Swedish Defence University

A Crime that Leaves Much to be Desired

An analysis of the required intent for the crime of attacking civilians under article 8(2)(e)(i) of the Rome Statute

Master of Laws -
International Operational Law

Author: Linnea Hydén
Supervisor: Nobuo Hayashi
Word count: 15.939

Acknowledgments

It hit me recently that I have spent a clear majority of my life as a student. So call me sentimental, but with the end of my education drawing near, I want to take this opportunity to acknowledge the teachers who have made that time worthwhile.

To my middle school math teacher Anna Efremova. Thank you for throwing out the textbooks and showing me that, with the right conditions, school can be fun. You gave me a passion for creative problem solving and logical reasoning that has stayed with me since. I can still see traces of your teaching in everything I do, even if my passion for math specifically has fiddled out since. As it turned out, math isn't my favorite subject, you were simply my favorite teacher.

To my high school Swedish teacher Carin Eklund. Thank you for giving me an understanding of the power of language and how to use it to my advantage, a knowledge that has not let me down since. You saw a potential in my writing that I would never have embraced or thought worth developing further if not for your encouragement. I have you to thank for the standard of every piece of academic writing I have handed in.

To my university lecturer Nobuo Hayashi. After years of just going through the motions in university, I walked into a lecture in international responsibility and found a purpose with my education. Learning about international criminal law has allowed me to test the limits of my analytical skills. This is thanks to you. Thank you for having the patience to detangle the ball of yarn that is my thought process during not one, but two thesis-projects. I am grateful to have had a supervisor who enables all the far fetched and abstract ideas.

When I look at the final product of this master it becomes very obvious how much influence a good teacher really has. At its core, this thesis is simply a reflection of the subjects taught to me by my favourite teachers, logical deduction, language, and international criminal law.

Last but not least, to my family who has been there during all of school and all the teachers. Thank you for knowing that I could do this before the thought to try had yet to even cross my mind.

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1. Introduction

The International Criminal Court (ICC) represents one of the most impressive projects related to international law to this day. It presents a permanent judicial body with the function to prosecute the gravest of international crimes, such as genocide and particular war crimes.[1] The necessity of the ICC is concrete, while never being intended to replace domestic courts it provides a complement to the national judicial system, which supports the standard that the crimes should primarily be handled domestically.[2] Simultaneously, the court is able to ensure that the most grave violations do not go unpunished if the state is unable or unwilling to prosecute the crime.[3] The Rome Statute is the international treaty founding the court.[4] Considering that the ICC is the only of its kind, it is unsurprising that its Statute presents new developments and codification of international criminal law (ICL) that cannot be understood simply in accordance with previously established law and practice.[5]

One of these developments can be found in article 30 which represents the first attempt to codify the mental element in ICL.[6] It is difficult to view the existence of article 30 as anything but a noble intention on behalf of the drafters to provide as much clarity as possible to the Statute. However, considering the amount of research articles that tries to decodify particularly the mental element in relation to one aspect or another it must be concluded that the noble intention did not translate to a perfectly manageable article.

It is a common saying that every rule has its exceptions. Concerning article 30 the primary source for the confusion it causes can be directly connected to precisely the exception it also presents. That is to say, that the mental element of article 30 is only relevant 'unless otherwise provided'.[7] For

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[1] *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art.1 & 6-8

[2] Mark S. Ellis, 'The international criminal court and its implication for domestic law and national capacity building' (2002) 15 *Fla.J.Int'l.L.* 215. 221

[3] *Rome Statute* (n.1) art.17; *See* also Lori Sinanyan, 'The International Criminal Court: Why the United States Should Sign the Statute (But Perhaps Wait to Ratify)' (1999) 73 *S.Cal.L.Rev.* 1171. 1195

[4] *Rome Statute* (n.1) art.1

[5] M. Cherif Bassiouni, 'Codification of international criminal law' (2016) 45 *Denv.J.Int'l L. & Pol'y*. 333. 350

[6] *Rome Statute* (n.1) art.30; Gerhard Werle & Florian Jessberger, 'Unless otherwise provided': Article 30 of the ICC statute and the mental element of crimes under international criminal law' (2005) 3.1 J.Int'l.Crim.Just. 35. 36

[7] *Rome Statute* (n.1) art.30

being such a tiny disclaimer, the relevance of its implications cannot be stressed enough. Arguably, every reference to intention in the Rome Statute outside of article 30 raises the possibility of representing an 'otherwise provided' mental element. Additionally, the power to otherwise provide is not necessarily limited to the Rome Statute itself but can be extended to other sources such as the Elements of crime document (EOC), a tool meant to aid the court with the interpretation of the crime covered by the Statutes jurisdiction.[8] Further complicating the matter is that, despite having decided to include a default mental element, the Rome Statute does not fall short of references to mental states outside of that provision that can possibly be interpreted as otherwise providing.[9]

One of these provisions is the prohibition against attacking civilians in a non-international armed conflict (NIAC) in article 8(2)(e)(i). The protection granted to civilians during armed conflicts represents a cornerstone of international humanitarian law (IHL). Consequently, it is not surprising that the Rome Statute includes provisions which prohibits the act of attacking civilians. However, what is cause for confusion is the article seemingly including an additional requirement unrelated to the corresponding IHL provisions, by requiring that the attack should be carried out 'intentionally'.[10] Requiring that the attack is carried out intentionally presents the possibility that the article otherwise provides a mental element that needs to be interpreted independently from the default definition derived from article 30.[11]

In the EOC the intentionality of the crime is extracted and clarified to be related specifically to civilians being the object of the attack.[12] This thesis sets out to answer the question,

- Does article 8(2)(e)(i) of the Rome Statute demand the perpetrator to possess direct intent in relation to civilians being the object of the attack?[13]

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[8] ICC, *Elements of Crimes* (2011) ICC-ASP/1/3 (part II-B) (EOC) art. 8(2)(e)(i); Werle & Jessberger (n.6) 43
[9] For example, *Rome Statute* (n.1) "for the purpose of" art.25(3)(c), "the aim" art.25(3)(d), "intentionally" art.70
[10] *Rome Statute* (n.1) art.8(2)(e)(i)
[11] Marta Bo, 'Autonomous Weapons and the Responsibility Gap in light of the Mens Rea of the War Crime of Attacking Civilians in the ICC Statute' (2021) 19.2 J.Int'l.Crim.Just. 275, 289
[12] *EOC* (n.8) art.8(2)(e)(i)
[13] *Note*, terminology, direct intent and oblique intent. *see* Will Chen 'Differentiate between 'direct intention' and 'oblique intention' in criminal law' (Lawprof) https://lawprof.co/flashcard/differentiate-between-direct-intention-and-oblique-intention-in-criminal-law/ accessed 28 April 2026

1.1. Purpose

The ICC serves an important purpose to the international community. However, its ability to continue to do so risks being compromised if the court's integrity is questioned.[14] Recently, the ICC has been facing criticism based on the fact that the cases brought up in the court display a bias.[15] Considering this criticism it is more relevant than ever that the way the court interprets and applies the law emits legitimacy.[16] One of the most relevant aspects of legitimacy is legal reasoning in the form of, for example, legal interpretation.[17] First and foremost, the written text of the law provides the basis of the provisions' meaning. However, there are reasons to interpret legal doctrines outside of a strict textual approach. Textually, laws are often unspecific and general to cover a broad spectrum of actions and, therefore, it is often necessary to take into account aspects such as the purpose of a treaty to interpret the law properly.[18] Consequently, judicial interpretations of legal text can deviate from a strict textual understanding of a provision but must be justified in other relevant legal reasoning when doing so.[19] Interpretations broadening the scope of a crime are helpful in relation to the desired result of holding perpetrators accountable. Simultaneously, an interpretation too disconnected from the written provision without justification risks doing more harm than good by undermining the agreed upon rules regulating the system providing those provisions with power in the first place.

1.2. Structure

This thesis is split into six analytical sections.

Section 2-4 provides an overview of the mental element and the relevant aspects to consider in order to understand it. This includes a general understanding of article 30, the relevance to

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[14] Gerhard Werle & Florian Jessberger *Principles of international law* (4th ed Oxford 2020) para.109-111

[15] *See* for example Rimsha Sayyed 'The International Criminal Court's Legitimacy Problem: Why Canada Cannot Afford to Look Away' (Open Canada 7 January 2026) https://opencanada.org/the-international-criminal-courts-legitimacy-problem-why-canada-cannot-afford-to-look-away/ accessed 1 May 2026; Geoff Dancy, et al. 'What determines perceptions of bias toward the International Criminal Court? Evidence from Kenya' (2020) 64.7-8 *J.Confl.Resolut* 1443

[16] Allen Buchanan & Robert O. Keohane. 'The legitimacy of global governance institutions' (2006) 20.4 *Ethics.Int.Aff* 405.

[17] Mikael Madsen, et. al. 'Backlash against international courts: explaining the forms and patterns of resistance to international courts.' (2018) 14 *Int.J.Law.Context* 197, 212

[18] David S. Jonas & Thomas N. Saunders. 'The object and purpose of a treaty: Three interpretive methods' (2010) 43 *Vand.J.Transnat'l l.* 565.

[19] Tilmann Altwicker, et al. 'Winning arguments about rights: an empirical analysis of argument construction at the European court of human rights' (2024) 1.2 *EJELS* 207, 209

consider the EOC, and what basis exists that the mental element of article 8(2)(e)(i) specifically deviates from the default one in article 30.

Section 5 analyses the mental element specifically in the context of the *Katanga* judgments interpretation

Section 6 analyses the crime of attacking civilians from a broader perspective. It covers how the crime being a conduct crime effects how it should be understood both in relation to the, seemingly, corresponding crime in the Ad Hoc tribunals as well as relevant IHL provisions

In contrast, Section 7 solely focuses on the mental element in the vacuum of the EOC, trying to establish a consistent understanding of what is meant when an element demands the perpetrator to have 'intended' a result.

2. The mental element in the Rome Statute

It is not possible to have any rewarding discussion regarding the mental element in relation to the Rome Statute without taking article 30 into account. As the Statutes codification of a default mental element the article states that, 'unless otherwise provided,' crimes only fall under the court's jurisdiction if they are committed with both intent and knowledge.[20] The article proceeds to provide a definition of what is required to fulfil these two criterions.

