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## **FROM THE EDITOR-IN-CHIEF AND CHAIRMAN OF THE EDITORIAL BOARD**

I am most delighted to introduce to you Volumes 4 of the Plateau State University Law Journal (PLASULJ). I am optimistic that these editions are a hub for educative, insightful and thought-provoking encounter with current and cutting-edge issues, bordering on different areas of law. Some of these issues border on terrorism, protection of marine environment from ship-source pollution in Nigeria, cultural diplomacy in the 21<sup>st</sup> Century, trade unions and collective agreements in Nigeria, punishment for rape under Nigeria law, climate finance in Nigeria and Rwanda, right to health and access to medicine, theories and causes of genocide and the quest for preventive measures, protection of child's data within the administration of justice system in Nigeria, the Nigerian judiciary and the challenges of justice delivery, militarization of Nigerian democracy and its impact on fundamental rights, amongst others.

These wide range of issues addressed by various authors in these Journals are of great value to private legal practitioners, academics, Judiciary and the society at large. It is believed that recommendations proffered will eventually become policy documents for government's action and implementation, which will in turn bring about growth and development in the legal and socio-political firmaments of Nigeria.

I am particularly grateful to the committed and dedicated staffers of the Faculty of Law, and our external reviewers, for their tireless and relentless sacrifices, towards ensuring the quality of the published articles. I equally appreciate the non-teaching staffers for their assistance in enhancing a conducive atmosphere for the work.

To the focused, supportive and visionary Vice-Chancellor of Plateau State University, Professor Shedrack Gaya Best, together with his management team, I am most grateful for support in all facets towards the promotion of academic scholarship, which has propelled us to publish Volumes 4 of the Faculty of Law Journal.

The members of the Faculty's Editorial Advisory Board, who are made up of iconic legal averters and colossus in various fields of law, deserve utmost appreciation, for their wise counsel and support. I equally express deep appreciation to Professor Alphonsus Okoh Alubo, SAN who is on ground in the Faculty, and from whom we have learnt, and are still learning, in the Faculty.

To God Almighty, I ascribe all the glory and for His faithfulness.

**Dr. Mark Y. Danung, PhD, BL, MCI Arb. (UK)**

*Editor-in-Chief*

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# EXAMINATION OF THE CHALLENGES AND PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT (ICC) IN THE PROSECUTION OF NATIONALS OF NON-PARTY STATES

By

**Mark Y. Danung\***  
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**Bentu Susan Nancin\***

## ABSTRACT

*This paper examined the jurisdiction of the International Criminal Court (ICC) over nationals of non-Party States. Article 5(1) of The Rome Treaty for an International Criminal Court provides for the establishment of an international court with jurisdiction over genocide, war crimes, crimes against humanity and the crime of aggression when committed after 1 July 2002. Article 5(2) of the said Treaty however provides that in the case of crime of aggression, the Court shall exercise jurisdiction over the crime once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations. Article 12 of the Rome Treaty however provides that, in some circumstances, the ICC may exercise jurisdiction even over nationals of States that are not Parties to the Treaty and have not otherwise consented to its jurisdiction. The motivation for this study stemmed from the desire to contribute new knowledge to the society as it relates to the jurisdiction of the International Criminal Court over nationals of States that are not Parties to the Treaty and have not consented to its jurisdiction. Some of the findings in this study include the fact that the ICC suffered pre-enforcement issue and post-trial enforcement issue, as it depends completely on member States to arrest and transfer defendants, the fact that the ICC appeared to focus more of its primary duties of investigating, arrest and prosecuting heinous crimes of genocide, war crimes, crimes against humanity, and the crime of aggression on African leaders in comparison to other leaders in the West or Asia, the Court lacks the institutional resources to ensure that the defendants actually show up in Court, as it has no police force of its own and has no reliably effective means to oblige states to cooperate. This study recommended that the ICC's Prosecutor should spread his tentacles to other regions of the world when it comes to investigating and prosecuting allegations of heinous crimes such as*

*genocide, war crimes, crimes against humanity and the crime of aggression. Secondly, the ICC needs to encourage better cooperation from its member states, as well as from other states throughout the world. The court cannot make progress if it is surrounded by hostile states, as all of its investigations depend on the host country's willingness to cooperate with the court. Thus, since international law is fundamentally contractual, and its enforceability is a complex of some sort, how would the Court navigate through in light of the provision of Article 12? This paper, using doctrinal method of legal research, considered the issues surrounding the implementation of Article 12 and proffers solutions on how the Court can best utilize it.*

**Keywords:** Examination, Challenges, International Criminal Court, Prosecution, non-party

## INTRODUCTION

The International Criminal Court was created in 1998 but became operational in 2002.<sup>1</sup>The ICC currently has 124 member states as signatories to its protocol. It has four primary organs namely: the Presidency, the Judicial Division, the office of the Prosecutor and the Registry.<sup>2</sup>The Office of the Prosecutor has three main Divisions: the Jurisdiction, Complementarity and Cooperation Division (JCCD), the Investigations Division (ID) and the Prosecutions Department (PD).<sup>3</sup>The Court has 6 official languages: English, French, Arabic, Chinese, Russian and Spanish. It was established during a time period of significant movement in the field of international criminal

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<sup>1</sup>Milena S, 'The International Criminal Court: Current Challenges and Prospects of Future Success' *Case Western Reserves Journal of International Law*(2020)(52)<<https://scholarlycommons.law.case.edu>> accessed 3<sup>rd</sup> January, 2026.

