



AHMADU BELLO UNIVERSITY LAW JOURNAL

FACULTY OF LAW

AHMADU BELLO UNIVERSITY, ZARIA - NIGERIA.

website: <https://abulj.org.ng> | e-mail: abulj@abu.edu.ng

A CRITICAL APPRAISAL OF THE LEGAL FRAMEWORK ON THE CRIME OF GENOCIDE AND THE NEED FOR EXPANDING THE VICTIM BASE

DANIEL F ATIDOGA*

YAHAYA ADEYI**

Abstract

This research revisits the legal framework for the crime of genocide, emphasizing the need to expand the victim base beyond the current four protected groups—national, ethnic, racial, and religious—recognised under international law. The problem lies in the rigid categorisation that excludes many vulnerable groups from protection against mass atrocities. This research aimed to propose a more inclusive legal framework that addresses these gaps and ensures comprehensive protection. Using a doctrinal and comparative methodology, this study examined the historical evolution of the genocide definition, international jurisprudence, and domestic legal systems, including that of Nigeria. Findings reveal that while tribunals like the ICTR and ICTY have broadened interpretive scope, significant limitations persist. This study advocated for the inclusion of new groups, such as political, social, and gender-based groups, using criteria of stability, identifiability, and historical persecution. Recommendations include amending the Genocide Convention, adopting additional protocols, and enhancing domestic capacity through legislative reforms and judicial training. The proposed framework balances legal certainty with the imperative to adapt to contemporary realities of mass atrocities. Contributing to international criminal law, this research calls for collective action by States and international organizations to prevent and punish the evolving patterns of genocide, advancing global commitment to safeguarding human dignity.

Keywords: Genocide, International Criminal Law, Expanding Victim Base, Protected Groups, and Reform.

1.1 Introduction

Genocide is widely regarded as one of the gravest crimes against humanity, earning the title "crime of crimes" for its severe impact on human groups and societies.¹ The legal framework for addressing this atrocity has undergone considerable development since Raphael Lemkin first introduced the term in 1944.² Central to this framework is the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly in 1948, which remains the foundational instrument guiding the international community's efforts to prevent and prosecute acts of genocide.

Article II of the Genocide Convention defines genocide as specific acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.³ This definition has been incorporated into the Rome Statute of the International Criminal Court and numerous domestic legal systems worldwide.⁴ For instance in Nigeria, the Rome Statute has been domesticated through the Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Act of 2012, which enshrines the crime of genocide in the law of the Federal Republic of Nigerian.⁵

However, the limited scope of protected groups under the current legal framework has been a subject of ongoing debate and criticism within the international legal

* LLB, LLM, Ph.D. (ABU), BL; Professor and Dean of Law Prince Abubakar Audu University, Anyigba, Kogi State, Nigeria; dr.atidoga@gmail.com.

** LLB, BL; LL.M Candidate at Prince Abubakar Audu University, Anyigba, Nigeria

¹ WA Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 4.

² R Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) 79.

³ Convention on the Prevention and Punishment of the Crime of Genocide 1948, Art II.

⁴ Rome Statute of the International Criminal Court 1998, Art 6.

⁵ Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Act 2012.

community. The rigid categorization of victims into four groups - national, ethnical, racial, or religious - has led to situations where mass atrocities bearing the hallmarks of genocide have fallen outside the legal definition. A notable example is the Khmer Rouge regime's atrocities in Cambodia, where the targeting of political and social groups did not neatly fit within the Convention's protected categories.⁶

The International Criminal Tribunal for Rwanda (ICTR) made significant strides in this regard by interpreting the scope of protected groups in the landmark Akayesu case. The Tribunal adopted a broader approach, stating that protected groups should be "stable and permanent groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment".⁷ This interpretation opened the door for a more flexible understanding of group identity in genocide.

Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) struggled with the limitations of the current definition in cases such as Krstić, where it considered the possibility of genocide against a part of a national group defined by its geographic location.⁸ These judicial interpretations demonstrate the growing recognition within international criminal law of the need for a more refined approach to group identity and victimhood in genocide cases.

