

**THE ROLE OF ICC IN THE PROSECUTION OF GENOCIDE**

**BY**

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THE AWARD OF THE DEGREE OF BACHELOR OF LAWS (LLB) OF THE  
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### **CERTIFICATION**

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## **DEDICATION**

To Almighty God, the architect of wisdom, my constant guide, my provider, my hope and my unfailing strength throughout this academic journey.

This academic project is also dedicated to my amazing, strict and yet wonderful parents, Mr and Mrs (Ngozi) Francis Eze, whose love and sacrifices throughout the duration of these academic rigors taught me that greatness is not inherited, it is built and that you can do great things even from a small place. You believed in me long before I became conscious of myself.

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## **TABLE OF STATUTES**

### **International:**

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- Penal Code Act, Sections 221 and 222.

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- Prosecutor v Simon Bikindi, ICTR-01-72-A.
- Prosecutor v Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-397-Corr (Appeals Chamber Judgment, 6 May 2019).

- Prosecutor v Jean-Pierre Bemba Gombo, ICC-01/05-01/08-3636-Red (Appeals Judgment, 8 June 2018).
- Prosecutor v William Samoei Ruto et al., ICC-01/09-01/11.

### **Abbreviations / Acronyms**

- ICC — International Criminal Court.
- OTP — Office of the Prosecutor (of the ICC).
- UNSC — United Nations Security Council.
- UN — United Nations.
- ASP — Assembly of States Parties.
- AU — African Union.
- ICTY — International Criminal Tribunal for the former Yugoslavia.
- ICTR — International Criminal Tribunal for Rwanda.
- ICJ — International Court of Justice.
- DRC — Democratic Republic of the Congo (appears in context).
- CAR — Central African Republic.
- MLC — Mouvement de Libération du Congo (MLC).

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## **ABSTRACT**

Genocide is one of the most heinous crimes under international law, characterized by acts intended to destroy, in whole or in part, a national, ethnic, racial, or religious group. The International Criminal Court (ICC) was established to ensure that such serious crimes do not go unpunished by providing a permanent international judicial body dedicated to holding perpetrators accountable. This role is critical in promoting justice, deterring future atrocities, and affirming the commitment of the international community to uphold human rights and the rule of law. The ICC's involvement in prosecuting genocide marked a significant development in international criminal justice, addressing impunity where national courts failed to act. This aim of this long essay is to critically examine the effectiveness of the ICC in addressing and prosecuting genocide, identify existing gaps, and propose recommendations for improvement. Utilizing doctrinal methodology, the research analyses legal texts, ICC case laws, and international treaties relevant to genocide prosecution. The essay reveals that while the ICC represents a significant advancement in international criminal law by providing a permanent forum for justice, several gaps hinder its full effectiveness. These include limited jurisdictional reach, challenges to state cooperation, political interference, and delays in the prosecution process. Additionally, the ICC faces difficulties in ensuring victim participation and protection, which are crucial for restorative justice. The study recommends emphasizing strengthening international cooperation to overcome jurisdictional and enforcement challenges, enhancing the Court's resources and capacity for expedited proceedings, and promoting broader acceptance of ICC jurisdiction through international diplomacy. The study also suggests amplified support for victim rights and witness protection mechanisms to ensure comprehensive justice delivery.

## CHAPTER ONE:

### INTRODUCTION

Genocide, widely recognized as one of the most egregious international crimes, involves acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.<sup>1</sup> The quest to hold perpetrators of such heinous crimes accountable has been a central challenge for the international community, leading to the establishment of various judicial mechanisms over time to ensure justice and prevent impunity.<sup>2</sup> Among these, ICC stands out as a permanent, treaty-based court dedicated to prosecuting individuals for genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>3</sup>

The ICC was established by the Rome Statute in 1998 and began functioning in 2002.<sup>4</sup> It emerged from the legacy of earlier ad hoc tribunals such as the Nuremberg and Tokyo Trials post-World War II, and later the International Criminal Tribunals for the former Yugoslavia and Rwanda.<sup>5</sup> Unlike these temporary bodies, the ICC is designed to be a permanent institution with jurisdiction that complements national courts.<sup>6</sup> It acts primarily when states are unwilling or unable to genuinely prosecute international crimes, thereby filling the gaps left by domestic legal

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<sup>1</sup> K. Claus, 'The Crime of Genocide under International Law' < [https://brill.com/view/journals/icla/6/4/article-p461\\_1.xml](https://brill.com/view/journals/icla/6/4/article-p461_1.xml)> accessed 10<sup>th</sup> August, 2025

<sup>2</sup> F. Lindsay, 'Revolutions in Justice: Advancing the Rome Statute System to Fight Impunity in Future Wars' < <https://cjl.uchicago.edu/print-archive/revolutions-justice-advancing-rome-statute-system-fight-impunity-future-wars>> accessed 10<sup>th</sup> August, 2025

<sup>3</sup> M. V De Frietas, 'The Role of the International Criminal Court in Preventing Crimes Against Humanity and in the Rebuilding of Nations' < [https://www.policycenter.ma/sites/default/files/2025-04/PB\\_26-25\\_Marcus%20Vinicius.pdf](https://www.policycenter.ma/sites/default/files/2025-04/PB_26-25_Marcus%20Vinicius.pdf)> accessed 10<sup>th</sup> August, 2025

<sup>4</sup> S. McTaggart, 'The International Criminal Court: History and Role' < [https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/200211E](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200211E)> accessed 10<sup>th</sup> August, 2025

<sup>5</sup> W. P Nagan, 'International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia' < <https://heinonline.org/HOL/LandingPage?handle=hein.journals/djcil6&div=11&id=&page=>> accessed 10<sup>th</sup> August, 2025

<sup>6</sup> D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' *Journal of International Criminal Justice* (2003) vol 1(3)

systems.<sup>7</sup> The Court's mandate is not only judicial but also symbolic, serving as a global moral compass by affirming that grave crimes like genocide cannot go unpunished.<sup>8</sup>

The jurisdiction of the ICC is limited to crimes committed on the territory of states party to the Rome Statute or by nationals of such states.<sup>9</sup> Unless a case is referred to the court by the United Nations Security Council,<sup>10</sup> As was the case in Sudan's Darfur conflict, where genocide charges were brought against former President Omar al-Bashir. This jurisdictional limitation reflects a key challenge the ICC faces, especially given that several major powers, including China, India, Russia, and the United States, have not ratified the Rome Statute and do not recognize its authority. Furthermore, the ICC's reliance on state cooperation for arrests and enforcement impacts its ability to secure justice swiftly and effectively.<sup>11</sup>

Despite these limitations, the ICC plays a pivotal role in international criminal justice. It acts as a deterrent, raising the political and legal costs for potential perpetrators of genocide by signaling that they can be held accountable irrespective of their positions or power, exemplified by indictments of high-profile figures across different conflicts. Additionally, the ICC contributes to reinforcing global norms against genocide, helping to institutionalize accountability and empowering national and regional efforts to bring justice to victims.

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<sup>7</sup> B. S Brown, 'Primacy or complementarity: reconciling the jurisdiction of national courts and international criminal tribunals' < [https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/yjil23&section=14](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/yjil23&section=14)> accessed 10<sup>th</sup> August, 2025

<sup>8</sup> M. V De Frietas, 'The Role of the International Criminal Court in Preventing Crimes Against Humanity and in the Rebuilding of Nations' < [https://www.policycenter.ma/sites/default/files/2025-04/PB\\_26-25\\_Marcus%20Vinicius.pdf](https://www.policycenter.ma/sites/default/files/2025-04/PB_26-25_Marcus%20Vinicius.pdf)> accessed 10<sup>th</sup> August, 2025

<sup>9</sup> Article 12(2)(a) of the Rome Statute of the ICC

<sup>10</sup> Article 13(b) of the Rome Statute of the ICC

<sup>11</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir*, International Criminal Court, Case No. ICC-02/05-01/09. This stems from the United Nations Security Council Resolution 1593 (2005), which referred the situation in Darfur, Sudan, to the ICC. The ICC issued two arrest warrants for Omar al-Bashir (2009 and 2010) for genocide, crimes against humanity, and war crimes.

However, the ICC has faced criticism regarding its effectiveness, especially in the following areas: the long duration of cases, the limited number of convictions, and accusations of geopolitical selectivity, especially concerning cases concentrated in Africa. These challenges underscore the complexities inherent in international justice but do not diminish the Court's importance as a cornerstone institution for upholding human dignity and the rule of law at a global level.<sup>12</sup>

In conclusion, the ICC represents a landmark institution in the fight against genocide and other grave crimes under international law. Its establishment marks a global commitment to ending impunity, delivering justice for victims, and preventing future atrocities through accountability. While facing significant challenges in jurisdiction, enforcement, and political dynamics, the ICC's role remains indispensable for fostering a rules-based international order and championing the principles of justice and human rights worldwide.

### **1.1 Background to the Study**

The ICC represents a landmark development in the international community's efforts to combat genocide and other heinous crimes. The history leading to its establishment spans over half a century, beginning shortly after World War II, when the international community first recognised the need for mechanisms to hold perpetrators of mass atrocities accountable. The adoption of the Convention on the Prevention and Punishment of the Crime of Genocide by the United Nations General Assembly in 1948 marked a foundational milestone, declaring genocide a crime under international law and calling for the prosecution of individuals responsible either by competent national courts or international tribunals.

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<sup>12</sup>Human Rights Watch, *Africa Attacks the International Criminal Court* (14 January 2014) <<https://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court>> accessed 6 November 2025.

Following the Convention, there was a sustained effort to establish a permanent international judicial body capable of prosecuting genocide and comparable crimes. Earlier attempts included the creation of ad hoc international tribunals, such as the Nuremberg and Tokyo tribunals after World War II, which prosecuted war crimes and crimes against humanity, setting vital precedents for international criminal law. Later, in the 1990s, the international community formed specialised tribunals for specific conflicts: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which prosecuted crimes, including genocide committed in those regions.<sup>13</sup>

Despite these advancements, the lack of a permanent institution was a significant gap until the late 1990s, when the Rome Statute was adopted in 1998, leading to the formal establishment of the ICC in 2002. The ICC was designed as a permanent, treaty-based court with jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression. It functions as a court of last resort, exercising complementary jurisdiction when national courts are unwilling or unable to prosecute these crimes effectively.<sup>14</sup>

The ICC's creation marked an evolution in international criminal justice by institutionalising a permanent judicial mechanism that aims to deter impunity and promote accountability globally. However, its mandate comes with jurisdictional challenges, particularly because not all countries are parties to the Rome Statute, limiting the Court's reach. The ICC must also rely heavily on state cooperation for the enforcement of arrest warrants and to facilitate investigations, which

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<sup>13</sup> G. Mattreaux, 'Crime against Humanity in the jurisprudence of International Criminal Tribunal for the former Yugoslavia and for Rwanda' *Harv. Int'l L.J* (2002) vol 43(1)

<sup>14</sup> S. J Apochi, 'Examining the Complementarity Principle of the International Criminal Court' *Redeemer's University Nigeria, Journal of Jurisprudence & International Law* (2022) vol 2

can constrain its effectiveness. Moreover, its operations have sometimes been criticised for perceived political selectivity and lengthy trial processes.<sup>15</sup>

## **1.2 Statement of the Problem**

The research problem centres on the significant challenges faced by the ICC in effectively prosecuting genocide, despite its mandate as a permanent international judicial body dedicated to ending impunity for the gravest crimes. Although the ICC was established to ensure accountability where national courts are unwilling or unable to act, multiple structural and operational hurdles impede its full efficacy. Key issues include the ICC's limited jurisdiction, as the Court can only exercise authority over crimes committed within states party to the Rome Statute or through specific referrals, excluding major countries that have not ratified the treaty. This limits the ICC's reach and creates gaps in prosecuting genocide globally. Furthermore, the ICC's reliance on state cooperation for arresting suspects, gathering evidence, and enforcing judgments often results in delays and incomplete justice, as some states decline or fail to cooperate fully.

Another significant problem is the perceived weakness in the ICC's prosecutorial performance, marked by challenges in presenting compelling evidence, case delays, and occasional acquittals that undermine public confidence and raise questions about the Court's effectiveness. Inconsistencies in judicial decisions due to discord among judges and geopolitical selectivity in its case portfolio, particularly with many cases concentrated in Africa, further jeopardise the ICC's legitimacy and universal acceptance. These challenges also include concerns about victim participation, witness protection, and balancing justice with political interests.

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<sup>15</sup> N. anteka, 'Mind the Gap: A Systematic Approach to the International Criminal Court's Arrest Warrants Enforcement Problem' *Cornell International Law Journal* (2016) vol 49(2)

This study, therefore, seeks to critically analyse these gaps and operational shortcomings that limit the ICC's ability to fulfil its core purpose of prosecuting genocide, aiming to identify pathways for strengthening the Court's jurisdictional authority, prosecutorial capacity, and political support to enhance international justice and genocide prevention. Addressing these problems is crucial for realizing the ICC's potential as a global mechanism for ending impunity for genocide and reinforcing the rule of law internationally.

### **1.3 Aims and Objectives of the Study**

The primary aim of this study is to critically examine the role and effectiveness of the ICC in the prosecution of genocide. The study seeks to identify the structural and operational challenges faced by the ICC, assess the gaps in its jurisdiction and enforcement mechanisms, and explore how these limitations impact its capacity to deliver justice and deter future genocidal crimes.

1. To examine the role and effectiveness of the ICC in prosecuting genocide
2. To identify legal and procedural challenges facing the ICC
3. To assess the impact of ICC prosecutions on international criminal law and state behaviour.

### **1.4 Research Questions**

1. What is the legal foundation of the ICC's jurisdiction over genocide?
2. How effective has the ICC been in prosecuting cases of genocide?
3. What challenges hinder the ICC's ability to prosecute genocide?
4. What role can domestic legal systems play in complementing the ICC?

### **1.5 Scope and Limitation of the Study**

This study focuses on the ICC's role in prosecuting genocide as a core international crime under its mandate. It examines the ICC's legal framework, jurisdiction, prosecutorial procedures, and case law related to genocide. The geographical scope primarily covers ICC cases and contexts where genocide prosecutions have been pursued, including but not limited to conflicts in Africa, the former Yugoslavia, and Sudan. The study also explores challenges related to state cooperation, enforcement of ICC rulings, victim participation, and international political dynamics affecting the Court's effectiveness. The doctrinal methodology centres on analysis of legal texts, court documents, UN resolutions, and scholarly commentary to provide a comprehensive understanding of the ICC's functions, limitations, and impact in genocide prosecution.