<sup>2</sup>International Criminal Court Project, *Structure of the ICC*<<https://www.aba-icc.org/about-the-icc/structure-of-the-...>> accessed 3<sup>rd</sup> February, 2026.

<sup>3</sup> "Jurisdiction, Complementarity and Cooperation Division of the office of the Prosecutor of International Criminal Court" THISDAY (Lagos, 3<sup>rd</sup> May, 2016)8.

law: the Yugoslavia and Rwanda Tribunals were established in 1993 and 1994 respectively, through Security Council Resolutions, and the creation of a permanent international criminal court was viewed as complementary to the existing ad hoc accountability mechanisms.<sup>4</sup> Their primary function was the prosecution of individuals for the international “core crimes” i.e. grave breaches of the Geneva Conventions 1949: genocide, war crimes, crimes against humanity and the crime of aggression.<sup>5</sup> The creation of the ICC was followed by the creation of further ad hoc tribunals, such as the Special Court for Sierra Leone, the Extraordinary Chambers in the courts of Cambodia, and the Special Tribunal for Lebanon.<sup>6</sup> Thus, the ICC’s birth can be situated within a period of activism in international criminal law, resulting in the creation of new accountability mechanisms focused on the prevention and punishment of atrocious crimes.<sup>7</sup>

However, Article 12(3) of the Rome Treaty provides that in certain situations, the ICC can exercise its jurisdiction over nationals of non-party states: firstly, if the United Nations Security Council refers the situation to the ICC under Chapter 7 of the United Nations Charter as it did with the situations in Dafur and Libya; secondly, if nationals of a non-State Party commit crimes on the territory of a State Party; and thirdly, if the non-State Party accepts the jurisdiction of the ICC under article 12(3) of the Rome Statute.<sup>8</sup>

The ICC was initially considered as a tremendous success for the field of international criminal law, and for the proposition that those who commit atrocious crimes should face individual criminal responsibility. “The court’s mere existence has served as a catalyst for accountability.”<sup>9</sup> However, the initial enthusiasm for the court has significantly waned over the past two decades, in light of the court’s weak record of convictions, the ongoing turmoil among the court’s judges, as well as the court’s contentious relationship with some of the world’s great powers, including the United States, China, Russia, among others.

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<sup>4</sup>Milena (n 1)467.

<sup>5</sup> Claire de Than and Edwin Shorts, *International Criminal Courts for the Indictment of Individuals* (eds, Sweet&Maxwell Publishers 2003) 316.

<sup>6</sup>Milena (n 1) 467.

<sup>7</sup>Ibid 468.

<sup>8</sup>Ibid.

<sup>9</sup> Ibid

## CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

The jurisdiction of the ICC is limited to genocide, war crimes, crimes against humanity and crime of aggression. Each of these offences shall be examined.

### i. Genocide

Genocide includes all acts committed with the intent to destroy a national, ethnic or religious group. In *Prosecutor v. Kambanda*,<sup>10</sup> a judgment that was handed down on the crime of genocide, the International Criminal Tribunal for Rwanda (ICTR) held:

The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent ‘to destroy in whole or in part, a national ethnic, racial or religious group as such; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.’<sup>11</sup>

In tacit agreement with the above position, the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber put it in *Prosecutor v Krstic*:<sup>12</sup> “Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium.”<sup>13</sup> This special condemnation and opprobrium has a lot to do with the prime historic example behind the international criminalization of genocide which according to Article 6 of the Rome Statute of the International Criminal Court is defined as any of five specific acts committed with the intent to destroy, in whole or in part intent to destroy a national, ethnic, racial, or religious group.<sup>14</sup>

When indictments were drafted for purposes of the Nuremberg Trials, genocide was not yet perceived as an international crime in its own right, and for that reason the German war criminals, including those directly responsible for, and engaged in, the execution of the

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<sup>10</sup> The International Criminal Tribunal for Rwanda-judgment (1998) and sentence’, ICTR 1 <<https://www.un.org/rwanda/pdf>> accessed 10<sup>th</sup> January, 2026.

<sup>11</sup> Klaus K., ‘The Crime of Genocide under International Law’, *International Criminal Law Review* (6) <<https://www.un.org/genocide/prevention>> accessed 10<sup>th</sup> January, 2026.

<sup>12</sup> Case No. IT-98-33-A, Judgement, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 April 2004

<sup>13</sup> Ibid

<sup>14</sup> See Article 6 of the Rome statute of the International Criminal Court.