Paragraph 30(2), concerning intent, splits the phenomenon up into two different aspects. Conduct related intent in subparagraph 30(2)(a) and consequence related intent in 30(2)(b).[21] The conduct related intent concerns whether the perpetrator meant to carry out the action resulting in the material element of the crime. This intention demands the conduct to be a voluntary action. For example, that the perpetrator meant to push the trigger of a gun, and it was not an unintentional reflex. The perpetrator only needs to have been aware of the conduct being able to constitute a crime. It is not necessary to show that the perpetrator had any knowledge towards the bullet actually killing someone.[22] Paragraph 30(2)(b) covers the more commonly associated interpretation of intention in relation to criminal law, intent towards the consequences. It states

[20] *Rome Statute* (n.1) art.30

[21] *ibid*

[22] Albin Eser, 'Mental elements–Mistake of fact and mistake of law.' in Antonio Cassese, Paola Gaeta & John RWD Jones (eds) *The Rome statute of the international criminal court: A commentary*. (2002 Oxford University Press) 889-948. 913

that the perpetrator must have either meant for the consequences to happen or been aware that it would occur in the ordinary course of events.[23] According to the *Lubanga* appeals judgement the phrase "aware that it would occur in the ordinary course of events" demands that the perpetrator was virtually certain that the crime would materialise as a consequence of their action.[24] In accordance with this determination, the sufficient mental element of the Rome Statute is constricted to direct intent, meaning to cause a consequence, and oblique intent, virtual certainty a consequence will occur.[25] Consequently the Rome Statute entails a higher standard for the mental element than the Ad Hoc tribunals[26] and the general standard of domestic courts when implementing the provisions of the Statute in its own legal system.[27] However, since the Rome Statute was created with the intention to prosecute only the most serious violations of international crimes, the fact that the required intent for a crime can exceed the customary standard does not contradict the Statutes purpose.[28]

Paragraph 30(3) concerns the necessary knowledge. Similarly to the consequence related intent, the required knowledge is also split into two different options. That the perpetrator was aware of certain circumstances or was aware that the consequences would occur in the ordinary course of events.[29] The second alternative thus reinforces the limitations of direct and oblique intent as found in the knowledge-based intent in article 30(2)(b).[30]

2.1. "Unless otherwise provided"

By specifying that article 30 provides necessary mental elements of a crime "unless otherwise provided" the Statute opens up the possibility of Lex Specialis. That is to say, that if a crime gives a more specific description of the required mental element this specification overrides the general

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[23] *Rome Statute* (n.1) art.30(2)(b)
[24] *Prosecutor v. Thomas Lubanga Dyilo* (Judgment on the Appeal) ICC-01/04-01/06 A 5 (1 December 2014) para.447
[25] Werle & Jessberger (n.6) 42
[26] When referencing Ad hoc tribunals this thesis refers to the International Criminal Tribunal of Yugoslavia (ICTY), The International Criminal Tribunal of Rwanda and the Special Court for Sierra Leone
[27] Werle & Jessberger (n.6) 42
[28] *Rome Statute* (n.1) art.1
[29] *Rome Statute* (n.1) art.30(3)
[30] Johan D. Van der Vyver 'The International Criminal Court and the concept of mens rea in international criminal law' (2004) 12 *U.Miami.Int'l & Comp.L.Rev.* 57, 102

mental element provided by article 30.[31] The exception is essential for the Statutes capability to include, for example, the crime of genocide in its jurisdiction since the crime of genocide depends on demanding a specific genocidal intent.[32] However, in relation to other crimes where the necessary intent is not as institutionalised as the one necessary for genocide, the provision risks causing confusion and uncertainty as to when a crime otherwise provides a mental element and what the new mental element should be understood to require. Since article 30 provides a default mental element should every reference to a mental state outside of that article be considered to 'otherwise provide'? And is the ability to 'otherwise provide' limited to the statute itself?

Article 21 of the Rome Statute provides a hierarchical list over sources that should be applied by the court in their judgments. On the top of that list, in article 21(1)(a), is the Statute itself, its rules of procedure and evidence, and the EOC document.[33] As all the listed sources have been provided a similar status of influence it is reasonable to conclude that the EOC, like the Statute itself, is able to 'otherwise provide' for the mental element. This understanding is supported by the introduction of the EOC which states that,

> "Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies."[34]

Further supporting this stance is the decision made by the pre-trial chamber in *Lubanga* which determined that, concerning the crime of enlisting children covered by article 8(2)(b)(xxvi) and 8(2)(b)(vii), the 'should have known' standard regarding the children's age provided by the article's third element makes a lower knowledge than the one found in article 30 adequate.[35] Consequently,

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[31] Nancie Prud'homme, 'Lex specialis: oversimplifying a more complex and multifaceted relationship?' (2007) 40.2 *Isr.Law.Rev* 356, 367

[32] *Convention on the Prevention and Punishment of the Crime of Genocide*, (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide convention) art.II

[33] *Rome Statute* (n.1) art.21(a)

[34] *EOC* (n.8) General Introduction

[35] *Prosecutor v. Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) para.359; *Note* a later stage of the proceeding determined that it was necessary to prove the higher standard of knowledge in art.30. However, this was based on the applied mode of liability. Thus, EOCs ability to 'otherwise provide' was never opposed *see Prosecutor v. Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) para.942-944

to interpret the necessary intent demanded by a specific crime, both its interaction with article 30 as the default element as well as any influence from the EOC must be taken into consideration.

3. The Elements of Crime document

Considering the EOCs ability to influence the mental element, it is important to understand the function and capabilities of the document to be able to properly take it into account when trying to provide a proper interpretation.

3.1. What is the Elements of Crime document?

The EOC document is an interpretative tool meant to aid the court in interpreting the crimes covered by article 6-8 of the Statute.[36] The ICC is a judicial institution established by a multitude of states. However, the legal power of the court is outside the influence of these states and left to the judges appointed by the court. The State parties influence through negotiating the more precise understandings of the crimes covered by the court's jurisdiction in the EOC was one way to give the States a bit more influence over the courts future practice.[37] In favour of comprehensibility and avoiding ambiguity the elements a crime consists of are listed in accordance with a standardised structure.[38] The Rome Statute divides the material elements into three distinct categories: conduct, consequences and circumstances, their elements in the EOC are generally listed in that precise order. Any specific mental element is listed directly after the material element it concerns. Contextual elements of a crime are listed last.[39]

3.2. Interpreting the Elements of Crime

The EOC, unlike the Statute itself, is not a treaty. It cannot be signed or ratified by state parties and does not have the binding power of the Statute.[40] As indicated by the name, the rules of interpretation provided by the Vienna Convention on the Law of Treaties (VCLT) only apply to treaties.[41] Therefore, they cannot automatically be relied upon to support the legitimacy of

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[36] *Rome Statute* (n.1) art.9
[37] Herman von Hebel 'The decision to include the elements of crime in the Rome Statute' Roy S. Lee (Ed.) *The International Criminal Court* (2001 Transnational Publisher inc) 7
[38] Maria Kelt & Herman von Hebel 'General Principles of Criminal Law and Elements of Crimes' in Lee (n.37) 21
[39] *EOC* (n.8) General Introduction
[40] Maria Kelt & Herman von Hebel 'What are the elements of crime' in Lee (n.37) 17
[41] *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art.1

interpreting an element in EOC by, for example, comparisons between specific phrases or articles. However, that the EOC exists in a vacuum completely devoid from any correspondence to interpretative standards of legal interpretation does not seem suitable for the kind of document that it is. One of the arguments in favour of creating the EOC was that the formulation of the crimes the Statute was vague enough to be perceived as contradicting the principle of legality, nullum crimen sine lege, causing a risk to violate human rights.[42] By providing more precise elements, the EOC would more properly protect the rights of the accused and prevent political manipulation.[43]

This argument suggests that the EOC has sufficient influence to be regarded as having legislative power to provide specifics on the law although not being binding. Consequently, seemingly elevating the status of the EOC from solely an interpretative tool to a legal document in its own right, although subsidiary to the Statute.[44] A standpoint that appears to be corroborated by the ICC, as they proscribe the EOC with great binding power, limiting its application only to if it actively contradicts the statute.[45] Furthermore, while being binding on member states through the process of being adopted by the security council, the statutes of the ICTY and ICTR are not proper treaties possible to be signed or ratified by states.[46] Despite this, the trial judgment in the case of *Tadić* determined that, as a reflection of customary law, the rules on treaty interpretation should be applied to understand any norm-creating instrument.[47] Considering the relevance ascribed to the EOC it is reasonable to conclude that it has sufficient influence to be considered a norm-creating instrument and should hence be interpreted in accordance with customary treaty interpretation.

The practice of the ICC also suggests that the EOC should be interpreted in accordance with customary interpretative principles. Trial chamber I in *Lubanga* determined that the interpretation

[42] von Hebel (n.37) 5
[43] von Hebel (n.37) 6
[44] See *Rome Statute* (n.1) art.9(3)
[45] *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on Warrant of Arrest) ICC-02/05-01/09 (4 March 2009) para.128
[46] Werle & Jessberger (n.14) para.227
[47] *Prosecutor v. Duško Tadić* (Judgement Appeals Chamber) IT-94-1-A (15 July 1999) para.303

of the phrase "conduct took place in the context of and was associated with an armed conflict not of an international character" constituting a contextual element for war crimes in NIACs, was not necessary to interpret thoroughly as the meaning of the provision was plain and ordinary.[48] This conclusion relies on applying general principles of legal interpretation.[49] Furthermore, pre-trial chamber I in *Abu Garda* noted that the third element of intentionally directing attacks against peacekeepers under article 8(2)(e)(iii) was similar to the third element of intentionally directing attacks against civilians. Pre-trial chamber Il in *Katanga* had already analysed the relevant intent required by the specific element in relation to the latter crime.[50] In light of this, the chamber in *Abu Garda* did not find it necessary to consider the subject further, but decided that the elements were identical enough to apply the previous case's interpretation.[51] This deduction also depends on the EOCs ability to be interpreted according to established standards of legal interpretation.[52] Consequently, it appears that the practice of the court is in agreement that the EOC should be understood in accordance with general principles of interpretation.

Additionally, the purpose of the EOC was that it would be able to aid the ICC in interpreting the necessary material and mental elements of a crime. Hence, it would be contradictory if the document itself did not comply with general principles of interpretation.[53] If the meaning of the EOCs elements are in themself ambiguous they are of little help to clear up any ambiguity originating in the Rome Statute.

[48] *Lubanga* judgment (n.35) para.571
[49] *VCLT* (n.41) art.31
[50] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) ICC-01/04-01/07 (30 September 2008) para.271
[51] *Prosecutor v. Bahar Idriss Abu Garda* (Decision on the Confirmation of Charges) IÇC-02/05-02/09 (8 February 2010) para.93
[52] *VCLT* (n.41) art.31
[53] This is a bit of a catch 22 since considering the treaties purpose is in itself an interpretative rule *See VCLT* (n.41) art.31

3.2.1. Relevant customary standards of interpretation

The rules on treaty interpretation in the VCLT are considered customary and hence applicable when interpreting the EOC.[54] Perhaps most relevant for this thesis, is the guidelines the VCLT offers through its rules concerning how textual aspects and nuances should be approached in legal interpretation. This includes that a treaty should be read in good faith, where words should be understood in accordance with their ordinary meaning and the document's object and purpose.[55] Thus, when interpreting the EOC, it should be in accordance with context that it is intended to function as an interpretative tool. Furthermore, treaties should not be fragmentised in their interpretation but be read as a whole.[56] The standard of consistent meaning is interconnected to this rule as terms and phrases should be understood in the context of the document in its entirety and not be given deviating meanings without clear reason.[57] Also covered by good faith, a treaty should be interpreted in accordance with the principle of effectiveness. The principle of effectiveness states that legal text and provisions should have a purpose. If an interpretation results in redundancy, another possible interpretation which does not yield such a result should be favoured.[58]

The VCLT demotes the necessity to consider the intention of the drafters, by for example considering preparatory works, to a secondary rule of interpretation.[59] However, this is not reflected by customary law, making it an equally relevant aspect to consider in interpreting the EOC. The dilemma represented by considering the drafter's intention is that the EOCs content represents the compromises resulting from negotiations between many different states.[60] It can therefore be difficult to extract the precise intended function of any given element as it is likely that the negotiating states did not agree on it.[61]