While this study aims at a comprehensive analysis, it faces several inherent limitations:

1. **Jurisdictional Boundaries:** The ICC's limited jurisdiction over non-member states restricts the ability to generalise findings across all genocide situations globally. Cases involving non-Rome Statute states or relying on international referrals are fewer and may not fully reflect the ICC's potential reach.
2. **Access to Information:** Some ICC proceedings, especially ongoing or sensitive cases, may lack full publicly available data, limiting in-depth analysis of prosecutorial strategies and internal challenges.
3. **Political and Diplomatic Influences:** The study acknowledges but cannot fully quantify the impact of geopolitics on ICC operations, as political decisions often occur outside the Court's transparency.

4. Focus on Legal-Doctrinal Analysis: The doctrinal methodology limits empirical or fieldwork-based insights such as survivor perspectives or enforcement studies, which would require separate qualitative or quantitative research approaches.

Despite these limitations, the study provides a critical and focused examination of the ICC's role in genocide prosecution, identifying key gaps and proposing actionable recommendations to improve international justice.

### **1.6 Significance of the Study**

The significance of this study lies in its comprehensive examination of the ICC's critical role in prosecuting genocide, one of the most severe violations of international law and human rights. Genocide, characterized by the deliberate destruction of entire national, ethnic, racial, or religious groups, presents profound challenges to international peace, security, and justice. By analyzing the ICC's mandate, strengths, and limitations, this study contributes valuable insights into the functioning and effectiveness of the ICC as the foremost permanent international tribunal tasked with ending impunity for such crimes.

Understanding the ICC's operational and jurisdictional challenges is crucial for policymakers, legal practitioners, and international actors committed to strengthening global justice mechanisms. This study highlights gaps in the Court's enforcement capabilities and the political realities it faces, helping to inform efforts aimed at enhancing cooperation among states, improving judicial procedures, and addressing criticisms regarding bias and selectivity. By doing so, the research supports initiatives to bolster the ICC's legitimacy and credibility in the eyes of the global community.

Moreover, the study is significant for advancing academic discourse on international criminal law and genocide prevention. It offers a doctrinal analysis that bridges theoretical and practical aspects, providing a robust foundation for further research and legal reform. In addition, by focusing on victims' rights and participation, the research underscores the human dimension of international justice, advocating for more inclusive and restorative approaches within the ICC framework.

In conclusion, the study's findings and recommendations aim to contribute to the broader objective of preventing future genocides through effective prosecution and deterrence. It underscores the ICC's indispensable role in promoting accountability, peace, and human dignity worldwide, making the study highly relevant for international legal development and the global fight against atrocities.

## **1.7 Methodology**

This study employs a library-based doctrinal research strategy. Primary and secondary legal sources are consulted during this research. Domestic legislation, international treaties, books, journals, and several publications by credible scholars, as well as judicial precedents, are consulted. This study also relies on articles and internet-generated materials to achieve the research's goal and boost its credibility as a genuine contribution to knowledge.

## **CHAPTER TWO:**

### **CONCEPTUAL CLARIFICATIONS, THEORETICAL AND HISTORICAL FOUNDATIONS, AND LITERATURE REVIEW**

#### **2.1. Genocide**

Genocide is defined by Article 2 of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide as killing group members, causing significant physical or mental injury to group members, deliberately putting the group in conditions of existence that are likely to lead to its, and destroying the group physically, either in whole or in part, imposing measures meant to stop births within the group forcibly moving children from one group to another.<sup>16</sup>

According to Chalk and Kurt, they defined genocide is a form of one-sided mass killing where a state or other authority intends to destroy a group as defined by the perpetrator.<sup>17</sup> Fein, describes the term as a sustained, purposeful action to physically destroy a collectivity, either directly or indirectly, including efforts to interrupt the biological and social reproduction of the group.<sup>18</sup>

The term "genocide" was first coined in 1944 by Polish jurist Raphael Lemkin and originated from the Greek prefix "geno" and the Latin suffix "cide," literally signifies the act of destroying a

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<sup>16</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, entered into force 12 January 1951, 78 UNTS 277.

<sup>17</sup> F. Chalk and J. Kurt, *Genocide and Gross Human Rights Violations: in Comparative Perspective* (New Brunswick, Transaction Publishers, 1998)

<sup>18</sup> H. Fein, 'Genocide and gender: The uses of women and group destiny' *Journal of genocide research* (1999) vol 1(1)

race or tribe.<sup>19</sup> In the case of *The Prosecutor v Jean-Pierre Bemba Gombo*, The court adopted the meaning of the term used in the 1948 UN Genocide Convention.<sup>20</sup>

### **2.1.1 Individual criminal responsibility**

The concept of individual criminal responsibility in international law refers to the principle that natural persons (individuals) can be held personally accountable and liable for committing international crimes, such as genocide, war crimes, and crimes against humanity. It means that individuals are not immune to prosecution simply because they acted on behalf of a state or organisation.<sup>21</sup>

According to Shandilya, Individual criminal responsibility is "a person's ability to understand his or her conduct at the time a crime is committed," it refers to the mental state and intent behind the act, along with the act itself (actus reus and mens rea).<sup>22</sup> This forms the basis for holding someone responsible for a crime under international law. Ambos, explains that individual criminal responsibility means a person can be held liable "if he or she perpetrates, takes part in or attempts to commit a crime within the jurisdiction of the Court," including aiding or abetting the crime or contributing to a group crime with criminal intent.<sup>23</sup>

According to Article 25 of the Rome Statute, A person who commits, orders, aids, abets, or otherwise contributes intentionally to the commission of a crime shall be criminally responsible and liable for punishment.<sup>24</sup> This statute clearly outlines how individual responsibility is

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<sup>19</sup> H. Nicole, 'Prosecuting Hate: Genocide and the International Criminal Court' <<https://www.american.edu/sis/news/20230907-prosecuting-hate-genocide-and-the-international-criminal-court.cfm>> accessed 18<sup>th</sup> 17<sup>th</sup> August, 2025

<sup>20</sup> ICC-01/05-01/08

<sup>21</sup> E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012)

<sup>22</sup> P. Shandilya, 'Individual Criminal Responsibility Under International Law' <<https://blog.ipleaders.in/individual-criminal-responsibility-international-criminal-law/>> accessed 17<sup>th</sup> August 2025

<sup>23</sup> K. Ambos, *Substantive and Procedural Aspects of International Criminal Law* (Brill 2000)

<sup>24</sup> Rome Statute of the International Criminal Court 1998

attributed in international criminal law. The International Committee of the Red Cross (ICRC) states that individual criminal responsibility includes attempting, assisting, facilitating, aiding, abetting, planning, or instigating the commission of crimes and emphasises that individuals, not abstract entities, are the perpetrators of international crimes.<sup>25</sup>

### 2.1.2 The principle of complementarity

This is a foundational concept in international criminal law that governs the relationship between the ICC and national courts.<sup>26</sup> It essentially means that the ICC acts as a court of last resort, intervening only when national legal systems are unwilling or unable to prosecute serious international crimes.<sup>27</sup>

According to the Parliamentarians for Global Action (PGA), The principle of complementarity means that "States have the primary competence and authority to investigate and prosecute international crimes," and the ICC may only exercise jurisdiction when national systems "fail to do so, when they are unwilling or unable to carry out proceedings genuinely".<sup>28</sup> Complementarity is described as the basis of the relationship between the ICC and national courts, meaning the ICC has secondary jurisdiction and can only act if the relevant states are unwilling or unable to prosecute crimes within their jurisdiction.<sup>29</sup>

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<sup>25</sup> ICRC, 'Rule 102: Individual Criminal Responsibility' < <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule102>> accessed 17<sup>th</sup> August, 2025

<sup>26</sup> J. Stigen, *the relationship between the International Criminal Court (ICC) and national Jurisdiction: The Principle of complementarity* (Boston: Martinus Nijhoff Publisher. 2008)

<sup>27</sup> M. M El Zeidy, 'The principle of complementarity: a new machinery to implement international criminal law' < <https://heinonline.org/HOL/LandingPage?handle=hein.journals/mjil23&div=35&id=&page=>> accessed 17<sup>th</sup> August, 2025

<sup>28</sup> PGA, 'Complementarity' < <https://www.pgaction.org/ilhr/rome-statute/complementarity.html>> accessed 17<sup>th</sup> August, 2025

<sup>29</sup> ECCHR, 'Complementarity principle' < <https://www.ecchr.eu/en/glossary/complementarity-principle/>> accessed 17<sup>th</sup> August, 2025

The principle is implemented through Articles 17 and 53 of the Rome Statute, which makes a case inadmissible before the ICC if it is already under investigation or prosecution by a state with jurisdiction, unless the investigation or prosecution is conducted in bad faith to shield persons from responsibility.<sup>30</sup> Lee, A renowned scholar explained complementarity as a principle ensuring "the Court will complement, but not supersede, national jurisdiction," allowing national courts to have priority while the ICC steps in only when national courts are unable or unwilling to act.<sup>31</sup> The principle promotes respect for national sovereignty, enhances efficiency in prosecuting crimes, and strengthens the rule of law within states.

In summary, the principle of complementarity prioritises national jurisdictions in prosecuting crimes and allows the ICC to intervene only when national systems fail to act genuinely, ensuring a cooperative relationship between national and international justice systems.

### **2.1.3. Distinction between genocide, war crimes, and crimes against humanity**

Genocide is defined as acts committed with the specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. This includes killing members of the group, causing serious harm, inflicting destructive conditions, preventing births, or forcibly transferring children of the group. The defining feature of genocide is the special intent to physically or biologically destroy a protected group.<sup>32</sup>

War Crimes are serious violations of the laws and customs applicable in armed conflict (international or non-international). They include murder, torture, taking hostages, attacking

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<sup>30</sup> Rome Statute of the International Criminal Court 1998

<sup>31</sup> R. S Lee, *The International Criminal Court: The making of the Rome Statute, Negotiations and Results* (London: Kluwer International Law 1999)

<sup>32</sup> W. A Schabas, 'Genocide' < <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e804?p=emailA6GnuZrrboUyw&d=/10.1093/law:epil/9780199231690/law-9780199231690-e804>> accessed 17<sup>th</sup> August, 2025

civilians, and other grave breaches of the Geneva Conventions and customary international humanitarian law. War crimes are distinguished by their context in armed conflict and the breach of rules that protect those not participating in hostilities.<sup>33</sup>

Crimes Against Humanity involve widespread or systematic attacks directed against civilian populations.<sup>34</sup> These acts include murder, extermination, enslavement, deportation, torture, rape, and other inhumane acts. Unlike war crimes, crimes against humanity can occur during peace or war and focus on the collective perpetration against civilians regardless of any armed conflict.

## **2.2 Theoretical Frameworks**

Theoretical frameworks in legal research are essential tools that assist scholars in organising their investigation and framing their analysis within established legal theories.

### **2.2.1 The theory of legal positivism in international criminal law**

Legal positivism is a jurisprudential theory asserting that law is a set of rules and norms formally enacted or recognised by a sovereign authority, independent from moral or ethical considerations.<sup>35</sup> It grounds the legitimacy of law on social facts and institutional acceptance rather than on natural law or moral principles. Within international criminal law, this theory provides grounds for international institutions like ICC, where authority flows from treaties such as the Rome statute of 1998, which have been ratified by consenting states.

Legal positivism manifests prominently through the principle of legality, *nullum crimen sine lege* (no crime without law), this is clearly portrayed in ICC's operations, mandating that criminal

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<sup>33</sup> M. Bothe, War Crimes in Non-International Armed Conflicts

<sup>34</sup> C. Robert, 'On the definition of crimes against humanity and other widespread or systematic human rights violations' < <https://heinonline.org/HOL/LandingPage?handle=hein.journals/hybrid20&div=5&id=&page=>> accessed 17<sup>th</sup> August, 2025

<sup>35</sup> A. John, *Lectures on Jurisprudence and the Philosophy of Positive Law* (St. Clair Shores, MI: Scholarly Press. 1977)

offences and punishments must be clearly defined in law before prosecution. This principle ensures legal certainty and restricts retroactive application of criminal laws, which was a crucial development post-World War II, exemplified by the Nuremberg trials and further embedded in the Rome Statute governing the ICC.<sup>36</sup>

While traditional positivism often emphasises the primacy of states as subjects of international law, the evolution of international criminal law challenges this state-centrism by recognising individuals as bearers of rights and obligations subject to prosecution for grave crimes under treaties such as the Rome Statute. This shift underscores a departure from strict state sovereignty to an individual accountability framework, reinforcing the legal positivist focus on codified rules established through treaty law and state consent.<sup>37</sup>

However, legal positivism faces significant scholarly critiques regarding its capacity to address supra-positive norms such as jus cogens and peremptory norms that command universal respect regardless of consent and arguably challenge the positivist premise that law derives solely from enacted rules or state will. These critiques advocate for an interpretive approach whereby positivism coexists with a recognition of fundamental principles that underpin international criminal law's moral and normative force, ensuring it serves substantive justice rather than mere procedural legality.<sup>38</sup>

Ultimately, legal positivism plays a central role in legitimising international criminal justice by providing a clear and systematic legal framework grounded in state practice and treaty law, while also inviting ongoing scholarly debate on balancing formal legalism with normative

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<sup>36</sup> D. Jacobs, 'Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories' < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2046311](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046311) > accessed 17<sup>th</sup> August, 2025

<sup>37</sup> G. Hernandez, 'Legal Positivism and the Individual in International Law' < <https://academic.oup.com/book/56268/chapter/445196406?login=false> > accessed 17<sup>th</sup> August, 2025

<sup>38</sup> N. P Monuz, 'Why International Criminal Law Can and Should be Conceived With Supra-Positive Law: The Non-Positivist Nature of International Criminal Legality' *Criminal Law and Philosophy* (2022) vol 7

commitments essential for enforcing international criminal norms effectively and justly. The continued dialectic between positivist doctrine and normative imperatives frames much of the contemporary discourse on international criminal law's theoretical and practical evolution.