Holocaust, were indicted to stand trial on charges of crimes against the peace, war crimes, crimes against humanity, and a common plan or conspiracy to commit these former crimes. Genocide was indeed mentioned in the Nuremberg indictment, but only as a distinct manifestation of war crimes and crimes against humanity. In 1946, the General Assembly of the United Nations proclaimed that the crime of genocide is a denial of the right to existence of entire human groups and noted that such denial shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations.<sup>15</sup>

The International Convention on the Prevention and Punishment of the Crime of Genocide, 1948<sup>16</sup> finally provided the basis for the emergence of a norm of customary international law, with the force of *jus cogens*, which renders genocide punishable. As such, the crime of genocide is subject to universal jurisdiction. In 1998, the International Criminal Tribunal for Rwanda, in the case of *Prosecutor v Jean-Paul Akayesu*<sup>17</sup> rendered the first conviction ever for acts of genocide. Earlier, in Bosnia and *Herzegovina v Yugoslavia*,<sup>18</sup> the International Court of Justice rejected a submission of the respondent to the effect that the responsibility of states under the Genocide Convention entails no more than a duty to prevent and punish acts of genocide. Instead, the International Court of Justice held that the Genocide Convention does not preclude state responsibility for acts of genocide. These cases constitute authority for the proposition that the definition and scope of the crime of genocide as a proscription of customary international law have developed well beyond the confines dictated by the wordings of the Genocide Convention itself.<sup>19</sup>

## ii. War Crimes

According to Article 8 of the Rome Statute, war crimes are grave breaches of the Geneva Conventions and other serious violations of international humanitarian law committed during

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<sup>15</sup> See Resolution 96(I) of the United Nations General Assembly of 11<sup>th</sup> December, 1946

<sup>16</sup> Simply called Genocide Convention.

<sup>17</sup> Case No. ICTR-96-4-T

<sup>18</sup> I.C.J. Reports 2007, p. 43

<sup>19</sup> Ibid

international or non-international armed conflict. These include willful killing, torture, sexual violence, targeting civilians, taking hostages, and using child soldiers.<sup>20</sup>

### iii. **Crimes against Humanity**

Crimes against humanity are acts committed as part of a widespread or systematic attack directed against any civilian population, such as murder, deportation, torture and rape.<sup>21</sup> The ICC prosecutes the perpetrators, even if the crimes were not committed in times of war.<sup>22</sup> Individuals who were indicted and tried by the International Criminal Court for the heinous crime against humanity include Charles BléGoudé who was indicted on 21 December 2011 with four counts of crimes against humanity with regard to the situation in the Republic of Côte d'Ivoire.<sup>23</sup> Muammar Gaddafi was indicted on 27 June 2011 on two counts of crimes against humanity with regard to the situation in Libya<sup>24</sup> As the Leader of the Revolution (the *de facto* head of state) and Commander of the Armed Forces of Libya, he allegedly planned, in conjunction with his inner circle of advisers, a policy of violent oppression of popular uprisings in the early weeks of the Libyan civil war.<sup>25</sup> Omar al-Bashir was indicted on 4 March 2009 on five counts of crimes against humanity and two counts of war crimes with regard to the situation in Darfur, Sudan.<sup>26</sup> On 12 July 2010 he was additionally charged with three counts of genocide.<sup>27</sup> Mohammed Ali was indicted on 8 March 2011 on five counts of crimes against humanity with regard to the situation in the Republic of Kenya.<sup>28</sup> Ali, who at the time was the Commissioner of the Kenyan Police, was alleged to have conspired with Francis Muthaura, an adviser of Kenyan President Mwai Kibaki, to order the police forces that he commanded not to intervene in stopping violence perpetrated by Mungiki forces loyal to President Kibaki during post-election violence from 27 December 2007 to 29 February 2008.<sup>29</sup>

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<sup>20</sup> See Article 8 of the Rome Statute

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> List of People Indicted in the International Criminal Court' [https://en.wikipedia.org/wiki/List\\_of\\_people\\_indicted\\_in\\_the\\_International\\_Criminal\\_Court](https://en.wikipedia.org/wiki/List_of_people_indicted_in_the_International_Criminal_Court)>accessed 11<sup>th</sup> January, 2026..

<sup>24</sup> Ibid

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> Ibid

#### iv. Crime of Aggression

The International Criminal Court's Assembly of States Parties agreed sometime in December 2017 that the ICC can now prosecute crimes of aggression, making it the fourth crime (after war crimes, crimes against humanity, and genocide) to fall within the Court's jurisdiction. The decision became effective on July 17 2018.

However, the limitation of this resolution is that the Court does not have jurisdiction over states that have not ratified the amendment in the case of state referrals or *proprio motu* investigations, except when a situation is referred by the UN Security Council. This development is enormously significant because it is the first time since Nuremberg's Nazi trials that an international tribunal has been empowered to prosecute this crime, but given how narrowly they defined the crime, and the scope of the ICC's jurisdiction, its significance may be largely confined to its declarative and symbolic force, though this is a value that should not be underestimated.<sup>30</sup>

Although today it is often argued that the Nuremberg prosecutions were about Holocaust crimes, but the reality is that the lead charge was crimes against peace. The first line of Justice Robert Jackson's opening statement was, "the privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility," and the judgment in that case concluded that, "to initiate a war of aggression is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole."<sup>31</sup> After Nuremberg, there were no international criminal tribunals until the establishment of the International Criminal Tribunal for the former Yugoslavia in 1993, which then sparked a succession of tribunals for Rwanda, Sierra Leone, and Cambodia, among other places.<sup>32</sup>

Notwithstanding the fact that the crime of aggression was the top charge at Nuremberg, it was the one crime that was conspicuously left out of the mandate of all of the tribunals that came after it, which focused instead on war crimes, crimes against humanity, and genocide. The possibility of the crime of aggression was included in the Rome Statute of the ICC, but only in

