Rethinking the Boundaries of Genocide: Calculated Economic Measures and Contemplation Under the Rome Statute

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Strathmore University Law School

By

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Prepared under the supervision of
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Declaration

I, **KITONGA MULANDI KITONGA,** 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.

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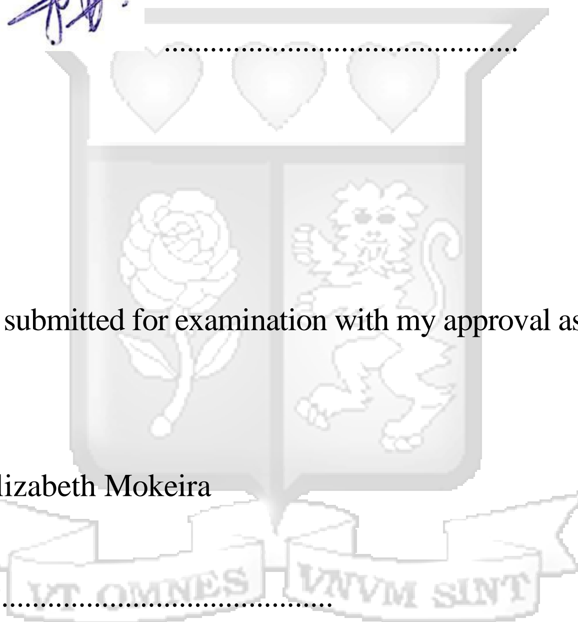

This dissertation has been submitted for examination with my approval as University Supervisor

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This dissertation would not have been completed without the unwavering support of my family. My mother, whose zeal, love, and insatiable appetite for life serves as the kindle that ignited my passion. My father, whose dedication, grit, and uncompromising sacrifice for our family acts as the match that continuously fuels my determination. My sisters, whose grace, charm, and hunger for adventure have challenged life's dogmas, adding fuel to my passion and burning it stronger than ever.

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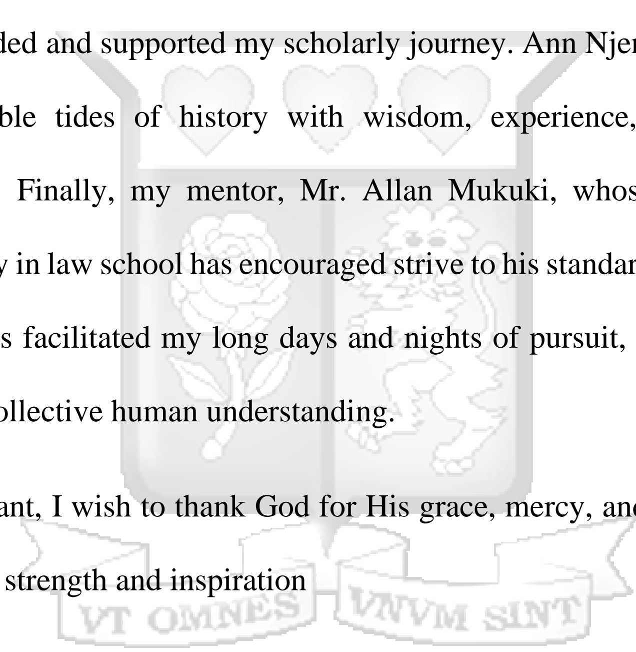
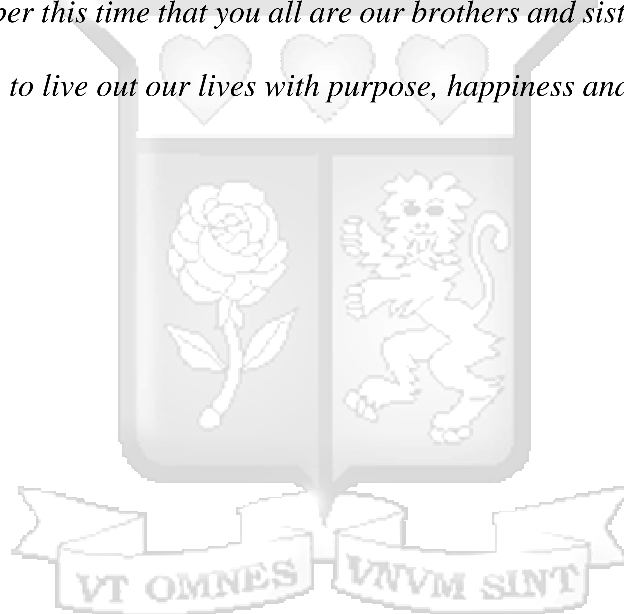
Last, but most important, I wish to thank God for His grace, mercy, and boundless love—the ultimate source of my strength and inspiration



Dedication

No longer shall we ignore our common bond of humanity, and our claim to civilization. The violence of institutions, that's slower, but just as lethal as the shot of a bullet and the blasts of a bomb, must be cleansed to rid our souls of decay. This is a violence that poisons relations between men, because of their splendid heterogeneity, and that breaks a man's spirit, by denying him the chance to stand tall with pride and dignity aside his fellow men.

To all victims of such subjugating violence, those gone and with us, we admit the vanity of our humanity and justice, we recognize that our short lives must be dedicated to banishing such evil. We remember this time that you all are our brothers and sisters who seek as do we the chance to live out our lives with purpose, happiness and fulfilment.



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Prosecutor v Rukundo, Case No. ICTR-2001-70-T, ICTR Trial Chamber, Judgment, 27 February 2009.

Prosecutor v Seromba, Case No. ICTR-2001-66-A, ICTR Appeals Chamber, Judgment, 12 March 2008.

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List of Abbreviations

ICC- International Criminal Court

ICL- International Criminal Law

HRL- Human Rights Law

CEMs- Calculated Economic Measures

UDHR- Universal Declaration of Human Rights

ICCPR- International Covenant on Civil and Political Rights

ECtHR- European Court of Human Rights

ECHR- European Convention on Human Rights

ICTY- International Criminal Tribunal for the former Yugoslavia

ICTR- International Criminal Tribunal for Rwanda

OHCHR- Office of the High Commissioner for Human Rights

CAT- Collective Action Theory

GMAs- Genocide and Mass Atrocities

ICESR- International Covenant on Economic, Social and Cultural Rights

VCLT- Vienna Convention on the Law of Treaties

VT OMNES VNVM SINT

IMT- International Military Tribunal

EoC- Elements of Crimes of the Rome Statute

JCE- Joint Criminal Enterprise

PTC- Pre- Trial Chamber

VRS- Army of Republika Srpska

ABiH- Army of the Republic of Bosnia and Herzegovina

OTP- Office of the Prosecutor

CAH- Crimes Against Humanity

Abstract

In the annals of international criminal law (ICL), the crime of genocide stands as a stark testament to humanity's capacity for unimaginable cruelty. Yet, while physical violence has dominated our understanding of this crime, a more subtle and insidious form of genocide often lurks in the shadows – the calculated destruction of a group through economic means. This research delves into the uncharted territory of Calculated Economic Measures (CEMs) as a tool of genocide, challenging the conventional focus on physical violence and advocating for a more nuanced understanding of this heinous crime.

Drawing on cases such as Darfur, Rwanda and the former Yugoslavia, where economic destabilization played a significant role in the destruction of protected groups, this study argues that CEMs, strategically employed to cripple the economic foundations of a protected group, can equally be as devastating and should be recognized under the current enumerated genocidal acts. Through a doctrinal analysis of legal frameworks, and jurisprudence this study challenges the anthropocentric paradigm that has traditionally constrained the understanding of genocide.

The study posits that destruction of a group can be achieved through the dismantling of a groups' economic and social fabric. Ultimately, this research contributes to a more holistic understanding of genocide, bridging the gap between human rights and ICL, and strengthening the international community's ability to prevent and punish this crime in all its forms. It is a call for justice that recognizes the full spectrum of genocidal violence, ensuring that those who seek to destroy a group through economic means are held accountable for their crime.

VT OMNES VNVM SINT

Key words: Economic Genocide, CEMs, Rome Statute

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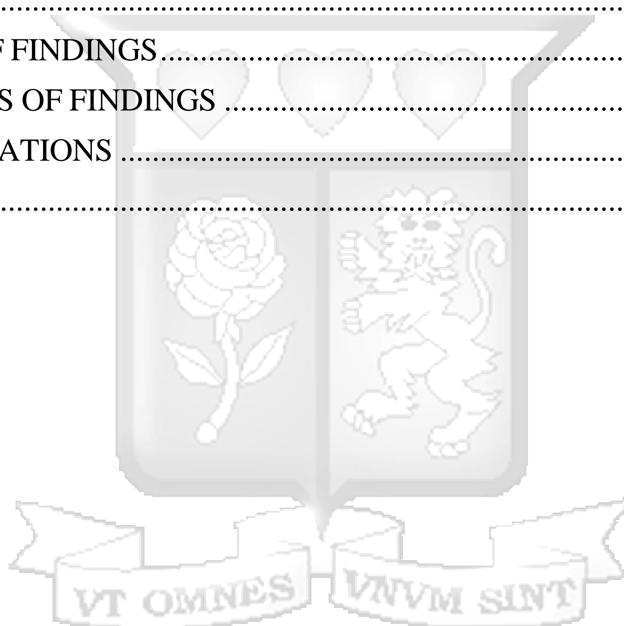


CHAPTER ONE

INTRODUCTION

Over the last two decades, there has been a spectacular promotion of international criminal law as a new and important sub-discipline.[1] Its newfound prominence is a recognition by all mankind that impunity is the greatest enemy of peace, and the greatest impunity is that committed against dignity, personhood and existence of mankind, genocide. [2] The human rights movement was a key force in the establishment of this system, veraciously advocating for a permanent International Criminal Court (ICC).[3]

While Human Rights Law (HRL) and International Criminal Law (ICL) espouse similar and complimentary values, their articulation takes differing approaches. ICL takes up a consensus-based approach, criminalizing crystalized aspects of the human rights movement, particularly civil and political rights violations.[4] It is characterized as an anthropocentric based discipline,[5] constraining its application to the right to life, and the physical and mental integrity of man, framing the catalogue of offenses with the ICC's authority.[6]

Socio-economic issues have been of vein concerns to ICL traditionally, with the field of HRL addressing this subject. Authors have considered the status quo as attributable to the approach used in HRL, which takes a more aspirational character as opposed to the creation of crystalized

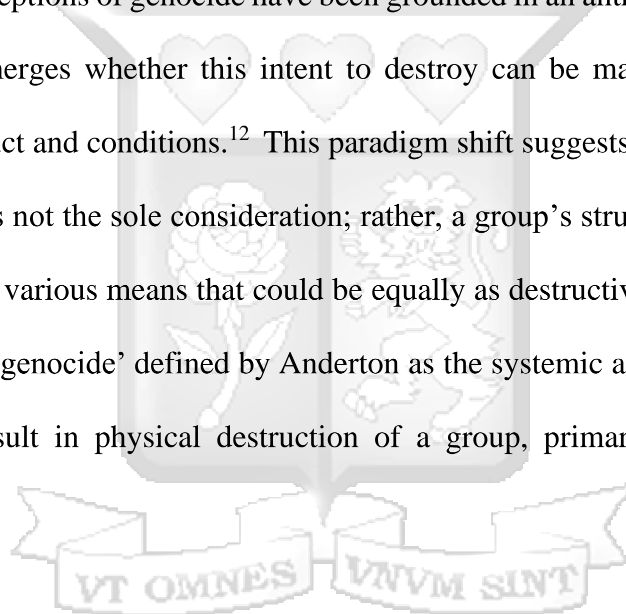
[1] Schabas WA, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, 397.
[2] Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 397
[3] Schabas WA, *The International Criminal Court: A Commentary on the Rome Statute*, 397.
[4] Robinson D, 'The Identity Crisis of International Criminal Law' 21(4) *Leiden Journal of International Law*, 2008, 925-963 < The Identity Crisis of International Criminal Law by Darryl Robinson :: SSRN> on 3rd October 2024.
[5]Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 397
[6] Herik L, 'Economic, Social and Cultural Rights - International Criminal Law's Blind Spot?' in Riedel E, Golay C, Mahon C and Giacca G (eds*), Economic, Social and Cultural Rights: Contemporary Issues and Challenges*, Oxford University Press, Oxford, 2013< Economic, Social, and Cultural Rights - International Criminal Law's Blind Spot? by Larissa van den Herik :: SSRN> on 30th January 2024

justiciable rights.[7] Flawing from this, socio-economic and cultural rights are similarly thought of as imposing aspirational obligations rather than obligations of conduct.

ICL's concern with heinous acts of evil, can be tracked since the advent of the 20th century, during the Nuremberg Trials.[8] The field grappled with the question of defining "a crime without a name", but which's effects and conduct inflicted injury on all, genocide.[9]

The Rome Statute specifically defines 'genocide' as acts intentionally committed to destroy a protected group, whether in whole or in part, as specified in its enumerated provisions.[10]

While traditional conceptions of genocide have been grounded in an anthropocentric paradigm, a critical question emerges whether this intent to destroy can be manifested through non-physiological,[11] conduct and conditions.[12] This paradigm shift suggests that the mere peaceful existence of a group is not the sole consideration; rather, a group's structure and integrity can be eliminated through various means that could be equally as destructive. From this stems the concept of 'economic genocide' defined by Anderton as the systemic and deliberate infliction of conditions that result in physical destruction of a group, primarily through economic means.[13]



[7] Robinson D, '*The Identity Crisis of International Criminal Law',* 929
[8] Robinson D, '*The Identity Crisis of International Criminal Law',* 936
[9] 'A Crime Without a Name: Churchill, Zionism & the Holocaust', *Winston Churchill Foundation*, available at https://winstonchurchill.org/publications/finest-hour/finest-hour-170/a-crime-without-a-name-churchill-zionism-the-holocaust/ on 27 December 2024
[10] The acts being under Article 6 are (a) killing members of the group, (b) causing serious bodily or mental harm to members of the group, (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, (d) imposing measures intended to prevent births within the group, (e) forcibly transferring children of the group to another group, *Rome Statute*.
[11] Merriam-Webster Dictionary, online ed., available at https://www.merriam-webster.com/dictionary/physiological on 27 December 2024
[12] It is imperative to note that the phrase "non- physiological" and "physiological" in this study pursuant to the Merriam Webster dictionary definition, and the context of this study refers to conduct that directly affects the biological and physical functions and activities of the group, in relation to their survival.
[13] Anderton, C.H and Brauer, J , *Economic Aspects of Genocides, Other Mass Atrocities, and Their Prevention,* Oxford University Press, New York, 2016, 126.

Given the constrained normative substance of economic, social, and cultural rights in genocide law,[14] this research contends that Calculated Economic Measures (CEMs) imposed on protected groups with destructive intent illustrate a significant disjunction. The Rome Statute's enumeration of genocidal acts reveals an implicit hierarchy that prioritizes physiological considerations over other human rights violations;[15] this prioritization contradicts the principles established under the 1993 Vienna Declaration and Programme of Action.[16]

The critical examination of CEMs and their potential classification as genocidal actions arises from humanity's fundamental reliance on economic opportunities for survival. However, CEMs that deliberately create destructive conditions for protected groups are rarely considered legally constitutive of genocide.[17] Against this backdrop, this research seeks to revisit the theoretical foundations underlying the disconnect between international criminal law and socio-economic rights, placing scrutiny on how ICL addresses—or fails to address—economic forms of genocide

1.1 BACKGROUND

1.1.1 The Economic Dimension of Genocide: An Overlooked Reality

Genocide, as originally conceptualised by Lemkin,[18] encompasses a synchronized attack against key foundations of a targeted group- political, social, cultural, biological, physical, religious, moral and critically for this study, economic.[19] His understanding aimed to capture

[14] Schmid E, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, Cambridge University Press, Cambridge, 2015, 16-24
[15] Herik, 'Economic, Social and Cultural Rights - International Criminal Law's Blind Spot?', 2-3
[16] The *Vienna Declaration and Programme of Action of* 1993 affirmed that human rights are of universal nature, and are both interdependent and indivisible. Hierarchical approaches of human rights that focus on the physiological nature of mankind and their corresponding rights are subsequently contradictory to the declaration and risk exacerbating and perpetuating inequalities and social injustices.
[17] Schmid E, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*, 16.
[18] Rafael Lemkin is widely regarded as the chief architect of the crime of 'genocide', with his seminal works including 'Axis Rule in Eastern Europe' being accredited as a major work that conceptualized the work.
[19] Thomas B. "A synchronized attack: On Raphael Lemkin's conception of genocide" *Journal of Genocide Research,* 2015, 253-271, -< https://doi.org/10.1080/14623528.2013.821221>- accessed on 24th February 2024

the annihilation of the national pattern of the victim group and its replacement with that of the oppressor. [20]

While scholars have extensively explored genocide through various lenses- centred around physiological approaches- its economic dimensions remain understudied, creating a significant gap in international criminal law. This oversight persists despite the economic motives of genocide being as evident as its consequences.

