J. (December 17) (Weeramantry, separate opinion) ¶ 17.

21. Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment 2014 I.C.J. (March 31) (Trindade, dissenting) ¶ 76.

22. Alina Miron and Christine Chinkin, *Article 63*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, A COMMENTARY, 1741, 1743 (Andreas Zimmermann et al. 3rd ed. 2019); Juliette McIntyre, *Procedural Values in the Intervention Procedure at the International Court of Justice*, 1 Ukr. L. Rev. 1, 8 (2022).

23. Ton Nu Thanh Binh, *Article 63 Intervention Before the International Court of Justice: New Developments and the Way Forward*, *OpinioJuris* (July 26, 2024),

have been historically uncommon, and their impact on the outcome of cases has been fairly limited.²⁴

Article 63 interventions may be particularly low-cost endeavors in genocide cases, which may partially explain why they have become significantly more common in them. Firstly, the ICJ's judgments do not normally bind non-parties.²⁵ However, states become "equally bound" by the treaty construction in a judgment if they intervene in a case under Article 63. Such a binding effect could introduce "sovereignty costs" to intervening states, even though they would only be bound in respect to the particular case.²⁶ Secondly, the ICJ generally upholds its own precedent,²⁷ and when making determinations on issues that have *erga omnes* implications, its decisions have a significant legal force on parties and non-parties alike even if there has not been an intervention. In such cases there may be little practical difference between intervening or not. As the key obligations of the GC apply *erga omnes*, states may therefore intervene more often in genocide cases. The *erga omnes* nature of the obligations at issue in genocide cases applies twofold pressure, first by the inherent importance of principles such as *dolus specialis* in international law, and secondly by reducing the potential costs of intervening. Thus, states are beginning to take advantage of the opportunity provided by Article 63 to intervene in these uniquely universal cases.

III. STATE INTERVENTIONS AND PROPOSED REINTERPRETATIONS OF THE ORI STANDARD

States have warned against "rendering the threshold for inferring genocidal intent so difficult to meet so as to make findings of genocide

<https://opiniojuris.org/2024/07/26/article-63-intervention-before-the-international-court-of-justice-new-developments-and-the-way-forward/>.

24. Huremagić, *supra* note 18, at 12 (noting that the majority of the interventions in *Ukraine v. Russia* argued that the ICJ had jurisdiction regarding the use of force invoked on the basis of the GC, but the Court ultimately held that it did not have jurisdiction over that particular claim).

25. Statute of the ICJ, art. 59.

26. Huremagić, *supra* note 18, at 9; Statute of the ICJ, art. 63(2).

27. Allyson Ping, *A Common Law of Procedural Adjudication: Working towards Precedential Effect in ICJ Preliminary Objections Judgments*, Colum. J. Transnat'l L. (Mar. 29, 2023), <https://www.jtl.columbia.edu/bulletin-blog/a-common-law-of-procedural-adjudication-working-towards-precedential-effect-in-icj-preliminary-objections-judgments>.

near-impossible.”²⁸ Judge Trindade, dissenting, stated that the ICJ had created too strict a standard that was not in line with the jurisprudence of the ad hoc tribunals.²⁹ As Spain points out in its intervention, direct evidence of genocidal intent is rare, which necessitates a balanced approach to analyzing it.³⁰ Belize argues that in establishing a “notion of reasonableness” to the ORI test, the ICJ should also be careful to avoid setting the evidentiary standard for genocidal intent “unrealistically high.”³¹ There are two central elements to a balanced approach: (1) the holistic assessment of the evidence and (2) the permission of the inference of *dolus specialis* where the perpetrator holds multiple intents.

A. Evidence Should be Assessed Holistically

One major critique of the ICJ’s ORI analysis is that it does not conduct a holistic assessment of evidence across a collectivity of incidents to establish *dolus specialis*. This can be observed in its reasoning in *Bosnia v. Serbia*, where it found that save for the events of July 1995 at Srebrenica, “the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident.”³² The ICJ resultantly found a single instance of genocide at Srebrenica, but did so by analyzing each pattern of conduct in an independent silo. Rather than considering all of the patterns of conduct available, within the broader context of the evidence, including the scope of harm, scale of harm, any additional historic or political context, or statements of leaders, the ICJ primarily appears to apply the ORI standard to patterns of conduct individually.³³

Intervening states have emphasized that the ICJ must “assess the evidence available to it comprehensively and holistically” when

28. Joint Declaration of Canada, Denmark, France, Germany, the Netherlands and the UK, *supra* note 16, ¶ 51, citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, 2015 I.C.J. 3 ¶ 467 (Feb. 3) (Trindade, dissenting).

29. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, 2015 I.C.J. 3 ¶ 467 (Feb. 3) (Trindade, dissenting).

30. Spain intervention *South Africa v. Israel*, *supra* note 16, ¶ 24.

31. Belize intervention *South Africa v. Israel*, *supra* note 16, ¶ 61.

32. *Bosnia v. Serbia*, 2007 I.C.J. 43, ¶ 370.

33. *Bosnia v. Serbia*, 2007 I.C.J. 43, ¶ 370.

determining specific intent.³⁴ The ICTY appeals chamber noted that “a compartmentalized mode of analysis [would] obscure the proper inquiry.”³⁵ The ad hoc tribunals universally held that all acts must be taken together to determine the existence of genocidal intent.³⁶ States advocate for an approach that does not view individual incidents, individual patterns of conduct, or underlying acts of genocide in isolation, but places them in an overall assessment.³⁷

The ICJ should adopt a more holistic approach to the ORI analysis. First, doing so would put the ICJ’s jurisprudence more in line with the work of the tribunals. By focusing on discrete patterns of conduct, the ICJ conducts precisely the kind of “compartmentalized” analysis of individual pieces of evidence that the ad hoc tribunals warned against.³⁸ Aligning the approaches of the ICJ and international criminal courts also furthers legal certainty and predictability by preserving a single international standard to ascertain genocidal intent. Second, compartmentalized analysis obscures an accurate analysis of evidence of genocide. By focusing on individual incidents, the ICJ may become blind to the broader context and other key issues such as the overall scale of genocide across the conflict or the statements of leaders which may not speak directly to the incident being analyzed. Third, a holistic analysis is more in line with the conception of genocide as a mass atrocity. Genocide is generally perceived as a single unified occurrence, not a series of separate events.

B. *Permit inferring Dolus Specialis Even Where It Co-Exists with Other*

34. See, Joint Declaration of Canada, Denmark, France, Germany, the Netherlands and the UK, *supra* note 16, ¶ 54; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Declaration of Intervention of Chile, 2024 I.C.J. ¶ 32 (Sept. 12); Spain intervention South Africa v. Israel, *supra* note 16, ¶ 26; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Declaration of intervention of Türkiye, 2024 I.C.J. ¶ 101 (Aug. 7); Belize intervention South Africa v. Israel, *supra* note 16, ¶ 62; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Declaration of intervention of Slovenia, 2024 I.C.J. ¶ 53-54 (Nov. 29).

35. Stakić, IT-97-24-A, *supra* note 8, ¶ 55.

36. *Id.*; Tolimir, IT-05-88/2, *supra* note 9, ¶ 745; Prosecutor v. Hategkimana (Appeal), Case No. ICTR-00-55B, Appeals Judgment ¶ 133 (May 8, 2012); Prosecutor v. Munyakazi (Appeal), Case No. ICTR-97-36A, Appeals Judgment ¶ 123, 142 (Sept. 28, 2011).

37. Joint Declaration of Canada, Denmark, France, Germany, the Netherlands and the UK, *supra* note 16, ¶ 56.

38. Stakić, IT-97-24-A, *supra* note 8, ¶ 55.

Intent

The second critique is that the ICJ's approach appears to require genocidal intent to be the sole intent harbored by the perpetrator for *dolus specialis* to be established. Where alternative inferences are present, such as punishing a population, or forcing them to flee the area, the ICJ does not infer genocidal intent.³⁹ This makes *dolus specialis* highly challenging to prove where a perpetrator can establish that they had dual intents in engaging in a given pattern of conduct. It most notably makes proving *dolus specialis* more difficult in the context of armed conflicts. As Judge Trindade argued, armed conflict and genocide are not mutually exclusive.⁴⁰ Rather, the vast majority of recognized cases of genocide occurred in the context of an armed conflict.⁴¹

States have proposed several approaches that all aim to establish an ORI analysis which permits finding *dolus specialis* where multiple intents co-exist. One approach is to argue that the decisive element in inferring genocidal intent is the reasonableness of the inference, and the "mere existence" of an alternative interpretation should not "automatically render the inference of genocidal intent unreasonable."⁴² Similarly, several states have argued that the ORI standard should operate by weighing the evidence and filtering out inferences that are not reasonable.⁴³ Then, the "only reasonable inference" standard is to be applied between alternative explanations that are reasonably supported by the evidence.⁴⁴

