

# The Effectiveness of the ICC in Combatting Genocide and Crime Against Humanity Under International Law: A Critical Appraisal

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## Abstract

The international criminal law is a rich and varied subject bearing upon most of the great issues facing individual and international community. The paper aims at examining the role of international criminal court (ICC) in combatting crime against humanity and genocide. The study is designed to assess the parts played by the international criminal court in combating crime against humanity and genocides as well as challenges face by the international criminal court. To achieve this objective, we make use of primary and secondary method of data collection and analysis. Our findings revealed that, the international criminal court is not effective in combatting genocide and crime against humanity due to numerous challenges. Against this backdrop, we therefore, recommend among others that, all nations should subscribe to the ICC Statute and extend their whole-hearted support for the prosecution and related activities of the ICC especially joint investigation to establish evidence of genocides and crimes against humanity as well as diplomatic channels to deter and respond to emerging threats of genocide and crime against humanity. This and others will go a long way in curtailing the weakness of the international criminal court in combating genocide and crime against humanity.

**Keywords:** Critical, Appraisal, Effectiveness, ICC, Combatting, Genocide, Crime against Humanity, International Law.

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## INTRODUCTION

The International Criminal Court (ICC) has the potential to become effective despite its acute enforcement problems. In the event that ICC indictments can be used to empower weak opposition groups so that they are able to affect regime change without resort to the commission of atrocities, the Court will have a residual deterrent effect as predicted by Gilligan's Model, while at the same time obviating the opposition's need to commit atrocities in order to remove a particularly ruthless leader. [1] In the presence of the threat of opposition punishment, leaders indicted by the ICC are likely to find it to be in their self-interest to surrender to the ICC in order to escape harsher opposition punishment. [2]

Moreover, in 1998, a groundbreaking idea turned into reality, and 50 years of debate ended as the first International Criminal Court (ICC) was established as a result of the Rome Statute. This judicial body took shape and created the foundation of a permanent court to prosecute persons that committed war crimes, crimes against humanity and genocide. The idea of an international criminal court came about from many factions. At the end of World War II, the Allied Powers responded swiftly after the discovery of crimes committed by the Axis Powers. They therefore created the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal (IMT). This chapter answers the third specific research question (How effective is the ICC in combating genocide under International Law?) and attains the third specific research

<sup>1</sup> M.J. Gilligan, 'Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime', International Organization, 60/04 (2006), 935-67.

<sup>2</sup> See suggestion that Saif al-Islam Gaddafi concluded it was safer for him to surrender to the ICC than to remain in Libya post regime-collapse in Ben Farmer, Saif al-

Islam Gaddhafi 'trying to broker deal to surrender to the ICC', The Telegraph (October 26, 2011),

objective (To examine the effectiveness of the ICC in combating genocide under International Law).

This paper is underpinned under the deterrence theory. This theory predicts that the credible threat of punishment from a well-enforced criminal justice system will reduce crime: it will dissuade individuals from becoming criminals in the first place or from continuing with a life of crime. One primary justification for creating and maintaining both national and international justice system is the belief that they deter crime.

## **SUCSESSES OF THE ICC IN COMBATING GENOCIDE AND CRIMES AGAINST HUMANITY**

The ICC has recorded some successes which include: Increased efficiency and reduced state opposition, Efficient and successful judicial entity, clearly defined roles, The International Tribunal for Rwanda and its Contribution in the Rwandan genocide. The role of the ICTR in the Rwandan Genocide, these successes will be explained in details in the subsequent paragraphs.

### **Increased efficiency and reduced state opposition**

The ICC is a fairly young institution, having only been open and active since 2003. Therefore, the institution, like the Tribunal courts before it, have to take into account small successes, especially when dealing with doctrine and law that the court achieves in order to evolve its uses and expand its powers through increased efficiency and reduced state opposition [3].

In order for the court to fully realize its potential, it must show the world that it can be a successful permanent institution in international law with clear standards and goals, as well successful indictments, prosecutions and convictions of heinous war criminals in different parts of the world [4]. A case in which the ICC has demonstrated efficiency is the case of the Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") [5]. He was transferred to the ICC's custody on 9 June 2020, after surrendering himself voluntarily in the Central African Republic. The initial appearance of Mr Abd-Al-Rahman before the ICC took place on 15 June 2020.

