



**Strathmore University**  

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**Law School**

**PROSECUTION OF THE CRIME OF GENOCIDE: ANALYSING THE  
SYSTEM OF PROOF IN THE ROME STATUTE**

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By

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**Declaration**

I, MWANGI ALEXANDER NELSON MUGO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: 11/12/2024 .....

This dissertation has been submitted for examination with my approval as University Supervisor.

A handwritten signature in blue ink, appearing to read 'Antoinette Kankindi', written over a dotted line.

Signed: .....

**DR ANTOINETTE KANKINDI**

## **List of Abbreviations**

ICC- International Criminal Court

ICTR- International Criminal Tribunal for Rwanda

ICTY- International Criminal Tribunal for the Former Yugoslavia

JCE- Joint Criminal Enterprise

## **List of International legal Instruments**

The Rome Statute for the International Criminal Court

The Convention on Prevention and Punishment of the Crime of Genocide

## **List of Cases**

*The Prosecutor v Jean-Paul Akayesu* (1998)

*The Prosecutor v Radovan Karadzic* (2016)

*The Prosecutor v Theoneste Bagosora* (2011)

*The Prosecutor v Bosco Ntaganda* (2019)

*The Prosecutor v Slobodan Milosevic* (2009)

*The Prosecutor v Omar Hassan Ahmad Al Bashir* (2009)

*The Prosecutor v. Germain Katanga* (2014)

**Definitions**

**Genocidal Intent:** The intent to completely or partially annihilate a national, ethnic, racial, or religious group as such.

**Intent:** Genocidal Intent.

## **Abstract**

Since its inception in 2002, the International Criminal Court (ICC) has notably not secured even a single conviction, specifically for the crime of genocide, despite a number of individuals being charged. The prosecution of genocide before the ICC presents significant challenges, particularly in establishing genocidal intent, a requirement for conviction. The problem is that, while the *Convention on Prevention and Punishment of Genocide* 1951, as well as the *Rome Statute* 2002 have defined the International Crime of Genocide and set out its criteria, the ICC has found it difficult to prove genocidal intent in the case of many individuals charged with the same crime. This paper seeks to establish the reason why the ICC fails to convict genocide criminals despite prosecuting so many. The research will use the collective theory of genocidal intent selected because it offers a comprehensive approach to proving genocide. It posits that, when trying to establish genocidal intent, the coordinated actions of groups should be taken into account rather than focusing solely on the actions of individual actors. This study covers relevant provisions from international legal instruments on genocide, international criminal courts' jurisprudence, literature regarding genocidal intent; to provide an in-depth analysis of genocide and its system of proof. A doctrinal research methodology will be employed. The research hopes to provide insights on the conceptualization of the international crime of genocide and how its understanding determines trial outcomes.

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## CHAPTER 1. INTRODUCTION

### 1.1 Background

International law characterizes genocide as the intentional and calculated destruction of specific ethnic, racial, religious, or national groups<sup>1</sup>. It represents one of humanity's darkest realities, because the deliberate elimination of a whole human group is a grave violation of human dignity<sup>2</sup>. After World War II, it was acknowledged as a global criminal act, particularly in light of the atrocities carried out during the Holocaust. Genocide was regarded as a transnational offense by the United Nations and consequently the *Convention on the Prevention and Punishment of the Crime of Genocide* 1951 was adopted. *The Convention on Prevention and Punishment of Genocide* 1951 was a groundbreaking treaty, which codified the prohibition of genocide and established mechanisms for its prevention and punishment<sup>3</sup>. However its application and enforcement has been fraught with difficulties.

In 1993, the International Criminal Tribunal for Yugoslavia (ICTY)<sup>4</sup> was established to try individuals responsible for the Yugoslav conflict atrocities. The ICTY has since indicted 161 individuals, on account of the war crimes that took place during the 1990s conflict in the Balkans. Of these individuals, only 10 were convicted of genocide. 79 others were convicted of either aiding and abetting genocide or other crimes against humanity; due to insufficient evidence directly linking them to genocide. 18 individuals were acquitted on all counts of genocide and 13 others referred to national courts as they were considered lower-level perpetrators<sup>5</sup>. The case of Radovan Karadžić, the former Bosnian Serb leader, stands out. While Karadžić was convicted of genocide for the Srebrenica massacre in 1995, he was acquitted of all the other counts of genocide related to other regions in Bosnia, due to insufficient evidence establishing genocidal intent<sup>6</sup>. Slobodan

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<sup>1</sup>Article II, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, UNTS 78.

<sup>2</sup>Chalk F and Kurt J 'The Definition of Genocide' in *The History and Sociology of Genocide: Analyses and Case Studies*, Yale University Press, 1990, 24.

<sup>3</sup>Zachary K, 'An Unfulfilled Promise: The Genocide Convention and the obligation prevention' 11(4) *Journal of Strategic Security*, 2018, 23.

<sup>4</sup>UNSC S/RES/827 (1993), International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 1.

<sup>5</sup>*Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, President of the International Criminal Tribunal for the former Yugoslavia*, 1 August 2017, UN Doc A/UNGA/72/266 (hereafter UN ICTY 2017 Report) 12.

<sup>6</sup>*The Prosecutor v Radovan Karadzic* (2016), The International Criminal Tribunal for the former Yugoslavia.

Milošević who was charged with genocide initially, had his case faltered due to the difficulties in establishing genocidal intent<sup>7</sup>.

In 1994, the International Criminal Tribunal for Rwanda (ICTR) was established in response to the 1994 Genocide against the Tutsi in Rwanda<sup>8</sup>. The tribunal indicted 93 individuals. The tribunal convicted 29 criminals of genocide. 61 were convicted of either assisting and facilitating genocide or other crimes against humanity<sup>9</sup>. One notable case is that of Jean-Paul Akayesu, who was the first person to be convicted of genocide by an international court<sup>10</sup>. On the other hand, Théoneste Bagosora, who was initially found guilty of genocide, saw his sentence reduced due to insufficient evidence of the requisite genocidal intent<sup>11</sup>.

The Rome Statute of 2002 established the International Criminal Court (ICC) as a permanent entity to prosecute those responsible for the most grave crimes of global concern, including genocide<sup>12</sup>. Despite its mandate and the significant expectations placed upon it, the ICC has faced substantial challenges in convicting criminals of genocide. The ICC has publicly indicted 57 people on counts of international crimes. However, the court has not achieved a single conviction for genocide to date.<sup>13</sup> Bosco Ntaganda, was charged with war crimes, crimes against humanity, and genocide for his role in the violence in the Democratic Republic of Congo. While Ntaganda was convicted of multiple counts of other crimes, the charge of genocide was dropped, on account of the prosecution's failure to establish genocidal intent<sup>14</sup>.

While the ICC was established to provide an international instance of justice for the most serious international crimes, it has struggled to prosecute and convict criminals of genocide. The court's cases often involve complex contexts with overlapping war crimes and crimes against humanity, making it challenging to isolate and prove the specific intent required for genocide. For instance, in Ntaganda's case, the prosecution's inability to demonstrate genocidal intent led to the dropping of genocide charges. Political constraints also limit the International Criminal Court's effectiveness. The court relies on member states' to arrest suspects and acquire evidence, but political concerns and a lack of state cooperation might jeopardize its operations.

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<sup>7</sup>*The Prosecutor v Slobodan Milosevic* (2009), The International Criminal Tribunal for the former Yugoslavia.

<sup>8</sup>UNSC S/RES/955 (1994), The 1994 Genocide against the Tutsi in Rwanda, 1.

<sup>9</sup>*Report on the Completion Strategy of the International Criminal Tribunal for Rwanda as at May 2015, President of the International Criminal Tribunal for Rwanda*, UN Doc S/UNGA/340 (hereafter UN ICTY 2015 Report) 5-7.

<sup>10</sup>*The Prosecutor v Jean-Paul Akayesu* (1998), International Criminal Tribunal for Rwanda.

<sup>11</sup>*The Prosecutor v Théoneste Bagosora* (2011), The International Criminal Tribunal for Rwanda.

<sup>12</sup>Article 1, *Rome Statute of the International Criminal Court*, 17 July 1998, UNTS 2187.

<sup>13</sup> – <<https://www.icc-cpi.int/>> – on 28 July 2024.

<sup>14</sup>*The Prosecutor v Bosco Ntaganda* (2019), The International Criminal Court.

There seems to be something about genocide that makes the court fail to convict criminals charged with the crime.

## **1.2 Statement Of The Problem**

The *Convention on Prevention and Punishment of Genocide* 1951, as well as the *Rome Statute* 2002 have defined genocide as an international crime and set out the criteria for convicting genocide criminals. However, prosecution of genocide before the ICC is evidently difficult, primarily due to the inherent hurdle in establishing genocidal intent, a required proof for convicting criminals of genocide. This study intends to investigate the reason why the ICC fails to convict criminals of the crime of genocide despite charging many. While the crime is so clear in itself, the problem seems to derive from the inability of the prosecution, at the ICC, to establish genocidal intent. The prosecution appears to focus on the actions of an individual perpetrator, rather than collective and coordinated action involved in carrying out genocide.

## **1.3 Objectives Of The Study**

The objectives of this study are centered around analyzing the system of proof of the crime of genocide, to assess why it is difficult for the ICC to prosecute and convict on the ground of the crime.

### **1.3.1 Main Aim**

The main aim of this study is to establish the reason behind the ICC's failure to convict criminals of the crime of genocide.

### **1.3.2 Research Objectives**

For the achievement of the primary aim of the study, the following objectives will be addressed:

1. To examine the legal framework that governs the system of proof of genocide in International Criminal Law.
2. To examine case law from international criminal courts pertaining to the crime of genocide.
3. To present the findings and recommendations on a nuanced understanding of the system of proof with an emphasis on the criteria for genocidal intent.

#### **1.4 Research Questions**

The aforementioned objectives will be analyzed guided by the the following study questions:

1. What is the legal regime that governs the system of evidence for the prosecution of genocide as a crime?
2. What are the challenges and criticisms of proving genocidal intent in legal proceedings before the International Criminal Courts?

#### **1.5 Research Hypothesis**

This research proceeds on the assumption that the ICC's failure to convict criminals of genocide is due to the difficulty in proving genocidal intent, for a crime that tends to be collective, rather than individual.

#### **1.6 Justification For The Study**

The justification of the proposed study lies in the need to address the weakness, derived from the hurdle in establishing genocidal intent as a component of the system of proof of genocide. Existing literature seems not to have dwelled on the collective approach to proving intent. The proposed research hopes to contribute to filling part of this gap.

#### **1.7 Theoretical Framework**

The analysis of the research problem will use the Collective Theory of genocidal intent, advanced by Sangkul Kim<sup>15</sup>. The theory was selected because it offers a mechanism of interpreting proof of genocide as a crime particularly an approach to intent. The theory posits that genocidal intent should be seen as a collective, rather than solely individual, state of mind<sup>16</sup>. Thus, it is imperative to infer genocidal intent from the activities of the accused organization as a whole, rather than the action of an individual culprit. The nature of the crime i.e. its organisation and the way it is carried out, justifies a consideration of group dynamics rather than an individual's act.

Larry May's discussion of the role of collective responsibility in atrocity crimes supports Kim's theory. May considers the concept of collective responsibility, arguing that genocide is inherently a

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<sup>15</sup>Sangkul K, *A Collective Theory of Genocidal Intent*, 1ed, T.M. C Acer Press, Georgetown, 2016.