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[54] *See* referenced evidence in Panos Merkouris, 'Interpreting the customary rules on interpretation.' (2017) 19.1 *ICLR* 126, fn.2.
[55] *VCLT* (n.41) art.31(1)
[56] *VCLT* (n.41) art.31(2)
[57] Ulf. Linderfalk, *On the interpretation of treaties: the modern international law as expressed in the 1969 Vienna Convention on the Law of Treaties*. (2007 Vol.83 Springer) 107
[58] ILC, 'Draft Articles on the Law of Treaties with commentaries' (1966) in *Yearbook of the International Law Commission*, 1966, vol II, (VCLT Commentary) art.28 commentary 6
[59] *VCLT* (n.41) art.32
[60] Merkouris (n.54) 154
[61] Linderfalk (n.57) 32

4. The mental element and article 8(2)(e)(i)

4.1. Does article 8(2)(e)(i) 'otherwise provided' a mental element

As established, it is irrelevant to discuss what intent a crime requires unless it otherwise provides a mental element in accordance with article 30. If not, then the default mens rea is the applicable one.[62] Arguably, article 8(2)(e)(i) otherwise provides a mental element separate from article 30 in the Rome Statute itself as the formulation of the article is as follows,

> *Intentionally* directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities[63]

Since article 30 already establishes that crimes should be committed with intent, the specification of intentionality appears redundant if it only reinforces the necessary intention already required by the default mental element.[64] By aspiring towards an interpretation aligning with the VCLT principles, which applicability is free from ambiguity since the Rome Statute is a treaty, it must hence be determined that 'intentionally' in the crime otherwise provides a mental element distinguished from article 30. Otherwise, it contradicts the principle of effectiveness as it lacks a purpose that adds anything to the provision.[65]

As concluded in section 2.1., the elements of the crime listed in the EOC must also be taken into consideration to determine if an article otherwise provides a mental element. Article 8(2)(e)(i) consists of the following elements,

> 1. The perpetrator directed an attack.
> 2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
> 3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
> 4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

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[62] Werle & Jessberger (n.6) 40
[63] *Rome Statute* (n.1) art.8(2)(e)(i) (emphasis added)
[64] Roger S. Clark, 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences' (2001) 12 *Crim.LF* 291, 315
[65] VCLT commentary (n.58)

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[66]

Of particular relevance for the current research question is the third element. As established in section 3.2.1,. the principle of effectiveness should be applicable to the EOC through its status as custom. Accordingly, element 8(2)(e)(i)(3) should be interpreted as providing a mental element separate from the default one in article 30. The element is a manifestation of the intentionality referenced in the crime itself, although with the added context of precisely what this intentionality concerns. Thus, a central aspect of understanding the intent of article 8(2)(e)(i) is understanding what is meant by the perpetrator intending the civilian population to be the object of the attack. [67]

4.2. Theories on 'intentionality'

There are two dominating theories regarding the meaning of intentionality when referenced in a war crime.[68] The first theory states that the required intention should be understood in accordance with the default intent in article 30.[69] That is to say, that both direct and oblique intent is sufficient to show the perpetrators intention towards the civilians being the object of the attack.[70] This theory relies on the fact that article 30 gives the Statute a specific definition of intention. Hence, since principles of treaty interpretation states that words should not be given deviating meaning if there is no clear reason for it, any mention of 'intention' should be interpreted in accordance with its definition in article 30.[7172]

The other theory states that any reference to intention should be considered as otherwise providing a mental element that is not synonymous with the definition in article 30. The ordinary meaning of 'intention' differs in law from other common uses of the phrase. Ordinarily, intention is not equivalent to knowing that something will occur but only refers to something a person *wants* to

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[66] *EOC* (n.8) art.8(2)(e)(i)
[67] Werle & Florian (n.14) para.1416
[68] *Note,* this is a generalisation for the sake of this thesis. There is much nuance within these two simplified theories.
[69] Tom Dannenbaum, 'Criminalizing Starvation in an Age of Mass Deprivation in War: Intent, Method, Form, and Consequence' (2022) 55 *Vand.J.Transnat'l.L.* 681. 716,
[70] *Rome Statute* (n.1) art.30(2)
[71] *VCLT* (n.41) art.31; Richard Gardiner *Treaty interpretation*. (2015 OUP Oxford) 169
[72] Dannenbaum (n.69) 717.

occur.[73] Since the definition of intent in article 30 aligns with its associated ordinary meaning in the legal sphere, this cannot also be the meaning of the word when it serves the purpose of 'otherwise providing'. Instead, the ordinary meaning of intention in a context outside of law should be applied. Consequently, the perpetrators intention towards making civilians the object of attack is a purposive intention, excluding situations where this was a foreseeable or even unavoidable outcome but not necessarily a desired one.[74]

5. Katanga, *the* previous decision

Article 21(2) of the Rome Statute states that the ICC may apply the interpretations on rules and law made in previous decisions.[75] In relation to article 8(2)(e)(i), the case of *Katanga* provides the most elaborate interpretation of the crime, which has subsequently been referenced and relied upon by other judgments.[76] Trial chamber II in *Katanga* determined that article 8(2)(e)(i) does not demand that the perpetrator possessed direct intent towards civilians being the object of the attacks. Instead, the trial chambers stated that the referenced 'intentionality' in element 8(2)(e)(i)(3) is a repetition of the conduct related intent in article 30(2)(a).[77] This interpretation leaves the necessary intent toward the consequences unspecified which means that the default mental element of article 30(2)(b) is to be applied, making both direct and oblique intent sufficient.[78]

5.1. Basis to question the judgment

Discussing the necessary mental element required by article 8(2)(e)(i) might appear unnecessary as the court has already provided a ruling on the matter in *Katanga*. Since article 21 of the Rome Statute establishes that previous determinations by the court may be applied in future cases it would appear that this topic has been exhausted.[79] However, the rationality of legal argumentation

[73] Cambridge Dictionary 'Intent' https://dictionary.cambridge.org/sv/ordbok/engelska/intention accessed 29 April 2026
[74] i.e. direct intent *see* Werle & Jessberger (n.14) para.1491
[75] *Rome Statute* (n.1) art.21(2)
[76] For example, *Prosecutor v. Bosco Ntaganda* (Judgment) ICC-01/04-02/06 (8 July 2019); *Prosecutor v. Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15 (4 February 2021)
[77] *Prosecutor v. Germain Katanga* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) para.806
[78] *Katanga* (n.77) para.804
[79] *Rome Statute* (n.1) art.21(2)

providing the foundation for judicial interpretations are central to ensuring the courts legitimacy.[80] Since the Rome Statute is one of a kind, the ability to rely on previous determinations risks making the court into a kind of echo-chamber, where previous determinations are simply applied without being assessed critically first.[81] Consequently, it becomes more relevant to analyse how the original judgement reasoned to reach its conclusion on what is the correct interpretation. Additionally, it is clear in article 21 that previous decisions fall under both the Statute itself, as well as the EOC in the hierarchy of applicable law.[82] Therefore, it is not irrelevant to question decisions made by the court. Especially so, if they appear to contradict the primary sources which take precedence and should be applied independently and not through the lens of previous decisions.[83]

5.2. Conduct, consequence or circumstance?

According to the chamber in *Katanga,* directing an attack towards civilians does not demand any particular intent.[84] As mentioned, the judgment justifies the adequacy of oblique intent in article 8(2)(e)(i) by interpreting element 8(2)(e)(i)(3), stating that the perpetrator needs to have intended civilians to be the object of the attack, as a repetition of conduct related intent in article 30(2)(a).[85] Any reflection on this argument makes it clear that it entails a number of inconsistencies. Firstly, it is noteworthy that the interpretation provided by *Katanga* doesn't confer with either of the previously mentioned academic theories on how references to 'intention' could be understood. Even the theory allowing for oblique intent to be sufficient comes to this conclusion by understanding 'intention' in accordance with the entirety of article 30's definition of the term.[86] That is to say, not limiting it to subparagraph 30(2)(a) and conduct related intent.

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[80] Altwicaker (n.19) 209

[81] *See* for example, *Ntaganda* (n.76) para.921 not reflecting on the result of relying on *Katanga* the inclusion of indiscriminate attacks in art.8(2)(e)(i) while simultaneously stating that the obligation of precaution is also sufficient, contradicting *Katanga see* (n.77) fn.1851

[82] *Rome Statute* (n.1) art.21, Contrast the Statute itself and the EOC *shall* be applied to previous be applied, showing that the first sources should take priority; Stephen Bailey. 'Article 21 (3) of the Rome Statute: A plea for clarity.' (2014) 14.3 *Int.Crim.Law Rev* 513, 520

[83] *Al Bashir* (n.45) para.128

[84] *Katanga* (n.77) fn.1851

[85] *Katanga* (n.77) para.806

[86] Dannenbaum (n.69) 716,

Secondly, and of more legal relevance, the court's argument in *Katanga* represents an obvious contradiction to the principle of effectiveness. Every crime must include a conduct element.[87] Additionally, unlike subparagraphs 30(2)(b) and 30(3) the conduct related intent does not provide multiple alternatives to how it can be fulfilled.[88] Hence, the conduct intent is straightforward enough to conclude that it should never be necessary to reinforce that article 30(2)(a) in particular should be applied.[89] Since the *Katanga* interpretation of element 8(2)(e)(i)(3) renders it entirely redundant, another coherent interpretation that does not yield this result should be favoured.[90]

5.2.1. Everything is conduct?

Trial chamber II in *Katanga* based their conclusion of 8(2)(e)(i)(3) being a repetition of article 30(2)(a) on description of how the elements are structured given in the EOCs introduction. That is to say, that any specific mental element provided should be understood in correspondence with the element it proceeds.[91] The chamber determined that element 8(2)(e)(i)(2) concerned conduct and thus, the specified intent in the following element should be interpreted accordingly as conduct related intent.[92] While the logical reasoning supporting the conclusion is not in itself incorrect it relies on a fundamental misconception of element 8(2)(e)(i)(2) as conduct. Firstly, in relation to the structure of the elements, the introduction of the EOC also states that elements concerning conduct, consequences and circumstances are listed in that order.[93] While this is rather a guideline than a strict rule it appears contradictory to the general structure that the second element of the crime would concern the conduct. Additionally, it contradicts a previous statement made in the same judgement which provides that the conduct of the crime is that the perpetrator directed the attack, as covered by element 8(2)(e)(i)(1).[94] If one is to understand the *Katanga* trial judgment all the elements beside the contextual one relates in one way or another specifically to the conduct of the crime.

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[87] M. Cherif Bassiouni, *The statute of the international criminal court: a documentary history*. (1999 Transnational Publishers imprint Vol.2.) 382
[88] *Rome Statute* (n.1) art.30
[89] Bo (n.11) 285
[90] VCLT commentary (n.58)
[91] *EOC* (n.8) General Introduction
[92] *Katanga* (n.77) para.806
[93] *EOC* (n.8) General Introduction
[94] *Katanga* (n.77) para.805;

Furthermore, the material element of conduct demands an action on behalf of the perpetrator.[95] Linguistically, actions are conveyed through dynamic verbs, of which there are none in element 8(2)(e)(i)(2).[96] Consequently, it must be determined that the element cannot establish a conduct.