To understand genocide comprehensively, we must move beyond equating it with mass deaths. It is as a synchronized attack that includes acts that undermine a group's economic wellbeing- crucial to its structural integrity.[21] Historical evidence supports this. The Turkish Military Tribunal's adjudication of the Armenian genocide revealed systematic planning aimed at enriching perpetrators through asset looting.[22] The *Akayesu* Tribunal, similarly, highlighted economic motivations in the elimination of Tutsis, based on 'economic sabotage'.[23] Despite this, post-World War II, understandings remain Holocaust centric, overshadowing Lemkin's more comprehensive and nuanced considerations.

While some scholars and tribunals have acknowledged economic conditions as precursors to genocide- notably Staub's argument that economic strain leading to elimination of 'outgroups'[24]- this perspective only scratches the surface of a concept that accommodates for the fundamental structural integrity of groups. Anderton and Brauer compellingly argue, genocide and mass atrocities (GMAs) result from economic decisions and conditions that affect

[20] Thomas B. "A synchronized attack: On Raphael Lemkin's conception of genocide", 258.
[21] Lemkin R, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington, 1944.
[22] Karamanian SL, 'Economic-Legal Perspectives on the Armenian Genocide' 14(2) *International Criminal Law Review*, 2014, 242-260, where an empirical analysis determined economics as a driver of the genocide
[23] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Decision, International Criminal Tribunal for Rwanda, 2 September 1998.
[24] Staub E, 'The Origins and Prevention of Genocide, Mass Killing, and Other Collective Violence' 5(4) *Peace and Conflict: Journal of Peace Psychology*, 1999, 303-336.

their risk, severity and recurrence.[25] Yet, paradoxically, ICL, rooted in classical liberal principles, fails to recognize CEMs as a constitutive element of genocide. This limitation stems from the tension between ICL's defendant-oriented approach and human rights law's victim-oriented focus.[26]

On the 78th anniversary of World War II, the emergence of the welfare state era,[27] underscores that humanity's personhood extends beyond physical safety.[28] At this critical historical moment, we must reexamine genocide to include economic forms of group destruction

Given the intersect between international crimes and social rights violations, this paper argues for a re-examination of social rights in genocide contexts. Such exploration is justified by the role of social rights violations as root causes of international crime. Understanding genocide requires recognizing it extends beyond direct violence.[29]

1.2 STATEMENT OF THE PROBLEM

ICL has traditionally confined genocide's ontology to physiological violence, narrowly circumscribing the interpretive boundaries of systemic destruction. The textual definition of genocide under Article 6 of the Rome Statute, critically elides this reality; ignoring the reality that covert economic mechanisms strategically erode the existential capabilities of a group.[30]

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[25] Anderton, C.H and Brauer, J , *Economic Aspects of Genocides, Other Mass Atrocities, and Their Prevention,* Oxford University Press, New York, 2016, 126.

[26] Robinson D, '*The Identity Crisis of International Criminal Law',* 936

[27] Philosophically grounded in Rawlsian social justice theory, the welfare state emerged in the late 19th century as an institutional response to industrial urbanization. It represents a paradigm shift from limited governance to state-guaranteed social provisions, fundamentally aiming to ensure economic security and social equity through strategic interventions in healthcare, education, and social security

[28] Savelsberg JJ, 'The Making of Criminal Law Norms in Welfare States: Economic Crime in West Germany' 21(4) *Law & Society Review*, 1987, 529–561—https://doi.org/10.2307/3053595 on 19 January 2025

[29] The crime is often preceded by economic dominance or encumbrance against targeted populations, CEMs that enable and perpetuate genocide warrant a thorough examination and inclusion under the current framework

[30] *The Prosecutor v Bosco Ntaganda, ICC, Appeals Chamber*, ICC-01/14-01/22-324, 30 March 2021, 234.

1.3 OBJECTIVES OF THE STUDY

In consideration of the above, this study shall seek:

1. To critically analyse the historical evolution of genocide, assessing whether CEMs align with its essential legal elements
2. To investigate the interpretive trajectory of CEMs, tracing their legal conceptualization across *ad hoc* tribunals and the ICC.
3. To examine the legal integration of CEMs under the current framework, evaluating implementation barriers and proposing a normative refinement.

1.4 RESEARCH QUESTIONS

To successfully achieve the mentioned objectives, this research will be guided by the following questions:

1. Do historical dynamics define genocide's legal boundaries in the context of CEMs?
2. What do judicial interpretations of CEMs reveal their systemic role in enabling genocide's structural violence?
3. What existing judicial and doctrinal limitations constrain and potentially reveal pathways for the reconceptualization of CEMs as constitutive elements of genocide?

1.5 JUSTIFICATION

This research explores the legal interpretations of genocide, focusing on non-physiological acts that contribute to group destruction. Specifically, it investigates CEMs as a potent instrument for genocide. It posits that CEMs strategically used to dismantle the economic foundations of a targeted group, can be as devastating as physical violence, warranting recognition as a punishable act of genocide .

By examining historical and contemporary CEMs, the research challenges the physiological paradigm of genocide. It amplifies victims' experiences of destruction, calling for a holistic approach to genocide prevention and punishment that protects social and economic rights.

1.6 HYPOTHESIS

CEMs, as a subset of social rights abuses, are not peripheral consequences but strategic architectures of systemic violence; deliberately engineered to systematically destroy protected groups through covert institutional mechanisms.

1.7 THEORETICAL FRAMEWORK

Recent scholarship in ICL has undergone a critical turn, transforming the discourse from romanticisation to reform, manifested in efforts to expand the core crimes catalogue and integrate diverse perspectives into ICL discourse.[31] In a similar spirit this study employs the collective action theory(CAT) to critically examine the hypothesis.

John Hagan and Wenona Rymond- Richmond, in "Darfur and the Crime of Genocide",[32] propose a CAT of genocide, that begins at the macro-level,[33] and explores how the micro,[34] meso,[35] and macro-levels interplay resulting in genocidal victimization.

This approach offers a multi-level analysis of the crime of genocide, that examines and illustrates key contributory and in-action dynamics and frames at the macro- micro, and meso stages. Significantly it reconceptualises genocide not as a singular event, but as a dynamic

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[31] Robinson D, 'The Identity Crisis of International Criminal Law' 21(4) *Leiden Journal of International Law*, 2008, 925-963
[32] Hagan J and Rymond-Richmond W, *Darfur and the Crime of Genocide*, Cambridge University Press, Cambridge, 2008.
[33] This refers to a general overview of the state, looking at big picture national issues that effect the entire society. Examples of fields at the macro-level include government policy, economic conditions, and widespread beliefs, which all fall under this category.
[34] This is the individual level, looking at the thoughts, feelings and actions of persons.
[35] This is the middle-ground, and focuses on groups withing societies, exploring how they interact and influence leaders within the group, or how collective emotions and actions develop.

process comprising interconnected steps, thereby facilitating a more nuanced understanding of its commission.

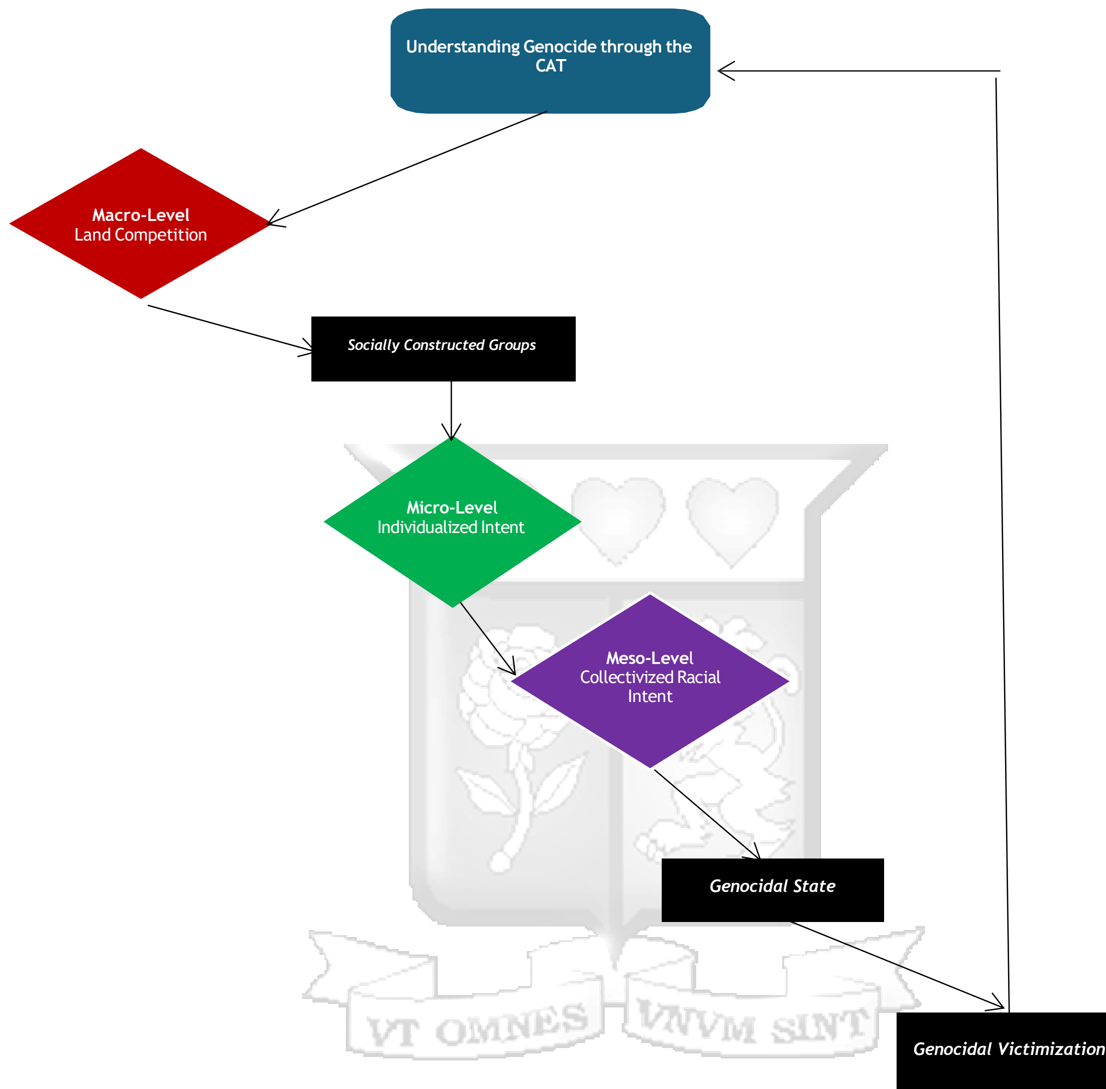

Figure 1: Flow chart representation of Collective Action Theory.

Figure 1 represents the dynamic interplay of factors at different levels that contribute to genocide. It starts at the macro-level, with broad societal conditions like land competition and supremacist ideologies, that create divisions between groups. These divisions fuel individualised racial intent at the micro-level, further amplified by influential persons and authorities. The individual prejudice then escalates into collectivised racial intent at the meso-level, where groups engage in violence. Finally, the state's actions or inactions, particularly in autocratic regimes can enable, or orchestrate

the violence, leading back to the macro-level with the emergence of a genocidal state and resulting in genocidal victimization. The cyclical nature of the diagram illustrates how these factors reinforce each other, creating a self-perpetuating system of violence and discrimination.

They argue that the accountability tools of ICL such as "joint criminal enterprises" and "criminal organizations" inadequately capture the complex social dynamics underlying the genocidal processes. Their tri-level analytical framework provides a more nuanced and accurate lens for understanding genocide's precursor. As documented by Alison Des Forges on the Rwandan Genocide,[36] illustrates the micro-level dynamic- a Hutu militiaman, recognizing a Tutsi girl condemned to death, successfully negotiated her survival through a 5,00 Rwandan franc bribe. In Jean Hatzfeld's Machete Season, [37] the meso level is revealed- describing how "violent entrepreneurs" created systems where economically disadvantaged Rwandans were coerced into participating, lacking the financial means to "bribe their way to neutrality" [38] This lens of Hagans illustrates how genocide is shaped not only by intergroup inequalities but also intragroup economic disparities, laying the foundation for an exploration of CEMs in genocides.

1.8 LITERATURE REVIEW

There is a need to pause in the process of international justice, and consider how we can utilize existing legal frameworks to address social rights abuses in international crimes.[39] In an attempt to call the world's attention to this gap, Pablo de Greiff, testified to the relevance of social rights abuses in facilitating the commissioning of international crimes.[40]

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[36] Human Rights Watch, 'Leave None to Tell the Story: Genocide in Rwanda', 1 March 1999, 1711 – <https://www.refworld.org/reference/countryrep/hrw/1999/en/97537 >-ON7 October 2024
[37] Hatzfeld J, *Machete Season: The Killers in Rwanda Speak*, Farrar, Straus and Giroux, 2005, 49.
[38] Hatzfeld J, *Machete Season: The Killers in Rwanda Speak*, Farrar, Straus and Giroux, 2005, 49.
[39] Arbour L, 'Address by Ms. Louise Arbour'
[40] de Greiff P, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence', UN Doc A/HRC/21/46, 9 August 2012, para. 17

ICL is not constrained to the core catalogues crimes of the ICC. [41] Understandings vary immensely, however can be categorized into two schools of thought. First is the relatively straightforward common understanding of crimes catalogued under the Rome Statute, to which states have delegated jurisdiction to the ICC to oversee.[42] The second conception of ICL is that, it is those acts which a perpetrator does not incur penal responsibility for directly under international law, but indirectly by virtue of treaty based obligations.[43] Based on these understandings, does the exploration of interpretations of non-overt, clearly specified conduct as criminal under the field stem. Hence an analysis of CEMs as genocidal both under the first method, strictly through the Rome Statute and its emanating jurisprudence, and that of the Genocide Convention, and other corresponding treaties surrounding CEMs must yield an answer in the positive of their genocidal capabilities.

Professor Everlyn Schmidt contends that a strict distinction and treatment of the two fields of law as separate, creates a gap where an abuse of social rights facilitates the commissioning of an international crime, and second when the abuse of a social right is a root cause and driver of the crime.[44] She further proposes that the consequences of international crimes are correlated to the state of social rights; arguing that international crimes often have a negative consequence on the enjoyment of social crimes, and finally, international criminal law can have a negative or positive influence on the protection of social rights.[45] Her theory of "legal impossibility",[46] disproves the

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[41] Robinson D, 'International Criminal Law as Justice' 11(3) *Journal of International Criminal Justice*, 2013, 699–711 – <https://doi.org/10.1093/jicj/mqt039>- on 10 October 2024

[42] These are the crimes of (1) genocide, (2) crimes against humanity, (3) war crimes, and (4) the crime of aggression.

[43] See Robinson D, 'International Criminal Law as Justice', 701, these crimes include slavery related practices, money laundering, movements of harzadous waste and torture among other forms of conduct,

[44] Schmid E and Nolan A, 'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice' 8(3) *International Journal of Transitional Justice*, 2014, 362–382 –< https://doi.org/10.1093/ijtj/iju015 >-on 10 October 2024.

[45] Schmid and Nolan, 'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice', 365-378

[46] The "legal impossibility argument" represents the mistaken assertion that ICL cannot address social rights violations due to its supposed exclusive focus on civil and political rights. This flawed interpretation neglects the potential for overlap between certain social rights abuses and establishes international crimes, thereby underestimating the existing legal framework's capacity to encompass social rights concerns.

defence of ICL, proving that the hierarchical treatment of human rights in ICL is not necessary, and social rights contemplations can be considered under the framework of the ICC.[47]

An example of the "legal impossibility" school of thought is under genocide and crimes against humanity. The development of crimes against humanity was driven by the aspirations of international community to punish mass violations of human rights by States against their citizens.[48] Some elements, namely those of forcible transfer,[49] go hand in hand with abuses of socio-economic rights, especially forced evictions, and the calculated measures that affect a populations access to livelihoods and jobs.[50] Under genocide, as the *Akayesu* decision held, methods of destruction by a perpetrator that do not immediately kill, but ultimately seek the physical destruction of the population, attract genocidal intent and could constitute genocidal acts.[51] Scholars, like Kress therefore point out the temporal lag between the commissioned abuses and the intended destruction, wrongfully solely understanding overt acts to constitute the crime.[52]

Larissa van den Herik, has argued that despite the strict distinction between the goals of character of ICL and HRL, social rights are reconcilable with the *mens rea* character of ICL. Her first limb of argument to support this is the contribution of HRL to the procedural nature of ICL.[53] She points to the ICTY, borrowing from the ECHR,[54] to interpret and apply fair trial protection rights, despite the tribunals operation in its own unique legal framework.[55] The *Tadic* decision held that the

[47] Schmid E, 'International Criminal Law and Social Rights' in *Law 2020*, 2020, 519–534 – <https://doi.org/10.4337/9781788972130.00044 >-on 10 October 2024.
[48] Sands P, *East West Street: On the Origins of Genocide and Crimes Against Humanity*, Weidenfeld & Nicolson, 2017
[49] Article 7(1), Rome Statute.
[50] The *Kupreškić* Trial Judgement in the ICTY explicitly referred to socio-economic rights, notably housing, education, and health. For more information see *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, International Criminal Tribunal for the Former Yugoslavia, 14 January 2000, paras. 597-634
[51] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998, para. 505.
[52] Kreß C, 'The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case' 7(3) *Journal of International Criminal Justice*, 2009, 545–554 – <https://doi.org/10.1093/jicj/mqp031>- on 10 October 2024.
[53] Herik L, 'Economic, Social and Cultural Rights - International Criminal Law's Blind Spot?', 4.
[54] Article 6, *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended), adopted 4 November 1950, entered into force 3 September 1953, ETS No. 5.
[55] Herik L, 'Economic, Social and Cultural Rights - International Criminal Law's Blind Spot?',6.

interpretation by other judicial bodies of Articles 14 and 6 of the ICCPR were of limited relevance, given the differences in considerations. [56] Despite this the formulation of the ICC, was developed in a more stringent form, alike the character of proper criminal law, with the principle of legality,[57] barring prosecution of crimes and elements that remain ambiguous and ill articulated; a structure which has so far limited social rights considerations. [58] The consequences thereof are superficial foreclosure of the second school of thought, which looks to treaty-based obligations in the interpretation of core crimes- an approach that could effectively address the issue within the typology of genocide, being too narrowly construed.