<sup>16</sup>Sangkul K, *A Collective Theory of Genocidal Intent*, 1ed, T.M. C Acer Press, Georgetown, 2016, 1-10.

crime of the collective liability, involving the actions and intentions of groups rather than just individuals<sup>17</sup>. May concurs with Kim's Collective Theory, reinforcing the idea that the legal interpretation of genocidal intent should account for the collective dynamics within a group. Both May and Kim challenge the conventional focus on individual intent, highlighting the significance of group actions in the perpetration of genocide.

In contrast, William Schabas defends the traditional approach to proving genocidal intent, which is currently employed by the ICC. Schabas endorses individual criminal culpability advanced by the use of both direct and circumstantial evidence to establish the intent of specific perpetrators<sup>18</sup>. The individual criminal liability approach not only diverges from Kim's theory by prioritising individual over collective responsibility, but also makes it difficult for the ICC to convict genocide criminals, given the difficulty of proving personal intent.

### Literature Review

The concept "genocide" has evolved significantly since its initial definition by Raphael Lemkin in 1944. Lemkin described genocide as, "A coordinated plan to annihilate the essential foundations of the life of national groups, with the aim of eradicating them"<sup>19</sup>. Lemkin's definition has been influential in shaping legal frameworks and scholarly discussions. However, the term has been subject to reinterpretation and redefinition by various writers. Adam Jones considers that, "Genocide includes, not only the physical destruction of a group but also the eradication of its cultural, social, and economic foundations"<sup>20</sup>. Jones' perspective is echoed by Dirk Moses, who argues that genocide must be interpreted in light of its sociopolitical and historical context, noting how such contexts have shaped the comprehension of genocide<sup>21</sup>. The crime is a tool utilised in driving a socio-political agenda. Leo Totten and Steven Jacobs elaborate on the same by presenting genocide as a term that has been used to describe mass atrocities historically; for instance the holocaust and the killing of Africans by their respective masters during the colonial period<sup>22</sup>.

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<sup>17</sup>May L, *Genocide: A Normative Account*, 1ed, Cambridge University Press, Cambridge, 2010, 121.

<sup>18</sup>Schabas W, *An Introduction to the International Criminal Court*, 3rd edn, Cambridge University Press, Cambridge, 2011,77-85.

<sup>19</sup>Lemkin R, 'Genocide as a Crime under International Law' 41 *The American Journal of International Law* 1, 1947, 147.

<sup>20</sup>Jones A, *Genocide: A Comprehensive Introduction*, 3ed, Routledge, London, 2016, 1-10.

<sup>21</sup>Dirk M, *Genocide: Critical Concepts in Historical Studies*, 1ed, Routledge, London, 2010, 1-7.

<sup>22</sup>Samuel T, Steven J, *Pioneers of Genocide Studies*, 1 ed, Routledge, London, 2013, 1-15.

Scholarly works reveals varying interpretations of the term “genocide”. Paul Bartrop, who studies genocide from a historical perspective, suggests that the term has been applied inconsistently, leading to debates about its scope and application<sup>23</sup>. Franklin Chalk analyses the implications of different definitions of genocide, contending that these definitions shape international responses and influence the pursuit of justice for victims<sup>24</sup>. Ernesto Verdeja argues that the concept of genocide integrates into broader discussions of mass violence and state crimes in international law, often influenced by driving a particular political or social objective<sup>25</sup>.

Many scholars critique the Genocide Convention's limitations, citing its narrow scope. Helen Fein argues that the Convention’s omission of political and social groups from its protections has restricted its applicability, leading to the exclusion of many atrocities that could be considered genocidal under broader interpretations<sup>26</sup>. Samantha Power criticises the Convention's lack of enforcement mechanisms, observing that despite its promise to prevent and punish genocide, the international law has often failed to act decisively due to political hesitation<sup>27</sup>. Leo Kuper points out the challenges posed by the convention's requirement to prove genocidal intent, which has made prosecution difficult and inconsistent<sup>28</sup>. While the convention laid a legal foundation, it has struggled to fulfill its objectives in practice due to definitional and enforcement issues.

Commentators on the Rome Statute have identified both strengths and weaknesses in its prosecution framework. Antonio Cassese praises the Statute for establishing the ICC, a significant leap in international criminal justice which creating a permanent mechanism to prosecute international crimes<sup>29</sup>. However, Carsten Stahn has raised concerns about the Statute’s evidentiary standards for proving genocidal intent. He argues that the ICC’s need for direct evidence of intent often complicates prosecutions, as perpetrators rarely leave explicit orders to commit genocide<sup>30</sup>. Leila Sadat flags the political constraints faced by the ICC, particularly regarding state

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<sup>23</sup>Bartrop P, ‘The Concept of Genocide in a Historical Perspective’ 4 *Journal of Genocide Research* 3, 2002, 23.

<sup>24</sup>Chalk F, ‘Genocide in the 20th Century: Definitions of Genocide and their Implications for Prediction and Prevention’ 4 *Holocaust and Genocide Studies* 2, 1989, 149-160.

<sup>25</sup>Verdeja E, ‘The Political Science of Genocide: Outline of an Emerging Research Agenda’ 10 *Perspectives on Politics* 2, 2012, 307-321.

<sup>26</sup>Fein H, *Genocide: A Sociological Perspective*, 1ed, Sage Publications, California, 1993, 45-67.

<sup>27</sup>Power S, *A Problem from Hell: America and the Age of Genocide*, 1ed, Basic Books, New York, 2002, 83-105.

<sup>28</sup>Kuper L, *Genocide: Its Political Use in the Twentieth Century*, 1ed, Yale University Press, Connecticut, 1981, 21-35.

<sup>29</sup>Cassese A, *International Criminal Law*, 2 ed, Oxford University Press, Oxford, 2008, 123-140.

<sup>30</sup>Stahn C, *The Law and Practice of the International Criminal Court*, 1ed, Oxford University Press, Oxford, 2015, 212-228.

cooperation, which often impedes the court's ability to arrest and prosecute key suspects<sup>31</sup>. While the Rome Statute has advanced international efforts to prosecute genocide, obstacles remain in securing convictions and ensuring widespread compliance in instances where arrest is necessary.

Genocidal intent, or *dolus specialis*, is a key aspect that distinguishes genocide from other international crimes. Genocidal intent has been a focal point of discourse, particularly regarding how intent is established and proven. Moses contends that genocidal intent should be understood within the broader framework of state power and security<sup>32</sup>. He posits that The desire to annihilate a group is often aligned with political and ideological goals; where the eradication of a group is seen as necessary for the state's perceived security or ideological purity<sup>33</sup>. Sarkin explores the manifestation of genocidal intent in colonial policies, suggesting that the systemic oppression and exploitation inherent in colonialism often carry an implicit genocidal intent, even if not explicitly stated<sup>34</sup>.

Schabas discusses the challenges the ICTR and ICTY faced when seeking to establish genocidal intent. He notes that intent should be inferred from patterns of behaviour rather than direct evidence<sup>35</sup>. The 'direct evidence' approach led to difficulties in securing convictions, as the requirement of specific intent has proved a high legal standard to meet<sup>36</sup>. David Nersessian critiques the jurisprudence of the ICTR and the ICTY, arguing that the strict requirement for specific intent has resulted in inconsistent and sometimes troubling outcomes in genocide trials<sup>37</sup>. He suggests that the legal standard for intent may need reevaluation to better align with the realities of prosecuting genocide<sup>38</sup>. Donald Bloxham provides a historical analysis of the ICTR and ICTY matters. He

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<sup>31</sup>Sadat L, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Transnational Publishers, London, 2002, 56-70.

<sup>32</sup>Dirk M, *The Problems of Genocide: Permanent Security and the Language of Transgression*, 1ed, Cambridge University Press, England, 2021, 1-15.

<sup>33</sup>Dirk, *The Problems of Genocide: Permanent Security and the Language of Transgression*, 5.

<sup>34</sup>Sarkin J, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia 1904-1998*, 1ed, Praeger, Westport, 2008, 63-79.

<sup>35</sup>Schabas W, 'Genocide in International Law: The Crime of Crimes' 28 *International Journal on World Peace* 1, 2011, 96-98.

<sup>36</sup>Schabas W, 'Genocide in international law: The crime of crimes,' 97.

<sup>37</sup>Nersessian D, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals' 37 *Texas International Law Journal* 1, 2002, 1-7.

<sup>38</sup>Nersessian D, 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals' 220.

links intent to broader issues of state criminality and ideological enforcement, suggesting that genocidal intent is often deeply embedded in the policies and practices of oppressive regimes<sup>39</sup>.

Schabas provides an in-depth analysis of the evidentiary standards used in the tribunals, noting that they relied on circumstantial evidence heavily<sup>40</sup>. This reliance is due to the covert nature of the crime genocide. Explicit orders or statements of intent are rare<sup>41</sup>. The difficulty in proving genocidal intent is further explored in Alexander Greenawalt's article, "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation."<sup>42</sup> He argues that the traditional interpretation of 'dolus specialis' sets an excessively high threshold. Greenawalt advocates for a knowledge-based approach, where intent could be inferred from the knowledge of the likely consequences of one's actions, rather than requiring explicit evidence of a desire to destroy a group<sup>43</sup>. Greenawalt's perspective suggests that current legal standards for proving genocidal intent may need to be reexamined to ensure that justice is served in cases of mass atrocities<sup>44</sup>.

Van Schaack discusses the approach of the ICC in handling genocidal intent, noting that applying a consistent standard across different cases is not feasible. She notes that the ICC's reliance on previous tribunal jurisprudence has both helped and hindered its ability to effectively prosecute genocide because the crime of genocide manifests uniquely in different regions<sup>45</sup>. The ICC cannot therefore operate in a realm of binding precedents given the distinctiveness of genocide across regions<sup>46</sup>. Herbert Hirsch addresses the prosecution's onus of proving intent. The ambiguity surrounding intent often leads to acquittals or lesser charges, as the prosecution may struggle to meet the high evidentiary standards required by international law<sup>47</sup>.

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<sup>39</sup>Bloxham D, 'The Genocidal Mindset: An Historical Interpretation of the Intent Requirement of Genocide' 4 *Journal of Genocide Research* 3, 2001, 15-19.

<sup>40</sup>Schabas W, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone*, 1ed, Cambridge University Press, England, 2006, 200.

<sup>41</sup>Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone*, 200.

<sup>42</sup>Greenawalt K, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' 99 *Columbia Law Review* 8, 1999.

<sup>43</sup>Greenawalt K, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' 2259-2294.

<sup>44</sup>Greenawalt K, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' 2293.

<sup>45</sup>VanSchaack B, 'The Crime of Genocide and the ICC Statute' 93 *American Journal of International Law* 2, 1999, 385-397.

<sup>46</sup>VanSchaack B, 'The Crime of Genocide and the ICC Statute' 93 *American Journal of International Law* 2, 1999.

<sup>47</sup>Hirsch H, 'The Genocide Convention and the Prosecution of Genocidal Intent' 35 *New York University Journal of International Law and Politics* 4, 2003, 551-567.