5.2.2. So, what are the elements?

Having concluded that 8(2)(e)(i)(2) is not a conduct element the question stands as to what the element actually represents. Establishing what the different elements cover aids in understanding how they interact with each other, consequently shining light on specifically what the mental element in 8(2)(e)(i)(3) entails. Element 8(2)(e)(i)(1) presents a necessary action and can, hence, be concluded to provide the conduct.[97] Element 8(2)(e)(i)(2) covers what status the group or person the attack was directed against must have had for it to be prohibited. The subparagraph, hence, concerns a circumstance element.[98] It is sometimes difficult to distinguish between material elements. The first element arguably presents a consequence in itself, an attack being directed. However, when reading the two first elements together another consequence can be deduced, the attack being directed against civilians. [99]

According to the element's structure, a specific mental state should be listed immediately after its relevant material element.[100] For circumstances, the relevant mental element is always knowledge and not intent.[101] Since element 8(2)(e)(i)(2) concerns a circumstance and element 8(2)(e)(i)(3) intent, the intent in question cannot be explained by the interaction between the elements. Thus, 8(2)(e)(i)(3) must be understood as its own mental element, unrelated to any material element.[102] This correlates with the consequences the perpetrator needs to have intended, that is to say, civilians being the object of the attack. It is possible for something to be the object of an attack

[95] Or omission, Bassiouni (n.87) 382
[96] University of Victoria 'Stative and dynamic verbs' (Continuing studies@UVIC) https://continuingstudies.uvic.ca/elc/studyzone/410/grammar/stat accessed 2 May 2026
[97] *Katanga* (n.77) para.805, shown by the dynamic verb 'directed'.
[98] Kelt & von Hebel (n.38) 24
[99] Every effect ensuing from a conduct is a consequence *see* Eser, (n.22) 914, However, in itself element 8(2)(e)(i)(2) is strictly a circumstance, compare to, *EOC* (n.8) 8(2)(b)(vii)-1(4) for a result element
[100] *EOC* (n.8) General introduction
[101] Eser (n.22) 899
[102] Dannenbaum (n.69) 712

without being harmed. However, by intending something to be the object of attack the envisioned outcome is a harmful one.[103] Article 8(2)(e)(i) does not demand a harmful result on the civilians the attack targeted. If the attack was directed against civilians the material element of the crime has been fulfilled regardless of whether the attack failed to cause any harm to civilians.[104] Hence, the crime of attacking civilians in the Rome Statute represents a conduct crime.

5.3. Why does element 8(2)(e)(i)(3)'s exist?

In *Katanga* the chamber considered that the inclusion of element 8(2)(e)(i)(3) is justified, not by its purpose to enforce an additional subjective element to the crime, but simply as a consequence of the Statute phrasing the crime as "*intentionally* directing an attack".[105] However, the relevance of this argument is diffuse as it remains uncertain why the inclusion of intentionally in the article would not, in itself, otherwise provide an additional mental element. Article 70, prohibiting offences against the administration of justice, states in its chapeau that all crimes listed in its subparagraphs need to be committed 'intentionally'.[106] Trial chamber VII in *Bemba et al.* determined that this inclusion did not otherwise provide in relation to article 30, but that both direct and oblique intent was sufficient.[107] By considering this assessment it is possible to argue that a similar understanding should be applied to the use of 'intentionally' in the prohibition against attacking civilians. That is to say, simply referencing that the crime should be committed intentionally is not sufficient to be considered otherwise providing a mental element. However, the EOC does only cover the crimes under article 6 to 8. Crimes against the administrative justice does hence not fall within its scope. Consequently, in contrast to crimes covered by article 70, article 8(2)(e)(i) is granted the opportunity to be explained more clearly and the inclusion of element

[103] Aurel Sari, 'Indiscriminate attacks and the proportionality rule: what is incidental civilian harm?' (2025) 30.2 *JC&SL* 203, 217
[104] *The Prosecutor v. Germain Katanga* (Decision on evidence for the issuance of a warrant of arrest) ICC-01/04-01/07 (6 July 2007) para.37
[105] *Katanga* (n.77) fn.1851
[106] *Rome Statute* (n.1) art.70
[107] *Prosecutor V. Jean-Pierre Bemba Gombo et al.* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13 (19 October 2019) para.29

8(2)(e)(i)(3) therefore appears to be the aspect that actually reinforces that the referenced 'intentionality' should have a purpose.[108]

The purpose of the EOC as an interpretative tool meant to provide clear interpretations of ambiguous provisions needs to be considered when understanding why a specific element exists.[109] Considering both that the drafters of the Rome Statute found it necessary to codify a default mental element and the fact that the EOC provides further clarification on how the mental element is supposed to be interpreted in its introduction, it is clear that that the subjective element in particular represents quite a bit of uncertainty in ICL. Thus, it is contradictory to the EOCs purpose that an unnecessary descriptive term would simply be reiterated in an element in favour of its meaning being clarified. For the purpose of clarity, compare the crime of attacking civilians to the crime of wilful murder in article 8(2)(a)(i).[110] As stated in the commentary to article 147 Geneva convention protocol IV, the mental element required by the term 'wilful' extends to reckless intent but excludes mere negligence.[111] This is a lower standard than the default mens rea demanded by the Rome Statute. The elements of article 8(2)(a)(i) in the EOC deviates from the Statutes wording of the crime and excludes any reference of 'wilful'.[112] Consequently, the EOC serves its function as an interpretive tool by clarifying that the default mens rea is the necessary one.[113]

Unlike the crime of wilful killing, the phrasing 'intentionally directing an attack' cannot be traced back to a corresponding war crime. Its relevance to the crime must therefore be attributed to a conscious decision of the Statute and not a residual phrasing from previously established

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[108] *See The Prosecutor V. Jean-Pierre Bemba Gombo* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016) para.120 concerning pillaging which states, that despite not being established customary standard, the inclusion of element 8(2)(e)(v)(2) in the EOC means that it is required by the ICC

[109] von Hebel (n.37) 9

[110] *Rome Statute* (n.1) art.8(2)(a)(i) originating from art.147 of *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287, 12 August 1949

[111] ICRC 'Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949' (Commentary of 2025) art.147 para.6654 https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-147/commentary/2025?activeTab=#c__Toc211412063 accessed 23 April 2026

[112] *EOC* (n.8) art.8(2)(a)(i)

[113] Knut Dörmann 'Grave Breaches of the 1949 Geneva Convention' in Lee (n.37) 125

practice.[114] Additionally, if element 8(2)(e)(i)(3) does not have any real purpose but to represent a link to the referenced 'intentionality' in the Rome Statute provision it stands to question why this crime was not granted the same treatment and clarity as wilful killing by simply removing the dispensable description. Considering that the ambiguity remains, despite conferring the EOC, the crime should be constricted to the stricter mental element of direct intent as this would be the favourable outcome for the defendant.[115]

6. From a result crime to a conduct crime

To understand any aspect of article 8(2)(e)(i), including the required intent, the crime of attacking civilians needs to be considered in a broader context outside the vacuum of the Rome Statute. The prohibition against attacking civilians results in a gap between IHL and ICL. IHL primarily focuses on prohibiting actions that will lead to civilians being attacked. Since IHL is centred around establishing norms and regulating behaviour in an effort to avoid harmful outcomes it is reasonable that the framework chooses to put its focus on the conduct rather than the result. However, the main relevance of criminal law is its function after a prohibited action has actually occurred.[116] The Ad Hoc tribunal's interpretation on the crime of attacking civilians contextualises this difference. In the case of *Kordić & Čerkez* it was determined that, at the time of the attack the trial prosecuted, there was no basis to establish that the act of targeting civilians was sufficient to be considered a crime in itself under customary law.[117] Consequently, the court determined that, to hold someone criminally responsible for the crime, it was necessary to prove that the attack had resulted in death, serious harm or other relevant damage.[118]

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[114] Specific terms in the Statutes and EOC originating from other sources is a recurring phenomenon. *See* for example, the differing terminology regarding certain intent in genocide crimes, such as "calculated" in element 6(c)(4) and "intended" in 6(d)(4) iginates inthe *Genocide Convention* (n.32) art.II.C-D

[115] *Rome Statute* (n.1) art.22

[116] Adil Ahmad Haque 'Protecting and respecting civilians: Correcting the substantive and structural defects of the Rome statute.' (2011) 14.4 *New Criminal Law Review* 519, 553

[117] *Prosecutor v Dario Kordić and Mario Čerkez* (Judgement Appeals chamber) IT-95-14/2-A (17 December 2004) para.66

[118] *Kordić & Čerkez* (n.117) para.67; corresponds with the grave breach of making civilians the object of attack under art.85(3)(a) *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 265 (AP I)

As previously established, the Rome Statute does not require any harmful result of civilians being attacked, making the prohibition a conduct crime. The necessity of conduct crimes relies on the need to prohibit acts regardless of their consequences. This is valuable to prohibit acts that are, in themself, dangerous but not necessarily tied to a specific harmful result.[119] Take for example, reckless driving under domestic law. Reckless driving is prohibited because it represents an inherent elevated risk of causing harm and endangering people's safety. It is not necessary for that harm to have occurred for someone to be held criminally liable, the failure to acknowledge the risk is enough.[120] In contrast, the crime of attacking civilians does not revolve around an inherent dangerous conduct independent from a specific result, rather the opposite. Attacks are not an unlawful practice in war. The crime of attacking civilians can therefore not be boiled down to the fact that the conduct itself is unlawful since it is inherently tied to a prohibited consequence, causing harm to civilians.[121] Consequently, the crime cannot exist without acknowledging the harm to civilians as the relevant result despite not needing it to occur, hence, the existence of element 8(2)(e)(i)(3). Attacking civilians therefore differs from conduct crimes such as reckless driving as the latter does not demand any knowledge or intent in relation to the hypothetical consequences. Conduct crimes based on the conduct being inherently dangerous and a risk of safety is tied to the guilty mind of recklessness.[122] Thus, the inclusion of these crimes in the Rome Statute is directly contradictory to the high threshold established by article 30 which excludes specifically recklessness. Instead, article 8(2)(e)(i) is better explained as a specific intent crime.