This research paper aims to critically examine the legal justification for expanding the victim base of genocide beyond the four protected groups currently recognized under international law. By proposing a new legal framework for the crime of genocide that incorporates a broader range of victim groups, this research seeks to contribute to the ongoing scholarly and policy debates on the future of

⁶ B Kiernan, 'The Cambodian Genocide 1975-1979' in S Totten and WS Parsons (eds), *Centuries of Genocide: Essays and Eyewitness Accounts* (4th edn, Routledge 2012) 317-354.

⁷ *Prosecutor v Akayesu* (1998) ICTR-96-4-T 516.

⁸ *Prosecutor v Krstić* (2001) IT-98-33-T 559-560.

international criminal law. It balances the need for legal certainty with the imperative of ensuring comprehensive protection for vulnerable groups against mass atrocities.

1.2. Meaning and Nature of Genocide

The current legal definition of genocide, as enshrined in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, forms the cornerstone of international criminal law's approach to this grave offense. This definition requires three key elements: (1) the commission of one or more enumerated acts, (2) against a protected group, (3) with the specific intent to destroy that group in whole or in part. Each of these elements has been subject to extensive judicial interpretation and academic scrutiny.

The enumerated acts constituting the *actus reus* of genocide are: (a) killing members of the group; (b) causing serious bodily or mental harm; (c) deliberately inflicting conditions of life calculated to bring about physical destruction; (d) imposing measures intended to prevent births; and (e) forcibly transferring children of the group to another group. The jurisprudence of international criminal tribunals has elucidated these acts. In *Akayesu*, the ICTR provided a broad interpretation of "killing members of the group" as "homicide committed with the intent to cause death" and expanded "causing serious bodily or mental harm" to include acts of torture, rape, sexual violence, and inhumane treatment.⁹

The ICTY in *Brdanin* held that "deliberately inflicting conditions of life calculated to bring about physical destruction" could include systematic expulsion from homes and calculated deprivation of resources indispensable for survival.¹⁰ This demonstrates the courts' willingness to consider a wide range of destructive acts that may not immediately result in death but are genocidal in nature.

⁹ *Prosecutor v Akayesu* (1998) ICTR-96-4-T 500-501.

¹⁰ *Prosecutor v Brdanin* (2004) IT-99-36-T 691.

The *mens rea* requirement for genocide, often described as *dolus specialis* or special intent, is perhaps the most distinctive feature of this crime.¹¹ The perpetrator must not only intend to commit the underlying act but must also possess the specific intent to destroy, in whole or in part, a protected group as such. In *Jelisić*, the ICTY Appeals Chamber emphasized that genocidal intent can be inferred from factual circumstances, including the general context of other culpable acts systematically directed against the same group.¹²

The protected groups under the current definition are limited to national, ethnical, racial, or religious groups. The ICTR in *Akayesu* provided guidance on interpreting these categories, defining a national group as "a collection of people who are perceived to share a legal bond based on common citizenship," an ethnic group as one "whose members share a common language or culture," a racial group as "based on hereditary physical traits," and a religious group as one "whose members share the same religion, denomination or mode of worship".¹³

However, these definitions have not resolved all interpretative challenges. In *Krstić*, the ICTY struggled with whether the targeting of Bosnian Muslims in Srebrenica constituted genocide against a part of a national group, ultimately concluding that the intent to destroy a substantial part of a group within a limited geographical area could satisfy the definition.¹⁴ This decision expanded the understanding of "in part" in the genocide definition.

The implementation of the genocide definition in Nigeria has faced challenges due to ethno-religious differences. Nigeria ratified the Genocide Convention in 2009 and domesticated the Rome Statute in 2012.¹⁵ However, applying the

¹¹ A Cassese, *International Criminal Law* (Oxford University Press, 2nd ed 2008) 137.

¹² *Prosecutor v Jelisić* (2001) IT-95-10-A 47.

¹³ *Prosecutor v Akayesu* (1998) ICTR-96-4-T 512-515.

¹⁴ *Prosecutor v Krstić* (2001) IT-98-33-T 590.

¹⁵ Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Act 2012.

genocide definition to conflicts in the Middle Belt region, which often involve overlapping ethnic, religious, and resource-based motivations, remains challenging.