According to the Prosecution's submission of the Document Containing the Charges, Mr Abd-Al-

Rahman was suspected of 31 counts of war crimes and crimes against humanity allegedly committed between August 2003 and at least April 2004 in Darfur, Sudan. The confirmation of charges hearing took place from 24 to 26 May 2021 [6]. On 9 July 2021, Pre-Trial Chamber II confirmed all the charges of war crimes and crimes against humanity brought by the Prosecutor against Ali Muhammad Abd-Al-Rahman and committed him to trial. On 5 April 2022, the trial in this case opened before Trial Chamber I and is currently ongoing.

### **Efficient and successful judicial entity**

The ICC has laid a foundation for what could be an extremely efficient and successful judicial entity. The fact that the Rome Statute passed with such a lopsided victory, despite all of the objections from different sides regarding the semantics of the document, was a major victory in itself. Then, the rapidness of the ratification of the treaty, just four short years after the monumental signing, showed that the need to establish a world criminal court was present. Since the inception of the court, fifty-seven additional nations have joined the court, with more coming all the time. The support for the ICC is definitely growing, especially among the smaller nations of the world, as they view the ICC as a support system to their own domestic judicial institution.

When the outline for an international criminal court was established, it quickly became evident that in order for the court to not only appease the reluctant states, but maximize its usefulness on the international stage, the court had to be complimentary. This role of a complimentary institution maintains the domestic jurisdiction of the individual states to prosecute their own criminals if they find the evidence to prosecute as well as possess a functioning judicial body to properly convene a fair and just trial. By limiting the role of the ICC to complimentary, the Rome Statute and the states that are party to the treaty created a last resort institution that will only be utilized if the country is unable or unwilling to prosecute their war criminals. This entails many factors that must each be examined before an indictment or even an investigation is launched by the ICC. [7]

First, is the country's judicial system intact? Many war crimes are committed during times of civil war, or in the recent case of Libya, the civil war often leads to regime change. If a new court is not established,

<sup>3</sup> Digest, International Policy, et al. "International Criminal Court: Successes and Failures." International Policy Digest, 23 Mar. 2012, [intpolicydigest.org/international-criminal-court-successes-and-failures](https://intpolicydigest.org/international-criminal-court-successes-and-failures). Accessed on September 9, 2022

<sup>4</sup> Daniel Donovan: "International Criminal Court: Successes and Failures" available at <https://intpolicydigest.org/international-criminal-court-successes-and-failures/> accessed on August 12, 2022

<sup>5</sup> ICC: "Trying individuals for genocide, war crimes, crimes against humanity, and aggression" available at

<https://www.icc-cpi.int/cases> accessed on August 13, 2022

<sup>6</sup> ICC-CPI: "ICC concludes confirmation of charges hearing in Abd-Al-Rahman case" <https://www.icc-cpi.int/news/icc-concludes-confirmation-charges-hearing-abd-al-rahman-case> accessed on August 13, 2022

<sup>7</sup> Akhavan, Payam. "Preventing genocide: measuring success by what does not happen." *Criminal Law Forum*. Vol. 22. No. 1. Springer Netherlands, 2011.

and the state is therefore unable to launch an investigation or hold a court proceeding, then the ICC can step in as a support unit and take over the case. Also, if circumstances arise that invoke a sense of bias for or against a criminal who is being prosecuted, such as the case of President Al-Bashir of Sudan for the crimes committed in Darfur in which his country will never consider indicting him, then the ICC can step in and take over the case, as they have done [8].

In order to determine if the state is unwilling the court needs to examine if the proceedings are impartial, if the criminal is being shielded by government lackeys or whether there is an unjustifiable delay in the proceedings. The role of a complimentary court counts as a success because it limits the authority the court possesses, and it enables the states themselves to take the initiative in prosecuting their own criminals. [9] By limiting the power of the court, the Rome Statute correctly prevented the court from growing into an unrestricted power.

### Clearly defined Roles

Another success of the ICC is the clearly defined roles that the different organs operating within the confines of the Rome Statute have and how they are utilized to the advantage of the court and the international stage, especially the unique role of judges and the use of the appeals process. First, the court's decision-making process is common law, which means that judges, and not a jury, decide the fate of the accused based on legal precedence and knowledge of the law [10]. Although this is contrary to the United States legal system, it definitely has its benefits. The common law practice definitely ensures that the rights of the individual, as well as the palpability of the court are handled by professionals. This is very important with an international forum because of the vast differences between hundreds of judicial systems. A civil law court at the international level is simply not practical. By granting the fate of indictees to the judges, a system of checks and balances has also been included in the Rome Statute and is therefore utilized by the court. The appeals system for the ICC creates an atmosphere of fairness and justice that protects all individuals, from the defendants to the victims, of their alleged crimes.