The ICESCR, is the chief instrument that has codified and articulated social rights.[59] Despite criticisms and fault being laid at the feet of the aspirational character of the Covenant,[60] its approach and prescribed methodology do offer hope in the criminalization of such abuses. The Covenant is based on a *raison d'etre,* of prescribing an irreducible minimum for each right to be guaranteed; in particular it prevents States from denying persons the essential means of sustenance, such as basic education, primary healthcare and food.[61] The Committee has noted that their core obligations are non-derogable, and apply in times of war and peace, regardless of considerations regarding the available resources available.[62] Premised on the above, Anderton's argument for 'economic

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[56] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, International Criminal Tribunal for the Former Yugoslavia, 10 August 1995, paras. 26-28
[57] Article 22(2), Rome Statute.
[58] Schabas WA, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, 397-401.
[59] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.
[60] Dennis MJ and Stewart DP, 'Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' 98 *The American Journal of International Law*, 2004 –< Sutton Colloquium 2013 - Stewart, David and Dennis, Michael – Justiciability of Economic, Social, and Cultural Rights- Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?.pdf (du.edu)>- on 10 October 2024
[61] Young K, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' 33(1) *Yale Journal of International Law*, 2008, 115-121 – < The Minimum Core of Economic and Social Rights: A Concept in Search of Content by Katharine Young :: SSRN>- on 10 October 2024.
[62] U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997).

genocide' highlights that economic conditions with fundamental connections to survival and human dignity are genocidal in their very nature.[63]

Scholars have additionally debunked the theoretical barriers to including social rights considerations in the body of ICL, arguing despite their imposition of positive obligations, exceptions in criminal law lay the ground works.[64] Criminal law is generally concerned with commissions rather than omissions.[65] However, ICL does recognize omissions in a limited regard, exemplified by the elements of crimes against humanity laid under Article 7(2) which assesses a "deliberate failure to take action". [66] Therefore, the justifications provided for the omission and lack of attention to social rights, particularly CEMs, demonstrate insufficient substantiation for their lack of interpretation under core crimes.

The discussed positively demonstrates that the conception of genocide, under ICL, fails to account for its varying sociological drivers, and non-physiological manifestations, which can (1) drive, (2) facilitate the commissioning of the crime, and (3) achieve the aim of destruction of a protected group, through the consistent application of CEMs. This study therefore contributes to the sealing of a critical gap of CEMs, and the role of social rights within the current ICL framework, as a constituent element of genocide. Though present, there is little analysis and research on the place of CEMs, as genocidal under the existing framework.

1.9 RESEARCH METHODOLOGY

This is desk-top research. It will harness collate and utilize the written laws, books, journal articles, commentaries, and sociological pieces that explore genocide. Secondary sources will

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[63] Anderton, C.H and Brauer, J , *Economic Aspects of Genocides, Other Mass Atrocities, and Their Prevention,* Oxford University Press, New York, 2016, 126.

[64] Sliedregt E, *Individual Criminal Responsibility in International Law*, Oxford Monographs in International Law,2012, 54-57.

[65] Jackson M, 'Omissions and Complicity in International Criminal Law' in *Complicity in International Law*, Oxford Monographs in International Law, Oxford, 2015, 104-110 –< https://doi.org/10.1093/acprof:oso/9780198736936.003.0005 >-on 9 October 2024

[66] Article 7(2), Rome Statute.

be utilized to contextualise the trends and perceptions of genocide throughout time illustrating the importance of protecting groups from institutionalized economic corruption.

1.10 LIMITATIONS

Deciphering the intent and destruction through the impact of economic policies can be challenging given the closely guarded nature of such information and its limited public accessibility. Therefore, this research will encounter the challenge of disentangling deliberate acts of CEMs, from unintended consequences of other genocidal acts. This limitation will demand an interdisciplinary collaboration with the aid of economics, and publicly available data including, utterances by authorities and public sentiments around different protected groups to clearly distinguish such acts of sufficient corroboration to infer intent.

The second limitation would be the limited conception of social rights within the ICL framework to those that are directly related to the physiological being of persons. This is because economic rights are a relatively new conception both in the fields of human rights law and ICL, hence only a marginal amount of legal research has been conducted specifically based on the nexus and interlink between economic rights and the core catalogued crimes of the ICC.

1.11 CHAPTER BREAKDOWN

Chapter 1 introduces the thesis that CEMs constitute an unrecognized form of group destruction within genocide law. The chapter situates this analysis within the research context, problem statement, and significance to genocide scholarship; articulating the argument that protected groups face non-physiological methods outside current legal frameworks, as the subject of interrogation throughout the thesis.

Chapter 2 examines genocide's historical development and the factors shaping its legal definition. It analyses the Rome Statute's legal elements and explores how CEMs align with the crime's contextual elements, *mens rea* and *actus reus*, testing their validity under current legal frameworks.

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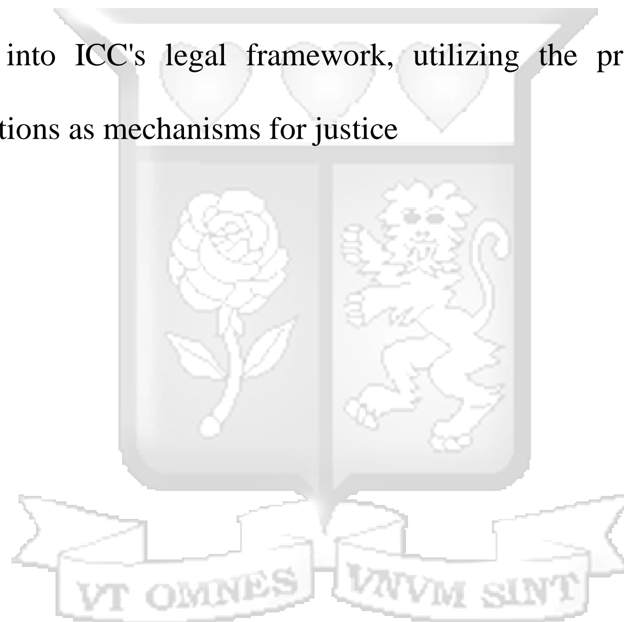
Using cases from the *ad hoc* tribunals and the ICC, Chapter 3 examines the relationship between human rights law and ICL, emphasizing their shared goals and complementary values. It addresses their divergent approaches and the legal impossibility argument, advocating for integration that recognizes social rights violations' role in genocide.

Chapter 4 assesses possibilities for refining the legal definition, weighing practical barriers against potential benefits for incorporating CEMs into genocide law. It evaluates existing obstacles and proposes solutions for statutory amendments.

Chapter 5 presents key findings, highlighting CEMs' destructive effects. It argues for incorporating CEMs into ICC's legal framework, utilizing the proposed strategies and jurisprudential foundations as mechanisms for justice



CHAPTER TWO

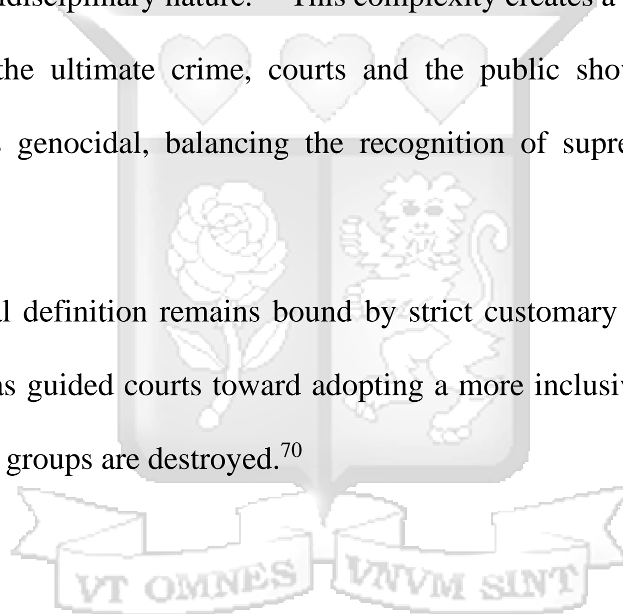
CONCEPTUALISZING CEMs AS GENOCIDE DE LEGE LATA

INTRODUCTION

This Chapter traces the historical development of genocide as a crime and seeks to illustrate how the traditional framework of ICL, though inherently restrictive due to the crime's customary status, can accommodate considerations of CEMs.

Understanding CEMs' legal dimensions and implications for genocide-targeted groups requires recognition of its multidisciplinary nature. [67] This complexity creates a critical tension: despite genocide's status as the ultimate crime, courts and the public show marked restraint in characterizing acts as genocidal, balancing the recognition of supreme evil against legal precision.[68]

While genocide's legal definition remains bound by strict customary interpretations,[69]social science scholarship has guided courts toward adopting a more inclusive approach that better reflects how protected groups are destroyed.[70]



[67] Scholars across multiple disciplines-law, phycology, political science, sociology and criminology- have contributed to understanding genocide's complexity, advancing theories that examine perpetrators mental states, enabling conditions and societal structures that facilitate its commission.
[68] The international community's initial reluctance to classify the Rwandan atrocities as genocide—largely to avoid intervention obligations—stands in stark contrast to subsequent responses. This shift in approach was evident in the U.S. Congress's swift characterization of the 2004 Darfur crisis as genocide, though this declaration notably did not precipitate military intervention. Paradoxically, the UN's Cassese Commission later found insufficient evidence to support this genocidal classification, highlighting the complex interplay between legal determination, political will, and humanitarian intervention.
[69] See Van den Herik, Larissa, "The Schism between the Legal and the Social Concept of Genocide in Light of the Responsibility to Protect," in R. Henham & P. Behrens (eds.), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate, Burlington, 2007), pp. 75–95, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989847#:~:text=This%20contradistinction%20is%20exemplary%20for,the%20%27legal%27%20concept accessed 8 December 2024, where the dynamic manifests as the "schism" between genocide's legal and societal concepts, and understandings
[70] Van den Herik, 'The Schism between the Legal and the Social Concept of Genocide', 75–95, and Koursami N, *The 'Contextual Elements' of the Crime of Genocide*, International Criminal Justice Series Volume 17, Gerhard Werle and Moritz Vormbaum (eds), Asser Press, Berlin, 2016, 86.

2.1 LEMKIN'S FRAMEWORK & PRECONDITIONS TO CONSIDERING CEMS

In "Axis Rule in Europe",[71] Raphael Lemkin examined not only the physiological destruction of the Jewish and Polish people, but significantly, the decrees issued to systematically erase their language, cultural monuments, treasures, food distribution, and economic activity. Lemkin argued that these measures were introduced, fundamentally, to annihilate the essential foundations of the groups' collective lives

> "[Genocide] is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups."[72]

From its inception, proponents considered economic, social, and cultural right violations not as periphery to the destruction but as integral given their personification of the communities unique, distinguishing features and livelihoods.

Justice Robert Jackson, proposed that evidence of the crime could be inferred through the deployment of mechanisms such as (1) underfeeding, (2) sterilization and castration, (3) deprivation of clothing, shelter, fuel, sanitation, medical care, (4) forced labour, and (5) subjection of the group towards inhumane working conditions. [73]

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[71] Raphael Lemkin, Axis Rule, Carnegie Endowment for International Peace, 1944, 79

[72] Raphael Lemkin, Axis Rule, Carnegie Endowment for International Peace, 1944, 79.

[73] *Prosecutor v von Neurath*, in *Nazi Conspiracy and Aggression*, Proceedings, 25 June 1946, XVIITWC 37, IMT, 61, where Sir David Maxwell-Fyfe in his cross-examination asserted that the charges included the deliberate attempt to destroy the 'essential foundations' of the said protected groups.

Lemkin's original conception of genocide thus permits the exploration of CEMs as genocidal, given their potential interconnection with: (1) the contextual element (2) special intent, and (3) the *actus reus*. While existing literature establishes a *de legel lata* framework and list of protected groups, this research will not contemplate genocide as a crime inclusive of socio-economic classes, as part of its protected groups; it rather focuses on the more pertinent discussion of deliberate destruction of a protected groups,[74] economic foundation, and such action being genocidal within the three parameters mentioned above.

2.2 CONTEXTUAL ELEMENTS OF GENOCIDE

Initially the context under which the core crimes of ICL were developed was in relation to World War II. As put by Robert Jackson. "the wrongs which we [the Nuremberg Tribunal] seek to condemn and punish have been so calculated, malignant and so devastating, that civilization cannot tolerate them being ignored, because it cannot survive them being repeated".[75] Later the direct nexus between such core crimes and the presence of a war was abandoned.[76] The question prevails to what context genocide can be committed under. This question is key because, CEMs, can target protected groups during both peace and conflict, with concern for silent, unprosecuted genocides during peacetime.

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2.2.1 Originalist Conception of the Contextual Element

Lemkin initially considered this context to be one of a 'plan'; given the act of large-scale destruction of a groups' requisite foundational pillars of life.[77] He argued such objectives

[74] These protected groups as per Article 6 of the Rome Statute are (1) national groups, (2) ethnic groups, (3) racial groups, and (4) religious groups.
[75] *Trial of the Major War Criminals before the International Military Tribunal*, Second Day, Wednesday, 11/21/1945, Part 04, Volume II, Proceedings: 11/14/1945–11/30/1945, Nuremberg: IMT, 1947, 98–102.
[76] Article 1 (b), *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, adopted by General Assembly resolution 2391 (XXIII) of 26 November 1968.
[77] Schabas WA, *Preface to the Second Edition* in *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, 2009, xiii-xiv.

cannot be achieved without a collective plan, typically manifested through coordinated government policy and action.[78]

The Armenian genocide exemplified this contextual element of a government 'plan'; forcibly transferring a protected group through desert routes, imposing inhumane conditions, compounded by forced religious conversions and marriages[79]- demonstrate such systemic group destruction.[80]

Similarly, Hitler's Final Solution required a coordinated action targeting a protected group,[81] unequivocally meeting Lemkin's genocide criterion. Lemkin's analysis of forced marriages reveals an undeniably complex narrative: beyond sexual trauma, these acts targeted human dignity and cultural heritage by dismantling family units and disrupting intergenerational transmission.

Third Reich's techniques,[82] illustrated that genocide cannot be committed by a lone *genocidaire* and requires a coordinated national policy.[83] What remains a consistent finding of his phenomena, is that killing need not be the sole focus of physically destructive plans; rather one must survey the patterns of actions directed against the given group,[84] with the underlying intent being to destroy the group.[85]Ultimately, the originalist conception of genocide as a 'plan'

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[78] Lemkin's examination of the exterminations of Armenians in Turkey, and Jews in Nazi Germany, connote that what he envisioned was the large scale state destruction of individuals as a consequence of their membership to a group.
[79] Members of the group were forced to convert to Islam, and young Armenian girls were forced into marriages in an attempt to destroy the group through ensuring limited lineage, and identity destruction by forced religious conversions.
[80] Dadrian V N, *The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, *The Yale Journal of International Law* (1998) 23: 503, https://openyls.law.yale.edu/handle/20.500.13051/6387, accessed 9 December 2024.
[81] Dadrian V N, *Armenian Genocide and Jewish Holocaust*, 517
[82] See Dadrian V N, *Armenian Genocide and Jewish Holocaust*, 521 where the actions and techniques used in the Third Reich were deemed to have been to the end of imposing German patterns on oppressed populations
[83] *The Prosecutor v. Goran Jelisic*, ICTY, IT-95-10-T, decision of 14 December 1999, Judgment, para. 99.
[84] These being but not limited to cultural, religious, economic, social and political considerations, attacked to the ends of disintegration of the essential foundations of life,
[85] Given that the chapeau requirement for the crime is of *dolus specialis.*

transcends beyond physiological destruction, focusing on organized efforts that endanger a group's existence.

