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THE ‘CONTEXTUAL ELEMENTS’ OF THE CRIME OF GENOCIDE

By

NASOUR I.N KOURSAMI

A Doctoral Thesis Submitted to the University of Edinburgh in Fulfilment of the Requirements for the Degree of Doctor of Philosophy (LAW)

July 2016
I do hereby solemnly declare that the PhD thesis ‘The “Contextual Elements” of the Crime of Genocide’ is a result of my independent work. All sources of information and bibliographical references used in this thesis have been cited accordingly in the footnotes and the list of authorities. I also hereby submit that this work has not been submitted for any other degree or professional qualification.

--------------------------------------------

Nasour Ibrahim-Neguy Koursami
Old College, University of Edinburgh
13 July 2016

94 285 words
DEDICATION

To the man who made me the man I am
The man who tough me to always believe that I can
To the man who helped me to be the man, I am
To the man, to whom I owe my being
To my beloved father
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I could not finish without extending my gratitude to my mother and father who have sacrificed their own lives in order to give me everything in life. I know my father is watching over me with pride from his eternal home, and I would like to say: ‘Father, there are no words appropriate enough to express my gratitude and I am almost there, ‘Ba’”.

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LAY SUMMARY

This thesis examines the extent to which the existence of multiple acts of large-scale violence, carried out according to a plan or a policy or a campaign, organized or tolerated, by the state or state like entities are necessary for the commission of the crime of genocide.
ABSTRACT

According to the literal interpretation, the crime of genocide is characterized by an individualistic intent to destroy a group, unlike other international crimes where contextual elements such as the need for plan or policy, or pattern of similar acts, or collective campaign and magnitude are explicitly required as constitutive elements. This thesis, therefore, examines whether ‘contextual elements’ are constitutive elements of the crime of genocide. In particular, it will examine the evolution and the current state of the definition of genocide, to determine the extent to which an individual génocidaire is required to act within a particular genocidal context.

This thesis will examine and trace the historical development of the crime of genocide from its inception as an academic concept to the attainment of an autonomous legal character as a crime. It is argued that, during this period, the concept of genocide was akin to the current definition of crime as used in the social sciences. Hence, contextual elements were tacitly perceived and considered as a constitutive part of the concept; therefore, any reference to this period is of little help in the determination of the current status of the contextual element. In addition, it is found that upon codification of the notion of genocide, deliberate efforts were made to depart from the old concept by putting the subjective side of the crime at the centre. Thus, the thesis finds, on the basis of prevailing case law, that today’s dilemma over the crime of genocide originates from the difficulty to separate the concept from its past. This has led, in turn, to the existence of a vague and unsound legal stance on the contextual elements of genocide when the definition is applied to specific cases; therefore, the legal examination of the definition has produced an inconsistent approach bordering on illegitimate law making, especially in the cases of the ad hoc tribunals, by failing to balance the interpretation requirements on the one hand and the requirements of legality and consistency on the other. The thesis also establishes that the protracted debate for inclusion of the contextual elements as legal ingredients of the crime is sustained by this inconsistency.

The thesis further evaluates the contextual elements in the light of the new regime of the Rome Statute and its ‘Element of Crimes’ which explicitly require the accused to act in a ‘context of manifested pattern of similar conduct’, but analysis of this requirement reveals that this is only a jurisdictional element to limit the case flow to the International Criminal Court. This research critiques the ‘contextual elements’ and the need for them and concludes with a new case for the assessment of this context as, first, a jurisdictional element and second, necessary on two other occasions: when alleging the existence of the crime of genocide in general and in cases of liability for participation and inchoate offences.
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<th>Description</th>
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<tr>
<td>ACHR</td>
<td>American Convention of Human Rights</td>
</tr>
<tr>
<td>BiH</td>
<td>Bosnia and Herzegovina</td>
</tr>
<tr>
<td>CCL</td>
<td>Control Council Law</td>
</tr>
<tr>
<td>ECCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>FRY</td>
<td>Former Republic of Yugoslavia</td>
</tr>
<tr>
<td>GA</td>
<td>General Assembly</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
</tr>
<tr>
<td>IHL</td>
<td>International Humanitarian Law</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>ILDG</td>
<td>International Law Discussion Group</td>
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<tr>
<td>IMT</td>
<td>International Military Court</td>
</tr>
<tr>
<td>JCE</td>
<td>Joint Criminal Enterprise</td>
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<tr>
<td>NMTs</td>
<td>Nuremberg Military Tribunals</td>
</tr>
<tr>
<td>OTP</td>
<td>Office of the Prosecutor</td>
</tr>
<tr>
<td>PTC</td>
<td>Pre-Trial Chamber</td>
</tr>
<tr>
<td>RSHA</td>
<td>Reich Security Central Office</td>
</tr>
<tr>
<td>SC</td>
<td>Security Council</td>
</tr>
<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
</tr>
<tr>
<td>SFRY</td>
<td>Socialist Federal Republic of Yugoslavia</td>
</tr>
<tr>
<td>SS</td>
<td>Nazi Party corps (Schutzstaffel)</td>
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<tr>
<td>STL</td>
<td>Special Tribunal for Lebanon</td>
</tr>
<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>UNWCC</td>
<td>United Nations War Crimes Commission</td>
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<tr>
<td>WCC</td>
<td>War Crimes Chamber of the Court of Bosnia and Herzegovina</td>
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### TABLE OF BOOK/JOURNAL ABBREVIATIONS

#### Books
- Cambridge University Press  
  CUP  
- Oxford University Press  
  OUP

#### Journals
- American Journal of International Law  
  AJIL  
- British Yearbook of International Law  
  BYbIL  
- Canadian Yearbook of International Law  
  CYbIL  
- Columbia Journal of Transnational Law  
  Col JTL  
- Columbia Law Review  
  Col LR  
- Criminal Law Forum  
  Crim LF  
- European Journal of International Law  
  EJIL  
- Fordham International Law Journal  
  FILJ  
- Georgetown Journal of International Law  
  Geo JIL  
- Harvard Human Rights Journal  
  HHRJ  
- Harvard International Law Journal  
  HILJ  
- Human Rights Quarterly  
  HRQ  
- International and Comparative Law Quarterly  
  ICLQ  
- International Review of the Red Cross  
  IRRC  
- Journal of Conflict and Security Law  
  JCSL  
- Journal of International Criminal Justice  
  JICJ  
- Law and Contemporary Problems  
  L&CP  
- Leiden Journal of International Law  
  LJIL  
- Melbourne Journal of International Law  
  Melb JIL  
- Michigan Journal of International Law  
  Mich JIL  
- New England Law Review  
  NELR  
- New York University Journal of International Law and Politics  
  NYJILP  
- New York University Law Review  
  NYULR  
- Stanford Journal of International Law  
  Stan JIL  
- Texas Law Review  
  Tex LR
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<td>Yale Law Journal</td>
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CHAPTER 1: INTRODUCTION

1.1 The background to the study

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 Genocide\(^3\) (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 the criteria behind the limitation of the protected groups to only four groups; confining the acts to five enumerated acts, to only 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 thesis. This research will

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\(^1\) Even though the legal definition remains the only definition of genocide, there are other alternative definitions offered as a result of dissatisfaction with the legal definition. For genocide definition from the perspective of the social sciences, including psychology, sociology, anthropology, political science, international relations, and gender studies, see Adam Jones, *Genocide: A Comprehensive Introduction* (Routledge 2010) and CP Scherrer, *Towards a Theory of Modern Genocide. Comparative Genocide Research: Definitions, Criteria, Typologies, Cases, Key Elements, Patterns and Voids* (1999) 1(1) Journal of Genocide Research 13-23.


also not address the question whether the definition of genocide serves its intended purpose; nor will it entertain any question of group limitation\textsuperscript{5}.

The question that this study will endeavour to explore is what lies beneath the analysis and the examination of the basic components of the elements of genocide. The research 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 thereby 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 debates. Therefore, in almost all cases, the question of whether the crime of genocide has been perpetrated includes consideration of those contextual elements which are associated with genocide.

However, evaluation of the position of those contextual elements within the genocide definition 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, or finding a middle ground between those two positions. These controversies are the subject matter of this thesis.

\textbf{1.2 The concept of genocide: a malformed concept}

\textbf{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 UN General Assembly Resolution 96(1). The Turkish massacre of the Armenians in 1915, the Holocaust during World War II, the most recent massacre in the Former Yugoslavia and Rwanda, and the current conflict in Syria and Iraq all constitute mass crimes against human groups of some sort. Therefore, there is truth in the assumption that

\textsuperscript{5} For this discussion, see Paul Behrens, ‘The Need for a Genocide Law’ in Paul Behrens and Ralph Henham (eds), \textit{Elements of Genocide} (Routledge 2013) 237-253.
denial of the right of existence to human groups is not a new concept or phenomenon or 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 ‘the crime without a name’.6 Most recently, Leo Kuper has also contended: ‘The word genocide is new, but the concept is ancient.’7 Raphael Lemkin himself acknowledged that the new word he coined was an attempt to represent an old practice in its modern form.8 This old concept is what finally became known as genocide following World War II.9

Defining the concept of genocide in legal terms commenced with Lemkin’s research into the phenomenon of the mass destruction of human groups as early as the 1930s.10 However, in the early period Lemkin was advocating the criminalization of genocide under various different appellations.11 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.12

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9 The preamble of the Convention declared that ‘at all periods of history genocide has inflicted great losses on humanity’: Genocide Convention, art II.
10 It was believed that Lemkin’s interest in human destruction was said to have started from reading Henryk Sienkiewicz‘, Qua Vadis, see William Korey, An Epitaph For Raphael Lemkin (Jacob Blaustein Institute for the Advancement of Human Rights, of the American Jewish Committee 2001) 5. See also Samantha Power, ‘A Problem from Hell’: America and the Age of Genocide (Basic Books 2002) 20.
11 Note that Lemkin’s concept of genocide in his early writing and the one employed in his 1944 book is different.
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.\(^{13}\) 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 and a Latin word – the Greek word *genos*, meaning race or tribe, and the Latin *cide*, meaning killing – to describe such a crime.\(^{14}\) 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.\(^{15}\)

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 the political and social institutions, of culture, language, national feelings, religion, and the economic existence of a national group, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.\(^{16}\)

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’\(^{17}\).

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\(^{14}\) ibid 79.

\(^{15}\) ibid.

\(^{16}\) ibid.

\(^{17}\) ibid.
Lemkin wrote his book to provide support for his campaign and his successful insertion of the word ‘genocide’ into the legal vocabulary.\(^{18}\) was subsequently used as a foundation on which to base the drafting of the UN Convention. However, the Nazi defeat in fact provided a galvanizing platform for the new term to swiftly crystallize as part of the legal vocabulary. Recounting this success, Schabas opined that: ‘Rarely has a neologism had such rapid success.’\(^{19}\) The word even quickly gained reference in the Nuremberg deliberations before any legal definition was attached to it.\(^{20}\) He also worked tirelessly to obtain the signatures required for the ratification of the Convention.\(^{21}\)

### 1.2.2 The legal definition of genocide

By adopting Resolution 96(1), the international community and the UN recognized the new concept and decided to legalize this newly invented academic concept to form a new category of a crime and thereby added 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 the UN incorporated an alternative definition of the act of genocide to that of Lemkin in article II.\(^{22}\)

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 will 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 than what is currently defined in article II.\(^{23}\)

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\(^{19}\) Schabas (n 2) 14.

\(^{20}\) Cases in which the word ‘genocide’ was used included such cases as the Justice Case and USA v Ulrich Greifelt et al, Trials of War Criminals, vol XIII (1949).

\(^{21}\) For an account of Lemkin’s struggle and campaign, see John Cooper, Raphael Lemkin and the Struggle for the Genocide Convention (Palgrave Macmillan 2008) 213; Power (n 10).

\(^{22}\) 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; also see the Genocide Convention, arts II and III.

\(^{23}\) Lemkin, ‘Genocide’ (n 6) 227, 228, 230.
However, the 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.\textsuperscript{24} 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. The perpetrator is not a predefined person or category of persons or a state or organization, and the act does not need to be formulated, planned, or conducted systematically. It is solely categorized by the prerequisite of a specific intent, purpose, goal, or aim to destroy a human group, limited to only national, ethnical, 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 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 been cemented in international customary law now – both in form and substance – not only by the early affirmation by the International Court of Justice\textsuperscript{25} (hereinafter ‘ICJ’) but also as a result of the verbatim reproduction of the definition in numerous international statutes and national legislations.\textsuperscript{26} Kirsch has rightly described the definition of genocide as the most standardized definition in the world.\textsuperscript{27}

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, the remnant of the old concept and the colloquial perception of what genocide should mean, have

\begin{itemize}
\item \textsuperscript{24} Of course, Lemkin was among those experts who were commissioned by the UN to study the possibility of a genocide convention.
\end{itemize}
lingered around 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 into 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\textsuperscript{28}. Accordingly, the existence and development of this parallel line of social definition is worthy of 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, the social scientists\textsuperscript{29} 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.\textsuperscript{30} 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 the social scientists to develop their own definition of genocide.

Social scientists define genocide as an attack on or a destruction of any human group with very little emphasis on the \textit{mens rea} element.\textsuperscript{31} 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 a crime to be committed by a single individual for lack of resources\textsuperscript{32}. Chalk and Jonassohn argued: ‘Genocide is a form of one-sided mass killing in which a state or other authority

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{30} The social scientists study contains various definitions and typologies and theoretical suggestions that cannot be unified into one concept. It also lack consensus with the Holocaust studies.
\item \textsuperscript{31} Pieter Nicolaas Drost, \textit{The Crime of State}, vol 2 (Leiden 1959) 122-23.
\item \textsuperscript{32} Irving Louis Horowitz, \textit{Genocide: State Power to Mass Murder} (Transaction Publisher 1976); Vahakn Dadrian, \textit{Typology of Genocide} (1975) International Review of Modern Sociology 201-212. More similar views were recently expressed by Chalk and Jonassohn (n 29).
\end{itemize}
\end{footnotesize}
intends to destroy a group. 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. However, it is necessary to consider genocide by specifying the scale of the destructive effect on the group.

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 has stated that genocide is a series of purposeful actions by a perpetrator to destroy a group or the selective targeting of group members and the suppression of the biological and social reproduction of the group. 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, has stated:

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

The 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, for instance, class destruction is characterized as ‘classcide’ or ‘eliticide’ or ‘gendercide or femicide’ for the systematic murder of females, and ‘politicide’ for political extermination. Nonetheless, there are some among the social scientists who oppose coming up with a totally new definition when there is an

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33 Chalk and Jonassohn (n 29).
37 Steven Katz, The Holocaust in Historical Context, Volume I: The Holocaust and Mass Death before the Modern Age (OUP 1994) 131. Note that not all social scientists depart from the Genocide Convention’s definition. L Kuper, for instance, does not agree with the Convention’s definition, but does use it: Kuper (n 7) 39.
38 Michael Mann, The Dark Side of Democracy (CUP 2004).
40 Diana EH Russell and Roberta A Harmes (eds), Femicide in Global Perspective (Teachers College Press 2001); also see Adam Jones (ed), Gendercide and Genocide (Vanderbilt University Press 2004).
internationally recognized definition in the Genocide Convention which might become the basis for some effective action.\(^42\)

The disregard of the Convention’s definition is not only attributable to social scientists but also to some national laws which found the Convention definition unsuitable for their needs and amended the definition accordingly\(^43\). 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, 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\(^44\).

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 thesis 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 thesis is based. However, the use of the various different social concepts of genocide cannot be avoided in their entirety in the course of explaining the reasoning of the various international criminal tribunals and the academic debates. Therefore, any reference to the social concept of genocide should be regarded in the light of the need for an explanatory or an illustrative guide only.\(^45\)

### 1.3 The research question

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\(^46\).

\(^{42}\) Kuper (n 7).

\(^{43}\) Penal Code (France), Journal Officiel, 23 July 1992, art 211-1 and the Turkish Penal Code (no 5237), art 76, adopted 1 June 2005.

\(^{44}\) L. Van den Herik, ‘The Schism between the Legal and the Social Concept of Genocide in Light of the Responsibility to Protect’ (n 2) 75-95; also Edward S Herman and David Peterson, *The Politics of Genocide* (NYU Press 2010); L Kuper (n 7).


The 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 that can be committed by a single individual.\(^{47}\) 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 the individualistic intent brings into the equation the question whether vain hope or unrealistic intention is sufficient to attract criminal responsibility. This in turn leads to considerations 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 the existence of armed conflict is required for war crimes.\(^{48}\) 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.\(^{49}\) In addition, there is a requirement that the acts must be

\(^{47}\) Kirsch (n 27).

\(^{48}\) The ICTR Statute, art 3; The ICTY Statute, art 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 research.

\(^{49}\) Prosecutor v Akayesu, ICTR-96-4-T, Trial Chamber, Judgment 2 September 1998 (hereinafter ‘Akayesu (Trial Judgment)’) para 580; Prosecutor v Kayeshe and Rakindana, ICTR-95-1-T, Trial Chamber, Judgment 21 May 1999 (hereinafter ‘Kayeshema (Trial Judgment)’) para 123; Prosecutor v Kunarac et al, IT-96-23-T& IT-96
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.\textsuperscript{50} 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.\textsuperscript{51}

However, that does not mean that genocide lacks surrounding circumstances like the 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’\textsuperscript{52} are 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.

Conversely, the judiciary is faced with major hurdles, because in most of the genocide cases that reach the international tribunals, the acts and the 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 (eg whether a single killing suffices); the required manner of destruction (eg 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 of inferring the specific intent using the contextual elements as indicators was developed for the first time by the ICTR Trial Chamber in the case of Akayesu. However, these contextual elements rarely directly related to

\textsuperscript{50} Prosecutor v Tadić, IT-94-1-T, Trial Chamber, Judgment 17 July 1997 (hereinafter ‘Tadić (Trial Judgment)’) paras 654, 653; Kayeshema (Trial Judgment) paras 125-126.

\textsuperscript{51} Note that the International Criminal Court Statute added an extra prong in art 8(1).

\textsuperscript{52} See Chapter 2, section 2.3 for an explanation of these elements.
the behaviour of an individual accused, 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.

However, 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 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.53

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,54 or the relevance of this in relation to the crime or the accused55. Thus, if the relevance of the existence of a genocidal campaign is accepted, then the court would have stripped genocide from its literal specificities (such as ‘intent to destroy in whole or in part’) or would even have ended up with a different concept from 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 as such – a lone génocidaire56. In addition, the Appeals Chamber confirmed this decision, that the existence of a plan or policy is not a legal ingredient of the crime57.

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

53 Akayesu (Trial Judgment) paras 112-118, 523; Kayeshema (Trial Judgment) para 274.
54 Prosecutor v Karemera (Appeal Judgment).
55 Prosecutor v Karemera et al, ICTR-98-44-AR73(c), Trial Chamber, Decision 16 June 2006 ([hereinafter ‘Karemera (Decision on Prosecutor’s Interlocutory Appeals Decision on Judicial Notice)’]) para 35.
56 Prosecutor v Jelisić, IT-95-10-T, Trial Chamber, Judgment, 14 December 1999 (hereinafter ‘Jelisic (Trial Judgment)’) para 100.
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.\textsuperscript{58}

The recent Rome Statute made a verbatim copy of the genocide definition 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 ‘a context of a manifest pattern of similar conduct or the conduct could itself effect such destruction’\textsuperscript{59}. 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\textsuperscript{60}.

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 the 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 Crime 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 itself but also as to the inclusion of the 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

\textsuperscript{58} Whether an inference from contextual elements supports the presumption that the contextual element is a legal ingredient will be discussed in the second part of this chapter.
\textsuperscript{59} International Criminal Court (ICC), \textit{The Elements of Crimes}, adopted 2010.
\textsuperscript{60} This will be the subject of Chapter 4.
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 whether they are a constitutive element of the crime of genocide is of paramount importance to judges, lawyers, and academics alike. The position is not clear because both academics in the field and the judiciary have failed to construct a clear position on the contextual elements.

Therefore, the subject matter of this thesis is whether the contextual elements have any value as far as the constituent elements of genocide are concerned in the light of the legal definition provided in the Genocide Convention, the subsequent Elements of Crimes of the Rome Statute, and the case law of the international/ized courts and tribunals. However, it will be argued in this study that the phrase ‘contextual elements’ has no place in the legal definition of the crime of genocide. Hence this thesis proposes a new perspective from which this question can be satisfactorily addressed without the need to tamper with the legal definition of the crime by leaping into reliance on the social scientist’s understanding of genocide or by slipping into irrelevant considerations in examining the constitutive elements of the crime of genocide.

1.4 The aim of the thesis

This thesis seeks to achieve the following aims:

1. To study the history, the theoretical underpinnings, and the developments of the crime of genocide to ascertain the nature and difficulties surrounding the concept of the ‘contextual elements’ of crime and their position in relation to the constitutive elements of the crime of genocide.

2. To follow and critically examine the development and the debate surrounding the contextual elements pre- and post-Genocide Convention and in the ad hoc tribunals and the International Criminal Court (hereinafter ‘ICC’) decisions, to establish whether such contextual elements are part of the legal ingredients.
of the crime and whether this notion has at any rate a role to play in the legal understanding of the crime of genocide.

3. To identify the consequences and the challenges to the concept of genocide, if the contextual elements are found to be required by law, and to further investigate and explore the effects of adhering to the theory of the lone génocidaire and the legal definition of genocide as provided in the Genocide Convention.

4. To examine the contextual elements from the dual perspective of the traditional position under the Genocide Convention and the current ICC Statute, to ascertain whether the phrase ‘contextual elements’ has any other explanatory or facilitative element that aids judges in their interpretation of the crime of genocide.

5. To critically consider the significance of the phrase ‘contextual elements’ in the jurisprudence of the crime of genocide to determine its future position in the legal definition of the crime of genocide and to establish whether we really need the concept of contextual elements for identification of the crime of genocide.

1.5 The methodology of the thesis

The applicable law in this thesis is international criminal law in general and the Genocide Convention in particular and, more specifically, the notion of its ‘contextual elements’ is the central topic of inquiry. The thesis confirms that, following the ratification of the Genocide Convention, nearly fifty years has passed with little jurisprudential discussion on the definition of the crime of genocide as provided for in the Convention. However, the research will primarily focus on the definition of the crime of genocide as provided in the most authoritative international instrument (the Genocide Convention) as a foundational basis for the research which,
then, incorporates all the other international and national instruments which deals with genocide where necessary.\textsuperscript{61}

The research will set out according to these instruments the nature and the difficulties of the contextual elements of genocide, in order to construct the broadest entry point for the research. Thus, the thesis will provide a panoramic view of these instruments for three reasons: First, almost all the other instruments, with very few modifications, have adopted or reproduced the Genocide Convention’s definition of the crime,\textsuperscript{62} making the genocide definition ‘the most standardized in the world’.\textsuperscript{63} Second, it provides a wider framework within which the research question is studied, because processing the substantive aspect of this thesis requires the interpretation of different instruments and the case law in this area. Third, there is a lack of clarity and a divisive position on the contextual elements as well as a failure of academics or the courts to deal with this question in a systematic and exhaustive manner. Furthermore, the thesis will be inadequate if the codification history behind the Genocide Convention and the domestic treatment of this aspect are not thoroughly considered.

It is rarely a pressing matter in international law to adopt a philosophical position on any issue that is under consideration, but should such a need arise, the thesis is obliged to adopt a positivist approach, which generally regards international law as a system of rules and procedures that are voluntarily accepted by states (and whereby the overriding principle is the consent of the states), rather than posing metaphysical questions which have no immediate effect on rule clarification or on the law as it currently stands.\textsuperscript{64} The research thus proposes to verify the ‘lex lata’ through its gradual emergence to establish the position of the ‘contextual elements’ of genocide.

\textsuperscript{61} The Rome Statute of the International Criminal Court (art 6), the ICTY Statute (art 4), the ICTR Statute (art 2), and the Extraordinary Chambers in the Courts of Cambodia (art 4) all reproduced verbatim the definition of genocide. This thesis is limited to the ad hoc tribunals on the basis that other international and national tribunals have modified the genocide definition or completely avoided the mentioning of genocide as the Special Court for Serra Leone (SCSL) where the court’s power was expressly limited to prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonan law committed in the territory of Sierra Leone since 30 November 1996.

\textsuperscript{62} The Genocide Convention.

\textsuperscript{63} See the two ad hoc tribunal’s Statute and the Rome Statute; Kirsch (n 27) 347.

and to determine whether there are any grounds for the adoption of contextual elements as a constituent element of the crime of genocide.\textsuperscript{65}

The adoption of the doctrinal or legal positivist approach means critically analysing the law as it is, clarifying ambiguities within its rules, and placing those rules within a logical and coherent structure.\textsuperscript{66} This approach is found to be suitable not only because the objectives of this research can only be attained through rigorous legal analysis, evaluation, summarization, and systemization of a large number of legal materials provided in different instruments, but because the courts operate within different jurisdictions and deal with different facts and circumstances at different times. Furthermore, this method provides a framework which allows the research to draw conclusions on the validity and coherence of evidence and arguments by drawing on the arguments and views of others.\textsuperscript{67} In the context of the research question, the doctrinal approach allows a systematic presentation of the problems with the ‘contextual elements’ of genocide and the basis upon which the proposed interpretations of the possible solutions are constructed. The thesis attempts, without the introduction of a plurality of methods but slightly deviating from the doctrinal approach, essentially to understand the origin of the concept of contextual elements and its meanings within the proper context and also to build support for the subsequent arguments.

Legal rules are abstract in nature, which means they cannot be applied without interpretation. It is acknowledged here that it is difficult to discern coherent interpretative techniques from the international tribunals’ and the courts’ jurisprudence.\textsuperscript{68} In addition, there is the inherent difficulty that sometimes one method of interpretation will yield a different meaning for one legal provision, and also that different interpretative methods sometimes yield different meanings for one

\textsuperscript{65} ibid 515.
\textsuperscript{68} Isabelle Van Damme, ‘Treaty Interpretation by the WTO Appellate Body’ (2010) 21(3) EJIL 605, 618.
legal rule. However, the question of which interpretative methods suit a particular rule is not based on the rule itself; thus, it is difficult to take sides and shield such choices from criticism because the selection of the method has a subjective element to it. Nothing demonstrates this blind spot of interpretative methods better than Lauterpacht’s comments that interpretative rules ‘are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means’.

This thesis, at least as far as the Genocide Convention is concerned, will rely on the most prominent general rules of interpretation of treaties provided for in articles 31 and 32 of the Vienna Convention on the Law of Treaties. This choice is justified because the Genocide Convention is a treaty that cannot be diverted from the customary interpretative methods articulated in the Vienna Convention. It must be recalled, on the other hand, that the two ad hoc tribunals have their foundational basis in UN Security Council resolutions excluding them from the Vienna Convention rules, at least from the literal reading, but both tribunals made it clear that the rules of the Vienna Convention on the Law of Treaties are relevant and applicable. The thesis will also take into consideration, despite the small amount of substantive content in terms of the individual elements of genocide, the Security Council and the Secretary-General debates, resolutions and the Secretary-General Reports pursuant to Security Council resolutions where necessary.

However, neither of the statutes of the international criminal tribunals contains any interpretative guidance. This is clear in the jurisprudence of the ad hoc tribunals in which the judges gave few or no reasons as to their choice of interpretative methods.

69 Mark Klamberg, Evidence in International Criminal Procedure: Confronting Legal Gaps and Reconstruction of Dispute Events (PhD thesis in Public International Law, Stockholm University, Sweden 2012) (copy with the author).
71 H Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 BYIL 48, 53.
and techniques. The ICC Statute – unlike the statutes of the ad hoc tribunals – contains some interpretative guidance in the form of articles 21(3) and 22(2) and the applicable law as a self-contained system but, due to the richness of the ad hoc tribunals’ jurisprudence, interpretative analogies will be drawn in some instances for the sake of clarity.

This thesis will proceed by prioritizing the textual or literal interpretation as an autonomous method of interpretation with primacy of application. This is so because the textual interpretation considers the text as the authentic manifestation of the intentions of the drafters of the text and avoids an \textit{ab initio} investigation into the intention of the drafters. This method of interpretation suffers from one shortcoming, namely, that what is considered as the ‘ordinary meaning’ of a word might be subjective and it might vary according to the trier of the facts. However, all the other methods, whether reliance on the \textit{Travaux Préparatoires} or the object and purpose of the treaty (the teleological method), cannot be shielded from such criticisms. But the interpretative methods of this thesis is grounded on the fact that there can only be one true meaning that can be reached by the application of the correct interpretation methods.

Using the above methods, the research will mainly rely on an analysis of the available academic literature, but it will also include an examination of two categories of primary sources. The first category consists of the \textit{Travaux Préparatoires} of the Genocide Convention, reports of the International Law Commission (ILC) for the valuable guidance resulting from the wide research and

\cite{75} Prosecutor v Jelisic (Trial Judgment) para 61 and dissenting judgment of Judge Shababuddeen, p 21; \cite{76} Prosecutor v Tadić, ICTR-94-1-AR72, Trial Chamber, Decision 2 October 1995 (hereinafter ‘Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)’) paras 71-142.

\cite{77} Both arts 21 and 22 contain rules on adherence to the international human rights standard and rules prohibiting discrimination on any basis of gender or religious etc and rules on strict interpretation favouring the accused in cases of ambiguities.

\cite{78} The Vienna Convention makes no reference to the ‘literal/textual’ interpretations, but art 31(1) refers to the ‘ordinary’ meaning to be given to the terms of the Treaty; William Schabas, ‘National Courts Finally Begin to Prosecute Genocide, the ‘Crime of Crimes’ (2003) 1 JICJ 855.


\cite{80} G Fitzmaurice, ‘Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points’ (1951) 28 British Yearbook of International Law 1-28, 2.

\cite{81} ibid; H Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 BYbIL 48-85, 52.

\cite{82} Hans Kelsen, \textit{The Law of the United Nations} (Stevens & Sons Limited 1950).
the efforts of the experts to reconcile the views of the UN member states, and the Preparatory Commission’s documents on preparing and developing the Rome Statute for the extensive legal expertise of the participants and their awareness of the ICTY and ICTR, as well as the knowledge that they are drafting international criminal law instruments for a court with a permanent jurisdiction. The second category includes treaties and conventions and the international courts’ case law in this matter. These sources will assist in ascertaining the evolution, purpose, interpretation, and policy concerns that influenced the various different stands.

Although the primary sources are adequate by themselves as far as the literal reading of the law is concerned, it is of paramount importance to revert to secondary sources. This observation is made in the light of the fact that often the concepts and standards that are embodied in the international conventions, legislation, and cases will have been investigated, analysed, and elucidated by many different authors in a variety of contexts and from wide-ranging perspectives. Therefore, these writings constitute an important resource for understanding and elaborating the principles in the primary legislation.

This immense literature of treatises and journals articles devoted to the question of international criminal law in general, and genocide in particular, and in addition the literature of the international agencies both inside and outside the UN system, must be used. This thesis contains a chapter critiquing the views of those commentators who make reliance on these secondary sources indispensable. However, this presents a difficulty for any attempt to deal intelligently with this mass of information and ideas. Conversely, it allows the research to cover the research subject comprehensively by having recourse to these materials. For example, NGOs had a significant role to play in the development of the genocide laws and they issued detailed position papers on every aspect of the Rome Statute. Furthermore, it is also contemplated that national case law will be utilized; for instance, cases from Israel

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83 Grover (n 74) 552.

and Germany will offer invaluable insights into different opinions surrounding the ‘contextual elements’ of genocide.\(^8\)

The research will also rely on press releases and publications from the ICC, UN, and other interested organizations to draw comprehensive arguments on the issues in question. The thesis acknowledges here that there are important contributions that have been made in many different languages, and the presumption that English is an internalized language does not remove the obligation to deal with other languages such as those used in national cases and academic opinions from other jurisdictions. This can present a problem of access to materials, but efforts will be made to search for translated materials since, even if they not suitable for reference, they can present a valuable view that would not otherwise be present.

### 1.6 The contribution and significance of the thesis

To date there has been no comprehensive study addressing solely the issue of the ‘contextual elements’ of the crime of genocide, other than a handful of articles and book chapters\(^8\). However, the majority of these evaluations have tackled the issue of context from a preconceived angle or through the examination of one of the constitutive elements of the crime and their meanings, such as the mental element (the intent to destroy) or the requirements of destruction (in whole or in part) and the

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object and purpose of the Genocide Convention and whether genocide requires one specific contextual element such as state plan.\textsuperscript{87}

This thesis tackles the issue in a more inclusive manner by dissecting the question of the ‘contextual elements’ as a separate question from the other constitutive elements by tracing the need for contextual elements from the inception of the concept of genocide to the current form represented in the Elements of Crimes. Consequently, by so doing, the thesis contributes to the literature by elaborating the legal and the theoretical arguments surrounding the significance of the ‘contextual elements’. Understanding of the legal value of the contextual elements of genocide is important because it leads to examination of the normative character and the conceptual challenges of the definition of the crime of genocide.

This will be done by a definite clarification of the position of context and will consequently allow the courts to avoid holding individuals culpable by mere association. Because the schism between the legal and the social definition of genocide lies in the inclusion or exclusion of the contextual elements as a legal ingredient, this thesis will cement the principle of legality by demarcating the boundaries between the legal and social definitions of genocide. Furthermore, establishing a clear and precise position for the contextual elements also brings about the definitive realization as to whether genocide should be interpreted so broadly by the inclusion of contextual elements as a constitutive element. Consequently, some perpetrators of genocide escape punishment because their acts do not fit within the overall context or punish others by mere association because their acts fall with the said context, and by the disregard of the fact that genocidal intent is based on the personal acts/conduct of the accused. Or, alternatively interpreted so narrowly by the exclusion of the context and thereby correctly apply the law as it stand and adhere to the rule of law by guarding the legal rights of the accused.\textsuperscript{88}

Therefore, the importance of this thesis lies in shedding particular light on the contextual elements of genocide and in drawing a definitive conclusion to the question whether the context of genocide is a legal ingredient of the crime. Hence, \textsuperscript{87} ibid. \textsuperscript{88} \textit{Prosecutor v Kayeshema Ruzindana} (Trial Judgment) 21 May 1999, paras 527-540; \textit{Prosecutor v Simba} (Trial Judgment) 13 December 2005, para 416; \textit{Prosecutor v Ndindahabizi} (Trial Judgment) 15 July 2004, para 463.
this research aims to conduct an in-depth analysis and breaks new ground by establishing a definitive position to the effect that the contextual elements of genocide are not formal ingredients of the crime and that there is another logical interpretation which requires no such encroachment on the constitutive elements of the crime, such as consideration of the genocidal context as necessary elements for alleging the crime of genocide, and establishing the secondary liability, or requiring such element as jurisdictional limitation to the international courts and tribunals. Such a finding has practical and intellectual significance in the context of the legal deliberation of judicial bodies which are currently adjudicating international crimes and in the subsequent practice of international/ized tribunals and academics around the world and above all the permanent ICC.

1.7 The organization of the thesis

This thesis consists of five chapters excluding this introductory chapter and the concluding chapter. To achieve its objectives, the thesis is structured to cover, in Chapter 2, an examination of the nature and the difficulties of the contextual elements, through a detailed examination of how the concept of the context of the crime of genocide can be defined and the difficulties associated therewith. In this chapter, ‘context’ is grouped into three identifiable elements – genocidal pattern, scale and magnitude, and plan or policy – that are deemed to be inclusive of all the other elements, and it concludes by presenting the raison d'être for the place of contextual elements among the core international crimes in general. Chapter 3 will examine the position of the contextual elements in the early concept of genocide prior to the codification of the word and through the lens of the Travaux Préparatoires of the Convention and the development in the subsequent period following the ratification of the Genocide Convention, with a significant focus on the work of the ILC, and on the academic opinions and court decisions of that period.

Chapter 4 will address the question of context in the jurisprudence or the case law of the ad hoc tribunals in order to appreciate the position of the contextual elements of the crime from the assessment of the definition of the crime in practice. Here, the cases will be rigorously analysed and systematized to ascertain firstly how context
was defined as a concept and applied in practice, whether there is any agreement for consideration of the contextual elements as part of the constitutive elements of the crime, and what judicial justifications were given in those cases or whether they simply amounted to interpretative contortion of the definitions wordings to fit the facts of the cases before the court.

Chapter 5 examines the orientation of the Rome Statute towards a new assessment of the contextual elements of the crime of genocide, by elaborating and highlighting its evolution and inclusion in the Elements of Crimes of the Rome Statute and elucidating its features and relationship as an element of the crime of genocide. The chapter will conclude with the question whether the Rome Statute’s characterization of context represented a new assessment of the contextual elements of the crime of genocide or whether it incorporated a wholly new reason that was not contemplated when the Genocide Convention was drafted.

Finally, Chapter 6 seeks a critique of the contextual elements by reviewing the legal and the theoretical arguments about the significance of the contextual elements. The research aims here to conduct an in-depth and inclusive analysis of all the legal authorities and the academic literature in the field to determine the effect of the ‘contextual elements’ in the understanding of the crime of genocide and the prospect of its existence and whether they are truly required in the first place. The thesis will conclude by making a summation and affirmation of the fact that the cumulative findings of the research lead to the conclusion that the contextual elements of the crime of genocide are not part of the constitutive elements of the crime of genocide, but do have practical implications.

Each of the chapters addresses a distinct conundrum. It is worth noting here the absence of academic opinions or judicial decisions in the first two chapters because the thesis is structured so as to address the question of the role of context in the development of the concept of genocide. Therefore, the chapters are either period-specific or institution-specific. Accordingly, the contentious issues in the academic debate and judicial decisions are limited as per the chapter’s limitation. However, this structure deals with context at all stages of the evolution of genocide as a concept, and therefore plan or policy as contextual element for instance, is dealt with
in Chapter 3 in the light of the _Travaux Préparatoires_ of the Convention and the same issue is dealt with again in Chapter 4 in the light of the prevailing case law.

### 1.8 Terminological references

To clarify the terminologies adopted throughout this research, when the thesis refers to the legal definition of genocide, it means the Genocide Convention’s definition by default, and any reference to ‘Convention’ is the Genocide Convention. In Chapter 5 any article without a treaty reference is referring to the Rome Statute. Also the dichotomy between the Convention’s definition and any other common parlance definition of genocide is noted by prefixing the word ‘social’ to any other definition outside the Convention’s definition, but when the genocide definition is referred to, it means the Convention’s definition and all other instruments with a verbatim reproduction of the Convention’s definition\(^89\).

The thesis will use the terms ‘specific intent’ and ‘genocidal intent’ interchangeably to describe the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such\(^90\). In pursuing the discussion on the contextual elements of genocide, the terms ‘genocidal campaign’, ‘genocidal context’, ‘collective act’, and ‘general context’ are used to mean contextual elements of genocide. The terms ‘contextual element’, and ‘context’ are also used interchangeably to mean the element common to all of the contextual elements that have been suggested for the crime of genocide, such as ‘pattern’, ‘plan and policy’, and ‘magnitude or scale’. When the same terms are employed in relation to other crimes, such as crimes against humanity and war crimes, it refers to their respective contextual elements\(^91\).

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\(^89\) The national definitions deviated from the Convention’s definition by the inclusion or exclusion of some of the elements of the definition of the Genocide Convention, but these will be treated as social definitions for the purpose of this study. For examples, see the French Penal Code (Penal Code (France), Journal Officiel, 23 July 1992). The English translation of the Turkish text can be found at [http://www.tuerkeiforum.net/enw/index.php/Translation_of_selected_Articles_of_the_Turkish_Penal_Code](http://www.tuerkeiforum.net/enw/index.php/Translation_of_selected_Articles_of_the_Turkish_Penal_Code) (last accessed 7 January 2011). Other instruments with verbatim reproduction are as per the ad hoc Tribunals’ Statutes.

\(^90\) _Prosecutor v Jelisic_ (Appeal Judgment), para 45.

\(^91\) See above section 1.2.
CHAPTER 2: THE NATURE AND DIFFICULTIES OF THE CONCEPT OF ‘CONTEXTUAL’ ELEMENTS

2.1 Contextual elements in international crimes

2.1.1 The concept of ‘contextual elements’: conceptual ground clearing

This chapter focuses on the nature, the inherent characteristics, and the difficulties of the concept of ‘contextual elements’ in the crime of genocide. It requires tracing back to the origin of the concept of context and its elements and its uses in relation to international crimes in general. This is especially relevant in order to answer the question whether any context is part of the constitutive elements of the crime of genocide, given that it has not been expressly provided for – at least in the literal definition of this crime – in any international instruments.1

The concept of ‘context’ is a frequently used term in various disciplines,2 but it has remained an ill-defined concept.3 In the international law field, the concept is provided for in various definitions of international crimes such as crimes against humanity and war crimes. Nevertheless, there is no agreed definition of the concept in the legal field as such. There seems to be an assumption that it is an obvious concept. Therefore, it is necessary to ask what a ‘contextual element’ is. This requires consideration of the components of this concept within the milieu of criminal law by disentangling the combination of the terms ‘contextual’ and ‘element’. Etymologically, the meaning of the term ‘contextual’ is derivative of a context, which according to the Oxford English Dictionary means ‘the circumstances that form the setting for an event, statement, or idea, and in terms of which it can be fully understood’;4 the term originates from the Latin ‘contextus’, from ‘con’

1 Statute of the ad hoc tribunals; Rome Statute of the International Criminal Court. Some national codes departed from the Convention definition of genocide, such as the French Penal Code and the Turkish Penal Code. The Rome Statute’s inclusion of the Elements of Crime as an annex is discussed in detail in Chapter 4.
3 Bazire and Brézillon (n 2) 29.
meaning ‘together’ and ‘texture’ meaning ‘to weave’ – or in other words, to weave together the circumstances that form the setting of something with that thing itself.

‘Element’, on the other hand, means one of several parts that unite to form a whole: a fundamental, essential, or irreducible constituent of a composite entity. In this case, it means a component of the context of a crime. Werle has stated that the term ‘element’ was chosen because it was more appropriate than ‘an act’ but it means ‘an overall act’ or ‘contextual act’. Werle’s assertion on the appropriateness of the word ‘an element’ as opposed to ‘an act’ can be demonstrated by the fact that not all components of the ‘context’ of a crime are acts; for instance, they may be patterns or more clearly widespread or systematic. Therefore, an ‘element’ means one component of the context of a crime; elements such as patterns, scale, or any attendant circumstances or acts, such as the act of being selective with victims or the fact that the language used was derogatory.

Hence, in a criminal law milieu which focuses on the criminal prohibition of certain acts or omissions, ‘contextual elements’ are best characterized as any kinds of information, facts, or elements that can be used to characterize the overall background circumstances of the criminal act or omission, including the set of circumstances that are present before and after the act or omission, such as genocidal policy in the crime of genocide or widespread and systematic attacks in crimes against humanity or armed conflict in war crimes. Any of these elements might include various other elements that can be grouped under a single phrase such as ‘widespread and systematic attacks’; for instance, widespread is understood to be

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5 ibid.
6 ibid.
8 The ICTY called the component of the context of crimes against humanity as elements and subdivided it into five elements, see Kunarac (Appeal Judgment), para 85 (and references given therein); Kunarac Trial Judgment, para 410. The American Penal Code described the attendance circumstance of the crime as an objective element of the crime.
9 Prosecutor v Akayesu (Trial Judgment) paras 78-111 looked at the background and the historical event in Rwanda; in Prosecutor v Kayeshema (Trial Judgment), the court looked into the event and whether genocide occurred in Rwanda at all (paras 31-54) and a similar method was used by the ICTY in Prosecutor v Krstic (Trial Judgment). Also, Maria Kelt and Herman Von Hebel, ‘General Principles of Criminal Law and the Elements of Crimes’ in RS Lee and others, The International Criminal Court: Elements of Crimes & Rules of Procedure & Evidence (New York 2001) 13, 15, 28; Valerie Oosterveld, ‘The Elements of Genocide’ in RS Lee and others, The International Criminal Court: Elements of Crimes & Rules of Procedure & Evidence (Transnational Publishers 2001) 45.
massive and large in scale and carried out collectively against more than a person,\textsuperscript{11} and systematic as a concept is defined as a carefully organized plan, following a specific pattern or preconceived policy\textsuperscript{12}. The content of the term ‘contextual element’, therefore, refers to one or more factual circumstances that can be used to define the overall context, hence, difficult to predefine.

One of the common uses of context is, its use as the historical background or circumstances of an event or statements that are used to make an allegation and call for examination of it in the light of these historical backgrounds\textsuperscript{13}; or context could be used as evidence to characterize the different angles of looking at an event or a statement from that of the author of the event or the statement\textsuperscript{14}. Alternatively, context can be used as a means to emphasize the different aspect of the event, the entity, or the statement from other general ones or to render it different from other things that otherwise look similar\textsuperscript{15}.

From the standpoint of jurisprudence, the relevance of context seems to derive from the fact that the context gives a narrative or history of the event surrounding a particular act. Therefore the relation stems from the extent to which it provides an understanding of a particular event or words or the extent to which it can act as a medium that allows us to distinguish and emphasize the difference between events, statements, or facts or their difference from other similar ones. The existence of armed conflict in war crimes, for instance, extends the threshold of humanitarian protection only against those acts that are found to have been facilitated by the conflict or provided an opportunity for their perpetration to further the purposes of the conflict\textsuperscript{16}.

\textsuperscript{11} Akayesu (Trial Judgment) para 580; Rutaganda (Trial Chamber) (6 December 1999) para 69; Musema (Trial Chamber) (27 January 2000) paras 204; Ntakirutimana and Ntakirutimana (Trial Chamber) (21 February 2003) para 804.

\textsuperscript{12} Akayesu (Trial Chamber) (2 September 1998) para 580; Kayeshema and Ruzindana (Trial Chamber) (21 May 1999) paras 124, 58; and Semanza (Trial Chamber) (15 May 2003) para 329.

\textsuperscript{13} Prosecutor v Kayeshema & Ruzindana (Judgment) ICTR 95-1-T, J 274 (21 May 1999).

\textsuperscript{14} Prosecutor v Karemera et al ICTR 98-44-AR73(C) (Decision on the Prosecutor's Interlocutory Appeals of the Decision on Judicial Notice, 36) (16 June 2006).

\textsuperscript{15} Minow and Spellman (n 2) 1602, 1602-1603.

\textsuperscript{16} Prosecutor v Akayesu (Trial) paras 638-644; Decision on the Defence Motion for Interlocutory Appeals on Jurisdiction, Tadić (IT-94-1) (Appeals Chamber) 2 October 1995, para 70 and Prosecutor v Norman and others, Decision on Appeals Against the Decision on the Prosecution’s Motion for Judicial Notice and Admission of Evidence SCSL-2004-14-AR73, ICL 401 (SCSL 2005).
Thus, the situational circumstances or the context surrounding the manifestation and progression of the crimes allows such differentiation between the constituent elements of national and core international crimes. Therefore, the contextual elements of a crime assist our understanding of criminal conduct, which would otherwise appear to be an isolated perpetration of a common crime under the national jurisdiction. The Trial Chamber held in Tadić that an act must occur on a ‘widespread basis or systematic manner’ regardless of any motive behind taking part in the attack, relying on its constitutive statute, a finding which was also confirmed by the Appeals Chamber. Sluiter contended that the court was not clear on how such a reading of the definition of crimes against humanity can be justified because it was not clear that this was part of customary international law at the time of the crime. However, what is certain is that without such contextual elements, both crimes against humanity and war crimes would be assimilated with national crimes due to lack of variance.

There is little indication in academic writing and judicial reasoning as to what exactly contextual elements of genocide are and what exactly they encompass, so that the absence of unified meaning and intent has led to the divergence of views and meanings at least in the pre-Rome period.

2.1.2 The different roles of contextual elements: constitutive, jurisdictional or evidentiary

In the milieu of criminal law, context seems to have three functional aspects: formal elements of the crime (and thereby provided for in the definition of the crime); jurisdictional elements; and evidence from which the formal elements are proven. In respect of genocide, no such pronouncement has been made on the definition of the

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17 Tadić (Trial Judgment) paras 618 and 626; Kupreškić (Trial Judgment) para 543; Blaškić (Trial Judgment) paras 201–214; Kordić and Ćerkez (Trial Judgment) paras 172–187; Jelisić (Trial Judgment) paras 50–57; Kunarac (Trial Judgment) para 410; Krstić (Trial Judgment) para 482; Kvočka (Trial Judgment) para 127; Kromojelac (Trial Judgment) para 53; Tadić (Appeal Judgment) paras 247–272; Kunarac (Appeal Judgment) paras 82–105. In the jurisprudence of the ICTR, see eg Akayesu (Trial Judgment) paras 563–584; Musema (Trial Judgment) paras 199–211; Rutaganda (Trial Judgment) paras 34–35; Kayeshema and Ruzindana (Trial Judgment) paras 119–134; Akayesu (Appeal Judgment) paras 460–469; Semanza (Trial Judgment) para 326.