### **2.2.2. Deterrence theory and its application to international justice**

Deterrence theory, a fundamental concept in criminology and legal studies, operates on the principle that individuals can be dissuaded from committing crimes if they perceive the costs primary punishment to outweigh the benefits.<sup>39</sup> Within the context of international criminal law, deterrence theory seeks to prevent gross violations such as genocide, war crimes, and crimes against humanity by imposing legal consequences and even create institutions like the ICC to be visible and continuously prosecute perpetrators, thus reducing the likelihood of future offences. The theory is generally divided into two forms: specific deterrence, which targets the individual offender to prevent reoffending, and general deterrence, aimed at society at large to dissuade potential offenders by setting an exemplary precedent.<sup>40</sup>

In international justice, particularly concerning institutions like the ICC, deterrence serves as a key justification for prosecuting high-level perpetrators of international crimes signaling that impunity no longer exists. The assumption is that the threat of prosecution and punishment will alter the behaviour of leaders and combatants, preventing them from engaging in atrocious acts. This presupposes rationality among offenders, who conduct a cost-benefit analysis weighing the risks of apprehension and punishment against the perceived gains from criminal conduct.

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<sup>39</sup> M. Altman, *A Theory of Legal Punishment: Deterrence, Retribution, and the Aims of the State* (London: Routledge. 2021)

<sup>40</sup> A.Kwame, 'Promoting Deterrence in ICC Prosecutions: A Critical Analysis' <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3648464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3648464)> accessed 17<sup>th</sup> August, 2025

However, the reality is complex, given the often chaotic and politically charged environments in which international crimes occur, raising questions about the practical efficacy of deterrence.<sup>41</sup>

The trial of Jean-Pierre Bemba Gombo, for instance, symbolised the deterrent capacity of international justice by showing that even politically powerful individuals are not immune from accountability. Empirical studies further suggest that the certainty of punishment exerts a stronger deterrent effect than the severity of sentences, emphasising the importance of robust investigation and enforcement mechanisms.<sup>42</sup>

Critical perspectives caution against overestimating deterrence in international criminal justice, emphasising that some perpetrators, such as ruthless dictators or ideologically driven actors, may not behave rationally or may prioritise power consolidation over legal risks. Therefore, deterrence theory's reliance on rational actor models must be tempered with recognition of political, social, and psychological factors influencing criminal behaviour in conflict settings.

In conclusion, deterrence theory occupies a vital but contested role in international justice. While it underpins the rationale for prosecuting international crimes, its effectiveness depends on multiple variables, including the perceived certainty and swiftness of punishment, comprehensive enforcement, and the nature of offenders. Ongoing scholarship and empirical study are essential to refine deterrence strategies within international criminal law, ensuring that justice mechanisms not only punish past crimes but also effectively prevent future atrocities.

### **2.3.1 Historical Foundations of the Nuremberg and Tokyo Tribunals**

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<sup>41</sup> L. Yann, 'International Criminal Court Deterrence and Optimal Enforcement of International Criminal Law' <<https://economix.fr/uploads/source/doc/seminaires/lien/Lecorps%20-%20International%20Criminal%20Court%20Deterrence%20and%20Optimal%20Enforcement%20of%20International%20Criminal%20Law.pdf>> accessed 17<sup>th</sup> August, 2025

<sup>42</sup> M. Stafano, 'The Approach to Deterrence in the Practice of the International Criminal Court' <<https://internationallaw.blog/2017/04/06/the-approach-to-deterrence-in-the-practice-of-the-international-criminal-court/>> accessed 17<sup>th</sup> August, 2025

The historical foundations of the Nuremberg Tribunal trace back to the aftermath of World War II, when the Allied powers sought to hold Nazi Germany's leaders accountable for unprecedented atrocities committed during the war. Between 1939 and 1945, Nazi Germany's invasions across Europe led to massive destruction and millions of deaths, prompting demands for justice that could address the scale and gravity of these crimes.<sup>43</sup> In early 1942, the governments of nine German-occupied European countries called for an international court to try German war criminals, signifying early recognition of the need for an international judicial mechanism. Despite initial reluctance by the United States and the United Kingdom due to the failure of war crimes prosecutions after World War I, the Allied powers united following Germany's surrender to create a tribunal capable of prosecuting major war criminals.<sup>44</sup>

The Nuremberg trials were formally established through the London Charter signed by France, the Soviet Union, the United Kingdom, and the United States on August 8, 1945.<sup>45</sup> This charter created the International Military Tribunal (IMT) with jurisdiction over three categories of crimes: crimes against peace, war crimes, and crimes against humanity. The tribunal was groundbreaking in holding individuals, not states, personally responsible for violations of international law, rejecting sovereign immunity and requiring individuals to answer for their actions regardless of superior orders. The trials were symbolically held in Nuremberg, Germany, chosen for its association with Nazi propaganda rallies, underscoring the defeat and condemnation of Nazi leadership.

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<sup>43</sup> Office of the Historian, 'The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948)' < <https://history.state.gov/milestones/1945-1952/nuremberg> > accessed 17<sup>th</sup> August, 2025

<sup>44</sup> K. Jacob, 'The Enduring and Controversial Legacy of the Nuremberg Trials' < <https://journals.library.wustl.edu/globalstudies/article/8971/galley/25740/view/> > accessed 17<sup>th</sup> August, 2025

<sup>45</sup> J. Kim, 'Establishing the Frontier of International Law: The Nuremberg Trial' < <https://rais.education/wp-content/uploads/2023/12/0352.pdf> > accessed 17<sup>th</sup> August, 2025

The IMT tried 22 prominent Nazi officials, including political, military, and economic leaders, between November 1945 and October 1946. The trials revealed irrefutable evidence of Nazi atrocities, including the Holocaust, and established the crime of waging aggressive war as “the supreme international crime”.<sup>46</sup> The Nuremberg Tribunal also developed legal doctrines foundational to modern international criminal law, such as the rejection of *ex post facto* prosecution and the defence of superior orders left to judicial discretion. Following the IMT, several other subsequent trials by the United States focused on lower-level defendants, further deepening the legacy of international accountability mechanisms.

The Tokyo Tribunal, formally known as the International Military Tribunal for the Far East (IMTFE), was established in 1946 to try Japanese leaders responsible for war crimes during World War II in the Asia-Pacific region. Modelled after the Nuremberg Tribunal, the Tokyo trials prosecuted Japanese military officials, politicians, and bureaucrats for crimes including waging aggressive war, conventional war crimes, and crimes against humanity. The tribunal sought to address the suffering caused by Japanese military actions in countries such as China, the Philippines, and Southeast Asia and carried forward the principle of individual accountability established at Nuremberg. Unlike Nuremberg, the Tokyo Tribunal faced unique challenges, including questions about the legality of prosecuting crimes under new categories and concerns regarding victor’s justice, but its establishment underscored the emerging international consensus on criminal responsibility.

Collectively, the Nuremberg and Tokyo Tribunals laid the foundational legal and procedural frameworks for contemporary international criminal justice. They marked the first systematic efforts to prosecute state leaders for violations of international humanitarian law and established

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<sup>46</sup> J. P John and S. T Hansa, ‘Nuremberg Trials and Its Impact on International Criminal Law’ *International Journal of Novel Research and Development* (2024) vol 9(11)

key principles such as the criminality of aggressive war, the individual's liability under international law, and the denial of immunity based on official capacity. Their legacies directly influenced the development of modern institutions such as the International Criminal Court and continue to shape the international community's approach to addressing war crimes, genocide, and crimes against humanity.

### **2.3.2 The ad hoc tribunals: ICTY and ICTR**

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are landmark ad hoc tribunals established by the United Nations to prosecute serious violations of international humanitarian law committed during conflicts in the 1990s. The ICTY was created on May 25, 1993, through United Nations Security Council Resolution 827 in response to atrocities committed during the Yugoslav Wars

Its jurisdiction covered grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity occurring on the territory of the former Yugoslavia since 1991. Sitting in The Hague, Netherlands, the ICTY aimed at holding accountable the individuals most responsible for war crimes, including political leaders, military commanders, and others implicated in ethnic cleansing and mass atrocities<sup>47</sup>

The ICTY was the first international war crimes tribunal established since the Nuremberg and Tokyo tribunals. It conducted over 161 indictments during its 24 years of operation before closing in 2017. Among its most notable cases were the trials of former Serbian President Slobodan Milošević and Bosnian Serb leader Radovan Karadžić, both charged with genocide and

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<sup>47</sup> UN, 'About the ICTY' < <https://www.icty.org/en/about> > accessed 17<sup>th</sup> August, 2025

crimes against humanity. The tribunal's mandate was significant for pioneering legal developments, such as defining command responsibility and prosecuting sexual violence as a war crime and a crime against humanity.<sup>48</sup>

The ICTR was established in November 1994 by United Nations Security Council Resolution 955 to address the genocide and other serious violations of international humanitarian law that erupted during the Rwandan genocide.<sup>49</sup> The tribunal was tasked with prosecuting those responsible for the mass slaughter of approximately 800,000 Tutsi and moderate Hutu between April and July 1994. Sitting in Arusha, Tanzania, the ICTR became a crucial platform for delivering justice, promoting reconciliation, and documenting the crimes committed during the genocide.<sup>50</sup>

The ICTR's jurisdiction encompassed genocide, crimes against humanity, and violations of the Geneva Conventions. The tribunal also contributed to the development of international criminal law by prosecuting cases on rape as a constitutive act of genocide and crimes against humanity, thereby expanding legal recognition of sexual violence as a grave international crime. The ICTR operated until 2015, completing trials of high-profile figures such as Jean-Paul Akayesu, whose conviction was the first for genocide by an international court

Both the ICTY and ICTR served as precursors to the establishment of the permanent ICC, demonstrating the effectiveness of international judicial institutions in addressing mass atrocities. They set precedents in procedural rules, protections for victims and witnesses, and contributed

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<sup>48</sup> UN, 'International Criminal Tribunal for the former Yugoslavia' < <https://www.icty.org/>> accessed 17<sup>th</sup> August, 2025

<sup>49</sup> J. N Maogoto, 'The International Criminal Tribunal for Rwanda: A Distorting Mirror; Casting doubt on its actor-oriented approach in addressing the Rwandan genocide' < <https://www.ajol.info/index.php/ajcr/article/download/136423/125914/0>> accessed 17<sup>th</sup> August, 2025

<sup>50</sup> L. Alastair, 'Rwanda genocide: International Criminal Tribunal closes' < <https://www.bbc.com/news/world-africa-35070220>> accessed 17<sup>th</sup> August, 2025

significantly to evolving concepts like individual criminal responsibility, command accountability, and the prosecution of crimes against humanity. Despite criticisms concerning their lengthy proceedings and resource intensiveness, the ad hoc tribunals have indelibly impacted international criminal justice and the global effort to fight impunity for the gravest violations of human rights.

In conclusion, the ICTY and ICTR represent monumental efforts by the international community to confront mass atrocities, uphold international humanitarian law, and deliver justice to victims while deterring future crimes. Their legacy continues to shape international criminal jurisprudence and informs ongoing efforts to strengthen mechanisms for accountability and reconciliation worldwide.

### **2.3.3. Evolution from ad hoc to permanent mechanisms (Rome Statute)**

The evolution from ad hoc tribunals to a permanent international criminal justice mechanism is epitomized by the adoption of the Rome Statute and the establishment of the International Criminal Court (ICC).<sup>51</sup> In contrast to ad hoc tribunals such as the ICTY and the ICTR, which were established by the United Nations Security Council in response to specific conflicts and had limited temporal and geographical jurisdiction, the ICC was designed to be a standing institution with a permanent mandate to prosecute the gravest international crimes globally.

The idea of a permanent international criminal court dates back to the aftermath of World War I and the League of Nations, but serious momentum was only gained following the Nuremberg

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<sup>51</sup> International Committee of the Red Cross, *Ad Hoc Tribunals* (ICRC, 2018)  
<<https://www.icrc.org/en/document/ad-hoc-tribunals>> accessed 7<sup>th</sup> November, 2025

and Tokyo tribunals after World War II and the ad hoc tribunals of the 1990s.<sup>52</sup> These earlier courts demonstrated the feasibility and necessity of international legal accountability but had limitations, such as restricted jurisdiction and reliance on ad hoc mandates. Learning from these experiences, the international community sought a more universal and consistent system to address crimes such as genocide, war crimes, crimes against humanity, and subsequently the crime of aggression.<sup>53</sup>

The Rome Statute<sup>54</sup>, adopted in Rome on July 17, 1998, after years of negotiation among states, established the ICC as a permanent judicial body with authority derived from states parties consenting to its jurisdiction. Entering into force on July 1, 2002, the statute outlines the Court's jurisdiction, structure, and functions. It represents a historic commitment to combating impunity worldwide by providing a legal framework capable of prosecuting individuals who bear the greatest responsibility for serious international crimes.<sup>55</sup> The ICC operates on the principle of complementarity, meaning it only intervenes when national jurisdictions are unwilling or unable to prosecute.<sup>56</sup>

The ICC's establishment shifted international criminal justice from temporary, conflict-specific mechanisms to a continuous institution aiming to provide consistent and impartial justice. This evolution addresses previous challenges of selectivity, delayed justice, and gaps in enforcement seen in ad hoc tribunals. Despite facing challenges such as political resistance and questions over

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<sup>52</sup> International Committee of the Red Cross, *International Criminal Justice – The Institutions* (ICRC, 2018) <<https://www.icrc.org/en/document/international-criminal-justice-institutions-0>> accessed 7<sup>th</sup> November, 2025.

<sup>53</sup> Law JRank, "International Criminal Courts – Historical Background" (JRank Law Encyclopedia, 2005) <<https://law.jrank.org/pages/1369/International-Criminal-Courts-Historical-background.html>> accessed 7<sup>th</sup> November, 2025.

<sup>54</sup> Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 3.

<sup>55</sup> <sup>55</sup> International Criminal Court, "How the Court Works" (ICC, updated 2024) <<https://www.icc-cpi.int/about/how-the-court-works>> accessed 7<sup>th</sup> November, 2025.

<sup>56</sup> United Nations, "The International Criminal Court Treaty Enters Into Force" *ASIL Insight* (Vol. 7, Issue 6, 11 April 2002) <<https://www.asil.org/insights/volume/7/issue/6/international-criminal-court-treaty-enters-force>> accessed 7<sup>th</sup> November, 2025.

jurisdictional reach, the ICC embodies a significant advancement toward a global legal order where accountability for the most severe crimes is institutionalized and accessible beyond the limitations of those ad hoc efforts.<sup>57</sup>

In summary, the transition from ad hoc tribunals to the permanent ICC through the Rome Statute marks a pivotal moment in international law's development. It reflects the international community's resolve to institutionalize mechanisms for justice that transcend individual conflicts and national boundaries, aiming to deliver justice, deter future crimes, and uphold international peace and security more coherently and sustainably.