2.2.2 Contextual Elements Under the Rome Statute

Under the Rome Statute,[86] most crimes have contextual elements, except genocide,[87] and the crime of aggression.[88] However, the Elements of Crimes (EoC),[89] addresses this by requiring genocide to occur 'in the context of a manifest pattern of similar conduct' or be conduct 'could itself effect such destruction'.[90] Article 9 mandates the EoC assist the Court's interpretation and application of enumerated crimes.[91]

Given this inconsistency, and failure to determine the status of sources of law under Article 21,[92] we must examine the *travuax preparatoires* of both the EoC and the Statute, to determine whether the contextual element applies. The EoC complicates the prosecution's burden of proof in genocide cases, by introducing a more rigorous evidentiary standard, requiring prosecutors to demonstrate the crimes occurrence within a specific contextual framework. This approach provides a nuanced mechanism for interpreting and placing CEMs, ensuring a precise examination of potential genocidal actions.

2.2.3 Justification Under The EoC

ICL conforms to principles of classical liberal domestic criminal law. [93] The EoC serves to provide precision and clarity, preventing broad judicial discretion.[94]

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[86] The reference to the Rome Statute here means the text of the Statute alone, without the Elements of Crimes, which assist the court in interpretation as per Article 9 of the *Rome Statute*.
[87] Article 6, *Rome Statute*.
[88] Article 8 bis, *Rome Statute*.
[89] *Elements of Crimes*, International Criminal Court, 2011.
[90] Article 6, *Elements of Crimes*, International Criminal Court, 2011.
[91] See Article 9, *Rome Statute* thus the entry into force of the EoC clarified and set forth the common elements to each of the enumerated genocidal acts.
[92] McKay L, *Characterising the System of the International Criminal Court: An Exploration of the Role of the Court Through the Elements of Crimes and the Crime of Genocide*, *International Criminal Law Review* (2006) 6(2), 257-274.
[93] See Section 1.1. where ICL's character is defined as alike to proper criminal law in regards to its foundational principles.
[94] For more see Mahony C, 'The Justice Pivot: U.S. International Criminal Law Influence from Outside the

The EoC transforms ICL from a field of substantive justice to one of strict legality,[95] a major critique ICL during the IMT trial.[96]. It embodies the *nullum crimen sine lege* ,establishing ICL as a forensic tool to hold powerful perpetrators accountable

2.2.4 The Preparatory Committee & *Ad Hoc* Committees Proposals on Contextual Elements

During the Preparatory Committee's deliberations, the genocide crime was initially proposed with a contextual element of a plan, but later attempted to borrow the widespread and systematic criterion from CAH.[97] The latter proposal took prominence,[98] but was rejected when the Colombian delegation pointed that an amendment of the definition would constitute the inclusion of a new element, going beyond Statutory definition and lessening the protection provided to protected groups.[99] Critically, the proposal's rejection signalled the Committee and Member State delegations were aware of genocide's various manifestations and their current incompatibility with the statutory definition.[100]

Rome Statute' 46 *Georgetown Journal of International Law*, 2015, 1071–1132—https://www.legal-tools.org/doc/4b7144/pdf on 27 December 2024. The preparatory committee and State Parties, through the U.S delegation confirmed as much citing that the *raison d'etre* of the inclusion of EoC was that 'they are something readily familiar to criminal practitioners, a necessary guide to prosecutors of what must be proved and to defence counsel of what must be defended against'.

[95] The International Military Tribunal's were characterized by their chosen approach of substantive justice, given that they tried perpetrators for crimes not specifically codified, and applied them retroactively to hold the Axis Powers accountable for atrocities.

[96] Rosen T (ed), *The Influence of the Nuremberg Trial on International Criminal Law* -<https://www.roberth-jackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/>-, accessed 9 December 2024.

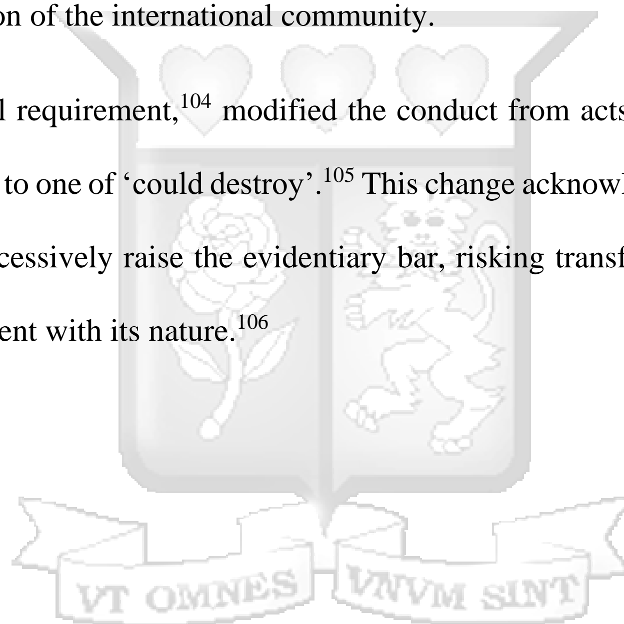
[97] Proposal submitted by the United States: Draft Elements of Crimes, UN Doc PCNICC/1999/DP.4, 4 February 1999, 7.

[98] Proposal submitted by the United States: Draft Elements of Crimes, 7. 'Systematic and widespread 'advocated for the crimes' contextual element requiring the genocidal act to be committed in "conscious furtherance of a widespread or systematic policy or practice aimed at destroying such a group"

[99] The Colombian delegation submitted that this amendment would conflate genocide with crimes against humanity, ignoring the fundamental aspect of the crime which is intention. They additionally propounded that incorporating the U.S proposal would limit the scope of genocide by eliminating conditions that are imposed to the ends of physical destruction but do not lead to actual destruction, thus narrowing the scope even further.

[100] Proposal submitted by Colombia: Comments on the Proposal Submitted by the United States of America on Article 6: The Crime of Genocide, PCNICC/1999/WGEC/DP.2, 18 February 1999. Adopting the U.S delegations proposal would even further narrow acts that constitute genocide by implying a contextual element that is higher than the 'manifest' or 'conduct that could destroy' elements under the current EoC.

The contextual elements of genocide, first, required it to be conducted in a manifestly similar pattern,[101] effectively excluding sporadic and isolated acts. Consequently, per se genocidal acts, are excluded if they occur outside a recognizable genocidal campaign.[102] The Committee adopted a position similar to Lemkin and early scholars and practitioners of ICL, through the IMT, that the gravity of the crime contemplated inherently attaches to it coordination, through a 'plan' to achieve such evil. The manifest requirement sought to avoid the trivialization of the crime, and avoidance of charges of lone *genocidaire's* [103]Thus future claims of genocide, must first pass the pre-screening of magnitude, not of numbers but of effort and organization, to warrant the intervention of the international community.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The second contextual requirement,[104] modified the conduct from acts that would 'in and of itself [would] destroy' to one of 'could destroy'.[105] This change acknowledges that the previous formulation would excessively raise the evidentiary bar, risking transformation into a result-based crime, inconsistent with its nature.[106]

[101] Article 6, *Elements of Crimes*
[102] Koursami N, *The 'Contextual Elements' of the Crime of Genocide*, 123.
[103] Cassese A, *International Criminal Law*, 3rd ed, Oxford University Press, Oxford, 2013.
[104] Article 6(4), *Elements of Crimes*.
[105] Oosterveld V, 'The Elements of Genocide' in Lee RS and Friman H (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001.
[106] The chapeau requirements of the crime require special intention of the perpetrator's to destroy in whole or in part the protected group. For more see Article 6 of the *Rome Statute* and Article 6(c) of the *Elements of Crimes*.

The theoretical framework does not preclude CEMs as potential genocidal acts, but rather focuses on the factual matrix under which the crime is committed; in search of collective acts (the 'manifest' requirement), and their potentiality (the 'could destroy' requirement) to destroy a protected group. This destruction could occur through direct physiological effects of CEMs or by creating societal conditions conducive to genocide via Hagan's tri-level hierarchy.

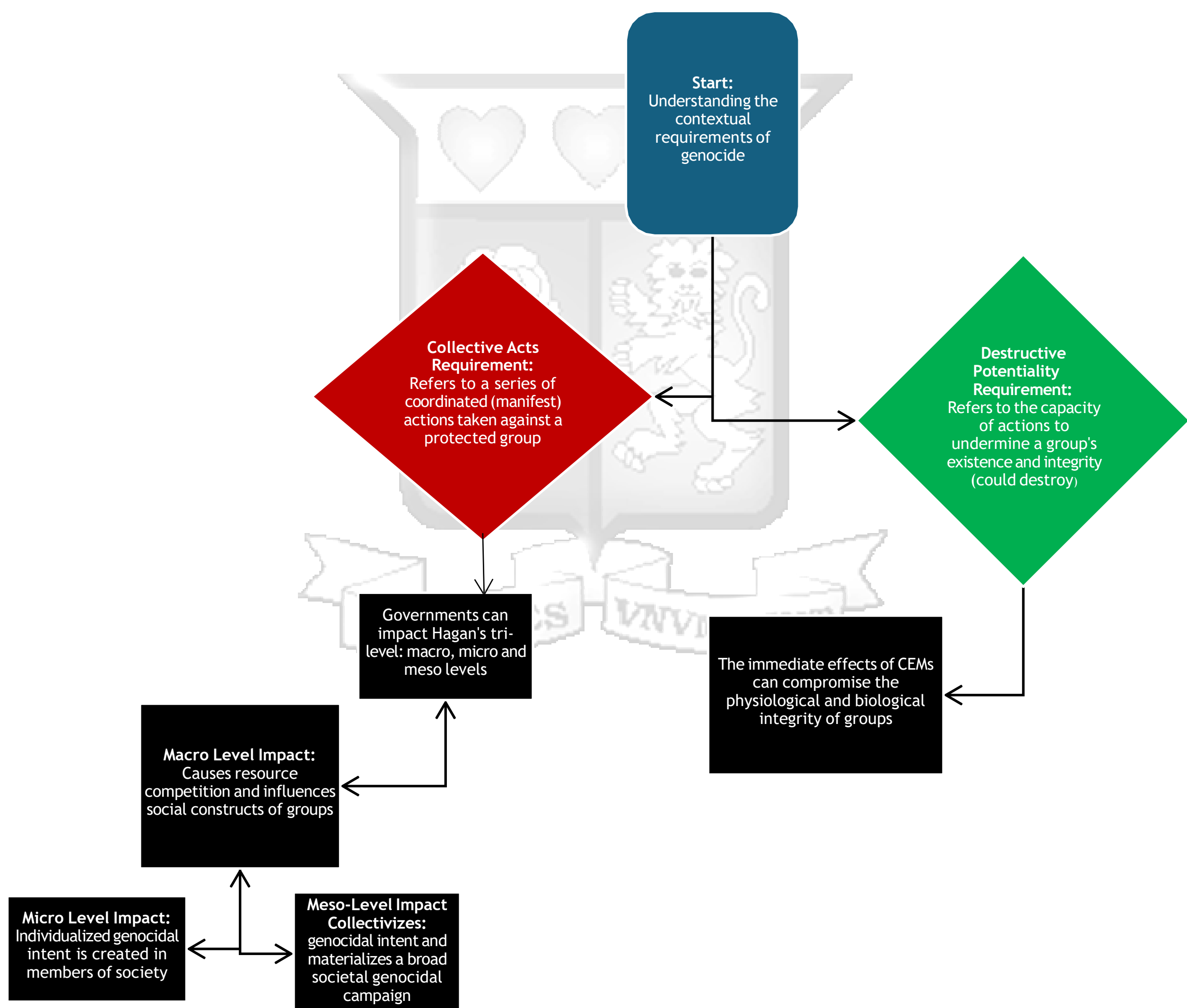

Figure 2: Flow chart representation of how CEMs is qualified by the contextual elements of genocide

2.3 RECALIBRATING THE HISTORICAL FOUNDATIONS OF THE CRIME WITH THE LEGAL DEFINITION IN LIGHT OF STRICT LEGALITY

The ILC's criteria of heinous crimes includes an analysis of the elements of magnitude, horror and motive:

> 'The sheer enormity and unspeakable horror genocide become[s] understandable once we accept that only organisations such as a State have the means and power to carry out genocide'[107]

The historical purpose of the prohibition of genocide, identified under Resolution 96(I), conceptualized genocide as the denial of the right of existence of an entire human group on any grounds either in whole or in part.[108] ICL continues to face a significant challenge in divorcing the legal concept of genocide from its social connotations of mass killings.[109] This challenge stems from the *jus cogens* definition under the Convention, which initially imposed few restrictions on understanding genocide. [110]

Article 22 requires strict construction of crimes and prohibits extension by analogy.[111] Consequently, the challenge of divorcing the social construct (which now includes CEMs per the public perception), from the legal phenomenon must be addressed to conceptualise CEMs within the current legal framework.

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[107] Simon TW, *The Laws of Genocide: Prescriptions for a Just World*, Praeger Security International, London, 2007, 143

[108] UNGA, *The Crime of Genocide*, A/RES/96(I), 11 December 1946.

[109] The macro-phenomenon of Genocide refers to cases witnessed in situations such as the Armenian Genocide, and Nazi Genocide elaborated on in Chapter 1.

[110] Advisory Opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide*, ICJ Reports 1951, 15; *Convention on the Prevention and the Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277. Key is the lack of a said 'contextual element(s) as done so under the EoC.

[111] Article 22, *Rome Statute*.

Such unanchored approaches to satisfy political motives and public outcry are not unprecedented. In Cambodia the Khmer Rouge leaders,[112] were tried under an amended definition prescribing:

> "[Genocide as] planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labour in conditions leading to their physical and mental destruction; wiping out religion; destroying political, cultural and social structures and family and social relations"[113]

The above definition has been critiqued and such convictions have been termed as based on an 'idiosyncratic definition substantially akin to crimes against humanity' [114]

A historical account would be limited to the social real and ignore the operational realities of criminal justice. As Mettaraux argues 'the definition of the offence determines the contours of the factual matrix relevant to the charges, not the other way around'.[115] Therefore even if a 'plan' is contemplated and implemented to the ends of destruction of a protected group through CEMs, it is necessary to fit it the conduct under the prescribed grounds of genocide; this are either of the following (1) killing, (2)causing serious bodily or mental harm, (3) deliberately inflicting conditions of life calculated to bring about physical destruction, (4) imposing measures intended to prevent births, or (5) imposing measures intended to prevent birth.[116]

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[112] This movement was communist and sought to eliminate any 'enemies' to their goal of creating a classless agrarian society, through killings, starvation and forced labour among other measures.
[113] Decree Law No 1: Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide, 15 July 1979
[114] Schabas WA, 'Problems of International Codification: Were the Atrocities in Cambodia and Kosovo Genocide?' 35 NELR, 2000, 289.
[115] Mettraux G, 'The Definition of Crimes against Humanity and the Question of a 'Policy' Element' in Sadat LN (ed), *Forging a Convention for the Crimes against Humanity*, Cambridge University Press, 2011, 146.
[116] Article 6, *Rome Statute*

This study will limit the conceptualization of CEMs under acts 3, and 2 which provide the strongest argument for the inclusion of CEMs in the crime's interpretation.

2.3.2 Conditions of life and serious bodily or mental harm

Most human right's scholars would argue that the literal reading of the paragraph on conditions of life and serious bodily or mental harm, is impossible to consider without taking into account the realm of social rights abuses.[117]

The EoC wordings on this paragraph (conditions of life), encourages this thought by including the deprivation of resources indispensable for survival such as food, medical services or expulsion from homes As set out in Section 1.7.1, this study will conceptualize deliberate conditions of life, not solely as a means that directly impacts the groups physiological existence, but as a means that strategically pushes the society to materialize a genocidal campaign against the said protected group.

Given the contextual elements of genocide, CEMs reasonably qualifying under this category. The ICRC's notably observed that famine constitutes 'a low cost and low technology method of genocide'.[118] Social rights prominence in genocide can be traced historically to the advent of the crime. Lemkin, characterized the Ukrainian Holodomor, highlighting how forced collectivization and punitive state allotment taxes were strategically designed to eliminate Ukrainian nationalism. [119]

A reading of the EoC of serious bodily or mental harm,[120] reveals some leniency, defining such acts to include-but not be limited to- rape, torture, sexual violence, and inhumane or degrading treatment, that cause such grave harm victims' physiological or mental condition. [121]Similarly,

[117] This brings to the forefront Larissa van den Herik's legal impossibility argument, referred to under section 1.8 of this study.
[118] Uhler O et al., *Commentary, Fourth Geneva Convention*, ICRC, 1958, 597.
[119] Lemkin R, 'Soviet Genocide in the Ukraine' in Luciuk L and Grekul L (eds), *Holodomor: Reflections on the Great Famine of 1932–1933 in Soviet Ukraine*, Kashtan, 2008, 235–244: 236, 239.
[120] Article 6(b), *Elements of Crimes.*
[121] Footnote 3, *Elements of Crimes.*

Lemkin considered the effects of victims of Soviet concentration camps in Poland and Ukraine as sufficiently grave to endanger the groups' existence.[122]

However, these illustrative links demonstrating social rights' role fail to substantiate the argument for inclusion of CEMs, given their explicit absence from the listed elements and definition of the crime.