6.1. Specific intent crimes

The Nuremberg tribunal differentiated between specific intent and result crimes on the one hand, and general intent and conduct crimes on the other.[123] Here, specific intent means that the perpetrator possessed some kind of intent towards the prohibited result, it cannot be implied simply through the fact that the result has occurred. Conduct crimes on the other hand does not demand any intention towards a specific consequence.[124] This is, however, not a consistent rule and

[119] R. A. Duff, 'Criminalizing Endangerment' (2005) 65 *La.L.Rev* 941, 956
[120] Sally Cunningham, 'Recklessness: being reckless and acting recklessly.' (2010) 21.3 *King's Law Journal* 445, 450
[121] Haque (n.116) 553-554
[122] *See* Cunningham (n.120) 466-467, arguing that even recklessness is too high and negligence is more suitable
[123] Van der Vyver (n.30) 70
[124] ibid

there exist many crimes that demand the perpetrators mental state in respect to a result that does not necessarily need to occur for the crime to still have been committed, namely specific intent crimes.[125] The most obvious example is the crime of genocide where the perpetrator needs to possess a specific genocidal intent towards the destruction of a particular group. An intent which, according to the dominating view, is limited to direct intent.[126]

The ICTY determined the crime of spreading terror among the civilian population to be falling within the scope of their jurisdiction, and subsequently interpreted it as a specific intent crime. It consists of the objective and subjective elements constituting the crime of attacking civilians[127] with the additional element that these attacks were carried out "with the primary purpose of spreading terror among the civilian population".[128] It is not necessary to prove causation between the attacks and the spread of terror. However, in relation to such a result it is not enough that the perpetrator was aware of it, he must have possessed direct intent towards it.[129]

Torture constitutes another specific intent crime. The perpetrator must have intentionally inflicted suffering to the victim.[130] This suffering must, additionally, be inflicted with the purpose to gain something from the victim or a third party.[131] It is not necessary for the purpose to be the sole or primary intention behind the action..[132] Nonetheless, the crime of torture is tied to the aim to attain a specific result and cannot be considered to have occurred without establishing the existence of this purpose.[133]

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[125] José. Doria 'The relationship between complicity modes of liability and specific intent crimes in the law and practice of the ICTY.' in Jose Doria, Hans-Peter Gasser and M. Cherif Bassiouni (ed) *The Legal Regime of the International Criminal Court*. (2009 Brill Nijhoff) 141. 146

[126] Van der Vyver (n.30). 84; Dannenbaum (n.69) fn.190

[127] Possible since it is not a conduct crime in ICTY

[128] *Prosecutor v. Stanislav Galić* (Judgement and opinion Trial Chamber I) IT-98-29-T (5 December 2003) para.133 *See* para.56 for for the elements in relation to attacking civilians

[129] *Galić* judgement (n.128) para.134-135; *See* also Werle & Jessberger (n.14) para.561 purpose synonymous with direct intent; Mohamed Elewa Badar, referenced as "conscious objective" in 'Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2006) 6 *IntlCLR* 6: 313, 318

[130] Recklessness is sufficient *see*, Guénaël Mettraux *International Crimes and the ad hoc Tribunals*. (2006 Oxford University Press) 116

[131] *Prosecutor v. Fatmir Limaj et al.* (Judgment Trial Chamber II) IT-03-66-T (30 November 2005) para.235

[132] *Prosecutor v. Zejnil Delalic et al.* (Judgment Trial Chamber) IT-96-21-T (16 November 1998) para.470

[133] *Prosecutor v. Milorad Krnojelac* (Judgment Trial Chamber II) IT-97-25-T (15 March 2002) para.180; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 art.1(1) Note; This thesis acknowledges the inconsistencies to this

Understanding the intent to make civilians the object of the attack found in element 8(2)(e)(i)(3) in accordance with the standard conveyed by the examples, attacking civilians should be a specific aim and objective on behalf of the perpetrator. This also corresponds with specific intent generally being associated with a stricter intent requirement.[134]

6.2. In relation to IHL principles

As to why the Rome Statute made the crime of attacking civilians a conduct crime, it appears to be an attempt to remedy the perceived gap created by the Ad Hoc tribunals interpretation by making the crime more closely align with IHL provisions.[135] However, the Rome Statute making attacking civilians a conduct crime inherently transforms the prohibition, resulting in the standards and established practice of the Ad Hoc tribunals being less relevant as they cannot be properly translated. Furthermore, since the material elements of the crime more closely aligns to the actual provisions in IHL, its capability to encapsulate several of them in one article becomes less likely then in the Ad Hoc tribunals.

It is undeniable that the prohibition of directing attacks against civilians relates to the general protection against harm civilians are granted during armed conflict. A protection based on IHL principles such as distinction, discrimination, proportionality and precautions.[136] The *Katanga* judgment made the assessment that the inclusion of the 'intentionality' in article 8(2)(e)(i) was an attempt to differentiate the crime from violations of the principles of proportionality or precautions.[137] Consequently, it is reasonable to conclude that the mental element of the crime does indeed represent a differentiating aspect as to what principles are captured by the prohibition. Thus, considering the interplay between article 8(2)(e)(i) and relevant IHL principles concerning

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standard presented by torture as a crime against humanity under art.7(1)(f) of the Rome Statute (n.1). However, since it does not directly affect the intent standard when this purpose *is* required it reflected on further

[134] *See* UN Secretary-General 'Report of the International Commission of Inquiry on Darfur to the Secretary-General, pursuant to Security Council resolution 1564 (2004) of 18 September 2004' S/2005/60 (25 January 2005) (Report Darfur) para.491 stating specific intent to be equivalent to aggravated criminal intent

[135] Haque (n.116) 552-553

[136] Camilla Waszink, 'Protection of Civilians under International Humanitarian Law: Trends and Challenges' (2011) *NOREF Repor*t 7

[137] *Katanga* (n.77) fn.1851

attacks can contextualise the practical reach of the Rome Statute provision and what attacks it should reasonably capture.

6.2.1. Indiscriminate attacks

Although both included under article 51, subparagraph 51(2) of Additional Protocol I to the Geneva Convention (AP I) prohibits direct attacks on civilians while article 51(4)-(6) prohibits indiscriminate attacks.[138] The main difference between them is the relation between the object of the attack and its necessary status. Indiscriminate attacks focus on a negative aspect concerning the target. Namely, that the attack wasn't, or couldn't be, directed towards a military object. By doing so, the crime cannot be interpreted as defined to any specific or necessary mental element.[139] Article 51(2) however, prohibits attacks based on a positive aspect in relation to the status of the object of attack, that it was civilians. In these attacks the perpetrator *deliberately* made the civilians the object of the attack.[140] These prohibitions are not interchangeable. Attacks where civilians are the object of the attack are encapsulated by the concept of indiscriminate attacks since the object of the attack is not specifically military. The opposite correlation, however, does not hold true since civilians being attacked does not automatically show that this action was deliberate, instead it could be a result of the perpetrators indifference towards such a result.[141] Consequently, it appears as if the prohibition in article 51(2) was given its own provision to symbolise a difference in gravity between crimes where civilians are the deliberate target, from crimes where they are an indirect target. If both of these crimes are captured by article 8(2)(i)(e) the Rome Statute fails to make a similar distinction to the one in AP I despite also focusing on conduct.

While *Katanga* notably does not include indiscriminate attacks in its list of attacks not captured because of the article's reference to intentionality, element 8(2)(e)(i)(3) represents the most substantial indicator that the crime of attacking civilians in the Rome Statute is not meant to

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[138] *AP I* (n.118) art.51

[139] Stephen Townley.'"Indiscriminate attacks and the past, present, and future of the rules/standards and objective/subjective debates in international humanitarian law.' (2017) 50 *Vand.J.Transnat'l L.* 1223. 1228, fn.18

[140] Claude Pilloud, et al. (eds.) *Commentary on the additional protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949*. (1987 Martinus Nijhoff Publishers) para.1605 states that the prohibition on making hors de combat the object the attack in art.41 concerns *deliberate* attacks against them; Sari (n.103) 217

[141] Haque (n.116) 534, 536

include indiscriminate attack.[142] Considering the language of the element it does not imply any connection to indiscriminate attacks as described by article 51(4)-(6). Instead, the language of element 8(2)(e)(i)(3) suggests that it is to the narrower article 51(2) the crime under article 8(2)(e)(i) has a close kinship, indicating that it is attacks falling within the scope of article 51(2) in particular that is covered the the Statutes prohibition against attacking civilians. One should proceed with caution in assigning specific mental elements to IHL provisions.[143] That being said, it is unquestionable that a provision on attacking civilians closer resembling the prohibitions of indiscriminate attacks would be more suitable to encapsulate both direct and oblique intent if this was the purpose of the crime.[144] Consequently, in the context of ICL, this linguistic distinction clearly favouring the prohibition on direct attack against civilians to the crime of indiscriminate attacks supports that article 8(2)(e)(i) does demand a higher intent.[145]

6.2.2. Proportionality

The principle of proportionality concerns attacks that target military objects but are expected to cause collateral damage excessive to the military advantage. The principle does not have its own article in AP I but is recognised as unlawful both in relation to the failure to take precautions in attacks as well as indiscriminate attacks.[146]

Disproportionate attacks are not covered by article 8(2)(e)(i) of the statute. Instead, the prohibition is covered by its own provision, article 8(2)(b)(iv), which is applicable in international armed conflicts (IACs).[147] A corresponding provision for NIACs is absent in the Rome Statute. The

[142] Haque (n.116) 537
[143] Mark Lattimer. 'Objective and Subjective Tests for Determining Violations of the Law of Targeting: The Unreasonable Commander and the Guilty Mind' (2024) 27 *Yearbook of International Humanitarian Law* 95. 111;
[144] *Note,* that the ICTY also refers to art.51(2) as the relevant provision for the corresponding crime in the Ad Hoc tribunals but does not interpret the article as intertwined to direct intent. Theoretically, this might be explained through art.51(2) consisting of two parts, the objective element formulated by the ICTY in *Galić* (n.128) para.56, and the subjective element of deliberacy. The objective element is capable of including, for example, indiscriminate attacks (see more on the objective element of directing attacks in section 6.2.4). Art.85(3) *AP I* (n.118), which demands a result and hence relevant for the ICTY, logically consists of the same objective element but the subjective element of 'wilful' consequently making the crime more inclusive in the ICTY. *See*, Werle & Jessberger (n.14) para.**1416 fn.670** also reflecting on art.85(3)'s effect in relation to this difference.
[145] Indiscriminate attack not reaching the threshold of oblique intent would still be excluded in correspondence with art.30
[146] *AP I* (n.118) art.51(5)(b), 57(2)(a)(iii)
[147] *Rome Statute* (n.1) art.8(2)(b)(iv)

relevant mental state in element 8(2)(b)(iv)(3) requires that the perpetrator knew that the attack would cause excessive damage. This differs from provisions on proportionality related to precautions and indiscrimination that only demands that the attack "may be expected" to cause excessive incidental harm. The reason for this change can be traced to another provision in AP I, article 85(3)(b), which prohibits indiscriminate attacks that will cause damage *known* to be excessive.[148] Since the necessary knowledge implied by "may be expected" is lesser than virtual certainty, the knowledge required by article 8(2)(b)(iv) reflecting the higher threshold in article 85(3)(b) rather than article 51(5)(b) and 57(2)(a)(iii) better correspond with the Rome Statutes exclusion of recklessness as a sufficient mental state.[149]

Proportionality being excluded from the scope of article 8(2)(e)(i) corresponds with the principle of effectiveness since it avoids a redundant relationship between the interchangeable crime of directing an attack against civilians in an IAC under article 8(2)(b)(i) and disproportionate attacks in 8(2)(b)(iv).[150] Simultaneously, the Rome Statute recognising that disproportionate attacks are a crime in itself causes uncertainty regarding the relationship between indiscriminate attacks and their inclusion in the statute. Article 85(3)(b) of AP I concerns disproportionality specifically in the context of it as indiscriminate attacks.[151] It is reasonable to conclude that the same holds true for article 8(2)(b)(iv), having established that it aligns with article 85(3)(b) in particular. This raises the question of what determines if an indiscriminate attack is capable of being included under the scope of 8(2)(e)(i), or needs its own provision like article 8(2)(e)(iv).[152] Similarly to directing attacks against civilians, the crime of disproportionate attacks does not need the prohibited damage to occur.[153] Consequently, as the result requirement does not differ between the crimes the difference needs to exist elsewhere.