## **2.4 Literature Review**

Mattraux emphasised the ICC's unique jurisdiction as a court of last resort, bound by the principle of complementarity.<sup>58</sup> He argued that the ICC filled critical gaps where national jurisdictions failed, particularly in prosecuting genocide, and reflected evolving norms of universal jurisdiction under international law.

Schabas examined that the ICC's function complemented national efforts by emphasising the need to prosecute "the most serious crimes" on an international scale. He noted that while international and domestic courts had a shared responsibility, the ICC became indispensable in fragile states where local capacity or political will was lacking. He concluded that ICC

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<sup>57</sup> United Nations, "The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law" *United Nations Chronicle* (UN, 2012) <<https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law>> accessed 17 August 2025.

<sup>58</sup> G. Mattraux, 'Jurisdiction to Investigate and Prosecute Acts of Genocide' < <https://academic.oup.com/oxford-law-pro/book/57761/chapter-abstract/470823441?redirectedFrom=fulltext>> accessed 17<sup>th</sup> August, 2025

prosecutions symbolised the international community's condemnation of genocide and provided victims a voice in global justice.<sup>59</sup>

McTaggard, an expert on genocide law, highlighted the institutional challenges facing the ICC in his analyses, including political interference and difficulties in apprehending suspects. Despite this, Scott argued that the ICC had been revolutionary in codifying genocide as an international crime and delivering landmark convictions that had preventive and symbolic deterrent effects worldwide.<sup>60</sup>

Antonio, a pioneer in international criminal law, in his article on enforcement of international humanitarian law, stated that the ICC represented the culmination of international efforts to prosecute genocide, overcoming sovereignty obstacles that limited earlier ad hoc tribunals.<sup>61</sup>

Payal explored recent expansions in the ICC's prosecutorial policy beyond the traditional crimes, but she asserted that genocide remained the "crime of crimes".<sup>62</sup>

Wagner, in a detailed review on the ICC's jurisdictional challenges, noted that genocide cases posed complex evidentiary and procedural hurdles but were central to the Court's mandate. He argued that the ICC had clarified and refined legal definitions, strengthening judicial precedents that informed national prosecutions and promoted consistent international jurisprudence.<sup>63</sup>

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<sup>59</sup> W. A Schabas, 'Prosecution of genocide by international and domestic tribunals' < <https://www.cambridge.org/core/books/abs/genocide-in-international-law/prosecution-of-genocide-by-international-and-domestic-tribunals/E53429DB99A6680B6AFED89AB3E8E1CF>> accessed 17<sup>th</sup> August, 2025.

<sup>60</sup> S. McTaggard, 'The International Criminal Court: History and Role' < [https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/200211E](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200211E)> accessed 17<sup>th</sup> August, 2025.

<sup>61</sup> C. Antonio, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' < <https://ejil.org/pdfs/9/1/1477.pdf>> accessed 17<sup>th</sup> August, 2025.

<sup>62</sup> P. Payal, 'Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC P Crimes: Can an ICC Policy Paper Expand the Court's Mandate to Prosecuting Environmental Crimes?' *Loyola University Chicago International Law Review* (2016) vol 14(2).

<sup>63</sup> M. Wagner, 'American Journal of International Law' < [https://www.mpil.de/files/pdf3/mpunyb\\_wagner\\_7.pdf](https://www.mpil.de/files/pdf3/mpunyb_wagner_7.pdf)> accessed 17<sup>th</sup> August, 2025.

Payam, on international justice, emphasised the normative and symbolic impact of the ICC's prosecution of genocide, arguing that trials like that of Jean-Pierre Bemba (for crimes including genocidal acts) enforced a global ethical standard and contributed to reconciliation by exposing atrocities.<sup>64</sup>

Adediran analyzed Nigeria's legal mechanisms against terrorism and argued that prosecutions of Boko Haram members had been inefficient, often neglecting the international crimes framework embedded in the Rome Statute, including genocide and crimes against humanity. The article stressed the need for comprehensive integration of ICC statutes into Nigerian law to improve prosecution quality and accountability. It also discussed challenges posed by constitutional immunities for government officials that conflicted with the Rome Statute's principles of no immunity for perpetrators of international crimes.<sup>65</sup>

Mattraux, in his work, emphasises the ICC's unique jurisdiction as a court of last resort, bound by the principle of complementarity.<sup>66</sup> He argues the ICC fills critical gaps where national jurisdictions fail, particularly in prosecuting genocide, and reflects evolving norms of universal jurisdiction under international law. Klamberg sees the ICC's role as pivotal in strengthening global accountability, despite limitations posed by political considerations

Schabas<sup>67</sup> examines that the ICC's function complements national efforts by emphasising the need to prosecute "the most serious crimes" on an international scale. He notes that while

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<sup>64</sup> A. Payan, 'Beyond impunity: can international criminal justice prevent future atrocities?' *American Journal of International Law* (2001) vol 95(1).

<sup>65</sup> A. O Adediran, 'Prosecuting Terrorism in Nigeria and the International Criminal Legal Framework' < [https://juritrustcentre.org/index.php/reports-and-publications/in-brief/130-prosecuting-terrorism-in-nigeria-and-the-international-criminal-legal-framework\).%5B3](https://juritrustcentre.org/index.php/reports-and-publications/in-brief/130-prosecuting-terrorism-in-nigeria-and-the-international-criminal-legal-framework).%5B3)> accessed 17<sup>th</sup> August, 2025.

<sup>66</sup> G. Mattraux, 'Jurisdiction to Investigate and Prosecute Acts of Genocide' < <https://academic.oup.com/oxford-law-pro/book/57761/chapter-abstract/470823441?redirectedFrom=fulltext>> accessed 17<sup>th</sup> August, 2025

<sup>67</sup> W. A Schabas, 'Prosecution of genocide by international and domestic tribunals' < <https://www.cambridge.org/core/books/abs/genocide-in-international-law/prosecution-of-genocide-by-international-and-domestic-tribunals/E53429DB99A6680B6AFED89AB3E8E1CF>>

international and domestic courts have a shared responsibility, the ICC becomes indispensable in fragile states where local capacity or political will is lacking. He concludes that ICC prosecutions symbolize the international community's condemnation of genocide and provide victims a voice in global justice.

McTaggart,<sup>68</sup> an expert on genocide law, highlights the institutional challenges facing the ICC in his analyses, including political interference and difficulties in apprehending suspects. Despite this, Scott argues the ICC has been revolutionary in codifying genocide as an international crime and delivering landmark convictions that have preventive and symbolic deterrent effects worldwide.

Antonio,<sup>69</sup> a pioneer in international criminal law, in his article on enforcement of international humanitarian law, states that the ICC represents the culmination of international efforts to prosecute genocide, overcoming sovereignty obstacles that limited earlier ad hoc tribunals. Cassese acknowledges operational constraints but underscores the Court's critical role in the ongoing development of legal norms addressing mass atrocity crimes including genocide.

Payal<sup>70</sup> explores recent expansions in ICC's prosecutorial policy beyond the traditional crimes, but she asserts that genocide remains the "crime of crimes". Patel posits that the ICC's emphasis on genocide prosecution strengthens international human rights protection frameworks and establishes a moral and legal benchmark for state and non-state actors.

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<sup>68</sup> S. McTaggart, 'The International Criminal Court: History and Role' <[https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/200211E](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200211E)> accessed 17<sup>th</sup> August, 2025

<sup>69</sup> C. Antonio, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' <<https://ejil.org/pdfs/9/1/1477.pdf>> accessed 17<sup>th</sup> August, 2025

<sup>70</sup> P. Payal, 'Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC P Crimes: Can an ICC Policy Paper Expand the Court's Mandate to Prosecuting Environmental Crimes?' *Loyola University Chicago International Law Review* (2016) vol 14(2)

Wagner<sup>71</sup> in a detailed review on the ICC's jurisdictional challenges, notes that genocide cases pose complex evidentiary and procedural hurdles but are central to the Court's mandate. He argues that the ICC has clarified and refined legal definitions, strengthening judicial precedents that inform national prosecutions and promote consistent international jurisprudence.

Payam<sup>72</sup> in his seminal work on international justice emphasises the normative and symbolic impact of ICC's prosecution of genocide, arguing that trials like that of Jean-Pierre Bemba (for crimes including genocidal acts) enforce a global ethical standard and contribute to reconciliation by exposing atrocities.

Adediran<sup>73</sup> analyzes Nigeria's legal mechanisms against terrorism and argues that prosecutions of Boko Haram members have been inefficient, often neglecting the international crimes framework embedded in the Rome Statute, including genocide and crimes against humanity. The article stresses the need for comprehensive integration of ICC statutes into Nigerian law to improve prosecution quality and accountability. It also discusses challenges posed by constitutional immunities for government officials that conflict with the Rome Statute's principles of no immunity for perpetrators of international crimes.

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<sup>71</sup> M. Wagner, 'American Journal of International Law' < [https://www.mpil.de/files/pdf3/mpunyb\\_wagner\\_7.pdf](https://www.mpil.de/files/pdf3/mpunyb_wagner_7.pdf) > accessed 17<sup>th</sup> August, 2025

<sup>72</sup> A. Payan, 'Beyond impunity: can international criminal justice prevent future atrocities?' *American Journal of International Law* (2001) vol 95(1)

<sup>73</sup> A. O Adediran, 'Prosecuting Terrorism in Nigeria and the International Criminal Legal Framework' < [https://juritrustcentre.org/index.php/reports-and-publications/in-brief/130-prosecuting-terrorism-in-nigeria-and-the-international-criminal-legal-framework\).%5B3](https://juritrustcentre.org/index.php/reports-and-publications/in-brief/130-prosecuting-terrorism-in-nigeria-and-the-international-criminal-legal-framework).%5B3) > accessed 17<sup>th</sup> Augsut, 2027

### **CHAPTER THREE:**

## **LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE PROSECUTION OF GENOCIDE**

Genocide is recognised as one of the gravest violations of international law, defined by acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.<sup>74</sup> Since the adoption of the 1948 Genocide Convention, the international community has strived to create a robust legal and institutional framework to prosecute those responsible for

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<sup>74</sup> K. Clause, 'The Crime of Genocide under International Law' *International Criminal Law Review* (2006) vol 6

genocide, aiming to deter such atrocities and deliver justice to victims.<sup>75</sup> This framework comprises international treaties, national laws, courts, and institutions designed to hold perpetrators accountable and prevent impunity.<sup>76</sup>

The cornerstone legal instrument for the prosecution of genocide is the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which establishes states' obligation to prosecute genocide and obliges them to enact necessary legislation. It also allows for universal jurisdiction, enabling states to prosecute genocide regardless of where the crime was committed or the nationality of the accused, should the territorial state fail in its duties. Complementing the Convention are international criminal tribunals established to adjudicate mass atrocities, beginning with post-World War II Nuremberg and Tokyo Trials, which set precedents for individual criminal responsibility for crimes against humanity, including genocide.<sup>77</sup>

The institutional framework for genocide prosecution has evolved significantly, culminating in the establishment of the ICC, which was created by the Rome Statute in 1998. The ICC serves as a permanent, independent international judicial body with the specific mandate to prosecute individuals for the most serious crimes of international concern: genocide, crimes against humanity, war crimes, and crimes of aggression. Unlike its ad hoc predecessors, such as the ICTR and the ICTY, the ICC is designed to operate universally and permanently, filling critical

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<sup>75</sup> S. Chima, 'Genocide Law and Accountability: Current Mechanisms, Challenges, and Pathways for Improvement' < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5208691](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5208691) > accessed 1<sup>st</sup> September, 2025

<sup>76</sup> UN, 'Legal Framework of Genocide and Related crimes' < <https://www.un.org/en/genocide-prevention/legal-framework> > accessed 1<sup>st</sup> September, 2025

<sup>77</sup> W. A Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press 2009)

gaps left by national judicial systems that are either unable or unwilling to prosecute genocide effectively.<sup>78</sup>

A fundamental principle underpinning the ICC's jurisdiction is complementarity. This principle asserts that the ICC is a court of last resort and can only intervene when national courts are either unable or unwilling to carry out genuine prosecutions. This cooperative relationship ensures respect for national sovereignty while emphasising accountability and justice at the international level when needed. The ICC's legal framework includes detailed provisions on the definition and elements of genocide, modes of liability, and procedural safeguards to ensure fair trials, the protection of victims and witnesses, and the delivery of justice.<sup>79</sup>

The ICC's prosecutorial office operates independently, empowered to initiate investigations based on referrals by states parties, the United Nations Security Council, or proprio motu (on its own initiative), reflecting an inclusive and multi-layered approach to addressing and preventing genocide. Further complementing international prosecution efforts, networks like the European Genocide Prosecution Network facilitate cooperation between national judicial authorities to enhance investigation and prosecution capacities, further strengthening the institutional architecture against impunity.<sup>80</sup>

Together, these legal and institutional frameworks establish a comprehensive and evolving system designed to reinforce international criminal justice, deter genocide, and provide redress to victims. Despite challenges such as political obstacles, limited state cooperation, and capacity

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<sup>78</sup> H. Friman and D. Robinson, 'Institutional Framework of the ICC' < <https://www.thecommonwealth-ilibrary.org/index.php/comsec/catalog/download/805/805/6448?inline=1> > accessed 1<sup>st</sup> September, 2025

<sup>79</sup> M. V De Freitas, 'The Role of the International Criminal Court in Preventing Crimes Against Humanity and in the Rebuilding of Nations' < [https://www.policycenter.ma/sites/default/files/2025-04/PB\\_26-25\\_Marcus%20Vinicius.pdf](https://www.policycenter.ma/sites/default/files/2025-04/PB_26-25_Marcus%20Vinicius.pdf) > accessed 1<sup>st</sup> September, 2025

<sup>80</sup> European Union Agency for Criminal Justice Cooperation, 'Genocide Prosecution Network' < <https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-prosecution-network> > accessed 1<sup>st</sup> September, 2025

gaps in national systems, the ICC remains a pivotal institution in the global architecture for the prosecution of genocide, symbolising the international community's commitment to ending impunity for such heinous crimes.

