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Targeting and the Concept of Intent

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TARGETING AND THE CONCEPT OF INTENT

*Jens David Ohlin**

ABSTRACT

*International law generally prohibits military forces from intentionally targeting civilians; this is the principle of distinction. In contrast, unintended collateral damage is permissible, just as long as the anticipated civilian deaths outweigh the expected military advantage of the strike; this is the principle of proportionality. These cardinal targeting rules of international humanitarian law are generally assumed by military lawyers to be relatively well settled. However, recent international tribunals applying this law in a string of little-noticed decisions have completely upended this understanding. Armed with criminal law principles from their own domestic systems, often civil law jurisdictions, prosecutors, judges and even scholars have progressively redefined what it means to “intentionally” target a civilian population. In particular, these accounts rely on the civil law notion of *dolus eventualis*, a mental state akin to common law recklessness that differs in at least one crucial respect: it classifies risk-taking behavior as a species of intent.*

*This problem represents a clash of legal cultures. International lawyers trained in civil law jurisdictions are nonplussed by this development, while the Anglo-American literature on targeting has all-but-ignored this conflict. But when told of these decisions, U.S. military lawyers view this “re-interpretation” of intent as conflating the principles of distinction and proportionality. If a military commander anticipates that attacking a building may result in civilian casualties, why bother analyzing whether the collateral damage is proportional? Under the *dolus eventualis* view, the commander is already guilty of violating the principle of distinction. The following Article voices skepticism about this vanguard application of *dolus eventualis* to the law of targeting, in particular by noting that *dolus eventualis* was excluded by the framers of the Rome Statute and was nowhere considered by negotiators of Additional Protocol I of the Geneva Convention. Finally and most importantly, a *dolus eventualis*-inspired law of targeting undermines the Doctrine of Double Effect, the principle of moral theology on which the collateral damage rule rests. At stake is nothing less than the moral and legal distinction between terrorists who deliberately kill civilians and lawful combatants who foresee collateral damage.*

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INTRODUCTION

Imagine that an attacking soldier is about to launch an aerial attack against a building in the territory of his enemy. The enemy combatants are located on the second floor of the building, but there are civilians on the first floor as well. Although the attacking soldier aims at the second floor, he is fully aware of a substantial risk that some civilians might be killed as collateral damage. The November 2012 air war by Israeli forces against Hamas in the Gaza Strip included countless strikes that fit this description.¹ Other examples include a well-known incident where an American drone allegedly fired upon civilians conducting a funeral in Yemen.² Both orthodox Just War Theory and orthodox international humanitarian law (IHL) proclaim such attacks perfectly lawful as long as the primary objective is a legitimate mili-

¹ See Isabel Kershner & Rick Gladstone, *Israel and Hamas Step Up Air Attacks in Gaza Clash*, NEW YORK TIMES (Nov. 15, 2012).

² See Chris Woods, *Get the Data: Obama’s terror drones*, THE BUREAU OF INVESTIGATIVE JOURNALISM (February 4, 2012). For a discussion of this and other alleged incidents involving funerals, see Robert Chesney, *Is DPH the Relevant Standard in Pakistan? An Important Element in the Debate Missing from BIJ’s Report*, LAWFARE (February 6, 2012); Kevin Jon Heller, *Chesney on Attacking Mourners and Rescuers with Drones*, OPINIO JURIS (February 7, 2012); Dapo Akande, *US Drone Strikes in Pakistan: Can it be Legal to Target Rescuers & Funeralgoers?* EJIL: TALK! (February 12, 2012).

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tary target and the anticipated civilian deaths are not disproportionate to the value of the military target.³ Although this legal and moral rule is distasteful (because it involves the gruesome deaths of combatants and civilians), its contours ought to be clear.