In the ICC an appeal can not only be granted for guilty verdict, but also an acquittal. This additional

appeal gives the prosecutor a second chance to submit additional evidence that may change the determination of the judgment. In creating a system in which the court can interpret international criminal law, it has correctly identified the issue that needs to be addressed in order for the court to blossom and reach its full potential. It will need to create a system in which precedence can be established and therefore common law is correctly carried out.

In 2010, a major breakthrough for the court came into existence which has been viewed not only as a display of the flexibility of the state's party to the Rome Statute, but a necessary addition to the constantly changing international community. The Conference in 2010 in Kampala, Uganda took direction from the UN Security Council a step further and inducted a definition of aggression based on SC Resolution 3314, and added it to genocide, war crimes and crimes against humanity as a list of possible crimes that fall under the umbrella of the ICC. Although Kampala has not been entered into effect as a treaty yet, it cannot take effect until January 1, 2017, this amendment to the Rome Statute showed the flexibility of the court and its states members to adjust to a constantly changing world. Adding aggression to the list of war crimes ensured that despite the solid foundation from the Rome Statute, the ICC was able to add new amendments that would further extend its jurisdiction and ensure international peace.

Another example of this adaptability occurred in 2009 [11] when a Review Conference convened and stated that an amendment should be considered to include terrorism to the list of crimes falling under the ICC's jurisdiction. This document called Annex E, laid out a fairly acceptable definition of terrorism, which has been one of the major stepping stones in the process of including it in international criminal law, and went as far as to almost recommend that the Rome Statute should include terrorism as another crime added to the list for ICC jurisdiction. Although the steps have not yet been taken to establish an amendment for a new inclusion, the groundwork has been laid, and therefore the idea of including terrorism has been mulled over. This is just another example of the constant flexibility and adaptability of the ICC and the Rome Statute, which is absolutely essential to the success and survival of the court in combatting the crime of Genocide.

<sup>8</sup> Ssenyonjo, Manisuli. "II. The International Criminal Court arrest warrant decision for President Al Bashir of Sudan." *International & Comparative Law Quarterly* 59.1 (2010) pp. 205-225.

<sup>9</sup> Akande, Dapo. "The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities." *Journal of International Criminal Justice* 7.2 (2009): 333-352.

<sup>10</sup> Gaja, Giorgio. "The Respective Roles of the ICC and the Security Council in Determining the Existence of an

Aggression." *The International Criminal Court and the Crime of Aggression*. Routledge, 2017. 121-124.

<sup>11</sup> In accordance with article 123 of the Rome Statute, the Secretary-General of the United Nations, on 7 August 2009, convened the Review Conference of the Rome Statute (hereinafter "the Conference"). The Secretary-General invited all States Parties to the Rome Statute to participate in the Conference. Other States that had signed the Statute or the Final Act were also invited to participate in the Conference as observers

### The International Tribunal for Rwanda and its Contribution in the Rwandan genocide

The International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994, more commonly referred to as the International Criminal Tribunal for Rwanda (hereafter referred to as ICTR) or (French: *Tribunal pénal international pour le Rwanda, TPIR*), is an international court established in November 1994 by the United Nations Security Council in Resolution 955 in order to judge people responsible for the Rwandan Genocide and other serious violations of international law in Rwanda, or by Rwandan citizens in nearby states, between 1 January and 31 December 1994. [12]

### The role of the ICTR in the Rwandan Genocide

By 1 May 2001, the ICTR had issued indictments against approximately 65 persons. [13] The names of 60 of these were publicly disclosed and 45 have so far been arrested. These come from various power circles: government, the army, the media, militias, clergy - and represent high levels of responsibility [14]. Ten of the 19 ministers from the interim government [15] established in Rwanda in April 1994, as well as the interim Prime Minister, have been arrested. Three other top political leaders were apprehended, as well as local authorities, including six (mayors) and four préfets. [16] Three key media figures responsible for broadcasting anti-Tutsi propaganda are also in prison. Finally, nine officers from the ex-Rwandan Armed Forces

A typical case in which the ICTR played an instrumental role was the trial of the former mayor of the Taba commune, Gitarama prefecture. This trial began in January 1997 and ended in March 1998. The verdict, announced on 2 September 1998, was the first conviction for genocide following a substantial trial before an international court. Jean-Paul Akayesu was found guilty of genocide and crimes against humanity for

extermination, murder and rape and sentenced to life imprisonment.

