

# **International Criminal Justice Series**

Volume 17

## **Series editors**

Gerhard Werle, Berlin, Germany

Moritz Vormbaum, Berlin, Germany

## **Series Information**

The *International Criminal Justice Series* aims to create a platform for publications in the whole field of international criminal justice. It, therefore, deals with issues relating, among others, to:

- the work of international criminal courts and tribunals;
- transitional justice approaches in different countries;
- international anti-corruption and anti-money laundering initiatives;
- the history of international criminal law.

The series concentrates on themes pertinent to developing countries. It is peer-reviewed and seeks to publish high-quality works emanating from excellent scholars, in particular from African countries.

## **Editorial Office**

Prof. Dr. Gerhard Werle  
Humboldt-Universität zu Berlin  
Faculty of Law  
Unter den Linden 6,  
10099 Berlin, Germany  
gerhard.werle@rewi.hu-berlin.de  
moritz.vormbaum@rewi.hu-berlin.de

More information about this series at <http://www.springer.com/series/13470>

Nasour Koursami

# The ‘Contextual Elements’ of the Crime of Genocide



ASSER PRESS



Springer

Nasour Koursami  
Applied Research  
National School of Administration  
N'Djamena  
Chad

ISSN 2352-6718 ISSN 2352-6726 (electronic)  
International Criminal Justice Series  
ISBN 978-94-6265-224-8 ISBN 978-94-6265-225-5 (eBook)  
<https://doi.org/10.1007/978-94-6265-225-5>

Library of Congress Control Number: 2017956311

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands <http://www.asserpress.nl>  
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the author 2018

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Printed on acid-free paper

This T.M.C. ASSER PRESS imprint is published by Springer Nature  
The registered company is Springer-Verlag GmbH, DE  
The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

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

# Acknowledgements

This book is a result of my doctoral research at the University of Edinburgh. During my research, I received invaluable support and input from various people who deserve special thanks.

I would first like to extend my heartfelt and sincere appreciation and gratitude to Dr. Paul Behrens for all the support and time he invested in me and my research during those long years. I am particularly grateful for all the lengthy discussions on various issues pertaining to this book. My undertaking of this project would not have been possible without his invaluable guidance. I have also benefited equally as much from the support of Dr. Stephen Neff, whose guidance helped me to shape coherent thoughts. Moreover, I would like to extend my warmest gratitude to the Old College Law School and library staff at Edinburgh University. In particular, I have benefited greatly from the practical advice of Dr. James Harrison.

Among the people without whom this book could not have seen the light of day is Dr. Abdoulaye Sabre Foudal, not only for his unwavering support, but also for my nomination as Director of Applied Research at the National School of Administration of Chad, and for granting me unrestricted leaves of absence to allow me to complete this book.

It has also been a pleasant experience to work with all the members of T.M.C. Asser Press and a great honour to publish this book in the International Criminal Justice Series.

I could not finish without extending my gratitude to my parents, who have sacrificed their own lives to give me everything in life. I know my father is watching over me with pride from his eternal home. Last, but by no means least, I express my deepest appreciation to my family for their forbearance and support. My heartfelt thanks go to my beloved wife and son, not only for their unconditional love, encouragement and patience, but also for the long hours they endured without my company.

# Contents

<b>1</b>	<b>Introduction</b>	1
1.1	Background	2
1.2	The Concept of Genocide: A Malformed Concept	3
1.2.1	The Early Academic Concept of Genocide	3
1.2.2	The Legal Definition of Genocide	5
1.2.3	The Social Scientists' Definition of Genocide	7
1.3	The Debate and Position of Context in the Legal Definition of the Crime of Genocide	9
1.4	Setting the Objectives of the Book	13
1.5	The Organization of the Book	14
1.6	Terminological References	16
	References	16
<b>2</b>	<b>The Nature and Difficulties of the Concept of 'Contextual' Elements</b>	19
2.1	Contextual Elements in International Crimes	20
2.1.1	The Concept of 'Contextual Elements': Conceptual Ground Clearing	20
2.1.2	The Different Roles of Contextual Elements: Constitutive, Jurisdictional or Evidentiary	23
2.1.3	The Different Facets of 'Contextual Elements'	26
2.1.4	Difficulties with the Concept of Contextual Elements	27
2.2	Does the Crime of Genocide Have a Context?	31
2.2.1	The Suggested Contextual Elements for Genocide	31
2.3	Why 'Contextual Elements'? The Rationale, Function and Significance of This Phrase	36
2.3.1	The Making of Core International Crimes	37
2.3.2	The Role of Context and Criteria for Selection of Core International Crimes	40

