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The 'Contextual Elements' of the Crime of Genocide

Nasour Coursami



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*To my Father
The man who made me the man I am
The man to whom I owe everything*

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Abbreviations

AJIL	American Journal of International Law
AmCHR	American Convention of Human Rights
BYbIL	British Yearbook of International Law
Case W Res J Intl L	Case Western Reserve Journal of International Law
CC Law 10	Control Council Law No 10
Col JTL	Columbia Journal of Transnational Law
Col LR	Columbia Law Review
Comp	Comparative
Crim LF	Criminal Law Forum
Denv J Intl L & Poly	Denver Journal of International Law and Policy
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
EHRH	European Human Rights Reports
EJIL	European Journal of International Law
EoC	Elements of Crimes
FILJ	Fordham International Law Journal
GA	General Assembly
GC	Genocide Convention (1948)
HHRJ	Harvard Human Rights Journal
HRQ	Human Rights Quarterly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILR	Israel Law Reports
IMT	International Military Tribunals
Intl	International

IRRC	International Review of the Red Cross
JCE	Joint criminal enterprise
JICJ	Journal of International Criminal Justice
J	Journal
L&CP	Law and Contemporary Problems
LJIL	Leiden Journal of International Law
L	Law/Legal
Melb JIL	Melbourne Journal of International Law
NC	Nuremberg Charter (1945)
NELR	New England Law Review
NYULR	New York University Law Review
PTC	Pre-Trial Chamber
Rev	Review
SCSL	Special Court for Sierra Leone
SS	Nazi Party corps (Schutzstaffel)
Stan JIL	Stanford Journal of International Law
UDHR	Universal Declaration of Human Rights
UNGA 96(1)	United Nations General Assembly Resolution 96(I) (genocide)
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
YIHL	Yearbook of International Humanitarian Law
YJIL	Yale Journal of International Law
YLJ	Yale Law Journal

Chapter 1

Introduction

Abstract To illuminate the inexplicable consistent referral to the contextual elements of the crime of genocide contrary to the textual reading of the definition, this introductory chapter provides a background to tackling the issue of context, by tracing the formation of the concept of genocide and the various distinct meanings this concept came to acquire. The chapter illustrates the definition of genocide's three transformative phases; first, the creation of the concept as an academic notion based on Lemkin's beliefs; the second phase is represented in the partial expropriation of the notion by the UN and its swift crystallization into a legal definition with a noticeable difference to that of Lemkin; and lastly, the social scientists' transformation of the definition to a wholly new direction, based on their investigation of the causes and dynamics of this phenomenon, thereby expanding the concept to include all types of mass killing. To open discussion on the debate and the position of contextual elements, the chapter briefly introduces the debate on the weight of contextual circumstances in light of the Convention's definition and the Rome Statute's Elements of Crimes. It became apparent that the doctrinal and judicial approach to the question of contextual elements of genocide produced various distinct and irreconcilable schools of thought, preventing the formation of a clear position on the legal status of contextual elements. The chapter ends with setting the general objectives and organisation of this book, and the terminological references used.

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1.1 Background

Genocide is a highly contested concept across all fields;¹ even the legal definition suffers from the same lack of clarity.² The crime of genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide³ (hereinafter ‘the Genocide Convention’ or ‘the Convention’), has its own controversies. Analysis of its most basic elements unveils a lack of precision in its most important constituent elements, such as the lack of reasons and criteria behind the limitation of the protected groups to only four groups, and confining the acts to five enumerated acts, only to be committed with the aim and purpose of destroying in a physical and biological sense, while maintaining the ‘preservation of human groups as an entity’ as the fundamental objective of the Convention, in addition to the lack of any preventative measures.⁴ None of these will be dealt with in any depth because they do not fall within the subject matter of this book. This book will also not address the question of whether the definition of genocide serves its intended purpose; nor will it entertain any question of group limitation.⁵

The question that this book will endeavour to explore is what lies beneath the analysis and the examination of the basic components of the elements of genocide. It will only concentrate on the elements that reveal a set of contextual elements, not provided for in the definition of genocide. In particular, it will ask whether genocide is a systematic crime, which requires a collective act or plan or policy for its execution; or whether genocide can be committed by a single individual who harbours a specific intent to destroy a group; and finally whether genocide requires a threshold or a certain scale. Genocide has no defined contextual elements, other than the various elements suggested by the judiciary and supported by the doctrinal

¹ Even though the legal definition remains the only definition of genocide, there are alternative definitions offered because of dissatisfaction with the legal definition. For definitions of genocide from the perspective of the social sciences, including psychology, sociology, anthropology, political sciences, international relations and gender studies, see Jones 2010; Scherrer 1999.