2.4 CONCLUSION

CEMs as genocide potentially meet the existing contextual elements to reasonably discuss the crime's contemplation *de lege lata.* However fitting CEMs into the current legal framework fails due to the specific conduct's absence from both the Statute, and its elements, which only permit social right considerations with a strict physiological existence nexus

The mere presence of social rights considerations cannot interdependently warrant CEMs as genocide, given that the crime's scope determines the factual matrix relevant, not vice versa. Nevertheless, this does not negate CEMs historical use as a tool in past genocides, or their potential for future atrocities. Therefore, further analysis is necessary to prove CEMs role as central, rather than ancillary, to genocide for potential Rome Statute charging.

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[122] Lemkin, 'Soviet Genocide in the Ukraine', 236, 239.

CHAPTER THREE

JURISPRUDENTIAL PATHWAYS: MAPPING CEMs UNDER CASE LAW

INTRODUCTION

Chapter two doctrinally establishes the pre-screening parameters genocide’s contextual elements. It demonstrates that the framers crafted parameters broad enough to acknowledge genocide’ varying factual matrices, yet concise enough exclude the patterns and actions failing to conform with international justice goals. Within this framework, the chapter posits that CEMs have a dual role: (1) facilitating the physiological destruction of groups, and (2) collectivizing genocidal intent within a society, ultimately catalysing a full-blown genocidal campaign.

Despite the broad legal doctrines in ICL,[123] the current cadre of literature illustrates attempts to mobilise justice more effectively to these nuanced realities, recognizing CEMs as potential constituent acts of genocide.

While this research scope is limited in contemplating CEMs under the Rome Statute, emanating jurisprudence from the ICTR, ICTY , and ICC (though limited), [124] remains relevant due to their high success rate[125] litigated charges, and near verbatim genocide statute replication.[126] This chapter will highlight the tribunals’ and ICC;s developing contemplations of CEMs role.

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[123] Which often pose significant barriers to the consideration of CEMs in genocide cases- given their complex linkages to underlying economic causes

[124] This chapter seeks to explore the emanating jurisprudence from the *ad hoc* tribunals primarily due to their (1) high success rates, and (2) the ‘new’ nature of the ICC. The ICC has only tried one case concerning the charge of genocide, and only at the Pre-Trial Chamber, where the evidentiary standard is 'reasonable grounds to believe.' As such, the relevance of the ICC jurisprudence is strictly constrained to the charge of genocide through the method of ‘conditions of life’ under the Al Bashir decisions, given the *ad hoc* tribunals' classification of CEMs as war crimes in the form of plunder and pillaging."

[125] Morris PS, ‘Economic Genocide Under International Law’ 82(1) *The Journal of Criminal Law*, 27 September 2017, 22—https://ssrn.com/abstract=4926688 on 27 December 2024.

[126] ICTY Statute, Article 4, adopted by UNSC Resolution 827, 25, and , ICTR Statute, Article 2, adopted by UNSC Resolution 955, 8 November 1994.

3.1 TREATMENT OF CEMs UNDER CASE LAW

3.1.1 Contextual Background

The ICTR's first genocide conviction was a remarkable feat highlighting ICLs potential to punish perpetrators of evil. To comprehend the Rwandan genocide's causal link with CEMs, contextualising the tribunal's contributions are crucial.

Understanding the atrocious environment requires an examination of the collapse of the coffee markets in the late 1980s, and early 1990s.[127] While financial austerity translating into macro and micro societal realities of genocide falls outside the direct scope of this study, it remains integral to this analysis.[128]

Scholars like Choussudovsky argue that during this period, economic reforms demanded by multilateral significantly contributed to the underlying social tensions.[129] Rwanda's coffee market—a vital resource for economic sustenance—became a battleground of high-stakes competition;[130] creating a powder keg of social and economic instability.[131]

Similarly studies on Yugoslavia's collapse have attempted to link economic factors to atrocities. Milosevic's pursuit of 'economic and cultural progress', and subsequent plunder of Yugoslav resources was critical to the tragedy's unfolding.[132]

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[127] Kamola IA, 'The global coffee economy and the production of genocide in Rwanda' 28(3) *Third World Quarterly*, 2007, 571–592—https://doi.org/10.1080/01436590701192975 on 27 December 2024.
[128] The study conceptualizes CEMs strictly emanating solely from the macro level to facilitate a full-blown genocidal campaign, or the employment of CEMs to destroy the physiological aspects of the given protected group by authorities—however, this aspect remains integral to the study as it underscores how financial austerity can result in the collapse of states, arising from systemic failures or targeted disruptions of economic institutions.
[129] Kamola, 'The global coffee economy and the production of genocide in Rwanda', 571.
[130] Kamola, 'The global coffee economy and the production of genocide in Rwanda', 574
[131] To properly understand the significance of this, it is key to keep in mind Hagan's tri level referred to under Figure 1, and the specific element of competition for economic resources.
[132] Lamont CK, *International Criminal Justice and the Politics of Compliance*, Ashgate Publishing, Farnham, Surrey; Burlington, VT, 2010, 64.

In recognition of this undeniable reality, it then follows that the treatment of CEMs under case law surrounding these events ought to be considered to explore any contemplated linkages made between CEMs and genocides.

3.2. CEMs AND GENOCIDAL INTENT: A CRITICAL ANALYSIS OF *AD HOC* TRIBUNAL JURSPRUDENCE

3.2.1 On Intent: Under the ICTR

Examining the question of intent and the role of CEMs, tribunals have inferred intent based on the substantiality of the crimes committed. Notably, the ICTR,[133] consistently found that *dolus specialis* for the crime was fundamentally contingent on quantitative considerations.[134] The *Kamuhanda* Trial Chamber Decision reaffirmed this, asserting that intent to destroy required "more than an imperceptible number of the targeted group."[135] Paradoxically, this quantitative interpretive framework was not explicitly supported by a textual analysis of the ICTR Statute.[136]

Despite the predominant quantitative methodology, the *Akayesu* Trial Chamber recognized the intersectionality between genocide and CEMs, stating:

> "[When] the Convention on Genocide was being drafted, the Polish delegate observed that it was sufficient to play skilfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favourable to the perpetration of the crime."[137]

[133] In the (1) Akayesu, (2)Kayishema, and (3) Ruzidana decisions.

[134] Neressian DL, 'The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention' 36 *Cornell International Law Journal*, 2003, 314—https://scholarship.law.cornell.edu/cilj/vol36/iss2/3 on 27 December 2024.

[135] *Prosecutor v Jean de Dieu Kamuhanda*, Judgment and Sentence, ICTR-99-54A-T, Trial Chamber II, 22 January 2003, para. 628.

[136] Milaninia N, 'Understanding Serious Bodily or Mental Harm as an Act of Genocide' 51 *Vanderbilt Law Review*, 2021, 1404—https://scholarship.law.vanderbilt.edu/vjtl/vol51/iss5/ on 27 December 2024.

[137] *Prosecutor v Jean-Paul Akayesu*, Judgment, ICTR-96-4-T, Trial Chamber I, 2 September 1998, para. 557.

Critically, *Akayesu* was charged with incitement to commit genocide,[138] punishable by the statute.[139] In defining the terms incitement, direct, and public, the Chamber noted that under common law, incitement was known as encouraging or persuading others to commit an offence;[140] and under civil law, it related to an act intended to directly provoke another to commit a crime through speech, shouting, threats, or any other means of audiovisual communication.[141] In relation to the public element, the Chamber relied on the ILC, which characterizes it as a call to criminal action to a number of individuals in a public space or through means of mass communication.[142] The Chamber established nuanced prosecutorial parameters, requiring demonstrable causal links between incitement (here in relation to CEMs) and specific offenses,[143] evaluated on a case by case basis.[144] Crucially, the Chamber lowered the incitement threshold in genocide, given the gravity of the charge and its effects on society. **[145]**

Drawing on Dr. Alison Des Forges' testimony, the tribunal revealed how political actors strategically transformed resource based conflicts into ethnically-framed narratives through sophisticated propaganda.[146]

Notably, when conventional incitement appeared insufficient, the Court innovatively utilized the *travaux préparatoires* to conceptualise the charge as an inchoate offence.[147] Fundamentally,

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[138] See *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-I, Amended Indictment (1998), para. 4. Under Count 4 of the Document Containing Charges, with the legal characterization being direct and public incitement to commit genocide
[139] Article 2(3), ICTR Statute.
[140] *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-I, Amended Indictment (1998), para. 555.
[141] *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-I, Amended Indictment (1998), para. 555.
[142] Draft Code of Crimes Against the Peace and Security of Mankind, Article 2(3)(f); Report of the International Law Commission to the General Assembly, 51 UN GAOR Supp. (No. 10), 26, UN Doc. A/51/10 (1996).
[143] that prosecution must prove a definite causation with the characterized acts of incitement,(here being in relation to CEM factors) and the specific offence
[144] Petrosian T, 'Secondary Forms of Genocide and Command Responsibility under the Statutes of the ICTY, ICTR and ICC' *Australian International Law Journal*, 2010, 44—https://www.austlii.edu.au/au/journals/AUIntLawJl/2010/2.pdf on 27 December 2024
[145] *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-I, Amended Indictment (1998), para. 562
[146] *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-I, Amended Indictment (1998), para. 99.
[147] Inchoate offences are offences under common law that are punishable by virtue of the criminal act alone and irrespective of the result thereof.

the Chamber justified this approach by positioning genocide as an exceptionally grave crime with unprecedented societal risks. [148]

Conclusively, while directly and publicly inciting genocide relates to CEMs, it remains a legally distinct offense from genocide itself.

3.2.2 On Intent Under the ICTY

Analysing the *mens rea* for genocide, the tribunal departed from strict quantitative criteria,[149] instead adopting a nuanced analytical approach,[150] that evaluates the critical importance of specific population strata to a group's survival.[151]

The tribunal's treatment of CEMs is exemplified through Directive No. 7 issued by President Karadžić to the VRS in relation to their strategy in the Srebrenica area.

The Directive specified that the VRS was to:

> "Complete the physical separation of Srebrenica from Žepa as soon as possible, preventing even communication between individuals in the two enclaves. By planned and well-thought-out combat operations, create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica."[152]

The *Krstic* Trial Chamber interpreted the Directive as strategically designed to make the population "dependent on our good-will, while at the same time avoiding condemnation by the international community."[153] Given the appellant's senior military position the mere circulation of the Directive was deemed sufficient to infer genocidal intent, articulating that:

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[148] *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-I, Amended Indictment (1998), para. 562..
[149] The stringent quantitative criteria is concerned with how many people ought to have been killed as per the ICTR jurisprudence
[150] Opposed to the quantitative criteria, this represents a complex value judgement of the importance of a strata to the survival of an entire group
[151] Drumbl M, 'Prosecutor v Radislav Krstic: ICTY Authenticates Genocide at Srebrenica and Convicts for Aiding and Abetting' 5(2) *Melbourne Journal of International Law*, October 2004, 7— https://law.unimelb.edu.au/mjil/issues/issue-archive/52 on 27 December 2024.
[152] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, ICTY Appeals Chamber, 19 April 2004, para. 88
[153] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T, ICTY Trial Chamber, 2 August 2001, para. 98.

"Just as envisaged by this decree, by mid-1995, the humanitarian situation of the Bosnian Muslim civilians and military personnel in the enclave was catastrophic. **[**Inter alia**]** a series of reports issued by the 28th Division reflected the urgent pleas of the ABiH forces [the opposing army] in the enclave for the humanitarian corridor to be deblocked**,** and, when this failed, the tragedy of civilians dying from starvation."[154]

The Trial Chamber inferred that the appellant was put on notice that the survival of the Bosnian Muslim population was in question following the take-over of Srebrenica, and shared genocidal intent.[155] It is critical to note that the Appeals Chamber reversed the Chamber's inference of genocidal intent of and liability under the joint criminal enterprise(JCE) form;[156] instead holding that he was culpable in the secondary form as an aider and abettor,[157] which's' significance will be revisited shortly.

The Appeals Chamber accepted counsel's argument that the intent had to be to destroy physically or biologically.[158] *Krstić* was charged with genocide in relation to the mass executions,[159] of Bosnian-Muslim men in Srebrenica, as part of JCE.[160] Under JCE, if the agreed crime is committed by one , all are guilty regardless of individual roles. [161]The *Krstić* Trial Chamber, based on evidential inferences regarding *Krstić's* knowledge about the conditions experienced by Bosnian Muslim civilians, his interactions with the main participants of the JCE, and his

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[154] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T, para. 28.
[155] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T, paras. 569-580.
[156] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T , para. 569.
[157] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, para 59-75.
[158] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, para 46.
[159] Though his actual commissioning of the act was not proved, but inferred under JCE, and the fact that Directive No.7, made him aware of the grave CEMs imposed on the population which he oversaw, and was aware of both this and the mass executions.
[160] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T , para. 569.
[161] *Prosecutor v Milorad Krnojelac*, Case No. IT-97-25-T, ICTY Trial Chamber II, 15 March 2002, para. 80. This is related to both JCE 1, regarding the basic form, and JCE 2, regarding the systemic form of commissioning of the crime.

knowledge that resources and soldiers under his command were used to facilitate killings, held that genocidal intent could be inferred.[162]

On appeal, the defence objected on the inferential use of the evidence, including in relation to the CEMs,[163] specifically on the conditions faced by the Bosnian Muslims. [164] The majority of the Appeals Chamber concurred that mere knowledge of the co-perpetrator's genocidal intent, knowledge of the dire humanitarian crisis, and executions was insufficient to support an inference; they pronounced that knowledge without more is insufficient.[165]

Judge Shahabuddeen dissented, noting that the proposition overlooks the critical distinction between the acts and intent; intent as per the statute does not require causation of physical or biological destruction of the group.[166] He noted, despite the *contrario* position among literature requiring the acts to be in relation to the physiological destruction of the group, intent, so long as it is attached to the listed acts, is not limited to the same ambit.[167]

The Appeals Chamber in reliance on the ILC 1991 formula,[168] found that "destruction" must exclusively be taken in a material, physiological sense, does not account for the reality that destruction need not always be physiological.[169] Judge Shahabuddeen's finding posited that provided that there is a listed act (understood as physiological), intent sufficiently emerged through proof of non-physiological intent to destroy the group in whole or in part, specifically when attached to the destruction of a critical strata required by the group for survival. [170] Fundamentally, is dissent reasons that CEMs considerations could be used to infer genocidal intent by the court, and so long as the charge includes a listed act under the statute. The fact that the

[162] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T, paras. 569-580.
[163] Specified under Directive No.7
[164] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, paras 42-44
[165] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, para 61.
[166] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, para 48.
[167] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, para 49.
[168] Report of the International Law Commission on the Work of its Forty-third Session, 29 April–19 July 1991, UN Doc. A/46/10, 1991, 96–105
[169] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, para 51.
[170] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, paras 53-54.

method of destruction contemplated is not maximally effective (being physical and biological), is not dispositive of a lack of genocidal intent.[171]

Regarding *Krstić's* mode of liability, the Appeals Chamber found that the crime of aiding and abetting genocide,[172] exists under customary international law, and thus held him liable under this secondary form given his palpable level of guilt in contrast to other perpetrators.[173]

3.3 THE RECOGNITION OF CEMs AS A METHOD OF GENOCIDE: A JURISPRUDENTIAL ANALYSIS OF THE *AD HOC* TRIBUNALS

3.3.1 Contemplating CEMs under "Causing serious bodily or mental harm"

The evidentiary principle applicable for this method relies on proving a specific result,[174] emphasizing *ex-post facto* considerations.[175] The result is adduced through direct evidence, such as medical records or victims' own statements, demonstrating bodily or mental harm;[176] additionally, the court may draw inferences from circumstantial evidence.[177]

When analysing evidence, a holistic approach is critical, avoiding piecemeal assessment.[178] Bodily and mental harm is evaluated as arising from all relevant acts.[179] In *Tolimir,* both the Appeals and Trial Chambers found that this criterion was satisfied not only by the forcible transfer of women and children, but by the entire experience, including the trauma of separation

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[171] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, para 32.
[172] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, para 144.
[173] The Appeals Chamber in essence found Krstic liable for a crime not stipulated under the Statute, but present under customary law, in line with the crime of genocide. It is noteworthy that this form of liability was arrived at given their finding that his level of guilt was not near as much as his alleged co-perpetrators.
[174] *Prosecutor v Stakić*, Case No. IT-97-24-T, ICTY Trial Chamber, 31 July 2003, para. 514.
[175] The perpetration or facilitating of the genocide through the method is not what is focused on, but rather the results of the commissioning of the crime, in relation to consideration of genocide under this method.
[176] *Prosecutor v Rukundo*, Case No. ICTR-2001-70-T, ICTR Trial Chamber, 27 February 2009, para. 388
[177] *Prosecutor v Rukundo*, Case No. ICTR-2001-70-T, para. 388-389
[178] *Prosecutor v Tolimir*, Case No. IT-05-88/2-A, Notice of Filing of Redacted Public Version of Prosecution Response to Zdravko Tolimir's Appeal Brief, 10 March 2014, para. 78.
[179] Please note with emphasis that the gravity of the harm resulting from the method is the most important element of consideration under this threshold; which's mode of measurement shall be explained in sufficient detail below.

from family members and the financial and emotional challenges that fundamentally altered the lives of the Bosnian Muslim women as a population.[180]

On the "serious" threshold, the *ad hoc* tribunals avoided a uniform precise definition, instead opting for a case-by-case analysis,[181] until the recent *Tolimir* Appeals Chamber Decision set the minimum threshold to be that:

> "That harm must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group; although it need not be permanent or irreversible, it must go beyond temporary unhappiness, embarrassment, or humiliation, and inflict grave long-term disadvantage to a person's ability to lead a normal and constructive life."[182]

From the Chamber's decision, we will examine the scholarly debate around the parameters and their potential accommodation of CEMs. The components of the test are laid out below:

3.3.1.1 Harm that Goes Beyond Temporary Unhappiness, Embarrassment or Humiliation

The *Krstić* Trial Judgment held that serious harm need not cause permanent and irremediable harm, but must go beyond temporary unhappiness, embarrassment, or humiliation.[183] This aligned with the *Bagilishema* Trial Judgment, which established that serious harm entails more than minor impairment of mental or physical faculties.[184] For CEMs to qualify as a method here, we must analyse the second component to discern the gravity of the harm contemplated, whether quantitative or qualitative.