One significant critique of the current framework is the exclusion of political and social groups from the protected categories. This omission has led to situations where mass atrocities bearing the hallmarks of genocide have fallen outside the legal definition. The Khmer Rouge regime's atrocities in Cambodia targeted political opponents and social classes that did not fit within the Convention's protected categories.¹⁶

Some countries have addressed these limitations in their domestic legislation. Ethiopia's Criminal Code includes political groups among the protected categories,¹⁷ and Bangladesh's International Crimes (Tribunals) Act extends protection to "political groups".¹⁸ These domestic expansions reflect a growing recognition of the need for a more inclusive approach to group identity in mass atrocities.

International courts have also struggled with the limitations of the current definition. In *Bosnia and Herzegovina v. Serbia and Montenegro*,¹⁹ the International Court of Justice (ICJ) adhered to a strict interpretation of the protected groups, rejecting arguments for a broader approach to group identity. This decision highlights the struggle between legal certainty and comprehensive protection against mass atrocities.

¹⁶ Kiernan (n6) 317-354.

¹⁷ Criminal Code of the Federal Democratic Republic of Ethiopia (Proclamation No414/2004) art269.

¹⁸ The International Crimes (Tribunals) Act 1973 (Bangladesh) Act (No XIX) 1973, s3(2)(c).

¹⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) ICJ Reports 2007, 43, 187-190.

1.3. Legal Rationale for Expanding the Victim Base

The legal rationale for the expansion of the victim base includes the following:

1.3.1 Gaps in the Current Legal Framework: Case Law Analysis

The restrictive definition of protected groups in the Genocide Convention has led to situations where mass atrocities with clear genocidal characteristics fall outside the scope of the law. This limitation was starkly illustrated in the case of the Khmer Rouge atrocities in Cambodia, where the systematic targeting and extermination of political opponents and social classes could not be legally classified as genocide under the current framework.

In *Prosecutor v Akayesu*,²⁰ the ICTR highlighted both the potential and limitations of the current definition. While the Tribunal adopted a broader approach to interpreting protected groups as "stable and permanent groups," it was still constrained by the four enumerated categories in the Convention.

1.3.2 Evolving Interpretations in International Criminal Tribunals

International criminal tribunals have struggled with the limitations of the current genocide definition, often seeking interpretations that address contemporary realities of mass atrocities. In *Prosecutor v Krstić*²¹, the ICTY considered whether targeting Bosnian Muslims in Srebrenica constituted genocide against a part of a national group. The Tribunal's conclusion that intent to destroy a substantial part of a group within a limited geographical area could satisfy the definition represented a significant evolution in the interpretation of the "in part" clause.

Similarly, in *Prosecutor v. Al Bashir*²², the ICC Pre-Trial Chamber I issued an arrest warrant for the Sudanese President, charging him with genocide against the Fur, Masalit, and Zaghawa ethnic groups in Darfur. This case demonstrated the

²⁰ *Prosecutor v Akayesu* (1998) ICTR-96-4-T 516.

²¹ *Prosecutor v Krstić* (2001) IT-98-33-T 559-560.

²² *Prosecutor v Omar Hassan Ahmad Al Bashir* (2010) ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest.

ICC's willingness to apply the genocide definition to situations of ethnic cleansing, even when the groups targeted were not explicitly enumerated in the Genocide Convention.

1.3.3 Legal Principles Supporting Expansion

The expansion of the victim base for genocide is supported by fundamental legal principles that underpin international human rights and criminal law. The principle of non-discrimination, enshrined in numerous international instruments including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, supports equal protection for all groups against mass atrocities.²³

Moreover, the principle of human dignity, recognized as a foundational concept in international law, argues for a more inclusive approach to protecting groups from genocidal acts. The preamble to the UN Charter reaffirms "faith in fundamental human rights, in the dignity and worth of the human person," a principle difficult to reconcile with a narrow definition of protected groups.²⁴

The principle of dynamic interpretation in international law also supports expansion of the victim base. This principle posits that treaties should be interpreted in light of contemporary conditions and evolving societal norms.²⁵ In the context of genocide, this suggests protected groups should be understood in a manner reflecting current understandings of group identity and vulnerability to mass atrocities.

The principle of non-discrimination in Nigeria is enshrined in Section 42 of the Constitution, which prohibits discrimination on grounds of ethnic group, place of origin, sex, religion, or political opinion.²⁶ This constitutional provision, broader

²³ Universal Declaration of Human Rights 1948 art2; International Covenant on Civil and Political Rights 1967 Art 26.

²⁴ Charter of the United Nations 1945 Preamble.