The trial revealed that crimes committed by local authorities, whose power is conferred by central government, were carried out in accordance with government policy. It was established that the defendant who did not have an extremist background - fought against the *Interahamwe militias* until 18 April, after which he began to lead the Tutsi hunt the day after a crucial government meeting with local authorities, which marked the extension of the massacres across the whole of Rwandan territory. [17]

Another case on the genocide in Rwanda which the court dealt with is the *Case of Ferdinand Nahimana and Jean Bosco Barayagwiza*. [18] On 19 August 2003, at the tribunal in Arusha, life sentences were requested for Ferdinand Nahimana, and Jean Bosco Barayagwiza, persons in charge for the Radio Télévision Libre des Mille Collines, as well as Hassan Ngeze, director and editor of the Kangur newspaper. They were charged with genocide, incitement to genocide, and crimes against humanity, before and during the period of the genocides of 1994. On 3 December 2003, the court found all three defendants guilty and sentenced Nahimana and Ngeze to life imprisonment and Barayagwiza to imprisonment for 35 years. On 28 November 2007, the Appeals Chamber partially allowed appeals against conviction from all three men, reducing their sentences to 30 years' imprisonment for Nahimana, 32 years' imprisonment for Barayagwiza and 35 years imprisonment for Ngeze. [19]

### FAILURES AND CHALLENGES OF THE ICC IN COMBATING GENOCIDE AND CRIMES AGAINST HUMANITY

International law permits states to investigate and, if there is sufficient admissible evidence, to prosecute crime against humanity based on universal jurisdiction, regardless of where those crimes were committed, regardless of the nationality or location of the suspect or the victims and irrespective of any specific connection to the prosecuting state. One of the justifications for this rule of international law is that such crimes are crimes against the international community as

<sup>12</sup> United Nations Security Council *Resolution 955 S/RES/955*(1994) 8 November 1994. Retrieved 2008-07-23.

<sup>13</sup> Africa Report n°30 Nairobi/Arusha/Brussels, International Criminal Tribunal for Rwanda: Justice delayed, 7 June 2001, p.3.

<sup>14</sup> Another arrested suspect, Bernard Ntuyahaga, gave himself up to the ICTR before being released on 31 March 1999 after the Prosecutor withdrew his indictment. Since that date, he has been detained in Tanzania, awaiting a decision on his extradition to Rwanda.

<sup>15</sup> The government in power in the aftermath of the attack on the presidential plane on 6 April 1994 in which

President Juvénal Habyarimana died. The former members of this government are today accused by the ICTR of having planned and supervised the genocide against members of the Tutsi community

<sup>16</sup> In 1994, Rwanda was administratively divided into 11 prefectures and 145 communes

<sup>17</sup> Africa Report, *op cit*, p.4.

<sup>18</sup>

[http://en.wikipedia.org/wiki/International\\_Criminal\\_Tribunal\\_for\\_Rwanda](http://en.wikipedia.org/wiki/International_Criminal_Tribunal_for_Rwanda), visited, 11/07/2019.

<sup>19</sup> Grunfeld[2007]pp=21-22>Grunfeld, Fred; Anke Huijboom (2007). *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders*. Brill.



a whole and, as such, each member of the international community has an inherent interest and responsibility to ensure that perpetrators of such crime do not evade justice or fail to provide reparations to the victims and their families.

Overall, the major successes of the court have been almost exclusively on paper and not in the actual prosecuting or sentencing of criminals. Thus, the success of the court has not yet been completely realized. This is because, over the past decade however, there are cases in which persons suspected of the crime against humanity have escaped investigation and prosecution. In fact, the commission of these crimes continues to plague nearly every corner of the globe. While this has demonstrated the urgent need to enforce such crimes vigorously, unfortunately, their effective prosecution remains elusive in spite of the important advances of the past twenty years, including the establishment of the International Criminal Court.