[180] *Prosecutor v Tolimir*, Case No. IT-05-88/2-A, para. 210.
[181] *Prosecutor v Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze & Anatole Nsengiyumva*, Case No. ICTR-98-41-T, ICTR Trial Chamber, 18 December 2008, para. 2117.
[182] *Prosecutor v Tolimir*, Case No. IT-05-88/2-A, paras. 201–202
[183] *Prosecutor v Krstić*, Case No. IT-98-33-T, ICTY Trial Chamber, Judgment, 2 August 2001, para. 513
[184] *Prosecutor v Baglishema*, Case No. ICTR-95-1A-T, ICTR Trial Chamber, Judgment, 7 June 2001, para. 59.

3.3.1.2 Harm that Inflicts Grave and Long-Term Disadvantages to a Person's Ability to Lead a Normal Constructive Life

Evaluation is conducted on a case-by-case basis, depending on the evidence presented.[185] The *Karadžić* Appeals Chamber determined the component was met through examining genocide results, including the paralysis of limbs, chronic pains, facial deformities, jaw and vertebrae fractures, and permanent headaches.[186] These qualified as grave and long-term disadvantages.

No tribunals have enumerated what exactly qualifies as a normal and constructive life or how certain harms may impede the ability to lead such a life.[187] Instead, tribunals have conflated both elements of the test. In *Tolimir* the Court found that the trauma, financial, and emotional consequences caused to the Bosnian Muslim population prevented them from leading a normal, constructive life, so as to threaten the physical destruction of the group in whole or in part.[188]

3.3.1.3. Contributes or Tends to Contribute to the Destruction of the group in whole or in part

The *Krajišnik* Trial Chamber observed that for the crime of genocide, the act must contribute or tend to contribute to the destruction of the protected group, or part of the group.[189] The Chamber interpreted these acts as those undermining the group's future viability.[190] The question of whether a qualitative or quantitative mode of assessment should be used to arrive at this finding was answered, in *Krajišnik*,,[191] *Kajelijeli*, [192]and *Seromba*[193]—none of which conducted a quantitative impact. For instance, in *Rukundo*, the Trial Chamber found that the

[185] *Prosecutor v Karadžić*, Case No. IT-95-5/18-AR98bis.1, ICTY Appeals Chamber, Reply Brief for Appeal of Decision on Remand, 13 August 2013, para. 35
[186] *Prosecutor v Karadžić*, Case No. IT-95-5/18-AR98bis.1, para. 35.
[187] Milaninia, 'Understanding Serious Bodily or Mental Harm as an Act of Genocide', 1403.
[188] *Prosecutor v Tolimir*, Case No. IT-05-88/2-A, para 211.
[189] *Prosecutor v Krajišnik*, Case No. IT-00-39-T, ICTY Trial Chamber, Judgment, 27 September 2006, para. 861
[190] Note that the element of the test herein originates from the ILC Commentary to the Draft Code of Crimes Against the Peace and Security of Mankind, referenced in footnote 132; which requires the harm caused here to 'be of such a serious nature as to threaten its, [the groups'], destruction in whole or in part. The ILC contextualized the crime in accordance with its *raison d'être*, being to prevent acts that threaten the destruction of the group.
[191] *Prosecutor v Krajišnik*, Case No. IT-00-39-T, para. 861.
[192] *Prosecutor v Kajelijeli*, Case No. ICTR-98-44A-T, ICTR Trial Chamber, Judgment, 11 December 2003, para. 814.
[193] *Prosecutor v Seromba*, Case No. ICTR-2001-66-A, ICTR Appeals Chamber, Judgment, 12 March 2008, para. 46

beating of two children met the threshold for serious bodily or mental harm, notwithstanding the fact that there was no demonstrable impact on the group at large.[194]

The *Tolimir* Appeals Chamber confirmed so, finding that the Trial Chamber failed to establish a causal link between the harms inflicted on Bosnian Muslims and the physical destruction of the group;[195] upholding the Trial Chamber's decision on account of the severity of the harm that profoundly traumatizing some women to the point they wished for death. This was sufficient to support the finding that the nature of the harm tended to contribute to the destruction of the group.[196] It is especially notable that under the acts perpetrated against the group, the both the Trial Chamber and Appeals Chamber considered the financial and emotional trauma, under the test; practically CEMs considerations.

Under the Bashir 2010 Decision,[197] acts of rape, torture, and forcible displacement did on reasonable grounds to believe qualify as genocidal under this method. It is notable that the Chamber did not pass the acts through the above test given the burden of proof at the PTC, here being reasonable grounds to believe; hence the findings around the factual matrix were sufficient herein to corroborate the arrest warrant's issuance.

3.3.2 Contemplating CEMs Under "Conditions of life calculated to bring about its physical destruction in whole or in part"

In the *ad hoc* tribunals jurisprudence, plunder and pillaging emerge as the primary manifestation of CEMs. *Jelisic* defined plunder as the fraudulent appropriation of public or private funds belonging to the enemy or opposing party, committed during an armed conflict.[198] *Kunarac* broadened this definition, holding that plunder encompasses the unjustified appropriation of property from either a significant group of persons or those within an

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[194] *Prosecutor v Rukundo*, Case No. ICTR-2001-70-T, para. 388-389
[195] *Prosecutor v Tolimir*, Case No. IT-05-88/2-A, paras. 201–202
[196] *Prosecutor v Tolimir*, Case No. IT-05-88/2-A, para 203.
[197] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010, para 34.
[198] *Prosecutor v Jelisic*, Case No. IT-95-10-T, ICTY Trial Chamber, Judgment, 14 December 1999, para. 48.

identifiable area.[199] The context of CEMs was limited to considerations of war crimes and did not address the legal requirements of CEMs under the context of genocide.[200] The unresolved question remains: how does plunder relate to genocide and impact conditions of life for a protected group?

Critically, plunder and pillaging are recognized as war crimes with an inherent link to a protected group's living conditions.[201] Looting, pillaging, and plundering of a group's economic resources frequently occur as part of a genocidal campaign.[202] In *Krstic*, the Chamber found that the genocidal enterprise was specifically limited to the conduct committed in Srebrenica,[203] in 1995 by the Bosnian Serb forces.[204] Given the strict classification of plunder and pillaging as a war crime under the *ad hoc* tribunals, it is necessary to turn to the Darfur Situation, to consider the ICC's treatment of this form of CEMs under the 'conditions of life' mode of genocide.

3.3.2.1 Relevance and Treatment Under Darfur

The Darfur Situation has widely been categorized as one of ethnic cleansing, despite the OTP's charges of genocide. [205]The conflicts economic aspects centres on resource competition for control of energy resources and land, as crystallized in *Presbyterian Church v. Talisman*

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[199] *Prosecutor v Kunarac*, Case Nos. IT-96-23-T and IT-96-23/1-T, ICTY Trial Chamber, Decision on Motion for Acquittal, 3 July 2000, para. 16.
[200] Morris, 'Economic Genocide Under International Law', 30.
[201] Morris, 'Economic Genocide Under International Law', 28
[202] Morris, 'Economic Genocide Under International Law', 31
[203] Carefully delineating and separating the crime of genocide from the broader conduct of ethnic cleansing witnessed, which is often mistaken for genocide by the general public
[204] The Chamber struggled to clearly delineate that the conduct related to charges of extermination and crimes against humanity cannot be imported in a blanket manner to the charge of genocide, despite the similarity in the accused's conduct, though the conduct was relevant for an inference of genocidal intent. For more see *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, para. 141.
[205] Trahan J, 'Why the killing in Darfur is genocide' 31(4) Fordham International Law Journal, 2007, 991—https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2107&context=ilj on 29 December 2024

Energy,[206] where the claimant alleged conspiracy to commit genocide through displacement and atrocities.[207]

Genocidal elements are further evident in the ethnic division between the Black and Arab populations, and a long history of economic policies aimed at territorial and resource control.[208] Omar Al Bashir's rise in 2003 and the subsequent atrocities of the civil war, culminated in his indictment for genocide by the ICC.[209] As a caveat to this analysis, it must be noted that the case has only been adjudicated at the Pre-Trial Chamber applying an evidentiary standard of reasonable grounds to believe.

The PTC determined that "conditions of life" charges must prove acts are underlying genocidal acts committed to partially or wholly destroy the protected group..[210] The OTP submitted that the acts that fell under this charge included inter alia,[211] (1) destruction of their homeland, (2) systematic displacement into inhospitable terrain where some died as a result of thirst, starvation, and disease, (3) usurpation of land, and (4) the denial and hindrance of medical and other humanitarian assistance to sustain life in IDP camps.[212]

The parameters for "conditions of life" under the Rome Statute, requires that they be imposed "on the group," ,[213] effectively excluding any considerations of a lone *génocidaire*. Despite this, the EoC considers such conditions imposed as part of the crime. The PTC Second Decision addressed this, stating that:

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[206] Please note that the reliance on a U.S. domestic case is not being used for legal substantiation but merely to illustrate how resource competition (a product of CEMs) contributed to the atrocity in Darfur.

[207] *The Presbyterian Church of Sudan* et al v *Talisman Energy Inc* and *Sudan* (2009), The United States Court of Appeals for the Second Circuit.

[208] Morris, 'Economic Genocide Under International Law', 31

[209] Morris, 'Economic Genocide Under International Law', 31

[210] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09, Pre-Trial Chamber I (12 July 2010), para. 26-27

[211] Acts were against the Fur, Masalit, and Zaghawa

[212] *Al Bashir*, ICC-02/05-01/09, para 34.

[213] Article 6, Rome Statute

> "[The EoC] Provides an additional element for this particular offense and requires that the infliction of certain conditions of life upon one or more persons 'should be calculated to bring about the physical destruction of that group in whole or in part."[214]

It is imperative to note that the conditions of life must be capable of causing either death or serious mental harm to the population, mere dissolution would not qualify as genocidal.[215] This qualification is supported by the OTP's 2008 Application,[216] where they articulated the crime as, "systematic expulsions from homes" and promptly recalled the Convention's stipulation that mass displacements alone are not genocidal;[217] hence their decision for the charge to read "systematic displacement from their homes into inhospitable terrain where some died as a result of thirst, starvation, and disease."(emphasizing the last part of the quotation).[218]

The 2010 Decision found in view of the above that (1) members of the Fur, Masalit, and Zaghawa in Darfur were subjected to murder by the government forces and (2) members of the aforementioned groups were subjected to torture, that the forcible transfer of group members and resettlement of other groups onto the land was committed in furtherance of a genocidal policy and qualified under the "conditions to destroy" method. [219]The Chamber thus considered CEMs and the elements of resource competition when considering whether the acts fulfilled the elements of the method, holding in the affirmative..[220]

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[214] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-94, Second Decision on the Prosecution's Application for a Warrant of Arrest, para. 33 (Pre-Trial Chamber I, ICC, 12 July 2010), 28.
[215] Kreß C, 'The ICC's first encounter with the crime of genocide: The case against Al Bashir'—https://academic.oup.com/edited-volume/34975/chapter/374224538 on 29 December 2024.
[216] Public Redacted Version of Prosecution's Application under Article 58 filed on 14 July 2008, ICC-02/05-157-AnxA, 13 September 2008, para. 172.
[217] The OTP recalled the Genocide Conventions deliberations that recalled that mass displacements from homes do not qualify as genocidal unless the operations were attended by such circumstances as to lead to the death of the population either in whole or in part
[218] Prosecution's Application under Article 58, ICC-02/05-157-AnxA, paras. 172.-174
[219] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, para. 178
[220] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, para. 178

3.4 CONCLUSION

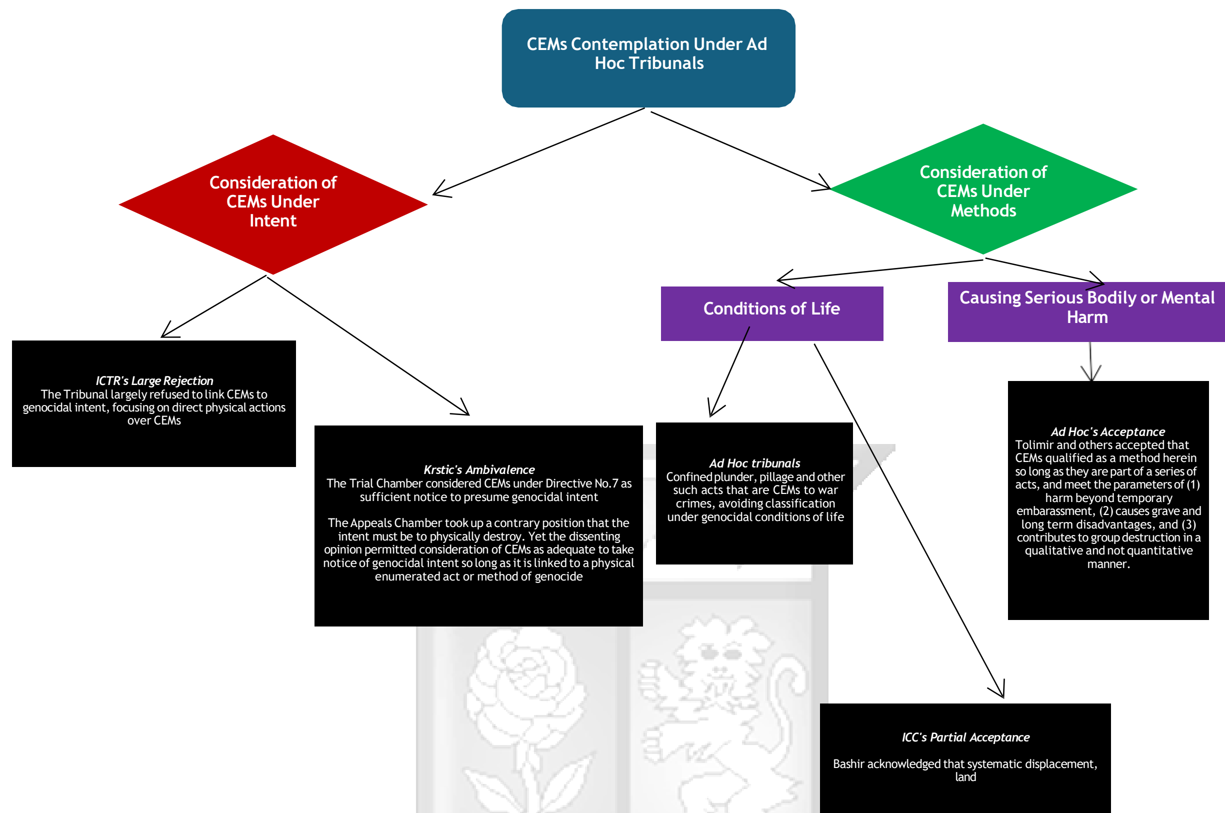

Figure 3: Flow chart representation of the relevance and varying considerations of CEMs under the *Ad Hoc* Tribunals.

The *ad hoc* tribunals as well as the ICC have, unequivocally acknowledged the relevance and significance of CEMs in genocidal contexts. However, debate has persisted on their evidentiary value and incorporation within the framework of ICL. On intent, the ICTR has largely rejected the notion of CEMs as sufficient to infer genocidal intent of an accused; instead finding the relevant threshold requires an *ex post facto* examination of physical direct acts against the protected group.