18 Prosecutor v Tadić (Trial) para 646 and (Appeals) 248.

crime; thus, at least literally, the concept of context can only have the latter two functionalities.

It is therefore necessary and judicious to consider briefly the distinction between constitutive, jurisdictional, and evidentiary elements of a crime, because contextual elements can be constituent or jurisdictional element or have evidentiary functions and effects at the same time. This dichotomy is not clear from the general use of contextual elements in the case of genocide; in some instances, they were referred to as evidence of intent and in other instances as necessary elements that need to be proven without explicitly alluding to whether they constitute part of the legal definition of the crime.

This distinction is also important in international law, since unlike the national rules of evidence – where there is no principle of free evaluation of evidence and a strict set of exclusionary rules – in all international criminal charges there is a tendency to include all the contextual circumstances, because of the insufficiency of individual misconduct to lay out the whole context within which the alleged international crime is committed. Additionally, the difference between evidence and constituent elements is important because each has a different function in a legal case.

Accordingly, the constitutive elements of a crime are those parts that constitute the legal ingredients of the crime that have to be proven by the prosecution in determination of the innocence or guilt of the accused or, in other words, those elements to which the law attaches some legal consequences. The courts or the adjudication process are always concerned with discovery of those constitutive elements, if the contextual element of genocide has such a character, so that they must be objectively identified as part of the material elements of the crime which need to be reflected in the perpetrator’s state of mind. Thus, all the constitutive

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22 AAS Zuckerman, The Principles of Criminal Evidence (OUP 1989) 22; see also ICTY RPE Rule 89(c) which is identical to ICTR RPE which allows the admission of any evidence that has probative value.

23 Zuckerman (n 22).
elements must be present or are proven beyond reasonable doubt as stipulated by the law. These elements are usually established by one or many evidentiary facts or elements which might include – but which are not limited to – the contextual elements of the crime in question.

The jurisdictional power of a court normally derives from the constitutive documents of the court and the definition of the crime within their respective constitutive statutes – especially in cases of international tribunals and courts. Therefore, some elements within the definition of a crime constitute a jurisdictional element with no legal value in terms of the wrongfulness or the blameworthiness of the criminal act in question. But this does not mean that they are not part of the constitutive elements of the crime; therefore, an element can have a double function as a jurisdictional prerequisite and a substantive element of the crime. The Appeals Chamber of the ICTY in Mladen Naletilić and Vinko Martinović held:

The fact that something is a jurisdictional prerequisite does not mean that it does not at the same time constitute an element of a crime.

Evidence, on the other hand, is defined as a relative concept which signifies the relationship between a proposition that needs to be established (a fact in an issue) and material supporting that proposition (an evidentiary fact). In contrast, evidence is linguistically defined as, ‘Information given personally, drawn from a document, or in the form of material objects, tending or used to establish facts in a legal investigation or admissible as testimony in court’. Accordingly, evidence is an element or a fact that provides proof to the tribunals to establish the constitutive elements or some other elements or a fact from which constitutive elements can be inferred. The precise definition of evidence can be ascertained with clarity from Hohfeld’s formulation:

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26 Mark Klamberg, Evidence in International Criminal Procedure: Confronting Legal Gaps and Reconstruction of Dispute Events (PhD thesis in Public International Law, Stockholm University, Sweden 2012) 95 (copy with the author).


An evidential fact is one which, on being ascertained, affords some logical basis – not conclusive – for inferring some other facts. The latter may be either a constitutive fact or an intermediate evidential fact. Therefore, evidence denotes something that is not essential, that helps us find an operative factor. Thus, the evidentiary relevance of the contextual elements of crime is found only in the extent to which they can provide an understanding of a particular allegation before a court of law. This functional aspect of the contextual elements should always be kept separate and measured by their ability to assist in the explanation of a statement or an event, or to reinforce the plausibility or evaluation of some other evidence.

In this regard, it is worth mentioning that contextual elements can always have evidentiary value as far as allegation of the international crime is concerned – as opposed to individual perpetrator crime – regardless of their position within the definition of a crime, and that might be the reason why they are not codified in any way in respect of the crime of genocide. It can therefore be said that the distinction between these three elements is difficult because they are intricately related, and thus a sharp distinction is not always judicially beneficial. However, this distinction is required here because this thesis explores the contention that the crime of genocide requires contextual elements as a constitutive element, as with other similar international crimes, such as crimes against humanity and war crimes.

2.1.3 *The different facets of ‘contextual elements’*

When the contextual elements are included within the constitutive elements of a crime in general, not all the attendant circumstance of that crime can be included within the contextual elements due to the indeterminacy of the context of any crime. In a case where the context is defined as an element such as widespread or systematic, its constituent boundaries still remain difficult to define with any degree of certainty required in criminal law. Hence, contextual elements can be independent of the alleged criminal act or omission on which the criminal charges are based. For instance, in cases of genocide, there can be a plan and a policy that is detached from

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the perpetrator’s own control or which may be totally unrelated to either the perpetrator or the alleged act.

In international criminal law, the context can be a result of the acts or omissions of some other unnamed individuals who are not even indicted in the case in question or are not even known to anyone. Or the context can be the result of other external factual circumstances that are not static or particular to any crime but are factual circumstances in constant flux dependent on whom, when, where, and why a prohibited act takes place, such as the general political doctrine, the region where the crime took place, or the general nature of the acts, plan, or policy.30

Both ICTY and ICTR jurisprudence have contended that the context of a crime consists of a combination of contextual facts, some of them directly resulting from the perpetrator’s acts or omissions or those of other perpetrators who are not related in any way to the perpetrator standing before the court but which can be considered (together with the surrounding circumstances) with the acts or omissions being attributed to the accused. For instance, the act of systematically directing an act against one protected group, or selecting the victims of one group by excluding others, and the committing of large-scale and repetitive acts, or uttering of an intention can be acts of the accused or acts existing outside the act in question.31 These facts can be attributed directly to the accused and may be relevant to the acts and omissions of the accused which are under consideration. It can also be utilised as a filter that defines, what knowledge the perpetrator must have had at a given time, that needs to be taken into account in separating those acts and omissions from those of which the perpetrator might deny all knowledge or intention.

On the other hand, there are the external contextual elements that can include facts that are unknown by the perpetrator or that cannot be said to focus directly on his intended acts, such as widespread or systematic attacks, or armed conflict, or a genocidal campaign which cannot be attributed to a single individual because those

30 Prosecutor v Akayesu (Judgment) T, para 523; Prosecutor v Jelisić (Judgment), T, para 73; Radovan Karadžić, Ratko Mladic case (Cases Nos. IT-95-5-R61 and IT-95-18-R61), Consideration of the indictment within the framework of Rule 61 of the Rules of Procedure and Evidence, paragraph 94.

31 Prosecutor v Akayesu (Judgment), T, para 523; Prosecutor v Jelisić (Judgment) (Consideration of the indictment within the framework of Rule 61 of the Rules of Procedure and Evidence) para 94. Note that the court in Akayesu did not refer to those acts as context but other factors.
facts by their nature imply a collective act\textsuperscript{32}. Or even the scale of a crime may require more than an event to take place in one locality.

Therefore, it is important to consider context in this way when assessing the acts of the accused, because not all external contextual factors can be known to the accused and can have a direct effect on the events that are under consideration; hence, linking them to the acts of the accused may depend on the dynamics of the contextual elements as a whole. Context means different things to different people, at different levels (for instance, heads of state and foot soldiers).

\textbf{2.1.4 Difficulties with the concept of contextual element}

The main difficulties with the contextual elements of genocide arise from the fact that there is not one element and that there is no unifying singular element that can be examined and investigated, but rather there is a collection of elements. The description given by the Rome Statute on the Elements of Crimes is consistent with similar formulations by the courts and the academics alike but is woefully lacking in terms of clarity and content.

In the case of genocide, the notion of context seems to have grouped different factors under one heading to extract an idea or meaning or to be used to make a claim. In criminal law in general, the contextual elements and their relationship to the criminal act or omission are imprecise and difficult to establish because this involves looking at a number of factors, including the perpetrator, the milieu of the conduct, the interactions, the situation, and the victims\textsuperscript{33}. In addition, context is a relative concept, so that its significance and meaning is dependent on a subjective assessment that cannot be avoided. The ICJ’s Judgment in the case of \textit{Croatia v Serbia} stated that from the seventeen contextual factors presented by Croatia to establish the context, only those concerning scale and systematic nature of the acts were relevant contextual factors to establishing specific genocidal intent\textsuperscript{34}.

\textsuperscript{32} \textit{Prosecutor v Karemera et al ICTR 98-44-AR73(C) (Decision on the Prosecutor's Interlocutory Appeals of Decision on Judicial Notice, 35) (16 June 2006)}.

\textsuperscript{33} \textit{Prosecutor v Akayesu (Judgment) 523; Prosecutor v Jelisić (Judgment) 73; Prosecutor v Ratko Mladic 94}.

\textsuperscript{34} Application on the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Judgment) [2015] ICJ Report, para 413.
Therefore, it is not challenging to see the arduous task that might result from establishing such imprecise contextual facts, coupled with the criminal law requirement for the prosecutor to prove beyond reasonable doubt all the constituent elements of a crime. It is a violation of the most basic principle of criminal law – *nullum crimen* – to find guilt in the absence of any of the constituent elements of the crime of which the accused is charged.

It cannot be determined when the context begins and when it ends. Context can have infinite dimensions and cannot be completely ascertained in one definition. For instance, in war crime cases, the ICTY made some suggestions as to the beginning and end of armed conflict in war crimes, but it did not remove the need for subjective assessment of those contextual elements due to the lack of legal precision. It stated that armed conflict starts from the initiation of armed conflict and continues until the cessation of hostilities and ends with the conclusion of a peace settlement. The relationship to the crime is not governed by an objective standard because determining this relationship is in itself context-dependent. For instance, how many attacks (that is, the precise number) are required to qualify as widespread attacks? The ICTY in *Blaskić* made this very clear when it contended that there is no objective test for attacks being widespread, and held:

> The quantitative criterion is not objectively definable as witnessed by the fact that neither international texts nor international and national case-law set threshold starting with which a crime against humanity is constituted.

Similarly, what constitutes a pattern? It is not impossible to place an individual perpetrator’s acts or omissions within a chain of events that can qualify as a pattern for any international crime. However, this bring into the equation an objective requirement of determining what constitutes a sufficient series of events for them to form a chain of events that can qualify as a pattern of genocide. Oosterveld observed that a pattern can be created from all of the five genocidal acts listed in article 2(a)-

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35 *Tadić* (Jurisdiction Decision) para 70.
38 *Blaskić* (Trial Judgment) para 207.
(e). However, regardless of the individual and collective pattern, the question of how similar the acts need to be in order to form a chain which constitutes a pattern is another conundrum. Can it be a pattern of collective acts that are different in character but which lead to the same result, or can it be a collection of any similar acts?

The reasoning is that crimes against humanity must include a contextual element as a constitutive element to explain the mass or systematic criminality aspect of the crime. In crimes against humanity, the condition of applicability – the contextual element – is contained in a bundle of substantive elements that must be proven beyond reasonable doubt by the prosecution in order to secure conviction. The war crimes include the nexus or a relation to war, as a conceptual constitutive element which requires other facts to be established to find war crimes.

The contextual element is an open concept that can be used subjectively by the judiciary since it can be inferred from the facts themselves. So not only does the contextual element require strict demonstration, but the constitutive elements of the ‘contextual element’ in question need an application of the same standard that is required in criminal law cases. For instance, the ICTR in Akayesu did not accept that the nexus linking Akayesu to the internal armed conflict in Rwanda was sufficiently well established by the prosecutor, despite the fact that he was carrying a rifle and wearing an army uniform. Cassese, similarly, contended that the International Military Tribunals (hereinafter ‘IMTs’) in war crimes cases found the link to war in an unscrutinized manner, so that even the seizure of personal property for personal gain can be considered as a war crime.

It can therefore be said that the courts in most cases are selective as to the interpretation of the contextual elements surrounding the perpetration of a criminal act and they use only those which are capable of justifying their reasoning, so that

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39 Oosterveld (n 9).
40 Prosecutor v Kayeshema Racindana (Trial) para 123; Akayesu (Trial Judgment) paras 579-580; Mussema (Trial Judgment) paras 202-204.
41 Prosecutor v Tadić (Opinion and Judgment) IT-94-1-T (Intl Crim Trib former Yugo, Trial Chamber II, 7 May 1997) 235, para 625.
42 Prosecutor v Akayesu (Trial) paras 638-644.
there is a lack of objective recourse to those elements individually or collectively. However, at least in the cases of war crimes and crimes against humanity, a certain limit is placed upon the judiciary’s ability to be selective by the fact that the contextual element is enshrined in the statutes of the tribunals. Accordingly, selectivity and discretion is limited by the express wording of the definition of the crime. However, in cases of genocide, there is very little guidance on what the contextual elements are or how they can be interpreted, even if agreement is reached on what is the context, thereby making the task of defining and determining the contextual element of genocide and its legal value a very challenging task.

According to the laws of the international tribunals, one can see the difference in the application and assessment of the contextual element. War crimes can only be committed if there is a material link to war.\textsuperscript{44} This is in contrast to the crimes-against-humanity requirement of the context only being in the background of the events that the accused is being tried for, in addition to the mere knowledge of this background\textsuperscript{45}. The ICTR in the case of \textit{Akayesu} was more forceful in defining the level of the nexus required: ‘The term “nexus” should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be established factually.’\textsuperscript{46}

It can be noted here that the ad hoc tribunal aggregated all the contextual factors that would in general be relevant to the question under consideration and strove to extract the common context from all the other contextual factors to form a basis on which to make the final decision on the matter. However, the contextual evidence on the other hand includes all the surrounding acts and circumstances (pattern, magnitude, plan and policy, etc), so they cannot be exhaustively enumerated or coherently applied according to a uniform rule. The difficulty here is that genocide can take place in the context of war crimes or crimes against humanity or any other context. For example,

\textsuperscript{44} \textit{Kunarac} (Trial Judgment) para 568; \textit{Tadić} (Jurisdiction Decision) para 70; \textit{Blaskic} (Trial Judgment) paras 63-65; \textit{Celebici} (Trial Judgment) paras 182-5 and 193-5.\textsuperscript{45} \textit{Tadić} (Appeals Judgment) para 205.\textsuperscript{46} \textit{Kayieshema} (Trial Judgment) para 188.
the pattern of atrocities in the Former Yugoslavia was categorized as ethnic cleansing but as genocide as well in some municipalities.\(^{47}\)

However, the difficulty with the contextual elements is, for instance, how in practice can one determine what constitutes a pattern? Can pattern be temporally and geographically limited? And can any repetition of an act suffice? The task is even tougher because genocide can be committed in an indefinite number of ways that can only be contemplated by the perpetrator alone. However, the plurality of means and the lack of specificity of those means permits the conclusion that the finding of a pattern is the only way that these acts can be meaningfully used in the determination of genocidal intent in general by looking at a genocidal campaign and, individually, by compartmentalizing the individual’s acts into a separate pattern that is suggestive of his intent regardless of the campaign in progress.

Similar difficulties exist among most of the contextual elements. For example, how can a threshold of the magnitude be determined? Can any multiplicity of victims suffice or does there need to be a numerical limit? Can it be one victim, or a thousand? Can it be measured qualitatively or quantitatively? The answers to these questions determine the relationship to genocidal intent. But ultimately what needs to be established is the state of mind of the perpetrator, and anything that can lead to an approximation to that must be considered.

2.2 Does the crime of genocide have a context?

Genocide – as formulated in the Genocide Convention and in its verbatim reproduction in all subsequent instruments – is defined by the intent to destroy a protected group\(^ {48}\). Notwithstanding that genocide is an outgrowth of the crimes against humanity;\(^ {49}\) it lacks any reference to an objective circumstantial threshold which has to exist during its commission, as opposed to crimes against humanity or war crimes\(^ {50}\). The lack of any such references puts the crime of genocide in a

\(^{47}\) Krstic (Trial Judgment) and (Appeal Judgment); Prosecutor v Popović et al (Judgment) Case No IT-05-88-T (10 June 2010) (hereinafter ‘Popović (Trial Judgment)’).

\(^{48}\) The ICTY Statute, the ICTR Statute and the Rome Statute.

\(^{49}\) Kambanda (Trial Judgment) para 16; Kayishema (Trial Judgment) para 89.

\(^{50}\) See Chapter 1, section 1.2.2, also note that the cases of Jelisić and Akayesa made it very clear that genocidal intent is required on an individual level and that this has nothing to do with the collective action.
separate category to the other international crimes because it allows for an isolated act to qualify as an international crime provided that the necessary intent can be established\textsuperscript{51}.

\textit{2.2.1 The suggested contextual elements for genocide}

The perceived common foundations of genocide as a mass crime coupled with an analysis of the specific intent required for genocide were found to be the reasons why genocide failed to detach itself from association with the context of the crime in the judicial and academic sphere despite the lack of any reference to such context in the definition\textsuperscript{52}.

The association of genocide with contextual elements is problematic not only because of the lack of express provision, but also because the plurality of those elements makes it more challenging to decide with legal certainty what those contextual elements? Even those codified contextual elements in war crimes and crimes against humanity require other context-related elements for their establishment. Hence, in the case of the crime of genocide, the conundrum is: what is/are the ‘contextual element/s’? How do we determine them if there is no one or set of pre-agreed circumstances, facts, or elements that qualify as the genocidal context?

The recent Elements of Crimes of the Rome Statute have partially resolved the issue to the extent of establishing what should be the contextual elements of genocide in cases arriving before the ICC. They state that for an act to qualify as genocide the conduct has to take place in the ‘context of manifested pattern’ or the conduct of the accused could in itself bring about the intended destruction\textsuperscript{53}. The legal position of those elements is not clarified as far as the legal ingredients of the crime are concerned, and thus it is not a settled case at the moment\textsuperscript{54}.

To explore the nature and difficulties of establishing the contextual elements of genocide, it is indispensable to look at the suggested contextual elements and their

\textsuperscript{51} Jelisić (Trial Judgment) para 400.
\textsuperscript{52} Chapter 3 deals with this aspect.
\textsuperscript{53} ICC Elements of Crimes, art 6.
\textsuperscript{54} Art 9(3), however, stipulates that the ‘Elements of Crimes … shall be consistent with this Statute’, thus reinforcing the implicit primacy of the latter in the event of inconsistency. Also see Chapter 4 for further discussion.
possible relationship to the constitutive elements of the crime of genocide. Because of the lack of any specific definition of what are the contextual elements of genocide, and there is a prevailing indeterminacy that might result from individual consideration of all the circumstances that might surround an act of genocide, but on the other hand, this thesis found that the suggested ‘contextual elements’ can be grouped under three general headings, based on a survey of the case law of the international tribunals and the academics writing on the contextual elements and the ICC’s recent drafting of the Elements of Crimes.

First is the existence of genocidal patterns as intrinsic elements (which result from the criminal acts themselves) that precede and accompany the crime. This includes all those elements that are evocative of group destruction as well as the incremental elements such as propaganda, dehumanization, any selective discrimination, repetitive criminal acts, and utterances by the perpetrator. These are grouped under the umbrella of a persistent pattern of conduct, but the courts specifically failed to define what such a pattern is, in respect of the crime of genocide. The ICJ noted in Croatia v Serbia that both parties agreed that intent can be inferred from pattern without any unified definition or agreement upon its characterization.

However, despite the numerous and repeated references to a pattern of criminal conduct in an effort to establish the crime of genocide or the intent to destroy, the courts failed to specifically define what such a pattern is, in respect of the crime of genocide. In the absence of any legal definition, one can accordingly deduce from the ordinary meaning that a genocidal pattern means sequences of circumstances surrounding the criminal acts or omissions which have enough in common to allow

56 Kayeshema (Trial) paras 541-544 and (Appeals) para 163.
58 In Kayeshema, the Appeals chamber stated that there is no need to define ‘pattern’ if the court used it as evidence from which intent can be inferred (para 163). However, the court was making such a statement not to clarify what pattern is but in response to the claim of the accused that failure to define it was a reason for his acquittal, so it is reasonable to assume that the court can define it, but its failure to do so must not be a reason to disregard the definition of pattern even if it has evidentiary value only.
the logical determination that a group is being destroyed. Thus, these circumstances are said to exhibit characteristics suggestive of intentional group destruction and for this reason are considered as a genocidal pattern. Hence, pattern is an open list in which the court can include whatever is found to be relevant by the court in the particular case under consideration.

Both the academic and the judicial community presume that a natural requirement for an act of genocide to take place is that it has to occur in accordance with a certain pattern of conduct. These assumptions take their validity not from literal legal deduction from the definition of the crime or by being sourced from clear customary law but from the social and historical definition of the crime which includes all mass killings.

One of the difficulties in defining a genocidal pattern is that a specific pattern can only be presumed if the crime occurs in a certain definable manner or using certain methods, from which the pattern of the crime can be ascertained and defined. International crimes in general, and genocide in particular, can be committed in various manners and using various methods, as is shown by the few instances of legally qualified genocide and other socially or historically presumed cases of genocide.

Furthermore, the crime of genocide can be committed by a single person or be effectuated by a single act; therefore, these reasons coupled with the absence of express provision of context in the definition of genocide add further difficulties in ascertaining a definable genocidal pattern of acts or omissions. Because genocide can

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61 For Rwanda the first case that qualified the Rwandan event as genocide was Akayesu (Trial Judgment) para 129 and in same court it was Judicially noted that genocide had taken place in Rwanda in 1994; Prosecutor v Édouard Karemara, Mathieu Ngorunpate & Joseph Nziro, ICTR-98-44-AR73(C), Appeal Chamber, Decision 16 June 2006 (hereinafter 'Karemara (Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice)'). In case of Former Yugoslavia the ICTY acknowledged genocide to have taken place in Serberica in the case of Kristic (Trial Judgment) para 599
62 For instance, in the case of Rwanda, there were clear statements and utterances showing the intention to destroy a group and the collective participation in so doing, but in the case of Yugoslavia, genocide was found to have been committed in only one territory of Srebrenica. Similarly, historical genocides such as the Holocaust were planned and executed by the machinery of state, as opposed to Armenians.
63 Note that during the drafting of the Genocide Convention, France suggested a broad formulation of the genocide definition to include the murder of a single person; see UN Doc p 3 UNGAOR, Sixth Committee (1948), pp 91-92. See also the 2002 German Code of Crimes against International Law, s 6.
64 Genocide can be committed by single act – for instance, by the use of a chemical weapon. Such possibility is acknowledged by the ICC Elements of Crimes in Elements of Crimes, art 6, the last common element.
be a collective as well as an individual enterprise, the existence of a pattern cannot be presumed as a prerequisite; the crime can occur with or without a pattern of conduct. However, the possibility of its existence and the evidentiary value of such cannot be rejected in its totality.

Second, scale and magnitude can be considered as consequential contextual elements (which result from the commission of the crime as consequences), such as the number of victims. The creator of the word ‘genocide’ did not speak about scale or magnitude of destruction of nations and ethnic groups as a prerequisite for the occurrence or criminalization of group annihilation. Lemkin instead talked about: ‘Destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.’

The notion of a quantitative requirement for genocide is the result of the inclusion of total or partial destruction which appeared in the General Assembly Resolution 96(1) which includes the phrase ‘with the purpose of destroying in whole or in part’, clearly stating that the purpose should be the total or partial destruction of a group in quantitative terms as a qualifying element.

However, the drafter agreed to the inclusion of the phrase ‘in whole or in part’ within the final definition of the crime, specifically in the chapeau. Hence, the criteria of scale and number became discernible from the prerequisite that the intent must be to destroy a group ‘in whole’ or ‘in part’, thus implying quantitative criteria as a qualifying ingredient in the establishment of the occurrence of genocide. From the outset, at least, one can argue that the inclusion of the words ‘in whole’ and ‘in part’ warrants a plausible assumption that the quantitative requirement is a prerequisite for the crime’s actus reus or, in other words, that destruction must affect part of the group in order to qualify as genocide with the intent to destroy the group.

Despite the above logic, in the assumption of a quantitative criterion arising from the inclusion of the phrases ‘in whole’ or ‘in part’, the literal reading of the definition suggests that there can be no genocide in whole or in part, because it is not number

that determines the crime and, hence, that genocide can be committed by destroying a small number or even a single person. But others, such as Schabas, argue otherwise. This is the direct result of the indecisive position that stems from the question whether genocide can be committed ‘in whole or in part’. This uncertainty was expressly dismissed by Schabas when he observed that ‘… from a grammatical standpoint, the phrase can just as easily apply to a single act of killing’.

In addition, the view that a single killing could suffice if the other conditions are met was the position of the Appeals Chamber of the ICTY in Jelisić. Similarly the ICTR in Semenza held that ‘… there is no numerical threshold of victims necessary to establish genocide’. As a result, the quantitative requirement that seems to be superficially enshrined in the phrase ‘in whole or in part’ belongs to the mental and not the material elements of the crime of genocide. However, there are commentators such as Cassese who still argue that the Convention’s use of the plural form in the subsection of article 2 suggests a matter of numbers and requires the targeting of more than one individual.

The majority view is confirmed by the Elements of Crimes of article 6 of the ICC Statute which made it clear that killing one person is sufficient.

The final heading is the existence of a ‘plan or policy’ as an extrinsic element (which results from external acts) such as preparation, the organization, and the methods used by the perpetrator the crime. This division of the contextual elements almost corresponds to the Rome Statute’s common elements of the crime of genocide in the Elements of Crimes. Genocide as per the Convention’s definition means that there is

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69 Schabas (n 67) 158.
70 Prosecutor v Jelisić (Appeals Judgment) para 100.
71 Prosecutor v Semenza (Trial Judgment) para 316.
72 Prosecutor v Krstić (Trial Judgment) para 584; Schabas (n 67) 158.
no need for any grand plan to exterminate a protected group; all that is required is the intent to kill one protected person together with the intent to destroy that group.\(^{74}\)

The legal concept, however, failed to free itself from the entrapment of the social concept’s inhibitions, such as the need for plan or policy, or scale or patterns. This association is a direct result of the historical interpretation of the notion of genocide and the raison d’être advanced by Raphael Lemkin.\(^{75}\) The general circumstance, within which the Convention was born, coupled with instances of genocide such as the Rwandan case, highlights the interrelatedness of the notion of genocide with the social concept and explains the slippery slope aspect of the genocidal context which might lead to assimilation of genocide with crimes against humanity by inclusion of all large-scale extermination as genocide.

However, due to this foundational setting in which the crime was born, there has been an assumption that the crime must require more than one person to viably plan, organize, and execute it.\(^{76}\) The need for there to be a plan has persisted because it has not been determined whether genocide requires a perpetrator to have a specific intent with regard to each and every act committed, or whether there needs to be a genocidal plan within which the individual intent can be placed. This argument was advanced in the ICTY appeal judgment by the defendant Tolimir, but the tribunal chose to follow its precedents in favouring the holistic approach to evidence of genocidal intent due to the insusceptibility of genocidal intent to direct evidence.\(^{77}\)

The supporters of the plan requirement state that if the crime is seen as one that can be committed by one individual without the need for any others, this runs counter to the concept of genocide as a mass crime and that proving such intent will lead to an unnecessary examination of the perpetrator’s motives, which are irrelevant.\(^{78}\) Hence

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74 Jelisić (Trial Judgment) para 400.
76 Krstić (Trial Judgment) para 549; Jelisić (Appeals Judgment) para 48; Kayeshema (Trial Judgment) para 94; Jelisić (Trial Judgment) para 101.
78 John RWD Jones, ‘Whose Intent Is It Anyway? Genocide and the Intent to Destroy a Group’, in LC Vohrah and others (eds), Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese vol 5
the consideration of the context in which the crime was committed and all the surrounding circumstance seems to be the norm. The ICTY’s Trial Judgment in *Tolimir* viewed such practice as being ‘in line with the fluid concept of intent’\(^79\).

The difficulty here is to establish what these circumstances mean in terms of determining the guilt of a perpetrator before a court, how do they sit within the material and mental requirements of the offence, and how are they to be proved?. If the crime of genocide is viewed as a macro-criminal phenomenon (to borrow Kirsch’s terminology),\(^80\) then an individual’s intent to destroy a group, is difficult to ascertain without the attribution of such intent to carry out a plan. On the other hand, if genocide is considered to be a crime that is committable on a personal level, then the examination of the perpetrator’s personal intent to destroy necessitates the examination of all the circumstances surrounding the acts, including any plan by the accused only, and not acts of others which are irrelevant as far as the guilt or the innocence of the accused is concerned. Therefore, despite the lack of reference to the contextual elements in the definition of the crime of genocide, the suggested contextual elements have a role to play, but not as a part of the legal ingredient of the crime.

2.3 Why ‘contextual elements’? The rationale, function, and significance of this phrase

This section aims to examine the rationale for the contextual elements in the core international crimes. It aims to establish whether context is required by the nature of the core international crimes. If not, what is the *raison d’être* of context that demonstrates the need for its stipulation in the definition of war crimes and crimes against humanity and not in genocide? And what are the difficulties associated with that?

\(^79\) *Prosecutor v Tolimir* (Judgment) IT-05-88/2-T (12 December 2012) para 772.

All crimes are abhorrent by nature – mass murder, torture, prevention of birth, wanton destruction, and terrorism – but the international community has limited the ICC’s jurisdiction to crimes that took place in specified circumstances provided for in the definition of the crime. What distinguishes crimes against humanity and war crimes from domestic ones is the context of their occurrence which is stipulated in the definition.

2.3.1 The making of the core international crimes

There is the idea that international crimes are criminalized at an international level because of their contextual elements, be it widespread or systematic attacks or armed conflict or patterns of similar acts, and that these characteristics make them shocking to our conscience and affect humanity as a whole. This is offered as a justification for inclusion of the contextual elements with those core crimes.

The international crimes under the customary law and the international instruments show no uniform doctrinal foundation upon which international crimes can be based. International law generally consists of an amalgamation of international treaties, customs, agreements, and specialized courts and tribunals dealing with legal issues arising from those customs and instruments, such as the ad hoc tribunals. However, the adoption of the Rome Statute saw the formation of a permanent court with constitutive documents and a clear direction as to the sources of the law to be relied upon.

The codification of international law is not centralized; nor does there exist any predetermined reason for the inclusion of any crime within the list of international crimes. This fact suggests that the crime of genocide can be codified in its current form without the need for any formal contextual elements to be attached thereto. It also goes against any comparison or amalgamation with other crimes by reference to their nature as international crimes. Therefore, international crime does not have universal indicators but mostly refers to atrocities such as genocide, crimes against humanity and war crimes, and acts of aggression which were defined on an ad hoc basis.

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82 Not all countries have signed on to the formation of the court. Most notably absent are the United States, China, and India.
basis as opposed to the domestic penal legislation, and this is reflected in the rudimentary and gradually developing nature of international criminal law.\(^{83}\) However, examination of the rationale given behind the categorization of the core international crimes at the Nuremberg level suggests that elements such as gravity and universal recognition play an important role but cannot be definitely pinned into those elements. For instance, the US Military Tribunal at Nuremberg defined international crime as follows:

An international crime is an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances.\(^{84}\)

These atrocities are crimes under international law because they are sanctioned by international law as stipulated in turn by international agreements and customs. But what is not clear is; what are the valid reasons which compelled the international law to not leave these crimes to national laws? There is another suggestion that they are crimes not because they exhibit any other characteristics or elements that make them international but because the states agree to make them so.\(^{85}\) However, the important question that needs to be posed here is, what makes these crimes different than the others found in the domestic instruments and what makes them of international concern rather than the concern of the domestic courts?

There is an uncritical acceptance of the idea that the contextual elements of the core crimes are what makes those crimes international and that they are heinous and offensive to the international conscience because of the contextual circumstances such as the scale and pattern. It is important here to demonstrate that the contextual elements alone could not make a crime international, because none of these three contextual elements (a manifest pattern of similar conduct, or crime that itself could affect destruction, in the case of genocide; widespread or systematic attacks against a civilian population, in the case of crimes against humanity; and an armed conflict


\(^{84}\) Wilhelm List and Others (US Military Tribunal at Nuremberg) (19 February 1948) (1953) 15 Ann Dig 632, 635.

(international or non-international), in the case of war crimes) standing alone can denote that character and, hence, it is a false postulation.

It is important to note that all international crimes are crimes within the domestic system in almost all states. For example, when the conducts under article 6(c) were criminalized as crimes against humanity, those acts were crimes in all criminal law systems including Germany. There is nothing that can be called an international crime by nature. If the context makes a domestic crime international automatically, then where could we place those political killings which could take place in a systematic manner but are not quite widespread? Or, if a manifested pattern of similar conduct turns an act into genocide, then where could we place the intentional eradication of political groups and so forth?

However, what needs to be noted here is that none of the international instruments upon which the international crimes’ definitions are based have given any definition of what makes a crime an international crime. The international community has been unable to agree on what constitutes such a crime and how to deal with international crimes over and above their agreement to do in certain circumstances. For instance, the ICTY in its constitutive document refers to the serious violation of international humanitarian law, and the ICC in its Statute talked about the most serious crimes that are of concern to the international community, both of which suggest the absence of something called the international aspect of crime, contextual or otherwise.

Criminalization of a conduct is a political process; therefore, the content of the crime will vary from time to time and will be based on the moral grounds of the initiator of the law – the gravity of the act, or the simply the will of the state. However, in the international sphere the foundational base for the criminalization of conduct differs greatly from the domestic practices. Until the early 1990s, the international community was engaged in an exercise of repression among themselves to guard their interests by combating those crimes with a transnational dimension, so it is a matter of cooperation among states rather than a system of international

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88 Cassese *International Criminal L. Law* (n 83) 16.
criminalization of any conduct\textsuperscript{89}. For instance, the rule on piracy is not an international criminalization of the act of piracy or the addition of any dimension by bringing it within the international domain; rather, it is a result of states’ agreement that they had to cooperate among themselves for the betterment of their interests on the sea\textsuperscript{90}. In international law, only the international community or states can make and criminalize acts and not the context of its occurrence. Therefore, any moralistic considerations for criminalization of the act will not differ from the domestic considerations.

The international law originates from the sovereign power of the states, which is based on the Westphalian principles of equality of sovereigns and non-intervention. In such a system, laws are results of this horizontal relationship in which no one person has any higher authority than the others, hence the claim that context makes a crime an international crime is weakened. Consequently, international crimes that are generated within such a system primarily have their normative basis in state consent, and then in other considerations if there are any. Thus, the lack of any identifiable normative basis shows that the criminalization of conduct on an international level is a matter of states’ choice. Furthermore, the consent-based nature of international law goes against any assumption that there exists a unique element that internationalizes a crime, because states can only be bound by the obligations they have created or have accepted to be bound by\textsuperscript{91}. But the question remains as to why states agreed on those crimes and what are the external elements that grant an act an international status.

Therefore, international crimes will require an inter-state consent first, and then an element that justifies the imposition of the international jurisdiction over those crimes or the element that is agreed upon by the states to allow extension of jurisdiction in order to engage the criminal responsibility of the individual under international law. In the case of crimes against humanity and war crimes, for instance, the choice of these justifying elements were the contextual elements that


\textsuperscript{90} Paola Gaeta, 'International Criminalization of Prohibited Conduct' in The Oxford Companion to International Criminal Justice (OUP 2009) 63-74, 63.

\textsuperscript{91} Statute of the International Court of Justice, art 38.
were specifically selected from the surrounding circumstances of the crime in question (eg nexus to war, widespread or systematic, state policy). For instance, the current definition of the contextual elements of the crimes against humanity stipulated in the Rome Statute reaches this formulation following different and inconsistent enumerations in several instruments as a result of the international communities’ refining of when and how to extend international jurisdiction.92

Whatever the moral or philosophical reasons used by the states to justify inclusion of these crime within the international list of crimes were already considered by the domestic law and there will not be any moral or philosophical reasons that are newly discovered to internationalize the crime.

2.3.2 The role of context and the criteria for the selection of core international crimes

The raison d’être of the contextual elements becomes clearer with the historical tracing of its coming into being. Initially the allied powers were confronted with the German atrocities that were not easy to leave them for the domestic jurisdiction because these crimes cannot be addressed locally and not because of their abhorrent nature or state involvement but because there was a very good chance that it would go unpunished for one reason or another.93 Hence, the International Conference on Military Trials in 1945 adopted the United States delegation proposition94 and confined the prosecution of the Nazis to the situation that was found to be the source of the impunity, that is, aggressive war.

Therefore, crimes against humanity were born and were limited to aggressive organized war. This jurisdictional limitation was imposed to also protect the allied powers’ own self-interest because if massive scale and planned methods of crimes were used, then their own conduct might be questionable. So the real reason for

92 IMT, art 6(c); Tokyo Charter, art 5(c); Allied Control Council No 10; ICTY Statute, art 5; ICTR Statute, art 3; Genocide Convention 1948; The Convention on the Non-applicability of Statutory Limitation to War Crimes and Crimes against Humanity 1968; Apartheid Convention 1973; Inter American Convention on Enforced Disappearance 1994.
elevation of the crimes against humanity to international level was the impunity that was feared if the Nazi crimes were to be left to the German Government and the only justification which was available to extend the international criminal jurisdiction was the waging of the aggressive war.

As US Prosecutor Robert Jackson later explained, in his opening address at the Nuremberg trial, ‘[t]he wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated’.

However, later the nexus to war disappeared because the crime against humanity can take place without war and can lead to impunity. Hence the limitation of war became invalid in terms of an assurance of the international guarantee of justice. Hence, another contextual element came to replace the nexus with armed conflict. That is now represented in the requirement of ‘widespread or systematic’ which is found to be a source of impunity in the current circumstances. This is true because one of the reasons for not including crimes such as terrorism in the list of Rome Statute international crimes was the conviction that these crimes will not lead to impunity and can be satisfactorily dealt with in the domestic courts. The evolving jurisdictional element of the crimes against humanity was captured by the Einsatzgruppen case, when it held:

... the concept of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered state makes adequate provision. They can only come within the purview of this basic code of humanity because the state involved, owing to indifference, impotency or

96 Prosecutor v Tadić IT-94-1-AR72, Appeal Decision, 2 October 1995, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 140-142.
99 H van Hebel and D Robinson, ‘Crimes within the Jurisdiction of the Court’ in R Lee (ed), The International Criminal Court (Kluwer 1999) 186.
complicity, has been unable or has refused to halt the crimes and punish the criminals.100

Because the crime of genocide came into being to cover the impunity gap left by the crimes against humanity in the WWII and Nuremberg trials, it was not defined by the limitation to war because it took place in peace time. Lemkin was personally motivated not by the abhorrent and heinous nature of the crime of group destruction, but by the fact that killing a single man has legal consequence but the deliberate and intentional killing a group goes unpunished. However, the general understanding was that the intentional destruction of specific groups was going unpunished and impunity was likely to persist. Thus, the crime of genocide became an international crime when states accept the international jurisdiction when there is intentional group destruction. When later the crimes against humanity took the widespread or systematic elements as characteristics and new jurisdictional limitation, there was no need to touch genocide because there was no change to the reason that led to internationalization of the crime.

Thus, the whole new concept that must be argued is that crimes become international where there is the possibility of impunity and unaccountability which might result from crimes taking place within certain contexts. To curb or fight such impunity, the international law takes the contexts in which it becomes probable and, by utilizing these contexts, international criminal law extends its jurisdictional arm to cover them where these contextual elements are present. In order to do so successfully in the case of crimes against humanity and war crimes, this context ought to be part of the definition to limit the international law’s powers, but this was not necessary in the case of genocide because what was needed is to establish the intent.

So in the case of genocide, the international community found that impunity can only stem from when there is the intent to eradicate a group of people for no reason other than their membership of that group. The position has now changed with the new Rome Statute establishing a permanent court for certain international crimes including genocide. The existence of this court created the need to distinguish cases of genocide that can be tried in the national court (genocide by a single individual)

100 United States v. Otto Ohlendorf, IV Trials Of War Criminals Before The Nuernberg Military Tribunals Under Control Council Law No. 10 411 (1950) [hereinafter Einsatzgruppen judgment], 427
from those that can have dual enforcement at both national and international levels, and thus the addition of the contextual elements became an important element to limit international intervention only in cases of large-scale and grave acts of genocide where impunity is likely to fester and that is when there is a manifested pattern of similar acts or the act could itself affect such destruction\textsuperscript{101}.

\textbf{2.4 Concluding remarks}

The concept of context is ill-defined in its terms and role within the international criminal law. However, this lack of precision represents only a small inconvenience for the crimes against humanity and war crimes because they are worded within the definition of the crime. In the case of genocide, there is no need for contextual elements in the first place and this concept has no role to serve within the constituent elements of the crime. The contextual elements of genocide appear to be case-dependent elements, and lack a unified concept of context that can be attached to the crime without changing the nature of the crime\textsuperscript{102}.

International law is a product of horizontal state relations, based on sovereign equality, in which these relations are regulated by the regulating principle of peaceful co-existence. Peaceful co-existence requires non-interference, or interference only in those limited circumstances upon which the sovereign’s consent is given. In the case of international criminal law, the state’s consent is limited to those instances where the crime took place in a widespread or systematic manner, or in a war context, or where there is intent to destroy a group in whole or in part in order to preserve their sovereignty\textsuperscript{103}. The international community exercises selectivity among large-scale crimes and grave atrocities by using the limitation of those contextual elements to avoid indeterminate crimes being treated as international and frustrate the moral purpose of international criminal law.

\textsuperscript{101} Elements of Crimes of the Rome Statute of the International Criminal Court.
\textsuperscript{102} See section 2.2.4 above.
\textsuperscript{103} The crime of aggression will be added to this list following the court exercise of jurisdiction of it as per the Kampala’s conditions.
CHAPTER 3: THE CONTEXTUAL ELEMENTS IN THE EARLY LEGAL CONCEPT OF GENOCIDE

3.1 Introduction

Consideration of the early concept of genocide in international criminal law is warranted on two grounds. First, while the definition of the crime of genocide was clearly and firmly established by an international convention in 1948 – the Genocide Convention – such clarity of the definition was not reflected in the few early criminal cases involving this crime\(^1\), nor in the academic literature and scholarly debates dealing with this phenomenon before the establishment of the ad hoc tribunal in the 1990s.

Second, following its codification, the new concept remained untested in international judicial forums and very few of its intricate questions that might arise from the definition (such as its contextual and constitutive elements) were extensively subjected to any academic scrutiny except by a handful of scholars\(^2\). Therefore, a closer scrutiny of the few early international and domestic judicial pronouncements on the definition, and the sporadic mentions by the International Law Commission (hereinafter ‘ILC’) in its Draft Code and Commentaries as well as by academic theorists, is merited in this chapter.

Examination of the early concept of genocide will reveal some unconvincing and uncorroborated direct and indirect association of the contextual elements of genocide with its definition. Therefore, the chapter will examine the evolution of the early concept of genocide in the first fifty years of its existence, from the pre-codification period to the early 1990s, in order to observe whether there was an early different concept of genocide and whether the contextual elements are dissimilar to the ones currently identified by the jurisprudence – that is, a pattern of similar acts, scale, plan or policy, and systematic and collective perpetration – if they were dissimilar to these contextual elements, then how these elements were featured during this period. The

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\(^1\) The Nuremberg trials and the subsequent trial by the Control Council and the Eichmann Trial by the Israel court.

post-1997 period is omitted because it represents the modern stage when the
definition was critically subjected to the judicial scrutiny of the ad hoc tribunals,
which in turn generated extensive academic literature that was used as a theoretical
platform on which the subsequent debates were grounded, including the Rome
Conference\(^3\).

In the pre-Convention period the arguments were centred and shaped by the
positioning of Lemkin’s definition of genocide within the attempts to prosecute
crimes of mass destruction of humans and the Nazi horrors of WWII. Hence, context
was assumed within the discourses not because Lemkin had made such distinction in
his propositions and definition of genocide as a phenomenon but because he
constructed the concept of genocide as a response to the massacres perpetrated by the
German state\(^4\). Furthermore, consideration of the *Travaux Préparatoires* of the
Genocide Convention also reveals very little guidance other than some delegates’
views of the concept and the level of the disagreement on the status of those
contextual factors, but what is clear from the final definition in article II is that all
contextual elements fail to make into the definition as a constitutive element and that
there is no one unanimous view on the matter.

Similarly, in the post-Convention discussions, mainly in the ILC, the ICJ, and
academic writings, the same assimilation of genocide to large-scale state crime
continued, not because of its constituent components, but due to the uncorroborated
assumption that the nature of the crime warranted such association. This confusion
continued with the consistent references to the authoritative definition of the
Convention which lacks any explicit reference to contextual elements.

\(^3\)The treatment of this matter from the 1990s onwards is the subject of Chapter 3 of this thesis.
\(^4\)In all his writings and campaigns, no reference is made to the need to distinguish the surrounding circumstances
Redress* (Carnegie Endowment for International Peace 1944); Raphael Lemkin, ‘Genocide’ (April
3.2 Mass atrocities, state crimes, and conceptualization of genocide in positive international law

3.2.1 Genocide and its context in Lemkin’s understanding

In establishing what Lemkin meant by the word ‘genocide’, his reasoning behind coining the word represents an important consideration to such analysis. To appreciate the early concept of genocide, one must consider it first from the perspective of the creator of the word rather than in terms of what the codified law states.

The word first appeared in 1944 in his book *Axis Rule in Occupied Europe*, but the idea had been in the mind of the Polish scholar since 1933 when, at a conference in Madrid, he presented a paper inspired by the Armenian massacre, calling for criminalization of barbarity and vandalism. In an article published in 1946 in *American Scholar* Lemkin admitted that in Madrid Conference he introduced ‘… a proposal providing for this type of jurisdiction for acts of persecution amounting to what is now called genocide’. These historical facts reveals that Lemkin’s foundation was based on criminalization of large-scale and organized group destruction rather than specific-intent crime independent of the context in which it occurs. Examination of Lemkin’s own work leads to an acknowledgement of the fact that he was primarily driven by the interest to eradicate any attack on human groups, which gave him the impetus to advocate the international criminalization of such a crime.

Therefore, the crime of genocide is unique only by virtue of its effect on groups of human beings, and it represents the underpinning premise on which Lemkin built the concept of genocide. In his early writings, immediately after the UN General Assembly approved Resolution 96(I) on 11 December 1946 referring to the Germany extermination policies, Lemkin contended that the ‘destruction of entire

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7 Lemkin, ‘Genocide as a Crime under International Law’ ibid.
human groups gave impetus to a reconsideration of certain principles of international law. According to Lemkin, genocide was not the immediate destruction of a human group but a process in which a great deal of effort and planning is required. He described genocide by cataloguing the methods, and the plan of the Nazi extermination of all aspects of the minorities’ life in the occupied territories.

In Lemkin’s concept, ‘plan’ is an important element not only because the act of large-scale destruction requires such planning but the objectives of the perpetrator (such as the disintegration of the political, social, and cultural existence of the group) requires such planning. Thus, according to Lemkin, there is no attempt to differentiate between genocide and crimes against humanity or mass crime, other than by the fact that the crime of genocide requires an element of targeting one group as an entity to the exclusion of others. He contended that ‘the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.’

From Lemkin’s frequent and detailed references in his writing to the extermination of the Armenians and the Jews under Hitler reveal that what he had in mind is large-scale state destruction of groups as opposed to what is currently codified in the Genocide Convention. Both instances could not have taken place without a plan at the governmental level, or at least a collective plan, where a claim of genocide can be made from the plan and policy and the pattern of the crime perpetrated against the protected groups. This was the distinguishing element of the new concept because the crime that was being committed at the time was the large-scale destruction of groups that was understood and treated as something other than genocide.

For instance, in the Armenian case the Turkish Government included within their plan the forced transfer and relocation of the Armenians from one area to another, through the desert, with devastating effect, in addition to the policy of assimilation.

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8 ibid.
10 ibid.
11 ibid.
by converting Armenian girls to Islam and marrying them and so forth. A similar pattern of acts and planning on a governmental level with collective participation can be seen in the case of Jewish prosecution under the Nazis as early as 1942 in the Wannsee Conference to implement what was called ‘the final solution to the Jewish question’. The need for a coordinated plan and collective act for genocide can further be observed from Lemkin’s reference point for his new concept. He acknowledged this when he propounded the view:

The realities of European life in the years 1933-45 – i.e. State involvement in planned mass destruction of human group – called for the creation of such a term and for the formulation of a legal concept of destruction of human groups.

Further evidence of Lemkin grounding his concept on state-planned mass crimes against a group is evident in his list of purported methods of genocide used by the Third Reich. Some of these perceived techniques include destruction of social patterns of a group by, for example, ‘imposing the German pattern’ on the oppressed group or destruction of their national pattern in social field, destruction of national libraries and museums, prevention of birth, and destruction of religious shrines and monuments. All of these acts cumulatively cannot reasonably be achieved by a lone perpetrator or génocidaire; nor are they acts that can be committed without planning and coordination because of the policy aspect attached to accomplishing such acts.