²⁵ R Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 242-243.

²⁶ Constitution of the Federal Republic of Nigeria 1999 (as amended) s42.

than the current genocide definition, could serve as a basis for expanding protected groups in Nigeria's implementation of genocide law. The expansion is further supported by the Responsibility to Protect (R2P) principle, adopted by all UN member states at the 2005 World Summit. This principle emphasizes states' responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.²⁷ The inclusive nature of R2P, which does not limit protection to specific groups, aligns with arguments for a broader definition of genocide.

International jurisprudence has recognized the need for evolving interpretation of human rights protections. The European Court of Human Rights, in *Tyrer v United Kingdom*²⁸, described the European Convention on Human Rights as a "living instrument which must be interpreted in light of present-day conditions". While not directly related to genocide, this principle of dynamic interpretation supports expanding protected categories to reflect contemporary understandings of group identity and vulnerability.

1.4. Proposed Legal Criteria for Expanding the Victim Base

1.4.1 Doctrinal Analysis of Group Identity in International Law

The concept of group identity in international law has evolved significantly since the adoption of the Genocide Convention in 1948. The Convention's focus on national, ethnical, racial, or religious groups reflects the historical context of its creation, particularly the aftermath of the Holocaust. However, subsequent developments in international human rights law and international criminal law have broadened our understanding of group identity and the need for protection against mass atrocities.²⁹

²⁷ UN General Assembly, 2005 World Summit Outcome: resolution / adopted by the General Assembly, 24 October 2005, A/RES/60/1, paragraphs 138-139.

²⁸ *Tyrer v United Kingdom* (1978) Series A No 26.

²⁹ Schabas (n1) 117.

The ICJ, in its 2007 judgment in *Bosnia and Herzegovina v Serbia and Montenegro*³⁰, faced challenges associated with defining protected groups under the Genocide Convention. The Court emphasized the need for a "positive" approach to group identification, focusing on specific characteristics that define the group rather than the absence of such characteristics. This approach provides a foundation for considering the inclusion of new categories of protected groups.

The concept of group identity in Nigeria has been shaped by ethnic and religious diversity. Nigeria's Constitution recognizes the importance of group identity in the federal character principle, which aims to ensure equitable representation of various groups in government and public institutions.³¹ This constitutional recognition could serve as a basis for expanding the categories of groups protected under genocide law in Nigeria.

1.4.2 Proposed Legal Tests for Inclusion of New Groups

Drawing on doctrinal analysis of group identity and evolving jurisprudence, we propose three key legal tests for including new groups within the protected categories of genocide:

i. Stability and Permanence Test

This test draws inspiration from the ICTR's judgment in *Akayesu*, which described protected groups as "stable and permanent groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment".³² It aims to distinguish between groups that form a fundamental and enduring part of an individual's identity and those more transient or voluntary in nature.

³⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) ICJ Reports 2007, 43, 193.

³¹ Constitution of the Federal Republic of Nigeria 1999, Section 14(3).

³² *Prosecutor v Akayesu* (1998) ICTR-96-4-T 516.

Courts would consider factors such as historical continuity of the group, depth of cultural or social ties binding its members, and the extent to which membership is perceived as immutable by both members and non-members. Ethnic groups like the Yoruba, Igbo, or Hausa-Fulani in Nigeria would likely meet this test due to the long-standing historical presence and perception of membership as determined by birth and ancestry.³³

ii. Identifiability Test

This test focuses on whether a group can be objectively recognized as distinct within society, drawing on the ICTY's jurisprudence in cases such as *Jelisić*, where the Tribunal noted that determination of a protected group should be made on a case-by-case basis, considering both objective and subjective criteria.³⁴

Courts would consider factors such as shared cultural practices, language, social structures, or other distinguishing characteristics that set the group apart from the broader society, as well as subjective elements like the group's self-identification and perception by others.

The European Court of Human Rights has recognized ethnicity as a concept rooted in societal groups with shared nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds in *Timishev v Russia*.³⁵ This approach to identifying distinct groups could inform the application of the identifiability test in genocide cases.

iii. Vulnerability and Historical Persecution Test

This test aims to identify groups that have been subjected to systematic discrimination, marginalization, or violence, making them particularly vulnerable to genocidal acts. Grounded in the preventive purpose of the Genocide

³³ T Falola and MM Heaton, *A History of Nigeria* (Cambridge University Press 2008) 4-5.