The International Criminal Court was established with the idea of fixing individual criminal responsibility for those who commit atrocities. It is expected that “the mere existence of ICC will act as a catalyst for accountability”. [20] However, a review of the functioning of the ICC for the last 22 years reveals that the ICC become merely one of the international bodies to deal with certain disputes of criminal nature. Several challenges and criticisms question the legitimacy and effectiveness of ICC; among them some of the key challenges and criticisms are as follows:

#### **Lack of Universal Membership**

As per the Statute, the ICC can exercise jurisdiction only for crimes against humanity and genocides in the countries that have ratified the statute. It is to be noted that only 124 countries are currently parties to the ICC statute; many major powers, including Russia, the USA, India, China, etc, are not yet part of the statute. About 40 countries of the world never joined the Statute, and most of them are critical to the activities of the ICC. Russia is a key power to these effects especially its genocidal activities in the Israelites territory. The non-signatory of these powers to the statute adversely affects the functioning of the ICC and limit the ICC from exercising jurisdiction over several crimes against humanity and genocide orchestrated by these powers.

Another glaring example could be seen in USA. There were allegations about crimes against humanity in Guantanamo Bay against the US, since the US was not subscribed to the ICC Statute; it was unable to deal with such allegations. [21] Likewise, concerning China’s treatment of Uyghurs in Xinjiang and Tibetans in Tibet,

Russia’s activities in Crimea, etc, highlight the issue of and the need for universal membership.

#### **Ineptness of the prosecutor’s office**

Despite sufficient groundwork for the ICC laid out through the Rome Statute and amended to include aggression at Kampala in 2010, the ICC in many nations’ eyes has been a failure. Despite the doors opening and becoming fully functional in 2003, just recently, September 2009, the ICC opened its first case, prosecuting Congolese warlord Thomas Lubanga Dyilo. For nine years the court has sat dormant due to several different reasons. When the ICC first opened its doors, it immediately began investigating various situations, especially in Africa for the crimes it was established to enforce. The first elected chief prosecutor, Luis Moreno-Ocampo, an Argentine lawyer who gained fame through exposing Argentine corruption in the Trial of the Juntas, was inaugurated in 2003 and opened cases in regions such as Uganda and the Democratic Republic of Congo. Since that time Ocampo has been widely criticized for his continuous failures and this disappointment has led to reluctance of the states.

Although recently, the trial of Thomas Lubanga Dyilo has been completed and the accused has been found guilty of all charges as of March 14, 2012, this event stands on the doorstep of Moreno-Ocampo’s departure from the role of Chief Prosecutor. When the ICC was established through the Rome Statute it became evident that the role of the chief prosecutor would be essential to the court’s success, and in many ways the successes of the court would mirror the successes of the prosecutor.

This analysis has become accurate, only to the negativity of the court. Moreno-Ocampo’s failures are directly linked to the failures of the ICC in its attempt to become a viable force in the stage of international criminal law. Some believe that Moreno-Ocampo’s attitude and management style are not conducive to the teamwork required in order to increase the fluidity with which the court is run.

“The Office of the Prosecutor is the engine; systematic efforts for professional investigations and effective cooperation are the fuel for the entire Court!” One fundamental demand from Chambers to the Prosecutor is obvious: the Office of the Prosecutor should not take steps to initiate pre-trial or trial proceedings, until there is certainty, real certainty that the cases are based on sufficient evidence. It would be ideal, for example, if investigations were almost completed during the pre-trial proceedings so that the focus shifted

<sup>20</sup> Goldston, J. A., (2019). Don’t give up on the ICC. Foreign Policy. <https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/>. Last accessed on the 10/02/2025.

<sup>21</sup> Aneesh Vijayan Pillai, Shilpa Sharma, Georgekutty Mathew & Kaumudhi Challa , 2024, Crimes Against Humanity: Evolution, Prosecution, and Challenges for the International Criminal Court, International e-Journal of Criminal Sciences, 19, 6, p.1-17.

from investigations to prosecution. This would have the consequence that the Pre-Trial Chambers have the ability to complete all preparatory work of the cases: the accused are informed of all facts, the evidence has been collected, and the Pre-Trial Chamber has ruled on protective measures. It is also possible that trials commence shortly after the decision confirming the charges without a time gap of another year in which trial proceedings are prepared anew inside the Office of the Prosecutor. While judges do not have insight in the Office of the Prosecutor, there is an impression that there is still some room for improvement with regard to general work methodology in investigations, ensuring cooperation as well as efficient structures and the efforts to have highly qualified prosecutorial staff.