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<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> Ibid

theory.<sup>33</sup>The Rome Statute specified that it would become part of the Statute only after the Assembly of States Parties (ASP) of the Court agreed to a definition and a ratification process, which it did at its review conference at Kampala in 2010.<sup>34</sup> There, it was agreed that it would require 30 States Parties to ratify the amendments to the Statute defining the crime, followed by a vote to activate the crime by at least a two-thirds majority of States Parties at an ASP meeting after January 1, 2017.<sup>35</sup> Those ratification conditions were achieved, thus making the ICC the first international court since Nuremberg to have the crime of aggression in its statute.<sup>36</sup>

## **JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER NATIONALS OF NON-PARTY STATE**

As already noted in the introductory aspect of this paper, it is instructive to note that, generally speaking, the International Criminal Court does not have jurisdiction over alleged crimes committed by nationals of a non-party to the ICC. However, there are three ways in which the International Criminal Court could investigate and exercise its jurisdiction over alleged crimes attributed to nationals of non-state parties.

- i. First, if the United Nations Security Council refers the situation to the ICC under Chapter 7 of the United Nations Charter as it did with the situations in Dafur and Libya.<sup>37</sup>
- ii. Second, if nationals of a non-State Party commit crimes on the territory of a State Party;<sup>38</sup> and
- iii. Third, if the non-State Party accepts the jurisdiction of the ICC under article 12(3) of the Rome Statute, which established the ICC.<sup>39</sup>

The United States has objected to the ICC Treaty on the ground that, by purporting to confer upon the Court jurisdiction over the nationals of non-consenting party states, the Treaty would

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<sup>33</sup> Ibid

<sup>34</sup> Ibid

<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> See Article 13 of the Rome Statute

<sup>38</sup> Ibid

<sup>39</sup> Ibid

bind non-parties in contravention of the law of treaties.<sup>40</sup> This objection has given rise to a heated controversy. In view of the heated controversy surrounding the exercise of ICC's jurisdiction over nationals of non-party state, we shall examine three cases: Omar al-Bashir of Sudan, Vladimir Putin of Russia, Benjamin Netanyahu of Israel and his Defence Minister, and Hamas leaders.

### **i. The Case of Omar-albashir**

Omar al-Bashir was the Head of State for Sudan for almost two decades.<sup>41</sup> During his administration, the Darfur conflict arose when the non-Arabs and non-Muslims in Darfur demanded equality in the division of natural resources and equal representation in various areas as they had been marginalized in the South, the Nuba Mountains, and the Red Sea region.<sup>42</sup> The International Criminal Court charged him with five counts of crimes against humanity, two counts of war crimes and three counts of genocide. The ICC issued a first arrest warrant in 2009 and second arrest warrant in 2010.<sup>43</sup> Despite this, until today, Bashir has not been presented to the ICC to undergo his trial, and without his physical presence in the courtroom, the ICC cannot start a trial.<sup>44</sup>

Accordingly, the ICC relies on state cooperation for the execution of the warrant. Over the decades, there have been many instances of non-compliance by state parties, namely, by Kenya, Djibouti, Chad (twice), Malawi, Nigeria, and the Democratic Republic of Congo (DRC). A specific focus is put on non-execution of the warrant by South Africa in the Al Bashir case. In 2015, Bashir traveled to South Africa for an African Union Summit. Initially, the South African authorities did not arrest Bashir on the basis that as Head of State, he had immunity and the matter was sent to the national court for adjudication. The Court held that the South African authorities were compelled to take all reasonable steps to arrest President Al-Bashir. However, he left South Africa before he was arrested; he was able to defy the court orders and escaped.<sup>45</sup>

### **ii. The Case of Vladimir Putin**

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<sup>40</sup>Madeline M, 'Jurisdiction of the International Criminal Court over Nationals of non-party States' *ILSA Journal of International & Comparative Law* <<https://www.Scholarship.law. Duke. edu>> accessed 29<sup>th</sup> December, 2025.

<sup>41</sup>Ibid.

<sup>42</sup> al-Bashir Case ><https://www.icc.cpi.int/dafur> accessed 20<sup>th</sup> December, 2025.

<sup>43</sup> Ibid

<sup>44</sup>Ibid

<sup>45</sup> Ibid

Vladimir Putin is the current President of Russia. In March 2023, he was charged for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.<sup>46</sup>The crimes were allegedly committed in Ukrainian occupied territory at least from 24 February 2022.<sup>47</sup> Russia claimed that the inhabitants in those territories decided to join the Russian Federation in exercise of their right to self-determination through referendum provided under the United Nations Charter, the government refused to acknowledge or accept the charges on the basis that the Court had no jurisdiction, and instead issued criminal proceedings against the ICC prosecutor and judges who issued the warrant.<sup>48</sup>Nevertheless the arrest warrant stands legally sound as far as the 124 member countries of the ICC are concerned. The challenge however is whether any of those countries has the capacity to have Putin arrested and hand him over to the ICC.<sup>49</sup>

However, it should be noted that Russia is a permanent member of the Security Council. Therefore, it is likely that state parties may choose not to execute the arrest for political reasons. Hungary, as an ICC member, signaled that it will not arrest Putin when he visits Hungary. Some factors that prompt this statement are that Hungary does not maintain close ties with its European neighbours or its North Atlantic Treaty Organization (NATO) allies. Russia and Hungary have maintained strong economic ties and despite the war, “Russia is able to complete maintenance on the TurkStream gas pipeline between the two countries, and Hungary’s natural gas supplies will remain undisturbed. As a matter of fact, it has come out in the open to garner support for Putin by saying that it will not arrest him. It should be noted that since the issuance of the arrest warrant against the Russian President, he has traveled to China twice, North Korea, and Vietnam without any issue. The aforementioned countries are not signatories to the ICC protocol.