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[148] *AP I* (n.118) art.85(3)(b)
[149] *Rome Statute* (n.1) art.30
[150] VCLT commentary (n.58)
[151] *AP I* (n.118) art.85(3)(a)
[152] *See* Harmen van der Wilt, reference that the concept of indiscriminate attacks as "chopped up" in the Rome Statute in 'Towards a better understanding of the concept of 'indiscriminate attack'—how international criminal law can be of assistance.' (2019) 22 *Yearbook of International Humanitarian Law* 29. 38
[153] Didier Pfirter 'Article 8(2)(b)(iv)-Excessive incidental death, injury or damage' in EOC book

In relation to the material elements, the relevant conduct is the same since the chamber in *Katanga* determined that 'directing an attack' in 8(2)(e)(i)(1) is equivalent to launching an attack, the required conduct in article 8(2)(b)(iv).[154] Instead, the relevant difference might lie in the required circumstances of the crime, i.e. civilians being the object of attack contrary to the attack being such that it would cause excessive incidental damage to civilians. In *Katanga* it was determined that civilians being hit incidentally is not sufficient to be captured by article 8(2)(e)(i) since it does not equal them being the object of attack.[155] However, this is contradicted in the *Ntaganda* judgment which stated that civilians can be the object of an attack even incidentally.[156] This corresponds with the Ad Hoc tribunals' stand point as they have acknowledged that disproportionate attacks *may* show that the attack was directed against a civilian population.[157] Consequently, a possible difference between the threshold of hypothetical damage to civilians necessary for it to be considered proof that civilians were the object of the attack rather than only excessive must also be considered. The chamber in *Katanga* stated that indiscriminate attacks are able to show civilians being the object of the attack especially when the damage to them is severe.[158] At the same time the Rome Statute prohibition against disproportionate attacks implements a high threshold regarding the expected damage necessary for an attack to fall within the articles scope, requiring it to be *clearly* excessive. The requirement stands in contrast to corresponding IHL provisions on proportionality, which only need it to be excessive.[159] Consequently, there appears to be no clear difference between disproportionate attacks expected to cause clearly excessive damage to civilians and indiscriminate attacks severe enough to be perceived as making civilians the object of attack.[160]

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[154] *Katanga* (n.77) para.799
[155] *ibid*
[156] *Ntaganda* (n.76) para.668
[157] *Prosecutor v. Stanislav Galić* (Judgment Appeals Chamber) IT-98-29-A (30 November 2006) para.133; Prosecutor v. *Radovan Karadžić* (Judgment Appeals Chamber) MICT-13-55-A (20 March 2019) stating that the indiscriminate nature of the attack made it irrelevant to also consider if it was disproportionate para.506;
See, Prosecutor v. Bosco Ntaganda (Judgment on the appeal) ICC-01/04-02/06 A A2 (30 March 2021) para.411, 422 for 'directing attacks against civilians' being synonymous with civilians being the 'object of attack'
[158] *Katanga* (n.77) para.802 "so great"
[159] Jeroen Van den Boogaard, *Proportionality in International Humanitarian Law: Refocusing the Balance in Practice*. (2023 Cambridge University Press) 345-347
[160] *See* concerning the close relationship between what constitutes excessive incidental harm or an indiscriminate attack, Dr Luigi Daniele's analysing an approach where disproportionate attacks become indiscriminate based on an *objective* evaluation that the harm of civilian objects outweigh the damage to military objects, the subjective standard of military advantage becomes less relevant, 'Incidentality of the civilian harm in international humanitarian law and its Contra Legem antonyms in recent discourses on the laws of war' (2024) 29.1 *JC&SL* 21. 38-39

Considering the interaction between article 8(2)(b/e)(i) and 8(2)(b)(iv), it appears that their material elements significantly overlap. Consequently, it is reasonable that the difference lies in the intentions reflected by the articles' third elements.[161] Element 8(2)(e)(i)(3)'s 'intended' must differ from element 8(2)(b)(iv)(3)'s required 'knew'. Since the necessary knowledge towards a consequence in subparagraph 30(3) echoes 30(2)(b)'s description of oblique intent this is the reasonable interpretation of necessary knowledge for disproportionate attacks.[162] Thus, if oblique intent is also sufficient for element 8(2)(e)(i)(3) they are the same. It could, theoretically, be argued that it is element 8(2)(b)(iv)(3) that differs from article 30 by demanding a lesser knowledge than the one equivalent to oblique intent. However, such an interpretation is unprecedented since the phrase "should have known" is already the established indicator in the EOC that a crime requires a lower knowledge than the default one.[163] Instead, the interpretation aligning more with a good faith reading is that article 8(2)(b/e)(i) demands higher intent.

The ambiguity surrounding the interplay between disproportionate and indiscriminate attacks is reflected by the courts practice. *Katanga*, as previously mentioned, clearly recognises that proportionality falls outside the scope of article 8(2)(e)(i).[164] However, when assessing the occurrence where shots were fired at people fleeing the Institute it was determined that the resulting loss of human life was excessive to the military advantage.[165] Since this evaluation is only necessary to consider for disproportionate attacks it appears to suggest that the attack was not otherwise indiscriminate and that the civilians were harmed incidentally.[166] On the one hand, the chamber not immediately dismissing the possibility of this occurrence constituting an attack against civilians based on the fact that civilians were attacked incidentally, can be perceived as the chamber taking the proportionality principle into consideration despite it not being applicable to NIACs. On the other hand, the chamber ultimately determined that the occurrence was insufficient to qualify as an attack against civilians under article 8(2)(e)(i) since the proportion of

[161] *EOC* (n.8) art.8(2)(b)(i) & 8(2)(b)(iv); *Katanga* agrees (n.77) fn.1851
[162] *Rome Statute* (n.1) art.30
[163] *Lubanga* (n.24) para.447
[164] *Katanga* (n.77) para.800, also fn.1851 specifically says so
[165] *Katanga* (n.77) para.865
[166] Sari (n.103) 236

civilians to combatants in the group fleeing could not be determined, thus making it difficult to conclude that the civilians were indeed the object of attack.[167] This could instead be perceived as the chamber acting accordingly to the exclusion of proportionality since the situation was arguably dismissed because the civilian harm was not severe enough to constitute an indiscriminate attack. However, if so, this decision only further contextualises the causation between clearly excessive damage to civilians and civilians becoming the object of attack.[168]

6.2.3. Precautions

Trial chamber VI in *Ntaganda* appears to have tried to solve the difficulty of distinguishing between article 8(2)(b)(iv) and 8(2)(b/e)(i) in any way other than the mental element. They did so by describing the material element of 'directing an attack' in a way not equivalent to launching an attack.[169] Instead, according to *Ntaganda,* directing an attack is the action of "selecting the intended target and deciding on the attack", consequently establishing a difference in the material element between article 8(2)(b)(iv) and 8(2)(b/e)(i).[170] The case proceeds to state that, in accordance with their interpretation, Ntaganda's actions of ordering the attack was sufficient to fulfil the necessary material element.[171]

The chamber's interpretation of the material element in *Ntagandas* leaves a significant gap between the actions of the perpetrator and the hypothetical outcome of civilians being attacked. The conduct given in the case itself is one of the better examples to demonstrate this gap. If ordering an attack against civilians constitutes directing an attack against civilians, the necessary intent in relation to article 30 demands that the perpetrator meant to engage in the conduct of ordering an attack and, either meant or knew that this conduct resulted in an attack being ordered. Consequently, considering the additional subjective element in 8(2)(e)(i)(3), the crime can be argued to have occurred when the perpetrator orders an attack against civilians with the direct intent towards civilians being the object of the attack.[172] Whether that order was in any way

[167] *Katanga* (n.77) para.875
[168] The chamber makes no reference to *clearly* excessive damage
[169] In contrast to *Katanga* (n.77) para.799
[170] *Ntaganda* (n.76) para.744, reinforced in *Ongwen* (n.76) para.2758
[171] *Ntaganda* (n.76) para.744
[172] *Note*, direct intent is used for the sake of the example, *Ntaganda* (n.76) does not state that it is required

successful or even had an effect on the likelihood of an attack being launched towards civilians is irrelevant. That ordering is not meant to be a conduct in its own right is contextualised when taking into account that it constitutes its own mode of liability.[173] Case law on article 25(3)(b) provides that ordering requires an additional material element consisting of the order having an effect on the commission of the crime.[174] Hence, as a mode of liability, ordering is able to apply this "bridging" element, closing the otherwise notable gap between the conduct and the criminal offence.

The foundation of *Ntaganda's* interpretation regarding the conduct is article 57(2) of AP I concerning the obligation to take precautions in attack.[175] The principle of precaution demands that, in planning and deciding on an attack, preventative measures considering the protection of civilians should be taken into account. This includes verifying that the object of the attack is indeed a legitimate target and that means and methods of warfare should be chosen with the aim of avoiding or minimising incidental harm to protected objects and persons.[176] An interpretation that precautions in attack is the principle the conduct element of article 8(2)(e)(i) derives from implies that the principle is central to the crime.[177] The judgment stays consistent in its understanding of the principle being of great importance by stating that the failure to take precautionary measures, in itself, could constitute intentionally making civilians the object of attack. The great relevance of precaution to the crime does, however, appear factually unsubstantiated. Firstly, the conclusion that article 8(2)(e)(i) captures proportionality directly contradicts the reasoning in *Katanga* concerning why element 8(2)(e)(i)(3) does not provide a specific intent.[178] Secondly, the referenced case law supporting this conclusion does not state that the failure to take precautionary measures in itself constitutes directing an attack against civilians. Relevant case law does little more than enforce that aspects, such as compliance with precautionary requirements, are necessary indicators to

[173] *Rome Statute* (n.1) art.25(3)(b)
[174] *Prosecutor V. Ali Muhammad Ali Abd-Al-Rahman* (Trial Judgment) ICC-02/05-01/20 (6 October 2025) para.805
[175] *Ntaganda* (n.76) fn.2300
[176] *AP I* (n.118) art.57
[177] Compare to, for example, how *Galić* (n.128) para.52, establishes the necessary conduct for attacking civilians as 'act of violence' in accordance with the the definition of 'attack' in art.49 of *AP I*
[178] *Ntaganda* (n.76) para.921. The judgment does not reflect on the connotations of this contradiction

determine whether an indiscriminate attack was directed towards civilians.[179] When actually considering the relevance of precautionary measures, *Ntaganda* appears to follow this standard by analysing their relevance in the context of other factors, such as the use of indiscriminate weapons.[180]

6.2.4. The implied intent in becoming the object of attack

The trial judgement in *Galić* formulated the two following elements for the crime of directing an attack against civilians.

> 1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
> 2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.[181]

The ICTY has also encountered uncertainties as to what kind of attacks are encapsulated by the crime. However, these uncertainties are unrelated to the mental element and rather focused on the circumstance element and what it means for an attack to be *directed* against a civilian population.[182] The ICTY has decided that this determination needs to be made on a case-to-case basis but neither deliberate, indiscriminate or disproportionate attacks are ruled out as possible circumstances establishing that the attack had been directed against a civilian population. When making the assessment in any given case, aspects such as how excessive the damage was, how much an attack missed by and compliance with precautionary regulation needs to be considered to determine how that specific attack measures up to the threshold.[183] The language of the circumstance element mirrors the basic rule of distinction codified in article 48 of AP I on directing attacks only towards military objects.[184] Article 48 provides a double protection towards civilians where they should, not

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[179] *Prosecutor v. Kupreskic et al.* (Judgement trial judgement) IT-95-16-T (14 January 2000) para.524-525; *Galić* (n.128) para.142
[180] *Ntaganda* (n.76) para.926
[181] *Galić* (n.128) para.56
[182] Badar (n.128) 317
[183] *Prosecutor v. Dragoljub Kunarac* (judgement appeals chamber) T-96-23/1-A (12 June 2002) para.91; *Galić* (n.157) Appeals Chamber para.132-133
[184] *AP I* (n.118) para.48

only, not be attacked but that attacking them should actively try to be avoided.[185] Consequently, the court's determination that the material element of directing attacks against civilians is not synonymous with *direct* attacks on civilians is reasonable.