Garren Fletcher compares approaches to proving criminal intent, suggesting that divergent legal standards across jurisdictions complicate the prosecution of genocide<sup>48</sup>. He calls for a unified approach to evidentiary standards, which could help in overcoming the challenges faced by prosecutors<sup>49</sup>. David Nersessian revisits the intent requirement, proposing reforms to the evidentiary standards to ensure consistent and fair outcomes in genocide cases<sup>50</sup>. He argues that the current standards are often too rigid, preventing the effective prosecution of those responsible for genocidal acts<sup>51</sup>.

The jurisprudence of the ICTR and ICTY has played a pivotal role in shaping the international legal landscape regarding genocide. These tribunals have provided important case law that has influenced subsequent prosecutions and legal interpretations of genocide. Payam Akhavan discusses how these tribunals have reduced genocide to a legal definition, often focusing on the narrow interpretation of intent and acts<sup>52</sup>. He argues that this legal reductionism sometimes overlooks the broader social and political contexts in which genocides occur, potentially limiting the scope of justice<sup>53</sup>. Drumbl critiques the retributive justice model adopted by the ICTR, indicating that it has led to a narrow interpretation of genocide. He suggests that this approach fails to address the root causes of mass violence, such as socio-political instability and ethnic tensions<sup>54</sup>.

Alex Alvarez examines state criminality within the ICTY's jurisprudence. He notes that the ICTY has been instrumental in establishing legal precedents for state responsibility in genocidal acts, but also points out the limitations of its approach in cases involving complex political and military contexts<sup>55</sup>. Aaron Fichtelberg reflects on the legacy of the ICTY discussing the dilemma the court faced in balancing legal principles with political realities in the context of the Balkans conflict<sup>56</sup>. Rachel Kerr analyses the ICTY's influence on international law, particularly in shaping the

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<sup>48</sup>Fletcher G, 'Proving Genocidal Intent: International and Comparative Approaches,' 14 *Duke Journal of Comparative & International Law* 1, 2004, 49-65.

<sup>49</sup>Fletcher G, 'Proving Genocidal Intent: International and Comparative Approaches,' 14 *Duke Journal of Comparative & International Law* 1, 2004, 49-65.

<sup>50</sup>Nersessian D, 'Rethinking the Genocidal Intent Requirement' 42 *Texas International Law Journal* 3, 2007, 43-60.

<sup>51</sup>Nersessian D, 'Rethinking the Genocidal Intent Requirement' 43-60.

<sup>52</sup>Akhavan P, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*, Cambridge University Press, Cambridge, 2012, 156-168.

<sup>53</sup>Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*, 156-168.

<sup>54</sup>Drumbl A, 'Sclerosis: Retributive Justice and the Rwandan Genocide' 2 *Journal of Genocide Research* 3, 2000, 287-306.

<sup>55</sup>Alvarez A, 'Crimes of States, Crimes of Hate: The Case for Understanding State Criminality' 35 *Law and Society Review* 4, 2001, 1027-1058.

<sup>56</sup>Fichtelberg A, 'The Legacy of the ICTY: A Challenge for the Future' 19 *Criminal Law Forum* 2, 2008, 24.

understanding of genocidal intent and the evidentiary standards required to prove it. Kerr states that the ICTY's jurisprudence has been both groundbreaking and controversial, setting important precedents while also illustrating the challenges of prosecuting genocide in an international court<sup>57</sup>

The ICC has built on the foundations laid by the ICTR and ICTY, but it faces its own unique challenges in prosecuting genocide. The court's jurisprudence on genocide continues to evolve, with significant implications for international law and the prosecution of mass atrocities. Schabas provides his insights on how the court has approached prosecution of the crime of genocide. He states the ICC relies on the definitions and precedents set by earlier tribunals<sup>58</sup>. Yvonne McDermott opines that while the court has made significant strides, it continues to struggle with issues of evidence gathering and political interference<sup>59</sup>.

There is a growing consensus on the need for a unified approach to prosecuting genocide. Jack Goldsmith maintains that the limits of international law have become apparent in the prosecution of genocide. He suggests that a cohesive legal framework is necessary to address the complexities of international crimes<sup>60</sup>. The literature on the crime of genocide and its prosecution reveals substantial progress in defining and addressing the crime, yet the ICC is unable to convict criminals of the crime. The present framework for prosecution and conviction of genocide criminals often falls short in establishing genocidal intent. The problem stems from the prosecutions' failure to evaluate how collective group behaviors and broader sociopolitical circumstances contribute to genocide.

### **Research Methodology**

This study employs a desk-based doctrinal research methodology. It will utilize primary sources, including the *Convention on the Prevention and Punishment of the Crime of Genocide* 1951 and the *Rome Statute* 2002. The sources will be used to examine the legal framework for prosecution of genocide. The study will also use secondary sources such as books, chapters in books, journal articles and court reports.

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<sup>57</sup>Kerr R, 'The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy' 15 *European Journal of International Law* 2, 2015, 323-343.

<sup>58</sup>Schabas, *An Introduction to the International Criminal Court*, 77-85.

<sup>59</sup>McDermott Y, 'The Ad Hoc Tribunals and the ICC: Achievements and Challenges' 7 *Journal of International Criminal Justice* 5, 2009, 1217-1236.

<sup>60</sup>Goldsmith J, 'The Limits of International Law' 18 *Harvard Law Review* 4, 2005, 1706-1730.

For the first research objective, a deductive research approach will be employed to analyze the legal framework governing the system of proof of genocide in International Criminal Law. For the second objective, I intend to critically analyse jurisprudence from the International Criminal Courts regarding genocide. For the third research objective, I will use a deductive approach to present the findings of the analysis made.

### **Limitations Of The Study**

Extensive body of international case law exists on the crime of genocide. Sorting through numerous case laws and legal records to identify those most relevant to the system of proof under the Rome Statute can be time-consuming and challenging. To mitigate the limitation, the study will focus on major cases that bring out the aspect of genocidal intent.

The theoretical framework presents a challenge in terms of finding scholarly material that directly supports or critiques the collective theory of genocidal intent. Since the theory is relatively novel, there may be limited academic literature to draw upon, which could limit an precise understanding of the theoretical framework. To alleviate the limitation, the study will contrast the collective theory of genocidal intent to the ICC's conventional approach.

### **Chapter Breakdown**

Chapter one will introduce the study, providing a background on prosecution of genocide. It features, among others, the research objectives, questions, theoretical framework, literature review, hypothesis and the justification of the study.

Chapter two will discuss the theoretical framework underpinning the study, focusing on the Collective Theory of genocidal intent and its refinement into the collective systems approach.

Chapter 3 will analyse the legal instruments for prosecution of genocide, particularly with respect to proving genocidal intent.

Chapter 4 will analyse selected cases from the ICC, ICTR, and ICTY to illustrate the practical challenges in proving genocidal intent. The section will provide a comprehensive overview of how different cases have been handled, highlighting key issues and inconsistencies.

In the final chapter, the research will present findings, subsequent recommendations and a conclusion of the research.

## CHAPTER 2. THEORETICAL FRAMEWORK: THE COLLECTIVE THEORY OF GENOCIDAL INTENT

### 2.1 Introduction

The Collective Theory of Genocidal Intent, coined by Sangkul Kim, will be utilised for the research. The theory challenges traditional approaches to establishing genocidal intent, focusing on collective action rather than the actions of individual actors<sup>61</sup>. Employing this framework, the study aims to provide a nuanced understanding of the proof of genocidal intent in international criminal law. The perspectives of other scholars, such as May and Schabas, are incorporated into this discussion to provide an overview of the various approaches on proving genocidal intent.

### 2.2 The Collective Theory of Genocidal Intent

Kim's Collective Theory of Genocidal Intent contradicts the conventional focus on individual intent in genocide prosecutions by advocating for a collective understanding of intent. Kim argues genocidal intent does not reside solely within the actions or mindset of individual perpetrators<sup>62</sup>. He depicts genocide as a collective phenomenon, emerging from the coordinated actions of a group, such as a political faction, a government or military<sup>63</sup>.

The crime of genocide is perpetrated as part of a broader campaign to drive a political or social ideology. In such scenarios, individual actors may not explicitly harbour genocidal intentions but may nonetheless participate in actions that contribute to the genocidal outcome<sup>64</sup>. For instance, soldiers or state officials may be following orders or contributing to a systematic plan without personal animus against the targeted group<sup>65</sup>. Kim's theory suggests that it is easier to prove collective actions such as state policies and coordinated efforts.

By shifting the focus from the individual responsibility to the collective nature of genocidal acts, Kim's proposed approach should enable the prosecution of those involved in orchestrating genocide, even if they did not personally commit genocidal acts or explicitly express genocidal

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<sup>61</sup>Sangkul K, *A Collective Theory of Genocidal Intent*, 1ed, T.M. C Acer Press, Georgetown, 2016.

<sup>62</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 1-10.

<sup>63</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 1-10.

<sup>64</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 7.

<sup>65</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 10.

intentions. The theory will thus serve to analyse traditional methods of proving genocidal intent, as it might offer a flexible system of proof in international criminal law.

### **2.3 Larry May's Concept of Collective Responsibility**

May's work on collective responsibility offers a philosophical foundation to Kim's Collective Theory of Genocidal Intent. May argues that genocide is inherently a crime of collective liability, where the actions and decisions of a group, rather than individual perpetrators alone, lead to genocidal outcomes<sup>66</sup>. May emphasizes the moral and legal importance of holding groups, such as governments or military organizations, accountable for crimes against humanity, including genocide<sup>67</sup>.

May's concept strengthens Kim's collective approach by providing a legal and moral justification for prosecuting groups as collective entities responsible for genocide. This perspective broadens the scope of evidence that can be used to prove intent, making it easier to establish genocide in cases involving complex hierarchies and systemic violence<sup>68</sup>.

### **2.4 William A. Schabas' Traditional Approach**

The system of proof that the ICC has been using is attempting to prove genocidal intent in the individuals charged by the court. Schabas defends the individual criminal liability approach. He states that the prosecution ought to demonstrate that specific individuals acted with the "intent to destroy, in whole or in part, a targeted group"<sup>69</sup>. Schabas' approach relies on direct evidence including explicit statements, circumstantial evidence as well as patterns of behaviour or documented plans, which would infer individual intent.

While the individual criminal culpability is the ordinary system of proof of crimes in the ICC, its limitation is illustrated by the court's consistent failure to convict criminals of genocide. In cases of genocide perpetrated by state structures, it is practically impossible to establish personal intent of all individual perpetrators.

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<sup>66</sup>May L, *Genocide: A Normative Account*, 1ed, Cambridge University Press, Cambridge, 2010, 121.

<sup>67</sup>May, *Genocide: A Normative Account*, 121.

<sup>68</sup>May, *Genocide: A Normative Account*, 121.

<sup>69</sup>Schabas, *An Introduction to the International Criminal Court*, 83.

## **2.5 Application of the Theoretical Framework to Research Objectives**

The Collective Theory of Genocidal Intent will be utilised in addressing the research objectives. First, the theory will be applied to the analysis of the legal framework governing the proof of genocidal intent in international criminal law. Adopting a collective theory, the study will highlight the limitations of current legal standard's focus on individual culpability.

Second, the framework will guide the examination of case law from international criminal courts, such as the ICTY, ICTR, and ICC. In cases before these courts, prosecutors often face challenges in proving individual intent due to the complex structures involved in the crime of genocide. The application of Kim's collective theory in analysing the jurisprudence of international courts, will inform findings with respect to the merits and limitations of the current system of proof in international criminal law.