The *Krstić* Trial Chamber diverged, accepting Directive No. 7, which included specific orders targeting the economic foundations of the group's survival, as sufficient to infer intent under JCE. The Appeals Chamber overturned this, finding that mere knowledge is inadequate and

that intent inferring acts must be physical. However, Judge Shahabuddeen dissented that so long as the intent is linked to an enumerated act, then the court may infer intent—essentially, the threshold need not consider whether the means were the most effective in perpetrating genocide. Consequently, there remains a fundamental lack of clarity to sufficiently support this avenue without contradicting the *nullum crimen sine lege* principle.

Regarding CEMs as a method of genocide, the picture more promising. Under "serious bodily and mental harm," CEMs can satisfy the test provided that the gravity meets the enumerated threshold. This approach offers the best avenue invigorate the international criminal justice project for victims of genocidal CEMs. The literature is remarkably accommodative, not only permitting the consideration of CEMs but lowering the threshold by employing a qualitative analysis of their genocidal implications

Under the second method of "conditions to destroy", the literature and jurisprudence remains nascent and insufficient. The ICTY primarily examined CEMs through plunder and pillage, which, while expanding the scope of the definitions, were considered as war crimes. The 2009 and 2010 Bashir Decisions considered CEMs under this method, concluding that acts of usurpation of land and resettlements can be genocidal, specifically when linked to the causal genocidal result of physical destruction.

While this chapter reveals promising avenues for exploration under the *ad hoc* and (limited) ICC jurisprudence, the practicality of prosecuting genocidal CEMs remains uncertain. Despite the proven philosophical and jurisprudential relevance of CEMs in genocide, the practical objectives will be explored in Chapter 4.

CHAPTER FOUR

CEMs: BENEFITS, BARRIERS AND REFORMS

INTRODUCTION

The previous chapter demonstrated the relevance of CEMs under both the *ad hoc* tribunals' as well as the ICC, albeit to a limited scope. It elaborated on the leanings of both the *ad hoc* tribunals and the ICC in the negative while considering CEMs to support an inference of *dolus specialis;* yet it highlighted the various interactions with the concept as potentially sufficient to support intent and the relevantly clear potential of considering CEMs under (1) serious bodily or mental harm and (2) conditions of life. Yet, three key questions still remain unanswered to sufficiently corroborate the argument for consideration of CEMs; these relate to the "why"—what practical benefit could this approach solve in recent times; the "why not"—would the framing of the Rome Statute as is present any insurmountable barriers; and the "how"—what reforms may be required to entrench this discussion decisively into the field of ICL.

As such, this chapter seeks to draw on recent and past situations to explore the possible reasons and pertinent realities that these phenomena can cure, as well as its corresponding barriers, and contemplate possible solutions.

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4.1 BENEFITS: CEMs AS A REMEDY FOR THE IMPUNITY GAP IN DARFUR.

As represented in Chapters 2 and 3, the scant, obscured, and marginalized consideration of CEMs under genocide, both under intent and as a method, has reached a 'joint' more critical than the moral dilemmas of Hamlet. The significant implications and essential potential of the recognition of CEMs under genocide—which has been lacking so far—would produce, posits that this recognition is not only supported by the evidence adduced but must be addressed clearly to overcome the impunity gap. The present realization of the inadequacy of the past

proceedings,[221] have tragically stopped short of definitively acknowledging the role of CEMs in the facilitation of genocides, as sufficient to attribute criminal responsibility on culpable actors.

4.1.2 The Grave Consequences of Failing to Clarify the Role of CEMs

Given that the contextual background of Darfur established in Chapter 3, this section shall examine further the case of *Presbyterian Church v. Talisman Energy* ,[222]to illustrate the impunity gap that clarifying the role of CEMs could address. Despite the civil nature of the case, as well as its filing in a domestic court,[223] it effectively illustrates the challenges in capturing perpetrators under secondary forms in relation to CEMs.

The plaintiffs filed at the District Court, and appealed to the Second Circuit Court of Appeals, alleging the corporate complicity in genocide, and mass atrocities committed by the Sudanese government.[224] The Court analysed customary international law through application of the ATS,[225] focusing on the corporation's ability to possess "intent" to commit genocide. Critically, *Talisman* conceded that they did engage in government military operations to create a buffer zone for its facilities;[226] arguing that forcible displacement of civilian populations was not unlawful.[227]

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[221] Schabas WA, 'Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide' 61(1) *Rutgers Law Review*, 2008—https://rutgerslawreview.com/wp-content/uploads/2011/08/Genocide-Law-in-a-Tiem-of-Transition-Recent-Developments-in-the-Law-of-Genocide.pdf on 27 December 2024.
[222] *The Presbyterian Church of Sudan et al v Talisman Energy Inc and Sudan*, (2009), US Court of Appeals (2nd Circuit).
[223] *The Presbyterian Church of Sudan et al v Talisman Energy Inc and Sudan*, (2009), US Court of Appeals (2nd Circuit).
[224] *The Presbyterian Church of Sudan et al v Talisman Energy Inc and Sudan*, US District Court (SDNY), Judge Cote
[225] The application of the Alien Tort Statute (ATS) is particularly important for the simple reason that it permitted the U.S National Courts to apply laws based on norms of an international character, accepted by the civilized world and defined with a specificity, a criteria that the crime of Genocide undoubtedly meets as elaborated on substantively throughout the course of this research and across the majority of respectable objective literature.
[226] *The Presbyterian Church of Sudan et al v Talisman Energy Inc and Sudan*, (2009), US Court of Appeals (2nd Circuit), para. 453.
[227] At this juncture the absurdity of this claim can be seen in full glare given the PTC's Decision that the forced displacement of protected groups and subsequent resettlement did on reasonable grounds qualify as genocidal conduct.

Applying the ATS, the Court held that proving purposeful assistance was necessary.[228] First, despite *Talisman's* infrastructure support,[229] the Court required proof that such acts directly aided atrocities- concluding that mere knowledge of the crimes could not constitute intent. Second, the Court determined that forced displacements did not violate international law, asserting a government's power to regulate resources.[230] Based on the veracity of these findings, the Court upheld the District Court's finding, that they were not culpable for aiding and abetting as per customary law, premised on the first finding that secondary liability requires purposeful action. [231]

The Court acknowledged the *ad hoc* tribunals' deliberations that knowledge as a standard for aiding and abetting for genocide but concluded that this standard lacked the necessary consensus under the ATS.[232] This restrictive interpretation emerged despite the *ad hoc* tribunals applying law that was "beyond any doubt customary law" and the knowledge standard in many cases.[233]

Previous sections explored the role of CEMs under inferences of *dolus specialis* for principal perpetrators, with varying findings. However, on secondary forms of liability, the literature conclusively supports knowledge as sufficient for intent under aiding and abetting, given the lower criminality threshold.[234] The ILC Draft Code, in addressing the *mens rea* standard for aiding and abetting, states that persons are responsible when they "knowingly aid, abet or

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[228] *The Presbyterian Church of Sudan et al v Talisman Energy Inc and Sudan*, (2009), US Court of Appeals (2nd Circuit), para. 249.
[229] Through the building of roads and airstrips for military use.
[230] *The Presbyterian Church of Sudan et al v Talisman Energy Inc and Sudan*, (2009), US Court of Appeals (2nd Circuit), para. 249.
[231] Morrissey J, 'Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and Abetting Liability Under the Alien Tort Statute' *Minnesota Journal of International Law*, 2011, 337—https://scholarship.law.umn.edu/mjil/337 on 27 December 2024
[232] *The Presbyterian Church of Sudan et al v Talisman Energy Inc and Sudan*, (2009), US Court of Appeals (2nd Circuit), para. 259.
[233] *Prosecutor v Tadic*, Case No. IT-94-1-T, ICTY Trial Chamber, Opinion and Judgment, 7 May 1997, para. 662
[234] For more see Section 3.2.2 under the discussion on the *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T, para. 28.

otherwise assist, directly and substantially, in the commission of such a crime, including providing means for its commission." [235]The Second Circuit failed to account for this. Instead, Judge Katzmann relied on the language of Article 25(3)(c) of the Rome Statute,[236] which on face value adopts a purpose standard. It reads that persons will be criminally responsible if "for the purpose of facilitating the commission of a crime, [they] aid, abet, or otherwise assist in its commission or its attempted commission, including providing the means for its commission."[237] However, this premise collapses by neglecting Article 25(3)(d),[238] which relates to groups of persons acting with a common purpose, that holds persons liable if they act "with the aim of furthering criminal activity" or (emphasis added): "with the knowledge of the intention of the group to commit the crime.".[239]

The case illustrates a corporation deliberately assisting a genocidal military operation resulting in forced displacement,[240] yet evading liability due to minimal considerations of CEMs in aiding and abetting genocide.[241] Worst of all the decision was premised on the Court's erroneous (yet understandable) interpretation of Article 25 of the Rome Statute[242]—the very instrument fashioned to bring justice to victims of the crime—ignoring the alternative basis for liability under complicity widely accepted and applied and supported by the ICL Draft Code.[243] Such an egregious decision emerges from the problematic potential for selective interpretation of CEMs in mass atrocities, directly perpetuating the existing impunity gap

[235] *Draft Code of Crimes Against the Peace and Security of Mankind*, Article 2, para. 3.
[236] Article 25(3)(c), *Rome Statute*
[237] Article 25(3)(c), *Rome Statute*
[238] Article 25(3)(d), *Rome Statute*
[239] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-T , para. 569.
[240] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, para. 178
[241] Morrissey, 'Presbyterian Church of Sudan v. Talisman Energy, Inc.', 340
[242] *The Presbyterian Church of Sudan et al v Talisman Energy Inc and Sudan*, (2009), US Court of Appeals (2nd Circuit), para. 582
[243] Morrissey, 'Presbyterian Church of Sudan v. Talisman Energy, Inc.', 346

4.2. BARRIERS: CHALLENGES IN PLACING CEMs IN THE TYPOLOGY OF GENOCIDE UNDER THE ROME STATUTE.

As previously discussed**,** the ICC's dealings with the Omar Al-Bashir case are critical for three main reasons**.** First, it was and still remains the Court's only encounter with the crime of genocide.[244] Second, the Court was confronted with the examination of how state leaders have crossed a red lines of ICL**,** rather than its past usual examination of rebel leaders.[245] Third, the case demonstrated tensions between new international criminal justice under the Rome Statute and its past 'traditional' applications under the *ad hoc* tribunals.[246] Given these reasons, it is essential to examine the proceedings under the Court's to understand and comprehend the possible barriers that may exist in the placement of CEMs under genocide

<u>4.2.1 Challenges Under the Contextual Element.</u>

Article 6 of the Rome Statute,[247] reproduces Article II of the Genocide Convention, [248]as explained. While the Article lacks an explicit objective contextual element,[249] these elements are provided in the EoC, with the requirement being for the conduct to have taken place in the "context" of a "manifest pattern." [250]This discussion is particularly significant given the 2009 Bashir Pre-Trial Chamber's restrictive interpretation of a manifest pattern as a 'concrete threat' [251]—a threshold that would severely limit CEMs consideration in genocide.[252]

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In the 2009 Decision, the PTC found no irreconcilable difference between the Statute and the EoC,[253] to interpret the contextual element of 'manifest pattern' as requiring a "concrete threat

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[244] Kreß C, 'The ICC's First Encounter with the Crime of Genocide: The Case against Al-Bashir' in Stahn C (ed), *The Law and Practice of the International Criminal Court*, Oxford University Press, London, 2015, 670
[245] Kreß, 'The ICC's First Encounter with the Crime of Genocide', 670
[246] Kreß, 'The ICC's First Encounter with the Crime of Genocide', 670
[247] Article 6, *Rome Statute*
[248] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, Article II
[249] Cupido M, 'The Contextual Embedding of Genocide: A Casuistic Analysis of the Interplay between Law and Facts' 15(2) *Melbourne Journal of International Law*, 2014, 24—https://ssrn.com/abstract=2539981 on 27 December 2024.
[250] Article 6 and Article 6(a), *Elements of Crimes*.
[251] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, para. 178
[252] For more see Section 2.2.4 on the drafters deliberations and views on the threshold envisioned, which is much lower and Section 2.3 that substantiates this position as well as
[253] They relied Article 22(2) of the *Rome Statute* to refer to the *Elements of Crimes.*

to the existence of the group or part thereof."[254] The Chamber contended that genocide's *ultima ratio* is to preserve the highest values of the international community, thus only applicable in cases of a 'concrete' threat and not extending to latent or hypothetical cases.[255]

Conversely, Judge Usaka's partial dissent, propounded that the reliance on Article 22(2) ,[256]for the application of the contextual element was premised on her view of Article 9(3),[257] which provides that the EoC be consistent with the Statute**.**[258] Her view was that the Statute is the sole instrument that espouses the legal definitions of the crime.[259] Thus**,** the EoC play the role of 'assisting' and not substituting or adding, and therefore.In accordance with the VCLT,[260] she found the term 'manifest pattern' to mean a systematic and clear pattern of conduct, not requiring a 'concrete threat.'[261] Her finding was that based on the objective element of a 'manifest pattern'**,** when read plainly as per the VCLT,[262] the conduct in question of the accused met this standard.[263]

The implication of the discussion is seen under inferences drawn from genocidal conduct. The competing standards —Judge Usaka's plain interpretation and the Majority's 'concrete threat'—spills over into the question of what conduct is of sufficient gravity to draw an inference of genocidal intent, with both views proposing divergent standards. The meaning of the term 'concrete threat' was not explained clearly,[264] but comes close to the notion of a 'result-

[254] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, para. 125
[255] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, para. 124
[256] Article 22(2), *Rome Statute.*
[257] Article 9(3), *Rome Statute.*
[258] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, paras. 16 and 20.
[259] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para 20.
[260] Article 31, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.
[261] Notably, she deliberately refrained from addressing the question of whether a contradiction exists between the EoC and the Statute on this poin
[262] Article 31, *Vienna Convention on the Law of Treaties*
[263] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para 19
[264] Kreß, 'The ICC's First Encounter with the Crime of Genocide', 681

based requirement,' where the crime has advanced to the level of actual destruction, or destruction that may imminently result. [265]Adopting such a position would dramatically elevate the threshold for identifying genocidal acts, undermining the crimes intent chapeau character.[266]

The 2009 Decision was impugned due to the Chamber's misapplication of the reasonable grounds to believe standard,[267] but in the 2010 Decision that granted the arrest warrant, the Chamber failed to address the discussion regarding the requirement of a 'concrete threat,'; instead finding that the contextual elements were satisfied based on the magnitude, consistency, and planned nature of the crimes.[268] The question of the contextual elements and its treatment and placement of CEMs under international criminal justice remains unsolved.[269] The resolution hinges on either discarding the treatment and placement of CEMs or acknowledging its importance, depending on the standard applied and the interpretation of the contextual element.