A second approach focuses on distinguishing genocidal intent from underlying motives. The ICJ and the ad hoc tribunals have utilized this distinction in the past, noting that intent and motive are indeed separate concepts at law.⁴⁵ States argue that the special intent of

39. Croatia v. Serbia, 2015 I.C.J. 3, ¶ 429-430.

40. Trindade dissent Croatia, *supra* note 29, ¶ 144.

41. Natasha Yvonne Barigye, Melissa Hendrickse, Vito Todeschini, *Genocidal Intent in Armed Conflict: Unpacking the ICJ's "Only Reasonable Inference" Standard*, OpinioJuris (May 26, 2025), <https://opiniojuris.org/2025/05/26/genocidal-intent-in-armed-conflict-unpacking-the-icjs-only-reasonable-inference-standard/>.

42. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Declaration of intervention of the Democratic Republic of the Congo, 2024 I.C.J. ¶ 73 (Dec. 10).

43. Joint Declaration of Canada, Denmark, France, Germany, the Netherlands and the UK, *supra* note 16, ¶ 52; Spain intervention South Africa v. Israel, *supra* note 16, ¶ 25; Belize intervention South Africa v. Israel, *supra* note 16,

¶ 61.

44. *Id.*

45. Bosnia v. Serbia, 2007 I.C.J. 43, ¶ 189; Bhandari Separate Opinion Croatia v. Serbia, 2015 I.C.J. 3, ¶ 50.

genocide is unique, and is distinct from the reasons, motivations, or purposes which incline the accused to perpetrate the conduct at issue.⁴⁶ Additionally, states have pointed to the ad hoc tribunals⁴⁷ which consistently held that the invocation of ulterior motives by an accused cannot preclude a finding of genocidal intent.⁴⁸

A third approach focuses specifically on co-existing genocidal and military intents. Belgium argues that for a perpetrator's military objective to rule out genocidal intent, it should be the "sole explanation" for the perpetrator's conduct based on the evidence, rather than merely co-existing with the genocidal intent.⁴⁹ Other nations emphasize that perpetrators of genocide may pursue multiple objectives, or have dual military and genocidal intent.⁵⁰ Belize noted that even military force when used in a manner in compliance with international humanitarian law ("IHL") may, over a prolonged period, impose conditions of life calculated to bring about the physical destruction of a group, and achieve genocidal aims.⁵¹

Any flexibility in permitting findings of *dolus specialis* where perpetrators have dual or multiple intents would make the analysis more reasonable. First, as states have argued, an ORI standard which requires an exclusive finding of genocidal intent is unreasonable, as perpetrators of genocide can pursue multiple intents and objectives. The Democratic Republic of the Congo ("DRC") notes "perpetrators

46. Chile intervention, *South Africa v. Israel*, *supra* note 34, ¶33; Belize intervention *South Africa v. Israel*, *supra* note 16, ¶ 58.

47. Jelisić, IT-95-10-A, *supra* note 9, ¶ 49; *Prosecutor v. Niyitegeka* (Appeal), Case No. ICTR-96-14, Appeals Judgment ¶ 47-55 (July 9, 2004); Akayesu, ICTR-96-04 *supra* note 7 ¶ 522; *Bosnia v. Serbia*, 2007 I.C.J. 43, ¶ 189; General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese*, U.N. Doc. A/79/384 ¶ 53 (Oct. 1, 2024); *Rana Moustafa Essawy, The Attainability of the Evidentiary Standard for Genocidal Intent in Gaza*, EJIL:TALK! (May 3, 2024), <https://www.ejiltalk.org/the-attainability-of-the-evidentiary-standard-for-genocidal-intent-in-gaza/>.

48. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), Declaration of intervention of Belgium, 2024 I.C.J. ¶ 27 (Dec. 12); Chile intervention, *South Africa v. Israel*, *supra* note 34, ¶ 33.

49. Belgium intervention the *Gambia v. Myanmar*, *supra* note 48, ¶ 25.

50. DRC intervention the *Gambia v. Myanmar*, *supra* note 42, ¶ 38; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v. Israel*), Declaration of intervention of Ireland, 2025 I.C.J. ¶ 38-39 (Jan. 6); Chile intervention, *South Africa v. Israel*, *supra* note 34, ¶ 33.