### **3.1 The Rome Statute and Genocide Provisions**

The Rome Statute of the ICC, adopted on July 17, 1998, and in force since July 1, 2002, is the foundational treaty establishing the ICC and codifying its jurisdiction over the crime of genocide, among other core international crimes. Article 6 of the Rome Statute specifically defines genocide, reflecting the definition from the 1948 Genocide Convention, and enumerates distinct acts committed with the intent to destroy, in whole or in part, protected groups based on nationality, ethnicity, race, or religion.<sup>81</sup>

Genocide sits among the four “most serious crimes of concern to the international community” within the ICC’s subject-matter jurisdiction, listed in Article 5 alongside crimes against humanity, war crimes, and the crime of aggression.<sup>82</sup> Article 6 then defines genocide by adopting, essentially verbatim, the 1948 Genocide Convention formula: any of five enumerated acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.<sup>83</sup> The five acts are: killing group members; causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about the group’s physical destruction; imposing measures intended to prevent births; and forcibly transferring children of the group.<sup>84</sup>

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<sup>81</sup> UN, ‘Rome Statute of the International Criminal Court’, <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court> accessed 1<sup>st</sup> September, 2025

<sup>82</sup> Article 5(1)(a)-(d) of the Rome Statute of the International Criminal Court

<sup>83</sup> Article 6 of the Rome Statute of the International Criminal Court

<sup>84</sup> Article 6(a)-(e) of the Rome Statute of the International Criminal Court

The ICC's Elements of Crimes further clarify these acts, for example, that "serious bodily or mental harm" can include, depending on the evidence, acts such as torture, inhuman or degrading treatment, or sexual violence, while the mental element remains the specific intent to destroy the protected group, in whole or in part.<sup>85</sup> While the ICC has not yet delivered a final conviction for genocide, international courts have richly elaborated the definition: the ICTR's *Akayesu* judgment was the first international conviction for genocide and famously recognized that sexual violence can constitute genocidal acts when tied to the requisite special intent.<sup>86</sup> The ICTY's jurisprudence, especially *Krstić* on Srebrenica, clarified "in part" and "substantial part" of a group, as well as the role of the group's leadership or its essentiality in assessing destructive intent.<sup>87</sup> Equally important, *Jelisić* underscored that even where a perpetrator commits killings, the absence of proven *dolus specialis* (the specific intent to destroy the group) defeats the genocide charge, illustrating how exacting the mental element is.<sup>88</sup>

The ICJ's *Bosnia v Serbia* judgment, while addressing state responsibility, has become a lodestar for evidentiary standards and the content of genocidal intent, emphasising that genocide requires proof of specific intent that is "the only reasonable inference".<sup>89</sup>

Article 30 of the Rome Statute sets "intent and knowledge" as the default mental element, unless a particular crime requires otherwise<sup>90</sup> genocide is exactly such a crime, because it additionally requires the specific intent to destroy a protected group as such.<sup>91</sup> The Elements of Crimes

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<sup>85</sup> ICC, 'Element of Crimes' < [https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf?utm\\_source=chatgpt.com](https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf?utm_source=chatgpt.com) > accessed 1<sup>st</sup> September, 2025

<sup>86</sup> *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judgment, 2 Sept. 1998

<sup>87</sup> *Prosecutor v Radislav Krstić*, IT-98-33-A, Appeals Judgment, 19 Apr. 2004

<sup>88</sup> *Prosecutor v Goran Jelisić*, IT-95-10-A, Appeals Judgment, 5 July 2001

<sup>89</sup> Judgment, I.C.J. Reports 2007, p. 43

<sup>90</sup> Article 30(1) of the Rome Statute of the International Criminal Court

<sup>91</sup> G. Werle and F. Jessberger, 'Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law' *Journal of International Criminal Justice* (2005) vol 3(1)

explicitly layer this “intent to destroy” over the underlying actus reus, meaning proof must show that the perpetrator meant the physical or biological destruction of the group, at least in part, not merely that he or she anticipated that result as a side-effect. ICTY appellate case law illustrates how tribunals infer that special intent: in *Krstić*, the Appeals Chamber accepted that destroying the Bosnian Muslim community of Srebrenica, by killing the men and boys and expelling the rest, could satisfy “in part,” focusing on the community’s substantiality and essential role, while carefully parsing the leadership’s knowledge and aims.<sup>92</sup> By contrast, *Jelisić* shows that a perpetrator’s brutal conduct, even accompanied by hateful rhetoric, is not enough where the chamber cannot conclude, beyond reasonable doubt, that the killings were animated by the intent to destroy the group rather than by opportunistic or personal motives.<sup>93</sup>

The ICJ aligns with this rigorous approach, holding that genocide’s intent is distinct and more exacting than the intent required for other atrocity crimes, and cannot be presumed from the mere occurrence of large-scale atrocities without a reasoned inference grounded in evidence (ICJ, *Application of the Genocide Convention* (Bosnia v Serbia)).

Although the ICC has to date convicted for other atrocity crimes rather than genocide, its general Article 30 jurisprudence (e.g., on intent/knowledge and the use of inferences) informs how future ICC genocide cases will evaluate special intent alongside context and pattern evidence, with the Elements of Crimes providing the interpretive bridge. Uniquely among ICC crimes, genocide includes an *inchoate* mode of liability, “direct and public incitement to commit genocide”—punishable even if genocide is not ultimately carried out.<sup>94</sup> The ICC’s policy and filings reaffirm that Article 25(3)(e) criminalizes direct, public advocacy that calls for the destruction of a

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<sup>92</sup> *Prosecutor v Radislav Krstić*, IT-98-33-A, Appeals Judgment, 19 Apr. 2004

<sup>93</sup> *Prosecutor v Goran Jelisić*, IT-95-10-A, Appeals Judgment, 5 July 2001

<sup>94</sup> Article 25(3)(e) of the Rome Statute of the International Criminal Court

protected group, aligning with the Genocide Convention’s approach and the ad hoc tribunals’ doctrine.

The ICTR’s seminal “Media Case,” *Nahimana et al.*, confirmed that public broadcasts and publications urging the destruction of the Tutsi constituted direct and public incitement, clarifying how context, audience, and explicitness mark the line between protected speech and criminal advocacy.<sup>95</sup> Similarly, *Bikindi* upheld a conviction where exhortations during public addresses amounted to incitement, emphasising the immediacy and specificity of the call to destroy the protected group.<sup>96</sup> The ICC’s Elements of Crimes provide further guidance on the “directness” and “public” character of incitement under Article 25(3)(e), aiding prosecutors and judges in distinguishing criminal solicitation from inflammatory yet non-criminal speech in borderline cases.

Article 27 removes immunity based on official capacity, specifying that the Statute applies equally to all persons, including heads of state, and that immunities or special procedural rules under national law do not bar the Court from exercising its jurisdiction.<sup>97</sup>

In the *Jordan Referral re Al-Bashir* (Darfur), the ICC Appeals Chamber held in 2019 that customary international law allows an international criminal court to proceed against a sitting head of state of a non-party where the Security Council has referred the situation, rejecting reliance on personal immunities to defeat cooperation duties.<sup>98</sup> The decision is central for genocide accountability because many alleged genocides are orchestrated or enabled by state

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<sup>95</sup> *Prosecutor v Nahimana, Barayagwiza & Ngeze*, ICTR-99-52-A

<sup>96</sup> *Prosecutor v Simon Bikindi*, ICTR-01-72-A

<sup>97</sup> Article 27(1)–(2) of the Rome Statute of the International Criminal Court

<sup>98</sup> *Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-397-Corr, Appeals Chamber Judgment, 6 May 2019

leadership, and Article 27 ensures that the ICC’s hand is not tied by status-based bars when the jurisdictional predicates are met.

Article 28 establishes liability for military commanders and superiors who, with effective control, knew or should have known that forces were committing or about to commit crimes and failed to take necessary and reasonable measures to prevent or repress them or submit the matter for investigation.<sup>99</sup> Although *Bemba* concerned crimes against humanity and war crimes in the CAR rather than genocide, the Appeals Chamber’s 2018 judgment significantly refined the due diligence and causation analyses under Article 28, emphasizing a concrete assessment of what measures were “necessary and reasonable” in the specific operational context.<sup>100</sup> This jurisprudence would apply *mutatis mutandis* in genocide cases where commanders or civilian superiors exercise effective control over perpetrators and fail in their preventive or punitive duties, provided the underlying crimes and genocidal intent are proven for subordinates or otherwise within the contextual framework.

The Statute provides that crimes within ICC jurisdiction “shall not be subject to any statute of limitations,” reflecting the gravity and *jus cogens* character ascribed to genocide in contemporary international law.<sup>101</sup> ICC practice and outreach materials restate this rule, underscoring that temporal passage cannot extinguish liability for genocide, crimes against humanity, war crimes, or aggression, an institutional position critical for long-tail accountability processes where political circumstances delay arrests. Recent ICC filings also reiterate the Article 29 principle when interpreting withdrawal or temporal clauses, emphasising that Rome Statute crimes remain chargeable irrespective of domestic limitation periods.

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<sup>99</sup> Article 28(a)–(b) of the Rome Statute of the International Criminal Court

<sup>100</sup> *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3636-Red, Appeals Judgment, 8 June 2018

<sup>101</sup> Article 29 of the Rome Statute of the International Criminal Court

While Article 31 lists grounds excluding criminal responsibility (e.g., mental disease, intoxication, self-defence, duress), none creates a categorical carve-out for genocide, and each is strictly construed against the evidence and circumstances of the case.<sup>102</sup> Article 33 rejects the defence of superior orders for genocide, crimes against humanity, and war crimes where the order was manifestly unlawful; genocide orders are *per se* manifestly unlawful, meaning obedience cannot exculpate the accused even in highly coercive command environments.<sup>103</sup> The ad hoc tribunals' treatment of duress (distinct from superior orders) shows the narrow path for any exculpation in atrocity contexts, and while the ICC has its own framework, that cautionary approach aligns with the gravity of genocidal wrongdoing.<sup>104</sup>

Finally, Article 29's bar on limitation periods and the Rome Statute's incorporation of the Convention's core definitions ensure that even delayed arrests can lead to genocide trials, preserving accountability despite political or practical obstacles that often postpone enforcement.

### **3.2 Jurisdiction of the ICC over Genocide**

The jurisdiction of the ICC over the crime of genocide is grounded in the Rome Statute, which establishes both the scope and limits of its competence. The Court's subject-matter jurisdiction, as provided in Article 5 of the Statute, expressly covers genocide alongside crimes against humanity, war crimes, and the crime of aggression.<sup>105</sup> Genocide itself is defined in Article 6, which mirrors the 1948 Genocide Convention, thereby criminalising acts such as killing, causing serious bodily or mental harm, inflicting conditions calculated to destroy a group, imposing

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<sup>102</sup> Article 31 of the Rome Statute of the International Criminal Court

<sup>103</sup> Article 33(2) of the Rome Statute of the International Criminal Court

<sup>104</sup> See general ICTY defence analyses referencing *Jelisić* on limits of exculpation and the ICTY defence manual citing *Jelisić* and ICC art. 3.

<sup>105</sup> Article 5 (a)-(d) of the Rome Statute of the International Criminal Court

measures to prevent births, and forcibly transferring children when committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.<sup>106</sup>

The ICC's jurisdiction is limited temporally to crimes committed after 1 July 2002, the date the Rome Statute entered into force.<sup>107</sup> It also has both territorial and personal jurisdiction where crimes occur on the territory of a State Party or are committed by a national of a State Party.<sup>108</sup> Importantly, the Court may exercise jurisdiction even over non-States Parties where the situation has been referred by the United Nations Security Council (UNSC) acting under Chapter VII of the UN Charter.<sup>109</sup> A notable example is the situation in Darfur, Sudan, referred to the ICC in March 2005 by UNSC Resolution 1593. Although Sudan is not a State Party to the Rome Statute, this referral conferred jurisdiction over crimes committed on its territory from 1 July 2002 onwards.<sup>110</sup>

The principle of complementarity under Article 17 further restricts ICC jurisdiction, ensuring that the Court acts only where national courts are unwilling or unable genuinely to investigate or prosecute. This preserves state primacy while ensuring accountability where domestic systems fail. Moreover, the Prosecutor has the power to initiate investigations proprio motu under Article 15, subject to judicial authorisation, thereby broadening the potential for cases to be brought before the Court. In practice, the ICC's jurisdiction over genocide has been tested in several high-profile situations. The most significant is the Darfur investigation, where the Prosecutor sought arrest warrants against senior Sudanese officials, including former President Omar

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<sup>106</sup> Article 6 (a)-(e) of the Rome Statute of the International Criminal Court

<sup>107</sup> N. M Orina and M. J Christensen, 'Jurisdictional Links: International Criminal Court (ICC)' < <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3227.013.3227/law-mpeipro-e3227> > accessed 5<sup>th</sup> September, 2025

<sup>108</sup> Article 12(1) of the Rome Statute of the International Criminal Court

<sup>109</sup> Article 13(b) of the Rome Statute of the International Criminal Court

<sup>110</sup> ICC, 'Darfur, Sudan' < <https://www.icc-cpi.int/darfur?> > accessed 5<sup>th</sup> September, 2025

Hassan Ahmad Al-Bashir. The Pre-Trial Chamber initially issued warrants for crimes against humanity and war crimes but, following an appeal, added charges of genocide in 2010, marking the first time a sitting head of state was indicted for genocide by the ICC.<sup>111</sup> The Court also proceeded against Ali Muhammad Ali Abd-Al-Rahman, known as Ali Kushayb, who was arrested in 2020 and is currently on trial, facing charges including genocide, crimes against humanity, and war crimes.

Although the ICC has not yet delivered a final conviction for genocide, these proceedings illustrate how jurisdiction operates both substantively and procedurally. They also demonstrate the significance of UNSC referrals in extending the reach of the Court to non-State Parties. For context, while outside the ICC, the International Court of Justice (ICJ) has addressed state responsibility for genocide in cases such as *Bosnia and Herzegovina v. Serbia and Montenegro* (2007), where it held Serbia responsible for failing to prevent and punish genocide committed in Srebrenica. Such jurisprudence complements the ICC's role by affirming genocide as a jus cogens crime that engages both individual and state accountability.