² This is evident in the Rome Statute inclusion of the Elements of Crimes and the zealous discussion among academics to date. See Schabas 2000; Shaw 2007; Quigley 2009; Behrens and Henham 2013a; Van den Herik 2012; Kress 2006; Schabas 2001b; Van Schaack 1996–1997; Luban 2006.

³ Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, entered into force on 12 January 1951 (hereinafter ‘the Genocide Convention’), Article II.

⁴ The Genocide Convention, Article II; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res 827, Article 4, UN Doc S/RES/827, 25 May 1993, Article 4(2); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 Jan. 1994 and 31 Dec. 1994, Annex to SC Res 955, UN Doc S/RES/955, 8 November 1994, Article 2(2); The Rome Statute of International Criminal Court, UN Doc A/CONF183/9 of 17 July 1998, Article 6.

⁵ For this discussion, see Behrens 2013.

debates. Therefore, in almost all cases, the question of whether the crime of genocide has been perpetrated inevitably includes consideration of those contextual elements that are associated with genocide.

However, evaluation of the position of those contextual elements within the definition of genocide has led to various distinct propositions, revolving around strict adherence to the literal definition of genocide or the possible expansion thereof to accommodate those contextual elements within the boundaries of the constitutive elements of the crime, or alternatively finding a middle ground between those two positions. These controversies are the subject matter of this book, hence tracing the historical evolution of the concept of genocide became a pertinent departure point at this juncture.

1.2 The Concept of Genocide: A Malformed Concept

1.2.1 *The Early Academic Concept of Genocide*

The term ‘genocide’ has a very recent history, but the act of mass destruction and extermination of a human group or the attempt to do so for whatever reason or cause is a well-known phenomenon in most societies, as alluded to by the first United Nations (UN) General Assembly Resolution 96(I).⁶ The Turkish massacre of the Armenians in 1915, the Holocaust during World War II, the most recent massacres in the former Yugoslavia and Rwanda, and the current conflict in Syria, Libya and Iraq all constitute mass crimes against human groups of some sort.⁷ Therefore, there is truth in the assumption that denial of the right of existence to human groups is not a new concept or phenomenon nor a novel evil confronting the international community. Yet, through the international community’s efforts to confront this phenomenon, the term ‘genocide’ was born.

The British Prime Minister Winston Churchill was understood as referring to genocide when he described the German attack on Soviet Russia in June 1941 as

⁶ The Resolution affirmed that ‘many instances of such crimes of genocide have occurred when racial, religious, political, and other groups have been destroyed, entirely or in part’.

⁷ The US House of Representatives unanimously passed a resolution labelling the atrocities perpetrated by Islamic State in Iraq and the Levant (ISIL) against religious and ethnic minorities in Iraq and Syria to include war crimes, crimes against humanity, and genocide. H. Con. Res. 75, in the US Senate, 15 March 2016, see <https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/75/text>. Accessed 10 July 2016. Furthermore, Secretary of State John Kerry was quoted as saying, ‘in my judgment, Daesh is responsible for genocide against groups in areas under its control, including Yazidis, Christians and Shi’ite muslims’. See Reuters news report on 17 March 2016 at <http://www.reuters.com/article/us-mideast-crisis-usa-genocide-iduskcn0wj1o>. Accessed 10 July 2016.

‘the crime without a name’.⁸ Most recently, Leo Kuper also contended: ‘The word *genocide* is new, *but* the concept is ancient.’⁹ Raphael Lemkin himself acknowledged that the new word he coined was an attempt to represent an old practice in its modern form.¹⁰ This old concept is what finally became known as genocide following World War II.¹¹

Defining the concept of genocide in legal terms commenced with Lemkin’s research into the phenomenon of mass destruction of human groups before Hitler came to power in Germany or as early as the 1930s.¹² However, in the early period, Lemkin advocated the criminalization of genocide under various different appellations.¹³ In a paper presented at a conference in Madrid in 1933, inspired by the Armenian persecution, Lemkin called for the criminalization of such acts of ‘barbarity’ as the extermination of racial, religious and social groups, and such acts of ‘vandalism’ as the complete destruction of the cultural and artistic work of a human group.¹⁴

Given the atrocities of the Third Reich and the mass killing of Poles, Slovenes and Russians, this presented Lemkin with an opportunity and solid ground on which to reconstruct and argue for the recognition of group destruction as an international crime.¹⁵ Thus, in his book *Axis Rule in Occupied Europe*, detailing and cataloguing the Nazi treatment of those minorities who lived in the occupied territories, Lemkin included a chapter entitled ‘Genocide’.