### **The unwillingness of states party to the treaty to cooperate with the wishes of the court**

The ICC depends on the cooperation of the states that have ratified it to turn over suspects, and help in the information gathering process to speed up and actually complete fair and efficient trials. The ICC can proceed with an investigation only if there is cooperation with the concerned states. However, in serious cases of crimes against humanity and genocides, the states are unwilling to cooperate, and hence, the ICC finds it very difficult to collect evidence, arrest the perpetrators and conduct the trial. Specifically, many instances have occurred since the inception of the court where the prosecutor has the evidence, the indictment has been issued, but no trial ensues simply because the indicted is not turned over to the ICC for trial<sup>22</sup>. Therefore, the suspect remains at large as an international criminal. The resistance of Sudan and some of the member states of the African Union in cooperating with the ICC for the prosecution of former Sudanese President Omar al-Bashir is one of the relevant examples. Even though the ICC issued an arrest warrant, the state was not ready to execute it. Likewise, in the case of Kenyan President Uhuru Kenyatta, Kenya refused to cooperate with the ICC and did not provide relevant documents and other evidence. The case of Saif al-Islam Gaddafi, son of former Libyan leader Muammar Gaddafi, is another well-known example in this context.

Due to the lack of cooperation, heads of states indicted, as well as powerful military leaders continue to purge local populations without having to answer to their crimes. Despite ratification of the Rome Statute, the perception of state cooperation and the actuality of it can be vastly different. This lackadaisical approach by party states continues to frustrate the court and its process.

### **CHALLENGES RELATED TO INTERNATIONAL JURISDICTION**

The universal jurisdiction rule applies to crimes against humanity, the problem however, is to determine

when and on what terms these crimes should be prosecuted on the basis of universal jurisdiction. In some countries, treaties are automatically the law of the land and can be relied upon directly in domestic courts. In many others like Nigeria, however, treaties must be incorporated into domestic law in order for someone to rely on them in court. In those cases, a domestic legislature must adopt implementing legislation.

Consequently, while the number of states that have expressly recognized crimes against humanity and war crimes in their domestic criminal law has increased exponentially in recent years, it is still the case that these provisions do not exist in all countries. Even in the many states where such domestic criminal laws do exist, not all have explicitly provided for universal jurisdiction prosecutions. The legal basis for exercising universal jurisdiction differs depending on whether the crime is set out in an international treaty or is part of customary international law. This gap between international obligations, and what domestic law actually allows for, poses a significant challenge in the prosecution of crime against humanity.

### **High Burden of Proof**

Crimes against humanity involve widespread and systematic 'attacks ranging from murder and torture to acts of sexual slavery and rape on a civilian population. The Prosecutor therefore is required to prove that the underlying offences are committed as part of a widespread or systematic attack against a civilian population. The Prosecutor in addition to proving this is also expected to ascertain that the perpetrator has committed the attacks with the knowledge of the attack.

Under Article 30 (3) of the International Criminal Court Statute knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Hence, the Prosecutor is expected to prove that the defendant was aware of either the existence of the attack or its consequence. Particularly, he needs to prove that the defendant knew the conduct was part of or intended to be part of a widespread and systematic attack directed against a civilian population. The International Criminal Tribunal for Rwanda (ICTR) Statute requires that the widespread and systematic attacks directed against a civilian population must be on the national, ethnic, racial, political, and religious grounds.

### **Lack of police**

The ICC is still a fledgling organization that lacks its own police force and generally must rely on the assistance willing or coerced - of the governments in whose countries it is operating. It is also dependent on international support if it is to succeed: for funding, for intelligence and evidence, for the arrest of suspects, and

<sup>22</sup> Caesius, Antonio. "The Statute of the International Criminal Court: some preliminary

reflections." *European Journal of International Law* 10.1 (1999): 144-171.

for pressure on recalcitrant governments. All too often that support is not forthcoming, making an already challenging job even more difficult.

Another limiting factor in that is the unprecedented, indeed gigantic difficulty the Court faces, in order to obtain the evidence required, it has to conduct the necessary, complex investigations in regions thousands of kilometers away from The Hague, regions where travel is difficult, the security situation is volatile and it may be difficult to collect the evidence [23].