In conclusion, the ICC's jurisdiction over genocide is firmly embedded in the Rome Statute and has been operationalised in practice through State Party consent, UNSC referrals, and prosecutorial initiative. While actual convictions for genocide are still pending, the Darfur cases illustrate how the Court applies its jurisdictional framework in concrete contexts, reflecting both the promise and challenges of enforcing accountability for one of the gravest crimes under international law.

### **3.3 The Office of the Prosecutor and Investigative Process.**

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<sup>111</sup> *Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09

The Office of the Prosecutor (OTP) is one of the four principal organs of the International Criminal Court (ICC), alongside the Presidency, the Chambers, and the Registry. Its mandate is central to the functioning of the Court, as it is responsible for receiving referrals, conducting preliminary examinations, initiating investigations, and prosecuting cases before the Chambers.<sup>112</sup> The OTP operates independently under Article 42 of the Rome Statute, which establishes its functional and institutional autonomy, while ensuring that it is not subject to external influence from States Parties, the UN, or other actors.

The investigative process begins with a preliminary examination, governed by Article 15 of the Statute, which allows the Prosecutor to act on referrals by a State Party, the United Nations Security Council (UNSC), or *proprio motu* (on their own initiative) with the authorisation of the Pre-Trial Chamber.<sup>113</sup> At this stage, the Prosecutor assesses jurisdictional issues, admissibility under the principle of complementarity,<sup>114</sup> and whether opening an investigation serves the “interests of justice.” For example, in the situation in Kenya, the Prosecutor opened investigations *proprio motu* into post-election violence in 2007–2008, marking the first time the Court authorised such proceedings without a state referral.<sup>115</sup>

Once an investigation is authorised, the OTP undertakes evidence-gathering and witness interviews in accordance with Articles 54 and 55 of the Rome Statute, which require it to establish the truth by investigating both incriminating and exonerating circumstances equally.<sup>116</sup> This impartiality was notably highlighted in the Lubanga case, where the Prosecutor pursued evidence not only of child soldier recruitment but also examined claims that could exonerate the

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<sup>112</sup> Article 42 (1)-(9) of the Rome Statute of the International Criminal Court

<sup>113</sup> Article 15 of the Rome Statute of the International Criminal Court

<sup>114</sup> Article 17 of the Rome Statute of the International Criminal Court

<sup>115</sup> *Prosecutor v William Samoei Ruto et al.*, ICC-01/09-01/11

<sup>116</sup> Article 54 of the Rome Statute of the International Criminal Court

accused. The case of *Prosecutor v Thomas Lubanga Dyilo*<sup>117</sup> the Court's first-ever trial underscored the evidentiary burdens and challenges of protecting witnesses in conflict settings.

The investigative process is further characterised by strict adherence to the rights of suspects and accused persons, guaranteed under Article 55 of the Statute. Suspects must not be subjected to coercion, torture, or undue pressure during questioning, and they are entitled to counsel. These safeguards were reinforced in cases like *Prosecutor v. Jean-Pierre Bemba Gombo*,<sup>118</sup> where the Defence challenged the admissibility of evidence gathered during preliminary stages.

A crucial element of the OTP's work is cooperation with States and international organisations. Since the ICC lacks its own enforcement mechanism, it depends on State Parties for arrests, access to evidence, and witness protection, as emphasised in Articles 86–93 of the Rome Statute. The difficulties of securing state cooperation were starkly illustrated in the case of Omar Al-Bashir, where several States Parties failed to execute ICC arrest warrants despite their obligations.<sup>119</sup>

The OTP also manages sensitive evidentiary issues, including the use of intermediaries and the disclosure of information, which have been contentious in multiple proceedings. In *Lubanga*, the Court criticised the OTP for its handling of confidential UN documents, stressing the need for full disclosure to ensure a fair trial. Similarly, in *Prosecutor v Germain Katanga*,<sup>120</sup> evidentiary management was pivotal in determining the scope of liability.

In conclusion, the OTP functions as the engine of the ICC's judicial process, with its investigative process designed to balance prosecutorial zeal with fairness and the protection of

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<sup>117</sup> (ICC-01/04-01/06)

<sup>118</sup> ICC-01/05-01/08

<sup>119</sup> *Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09

<sup>120</sup> ICC-01/04-01/07

due process rights. Through cases such as *Lubanga*, *Ruto*, *Bemba*, and *Al-Bashir*, the OTP's mandate and challenges are clearly illustrated, showing the complexity of conducting international criminal investigations in politically sensitive and conflict-ridden environments

### **3.4 The Role of the Assembly of States Parties and the Security Council**

The Assembly of States Parties (ASP) and the United Nations Security Council (UNSC) play distinct but interrelated roles in the functioning of the International Criminal Court (ICC). The ASP is the Court's management oversight and legislative body, composed of representatives of States that have ratified or acceded to the Rome Statute, and its authority is derived from Articles 112–118 of the Statute.<sup>121</sup> It is responsible for the administration of the Court, including the adoption of the budget, the election of judges, the Prosecutor and Deputy Prosecutors, and providing management oversight of the Presidency, Chambers, and Office of the Prosecutor. It also adopts amendments to the Statute, as seen in the 2010 Kampala Amendments, which expanded the ICC's jurisdiction to cover the crime of aggression.<sup>122</sup>

The ASP also serves as a political forum for State Parties to reaffirm commitment to the Court's mandate, to debate cooperation challenges, and to build consensus on sensitive matters such as non-cooperation by States. For instance, following multiple failures by State Parties to arrest Omar Al-Bashir despite outstanding warrants, the ASP convened discussions on strengthening mechanisms of compliance.<sup>123</sup> This illustrates its quasi-political role in reinforcing the effectiveness of ICC judicial orders.

The UNSC, by contrast, has a more direct role in conferring or constraining the ICC's jurisdiction under Article 13(b) of the Rome Statute. This provision empowers the Council,

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<sup>121</sup> Article 112 of the Rome Statute of the International Criminal Court

<sup>122</sup> ICC, 'Assembly of States Parties' < <https://www.icc-cpi.int/asp?> > accessed 5<sup>th</sup> September, 2025

<sup>123</sup> *Prosecutor v Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09

acting under Chapter VII of the UN Charter, to refer situations to the ICC even where crimes occur in non-State Parties. This was unprecedentedly exercised in Resolution 1593 (2005), which referred the situation in Darfur, Sudan, to the Court despite Sudan not being a State Party. Similarly, in Resolution 1970 (2011), the Council referred the situation in Libya, resulting in cases against Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi.<sup>124</sup> These examples demonstrate the Security Council's unique power to expand ICC jurisdiction beyond the Statute's inherent limits.

The UNSC also exercises an unusual authority under Article 16 of the Rome Statute, which allows it to request a 12-month deferral of an investigation or prosecution, renewable by further resolutions. This has been controversial, with critics arguing that it politicises the Court by making the continuation of judicial proceedings subject to the will of a political body. For instance, the African Union has repeatedly urged the UNSC to invoke Article 16 to defer proceedings against Al-Bashir, though no such resolution was passed.

The interplay between the ASP and the UNSC highlights the delicate balance between judicial independence and political realities. While the ASP embodies the collective will of States Parties to strengthen and fund the Court, the UNSC has the capacity to extend the Court's reach to otherwise inaccessible situations, but also to limit its independence through deferrals. This dynamic has been evident in debates over the Court's alleged bias towards African cases, as many of these situations arose from Security Council referrals rather than proprio motu investigations.

In conclusion, the Assembly of States Parties plays a governance, legislative, and oversight role, ensuring that the ICC functions effectively and retains legitimacy among States Parties, while the

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<sup>124</sup> ICC, 'Libya' < <https://www.icc-cpi.int/situations/libya?>> accessed 5<sup>th</sup> September, 2025

Security Council wields unique powers to trigger jurisdiction and defer cases, situating the Court within the broader framework of international peace and security. Together, these two bodies exemplify the ICC's dual reliance on legal authority and political cooperation for its effective operation.

### **3.5 Legal Framework for Genocide Prosecution in Nigeria.**

The legal framework for the prosecution of genocide in Nigeria reflects a blend of international treaty obligations, constitutional provisions, and domestic statutes. Nigeria ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in 2009, thereby undertaking obligations under international law to prevent and punish genocide. Article V of the Genocide Convention obliges State Parties to enact effective domestic legislation criminalising genocide, yet Nigeria has faced criticism for not fully incorporating the Convention into national law, given the constitutional requirement under Section 12(1) of the Constitution<sup>125</sup> that international treaties have no force of law until domesticated by the National Assembly.

At the constitutional level, Nigeria provides fundamental human rights guarantees that form the foundation for prosecuting atrocities, including the right to life under Section 33(1) and the prohibition of torture, inhuman, or degrading treatment under Section 34(1)(a). These rights reinforce Nigeria's obligation to protect individuals and groups from acts that could amount to genocide (Nigeria Constitution 1999). However, the Constitution itself does not define or expressly criminalise genocide, leaving a gap that requires statutory intervention.

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<sup>125</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended)

Domestically, the most relevant statutes are the Criminal Code Act (applicable in Southern Nigeria) and the Penal Code Act (applicable in Northern Nigeria). Both codes criminalise murder, culpable homicide, and related offences, but fall short of codifying genocide as a distinct international crime. For instance, Section 316 of the Criminal Code defines murder, while Sections 221 and 222 of the Penal Code deal with culpable homicide punishable with death. These provisions may be used to prosecute acts that fall within the scope of genocide, such as mass killings, but they do not capture the specific “intent to destroy, in whole or in part, a national, ethnical, racial or religious group” that is the hallmark of genocide under international law.

Judicially, Nigerian courts have yet to deliver a landmark ruling on genocide, though there have been instances of mass violence that could arguably amount to genocidal acts under international definitions, such as the atrocities committed during the Nigerian Civil War (1967–1970) or more recent episodes of communal and sectarian violence. In practice, prosecutions for such acts have generally been pursued under ordinary criminal law provisions. The lack of judicial precedents reflects both political reluctance and the challenges of proving genocidal intent, which distinguishes genocide from other serious crimes.

Nigeria’s framework is also shaped by its obligations under regional instruments. The African Charter on Human and Peoples’ Rights, domesticated in Nigeria through the African Charter on Human and Peoples’ Rights Act<sup>126</sup> guarantees rights to life, dignity, and equality, all of which underpin protection against genocidal acts. Nigerian courts, notably in *Abacha v. Fawehinmi*,<sup>127</sup> have held that the Charter, being domesticated, has the force of law and can be invoked in

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<sup>126</sup> African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act 1981

<sup>127</sup> (2000) 6 NWLR (Pt 660) 228

domestic courts, strengthening the legal foundation for human rights protection in relation to genocide.

In conclusion, the legal framework for genocide prosecution in Nigeria is multi-layered, resting on constitutional guarantees, domestic statutes, and international obligations. Strengthening the framework requires not only legislative clarity and prosecutorial commitment but also a willingness to test these laws in Nigeria's courts, thereby transforming the country's international obligations into effective domestic justice mechanisms.

## **CHAPTER FOUR**

### **CASE STUDIES AND CRITICAL ASSESSMENT OF ICC PROSECUTION OF GENOCIDE.**

#### **4.1 Prosecutor v. Omar al-Bashir (Sudan)**

The case against Omar Hassan Ahmad al-Bashir,<sup>128</sup> represents a defining test of the International Criminal Court's (ICC) authority and effectiveness in prosecuting genocide. The former Sudanese president was charged in relation to the conflict in Darfur, following the United

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<sup>128</sup> Hereafter, "al-Bashir"

Nations Security Council (UNSC) referral under Resolution 1593 in 2005.<sup>129</sup> This referral conferred jurisdiction on the ICC despite Sudan not being a State Party to the Rome Statute, an important precedent for extending the Court's reach through Chapter VII of the UN Charter.<sup>130</sup>

The ICC issued two warrants for al-Bashir's arrest. The first, in March 2009, contained counts of crimes against humanity and war crimes. The second, in July 2010, added three counts of genocide for acts committed against specific ethnic groups in Darfur. These charges marked the first instance in which the ICC indicted a sitting head of state for genocide.<sup>131</sup> The prosecution alleged that al-Bashir bore individual and command responsibility for widespread attacks, murder, rape, extermination, and persecution by Sudanese forces and allied militias, with the intent to destroy targeted non-Arab communities.<sup>132</sup>

A central legal issue was whether a sitting head of state enjoyed immunity from ICC jurisdiction.<sup>133</sup> Al-Bashir and several supporting states invoked customary international law immunity,<sup>134</sup> while the ICC, relying on Rome Statute, held that official capacity does not exempt any individual from criminal responsibility for Rome Statute crimes.<sup>135</sup> This position created significant diplomatic friction, especially with the African Union (AU), which perceived the prosecution as politically selective and inconsistent with principles of sovereign equality. The Court's decision in the South Africa Non-Cooperation matter (2015) confirmed that state parties

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<sup>129</sup> Article 13(b) of the Rome Statute of the International Criminal Court 1998.

<sup>130</sup> Article 12(3) of the Rome Statute of the International Criminal Court 1998.

<sup>131</sup> ICC, 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir' < <https://www.icc-cpi.int/court-record/icc-02/05-01/09-3> > accessed 10<sup>th</sup> October, 2025.

<sup>132</sup> ICC, 'Omar Hassan Ahmad Al Bashir Suspected of five counts of crimes against humanity, two counts of war, and three counts of genocide allegedly committed in Darfur, Sudan. Not in ICC custody' < <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/AlBashirEng.pdf?>> accessed 10<sup>th</sup> October, 2025.

<sup>133</sup> Prosecutor v Omar Hassan Ahmad Al Bashir (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397-Corr (Appeals Chamber, 6 May 2019).

<sup>134</sup> B. Lucas, 'Holding an Arsonist's Feet to the Fire? - The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir' *American University International Law Review* (2009) vol 24(5)

<sup>135</sup> Article 27 of the Rome Statute of the International Criminal Court 1998.

are obliged to arrest suspects irrespective of office, yet it also exposed the ICC's dependence on state cooperation, since many states failed to execute the warrants.