Thus, the term ‘genocide’ was coined by combining a Greek word and a Latin word—the Greek word *genos*, meaning race or tribe, and the Latin word *cide*, meaning killing—to describe such a crime.¹⁶ According to Lemkin, genocide meant a centrally conceived plan to coordinate different acts designed to exterminate a designated human group. He formulated it as 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.¹⁷

⁸ See Fussell 2004; also quoted in Schabas 2000, p. 14; Quigley 2006, p. 4; also in Prosecutor v Kambanda, Trial Judgment, 4 September 1998, ICTR-97-23, para 16. Also, Lemkin himself referred to this in Lemkin 1946, p. 227.

⁹ Kuper 1981, 9 (emphasis added).

¹⁰ Lemkin 1944, pp. 79–80.

¹¹ The preamble of the Convention declared that ‘at all periods of history genocide has inflicted great losses on humanity’: Genocide Convention, Article II.

¹² Lemkin’s interest in human destruction was said to have started from reading Henryk Sienkiewicz’s *Quo Vadis*; see Korey 2001, p. 5. See also Power 2002, p. 20.

¹³ Note that Lemkin’s concept of genocide in his early writing and the one employed in his 1944 book are different.

¹⁴ Lemkin 1947, p. 146; Schabas 2001b, p. 25; Moses 2004, p. 21. For Lemkin’s influence by the Armenian Massacre and his views and reaction, see Jacobs 2003, p. 127.

¹⁵ Lemkin 1944, pp. xi–xii, 80–82.

¹⁶ *Ibid.*, p. 79.

¹⁷ *Ibid.*

This plan must have one objective and that is the annihilation of the group by a combination of methods, as was found to be appropriate by the perpetrator, and he described the objective of the plan as being the:

disintegration of political and social institutions, of culture, language, national feelings, religion, and the economic existence of a national group, and destruction of the personal security, liberty, health, dignity, and even the lives of individuals belonging to such groups.¹⁸

To distinguish the crime of genocide as an innovative legal term where none had previously existed, Lemkin characterized it by the fact that the attacks against individual members of the group were a means to an end, which is the destruction of the group as an entity, so he defined genocide as a criminal act ‘directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group’.¹⁹

Lemkin wrote his book to provide support for his campaign, and his successful insertion of the word ‘genocide’ into the legal vocabulary²⁰ was subsequently used as a foundation on which to base the draft of the UN Convention. However, the Nazi defeat in fact provided a galvanizing platform for the new term to crystallize swiftly as part of the legal vocabulary. Recounting this success, Schabas opined that: ‘Rarely has a neologism had such rapid success.’²¹ The word even quickly gained reference in the Nuremberg deliberations before any legal definition was attached to it.²² Lemkin also worked tirelessly to obtain the signatures required for ratification of the Convention.²³

1.2.2 The Legal Definition of Genocide

By adopting Resolution 96(I), the international community and the UN recognized the new concept and decided to legalize this newly invented academic concept to

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Travis 2012.

²¹ Schabas 2000, p. 14.

²² Cases in which the word ‘genocide’ was used included such cases as the Justice Case, USA v Josef Altstoetter et al., 1947; and USA v Ulrich Greifelt et al., Trials of War Criminals, vol. XIII (1949) (the RuSHA Case).

²³ For an account of Lemkin’s struggle and campaign, see Cooper 2008, p. 213; Power 2002.

form a new category of crime, and thereby adding it to the list of internationally punishable crimes by adopting the Genocide Convention. However, what is striking about the new definition is the fact that in Article II, the UN incorporated an alternative definition of the act of genocide to that of Lemkin.²⁴

It is logical to think that since the term was a technical term invented by Lemkin, it should hence take the author's definition as a common, exhaustive authority and transplant it for use as a legal definition. Accordingly, genocide would include any planned large-scale murder and destruction by means of systematic criminality involving the state or powerful groups with the backing of the state, as envisaged by the coiner of the word, rather than what is currently defined in Article II.²⁵