The requirement of the attack being directed against civilians in the ICTY is comparable to element 8(2)(e)(i)(2) in the Rome Statute, that the civilians were the object of the attack.[186] Therefore, the considerations made by the ICTY regarding weapons used, precautionary measures, indiscrimination attacks and alike are applicable to determine whether element 8(2)(e)(i)(2) has been fulfilled. Thus, the civilians must not have been deliberately attacked to have been the object of the attack. This corresponds with the ICJs advisory opinion on nuclear weapons concerning attacks, since they equate using indiscriminate weapons to making civilians the object of attack.[187] However, determining that the circumstance element has been fulfilled is separate from proving the necessary mental element in relation to the consequences.

The necessary mental element on behalf of the perpetrator in relation to a circumstance is always knowledge and never intent.[188] Consequently, in the ICTY the perpetrator must have been aware that the attack was directed against a civilian population or the possibility of that.[189] In relation to the intent, the crime must have been committed 'wilfully', limiting the reach to include recklessness but excluding negligence.[190] Since the threshold for determining if the attack was directed against a civilian population is so high it becomes, in practice, technically unnecessary to determine if the perpetrator had the necessary intention towards the consequences. If the perpetrator was aware that the attack was indiscriminate in a manner that would equal the attack being directed against civilians then they arguably possessed, at least the, necessary intent of recklessness towards the consequence of harm and injury being caused.[191]

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[185] Haque (n.116) 528
[186] *See Ntaganda* (n.157) para.411, 422, civilians being object of attack equals attack directed against civilians.
[187] ICJ, 'Legality of the threat or use of nuclear weapons' Advisory opinion (8 July 1996) para.77
[188] Eser, (n.22) 899
[189] Badar (n.128) 319-320
[190] AP I commentary (n.140) para.3474
[191] See *Prosecutor v. Pavle Strugar* (Judgment Appeals Chamber) IT-01-42-A (17 July 2008) para.276 the indiscriminate nature of the attack "Would have been impossible not to know that civilians would not be hit"

The ICC appears to approach the relationship between civilians being the object of the attack in element 8(2)(e)(i)(2) and the intent in 8(2)(e)(i)(3) in a similar way to the Ad Hoc tribunals. Firstly, it is of relevance that the higher default mental element in the Rome Statute does not make this transition seamless regardless of whether article 8(2)(e)(i) demands direct intent or not. For example, the obligation to take precautions in an attack is generally more relevant in determining criminal liability related to recklessness.[192] Consequently, while the failure to take precautionary measures might constitute the civilian population being the object of the attack, the intent underlying that omission would more easily be encapsulated by wilful intent in the ICTY. The ICC fails to acknowledge or reflect on this difference in *Ntaganda* despite basing their arguments that attacks failing to take necessary precautionary measures is covered by article 8(2)(e)(i) on ICTY cases with this differentiating mental element.[193]

Additionally, by arguing that proof of civilians being the object of the attack in element 8(2)(e)(i)(2) as equivalent to the civilians being the intended object of the attack in element 8(2)(e)(i)(3) the court ends up ascribing the former element with a very high implied intent. In *Katanga* it is stated that if the damage is severe enough it can appear to the chamber that the indiscriminate attack was "*meant* to target civilian objectives".[194] In *Ntaganda* the indiscriminate manner the attack was carried out, the use of heavy weapons and the failure to take necessary precautions, was understood as signalling that *both* the civilian population and fighters present were the intended object of the attack.[195] The pre-trial chamber in *Mbarushimana* stated that no direct instructions concerning attacking civilians in particular was given but that civilians and combatants were all perceived as enemies without distinction.[196] The chamber considered the existing evidence sufficient to fulfil one of the two alternatives concerning the mental element they interpreted article 8(2)(e)(i) to demand. Namely, that the attack was launched with the two distinct and specific aims of attacking fighters and civilians simultaneously.[197] These examples show the

[192] ICTY, Final Report to the Prosecutor bv the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (13 June 2000) para.70. ICC-02/05-02/09-HNE-2 (29 October 2009)
[193] *Ntaganda* (n.76) para.921
[194] *Katanga* (n.77) para.799 (emphasis added)
[195] *Ntaganda* (n.76) para.926
[196] *Prosecutor v. Callixte Mbarushimana* (Decision on the confirmation of charges) ICC-01/04-01/10 (16 December 2011) para.144
[197] *Mbarushimana* (n.196) para.142

ICC inferring the presence of direct intent through the nature of the attack. Assuming that both direct and oblique intent is sufficient in relation to civilians being the object of the attack, this specification would be entirely irrelevant. If the perpetrator was virtually certain that civilians were the object of the attack, that is sufficient to prove the required oblique intent. Therefore, stating that the attack implies that the perpetrator *meant* to target civilians or possessed the same intent towards them and the combatants attacked is unnecessary.[198] Since the ICC clearly finds these justifications necessary, the implications are that oblique intent actually isn't sufficient for the crime.[199]

7. A consistent understanding of 'the perpetrator intended'

The prohibition against attacking civilians is not the only crime which includes an element requiring the perpetrators intention in one way or another. Considering rules of legal interpretation, these other elements referencing intent can provide an advantageous source of comparison as phrases generally should be interpreted consistently.[200]

7.1. Genocide

All articles concerning the crime of genocide includes an element referencing "the perpetrator intended". The different articles recognise the conduct through which the crime of genocide can be carried in accordance with the Genocide Convention.[201] For the sake of simplicity, this comparison will be narrowed down to genocide by killing in article 6(a) of the Statute.[202] The EOC provides following elements for the crime,

1. The perpetrator killed one or more persons.

2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

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[198] In contrast to *Strugar* (n.191) para.276, where the chamber determined in unnecessary to consider any intent other than indirect because of the perpetrator's willingness related to carrying out the indiscriminate attack, not in relation to objects hit

[199] *Note,* this does not solve the confusion concerning intent, but moves the focus away from the current research question. From asking if 8(1)(2)(e) demands direct intent to whether, for example, a clearly indiscriminate attack can show direct intent

[200] *VCLT* (n.41) art.31

[201] *Genocide Convention* (n.32) art.II

[202] *Note*, art.6(4) provides a good comparison for the sake of this thesis, other crimes of genocide deviates from this structure, *see* for example *EOC* art.6(d)(4)

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.[203]

Some crimes make it difficult to distinguish between the conduct and consequences. Hence, the first element provides both for the conduct and consequences of the crime. The conduct of killing and the consequence of someone being killed.[204] In accordance with article 30, the entirety of the default mental element concerning intention covered by both subparagraph 30(2)(a) and (b) should therefore be applied to the first element.[205] In practice, did the perpetrator mean to engage in the conduct killing the person according to 30(2)(a)? Did the perpetrator mean for the person to be killed or know that it would happen in the ordinary course of events according to 30(2)(b)? Element 6(a)(3) establishes a special intent on behalf of the perpetrator in relation to the destruction of a protected group. The mental element referenced here has no material element since the crime does not rely on the intended consequence occurring.[206] Thus, as the definition of intent in article 30 is interconnected with the existence of a material element it cannot be implemented to interpret the intent demanded by 6(a)(3).[207] This special intent is also mentioned in the chapue of article 6 on genocide in the Statute itself.[208]

The elements the crime of intentionally directing attacks against civilians consists of very much resembles the structure of the elements making up genocide by killing. Similarly to the crime of genocide, the third element concerns the perpetrators intention, although in relation to a different consequence, civilians being the object of attack.[209] As established in section 5.2.2., it is not necessary for this consequence to occur for the crime to have been committed. Hence, as element 8(2)(e)(i)(3) does not include any material element, the referenced mental element cannot be understood in accordance with article 30 of the Statute.[210] If the elements of article 8(2)(e)(i) is

[203] *EOC* (n.8) art.6(a)
[204] Kelt & von Hebel (n.40) 15
[205] Charles Garraway 'Elements of the Specific Forms of Genocide' in Lee (n.37) 50
[206] Dannenbaum, (n.69) 712
[207] *Rome Statute* (n.1) art.30
[208] *Rome Statute* (n.1) art.6
[209] *EOC* (n.8) art.8(2)(e)(i)
[210] Dannenbaum, (n.69) 712

perceived and approached in an identical way to the elements making up the crime of genocide the default mental element should be applied to 8(2)(e)(i)(1), "the perpetrator directed an attack". That is to say, it needs to be determined that the perpetrator, firstly, meant to engage in the conduct that constituted directing an attack in accordance with article 30(2)(a). Secondly, that the perpetrator meant to direct an attack or knew that it would be so in the ordinary course of events in accordance with article 30(2)(b). Although this application becomes a bit more abstract then the one demonstrated by applying the default mens rea to the more concrete material elements of genocide, the standard is the same.[211] Of relevance is that, through this approach, the two intentions concerning a result are different. Intending an attack to be directed is different from intending something to be the object of an attack. The former focuses on an attack happening, as in being launched, and the later on the attack having an effect.[212] Thus, this interpretation does not compromise the principle of effectiveness.

Consequently, it is clear that the structure of attacking civilians resembles genocide by killing in the Rome Statute. Firstly, both are crimes of conduct as they do not criminalise an actual result.[213] Secondly, both crimes refer to the perpetrator *intending* to cause a consequence lacking a material element in its third element. Thirdly, the structure of the elements the crimes consist of is identical.[214] Taking these similarities into account it is reasonable to conclude that, in accordance with customary principles of interpretation, the phrase 'the perpetrator intended' should require the same intent towards the consequence between the crimes.

It needs to be taken into consideration that the crime of genocide and war crimes are two different categories of crimes in the Statute. Hence, it must be determined if the same term being used in

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[211] *See Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (17 September 2016) para.47-48, the court firstly established an intent in relation to directing the attack against protected objects, determining the attacks to have been carried out in a "deliberate manner" before considering whether the perpetrator intended the protected objects to be the object of attack;
Note, because of the required knowledge of art.30(3) towards the victims' status, *Rome Statute* (n.1) considering it at this step make no difference, the same is true for genocide where the group the person belongs to could equally be considered in connection to the material element of killing.

[212] Sari (n.103) 217

[213] *See* Claus KreIß. 'The Crime of Genocide and Contextual Elements' (2009) 7.2. *J.Int.Crim.Justice* 297. 300 argument indicating genocide as a conduct crime

[214] Conduct in element 1, status/circumstance in element 2 and contextual elements last

different crimes can affect the meaning of it. For example, the meaning of the term 'attack' differs depending on if it is associated with a crime against humanity under article 7, or a war crime under article 8. The introduction on war crimes in the EOC establishes that the interpretation of them should correspond with the established framework of IHL.[215] Therefore, it has been determined that the meaning of 'attack' in war crimes covered by the Statute should derive from the definition of the term codified by article 49 of AP I.[216] Namely, that an attack is an act of violence carried out against the adversary party during hostilities.[217] Likewise, the introduction of crimes against humanity provides clarity specifically regarding what the meaning of the term 'attack' is in the context of the crime, stating that it does not need to constitute a military attack.[218] Hence, the meaning of attack based on IHL provisions applicable to war crimes, is not equivalent to the meaning of attack in crimes against humanity. However, the fact that the term changes meaning between the crimes is explicitly established in the EOC itself. This is not the case with the term 'the perpetrator intended' between the crime of genocide contra war crimes. While the EOC introduction to the crime of genocide states that it demands the additional genocidal intent, this intent is captured by the third element in its entirety, including the specified consequence to destroy the group.[219] It is not inherently tied to the phrase 'the perpetrator intended' in a way justifying that it should be understood in a unique way in the context of genocide in particular.