2.4	Concluding Remarks . . . . .	42
	References . . . . .	43
<b>3</b>	<b>Contextual Elements in the Early Legal Concept of Genocide . . . . .</b>	<b>45</b>
3.1	Introduction . . . . .	46
3.2	Mass Atrocities, State Crimes, and Conceptualization of Genocide in Positive International Law . . . . .	47
3.2.1	Genocide and Its Context in Lemkin’s Understanding . . . . .	47
3.2.2	Early Use of the Context of Genocide in Nuremberg and Subsequent Trials . . . . .	52
3.2.3	Context in the Codification of the Normative Concept of Genocide . . . . .	60
3.3	The Post-Codification Period: Maintaining the Distinction Between Holocaust-Based Conceptions and the New Formal Concept of Genocide . . . . .	74
3.3.1	Commission of Genocide and the Need for a Plan or Pattern of Similar Conduct . . . . .	74
3.3.2	The Scale of Genocide as a Qualifying Element of the Crime . . . . .	77
3.4	Concluding Remarks . . . . .	80
	References . . . . .	82
<b>4</b>	<b>Contextual Elements in Prevailing Case Law: Application of the Legal Definition of Genocide or an Interpretative Contortion . . . . .</b>	<b>85</b>
4.1	Introduction . . . . .	86
4.2	Does a Contextual Element Exist Under Prevailing Case Law? . . . . .	87
4.2.1	The Judicial Approach to the Wording of the Definition of Genocide . . . . .	87
4.3	Tweaking the Law to Fit the Facts: Going Beyond the Literal Meaning . . . . .	92
4.3.1	Sloppy Language and the Importation of Context Through the Back Door . . . . .	92
4.3.2	Blanket Application of the Inference Rule and the Leap into the Social Scientist’s Sphere . . . . .	94
4.3.3	The Need to Compartmentalize Contextual Factual Circumstances and the Legal Ingredients . . . . .	98
4.3.4	Rules of Interpretation and Their Role in Circumventing Contextual Elements . . . . .	102
4.4	Case Law of Internationalized and Domestic Tribunals . . . . .	108
4.5	Concluding Remarks . . . . .	113
	References . . . . .	114



**5 Towards a New Assessment? Contextual Elements in the Rome Statute** . . . . . 117

5.1 Introduction . . . . . 118

5.2 The Drafting History: Relationship Between the ‘Elements of Crimes’ and the Rome Statute . . . . . 120

5.2.1 The Last ‘Common Element’: Its Content and Aims . . . . . 120

5.2.2 ‘Elements of Crimes’: The Need and Relevance . . . . . 123

5.2.3 ‘Elements of Crimes’: Constituent and Binding or Legally Redundant Elements . . . . . 127

5.3 Phrasing and Interpretation . . . . . 131

5.3.1 The Words ‘Shall Assist’ in Article 9 of the Rome Statute . . . . . 131

5.3.2 The Words ‘Shall Apply’ in Article 21 of the Rome Statute . . . . . 135

5.4 The Case for New Assessment Under the New ‘Rome Regime’ . . . . . 138

5.4.1 The Jurisdictional Aspect of Contextual Elements . . . . . 139

5.4.2 Trivialization of the Court: Raising of the Threshold . . . . . 145

5.5 Concluding Remarks . . . . . 151

References . . . . . 152

**6 A Critique of the Contextual Elements** . . . . . 155

6.1 Introduction . . . . . 156

6.2 Clarity or Confusion: Do We Really Need Context for Genocide? . . . . . 156

6.2.1 The Doctrinal Debate . . . . . 156

6.3 The Case for Inclusion of ‘Contextual Elements’ as a Constitutive Element . . . . . 164

6.3.1 Adhering to the Historical Foundation of the Crime: The Difficulties of Recalibrating the Relationship with the Legal Definition . . . . . 164

6.3.2 Avoiding Trivialization of the Crime of Genocide . . . . . 168

6.4 The Case for Exclusion of ‘Contextual Elements’ as Constitutive Elements . . . . . 171

6.4.1 The Need for Clarity and Certainty . . . . . 171

6.4.2 The Need for Strict Interpretation . . . . . 175

6.5 Keep It Relevant: The Case for Reconciliation of ‘Contextual Elements’ with the Legal Definition of Genocide . . . . . 178

6.5.1 Manoeuvring the Ambiguities of Context: The Dividing Line Between Alleging and Proving Genocide . . . . . 178

6.5.2 Beyond the Individualistic Intent: Secondary Liability and the Need for Contextual Elements . . . . . 183

References . . . . . 187

<b>7 Conclusion</b> .....	191
References .....	195
<b>Table of Cases</b> .....	197
<b>Table of Treaties and Legislation</b> .....	203
<b>Bibliography</b> .....	205
<b>Index</b> .....	223

# Abbreviations

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

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