In addition, his definition suggested that killing does not have to be part of the physically destructive policies. This is because policies aimed only at destruction of the foundation of life of the group and disintegration of their political and social life is sufficient to fulfil this criterion. The idea of pattern is the cornerstone of Lemkin’s definition of genocide, because he believed that the only way the crime can be proven is by surveying those patterns of actions directed against the protected group,

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14 Lemkin, ‘Genocide as a Crime under International Law’ (n 5) 147.
15 ibid 83 (emphasis added).
16 ibid 84.
17 ibid 86.
18 ibid 86.
19 ibid 89.
through the effect on their culture, religion, language, and way of life in the economic, social, and political sense\(^{20}\). He detailed the way the Jews and the Armenians were treated to demonstrate this point.\(^{21}\) Later on in an attempt to delineate the borderline between genocide and other crimes, Lemkin wrote that ‘genocide can be committed by a series of techniques which are all subordinate to the intent to wipe out the specific group.’\(^{22}\) Therefore, the premise of the idea was based on protecting a group from any policy or any act that infringes elements that make a group an entity or that endanger the existence of a national, ethnical, and religious group, which were all in his cited examples of a large-scale destruction planned by state or state-like entities\(^{23}\).

Scale was also an important element in Lemkin’s concept of genocide. In explaining the techniques of genocide a reference was made to the food rationing, the increase in anaemia, the death rate in the Netherlands and Belgium, and the morality rate in Warsaw to show the scale of the crime against the targeted groups\(^{24}\). Further significance of scale in Lemkin’s concept can be discerned from his use of statistical figures of the Institute of the Jewish Affairs of the American Jewish Congress in New York to demonstrate the number of Jewish victims from the Nazi atrocities in the occupied countries\(^{25}\).

Lemkin’s idea of genocide as large-scale destruction of peoples was probably more clearly revealed by his reference to the fact that individual crimes against individuals are protected against by the law, but the killing of millions is not punished and has no name that can describe such large-scale destruction of people\(^{26}\). Lemkin’s own views show that he is defining a crime in which scale and planning is inherent in its nature. He was advocating for criminalization of mass crimes that occurred throughout history, and his examples show that he was referring to mass crimes that cannot be

\(^{20}\) ibid 80-82.
\(^{21}\) ibid xi-xii.
\(^{23}\) Lemkin, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress (n 4) 90-93.
\(^{24}\) ibid 88.
\(^{25}\) ibid 89.
attributed to a single individual. He referred to the destruction of Carthage, and the massacres of the Albigenses and the Waldenses.\(^{27}\)

As a result of his tireless campaign, Lemkin drafted a resolution and convinced Cuba, India, and Panama to sponsor and place it before the General Assembly.\(^{28}\) From this point the codification process of the concept began.\(^{29}\) Despite Lemkin’s campaign and invention of the word ‘genocide’, his views in this matter were not mirrored in the Genocide Convention’s definition of genocide, but his views as an influential commentator in the field can be said to have been confined to the extent to which it explains the reasoning behind codification of the concept of genocide. Lemkin’s definition does not explain the current definition of the Convention in its entirety or address its deficiencies.

It is important to note here that the codification process was not an exercise to document Lemkin’s thoughts but rather an effort to codify a crime that can be accepted by the international community at the time.\(^{30}\) Therefore, this demarcation is important because the Convention from its initial commissioning by the Economic and Social Council, the Secretary General entrusted the drafting of the Convention to his Secretariat and a few experts to draft, among them Lemkin himself.\(^{31}\) The role of the experts was only to assist the Secretariat but not to codify law. Therefore, the Genocide Convention was a product of the views of those involved in its drafting and not of Lemkin alone. Accordingly, the Convention is shaped by various proposals, amendments, caveats, and the political manoeuvrings which were not necessarily in conformity with Lemkin’s concept of large-scale group destruction.\(^{32}\)

Lemkin’s influence on the final definition of genocide is to some extent limited because of the drafting process, where numerous observations were suggested and

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\(^{27}\) Lemkin, ‘Genocide’ (n 4) 227.

\(^{28}\) UN Doc A/BUR/50 (2 November 1946); Lemkin, ‘Totally Unofficial Man: The Autobiography of Raphael Lemkin’ (n 26) 236.

\(^{29}\) Lemkin, ‘Genocide as a Crime under International Law’ (n 5) 149.


\(^{31}\) UN Doc E/447, p 15. The experts were Mr Donnedieu de Vabres (Professor at the Paris Faculty of Law), His Excellency, Professor Pella (President of the International Association for Penal Law), and Professor Raphael Lemkin.

\(^{32}\) Drost (n 2) (Introduction).
rejected by the drafting committees. For instance, the Soviet Union argued against the first expert draft and with it Lemkin’s views, under the pretext that those views were not representative of the international community and the views of governments had not been taken into consideration in their drafting process, and therefore the draft should not be taken as a basis for the Committee’s work. The Soviet Union’s view was that the views of Lemkin and the other experts were only theirs and represented no law at the time, but were simple propositions with no effect and therefore should not be used as a base for the Committee’s work. These elements make the claim that the concept of genocide enshrined the Convention is analogous to Lemkin’s initial concept difficult.

It is true that the historical dimension has a role as far as the understanding of an idea is concerned; this can be seen in the social concept of genocide in which Lemkin’s views were precisely represented with very few alterations. When Lemkin coined the word ‘genocide’, he was describing the disapproval that should be in place to address the killing or attempted killing of groups or part of groups, as a phenomenon which was not adequately described by previous terms or laws. For example, the previous laws relating to mass killing do not address the issue of cultural destruction or forced sterilization; in later writing Lemkin acknowledged this gap in the laws when he submitted that the evidence produced at Nuremberg supported his concept of genocide.

The fact that the moral and philosophical underpinnings of Lemkin were based on acts such as the Armenian and Jewish exterminations and the resulting impunity means that the newly coined concept is a large-scale crime organized by state as opposed to individual crime such as murder and assault. The roadmap of his academic work and campaign through his published and unpublished work shows that his goal was to bring to the international law’s attention the loophole in not punishing perpetrator of mass extermination of a human group. In so doing Lemkin constituted the elements of his new concept from practical examples of the time and

34 UN Doc A/AC10/SR29 (1947) (29th meeting).
35 ibid.
36 See Chapter 1, section 1.2.3.
37 Lemkin, ‘Genocide as a Crime under International Law’ (n 5) 147.
adopted the characteristic of their occurrence – large-scale, planned conspiracy, and state participation – as elements.\(^{38}\)

In summary, contrasting the current legal definition in the Genocide Convention with Lemkin’s perceptions and reasoning offers very little guidance on the constitutive elements of this crime. Contrary to Lemkin’s understanding, the literal definition of the Genocide Convention omitted any mention of the context in the legal definition; this is an understandable variation because the concept was codified by the international community’s collaboration and was not a direct transplant of Lemkin’s propositions in which contextual elements such as pattern, scale, and policy were foundational constitutive elements.\(^{39}\)

### 3.2.2 The early use of the context of genocide in Nuremberg and subsequent trials

Following WWII and amidst the international communities’ effort to address the Nazi crimes, Lemkin introduced the concept of the crime of genocide.\(^{40}\) Yet, the International Military Tribunal (IMT) Charter excluded the crime of genocide; despite attempts to include it during the Charter’s drafting stage.\(^ {41}\)

The Nuremberg tribunal could not legally apply the crime of genocide for lack of legal basis to do so by reference to their constitutive documents or by any implication.\(^ {42}\) In addition, the word was also not clearly defined to attain general acceptance within the legal realm, thereby excluding it from any consideration within the ambit of the customary international law and consequently from the charges sheet.

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38 Lemkin, ‘Genocide’ (n 4) 230.
39 For instance, the addition of ‘in whole or in part’ was proposed by the Norwegian delegate, the inclusion of ‘as such’ was from the Venezuelan delegate, and ‘causing serious mental harm’ was added by the Indian delegate.
42 The Justice case was the only case in which the court engaged in detailed discussion on genocide but in the other judgment the court completely avoided the word genocide. See United States v. Josef Altstoetter, III Trial of War Criminals Before The Nuernberg Military Tribunals Under Control Council Law No. 10 954 (1951) [Hereinafter Justice Judgment], 174-181
at the Nuremberg trials. However, through Lemkin’s campaign and the prosecutions’ insistence, the Nuremberg trials were the first instance in which the word ‘genocide’ was used in a legal framework. Nevertheless, all defendants were convicted of crimes against humanity, because the international community characterized the Nazi crimes as such.

Hence, neither the Nuremberg Charter nor the judgments conceptualized genocide as a separate crime, but the term genocide was first used in an indictment in the trials of Goring et al under count three of war crimes, and held the accused responsible for war crimes for conducting a:

deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups …

The same fact under count three was also expressly used in count four for crimes against humanity. Therefore, by couching genocide as ‘deliberate and systematic’ extermination, genocide was perceived as a natural extension of any intentional, large-scale, methodical, and planned extermination. This element is missing from the applicable law as provided for in article 6(c) of the IMT. The court embedded the crime of genocide within the meaning of war crimes because war crimes were committed in execution of a common plan and conspiracy to commit war crimes. The court even used the same facts pleaded in count three of war crimes in count


44 Barrett (n 41) 35. Note, Lemkin was also acting as adviser to Justice Robert of the USA.


46 ibid.


48 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg (n 45) 43-44.

49 ibid 43.

50 The court talked about the enormous proportion of the mortality rate in the camp, ibid. See also, Mathew Lippman, (n45)

four of crimes against humanity.\textsuperscript{52}

Therefore, in the absence of a legally recognized definition of genocide, any meaning given to the word can only be sourced to Lemkin’s initial definition as a ‘coordinate plan of different action’\textsuperscript{53} or what the user of the word perceived it to mean as per Lemkin’s definition or otherwise. From this standpoint, what is evident from this early instance of the use of the word is that no disassociation of it from the crime against humanity was clearly made as far as the objective elements of the crime are concerned. However, the crime of extermination of a human group was found to be embedded within the crimes in the jurisdiction of the tribunal\textsuperscript{54}.

Therefore, the evolving theme was found to be not the conceptualization of genocide as a separate crime but the emphasis of the methods used in the commission of the crime. The contextual elements of the crime of genocide were imperative to this early concept of genocide at Nuremberg because the prosecutor believed that genocide was the wholesale destruction of a group and the only way to prove that was naturally to refer to any element that might lead to such conclusion, including unrelated and irrelevant information such as the contextual circumstance.

For example, the tribunal asserted that the crime of persecution of the Jews was more than apparent from the ‘record of consistent and systematic inhumanity on the greatest scale’\textsuperscript{55}. The tribunal went on to examine the utterances of the accused to show the pattern of systematic plan to exterminate, the defendant (Franck) testified to this fact when admitting that he had allowed himself ‘to make utterances and his own diary has become a witness against him in this connection’\textsuperscript{56}. Furthermore, the tribunal even attempted to establish the existence of a plan, its characteristics, and when it was conceived in order to determine that the policy was certainly carried out on a vast scale, and in an organized and systematic manner\textsuperscript{57}. The crime of genocide

\textsuperscript{52}Trial of the Major War Criminals before the International Military Tribunal (n 45) 65.
\textsuperscript{53}Lemkin, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress (n 4) 79.
\textsuperscript{54}Lippman (n45) 427-428.
\textsuperscript{55}Trial of the Major War Criminals before the International Military Tribunal (n 45).
\textsuperscript{56}Ibid.
\textsuperscript{57}Ibid.also see United States v. Otto Ohlendorf, IV Trials Of War Criminals Before The Nuernberg Military Tribunals Under Control Council Law No. 10 411 (1950) [hereinafter Einsatzgruppen judgment], 32, 412, 415-416, 427
was not mentioned, but it appears that the crime was recognized as a sub-category of crimes against humanity and war crimes.

It seems from the trial of major war criminals that the courts tried the accused for extermination of human groups but not as genocide because the crime did not exist, but it is apparent that the courts’ use of the contextual elements as scale, plan, and systematic and intentional targeting of specific groups, was to identify those contextual elements with the term ‘genocide’. However, it was not important to the court whether those contextual elements represent a separate crime because targeting a group is considered a part of crime against humanity or a war crime. Mathew Lippman argued that:

The Tribunal did conceptualize the extermination of racial and national groups as a distinct and aggravated form of murder, but did not specifically recognize genocide as a separate offense within the category of crimes against humanity or war crimes. ⁵⁸

However, tracing the reasoning given by the judgment in Nuremberg shows no clear demarcations between genocide and other crimes, but in the Nuremberg tribunal use of the word genocide might be clearer if considered form the standpoint of the prosecution who used the word to ascertain whether they were advocating a new autonomous crime or referring to the existing crimes. The distinction of genocide from crimes against humanity by only emphasizing the systematic character and pattern of the act and its scale to describe genocide and its heinousness and destructive effect on a group of humans was clearly made by the French Prosecutor Champetier de Rides when he referred to Nazi crimes as:

… scientific and systematic extermination of millions of human beings … is a crime so monstrous, so undreamt of in history throughout the Christian era up to the birth of Hitlerism, that the term ‘genocide’ has had to be coined to define it. ⁵⁹

The same trend was followed at the Nuremberg trials and this is clear from the final statement of the British prosecutor when he reminded the court that most of the crimes committed by the Nazis fell under the umbrella of genocide because

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⁵⁸ Lippman (n51) 430.
⁵⁹ Champetier de Ribessee XIX Trial of the war criminal before the IMT, 498 (1950) at 531.
‘[g]enocide was not restricted to extermination of the Jewish people or of the gypsies.’ 60 However, it takes different forms and methods according to the perpetrator’s choice of methods or techniques but ‘[t]he methods followed a similar pattern: First a deliberate program of murder, of outright annihilation.’ 61

Around the same period, at a national level, the Polish Supreme National Tribunal held in its judgment in the Greiser Trial, that the accused had committed a crime against humanity and had expressly admitted that genocide was committed as part of crimes against humanity by Germanization without entering into the question of law regarding the specifics of the crime of genocide. However, the court portrayed genocide by the scale of the crime when it described the policies of repression as: ‘Genocidal in character, of the religion of the local population by mass murder and incarceration in concentration camps of Polish priests’ and, ‘Equally genocidal attacks on Polish culture and learning.’ 62

Furthermore, the court also stated the pattern in which the process of Germanization was achieved along the line of Lemkin’s definition of genocide by distinguishing the methods employed from those of the conduct of war and contended that the purpose of that pattern was to achieve genocide by deportation of Poles and Jews and the Germanization of Polish children through: ‘New method of mass extermination of the Polish and Jewish population, and complete destruction of Polish culture and political thought, in other words by physical and spiritual genocide.’ 63.

The assimilation of genocide with crimes against humanity continued even into the subsequent trials under Control Council Law No 10 64. However, it is not unreasonable to state that the word ‘genocide’ quickly gained ground as early as 1946 when the General Assembly adopted Resolution 96(1), and was used in the subsequent trials and referenced to as an independent crime. However, even at this stage, not everybody was clear about what it meant. When drafting the Nuremberg

60 United States v. Hermann Goring, II Trial of the major war criminals before the international military tribunal 45-46 (1947) (hereinafter ‘Trial of the Major War Criminals) 497.
61 ibid.
62 Case No 74 Trial of Gauleiter Artur Greiser (Supreme National Tribunal of Poland) (21 June - 7 July 1946), reproduced in Law Reports of Trials of War Criminals, United Nations War Crimes Commission, vol XIII (London 1949) 70, 112.
63 ibid 114.
Indictment in London in 1945, the British thought of the word ‘genocide’ as too fancy to be included in a legal document, referring to the ambiguity surrounding the word. That ambiguity seems to have continued well after the unanimous resolution of the General Assembly of the United Nations.

The United States Military Tribunal in the Justice Case represents an early instance where genocide started to take shape as currently defined. The accused Oswald Rothaug was found guilty of crimes against humanity only, but above that the court also stated that the accused had also ‘participated in the crime of genocide’. The court went on and clearly demarcated the line between genocide and crimes against humanity by stating that the crime of genocide ‘is aimed against groups, whereas crimes against humanity do not necessarily involve offences against or persecutions of groups’, thereby distinguishing genocide as a separate crime on the same systematic and large-scale exterminatory facts. For instance, Benjamin B Ferencz distinguished genocide in the case of the Einsatzgruppen as ‘fundamentally different from the mere war crimes in that it embraces systematic violations of fundamental human rights committed at any time against the nationals of any nation.’ However, in establishing the existence of genocide in international law principles, the court transformed the crimes against humanity: ‘by reason of its magnitude and its international repercussions has been recognised as a violation of common international law, we cite “genocide”’, relying on the General Assembly Resolution as justification for such characterization. Here the court seems to have transformed the crime of persecution into genocide by reason of its magnitude which was found to be over and beyond what was perceived as constituting a crime against humanity.

Genocide is described with the emphasis on the level of its magnitude and the methodical plan and policy that shapes crimes against humanity at the macro-criminal level. The court also added the need for plan and policy for the crime of

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65 Barrett (n 41) 45; Korey (n 10) 26.
66 Case No 35, The Justice Trial, Trial of Josef Altstotter and Others, United States Military Tribunal, Nuremberg (17 February–4 December 1947) vol VI.
67 ibid 83, footnote 3, p 99, 48, 75.
68 ibid 83, footnote 3.
70 Case No 35 (n 66) 48.
genocide when it stated that Ernst Lautz, Chief Public Prosecutor at the People’s Court in Berlin, was guilty of crimes against humanity and also genocide because of the policy of extermination which he zealously enforced. Policies were found by the court ‘to be a part of the established governmental plan for the extermination of those races’; \(^{71}\) and therefore, the tribunal added that ‘he was an accessory to and took a consenting part in the crime of genocide.’ \(^{72}\) Hence, Lautz’s genocidal acts were presumably differentiated from war crimes and other crimes against humanity by the fact that they had been animated by a plan at governmental level. As a result, the court went on to perform a detailed examination of the plan of this systematic programme. In the same case the court held that the defendant Rothaug was also guilty of participation in genocide because ‘he participated in the national programme of racial persecution’. \(^{73}\)

In the *RuSHA Case* the court charged the accused with committing a ‘systematic programme of genocide’ \(^{74}\) and stated it in the indictment. The court contended that this crime is characterized by plan and policy, a component which is evidenced by the master plan of systematic genocide of group destruction which was conceived and designed by the top Nazi leaders. \(^{75}\)

The court referred their definition of genocide to Raphael Lemkin’s views and gave an illustrative example of an act falling within such definition of genocide as a ‘coordinated plan of different action’. \(^{76}\) The court then cited the IMT Judgment, the United Nations General Assembly Resolution 96(1), and finally the Genocide Convention which had not yet entered into force. \(^{77}\) These references showed that the court was not in a position to establish reliance on the Genocide Convention as law but made reference to the fact that genocide as crime perfectly fitted the crime under consideration. Therefore the court found the word ‘genocide’ to be a descriptive term that encompasses all the scale, the plan, and the exterminatory nature of the Nazi

\(^{71}\) ibid 75.
\(^{72}\) ibid.
\(^{73}\) ibid 99.
\(^{74}\) Case No 73 Trial of Ulrich Greifelt and Others, United States Military Tribunal, Nuremberg (10 October 1947-10 March 1948), Law Reports of Trials of War Criminals, United Nations War Crimes Commission, Vol XIII (London 1949)1, 2.
\(^{75}\) ibid 6.
\(^{77}\) Case No 73 (n 74) 37-39.
policies against racial groups, but that this was not dealt with in the Nuremberg trials because the trials were limited to only those acts which were done in execution of or in connections with any crime within the jurisdiction of the court. Thus, court mixed up genocide (as per Lemkin’s definition) with the new Convention’s definition. There is nowhere this is clear other than in the court’s comparison of genocide with crimes against humanity. Quoting directly from Lemkin, the court considered:

> There are three basic phases of life in a human group; physical existence, biological continuity (through procreation), and spiritual or cultural expression. Accordingly, the attacks on these three basic phases of the life of a human group can be qualified as physical, biological, or cultural genocide.  

The court’s use of the word ‘genocide’ and its elements might be clarified by the court’s comments that the word is used in a descriptive manner to describe how the crime was approached by the prosecution: as a general concept defining the background of the total range of specific offences committed by the accused, which in themselves constitute crimes against humanity and/or war crimes.

Therefore, regardless of the type of the crime under consideration, the plan and scale of the wholesale extermination policies were considered as a constituent element of the crime of genocide because it explained the heinousness of the crime in question which was not sufficiently depicted by the crimes against humanity and war crimes as defined by the Nuremberg Charter. During this period, the plan was considered as an integral part and a constituent element of the genocide. The opening statement of Benjamin Ferencz in the Einsatzgruppen case described his task as being to demonstrate to the court that the Nazi crimes were methodical and ‘long-range plans’ leading to ‘extermination of whole categories of human beings’.

Similarly, the Polish Supreme National Tribunal held, in Hoess, that the criminal medical experiments conducted at Auschwitz against the Jews, Slavs, Poles, and others were a preparatory stage of genocide. The court arrived at such as

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78 ibid 40(ii).
79 ibid 36.
80 USA v Otto Ohlendorf et al (Einsatzgruppen case), Trial of War Criminal before the Nuernberg Military Tribunals under Control Council No 10, vol 4, p 30.
81 ibid.
82 Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess, 7 (Sup Natl Trib Pol 1947).
conclusion not because these crimes contained elements that distinguished them as genocidal but because of the existence of a plan to exterminate human groups. The accused confirmed the existence of plans of wholesale destruction of the Slav nations, and of Poles and Czechs in particular. However, special circumstances in which they were performed constitute in addition elements which allow them to be classified as violations of the laws and customs of war and of laws of humanity.

The Polish court here distinguished these crimes from war crimes and crimes against humanity by examining the pattern in which they occurred and the purpose behind them to discern whether they were part of the Nazi scheme of exterminating whole nations and could thereby be transformed into genocide. Therefore, the court determined from the pattern that those medical experiments were ‘the preparatory stage of one of the forms of the crime of genocide, which was intended to be perpetrated by scientific means.

In conclusion, criminal trials have certain requirements in order to give the person in the dock a fair trial, such as the principle of legality. Therefore, the Nuremberg trials had to link any act that is alleged to be criminal to the state of mind of the perpetrator – the mental element. However, in all the cases in Nuremberg in which the crime of genocide was alleged or where the word was simply employed, no identification of its constitutive elements was made. Hence, the use of the word to indicate a crime could not be legally sound, so what the judges or prosecutors were referring to was a crime against humanity and a war crime. More recently, the ICTR held in Kambanda that the Holocaust was in fact genocide but the court could not apply it. Hence, it is sound to conclude that genocide was used to address the same crimes covered in the Nuremberg Charter and emphasize elements suggestive of group targeting. Lemkin himself later acknowledged that the Nuremberg Charter covered specific Nazi crimes

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83 ibid 25.
84 ibid 24-25.
85 ibid 25.
86 ibid 26.
but failed to provide a permanent law for international crimes or similar future atrocities.88

The fact that the Nazi crimes were tried as crimes against humanity, which includes the offence of extermination and persecution on political, racial, and religious grounds, precludes any meaningful need to refer to Lemkin’s newly coined concept of genocide, other than the need of the prosecutors to express outrage and horror at the scale, pattern, and methods of the Nazi crimes which took place prior to the period covered by the Nuremberg Charter and the assumption that the newly codified word extended to peacetime and wartime crimes and its ability to encapsulate the specific targeting of groups.

In addition to the fact that crimes against humanity and war crimes were considered at the time as war triggered crimes of grave nature that deserved international communities’ attention, what was found in the Nazi crimes can not only be explained by the conditions created by the war. Therefore, contextual elements as scale, plan, and pattern of the Nazi crimes represent elements beyond those that can be attributed to crimes against humanity or war crimes, and hence they were considered as an inherent part of the new crime of genocide. As a result, the need for a convention gathered momentum through the UN system, but only because similar crimes to those of the Nazis need to be covered when taking place in peacetime unrelated to any war. Schabas noted that if the Nuremberg Charter had been formulated to cover peacetime crimes against humanity, the world would be without a separate crime of genocide.89

Yet, for the purpose of legal analysis of the position of context in the early concept of genocide, the departure point for such analysis should be the Travaux Préparatoires of the Convention. This is because any retreat to the pre-codification period will predictably yield a mixed result because the Convention unambiguously states that genocide is committing any of the enumerated acts with ‘[i]ntent to destroy in whole


89 Schabas, Convention for the Prevention and Punishment of the Crime of Genocide (n 33) 1.
or in part’ without at least literally any mention of its contextual circumstances. As stated above, the current definition of genocide has taken a meaning independent from its historical definition and any association with its pre-codification meaning can only handicap the discussion. The pre-codification concept of genocide was more akin to the current social concept, in which context is a paramount constituent element.\textsuperscript{90}

The use of the word genocide at the Nuremberg trials revealed no consistent agreement on what is meant by ‘genocide’ or its legal parameters; therefore, it yields no clear position of the contextual elements in the early concept of genocide. The lack of such discussion could be for the obvious reasons that the Holocaust – the triggering event – was treated as a crime against humanity where no discussion pertaining to genocide as a separate crime was necessary at the time because the word ‘genocide’ itself was at an inception stage and could not be used in more than a descriptive capacity. It could therefore be said that the Holocaust was first looked at as genocide in a legal framework in 1961 by the Israeli court, in the trial of Adolf Eichmann\textsuperscript{91}. Mr Eichmann was charged with ‘crimes against the Jewish people’ and ‘crimes against humanity’ under the Nazis and Nazi Collaborators (Punishment) Law of August 1, 1950, which was limited in time and place to the Nazi crimes and modelled on the Genocide Convention.

3.2.3 Context in the codification of the normative concept of genocide

Consideration of the \textit{Travaux Préparatoires} is imperative, because the interpretations, examination, and references to the concept of genocide at the preparatory stage of the Convention have more than a historical feature in understanding the current definition because they represent the first stage of legalization of the concept of genocide. The importance is also reinforced by the Vienna Convention on the Law of Treaties which permits reference to the \textit{Travaux Préparatoires} as means of

\textsuperscript{90} See Chapter 1, section 1.2.3 above.

\textsuperscript{91} On 29 May 1962, the Supreme Court of Israel confirmed the conviction of Adolf Eichmann by the District Court in Jerusalem in December 1961 for crimes against humanity, war crimes, and crimes against the Jewish people (genocide) during the Second World War: \textit{Attorney-General of the Government of Israel v Eichmann} (Israel Sup Ct 1962) (1968) 36 Intl L Rep 277 (English translation).
interpretation. Therefore, the deliberations at the preparatory stage at least shed light on the purpose of the contextual elements of genocide and whether they have any legal validity as far as the constituent elements of the crime are concerned.

First, what needs to be ascertained in general is whether Lemkin’s idea of genocide as a ‘coordinate plan of different action’ made its way into a legal definition. This concept included contextual elements as conceptual and natural ingredients of the crime. Next, is there any other attempt to construe genocide as a collective or state crime in which contextual elements such as pattern, scale, or state plan are required? Such a finding might allow support for the theory that the contextual aspects of genocide have a role to play in the constitutive elements of the legal definition of genocide. However, preliminary consideration of the views of the delegates involved in the drafting of the Genocide Convention and the UN Resolutions in this respect reveals a variety of different views on what constitutes genocide and what are its constituent elements.

### 3.2.3.1 Importing context through assimilation with other crimes

A survey of the pre-Convention period reveals an initial attempt to construe genocide in the light of crimes against humanity, as such assimilating genocide with large-scale and mass extermination of human groups through methodical and planned acts of a state against a human group. The effect of such affirmation of genocide means the inclusion of all contextual elements within the constituent components of the definition of genocide. At a very early stage in the Sixth Committee discussion, Mr Dihigo of Cuba, outlining the reason for the initial resolution, jointly submitted with Panama and India that the crime of genocide is an old phenomenon that occurred before and during the Second World War. Therefore, the first UN Resolution 96(1), which spoke in the past tense and made reference to past instances of group

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94 A/C6/84, 22nd meeting of the sixth Committee (22 November 1946).
destruction in entirety or in part, suggesting codification of a crime already in existence.\(^95\)

The idea that genocide is a state crime or a collective crime was sustained during the early period, making no distinction in elements of the concept of genocide at this initial stage of codification. France, for example, circulated a memorandum at the preparatory stage of the Convention warning against the use of the word ‘genocide’, preferring treatment of the matter under the crimes against humanity of persecution\(^96\). This idea persisted until late 1947, where the UK, through its representative at the Sixth Committee, Sir Hartley Shawcross, stated that genocide was already recognized under international law, as adhered to by the Nuremberg tribunal, and hence refused to accept the unique elements of genocide of destruction of a group as separate from crimes against humanity.\(^97\) The Soviet Union, on the other hand, assimilated genocide to the state destruction of a human group and was of the opinion that genocide was exclusively related to the Nazi crimes, that it must be taken as a prototype, and that such association needed to be made clear in the Convention.\(^98\)

The Soviet’s view of genocide was a very wide concept which included not only crimes against humanity but any plan that seemed to target or prepare to target a human group. Even if those acts that have no genocidal character at all, unless taken cumulatively they might be suggestive of genocidal aim, such as propaganda to instigate racial and religious hatred\(^99\). The danger here is that inclusion of contextual circumstances and the assimilation with crimes against humanity leads to the inclusion of unrelated and far-removed matters to the crime in question, thereby changing its paradigm from a crime that can be committed without any collective participation or state involvement to a crime where plan is an absolute necessity for its success and where large-scale destruction of humans is an inevitable result.

\(^{96}\) UN Doc A/AC.20/29.
\(^{97}\) UN Doc A/C.6/SR.39 (Showcross, United Kingdom).
\(^{98}\) UN Doc E/AC.25/SR.26 (1948), Mr Morozov (Union of Soviet Socialist Republics).
\(^{99}\) ibid.
However, in sharp contrast to these views, the need to distance the concept from the previously held belief that genocide is a mass crime resembling the Holocaust and crimes against humanity to a crime directed towards a group started to emerge with the effort to criminalize human group destruction as an independent international crime. With efforts being concentrated on the examination of how to codify the crime of genocide came the questioning of the idea of genocide as a concept and how this crime could take place. It became clear early on that more precision was required in codification of a criminal code. For example, the first draft by the Secretariat’s Human Rights Division defined genocide as ‘intentional’ destruction of a group in whole or in part, limiting the destruction of group to those committed with a specific purpose of group destruction creating a distance from those widespread and systematic destruction.

It was also clear to those involved that there was a danger presented by those advocating the link with crimes against humanity, as this might lead to over-expanding the concept of genocide to a point where it could not be distinguished from those crimes where contextual elements are infused in the definition. Along those lines, Venezuela introduced an amendment to the Ad Hoc Committee draft removing a paragraph assimilating genocide and crimes against humanity. The Venezuelan delegate Mr Perez-Perozo went on to state that the acts prohibited by the Nuremberg Charter:

did not correspond exactly to those which the United Nations intended to prevent and to make punishable through the convention of genocide; consequently there was no reason to include in the convention on genocide a reference to the judgement of the tribunal.

The French delegate sought to create and keep a link between genocide and crimes against humanity because genocide was being codified for practical reasons until such time when crimes against humanity are disassociated from war crimes. However, the General Assembly (GA) was clearly trying to give genocide special

100 See the discussion in the above three preceding paragraphs.
101 Resolution 96(1), even though the Resolution’s reference to past genocides represented the starting point for a much narrower definition.
102 UN Doc A/AC.10/41 (6 June 1947).
103 UN Doc A/C.6/261.
104 3 UN GAOR C.6 (109th mtg) (1948) 489 (Mr Perez Perozo, Venezuela).
105 UN Doc E/794, p 7.
treatment because of the gravity of it as per the wording of the Resolution 96(1) and create a distinct crime of genocide from the same category of acts that might fall into the definition of crimes against humanity\(^\text{106}\). This is so because the GA noticed certain specific characteristics that differentiate genocide, and that these specificities lie in the targeting of a group as an entity, not the magnitude, or patterns or plan and policy of state and state-like entities which characterize other international crimes such as crimes against humanity\(^\text{107}\). In a Secretariat document prepared for the Ad Hoc Committee it was observed that the intentional destruction of a human group is the aim of the genocide here and that, ‘In case of foreign or civil war, one side may inflict extremely heavy losses on the other but its purpose is to impose its will on the other side and not to destroy it’.\(^\text{108}\) This goes against the argument that had Nuremberg punished the crimes against humanity of peacetime, then we would have no genocide today.\(^\text{109}\)

3.2.3.2 Conceptualization of genocide as a state crime

The need to codify genocide as a different crime in its own right without association with contextual elements derivative of their magnitude, or pattern and circumstances of their occurrence was not wholly appreciated by everybody. The United Kingdom, France, and many others thought that genocide was a state crime and could not be an individual enterprise – views that can only be traced to the Holocaust.\(^\text{110}\) Similar views that genocide is a continuation or an extension of crime against humanity has some support even today.\(^\text{111}\)

At the very initial step of the codification process the Cuban representative stated that genocide is usually committed by those who are in power and thereby escape

\(^{106}\) UN Doc E/AC.25/3. Lebanon stated that Nuremberg dealt with crimes against humanity and not genocide E/AC25/SR23, p 4.

\(^{107}\) UN Doc, E/AC.25/3.

\(^{108}\) ibid.


\(^{110}\) 3 UN GAOR C.6 (94th mtg) (1948) 344 (Mr Fitzmaurice, United Kingdom); 3 UN GAOR C.6 (92nd mtg) 308 (Mr Zourek, Czechoslovakia), see also Rafaat of Egypt.

prosecution.\textsuperscript{112} The first comprehensive study carried out by the UN Secretariat conceived the crime of genocide (without clear declaration) as a state crime by declaring genocidal acts as including lack of proper housing, clothing, food and medical care, and excessive work, as well as deprivation of means of livelihood by confiscation, looting, and curtailment.\textsuperscript{113} However, the Secretariat ignored the fact that it was drafting under the General Assembly Resolution 96(1) which was built on individual responsibility under international law\textsuperscript{114} so it would be out of place to limit the possible perpetrator to states only. However, the Secretariat was very much aware of the need to restrict the definition of genocide to the deliberate or intentional destruction of human groups and avoid expanding the definition indefinitely to include war crimes, minority protection, and human rights for two reasons: to avoid using the expansive definition to include any reprehensible acts as genocide, and to make sure that states ratified the Convention\textsuperscript{115}.

When the Ad Hoc Committee was appointed by the Economic and Social Council to continue on the Secretariat’s Draft Convention, it had the power to change the Secretariat draft, but the discussion on the role of state continued.\textsuperscript{116} Hence, there was a discussion on whether state participation should be a constitutive element of the crime of genocide because the historical event shows it to be a necessary element. The Soviet Union delegate believed that genocide was always connected to state policy.\textsuperscript{117} If mass murder is committed without the involvement of the state in any possible way, then there will very little need for the international community to interfere, because domestic mechanisms should be triggered to address such crimes. Therefore, the advocates of these views believe that state complicity should be a constitutive element of the crime of genocide.\textsuperscript{118}

However, these views were not unanimously held by all participants in the drafting process.\textsuperscript{119} There were those who contended that a private act might have

\textsuperscript{112} UN Doc A/C.6/84.
\textsuperscript{113} UN Doc E/447, arts II(1)(b), II(1)(d), and II(2).
\textsuperscript{114} Resolution 96(1) provided for the punishment of private individuals, public officials, and statesmen, and also recommended that states cooperate in order to ensure punishment for the crime of genocide; Drost (n 2) 24.
\textsuperscript{115} UN Doc E/447 pp 15-16.
\textsuperscript{116} UN Doc E/AC.25/2, and E/A.C. 25/S.R1-28 (1 April 1948).
\textsuperscript{117} UN Doc E/794, pp 8-9.
\textsuperscript{118} United States delegate, E/AC.25/SR4, p 3.
\textsuperscript{119} E/AC.25/SR4, p 6.
international consequence. For instance, Mr Lin of China refused to accept such limitation to internationalize the crime of genocide, but contended that there could be no genocide without government involvement, even by turning a blind eye on actions of officials who might have committed the crime. Mr Azkoul of Lebanon offered similar reasons by arguing that government might be an accomplice in genocide but such role should not be a ‘sine qua non condition’ because there could be governments that are incapable of preventing a group extermination for lack of means and power. He reaffirmed that one of the reasons for rejection of this proposition is because it excludes the possibility of genocide being committed by an individual.

In more robust language Mr Rudzinski of Poland protested against such restriction of the genocide definition. He was of the opinion that acceptance of such a limitation would derail the crime from the intended path. He further reminded the participants that it was the definition of genocide that was being formulated, not practical examples, and that government complicity might be involved more often than not. Therefore, determination of government complicity and its effect can be left to the due diligence of the judges; hence, such limitation must be removed from the definition of the crime to stay in the course of drafting a legal definition. More clearly, the Venezuelan representative Mr Perez-Perozo rejected the inclusion of state collusion as an independent element of the crime of genocide because the root of genocide is a combination of two elements, ‘group’ and ‘kill’, and therefore as soon as those two elements are present, there is genocide, regardless of the other circumstances that might be present or not. Therefore, at the hoc Committee’s stage the drafting began with the assumption that genocide is a state crime, but such assumption was later rejected in the face of strenuous objections from several countries. The later views of the Venezuelan representative must have succeeded in this case because the crime of genocide was not drafted to specifically address

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120 UN Doc E/AC.25/SR18.
122 ibid.
123 ibid.
124 Abtahi and Webb (n 121) 714.
125 ibid 715.
126 UN Doc E/AC.25/SR4, pp 3-4; UN Doc E/AC.25/SR18.
peacetime crimes against humanity which were not covered by Nuremberg but a new crime dependent on the intent to destroy a human group as an entity.

The question of the role of state in the commission and definition of genocide continued to the final stages of the drafting of the Genocide Convention. At the 63rd session of the Sixth Committee the French representative recalled into discussion their previous draft (A/C.6/211) submitted to the Ad Hoc Committee on the role of governments in an attempt to treat what the representative called the defect of the ad hoc Committee’s draft.\textsuperscript{127}

Consequently, from the various views expressed at this stage there seemed to be some states who vigorously claimed that genocide could not be committed without complicity of the state by phrasing the commission of genocide without complicity of state as being ‘impossible’\textsuperscript{128} and an ‘illusion’\textsuperscript{129}. At any rate, there are divergences of views expressed on this matter, but one that was put forward without criticism, with almost unanimous agreement, was that genocide can be committed with or without government complicity.

The French amendment which requires genocide ‘to be committed, encouraged, or tolerated by the rulers of a state’ was introduced by the Chairman in the 73rd session of the Sixth Committee.\textsuperscript{130} The French delegate Mr Chaumont reiterated earnestly to the Committee his reasoning for the inclusion of state policy in the definition.\textsuperscript{131}

Yet, the French delegate was not advocating government involvement on a conceptual ground or for reasons that are natural and inherent in the crime of genocide.\textsuperscript{132} The rationale proposed was the need for prevention of genocide by drafting for the practical possibilities of trying genocide in domestic forums and the lessons of similar historical crimes.\textsuperscript{133} History suggests that if the Committee formulated the definition as a whole on individual responsibility alone, then the

\textsuperscript{127} UN Doc A/C.6/211.
\textsuperscript{128} Haiti in A/C.6/SR.74.
\textsuperscript{129} The United Kingdom, in A/C.6/SR.69 and A/C.6/SR.74.
\textsuperscript{130} UN Doc A/C.6/78.
\textsuperscript{131} UN Doc A/C.6/78.
\textsuperscript{132} ibid.
\textsuperscript{133} UN Doc A/C.6/SR.97.
drafters would be allowing states to judge themselves for a crime they committed.\textsuperscript{134} The French fear was temporally valid in the absence of an operating ICC-like institution\textsuperscript{135} or the impossibility to envisage any proactive role for the UN Security Council.

In a similar direction, there are those who think even organized groups can commit genocide and not state alone. For example, the Pakistani representative quoted extracts from the speech of Giani Kartar Singh (an Indian Sikh leader) who declared, ‘Our Kirpans (battle-axes) will decide whether the Muslims are to rule’\textsuperscript{136} and another extract from a newspaper (\textit{Hindu Outlook}) reporting a call to prepare for war against Pakistan and the Muslims, but the Pakistani representative, despite reference to group and private individual’s speeches and writings, confirmed that it was not a conflict between communities but a deliberate act of genocide, carefully planned by the rulers on the part of the population\textsuperscript{137}.

It is important to draw attention to the other side of the argument against the French proposition. Mr Abdoh of Iran, for instance, reiterates the fact that the French proposal does not add anything that is natural and absolute to the crime because genocide can be committed without government involvement or plan or policy. Therefore the proposal proposes an element that is ‘foreign to the very nature of the act, since the complicity or connivance of rulers was only an attendant circumstance and not a constituent factor in the crime’\textsuperscript{138}.

Along a similar line of argument the Union of Soviet Socialist Republic’s Mr Morozov stated that the French amendment is attempting to import foreign elements such as circumstances upon which an act can be classified as a punishable genocidal act and a ‘definition of possible perpetrators’ in the definition of genocide\textsuperscript{139}.

\textsuperscript{134} UN Doc A/C.6/78. This fear has now been addressed by the ICC.
\textsuperscript{135} Note that such institution was envisaged in the Genocide Convention, and the ILC initiated such discussion back in the 1940s.
\textsuperscript{136} UN Doc A/C.6/63.
\textsuperscript{137} UN Doc A/C.6/63. The Indian representative, Mr Sundaram, replied in the 64th meeting of the committee (A/C.6/SR64) that the Pakistani accusations were merely an attempt to divert Pakistan’s own guilt in Kashmir and these accusations were not based on fresh facts but mere propaganda.
\textsuperscript{138} A/C.6/SR.79; Abtahi and Webb (n 121) 1456.
\textsuperscript{139} A/C.6/SR.79.
Mr Raafat of Egypt, on the other hand, stated that the French proposal of state plan and policy is practically contrary to the General Assembly Resolution 96(1)\(^{140}\) and that it created two crimes, with and without state implication\(^{141}\). Nevertheless, the Resolution also made no difference in the way that the crime should be prevented and punished an angle from which the French proposal is coming. To reinforce his arguments Mr Raafat stated that there could be an instance where a para-military force is capable of committing genocide without government involvement, such as in the case of Palestine before 14 May 1948, when ‘…a Zionist group had wiped out whole villages, at a time when the Mandatory Power was leaving the country and when no established authority could assume responsibility for those acts’\(^{142}\).

Mr Bartos of Yugoslavia also gave an example against the French amendment that during 1945 armed bands had been brought into Czechoslovakia and in spite of the government opposition had committed crimes of genocide and that the same had also happened in Poland in 1948\(^{143}\). The Philippines representative, Mr Paredes, rejected the French proposal because it excluded from the jurisdiction of the domestic courts the ability to try individuals for the crime of genocide because it practically limited genocide to state crime only\(^{144}\).

Nonetheless, the question of state involvement was exhaustively treated at the drafting stage. There is nowhere that this disagreement is clearer than in the exchange between the UK and US representatives. In a response to the US delegate’s insistence that genocide could be committed without state involvement, Mr Fitzmaurice of the UK said if the US delegate believed that genocide is possible without state collusion, then ‘he was living in a fool’s paradise’\(^{145}\). In response, Mr Makato of the US asked Fitzmaurice if he denied that individuals could commit

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\(^{140}\) Resolution 96(1) requires punishment for public official, statesmen, and private individuals.

\(^{141}\) A/C.6/SR.79. The Iranian delegate clearly stated that the French proposal created two crimes by treating two similar acts differently as genocide and murder.

\(^{142}\) A/C.6/SR.79; Abtahi and Webb (n 121) 1458.

\(^{143}\) A/C.6/SR.79.

\(^{144}\) UN Doc A/C.6/SR.80 (1948) p 166.

\(^{145}\) UN Doc A/C.6/SR.98 (Mr Fitzmaurice).
genocide, and whether the Convention failed to achieve its purpose if individuals were not to be punished\textsuperscript{146}.

Finally, Mr Fitzmaurice of the United Kingdom said that the UK abstained from voting on the draft Convention because the UK believed that the whole issue of genocide was an approach from the wrong angle of individual responsibility while it should have been about state responsibility\textsuperscript{147}. However the final wording of the definition of genocide affirms that supporters of the state plan and policy element lost the battle because the final definition lacks any reference to state as a perpetrator.

\textbf{3.2.3.3 Importing attendant circumstances within the constituent elements of genocide}

For lack of an agreed concept of genocide, the initial propositions defining genocide fail to distinguish between attendant circumstance and the constitutive elements of the crime. For instance, in the early Secretariat draft there was an understanding that genocide normally requires the support of a relatively large number of individuals, substantial preparation, and state collusion\textsuperscript{148}. However, there were other views that the crime requires a certain mind to exist before it can qualify as genocide without any clear reference to particularization of genocide as a collective crime and the attendant circumstances such as scale and pattern as the constitutive elements of the crime. During the deliberations in the Sixth Committee it was revealed that there was clear pronouncement to distinguish genocide from any association with collectivity as a criminal element or scale, plan, and policy, especially when the discussion turned into disagreement as to whether killing a single individual would suffice for the crime of genocide to take place.

Thus, two arguments emerged: some states were comfortable with the idea that genocide can be committed by both state and individuals or lone génocidaires. And other states admitted that if the accused is an individual and committed his crime without the complicity of state the national jurisdiction must be applicable, thereby

\textsuperscript{146} UN Doc A/C.6/98 (Mr Makato). In the ad hoc committee draft the US was of a different opinion which was abandoned: UN Doc E/AC.25/SR.4, pp 3–4.
\textsuperscript{147} UN Doc A/C.6/132 (Mr Fitzmaurice).
\textsuperscript{148} UN Doc E/477, pp 29–30.
acknowledging the possibility of a lone génocidaire. The Iranian delegate Mr Abdoh rejected the Belgium amendment which attempted to categorize genocide as a collective crime, because it attempted to introduce the idea of co-operation, thereby making genocide a collective crime when it can actually be committed by a single individual alone. The Belgium delegate in response favoured to substitute the word ‘co-operate’ with ‘participate’ because of the inconceivability of one individual committing destruction of a race or a group. The objection here is in any event not impossibility but practical possibility, so it can be committed by a lone individual, however small that crime might be.

The French delegate Chaumont changed the object of the Iranian objection to the Belgium proposition that categorized genocide as a collective crime by stating that genocide can be committed if a single individual is attacked as a member of a group provided that the necessary intent was in existence. On the contrary the British Mr Fitzmaurice contended that a single-person attack should be homicide whatever the intent of the perpetrator, transforming genocide into a result crime that can only occur following a result. Mr Fitzmaurice had ignored the fact that genocide’s foundational base was the intentional destruction of a group regardless of the scale or the number or the strength of the perpetrators. This was properly understood by the Iranian delegate.

Sweden’s delegate, Mr Petren, identified that the force of the Convention should not be viewed as weakened by inclusion of the possibility of commission by a lone individual or private organizations and that such possibility must not be ignored. Mr Fitzmaurice of the UK reiterated that the French proposal recognized that genocide can be committed by a lone génocidaire but emphasized the fact that the Ad Hoc Committee’s draft failed to stress the role and policy of state in the commission of genocide, and therefore it was not a new element being imposed but reinforced the state complicity elements to avoid producing an absurd text based entirely on individual responsibility.

150 A/C.6/217. See also Lebanon UN Doc A/C.6, at 32.
151 A/C.6/SR.73.
152 A/C.6/SR.73; Abtahi and Webb (n 121) 1381.
153 A/C.6/SR.73; Abtahi and Webb (n 121) 1382.
154 UN Doc A/C.6/SR.79.
In the face of these complex views the French delegate Mr. Spanien later found it necessary to respond to the objections raised against their amendments. He stated that their proposal by no means excluded the responsibility of private individual and limited genocide to only state perpetration. The delegate further explained that their proposal was prompted by their government’s desire to entrust the suppression of genocide to the international court. So the proposal was not borne out of inherent and conceptual necessity.\(^{155}\) The French amendment was rejected by a huge majority (40 votes to 2, with 1 abstention).

The drafting process was concerned with criminalization of destruction of groups and not single members of group in their individual capacities, and this naturally led to discussion of the required scale of destruction. The earliest draft of the Secretariat construed genocide as systematic destruction of even a ‘fraction of a protected group’\(^{156}\). This was not only acceptance of small-scale genocide but also an acknowledgement of the difficulties that might stem from scaling genocide in number and body count, because there can be a large-scale massacre that might not qualify as genocide. For instance, it was remarked in the Secretariat draft that there are borderline cases where ‘a relatively high death rate might be ascribed to lack of attention, negligence or inhumanity, which, though highly reprehensible would not constitute evidence of intention to commit genocide.’\(^{157}\)

At this stage of the drafting, it is difficult to ascertain one position as far as the scale and its relevance to genocide. This is partly because the Secretariat draft initially adopts a broad-brush policy in including all contextual elements that might be adopted within the new definition of genocide and left the task of eliminating the irrelevant elements to the responsible UN organ\(^{158}\). Therefore, no legally valuable position should be extracted here because the draft was not meant as a legal text\(^{159}\). Professor Donnedieu de Vabres of France said that the Secretariat draft was ‘avant-projet’.\(^{160}\) Similarly the Yugoslavian delegate, Professor Bartos, commented that the

\(^{155}\) A/C.6/SR.80. Abtahi and Webb (n 121) 1469.