Expanding on the concept of differing meanings of the same word between crimes, the connotations of the *Ntaganda* appeals judgements discussion related to the term 'attack' should be considered. In the appeal the prosecution contested the trial chamber's narrow interpretation of the term 'attack' in relation to the war crime of attacking protected objects under article 8(2)(e)(iv), and argued that it needed to be expanded.[220] The prosecution's appeal was not entirely unfounded but also based on established IHL. While accepting that the crime was primarily based on article 27 of the Hague Regulations the prosecution argued that it also derived from article 56 of the same

[215] *EOC* (n.8) art.8 introduction
[216] *Ntaganda* (n.76) para.916; *Katanga* (n.77) para.798
[217] *AP I* (n.118) art.49
[218] *EOC* (n.8) art.7 introduction
[219] EOC (n.8) art.6 introduction; Victor Tsilonis. 'The Crime of Genocide and the International Criminal Court's Jurisdiction' in *The Jurisdiction of the International Criminal Court*. (2024 Springer International Publishing). 83-113. 89
[220] *The Prosecutor v. Bosco Ntaganda* (Prosecution Appeal Brief) : ICC-01/04-02/06 (7 October 2019) para.30

framework.[221] Article 56 of the Hague Regulation prohibits any wilful damage towards institutions intended for art, science or religion regardless of whether it is during hostilities or the object belongs to the adversary.[222] Accepting that article 8(2)(e)(iv) is meant to capture crimes covered by article 56 of the Hague Regulations would make the meaning of 'attack' broader in article 8(2)(e)(iv) then other war crimes concerning attacks which interpretations align with article 49 of AP I. According to the prosecution this interpretation would correspond with the courts standards standards since it is both based in established IHL and would avoid redundancy between the inclusion of hospitals in the relevant article and the prohibition on attacking buildings using the distinctive emblems of the Geneva Conventions under article 8(2)(e)(ii).[223] Despite this, the chamber rejected the appeal in favour of a consistent interpretation of the term attack throughout all war crimes.[224] Hence, it is reasonable to conclude that, unless explicitly provided by the Statute or the EOC, terms should be interpreted consistently between different crimes of the same category as well as between categories.

As the intent demanded by genocide is the more generally established intention within the international community and the one leaving less leeway for interpretation this is the crime that will establish the necessary intent. It is predominantly recognised that genocidal intent is limited to direct intent.[225] Consequently, a consistent understanding of the closely resembling element of attacking civilians provides that the perpetrator needs to possess direct intent towards the civilians being the object of the attack.[226]

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[221] *Ntaganda* (n.220) para.32

[222] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land* (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 para.56

[223] *Ntaganda* (n.220) para.121

[224] *Ntaganda* (n.157) para.1164, 1169

[225] *See* (n.126) and *Al Bashir* (n.45) para.139 showing ICC specifically reinforcing this

[226] *Note*, the same term being used for intent in attacks against civilians and genocide is not mirrored by the French translation of EOC. Genocidal intent is referred to as 'l'intention' while the intent towards the object of attack is referred to as 'entendait' *see EOC* (n.8) (French text) art.6(a)(3) & 8(2)(e)(i)(3). This appears to be a difference of formality rather than meaning. What is noteworthy is that the 'entendait' corresponds to the French translation's explanation of direct intent in art.30(2)(b) *see Rome Statute* (n.1) (French Text). The genocidal intention is so inherent to genocide that, at times, it is referred to as a crime of intent *see* William Schabas and Sudan Burundi. *The Genocide Convention at Fifty*. (1999) 3. Consequently, this inconsistency could possibly be the result of the more formal term being considered necessary for genocide. However, in relation to war crimes, the specific language of direct intent used in article 30 was used to indicate this requirement for the sake of clarity.

7.2. Other war crimes

The court has recognised that the influence of the term 'the perpetrator intended' over the required intent is not limited to genocide specifically but does extend to war crimes. Pre-trial chamber I in *Katanga* concluded that the third element of the crime of attacking civilians in an IAC, article 8(2)(b)(i), represents an additional subjective element to article 30. Hence, they determined the crime to demand direct intent.[227] As discussed, this assessment was later contradicted by trial chamber II in *Katanga* in their determination of the necessary subjective element for the corresponding crime in a NIAC.[228] However, it is relevant to note that the court, at one point, considered that the crime at the centre of this thesis demands a mental element surpassing the one in article 30. Additionally, the conclusion of direct intent being necessary in *Katanga and Ngjolou Choi* was not questioned by Pre-trial chamber I in *Abu Garda* which referenced this decision when determining the necessary subjective element for the crime of attacking peacekeepers in article 8(2)(e)(iii).[229]

The crime of pillaging also provides a relevant comparison. The second element of the crime demands the perpetrator to have "intended" to deprive the owner of their property.[230] The ICC has interpreted this element as establishing a specific intent.[231] The crime of pillaging does not represent a perfect comparison as it differs from attacks against civilians in that it is not a conduct crime. Instead, it requires a specific result for the crime to have occurred.[232] However, what is noteworthy is that, in the Statute itself, the crime does not provide any indication that a specific intent additional to the default one would be necessary. This is an interpretation solely based on an element introduced in the EOC.[233] In contrast, article 8(2)(e)(i) arguably already otherwise provides a mental element in the crime itself through its phrasing "*intentionally* directing an attack against civilians".[234] Consequently, it is inconsistent that the reference to the perpetrators intention in an element would constitute specific intent in pillaging but not in attacking civilians, despite the

[227] *Katanga & Ngudjolo Chui* (n.50) para.37
[228] *Katanga* (n.77) fn.1851
[229] *Abu Garda* (n.51) Para.93
[230] *EOC* (n.8) art.8(2)(e)(v)
[231] *Katanga* (n.77) para.913; Ongwen (n.76) para.2767
[232] Hans Boddens Hosang 'Article 8(2)(b)(xvi) - Pillaging in Lee (n.37) 176-177
[233] Further supporting that the *EOC* is able to 'otherwise provide'
[234] *Rome Statute* (n.1) art.8(2)(e)(i)

reference in the latter being directly tied to the Statute itself. Furthermore, this decision questions the integrity of the theory that 'intentionality' should always be understood in accordance with article 30, unless there is a clear reason for deviation, since pillaging requiring a special intent is not recognised in a similar way as, for example, genocidal intent.[235]

In the case of *Al Mahdi* the defendant was accused of having intentionally directed attacks against protected objects under article 8(2)(e)(iv). The elements of article 8(2)(e)(iv) mirror the ones required by article 8(2)(e)(i) with the exception of the object the article prohibits attacks against.[236] Hence, in accordance with customary principles of interpretation, the elements of this crime should be interpreted the same way as the ones demanded by directing an attack against civilians.[237] Since Al Mahdi confessed to the crime he was accused of, the trial judgement does not provide a thorough analysis of the elements article 8(2)(e)(iv) consists of. However, they do establish that the elements need to be fulfilled in order to show that the crime has indeed occurred, and do apply them in subsequent order to Al Mahdi's actions determining that they have been so.[238] When applying element 8(2)(e)(iv)(3), concerning the perpetrators intention that the object of the attack would be one of the protected objects covered by the article, the court states that the *purpose* of the operation was to destroy the protected buildings. Based on this the chamber determined that they were indeed the intended object of the attack, indicating that the crime does demand direct intent.[239] The section on applicable law provides additional context of the necessary mental element. The chamber considered that the more general crime of destruction of civilian property under article 8(2)(e)(xii) might have been more suitable before ultimately coming to the conclusion that no legal recharacterization was necessary. In this evaluation they particularly took into consideration the fact that "the specific intent of the defendant to attack protected objects meets squarely the mens rea requirement of Article 8(2)(e)(iv)".[240] Since the concept of special intent is

[235] *Bemba* (n.108) para.120; Dannenbaum (n.69) 717
[236] *EOC* (n.8) art.8(2)(e)(i) & 8(2)(e)(iv)
[237] Gardiner (n.71) 169
[238] *Al Mahdi* (n.211) para.45-52
[239] *Al Mahd*i (n.211) para.48; *See* Werle & Jessberger (n.14) para.561, purpose synonymous with direct intent
[240] *Al Mahdi* (n.211) para.12

generally associated with an evidentiary standard higher than the general mens rea it is reasonable to conclude that that article 8(2)(e)(iv) does indeed require the stricter direct intent.[241]

8. Conclusion

It is clear that the ICC are of the opinion that the conduct of attacking civilians in a NIAC needs to be criminalised regardless of whether the attack was committed with direct intent. Since article 8(2)(e)(i) represents the only crime in the Rome Statute concerning attacking civilians in a NIAC it is assigned the responsibility to fulfil this need. The judgment in *Katanga* argues in favour of oblique intent being sufficient for the article. However, the reasoning invoked to reach such a conclusion display that the court relied on a fundamental misconception of the crime's elements. Not only does subsequent cases prosecuting the crime of attacking civilians, such as *Ntaganda* and *Ongwen,* concur with the Katanga judgment without reflecting on the misconception in the preceding judgment. They also apply the standard in a way which contradicts the reasoning originally made in *Katanga* in support for its conclusion, consequently demonstrating the inherent flaws the initial judgements interpretation entails.

Interpreting the necessary intent of article 8(2)(e)(i) independently from previous judgements, the general concurrence suggests that the article does demand direct intent. Firstly, direct intent being required corresponds with the transformation of the prohibition to a conduct crime. This change demands the very relevant consequence of civilians being attacked to be implemented in the crime through a specific intent element, which are generally associated with a stricter intent requirement. Secondly, article 8(2)(e)(i) excluding oblique intent is supported by the principle of effectiveness as this would ensure that the crime of disproportionate attacks does not risk being redundant in relation to the crime of attacking civilians. Thirdly, considering a consistent understanding of the phrase 'the perpetrator intended' in the EOC also supports that direct intent towards the civilians being the object of the attack is the necessary threshold, since this is the implied or established meaning of the phrase in multiple other crimes.

[241] Dannenbaum, (n.69) 713; *see also* Report Darfur (n.134) para.491 stating specific intent to be equivalent to aggravated criminal intent

In conclusion, the crime of attacking civilians requiring direct intent does result in a gap in the law as neither indiscriminate or disproportionate attacks are consequently prohibited in NIACs. However, an understanding of element 8(2)(e)(i)(3) which supports the inclusion of oblique intent makes the element ambiguous to such a degree that it directly contradicts the purpose of the EOC. Consequently, an interpretation of article 8(2)(e)(i) corresponding with good faith requires the perpetrator to have possessed direct intent in relation to the civilians being the object of the attack.

9. Future Research

The topic of intention and ICL is far from exhausted. For future research it would be relevant to further explore the relationship between Rome Statute provisions and EOC elements. For example, the applicable mode of liabilities possible influence over a crime's elements. Also, the EOC consistently refers to the perpetrators' knowledge, how does this interact with article 30 and its reference to ‘otherwise providing’?

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