51. Belize intervention *South Africa v. Israel*, *supra* note 16, ¶ 59 (citing *Legality of Use of Force* (*Yugoslavia v. Belgium*), Provisional Measures, 1999 I.C.J. (June 2) (Kreća, dissenting) ¶ 12).

of genocide may pursue multiple objectives, and that genocidal intent does not have to be either the sole or the primary intent.”⁵² This position, that genocidal intent is often not the exclusive intent in fact, and therefore that its exclusivity should not be a requirement in law, is supported by a number of other states.⁵³ Ireland argues that humans have the capacity for having more than one intent behind an action, and therefore a pattern of conduct may point to two separate intentions, one of which would be genocidal.⁵⁴ Second, such an approach would prevent armed conflict from inhibiting findings of *dolus specialis*. The GC must be equally operative in peacetime and during war,⁵⁵ and states object to an ORI standard which requires exclusivity of intent, thereby rendering findings of genocidal intent virtually impossible when committed by military commanders with dual genocidal and military intentions.⁵⁶ Third, the ICJ is uniquely procedurally unsuited to investigating the intent of perpetrators. The ICJ is not a criminal court, and therefore lacks substantial investigative tools to establish *mens rea*.⁵⁷

IV. NORMATIVE IMPLICATIONS

The unprecedented rise of third-party state interventions raises the question of whether it is a normatively desirable phenomenon. First, one critique is that a significant number of states intervening on behalf of one of the parties in a contentious proceeding may harm the equality of the parties.⁵⁸ Russia argued that such interventions should

52. DRC intervention the Gambia v. Myanmar, *supra* note 42, ¶ 75.

53. Belize intervention South Africa v. Israel, *supra* note 16, ¶ 58; Chile intervention, South Africa v. Israel, *supra* note 34, ¶ 33; Ireland intervention South Africa v. Israel, *supra* note 50, ¶ 38.

54. Ireland intervention South Africa v. Israel, *supra* note 50, ¶ 38, (citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 2015 I.C.J. 3 (Feb. 3) (Bhandari, separate opinion) ¶ 50).

55. Genocide Convention, *supra* note 1, art. I.

56. Trindade dissent Croatia, *supra* note 29, ¶ 144.

57. Yonah Diamond and John Packer, *Reviving the Genocide Convention's Preventive Purpose*, 18:2 Genocide Stud. and Prevention: An Int'l J. 26, 35 (2024).

58. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order on the Admissibility of the Declarations of Intervention, 2023 I.C.J. (June 5) (Xue dissenting) ¶ 26-29; Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order on the Admissibility of the Declarations of Intervention, 2023 I.C.J. (June 5) (Gevorgian declaration) ¶ 2-7.

not be admissible, as one party is disadvantaged by needing to respond to the arguments of so many additional states.⁵⁹ It further argued that so many interventions on behalf of one party may place political pressure on the judges, and attract undue media attention.⁶⁰ Second, states have often exceeded the scope of what is permissible under Article 63, issues of treaty construction. Many of the intervening states in the *Ukraine v. Russia* acted as co-applicants and accused Russia explicitly of violating the GC.⁶¹ The Court's approach to this issue has been straightforward, as it has stated that to the extent interventions address matters beyond the construction of the treaties, they will simply "not consider them."⁶²

While these critiques raise valid concerns, they do not justify substantially limiting states' rights to intervene under Article 63. Beyond simply infringing states' right to be heard, states are the primary generators of international law, and their input on treaty construction contributes to *opinio juris*. The influence of ICJ decisions rests on their normative legitimacy.⁶³ Understanding states' positions on an issue with *erga omnes* implications is key as those positions may contribute to substantive alterations of the law through *opinio juris*, and further, states may view the ICJ's decisions as less legitimate where they overtly and consistently rule against widely held state positions. This consideration is essential in genocide cases, as the key provisions of the GC have *erga omnes* character. It would be incongruous for the ICJ to hold simultaneously that the prevention of genocide is an obligation *erga omnes* while also limiting the opportunity for states to be heard in genocide cases. If any state may bring a genocide claim to the ICJ as a full party on the basis of their *erga omnes* obligation, regardless of a lack of any particularized nexus to the claim, it would be inconsistent to hold that states lack the less significant legal right to voice their opinion on the interpretation of the GC via an intervention in the same case.

59. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*), Written Observations of the Russian Federation on the admissibility of the Declarations of Intervention, 2023 I.C.J. ¶ 46 (Mar. 27).

60. Binh, *supra* note 23.

61. *Id.*

62. Keilin Anderson, *The (in)admissibility of interventions with respect to provisional measures*, EJIL:TALK! (Sept. 12, 2025), <https://www.ejiltalk.org/the-inadmissibility-of-interventions-with-respect-to-provisional-measures/>; Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*), Order on the Admissibility of the Declarations of Intervention, 2023 I.C.J. ¶ 84 (June 5).

63. McIntyre, *supra* note 22, at 8.

This already stands as a compromise relating to judicial efficiency and equality of arms, as the ICJ retains considerable discretion to limit interventions, often restricting them to a single written document.

A further critique is that states may be intervening to support their political positions and biases, rather than their legal interests. For example, through the intervention mechanism, some states have accused Russia of failing to comply with provisional measures, critiqued their military actions in Ukraine, and condemned the war of aggression.⁶⁴ Where participation is dictated more by a states' alliances than truth-seeking, they may propagate error and "compromise the integrity of the adjudication."⁶⁵ Scholars have critiqued the fact that many interventions are identical,⁶⁶ and that states have publicly indicated that their interest is to demonstrate solidarity with the party they are intervening on behalf of.⁶⁷

However, there is less evidence that states are intervening to alter the ORI standard for political reasons. First, states are making chiefly legal arguments about the ORI standard. Second, states have intervened with remarkable consistency in support of these arguments. Several states have intervened repeatedly in the genocide cases⁶⁸ while others have intervened in only one case.⁶⁹ Where states have lodged multiple interventions consistently critiquing the strict ORI standard, it is difficult to suggest political bias. It is plausible that a state intervening only against Myanmar, but not Israel,⁷⁰ may have done so out of political necessity. However, the ICJ is highly likely to craft a consistent approach to the ORI standard across the genocide cases. Therefore, a nakedly political calculus would bring a State to submit a

64. *Id.*

65. Shai Dothan, *Staging an Intervention for Rogue States*, 50 N. C. J. Int'l L. 1, 2-3, 15-19, 22-23 (2025).

66. Kyra Wigard et al., *Keeping Score: an empirical analysis of the interventions in Ukraine v. Russia*, 14 J. Int'l Disp. Settlement 305, 321 (2023).

67. *See e.g.*, Federal Foreign Office (Germany), Joint statement by the Ministers for European Affairs of the Weimar Triangle, Sept. 16 2022 <https://www.auswaertiges-amt.de/en/newsroom/news/weimar-triangle-2552384>; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Declaration of Intervention of Libya, 2024 I.C.J. at 3 (May 10) (indicating it was intervening "in support of the Palestinian people").

68. *See e.g.*, Declarations of Chile, Ireland in South Africa v. Israel and the Gambia v. Myanmar.

69. Joint Declaration of Canada, Denmark, France, Germany, the Netherlands and the UK, *supra* note 16.

70. *Id.*

second intervention where the State either backtracks on their argument about the ORI standard to protect their ally or at least distinguishes the cases. States have not yet done so, which invites the alternative interpretation that states which have already intervened in one genocide case see no reason to duplicate their analysis when the ICJ will develop a uniform standard.

V. CONCLUSION

States have broadly taken a negative view of the ICJ's ORI standard seeing it as overly strict, particularly when applied in armed conflicts. Over time, the ICJ has continued restricting findings of *dolus specialis*, to the point that many now view the *mens rea* threshold as unattainably high. In the wake of these limitations, states have turned to article 63 interventions, engaging in a novel "mass" wave of third-party interventions before the court which cut to the very heart of the Genocide Convention: interpreting and applying *dolus specialis*. Specifically, states have frequently used this tool to advocate for a more lenient ORI analysis, proposing that it should be conducted holistically, and that *dolus specialis* may exist even where the perpetrator holds multiple intents.

The ICJ is under no obligation to defer to these interventions, but the ORI standard is not a secondary procedural question of the kind the Court sidestepped in the *Ukraine v. Russia* decision where the Court opposed the majority position among state interventions. Here, it is dealing with an issue core to the fundamental nature of the crime of genocide. The Court may ignore the wishes of a majority of states to loosen this standard, but it does so at increasing risk to its own normative legitimacy.