Hence, the new legal definition represented the first departure from the academic concept of Lemkin to create a new, autonomous legal concept by political negotiations, where each delegate came to the table with their own concept of what the definition of genocide should be.²⁶ The legal definition is, therefore, characterized by a number of noticeable differences from the concept of genocide of the period—the academic concept of Lemkin; henceforth, the UN partially expropriated the new concept. The new legal concept did not predefine a person or category of persons or a state or organization as perpetrator, nor the act to be formulated, planned or conducted systematically. It solely categorized the crime by the prerequisite of a specific intent, purpose, goal or aim to destroy a human group, limited to only national, ethnic, racial or religious groups, without any lower limit to the number of people affected. The UN gave the concept a very narrow legal definition as opposed to Lemkin's own definition, where any kind of destruction—including cultural destruction—is considered as genocide as long as it is part of a coordinated plan with the aim of annihilating that group, including a political group.

The Genocide Convention's definition of the crime of genocide has now been cemented in international customary law—both in form and substance—not only by early affirmation by the International Court of Justice²⁷ (ICJ), but also as a result of the verbatim reproduction of the definition in numerous international statutes and

²⁴ The process was not a mere transplantation of the new concept, but was discussed at several levels by various committees. It started with the UN Secretariat draft, and the Ad Hoc Committee of the Economic and Social Council, and finally the Sixth Committee of the General Assembly finalized the text of the Convention; see also the Genocide Convention, Articles II and III.

²⁵ Lemkin 1946, pp. 227, 228, 230.

²⁶ Of course, Lemkin was among those experts who were commissioned by the UN to study the possibility of a genocide convention.

²⁷ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, [1951] ICJ Rep 15, ICGJ 227 (ICJ 1951), 28 May 1951, International Court of Justice.

national legislation.²⁸ Kirsch has rightly described the definition of genocide as the most standardized definition in the world.²⁹

However, despite the Convention's concise definition of the word 'genocide' in a legal text, the concept and its content remained less well-defined. The reason is that following the codification of the word 'genocide' in a Convention, remnants of the old concept and the colloquial perception of what genocide should mean have lingered and muddled the new definition. The word has become of interest not only to lawyers but to historians, psychologists, anthropologists, social scientists, and the wider public who took an interest in the word 'genocide', thus routing it in a new direction that cannot be reconciled with the legal definition. Therefore, genocide is now found to be a label that can stick to any surface from government race policies, to the slave trade, birth control, apartheid and the Holocaust.³⁰ Accordingly, the existence and development of this parallel line of social definition are worthy of a brief examination.

1.2.3 *The Social Scientists' Definition of Genocide*

Given the historical events that gave rise to the concept of genocide, in contrast to the narrowly defined legal concept, social scientists³¹ found that the new legal concept does not sit well with their investigation of the causes and dynamics of this phenomenon or the study of the techniques used to prevent it.³² The legal definition limited the crime to the specific intent to exterminate four specific groups by various physical and non-physical means, but it ignored the methods, causes, results and scale of the crime, and this led social scientists to develop their own definition of genocide.

Social scientists define genocide as an attack on or the destruction of any human group with very little emphasis on the *mens rea* element.³³ There are those who claim that genocide cannot be committed without utilization of the power and resources of the state, a view that stems from the perception that genocide is too big

²⁸ Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993 by Resolution 827, Article 4(2); Statute of the International Criminal Tribunal for Rwanda, adopted 8 November 1994 by Resolution 955, Article 2(2); the Rome Statute of the International Criminal Court, adopted 12 July 1998, entered into force 1 July 2001, Article 6.

²⁹ Kirsch 2009. The definition of genocide was reproduced in all of the Ad Hoc Tribunals' constitutive documents: The Statute of the International Criminal Tribunal for Rwanda, adopted 8 November 1994 by Resolution 955, Article 2(2); the Statute of the International Criminal Tribunal for Former Yugoslavia, adopted 25 May 1993 by Resolution 827, Article 4(2); the Rome Statute of the International Criminal Court, adopted 12 July 1998, entered into force 1 July 2001, Article 6.

³⁰ Porter 1982, pp. 9–10.

³¹ See particularly Kuper 1981; Horowitz 1980; Wallimann and Dobkowski 1987; Charny 1988; Staub 1989; Chalk and Jonassohn 1990; Melson 1989.

³² The social scientists' study contains various definitions, typologies and theoretical suggestions that cannot be unified into one concept. It also lacks consensus with the Holocaust studies.