\(^{156}\) UN Doc E/477 p24; E/AC.25/SR13, p 7.

\(^{157}\) UN Doc E/447, p 25.

\(^{158}\) UN Doc E/447, pp 15-16.

\(^{159}\) Drost (n 2) 8 ; UN Doc E/447, pp 115-16.

\(^{160}\) UN Doc A/Ac.10/SR.29 (24 June 1947).
Secretariat draft was only an internal document of the Secretariat.\(^{161}\)

The question of scale was also discussed at the Ad Hoc Committee stage. Principle VII envisaged the inclusion of partial genocide,\(^{162}\) and the Committee agreed to include ‘in whole or in part’,\(^{163}\) but this proposition did not appear in the final draft\(^{164}\). However, it was not apparent as to why this contextual element was missing. Was it because there is no small genocide or the belief that there is no need to classify genocide numerically? The Ad Hoc Committee expressed similar views to the French proposal that the killing of an individual could be genocide if committed as part of series of other acts aimed at destruction of a group, but this assessment was not disclosed to the Economic and Social Council\(^{165}\).

The Ad Hoc Committee drafts were free from any mention of scale, but in the Sixth Committee a proposal from Norway added the ‘in whole or in part’\(^{166}\) to the mens rea of the crime, but this does not make it clear what was meant by ‘in part’. The French delegate withdrew a similar proposal\(^{167}\) on the belief that the Norwegian proposal expressed the same idea, namely, that to add ‘against an individual as a member of a human group’ before the word ‘group’ in the definition might show that genocide against one single individual is possible without any need for scale\(^{168}\). However, the Norwegian delegate stated that their proposal of ‘in whole or in part’ did not go as far as the French proposal\(^{169}\).

The Ad Hoc Committee Working Paper (E/AC.25/W.1) stated that an isolated act directed against one or more members of a protected group could not constitute genocide. But such an act that is part of a chain of actions inspired by the intent to destroy could qualify as genocide.\(^{170}\) However, this comment ignores why the one isolated act could not qualify if it was inspired by the same intent but was not part of such pattern, and also what value the fact that there is a chain of acts or pattern add to

\(^{161}\) UN Doc A/AC.10/SR.30; A/401, 07/10/1947.
\(^{162}\) UN Doc E/AC.25/7.
\(^{163}\) UN Doc E/AC.25/SR.10, p 16.
\(^{164}\) UN Doc E/AC.25/SR.24, p 4.
\(^{165}\) Drost (n 2) 84; UN Doc A/C.6/SR.81, p 8.
\(^{166}\) UN Doc A/C.6/228.
\(^{167}\) UN Doc A/C.6/224.
\(^{168}\) UN Doc A/C.6/SR.73.
\(^{169}\) A/C.6/SR.73; Abtahi and Webb (n 121) 1383.
the crime. This is the slippery slope that existed from the beginning of the drafting process as a result of accounting for the practical instance within the codification process and the attempt to account for all possible ways in which genocide might take place. This aspect should have been left to the judges to be decided on a case-by-case basis, but assessment can only be made as to whether there existed intent to destroy a group or involved an element to substantiate the mental state of the perpetrator. In the same Working Paper commenting on the type of act constituting genocide, the Ad Hoc Committee commented in contradiction that assassination of individuals with a view to total or partial destruction of a group could constitute genocide.171

The initial drafts of the Genocide Convention included the word ‘deliberate’, which implies that genocide requires some sort of planning. This was removed following a request from Belgium for deletion of the word.172 Drost argued that by omitting this word it became clear that genocide no longer requires the element of scheming, plotting, and conspiracy to make an act genocide intended for destruction of human group173.

3.2.3.4 The need for a novel and narrowly constructed definition of genocide

The historical reference and Nuremberg references relating to creating a link between Nuremberg crimes against humanity and genocide were struck out at the Sixth Committee stage by acceptance of the Venezuelan proposal,174 so the new draft created a completely novel legal concept originating in the UN General Assembly Resolution 96(1)175. The United States reiterated that the concept of genocide is a novel concept based on Resolution 96(1).176 Thus, this new concept represented a complete divorce from the previous concepts of genocide, whether the one conceived

171 ibid 3.
172 UN Doc A/C.6/217.
173 Drost (n 2) 82.
174 UN Doc A/C.6/261. The Soviets called for a link to fascism to be added and to use the recent event as evidence, UN Doc A/C.6/273. France also advocated for reference to Nuremberg, UN Doc A/C.6/267. On the other hand, Egypt rejected such link, UN Doc A/C.6/SR.110 (Mr Raafat, Egypt).
175 Drost (n 2) 75; Claus Kress, ‘The Crime of Genocide and the Contextual Element, Comment on the ICC Pre-Trial Chamber’s Decision in the Al Bashir Case’ (2009) 7(2) Int Criminal Justice 297-306, 301.
176 UN Doc A/C.6/RS 109 (Mr Maktos, United States).
by Lemkin or any other concept that might have emerged as a result of association with crimes against humanity during the Nuremberg trials.

The definition and the codification process of genocide demonstrated the need to distance and disassociate genocide from the perceived connections or factors that make an act a mass crime, such as patterns, policies, and scale. The Secretary General very early in the drafting process undertaken by the Secretariat insisted on the need to keep codification of the crime of genocide separate from other already established crimes under international law. Schabas believes that what the Secretary General was referring to here is obliquely the crimes against humanity. Thus, the process of creating a legal definition started with the need for a narrow definition unrelated to any other crime. It was important because it is the starting stage of genocide’s legal journey.

The narrow construction of genocide was favoured over that of Lemkin’s concept developed in his book, *Axis Rule in Occupied Europe*, where no distinction is made between genocide and other crimes such as crimes against humanity and war crimes other than the mere emphasis that genocide is the act of extermination of a group by any means. For example, Professor PC Jessup of the United States acknowledged in the Committee on Progressive Development of International Law that the international law has not punished the Nazi genocide and similar genocide because of the underdeveloped status of the international law, and hence expansion of it, is required to cover those unpunished crimes and accept that their task was to draft a definition that is acceptable to the international community.

Therefore, all attempts to link genocide to Lemkin’s concept of genocide or other crimes or to assimilate genocide with crimes against humanity and include other attendant circumstance were all rejected on the basis that genocide is a novel crime, with different elements. Therefore, such association of genocide with other crimes should be avoided to create an inclusive definition that might cover future crimes.

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177 UN Doc E/447, p 17.
179 UN Doc E/447, p 15.
180 See Chapter 1, sections 1.2 and 1.2.1 above.
182 UN Doc E/794.
Thus, the plan from the beginning was to divorce genocide from the historical conceptions so it could be defined without the need for contextual elements as previously understood.

Therefore, despite the strong influence of the Holocaust and other mass crimes in the understanding of the concept prior to its codification, this association lost its influence at this stage – the codification stage – because the drafters were formulating a definition that was not unique to the Holocaust, but a phenomenon of intentional destruction of a specific group with specifically enumerated methods, and the definition had to reflect that. Hence, genocide now means a different thing as per the meaning given to it by article II of the Genocide Convention which covers Holocaust-like instances and other instances where the scale of the crime is not similar to that of the Holocaust. It is important to note here that this view of strict adherence to the narrow definition of genocide was prominent quite early in the Genocide Convention’s drafting process. The Secretariat draft emphasized the need for stricter interpretations to avoid the indefinite expansion of the idea of genocide to cover all reprehensible acts, and jeopardize the prevention of future genocides.\(^{183}\)

As far as the contextual element of genocide is concerned, the *Travaux Préparatoires* of the Convention gave very little because the final definition made it very clear that there was no need for any context, pattern, or scale despite the numerous proposals on contextual elements of genocide, none of which can be taken as definitive assessment of the contextual elements position within the definition. The *Travaux* can only be used in cases of ambiguity, and where interpretation may lead to manifest absurdity. However, in the case of ‘contextual element’ the definition is very clearly defined. What is needed is the intent to destroy in whole or in part – an element that was not addressed by the international war crimes or crimes against humanity. Hence, the Genocide Convention became necessary to combat the impunity that results from not being tried for genocide but other less heinous crimes in terms of the stigma attached.

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\(^{183}\) Abtahi and Webb (n 121) vol 2, 222; Secretariat Draft E/447, Part II, Comment on the Draft Convention, Section I, Introduction.
Therefore, the deliberate effort of the international community to narrow down the definition of genocide as per article II of the Genocide Convention and the attempts to create a separate crime, beyond doubt can be discerned from the Convention’s clear departure from the wording of Resolution 96(1) in which genocide was widely defined as ‘a denial of right of existence of entire human group’ without enumeration of the genocidal act. The concept of genocide and the use of the word prior to its codification by the international community had a minor impact on the current definition of genocide as per the Genocide Convention\textsuperscript{184}.

### 3.3 The post-codification period: maintaining the distinction between the Holocaust-based conceptions and the new formal concept of genocide

#### 3.3.1 Commission of genocide and the need for a plan or pattern of similar conduct

It is evident beyond the need for any elaboration that the newly defined crime requires intentional destruction of a protected group only. However, despite such clarity, the Convention’s definition failed to dissociate the legal concept of genocide from its perceived historical foundation as a mass crime, which eventually led to misunderstanding of the relationship between genocide and its surrounding circumstances, as evidenced in the academic and the judicial debates\textsuperscript{185}.

After the ratification of the Genocide Convention, the matter lay dormant, without much examination except for infrequent assessment in the work of the ILC – which will be discussed below in detail – and a few national prosecutions, such as that of Eichmann. It is not easy to ascertain the importance of the need for plan or pattern at this stage because no case was brought before any international court in which the constituent components of the crime could be disentangled.

In the early period following the ratification of the Genocide Convention, Mr Spiropoulos, Special Rapporteur of the International Law Commission in drafting the

\textsuperscript{185} See Chapter 4, section 4.2, specifically section 4.2.1 on judicial debate and 4.2.2 on academic debate.
Draft Code of Offence against Peace and Security of Mankind, defined Crime No VIII by combining the definition of genocide and the definition of crimes against humanity – the latter as stipulated in article 6(c) of the Nuremberg Charter – on the presumption that the two concepts overlap and cannot easily be separated, with the difference being only the war nexus and the group element. The Rapporteur joined the two crimes because he was of the opinion that there is no other way of including the two crimes in the draft other than by combining the two in one article.

Early in 1951, Mr Spiropoulos in his second report on the Draft Code of Offence against Peace and Security of Mankind regrouped genocide and crimes against humanity in one article and made an additional remark that genocide could be committed by a state as well as a private individual. This can be taken that a private individual can single-handedly commit a genocide, which goes against those who advocate the need for planning and policy to commit genocide by virtue of the fact that state is required to be involved in the act of killing a group.

The lone génocidaire possibility could hardly have been an important aspect in the 1950s because the concept had not been legally examined in a court of law, and its constitutive elements were unclear. Therefore, the inclusion of state and private individual was not to merely make an exhaustive list of who can commit genocide but a reference to the fact that an individual can be held responsible for the crime as opposed to just a state. The possibility of genocide being committed with state involvement is explicitly recognized by the Genocide Convention in article IV. Thus, this precision is of little significance other than to provide an illustration of what was in existence. The same idea was also considered at the drafting stage of the Genocide Convention.

The views in the few decades following the ratification of the Convention remained unaffected by the autonomous status gained by the concept of genocide. Lemkin, in a letter to a newspaper editor in the early 1950s, wrote that genocide was not

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187 ibid.
188 ibid vol II.
189 Genocide Convention 1948, art IV.
sufficiently known and not fully understood\textsuperscript{190}. Lemkin clearly rejected the possibility that genocide can be committed by an individual because the UN Resolution identified that genocide is the denial of the right of existence to a human group, defeating any possibility of an individual committing genocide because, according to his understanding genocide requires something more than individual capacity or state-like planning\textsuperscript{191}.

Contrary to Lemkin’s contention, Nehemiah Robinson, an early commentator on genocide, contended that the Ad Hoc Committee was correct when drafting the genocide definition in affirming that the crime of murder can be classified as genocide if it was committed as part of similar pattern of acts aimed at the destruction of a group and the same conclusion could also be reached on acts listed in sub-paragraphs (b) and (e). By removing any reference to premeditation from the definition of genocide at the drafting stage, it constituted exclusion of planning from the pre-requisite of genocide as a crime and that genocide can thus be committed by negligence or omission or that ‘the psychological moment of plotting’ is not necessary for classification of acts as genocidal\textsuperscript{192}.

However, the erroneous assumption that genocide requires planning and policy continued to emerge in discussions on its definition. For example, in the deliberations of the Ad Hoc Committee on the Establishment of the International Criminal Court, some delegates suggested the need to distinguish between the intent of the planners, which requires specific intent, and that of the foot soldiers or actual perpetrators of the genocidal act, which requires general intent and knowledge. Such addition was called for without amending the Convention. This reveals that the suggestion stems from the belief that even the conventional concept of genocide needs planning or policy, but what is not expressed is what form this proposition takes in relation to the elements of the crime, and the difficulties associated with the agreement to leave the definition of the Convention intact.

\textsuperscript{190} Lemkin, ‘Nature of Genocide: Confusion with Discrimination against Individuals Seen’ (n 22).
\textsuperscript{191} ibid.
\textsuperscript{192} Robinson (n 2) 60.
The court in Israel acquitted Eichmann of crimes committed before a certain date because he was not aware of the Nazi plan to exterminate the Jews. This court assessed the individual guilt of the accused based on the level of his contribution as a principal and accessory in the execution of the Final Solution and his willingness and zeal in achieving the objectives of implementation of the said plan. This is a strong presumption by the Israeli court that the crime against the Jewish people – genocide – requires a plan because the court assumed that the Nazi crimes were beyond doubt genocide and this was affirmed by the General Assembly Resolution, the Genocide Convention, and the ICJ. The court even avoided consideration of the period between June and August 1941, because of a lack of specific acts on the part of the accused, in execution of the Final Solution. This is further evidence that the court unquestionably held the need for a plan to be a prerequisite and not because the Final Solution presented a golden opportunity to prove the accused’s intent.

The apparent confusion on the position of the context continued until the 1990s, when the ILC in its forty-eighth session submitted that General Assembly Resolution 96(1) was affirmation that persecution is genocide and recognized it as such because the current definition of genocide represented the development in the crime of persecution enshrined in the Nuremberg Charter. The ILC went even further in its commentary by holding that the crime of genocide, by virtue of its magnitude, required some degree of government and high-official involvement and thus some knowledge on the part of the perpetrator of the plan. The ILC failed to give reasons as to why persecution in the Nuremberg Charter developed into genocide as defined in the Genocide Convention, or even clarify the sweeping statement that genocide requires some plan or policy.

The analysis of the context of genocide in this period was limited, because the concept of genocide was coined in the shadow of the Holocaust to address mass
extermination of human groups without distinction, but the legal definition narrowed it down to intentional destruction of specific groups without reference to factual circumstances. The failure of the crime against humanity to address the odious element of group targeting, which was the core of the Nazi crime, coupled with the historical impunity for mass crimes, led to the lack of consistent treatment of the definition of genocide in this period, resulting in difficulty to find a definitive line of reasoning in respect of the contextual element.

3.3.2 The scale of genocide as a qualifying element of the crime

Given the impetus of the atrocities of World War II on the creation of the Genocide Convention and the mass scale of the violence, the debate over what constitutes sufficient destruction before the act constitutes a genocidal act continued despite the explicit and plain language of article II. This concern was present even during the codification of the Convention. However, the Convention was ratified without any reference to such threshold, as the plain reading of the definition clearly demonstrates the absence of such a numerical assessment.

The literal definition is clear – that it is not necessary to annihilate a group from ‘every corner of the globe’, to borrow from the ILC language. Notwithstanding this clarity, the inclusion of the phrase ‘in whole or in part’ in the subjective side of the crime, forced the question of a threshold into the equation when establishing the mens rea, by questioning whether to assess destruction in a geographical, qualitative, or quantitative sense. Nehemiah Robinson in his commentary in 1960 pointed out that intent to destroy a group must be demonstrated by the prosecution without reference to the actual destruction or the result achieved. Therefore, the magnitude of the act proves no genocidal intent, and thus an act of homicide can be classified as genocide. However, Robinson went on and fell into the trap of equating genocide to a large-scale crime by stating that the scale of the affected group must be substantial in a geographical, qualitative, or quantitative sense to qualify as genocide because

199 Quigley (n 12) 164, 170.
202 Report of the ILC (n 197) 125.
203 Robinson (n 2) 59, 62.
'the convention is intended to deal with action against large numbers'\textsuperscript{204}. Nonetheless, the later line of reasoning represented the understanding in the immediate period following the codification of the Convention. This is properly reflected in the United States’ rejection to ratify the Convention on the basis that destruction of a group ‘in part’ must mean a ‘substantial part’ of the protected group\textsuperscript{205}.

It is worth noting here that Lemkin himself advocated for the inclusion of scale element within the definition of genocide. He wrote that ‘genocide is a rare crime of great magnitude’\textsuperscript{206}. He accepted that genocide can be committed by different methods including causing serious mental harm, but reiterated that the mental harm inflicted must be vast in scale beyond an act of individual, recalling the Japanese administration of drugs against the Chinese during WWII, even though the definition does not support such reading. Lemkin seemed to be of the idea that confusing genocide with discrimination actually deflated the genocide concept or trivialized it somehow\textsuperscript{207}.

later in his correspondence with the United States Senate, when the Genocide Convention was under consideration, pointed the attention of the Senate to his understanding that the intent to destroy ‘in part’ was meant to be of ‘a substantial nature … so as to affect the entirety’\textsuperscript{208}. Lemkin seems to have side-lined the literal definition of the Convention and transformed the question of scale from the subjective side of the crime to the objective. He went further in his advice to suggest that the ratification must be supplemented with a clarification statement to the effect that ‘the Convention applies only to actions undertaken on a mass scale’\textsuperscript{209}. If both Lemkin and Robinson were referring to the mental assessment, then what difference does it make if the perpetrator intends mentally to destroy a group in whole or in part because what constitutes a part is a relative question as far as the perpetrator’s own assessment is concerned.

\textsuperscript{204} ibid 63.
\textsuperscript{206} Lemkin, (n 22).
\textsuperscript{207} In a letter to the \textit{New York Times}, Lemkin (n 22).
\textsuperscript{208} Raphael Lemkin in Executive Session of the Senate Foreign Relation Committee (Historical Series 1976) 370.
\textsuperscript{209} Executive Sessions of the Senate Foreign Relations Committee, Historical Series (1976), p. 370; see also \textsc{Jelisić} (Trial Judgment) para. 82; Schabas, \textit{Genocide in International Law: The Crimes of Crimes} (n 2) 238.
However, the question of what level of destruction is needed for the crime of genocide is not clear from the definition. This depends on separation of the intent element from the context element, that is, the intent to destroy ‘in whole or in part’ is meant to be taken in a literal sense, which means the threshold is to be measured by what is in the mind of the perpetrator, without the need for manifestation of that mental element into extermination of a large, considerable, or substantial number. The perpetrator’s capacity to achieve a partial or whole destruction of a protected group is irrelevant in the constitution of genocide.

In the 1991 draft Code, the ILC stated that there is no need to achieve the extermination of the group for genocide to ensue; thus, committing a single act listed in the draft article with genocidal intent would suffice. Therefore, any argument in favour of actual scale of destruction is accordingly invalidated as far as the objective constitutive component of the crime is concerned. This is a clear pronouncement that the scale is only measured by what the perpetrator has in mind rather than the actual number killed.

However, the confinement of scale to the mental side of the crime was not sustained. Most recently the ILC in 1996 referred to the General Assembly’s distinction between genocide and homicide in Resolution 96(1), but this does not mean an act would not be genocide by virtue of the scale, even though genocide can be committed on a large scale with state involvement. In addition, in 1985, the same reasoning was followed by Benjamin Whitaker when he suggested the need to accord some importance to the proportionate scale and the total number, rejecting the idea that genocide can be applicable to an individual where a single person is a victim, listing the use of the plural in the actus reus of genocide in article II. And the belief that genocide is a grave crime should not be diluted by allowing its application in cases where the scale is disproportionate to the total number of the group as a whole. The misconception here is that the scale threshold is not confined to the

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mental state of the perpetrator but the act, so that the act of killing a single person with the necessary mental state, or desire to kill at least a substantial part of the targeted group, is not considered genocide. The missing point here is that this single individual represents the starting point of the desired destruction. This act should not be lightly considered less criminal by virtue of the number of victims; this distinction needs to be made clear.

The alarming element here is not whether the requirement of substantiality is to be confined to the mental faculty of the perpetrator or taken in a material sense, but the use of words such as ‘by its very nature’, which submits a proposition to shift the genocide concept from one based on intent to exterminate a protected group, to one based on widespread and systematic or mass-scale crime by its nature. This is not helpful because it allows scale to be the benchmark for genocide and leads to assimilation of genocide with any large-scale atrocities distorting the specificity of the crime of genocide and the consequences attached to its commission. On the other hand, there are the misconceptions that genocide by its nature requires large-scale and systematically patterned targeting of the protected group, none of which is reflective of the definition of genocide as provided for in the 1948 Convention. The categorization of genocide in such a way was not uncommon at the time. In the few academic and judiciary deliberations during the early period, the inability to detach genocide from the experience of the Holocaust led to the sweeping association of genocide with mass-scale crime in which pattern, planning, and magnitude played an important role, but none of these had any effect on the original definition or its continuing functionality.

This has resulted from the lack of conceptual and factual elements to answer the question of scale in a non-arbitrary way. Drost commented on the drafts submitted that genocide is homicide ‘with a connecting aim’ that is destruction of the group. He stated that even though the construction of the definition implies that destruction of more than one person is intrinsically required for genocide to ensue, there is nothing in theory and principle to contradict or prohibit its interpretation to apply to single victim provided that the intention was to destroy a protected group.

213 Report of the ILC (n 197) 125.
214 Drost (n 2) 85.
Accordingly the intent of the perpetrator must contemplate killing more than a single individual (in the mental state), but the deed of the perpetrator ‘may remain restricted to one corpus delicti’.\textsuperscript{215}

It is sufficient to point out here that the numeric threshold is obscured at least at the early stage of the evolution of the genocide concept, but at the drafting stage and the subsequent examination of the concept the majority of arguments point towards inclusion of some numeric measurement – substantial, considerable or similar prerequisites – reducing the legitimacy of the proposition that genocide can be committed by killing a single person. These sporadic propositions seemed not to flow from the need to clarify the definition of genocide or insufficiency of the Convention, but might be the consequences of the understanding that the crime of genocide is a species of the crime against humanity. Therefore, the crime of genocide should resemble its elements, such as the need for pattern, scale, and state involvement contained in the need for ‘widespread and systematic attack’.

\textbf{3.4 Concluding remarks}

As discussed above, following the entry into force of the 1948 Genocide Convention, the legally authoritative definition in article II is the only definition that can be relied upon in legal proceedings, however deficient it might be. From 1947 to 1996 the ILC periodically addressed issues related to the material and contextual aspect of the crime of genocide,\textsuperscript{216} but what is important, is to establish that even during this period, the need for genocide to remain free from any contextual attachments was clear as per the emphasis on the need to preserve the conventional definition of genocide. Thus, any value or relevance these discussions might have would not exceed those that surfaced during the codification of the Genocide Convention. Thus, the genocide definition was consistently preserved from being grouped loosely with other crimes such as crimes against humanity.

This can be attributed to two reasons as far as the ILC’s work is concerned. First, Rapporteur Spiropoulos acknowledged that there was no need to formulate

\begin{flushright}
\textsuperscript{215} ibid 85-86.
\textsuperscript{216} Report of ILC (n 197); Whitaker, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide (n 213); Report of the ILC (n 210).
\end{flushright}
procedurally and substantively a comprehensive code of offences. Thus, any issues as substantive as the contextual element received little attention.\textsuperscript{217} Second, the ILC was well aware of the fact that it was entrusted with the task of formulating a code that could receive the approval of governments; this shackled it from venturing into more substantive issues regarding the concept of genocide\textsuperscript{218}.

The same line of reasoning was also reiterated by the 1994 draft Statute of the ICC (commentary on article 20) when it stated:

\textit{... the statute is primarily an adjectival and procedural instrument. It is not its function to define new crimes. Nor is it the function of the statute authoritatively to codify crimes under general international law.}\textsuperscript{219}

Despite the ILC’s knowledge of its ability to change, add to, or expand the definition of the crime of genocide, none of the propositions were taken any further. Therefore, any discussion of contextual element during this period is redundant, because those documents and legal discussions lacked any meaningfully defined engagement on the issue of the contextual aspect of the crime of genocide. Any mention was incidental by the virtue of connection, or the perceived connection, with crimes against humanity or the inability of many to detach the social understanding of genocide in the common parlance from the legal definition. Consequently, a defined position of this element of genocide is difficult to ascertain.

The distinction between the two crimes – genocide and crimes against humanity – has now matured following the effort of the ICJ and the ad hoc tribunals and the passage of almost five decades. The ILC in its 1996 draft Code of Crimes substantiates that the crime of genocide has its origin in the crimes against humanity of persecution as provided for in the Nuremberg Charter, article 6(c), but subsequently developed into a crime of genocide with distinct constitutive elements as recognized in the 1948 Convention. This development is clear in the characterization of the crime of genocide in terms of its specific intent and prohibited acts without the need for a nexus to war or crimes against peace as per the

\textsuperscript{217} Draft Code of Offences against the Peace and Security of Mankind, Report by J Spiropoulos (n186) 255, para 1.

\textsuperscript{218} ibid, paras 1-2.

Nuremberg Charter\textsuperscript{220}. Hence, it can be concluded that, in the early period, the contextual elements had no role to play as far as the constitutive elements of the crime were concerned and none of those discussions and documents lend any support for any position different than the one of the Genocide Convention. Hence, the above analysis of the early period of the existence of the crime of genocide reveals weak legal reasoning, and lacks any strong hint as to the position of the contextual elements.

\textsuperscript{220} Report of the ILC (n 197) 44, paras 1-4.
CHAPTER 4: THE CONTEXTUAL ELEMENTS IN THE PREVAILING CASE LAW: APPLICATION OF THE LEGAL DEFINITION OF GENOCIDE OR AN INTERPRETATIVE CONTORTION

4.1 Introduction

This chapter will comprehensively examine and critically evaluate how the ‘contextual elements’ of the crime of genocide have been treated in the prevailing case law. This consideration is important because it confined the treatment of the concept of genocide as it existed under the Convention and the customary law. The chapter will consider the prevailing judicial debate in the jurisprudence of the ad hoc tribunals, and in the international/ized and national courts.

The chapter will devote considerable attention to deliberation of the case law of the ad hoc tribunals, albeit that they are not the first institutions to have touched on the crime of genocide, even though the ICTR almost exclusively dealt with a situation that was internationally recognized as genocide. In fact, the ad hoc tribunals are the first institutions to have had the opportunity to test the normative contours of the definition of the crime as formulated in the Genocide Convention, and to have unambiguously addressed the issue of individual criminal responsibility for the crime of genocide in systematic and ascertainable case law.

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1 All issues related to the ICC will be the subject matter of Chapter 5.
Using mostly the cases of the ad hoc tribunals, this chapter will review whether the ‘contextual elements’ can be reinforced by the courts as constitutive element of the crime without changing the nature and the legal definition of genocide. If not, it will be necessary to consider how they dealt with it in practice, as alternatively a jurisdictional or evidentiary element. Through this discussion, the chapter will sketch the reasons for the courts’ constant references to context in their reasoning. It will incorporate the finding of the internationalized tribunals and domestic courts, too, where the contextual elements were dealt with, although the genocide definition differs in some domestic laws and in the internationalized tribunals’ constitutive documents.

The chapter will begin by illustrating (in section 4.2) the courts’ clear assertion that contextual elements have no place in the literal definition of genocide as provided for in the Convention, and will demonstrate the unambiguous acceptance of this position by the courts. It will then, (in section 4.3) examine how the courts have circumvented the reference to contextual elements in their reasoning by the use of ambiguous language and tweaking the law in the face of the evidentiary challenge presented by the need to prove genocidal intent and then examine the real need for the contextual elements and how the courts could have approached the matter without encroaching on the legal ingredients of the crime. Before the conclusion (in section 4.4) the chapter will look at how the internationalized and national courts have dealt with the issue of context.

4.2 Does a contextual element exist under the prevailing case law?

4.2.1 The judicial approach to the wording of the definition of genocide

The ad hoc tribunals confirmed that genocide, as defined in all the constitutive instruments of the ad hoc tribunals, is based on the standard verbatim incorporation

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5 The French Penal Code, art 211-1 required the existence of a concerted plan to destroy a group. The Turkish Penal Code similarly required the involvement of state in the commission of the crime. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, as amended and promulgated on 27 October 2004 (NS/RKM/1004/006), art 4. Also note that some states amended the genocide definition from that of the Genocide Convention but later reverted to the verbatim definition of the Convention, such as Spain and Portugal: William Schabas, ‘Development in the Law of Genocide’ in Horst Fischer and Avril McDonald, Yearbook of International Humanitarian Law-2002 vol 5 (CUP 2011) 136.
of the Convention’s definition, which lacks any mention of any contextual element or of its jurisprudential value. Therefore, the courts must work according to the general backdrop that there is no place for any contextual element at all, as far as the literal definition is concerned, and that what matters is the specific intent. Thus, genocide can be committed by a lone individual intending to destroy a protected group as such – a ‘lone génocidaire’.

This definition inevitably leads to consideration of whether a general genocidal campaign or context is required for the commission of the crime of genocide. A survey of the case law of the ad hoc tribunals reveals that the courts followed the literal meaning of the definition and made it clear in no uncertain terms that genocide does not require any contextual element as a constitutive element. However, such firm pronouncements failed to ensure a clear and a faithful application in practice, as will be seen in section 4.3 below.

In the first genocide case, in its clarification of the constitutive elements of this crime, the court confirmed the contextual elements’ evidentiary role, but no other role was attached to them. The tribunal actually devoted specific section of the judgment in finding the existence of genocide in the whole of Rwanda and the specific area by examining the pattern, scale, and existence of plan or policy where the alleged crimes of the accused took place without reference to the significance of referring to ‘genocide’ in this situation. But contended that such findings must have no influence on the court’s decision and that the judge must disregard such a background setting.

6 Prosecutor v Kayeshema and Ruzindana (Judgment) ICTR-95-1-T (21 May 1999) (hereinafter ‘Kayeshema (Trial Judgment)’) paras 45, 87; Prosecutor v Akayesu (Judgment) ICTR-96-4-T (2 September 1998) (hereinafter ‘Akayesu (Trial Judgment)’) para 494; Prosecutor v Jelisić (Judgment) IT-95-10-T (14 December 1999) (hereinafter ‘Jelisić (Trial Judgment)’) para 60; Prosecutor v Duko Sikirica et al (Judgment on Defence Motions to Acquit) IT-95-8-T (3 September 2001) (hereinafter ‘Sikirica (Judgment on Defence Motions to Acquit)’ para 55. See also the ICC making the same affirmation in Prosecutor v Omar Hassan Ahmad Al Bashir, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Situation in Darfur, Sudan, ICC-02/05-01/09, PTC 1, ICC, (04 March 2009) (hereinafter ‘Al-Bashir (Arrest Warrant Decision)’) para 118.

7 Note that Antonio Cassese is of the opinion that, taken literally, the genocide definition does not provide for contextual elements, nor does it exclude them: Antonio Cassese, ‘Is Genocidal Policy a Requirement for the Crime of Genocide?’ in Paola Gaeta, The UN Genocide Convention (OUP 2009) 128.

8 Prosecutor v. Krstić (Judgment) ICTY-98-33-T (2 August 2001) (hereinafter ‘Krstić, (Trial Judgment)’) para 571; Kayeshema (Trial Judgment) para. 89; Prosecutor v Kambanda (Judgment) ICTR-97-23-S (4 September 1998) (hereinafter ‘Kambanda (Sentencing Judgment)’) para 16; Akayesu (Trial Judgment) paras 498, 520. See also the ICC making the same affirmation in Al-Bashir (Arrest Warrant Decision) para 117.

9 Jelisić (Trial Judgment) para 99.

10 Akayesu (Trial Judgment) paras 500-524.
and must presume the accused innocent and give full consideration to all the incriminatory and exculpatory evidence\(^\text{11}\).

The clearest of such judicial assumptions, in recognition of the non-existence of contextual elements for genocide, is found by the same Trial Chamber’s reasoning in \textit{Kayeshema}, where it was held that genocide does not require any plan or organization in attempting to destroy the protected group, however difficult that might be\(^\text{12}\). But the court did not make it clear whether other contextual elements such as pattern of the crime can play any part since all contextual elements cannot be grouped in one element.

Similarly, the ICTY in \textit{Jelisić} affirmed that genocide can be committed by an individual acting alone, thus weakening any validity for contextual elements. In so doing the court based its affirmation on the customary law and the \textit{Travaux Préparatoires} to exclude the contextual elements from the concept of genocide\(^\text{13}\). It held:

\begin{quote}
… the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.\(^\text{14}\)
\end{quote}

The Appeals Chamber corrected the Trial Chamber’s erroneous acceptance of a genocidal plan and policy as a constitutive element – in a charge of secondary liability – and held beyond any doubt that the existence of a plan or policy is not a legal ingredient of the crime\(^\text{15}\).

The ICTR also followed the same affirmation of there being no place for contextual elements; the Appeals Chamber’s decision in \textit{Kayeshema} reiterated the fact that the court’s reference to context is only evidentiary\(^\text{16}\) and it confirmed that other contextual elements such as a ‘persistent pattern of conduct’ are not legal ingredients.

\footnotesize
\begin{itemize}
  \item \(^{11}\) ibid para 129.
  \item \(^{12}\) \textit{Kayeshema}, (Trial Judgment), para 94.
  \item \(^{13}\) \textit{Jelisić}, (Trial Judgment), paras 60-66.
  \item \(^{14}\) ibid para 100. Also note that Schabas is of the opinion that this finding is now eliminated by the ICC Elements of Crimes: William Schabas, ‘The Jelisić Case and the Mens Rea of the Crime of Genocide’ (2001) 14 LJIL 125.
  \item \(^{15}\) \textit{Prosecutor v Jelisić} (Judgment) IT-95-10-A (5 July 2001) (hereinafter ‘Jelisić (Appeals Judgment)’) para 48.
  \item \(^{16}\) \textit{Prosecutor v Kayeshema} (Judgment) Case No ICTR-95- A (01 June 2001) (hereinafter ‘Kayeshema (Appeals Judgment)’) para 138.
\end{itemize}
of the crime of genocide as defined in article 2 of the Statute. The Appeals Chamber held that there is no such requirement in the legal ingredients of the crime of genocide and there is no need for the accused to have certain means by which genocide can be brought about, nor is there any need for there to be any nexus between the accused and the modus operandi of genocide, thereby removing any need for context. The court went on to state that genocide can be committed by a low-level executioner and a high-level planner alike, and that this case did not concern a lone génocidaire and so the court refused to address the matter. Cassese is of the opinion that the court’s reasoning in this case is questionable because there is very little justification based on the law other than the few judicial precedents and academic opinions.

The ICTY court held in Sikirica that the issue of whether a genocidal plan is needed was a settled matter in the jurisprudence of the tribunals and that it was unnecessary to indulge in its interpretation. However, the position was crystallized in Krstić where the court held that under the customary international law the definition of the crime of genocide ‘does not require proof that a perpetrator of genocide participated in a widespread and systematic attack against the civilian population’. It can be noted that the court’s decision was subsequent to the ICC Elements of Crimes which added the objective requirement of contextual elements to the crime of genocide in the annex documents to the statute of the court. Furthermore, in 2007, the ICTR in Simba cemented the position by recalling that, according to its jurisprudence as well as that of the ICTY (specifically, the Jelisić Appeals Chamber’s decision), the existence of an agreement or a plan was not an element that was required for a conviction for genocide.

17 Kayeshema (Appeals Judgment) para 163.
18 ibid para 169.
19 ibid paras 170 and 172.
20 Cassese (n 7) 130.
21 Sikirica et al (Judgment on Defense Motions to Acquit) para 62.
The position of the Appeals Chamber in *Krstić* remained unchanged since the same court nine years later in the *Popović* case in 2010 held that the issue of the requirement of context, state plan, and policy is a settled matter, citing its own cases and those of the ICTR. It also noted that the ICC Element’s requirement of a ‘manifested pattern’ is not prescribed in the definition of genocide, and hence reiterated the words of the *Krstić* Trial Chamber’s reliance on the ICC Elements of Crimes as a justification to introduce the notion of a pattern into the definition of genocide as ‘inapposite’\(^\text{24}\). If the position of the contextual element was unclear for lack of clear pronunciation on the definition, then the court had very good opportunity to finally take a decisive position when faced with the clear addition of an objective contextual element, but the court seems to have made it easy for itself by reverting to the international customary law at the time of the commission of the crime.

It is evident, in the above cases, and more so in the case of *Popović* where the tribunals expounded the view that context is irrelevant as a formal element. In the Appeals decision, the court presented reasons for such a contention, from the direct interpretation of the words of the definition of genocide. Comprehensive arguments were advanced for that matter from the *Travaux Préparatoires* in response to the prosecution’s claims to rely on William Schabas’ opinion to import the notion of a plan and a policy as a formal element\(^\text{25}\).

Beyond the controversy over whether or not the existence of a ‘plan’ or a large-scale killing was ever required to prove genocidal intent, the court made an unambiguous pronouncement that no scale or magnitude is required for a crime to be considered as a case of genocide. The ICTR in the *Akayesu* Trial Judgment held that genocide is committed when one *actus reus* is committed with the intent to destroy a group as the whole or in part as opposed to popular belief that genocide requires an actual destruction of the group in its entirety\(^\text{26}\).


\(^{26}\) *Akayesu* (Trial Judgment) para 497.
In addition, the view that a single killing could suffice if the other conditions are met was the position of the Appeals Chamber of the ICTY in Jelisic. Similarly the ICTR in Semanza held that ‘there is no numerical threshold of victims necessary to establish genocide’. However, this position is not consistently held; in the same court in Kayeshema (Trial Chamber) it was held that ‘relative proportionate scale of the actual or attempted destruction of a group’ is evidence of genocidal intent, quoting a United Nation Commission’s findings, and the court went even further in attaching weight to the element of magnitude as a necessary element.

The literal definition requires the perpetrator merely to have the specific intent to destroy a protected group as such, in whole or in part. The Trial Chamber in Jelisic found that the definition of intent is included in the literal wording of the crime’s definition, and that: ‘The Statute itself defines the intent required: the intent to accomplish certain specified types of destruction.’ This means that the consequences or results need only to be intended, not achieved, thereby stripping genocide from any contextual elements. The characterization of the genocide by this type of intent removes any need for objective identification of the crime, because such intent can be demonstrated without the need for any result to show for it; perhaps no perpetrator will ever be able to succeed in achieving such a result.

The courts in some instances are very clear on the required intent and the evidence. For instance, the ICTR in Kayeshema held that genocidal intent is capable of formation even prior to any act taking place; the mens rea must be formed prior to the commission of the genocidal acts, thereby coming very close to admitting that genocide only exists in the mind of the perpetrator. Hence, the context can rarely be evidence of the individual genocidal intent unless the accused is directly responsible for them such as individually selecting members of one group to the exclusion of

27 Jelisic (Appeals Judgment) para 100; see also Prosecutor v Édouard Karemera et al (Judgment) Case No ICTR-98-44-T (2 February 2012) (hereinafter ‘Karemera (Trial Judgment)’) para 1606.
29 Kayeshema (Trial Judgment) para 93.
30 Kayeshema (Trial Judgment) para 94.
31 Jelisic (Trial Judgment) para 45.
others. The only consideration is that the acts should be done in furtherance of the genocidal intent ‘to destroy a group as such’\textsuperscript{34}. Therefore, this goes against any assumption of a numerical assessment of genocide or the existence of an organization or of a system or plan.

Finally, the ICC summarized the ad hoc tribunal’s position on this matter and defined the \textit{leg lata} by concluding:

\begin{quote}
... the case law of the ICTY and the ICTR has interpreted this definition as excluding any type of contextual element, such as a genocidal policy or plan. Hence, for the case law of the ICTY and the ICTR, the crime of genocide is completed by, inter alia, killing or causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such an individual belongs.\textsuperscript{35}
\end{quote}

The ad hoc tribunals acknowledged this literal reading of the definition that genocide does not require any reference to contextual elements as far as the constitution of this crime is concerned. This is in conformity with the Vienna Convention on the Law of Treaty, article 31 because there are no ambiguous or obscure terms which compel the court to revise such a holding\textsuperscript{36}. Therefore, how firmly the courts accept the irrelevancy of the contextual elements in the literal meaning of genocide in their jurisprudence and how the above acknowledgements have affected the interpretation and application of the concept of genocide is vital. Therefore, it is imperative to proceed in the next section with consideration of how the court dealt with the above affirmation of the irrelevancy of the contextual elements.

\section*{4.3 Tweaking the law to fit the facts: going beyond the literal meaning}

Despite the lack of reference to contextual elements in the literal definition of the crime of genocide and the general acceptance of this position by the courts (above in 4.2.1) and the academic communities alike, the courts found it irresistible to circumvent the contextual elements in their reasoning without any consistent

\textsuperscript{34} Kayeshema (Trial Judgment) para 91.
\textsuperscript{35} Al-Bashir (Arrest Warrant Decision) para 119.
\textsuperscript{36} The Vienna Convention on the Law of Treaties 1969, arts 31 and 32.
application of interpretative methods, or any robust demonstration of their choice of arguments or the rules discovery method\(^37\).

**4.3.1 The sloppy language and the importation of context through the back door**

The ambiguity surrounding the position of the contextual element stems not only from the open texture of the genocide definition but also from the courts’ failure to distinguish the other roles of the contextual elements which has resulted in the use of sloppy language that is suggestive of a constitutive role for the contextual elements. Thus, the schism between the social and the legal meanings of genocide became dangerously narrow. Such practices have led the courts to go beyond the literal definition of genocide and they have tweaked the law to fit the facts.

The ICTY Trial Chamber in *Jelisić*, for instance, contended that the existence of a plan is an extremely important element. However, very few elucidations were advanced in support of such an assertion, only the contention that ‘in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases.’\(^38\) The ICTR Trial Chamber in *Kayeshema* stated: ‘although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out genocide without such a plan, or organisation.’\(^39\)

What is noticeable here is that the court gives very few reasons as to why genocide without context is not easy. By such reasoning the court came close to the affirmation that the crime of genocide requires some type structure and objective identification by its very nature\(^40\). The court went further by stating that genocide is a magnitude crime and thus it is impossible for it to happen without state involvement, by concurring with the views of Morris and Scharf in their contention that it is almost impossible to commit genocide without some sort of state involvement\(^41\).


\(^{38}\) *Jelisic* (Appeals Judgment) para 48.

\(^{39}\) *Kayeshema* (Trial Judgment) para 94.


\(^{41}\) *Kayeshema* (Trial Judgment) para 94.
The ICTR Trial Chamber in *Krstić* held: ‘The gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration.’[^42] The court preceded its finding by insisting on the need to distinguish between individual intent and collective intent but the use of a word like ‘ordinarily’ is not helpful as far as establishing the relationship between genocide and its contextual elements is concerned because it assumes the crime of genocide to have specific way of occurrence.

Later in the same case, the court held that genocidal acts must be committed in the context of a manifested pattern of similar conduct or could itself effect the destruction of the group as such, in whole or in part. The court here borrowed directly from the Elements of Crimes of the Rome Statute of the International Criminal Court[^43]. In the above cases, the court did not only obscure the issues concerning context, by the use of such language, but created an irreconcilable difference with the literal definition of the crime of genocide as per the Convention and the customary law. Thus, the court troubled the definition with ambiguities and endless theoretical debate on its meaning, even though it correctly held that the contextual elements have no role to play as far as the constitution of the crime is concerned.

### 4.3.2 The application of the blanket inference rule and the leap into the social scientist’s sphere

What is peculiar to genocidal intent is the fact that it does not necessarily require an act or a result for its formation or manifestation. This is clearly so because the destruction need not be complete destruction;[^44] neither does it need to target the group in its entirety nor even take place at all, to allow the perpetrator to form that genocidal state of mind. Genocidal intent by its nature is not susceptible to direct evidence unless the accused confesses his intent[^45]. The contrary can be the case in rare instances; for example, the minutes of the discussion held at Wannsee to plan

[^42]: *Krstić* (Trial Judgment) para 549.
[^43]: *Krstić* (Trial Judgment) para 682.
[^44]: *Jelisić* (Trial Judgment) para 80; *Kayeshema* (Trial Judgment) para 95.
the destruction of the Jews in Berlin on 20 January 1942 can be considered as direct
evidence of genocidal intent⁴⁶.

In Akayesu, the Trial Chamber rightly noted that ‘intent is a mental factor which is
difficult, even impossible, to determine’⁴⁷. Hence, the court’s solution to this rigidity
of the specific intent was to infer genocidal intent from a combined set of facts and
circumstances⁴⁸. However, what must be set out prior to any inference application is
the fact that the culpability of an accused person can only be established from the
accused’s own acts and omissions, in addition to the requirements of relevance that
are stated in rule 89(C) of the Rules of Procedure and Evidence (of the court)⁴⁹. This
provides that a Chamber ‘may admit any relevant evidence which it deems to have
probative value’, allowing for a case to be made for the use of the contextual
elements. However, what needs to be clarified from this statement is the value of the
contextual elements or the relevance of pattern, plan, magnitude, or policy in
establishing individualistic intent unless it can be directly attributed to the accused.

The courts’ practice exposes its reliance on various sets of facts and circumstances
without any clear demarcation as to what is being assessed: the general existence of
the crime or the culpability of the individual accused. Therefore, within the context
of the examination of genocidal intent – the surplus or specific intent – the court
furnished the contextual elements with a direct evidentiary role but fell short of a full
admission of its constitutiveness. For instance, the court relied on, inter alia, the
accused’s own utterances, acts, omissions, pattern, scale, and magnitude of the crime,
and the existence of a plan or policy,⁵⁰ without any precision as to what elements
could be proven by those elements taken individually and how.

In such practice the main hurdle is that Akayesu did not give any details as to how the
inference rule works; the court did not explain the value of the contextual elements in
relation to the crime and the accused, their relevance, and probative value, and what

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⁴⁷ Prosecutor v Akayesu (Trial Judgment) para 523; Kayeshema (Trial Judgment) para 527.
⁴⁸ Musema (Trial Judgment) para 166; Rutaganda (Trial Judgment) para 61; Kayeshema (Trial Judgment) paras
531-45. The ICTY also affirmed Akayesu in Sikirica (Trial Judgment) para 61. The Appeals Chamber common to
both the ICTR and ICTY upheld the inferability of intent in Jelisic (Appeals Judgment) para 47.
⁴⁹ Rule 89(C) of the Rules of Procedure and Evidence.
⁵⁰ Akayesu (Trial Judgment); Kayeshema (Trial Judgment); Krstic (Trial Judgment); Jelisic (Trial Judgment and
Appeal).
their effect is on the principles of criminal law. The weakness of the Akayesu Trial
Judgment rule of inference lies in the bareness of its reasoning. It held, for instance,
that genocidal intent can be deduced from acts perpetrated by other offenders, not the
ones before the court, without any explanation of what is the relevance of other
offenders’ acts. The court even widened the inference rule by assuming inferences
from the scale of the atrocities and their general nature. This procedure seems to
have been followed throughout in the ICTR and ICTY.

Nevertheless, there are no particular facts or circumstances that carry more weight
than any other. Therefore, the contextual elements cannot be divided in themselves
into those which are relevant to the individual accused and those which are relevant
to the existence of the crime in general. For instance, the utterances of the accused
can be interpreted differently according to the context; the ICTY found that the
utterances of Jelisić did not provide evidence of any intention to destroy whereas
similar utterances in the context of the Rwandan atrocities carried a different
meaning.