³⁴ *Prosecutor v Jelisić* (1999) IT-95-10-T 70.

³⁵ *Timishev v Russia* (2005) 55762/00 and 55974/00, Eur Ct HR 55.

Convention, it seeks to extend protection to groups facing heightened risks of mass atrocities.

Courts would consider historical patterns of persecution, structural inequalities, and contemporary threats faced by the group. The test draws inspiration from the concept of "particularly vulnerable groups" developed in international human rights law, exemplified by the jurisprudence of the Inter-American Court of Human Rights.³⁶

This test could be relevant in Nigeria for religious minorities or indigenous communities that have faced historical marginalization or ongoing threats, such as Christian communities in some northern states or indigenous communities in the Niger Delta region affected by environmental degradation.³⁷

1.4.3 Application of Proposed Tests to Potential New Categories

i. Political Groups

The exclusion of political groups from the Genocide Convention has long been contentious. Applying the proposed tests yields mixed results. While political groups may not always meet the stability and permanence test due to potential for individuals to change affiliations, certain political identities can be deeply ingrained and perceived as immutable, especially in prolonged conflict or authoritarian regimes.³⁸

Political groups often meet the identifiability test, with distinct ideologies, symbols, and organizational structures. The vulnerability and historical persecution test is particularly relevant given numerous historical examples of

³⁶ JM Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd ed, Cambridge University Press 2013) 253-254.

³⁷ Human Rights Watch, 'World Report 2021: Nigeria' (2021) <https://www.hrw.org/world-report/2021/country-chapters/nigeria> accessed October 15, 2024.

³⁸ D Nersessian, *Genocide and Political Groups* (Oxford University Press 2010) 21-22.

mass atrocities targeting political opponents, such as under the Khmer Rouge regime.

Some domestic legal systems already recognize the need to include political groups in genocide laws, such as Ethiopia's Criminal Code.³⁹ This domestic practice could inform international law development in this area.

ii. Social Groups

Social groups present challenging considerations under the proposed tests. While some may lack the stability and permanence of ethnic or religious groups, others, particularly in stratified societies, can exhibit significant intergenerational continuity.⁴⁰

The identifiability test may be met by social groups with distinct cultural practices, dialects, or visible markers of status. The vulnerability and historical persecution test is significantly relevant for marginalized social groups facing systematic discrimination or violence.

The treatment of the *Osu caste* system in southeastern Nigeria provides an example of a social group potentially meeting these criteria. Despite legal abolition, the *Osu* continue to face social discrimination and exclusion, demonstrating the enduring nature of certain social categorizations.⁴¹

iii. Gender-based Groups

Applying the proposed tests to gender-based groups reveals potential for expanding protection. While gender identity meets the stability and permanence test for many individuals, the evolving understanding of gender fluidity in

³⁹ Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, Art 269.

⁴⁰ T Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014) 237-238.

⁴¹ EM Duru, 'The *Osu Caste* Discrimination in Igboland: Impact on Igbo Culture and Civilization' (2016) 4(1) *African Research Review* 176, 180-181.

contemporary society must be noted.⁴² Gender-based groups clearly meet the identifiability test, as gender is a fundamental aspect of human identity recognized across cultures. The vulnerability and historical persecution test is also significantly relevant given the long history of gender-based violence and discrimination globally.

International criminal law has already recognized gender's relevance in mass atrocities. The Rome Statute includes gender as a protected category under crimes against humanity, specifically in the crime of persecution.⁴³ This recognition could serve as precedent for including gender-based groups in an expanded definition of genocide.

1.5. Formulating A New Legal Framework

1.5.1 Proposed Amendments to the Genocide Convention: Textual Analysis

The most direct approach to expanding the victim base would be to amend the Convention on the Prevention and Punishment of the Crime of Genocide. Article II could be modified to include additional protected groups based on the legal criteria proposed.

A potential amended text for Article II could read: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, religious, political, social, gender-based, or other identifiable group, as such: [...]"

This proposed amendment would retain existing protected categories while expanding scope to include other vulnerable groups. The phrase "or other identifiable group" provides flexibility for courts to apply the proposed legal tests to determine inclusion of additional categories as needed.

⁴² J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 6-7.