Although al-Bashir was deposed in 2019 and remains in Sudanese custody, he has not been surrendered to The Hague. The case therefore illustrates the practical limits of ICC enforcement powers: despite clear legal authority, the Court lacks the coercive capacity to compel state compliance. The Darfur proceedings further demonstrated the evidentiary and political challenges in proving genocidal intent, the highest threshold under international criminal law. The inclusion of genocide charges in 2010 underscored the Court's determination to hold leaders accountable for such crimes, but the absence of an actual trial against al-Bashir weakens the ICC's deterrent effect and questions its operational legitimacy.<sup>136</sup>

Critically, the case highlights the tension between effectiveness and legitimacy in the ICC's genocide prosecutions. Legally, the al-Bashir warrants affirmed that no individual is immune before international law and strengthened the jurisprudence rejecting impunity for heads of state. Politically, however, the widespread non-cooperation and AU opposition revealed the Court's limited influence over states prioritising national or regional interests. Thus, while the ICC achieved normative progress in defining accountability, it failed to translate legal authority into concrete enforcement.

The al-Bashir case exemplifies the broader findings of this research, that the ICC's prosecution of genocide has advanced international criminal law theoretically but remains hindered by political resistance and structural weaknesses. It demonstrates how the Court's jurisdictional innovations (such as UNSC referrals and Article 27) have expanded legal accountability, yet its

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<sup>136</sup> ICC, 'Warrant of Arrest for Omar Hassan Ahmad Al Bashir' < <https://www.icc-cpi.int/court-record/icc-02/05-01/09-1> > accessed 10<sup>th</sup> October, 2025.

reliance on state cooperation constrains its ability to deliver justice. The prosecution reaffirmed the principle that genocide, as the “crime of crimes,” is punishable irrespective of rank or sovereignty, but the lack of arrest and trial reveals the enduring gap between law and enforcement.

Consequently, this case, stands as both a milestone and a cautionary example, it legitimised the ICC’s role in combating impunity for genocide but simultaneously exposed the institutional fragility and geopolitical realities limiting the Court’s capacity to fulfil that mandate.

#### **4.2 Prosecutor v. Jean-Pierre Bemba (CAR)**

The Central African Republic (CAR) experienced instability and violence in the early 2000s. In 2004, the CAR Government referred the situation to the ICC for investigation.<sup>137</sup> Jean-Pierre Bemba Gombo<sup>138</sup>, leader of the Mouvement de Libération du Congo (MLC), was alleged to bear command responsibility<sup>139</sup> for war crimes and crimes against humanity (murder, rape, and pillaging) committed by his forces in CAR.<sup>140</sup>

The ICC charged Bemba under the Rome Statute for failing to take “all necessary and reasonable measures” to prevent or punish crimes committed by subordinates.<sup>141</sup> In March 2016, Trial Chamber III found Bemba guilty on all five counts and sentenced him to 18 years’ imprisonment.<sup>142</sup> The conviction marked one of the ICC’s earliest judgments addressing command responsibility and sexual violence as war crimes.

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<sup>137</sup> CAR ratified the Rome Statute on 3 October 2001 and referred the situation in its territory since 1 July 2002 to the ICC.

<sup>138</sup> Hereafter, “Bemba”

<sup>139</sup> W. Wakabi, ‘CAR Prosecutor Tells Why Bemba Not Charged in Bangui’ < <https://iwpr.net/global-voices/car-prosecutor-tells-why-bemba-not-charged-bangui>?> accessed 10<sup>th</sup> October, 2025.

<sup>140</sup> ICC, ‘Central African Republic’ < <https://www.icc-cpi.int/car>?> accessed 10<sup>th</sup> October, 2025.

<sup>141</sup> Article 28(a) of the Rome Statute of the International Criminal Court.

<sup>142</sup> S. Susana and P. V Selliers, ‘The BEMBA Appeals Chamber Judgment: Impunity for Sexual and Gender-Based Crimes?’ < [https://digitalcommons.wcl.american.edu/facsch\\_lawrev/1361/](https://digitalcommons.wcl.american.edu/facsch_lawrev/1361/)> accessed 10<sup>th</sup> October, 2025.

However, on 8 June 2018, the Appeals Chamber acquitted Bemba, holding that the Trial Chamber had erred in exceeding the scope of the confirmed charges and in assessing whether Bemba had taken sufficient measures given his position as a remote commander.<sup>143</sup> The majority found that the Trial Chamber demanded measures unreasonable in context and failed to appreciate the logistical and political constraints under which Bemba operated. The acquittal underscored the strict evidentiary standard required for proving command responsibility.<sup>144</sup>

The decision drew mixed reactions. Some scholars argued it weakened ICC efforts to prosecute sexual and gender-based crimes,<sup>145</sup> while others viewed it as strengthening due process and ensuring that convictions remain within the confines of the charges confirmed.<sup>146</sup> The *Bemba* case remains a landmark for testing the scope of Article 28, illustrating how procedural and evidentiary rigor can determine the outcome of complex international prosecutions.

Since its establishment in 2002, the ICC has investigated genocide, crimes against humanity, war crimes, and aggression. Its earliest cases, largely focused on Africa, led to accusations of regional bias. The Court defended this by noting that most were self-referrals by African states.<sup>147</sup>

A notable trend has been the ICC's focus on command responsibility, as seen in *Prosecutor v. Omar al-Bashir* and *Prosecutor v. Jean-Pierre Bemba*. These cases reinforced accountability of

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<sup>143</sup> ICC, 'ICC Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity' < <https://www.icc-cpi.int/news/icc-appeals-chamber-acquits-mr-bemba-charges-war-crimes-and-crimes-against-humanity>> accessed 10<sup>th</sup> October, 2025.

<sup>144</sup> S. Susana and P. V Seller, 'The BEMBA Appeals Chamber Judgment: Impunity for Sexual and Gender-Based Crimes' *William & Mary Bill of Rights Journal* (2020) vol 27(3).

<sup>145</sup> Ibid

<sup>146</sup> P. Joseph, 'Prosecutor v. Jean-Pierre Bemba Gombo: Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute" (Int'l Crim. Ct.)' < <https://www.cambridge.org/core/journals/international-legal-materials/article/prosecutor-v-jeanpierre-bemba-gombo-judgment-on-the-appeal-of-mr-jeanpierre-bemba-gombo-against-trial-chamber-iiis-judgment-pursuant-to-article-74-of-the-statute-intl-crim-ct/349912A47486DF7A0F578EF26BC5DFC3>> accessed 10<sup>th</sup> October, 2025.

<sup>147</sup> W. Schabas, *An Introduction to the International Criminal Court*, 6th ed. (Cambridge: Cambridge University Press, 2020), 87.

political and military leaders for crimes committed under their authority,<sup>148</sup> but also revealed institutional limits particularly the Court's reliance on state cooperation, lack of enforcement powers, and the complexity of proving superior responsibility.

The collapse or acquittal of several cases, including Bemba's, highlighted procedural and evidentiary challenges. The Appeals Chamber's 2018 decision emphasized that trial judgments must adhere strictly to confirmed charges and realistic assessments of control, showing that due process concerns can outweigh prosecutorial ambitions. Such reversals demonstrate both the ICC's commitment to legal precision and the fragility of its authority when prosecutions fail after years of litigation.

Other lessons include the need to strengthen complementarity by empowering domestic courts, to improve witness protection and evidence gathering, and to diversify investigations beyond Africa to counter perceptions of bias. Victim participation and outreach remain vital for the ICC's moral legitimacy and restorative mission.

The *Bemba* case, when read alongside *al-Bashir*, crystallizes the study's central conclusion: the ICC's contribution to the prosecution of genocide and related crimes lies more in the *development of legal standards* than in consistent convictions. Both cases reveal how political pressures, evidentiary limits, and procedural constraints undermine enforcement, even as jurisprudence on command responsibility and head-of-state immunity advances.

Thus, while the ICC has established a robust normative framework against impunity, its ability to translate that framework into concrete accountability remains conditional on state cooperation

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<sup>148</sup> K. Ambos, 'Command Responsibility and the ICC Jurisprudence' *Journal of International Criminal Justice* (2020) vol 18( )4.

and prosecutorial precision. The Court's long-term legitimacy will depend on balancing fairness, efficiency, and political independence the very challenges exposed by *Bemba* and *al-Bashir*.

### **4.3 Impact Assessment.**

The prosecution of genocide by the International Criminal Court (ICC) in the cases of Prosecutor v. Omar al-Bashir and Prosecutor v. Jean-Pierre Bemba has had profound implications on international criminal jurisprudence, state sovereignty, and the global pursuit of justice. These cases not only tested the limits of the ICC's legal authority but also revealed the practical, political, and moral challenges that accompany the enforcement of international criminal law. The overall impact of these prosecutions can be assessed from legal, political, institutional, and socio-moral perspectives.

#### **4.3.1. Legal Impact**

Legally, the al-Bashir and Bemba prosecutions expanded the body of international criminal law and clarified several jurisprudential principles.

The Omar al-Bashir case established a groundbreaking precedent that a sitting head of state is not immune from prosecution for genocide or crimes against humanity. By issuing arrest warrants against Bashir, the ICC affirmed the principle of individual criminal responsibility irrespective of official capacity, as enshrined in Article 27 of the Rome Statute. This decision has since influenced the global understanding of accountability and the non-derogable nature of justice for mass atrocities.

The Jean-Pierre Bemba case, while not directly involving genocide, made significant contributions to the interpretation of command responsibility under Article 28 of the Rome Statute. The initial conviction in 2016 marked the ICC's first successful prosecution based on a superior's failure to prevent or punish crimes committed by subordinates. Even though the Appeals Chamber later overturned the conviction, the case advanced legal debates about the threshold of control, due diligence, and the responsibility of political and military leaders during conflicts. Consequently, the case strengthened the jurisprudential foundation for future prosecutions involving genocide and other mass atrocities by clarifying evidentiary requirements and procedural fairness.

#### **4.3.2. Political Impact**

Politically, the prosecutions highlighted the tension between international justice and state sovereignty. The al-Bashir case exposed the limitations of the ICC's authority in enforcing its mandates without the cooperation of state actors. Despite multiple arrest warrants, Bashir managed to travel to several African and Middle Eastern countries without arrest, illustrating the ICC's dependency on state compliance and the lack of an independent enforcement mechanism.

This dynamic triggered a wave of criticism among African Union (AU) member states, some of whom accused the ICC of selective justice and political bias against African leaders. Several states, including South Africa and Kenya, questioned their obligations under the Rome Statute and even threatened withdrawal. Thus, while the Bashir prosecution reinforced the principle of accountability, it also strained the ICC's relationship with African nations and fueled debates on the politicization of international criminal justice.

In contrast, the Bemba case demonstrated the ICC's political vulnerability in handling cases involving complex command structures and cross-border conflicts. The eventual acquittal of Bemba raised concerns about prosecutorial competence and the perception that the ICC targets certain regions or individuals more aggressively than others. Nevertheless, both cases have forced states and international organizations to confront the need for a balance between justice and political stability.

#### **4.3.3. Institutional Impact**

From an institutional standpoint, these prosecutions revealed both the strengths and weaknesses of the ICC as a permanent judicial body. The Bashir case tested the Court's ability to maintain independence in the face of political pressure from powerful states and regional blocs. It also underscored the need for better cooperation frameworks between the ICC, the United Nations Security Council (UNSC), and member states to ensure compliance with arrest warrants and referrals made under Article 13(b) of the Rome Statute.

The Bemba case, meanwhile, influenced internal reforms within the ICC's Office of the Prosecutor (OTP), particularly in areas of evidence gathering, witness protection, and trial management. The Appeals Chamber's reversal of Bemba's conviction emphasized the importance of rigorous evidentiary standards and the need for more effective case-building procedures. Consequently, the ICC has since implemented measures to improve investigative capacity and the credibility of prosecutions, reflecting institutional learning from these high-profile cases.

#### **4.3.4. Socio-Moral and Global Justice Impact**

Socially and morally, the prosecution of Bashir and Bemba reinforced the global discourse on accountability, deterrence, and the moral authority of international justice. The Bashir indictment sent a powerful message to political and military leaders worldwide that genocide and mass atrocities will not go unpunished, regardless of one's position or political influence. It gave victims in Darfur a sense of international recognition and hope, even if justice has yet to be fully achieved.

The Bemba proceedings, despite ending in acquittal, marked a significant step forward in addressing conflict-related sexual violence, as it was the first ICC case to hold a political leader accountable for systematic rape as a weapon of war. This expanded the moral and humanitarian dimensions of international justice, emphasizing the importance of victim-centered approaches and reparative mechanisms in global criminal law.

However, the delays, acquittals, and enforcement failures have also diminished public confidence in the ICC's effectiveness. Critics argue that the Court's slow pace and susceptibility to political interference undermine its deterrent value. Nonetheless, both cases have sparked meaningful global conversations about justice, impunity, and the collective responsibility of the international community to prevent genocide.

In conclusion, the Prosecutor v. Omar al-Bashir and Prosecutor v. Jean-Pierre Bemba cases stand as milestones in the evolution of international criminal justice. Their impacts extend beyond individual accountability to shape legal doctrines, political relations, institutional practices, and moral consciousness. While the ICC's pursuit of genocide prosecutions continues to face obstacles particularly in enforcement and political legitimacy these cases have undeniably deepened global understanding of justice for mass atrocities. They reveal that the path toward

effective international justice is both legally complex and politically contested, yet fundamentally necessary in the fight against impunity for genocide and related crimes.

## **CHAPTER FIVE**

### **SUMMARY, RECOMMENDATIONS AND CONCLUSION**

#### **5.1 Summary of Key Findings**

The ICC stands as the foremost institution in the global legal order for prosecuting genocide, war crimes, and crimes against humanity. Its establishment in 2002 marked a turning point in the

evolution of international criminal justice, symbolizing the collective will of the international community to ensure that perpetrators of the gravest crimes do not escape punishment. The role of the ICC in the prosecution of genocide is grounded in the principles of accountability, deterrence, and justice for victims. By interpreting and applying international norms codified in the Rome Statute of 1998, the ICC has provided a permanent judicial mechanism that seeks to bridge the gap between moral outrage and enforceable legal responsibility.

In prosecuting genocide, the ICC emphasizes the concept of individual criminal responsibility, which forms the cornerstone of modern international criminal law. Article 25 of the Rome Statute codifies this principle by providing that anyone who commits, orders, aids, abets, or otherwise contributes to the commission of a crime within the Court's jurisdiction is individually liable. The doctrine breaks from traditional notions of state responsibility by targeting decision-makers and executors of genocidal acts. The prosecution of figures such as Omar al-Bashir, the former President of Sudan, exemplifies this commitment to personal accountability, affirming that immunity based on political office cannot shield perpetrators from justice.