The court should have made it clear that those factors that can be taken as a
demonstration of the existence of genocide in a general sense are different from those
factors that can demonstrate the guilt of an individual accused person. In the case of
an individual accused person, what matters are those pieces of evidence that are
directly related to the accused or which matter directly as evidence to establish his
intent. These strands of evidence by themselves prove the accused’s state of mind by
virtue of them being directly related to the accused. Therefore, any evidence that
cannot prove what has to be proven – an individual state of mind – is not relevant

51 Akayesu (Trial Judgment) para 523.
52 Ibid.
53 Semanza (Trial Judgment) para 313 Bagilishema (Trial Judgment) paras 62-63; Musema (Trial Judgment) paras 166-167; Rutaganda (Trial Judgment) paras 61-63; Kayishema (Trial Judgment) para 93; Jelisic (Trial Judgment) para 73; Prosecutor v Kajelijeli (Judgment) Case No ICTR-98-44-A (1 December 2003) (hereinafter ‘Kajelijeli (Trial Judgment)’) para 806; Prosecutor v Blagojević (Judgment) Case No IT-02-60-A (9 May 2007) (hereinafter ‘Blagojević (Appeals Judgment)’) para 123.
55 Jelisic (Trial Judgment) para ..., Also see Prosecutor v Milomir Stakic, IT-97-24-T, Trial Chamber, Judgment, 31 March 2003 (hereinafter ‘Stakic (Trial Judgment)’) para 554, and Prosecutor v Milomir Stakic, IT-97-24-A, Appeal Chamber, Judgment 22 March 2006 (hereinafter ‘Stakic (Appeal Judgment)’) paras 49-52. For ICTR cases, see Akayesu (Trial Judgment) paras 706 and 729.
and not admissible\(^{56}\). However, the individual strand of evidence that can be considered irrelevant evidence if taken individually, can combine with other facts and circumstance to extract an evidentiary value to establish the state of mind of the accused.

The court failed to clarify the different kinds of evidence required for the establishment of individual genocidal intent on the one hand and a collective campaign on the other, and opted for a blanket application of the *Akayesu* inference rule. Because of the lack of any uniform and consistent of application of inference rule, in addition to the lack of coherent factors from which this intent can be inferred, left the question of when to infer intent from context and under what circumstances unaddressed. Hence, the differentiation between individual acts and a collective campaign has become very important determining factor, but the court has failed to make such a distinction and this is seen by Greenawalt as the importation of a knowledge-based approach through the back door\(^{57}\).

To adhere to the criminal law requirements such as legality and the rule of law the court must have cautiously applied the inference rule by making a distinction between cases when the general existence of a genocidal campaign or collective mental state is under consideration on the one hand, as opposed to those instances when direct evidence of genocidal intent is being assessed in contrast to those instances when indirect and circumstantial facts are being addressed. In *Akayesu*, the Trial Chamber looked into the historical background of the events in Rwanda in 1994 ‘in order to understand the events alleged in the Indictment’\(^{58}\). In *Kayeshema*, on the other hand, the court also looked into the background to the events of 1994\(^{59}\) and inferred the existence of genocide from the number of victims and the discriminatory


\(^{58}\) *Akayesu* (Trial Judgment) paras 78, 118; Popović (Trial Judgment) paras 856, 859.

\(^{59}\) *Kayeshema* (Trial Judgment) para 277.
target of one group – the Tutsi. The ICTY in the Brdanin Trial held that genocidal intent can be inferred from the ‘political agenda of the Bosnian Serb leadership.’

The tribunal in general seems to refer to very general contextual circumstances that cannot be attributed to any specific individual or that in themselves give any indication of genocide, such as the general political background that gave rise to mass atrocities, which can be classified under international law either as crimes against humanity or as war crimes.

In disregard of the different value of different contextual elements, the ICTR Trial Chamber found that the allegation of genocide in one municipality is not sufficient to infer genocidal intent but felt the need to reinforce such localised evidence to the wider national campaign. In Akayesu, the Trial Chamber reasoned as follows:

Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, the Chamber is . . . able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes.

The court here relied for the validity for its argument on the drawing on unrelated national factors based on their factual similarities, in particular their geographical and temporal similarities, but not treating them as elements of evidence. The evidentiary effect of the existence of a genocidal campaign in establishing individualized intent is questionable because it does not tell us what was going through the mind of the perpetrator at the time of the commission of the crime, and so the Akayesu inference rule must fail.

Kevin Heller was very apprehensive of this move and was quite critical of the tribunals’ practice of inferring evidence of principal genocidal intent from the general context. To claim that some individual act or omission can only reveal their

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60 Kayeshema (Trial Judgment) paras 291, 312-313, 532; Musema (Trial Judgment) paras 929-930; Jelisić (Trial Judgment) para 74.


genocidal character when looked at in the light of a genocidal campaign is tantamount to suggesting that because of the context it will be genocide, otherwise it will be another crime\textsuperscript{65}.

The court went even further in its blanket application of the inference rule and its blurring of the boundaries of the contextual elements by relying on evidence that could hardly be accepted as evidence of a genocidal campaign – for instance, the manner of the commission of the crimes and the cruelty used in their commission and the way the wounds were inflicted and how the acts that disfigured the victims were all accepted by the court\textsuperscript{66}. This evidence might have had some sort of probative value, but the court should have reiterated the fact that this value can only be ascertained when it is combined with other evidence to draw one conclusion.

These types of evidence, even if taken in combination with other evidence, can only show the way that someone killed people, but does not show his intent or whether the killing was done with the aim of exterminating a group. Further, even if there is a possible explanation, there is always a counter-explanation that cannot be discredited. The case law of the ICTY reveals that the court has relied on contextual facts in combination, even though they may have had very little probative value in demonstrating the aim to destroy a group in themselves. For instance, in \textit{Krsti\v{c}} the Trial Chamber looked at the totality of the event in the Prijedor municipality to find genocidal intent: acts such as the detention of one particular ethnic group, expelling them from their houses and the municipality, dismissing them from work, and the destruction of their property and religious premises\textsuperscript{67}.

The court established this inference rule without any control mechanism as to when it can be used and its possible effect on free assessment of evidence. The only emphasis was on the need to counterbalance the general context with the individual conduct. This was recognized in \textit{Bagilishema} where the Trial Chamber ruled that

\begin{itemize}
\item \textsuperscript{65} Park (n54) 154.
\item \textsuperscript{66} Kayeshema (Trial Judgment) para 290.
\item \textsuperscript{67} Krstić (Trial Judgment) para 545.
\end{itemize}
‘the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the accused’\textsuperscript{68}.

However, the need to counterbalance must fail if it refers to the general genocidal context as opposed to those facts that are related to individual conduct. This is because, as examined above, the tribunals have not made a very good case in explaining what the contextual elements of genocide are and what their evidentiary roles are and at which stage they should be invoked. What the court should have said in reference to the general context is that those contextual elements are important in alleging genocide and establishing the existence of a genocidal campaign. However, in proving of individual responsibility the task should be undertaken as a separate task that has very little to do with the general genocidal campaign, as opposed to secondary liability cases where the contextual elements have a crucial role.

The lack of any clear method of evaluating circumstantial evidence has not prevented the court from using context to establish \textit{mens rea}\textsuperscript{69}. This might be the result of the misconception that genocide needs to be large in scale and that it must be a collective crime indirectly influencing the courts’ decision and reasoning. The general conclusion to be drawn from the jurisprudence of the ad hoc tribunals is that contextual evidence may also be used without any clear reference to their relevance or probative value. Such blanket application of inferences and absence of distinction seems to have culminated in systematic ambiguity as to when contextual/circumstantial evidence may be relevant, and the value of it in each case.

\textbf{4.3.3 The need to compartmentalize contextual factual circumstances and the legal ingredients}

Judge Almiro Rodrigues in \textit{Krsti\'c} (Trial Judgment) stated:

\begin{quote}
The Tribunal has not been established to deal with the possibility of collective responsibility. What is of interest to me in each of the trials in which I have sat in this court is to verify whether the evidence presented
\end{quote}

\textsuperscript{68} \textit{Prosecutor v Ignace Bagilishema} (Judgment) ICTR-95-1A-T (7 June 2001) (hereinafter ‘Bagilishema (Trial Judgment)’) para 63.

before it makes it possible to find an accused guilty. I seek to judge an accused. I do not judge a people.\textsuperscript{70}

As a matter of fact, genocide can be committed collectively as well as individually\textsuperscript{71}. In cases of individual perpetration, direct evidence of individual intent can only be the accused’s own confession or written document – which is difficult or almost impossible to find, unless tendered by the accused, which is unlikely\textsuperscript{72}. However, ordinarily there is a distinction between direct evidence and contextual evidence, particularly in cases of direct liability.\textsuperscript{73} Preference is always for direct evidence because there is no need for inference, and proof can be reached by simple deduction and can be directly connected with the perpetrator's own acts and omissions. This difference in methods can be clarified by comparing confession and written evidence to the accused’s own utterances. Contextual evidence can be contextually explained, unlike direct evidence. For instance, \textit{Jelisić’s} utterances were quite compelling as expression of his state of mind, but the courts held otherwise.

It is implicit in the above examination of the ad hoc tribunals’ case law that they created a close link between substantiating the individualized genocidal intent of a principal perpetrator and the existence of a genocidal campaign and other contextual factors suggesting the existence of a genocidal campaign without any emphasis on how to attribute this responsibility for the genocidal campaign and what probative evidentiary value those contextual elements have.

Therefore, in finding individualized genocidal intent, the solution lay in compartmentalizing the contextual elements into those that are relevant to individualized genocidal intent, and those that are related to the existence of a genocidal campaign or pattern\textsuperscript{74}. Thus, the rights of the accused, in addition to the ineptitude of attempts to systematize the use of contextual elements or to attach evidentiary value to one strand of contextual factors justifies the requirement that all evidence – including contextual evidence – must go through some phase of inference.

\textsuperscript{70} \textit{Krtic} (Trial Judgment), Summary Judgment read by Judge Almiro Rodrigues (The Hague, 2 August 2001) OFP.I.S./609e.

\textsuperscript{71} \textit{Jelisic} (Trial Judgment) para 100

\textsuperscript{72} \textit{Akayesa} (Trial Judgment) paras 521-522.

\textsuperscript{73} See Chapter 1 on the distinction between types of evidence.

\textsuperscript{74} Which need to be based on the accused’s own conduct and omissions – \textit{Bagilishema} (Trial Judgment) para 63.
to extract the genocidal intent indicia. These indicia differ according to the prosecution’s task. The first category arises if the task is the alleging of a general genocidal campaign or the imputing of responsibility for genocide to an individual as an accessory. The second category arises if the prosecution is imputing individualized genocidal intent to a principal perpetrator.

In the case of the first category, any acts or circumstances suggestive of group destruction can be imported within the evidentiary pool, but in the case of the second category any evidence must have probative value and have some relevancy to the accused’s conduct, the consequences, and the circumstances. The ICTR Trial Chamber in *Kayeshema*, in finding genocidal intent on the part of the accused, clearly assessed the evidence with this distinction in mind when it held: ‘The number of Tutsis killed in the massacres, for which Kayeshema is responsible, either individually or as a superior, provides evidence of Kayeshema’s intent.’

The court in *Kayeshema* examined the existence of a general genocide in Rwanda but, when it came to the individual accused, considered the general context as irrelevant and proceeded to consider separate evidence, to filter and weigh it, in determination of the accused’s culpability, and only those pieces of contextual evidence related to the individual accused were taken as evidence of the state of mind in which the act or omission was committed.

Accordingly, what has relevance and probative value depends on two components: first, the relevance of the evidence or its relationship to the issue on which the evidence is being offered or tendered, and second, the possibility of the evidence being sufficient to prove the issue in question. So the question whether there is a genocidal intent is largely an evidentiary question and it is the task of the judges to answer it. It is the most basic principle of criminal law that individual guilt must be established on the basis of the individual’s own conduct.

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76 See below on the allegation of genocide and the need for context and secondary liability.

77 For further discussion, see Chapter 6 at section 6.3.2.

78 *Kayeshema* (Trial Judgment) paras 531-532 (emphasis added).


80 *Bagilishema* (Trial Judgment) para 63.
Because genocide is a crime that primarily resides in the mental state of the perpetrator and that any physical manifestation does not alone suffice in isolation to establish genocide, the individual’s own evidence is difficult to group in an ascertainable manner, because this varies from case to case in the case of genocide in general. What should be a determining factor in establishing an accused person’s intent is his recourse to acts that can be directly linked to him, making it difficult for the accused to escape from the allegation of genocide by simply stating a motive or providing an alternative or counter-narrative for his conduct.

A good example where the court clearly demonstrated individualized intent on the basis of the accused’s own conduct is the Trial Chamber’s decision in Niyitegeka where the court based its judgment on the accused’s intent on his personal participation in the killing of members of the protected group, where the discriminatory targeting of the victim group was clear and he had a role in the distribution of weapons and the organization of killing, in addition to the militia group Interahamwe chanting ‘Let’s exterminate them’ setting the genocidal context.

The court in the Nahimana Appeals Judgment held that the accused’s intent was demonstrated by his own utterances, where he was publically heard inviting others to exterminate the victim group and his use of slogans which were found to be referring to the victim group as ‘gutsembatsemba’, ‘tuzabatsembatsemba’, and ‘tuzitsembatsemdea’. Various meanings can be attached to these words but they generally mean ‘Let’s exterminate or kill them.’

The use of derogatory language in isolation has been dismissed as evidence of genocidal intent. There have been instances in which the utterances were taken according to their context and were not deemed evidence of genocidal intent. The ICTR in Kayeshema held that the perpetrator’s reference to the victims as ‘filth’, ‘dogs’, ‘sons of bitches’, and ‘cockroaches’ did not suggest any genocidal intent, but

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81 Prosecutor v Niyitegeka (Judgment) Case No ICTR-96-14-T (16 May 2003) (hereinafter ‘Niyitegeka (Trial Judgment)’) paras 411-419.
they were taken in combination with other factual elements to arrive at the conclusion that they were direct evidence of the accused’s own intent.\footnote{Kayeshema (Trial Judgment) para 538; Muhimana (Trial Judgment) para 496.}

On the one hand, individualism is considered as ‘the first principle of ordinary liberal criminal law’ and the emphasis is on the attribution of responsibility only to individuals, not to groups.\footnote{Mark A Drumbl, Atrocity Punishment and International Law (CUP 2007).} An ambivalent relationship between individuals and groups, and thus between individual punishment and collective criminality, is an ‘enduring feature’ of international criminal law. The blanket acknowledgement of contextual elements within the ambit of ascertaining individualized intent goes against the principle of the guilty mind or the Latin maxim \textit{actus reus non facit reum nisi mens sit rea}.

This examination requires more than just a listing of the contextual elements; it entails a holistic approach to the totality of the evidence.\footnote{Jelisić (Trial Judgment) paras 68, 108; Park (n 54) 152.} This is important because establishing the specific genocidal intent without confession or documentary evidence has implications on certain criminal law principles, such as the right of the accused to the interpretation of any ambiguity in their favour and to the presumption of innocence.\footnote{Art 21(3) of the ICTY and Art 20(3) of the ICTR Statute, and art 66(1) of the Rome Statute.}

In evaluating evidence, particular notice must be taken of the fact that even in cases of direct responsibility the evidence of genocidal intent derived from circumstantial or contextual evidence must not be a reasonable conclusion that could be made but the only conclusion that is available to be made.\footnote{Bosnia and Herzegovina v Serbia and Montenegro (Judgment of 26 February 2007) ICJ Rep 2007 paras 373, 376.} Applying this rule would make it difficult for the court to rely on the general context of a crime (such as the pattern or the scale of the crime or the policy) to infer intent. If there are other competing readings that are possible from the evidence, the court should not find the accused guilty of genocide.\footnote{Brdjanin (Trial Judgment) para 353.} However, when using the contextual elements as evidence,
whatever value they may have in proving or disproving the guilt of the accused must not substantially outweigh the need to ensure a fair trial\textsuperscript{91}.

This represents an attempt to bring the contextual elements in through the evidentiary back door, by examining the need to commit multiple acts, the types of génocidaire, and the structure and motive behind the crime. These aspects, which are variable by nature, have no bearing on the criminal responsibility of the perpetrator or the constitutive elements of the crime. Such a reading cannot fit within the certainty required by the law in the name of the difficulty of proving specific intent.

4.3.4 The rules of interpretation and their role in circumventing the contextual elements

The definition of the crime of genocide is very flexible due to the intricacies of the Convention’s definition, which can be identified almost immediately in the language of article II, as there is a distinct absence of any clarification of the \textit{actus reus} of the crime, in phrases such as ‘serious bodily or mental harm’\textsuperscript{92}, ‘conditions of life’\textsuperscript{93}, or ‘measures to prevent births’\textsuperscript{94}, as well as the required intent and its elements, such as the phrase ‘in whole or in part’\textsuperscript{95}.

Any interpretations and meanings of the genocide definition in the legal sphere can only be advanced convincingly if they are grounded on a systematic application of accepted rules of interpretation. Any selective use of interpretative methods or formulations through other methods of analysis is doubtful and flawed. This analysis will start with the assumption that a correct and methodical application of the interpretation rules will lead to no difficulties in the determination of the legal position of context, except when there is a selective recourse to methods that exacerbate the position of context in genocide.

\textsuperscript{91} \textit{Prosecutor v Zejnil Delalic et al (Celebici)} (ICTY Chamber Decision on the Motion of the Prosecution for Admissibility of Evidence) IT-96-21 (19 January 1998) para 16.
\textsuperscript{92} Genocide Convention, art II(b).
\textsuperscript{93} ibid art II(c).
\textsuperscript{94} ibid art II(d).
\textsuperscript{95} ibid art II (the chapeau).
Since the Genocide Convention is a treaty,\textsuperscript{96} the Vienna Convention on the Law of Treaties\textsuperscript{97} (bearing its specificity as an instrument imposing criminal responsibility), articles 31\textsuperscript{98} and 32\textsuperscript{99}, should be applicable in the interpretation of any of its meanings. Even the ad hoc tribunals applied the principles set out in the Vienna Convention on the Law of Treaties in the interpretation of their statutes, which originated in Security Council resolutions\textsuperscript{100}. In addition, interpretations in the sphere of international criminal law must adhere to general principles of criminal law and must be interpreted in accordance with the customary international law, in conformity with the international human rights law as recently enshrined in article 21(3) of the ICC Statute.

According to article 31(1), the definition of genocide must be interpreted in good faith, according to the ordinary meaning that can be given in the light of the object, purpose, and context of a treaty, which can in turn be found in the text itself, or in the preamble or any annex to a treaty\textsuperscript{101}. In application of this interpretative rule, the crime of genocide depends primarily on the text and its meaning, according to which

\textsuperscript{96}Nehemiah Robinson, \textit{The Genocide Convention: A Commentary} (Institute of Jewish Affairs 1960) 29. It must be noted here that the ICTY and ICTR Statutes were not treaties but instruments. The application of the Vienna Convention is accepted as a method of interpretation. See \textit{Prosecutor v Dusko Tadić} IT-94-1 ICTY Trial Chamber Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995) para 18; \textit{Prosecutor v Kanyabashi} (Case No ICTR-96-15) ICTR Appeals Chamber Decision (joint and separate opinion of Judge McDonald and Judge Vohrah 3 June 1999 para 15; \textit{Prosecutor v Jelisić} (Appeal Judgment) para 35.


\textsuperscript{98}1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

12(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.’

\textsuperscript{99}‘Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.’

\textsuperscript{100}\textit{Tadić} Decision on the Defence Motion for Interlocutory Appeals on Jurisdiction, paras 71-142; \textit{Prosecutor v Aleksovski} ITCY Appeals Chamber Judgment 24 February 2000, para 98. The ad hoc tribunals have a tendency not to name the Vienna Convention but to rely on it.

\textsuperscript{101}Vienna Convention on the Law of Treaties 1969, art 31(1), (2).
genocide is dependent on finding an individualistic specific intent, regardless of this context in which the crime is perpetrated. Thus, one can arrive at the simple conclusion that the existence of a genocidal campaign has no judicial, prosecutorial, or evidential significance. If the law can be found in such a manner, there is no need to revert to other sources of law or to revert to other supplementary means of interpretations, such as article 32.

It is important to note that one can only resort to the object and purpose of a treaty either to confirm the literal interpretation or to justify a different course of interpretation. The above interpretation is confirmed by the object and purpose of the Genocide Convention, which is extractable, firstly from the text of the Convention – the title – which places the prevention aspect before punishment. In addition, the preamble if taken in its entirety also presents the prevention and elimination of genocide as its main preoccupation – for instance, the reference to the UN Resolution 96(1) which was a strong reminder of the effects of genocide in history and the recognition of the need to rid the world of this ‘odious scourge’\(^\text{102}\). The Convention went even further in expressly obliging states to prevent or take action very early before the destruction of the group becomes reality, and it also called upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide\(^\text{103}\). It follows from this that, if the Genocide Convention’s object and purpose can be boiled down to one essence, it would be the elimination of genocide.

The ICJ also arrived at a similar conclusion even before the coming into force of the Vienna Convention on the Law of Treaties, when it held that the intention behind the law of genocide was to expressly disapprove of it and then to punish it under the international law when it occurs, in addition to safeguarding the existence of certain human groups\(^\text{104}\).

The ICTY Trial Chamber in Jelisić found no reason to insist that genocide is a collective act or to insist on the need for a plan, because the purpose and object of the Convention, as per the preamble, is the prevention and punishment of intentional

\(^{102}\) UN GA Resolution 96(1) 1946.
\(^{103}\) Genocide Convention, art VIII.
destruction of certain human groups without any reference to how the destruction is achieved. The court then went on to confirm the literal definition by relying on article 32, which permits recourse to supplementary means of interpretation by way of the *Travaux Préparatoires*. The court did not deviate from the textual interpretation, even though the object and purpose of genocide in the ad hoc tribunals’ statutes might differ slightly because the object and the purpose of their statutes is to punish the serious violation of humanitarian law in the Former Yugoslavia and Rwanda and to bring reconciliation and peace following these atrocities and then to act as deterrence for any future perpetrator who plans such crimes.

Therefore, one can conclude that the preventative element is derivative from the requirement punishment stipulated in the ad hoc tribunals’ statutes, as opposed to the Genocide Convention, and this is so because the ICTY’s and ICTR’s jurisdiction is temporally and geographically limited to an event that has already occurred. It is here, perhaps, where Behrens’ view that genocide prevention was considered in close proximity to punishment fits. Hence, if the contextual elements are included with the definition of genocide, a state’s capacity to prevent genocide is compromised by requiring the existence of large-scale acts or a genocidal campaign in order to start charging the perpetrators with genocide. This in turn means that the importance of the Genocide Convention is truncated by excluding the possibility of a lone génocidaire.

However, proponents of the contextual elements avoid engagement in the debate of the preventative aspect of the genocide definition *ab initio*. This avoidance is constructed through the application of the notion of the practical impossibility of a single individual being able to commit the destruction of a group, and hence the construction of the genocide definition according to the plain meaning of the word is considered unsuitable. Even if the above canon of interpretation is not sufficiently clear, any other interpretation requiring genocide to be a systematic crime or requiring any other elements, cannot be based *a contrario* on the plain meaning of

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105 *Prosecutor v Jelisić* (Trial Judgment) para 100.
the definition but on the practical impossibility of a lone génocidaire (who lacks the means and methods to affect a group destruction). Therefore, such recourse is not only inconsistent with the plain meaning but with the object and purpose of the Convention.

To interpret the lone génocidaire possibility as a ‘hypothese d’ecole’\(^{108}\) is to go against such a rule and to impose a need for the systematic perpetration of genocide and that, in turn, is contrary to any preventative purpose of the Convention. If the object and purpose do not resolve the matter, the interpretative canon suggests the need for reference to either a strict or a broad interpretation, whichever is more favourable to the accused\(^ {109}\). In the case of genocide, the need to protect the defendant appropriately and the need for prevention favour a strict interpretation\(^ {110}\).

In the Akayesu case, the Trial Chamber reaffirmed that in cases where there are the two parallel interpretations, the court must opt for the general principles of criminal law which permits the interpretation most favourable to the accused and held that the term ‘meurtre’ used in the French text was the more exact and favourable term for the accused than the term ‘killing’ used in the English text of the Statute\(^ {111}\). The Chamber held this interpretation pursuant to the general principles of criminal law – the construction that favours the accused.

The Vienna Convention is clear in stipulating that the rules of treaty interpretation are fixed rules and do not permit the interpreter a free choice among the interpretative methods.\(^ {112}\) There seems to be an agreement on the strict application of the Vienna Convention’s rules of interpretation and, consequently, there is no question of the possibility of deviating from a literal interpretation, because the rule of the Vienna Convention on the interpretation of treaties reflects customary law and hence requires strict adherence.\(^ {113}\) This is strong demonstration of the supremacy of


\(^{109}\) ICC Statute, art 22(2).

\(^{110}\) Prosecutor v Krstić (Trial Judgment) para 502.

\(^{111}\) Prosecutor v Akayesu (Trial Judgment) paras 500-501.

\(^{112}\) Kammerhofer Jörg and Jean d’Aspremont (eds), International Legal Positivism in a Post-modern World (CUP 2014) 324; Prosecutor v Krstić (Trial Judgment) (20 August 2001) para 584.

\(^{113}\) Iran v USA ICJ Judgment of 12 December 1996 (‘Oil Platforms’ case) 803 para 23.
the literal interpretation. The ICTY in *Krstić* refused to accept any interpretation that contradicted the plain meaning of the definition, even if such an interpretation was supported by the *Travaux Préparatoires*, when it held that the genocide definition term ‘in part’ refers to the intent of the accused and not to the act of destruction, contrary to the defence’s contention. The Trial Chamber contended that such a practice ‘would run contrary to the rules of interpretation to alter the ordinary meaning of the terms used in the Convention by recourse to the preparatory work which lacks clarity on the issue.’

Furthermore, in crimes such as genocide which have more than one meaning depending on the discipline (that is, social and legal) the rule of interpretation must be adhered to in the strictest sense. This is to avoid changing the definition and to prevent any arbitrary mutation of the definition – in other words, to avoid amalgamating the social with the legal definition, in addition to avoiding incorporating unrelated external considerations within the definition of genocide. Such strict adherence to the rules of interpretation yields the precision required in criminal law and the need to guard the human rights of the accused. Accordingly this suggests that there are to be no free rides on interpretation methods to suit the personal understanding of the interpreter, but fixed rules that need to be followed, even if this leads sometimes to undesirable outcomes.

According to this, the tendency must be to prefer the textual rule over the historical interpretation through the *Travaux Préparatoires*, because this can lead to almost any conclusion that the interpreter is willing to reach. The rejection of the *Travaux Préparatoires* should be even easier when the textual reading of the treaty gives a clear meaning. Therefore, treaty interpretation will become systematic and be based on structure. Structuring interpretation in this sense goes against the practice of picking and choosing, among the text, the context, the *Travaux Préparatoires* and case law to arrive at their preference for meaning, which might or might not conform

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115 *Prosecutor v Krstić* (Trial Judgment 20 August 2001) para 584.

to the meaning of the treaty.\textsuperscript{117}

A good example that illustrates the need to avoid this kind of cherry picking that is exercised when it comes to interpretative methods is when Judge Shahabadeen in \textit{Krstić}, dissenting, while recognizing that the prevailing understanding of the intent to destroy in the literal interpretation that genocide as requiring the physical and biological destruction of a group, constructed an \textit{a contrario} argument based on the definition’s silence on the matter of physical and biological destruction on all alternatives of committing the \textit{actus reus} as a reason to revert to the \textit{Travaux Préparatoires} and to bring cultural destruction within the genocide definition\textsuperscript{118}. Similarly, a contrary finding was also reached on the same content of the \textit{Travaux Préparatoires} to stress that cultural destruction is expressly and deliberately rejected, when the trial chamber held that attacking the cultural and sociological characteristics of a group, which give the group its identity, is not genocide\textsuperscript{119}.

Therefore, it is important to have a transparent method of interpretation to ensure against the selecting of subjective methods or the temptation to do so. This in turn ensures certainty in outcome, by channelling the recourse from one method to another in a systematic manner. Thus discourse outside the text and the structure, which might lead to an infinite and unnecessary discussion of clear legal questions, is avoided. The difference of opinion as far as what is required for the crime of genocide is mostly generated by the method of interpretation adopted. The contradiction seems to be a result of the liberal recourse to extrinsic evidence, such as the \textit{Travaux Préparatoires} and logical interpretation as opposed to the text and the preamble\textsuperscript{120}.


\textsuperscript{118} \textit{Prosecutor v Krstić} para 53; William Schabas’ review of the Genocide Convention: The \textit{Travaux Préparatoires} by Hirad Abtahi and Philippa Webb, (2010) 104 American Journal of International Law 319. Note that the notion of cultural genocide was quite deliberately rejected by the UN sixth Committee: UN General Assembly UNGAOR 3rd Sess Part 1 6th Committee Summary Records of meetings 21 September-6 December 1948 p202. As a result of this rejection, Greece proposed the adding of the forcible transfer of children instead of cultural genocide to console the proponents of it: UN Doc A/C.6/242.


\textsuperscript{120} \textit{Krstić} (Trial Judgment) para 584 and Appeals Judgment Dissenting Judgment of Judge Shabudeen para 52; Interpretation of the Peace Treaties with Bulgaria Hungary and Romania ICJ Advisory Opinion (18 July 1950) 229 and ‘Legality of the Threat or Use of Nuclear Weapons’ ICJ Advisory Opinion Dissenting Opinion of Judge Higgin (8 July 1996) p 592 para 40.
The courts in their majority accept the primacy of the literal interpretation when defining genocide as a concept, but they contradict themselves by reverting to the historical or teleological interpretation when they are faced with difficulties such as proving the genocidal intent. Therefore the practice of abandoning the hierarchy of the interpretative methods brought the context of genocide within the legal elements of the crime baselessly. If the purpose of interpretation is to ascertain the plain meaning of the text of the law, then any reference to a collective act, plan, pattern, magnitude, or campaign is only a case of ignoring the plain meaning, because the terms might support other readings but it involves the invention of ambiguities from practical situations to justify recourse to other interpretative means.

4.4 The case law of the internationalized and domestic tribunals

The Genocide Convention was conceived for local application by states, and the Convention expressly provided in article V that states must legislate specific provisions in their domestic law against the crime of genocide and must prosecute any such crimes. In the recent Rome Statute, states were obliged to legislate for the crime of genocide in order to adhere to the ICC’s cooperation and complementarity duties. However, not all states adopted such legislation and not all those that adopted such legislation adopted the same definition of genocide as was provided for in the Genocide Convention.

The most notable of those variations is the French definition of genocide, which shifts the whole concept of genocide from one based on specific genocidal intent to one based on the existence of a ‘plan and policy’ by expressly requiring the existence of ‘a concerted plan’ as a constitutive element of the crime. Thus, by emphasizing the systematic and organizational aspect of the crime, the French seem to have narrowed the schism between the crime of genocide and crimes against humanity.

122 Rome Statute, art 86, and in art 88 the Statute required states to put in place procedures for cooperation with the court.
123 Rome Statute, art 1. See art 17 on the issue of admissibility which provides further clarification of when the ICC can interfere in the local jurisdiction.
124 Penal Code of France (1 March 1994) art 211-1 (translated version <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> last accessed 13 May 2015. Note also, the French code grouped genocide under the title ‘Crimes against Humanity and Against the Person’ which includes the definition of both genocide and crimes against humanity.
However, such an assimilation of these crimes is not reflected in any noticeable change as far as holding a génocidaire to account is concerned.\footnote{Henham and Behrens, *The Criminal Law of Genocide* (n 3) 216-219.}

Similarly, the Turkish Penal Code followed the French direction and legislated for the inclusion of ‘state involvement at the leaders’ level’ as a constitutive element of genocide by requiring that genocide must be committed ‘through the execution of a plan’.\footnote{Turkish Penal Code, ch I, vol II, art 76. The English translation of the Turkish text can be found online <http://www.tuerkeiforum.net/enw/index.php/Translation_of_selected_Articles_of_the_Turkish_Penal_Code> last accessed 13 May 2015. Note also that the Turkish code expanded the protected group from the four groups provided for in the Convention to include any type of group.} At international level, the Cambodian Extraordinary Criminal Chamber defined genocide in article 4 as ‘… any acts committed with the intent to destroy, in whole or in part, a national, ethnic, and racial or religious group, such as …’ and then enumerated the acts.\footnote{Law on the Establishment of the Extraordinary Chambers with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art 4.} This definition departs from the Convention in replacing the expression ‘any of the following acts’ with ‘any acts’ and the phrase ‘as such’ referring to a ‘group’ in the Genocide Convention with ‘such as’ but referring to ‘acts’. Yet in the same article it stated that genocide should be as defined by the Genocide Convention 1948. Hence, this definition transformed genocide by pushing its boundaries to accept all the acts without distinction because intent no longer requires the targeting of a specific group; nor do the acts need to be specific acts to be classified as genocide.

Conversely, there are those countries that have opted to copy the Genocide Convention definition. The United Kingdom, for instance, incorporated the Convention’s definition in its 1969 Genocide Act, an Act designed to give effect to the Convention on the Prevention and Punishment of the Crime of Genocide.\footnote{The Genocide Act 1969, now repealed.} Australia also extended the application of the Genocide Convention definition verbatim into the Australian territory in 1949 without any amendments.\footnote{Genocide Convention Act 1949 (12 July 1949); The Criminal Code of Bosnia (Herzegovina Official Gazette of Bosnia Herzegovina No 3/03, 32/03, 37/03, 54/04, 61/04, 30/05).}

However, despite this variation in the Turkish and French definitions of genocide, there has not been any case where the elements of the definition have been tested or judicially interpreted. Hence the inclusion of planning or state involvement remains
without any effect. On the other hand, the German Criminal Code incorporated the definition verbatim from the Genocide Convention but the judiciary expanded it through their interpretation. The German court – the Higher Regional Court in Düsseldorf – in Jorgić interpreted the element of genocidal intent in a purposive manner and concluded that destruction in the case of genocide is not limited to physical and biological destruction but includes the social destruction of the group in its distinctiveness and particularity and its feeling of belonging together. By so doing, the court did not just expand the definition of genocide by equating genocide with ethnic cleansing and systematic expulsion, but included the contextual elements which were irrelevant to the equation because the acts of ethnic cleansing and persecution are mostly characterized by context of their occurrence.\textsuperscript{130}

Although the national definitions of genocide are wider than that of the Convention in many respects, the variation is not visible in the case law of the domestic and internationalized courts’ interpretations of genocide in their respective local statutes in the aforementioned cases. In Milorad Trbic, the penal division of the Court of Bosnia and Herzegovina held that in the case of genocide it is irrelevant that the killing was not large in scale or that it did not affect the totality of the intended victims, so the determinative factors lay in the commission of one act with the necessary specific intent.\textsuperscript{131} The penal division furthermore contended: ‘In theory, the killing of only one victim can still amount to an act constituting the actus reus of the crime of genocide.’\textsuperscript{132}

In the same way, Miroslav Vuckovic was convicted for genocide by the district court of Mitrovica of Northern Kosovo for intentionally setting fire to the residences of the Albanian community, for shooting at them, confiscating their property, and forcing them to flee their homes with the intention to partly or wholly destroy them, thereby inflicting on the victim group conditions of life that were calculated to bring about


\textsuperscript{131} Prosecutor’s Office of Bosnia and Herzegovina v Milorad Trbic Case No X-KR-07/386 (First Instance Verdict, 16 October 2009) para 786.

\textsuperscript{132} ibid para 780; in para 818 the penal division stated: ‘the number is not dispositive as even one killing if done with the specific intent can be considered genocide’.
their destruction. However, in complete contrast, the Supreme Court of Kosovo overturned the conviction for genocide because of the lack of any genocidal plan or policy, and that the manner and methods of the commission of the crime bore more resemblance to crimes against humanity, and hence they did not support the finding of genocidal intent. It is worth mentioning Nilsson’s comments that the Supreme Court arrived at this conclusion because they looked at whether the acts evinced genocidal intent rather than whether those acts were committed with genocidal intent, regardless of the policy of the Milosevic regime. It is now accepted that the precedent of the ad hoc tribunals means that the forced removal of people can lead to the destruction of a group or be an additional means by which genocidal destruction can be achieved. The Kosovan Supreme Court in its decision in Vuckovic appears to have ignored the fact that an individual can still commit genocide even if the Milosevic regime’s policy was the deportation of non-Serb groups.

Contrary to the Supreme Court’s finding, the district court of Osijek tried an accused (MH) for participation and actually assisting in the realization of the plans of creating a Greater Serbia, starting with the village Branjina, by means of forced displacement and putting a group in conditions of life that would lead to its complete or partial destruction, which is considered as a case of genocide. The court found the defendant guilty of genocide because he participated in the expulsion of 215 Croat nationals from a village with 289 Croats in total. However, the court perceived the accused’s activities as occurring within the wider plan to create a Greater Serbia, which is not genocide in itself, and determined that the accused’s participation and mistreatment of the Croats was done only due to their nationality, and it viewed such mistreatment as contributing to the realization of the goal of attempting to annihilate the Croat organization.

135 Nilsson ibid 545-555, 550-551.
national group from the village of Branjina, thereby attaching an intention to destroy\textsuperscript{138} to his actions.

The court made a major pronouncement on how a case of genocide can be alleged, when it stated:

For bringing charges against the defendant for genocide it would be enough to mention only one action against only one person, in case his intention was ‘to partly or entirely’ annihilate some of the groups as mentioned in the Article 119 Basic Criminal Law of the Republic of Croatia\textsuperscript{139}

Furthermore, even in cases of clear plan to exterminate a group, the national courts appear to be holding on the principle of individual criminal responsibility. For example, in the case of \textit{Mitrović} in the Bosnia and Herzegovina court the penal division held the accused responsible for genocide as a co-perpetrator in carrying out a genocidal plan, but his intent was solely examined on the evidence of his own acts. The court examined the genocidal campaign and the magnitude of the crimes, but based the inference as to the accused’s intent on whether he participated in this campaign by killing even a single man and most importantly whether that killing was done with the necessary intent. The Panel concluded beyond any doubt that the murder of the majority of the more than 1,000 Bosniaks in the Kravica warehouse was co-perpetrated by the accused with the aim of destroying Bosniaks, a protected group, in whole or in part\textsuperscript{140}. Schabas dismissed any claim of validity for this case and contended that only the most liberal interpretation of the genocide definition would have extended the definition of genocide to the acts proven by the court\textsuperscript{141}.

It seems from the aforementioned cases that there is very little need for any contextual elements of planning and policy or of systematic organization in those cases, since the allegation can be made within the limits of the geographical area in


\textsuperscript{140} Prosecutor’s Office of Bosnia and Herzegovina v Petar Mitrović Court of Bosnia and Herzegovina Case No X-KR-05/24-1 (First Instance Verdict, 29 July 2008) 7-9, 93-96, 107-114 and 114-129.

\textsuperscript{141} William Schabas, ‘National Courts Finally Begin to Prosecute Genocide, the ‘Crime of Crimes’ (2003) 1 JICJ 55.
which the crime took place and the limited nature of the opportunities that were available to the accused in question. Therefore the courts found no difficulties in holding the individual responsible for genocide individually without the need for any plan or policy or systematic targeting of the group. Since the literal reading of the genocide definition supports such an interpretation, and reaffirms the object and purpose of the Genocide Convention, as stipulated in the title and the preamble, by holding those lone génocidaire responsible for genocide, the courts are sending a signal that the destruction of a group, however small, will not be tolerated.

This claim can be more convincingly illustrated by the incidence of campaigns of destruction against smaller groups. For example, in Brazil, five men were charged and convicted by the Federal Court with genocide for their intention to destroy the Xacriaba Indians – numbering around 4,000 persons – as a group.\(^\text{142}\) It was observed that the Indians were currently in danger and therefore more needed to be done to deter the perpetrators and hold them responsible for such heinous crimes even if the number of the victims was small.\(^\text{143}\) In another case, the Brazilian Supreme Court upheld the conviction of five miners for genocide against the Yanomami Indians, the so-called ‘Haximu Massacre’, which resulted in the death of only 16 Indians.\(^\text{144}\) It was similarly contended that the Supreme Court’s ruling was very significant and it sent a very loud warning to those who might possibly commit similar crimes against those groups.\(^\text{145}\)

It is apparent that some of those national cases have had very little or no effect as far as the interpretation of the elements of genocide is concerned.\(^\text{146}\) However, ignoring those purported genocidal convictions that fall under the rubric of political retaliation and retribution, as in Romania, Bolivia and Ethiopia, or those that have occurred


\(^{143}\) Ibid.

\(^{144}\) The Yanomami case, The Brazilian Constitutional Court Judgement <http://stj.jusbrasil.com.br/jurisprudencia/332280/recurso-especial-resp-222653-r-1999-0061733-9> last accessed 29 May 2016. The accused were sentenced for 19-20 years


\(^{146}\) Schabas (n 141) p 40 footnote 3, p 43 footnote 27.
under ex post facto, as in Lithuania and Latvia\textsuperscript{147}, the rest tally with the accepted interpretation of the genocide definition and the prevailing understanding, but this also clarifies how the law on genocide can be applicable not only in relation to large-scale atrocities but also in relation to small-scale, geographically limited ones and can be used to protect even those very small ethnic, racial, religious, and national groups. Only by so doing can the aim and objective of the Genocide Convention be achieved.

4.5 Concluding remarks

In conclusion, the courts, on one hand, supported the characterization of genocide by the individualized intent requirement and, on the other, came very close to the inclusion of the systematic criminality element, where contextual elements – plans, patterns, magnitude, and genocidal campaigns – play a constitutive part. A survey of the cases reveals that this imprecision came from the court’s use of sloppy language on the role of contextual elements in general, in some instances emphasizing the evidentiary part without providing any clarification of what is being proven by the context. This situation is further complicated by the lack of clarity on the inference of evidence from context which occupies a major role in the tribunals’ assessment of evidence and the faithful application of the interpretative rules. Therefore, the courts’ inexplicable consistent references to the contextual elements of the crime cannot be explained by the textual reading affirmed in the above section\textsuperscript{148}. It is also noteworthy that the courts are not immune to similar debate that has been echoing in the scholarly community on the precise need and function of the contextual elements of genocide.

All in all, the courts appear to have made little effort to avoid venturing into the social concept of genocide, or meddle with the early definition, which was developed in light of the crimes against humanity\textsuperscript{149}. This is because the social concept at times slips into the legal discourse, leading to heated debates and outright suggestion to

\footnotesize{\textsuperscript{147} Discussion of these cases is not relevant to the current line of reasoning; however, see John Quigley, \textit{The Genocide Convention: An International Law Analysis} (Ashgate 2006) 36-49.}

\footnotesize{\textsuperscript{148} Whether an inference from the contextual elements supports the presumption that the contextual element is a legal ingredient will be discussed in the second part of this chapter.}

\footnotesize{\textsuperscript{149} Trial of the Major War Criminals, and also in Control Council Law No 10 and in \textit{USA v Josef Alstotter et al}, 1947, the trial of Arthur, Greiser, and Reich in Poland in 1946.}
redefine genocide altogether or add new elements to it as the contextual elements. The major criticism of the courts’ position from the beginning is that it must have based its analysis on the crime genocide post-Raphael Lemkin’s coining of the word. The 1948 Convention’s definition departed from the historical concept and the earlier definitions by Lemkin, the Nuremberg trials, and Resolution 96(1) by characterizing genocide with specific intent which is now recognized as part of the customary international law. The courts fail to realize that there are different types of genocide that may require separate explanations.

Therefore, it is apparent from the courts’ reasoning in the various cases examined in this chapter that despite the differences of opinion on the contextual element in the prevailing case law, the judiciary has been edging dangerously close to the legislators’ sphere and, despite the academic community’s irreconcilable division on this matter, there is unanimous agreement within the judiciary’s camp, and a majority position within the academic community, that the definition of genocide is sufficiently clear and that context is not part of the legal ingredients of the crime of genocide. However, a good case can be made to support the contextual elements utility as an evidentiary and jurisdictional element.


CHAPTER 5: TOWARDS A NEW ASSESSMENT?
CONTEXTUAL ELEMENTS IN THE ROME STATUTE

5.1 Introduction

The adoption of the Rome Statute of the International Criminal Court (hereinafter ‘the Rome Statute’), on 17 July 1998, created the International Criminal Court (hereinafter ‘ICC’) with jurisdiction on the crime of genocide, crimes against humanity, war crimes, and crimes of aggression. It was also agreed that the ‘Elements of Crimes’ (hereinafter ‘EoC’) will be elaborated – but after the Rome Conference – to assist the Court in the interpretation and application of articles 6, 7 and 8. It is important to note here another important addition in article 21 which expressly requires the courts to apply the EoC. Notwithstanding those innovations the Rome Conference agreed that the definition of genocide should be verbatim from article II of the Genocide Convention 1948.

Under the Rome Statute, all crimes within its jurisdiction comprise ‘contextual elements’ in their respective definitions, except genocide. However, through the EoC, a contextual element was incorporated for the crime of genocide, which states that for the crime of genocide to occur the conduct must take place ‘in the context of a manifest pattern of similar conduct directed against that group or … [be] conduct that could itself effect such destruction.

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1 Rome Statute of the International Criminal Court (last amended 2010) 17 July 1998 2187 UNTS 910/37 ILM 1002 (1998)/ (2002à ATS 15, art 5. Note that jurisdiction over the crime of aggression is exercisable only when a provision is adopted in accordance with arts 121 and 123.
3 Art 9 of the Rome Statute of the International Criminal Court 17 July 1998. The EoC structure starts with a general introduction and is followed by specific introductions to the elements of the three categories of crimes within the jurisdiction of the court – genocide, crimes against humanity, and war crimes. The general introduction describes the structure of the elements of each crime: first, the conduct consequences and circumstances associated with each crime (generally listed in that order), followed by a particular mental element, and lastly, any contextual circumstances.
4 Valerie Oosterveld, ‘The Elements of Genocide’ in RS Lee, The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers 2001) 42. The only addition was ‘for the purpose of this statute’, added to the beginning of the definition.
5 The crime of aggression is not considered here because the position of it is not yet clarified. The EoC also made no provision for the crime of aggression.
The concept of EoC was unheard of, but surfaced as a necessity for the precision and clarity required in criminal law. However, there were doubts about this claim because the definitional boundaries of the crimes within the jurisdiction of the courts are well defined with sufficient precision in their current respective forms and there appears to be nothing indicative of difficulties with its interpretation or applications. Yet the EoC attained entry into the Rome Statute pursuant to article 9, and thus the contextual elements of genocide were introduced into the legal concept as the last ‘Common Elements’ to each of the alternatives of genocide in the EoC. It represented a novel addition with very little guidance on its status or interpretation, or what is meant, or what purpose it intended to serve, in the light of the identical reproduction of the Genocide Convention’s definition of genocide which lacks any reference to context.

This chapter will attempt to evaluate the substantive and normative nature of the contextual elements of genocide in light of these new developments – the EoC, and articles 9 and 21 – and according to general principles of international criminal law and the Rome Statute as a whole. The chapter will first (in section 5.2) examine the need for the concept of the EoC through its evolution during the drafting process of the EoC itself and the Rome Statute to identify its legal position. Then, in section 5.3 the contextual element will be interpreted through the provisions of the Rome Statute to determine its legal position according to the current wording of articles 9 and 21.

The chapter will then (in section 5.4) conclude by putting forward a case for a new assessment and confirm that the contextual element of article 6 of the Rome Statute adds nothing to the definition of genocide and can only be explained by two roles: first, by the need for jurisdictional limitation of the new court – the ICC – to those serious and large-scale crimes in exclusion of smaller and similar hate crimes. (This jurisdictional limitation requirement is enshrined in the complementarity principle

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9 In the case of the crime of genocide the EoC lists the forms of genocide and starts with the specific element of each crime, then sets out the circumstance and the particular intent, and finally the contextual elements. The specific introduction of genocide provides further explanation, including the mental element.
and the need for gravity as a prerequisite for admissibility of cases before the court;)
and second, to avoid trivialization of the court by allowing prosecution of a lone génocidaire. Thus, the inclusion of context in the ICC Statute is explained by the need to attend to the fear of some states of the possibility of trivialization of the court and abuse of their sovereign rights by political manipulations of the definition of the crime\textsuperscript{10}.

5.2 The drafting history: relationship between the ‘Elements of Crimes’ and the Rome Statute

5.2.1 The last ‘Common Element’: Its content and aims

The need to preserve the definition of genocide was easily agreed upon during the Rome Conference, and thus it was adopted without any modification except the addition of the ‘For the purpose of this statute’ at the beginning of the definition\textsuperscript{11}. However, the Rome Statute lacks any guidance on the contextual elements requirement of the crime of genocide; therefore, recourse to the \textit{Travaux Préparatoires} of the EoC is in order to ascertain any reason for such addition.

The contextual element of genocide was initially proposed as requiring a plan or policy as a constitutive element\textsuperscript{12} but later changed to the concept of widespread and systematic by borrowing from crimes against humanity\textsuperscript{13}. Thus, the Preparatory Commission commenced elaboration of elements of genocide on the basis of a proposal – submitted by the United States (US)– which contains an additional contextual element requiring the genocidal act to be committed in ‘conscious furtherance of a widespread or systematic policy or practice aimed at destroying such group’\textsuperscript{14}. This proposition appears to have been drafted on the assumption that the crime of genocide pre-Rome Statute lacked such clarification of its context, and

\textsuperscript{11} Report of the Ad Hoc Committee on the Establishment of an International Criminal Court GAOR 50th Sess. Supp. No. 22 UN Doc A/50/22 (1995) xx 60–61. Note there were numerous previous attempts to modify the definition of genocide but none of them succeeded in achieving consensus.
\textsuperscript{14} ibid.
because the context element was not conventionally part of legal ingredients of the crime.