### Challenges of Legitimacy for the ICC

The ICC was established as the first permanent international criminal tribunal charged with entertaining cases of the commission of Crimes against Humanity, Genocide, and War Crimes in the territory of the members or by their nationals. However, it faces a huge challenge of legitimacy resulting from the referral of the Darfur case via the UNSC and its subsequent indictment of the President of Sudan, Omar Hassen Al-Beshir. It managed to do this, through Art.13 (b) of the ICC Statute which allows the United Nations Security Council (UNSC) to refer a case to the court.

It would be recalled that after many efforts to take action following the conflict that has raged over the western Sudan territory of Darfur, the UNSC decided to set up a Commission of Inquiry on Darfur on 18 September, 2004. In January 2005, the Commission came up with its report, which found that crimes were being committed in Darfur with the government involvement but there was no evidence 'to suggest that it was Genocide. The Commission also suggested that the Khartoum government was unlikely 'to bring the perpetrators before justice, so the UNSC should refer it to the International Criminal Court (ICC). The Commission emphasized that the ICC is the best option to prosecute the perpetrators and annexed evidence as well as a sealed list of persons accused of committing crimes and the reasons for them to be regarded as such. After considering the recommendation, the UNSC decided to refer the case to the ICC on 31 March, 2005, with the cooperation of all member states of the UN in the work of the court, by a vote of 11-4 with the rest abstaining. The ICC Prosecutor, Luis Moreno Ocampo acting under this Mandate, on 27 Feb, 2007, applied for a warrant to be issued on Ahmed Muhammed Harun, a former Minister of State for the Interior of the Government of Sudan and Currently Minister for Humanitarian Affairs, and Ali Muhammed Ali Abdel-Rahman (Also known as Ali Kushayb) an alleged Militia leader.

The problem of legitimacy of the ICC can also be perceived in 2023 where ICC issued an arrest warrant

against Israel P.M Benjamin Netanyahu and his defense minister for war crimes against humanity and genocide against the Palestinians. America and a few countries opposed and rejected the judgment. America and Israel are not members to the ICC. As a result, we are tempted to ask these questions: Can non-member nations be tried by this court? And can a non-member nation reject the judgment of the ICC?

### Lack of participation by the permanent members of the Security Council

The final major flaw of the ICC definitely stems from the lack of participation by three permanent members of the UN Security council. As of this text, China has not signed the Rome Statute, and neither the United States nor Russia has ratified it. In fact, as of the Bush Administration actions of 2002, the United States actually unsigned it.

This lack of participation certainly hinders the ability to enforce the laws instituted by the court. The lack of U.S. participation especially hinders any palpable advancement of the court. While the U.S. does deploy many troops overseas each year, full participation from the U.S. and the other permanent members of the Security Council is essential to the survival and effectiveness of the court. Granted veto power for permanent member status, if any of these three powers considers an indictment contradictory to the agenda of their nation, they can veto the indictment and allow the crimes and the perpetrator to go on unpunished.

Not only is the U.S. not signing or party to the Rome Statute, they had established a confrontational approach to the Statute under the Bush presidency. The U.S. has over fifty treaties of such, and is therefore undermining the justice and integrity of the court. Now however, the new administration, under President Barack Obama has begun to show some semblance of cooperation to the court and its functions. Although this is a step in the direction of support, the U.S. has not gone as far as signing the Rome Statute, or giving its full-fledged backing. Therefore, the overall lack of Security Council support which still exists, even from the teetering U.S., will need to be resolved in order for the ICC to reach its full potential [24].

### Political Pressure

The major powers in the world can exert significant political pressure and influence, thereby hindering the proper functioning of the ICC. There were several allegations about crimes against humanity committed by US, Taliban and Afghanistan authorities in Afghanistan. It was openly criticized by the US, which is a member of the ICC and exerted significant pressure

<sup>23</sup> Kaul, Hans-Peter. "The International Criminal Court: current challenges and perspectives." *Wash. U. Global Stud. L. Rev.* 6 (2007): 575.

<sup>24</sup> Ibid

through several measures, including sanctions on ICC officials, revocation of visas and diplomatic threats.

### Resource Constraints

The functioning of the ICC relies on the funds it receives as contributions from its member states. However, the inadequate funding by member states hinders the ICC from effectively collecting the evidence and conducting the trial speedily. [25] The Darfur investigation is an illustrious case wherein the ICC finds it difficult to collect evidence and secure witness protection due to financial constraints.

