Chapter III

Material Contextual Elements

III.1 The Objective Elements of Attacks Directed at Civilians or Civilian Objects and of Disproportionate Attacks.
The Distinction between Material Contextual Elements, Jurisdictional Contextual Elements and Specific Objective Elements

The objective elements of the war crimes provided for in art. 8 RS – including the attacks directed against civilians or civilian objects and the disproportionate attacks – can be classified into: (i) contextual elements which are applicable to all war crimes included in art. 8 RS (known as “material contextual elements”) and (ii) the specific elements of any given war crime. The material contextual elements, which must be met for any conduct to constitute a war crime under the RS, can be distinguished from those other circumstances which do not affect the qualification of a behaviour as a war crime and are only required for the Court’s exercise of its subject matter jurisdiction over war crimes (known as “jurisdictional contextual elements”).

Among the material contextual elements, one can distinguish between the elements concerning the relationship between the forbidden behaviour and the armed conflict in which it takes place and those elements relating to the protected status of the person or object subject to the forbidden behaviour. The jurisdictional contextual elements provided for in arts. 8(i) and 17(i)(d) RS – which are true requisites to proceed and will be analyzed in the section of this book dealing with the objective requisites to proceed – are those relating to the gravity threshold that must be met for the Court to exercise its subject matter jurisdiction over war crimes.

The material contextual elements include numerous normative elements, such as the existence of a crisis situation which can be legally qualified as an armed conflict or the protected status granted by international humanitarian law to the persons or objects subject to the forbidden conduct. This, along with the reference in art. 8(2)(b) and (e) RS to the “established framework of international law” and the reference in art. 21(1)(b) RS to “the established principles of the international law of armed conflict”, make international humanitarian law a

75 See infra section XIII.3.
key tool in the interpretation of such normative elements particularly if one considers that the EC, despite being a relevant source for interpretation, are not binding on the Chambers of the Court.

As a result, the conventional instruments of international humanitarian law, and in particular the Hague Conventions on the Laws and Customs of War on Land of 1899 and 1907 and their Annexed Regulations and the Geneva Conventions of 1949 and their two Additional Protocols of 1977, will play a central role in the interpretation of the material contextual elements. Likewise, customary international humanitarian law, as it has been reflected in the case law of the Ad hoc Tribunals, will also play an important role. However, one should not forget that the interpretation of the material contextual elements will have to be consistent with “internationally recognized human rights” without any distinction based on any of the grounds provided for in art. 21(3) RS. The material contextual elements, insofar as they are part of the objective elements of all war crimes and, thus, must be met for any given behaviour to become a war crime pursuant to the RS, must be covered by the general subjective element of the relevant crime. However, for individual criminal responsibility to arise the perpetrator does not need to make the value judgements inherent to the numerous normative elements included in the material contextual elements. On the contrary, it is sufficient for the perpetrator to be aware of the factual circumstances on which such value judgements are based.

Therefore, neither the RS nor the EC require for the perpetrator to be aware that a given crisis situation legally amounts to an armed conflict or that the persons or objects subject to the forbidden behaviour have a protected status under international humanitarian law. It is sufficient for the perpetrator to be aware of the factual circumstances justifying the qualification of a crisis situation as an armed conflict or the granting of a protected status to the persons or objects against which the forbidden behaviour is directed. On the other hand, as the

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76 Art. 21(1)(b) RS provides that the Court shall apply “in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”.
77 Art. 9(1) RS.
78 Art. 21(3) RS includes the following grounds: “gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”.
80 See EC, Introduction to the Elements of War Crimes [hereinafter EC]. See also K. Ambos, Elementos del Crimen así como Reglas de Procedimiento y Prueba de la Corte Penal Internacional, La Nueva Justicia Penal Supranacional. Desarrollos post-Roma 54 (Tirant lo Blanch 2002).