This uncertainty creates further difficulty for ICC to determine the success of the warrant and predict which state, if any, is more likely to comply. It seems the aim of the arrest warrant is symbolic as well as legal– it serves as a deterrent for other states to engage with Putin and seeks to isolate him diplomatically.

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<sup>46</sup> See Article s 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute.

<sup>47</sup> Research Society of International Law(see note 44)

<sup>48</sup> After Arrest warrant for Putin, Russia opens case<<https://www.aljazeera>.>accessed 15<sup>th</sup> June 2025

<sup>49</sup>Arrest warrant issued for Putin over crimes allegations<<https://www.bbc.uk/news/live/world-europe>> accessed 17<sup>th</sup> November, 2025.

### **iii. The Case of Israel, Gaza, and Myanmar**

The Prosecutor of the International Criminal Court (ICC) is seeking arrest warrants for top Hamas and Israeli figures on charges of war crimes and crimes against humanity over the October 7 2023 attacks on Israel and the subsequent war in Gaza. In February 2024, the Pre-Trial Chamber(PTC) of the ICC announced that the ICC may exercise jurisdiction over territory occupied by Israel since 1967, namely: West Bank, Gaza and East Jerusalem, to investigate potential war crimes. Israel, in this scenario, is not a state party to the Statute.

In the case of Myanmar, the Pre-Trial Chamber (PTC) of the ICC held that, in the case of deportation, only one element of the alleged crime must have taken place on the territory of a state party to the Statute.<sup>50</sup> The PTC was of the opinion that the crime of deportation was one that was inherently transboundary in nature and, for deportation to have occurred, there needs to be a crossing of international borders.<sup>51</sup>

In this case, the Rohingyas were deported to Bangladesh, a state party to the Statute, and the PTC held that the preconditions to the exercise of jurisdictions, pursuant to Article 12(2) (a) of the Statute, were fulfilled.<sup>52</sup> This decision, in effect, extended the jurisdiction of the ICC over the non-party state of Myanmar, not only for the crime of deportation but also for the crime of forced persecution and other crimes.<sup>53</sup>

## **EFFECTS OF NON-COMPLIANCE BY A STATE PARTY TO THE INTERNATIONAL CRIMINAL COURT PROTOCOL**

Article 87(7) of the Rome Statute provides that ‘Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a

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<sup>50</sup> Jurisdiction of the International Criminal Court over Non-party States: Legitimate or Ultra Vires< <https://www.jurist.org>> accessed on the 8<sup>th</sup> January, 2026.

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Ibid

finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.’<sup>54</sup>

In the case of Omar al-Bashir’s case, the International Criminal Court did not refer South Africa’s non-compliance to the Security Council. As the ICC maintains discretion, two arguments were put forward as to why a referral was unwarranted; that South Africa was cooperative towards the Court in the procedure and that a referral would serve no purpose as South Africa has now understood its obligation and that the UNSC or the Assembly of State Parties (ASP) would not take any action either.<sup>55</sup>

In the case of Vladimir Putin, the President of Russia, he had travelled to two countries which have complied with the ICC protocol since an arrest warrant was issued against him by the ICC. These countries are Mongolia in September 2024 and Tajikistan, October 2025 but none of these countries executed the warrant of arrest issued against him.

It should be noted that Mongolian government did not arrest Vladimir Putin, despite its obligations as a member of the International Criminal Court (ICC), primarily due to extreme economic dependence on Russia, reliance for energy (over 95% of petroleum products), and its precarious geopolitical position between Russia and China.<sup>56</sup> The visit was seen as a strategic choice to prioritize national security and economic survival over international legal obligations.<sup>57</sup>

In the case of Israel Prime Minister, Benjamin Netanyahu and former Defence Minister Yoav Gallant, despite an arrest warrant issue against them in November 2024 for alleged War crimes and crimes against humanity against the Palestinian population in Gaza, some leaders of Western Countries like that of Hungary, Viktor Orban and Donald Trump of the United States condemned the issuance of such a warrant of arrest. Hungary, though a member of the ICC but its government refused to arrest Benjamin Netanyahu in April 2025 because Prime Minister Viktor Orbán considered the (ICC) warrant "absurd," labeled the court too politicized, and

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<sup>54</sup> See Art. 87(7) of the Rome Statute

<sup>55</sup> Ibid

<sup>56</sup> ‘Key reasons for not Arresting Putin’, [www.politico.eu](http://www.politico.eu), Accessed 20<sup>th</sup> January 2026.