³³ Drost 1959, pp. 122–123.

a crime to be committed by a single individual, for lack of resources.³⁴ Chalk and Jonassohn argued: ‘Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group.’³⁵ Social scientists do not limit genocide to a specific act but consider it to be any act that puts the existence of any protected group in jeopardy.³⁶ However, it is necessary to consider genocide by specifying the scale of the destructive effect on the group.³⁷

Similarly, there are those who place the emphasis on the effects of the act and the manner in which it was pursued. For instance, Helen Fein stated that genocide is a series of purposeful actions by a perpetrator to destroy a group or the selective targeting of group members and suppression of the biological and social reproduction of the group.³⁸ On the other hand, there are those who do not depart entirely from the intent element of the crime of genocide, and thus they do not limit the objective side of the crime to any specific element. Steven Katz, for instance, stated:

The concept of genocide applies only when there is an actualized intent, however successfully carried out, to physically destroy an entire group.³⁹

Social scientists’ effort to expand the definition of genocide to include any mass murder did not end with the use of the word ‘genocide’, but new terms were coined along the same lines as genocide to cover mass atrocities or what are viewed as equivalent to mass atrocities and thus seen as worthy of the ‘-cide’ suffix. To cite a few examples, class destruction is characterized as ‘classicide’⁴⁰ or ‘eliticide’,⁴¹ or there is ‘gendercide or femicide’⁴² for the systematic murder of females, and ‘politicide’⁴³ for political extermination. Nonetheless, there are some social scientists who oppose coming up with a totally new definition when there is an internationally recognized definition in the Genocide Convention, which might become the basis for some effective action.⁴⁴

The disregard of the Convention’s definition is not only attributable to social scientists, but also to some national laws which found the Convention’s definition

³⁴ Horowitz 1976; Dadrian 1975. More similar views were recently expressed by Chalk and Jonassohn 1990.

³⁵ Chalk and Jonassohn 1990, p. 23.

³⁶ Huttenbach 1988, p. 297.

³⁷ Charny 1999.

³⁸ Fein 1993, pp. 24–27.

³⁹ Katz 1994, p. 131. Note that not all social scientists depart from the Genocide Convention’s definition. Kuper, for instance, does not agree with the Convention’s definition, but does use it: Kuper 1981, p. 39.

⁴⁰ Mann 2004.

⁴¹ Totten and Bartrop 2007, pp. 129–130.

⁴² Russell and Harmes 2001; see also Jones 2004.

⁴³ Harff 2003.

⁴⁴ Kuper 1981.

unsuitable for their needs and amended the definition accordingly.⁴⁵ Noticeably, in recent years, the word ‘genocide’ has become far more than a legal term; it has become a tool in the hands of governments and journalists, to be brandished by anybody who wants a pretext to stigmatize others or to create a situation designed to activate the political and legal consequences attached to the Genocide Convention.⁴⁶

However, the lack of a common concept and a precise meaning of the word ‘genocide’ across all fields of genocide study, compels us to identify what one means by genocide from those various meanings. This book is a study in the field of international law and, thus, it will not propose a new definition or amendment but will confirm that the legal definition of genocide given in the 1948 Convention is, by default, the one on which this book is based. However, use of the various social concepts of genocide cannot be avoided in their entirety while explaining the reasoning of various international criminal tribunals and academic debates. Therefore, any reference to the social concept of genocide should be regarded in light of the need for an explanatory or illustrative guide only.⁴⁷

1.3 The Debate and Position of Context in the Legal Definition of the Crime of Genocide

Textual examination of the legal definition of genocide reveals that the legal concept of genocide centred the definition on the *mens rea* requirement of specific intent, which is difficult to define and insufficiently precise, as opposed to an intent to kill, murder or rape.⁴⁸

International tribunals, practitioners and academics generally support the notion that this intent is an aim, goal, purpose or desire to destroy a part of the protected group. Therefore, the legal definition seems to have formulated the crime of genocide in a form of individual misconduct, and one which can be committed by a single individual.⁴⁹ According to this conception, killing a single person would satisfy the culpability requirement, but in fact no single person need be killed for genocide to ensue; for instance, inflicting ‘serious bodily or mental harm’, preventing births, or transferring children between groups all qualify as genocidal acts without the need for any death to occur.