⁴³ Rome Statute of the International Criminal Court 1998 Art 7(1)(h).

The challenge lies in the requirement for widespread state agreement. Article XVI of the Convention stipulates that amendments must be adopted by a two-thirds majority of the UN General Assembly and ratified by two-thirds of States Parties, including all permanent members of the Security Council.⁴⁴ This high threshold reflects the gravity of the crime of genocide and need for international consensus in its definition.

Support for such an amendment in Nigeria could be grounded in constitutional principles of non-discrimination and federal character. Section 42 of the Nigerian Constitution prohibits discrimination on various grounds, including ethnicity, place of origin, sex, religion, and political opinion.⁴⁵ This broader constitutional protection could serve as basis for Nigeria to advocate for an expanded definition at the international level.

1.5.2 Alternative Legal Instruments: Draft Articles or Protocols

Given challenges associated with amending the Genocide Convention, an alternative approach would be developing new legal instruments that complement and expand upon the existing framework. This could take the form of additional protocols to the Genocide Convention or separate international agreements addressing the expanded scope of mass atrocities.

One model is the development of Additional Protocols to the Geneva Conventions, which expanded and updated protections offered by the original conventions in light of evolving forms of armed conflict.⁴⁶ Similarly, an Additional Protocol to the Genocide Convention could introduce new protected categories and clarify legal tests for their inclusion without requiring amendments to the core treaty.

⁴⁴ Convention on the Prevention and Punishment of the Crime of Genocide 1948 Art XVI.

⁴⁵ Constitution of the Federal Republic of Nigeria 1999 (as amended) s42.

⁴⁶ International Committee of the Red Cross, 'The Additional Protocols at 40: Achievements and Challenges' *International Review of the Red Cross* (2017) 906, 1754-1758.

A draft Additional Protocol could include articles that:

1. Define new categories of protected groups based on the proposed legal tests
2. Establish procedures for determining inclusion of groups under the expanded definition
3. Address the relationship between the expanded definition and the original Convention

The International Law Commission could play a crucial role in developing such a protocol. The ILC's work on the Draft Code of Crimes against the Peace and Security of Mankind, which initially included a broader definition of genocide, could serve as a starting point.⁴⁷

Nigeria's experience with implementing international criminal law through domestic legislation could inform approaches to a new protocol. Nigeria's International Criminal Court Act of 2012 provides a model for incorporating expanded protections against mass atrocities into national law.⁴⁸

1.5.3 Interpretation of Existing Law: Expanding Through Judicial Interpretation

While formal amendments or new instruments provide clear legal bases for expanding the victim base, judicial interpretation offers a more immediate and flexible approach. International courts and tribunals have already demonstrated capacity to interpret the existing definition in ways that address contemporary forms of mass violence.

⁴⁷ International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind' (1996) 2 Yearbook of the International Law Commission 2, 17-56.

⁴⁸ Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Act 2012 (Nigeria).

The ICTR in *Akayesu* provided an expansive interpretation of protected groups under the Genocide Convention, stating that the drafters' intention was to protect any stable and permanent group. This interpretation opens the door for courts to consider a broader range of groups as potential genocide victims.

Similarly, the ICTY has had to deal with group identity complexities in cases such as *Krstić*. In this case, the Tribunal considered whether targeting Bosnian Muslims in Srebrenica constituted genocide against part of a national group. Such decisions demonstrate potential for judicial interpretation to adapt the existing legal framework to contemporary realities.

The judiciary in Nigeria in this context could play a significant role in interpreting domestic genocide laws to reflect the proposed expanded victim base. Nigerian courts, drawing on constitutional principles and international obligations, could adopt a more inclusive approach to identifying protected groups in cases involving mass atrocities.

1.5.4 Harmonization with Other International Legal Regimes

The expansion of the victim base must be harmonized with other international legal regimes to ensure consistency and effectiveness in addressing mass atrocities. This harmonization should consider the relationship between an expanded definition of genocide and other international crimes, particularly crimes against humanity.

The Rome Statute provides a useful framework for this harmonization. Article 7, defining crimes against humanity, includes a broader range of protected groups in persecution, specifically mentioning "any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender-based, or other grounds universally recognized as impermissible under international law."⁴⁹

⁴⁹ Rome Statute of the International Criminal Court 1998 Art 7(1)(h).