<sup>57</sup> Ibid

argued that Netanyahu held immunity as a leader of a non-ICC member state.<sup>58</sup> Hungary argued that its domestic law did not allow for the warrant's execution.<sup>59</sup> The U.S government under the administration of Donald Trump went to the extent of imposing sanctions on some officials and judges of the ICC in response to investigations into American and Israeli actions in June 2025.<sup>60</sup> These sanctions involve freezing assets, travel bans, and cutting off financial services, significantly affecting the judges' personal lives.<sup>61</sup>

Hamaz leaders, including Ismail Haniyeh, Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri ( known as Mohammed Deif) also had warrant of arrest issued against them by the ICC in November 2024. However, the Israeli authorities claimed that all of them had been killed through airstrikes before the warrant of arrest was issued against each one of them. This therefore makes it difficult if not impossible to contemplate any discussion that relates to effects of non-compliance by a State Party to the ICC protocol as it relates to each of them.

From the foregoing, it's clear that in each of the case already discussed, the ICC did not take any step to make a finding to that effect and refer the matter to the Assembly of States Parties and what complicated each of the case is that none of the of them was referred to the Court initially by the Security Council.

The underlying reasoning for this could be that either states would not comply still which would reflect badly on the court or that sanctions would seem disproportionate in what is already a contested area of the law.<sup>62</sup> However, the ICC should have trusted the UNSC to take appropriate action and perform its function.<sup>63</sup> The precedent would have showcased UN's support for the ICC's work and attracted more cooperation from states.<sup>64</sup>

## **INTERNATIONAL CRIMINAL COURT AND CONTEMPORARY CHALLENGES**

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<sup>58</sup> Necva Tastan Sevinc, 'Hungary Breached Obligations by Failing to Failing to arrest Israel's Netanyahu during April's Visit: ICC', Anadolu( Istanbul, 24<sup>th</sup> July 2025), Accessed 20<sup>th</sup> January 2026.

<sup>59</sup> Ibid

<sup>60</sup> " ICC judge says U.S Sanctions left her without Bank Cards and Google Accounts"(News hour, Al Jazeera, 26<sup>th</sup> March 2026)

<sup>61</sup> Ibid

<sup>62</sup> Jurisdiction of the International Criminal Court over Non-party States: Legitimate or Ultra Vires< <https://www.jurist.org>> accessed on the 8<sup>th</sup> January, 2026.

<sup>63</sup> Ibid

<sup>64</sup> Ibid

Since its establishment, the International Criminal Court has been bedeviled with a lot of challenges in terms of the exercise of its jurisdiction and general functioning. These challenges have, undoubtedly, negatively impacted on the performance of the court in so many ways. Some of the critical challenges are examined below:

**i. Lack of Enforcement Power**

Apart from the post-trial enforcement issue, the ICC also suffers from pre-trial enforcement problem, as it depends completely on member states to arrest and transfer defendants. It is uncertain if states are willing to use their military or economic force to extricate an oppressive leader from their country.<sup>65</sup> Furthermore, the Court lacks the institutional resources to ensure that the defendants actually show up in Court, as it has no police force of its own and has no reliably effective means to oblige states to cooperate. An illuminating example of this is the ICC's request to arrest and surrender Sudan's President, Omar Al-Bashir, for the committing crimes under Article 5.<sup>66</sup> The arrest warrant, first issued in 2009, was ignored by 19 different countries, 9 of which are signatories of the Rome Statute.<sup>67</sup>

**ii. Difficult Relationship with Great Powers**

The International Criminal Court has had difficult relationship with the world's great powers such as the United States, Russia, China, among others till date. In the case of Russia, when the ICC issued a warrant of arrest against the Russian President, Vladimir Putin, the Government of Russia heavily criticised the decision, stating that it is not a member of the ICC. In a show of defiance, Russia's top investigative body opened a criminal case against the International Criminal Court (ICC) prosecutor and judges who issued an arrest warrant for President Vladimir Putin on war crimes charges, thereby making issues difficult for the ICC.

In the case of the United States, the ICC had a difficult relationship with the United States during the George W. Bush administration. During this time, the United States passed the American Service Members Protection Act of 2002, which was intended to prohibit American cooperation with the ICC.<sup>68</sup> Moreover, the United States concluded multiple-bilateral agreements with

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<sup>65</sup>Frankie wong,' Criticisms and Shortcomings of the ICC (2019) <<https://accessaccountability.org>>accessed on the 3<sup>rd</sup> January, 2026.

<sup>66</sup>Ibid

<sup>67</sup> Ibid

<sup>68</sup>Sterio (note 1) 474

different countries, in order to ensure the latter would not extradite US nationals found within such countries to the court.<sup>69</sup> These agreements effectively precluded signatory countries from cooperating with the ICC in matters of extradition, and have weakened the court's ability to execute arrest warrants against some indicted individuals.<sup>70</sup>

More recently, the Trump Administration has displayed overt hostility toward the court. John Bolton, who, at the time, served as National Security Advisor, lambasted the court and accused it of having no jurisdiction, legitimacy or authority. Bolton announced that the United States would revoke visas for the ICC personnel, and even threatened that such personnel could be arrested if present in the United States.<sup>71</sup> The same scenario played out when the Prosecutor of the International Criminal Court requested for a warrant of arrest to be issued against the Israel Prime Minister for war crimes in the current Israel Gaza war, the Israel Government and the United States threatened the Prosecutor and the judges of the ICC. However, when the ICC issued a warrant of arrest against the current President of Russia, the same United States supported the ICC's decision. These separate reactions by the U.S have made most countries around the world to consider the U.S's position as double standard and hypocritical.