The difficulty with this proposition was identified early on, when the Colombian delegation reiterated that the US proposal represented an addition of a new element to the crime of genocide and should be rejected because it ‘goes beyond the meaning provided in the statute and lessens the protection provided to groups’. It was clear from the United Nations Conference’s Final Resolution F which stated in the preamble that the Preparatory Commission’s task is to prepare for the coming into operation of the ICC including elaboration of EoC but not amendment of the crime and the jurisdiction. According to this Resolution, the aims of the Preparatory Commission resemble preparation of the procedural text for the forthcoming court rather than any substantive change to law. In addition, the Commission’s work is also expressly required to respect article 9 and be consistent with article 21 and the general principles of part 3 and the statute as a whole, none of which sat well with new additions to the crime. The objective of drafting the EoC was apparent from the US acknowledgement in their proposal that the EoC should not change the definition and that any interpretation issues must be resolved so as to be consistent with the ICC Statute. Therefore, as a result of this understanding, the elaboration of the EoC concentrated on finding a formulation that fell within the current jurisprudential language and not elaboration of elements that might change the constitution of the crimes within the statute.

Finally, consensus emerged at this stage on elements that seem to be specific to the crime of genocide and was phrased as: ‘The accused knew or should have known that the conduct would destroy, in whole or in part, such group or that the conduct was part of a pattern of similar conduct directed against that group’. However, in 2000 the final modifications were approved on the above proposed contextual element by reversing the two prongs and changing the initially proposed element –

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17 ‘Draft Elements of Crimes’ (n 13) para 1.
18 Discussion paper proposed by the coordinator, article 6 PCNICC/1999/WGEC/RT.1 (25 February 1999) art 6: the crime of genocide. Oosterveld contended that this construction is loosely based on various passages from the Akayesu case: Oosterveld (n 4) 46.
which requires the conduct ‘in and of itself would destroy’ to ‘could destroy’ because the former is a result-based requirement, and hence raises the evidentiary bar of proof from that currently required by the customary and the Convention’s definition of genocide and the current precedents to one where the prosecution need to prove extra elements of result and knowledge.\textsuperscript{19}

Even though genocide did not provide for context in its current form, the Preparatory Commission’s work contains very little explanation about the need for such context. The initial proposal upon which the Commission based its deliberation only states in a general sense that the EoC helps the prosecutor and the defence to identify appropriate issues during litigation and describe the factual findings.\textsuperscript{20} It is very difficult to see the contextual element as help for the prosecution in the case of genocide, because it imposes an extra hurdle on the prosecution by requiring the crime to take place in a certain specific context or while other additional elements need to be present. If the context does not need to be established by the prosecution, then there is very little value in its addition as far as the substantive law is concerned, because it does not clarify the definition as it currently exists.

Nevertheless, there are still other states who want to reflect the concept of magnitude and threat to a group in the definition of genocide as a constitutive element, because the Statute seems to have assumed the existence of such elements to have been subsumed in the requirement of ‘specific intent to destroy a group’.\textsuperscript{21} This is so because the definition of genocide referred to the actus reus of genocide in the plural but at the same time the commission of a single act would not absolve an accused from being charged with the crime of genocide.\textsuperscript{22} Oosterveld is of the opinion that the contextual element of genocide came into existence as a compromise between those who want to mirror the magnitude of the crime and avoid the supposed trivialization of genocide and those who see context as a less burning issue but see the possibility of the lone génocidaire as a potential hindrance.\textsuperscript{23}

\textsuperscript{19} Ibid, 46-47.
\textsuperscript{20} ‘Draft Elements of Crimes’, (n 13) para 1.
\textsuperscript{21} Oosterveld; (n 4) 45.
\textsuperscript{22} Ibid; similar views were echoed by Cassese in Cassese, Antonio, et al. Cassese’s international criminal law. Oxford University Press, 2013.
\textsuperscript{23} Ibid.
The first possibility of including magnitude with the legal ingredients of the
definition of the crime through the EoC goes against the principal task of the
Commission because such addition can be an attempt to change the substantive law.
Furthermore, if the inclusion of context is only to avoid trivialization of the crime,
then such concern is subsumed in the requirement to exclude the possibility of lone
génocidaire. The later requirement can be procedurally addressed, as opposed to the
former one. The wording of the contextual element of genocide might be of
assistance here; it is suggested that the criminal conduct must take place ‘in a context
of’, which means it does not need to be part of, as in the case of crimes against
humanity and war crimes where criminal conduct is required to be part of the
context. The contextual elements of genocide included a qualifying element for
‘pattern of similar acts’ and required it to be a manifestly similar pattern to exclude
the possibility of sporadic acts being qualified as genocidal campaign. In a further
attempt to clarify this position, the introduction to the elements of article 6 requires
consideration of the terms to be taken as an objective qualification to raise the
threshold required and that the term ‘in the context’ includes the initial acts. The
formulation of this context appears to require a result and must be a concrete result
before the court can consider the situation. Thus, the any act taking place in the
initial stage of the context is left out of the court’s consideration if the context did not
develop and materialize into full genocidal campaign. All in all, the ICC Pre-Trial
Chamber stated that the protection offered by the penal norm of genocide could not
be triggered unless the threat to the existence of the group is concrete and real as
opposed to a vain hope. The ICC Pre-Trial Chamber (hereinafter PTC) held in Al
Bashir that genocide is only completed when the relevant threat presents a real threat
to the existence of the group.

The contextual element of genocide as it stands changed the context into a result
context, collective result or individual result, and hence the chief objective of the
contextual elements of genocide appear to be the isolation of the possibility of a lone
génocidaire and limitation of the court to the objective of trying the most serious

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26 ibid.
crimes of concern to the international community. Of course this conclusion does not exclude the firm possibility of lone génocidaire provided for in the definition of the genocide in both the Convention and the ICC Statute, but it only limits the jurisdiction of this particular court. Such reading must be accepted in conjunction with the objective of article 9, which is to assist the court – judges, prosecutor, and defence – in the interpretation and application of genocide in the new ICC setting.

5.2.2 ‘Elements of Crimes’: the need and relevance

The need and relevancy for the contextual element of genocide under the Rome Statute depend on the status of the EoC as enshrined in the Rome Statute. That is to say, if the EoC is a binding and integral part of the crime, the contextual element becomes a constituent element and if it is a mere guideline by virtue of its inclusion in the annex documents, it can be interpreted according to the criminal law principles and in the best light of the circumstance. Hence, this section will examine the EoC as a concept from the point of its origination to the point of its admission into the Rome Statute as an annex document in order to determine its status which in turn determines the position of the contextual elements.

The concept of the EoC originated from a US proposal with the commencement of the work of the Preparatory Committee in 1996 on the establishment of the ICC. Hence, it was planned prior to the Rome negotiations, but initially the US military identified a number of substantive concerns with the draft treaty text, among which were definitions and elements of crimes\(^{27}\). The proposals did not explain the need for the concept of ‘Elements of Crimes’ or the purpose it intended to serve; at this point, it only contained a few clarifications of the concept of genocidal intent as to why it should be specific intent and a demonstration that mental harm means more than a minor impairment, without any mention of ‘contextual elements’ or the need to revise the definition of genocide\(^{28}\). Von Hebel contended that the ILC’s efforts since


\(^{28}\) United States Delegation Redraft of the International Law Commission, art 20 on ICC jurisdiction with Proposed Elements General jurisdiction (22 March 1996); United States Delegation For Annex to Statute Elements Related to Article on Genocide 26 March 1996. Also note during the same time Bureau Meeting The Crimes of Genocide Summary of suggestions 27 March 1996 proposed two alternatives to the definition of genocide, one with reference to interpretation and application being based on relevant international conventions and other sources of international law, and one without any such reference.
1989 on the establishment of the ICC did not sufficiently detail the definition of the crimes within jurisdiction of the proposed court; as a result, this led the new framework to place emphasis on the comprehensiveness of the crimes within the jurisdiction of the Court\(^{29}\). It was true that the ILC drafts needed elaboration of its definitions of crimes, but it was clear, even early on, that the task of the Preparatory Committee was primarily to determine the applicability of the existing law without the prerogative to add or change the law\(^{30}\). Japan, for instance, at the preparatory stage for the establishment of the ICC demanded exercise of caution because the Genocide Convention had only been utilized on three occasions since its inception, and hence it would be judicious to verify whether it was fully operational\(^{31}\). But the majority opted for the verbatim definition of the Genocide Convention to avoid derailing or impeding the process of creating the court\(^{32}\). It was also noteworthy that the early general agreement among some delegates to elaborate the constituent elements in the Statute or the annex was not clear-cut in itself.

The reasons given for the EoC are: the need to bring precision and clarity, to guide prosecutors and judges, to avoid manipulation, and to restrict judges’ ability to venture into the legislative sphere\(^{33}\). Therefore, at this preparatory stage there was no discussion on whether the crimes required an additional contextual element. In the final session of the Preparatory Committee before the submission of the consolidated text to the Rome Conference, the EoC surfaced as a conference document with the requirement to be encompassed in the Statute or an annex with binding force (and here is where the contextual element first emerged for genocide).\(^{34}\) Thus, it was


\(^{31}\) ibid.

\(^{32}\) ibid.


added into the draft Statute to the Conference in article 52 and to the Rules of Procedure and Evidence as an option.\textsuperscript{35}

The US lobbied for inclusion of the EoC from the beginning of the process of establishing the ICC\textsuperscript{36}, but the only rationale that can be adduced from the arguments put forward during the Conference was the need for precision and clarity which was affirmed by the Preparatory Committee from the very beginning.\textsuperscript{37} However, the controversy here is that the EoC offers very little in the way of clarification and precision in the meaning of the crime of genocide. In fact, the crime of genocide does not need to take place while there is a manifested pattern of conduct; the reality is that the contextual element is the opposite of what is purported to be. In response to sceptics and comments on the proposal, the proponent of the EoC submitted that the Rome Statute as a criminal statute requires such elaboration of elements to achieve specificity and the fact that its international forum makes the need even more pressing considering the crimes within the jurisdiction of the ICC and the fundamental need for fairness. All in all, the raison d’être of the EoC, according to the US, 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.’\textsuperscript{38}

It is important to note here that the International Commission of Jurists briefed the Rome Conference against the elaboration of the EoC at this stage because the definitions as provided for in the draft statute do not violate the nullum crimen sine lege principle, even if the EoC provide adequate instructions to the judges, prosecutor, and the defence, thereby reducing the validity of any claim for the need for precision claimed by the US in introducing the EoC.\textsuperscript{39} The International Committee of the Red Cross also made a similar request against elaboration of the

\textsuperscript{36} The United States was fully aware that the EoC could not be agreed upon until the crimes within the jurisdiction of the court were agreed upon, but it believed that if numerous proposal were tabled, it would help in achieving their objective of attaching the EoC to the Rome Statute.
\textsuperscript{39} ICJ Brief No 1 to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ROME Definition of Crimes (15 June-17 July 1998) 3.
EoC on the ground that there is great deal found in the definition of crimes in their current form and in the precedent of the international and national courts. Thus, the arguments advanced in support of the contextual elements are not accurate because the crimes required no urgent need for clarification but the proponent of the idea believed in the need for context in those crimes for one reason or another.

The EoC was thus cloaked in the principle of *nullum crimen sine lege* during the Conference by emphasizing the need for clarification and precision, but there was also some genuine acceptance that the EoC is a prerequisite within the jurisdiction of the court to achieve clarity and precision to conform to the mandate of drafting a criminal law statute. In addition, there was a belief in the need for such elements because the Conference was in the process of setting up a court with inherent and compulsory jurisdiction on crimes that lack any widely accepted elements, and the definitions of those crimes in themselves are amalgamated from different multilateral instruments – specifically, crimes against humanity, war crimes, and crimes of aggression – to which some states are not even party, as well as the existence of general doubt in their customary status. This contention commands some truth, especially in the case of crimes against humanity because its elements were still not clear during the drafting of the Rome Statute. For instance, ‘the nexus to war or armed conflict’ limitation of the crimes against humanity which was recognized by the Nuremberg tribunal in article 6(c) was removed only in the 1990s by the ICTY in the *Tadić* case despite the express exigencies of article 5 of the ICTY Statute. However, there was not so much discussion of these questions in respect of the crime of genocide because the Conference was more inclined to accept genocide as it stands.

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42 Press release L/2672 (n 30).
43 *Prosecutor v Tadić* (Trial Judgment) para 627. The same nexus appeared in the ICTR Statute as ‘widespread and systematic’ in art 3.
However, even though supporters of the EoC are large in number, they all fail to provide an explanation as to its need in conjunction with the current definition of the crime, which was quite sufficiently defined at least in the case of the crime of genocide within the current international criminal law’s setting. Japan was a fierce supporter of the EoC but gave no elaboration other than the need not to violate *nullum crimen sine lege* and did not even explain how the legality principle is being violated by the current form of the crimes definition

Hence, there was no agreement on what the EoC was meant to address other than the claim of the delegates who proposed its inclusion in the Statute to enhance clarity and precision. Thus, the final agreement to include the EoC remained vague in essence and details. Because the idea of element in itself being an innovation in the realm of international criminal law, it caused a great deal of difficulty at the drafting stage to pinpoint a specific reason for its existence.

However, consensus finally materialized from the Bureau Discussion Paper, which recommended mentioning the need for the EoC in the ICC Statute, but postponing its elaboration until after the Conference and EoC finally secured an entry into the Rome Statute in its current form pursuant to article 9 as a result of compromise rather than agreement. It is quite apparent, from the drafting process, that the need and the relevancy of the EoC were neither certain nor apparent. Kelt and von Hebel observed that most delegations at the Rome Conference were unclear or had divergent understandings of the meaning, function, and role of the EoC in the effectiveness of the Court; they could not even agree on whether the EoC was a material or mental element or merely jurisdictional.

Therefore, any subsequent explanations of the contextual elements must bear in mind those facts into account and avoid the tendency to just attached contextual elements to all crimes within the ICC statute by virtue of the EoC.

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48 Maria Kelt and Herman von Hebel, ‘What Are the Elements of Crimes?’ in Lee (n 4) 13.
49 ibid 15.
5.2.3 ‘Elements of Crimes’: Constituent and binding or legally redundant element

According to the current wording of article 21 of the Rome Statute, and the clarity of the word ‘shall’ make any inquiry into the bindingness of the EoC a redundant task, but this section reverts to the Travaux Préparatoires to determine whether the word ‘shall’ was used as a result of a clear agreement to bind courts in the application of the EoC including the contextual one as a constitutive part of the crime of genocide. However, article 21 will be examined in more detail in section 5.3.2 below.

During the Conference the proposal on the EoC was pushed to be an integral part of the Statute and have binding force with the general provisions of criminal law. It was presented with the supporting claim that the success of the court depended on having binding EoC, and it was further proposed to replace the words of article 20(1)(a) of the Rome Statute, ‘and its Rules of Procedure and Evidence’ with the words ‘including its annexes’. In response to a proposal by the Bureau of the Diplomatic Conference, the US then submitted another proposal near the end of the Diplomatic Conference pressing for binding EoC by requesting the elements to be applicable in reaching determinations of guilt. If the EoC is found to have a binding effect, then the contextual element of genocide will find its way into the definition of the crime of genocide through the EoC.

However, the attempt to give the EoC a binding nature was defeated very early on by the Rome Conference. Even among the proponent states of the EoC only Japan, Egypt and China expressly required EoC to be of a binding nature. On the other hand, Jamaica, after initial objection, agreed only to advance negotiations and agreed with the Republic of Tanzania that if article XX was adopted, then the EoC would

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54 UN Doc A/CONF. 183/C.1/RS.25 para 32, Japan.
55 UN Doc A/CONF. 183/C.1/SR.26 para 115, Egypt.
56 UN Doc A/CONF.183/C.1/RS.25 para 36, China.
automatically be binding on the court\textsuperscript{57}. Hence if the EoC has no binding effect, then what effect do these elements have in the light of article 9 of the Rome Statute and the EoC as an annex document?

Notwithstanding the inconclusive position from the viewpoint of the proponent states, the great majority of states agreed to the inclusion of the EoC because they believed it served as a good guideline to courts and practitioners alike, but they certainly distanced any possibility of binding effect to be attached\textsuperscript{58}. It is difficult to count all the expression of support for the EoC as support for binding elements because some states who were open-minded about the whole concept\textsuperscript{59} and there are those who initially opposed the EoC but reversed their position only because consensus started to emerge\textsuperscript{60}.

On the other hand, there were other states that were sceptical of the need for the EoC,\textsuperscript{61} including those who found the inclusion of the EoC as superfluous. Hence, it became acceptable to them only if it could be considered as strictly advisory in nature\textsuperscript{62}. Others wanted to completely redraft the proposed addition to explicitly emphasize its non-binding nature\textsuperscript{63}. The proposition to grant the EoC a binding value was challenged on several grounds; that it might take the flexibility away from the judge in the application of the elements; or it might lead to irreconcilable differences.

\textsuperscript{57} UN Doc A/CONF.183/C.1/SR.34 para 16, Jamaica; UN Doc A/CONF.183/C.1/SR. 35 para 49, United Republic of Tanzania.


\textsuperscript{62} UN Doc A/CONF.183/C.1/SR. 26 para 42, Switzerland.

\textsuperscript{63} UN Doc A/CONF.183/C.1/SR.35 para 39, Finland; UN Doc A/CONF.183/C.1/SR.35 para 77, Romania.
with the Statute by imposing such checklist on judges, a possibility article 10 attempts to address.\textsuperscript{64}

The opposition to the EoC was only limited to legally reasoned arguments, but there were concerns at the negotiating stage that elaboration of the elements of crime could be used as a pretext to delay the conference or set back the establishment of the Court if the Preparatory Commission of the ICC failed in its task.\textsuperscript{65} Hence, the predominant views at the time were that the EoC must not be permitted to be used as a vehicle to restrict or broaden the crimes within the jurisdiction of the court.\textsuperscript{66} For instance, Mexico refuse to sign the Statute until the EoC were fully defined, fearing the use of the EoC as pretext to add extra elements to the crimes within the jurisdiction of the ICC.\textsuperscript{67} It is also noticeable that some states initially agreed to inclusion of the EoC but later changed their minds because the crimes were sufficiently drafted within the Statute to cover the requirement of \textit{nullum crimen sine lege}.\textsuperscript{68}

In summary, the drafting history illustrates that the inclusion of the EoC clearly shows that the only ground upon which the propositions were granted an entry into the Statute pursuant to article 9 was the agreement to accept the treatment of the EoC as guideline for the judges and the prosecutor.\textsuperscript{69} Norway, for example, before the closing of the argument on article XX, made a compelling case for clarification of its status.\textsuperscript{70} It required the Conference to make it absolutely clear that the EoC were to be considered as a guideline and not binding, and furthermore to avoid any future misinterpretation or backdoor smuggling of the EoC as a constituent element the

\textsuperscript{64} Politi (n 45) 447.
\textsuperscript{66} UN Doc A/CONF.183/C.1/SR.33 para 19, Switzerland.
\textsuperscript{67} UN Doc A/CONF.183/C.1/SR.25 para 65, Mexico.
\textsuperscript{68} UN Doc A/CONF.183/C.1/SR.4 para 56, Germany UN Doc A/CONF.183/C.1/SR.25 para 72, Germany UN Doc A/CONF.183/C.1/SR.33 para 69, Germany.
\textsuperscript{70} UN Doc A/CONF.183/C.1/SR.36 para 3, Norway.
word ‘shall’ must be substituted with the word ‘should’. 71

Bosnia and Herzegovina made a similar point to emphasize the need to make article XX non-binding beyond doubt by amending the word ‘shall’, in paragraph 4 of that article, to read ‘should’. 72 However, without such precision the Preparatory Commission mandate made it clear that the drafting of the Eoc would not entail reopening of the Statute or modifying its provisions directly or indirectly. 73 Von Hebel argued that the inclusion of article 9 in its current form was proof against any binding effect of the Eoc and any attempt to argue against that was ‘untenable’, because the Travaux Préparatoires did not support such reading. 75 Schabas dissented and argued that Von Hebel’s position on the negotiating process was reminiscent of his participation in the Rome Conference, from which no legal determination can be made. 76 Schabas, however, conceded that the Travaux Préparatoires in this case offers very little in term of evidence from which the legal status of the Eoc can be determined, but the effort put into the drafting of the Eoc goes against any suggestion of it being non-binding. 77

From surveying the Travaux Préparatoires and the contribution of the negotiating parties above, it is apparent that initially even the US did not push for any position to be taken on the content or status of the Eoc before agreement on the crimes to be included within the jurisdiction of the proposed court, but, following its introduction as a conference paper (A/AC.249/1998/DP.11, 2 April 1998), there were only a handful of states that advocated or expressly called for a binding Eoc and none of those who agreed to article XX accepted it without reiterating the non-binding nature of it. Therefore, even if a vote had been taken on this matter, it could hardly have been accepted as a binding element. Nonetheless, it is reasonable to expect its value not to exceed the provision of article 9 even if read in conjunction with article 21. 78

71 ibid.
72 ibid para 40, Bosnia and Herzegovina.
74 Hebel (n 29) 37.
75 ibid 8.
77 ibid 265.
78 These issues are covered below in more detail in sections 5.3.1 and 5.3.2.
However, if the EoC is not binding, then it does not mean that it has no value at all or that it should be taken as any other source of interpretation that can be used at will by the judiciary. It might be helpful here to recall the Philippines’ contention that article XX must be deleted because it would not achieve the purported objective but create a problem of interpretation of the crimes within the jurisdiction of the court. According to the Philippines, if the EoC was drafted as a guideline, then it had no place in an instrument embodying rights and duties of states; but if the EoC were important for understanding the legal nature of the crime, then they must be a constituent element of the crime and not an annex.

5.3 Phrasing and interpretation

5.3.1 The words ‘shall assist’ in article 9 of the Rome Statute

Article 9 was initially introduced at the Rome Conference as a constituent element that the court needed to take into consideration in finding an accused guilt, but it was watered down during the drafting process to its current form, with the words ‘shall assist’ giving the court the discretion in its application. The legal position and character of the contextual elements rest on the interpretation of article 9 as a departure point, and the rest of the provisions of the Rome Statute as a whole. As provided above, article 9 has no binding character, and hence has very little importance as far as the constituent element of the crime is concerned. However, bearing that in mind, it is worth assessing whether article 9 has any value in its current status. From the wording of the article, it is clear that, if there is any value, it rests – if not in its entirety – on the interpretation of the phrase ‘shall assist’, its meaning, the nature of the assistance, and the consistency requirements in article 9(3).

According to the literal interpretation, the word ‘assist’ linguistically means to give help or support, suggesting elements of choice to the interpreter. That in turn means that the EoC can only be subordinate or supplementary to the provisions of the Statute. Thus, only in cases where there is need for assistance could the court revert...

80 ibid.
to the EoC. The only way in which the EoC can play a role is limited by the words ‘shall assist’ to when the court judges that the EoC are necessary to support or aid in clarification of the definitions of the crime in question.

The need for clarification and interpretation is an unavoidable aspect of any process of application of criminal law provisions. Therefore, any assistance that the judiciary can derive from any documents can only be extended to interpretation and application. In case of interpretation of the law, whatever methods of interpretation and judicial reasoning are employed, it must not allow judges to change any definition or tamper with the constituent elements of the crime. Therefore, the EoC must assist the court in finding the constituent part of the crime, and in cases of contradictions a resort to the most consistent result with the Statute must be the preferred route as per article 9(3). Therefore, literally, article 9’s purpose is to assist the court in interpretation by simply clarifying terms or supporting interpretative choices.

If there is any doubt on the literal meaning, reference must be had to the object and purpose of article 9. As stated above, article 9 was based on respect of the nullum crimen sine lege principle and the need to assist the court to achieve full respect for this principle. Thus, the said role of article 9 has some merit in respect of crimes against humanity and war crimes, because it clarified numerous ambiguous constitutive elements because the definition of those crimes were the subject of an international treaty and had no solid customary status but were the amalgamation of several precedents from the Nuremberg, Tokyo, Rwanda and Former Yugoslavia Tribunals. But such possibility does not exist in the case of genocide, because the contextual elements of genocide are clearly not provided for in the authoritative definition, neither in the statute nor any other instrument (a fact acknowledged by the ICC Pre-Trial Chamber 1 in the Al Bashir case), and hence it is unclear what interpretative aid it can bring in the interpretation or application of the crime of

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84 Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (‘Al Bashir’) (ICC-02/05-01/09) Pre-Trial Chamber I (4 March 2009) paras 117-118 and paras 119-120.
genocide. The simple fact is that there is no corresponding element in the definition of genocide that the contextual elements can help to interpret.

The only interpretative aid the courts can source from the EoC in the case of genocide is the interpretation of terms which is permissible by the conventional canon of interpretation regardless of the existence of the EoC. For example, if the court is considering the crime of genocide committed by deliberately inflicting conditions of life calculated to bring about physical destruction, the term ‘conditions of life’ may include, but may not necessarily be restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes. In such case the court can apply the EoC in an interpretative capacity, insofar as it can explain the term ‘conditions of life’. From this perspective the need for the elements is explained by the prerequisite for interpretation of the other elements of the crime of genocide with the exception of the last common element. However, this purpose will be blurred when we consider the contextual element of genocide because it introduces an entirely new foreign element.

The EoC include several footnotes explaining the definition of genocide but the elements themselves appear to be identical to the definition with very little amendment. Many of those explanatory points have been covered in the case law of the ad hoc tribunals. For instance, mental harm in article 6(b) is not restricted to torture, rape, sexual violence, or inhuman and degrading treatment (as already affirmed by the court in Akayesu) or the fact that killing meant causing death. Thus, the assisting virtues of the EoC become superfluous.

There is no interpretative method that can possibly support the inclusion of the contextual elements to genocide as a constituent element. First, a literal interpretation of article 9’s clarity removes from consideration any claim of inclusion of the contextual elements in the crime of genocide and it would be unrealistic to stretch the

85 Rome Statute of the International Criminal Court, art 2(c).
87 Art 6(a) EoC (1) footnote 2; Art 6(b) EoC (1) footnote 3; Art 6(c) EoC (4) footnote 4; Art 6(e) EoC (1) footnote 5.
88 Akayesu (Trial Judgment) para 731.
89 ibid para 500.
literal meaning of ‘shall assist’ to read the contextual elements as a constituent element. The fact that the drafters of the Rome Statute and the EoC expressly rejected the EoC having a binding nature frustrates any claim of object and purpose or intention of drafter to bring the contextual elements as a constituent element and has no interpretative aid as far as the elements of genocide are concerned.

Schabas, on the other hand, believes that reading the word ‘assist’ to mean only assistance without any binding nature is bold \(^{90}\). The only support offered for such claim is the fact that enormous efforts were mobilized by states in the codification of the EoC and hence it is a trivialization of the effort to consider it as not binding or as a mere guideline \(^{91}\). The alternative sources for his propositions that the word ‘assist’ means more than the literal meaning of the word is based solely on article 21, which will be the subject of the next section. \(^{92}\)

The difficulty with this alternative source is that article 21(3) also states that the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights \(^{93}\). The human rights of the perpetrator will be violated by attaching a binding nature to the contextual element of genocide which would render the definition of genocide imprecise, vague, and unascertainable by introducing a new constitutive element, thereby violating, inter alia, the principles of *nullum crimen sine lege* and *nulla poena sine lege* as stipulated in part III, articles 22 and 23 of the Rome Statute, respectively. It is noted here that the European Commission of Human Rights has made allowance in some circumstance for some changes to the constituent elements of crimes if that is not prejudicial to the accused \(^{94}\). But the addition of a contextual element to genocide is more than what is legally permitted because it changes the constituent elements of the crime so drastically, almost bordering on being a complete legislation, which was not the task of the ICC Preparatory Commission. Thus, it would be hard to accept that this was the intention of the drafters of the EoC. Kress argued: ‘There is no compelling


\(^{91}\) ibid.

\(^{92}\) ibid.


indication that the drafters of the last common Element intended to amend the well-entrenched definition of the crime of genocide.95

The ICC is the highest international criminal justice institution and so it must apply the highest standard of justice, due process, and fair trial for accused96. Therefore, definitions of crimes must be strictly applied and in the event of any doubt, the rights of the accused must prevail97. Thus, there is need for a more expansive human rights protection which in turn gives the EoC nothing more than jurisdictional value98. The genocide definition is copied from the 1948 Convention, as tried and tested by the ICTY/ICTR and there is no vagueness that can be removed by the EoC. There is no reason to believe that the judges of the ICC are not capable of, or face any obstacle in, working with the definition which is currently available99. Finally, article 9(3) sets out that the interpretation and amendment of the EoC shall be consistent with the provision of the Statute, which characterized the genocide definition by individualistic intent. If the contextual element of genocide is to be considered in such a way as a constitutive element, then article 9(3) is not respected since the definition of the crime of genocide, either in the Rome Statute or in the Convention, does not support the inclusion of such context.

Therefore, the lack of any demonstrable need for clarification of definition of genocide or a practical example of a case of political manipulation suggests that there is no need for either further explanation of why additional precision is needed or existence of some other reasons behind the need for these elements for the crime of genocide100.

5.3.2 The words ‘shall apply’ in article 21 of the Rome Statute

Article 21 of the Rome Statute sets out a hierarchy of the applicable laws from the use of the words ‘shall’,101 and ‘may’102 and the respective order of the sources. It

96 Rome Statute of the International Criminal Court, art 21(3).
97 ibid art 22(2).
98 ibid art 22(2).
99 Lee (n 4) 219 p. Iix.
100 Darryl Robinson and Herman von Hebel. ‘Reflections on the Elements of Crimes’ in Lee (n 4 224.
101 ibid.
102 ibid. Rome Statute of the International Criminal Court, art 21(1).
also appears from article 21(1)(a) that a further hierarchy is created by, first, applying the Statute, then the EoC, and finally the Rules of Procedure and Evidence. But this article is not an authority on how the law can be applied or the manner of its interpretation and application. For instance, by looking into article 21 the court cannot decide or ascertain how to apply the definition of genocide; it can only specify that in cases of genocide one must first apply the definition provided in the Statute. When the need arises, then the court can have recourse to the other applicable laws as stipulated by the article.

If the word ‘shall’ is taken literally and interpreted as attaching a binding force to the EoC as a constitutive element of the crime, then in cases of genocide, the contextual element must be proven beyond reasonable doubt, thereby transforming genocide by bringing in the context as the central element. This in turn not only contradicts the Rome Statute but, first, impermissibly extends the law and violates the *nullum crimen sine lege* principle in article 22(1) because such addition transforms genocide into a different crime from the one stated in the Rome Statute. It can also represent the extension of genocide by analogy to other context-dependent crime such as crimes against humanity.

Second, such reading impermissibly lowers the standard of proof and makes the task of the prosecutor easier. As a result, a perpetrator who would otherwise be charged with crimes against humanity or murder can be charged with genocide by simply fitting the conduct into the genocidal pattern required by the context, and coupled with knowledge of such context, the prosecution can claim genocidal intent because the perpetrator can be reasonably taken to have intended the consequences of his action. For instance, in the context of the Darfur atrocities, a Janjaweed who killed a member of the Massllett or Zaghawa tribes who had resisted handing over his camels, leaving the other members of the group unharmed, or some Hutu had killed a Tutsi because they were interested in the corrugated iron roof or the cattle, could be charged with genocide because their mental state can easily be provided by their

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102 *ibid* art 21(2).
103 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General. Pursuant to Security Council Resolution 1564 of 18 September 2004 para 517 the commission held that there were genocidal patterns but no policy.
knowledge and contribution in a genocidal campaign, because motives and other justifications lose their significance within the macro-phenomenon of genocide.\textsuperscript{104}

Regardless of the *nullum crimen sene lege* principle, by easing the imposition of genocidal intent, the court allows for conviction for the crime of genocide instead of the crime against humanity and thus the court imposes the heavier penalty for genocide. Even if the sentences are similar to those of crimes against humanity or war crimes, the crime of genocide carries a stigmatization aspect that is not found in the other crimes in our perception and this is in itself a heavier burden on the accused.\textsuperscript{105} Similar difficulties can also be imposed on the defence team, because it would be a difficult task to avoid knowledge of a genocidal campaign in any collective campaign targeting a group so any act can easily be taken as participation in destruction with knowledge of so doing.

The question here must be determined is balancing the arguments and logic of such proposition. For example, if article 21(1)(a) is taken as more than providing the sources of the law to the court, it would violate its own terms because by applying it literally the court would find itself in conflict with the EoC because the genocide definition does not correspond with the last common element of genocide. In addition, it also contradicts the previous jurisprudence of the ICTY and the ICTR on the matter of genocidal context.\textsuperscript{106} Accordingly, the accused is better off with the contextual element not being a constituent ingredient of the crime. Even application of all the sources provided in article 21 would not support the imposition of contextual elements in the crime of genocide; the Statute’s position is clear, but the common element of genocide as discussed above could not be reconciled with the Statute according to article 9(3) because it adds a substantive element to the crime. In such situation the ICC Pre-Trial Chamber in *Al Bashir* held that recourse to paragraphs (l)(b) and (l)(c) of article 21 of the Statute can only be permitted if two conditions are met: there is a lacuna in the written law provided in article 21(a) and that this lacuna cannot be remedied or filled by application of

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\textsuperscript{104}*Akayesu* (Trial Judgment) para 353.

\textsuperscript{105}Universal Declaration of Human Rights GA Res 217 A(III) UN Doc A/810, art 11(2).

\textsuperscript{106}For the ICTY, see *Jelisic* (Trial Judgment) (14 December 1999), para 400; ICTR, *Akayesu* (Trial Judgment) (2 September 1998) paras 520 and 523. For further details see Chapter 4, section 4.3.
articles 31 and 32 of the Vienna Convention on the Law of Treaties and article 21(3) of the Rome Statute which requires any interpretation to be consistent with internationally recognized human rights, and be without any adverse distinction\textsuperscript{107}. Even if the lacuna is assumed to exist in the case of the genocide definition by mere absence of express provision of context, the last common element of the EoC cannot be reconciled with the definition of genocide. As discussed in Chapter 4 above, the ad hoc tribunals generated the most extensive case law on genocide and expressly applied articles 31 and 32 of the Vienna Convention and the human rights law and expressly rejected any relevancy of contextual element as a formal ingredient of the crime, but the academic literatures insist that this position is not decisive.

The court in \textit{Al Bashir} did not use contextual elements of genocide to interpret genocide as defined in article 6 nor did it accept the application of article 9 as binding, but did accept that the Rome Statute definition is the same as the Genocide Convention’s and that as soon as specific intent to destroy existed and materialized in an isolated act of a single individual, the protection would be triggered\textsuperscript{108}. This understanding is correct because if the court refers to context as a constituent element, then that means complete disregard of article 9(3) because it cannot be made compatible with the Statute and article 21(3) because it represents a new addition to the definition of the Convention which is accepted by the court. The court actually referred to the contextual elements addition brought about by the EoC to elaborate on the definition of genocide, which was hardly conclusive determination on the status of the contextual element\textsuperscript{109}. Furthermore, the court went on, in a footnote in the judgment, to acknowledge the academic reference to the contextual elements as jurisdictional without definitely pronouncing on the matter.

Given the imprecision to investigate the position of contextual elements on the postulation that both of the Pre-Trial Chamber (hereinafter PTC) conditions are met, article 21(1)(b) does not support such position because principles of international law could not permit the incorporation of an element that is not expressly provided for in the ICC Statute in a criminal law context. In regard to article 21(1)(c) there are

\textsuperscript{107} ICC, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar al-Bashir (ICC-02/05-01/09) Pre-Trial Chamber 1 (4 March 2009) para 44.
\textsuperscript{108} ibid paras 120-121.
\textsuperscript{109} ibid para 121.
several rules and principles and definitions among states that might permit the addition of contextual elements to genocide, but the application of this part of the definition is very slim, because the article only allows for those national principles that are consistent with the statute and international laws and principles.

Finally, article 21(2) permits the court a discretionary recourse to precedent. Since the ICC has only indicted one person for genocide, there is very little in terms of precedents, but the ICC can revert to the precedents of other courts such as the ICTY/ICTR, but the position of genocidal context in the case law of the ad hoc tribunals is not clear-cut, to say the least. However, there is reason for caution for any newly developing principles stemming from the use of precedent. Triffterer argued that the use of this article actually contributes to building consistency and predictability in international criminal law and hence serves the principle of legality. Of course, the inclusion of contextual elements to genocide will adversely affect the accused’s human right to a fair trial contrary to article 21(3). From this consideration it would be very difficult to read a contextual element of genocide as a constitutive element.

Further contradiction (if article 21 is found to establish applicable rules) is the fact that article 9(2) allows and sets the rules for amendment of the EoC. Thus, such permission or possibility of amendment would not allow a conclusion that any future amendments to the EoC would not be completely new and original elements or incompatible with the Statute contrary to article 9(3), or would not conflict with the previously adjudicated cases in complete violation of the nullum crimen sine lege principle as provided for in article 22(1) of the Rome Statute. This is because states did not agree to create or add a new element to the crime of genocide by adding the common elements to article 6. Therefore, there is very little logic in contemplating article 21 in the light of more than source illustrating article.

In the event of recourse to the EoC, the inconsistency created by the application of the terms ‘shall apply’ with article 9’s ‘shall assist’ could, according to Triffterer, be reconciled by reading both articles together, as the court shall apply the EoC insofar

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110 Triffterer (n 7) 711.
as it can be of any assistance in interpretation and application\textsuperscript{111}. Von Hebel argued that article 21 only enumerates the sources of the law that the court shall apply but does not make a determination of the legal status of those sources\textsuperscript{112}. McKay also argued along similar lines that article 21 only enumerates the various sources of law available to the ICC without determination of their status\textsuperscript{113}. Therefore, even faithful application of article 21 cannot produce convincing arguments of acceptance of the EoC as binding in cases involving the crime of genocide.

Hence the only way that the last common element of the EoC of genocide can be reconciled with the definition of genocide is to consider this element as a jurisdictional element, and thus the court can comply with article 21 and apply it as such to filter small-scale and lone perpetrator crimes from accessing the ICC.

\textbf{5.4 The case for new assessment under the new ‘Rome regime’}

This part concentrates on the formulation of a response to the contextual element of genocide and what purposes it can possibly serve in the light of the substantive definition of genocide. The first part (section 5.4.1) will demonstrate that the contextual element can only be jurisdictional elements imposed by the ICC to limit the cases arriving before it, because of the new wide jurisdiction given to this court in comparison to ad hoc tribunals. The second part (section 5.4.2) will discuss an ancillary element that is avoiding trivialization of the court, and to some extent the crime, by limiting it to grave serious crimes, an objective that can only be achieved by adding a contextual element to the crime of genocide. The chapter will conclude that the only practical effect that can be attached to the contextual element of genocide is jurisdictional, to limit access to those small-scale genocides, avoid trivialization of the court, and distinguish genocide from other international crimes.

\textsuperscript{111} ibid 705.
5.4.1 The jurisdiction aspect of contextual elements

The international community’s objective for a permanent criminal court with international jurisdiction was realized on 1 July 2002, with a clearly defined jurisdictional framework on specific crimes. The key characteristic of this jurisdiction is its complementarity, which requires states to exercise their own domestic jurisdiction on crime, however large or small the crime might be. Upon any state’s failure to do so, the Rome Statute has set specific elements in the Statute, the EoC and the Rules of Procedure and Evidence that need to be fulfilled before it can exercise its jurisdiction; these conditions are based on the gravity and seriousness of the crime.\(^\text{114}\)

To justify attachment of jurisdictional effect to the contextual element of genocide, one must trace the evolution of the international community’s means and methods of extending jurisdiction to the selected crimes. The need to limit the international criminal jurisdiction is apparent from the allied effort to address the Nazi crime.\(^\text{115}\) Despite the widespread nature of the attacks and their organization or scale, the allied powers could not surpass the sovereignty of Germany but the war link permitted them to impose jurisdiction over those crimes to combat impunity. Hence, the international community limited jurisdiction to those crimes that took place in association with a belligerent war.

Subsequently, through the judicial creativity the nexus to war was removed, first by Control Council No 10, article 2(c) and subsequently by the ICTY in the \textit{Tadić} Judgment.\(^\text{116}\) In the case of the ad hoc tribunals, the international community witnessed first-hand the scale of the atrocities committed in specific places for specific periods and to eradicate impunity for those atrocities, the solution was limited by the circumstance of those specific incidents. Thus, finally the choice fell on limitation of the courts’ jurisdiction by the use of the manner of occurrence of

\(^{114}\) Rome Statute, preamble and art 17(1)(d) EoC Last common element of genocide article 6; art 53(1) of the Rules of Procedure and Evidence.


\(^{116}\) \textit{Tadić} (Trial Judgment) para 627.
those crimes that is the widespread or systematic way of their occurrence. This choice was clarified without the need for war, in this case expanding the limits.

Therefore, there was *ratione temporis*, and *ratione loci* limitation set for those tribunals – without the need for jurisdictional limitation. There was no need for jurisdictional limitation in these cases because limits are already imposed by the constitutive statute to a specific territory and time. This limitation appeared in the wording of the statute itself; in the case of the ICTY, the jurisdiction is limited to serious crime committed in the Former Yugoslavia since 1991, and the in case of the ICTR Rwanda and neighbouring states from 1 January 1994 to 31 December 1994.

However, the ICC now represents a permanent institution with a very wide jurisdiction over most serious crimes of international concern open to referral by state members, non-members and by the Security Council (UNSC). Hence, due to this change in circumstances the international community agreement has moved towards limiting the international criminal jurisdiction by several means: first, through the application of the principle of complementarity and thus giving the ICC jurisdiction a supplementary role, and second, when the state concern is found to be unable or unwilling, the crime must take place in certain context, inter alia certain magnitude, plan, widespread or systematic violence, and war to permit international judicial intervention. Therefore, the jurisdiction of the ICC is limited to such extent because it is the only practical way in which it can discharge its duties of combating impunity. This can be traced back to the preamble of the Statute.

It can be concluded here that the crime of genocide in the ICC Statute remains the same in term of its material elements which permit holding a lone génocidaire responsible for genocide. Therefore, for simple practical reasons, such possibility is undesirable in this new structure of permanent court; for instance, in cases of lone

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117 *United States v Josef Alstooetter*, reprinted in III Trial of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (Washington 1951) 954, 982.
120 Rome Statute of International Criminal Court the Preamble the tenth operative paragraph and art 1.
121 Crimes against humanity and war crimes contain a contextual element as a formal element and genocide is also given a similar element through the EoC, more specifically the last common element.
122 Rome Statute Preamble operative paragraphs four and five.
génocidaire the complementarity principle is sufficiently tied to exclude the Court’s intervention in those cases where there are reasons to believe that the domestic courts are able to prosecuting lone génocidaires. Hence the contextual element was drafted through the only possible instrument that is EoC to limit the jurisdiction as desired.\textsuperscript{123}

At the beginning, efforts were made by some states to control the triggering mechanism of the ICC’s jurisdiction through the involvement of the United Nations Security Council (SC), but there was opposition.\textsuperscript{124} Schabas pointed out that had the SC still controlled the triggering mechanism for the jurisdiction of the court as proposed by the ILC in 1994, the US would be at the forefront of launching the ICC\textsuperscript{125}, but instead found itself in a position where halting the process of creation of the court is neither desirable nor possible. However, the US did not retreat, but opted for finding a way to control the ICC and its jurisdiction and to address its fears, by controlling the triggering mechanism as the best last resort available, because the creation of the ICC reached a point of no return.\textsuperscript{126} The US concentrated its efforts into setting a high threshold for the exercise of the ICC’s jurisdiction for crimes against humanity and war crimes.\textsuperscript{127} Scheffer recalled the US delegation’s effort at the Rome Statute drafting stage that it ‘waged a lonely struggle to incorporate elements of crimes into the treaty.’\textsuperscript{128}

When the EoC was proposed as part of the annex to the Statute, no precise reasons or clarifications were given.\textsuperscript{129} Nonetheless, the argument shifted during the Rome Conference and in the subsequent debates, the discussion on the constitutive nature of the contextual elements disappeared, as if the question of the need for the contextual element had been settled. Robinson and Von Hebel observed that the majority acceded to the minority in the case of elaboration of the EoC and the need

\textsuperscript{123} David L Nersessian, ‘Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity’ (2007) 43 Stan J Intl L 221, 251; Oosterveld (n 4) 47.
\textsuperscript{127} Scheffer (n 124) 16-17.
\textsuperscript{128} ibid 17.
\textsuperscript{129} Triffterer (n 33) 407.
for it, and it was finally agreed that its elaboration would be delayed until after the Rome Conference and that it would have no binding effect. However, there was some contention that limiting the court’s jurisdiction was among the implicit objective. Ambassador David Scheffer, who led the US delegation in Rome, commented that the USA succeeded in their attempt to limit the court’s jurisdiction even if not as contemplated in their initial demand. They succeeded in cementing a solid complementarity regime that guaranteed the supremacy of the national jurisdiction, and preserved the position of the UN SC in control of the court. Nersessian commented that the EoC could not possibly have any other meaning than limiting the access to court to larger-scale crimes and excluded the lone génocidaire trials at such level. Nersessian went as far as accepting the jurisdictional aspect of the EoC when he contended: ‘In order to limit the treaty’s application, genocide in the ICC is subject to a special restriction – EoC-. This self-limiting constraint applies only in the ICC and is not binding beyond that forum.’ Or in other words, he emphasized the functional aspects of the contextual elements of genocide in the ICC’s context.

Limitation of the court by raising the threshold of the crimes falling within the court’s jurisdiction appeared as the alternative methods. Therefore the ICC mechanism could trigger an action only when there were large-scale events as opposed to isolated crimes that could effectively be dealt with by the local courts. Thus, the requirements of contextual elements were successfully conscripted to further isolate the crimes of internal riot and sporadic civil violence and lone génocidaire or acts of similar nature. The importance of such distinguishing elements is significant in the context of the ICC because the initial examination of the admissibility of any case that comes before the court requires examination of the context of the alleged crime. The Pre-Trial Chamber (PTC) in the Al Bashir case held:

130 Robinson and von Hebel (n 4) 219.
131 Brown (n 126) 862, fn 28.
132 ibid
133 Nersessian (n 123) 251 (emphasis added).
134 ibid (emphasis added).
135 Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (‘Al Bashir’) (ICC-02/05-01/09) Pre-Trial Chamber I (4 March 2009 para 124.
136 Robinson and von Hebel (n 4) 228.
… the Chamber will first analyse whether there are reasonable grounds to believe that the contextual elements of the crimes alleged by the Prosecution in the Prosecution Application are present, and only if the answer is in the affirmative, will the Chamber turn its attention to the question as to whether there are reasonable grounds to believe that the specific elements of any such crime have been met.\footnote{Al Bashir, para 53.}

In the case of genocide, raising the bar by addition of the contextual elements will indeed keep the court arm limited to only large-scale exterminations. It became obvious that the only way to avoid lone génocidaires was to raise the bar to filter those cases.\footnote{William K Lietzau, \textit{Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court} (1999) 32 Cornell Intl LJ 477, 486-7.} This is so because precluding isolated crimes requires raising the bar to counter the definition allowance of lone génocidaire. Schabas suggested that the contextual elements of genocide might well have been resulted from the decision of the ICTY in Jelisić, and therefore contextual element became desirable to prevent a similar occurrence at an international level\footnote{William A Schabas, ‘Follow Up to Rome: Preparing for Entry into Force of the International Criminal Court Statute’ (1999) 20 Human Rights Law Journal 157 163-64.}.

The PTC in the case of genocide first listed the prosecution’s allegation of genocide and started its examination with heading such as ‘the contextual elements of the crime of genocide’. The support for such reasoning can also be found in the pre-trial reasoning, where the court held that according to the contextual elements of the crime of genocide, the crime is complete only when the conduct presented a concrete threat to the protected group\footnote{Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir Omar Hassan Ahmad Al Bashir (‘Al Bashir’) (n 135) para 124.}. From the outset the choice of the word ‘concrete’ seems to require more than just widespread and similar crimes to occur to view the event through the lens of the genocide definition.

This interpretation adds the contextual element of genocide as a triggering element by which the protection offered by the penal norm defining genocide is extended to the victims on an international level only when there is manifested patterns of similar acts ‘directed against that group’ rather than being general or hypothetical danger posed by one person. The divisive word is ‘triggering’, and the Court stated:

\begin{quote}
In the view of the Majority, according to this contextual element, the crime of genocide is only ... triggered when the threat against the
\end{quote}
existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.\textsuperscript{141}

Taking the contextual element of genocide in any other way simply puts it at odds with article II of the Genocide Convention on which article 6 of the Rome Statute is based by the Court’s own admission\textsuperscript{142}. The Court justified its reasoning by maintaining that the requirement of a concrete threat for the completion of the crime of genocide does not offend article 10, the object and purpose of article 9(1), and article 22\textsuperscript{143}.