A harmonized approach could align protected groups under genocide with those recognized in crimes against humanity, creating a more coherent international criminal law framework while maintaining genocide's distinct elements, particularly the specific intent to destroy a group.

The principle of complementarity, enshrined in the Rome Statute, provides a model for implementing an expanded definition at both international and domestic levels. Under this principle, States have primary responsibility to investigate and prosecute international crimes, with the ICC serving as a court of last resort.⁵⁰ This approach could be applied to an expanded definition of genocide, encouraging states to adopt and implement broader protections in their domestic legal systems.

Harmonization in Nigeria could involve amending the ICC Act to reflect an expanded definition of genocide, aligning Nigeria's domestic law with evolving international standards while maintaining consistency with Nigeria's obligations under the Rome Statute.

1.6. Legal Implications of Expanding the Victim Base

1.6.1 Jurisdictional Issues

i. Impact on the Principle of Legality (*nullum crimen sine lege*)

The principle of legality, encapsulated in *nullum crimen sine lege* (no crime without law), is fundamental to criminal law. This principle, enshrined in Article 22 of the Rome Statute, requires that a person shall not be criminally responsible unless the conduct constitutes a crime within the Court's jurisdiction when it takes place.⁵¹

Expanding the victim base raises important questions regarding adherence to this principle. International courts would need to carefully consider application of an

⁵⁰ Rome Statute of the International Criminal Court 1998 Art 17.

⁵¹ Rome Statute of the International Criminal Court 1998 Art 22.

expanded definition to ensure it doesn't violate the prohibition on retroactive criminal laws. The ICTY has had to deal with similar issues in the Tadić case, determining whether certain acts constituted war crimes in non-international armed conflicts.⁵²

The principle of legality in Nigeria is enshrined in Section 36(8) of the Constitution, stating that no person shall be held guilty of a criminal offense for any act that did not, at the time it took place, constitute such an offense.⁵³ Any expansion of the genocide definition in Nigerian law would need implementation with due regard to this constitutional protection.

ii. Retroactive Application Considerations

Closely related is the question of retroactive application of an expanded definition. Article 24 of the Rome Statute explicitly prohibits retroactive application.⁵⁴ However, application of an expanded definition to ongoing situations or crimes that commenced before but continued after adoption of the new definition presents legal challenges.

The European Court of Human Rights addressed similar issues in *Kononov v. Latvia*,⁵⁵ considering whether the applicant's conviction for war crimes committed during World War II violated the principle of non-retroactivity. The Court held that the acts were criminal according to international law at the time it was committed, emphasizing the importance of considering the state of international law at the relevant time.

1.6.2 Evidentiary Challenges in Prosecution

Expanding the victim base may introduce new evidentiary challenges in prosecuting this crime. Including additional protected groups could require

⁵² *Prosecutor v Tadić* (1995) IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 94.

⁵³ Constitution of the Federal Republic of Nigeria 1999 (as amended) s36(8).

⁵⁴ Rome Statute of the International Criminal Court 1998 Art 24.

⁵⁵ *Kononov v Latvia* [GC] (2010) 36376/04, ECHR-IV 236.

prosecutors to establish new elements of the offense, potentially complicating the already complex task of proving genocidal intent.

i. Proving Specific Intent for New Categories

The crime of genocide is distinguished by the requirement of *dolus specialis*, or specific intent to destroy a protected group in whole or in part. Expanding the victim base would necessitate developing jurisprudence on proving this specific intent for newly included groups, particularly challenging for groups not traditionally considered in genocide.

The ICTR provided guidance on proving genocidal intent in *Akayesu*, stating that intent can be inferred from presumptions of fact in the absence of direct explicit evidence.⁵⁶ Similar approaches may need development for new categories of protected groups, considering their unique characteristics and vulnerabilities.

Prosecution of genocide-like crimes in Nigeria has often occurred under domestic criminal law provisions. For instance, violence in Jos, Plateau State, which some describe as genocidal, has been prosecuted under various sections of the Nigerian Criminal Code relating to murder, arson, and unlawful assembly.⁵⁷ An expanded definition in Nigerian law would require developing new prosecutorial strategies and evidentiary standards.

ii. Challenges in Group Identification

Including new categories of protected groups may present challenges in clearly identifying and delineating these groups for prosecution purposes. This issue was highlighted in *Croatia v. Serbia*⁵⁸, where the ICJ emphasized the importance of clearly defining the protected group in question.