### **iii. Low Level of Convictions**

First, the ICC has been in existence for twenty four years. Since its inception, the court has successfully indicted more than 40 individuals, 17 individuals remain at large, criminal charges have been dropped against 7 people due to their deaths.<sup>72</sup> The Court convicted only ten and acquitted 4 defendants<sup>73</sup>. It would be imprudent to criticise the court for not convicting all defendants – all courts are supposed to respect defense rights, to operate on the presumption of innocence for all defendants, and it is rare for any court to have a 100 percent conviction rate. However, it is possible to criticise the court's Prosecutor for initiating so few prosecutions and for presenting weak cases.

In the Gbagbo case in particular, which resulted in an acquittal, the Trial Chamber lambasted the Office of the Prosecutor (OTP or Prosecutor) for having presented such a disorganized and weak case.<sup>74</sup> In Gbagbo, the Prosecutor struggled from the beginning. At the confirmation of charges

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<sup>69</sup> Ibid

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> About the Court <[https://www.icc-cpi.int/about/the\\_court](https://www.icc-cpi.int/about/the_court)> accessed 20<sup>th</sup> June 2025.

<sup>73</sup> Ibid

<sup>74</sup> Milena (note 1) 469.

stage, the Pre-Trial Chamber criticised the Prosecutor for attempting to build its case of crimes against humanity based on hearsay evidence from NGO reports and press articles. The Pre-Trial Chamber gave the Prosecutor five extra months to collect additional evidence which would withstand scrutiny and result in the confirmation of charges against Gbagbo. During Gbagbo's trial, the prosecution called multiple witnesses and presented thousands of pages of documents, but was unable to link Gbagbo to the violence that took place in Cote d'Ivoire.

At the close of trial, which took several years, the trial chamber asked the Prosecutor to submit an additional brief which would explain and better organize all of the evidence which the OTP had submitted during trial. And on January 15, 2019, the Trial Chamber acquitted Gbagbo, after it granted a no case to answer motion at the end of the prosecution's case. The Trial Chamber was exceptionally critical of the prosecution. Judges criticised the Prosecutor for her poor handling of the physical evidence, her reliance on hearsay testimony, and her distorted evidence gathering.

#### **vi. Disagreements among the Judges**

The ICC's judges have displayed a level of discord among themselves, have been inconsistent in their application of substantive law, and some judges have been publicly embroiled in a salary dispute.<sup>75</sup> All of these issues may contribute to a negative perception of the court as a failed institution.<sup>76</sup> It appears that ICC judges do not get along. According to Guilfoyle, "there are very worrying signs of a breakdown in collegiality among the ICC judges which is damaging both the formal coherence of court decisions and its wider legitimacy."<sup>77</sup>

Some years back, such a level of discord has escalated to a higher level when Judge Ibanez Carranza dissented from a decision assigning a different judge to preside over an appeal (Judge Ibanez Carranza complained that she had never been assigned to preside over an appeal).<sup>78</sup> Her dissent was rebutted by a joint declaration by the ICC President and Judge Hofmanski, and Judge Ibanez Carranza then publicly characterized the issuance of such a joint declaration as a potential

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<sup>75</sup> Ibid 471

<sup>76</sup> Ibid

<sup>77</sup> Ibid

<sup>78</sup> Ibid

abuse of administrative functions.<sup>79</sup> As Kevin Jon Heller observed, “you know things are bad at the Court when disagreements over presiding judge appointments is spilling out into the public.”<sup>80</sup>

#### **v. Division in the Application of Law among the Judges**

The judges of the International Criminal Court have been divided in their application of the law, resulting in inconsistent judgments and contributing toward uncertainty in the definition and development of legal norms in the field of international criminal law. For example, in the Ruto and Sang “no case to answer” decision, the Trial Chamber announced its decision through a reference to separate opinions which gave different reasons for the decision.<sup>81</sup> This “appears to be a signal a breakdown of the deliberative process, if those who agreed on the outcome could not agree on a common set of reasons.”<sup>82</sup>

In addition, some ICC judges have been involved in a pseudo-public dispute over their salaries. While these judges may have valid claims regarding their compensation, this type of a dispute contributes to a largely negative perception of the court as an elite institution whose members are out of tune with reality.

#### **iv. Exclusive focus on African Countries**

Many African countries have repeatedly criticized the International Criminal Court as being inappropriately political by only focusing on situations in Africa. At one extreme, some consider this seemingly unjustified practice as an attempt by the Western States “to keep African countries compliant to the dictates of the West and its allies” or “the sacrificial lambs in the ICC’s struggle for global legitimation”.<sup>83</sup> So far, every convicted person has been African.<sup>84</sup>

Despite the assertion, most of the African situations were referred to the ICC by African governments themselves.<sup>85</sup> Secondly, it is the individuals but not the States that were suspected of exceptionally grave crimes and consequently subject to ICC criminal jurisdiction.<sup>86</sup> Perhaps a

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<sup>79</sup> Ibid

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup>Wong(n 65)

<sup>84</sup> Ibid

<sup>85</sup>Ibid.