It is also submitted that such reading removes the impermissible extension that can be added by considering contextual element as constitutive elements contrary to article 22 and the most basic principle of criminal law, or be a guideline to be applied by some judges when they see fit and ignored by others, thereby eroding the principles of article 22\textsuperscript{144}. This reasoning also conforms with the wording of article 21(1)(a), since the plain meaning of the article employed the words ‘shall apply’ – because if the contextual element is a triggering mechanism for protection against genocide, then the court shall apply it in every case brought before it to conform to the Statute requisite to filter the isolated crimes and it furthermore conforms with the wording of article 9 ‘shall assist’. Hence there is no persistent need to reconcile ‘shall apply’ and ‘shall assist’.

Hence, the functions of genocidal context became the isolation of hate crimes from the concept of genocide and thus reassure states that the concept of genocide will not be stretched to cover isolated crimes, thereby limiting the court jurisdiction to crimes with some sort of pattern or significant threat to the group where impunity is likely to occur\textsuperscript{145}. However, such acceptance does not preclude the possibility of lone génocidaire but limits trial of the lone génocidaire to the domestic courts. Furthermore, the inclusion of the EoC assures states that the court shall not except in cases of most serious crimes, in the international sphere be interfering with their

\textsuperscript{141} ibid.
\textsuperscript{142} Ibid, para121
\textsuperscript{143} Ibid, para117-130
\textsuperscript{144} Ibid para 131.
\textsuperscript{145} Robinson and von Hebel (n 4) 228.
sovereignty.\textsuperscript{146}

At this juncture, logic also suggests that the court is the international court with limited resources; there are national courts which always address small, isolated crimes. Following the Rwandan genocide it became impractical for the ICTR or even the domestic courts to try more than the leader – the big fish – because the Rwandan people were housing around 135,000 suspects in the aftermath of the genocide.\textsuperscript{147} The Rwandan Government finally resorted to Gacaca courts to cover the shortcoming of the ICTR and reduce the number of genocide suspects.\textsuperscript{148} This example clearly demonstrates that international justice becomes incompetent in the face of large-scale violence. In addition, the international community always faces financial difficulties in sustaining international prosecution of perpetrator of crimes such as genocide and therefore opted for model change. For instance, the Special Court for Sierra Leone tribunal was jointly created by the United Nations and the Sierra Leone Government with a limited budget and jurisdiction.\textsuperscript{149}

The inclusion of contextual elements as a precondition for the application of international protection of groups does not go against the law as provided for in the Statute definition of genocide, or the international customary law, because the addition of context as jurisdictional limitation does not purport to change the constituent elements of the crime of genocide or the moral wrong attached to committing one of the enumerated acts with intent to destroy in whole or in part.\textsuperscript{150}

Kress argued that the inclusion of the contextual element for the crime of genocide demonstrates ‘the need to pass a high threshold to reach the realm of the international community’s \textit{jus puniendi}‘\textsuperscript{151} and therefore, the court’s interpretation of concrete threat does not offend the definition and that is because they are talking about

\begin{footnotesize}
\bibitem{146} ibid 230.
\bibitem{151} Kress (n 95) 302.
\end{footnotesize}
jurisdiction, not the crime in question as taken by some commentators. Vest also made similar support for the need for jurisdiction limit by favouring the ‘minor players’ to be dealt with in the domestic courts and the ICC to be reserved for the organizational perpetrations or a large-scale perpetration that disables the domestic courts even if committed by a lone génocidaire. Later in the same article Vest argued: ‘There has not yet been an in-depth investigation into the nature of that element, but it seems to constitute not a material element of crime but a prerequisite for the jurisdiction of the ICC.’

It can therefore be concluded that the contextual element of genocide can only have jurisdictional value. The need for it now was made urgent by the creation of this institution which could try genocide cases at an international level, as opposed to the previous arrangement of domestic punishment which required no such limitation. Hence, the change of circumstance in punishment of the crime of genocide necessitated the inclusion of a jurisdictional element to avoid changing the definition of genocide to isolate the cases of lone génocidaires.

**5.4.2 Trivialization of the court: raising of the threshold**

The primary objective of international criminal justice is to combat impunity by interfering only in cases where there are abhorrent, grave, and large-scale crimes which are going unpunished, as called for by the UNSC on several occasions. There is nowhere that the concern for impunity is clearer than in the preamble of the Rome Statute where the object and purpose underlies the statute. The Statute affirms that the most serious crime of concern to the international community must not go unpunished and measures for their effective prosecution must be taken. The preamble went on to state that ending the impunity contributed to the prevention of such crime.

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153 ibid 790, footnote 29.
156 ibid.
157 ibid.
Therefore, crimes within the jurisdiction of the court are selected because they affect the international community and go unpunished by virtue of their magnitude or difficulties to be addressed. It is an error to think that circumstances such as systematic attack, war, and policy is what elevates an otherwise ordinary crime to the level of international crime because these elements allow the international community to interfere and to impose international infliction of punishment for a crime that can be addressed in the domestic legal system\textsuperscript{158}.

The impunity is likely to occur, in the case of large-scale crimes, where the state judicial system becomes dysfunctional and unsuitable to address large-scale crimes. Therefore, the international adjudication must be triggered only in such cases. The plausible reason behind the inclusion of contextual elements in the crimes against humanity and war crimes – in addition to the characterization of the very nature of the crime – is that because under these circumstances, impunity is likely to result and thus it becomes paramount to eradicating such possibility. Therefore, the international community may choose those contextual elements as identifying factors of the instance where the international criminal jurisdiction is required. On the contrary, genocide as defined in the Convention and the Rome Statute lacks such distinguishing element – the contextual element- but a grave crime by its nature.

There are no internationally protected values that can be infringed by the crime taking place in a certain context or that an act taking place in a certain context is more heinous. For example, war crimes were crimes in domestic systems for a long time, but following WW1, the international community found that impunity is persisting in large-scale war, and hence had to be addressed, and not for any other intrinsic reasons that changed the crime nature from ordinary killing into an international crime that requires international treatment\textsuperscript{159}. In other words, the contextual element in respect of crimes against humanity and war crimes defines the very nature of the crime but the same elements were used to impose international jurisdiction over these crimes.

\textsuperscript{158} Gideon Boas and others, \textit{International Criminal Law Practitioner Library} vol II (CUP 2007) 16.
\textsuperscript{159} Art 228 of the Peace Treaty of Versailles recognized the right of the allied to bring to justice those Germans.
In the case of crimes against humanity, for instance, the Nuremberg trials revealed nothing out of the ordinary or novel in the nature of the widespread and systematic crime. Therefore, the crime was not new and novel, and did not require the allies to deal with it for any particular reason other than the fact that it was committed on a large scale and that there was the possibility of impunity which needed to be eradicated. So the allies asked themselves, how we can come to terms with the odious scourge of the Nazi against the citizens of Germany, which is more than likely to go unpunished if left to the German state? In the light of the ICC establishment, the situation changed for both war crimes and crimes against humanity by the introduction of extra qualifying elements to form lege lata constitutive contextual requirements, that is, the requirement of ‘state plan and organisation policy’ for crimes against humanity in article 7(2) (a) and the need for ‘plan and policy’ or ‘large scale commission’ in article 8(1) in war crimes. These requirements find strong affirmations in the jurisprudence of the ICC in all cases in determination of the ratione materiae\textsuperscript{160}.

In the case of genocide there was no need for contextual element, because it was initially conceived after the Nuremberg trial of the Nazis and structured for national application. The need did not even subsequently arise when the international courts and tribunal were established because they were designed to address post-conflict issues and hence the priority was to address impunity where the judicial institutions of the states failed. Thus, the international involvement becomes necessary and there was no need to find a justification for encroachment into the sovereignty of states involved\textsuperscript{161}. If the impunity can be eradicated, then there is no need for international justice to get involved in crime committed by state or individuals.

However, the position of genocide changed when the project to construct an international criminal court started, where the inclusion of any other crime that does not reach certain threshold entails a risk of trivializing the intended role of the court

\textsuperscript{160} Prosecutor v Francis Kirimi Muthaura Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Decision) ICC-01/09-02/11 (23 January 2012), Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute, Pre-Trial Chamber II, para 36.

and increase the possibility of political manipulation. There was general agreement very early in 1996 that the court’s jurisdiction must be limited to the most serious crimes of international concern, to avoid trivializing the role and function of the court and interfere in the domestic courts’ jurisdiction.

Therefore, in the case of genocide, the inclusion in the same definition verbatim in the Rome Statute without any modification will bring that inseparable possibility permitted by the literal reading of the genocide definition – lone génocidaire – and such possibility was not desired by many states, even though it is very slim, because there is a blanket assumption that allowance of a lone génocidaire within the definition of genocide trivializes the court as a result. It is notable that the Rome Statute stated in article 5 that the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole, but with this limitation in hand the choice remains with the persecution’s subjective judgement of what constitutes a serious crime.

This led to discussions on finding a possible solution; hence, the ‘contextual element’ was introduced as a mechanism to primarily exclude such possibility. The first attempt was by introducing within the definition the concept of plan, widespread and systematic, into the crime of genocide and to equate genocide with the other international crimes. However, these possibilities were rejected beforehand but a compromise was reached to restrict the court’s jurisdiction to lone génocidaire only when ‘the conduct could itself affect such destruction’ and thus avoid trivialization of this new institution – the ICC.

At the Rome Conference there was general agreement that the genocide definition does not refer to any contextual element, but delegates were divided into two camps. One group argued for inclusion to reflect the natural aspect of the crime of genocide such as scale, plan, and genocidal campaign, thus preserving the crime of genocide from being trivialized. The other group rejected such inclusion of contextual

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162 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court General Assembly Official Records, Fiftieth Session Supplement No 22 (A/50/22), 6 September 1995, para 81. The committee removed some crimes such as terrorism to avoid trivialization of the court.

163 Preparatory Committee on the Establishment of an International Criminal Court (n 10) para 1.

164 Oosterveld (n 4) 45.

165 See section 5.2.3 above.

elements as unnecessary but agreed that the possibility of lone individual forming genocidal intent is real. So the inclusion came as a result of two different foundational views but united by the need to exclude lone génocidaire from the ambit of the court’s jurisdiction$^{167}$. However, the court’s accepted that the genocide definition remains unchanged$^{168}$ but the EoC added another element that is not to be reflected or acknowledged as an intrinsic but jurisdictional elements.

Those who advocate the need for contextual element for the crime of genocide as a jurisdictional element do not reject the theory or possibility of a lone génocidaire. However, they do not want the possibility of single individual crime to fall under the jurisdiction of the international court because by its very nature and scale it should not be a situation that requires international intervention because it can quite capably be handled by the domestic court. Therefore, those commentators view the contextual element of genocide as a mechanism to avoid trivialization of the court. Logically, there is no wider support for this claim other than the fact of the contextual element of genocide providing for lone génocidaire when ‘the act could itself effect such destruction’. It was also observed that the preparation of the EoC took into account the current law, especially that of the ad hoc tribunals, which means that delegates were aware of the lone génocidaire conundrum.$^{169}$

However, considering it as a jurisdictional element creates two levels of enforcement regime: national and international. Therefore, it is evident that the ICC was structured towards addressing most serious crimes of international concern – the big fish – but left the genocide definition intact and capable of the prevention and punishment of genocide, however small it might be. Kress observed that this is what the Pre-Trial Chamber in Al Bashir cautioned about in terms of trivialization of the court by imposition of a threshold to limit access to international criminal law protection$^{170}$.

Second, what makes a crime of a serious nature and of concern to international law seems to be indistinctive from the inclusion in the Rome Statute, if not for the

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$^{167}$ Oosterveld (n 4) 45.
$^{168}$ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (‘Al Bashir’) (n 135) para 121.
$^{169}$ Lee (n 4) Ivi.
$^{170}$ Kress (n 95) 302.
addition of the contextual element. This means that the contextual elements only raise the crime of genocide to the international level, which is characterized by gravity and fighting impunity. If not for the context, the prosecutor has to go after single perpetrators that render the court impractical, because the ICC is only concerned with crimes of concern to the international community. Such outcome will not be desired because it renders the principle of complementarity a redundant principle and it burdens the ICC with any case that took place in the context of manifested pattern or any case that was large in scale.

The ICC is designed to address these crimes by virtue of their scale, not the moral wrong, because genocide remains an abhorrent crime whether small or large in scale. In addition, the international protection mechanism is only triggered in case of the latter, if the state concerned is unable or unwilling to take action. This is in no way an addition of a new element to the crime but a description of when access to the courts can be granted, and access is limited only to large-scale atrocities to avoid trivialization of such protective mechanism.

The attempt to avoid trivialization of the court is embedded in all the court documents from the Rome Statute itself by declaring as its object and purpose the eradication of impunity from the most serious violation of concern to the international community, to the Rules of Procedure and Evidence, and the EoC. The prosecutor will not be interested since the ICC rules state that the prosecutor can investigate a situation of serious gravity and not individual impunity cases where the national court could have taken the necessary judicial measure.

For instance, the ICTY and the ICTR at the beginning tried all low-level perpetrators, but the UN after a decade of operation, in Resolution 1534, urged the tribunal to concentrate on the high-level perpetrators who are mostly responsible for the crimes to avoid an ongoing judicial process and bring to closure the process because the

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171 Rome Statute of the International Criminal Court, arts 5 and 17.  
172 Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 preamble arts 17(1)(d) and 53(1)(c).  
174 Elements of Crimes, art 6, the last common element or the contextual elements of art 6.  
national systems have somewhat established themselves following the atrocities in Rwanda and Former Yugoslavia\textsuperscript{176}. This shows that the international community is moving towards limiting the international justice system to leader and scale crimes, a purpose which is served not only by the inclusion of the contextual elements in the crime of genocide but also by strong emphasis of such objective in the preamble and the inclusion of articles 5 and 17(1)(d) in the Rome Statute\textsuperscript{177}.

There is no disagreement as to the international community’s effort to establish the international court to concentrate on those heinous and grave crimes affecting the international community as a whole\textsuperscript{178}. The effort to raise the threshold is made clear by the ILC setting the criteria of heinous crime to include magnitude, horror, and motive\textsuperscript{179}. The rationale for the raising the threshold appears to be to promote and enhance the credibility and moral authority of the Court as well as isolating the danger of having a court with jurisdiction over small-scale crimes that are suited to the national courts to be effectively and economically dealt with\textsuperscript{180}.

At the drafting stage such attempts appear to address the fears not only of trivialization of the court but also the increase in the chance of Statute ratification. Politi argues that the inclusion of the EoC was intended as a unifying element to bring on board reluctant states to ratify the Rome Statute\textsuperscript{181}. Resolution 53/105 on establishment of the ICC, of 8 December 1999, requested the Preparatory Commission to enhance the effectiveness and acceptance of the ICC\textsuperscript{182}.

The jurisdictional limitation then acts as a filtration process to keep out the possibility of the lone génocidaire. It is true that some states had genuinely feared the possibility of a single individual being considered capable of genocide, and hence fall within the Court’s jurisdiction. The only approach to address these fears at the

\textsuperscript{177} Situation in the Democratic Republic of Congo Decision on the Prosecutor's Application for Warrants of Arrest, Article 58 ICC-01/04-01/07, para 64.
\textsuperscript{178} ILCYB 1984, vol 2, part 2 paras 46-48 and 69.
\textsuperscript{181} Politi (n 45) 443-473, 445.
\textsuperscript{182} Resolution 53/105 on establishment of the ICC, of 8 Dec 1999, operative para 4; Kirsch (n 53) xlvii.
Rome Conference was to limit the Court’s jurisdiction to large-scale crimes without change to the definition; but there was overwhelming agreement that change to the definition of the crime was neither possible nor desirable. Nersessian rightly observed that no ‘such treaty-based provisions such as EoC can ever alter the substance of jus cogens norms like genocide’\textsuperscript{183}. Bassiouni also indicated that the failure of the international community to change the genocide definition from the 1948 Convention is clear evidence that the definition of genocide included the possibility of lone génocidaire\textsuperscript{184}. The majority’s choice to keep the genocide definition as it is should lend support to the argument that the EoC should not stray far from the original elements of the crime of genocide and that the contextual elements in the case of genocide have no application or relevance as far as the constituent elements of the crime are concerned\textsuperscript{185}. But this is not a rejection of their jurisdictional or evidential relevance. Hence, the contextual element of genocide can be reconciled with the definition by recognition of its functional use as jurisdictional element and guarantor of the non-abuse of the court, since it is very far-fetched to assume any intent to modify the definition following the agreement to acknowledge its authoritativeness as provided for in the Genocide Convention.

It was finally agreed to annex a document addressing those concerns\textsuperscript{186}, but this does not in any way mean that they have signed up for a contextual element that can later be considered a constituent part of the crime. Judge Kaul observed in his dissenting opinion that without a high threshold for the court’s jurisdiction and stringent application of such jurisdiction limitation the Court would encroach into state sovereignty by interfering in the jurisdiction of the domestic courts and indefinitely broaden the jurisdiction of the ICC and risk trivializing the court – the court that is dependent entirely upon state cooperation – and on a practical level the court has neither the resources nor the time to deal with such expansion of jurisdiction\textsuperscript{187}.

\textsuperscript{183} Nersessian (n 123) 221, 251 (emphasis added).
\textsuperscript{185} Oosterveld (n 4) 42.
\textsuperscript{187} Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya Pre-Trial Chamber II ICC-01/09 (31 March 2010) para 10, Dissenting opinion of Judge Hans-Peter Kaul.
5.5 Concluding remarks

The contextual element of genocide cannot be regarded as a constituent element of the crime by any means of interpretation. The attempts of few to read the contextual elements as a constituent element with reference to history, nature, reality, and purpose is inconsistent as far as the legal definition stipulated in all international instruments is concerned.

The crimes that are not of sufficient gravity can be left to national courts, but grave crimes which were admissible to the Court’s jurisdiction under article 17 of Rome Statute and which fulfil the other requirement can be dealt with by the ICC. So the EoC is attached to introduce this demarcation, that small-scale or single individual crimes of genocide are suited to the national court to avoid wasting time and resources of the international community. The contextual elements can be said to have provided a welcomed clarification on the fact that genocide need no patterns or scale and that allowing for the lone génocidaire possibility does not trivialize the crimes in any way because they can be dealt with in national courts.

The Genocide Convention has been silent on the issue of contextual elements since its inception and frozen for almost 50 years without any examination of its meaning and elements, and when the ad hoc tribunal began its deliberations, all the dormant issues surfaced. For example, the case of Jelisić clarified the definition’s allowance for the so-called lone génocidaire as opposed to the popular understanding of genocide in the common parlance. Coincidently, the decision was pronounced by the Court just before finalization of the Rome Statute’s Elements of Crimes by the Preparatory Commission in June 2000. Therefore, possibility of lone génocidaire coupled with the detachment of the Court from the UNSC made some states distrustful of the Court future jurisdictional latitude, and this might explain the formulation of the last common element of the crime of genocide in the EOC.

Particularly in the case of genocide, a simple accusation of such crime carries a great deal of stigmatization, and hence the urgency to place a cap on the Court’s

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188 Jelisic (Trial Judgment)’ para 100.
jurisdiction over only large-scale and grave crimes becomes inevitable. This solution was found to be suitable, bearing in mind the customary law status of the genocide definition and the absence of any alternative option to address these misapprehensions by adding or removing the legal elements of the crime of genocide. Perhaps, in addition, states realized that the jurisdiction of the ICC, unlike the ad hoc tribunals, is not confined to a specific territory or period, so it is in the interests of justice and practicality to limit the Court’s reach. Hence, it is true that the EoC was adopted as a result of minority insistence on adding clarification and the majority acceding to the minority for the sake of efficiency, but it does not reflect any will to add or change the constituent elements of the crimes.

190 Robinson and von Hebel (n 4) 219.
CHAPTER 6: A CRITIQUE OF THE CONTEXTUAL ELEMENTS

6.1 Introduction

This chapter will critique the contextual elements of genocide in the light of the arguments that there is nothing in the Genocide Convention and international customary law that requires the contextual elements for the crime of genocide. Despite the clarity in the 1948 Convention’s definition on this question, the critique will focus the discussion on the general reasons for and against the inclusion of the contextual elements to answer whether contextual elements are required for the crime of genocide. Section 6.5 will present a case for reconciliation of the contextual elements with the definition of genocide, without the need to refer to such context as a constitutive element.

6.2 Clarity or confusion: do we really need context for genocide?

6.2.1 The doctrinal debate

Examination of the concept of genocide from its origin as an academic concept through to the case law of the ad hoc tribunals and the International Criminal Court (ICC) fail to clarify the extent to which the concept of genocide requires contextual elements or whether any uniform consistent use of the contextual elements can be deduced.

Arising from this doctrinal debate, two prominent schools of thought have emerged. The first school claims that the inclusion of the contextual elements cannot possibly be based on the literal definition of the crime of genocide because all that is required for this crime is the ‘intent to destroy in whole or in part’ a particular group, without any reference to genocidal campaigns, patterns, or any large-scale destruction. These arguments are supported by the need for a strict adherence to the principles of legality – nullum crimen sine lege – and the rights of the accused, such as their

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human rights and the right to have the law restrictively interpreted in their favour in cases of ambiguity because harm to the defendant stems from basing culpability on a simple association or participation in a large-scale killing\(^2\). This school, therefore, rejects the inclusion of the contextual elements explicitly or implicitly, because it would constitute an illegitimate extension of the law, and this poses another question of how could such an extension of the elements of crime be covered by the mental element of the crime? This position is faithful to the genocide definition as per the conventional definition, excluding any reference to those contextual elements within the constituent elements, in order to avoid the banalization of the crime of genocide by its equation with the social concept of genocide where all large-scale or systematic killing is considered genocide or limitation of the perpetrators of the crime to only states and leaders.

On the other hand, there is a second group\(^3\) who foster the view that genocide is a systematic crime and it cannot therefore be detached from the existence of a collective campaign, plan, or policy, as a legal ingredient. This debate has revolved around the fact that if it were not for the involvement of a state or a state-like entity, why should the crime of a single perpetrator enter the international realm, and how, in the absence of any written confession, could we investigate or establish the genocidal intent of a single person without any consideration of the context in which the crime took place (such as planning, magnitude, and pattern)? According to this view, one must first establish the existence of genocide by reference to the conduct, the results, and the attendant circumstances and then place individual perpetrators within this overall plan or policy, ignoring the relevance of the overall context for the innocence or guilt of the accused before the court.

A third middle-ground position has also emerged where contextual elements are considered and are legal ingredients only in respect of some genocidal acts (eg

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2 ICC Statute, art 22.2.
imposing measures or transferring children) since the context is an intrinsic element that is enshrined in the act itself.

The first group approach the question of the context of genocide more from the literal standpoint of the crime and they place an emphasis on the need for proof of the specific intent of the crime. Therefore, they require the ‘intent to destroy in whole or in part’ which was interpreted by the ad hoc tribunals as a specific intent to achieve an aim or objective without any examination of the possibility of its occurrence or completion, or the capability of the accused to achieve such an aim. For instance, Mettraux observed that international customary law characterized genocide in terms of the need for a ‘surplus of intent’ and according to the literal reading of the definition, it does not offer any possibility even of reducing this intent in cases of derivative liability. This interpretation imposes the consideration that genocide can be committed by a single individual increasing the gap between the Convention’s concept of genocide and its historical roots or the social scientists’ concept. In a recent reaction to the Rome Statute definition, Arnold contended that the inclusion of a verbatim definition meant that genocide does not require the intention of the perpetrator to materialize or to be manifested in any objective manner; hence the crime of genocide is an inchoate crime.

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6 ibid; Akayesu (Trial Judgment) paras 498 518; Sikirica (Defence Motion to Acquit Judgment) para 89; Musema (Trial Judgment) paras 164 166; Jelisic (Trial Judgment) para 66; Kayeshema (Trial Judgment) para 9; Krstic (Trial Judgment) para 549.


The starting premise here lies in the literal interpretation of the Chapeau Element of genocide. There is doctrinal support for such an interpretation well before any judicial interpretation of the definition of genocide. Robinson concurred in this by contending that the intent must be capable of being proven by the prosecution regardless of the result achieved. This argument cannot be dismissed; if the perpetrator does not have the intent, then killing more people in qualitative or quantitative terms, or however meticulously planned, does not change the state of mind of the perpetrator. What is required for the crime of genocide to exist is not objectively identifiable conduct but a mental state of an individual which is not susceptible to proof by anything that is not directly related to the conscious acts and omissions of the accused. Behrens rightly noted that even evidence can only lead to approximation of the true of intent at the time of the commission of the crime.

On the other hand, acceptance of lone génocidaire also leads to further consideration of the scale of the crime before it can qualify as genocide. There are a plethora of commentaries that support the interpretation that the requirement of intentionality in the definition of genocide means that a single killing by a lone individual satisfies the material requirements of the crime. Triffterer contended that for the crime of genocide to take place all that is required is the individual perpetrator’s intention to achieve that result – the destruction of the group as such, at least in part. He argued: ‘For the completion of the crime of genocide … it does not matter whether he was in this regard successful or not or perhaps will never be.’

Contrary to the individual génocidaire and the scale of the destruction, such analysis leads to further consideration as to whether genocide is a systematic crime, which requires by its very nature an organization and plan to be executed and to result in large-scale destruction. It follows from this that an isolated or sporadic killing of an individual belonging to a protected group does not reach that threshold, so that it cannot qualify as genocide, unless such acts were committed as part of a genocidal campaign or plan so that it can be viewed as part of the plan. At the same time, there

11 Behrens (n 8).
13 Triffterer ibid (emphasis added).
is unanimous agreement that there is no explicit mention of any collective campaign and it is accepted that the definition of genocide was drafted from the perspective of the ‘lone génocidaire’ even from the fierce critics of such understanding and that there is unambiguous concordance among the judiciary and academics that the literal definition leaves very little room for any other alternative interpretation.

Schabas leads with the argument that, even if genocide is drafted as an individual crime, it must be considered as an organized crime that cannot be achieved by a lone individual. He stated his views of such a reading by emphasizing that the possibility of a lone génocidaire is a:

… rather preposterous hypothesis of a lone genocidal maniac … genocide is, a crime committed in pursuit of a plan or policy of a state or state-like entity. Too much jurisprudential ink has been wasted by the ICTY on the theoretical case of the lone genocidal maniac, one that belongs more to psychiatry than it does to law.

Therefore, he argues that the need for state organization or policy is not only an ingredient of the crime but lies at the heart of the debate and emphasizes that this is the historical and theoretical underpinning of the crime of genocide. He buttresses his argument by asserting the practical impossibility of genocide through a lone individual but at the same time accepts that there is a possibility of lone génocidaire, however small that might be. Schabas discounts the fact that it is the law that is being considered and that there are specific rules of interpretation that need to be followed and not practical possibilities. He does not expound on all the relevant conundrums that his proposition brings into the equation, such as the consequence on rights of the individual accused, the small possibility of lone génocidaire, and genocide in the absence of state.

15 Schabas, ‘Darfur and the “Odious Scourge”: The Commission of Inquiry’s Findings on Genocide’ ibid 884 (emphasis added); William Schabas, Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals (OUP 2012) 131.
16 Schabas, ‘State Policy as an Element of International Crimes’ (n 14) 960.
17 ibid 966-967.
This interpretation is not based on an application of the common interpretative rules but on the conception that genocide should not be a crime that cannot be committed by a lone individual by nature, and the slim possibility of a lone individual achieving a genocidal goal should not preoccupy the international community. Schabas is right that the international community is not interested in the possibility of a lone génocidaire and there is no need to engage the involvement of international criminal law in such possibilities. But the question remains if genocide was to prohibit the intent to destroy a group, then it should not be a cause of concern if that destruction was done by one person or collectively on a small or large scale. If the effort of pursuing every single crazy individual is the concern at an international level, then why should the local courts have a similar concern? The national courts are now starting to prosecute under the definition of genocide. It should be borne in mind that genocide was initially intended for national application and can only come to international attention upon the failure of the state judicial system. Such position was clarified in the Darfur Commission’s findings that there was no genocidal plan at the level of the government of Sudan and it held that an individual can still be convicted for genocide and this is because it did not differentiate between killing and rape on the one hand and forced expulsion on the other. Therefore, there is no need for acts on a large scale or massive destruction to take place logically and the words of the definition of the crime support such a reading and sit more comfortably with this interpretation than with the theory of context inclusion.

Similar views were expounded to import a genocidal campaign through an analysis of the genocidal intent requirement – for instance, by Greenawalt. It was argued that the intricacies of the practical application and proof of genocidal intent in cases and the difficulties associated with it might open the possibility of allowing perpetrators of large-scale crimes to escape prosecution by manipulating the facts and claiming the absence of intent. Therefore, Greenawalt makes the case for a

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18 Schabas, ‘Darfur and the “Odious Scourge”: The Commission of Inquiry’s Findings on Genocide’ (n 14) 877.
21 Rome Statute of the International Criminal Court, art 17.
22 Cassese (n 4) 135, footnote 15.
23 Greenawalt (n 3).
knowledge-based approach countering the purpose-based approach (any adequate treatment of this subject is beyond the confines of this thesis) on the basis of the inconclusive position of specific intent in the historical and literal interpretation of the concept of intent in the Genocide Convention and in national criminal law. Thus the notion of a genocidal campaign according to this analysis becomes part of the genocide definition or an element on the objective side of the crime, mainly because participation in such a campaign, together with knowledge of the manifested effects, suffices for genocide.

Vest, on the other hand, takes specific intent as the starting point but brings the contextual elements within the parameter of genocide through the impossibility of a single individual being able to destroy a group but, unlike Schabas, he reads the conduct and the result of collective action in terms of the meaning of specific intent because the specificity of genocide as a crime lies in the requirement of mental state that extends beyond the actus reus of the perpetrator or what the perpetrator can possibly achieve in his individualistic capacity. So the collective act is inherent in the requirement of the specific intent. However, he still acknowledges the possibility of lone génocidaire in certain specific situations. Vest accepts that there is no explicit mention of context in the definition of genocide, but he imported it in his analysis through an examination of the structure of the crime which requires an individual perpetrator’s acts to achieve a destruction of groups that cannot possibly be achieved by a single man’s work; in making this assertion, he relied on one ICTY case – the Jelistić Trial Judgment – and various academic opinions. However, Vest’s ideas seem to have assumed that the word genocide naturally requires destruction on a large scale and from this assumption claimed that individuals single-handedly cannot be expected to achieve the destruction of a group unless by possessing a weapon of mass destruction. But there is little legal reasoning that supports such reading.

The difficulties with both Greenawalt’s and Vest’s premise is that, even if genocide were accepted as a systematic crime as they proposed, individual participation is only

\(^{24}\) ibid 2279.
\(^{25}\) ibid 2288.
\(^{27}\) ibid at footnote 9 he acknowledged the possibility of a perpetrator having a weapon of mass destruction.
\(^{28}\) ibid 781, footnote 12.
a small part of the collective conduct with which it is meant to achieve at least the partial destruction of the group in order to be classified as genocide. So an individual still cannot be certain that his act will actually destroy the group and he is merely participating in the destruction of a group regardless of whether that is genocide or a crime against humanity. Furthermore, bearing in mind the similarities between crimes against humanity of persecution and the scale of all international crimes in general, such a conclusion requires the perpetrator to make a legal assessment of the acts and determine that they are actually leading to genocide rather than crimes against humanity of persecution or even war crimes before the perpetrator can be held liable for knowingly participated in destruction of a protected group and hence commit a genocide, but the court is the only place where such determination can be made.

Thus, considering genocide as a large-scale crime commits us to a particular interpretation of genocide. Therefore, Kirsch, for instance, differentiated between realistic genocidal intent and vain hope when he stated that ‘the desire to achieve a certain goal only gains relevance in the realm of criminal law if the individual believes that he or she – or the criminal enterprise which he or she is a part of – possesses the means to achieve that goal.’ But possessing the means to do something is quite different to intending to achieve something. Possessing a gun certainly allows the claim that the holder believes that he has the means to kill, but shooting someone does not mean he intends to kill, because the mere belief in possession of means does not convert the act done, with indifference, into a volitionally committed act.

Kirsch and Kress started with the assumption that genocide, contrary to the literal meaning, has an unwritten element of the need for some sort of endeavour and plan because it could not be determined that an individual could realistically destroy an entire group single-handedly, otherwise, such individualistic intent is nothing more than a ‘vain wish’ unless the objective side of the crime is represented by large-scale

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29 Kirsch (n 4) 354.
destruction. The whole premise lies in accepting genocide as a systematic crime which can only be committed by activities at the collective level, and such an interpretation has no basis in law as it stands or in the Travaux Préparatoires of the Convention, other than according to the logical deductions of the author. Logically, this begs the question, at what point could the deduction be made that the collective act or the systematic targeting of a group is actually leading to the destruction of the group, unless there is a collective plan to exterminate the group and a collective attempt has been made to put that plan into action and the perpetrator is a party with full knowledge of this plan? Because in collective criminality all the participants might act on their own individual level and their individual beliefs and when these are put together in totality that determination of group destruction can be made. Kress arrived at a similar conclusion by requiring a collective genocidal act to be ‘an objective point of reference’ for any realistic genocidal intent.

The impediments facing the realistic intent requirement include the question, why does it matter whether the perpetrator had any realistic intent or whether he believed that he could realistically carry out the genocide? The law punishes the position of the intention to destroy a group ‘as such’ with one material act – ie the killing of one man or a thousand – and it is not beyond the realm of the law to punish a perpetrator for an unachieved result of their intent or the fact that they have not completed their heinous act or the fact that others may have been contributing to their aim. To say otherwise is to assume genocide is a large-scale crime that cannot be committed by an individual and that is neither the letter of the law nor the object and purpose of the law of genocide, which is to rid the international community of this ‘odious scourge’.

It is not a strong reason to state the practical difficulties or lack of evidence of culpability of an ‘entrepreneurial villain’ who took advantage of a situation to commit genocide single-handedly. Yet there is one example that can be cited, following the Second World War, involving a Jewish group who called themselves

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31 Kirsch ibid 353, 354.
32 ibid 354.
33 The author cited an academic opinion – Claus Kress, ‘The Darfur Report and Genocidal Intent’ (n 30) – and one case from the ICTY where the perpetrator was convicted for participation in genocide rather than as a principal actor in genocide – Krstic (Appeals Judgment).
35 Schabas, ‘State Policy as an Element of International Crimes’ (n 14) 953-982, 945.
‘the Vengeance’. One of their members got himself a job as a trainee baker in order to poison a consignment of loaves to kill SS men held at Stalag-13. They also planned to poison the water system of five German cities to kill the equivalent of 6 million Germans. Such possibilities defeat the claim that an individual is unable to commit genocide, and thus any validity of measures of the realism of individual intent. An individual who harbours the intent to destroy a group and acts by killing a person in furtherance of a genocidal campaign is not much different than a vengeance member who acted on his plan by poisoning one person, because the personal conduct of both is comparable in terms of magnitude, and the existence of campaign in the former adds nothing to the intent of the perpetrator other than the lack of it in the latter case.

In conclusion, these academic debates demonstrated that the court’s analyses are insufficient and that the courts’ reference to the contextual elements as evidence is an important concession to the inclusion of context, thereby appearing to attach to context an extra role in addition to the evidentiary role given to it by the court. These debates amass support from the fact that there has been no conviction for genocide in the absence of a plan and policy. Cassese believes that all those who support the inclusion of a plan or genocidal campaign as a requirement fail to recognize that this does not sit easily with the text of the Convention because they relied on logical deduction and on a ‘phenomenological construction of genocide as a historical event’, rather than the wording of the legal definition of genocide.

These arguments of the proponents of contextual elements ignore the literal reading of the definition of genocide in all instruments, a definition which is now crystallized into customary law and defined verbatim in all instruments. There is no support for such a reading in the Travaux Préparatoires; even if the Travaux suggest no support for one position over the other, the plain meaning should prevail as it represents the last terms agreed by the drafters and, most importantly, it does not produce any ambiguity or absurdity of any kind. Their argument should explain what ambiguity or absurdity the inclusion of a lone génocidaire brings. In addition, they all accept the

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37 Cassese (n 4) 130-131.
possibility but acknowledge that it is small in a practical sense. It can also be demonstrated that genocide can be committed by an individual who can be tried before the national court for the crime of genocide. This possibility is in line with the Convention’s preventative aspect which is clearly stated in the title of the Convention.

6.3 The case for the inclusion of ‘contextual elements’ as a constitutive element

6.3.1 Adhering to the historical foundation of the crime: the difficulties of recalibrating the relationship with the legal definition

The contextual elements find their way into the Convention’s definition of genocide through the interpretation of the particular elements of this crime. One of the arguments in support of inclusion of the contextual elements here is based on the fact that Lemkin championed the application of the word ‘genocide’ to mass violence against groups in the wake of the Nazi violence against the Jews following World War II, the word ‘genocide’ took on a social connotation and became permanently associated with mass violence in general and more specifically with violence against groups. In the interim period before 1948 the term was rightly used to describe the Nazi crimes by the judiciary and the public, not as a legal term but as an expression of the heinousness of the Nazi crimes (more specifically, war crimes and crimes against humanity); this historical association continued following the legal qualification of the word ‘genocide’.

It was agreed beyond any controversies that the crime of genocide is internationally recognized as a result of a reaction to a phenomenon that plagued the international community for a long time and not just in the twentieth century. Thus the international community decided to do something about it, and this renewed effort to

38 ibid.
39 See Chapter 3 above
40 It was reiterated in the first United Nations Resolution 96(1) that many instance of genocide occurred and also the Genocide Convention reiterated the fact that in all periods of history genocide has inflicted great losses on humanity.
halt such phenomenon was driven by two massive destructions of groups in 1915 and the 1940s. These facts represented the nature of the crime of genocide and thus created a difficult hurdle in making a clear distinction between the historical facts, the practical realities, and genocide as legally defined. Simon, for instance, states: ‘… the sheer enormity and the unspeakable horror of genocide become understandable when we accept that only organizations such as state have the means and the power to carry out genocide.’

The question whether a particular incident is genocide within the meaning of the 1948 Genocide Convention is not dependent on the factual setting upon which the prohibited act took place but on finding manifestation of genocidal intent to destroy from the analysis of the factual setting. Here is where the dichotomy becomes very important between the legal concept of genocide and any large-scale extermination because the prosecution must leap into the social scientists’ definition to some extent as far as the pattern, scale, and plan of destruction to allege the crime of genocide. This task is made even harder because the crime of genocide lacks boundaries in relation to other international crimes and sometimes overlaps as far as the material elements of the crime is concerned, rendering the task of labelling the acts or omissions of genocide particularly difficult. For example, the large-scale atrocities of the Khmer Rouge were labelled as genocide by international institutions such as the UN and national institutions as the United States Congress. This was based not on any legal analysis but on the simple assumption that the scale of atrocities must merit such labelling, oblivious to the fact that genocide is not an expression of how heinous an act is but a legal term qualifying an act as a crime in which individual culpability is measured. For instance, the United Nation General Assembly referred to the tragic history of Cambodia and the crimes committed during the regime of Democratic Kampuchea from 1975 to 1979 as past crimes of genocide and crimes against humanity.

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46 ibid, last operative paragraph of the preamble.
Another question is whether there is a need to look at the wider framework to realize that there is a different crime called genocide that only exists in the mind of the perpetrator and whether we must sacrifice the historical association of genocide with mass violence against a group. This is an ongoing debate among academics and judiciaries alike. The battle is between establishment of a broader meaning of genocide to include all mass killings and violence and the acceptance of the restrictive approach as articulated in the 1948 Convention. The debate is sustained by the difficulties to craft the schism between the narrow and the wider concepts of genocide. The impact of one concept over the other creates the need to keep genocide separate from other crimes such as crimes against humanity and war crimes.

However, these facts are historical facts and cannot be codified into law, or the law needs to revert to these facts in interpretation of clear words that produce no ambiguity. In the analysis of the Travaux Préparatoires of the Genocide Convention undertaken in Chapter 3, if the law expressly severed any link with its history or the reasons that gave rise to its codification, then that must be good enough reason not to revert back to it with demand to tender explanations for a new definition. The criminalization process is very clear in limiting the historical facts, and the evolution of the international criminalization process shows that. For instance, the Charter of the International Military Tribunals did not define the crime advocated by Lemkin at the time. It went on and limited the range of punishable acts and further limited the jurisdiction by association to war.

The fact that most of the contextual elements were discussed during the codification period and expressly rejected – by agreeing on the current definition – there is no validity to the claim that genocide is a large-scale or systematic crime. On the contrary the question then becomes how far in history one needs to go to import elements within the current definition of genocide. However, what is noticeable is that the contextual elements of the crime of genocide manifest themselves more noticeably when interpreted in the light of the historical purpose of the Genocide Convention. The historical purpose of the Convention is identified from the first

47 See section 6.2.1 above for the extent of this debate in the academic arena.
48 See Chapter 3, section 3.2.3 above.
49 Agreement of the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, annex: Establishing the Charter of the International Military Tribunal, art 6(c), UNTS 82, p 279.
United Nations General Assembly Resolution 96(1) which saw the presentation of genocide as the denial of the right of existence of an entire human group on any ground in entirety or in part, without any distinction of the scale required for the qualification of genocide\(^{50}\). The fact that ‘at all periods of history genocide has inflicted great losses on humanity’ and shocks the conscience of mankind fails to give any hint to genocide being anything other than a large-scale campaign of extermination\(^{51}\).

The difficulties largely stem from the fact that this historical context of the crime is not kept within the confines of history, but is reverted to in cases of difficulty without clear legal argumentations\(^{52}\). The distinction that needs to be made here is that the historical content of the crime has very little bearing on its current wording – except the limited possibility of reference to the *Travaux Préparatoires* permitted by the treaty interpretation rules-. This distinction becomes very difficult because of the thin line between the social and legal concept of genocide.

There is no strong reason as to the need to resort to the historical assimilation of the crimes definition, because it would not help to explain the current definition of genocide in anyway whatsoever. The fact that the Nazi and the Armenian massacres took place in the way they did – large in scale and systematic – does not form a template for similar crime in the future, because the criminal law does not criminalize the methods with which the crime is committed but the resulting harm. Furthermore, the crime of genocide as it stands does not categorize the manner of its occurrence as the criminal act but the destruction of the groups when done with specific intent. This argument places an emphasis on the factual manner in which the crime takes place to characterize the parameters of the crime. Mettraux argued: ‘It is the definition of the offence that determines the contours of the factual matrix that is relevant to the charges, not the other way around.’\(^{53}\)

\(^{50}\) UN Doc A/64/Add. 1 (31 January 1947).
\(^{52}\) See Chapter 4, section 4.3.4.
The Convention defines genocide with a few restrictions from what was previously held to be genocide. The prohibition of the crime of genocide as currently defined in the 1948 Convention was recognized to have a *jus cogens* character as far back as 1951 in the ICJ Advisory Opinion on genocide; thus, any changes to include the social scientists’ take on this crime are imaginative to say the least. The inability to separate the word ‘genocide’ from its relation to the macro-phenomena of mass killing is troubling. Now even the ad hoc tribunals make use of the broad social concept of genocide instead of strictly limiting themselves to applying the legal concept of genocide, and that is why the court could not concentrate on individual misconduct and describe and use the word ‘genocide’ without reference to the contextual elements being the source of the problem with the contextual elements of the crime of genocide.

The difficulties of recalibrating the legal definition of genocide as provided for in the Genocide Convention with what is commonly perceived as genocide led to the redefining of the genocide definition in several states to match their perception of the concept of genocide, some for political reasons and some for convenience to try perpetrators before their courts. For instance, Cambodia redefined genocide twice to fit its need to try the Khmer Rouge. In 1979 the Cambodian Government defined 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.

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54 In addition to the Holocaust, an example can be drawn from the Armenian massacre as the first incident in which other states expressed their dismay and the need for accountability, basing such claim on the international community’s newly found responsibility for the wellbeing of other sovereign states’ citizens, which was previously unknown under the principles of international sovereignty.


56 Especially following the verbatim reproduction of the Convention’s definition by the ICTY, ICTR and the ICC; *Prosecutor v Blagojevic* IT-02-06-T (Judgment) (17 January 2005) para 1639; *Prosecutor v Brdjanin* IT-99-36-T Judgment (1 September 2004) para 680; *Prosecutor v Stakic* IT-97-24-T (Judgment) (31 July 2003) para 500; Chapter 4 above.

57 See Chapter 4 in general of this thesis covering the ad hoc tribunals’ approach to the question of context.

58 See Chapter 4 in general, of this thesis.

59 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, July 15, 1979, art 1 (People’s Rep of Kampuchea) reprinted in Howard J De Nike, John B Quigley and Kenneth J Robinson (eds), *Genocide In Cambodia: Documents from the Trial of*
Schabas asserted that a conviction under this definition is not a conviction of genocide as internationally known but ‘rather conviction based on an idiosyncratic definition that is substantially akin to the concept of crimes against humanity’\textsuperscript{60}. The second attempt by the Cambodian Government was when the UN attempted to establish the Extraordinary Chambers in the Courts of Cambodia (ECCC) but the UN rejected such attempt and the Genocide Convention’s definition prevailed \textsuperscript{61}. Furthermore, some states went very close to the social meaning of genocide by opening the protected group and specifying the circumstance upon which genocide can occur, but it resulted in very few convictions for the crime of genocide, which means even expansion of genocide to the social scientist sphere does not guarantee successful conviction\textsuperscript{62}.

6.3.2 Avoiding trivialization of the crime of genocide

Most of the mass atrocities were committed by state and state-like entities or at least collective efforts were used in its perpetration, from the Armenian massacre, to the Holocaust and Rwanda, to the most recent Darfur atrocities (later resulted in one indictment for genocide only). Hence, the association of genocide with this practical reality, and perhaps lack of cases of internationally tried lone génocidaire – were used as a pretext to bring context for genocide\textsuperscript{63}.

Lack of explicit contextual element provided for in the genocide definition rendered the court incapable of adopting a selective approach to probative and non-probative evidence, leading to a practice bordering normative gap filling by the international criminal courts. The ICTR set the standard of genocide as specific intent but it almost destroyed its achievement by setting an unfounded and unsupported theory of inference from contextual elements that can only be relevant to the social definition.

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\textsuperscript{61} Sainati (n 59) 181-182; KA Seller, ‘Tipping the Scale from Mass Murder to Genocide’ (2013) 4 Creighton International and Comparative Law Journal 55; Schabas, ‘Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?’ ibid 293.


\textsuperscript{63} A create proponent of such reading is Schabas (n 14) 953-982 966-967; William A Schabas, ‘Developments in the Law of Genocide’ (2002) 5 Yearbook of International Humanitarian Law 131-165, 156.
of genocide such as scale, pattern, and plan/policy. The ICTR could have set clear rules on the level of reliance on these contextual elements and precisely why they are relevant. It is important to acknowledge here that sometimes the difference between the social and the legal definition of genocide is nuance; for instance, the destruction and killing of 7,000 Muslim boys in Srebrenica could have been not genocide if the killing was thoroughly selective of only those boys who are capable of being enlisted in the army, with more care in the movement of women, children, and elderly.

The call for inclusion of the contextual elements to the definition of genocide to avoid trivialization of the crime was called for as far back as the time of Benjamin Whitaker’s Report to the United Nations in 1985, he stated that ‘the offense of genocide can only retain its awesome nature, if the strictness of its definitional elements is retained and not in any way trivialized’. Whitaker was reiterating the limitation of genocide to large-scale crime and advocating for not allowing the possibility of a lone génocidaire. But he did so without any clear justification of how the current definition of genocide provided for in the Convention could accommodate the inclusion of a scale or plan and policy.

Whitaker’s claim is simplistic because the inclusion of contextual element as magnitude might have the opposite effect and all sorts of large-scale atrocities might be considered genocide. The exclusion of the contextual element of genocide is believed to result in trivialization of the crime by removing the stigma attached to this crime and equate genocide with normal national and domestic crimes of murder, so requiring a narrow definition by restricting it to large-scale organized crimes that need states. Removing stigma is a claim based on the assumption that genocide is large-scale crime associate with historical event. This argument creates an artificial hierarchy, and the belief that equates genocide with national crimes, such as murder, is trivialization. On the other hand, Whitaker made no claim as to why stigma is attached to one element and not the other; perhaps the stigma is not attached to the scale and gravity of the crime but to the ‘intent to destroy’ so that there is no

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64 See Chapter 4 in general, but the ICTR in the famous first genocide case held that genocidal intent can be inferred from contextual circumstance.
65 Krstić (Trial Judgment) paras 85, 360.
limitation or preservation of this stigma by adding context element, and so genocide committed in Rwanda in one prefecture must have the same stigma as genocide committed in the whole country. On the contrary, the ICTY in Krstić (Appeal Judgment) stated that the gravity of genocide is based on the stringent requirements of specific intent and group targeting in whole or in part and therefore the existence of these elements alone, regardless of magnitude or plan, must not be a reason to ‘shy away from referring to the crime committed by its proper name – genocide.’