### Perception of Selectivity and Bias

From the cases dealt with by ICC for the last 24 years, it can be seen that most cases are from the Global South. Hence, there were specific allegations of bias against the ICC's indictments. The leaders of the African Union publicly expressed their dissatisfaction about this selectivity in the 2013 African Union Summit. [26] In 2017, due to bias, the African Union backed the mass withdrawal from the ICC Statute. It is to be noted that, while withdrawing from the ICC Statute, Burundi opined that, the ICC Statute is "a political instrument and weapon used by the West to enslave other States.

### Other Challenges

Genocide, crimes against humanity and war crimes are usually committed during armed conflict as a result of orders "from the top" issued by all kinds of rulers, who at the same time make every effort to cover up their responsibility for the crimes. In pursuing its task, therefore, the Court will almost inevitably be caught between the poles of brutal power politics on the one hand and law and human rights on the other. Consequently, the work of the Court will often continue to be hampered by adverse political winds or indeed political reproach of every colour and we have seen this in particular in the Darfur situation.

There is a further phenomenon, a further challenging reality which can affect the Court 's international position or make its work the subject of international debate or even controversy: this concerns the temptation for some States, including powerful States and permanent members of the Security Council to somehow instrumentalize the Court, to use it for their political purposes and interests. As a former German Ambassador, who is now a Judge and Vice-President of the ICC I am neither blind nor naïve in this regard.

Already the so-called self-referrals of some African States Parties as Uganda and Democratic Republic of Congo have led to comments that leaders of those States used the ICC against political opponents:

*I have often heard arguments to this effect. But as a legal, as a judicial institution governed by the Rome Statute we have to apply its articles and there is no doubt that there were State Party referrals under article 13 (a) of the Statute and there is also no doubt that terrible mass crimes have been committed in Uganda and the DRC which the ICC had to investigate and prosecute. [27]*

It is well-known that the referral of crimes committed in Darfur/Sudan through Security Council resolution 1593 in 2005 and the subsequent ICC activities including the arrest warrant against President Bashir led to considerable international debate. A further noteworthy case is obviously the recent referral of the Libya situation through SC Resolution 1970 in March of this year. [28] From the ICC perspective it was positive that the decision of the Security Council, the highest authority of the United Nations, was this time unanimous. There were also positive editorials and comments, underlining "This Security Council decision demonstrates very clearly, yes, the ICC is nowadays part of the international reality." [29]

## CONCLUSION AND THE WAY-FORWARD

Overall, despite a strong foundation laid out at the Rome Conference, the ICC has had few tangible successes since its inception. Some of this can be attributed to the youth of the court, but much can be realized specifically from the three major flaws previously discussed, the ineptness of the prosecutor's office, the unwillingness of states party to the treaty to cooperate with the wishes of the court, and the lack of support from permanent members of the UN Security Council which holds veto powers over the cases of the ICC. However, several criticisms and challenges, including the lack of universal membership, funding issues, political pressure, etc., hampered its efficacy and functioning. Addressing the various criticisms and challenges will boost the efficacy and legality of the ICC, which is necessary in contemporary times for ensuring peace and security in the world.

Against this backdrop, it is therefore, imperative for all nations to subscribe to the ICC Statute

<sup>25</sup> Wiebelhaus-Brahm, E., & Ainley, K. (2023). The evolution of funding for the International Criminal Court: Budgets, donors and gender justice. *Journal of Human Rights*, 22(1), 31-46.

<sup>26</sup> Werle, G., Fernandez, L., & Vormbaum, M. (2014). *Africa and the International Criminal Court*. Asser Press.

<sup>27</sup> Mills, K. *International responses to mass atrocities in Africa*. (Philadelphia: University of Pennsylvania Press 2015), pg.57.

<sup>28</sup> Vahakn N.Dadrian, "The Armenian Genocide as a Dual Problem of National and International Law", *University of St. Thomas Journal of Law and Public Policy*, volume 4(2010): 60-82, pg. 60.

<sup>29</sup> United Nations General Assembly Resolution 96(I) (1946), Available online at: <https://www.refworld.org/docid/3b00f09753.html> accessed on 11/12/1946 (accessed on 19 Oct. 2024).



and extend their whole-hearted support for the prosecution and related activities of the ICC especially genocides and crimes against humanity. It will strengthen the ICC and make it a truly international institution armed with powers to deter and prosecute the perpetrators of crimes against humanity and genocide. This recommendation is rooted based on the principle of universal jurisdiction to prosecute crimes against humanity and genocide, ensuring accountability and global justice.

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