## **2.6 Conclusion**

Kim's Collective Theory of Genocidal Intent, supported by Larry May's concept of collective responsibility of international crimes and contrasted with William Schabas' traditional approach, forms this study's theoretical framework. Emphasizing on the collective nature of genocidal actions, this framework offers a comprehensive lens for examining the legal framework, case law, and evidentiary standards in genocide prosecutions.

## CHAPTER 3. LEGAL FRAMEWORK GOVERNING THE PROSECUTION OF GENOCIDE AND ITS SYSTEM OF PROOF

### 3.1 Introduction

The ICC operates according to the Rome Statute's principles and standards, which reflect the recognized international understanding of genocide as articulated in the Genocide Convention<sup>70</sup>. Thus, the prosecution of genocide is governed by two pertinent international legal instruments: the *Convention on Prevention and Punishment of the Crime of Genocide* 1951 and the *Rome Statute of the International Criminal Court* 2002<sup>71</sup>. These laws outline the legal definitions, procedural frameworks, and evidentiary standards that govern investigation and prosecution. However, despite the clear provisions, The practical application of the law in genocide trials has presented numerous challenges. This chapter aims at evaluating these international law instruments, to find out how they regulate the system of proof and which standards they set for establishing genocidal intent.

### 3.2 The Genocide Convention's System of Proof

The *Convention on the Prevention and Punishment of the Crime of Genocide* 1951 was a groundbreaking treaty that formalised the international community's commitment to eradicating genocide. Article II, which defines the crime, remains the standard for international prosecutions. It enumerates specific acts that constitute genocide—ranging from killing members of a group, to measures intended to prevent births—when committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>72</sup> It appears that the convention's definition of genocide considers its elements as the standard of proof. According to the convention, proving genocide involves demonstrating intent to eliminate groups.

The phrase “intent to destroy” has sparked great debate among scholars. Schabas points out that the Convention's definition of genocide presupposes the intent of an individual perpetrator<sup>73</sup>. Kim, on the other hand, is critical of the convention's definition of genocide, as it fails to account for the

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<sup>70</sup> Article 4, *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544.

<sup>71</sup> Jones A, *Genocide: A Comprehensive Introduction*, 3ed, Routledge, London, 2016, 1-10.

<sup>72</sup> Article II, *Convention on Prevention and Punishment of the crime of Genocide*, 9 December 1948, 260 A UNGA.

<sup>73</sup> Schabas W, ‘Genocide in international law: The crime of crimes,’ 97.

complex realities of collective intent<sup>74</sup>. Kim opines that genocidal campaigns are rarely the result of a single mastermind acting alone<sup>75</sup>. He explains that they often involve a coordinated effort by numerous individuals, who contribute to the overall goal of group destruction, without necessarily sharing the same subjective intent<sup>76</sup>. His view is supported by Robert Cryer, who claims that the convention's subjective definition of intent made it difficult for International Courts to connect seemingly uncoordinated actions as part of a genocidal plan<sup>77</sup>. The reason is that because the Genocide Convention's definition of intent concentrates too much on what's in a person's mind, it makes it hard for the prosecution to show how separate intentions by different people converge into one intent to commit genocide.

In terms of standard of proof, the convention offers no other threshold for establishing genocide, instead it goes on to propose it as a criteria for civil liability for the contracting parties<sup>78</sup>. The Convention seems to lack specificity concerning the evidentiary threshold for proving a "plan or policy", which means express orders and laws imposed to advance genocide. The absence of explicit language on the role of collective entities in shaping genocidal policy contributes to challenges in proving genocidal intent as a systemic phenomenon. As Kim argues, the convention's adoption of the traditional legal interpretation of intent places undue emphasis on pinpointing the psychological mindset of individual perpetrators<sup>79</sup>. It overlooks the fact that genocidal acts are planned by a web of people working within hierarchical or systemic organizations, making it difficult, if not impossible, to identify individual intent<sup>80</sup>.

Article III further elaborates on the punishable acts, including conspiracy, direct and public provocation, plot, and complicity<sup>81</sup>. The inclusion of clauses addressing conspiracy and incitement under Article III, acknowledges the potential collective dimension of genocidal behaviour, yet the Convention remains silent on how to bridge the gap between collective dynamics and individual culpability.

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<sup>74</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 45-70.

<sup>75</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 145-150.

<sup>76</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 145-150.

<sup>77</sup>Cryer R, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge, 2005, 80.

<sup>78</sup>Article V, *Convention on Prevention and Punishment of the crime of Genocide*, 9 December 1948, 260 A UNGA.

<sup>79</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 1-10.

<sup>80</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 1-10.

<sup>81</sup>Article III, *Convention on Prevention and Punishment of the crime of Genocide*, 9 December 1948, 260 A UNGA.

The examination of Article II and III of the Convention shows that it does not provide guidance on the types of evidence that can be used to prove intent. It implicitly leaves it to the discretion of the courts and tribunals to establish their own standards. Payam Akhavan discusses the practical implications of the Genocide convention's system of proof in the prosecution of genocide<sup>82</sup>. He observes that the necessity of proving specific intent, without guidance on what proof is sufficient, has resulted in many acquittals and the failure to prosecute key orchestrators<sup>83</sup>. Akhavan considers that, since the Convention lacks clarity on what constitutes sufficient proof of intent, courts have struggled to apply a consistent standard<sup>84</sup>. While the Genocide Convention set the legal standard for prosecution, its reliance on individual intent as the only proof required to prosecute, leaves international criminal courts with the challenge of prosecuting genocide as a crime. Genocide, by definition, is a collective crime and not an individual one.

### 3.3 The System of Proof in the Rome Statute

The *Rome Statute of the International Criminal Court 2002* was designed to refine the earlier convention and provide a legal framework for the International Criminal Court. The ICC uses the Rome Statute as its foundational legal document, providing the definitions, principles, and procedural rules governing the prosecution of individuals for serious international crimes, including genocide<sup>85</sup>.

Article 6 of the Rome Statute echoes the Genocide Convention's definition of genocide but offers a detailed enumeration of prohibited acts. "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group: killing members of the group, causing serious bodily or mental harm to members of the group, imposing measures intended to prevent births within the group or forcibly transferring children of the group to another group"<sup>86</sup> The Rome Statute only expanded the description of actions that fall under the concept of genocide. In repeating the provisions of the convention under article II, the Rome Statute also sets, as the only standard of proof, individual intent for all the actions. The stringent focus on individual intent persists, resulting in a similar burden of proof. Elies VanSliedregt states

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<sup>82</sup>Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*, 156-168.

<sup>83</sup>Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*, 160.

<sup>84</sup>Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*, 160.

<sup>85</sup>Schabas, *An Introduction to the International Criminal Court*, 77-85.

<sup>86</sup>Article 6, *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544.

that the Rome Statute broadens the scope of prosecutorial tools by expanding the scope of actions that constitute genocide<sup>87</sup>. Nonetheless, its basis on individual culpability, still confines the proof of genocidal intent to direct evidence, such as explicit orders or documented policies, which are not available in cases of genocide<sup>88</sup>.

Article 25 indicates various modes of participation in perpetration of the crime of genocide such as ordering, aiding, and abetting<sup>89</sup>. According to the clause, a person is criminally culpable and subject for punishment if they commit, order, or enable the commission of the offense<sup>90</sup>. In reference to genocide as a crime, article 25 like article 6 is centered on an individual criminal liability, rather than a collective one. Kim points out that the approach isolates individual contributions rather than situating them within the broader genocidal enterprise<sup>91</sup>.

Article 30 of the Rome Statute sets out the *mens rea* threshold for crimes under its jurisdiction. It provides that, for a person to be held criminally responsible, they must act with both *intent* and *knowledge*<sup>92</sup>. In an instance of genocide, the prosecution must show that the accused not only committed unlawful acts, but did so with full knowledge and the deliberate intent to eliminate, in whole or in part, a national, ethnical, racial, or religious group. Akhavan's critique sheds light on the difficulty of applying Article 30 to high-ranking officials, who may not have directly engaged in genocidal acts but whose actions facilitated the commission of such crimes<sup>93</sup>. Requiring proof of direct intent and knowledge in such cases creates a loophole that allows senior genocide leaders to evade responsibility<sup>94</sup>.

### 3.4 Findings and Conclusion

The legal framework governing prosecution of genocide presents significant challenges in establishing genocidal intent, a central component of the system of proof. While the definitions provided in Article 6 of the Rome Statute and Article II of the Genocide Convention attempt to

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<sup>87</sup>VanSliedregt E, *Individual Criminal Responsibility in International Law*, Oxford University Press, Oxford, 2012, 115.

<sup>88</sup>VanSliedregt E, *Individual Criminal Responsibility in International Law*, 115.

<sup>89</sup>Article 25, *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544.

<sup>90</sup>Article 25, *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544.

<sup>91</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 134.

<sup>92</sup>Article 30, *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544.

<sup>93</sup>Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*, 156-168.

<sup>94</sup>Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*, 156-168.

encapsulate the elements of the crime, they remain narrowly tailored to individual responsibility. While this traditional approach works in the case of individual crimes, it is insufficient or even inadequate in the case of the collective nature of genocidal campaigns. Indeed, in such cases intent is often distributed among multiple actors operating within intricate systems of power. Kim has argued that the focus on individual psychological state, requiring proof that the accused acted with specific intent to destroy a protected group, obscures the broader, collective dynamics at play<sup>95</sup>. This narrow interpretation prevents punishment of those who orchestrate genocide indirectly through systemic policies or decentralized networks. Article 30 of the Rome Statute outlines the mens rea standard for crimes within the ICC's jurisdiction. The provisions of article 30 have been subject to criticism for its insistence on proving intent and knowledge as distinct mental elements, making it difficult to establish genocidal intent in complex scenarios where direct evidence is often elusive. In such cases, intent must frequently be inferred from circumstantial evidence, a practice that has led to inconsistent applications across different tribunals<sup>96</sup>.

The examination of the legal instruments for prosecution of genocide presents the following findings:

Firstly, the Genocide Convention and the Rome Statute establish criminal responsibility through the concept of individual intent. This approach does not align with the realities of genocide, which usually involves coordinated efforts by multiple actors. By requiring a demonstration of personal intent, the framework complicates the prosecution of large-scale atrocities, making it difficult to link separate acts to an overarching genocidal plan.

Second, both instruments lack specific guidelines on the types of evidence required to establish genocidal intent. This ambiguity results in inconsistent interpretations and legal outcomes in genocide prosecutions. The absence of a defined evidentiary threshold means courts are left to determine standards on a case-by-case basis, leading to challenges in convicting.

Thirdly, the existing legal framework does not adequately address the collective dynamics of genocidal acts. Despite recognizing concepts like conspiracy and incitement, these instruments still focus on individual liability. The narrowness of the approach overlooks how institutional structures and coordinated efforts contributing to genocide, complicating efforts to tracing individual actions

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<sup>95</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 1- 10.

<sup>96</sup>Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime*, 160.

to a broader genocidal enterprise.

The stringent requirements for proving both intent and knowledge create barriers to prosecuting the masterminds of genocide. The failure to specify what intent means has allowed key orchestrators to avoid responsibility, undermining efforts to hold top-level perpetrators accountable for their role in facilitating genocide. The findings from this analysis reveal that the system of proof, is inadequate when it comes to establishing proof of genocide as a crime.