In addition, characterization of genocide in such manner removes the consensus on the requirement of prevention because there will be no acceptable point in which the preventative aspect can be utilized: how bad the does it have to get? In the judicially recognized instance of genocide, the international community in most cases had to interfere retrospectively and hence such question’s validity became a less pressing matter, but in the current setting where a permanent international institution with prospective jurisdiction is in place, it makes such consideration an urgent matter.

The word ‘genocide’ is now the most famous legal word that is used outside of courtrooms and legal documents. The word in its social meaning is synonymous with mass violence, with the pretext to be used to express any form of mass violence. Therefore, the word is taken advantage of as a mechanism to activate the international community’s conscience and UN protection responsibilities; this in turn has given victims of mass violence the comfort to use the ‘G-word’ to highlight their plight. This difficulty largely stems from people assuming that a particular situation is genocide, working with that background and trying to apply the definition of genocide to the situation, when this should not have been the case. The concept of genocide has several meanings and interpretations in different disciplines and

67 Krstic (Appeal Judgment) para 37.
68 Kirsch (n 4) 347, 349.
national legal systems. Schabas contended that ‘even at the legal level, it is imprecise to speak of a single, universally recognized meaning of genocide’.\(^71\)

When large-scale crimes fall beyond the reach of the genocide definition, there is the tendency to emphasize the effect of the divide between the legal and moral understandings of genocide and the danger of rendering genocide useless by this unduly restrictive definition of the crime. This argument, on the other hand, must also be balanced against inclusion of undefined contextual elements by diluting the definition of genocide with total disregard of the right of the accused and the need to not stretch the criminal law by analogy. These difficulties cannot be resolved by accommodating social scientists’ views within the law and the law cannot be elastic to allow an idiosyncratic definition that fits any situation where the moral disgust reaches the level to merit the label of genocide. The solution, therefore, is to keep genocide as per the legal definition and try any crime that is not genocide as a crime against humanity or a war crime.

Behrens observed that there is an invisible contradiction within the main aims of the crime of genocide. That is, if the lone génocidaire is permitted as possibility within the definition of genocide, it would take away from the stigma attached to this crime because such possibility equates genocide with ordinary crimes.\(^72\) Similarly, Kress argued that the lone génocidaire is a slim possibility and genocide requires an international dimension which is lacking in the cases of lone génocidaires\(^73\). Therefore, categorizing genocide as a lone individual crime disconnects the crime from its historical root and from the corpus of the international law. A possible distinction needs to be made here: such argument can have merit if considered in the light of the ICC as a permanent institution, and thus it is judicious to separate prosecution at international and national level\(^74\). Even if there is a possibility that the national court also equates genocide with murders and massacres, then such a small possibility can be countered by prosecutorial diligence and the courts’ control mechanism in directing the prosecution to what can be established by evidence.

\(^71\) Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (n 15) 104.

\(^72\) P Behrens, ‘The Need for a Genocide Law’ in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (Routledge 2013) 239.

\(^73\) Kress (n 4) 619-629, 620-622.

\(^74\) The national courts have supremacy, as established by the ‘principle of complementarity’ enshrined in the Preamble and in arts 1 and 17 of the Statute.
Hence the trivialization of the crime results from treating the crime as domestic level crime, not a crime of magnitude that requires punishment by international institutions.

At any rate the question of preservation of the status of the crime of genocide at the international level by attaching contextual elements such as state plan or policy and magnitude lost any weight in the current arrangement of the international justice system with the ICC as the pillar institution creating a division of labour with the domestic tribunals by leaving the small-scale and lone génocidaires to the domestic court by the addition of contextual elements as jurisdictional limiting element.

6.4 The case for exclusion of ‘contextual elements’ as constitutive elements

6.4.1 The need for clarity and certainty

The need for certainty in criminal law requires the law to be specific, and clear in nature, and thereby protect the legal rights of the accused. The definition of the crime of genocide as currently interpreted – bearing in mind the uncertain position of the contextual elements – lacks the precision and certainty required in criminal law and violates all the general principles of criminal law provided in part III of the Rome statute as well as the human rights of the accused (for instance, article 7 of the European Convention on Human Rights and article 15(1) of the International Covenant on Civil and Political Rights). The most obvious situation in which there is uncertainty in the case of genocide is the possibility of ascertaining with certainty, the components of the elements of this particular offence. Therefore, establishing the

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76 The requirement of legal certainty is a requirement in both civil and common law legal systems: Bert Keirsbilck, Erik Claes and Wouter Devroe (eds), Facing the Limits of the Law (Springer-Verlag Berlin Heidelberg 2009).
77 This principle is recognized by the European Court of Justice as a general principle: Damian Chalmers, Gareth Davies and Giorgio Monti, European Union Law: Cases and Materials (CUP 2010) 454.
78 Similarly, see art 11(2) of the 1948 Universal Declaration of Human Rights and arts 22 and 23 of the Rome Statute of the International Criminal Court. The statutes of the ICTY and ICTR do not contain provisions equivalent to art 22 of the Rome Statute but in the case of the ICTY the United Nations Secretary-General stated in a report that ‘the application of the principle nullum crimen sine lege requires that the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law’ (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) UN Doc S/25704 (3 May 1993) para 34). Furthermore see Prosecutor v Tadić (Decision on the Defence Motion on Jurisdiction) (10 August 1995) para 72.
commission of the crime of genocide beyond reasonable doubt cannot be sufficiently made by pointing to factual evidence of group destruction, but by establishing all the constitutive elements of this crime, most principally the genocidal intent.

Due to the nature of genocidal intent, in addition to the uncertain rule of inference of such intent, the question of *lex certa* becomes an important aspect that must be assessed in determining the elements of this crime, in particular the contextual elements. Therefore, the inclusion of the contextual elements as a constitutive element in the case of genocide reduces the court’s ability to determine the elements of this crime to pure subjective assessment of evidence and thereby undermines the decision on the guilt of the accused.

For instance, the court in *Jelisić* classified the scale of the atrocities, and systematic targeting of the protected group, as circumstantial evidence of genocidal intent, but found no such overall plan in which the perpetrator could have participated and thus found the perpetrator to lack genocidal intent although his acts could be taken to have constituted a plan to single-handedly destroy the group.\(^{79}\) In the case of *Kayishema* the court proceeded by establishing from the general factual findings a genocidal plan, prior to assessment of evidence relating to the individual liability of the accused and dismissed the exculpatory evidence which might have taken the accused away from the genocidal plan in existence.\(^{80}\) Behrens stated: ‘… [a] phenomenon of contradictory evidence may indeed emerge; and it is then of importance to accord a value to the various forms of evidence.’\(^{81}\)

However, the lack of guidelines on how this assessment of value is made in addition to the indeterminacy of the contextual elements components make the task of attaching a value to those contextual elements an unenviable elusive task for the court. As Behrens rightly noted that due to the nuance in the way the international crimes (ie crimes against humanity and war crimes) are committed, the inference of genocidal intent from contextual elements such scale of the crimes and collective

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\(^{79}\) *Jelisic* (Trial Judgment) para 47.
\(^{80}\) *Kayishema and Ruzindana* (Trial Judgment) paras 284, 298.
campaign is particularly difficult because the requirement of the specific intent imposes on the court a particular approach to evidence\textsuperscript{82}.

This lack of \textit{lex certa} not only affects the rights of the accused before the court, but the defence becomes unable to prepare a defence in terms of the court’s subjective assessment of those contextual elements. Hoff’s points out that the court’s ‘reliance on circumstantial evidence removes the defence’s ability to properly rely on precedent in cases of genocidal intent and takes away the accused’s ability to rely on legal certainty.’\textsuperscript{83}

This lack of certainty affects the rights of the accused, the court’s credibility, and international criminal justice as a whole. The existence of the contextual elements allows the court to make a judgment on the existence of individual direct (as opposed to indirect) genocidal intent makes the task of presenting a concrete defence against any subjective assessment of those contextual elements almost impossible, because they are in themselves context-dependent in terms of interpretations in the first place, in addition to the difficulties that might present themselves when a distinction between genocidal context and persecution as crimes against humanity is to be made.

The need for clear elements in this case is important not only to the prosecution and the defence but also to the judges. It allows judges to determine whether they have jurisdiction in the first place or whether particular evidence is admissible and relevant, whether the prosecution presented a prime facie case against the defendant and met its burden of proof by proving all the elements of the crime, and whether the defendant raised a defence to all elements of the crime. The introduction of the contextual elements runs into serious difficulties in terms of clarity and certainty, because the difference between genocide and other international crimes lies only in the intent to destroy in a volitional sense and the introduction of the contextual elements reduces the difference between the crimes to a point where the distinction becomes a complex task bordering infringement of the need for clarity and certainty.

\textsuperscript{82} Behrens (n 8) 126.
The fact that the contextual elements are not provided for in the literal definition goes against their inclusion because the crime must be clear in all its terms to be applicable in a just way by the judiciary. Without sufficient legal certainty the court will fail to carry out its obligation by encroaching into a legislative sphere by creating offences or being unable to indicate the legal rules applicable in a given situation.84.

The importance of clarity in the case of contextual elements is more apparent in cases where the court determines whether the crime of genocide has been committed in general.85 This in turn requires the court to decide what evidence is to be admitted or produced to show the criminal culpability of the accused by evidence proving the elements of the crime and not the context of the crime.86 The ICTY in Tadić held, vis-à-vis international crimes, that ‘most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality’.87 The court’s task is to sort through the collective campaign for elements that show the culpability of the person standing before the court.88 If elements of context are to be included as a legal ingredient, then what would those elements be, and what are the sub-elements of the genocide’s contextual elements? What sort of evidence is needed to prove the existence of such elements? The ICC’s EoC is not helpful, because pattern can be deduced from an act of an individual only or very few individuals and can also be directed against a group. The EoC does not state whether the requirement of ‘manifested pattern’ needs to be produced by the state or state-like entities.

The inclusion of the contextual element will hardly make the definition of genocide more precise than it currently is, primarily because the contextual element of genocide is not one element that can be defined but is rather a collection of contextual elements that cannot be grouped into one workable definition. Lack of

85 In the case of ICJ, see Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (ICJ, Genocide Application Case), ICJ Reports 2007, and for the ad hoc tribunals, see, Prosecutor v Jelisić (Appeal Judgment), Prosecutor v Krstić (Appeal Judgment), Prosecutor v Popović et al (Trial Judgment).
86 Tadić (Appeal Judgment) para 191.
87 ibid.
88 ibid.
clear legal basis on the inclusion of the contextual elements makes the task of deciding which collection of elements should be considered as the contextual element of genocide a hard task for both academics and the judiciary. As seen in the previous chapters of this thesis, the courts and academics alike are referring to a collection of elements, that is, state plan or policy, magnitude, pattern, collective campaign, and so on.

It is important to note here that the EoC of the Rome Statute was initially introduced under the pretext of fulfilling the objective of clarity and precision required in criminal law. However, the EoC remains an annexed document, thus leaving the crime of genocide dependent on specific intent, thereby reducing the need for the contextual element enshrined in the EoC to be a source of violation (in any attempt to consider it a constitutive element) of the *nullum crimen* principle. In any case, the ICC’s attempt to formulate a definition complicates the matter rather than clarifying it. Some of this lack of precision and clarity is the problem of international criminal law in general. Mettraux commented on this when he stated that ‘the definition of many of its concepts and prohibition have been loaded with terms and expression that end up meaning nothing or little like “weasel words”’.

The inclusion of context in the form of a plan and policy or pattern of similar acts or scale would not add any certainty to the definition of genocide or the evil criminal harm it intends to circumvent, because it is not clear at what level the process of a plan, what stage of similar acts, and/or what magnitude of perpetration of the criminal act the law should interfere. These questions will remain unanswered by inclusion of context, but this task becomes even harder in light of the new techniques that various planners and perpetrators of genocide devise to achieve their evil goals.

### 6.4.2 The need for strict interpretation

There is a general principle in international law of strict interpretation of the rules in criminal law which prohibits extension by analogies, and in cases of ambiguity the
interpretation that favours the accused must prevail – in dubio pro reo.\footnote{Rome Statute of the International Criminal Court, art 22(2).} This principle obliges the judges to interpret the law narrowly and in the case of genocide any construction of its meaning by analogy is rejected in favour of the accused and in this case the strictest definition is the literal one.\footnote{Prosecutor v Al Bashir (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009) para 156. Analogy as a tool of interpretation is not prohibited: Susan Lamb, ‘Nullum Crimen Nulla Poena Sine Lege in International Criminal Law’ in Antonio Cassese and others (eds), \textit{The Rome Statute of the International Criminal Court} (OUP 2002) 733-766, 752-753.} The crime of genocide being one of the most heinous crimes internationally adds to the urgency and further justifies so doing\footnote{There is disagreement as to the need for hierarchy in crimes, but there is a good case for placing genocide at the apex following the ICTR labelling of genocide as ‘the crime of crimes’.} because it expresses the highest legal condemnation of these acts with the highest legal sanctions, and the fact that this principle is based on punishment as a just retribution for a wrongful act adds to the urgency to strictly adhere to the definition of genocide to avoid punishing for genocide instead of other crimes (i.e war crimes and crimes against humanity). Therefore, the inclusion of the contextual elements through difficulties in interpretation of the elements of genocide will contravene this doctrine which is recognized in the cannon of international criminal law.\footnote{Prosecutor v Delalic \textit{et al} (Judgment) IT-96-21-T (16 November 1998) (hereinafter ‘Delalic \textit{et al} (Trial Judgment)’ paras 408-413.} \\

Furthermore, the need for strict interpretation ensures a certain standard of rights and protection for the accused in criminal law proceedings. Those rights have their foundation in the international human rights enshrined in the international covenants and declarations.\footnote{Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948) UN Doc A/810 (UDHR); International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171 (ICCPR); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted on 4 November 1950, entered into force on 3 September 1953) (ECHR) and American Convention on Human Rights (adopted on 22 November 1969, entered into force 18 July 1978) (AmCHR). Statute of the International Criminal Tribunal for the Former Yugoslavia, UNSC Res 827 (adopted on 25 May 1993); Statute of the International Criminal Tribunal for Rwanda, UNSC Res, 955 (adopted 8 November 1994); The Rome Statute of the International Criminal Court, adopted on 1 July 2002. On procedural law guaranteeing the rights of the accused, see Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, IT/32/Rev.38 (adopted on 11 February 1994); Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, ITR/3/Rev.15 (adopted on 29 June 1995); Rules of Procedure and Evidence of the International Criminal Court.} For example, the principle of presumption of innocence is a right recognized in international law, preventing the defendant from passing the \textit{onus oporandi} or any onus of rebuttal to the accused.\footnote{ICTY Statute, art 21(3) and ICTR Statute, art 20(3); Rome Statute, arts 66(2) and 67(1)(i); Prosecutor v Brdjanin (Krajina) (Judgment) IT-99-36-T (1 September 2004).}
The inclusion of the contextual elements as a constitutive element reduces the specific intent requirement to a mere knowledge of one’s destructive acts on the protected group, which is very difficult to evaluate. Determination of genocide context is not an easy task. The Rwandan genocide was initially classified as ethnic scrimmage by the international community by failing to identify the events as genocide earlier on97. Even the perpetrators deliberately publicized the genocide as a necessary self-defence to avoid of the danger of being exterminated by the Tutsi and use the fighting against the RPF rebels as a pretext to brand the Tutsi civilians as enemies98.

In most large atrocities cases many people realized that it was genocide well after the extermination took place. If genocide is the criminalization of specific intent to destroy a group for their belonging to that group and no other reason, then most low-level perpetrators could not make an assessment of whether a group was being exterminated or even realize such possibility from the factual situation around them, and the minimum that can be attributed to their knowledge is the existence of widespread attacks and war-like circumstance, so attributing a knowledge of genocidal campaign is bordering on violation of the principle of legality. Naturally, the prosecution will need to produce evidence related to the accused, but the only way that knowledge of group destruction can be attributed to the accused through his act is by reliance on the context. And the knowledge of the context being genocidal can be simply denied by the accused and he can claim being indifferent to the fact that a group is being destroyed. Hence, the principles of criminal law stipulate that in cases of doubt, the tribunals must apply the principle of dubio pro reo, and by so doing the benefit of any doubt should be resolved in favour of the accused99.

For instance, the ICTY struggled with the question whether ‘ethnic cleansing’ in Yugoslavia can be construed as genocide on some occasions. The court later found that genocide had taken place in the enclave of Srebrenica. This demonstrates the

98 Akayesu (Trial Judgment) para 127.
99 Prosecutor v Tadić’ IT-94-1-A (Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of the Additional Evidence) (15 October 1998) para 73. Similarly, ICTR in Akayesu (Trial Judgment) para 319.
fact that no context is needed for the crime of genocide because a plan to ethnically cleanse an area can at the last minute turn it into genocidal plan. On the other hand, the ICTR in Rwanda faced a similar issue with respect to the policy of the systematic rape of the women of a certain identifiable group and whether this could be considered one form of genocide. Therefore, the current genocide definition is sufficient to address the evil it is intended to prevent and it can also be recognized to fulfil its goals and purposes. Further evidence of that is the fact that since 1948, the genocide definition has been embodied in at least three notable international instruments, namely the statutes of the ICTY, the ICTR, and the ICC, without any changes and this is indicative of the need not to change its constitutive parts.

The international community from Nuremberg is moving towards individual responsibility and not collective responsibility and adding context to genocide is one step backward. Those contexts are better dealt with in respect of indirect liability cases of complicity and joint criminal enterprise, or co-perpetrations where scale, pattern, and policy directed against a group need to be established.

**6.5 Keep it relevant: the case for reconciliation of ‘contextual elements’ with the legal definition of genocide**

**6.5.1 Manoeuvring the ambiguities of context: the dividing line between alleging and proving genocide**

The *actus reus* of genocide is an amalgamation of various criminal acts that can qualify as crimes against humanity or war crimes. Hence, the killing of an individual regardless of the context for example, can be classified as genocide in article 6(a) or as crime against humanity of murder in article 7(1)(b) or war crime of killing in article 8(2)(a)(i) of the Rome Statute. Similarly, causing serious body harm in article

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100 Krstic (Trial Judgment) paras 85-87.
101 Akayesu (Trial Judgment) paras 732-734.
102 Note that the ICC included EoC later on and also combined in one article the provisions contained in arts 2 and 3 of the Genocide Convention.
6(b) can be classed either as crimes against humanity or war crime in article 7(1)(e) or 8(2)(a)(iii) respectively, but the picture changes as soon as the circumstances are introduced to qualify those acts. Therefore, what is peculiar about the crime of genocide is that the acts alone cannot manifest genocidal intent, because, any allegation that is based on the accused’s own conduct can easily be classified as crimes against humanity or war crimes or even domestic criminal acts104, and thus the prosecution needs to prove more than the bare acts in all cases in which genocide has been charged105.

With this in mind, in criminal law proceedings an indictment must specify each and every constitutive element of the alleged crime and must inform the accused of the charges against him106; and, prior to bringing a case before the court, the prosecution must determine whether the evidence it has gathered is sufficient to prove the crime alleged beyond any reasonable doubt and to persuade the court to convict the accused as charged. Thus, it is a matter for the prosecution, how the case is presented and, in cases of large-scale killing and mass atrocities, it would be easier for the prosecution to allege genocide in the general sense, prior to examination of the individual acts, not because it is required to prove genocide or genocidal campaign in a general sense as a legal requirement but to be able to allege the existence of the crime against the individual without the need for his actual state of mind. This practice is permissible in criminal law because the right of the accused is not violated if the allegation is made based on existence of suspicion without a formal assertion of guilt107. This was the finding of the ICTY in Krstić when it held that the conclusion that a particular event was characterized by genocidal intent can be made ‘where the individuals to whom the intent is attributable are not precisely identified.’108

In the case of genocide, any evidence advanced without the contextual elements as an integral part can be ambiguous and contradictory and open to counter-narratives because a genocidal intent to destroy a group does not have any objective

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104 The exception here is where there is a written confirmation or confession by the accused as to the intent to destroy a group, because any other physical evidence or utterances can be contextualized and differently interpreted.
105 Kayishema (Appeal Judgement), para. 159.
107 Krause v Switzerland (App No 7986/77), (1978) 13 DR 73.
108 Krstić (Appeal Judgment) para 34.
representation without taking all the evidence including the accused’s utterances in the light of the context. In order to determine the allegation of genocide the courts need to consider the individual evidence in the light of the entire body of evidence adduced before the court to establish an alleged fact.

Therefore, to allege genocide as a fact, then all the contextual elements become relevant in establishing such fact. This is not because individual accused acts alone are not sufficient, but because any allegation can be discredited by simply claiming another motive or a narrative and the allegation stage is not where the matter is determined, so the prosecution must present all the evidence, collective or otherwise, and leave the matter to the courts at the deliberation stage. The ICTY Appeal Chamber in *Stakić* held: ‘Rather than considering separately whether there was intent to destroy the groups through each of the enumerated acts of Article 4 of the Statute, consideration should be given to all the evidence, taken together.’ This construction of evidence is not because the criminal behaviour of others proves the state of mind of the individual accused, but it allows the prosecution to make an allegation by fitting the acts of the accused into the pattern of other similar acts suggestive of intention to destroy a group but when it comes to establishing this mental state, the accused’s own acts will be the determining factors.

Confronted with the lack of any objective representation of genocidal state of mind, the prosecution will resort to all the objective acts to make such an allegation, regardless of the value of those circumstances. The ICTR’s reasoning in *Kayeshema* illustrates the importance of first finding a general genocidal campaign:

finding the question of ‘whether genocide took place in Rwanda in 1994... [is] so fundamental to the case against the accused that the Trial Chamber feels obliged to make a finding of fact on this issue’ prior to addressing issues of individual liability.

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109 Gacumbishi (Appeal Judgment) para 40. See also Rutaganda (Appeal Judgment) para 525; Kayishema and Ruzindana (Appeal Judgment) para 159.


112 For an example where the court used a pattern to fit the accused’s act, see *Bagilishema* (Trial Judgment) para 62; *Semanza* (Trial Judgment) para 313; *Blagojević* (Appeals Judgement) para 123.

113 *Kayeshema & Ruzindana* (Trial Judgment) para 273.
The court even found it important to reiterate the fact that the aim in its examination was to find out if the events as a whole reveal the existence of elements of the crime of genocide irrespective of the crime of the accused before it\textsuperscript{114}. The court implicitly admitted that this examination is embedded in the genocide discourse. Perhaps, here is where commentators like Kress see genocide as systematic crime and the need for contextual elements represents an objective reference point\textsuperscript{115}, but the court removed any possibility of such reading by adding a caveat that ‘collective genocide’ in Rwanda ‘is not dispositive of the question of the accused’s innocence or guilt’\textsuperscript{116}.

Therefore, the simple inquiry as to whether there is genocide for which the individual accused is responsible necessitates alleging the existence of genocide in general, and such allegation could not be made with compartmentalization of evidence of genocidal intent of the accused alone and the general context apart. The ICTY held in \textit{Karadic}:

\begin{quote}
in the context of assessing evidence of genocidal intent, a compartmentalised mode of analysis may obscure the proper inquiry. Rather than considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state.\textsuperscript{117}
\end{quote}

In a genocide case the prosecution alleges the case based on all the factors that are suggestive of genocidal intent and in this phase there is no rule on the admissibility of evidence, and the court also follows a similar liberal practice of evidence assessment in its first assessment of whether there is a genocidal campaign, The ICTR, which was established to deal with genocide in Rwanda, in its first case of \textit{Prosecutor v Akayesu} established the existence of genocide throughout Rwanda in 1994\textsuperscript{118}. In \textit{Kayishema}, the same court held that establishing whether genocide took place was paramount in the case against the accused, so that the trial chamber was

\begin{flushleft}
\textsuperscript{114} ibid para 274.
\textsuperscript{115} Kress (n 4) 619-629, 622.
\textsuperscript{116} Kayeshema & Ruzindana (Trial Judgment) para 273
\textsuperscript{117} Prosecuer v Karadic (Appeals Chamber, Judgment) IT-98-S-3025 (17 February 2008) para 273.
\textsuperscript{118} Akayesu (Trial Judgment) para 126.
\end{flushleft}
obliged to make a finding of fact on this issue prior to addressing the individual’s liability.\textsuperscript{119}

Similarly in \textit{Musema} the court went into examination of very general elements such plane crash of the Rwandan president, the ethnic division in Rwanda, and the targeting of one group despite the fact that the individual accused before them was charged with specific acts that took place in a specific place and time prior to all those events\textsuperscript{120}, but furthermore, the court even felt the need not to just list those acts but to confirm that general genocidal context was proven without reasonable doubt\textsuperscript{121}. This was the wrong approach because it did not place extra emphasis on individual acts and evidence, creating an imbalance in consideration of the contextual evidence and thereby giving the contextual evidence a false weight. The ICTR Appeals Chamber in \textit{Ruganada} held that the trial chamber had erred in assessment of the individual accused’s guilt because it had failed to examine the accused’s own acts\textsuperscript{122}. A similar error in the case of \textit{Jelisić} led the court to dismiss the accused acts and omissions as ‘not the physical expression of an affirmed resolve to destroy in whole or in part a group as such’\textsuperscript{123}, although the perpetrator’s utterance and his acts may well have indicated the existence of genocidal intent\textsuperscript{124}.

Hence the general contextual elements started to play a preponderant role in the process of allegation and the determination of a general genocidal campaign prior to the examination of the individualized intent. For instance the ICTY Appeals Chamber dismissed Tolimir’s claim that the Trial Chamber erroneously relied on the factors such as destruction of ID cards of Muslims, the burial and reburial of victims, and inhumane conditions of detention in establishing the existence of genocidal intent. It held:

Since Tolimir fails to show any reason why the Trial Chamber’s holistic analysis of the relevant evidence was erroneous or why the Appeals Chamber should depart from its settled case law in that regard, his

\textsuperscript{119} \textit{Kayeshema} (Trial Judgment) para 273.
\textsuperscript{120} \textit{Musema} (Trial Judgment) para 354.
\textsuperscript{121} ibid para.361.
\textsuperscript{122} \textit{Rutaganda} (Appeals Judgment), paras 522, 529; \textit{Gacumbitsi} (Appeals Judgment) para 44.
\textsuperscript{123} \textit{Jelisić} (Trial Judgment) para 107.
\textsuperscript{124} ibid paras 102-106, where the court listed the accused’s own acts and utterances that are almost conclusive of his intention but gave considerable weight to the inconsistent evidence and absence of genocidal plan in the municipality of Brko.
arguments as to the approach adopted by the Trial Chamber are rejected.125

In addition to the direct circumstantial evidence, the court resorted to the use of factors that might have had a wholly different meaning if they had not been bundled together under the guise of genocidal intent. In Kayeshema, for instance, the plane crash and the Arusha accord were mentioned126, information disseminated prior to the atrocities was considered127, as was the civil defence programme128, in addition to the manner of the killing and its scale129. For instance, the Appeals Chamber in Tolimir held: ‘The fact that the forcible transfer operation does not constitute, in and of itself, a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of those individuals involved.’130

The ICTR in the first few cases was elected to examine the existence of a general genocidal campaign, until finally, in the interlocutory Appeals decision in Karemera, it judicially recognized the existence of a general genocidal campaign in Rwanda as ‘a fact of common knowledge’131. It was accepted that this judicial recognition did not in any way need to be proven by the prosecution, nor had it any effect on the culpability of the accused. However, the court did not make a very good case as to why they saw the genocidal campaign as important.

All things considered, the question remains why both the prosecution and the court find the need to refer to the contextual elements of genocide. From the above analysis, it is safe to say that significant weight seems to be placed on the unique nature of the genocidal intent and the inference rule established in Akayesu132 as a result of the inability to objectively identify the crime of genocide. Therefore, this has led the prosecution to bring before the court all the evidence, circumstantial or otherwise, and then leave the court with the task of compartmentalizing the evidence into general evidence and evidence related to the individual intent of the accused. It

125 Tolimir (Appeals Judgment) para 247.
126 ibid para 277.
127 ibid para 279.
128 ibid para 283.
129 ibid paras 290-291.
130 Tolimir (Appeals Judgment) para 254.
131 Prosecutor v Karemera ICTR-98-44-AR73(C) (Decision on the Prosecutor’s Interlocutory Appeals of Decision on Judicial Notice) para 3 (16 June 2006).
132 The need for inference of genocidal intent in confirmed in, Kayishema (Trial Judgment) para 93; Rutaganda (Trial Judgment) para 61; Musema (Trial Judgment) para 167.
is also important to note here that in most international criminal proceedings, there will be more than just a crime of genocide to be tried. Hence, the lack of difference between the international crimes on the objective side coupled with the prosecutions’ tendency to charge the accused as principal and accessory, in most cases makes the use of all the contextual elements of genocide necessary.

In addition, Jones tendered another plausible explanation, that the court finds the need for an overall plan is only a compromise to avoid appeals\textsuperscript{133}. Or, in other words, a conviction for genocide without a general genocidal campaign being established prior to examination of the individual perpetrators own conduct, would allow appeals on the basis of a simple claim that the crime was actually a crime against humanity and not genocide for lack of a context. Therefore, the valid reason for the need to firstly establish genocidal campaign from all the contextual and circumstantial evidence is to be able to allege the existence of genocide and thereby present a case against an individual accused before the court, but those general contextual elements have no bearing on the accused’s innocence or guilt.

6.5.2 Beyond the individualistic intent: secondary liability and the need for contextual elements

The role of the ‘contextual elements’ in establishing individualistic intent is unclear, but it becomes crucial when it comes to derivative liability cases where context constitutes the foundation upon which such accusations can be made. It is worthy to recall here the ICTY’s contention in Jelisić trial that:

\begin{quote}
… an accused could not be found guilty of genocide if he himself did not share the goal of destroying in part or in whole a group even if he knew that he was contributing to or through his acts might be contributing to the partial or total destruction of a group. It declared that such an individual must be convicted of complicity in genocide\textsuperscript{134}
\end{quote}


\textsuperscript{134} Jelisic (Trial Judgment) para 86.
Since the Genocide Convention in article 3 extended punishment for criminal acts beyond the acts of the principal perpetrator\(^{135}\). In cases such as conspiracy and incitement, the *mens rea* is the intent to commit the crime of genocide as the principal perpetrator\(^{136}\), but the evidence for demonstration of such intent is not dependent on the accused’s own direct acts or omissions.

For instance, the ICTR held in *Nihemana* that the agreement of the conspirator can be inferred from their pattern of the coordinated actions\(^ {137}\). Thus, the crime of conspiracy by its nature is a continuous crime that another perpetrator might join so that the collective acts of others play a crucial role in finding the intent to commit the crime of genocide by conspiracy\(^ {138}\). On the other hand, in a case of direct public incitement to commit genocide, for example, the court can only establish the existence of genocide from genocidal campaign and legally establish that genocide is actually perpetrated. For instance, the use of the derogatory terms such as ‘cockroaches’ was understood as incitement but only by taking into account the context of its use\(^ {139}\).

As a result, prosecution in international criminal proceeding rarely relies on one basis of conviction but brings the charges on various possible modes of criminal liability. Hence it is judicious to include all the contextual elements necessary to prove the existence of genocidal plan or collective campaign to destroy a protected group. For example, the ICTR in the *Karemera* case indicted the accused for conspiracy to commit genocide, for direct public incitement to commit genocide, and, alternatively, for complicity in genocide. The genocide that the court was referring to was the genocide that took place throughout Rwanda. The initial question of whether there was genocide could not be proven by the acts or omissions of the accused but by consideration of the general context on the ground, and here the need for evidence of scale, planning, campaign, and pattern was paramount because of the diminished

\(^{135}\) Note that the Rome Statute provides for modes of individual criminal responsibility in article 25(3); however, conspiracy was left out in the Rome regime.


\(^{137}\) *Ibid*, para 896.

\(^{138}\) *Prosecutor v Popovic* (Judgment) (hereinafter ‘*Popovic* (Trial Judgment)’) para 876.

\(^{139}\) *Akayesu* (Trial Judgment) paras 556-557.
central role of the specific intent, which is shifted from the specific intent to destroy a group to a set of factual circumstances suggestive of group targeting in exclusion of other groups in an objective sense.

In a case of indirect or secondary liability, the situation differs because the perpetrator does not need possess any specific intent which needs to be proven by evidence relevant to the accused’s own acts and omissions. For example, in the case of complicity, the *mens rea* is the knowledge of the principal perpetrator’s genocidal plan to exterminate a group. Similarly in cases of joint criminal enterprise (JCE) by it is rationale and very nature is focused on attributing criminal liability for participation with knowledge of a common criminal plan. Hence, the crime cannot be established without identifying the plurality of persons and the common plan or design in which they participated, and elements of such collective endeavour can only be established by the use of the contextual elements in the case of the crime of genocide even though each individual will be individually responsible. In cases of a superior’s responsibility, the superior need not intend the destruction of the group; it is sufficient if the superior knew or had reason to know that the subordinate had committed a crime of genocide. Henceforth, the international criminal law will punish the failure to prevent others committing a crime, and hence this certainly requires allegation on the basis of the acts and omissions of other perpetrators collectively or individually. The need for the contextual elements in this case is more persuasive than other modes of liability.

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140. *Brdjanan* (Trial Judgment) para 730.
141. *Baglishema* (Trial Judgment) para 36; in respect of aiding and abetting, see *Krstić* (Appeals Judgment) paras 140 and 143; also *Tadić* (Appeals Judgment) para 229; *Bališić* (Appeals Judgment) paras 26 and 49-50; *Kuntanac* (Trial Judgment) para 392. Note that the position of the *mens rea* of complicity is not well defined and there was initial disagreement in case law as to whether aiding and abetting required specific intent: *Kayeshema* (Trial Judgment) paras 91, 205, 207; *Musuma* (Trial Judgment) paras 530, 532; see for commentary A Obote-Odora, ‘Complicity in Genocide as Understood Through the ICTR Experience’ (2002) 2 International Criminal Law Review 375.
142. The ICTY discussion of the JCE, see *Brdjanan* (Trial Judgment) para 355 and *Stakic* (Trial Judgment) paras 438, 528; also see *Tadić* (Appeals Judgment) paras 196, 202, 204.
143. *Brdjanan* (Trial Judgment) para 258; *Tadić* (Appeals Judgment) para 190.
145. *Akayesu* (Trial Judgment) para 479.
146. The ICTY and the ICTR also provided for the superior order in their respective statute and in the Rome Statute article 28 to cover the superior responsibility. Note that the ICC added causation requirements and omitted failure to punish, but this does not affect the need for contextual elements of the crime in order to bring charges or conviction. Also see Beema (Decision pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean Bemba Gombo) para 425.
because the superior can be held liable for subordinate crime under any head of liability, for instance as co-perpetrator, JCE, or aiding and abetting\textsuperscript{147}.

What makes the existence of a general genocidal campaign important in this context is that there is no need for there to be an identifiable individual who harbours genocidal intent before a finding of genocide can be entered. It can be alleged to have taken place without the need for any such person as the definition legally seems to suggest\textsuperscript{148}. In these derivative liability cases the courts need not connect the accused directly to the facts and circumstances from which his mental state is inferred. Hence, in these cases the crime of genocide is transmuted into double layered crime open to subjective characterization of the crime from one based on mental state to one based on objective elements.

The requirement of liability in aiding and abetting is the knowledge of the principal perpetrator's crimes and in the case of genocide the specific intent to destroy a group\textsuperscript{149}. Hence, in the cases of genocide, the establishing of existence of genocidal plan or collective campaign to destroy specific group is paramount, because any person who substantially aided and abetted the principal perpetrator could be criminally liable\textsuperscript{150} and in these cases, the contextual elements of genocide are the perfect tools for the prosecution to hold someone responsible for genocide, because the aider and abettor does not even need to know exactly what was being committed was genocide; according to the ICTY Trial Chamber in \textit{Furundzija}:

\begin{quote}
\ldots it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.\textsuperscript{151}
\end{quote}

In the case of \textit{Jelisić} the Trial Chamber held that the case of aiding and abetting must fail because the prosecution could not prove that there was a genocidal plan to

\textsuperscript{147} Blagojevic (Appeals Judgment) paras 280-281.
\textsuperscript{148} Krstić (Appeals Judgment) para 34.
\textsuperscript{149} Šimić (Appeals Judgment) para 86.
\textsuperscript{150} Krstić (Appeals Judgment) para 140; Krnojelac (Appeals Judgment) para 52; Semenza (Appeals Judgment) para 316.
\textsuperscript{151} Prosecutor v Furundzija (Judgment) IT-95-17/1-T (10 December 1998) (hereinafter `Furundzija (Trial Judgment)`) para 246.
exterminate a group under this standard\textsuperscript{152}. Hence, any genocidal campaign or plan or policy established serves as the very base for culpability for aiding and abetting. Therefore, the court went on (in ten paragraphs with a heading ‘The intention to commit “All-inclusive” genocide’) to establish the existence of genocidal plan to exterminate the Muslims in Brcko\textsuperscript{153}.

Thus, the courts use circumstantial and contextual evidence to prove the \textit{mens rea} of indirect liability or participation. The ICTY in the Krstić case concurred that the facts on the ground led to inference of the existence of genocidal intent but that Krstić’s own or direct intent could not be inferred from those factual circumstances\textsuperscript{154} and, therefore, he was found to have been indirectly responsible for genocide\textsuperscript{155}. Consequently, the court examined the events and established genocide in a general sense without any reference to any individualistic genocidal intent\textsuperscript{156} and then examined the defendant’s participation in those crimes under article 7(1) of the ICTY Statute, signifying that individualistic acts have no relevance in establishing genocidal background in indirect liability cases.

Therefore, in cases of indirect liability in which all the evidence of the general existence of a crime have relevance, their probative value arises from the lack of a need for any identifiable perpetrator of the crime. Most of those modes of liability can only be attached after the crime actually occurs. For instance, the ICTR in Akayesu held: ‘In order for an accused to be found guilty of complicity in genocide, it must, first of all, be proven beyond a reasonable doubt that the crime of genocide has, indeed been committed.’\textsuperscript{157} The plausibility of this agreement is evident from the ICTY’s decision to charge the majority of the defendants after Krstić as being indirectly liable for single-scheme genocide committed by the Serbian Forces against the Muslims\textsuperscript{158}. It must be noted that in cases of JCE III, there is no need for the genocidal plan as such; there only needs to be a foreseeable consequence\textsuperscript{159}.

\textsuperscript{152} Jelisic (Trial Chamber) para 87.
\textsuperscript{153} ibid paras 88-98.
\textsuperscript{154} ibid paras 140-144.
\textsuperscript{155} ibid paras 137-139.
\textsuperscript{156} Krstic (Trial Judgment) para 599.
\textsuperscript{157} Akayesu (Trial Judgment) para 530.
\textsuperscript{158} Prosecutor v Karadžić (Judgment) IT-95-5/18-T (24 March 2016) (hereinafter ‘Karadzic (Trial Judgment)’); Popovic (Trial Judgment); Tolimir (Trial Judgment); Blagojevic (Trial Judgment).
\textsuperscript{159} Prosecutor v Brđanin (Decision on Interlocutory Appeal) IT-99-36-A (19 March 2004) paras 5-10.
Accordingly, this is naturally a reason to present all the evidence of the alleged crime and all the contextual settings. There is no due process and individual rights restrictions which impose on the court the need to separate evidence into those facts which provide evidence of the general existence of a crime or collective act and those which relate to a specific individual. Therefore, elements such as scale, pattern, plan, or policy all become relevant, and no distinction is needed or necessary, so there is a good reason to list all the contextual elements.

In addition to the above, the need for the contextual elements of genocide becomes far more significant in cases of dispute among states on responsibility arising from the Genocide Convention\textsuperscript{160}. Establishing state responsibility for genocide cannot be made on basis of the specific intent of an individual; instead it must be made on the basis of contextual elements such as pattern of purposeful act directed against the destruction of a group\textsuperscript{161}. In the case of Croatia v Serbia, Croatia contended that the consistent nature of the crime of the Serbian Forces and the scale of the crime taken in consideration with the series of 17 factors shows that the crimes in question were committed with clear genocidal intent\textsuperscript{162}. Therefore, the contextual elements in cases of derivative liability represent the basis for conviction, but in cases of an individual accused they only represent part of the necessary evidence to make a factual allegation for the existence of the crime of genocide.

\textsuperscript{160} Bosnia and Herzegovina v Serbia and Montenegro ICJ Reports 2007 (I), para 182 and Croatia v Serbia para 128.
\textsuperscript{162} Croatia v Serbia (Judgment) para 441.
CHAPTER 7: CONCLUSION

Although the crime of genocide was conceived as an academic concept and subsequently rooted in social science, but all its constitutive elements in criminal law were limited to those provided for in the Genocide Convention’s definition. Bearing in mind the lack of reference to contextual elements in this definition and the verbatim reproduction of the same definition in all subsequent international instruments, it should be safe to assume that the question of context is a settled matter. However, the question has remained one of the most continuous issues dividing the academics and the judiciary.

The dividing line is most visible in the need for one camp to characterize the crime with collective violence and large-scale crimes organized or tolerated by state or state-like entities, preserving the crime’s historical roots. The other camp adhere to the criminal law principles in general and strictly interpret the crime, thereby preserving the literal meaning within the bounds of the penal law without venturing into the social science sphere. This difference of opinion is mirrored in the evidence being adduced to support each position, creating a legal impasse for any reconciliation on this inconclusive debate on the extent to which an individual génocidaire is required to act within a particular context.

This research found that in the early period prior to the codification, the concept of genocide was akin to the current definition of crime as used in the social sciences, hence, contextual elements were tacitly perceived and considered as a constitutive part of the concept. However, on the contrary, the codification history of the definition reveals deliberate efforts to depart from the old academic concept by putting the subjective side of the crime – specific intent – at the centre.

One of the contextual elements that surfaced at the time was the state involvement but this was defeated because the duty to prevent and punish was entrusted to states, primarily because there was very little hope for the creation of an international court with permanent jurisdiction to try these cases. So this eliminates the idea that the crime required state involvement or state-like entities. In addition is the fact that large-scale killing of human groups can occur without any state involvement or in a
state of complete institutional breakdown or in a total state of chaos without the existence of even any state-like entity. Moreover, there can be a situation in which the majority targets the minority who are in government with genocidal intent and succeeds\(^1\). In this case there is no state plan or policy to point at to establish the crime of genocide.

Furthermore, the international community was well aware of the difficulties in imposing an international jurisdiction even in the future because even the Nazi crimes were only successfully tried under the pretext of the war of aggression – a possibility famously referred to by Jackson in the London conference in 1945 – so the inviolability of sovereignty at that time could not possibly allow contemplation of international prosecution. Thus, the inclusion of state plan or policy goes against entrusting the prevention and punishment to the national courts. The fact that large-scale human destruction was being sufficiently addressed by the crimes against humanity and war crimes – even though in a narrower context of war – goes against the need to include elements such as pattern and magnitude as constitutive elements of genocide, simply to avoid assimilation with other crimes.

In this light, examination of the early concept of genocide yields hardly any results because the concept lacked legal maturity and was used by both legal practitioners and academics as a convenient descriptive concept that addresses mass crime. Therefore, judiciary attempts to refer to it in some instances such as at the Nuremberg trials can only be taken as expression of the gravity of the crime before the court. This popular belief at the time paved the way for genocide to be considered as a natural extension of crimes against humanity or an aggravated form of crimes against humanity. This trend is found to have continued even after closing the curtain on the Nuremberg and Far East trials. The ILC, in its attempts to research the genocide law, failed to make good use of the differences that exist between genocide as defined in the Convention and the socially or colloquially defined genocide\(^2\). The ILC can be forgiven insofar as it did not consider the human rights of the accused or

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\(^1\) A good example is an instance in 1998 where the Hutus in Burundi attacked the minority Tutsi who were in power: R Lemarchand, ‘Burundi: The Politics of Ethnic Amnesia’ in Helen Fein (ed), *Genocide Watch* (1992) 70, 80.

\(^2\) Report of the International Law Commission on the Work of its Forty-Eighth Session, p44-47, also see Chapter 3 section 3.3 of this thesis.
consider the issues of retrospectivity, but not for slipping into the association of genocide with mass crime and inclusion of unrelated contextual elements.

On the whole, the circumstances under which this crime came into existence, the codification history and the subsequent debate of the concept in the first five decades offer very little support for the inclusion of the contextual elements or determination of its current status. Hence, before the operationalization of the ad hoc tribunals, the definition of genocide had not established an autonomous existence. For this reason, there is no clear position that can be extracted from this period, either in the jurisprudence or the academic literature, mainly because the newly coined definition was in a state of hibernation during the said period.

In the early 1990s when the definition was put into practice by the ad hoc and the internationalized tribunals, they found it difficult to maintain the position that ‘contextual elements’ is irrelevant. Thus, on the basis of prevailing case law, today’s dilemma over the crime of genocide originates from the difficulty to separate the concept from its past. Thus, the arguments on its status are anchored on the discussions and interpretations of the constitutive elements of genocide and on the perceived nature of the crime which is rooted in the social definition of the crime of genocide. Hence, the indeterminacy of the meaning of the definition of genocide and its constitutive elements rendered the concept and nature of the so-called ‘contextual elements’ difficult to pin down in a unifying and inclusive definition.

These contradictions led, in turn, to vague and unsound legal stances upon practical application of the definition, thus producing an inconsistent approach bordering on illegitimate law making. This inconsistency is sustained particularly in the cases of the ad hoc tribunals which have failed to balance the rules of interpretation and the requirements of legality and consistency on the one hand and the practical assessment of what constitutes genocide and the necessary evidence for such assessment on the other. The failure to distinguish this evidentiary and functional role of the contextual elements from examination of the constitutive elements of the crime originated from the failure to distinguish between the contextual evidence with probative value on the existence of general genocidal campaign and that evidence with probative value on the individual génocidaire intent to commit genocide.
Amidst this confused state of affairs on the status of the contextual elements, the international community reached a consensus on establishing the ICC. The addition of genocide in the constitutive statute of this court represented a new phase for assessment of the contextual elements of the crime of genocide. The evaluation of the contextual elements in the light of the new regime of the Rome Statute is based on the consensual elaboration of its ‘Element of Crimes’ which explicitly require the accused to act in a ‘context of manifested pattern of similar conduct’. The addition of the contextual elements to the crime possesses a significant legal value or expression of *opinion iuris* as a result of the overwhelming state support, but analysis of this requirement reveals that this is only a jurisdictional element to limit the case flow to the ICC. The jurisdictional function of the contextual elements has become more important than before because of the coming into existence of the ICC with its open access and permanent jurisdiction on the crimes such as genocide.

Therefore, the research critiqued the ‘contextual elements’ and the need for them in chapter 6 and determined that there is a new case for the assessment of this context on two grounds: firstly, in the light of the two functional aspects represented in the recognition of the contextual elements as jurisdictional elements limiting the flow of cases to the ICC and creating a barrier to prevent trivialization of the court by the possibility of the so-called lone génocidaire; and secondly, as a necessary element when alleging the existence of the crime of genocide in general regardless of the individual génocidaire’s own acts, and as an indispensable element in establishing secondary liability cases.

Consequently, the creation of the ICC represents a new development in realm of the international criminal law and a significant breaking point with the genocide as defined in the Convention and the customary law by requiring the crime of genocide to take place in ‘a context of manifested pattern’. This is a deliberate departure from the customary norms as addressed by article 10 of the Rome Statute by asserting that nothing in the new statute ‘shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute’.

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4 This is the conclusion of Chapter 5, section 5.4.
5 See Chapter 6, section 6.5.1
6 See Chapter 6, section 6.5.2.
Hence, considering the current difficulties in application of international criminal jurisdiction, the political will, and financial capabilities, the international community decided to complement the crime of genocide with a contextual element, creating a new regime separating large-scale genocide from those of a lone génocidaire, thereby confining the latter to the domestic courts.

Thus, this thesis found that the debate on the contextual elements is wrongly centred on the whether they constitute part of the constitutive elements of the crime, whereas the debate should be centred on the practical implications and the functional aspects of the concept of contextual elements. The legal characterization of the ‘contextual elements’ of the crime of genocide is not confined to the realms of academic debates of the law in its abstract sense, but has practical implications for how the law is applied in individual cases. If looked at in such a way, it would be easier to accept the functional implications in the practical application of the crime of genocide and the legal discharge of the duties of judges, prosecution, and defence.

This new conclusion does not change the crime of genocide but traces a line for implication of the international criminal justice and leaves the crime intact in the customary law. All the confusion seems to be primarily originating from the difficulties to accept the possibility of a lone genocidaire and what Behrens called the temptation to revert to the historical roots of the crime.

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7 Robert Cryer, ‘The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision’ (2009) 7 Journal of International Criminal Justice 283, 295-6. Cryer was apprehensive of such regime but in the views of this writer it is the natural course of action that the court can take in light of the new development in international criminal law and the crime of genocide in particular to be applicable when it needed

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<td>Korey W</td>
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