<sup>86</sup> Ibid

better question to ask is, why the ICC is doing so little elsewhere.<sup>87</sup> In January 2016, the Prosecutor of the ICC was authorised by the ICC Pre-Trial Chamber to start an investigation into the situation of Georgia, which is the first non-African situation under the Court's jurisdiction. There is also an appeal against the Pre-Trial Chamber's decision not to authorise an investigation into alleged war crimes committed by, inter alia, US Forces, CIA and members of international armed forces.<sup>88</sup>

It seems that the recent warrant of arrest issued by the ICC against the President of the Russian Federation, Vladimir Putin, the application by the ICC Prosecutor to the Pre-Trial Chamber of the ICC for a warrant of arrest against the Israel Prime Minister and his Defence Minister, and top Hamas leaders are gradually but surely changing the narrative that the ICC is only focusing on Africa and not other parts of the world.

## CONCLUSION

The International Criminal Court has served as an agent of impunity since its inception in 1998, and its critical role in the field of international criminal justice as a permanent accountability mechanism remains undisputed. The court is, however, facing significant challenges which may threaten its legitimacy. These challenges can be surmounted if the court is willing to change its own procedures, prosecutorial practices, and judicial attitudes. The success of the ICC is vital for international criminal justice, and its failure could constitute an enormous setback not only in the fight against impunity, but it would be a grave disservice to the many courageous activists who have given their lives for the cause of fighting crimes against humanity and genocide. The ICC's future may be bright if the court and all critical stakeholders, such as countries who are signatories to the ICC protocol make significant changes in the present.

In light of the foregoing discourse, it is apposite to make recommendations that will bolster and embolden the court in the performance of its statutory functions and to guarantee its future as an international criminal court. The recommendations are as follows:

1. ICC's Prosecutor should continue to build cases so that he can ultimately prosecute more individuals. Aside prosecuting presidents and prime ministers, the ICC's Prosecutor

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<sup>87</sup> Ibid

<sup>88</sup> Ibid

could focus more on lower level offenders, whose cases may be easier to put together and where the chances of conviction may be higher. In fact, a deep investigation into crimes committed by a lower level individual, and a successful conviction of the same individual could potentially lead toward the imposition of accountability on higher-level defendants from the same country or situation.<sup>89</sup> The Yugoslavia tribunal, in particular, was successful in this approach: the ICTY's first defendant was DuskoTadic, a relatively unknown lower-level leader of the Bosnian Serbs; the ICTY's last defendants were Radovan Karadzic and RatkoMladic, civil and military leaders of the Bosnian Serbs.<sup>90</sup> It may be argued that the ICTY built a successful foundation by first prosecuting lower-level leaders before reaching for those at the top, and that the investigations, gathered evidence, and prosecutorial work accomplished during the prosecution of lower-level cases paved the way toward a successful prosecution of Karadzic and Mladic.<sup>91</sup> The ICC could follow the ICTY's example and the Prosecutor could start building cases against lower-level defendants for existing situations, which may lead toward the indictment of leaders.<sup>92</sup>

2. The ICC's Prosecutor should construct a careful strategy regarding future case selection, which should include considerations such as the prospects of a successful conviction, the possibility that the chosen case and prosecution will lead toward more prosecutions of higher-level defendants, geographic diversity to ensure that defendants from all parts of the world are investigated and prosecuted, as well as any political concerns related to the opening of a new case.<sup>93</sup>
3. Certain procedures such as Pre-Trial Chambers, which according to the current procedures need to confirm charges presented by the OTP, should be re-examined. Scholars have already advanced this argument: Douglas Guilfoyle, for example, has argued that "[m]any of the Pre-Trial Chamber functions could as easily be conducted by a Trial Chamber, and the confirmation of charges process substantially streamlined," because in light of the court's relatively few active cases, "the Pre-Trial Division... has come to seem a cumbersome and ineffective mechanism which is largely a source of

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<sup>89</sup> Ibid 476

<sup>90</sup> Ibid

<sup>91</sup> Ibid

<sup>92</sup> Ibid

<sup>93</sup> Ibid

delay.”<sup>94</sup> Former ICC Judge Christine Van Den Wyngaert has also criticised the existence of the Pre-Trial Chamber, and has referred to it as a “mistake in the legal architecture” because “instead of accelerating everything, it just slowed everything down.”<sup>95</sup>

4. Judges of the International Criminal Court should work on forging consensus regarding substantive law. This may entail better communication and coordination among the judges, an increased sharing of experience, expertise, and ideas, and awareness from all the judges about the importance of delivering consistent and uniform decisions.
5. The ICC’s Prosecutor should spread his tentacles to other regions of the world when it comes to investigating and prosecuting allegations of heinous crimes such as genocide, war crimes, crimes against humanity and the crime of aggression. This will change the narrative being peddled around that the ICC is a Court established to investigate and prosecute only African leaders.
6. The ICC needs to encourage better cooperation from its member states, as well as from other states throughout the world. The court cannot make progress if it is surrounded by hostile states, as all of its investigations depend on the host country’s willingness to cooperate with the court. As Douglas Guilfoyle has noted, “international criminal tribunals need powerful patrons to operate successfully”<sup>96</sup> and the ICC’s future success may depend on better support and cooperation from its constituents. Thus, it is crucial for the ICC to invest resources into building strong support among its member states, and throughout the world.

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<sup>94</sup> Ibid

<sup>95</sup> Ibid

<sup>96</sup> Ibid