## CHAPTER 4. JURISPRUDENCE FROM INTERNATIONAL GENOCIDE TRIALS

### 4.1 Introduction

Cases from international criminal courts will be examined in this chapter to establish the system of proof they use to convict genocide criminals. The first case selected is *Prosecutor v Jean-Paul Akayesu* from the ICTR. The case is significant as it was the first conviction for genocide by an international court, setting a precedent for the definition and interpretation of genocidal intent. The second case is *Prosecutor v Radovan Karadžić* from the ICTY, which illustrated how the ICTY integrated command responsibility and collective criminality in its system of proof. The third case is *Prosecutor v Omar Hassan Ahmad Al Bashir* before the ICC. Al Bashir's case was selected due to its unique status as an ongoing action against a sitting head of state, demonstrating the difficulty in linking strategic leaders to genocide. The fourth case, *Prosecutor v Slobodan Milošević*, addresses the challenge of attributing genocidal intent to an individual whose actions were intertwined with their political function. The final case, *The Prosecutor v Germain Katanga*, instanciates the fine line between crimes against humanity and genocide. It demonstrates how insufficient evidence on intent has led to the courts' acquittal of genocide criminals. The collective theory of genocidal intent will be applied to demonstrate how the conceptualization of intent impacts the outcome of genocide trials. The analysis is likely to reveal legal hurdles encountered in the prosecution of genocide.

### 4.2 Case Law Analysis

#### *The Prosecutor v Jean-Paul Akayesu*

Following his arrest in Zambia on October 10 1995, and subsequent transfer to the ICTR, Akayesu, a former mayor of Taba Commune in Rwanda, was charged with genocide and crimes against humanity for his role in the 1994 Genocide against the Tutsi<sup>97</sup>. Akayesu was accused of directing violence and personally promoting the extermination of the Tutsi, through acts of mass murder and sexual violence<sup>98</sup>. The ICTR had to adopt a system proof that demonstrated Akayesu's intention to completely eradicate the Tutsi, a requirement for conviction.

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<sup>97</sup>*Prosecutor v Jean-Paul Akayesu* (1998), The International Criminal Tribunal for Rwanda (ICTR-96-4-T).

<sup>98</sup>*Prosecutor v Jean-Paul Akayesu* (1998), The International Criminal Tribunal for Rwanda (ICTR-96-4-T).

The ICTR articulated genocidal intent as the “intent to destroy, in whole or in part, a national, racial or religious group” as set forth in the Genocide Convention<sup>99</sup>. The court emphasised that such intent need not always be direct and obvious. Intent could be inferred from a pattern of deliberate actions that demonstrated a coordinated scheme of destruction. The tribunal observed that “intent is a mental factor which is difficult, even impossible, to determine directly.”<sup>100</sup> Thus it was established through evidence of “a consistent pattern of conduct by the accused.”<sup>101</sup>; given that genocide is in its essence a collective crime<sup>102</sup>. The prosecution adduced witness testimonies and documentary evidence, to establish genocidal intent. Akayesu’s presence at the massacre sites and his inflammatory statements, calling for action against the Tutsi, proved that he harboured the requisite genocidal intent<sup>103</sup>. Frederic Megret asserts that the ICTR’s construal demonstrated how courts could infer genocidal intent even when explicit orders or admissions were absent<sup>104</sup>. The Akayesu case expanded the prosecutorial tools available for proving genocidal intent<sup>105</sup>. The ICTR broadened the understanding of genocidal intent by interpreting it as not only an explicit aim to destroy a group but also as an intent that could be inferred from patterns of conduct<sup>106</sup>. Des Forges denotes that the tribunal, in its association of Akayesu’s statements and actions to direct genocidal acts, encapsulates an evidentiary system based on cumulative evidence, rather than a deduction of explicit genocidal intent from the actions committed by persons under his command such as policemen<sup>107</sup>.

This system of proof adopted in the Akayesu case involved an inference of intent from context and cumulative actions rather than concrete, documented commands alone. The court’s interpretation perhaps reflects the interpretation of genocide as a collective crime. The actions of various actors contribute to the ultimate genocidal end<sup>108</sup>. The ICTR also recognised rape as a genocidal act, when its object is to destroy a group<sup>109</sup>. This was an innovative approach to establishing genocide

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<sup>99</sup>Article II, *Convention on Prevention and Punishment of the crime of Genocide*, 9 December 1948, 260 A UNGA.

<sup>100</sup>*Prosecutor v Jean-Paul Akayesu* (1998), The International Criminal Tribunal for Rwanda (ICTR-96-4-T).

<sup>101</sup>*Prosecutor v Jean-Paul Akayesu* (1998), The International Criminal Tribunal for Rwanda (ICTR-96-4-T).

<sup>102</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 1-10.

<sup>103</sup>*Prosecutor v Jean-Paul Akayesu* (1998), The International Criminal Tribunal for Rwanda (ICTR-96-4-T).

<sup>104</sup>Megret F, ‘The Case for Collective Criminal Responsibility in International Criminal Law’ *5 International Law Journal* 2, 2005, 541.

<sup>105</sup>Megret F, ‘The Case for Collective Criminal Responsibility in International Criminal Law’ 541.

<sup>106</sup>*Prosecutor v Jean-Paul Akayesu* (1998), The International Criminal Tribunal for Rwanda (ICTR-96-4-T).

<sup>107</sup>DesForges A, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, Newyork, 1999, 654.

<sup>108</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 1-10.

<sup>109</sup>*Prosecutor v Jean-Paul Akayesu* (1998), The International Criminal Tribunal for Rwanda (ICTR-96-4-T).

in the absence of explicit evidence of commission of the actions recognised in the convention. Schabas states that the Akayesu case marked a pivotal advancement in international criminal law, establishing a flexible evidentiary standard for genocidal intent and recognizing sexual violence as an act of genocide when aimed at destroying a group<sup>110</sup>.

*The Prosecutor v Radovan Karadžić*

Radovan Karadžić was arrested in Belgrade on July 21, 2008, and subsequently transferred to the ICTY<sup>111</sup>. He was charged with genocide, crimes against humanity, and war crimes<sup>112</sup>. The charges stemmed from actions during the Bosnian War, particularly the Srebrenica massacre. As the former Bosnian Serb leader, Karadžić was accused of orchestrating violence against Bosnian Muslims, aimed at ethnic cleansing<sup>113</sup>.

In an attempt to establish Karadžić's accountability, the ICTY incorporated the doctrine of command responsibility, a critical legal instrument for prosecuting high-ranking leaders<sup>114</sup>. Command responsibility entails proving that the accused "knew or had reason to know" of their subordinates' criminal conduct and "failed to take the necessary and reasonable measures" to prevent such acts or punish perpetrators afterward<sup>115</sup>. The ICTY determined that Karadžić held effective control over the Bosnian Serb forces, which enabled the court to associate his position of authority to the genocidal actions undertaken by the said forces<sup>116</sup>. The tribunal's incorporation of command responsibility, evinces a collective approach to proving genocide. Genocide, is a collective crime, in that, the actual perpetrators of the prohibited acts are not the only ones involved<sup>117</sup>. Their actions could be mere adherence to commands rather than the manifestation of

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<sup>110</sup>Schabas W, *Genocide in International Law: The Crime of Crimes*, 318-320.

<sup>111</sup>*Prosecutor v Radovan Karadžić* (2016), The International Criminal Tribunal for the former Yugoslavia (ICTY-IT-95-5/18-T).

<sup>112</sup>*Prosecutor v Radovan Karadžić* (2016), The International Criminal Tribunal for the former Yugoslavia (ICTY-IT-95-5/18-T).

<sup>113</sup>*Prosecutor v Radovan Karadžić* (2016), The International Criminal Tribunal for the former Yugoslavia (ICTY-IT-95-5/18-T).

<sup>114</sup>*Prosecutor v Radovan Karadžić* (2016), The International Criminal Tribunal for the former Yugoslavia (ICTY-IT-95-5/18-T).

<sup>115</sup>Ambos K, *Treatise on International Criminal Law: The Crimes and Sentencing*, Oxford University Press, Oxford, 2013, 241-245.

<sup>116</sup>*Prosecutor v Radovan Karadžić* (2016), The International Criminal Tribunal for the former Yugoslavia (ICTY-IT-95-5/18-T).

<sup>117</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 1-10.

autonomous intent. The command responsibility paradigm is necessary for holding supervisors accountable for their ability to control, influence, or authorize the behavior of subordinates.<sup>118</sup>

Furthermore, the ICTY employed the concept of joint criminal enterprise (JCE). Cassese points out that JCE operates by connecting the intent of individuals within a broader plan, allowing the tribunal to attribute intent to all parties involved in the collective effort<sup>119</sup>. The court found that “Karadžić had participated in a common plan or purpose”, as demonstrated by policies and orders aimed at “creating ethnically homogenous territories<sup>120</sup>.” This link between individual actions and the collective criminal plan allowed the ICTY to ascribe genocidal intent to Karadžić, even though he did not physically carry out the actual killings<sup>121</sup>. The tribunal noted that his actions and directives reflected an aim to destroy the Bosnian Muslim population, a critical threshold in establishing genocide<sup>122</sup>.

The ICTY’s use of JCE demonstrates an expanded approach to prosecuting genocide, as it establishes the actions of each participant as integral to the overarching objective. This collective interpretation of genocidal intent signifies a shift from individual culpability to a broader collective framework, essential for capturing the coordinated nature of mass atrocities<sup>123</sup>. Using command responsibility and JCE, the ICTY addressed the challenge of linking high-level leaders to genocidal acts. The case provides a better way for establishing an individual’s intent behind a collective action<sup>124</sup>.

### *The Prosecutor v Omar Hassan Ahmad Al Bashir*

In 2009 and 2014 the ICC issued arrest warrants against Omar Hassan Al Bashir, then the president of Sudan. He was charged with genocide, crimes against humanity, and war crimes linked to the Darfur conflict<sup>125</sup>. The prosecution averred that Al Bashir orchestrated a plan to

<sup>118</sup>*Prosecutor v Radovan Karadžić* (2016), The International Criminal Tribunal for the former Yugoslavia (ICTY-IT-95-5/18-T).

<sup>119</sup>Cassese A, *International Criminal Law*, 199–202.

<sup>120</sup>*Prosecutor v Radovan Karadžić* (2016), The International Criminal Tribunal for the former Yugoslavia (ICTY-IT-95-5/18-T).

<sup>121</sup>*Prosecutor v Radovan Karadžić* (2016), The International Criminal Tribunal for the former Yugoslavia (ICTY-IT-95-5/18-T).

<sup>122</sup>*Prosecutor v Radovan Karadžić* (2016), The International Criminal Tribunal for the former Yugoslavia (ICTY-IT-95-5/18-T).

<sup>123</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 1-10.

<sup>124</sup>Cassese A, *International Criminal Law*, 199–202.

<sup>125</sup>*Prosecutor v Omar Hassan Ahmad Al Bashir* (2009), International Criminal Court (ICC-02/05-01/09).

destroy specific ethnic groups —the Fur, Masalit, and Zaghawa— under the pretext of a counterinsurgency strategy<sup>126</sup>. Despite the initial Pre-Trial Chamber's refusal to include genocide charges, they were later reinstated on appeal<sup>127</sup>.