⁵⁶ *Prosecutor v Akayesu* (1998) ICTR-96-4-T 523.

⁵⁷ Plateau State of Nigeria, White Paper on the Report of the Commission of Inquiry into the Riot of 12th April 1994 in Jos Metropolis (Government Printing Press 1995) 14-15.

⁵⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v Serbia*) (2015) ICJ 405.

For newly suggested categories such as political or social groups, prosecutors may face difficulties establishing group boundaries and demonstrating that perpetrators targeted individuals based on group membership. This challenge could be acute where group identities are fluid or individuals belong to multiple overlapping groups.

The experience of the Extraordinary Chambers in the Courts of Cambodia in prosecuting Khmer Rouge crimes provides insights into these challenges. The ECCC has had to deal with the targeting of political and social groups falling outside traditional genocide categories but bearing many hallmarks of the crime.

1.6.3 State Responsibility and Compliance Mechanisms

Expanding the victim base would significantly impact State responsibility and mechanisms for ensuring compliance with international obligations to prevent and punish genocide. Expansion of protected groups would likely broaden the scope of States' obligations under the Genocide Convention and customary international law. The ICJ, in *Bosnia and Herzegovina v. Serbia and Montenegro*⁵⁹, clarified that States have a duty to prevent genocide, arising when the state "learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed". An expanded definition could increase situations triggering this duty, potentially requiring states to take preventive action in a wider range of circumstances.

In Nigeria, this could mean enhanced responsibility to address communal violence and conflicts that may not currently fall under the genocide definition but could be included by an expanded framework. For instance, ongoing farmer-herder conflicts in the Middle Belt region, characterized by some as ethnic cleansing,

⁵⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (2007) ICJ 43, 431.

might trigger more robust preventive obligations under an expanded genocide definition.⁶⁰

1.7 Conclusion

Expanding the victim base for the crime of genocide is a vital step forward in international criminal law, aimed at filling crucial gaps in the current framework. This research highlights the legal justification for broadening the scope of protected groups, grounded in evolving jurisprudence, comparisons with other international crimes, and fundamental legal principles.

The current definition of genocide has shown limitations in addressing contemporary forms of mass atrocities. International criminal tribunals have struggled to apply the narrow categories of protected groups to cases of group-based violence, as evidenced in cases such as *Krstić* before the ICTY. The proposed expansion, incorporating political, social, and other identifiable groups, aligns more closely with the broader protections offered under crimes against humanity in the Rome Statute.

However, expanding the victim base must be balanced against the need for legal certainty and the principle of *nullum crimen sine lege*. The ICJ's 2007 judgment in *Bosnia and Herzegovina v. Serbia and Montenegro*⁶¹ emphasized the importance of clear definitions in establishing state obligations to prevent and punish genocide. Any expansion of protected groups must be accompanied by carefully crafted legal tests, as proposed in this research, to ensure consistent and fair application of the law.

The implementation of an expanded genocide definition would require significant efforts at both international and domestic levels. Amendments to the Genocide

⁶⁰ International Crisis Group, 'Stopping Nigeria's Spiralling Farmer-Herder Violence' (Africa Report N°262, 26 July 2018) 8-9.

⁶¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (2007) ICJ 43, 431.

Convention or adoption of additional protocols present potential avenues for legal reform. At the national level, countries like Nigeria would need to undertake comprehensive legislative reforms to reflect the broader scope of genocide.

The role of international and domestic courts in interpreting and applying an expanded definition cannot be overstated. The jurisprudence developed by these courts would be crucial in clarifying the scope and application of new protected categories. The experiences of countries with histories of inter-group conflict, including Nigeria, can provide valuable insights into practical challenges of implementing an expanded framework for genocide prevention and punishment.

As the international community continues to struggle with evolving forms of mass atrocities, the expansion of the victim base represents a critical step towards more comprehensive protection of vulnerable groups. While challenges remain in implementation and harmonization with existing legal regimes, the moral and legal imperative to address gaps in the current framework is clear. It is incumbent upon States, International Organizations, and Civil Society to work collaboratively towards a more inclusive and effective approach to preventing and punishing the "crime of crimes."