According to this formulation, it is irrelevant whether the intent of the accused can actually be achieved or whether it is a vain hope. Therefore, consideration of

⁴⁵ Penal Code (France), Journal Officiel, 23 July 1992, Article 211-1, and the Turkish Penal Code no. 5237, Article 76, adopted 1 June 2005.

⁴⁶ Van den Herik 2012, pp. 75–95; see also Herman and Peterson 2010; Kuper 1981.

⁴⁷ Kirsch 2013, p. 7.

⁴⁸ Boghossian 2010, p. 76.

⁴⁹ Kirsch 2009.

the individualistic intent brings into the equation the question of whether vain hope or unrealistic intention are sufficient to attract criminal responsibility. This in turn leads to consideration of the weight of the contextual circumstances such as scale and collective participation, or whether the accused received or expected to receive or was influenced by state or organizational support, even though these surrounding circumstances have no bearing or significance as far as the legal definition of genocide is concerned in its literal sense.

In contrast, in the case of crimes against humanity, proof that the proscribed act formed part of a ‘widespread or systematic attack’ on the civilian population is required as a constituent element, and similarly the existence of armed conflict is required for war crimes.⁵⁰ The contextual Elements of Crimes against humanity have two prongs: ‘widespread’ acts are defined as massive and large-scale acts that are carried out collectively with widespread effects, while ‘systematic’ acts are perceived as organized and regular forms of conduct following a similar pattern leading to the emergence of a trail.⁵¹ In addition, there is a requirement that the acts must be connected to a policy aimed at targeting civilians to confine the category of crimes against humanity to large-scale crimes deserving of the international community’s attention as opposed to random acts.⁵² In the case of war crimes, the crime cannot be committed in isolation by a lone perpetrator; rather, the conduct must take place in the context of or associated with an armed conflict to qualify as a war crime.⁵³

However, that does not mean that genocide lacks surrounding circumstances like other international crimes; genocide can be large in scale and committed in an organized, planned and methodical manner by a collective perpetration or with state involvement, but none of these surrounding elements or what became known as the ‘contextual elements’⁵⁴ is stipulated as being formal elements of the crime—that is, constitutive elements—as far as the literal definition of the crime of genocide is concerned. The textual reading of the legal definition does not rely on any of the ‘contextual elements’ surrounding the criminal act. This is what distinguishes the crime of genocide from other core international crimes.

⁵⁰ The ICTR Statute, Article 3; the ICTY Statute, Article 5; also, in the Rome Statute, the definition of a crime against humanity is detached from the nexus of the relation to war or any need for the accused to know the nexus of the relation of the act to the widespread or systematic attacks. The contextual element of war crimes is different, but this difference does not lie within the ambit of this book.

⁵¹ Prosecutor v Akayesu, Trial Chamber, 2 September 1998, ICTR-96-4-T, para 580; Prosecutor v Kayeshema and Ruzindana, Trial Chamber, 21 May 1999, ICTR-95-1-T, para 123; Prosecutor v Kunarac et al., Trial Judgment, 22 February 2001, IT-96-23-T and IT-96-23/1-T, para 429. Note that the International Criminal Court Statute added an extra prong in Article 7(2)(a).

⁵² Prosecutor v Tadić, Trial Chamber, 7 May 1997, IT-94-1-T, paras 654, 653; Kayeshema (Trial Judgment), 21 May 1999, paras 125–126.

⁵³ Note that the International Criminal Court Statute added an extra prong in Article 8(1).

⁵⁴ See Chap. 2, Sect. 2.3 for an explanation of these elements.

Conversely, the judiciary is faced with major hurdles, because in most of the genocide cases that reach international tribunals, the acts and deeds of the accused were part of many large-scale perpetrations. The legal definition mentions only the intent to destroy a group—one of four enumerated groups—without any reference to how a group can be destroyed by a single perpetrator, the extent of the destruction needed (e.g. whether a single killing suffices), the required manner of destruction (e.g. planned or systematic destruction), or any reference to how these issues can be treated or how they must be juxtaposed in order to qualify as a prohibited act, as a genocidal act.

Therefore, to resolve the question of how to prove that a given perpetrator acted with the required intent, a method was developed of inferring the specific intent using the contextual elements as indicators. However, these contextual elements rarely directly related to the behaviour of an accused individual, so one might ask what relevance they have in ascertaining the individual's intent. Thus, in genocide cases, examination of those contextual elements became an inevitable aspect as a result of the requirement of establishing genocidal intent—which was formulated on the basis of an individual perpetrator's intent without any reference to the context.