In Al Bashir's case, there was no direct documentation tying him to specific genocidal orders<sup>128</sup>. Consequently, the prosecution had to rely on evidence of systematic patterns of violence, allegedly targeting specific ethnic groups as indirect proof of genocidal intent<sup>129</sup>. This approach was met with resistance due to the Rome Statute's stringent evidentiary standard. Given the Rome Statute's set definition of the crime of genocide and its elements, the pre-trial chamber exercised judicial abstinence<sup>130</sup>. The ICC pre-trial chamber did not adopt a coherent system of proof in the absence of direct and clear-cut intent. The pre-trial chamber accordingly refused to include genocide charges. John Powell considers that the pre-trial chamber's decision brought out the challenge of proving genocidal intent in the absence of direct evidence<sup>131</sup>. He points out that leaders often operate through intermediaries, insulating themselves from explicit actions and statements that would reveal genocidal motives<sup>132</sup>. As Kim emphasizes, genocide is inherently a collective crime, orchestrated through a hierarchy of actors whose coordinated actions fulfill the broader intent of destruction, often leaving the individual culpability of leaders obscured by layers of delegation<sup>133</sup>.

On appeal, the ICC appeals chamber reinstated the genocide charges based on circumstantial evidence<sup>134</sup>. Michael DeGuzman argues that this was a pragmatic approach, which recognized the realities of obtaining direct proof of intent<sup>135</sup>. In its inference of intent from patterns of coordinated violence and discriminatory policies, the court sought to address the complexity in obtaining direct evidence against political leaders. The ICC's reliance on inferred intent reflects a realistic approach, balancing the need to hold high-ranking officials accountable with the challenges of

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<sup>126</sup>*Prosecutor v Omar Hassan Ahmad Al Bashir* (2009), International Criminal Court (ICC-02/05-01/09).

<sup>127</sup>*Prosecutor v Omar Hassan Ahmad Al Bashir* (2009), International Criminal Court (ICC-02/05-01/09).

<sup>128</sup>*Prosecutor v Omar Hassan Ahmad Al Bashir* (2009), International Criminal Court (ICC-02/05-01/09).

<sup>129</sup>*Prosecutor v Omar Hassan Ahmad Al Bashir* (2009), International Criminal Court (ICC-02/05-01/09).

<sup>130</sup>Powell J, 'Proving Genocidal Intent: The Legal Complexities of High-Level Leadership in the Al Bashir Case' 18 *International Criminal Law Journal* 2, 2010, 241–267.

<sup>131</sup>Powell J, 'Proving Genocidal Intent: The Legal Complexities of High-Level Leadership in the Al Bashir Case' 241–267.

<sup>132</sup>Powell J, 'Proving Genocidal Intent: The Legal Complexities of High-Level Leadership in the Al Bashir Case' 214–267.

<sup>133</sup>Sangkul, *A Collective Theory of Genocidal Intent*.

<sup>134</sup>*Prosecutor v Omar Hassan Ahmad Al Bashir* (2009), International Criminal Court (ICC-02/05-01/09).

<sup>135</sup>DeGuzman M, 'The International Criminal Court and the Interpretation of Genocidal Intent: A Case Study of the Darfur Arrest Warrants' 10 *Journal of International Criminal Justice* 1, 345–366.

upholding rigorous legal standards<sup>136</sup>. The approach bridged the gap between collective actions and individual responsibility in genocide prosecutions, particularly when explicit orders are absent and intent must be extrapolated from circumstantial evidence.

Whereas this is an ongoing trial, it is very unlikely that Al Bashir will be convicted, given the political realities and the limitations of international law. Nouwen observes that prosecuting heads of state like Al Bashir foregrounds the limitations of international law<sup>137</sup>. Al Bashir repeatedly disregarded ICC arrest warrants, while travelling freely to countries that chose not to enforce them<sup>138</sup>. His defiance, supported by political alliances, instantiates the struggle by international justice mechanisms in holding high-ranking officials accountable when states prioritise political interests over legal obligations<sup>139</sup>. State cooperation is vital to the effectiveness of international criminal justice. The enforcement of legal actions, including arrest warrants, depends on governments' willingness to assist international tribunals and courts<sup>140</sup>.

#### *The Prosecutor v. Slobodan Milošević*

Slobodan Milošević, the former President of Serbia and the Federal Republic of Yugoslavia, was charged with crimes committed during the conflicts in the former Yugoslavia in the 1990s, particularly in Bosnia and Herzegovina, Croatia, and Kosovo<sup>141</sup>. His indictment included a total of 66 counts of genocide, crimes against humanity, and violations of the laws/customs of war<sup>142</sup>.

The prosecution contended that Milošević played a central role in orchestrating a campaign of ethnic cleansing against Bosniaks and Croats in Bosnia and Herzegovina, with the aim of creating

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<sup>136</sup>DeGuzman M, 'The International Criminal Court and the Interpretation of Genocidal Intent: A Case Study of the Darfur Arrest Warrants' 345–366.

<sup>137</sup>Nouwen S, 'The Political and Legal Realities in Prosecuting Heads of State: A Study of the Al Bashir Case' 13 *Journal of International Criminal Justice* 2, 2015, 257–279.

<sup>138</sup>Nouwen S, 'The Political and Legal Realities in Prosecuting Heads of State: A Study of the Al Bashir Case' 257–279.

<sup>139</sup>Nouwen S, 'The Political and Legal Realities in Prosecuting Heads of State: A Study of the Al Bashir Case' 257–279.

<sup>140</sup>Nouwen S, 'The Political and Legal Realities in Prosecuting Heads of State: A Study of the Al Bashir Case' 257–279.

<sup>141</sup>*Prosecutor v. Slobodan Milošević* (2004), The International Criminal Tribunal for the former Yugoslavia (IT-02-54-T).

<sup>142</sup>*Prosecutor v. Slobodan Milošević* (2004), The International Criminal Tribunal for the former Yugoslavia (IT-02-54-T).

a Greater Serbia<sup>143</sup>. More than 8,000 Bosniak men and boys were systematically killed by Serb forces<sup>144</sup>. His defence claimed that he was not personally responsible for the crimes, arguing that he had acted to protect the Serb population amidst a civil war and that the prosecution's case was politically motivated<sup>145</sup>.

The ICTY's approach in this case underscored the difficulty of establishing individual responsibility in the context of state-led atrocities, particularly when the accused occupies a position of power. As the head of a state, entangled in a complex military and political conflict, Milošević argued that his actions were driven by national security concerns rather than an intent to destroy any particular ethnic group<sup>146</sup>. The ICTY's system of proof in this case had to address the complex interplay between Milošević's political functions and the genocidal acts attributed to forces under his leadership. The tribunal opined that Milošević was responsible under the doctrine of joint criminal enterprise (JCE), asserting that his authority and influence over Serbian forces allowed him to orchestrate a campaign that amounted to genocide<sup>147</sup>. Cherif Bassiouni notes that, the application of JCE in this context aimed to establish that Milošević shared the intent of others within this criminal enterprise, facilitating genocidal acts even if he did not directly participate in them<sup>148</sup>. However, proving intent was particularly complex because JCE requires showing Milošević's agreement or tacit support for the acts as part of a collective plan, which he denied<sup>149</sup>.

In Cassese's opinion the ICTY was cautious in attributing genocidal intent to Milošević, as they required concrete evidence linking him personally to an overt intent to destroy an ethnic group<sup>150</sup>. Cassese emphasized that the political functions Milošević held blurred the lines between state

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<sup>143</sup>*Prosecutor v. Slobodan Milošević* (2004), The International Criminal Tribunal for the former Yugoslavia (IT-02-54-T).

<sup>144</sup>*Prosecutor v. Slobodan Milošević* (2004), The International Criminal Tribunal for the former Yugoslavia (IT-02-54-T).

<sup>145</sup>*Prosecutor v. Slobodan Milošević* (2004), The International Criminal Tribunal for the former Yugoslavia (IT-02-54-T).

<sup>146</sup>*Prosecutor v. Slobodan Milošević* (2004), The International Criminal Tribunal for the former Yugoslavia (IT-02-54-T).

<sup>147</sup>*Prosecutor v. Slobodan Milošević* (2004), The International Criminal Tribunal for the former Yugoslavia (IT-02-54-T).

<sup>148</sup>Bassiouni C, 'The Law of International Criminal Tribunals and the Jurisprudence of the ICTY: Achievements and Challenges' 1 *Journal of International Criminal Justice* 2, 2004, 103–120.

<sup>149</sup>Bassiouni C, 'The Law of International Criminal Tribunals and the Jurisprudence of the ICTY: Achievements and Challenges' 103-120.

<sup>150</sup>Cassese A, 'The International Criminal Court and Genocide: The Case of Slobodan Milošević' 2 *Journal of International Criminal Justice* 4, 2008, 295-320.

policy and individual culpability, complicating the standard of proof needed for genocide<sup>151</sup>. Given the nature of his role, the court grappled with whether his directives were acts of genocide or aggressive policies aimed at regional dominance, a distinction with significant legal implications<sup>152</sup>. Drumbl has similarly mentioned that the court's difficulty in this case lay in distinguishing genocidal actions, from wartime conduct that was brutal but politically motivated<sup>153</sup>. He contended that the ICTY's reliance on circumstantial evidence to infer genocidal intent, without direct evidence from Milošević's actions or communication, raised questions about whether political and military strategies should be equated with genocidal motives<sup>154</sup>. Milošević's death in 2006 prevented the trial from reaching a conclusion, though the proceedings appeared to be gravitating toward yet another failure to conclusively establish genocidal intent in the case of a head of State.

#### *The Prosecutor v. Germain Katanga*

In 2007, Germain Katanga, a former militia leader, was charged with war crimes and crimes against humanity. Katanga was accused of leading forces that attacked civilians based on their ethnic identity in the Democratic Republic of Congo<sup>155</sup>.

Katanga was eventually convicted of war crimes and crimes against humanity, although he was cleared of genocide accusations. The ICC found insufficient evidence of his intent to completely or partially annihilate the selected group, which is required to prove genocide. The court's conclusion in this case clarifies the distinction between crimes against humanity and genocide. According to John Ohlin, the ICC must distinguish between crimes committed as part of a systematic attack on people and those motivated by genocidal intent. Crimes against humanity, which encompass "systematic attacks directed at civilian populations, are grave offences but do not require the specific intent to destroy a group"<sup>156</sup>. Ohlin emphasizes that the ICC's ruling in Katanga's case

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<sup>151</sup>Cassese A, 'The International Criminal Court and Genocide: The Case of Slobodan Milošević' 295-320.

<sup>152</sup>*Prosecutor v. Slobodan Milošević* (2004), The International Criminal Tribunal for the former Yugoslavia (IT-02-54-T).

<sup>153</sup>Drumbl M, 'The ICTY and Genocide: The Case of Slobodan Milošević' 87-110.

<sup>154</sup>Drumbl M, 'The ICTY and Genocide: The Case of Slobodan Milošević' 87-110.

<sup>155</sup>*The Prosecutor v. Germain Katanga* (2014), International Criminal Court (ICC-01/04-01/07-3436-T).