4.2.2 Challenges Under Intent: Knowledge or Purpose Based Approach on Intent

The debate between knowledge-based and purpose-based approach standards regarding the meaning and interpretation of intent creates an additional legal barrier with serious implications for the role of CEMs. In the 2009 Decision, the Chamber misrepresented these differences and applicable standards under both approaches.[270] The Court failed to properly delineate the requirements of the 'novel' knowledge-based approach (traceable since *Akayesu*),[271] instead applying neither and relying on a 'literal' reading of the Statute. [272]This led to the holding that 'those who act with the requisite genocidal intent can be principal perpetrators to such a crime pursuant to Article 25(3)(a)' and that 'those who are aware of the genocidal nature of the

[265] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, footnote 26.
[266] Kreß, 'The ICC's First Encounter with the Crime of Genocide', 681
[267] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 OA
[268] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-94
[269] Cupido, 'The Contextual Embedding of Genocide', 24
[270] Kreß, 'The ICC's First Encounter with the Crime of Genocide', 681
[271] *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, para. 518
[272] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, para 139.

campaign but do not share the genocidal intent can only be held liable as accessories pursuant to Articles 25(3)(b), (d) and 28 of the Statute.'[273]

The PTC's failure to explain its rationale for refusing to charge those who assist and are aware, but might not share the principal perpetrators' intent, as co-perpetrators is troubling. This becomes particularly problematic when considering the crime's commission as part of collective action (similar to JCE).[274] The existence of a realistic collective campaign often serves as the necessary reference point for individual genocidal intent.[275] The 2009 Decision acknowledges this by recognizing the need to determine the Government of Sudan's intent as a prerequisite to mitigate if Omar Al Bashir's (the individual's) genocidal intent was lacking.[276]While the collective plan need not be sophisticated, a genocidal campaign directed by the accused, if through the form of incitement, qualifies.[277]

Such context can only be comprehensively addressed using the knowledge-based approach,[278] as awareness of a genocidal campaign or plan means the perpetrator understands the possible partial or whole destruction of the protected group resulting from their chosen mode of contribution.[279] The 2009 Decision erred in failing to clarify how a 'literal' interpretation would yield clarity on the applicable standard, given the statute's vigorously debated standard.[280] This ambiguity was not novel, having been highlighted in *Akayesu*.[281]

[273] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, para 139.
[274] Kreß, 'The ICC's First Encounter with the Crime of Genocide', 698
[275] Kreß, 'The ICC's First Encounter with the Crime of Genocide', 698, *and* Cupido, 'The Contextual Embedding of Genocide', 27.
[276] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, para 147-151.
[277] Kreß, 'The ICC's First Encounter with the Crime of Genocide', 698
[278] Greenawalt AK, 'Rethinking genocidal intent: The case for a knowledge-based interpretation' *Columbia Law Review*, 99, 1999, 2259—https://ssrn.com/abstract=1517995 on 29 December 2024.
[279] Greenawalt AK, 'Rethinking genocidal intent', 2267
[280] Kreß, 'The ICC's First Encounter with the Crime of Genocide', 698
[281] *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, para. 518

4.3 NECESSARY REFORMS: RECONCILING CEMS CONCEPTUALIZATION WITH LEGAL REALITIES

As illustrated in Figure 2, regarding how CEMs doctrinal qualification under the Rome Statute's,[282] the Bashir Decision presents significant challenges,[283] that may impede CEMs adequate consideration

The contextual element of 'collective acts' (under Figure 2), which refers to the manifest requirement, is especially problematic.[284] The Preparatory Committee initially designed this prescreening measure to prevent the crimes trivialization.[285] They sought to examine a coordinated plan’s qualitative magnitude, assessing the organizational efforts and risks to protected groups.[286] However, the Bashir 2009 Majority's undefined 'concrete threat' standard risks future interpretive complications,[287] potentially approaching a restrictive ‘result based standard’.[288] Such would not only be contradictory to the preparatory committees goal of avoiding narrowing of the crime,[289] but usurp its chapeau character as being an intent based crime.[290]The imposition of such a threshold would be detrimental as it would likely take up the form of quantitative effects, largely ignoring the harm of CEMs.

The second barrier challenging CEMs placement *de lege ferenda*, is the question of intent. The Bashir 2010 Decision took up a position that adopts a 'literal' interpretation, rejecting the 'innovative' knowledge-based approach, while similarly distancing itself, though not successfully, from the 'purpose-based approach'.[291] The Chamber’s failure to explain what the literal approach is especially problematic given that a literal reading of the statute could yield various

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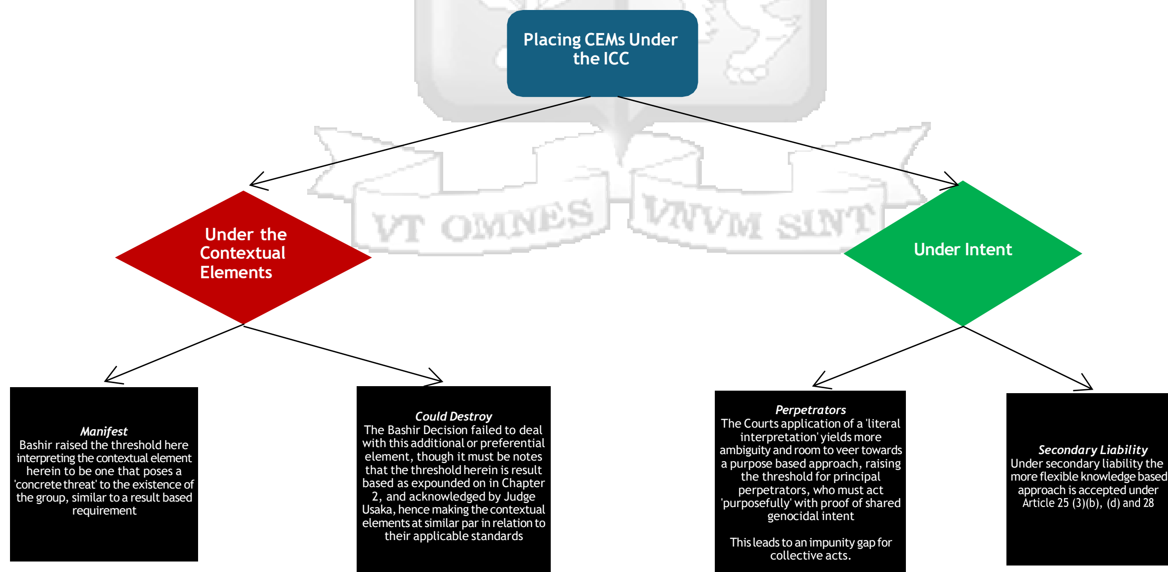
[282] See under Section 2.2.4
[283] Through setting the evidentiary burden for contextual elements as too high
[284] This is given the Bashir’s interpretation of the element as one of a ‘concrete threat’
[285] Koursami N, *The 'Contextual Elements' of the Crime of Genocide*, 123.
[286] Colombia, *Comments on Article 6*, PCNICC/1999/WGEC/DP.2.
[287] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-94
[288] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para.19
[289] Colombia, *Comments on Article 6*, PCNICC/1999/WGEC/DP.2. Hence the rejection of widespread and systematic as the contextual element
[290]Koursami N, *The 'Contextual Elements' of the Crime of Genocide*, 123..
[291] *The Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-94, para 147-151.

standards applicable, with the stringent purpose-based approach being among the most prominent.[292] As such, adoption of a literal approach could lead to the adoption of a purpose-based approach, failing to account for the role of co-perpetrators, who aid and abet with full knowledge of the objectives of the genocidal campaign,[293] removing them from the ambit of principal perpetrators.

Hypothetically, if *Talisman* were charged under the ICC's , successful prosecution would remain improbable. The OTP would have to prove that the accused's conduct posed a 'concrete threat', or their conduct could in and of itself destroy the protected group- on the first contextual element, the gravity of the CEMs considerations would likely be marginalized, compared to actual deaths of the Fur, Masalit and Zaghawa; and on the intent element, they would argue, as was done under the Second Circuit,[294] that they lacked a shared common 'purpose' in committing the crime- a near impossible standard

4.4. CONCLUSION



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[292] Kreß, 'The ICC's First Encounter with the Crime of Genocide', 698
[293] *Prosecutor v Radislav Krstic*, Case No. IT-98-33-A, ICTY Appeals Chamber, 19 April 2004, para. 88
[294] *The Presbyterian Church of Sudan* et al v *Talisman Energy Inc* and *Sudan* (2009), The United States Court of Appeals for the Second Circuit.

Figure 4: Flow chart representation of the challenges facing the placement of CEMs duly under the ICC.

The role of CEMs within the framework of genocide is unproblematic and accounted for under the ICC Statute; however, the Bashir Decisions and their interpretation of both the contextual elements of the crime, and the gravity of CEMs within the discussion of intent pose tough barriers.

The Bashir 2009 Decision's implications on the manifest requirement being one of a 'concrete threat' de facto makes the test of contextual elements, which was one of either/or, fashioned to account for cases in which the gravity of the actions is so clear that it could in and of itself destroy the group, or (critically here) cases where the plan and its efforts could be sufficient to qualify as the context, become the same. This is given that the concrete threat requirement applicable to the latter essentially imposes a similar standard as the 'could destroy element'. As such, the implications thereof and the 2010 Decision's failure to clarify this, are that CEMs weighting on an evidentiary level, will likely not be considered as evidence of a plan, and to be considered must be so extreme as to cause an imminent threat of destruction to the group or death, at the least. Such an evidentiary bar is difficult to adduce with proof of CEMs and will likely look more keenly to the results of the crime.

On the intent aspect, the Chamber's literal interpretation of Article 25, stating that charges relating to perpetrators can only be made under Article 2(3)(a) pursuant to the OTP proving that the accused possesses genocidal intent, while the knowledge-based approach is only applicable under Article 25(3)(b)(d) and Article 28, creates a near impossible threshold for the proof of genocidal intent, as lamented by Judge Cancado Trindade of the ICJ.[295]

[295] Cancado Trindade, A. K.*Separate Opinion and Dissent in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Judgment, 3 February 2015, Case No. 118, paras 461-466

As evidenced by the Bashir proceedings, then, the fate of acknowledging the immense and genocidal capabilities of CEMs in the forensic and legal realm of ICL, is entirely contingent upon which routes the Court seeks to take in relation to the interpretation of the contextual elements, and the intent standards it applies.

CHAPTER 5

CONCLUSION

INTRODUCTION

This study aimed to address ICL's restrictive framing of genocide, which emphasizes on physiological direct violence. As such, its key objective was to investigate the historical, theoretical, and interpretational plausibility of genocide through CEMs, a subset of the broader field of social rights. The study probed CEMs classification under HRL and ICL, since genocide's inception by Lemkin, and identifying emerging judicial patterns in their inclusion and use of CEMs under the *ad hoc* tribunals and the ICC, while exploring potential barriers to their incorporation under the Rome Statute

5.2 SUMMARY OF FINDINGS

5.2.1 Under Contextual Elements and Definitional Parameters

Presently and historically, the definition of genocide specifies five enumerated acts, that must be committed with intent to destroy, either in wholly or partially a protected group—all these acts on face value relate to the direct physiological harm of members, without mention of non-physiological modes of destruction

The crime's historical definition implicitly attaches a contextual requirement requiring a 'plan'. The *ad hoc* tribunals built upon this finding, elaborating that the context can either take the form of a manifest pattern of similar conduct or the presence of conduct that could in and of destroy the group would be sufficient; where the gravity and threat, and results are examined on their potentiality to destroy the protected group. CEMs could fit herein under either because, ,for manifest, it is possible to examine the macro-level policy which, if it deploys the use of CEMs, can cause resource competition, and eventually lead to individualized intent that then crystallizes to a full scale genocidal campaign; on the could destroy element, CEMs fit too, though not as clearly given it must be proved that they were so severe to threaten imminent

physical destruction, a near impossible standard given the character of CEMs, and this limb of the contextual element being restrained for overt, direct, and imminent acts that threaten the group's existence.

Despite this last fitting giving adequate weighting to CEMs considerations, the Bashir 2009 Decision that interpreted the manifest pattern requirement could present an insurmountable barrier for CEMs to be considered herein. The Majority's finding that the manifest requirement requires proof of a 'concrete threat' equates this contextual element to the 'conduct that could destroy' element, raising the evidentiary threshold substantially with little room for considerations of CEMs given the result-based implications of such an interpretation. The subsequent 2010 Decision did not articulate on the standard applicable.

5.2.2 Under Methods

Jurisprudence from the *ad hoc* tribunals' is accommodative of the place of CEMs in the methods of genocide**,** namely under the serious bodily or mental harm, and the conditions of life mode. Under the mode of serious bodily or mental harm, provided that the harm is of sufficient gravity on a qualitative assessment that assesses the effects of the harm caused to persons and not the numbers of group members it has been inflicted on. This gravity threshold must (1) go beyond temporary unhappiness, embarrassment, or humiliation, (2) inflict grave and long-term disadvantage to a person's ability to lead a normal and constructive life, and lastly (3) contribute or tend to contribute to the destruction of the group in whole or in part. The mode of assessment, being qualitative, and the criteria the harm must meet, consider CEMs as was exhibited in Krstic, and sufficiently accommodates CEMs but similarly mitigates against the trivialization of the crime of genocide.

Under the second method, “conditions to destroy," the *ad hoc* tribunal's position is ambivalent and unclear in substantiating the adequate consideration of CEMs. This is given that the tribunals solely considered physical and biological attacks against the population here.

However, the tribunals did contribute to acknowledgement of CEMs here, though under the war crimes of plunder and pillaging, giving the terms broad definitions to include fraudulent misappropriation of property. However, when the method is considered under the ICC, the Bashir Decision rekindles some hope given the finding that forced displacement, and subsequent resettlement of the land can be genocidal on reasonable grounds to believe, though provided that the act leads to the subsequent death of members of the protected group—again making the crime contingent on an ex post facto consideration of the results.

Under the current state of ICL under the Rome Statute, CEMs consideration and weighting under methods of genocide is the least problematic given the current interpretational trend and accommodative language of the Statute in this regard.

5.2.3 Under Intent

On intent, the evidentiary value and incorporation of CEMs into the crime is far less promising. The ICTR took up a near qualitative, result-based requirement as necessary for inference of genocidal intent. Though under the ICTY, there is some ambivalence, given that despite a similar finding to the ICTR on the mode of destruction being limited to physical and biological parameters to infer genocidal intent, there was a finding that (1) this need not be the case for culpability under secondary forms of responsibility such as complicity or aiding and abetting, and (2) Judge Shahabudden's dissent to the Majority's finding at the Appeals Chamber, instead proposed that an inference need not be based on the perpetrators choosing of the most effective form of physical destruction, and that so long as that intent is attached to one of the 5 enumerated acts of genocide, it qualifies as sufficient proof of *dolus specialis.*

Moreover, the Bashir 2010 Decision under the ICC, spells more damning news for the placement of CEMs under intent, with the Chamber rejecting a 'knowledge-based approach' for a sufficient inference of *dolus specialis,* instead taking a 'literal interpretation', which remains unclear as to its meaning and implications. Though the news is not as grim given that they

similarly did not endorse a purpose-based approach. However, the implications of the above are that it is unlikely that perpetrators of collective acts that enable the crime can be charged as perpetrators given the difficulty of proving shared *dolus specialis,* instead being held accountable under secondary forms of responsibility.

5.3 IMPLICATIONS OF FINDINGS

The implications of the findings, are unsurprisingly that the conceptualization of genocide as a crime, is largely based on the inherited, historically entrenched codification of the Genocide Convention—a definition that is strict in its construction, requiring a relatively high standard for the contextual elements, being strict with regard to proof of an intent to destroy the group physically, and showing a deliberate willingness to distinguish it clearly from other core catalogued crimes such as ethnic cleansing, where the acts are similar, but there may be doubts on the intent to destroy in whole or in part the protected groups. This leads to its interpretation erring excessively on the side of caution, excluding from its ambit cases where it is more than a reasonable conclusion that the crime has occurred. Consequently, this leaves the international community captive to the flawed and limited understandings of the past drafters, operating under a crime that is nearly 70 years old, and which proves impossible to overcome its legal corollaries, in the pursuit of justice

5.4 RECOMMENDATIONS

The strict construction of genocide presents a paradox**:** while expanding its definition risks trivializing the crime, an overly restrictive interpretation establishes unattainably high thresholds that may render the crime's scope ineffective in contemporary contexts. This study, while acknowledging the importance of strict legality, does not advocate for redefining genocide. Instead, it calls for judicial interpretation that establishes reasonable thresholds to address impunity gaps. The recommendations are as follows:

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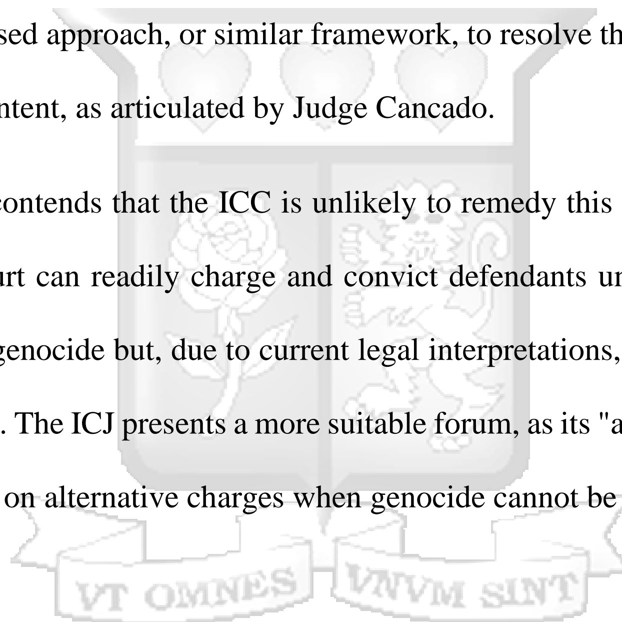
First, the contextual element of a 'manifest pattern of similar conduct' should not be interpreted as requiring proof of a 'concrete threat.' Such an interpretation would establish an unnecessarily high evidentiary threshold requiring proof of resultant deaths. This outcome-based approach contradicts the crime's intended character as an intent-based offense, which better serves substantive justice.

Second, regarding the proof of genocidal intent, the 'literal interpretation' has fostered a purpose-based standard that proves inadequate for addressing collective acts unless investigators uncover explicit documentary evidence of genocidal intent. Courts should instead adopt a knowledge-based approach, or similar framework, to resolve the current legal impasse in proving genocidal intent, as articulated by Judge Cancado.

However, the author contends that the ICC is unlikely to remedy this interpretational inertia. The OTP and the Court can readily charge and convict defendants under CAH for acts that essentially constitute genocide but, due to current legal interpretations, fail to meet genocide's stringent requirements. The ICJ presents a more suitable forum, as its "all or nothing" approach precludes falling back on alternative charges when genocide cannot be proven.



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