The lack of any reference to contextual elements in the definition of the crime excludes them from judicial consideration as a constitutive element. Yet, the courts have found it irresistible to circumvent it in their line of reasoning. The tribunal in question failed to clarify the relevance of those considerations and their methods of interpretation which allowed consideration of those contextual elements. It only stated that such findings would allow it to achieve a better understanding of the context in which the crimes had occurred.⁵⁵

The Appeals Chamber in *Karemera* went even further, by recognizing that the genocide in Rwanda was a fact of common knowledge without containing any reference to the question as to why such a finding is necessary,⁵⁶ or the relevance of this in relation to the crime or the accused.⁵⁷ Thus, if relevance of the existence of a genocidal campaign were accepted, then the court would have stripped genocide of its literal specificities (such as 'intent to destroy in whole or in part'), or even would have ended up with a different concept than that of the literal interpretation. The decision contradicted the International Criminal Tribunal for the former Yugoslavia (ICTY), where the Trial Chamber in *Jelisić* held that the accused could be held responsible as a lone individual seeking to destroy a group

⁵⁵ Akayesu, Trial Judgment, 2 September 1998, paras 112–118, 523; Kayeshema, Trial Judgment, 21 May 1999, para 274.

⁵⁶ Prosecutor v Karemera, Appeal Judgment, 29 September 2014, ICTR-98-44-A.

⁵⁷ Prosecutor v Karemera and others, Decision on the Prosecutor's Interlocutory Appeals of the Decision on Judicial Notice 36, 16 June 2006, ICTR-98-44-AR73(C), para 35.

as such—a lone *génocidaire*.⁵⁸ In addition, the Appeals Chamber confirmed this decision, that the existence of a plan or policy is not a legal ingredient of the crime.⁵⁹

This shows the courts' puzzling need to assess or at least refer to the contextual elements (such as plans, patterns, genocidal campaigns, and organizations or magnitude), while at the same time rejecting these factors as formal elements of the crime. If the contextual elements share nothing with the legal ingredients of the crime, the courts should presumably assess cases from the beginning on the basis of the individual misconducts of the accused. The courts' inexplicable consistent referral to the contextual elements of the crime cannot, therefore, be explained by the textual reading.⁶⁰

The Rome Statute made a verbatim copy of the definition of genocide from the Genocide Convention with an extra element, annexed in a form of Elements of Crimes to the Statute to be interpreted pursuant to Article 9 of the same Statute. The Elements of Crimes states that the crime of genocide takes place only in 'context of a manifest pattern of similar conduct or the conduct could itself effect such destruction'.⁶¹ However, the Elements of Crimes was added without much clarification as to the position of the annexed document; hence, the position of the contextual elements of the crime of genocide has not been resolved to a definitive standard by the Rome Statute.⁶²

The annex is not clear as to what purpose the requirement of a contextual element is intended to serve: it is not clear whether it is a formal element of the crime of genocide, because it neither excludes prosecution of a lone *génocidaire* nor does it clearly affirm the contextual elements as formal elements of the crime of genocide. This lack of clarity is not resolved or helped by the Rome Statute's inclusion of the Elements of Crimes as an annex to the Statute. Notably, not only is there a lack of clarity as to the legal position of the Elements of Crimes, but also as to inclusion of phrases such as 'manifested pattern' and 'similar conducts by the accused or other participants'.

On the other hand, the doctrinal approach to the question of the contextual elements of genocide produces various distinct and irreconcilable schools of thought. There are those who advocate the claim that contextual elements have no relevance as far as the meaning of genocide is concerned, and there are those who argue the contrary and attach a constitutive aspect to the contextual elements of genocide. A third group oppose any claim of legal relevance but accept some role for the contextual elements at the jurisdictional level. Therefore, the question of whether the 'contextual elements' of genocide are part of the legal ingredients or

⁵⁸ Prosecutor v Jelisić, Trial Chamber, 14 December 1999, IT-95-10-T, para 100.

⁵⁹ Prosecutor v Jelisić, Appeals Chamber, 5 July 2001, IT-95-10-A, para 48.

⁶⁰ Whether an inference of contextual elements supports the presumption that the contextual element is a legal ingredient will be discussed in the second part of Chap. 4, Sect. 4.3.

⁶¹ International Criminal Court (ICC), *The Elements of Crimes*, adopted 2010.

⁶² This will be the subject of Chap. 4.