<sup>156</sup>*The Prosecutor v. Germain Katanga* (2014), International Criminal Court (ICC-01/04-01/07-3436-T).

reflected the high threshold for proving genocidal intent, underscoring the court's reluctance to equate large-scale ethnic violence with genocide without concrete proof of intent<sup>157</sup>.

Furthermore, Kai Ambos discusses the evidentiary hurdles the prosecution faced in establishing genocidal intent. In Katanga's case, the court was cautious in attributing genocidal intent, as the evidence showed violent attacks on civilians without necessarily demonstrating a larger, organised plan to eliminate the group<sup>158</sup>. Although the attacks were horrific and ethnicized, they were not clearly shown to be motivated by a collective intent to eradicate the group, a requisite for genocide charges<sup>159</sup>. This evidentiary limitation led to the court's decision to convict Katanga for crimes against humanity rather than genocide.<sup>160</sup> The latter requires proving intent to destroy a select group, which was not sufficiently substantiated.

Linda Keller advances that the Katanga case underscores the ICC's strict adherence to the Rome Statute's distinction of crimes against humanity and genocide<sup>161</sup>. Keller posits that the court's rigorous approach serves to maintain the distinct legal status of genocide by avoiding overextension of the term to cover severe but less targeted atrocities<sup>162</sup>. She observes that Katanga's acquittal on genocide charges serves as a precedent for the ICC's careful application of the genocide standard<sup>163</sup>. The court's ruling preserves the legal clarity of the crime of genocide, even when prosecuting severe crimes against humanity<sup>164</sup>. The ICC's requirement for a high level of proof for genocidal intent ultimately led to Katanga's acquittal of genocide, illustrating the line between genocide and crimes against humanity is not very clear.

#### 4.3 Findings and Conclusion

The analysis of the cases demonstrates a consistent challenge in proving genocidal intent under the Rome Statute, particularly in instances where explicit evidence of intent is absent. Despite the

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<sup>157</sup>Ohlin J, 'The Prosecutor v. Katanga: A Critical Evaluation of the ICC's Distinction Between Crimes Against Humanity and Genocide' 13 *Journal of International Criminal Justice* 2, 2015, 178–202

<sup>158</sup>Ambos K, *The ICC and the Challenge of Proving Genocidal Intent in International Criminal Law*, Cambridge University Press, Cambridge, 2016, 123–145.

<sup>159</sup>Ambos, *The ICC and the Challenge of Proving Genocidal Intent in International Criminal Law*, Cambridge University Press, 123–145.

<sup>160</sup>*The Prosecutor v. Germain Katanga* (2014), International Criminal Court (ICC-01/04-01/07-3436-T).

<sup>161</sup>Keller L, 'Distinguishing Crimes Against Humanity from Genocide' 58 *Harvard International Law Review* 3, 2017, 433–457.

<sup>162</sup>Keller L, 'Distinguishing Crimes Against Humanity from Genocide' 433–457.

<sup>163</sup>Keller L, 'Distinguishing Crimes Against Humanity from Genocide' 433–457.

<sup>164</sup>Keller L, 'Distinguishing Crimes Against Humanity from Genocide' 433–457.

ICC's strict evidentiary thresholds, innovative jurisprudence by the ICTR and ICTY highlights alternative pathways for inferring intent through patterns of conduct and contextual evidence. In *The Prosecutor v. Akayesu*, the ICTR's reliance on circumstantial evidence underscored the efficacy of contextual inference in establishing genocidal intent, thereby advancing the prosecution of genocide, a collective crime. This contrasts with *Prosecutor v. Al-Bashir*, where the ICC's rigid approach to direct proof contributed to significant prosecutorial setbacks.

The analysis further reveals a paradox: while the ad hoc tribunals embraced interpretative flexibility to address evidentiary gaps, the ICC's adherence to stringent thresholds has constrained its capacity to secure convictions, raising questions about the adaptability of its system of proof in the face of evolving genocidal methodologies. In *The Prosecutor v. Radovan Karadžić* the ICTR's integration of command responsibility and collective criminality, affirmed the relevance of the collective conception of the crime of genocide. The tribunal effectively situated individual acts within hierarchical and systemic frameworks, attributing genocidal intent to broader patterns of coordinated actions rather than isolated conduct. The case accentuates the importance of situating individual acts within broader systemic frameworks, enabling courts to attribute genocidal intent to collective entities rather than isolated perpetrators.

The *Prosecutor v. Al Bashir* case underscores a significant limitation of international law: the dependence on state cooperation for enforcement. Despite multiple ICC arrest warrants, Al Bashir travelled freely to states that chose not to enforce them, demonstrating the prioritisation of political alliances over legal obligations. His defiance highlights the struggle of international justice mechanisms to hold high-ranking officials accountable when state interests conflict with the imperatives of justice. The *Prosecutor v. Germain Katanga* case illustrates the challenging distinction between genocide and crimes against humanity, with Katanga acquitted of genocide due to insufficient evidence establishing genocidal intent. The ICC's strict adherence to evidentiary thresholds in both cases reflects the difficulty in proving genocidal intent and the broader limitations of international law in holding individuals accountable where political considerations are involved.

Analysis of the cases foregrounds the delicate balance between adherence to the rigorous evidentiary standards of the Rome statute and the potential for alternative approaches to

prosecuting genocidal intent. How can the ICC justify its rigid evidentiary standards while the ICTY and ICTR successfully adapted innovative strategies to confront the complexities of establishing genocidal intent?

## CHAPTER 5. DISCUSSION, RECOMMENDATIONS AND CONCLUSION

### 5.1 Review of Findings

The research findings pinpoint challenges in prosecuting the crime of genocide under the ICC's present legal framework. The present framework's narrow focus on individual intent and the stringent evidentiary thresholds create barriers to holding perpetrators accountable, especially in the context of compounded genocidal campaigns. This limitation aligns with Kim's *Collective Theory of Genocidal Intent*, which critiques the traditional approach of prioritizing individual mental states over the broader systemic and collective dynamics of genocide<sup>165</sup>. The finding resonates with the work of Cassese, who points out the complexity of prosecuting genocide in scenarios where intent is distributed across networks of actors<sup>166</sup>.

The ICTR and the ICTY adopted innovative strategies such as reliance on circumstantial evidence, recognition of command responsibility and the concept of joint criminal enterprise to redress this challenge. The ICC, in contrast, strictly adheres to the stringent evidentiary standards of the Rome Statute. The ICC's position, in its pursuit of irrefutable proof, paradoxically risks allowing the guilty to go free, while potentially denying justice to the victims seeking retribution for heinous crimes. Acknowledging the differentiation between genocide and other crimes against humanity, the ICC has, at times, acquitted individuals due to the failure to establish genocidal intent, while still prosecuting them for other crimes.

### 5.2 Contribution to the Research Context

This study builds on existing literature, demonstrating the inadequacy of the current system of proof in addressing the 'collective dynamic' through which the crime of genocide takes place. While the analysis of the research objectives is grounded in Kim's collective theory of genocidal intent, the research extends the argument by proposing gradational evidentiary standards within an institutional intent framework. The approach advocates for shifting the focus from proving individual intent to analysing the institutional structures and policies driving genocidal campaigns.

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<sup>165</sup>Sangkul, *A Collective Theory of Genocidal Intent*, 1-10.

<sup>166</sup>Cassese A, 'The International Criminal Court and Genocide: The Case of Slobodan Milošević', 2008, 295-320.

Within such a framework, gradational evidentiary standards are applied to accommodate the varying levels of participation in genocidal acts.

The analysis of case law reveals the dichotomy of the adaptability of the ad hoc tribunals and the rigidity of the ICC. The research contributes to the ongoing discourse by advocating for a flexible and contextual application of evidentiary standards by the ICC to capture the distributed nature of genocidal intent.

### **5.3 Analysis Based on Research Objectives**

The findings indicate that the *Genocide Convention* 1951 and *Rome Statute* 2002 system of proof remains inadequate in the prosecution of individuals behind genocide. Their focus on individual responsibility often fails to encapsulate the systemic and collective nature of genocide.

The reliance on direct evidence under Article 30 of the Rome Statute has proven insufficient in cases like *Al-Bashir*, where explicit statements of intent are absent<sup>167</sup>. The ICTR and ICTY's reliance on circumstantial and contextual evidence offers alternative pathways for addressing these gaps. The gradational evidentiary standards within an institutional intent framework approach, provides a viable framework for reconciling the shortcomings of existing legal instruments by shifting focus from isolated acts to systemic and coordinated efforts.

### **5.4 A Case for Gradational Evidentiary Standards within an Institutional Intent Framework**

The prosecution of genocide requires a nuanced approach to evidentiary standards, especially when intent is distributed across various levels of actors within institutional frameworks. *Gradational Evidentiary Standards within an Institutional Intent Framework* offer a solution by tailoring the evidentiary burden according to the hierarchical role of the accused. This model acknowledges that genocidal intent is often not the sole domain of individuals but is embedded within collective structures, policies, and institutional actions. By emphasizing the organizational nature of genocide, this framework shifts focus from individual psychological intent to systemic evidence, which can accurately capture the collective dynamics of genocidal campaigns.

In this framework, gradational evidentiary standards propose varying levels of proof based on the accused person's rank within the institution. High-level perpetrators, such as political leaders or

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<sup>167</sup>Article 30, *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544.

military commanders, are linked to genocidal intent through systemic evidence like official policies, institutional directives, and coordinated actions that suggest a broader genocidal enterprise. Mid-level actors, who facilitate or coordinate actions, can be held accountable using a well articulated combination of circumstantial evidence and command responsibility, while low-level participants are evaluated based on their direct involvement in commission of prohibited genocidal acts, but within the context of the broader institutional framework, since they most likely follow hierarchical orders of different kinds.

The model balances the rigorous demands of proving intent while allowing flexibility in how evidence is presented, recognizing that direct proof of intent may not always be obvious. Incorporating an institutional context and gradational standards offers a comprehensive means of establishing genocidal intent, ensuring that those who orchestrate or contribute to genocide, whether directly or indirectly, are held accountable.

### **5.5 Recommendations**

Giving effect to the following recommendations would enhance the ICC's capacity to prosecute genocide effectively and foster international criminal justice.

#### **Gradational Evidentiary Standards within an Institutional Intent Framework**

To enhance the prosecution of genocide, legal frameworks should incorporate *Gradational Evidentiary Standards within an Institutional Intent Framework*. This system of proof would adjust evidentiary standards based on the hierarchical position of the accused, allowing a nuanced evaluation of intent in cases involving complex networks and institutions. Future research should explore the application of gradational evidentiary standards. This would provide valuable insights into the effectiveness of this framework in achieving consistent and fair genocide prosecutions. Future research should explore the practical application of gradational evidentiary standards. This would provide valuable insights into the effectiveness of this framework in achieving consistent and fair genocide prosecutions.

### **Guidelines for admissible evidence to prove genocidal intent**

The ICC should establish specific guidelines for admissible evidence to prove genocidal intent, reducing inconsistencies and increasing the predictability of outcomes in genocide prosecutions. Clear standards would help navigate the challenges in proving intent in large-scale, coordinated genocidal acts where direct evidence is often unavailable.

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*Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, President of the International Criminal Tribunal for the former Yugoslavia*, 1 August 2017, UN Doc A/UNGA/72/266 (hereafter UN ICTY 2017 Report).