The ICC operates under the principle of complementarity, which defines its jurisdictional relationship with national legal systems. According to Article 17 of the Rome Statute, the ICC may exercise jurisdiction only when national courts are unwilling or unable to prosecute serious international crimes. This principle safeguards state sovereignty while ensuring that impunity does not prevail in situations where domestic systems fail. Complementarity thus ensures that the ICC functions as a court of last resort, stepping in only when justice cannot be served at the national level. In cases such as Sudan and the Central African Republic (CAR), the Court has invoked this principle to justify its involvement, given the inability of domestic authorities to prosecute high-ranking officials implicated in genocide and related crimes.

A clear distinction exists between genocide, war crimes, and crimes against humanity, although they are all categorized under the ICC's jurisdiction. War crimes involve serious violations of the laws and customs of war during armed conflict, while crimes against humanity refer to widespread or systematic attacks directed against civilian populations. Genocide, however, carries the unique element of intent to destroy a protected group, making it the "crime of crimes" within international law. The ICC's jurisprudence has consistently sought to maintain this conceptual distinction while recognizing the often-overlapping factual contexts in which these crimes occur.

The theoretical foundations underpinning the ICC's role in prosecuting genocide can be seen in theories like legal positivism. Beyond positivism, the ICC also embodies the theory of deterrence, which posits that punishment serves to discourage future crimes. The prosecution of genocide, therefore, not only seeks to punish perpetrators but also to deter potential violators by demonstrating that accountability is unavoidable. Despite criticisms that the deterrent effect is limited due to political constraints and enforcement challenges, the ICC's symbolic and normative influence remains significant.

Historically, the ICC's approach to genocide prosecution evolved from the precedents set by earlier international tribunals. The Nuremberg and Tokyo Tribunals after World War II marked the first instances where individuals were held criminally liable for crimes against humanity and related offences. Although genocide as a legal concept had not yet been codified, the Nuremberg principles laid the groundwork for recognising that individuals, not just states, could bear responsibility for atrocities. The subsequent creation of the ICTY and the ICTR further developed the legal doctrines that now guide the ICC. The ICTR's landmark ruling in *Prosecutor v. Akayesu* (1998) was the first to recognise rape as a form of genocide, significantly expanding

the interpretative scope of the crime. These ad hoc tribunals demonstrated both the potential and limitations of temporary international justice, leading to the creation of a permanent court through the Rome Statute in 1998.

The Rome Statute provides the comprehensive legal and institutional framework within which the ICC operates. It defines genocide, establishes jurisdictional parameters, and outlines procedural mechanisms for investigation and prosecution. The ICC's jurisdiction over genocide extends to crimes committed on the territory or by nationals of State Parties, as well as situations referred by the United Nations Security Council. The Office of the Prosecutor (OTP) plays a central role in gathering evidence, initiating investigations, and pursuing indictments, while the Assembly of States Parties oversees administrative and financial aspects. The relationship between the ICC and the Security Council has been pivotal, especially in cases like Sudan and Libya, where referrals were made under Chapter VII of the UN Charter.

The ICC's engagement with genocide cases has been both transformative and controversial. The prosecutions of Omar al-Bashir and Jean-Pierre Bemba serve as illustrative examples. The Bashir case reinforced the principle that no individual, not even a sitting head of state, is above the law. Although enforcement remains a challenge, the issuance of arrest warrants against Bashir signaled a new era of accountability in international law. Similarly, the Bemba case advanced the understanding of command responsibility and the treatment of sexual violence as an instrument of mass atrocity, even though the conviction was later overturned. These cases collectively reflect the ICC's evolving role in refining legal doctrines, promoting deterrence, and asserting the moral authority of international justice.

However, the ICC's efforts have not been without limitations. The Court faces persistent challenges related to political interference, selective prosecution, and a lack of universal

jurisdiction. Many powerful states, including the United States, China, and Russia, are not parties to the Rome Statute, limiting the ICC's reach. Moreover, the Court's reliance on state cooperation for arrests and enforcement hampers its effectiveness. Despite these obstacles, the ICC continues to play a vital role as a symbol of hope for victims of genocide and as a mechanism for upholding the global rule of law. Its existence serves as a deterrent to would-be perpetrators and as a reminder that impunity cannot be an enduring feature of international relations.

In conclusion, the ICC's role in the prosecution of genocide is both legally significant and morally imperative. Through its jurisprudence, the Court has advanced the legal understanding of genocide, reinforced the principles of individual accountability and complementarity, and contributed to the deterrence of future atrocities. Historically rooted in the Nuremberg legacy and strengthened by the lessons of the ad hoc tribunals, the ICC represents humanity's collective resolve to confront the darkest manifestations of human conduct. While challenges persist in enforcement and political legitimacy, the ICC's role in prosecuting genocide remains a cornerstone of modern international justice, embodying the enduring pursuit of accountability and the prevention of future atrocities.

## **5.2 Recommendations**

In light of the challenges, successes, and limitations surrounding the ICC's role in prosecuting genocide, several recommendations can be made to strengthen the Court's capacity to fulfil its mandate effectively and ensure that the pursuit of justice is both meaningful and sustainable.

To begin with, there is a pressing need for greater cooperation between States Parties and the ICC. One of the greatest impediments to the prosecution of genocide remains the unwillingness

or inability of states to arrest and surrender indicted persons. The case of Prosecutor v. Omar al-Bashir demonstrated the ICC's dependence on state cooperation, as several member states failed to execute arrest warrants despite being legally obliged to do so. To address this, the Assembly of States Parties and the United Nations should work collaboratively to design clearer mechanisms for enforcing compliance, including the imposition of sanctions or diplomatic consequences on states that disregard their obligations. Strengthening cooperation frameworks through bilateral and multilateral agreements would enhance the ICC's authority and prevent political interference from undermining justice.

Additionally, the ICC should expand its engagement with domestic legal systems to make the principle of complementarity more effective. The Court's long-term success depends on the ability of national jurisdictions to prosecute genocide cases independently. To this end, the ICC should provide technical and financial assistance to member states to help build prosecutorial, investigative, and judicial capacities. Establishing regional training centres and encouraging legal harmonisation between the Rome Statute and domestic criminal codes would promote shared ownership of justice processes. A stronger domestic capacity for prosecuting genocide would not only reduce the ICC's workload but also foster a sense of justice that is locally grounded and internationally credible.

Another important recommendation is the need for reform within the Office of the Prosecutor (OTP). Several ICC cases, such as Prosecutor v. Jean-Pierre Bemba, have highlighted deficiencies in investigative strategies and evidence management. The Court must enhance its fact-finding capabilities through improved witness protection programs, forensic technology, and investigative training. The OTP should also ensure a more balanced approach to case selection, avoiding perceptions of regional or political bias. Transparent prosecutorial guidelines and

consistent standards for the initiation of investigations would reinforce confidence in the Court's impartiality and strengthen its legitimacy among member states and the global community.

The ICC should also intensify its efforts toward victim participation and reparations. Victims of genocide often suffer long-term psychological, social, and economic consequences that cannot be fully remedied by convictions alone. Therefore, the Court should continue to empower victims through participatory justice mechanisms, including testimony rights, community dialogues, and compensation schemes. The Trust Fund for Victims (TFV) must be better financed and more proactive in implementing reparative measures that address both individual and collective harm. By centring justice around victims, the ICC will reaffirm its humanitarian mission and strengthen its moral standing as an institution committed to restorative as well as retributive justice.

Furthermore, there is an urgent need for increased international awareness and political support for the ICC. Many of the Court's challenges stem from limited political will and resistance from powerful non-member states. Diplomatic engagement, advocacy, and education are vital in promoting universal adherence to the Rome Statute. The United Nations, regional organisations such as the African Union, and civil society actors should collaborate to counter misinformation about the ICC and emphasise its role in preventing future genocides. The ICC must also continue dialogue with non-member states to encourage ratification of the Rome Statute, ensuring that justice for genocide becomes truly universal rather than selective.

In addition, funding and resource allocation must be improved. The ICC's effectiveness is constrained by financial limitations that affect investigations, witness protection, and trial efficiency. Member states should prioritise consistent and adequate funding to ensure the timely and thorough prosecution of genocide cases. Resource diversification through voluntary contributions, partnerships with international organisations, and public-private collaborations can

also help stabilise the Court's operations. A well-funded ICC is essential for credible, independent, and prompt justice delivery.

Lastly, the ICC should embrace innovation and digital transformation in its work processes. Technological advancements can enhance the documentation of atrocities, secure digital evidence, and improve the efficiency of trials. Incorporating artificial intelligence tools, satellite imagery, and secure digital archives would modernise the Court's investigative and prosecutorial functions. Such innovations can help overcome evidentiary challenges that have historically hindered genocide prosecutions.

In conclusion, while the ICC has made remarkable strides in shaping international accountability for genocide, its future effectiveness depends on a concerted effort by states, institutions, and the global community to address its structural and operational challenges. Enhanced state cooperation, institutional reform, victim-centred justice, increased funding, and technological advancement are vital for the ICC to achieve its mandate of ensuring that those who commit the crime of genocide are held accountable. By implementing these recommendations, the ICC can strengthen its legitimacy, restore global confidence in international criminal justice, and uphold the enduring principle that impunity for genocide must never be tolerated.

### **5.3 Conclusion**

The establishment of the ICC marked a monumental advancement in the international community's commitment to combating impunity for the world's most heinous crimes, including genocide. Through its creation, the international legal order took a definitive step toward ensuring that the perpetrators of mass atrocities, regardless of rank, political influence, or national status, are held individually accountable. The ICC's role in the prosecution of genocide

is thus not only legal but profoundly moral and symbolic, embodying humanity's collective determination to confront the gravest violations of human rights.

From its legal foundation in the Rome Statute of 1998, the ICC has served as a permanent judicial body tasked with addressing genocide, crimes against humanity, war crimes, and the crime of aggression. The codification of genocide under Article 6 of the Statute aligns with the 1948 Genocide Convention and reaffirms the international community's long-standing recognition of genocide as a distinct and universally condemned offence. The ICC's contribution lies in its ability to translate this moral condemnation into enforceable law by establishing mechanisms for prosecution, trial, and punishment. In this sense, the ICC represents the institutionalisation of global justice and the transformation of moral outrage into judicial action.

The Court's jurisprudence has been instrumental in developing and clarifying essential principles of international criminal law, particularly individual criminal responsibility and the principle of complementarity. The concept of personal liability for genocide ensures that no individual, whether a political leader, military commander, or ordinary citizen, can escape justice by hiding behind the shield of state sovereignty. Complementarity, on the other hand, balances respect for national judicial systems with the international obligation to prevent impunity. This dual framework has redefined the global architecture of accountability by encouraging domestic prosecution while maintaining an international safety net when states fail to act.

Moreover, the ICC's existence has had significant implications for deterrence, prevention, and global governance. The prosecution of genocide serves not only to punish perpetrators but also to send a clear message that such acts will not go unaddressed. Even though empirical evidence of deterrence remains contested, the Court's very presence has altered political calculations in conflict zones by raising the potential costs of engaging in mass atrocities. The ICC's

interventions in cases such as Prosecutor v. Omar al-Bashir (Sudan) and Prosecutor v. Jean-Pierre Bemba (Central African Republic) underscore its willingness to challenge entrenched political power and affirm the universality of justice. These cases have also contributed to the expansion of international legal principles such as the non-recognition of immunity for sitting heads of state and the refinement of command responsibility thereby advancing both legal doctrine and practical accountability.

However, despite its achievements, the ICC faces considerable challenges that limit its effectiveness in the prosecution of genocide. The Court's dependence on state cooperation remains a fundamental obstacle, as evidenced by the refusal of several nations to execute arrest warrants or comply with investigative requests. Political interference and accusations of selective justice particularly from African states have further complicated the ICC's legitimacy. The uneven distribution of cases and the reluctance of powerful non-signatory states, including the United States, China, and Russia, to join the Rome Statute, have constrained the universality of the Court's jurisdiction. These challenges reveal the tension between the pursuit of international justice and the realities of international politics, emphasising that the ICC operates in a deeply politicised global environment.

Institutionally, the ICC continues to evolve through both success and failure. The reversal of the Bemba conviction, for instance, highlighted weaknesses in prosecutorial strategy and evidence management but also demonstrated the Court's internal checks and balances in ensuring fairness and procedural integrity. The ICC's efforts to include victims' participation and reparative mechanisms represent another crucial dimension of its work. By giving victims, a voice and providing reparations through the Trust Fund for Victims (TFV), the Court has shifted international criminal law from a purely retributive model to one that embraces restorative

justice. This evolution underscores the ICC's dual mission to punish perpetrators and to restore the dignity of victims.

The historical evolution of international criminal justice provides context for the ICC's role. From the Nuremberg and Tokyo Tribunals after World War II to the ad hoc tribunals for the former Yugoslavia and Rwanda, the trajectory of accountability reflects a gradual movement from temporary, selective mechanisms toward a permanent, universal institution. The ICC represents the culmination of this process, a standing court capable of addressing mass atrocities wherever they occur. Yet, its continued relevance depends on its ability to adapt to changing global realities, maintain impartiality, and secure broader international support.

In the broader context, the ICC's pursuit of genocide prosecutions has moral, political, and humanitarian implications. It reinforces the principle that the international community bears collective responsibility for preventing and punishing genocide. The Court's existence acts as a moral compass, guiding states toward respect for human rights and reminding humanity of the catastrophic consequences of indifference. While challenges persist, including enforcement gaps and political resistance, the ICC's very persistence in the face of adversity demonstrates the global community's refusal to accept impunity as an inevitable feature of international relations.

In conclusion, the ICC has played a pivotal role in shaping the modern framework for the prosecution of genocide. It has institutionalised accountability, advanced the legal definition and understanding of genocide, and provided a judicial platform for victims to seek justice. Although the ICC has yet to achieve universal acceptance or flawless effectiveness, its contributions to global justice remain profound and enduring. Moving forward, the strengthening of state cooperation, enhancement of investigative capacity, political neutrality, and broader ratification of the Rome Statute will be essential in realising the ICC's vision. Ultimately, the fight against

genocide is not solely the responsibility of the Court but a shared moral duty of all nations and peoples. The ICC stands as a beacon of hope that, despite political complexities, justice for the gravest crimes remains an attainable and necessary ideal in the pursuit of peace, dignity, and humanity.

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