*Report on the Completion Strategy of the International Criminal Tribunal for Rwanda as at May 2015, President of the International Criminal Tribunal for Rwanda*, UN Doc S/UNGA/340 (hereafter UN ICTY 2015 Report).

### **UN Security Council**

UNSC S/RES/827 (1993), *International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*.

### **Other Online Sources**

<https://www.icc-cpi.int/> on 28 July 2024

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**Strathmore University**

**Law School**

**STRATHMORE LAW SCHOOL**

**SLS 4246 RESEARCH PAPER**

**DISSERTATION PROJECT PROGRESS LOG (LOG BOOK)**

Student name and no.

MWANGI ALEXANDER NELSON MUGO

Research topic





PROSECUTION OF THE CRIME OF GENOCIDE:





ANALYSING



THE SYSTEM OF PROOF IN THE ROME STATUTE



Supervisor







Dr. A. K. KANKINDI


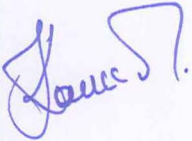

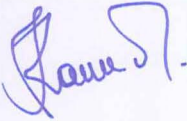


DATE	SUPERVISOR'S COMMENTS	Sign Student	Sign Supervisor
April to July (break)	Research	N/A	N/A
Monday 22nd July, 2024.	<ul style="list-style-type: none"> <li>● Submission of 1st draft of Chapter 1, and consultations on the topic as well as the title.</li> <li>● Is problem definition of genocide or the courts themselves?</li> <li>● What is the problem of the courts on matters of genocide ?</li> <li>● The Akayesu case by ICTR, study it.</li> <li>● International Criminal Court Prosecution failure: An examination of .... Article of the Rome Statute and Genocide convention that talks on the same.</li> <li>● Or Prosecution of Crimes of Genocide and Analysis of ...Article of the Rome Statute and Genocide convention that talks on the same.</li> <li>● Which legal instruments are you going to analyse and what legal provisions speak to the problem?</li> <li>● Prepare an abstract</li> </ul>		
Monday 29th July, 2024.	<ul style="list-style-type: none"> <li>● Review of the abstract and background</li> <li>● Ensure to remember the writing of laws on the text, according to SLASLEC.</li> <li>● Make a clearer point of the ad hoc tribunals as there was a genocide that took place between 1993 and 1994. A difference of a</li> </ul>		

	<p>year before the establishment of the other. As this is a background, you are required to go into detail on the same to give adequate context to the reader.</p> <ul style="list-style-type: none"> <li>• Redo the background taking into consideration the corrections given.</li> <li>• Write a statement of problem.</li> </ul>		
Monday 5th August, 2024.	<ul style="list-style-type: none"> <li>• Review of Statement of the Problem</li> <li>• The study is an investigation, therefore do not state the aim in finality, in a way that seems that you have come to a conclusion. <ul style="list-style-type: none"> <li>○ Is the crime difficult to define ? or;</li> <li>○ Is the court the problem?</li> </ul> </li> <li>• Elaborate on what the prosecution focuses on after stating that the problem is due to the prosecution failing to prove genocidal intent</li> <li>• Write the Main Aim</li> <li>• The research objectives-Should have at least 4 objectives.</li> <li>• The research questions</li> <li>• Write the hypothesis.</li> </ul>		
Monday 12th August, 2024.	<ul style="list-style-type: none"> <li>• Review of Research objectives and questions</li> <li>• The objective of the research needs to be comprehensive such that in the chapter you can now dive into the specific aspects in detail.</li> <li>• It is not necessary for you to have a question for the concluding chapter, because the conclusion is what you have</li> </ul>		


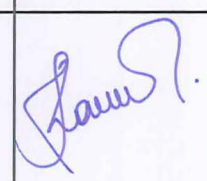
	<p>reached after the research of the first 2 objectives.</p> <ul style="list-style-type: none"> <li>● Should find out if other people have written about the topic and what then are you going to add to the discussion ?</li> <li>● Justification <ul style="list-style-type: none"> <li>- why your study must be done.</li> </ul> </li> <li>● Theoretical framework.</li> <li>● Write a literature review.</li> </ul>		
<p>Monday 19th August, 2024.</p>	<ul style="list-style-type: none"> <li>● Review of justification, theoretical framework and literature review</li> <li>● As at the moment, the justification is in line with the abstract, title, statement of problem and the theoretical framework.</li> </ul> <p><b>Theoretical Framework</b></p> <ul style="list-style-type: none"> <li>● Why do you need a theoretical framework? Analysing the objectives of the research</li> <li>● UNDERSTANDING, SELECTING, AND INTEGRATING A THEORETICAL FRAMEWORK IN DISSERTATION RESEARCH: CREATING THE BLUEPRINT FOR YOUR "HOUSE"</li> </ul> <p><b>Literature review</b></p> <ul style="list-style-type: none"> <li>● You cannot write a dissertation without a minimum of 30 articles as the minimum on the research topic. ( 5 Books and 25 law journals). The reports and news paper journals are just but in addition.</li> <li>● Repeat the theoretical framework.</li> </ul>		

	<ul style="list-style-type: none"> <li>● Repeat the literature review. <ul style="list-style-type: none"> <li>○ Please take into consideration the pointers under the comment.</li> <li>○ Examine the title.</li> <li>○ Brainstorm key variables in research.</li> <li>○ Review key science theories on topic.</li> </ul> </li> <li>● Please do thorough research before coming in.</li> </ul>		
<p>Monday 26th August, 2024.</p>	<p><b>Statement of problem</b></p> <ul style="list-style-type: none"> <li>● Went through the statement of problem to ensure a flow of the line of thought while making a few corrections during the meeting.</li> </ul> <p><b>Research Hypothesis</b></p> <ul style="list-style-type: none"> <li>● You should improve on punctuation. Specifically knowing the right places to add commas.</li> </ul> <p><b>Justification.</b></p> <ul style="list-style-type: none"> <li>● Please refrain from using the same statements to explain the same thing.</li> </ul> <p><b>Theoretical Framework</b></p> <ul style="list-style-type: none"> <li>● Give a reason for selecting the specific theoretical framework you are going to use in the research.</li> <li>● Are there any scholars who have mentioned collective theory but if not, you can contrast it with others to demonstrate that he is writing so that everyone who will be reading the work can see what to expect in chapter 2.</li> </ul> <p><b>Assignment</b></p>		

	<ul style="list-style-type: none"> <li>● Reformulate the theoretical framework and make the respective corrections. <ul style="list-style-type: none"> <li>● What is missing is that there are no other authors.</li> <li>● Who's theory of proving genocide is being used by the ICC ?</li> </ul> </li> </ul>		
Monday 9th August, 2024.	<p><b>Literature Review.</b></p> <ul style="list-style-type: none"> <li>● Remember to say things without being repetitive, so as to reduce the number of words used.</li> </ul> <p><b>Assignment</b></p> <ul style="list-style-type: none"> <li>● Ensure that you have inserted a table of contents.</li> <li>● Write the Limitations.</li> <li>● Write the methodology.</li> <li>● Write chapter breakdown.</li> </ul>		
Monday 16th August, 2024.	<p>Review of Chapter 1</p> <ul style="list-style-type: none"> <li>● The titles, use small letters and number them correctly.</li> <li>● Spacing of work.</li> <li>● Start on chapter 2. <ul style="list-style-type: none"> <li>○ Show how the theoretical framework will be used to analyse the research objectives.</li> </ul> </li> </ul>		
Monday 23rd August, 2024.	<ul style="list-style-type: none"> <li>● Start with what the theory states and then what it contradicts.</li> <li>● The reason you need the theoretical framework is to assist in analysing the objectives.</li> <li>● If it is a foundation it cannot be complementary. Rather it offers a foundation to Kim's theory.</li> <li>● Start Chapter 3</li> </ul>		

<p>Monday 30th October, 2024</p>	<ul style="list-style-type: none"> <li>● Show law is inconsistent or there is a gap before making the conclusion.</li> <li>● Must demonstrate to the readers that you have read the law and understood it.</li> <li>● There is no support of literature to the analysis of the law.</li> <li>● In the analysis you have only focused on intent and not knowledge.</li> <li>● The analysis is supposed to be supported by the literature from the literature review and the theoretical framework.</li> <li>● Review the work and see how you will incorporate the literature in the analysis and also rephrase findings.</li> </ul>		
<p>Monday 7th October, 2024.</p>	<p>Review of Chapter 3</p> <ul style="list-style-type: none"> <li>● The only issue of this chapter is the limitation of literature used.</li> <li>● Move forward to chapter 4.</li> </ul>		
<p>Monday 14th October, 2023</p>	<p>Review of Chapter 4</p> <ul style="list-style-type: none"> <li>● What is the aim of dedicating a whole chapter to examine the cases?</li> <li>● You should have added a brief facts of the case before the decision the court made.</li> <li>● What were the facts incriminating him?</li> <li>● Does it mean that the court should set the bar high to establish intent since the criminals are making it hard to improve it?</li> </ul>		

	<ul style="list-style-type: none"><li>● The Critique should be that the court does not find a way to expand it to apply to a group of people.</li><li>● Since the intent is quite individual, it leaves out the criminals who work in a collective group.</li><li>● Collective Responsibility/intent does not mean that the person did not individually intend to do it.</li><li>● Whenever you are stating direct and circumstantial evidence give an example of the type of direct and circumstantial evidence that was used. This is because, you shouldn't assume that everyone will understand what you are saying.</li><li>● Remember not to just quote the court's decision but to also involve an explanation/analysis of it.</li><li>● The involvement or use of the literature review in the analysis of the cases is getting scantier and scantier. This was mentioned at the point of <i>The Prosecutor v. Omar Hassan Ahmad Al Bashir</i></li><li>● When talking about the system of proof you can try and find literature on that.</li><li>● It should be noted that there is scarce literature being used, at the moment you are using it as a btw.</li><li>● The names of the authors in the literature review should be seen in the analysis of laws and cases. This is because the purpose of the literature review is for it to be</li></ul>		
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	<p>used to analyse the research objectives that you have.</p> <ul style="list-style-type: none"> <li>You should give a small introduction of the person being prosecuted such as highlighting their positions.</li> </ul> <p><b>Assignment</b></p> <ul style="list-style-type: none"> <li>Review chapter 4 and involve the literature review and theoretical framework in the analysis of the cases.</li> <li>Come back with a reviewed chapter 4.</li> <li>Prepare you chapter 5 too and come with it.</li> </ul>		
<p>Wednesday 20th November, 2024.</p>	<p><b>Review of Chapter 4</b></p> <ul style="list-style-type: none"> <li>State that you are giving a better way for establishing an individual intent behind a collective action.</li> <li>There is no need for you to repeat the use of the statement, pragmatic approach as you had already stated it earlier.</li> <li>You should not be using the same statement repeatedly as it waters down the quality of work. What you need to do is learn to use different words and statements to say the same thing.</li> <li>Commendable how you used literature in this chapter.</li> </ul> <p><b>Review of Chapter 5</b></p> <ul style="list-style-type: none"> <li>Reduce the use of the word this.</li> <li>Instead of saying that the ICC is inadequate, you should state that their system of proof remains inadequate in the prosecution of</li> </ul>		
<p>Wednesday 4<sup>th</sup> December, 2024</p>	<p>Review of compliance with submission guidelines. Arrangement of Bibliography</p>	