On the contrary, these scenarios, repeated every hour and every day in times of armed conflict, are surprisingly contested because the concept of intent has little or no settled meaning that stretches across bodies of law and across legal cultures. Indeed, the current literature on the law of targeting has all-but-ignored these differences. However, the concept of intent is one of the most contentious issues for domestic and international criminal law, and the indeterminacy surrounding the concept of intent now threatens to bleed into IHL, where the rule of collateral damage was previously well settled.⁴ Legal debates surrounding the concept of intent – familiar debates for philosophers and theorists of criminal law – risk confusing and upending an area that military lawyers falsely believed was clear and determinate.⁵ This Article unpacks and analyzes this development.

Simply put, it is black-letter international criminal law (ICL) that intentionally directing an attack against civilians constitutes a war crime.⁶ The

³ See Additional Protocol I of 1977 to the Geneva Conventions of 1949, opened for signature Dec. 12, 1977, art. 48 (“parties to the conflict shall at all times distinguish between the civilian population and combatants”), art. 51 (“The civilian population as such, as well as individual civilians, shall not be the object of attack.”), 1125 U.N.T.S. 3-608 (1979), reprinted in 16 I.L.M. 1391 (1978) [hereinafter cited as Additional Protocol I]. For additional codifications of the principle of distinction, see Hans-Peter Gasser, *Protection of the Civilian Population*, in Dieter Fleck (ed), *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 237, 238 (2nd ed. 2008) (rule 501); Stefan Oeter, *Methods and Means of Combat*, in Fleck, *supra*, at 126 (rule 401).

⁴ See *U.S. v. Otto Ohlendorf et al. [Einsatzgruppen Case]*, IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No.10 467 (1949) (“A city is bombed for tactical purposes: communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purposes of impeding the military. In these operations, it inevitably happens that non-military persons are killed. This is an in incident, a grave incident to be sure, but an unavoidable corollary of hostile battle action.... But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women and children and shooting them.”). See also W. van der Wolf (ed), *WAR CRIMES AND INTERNATIONAL CRIMINAL LAW* 103 (2010).

⁵ See WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 80 (2012); API *Commentary*, para. 1863 (principle of distinction is the “foundation on which the codification of the laws and customs of war rests”).

⁶ See Rome Statute of the International Criminal Court, art. 8(2)(b), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter cited as Rome Statute].

incidental killing of civilians is permissible if the civilian casualties are not “excessive in relation to the concrete and direct military advantage anticipated” in the words of the Additional Protocol to the Geneva Convention,⁷ or “clearly excessive” in the language of the Rome Statute,⁸ two similar expressions of the principle of proportionality.⁹ The problem here is the deep ambiguity over what is meant by the concept of intent. The tension is compounded by the fact that the ambiguity stretches along two axes: across legal cultures and across bodies of law. This claim requires elaboration.

First, not every jurisdiction understands intent in the same way in its criminal law.¹⁰ The word is notoriously vague and captures situations where the defendant desires a particular outcome as well as situations where the defendant is aware of the practical certainty of the outcome but is indifferent to the result. This is precisely why, for instance, the Model Penal Code abandoned the ambiguous language of intent in favor of the more precise categories of purpose and knowledge to express these differences.¹¹ The more common phrases in civil law jurisdictions, *dolus directus* and *dolus indirectus*, cover the same conceptual territory as acting with purpose and acting with knowledge.¹²

⁷ Additional Protocol I, *supra* note 3, art. 51(5).

⁸ See Rome Statute, *supra* note 6, art. 8(2)(b)(iv).

⁹ On the differences between the two standards, see GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY 100 (2008); Adil Ahmad Haque, *Protecting and Respecting Civilians: Correcting the Substantive and Structural Defects of the Rome Statute*, 14 NEW CRIM. L. REV. (2011) (Article 8 of the Rome Statute does “not incorporate the principles of distinction, discrimination, or necessity and incorporate[s] only a diluted version of the principle of proportionality”).

¹⁰ See, e.g., GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 445 (2nd reprint ed. 2000) (1978).

¹¹ See Model Penal Code, Section 2.02(2)(a) and 2.02(2)(b). See Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and under the Model Penal Code*, 18 GA. ST. U. L. REV. 341 (2001); Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2003); Michael Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, in R.A. Duff & Stuart Green (eds), PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (2011).

¹² See Lutz Eidam, *Making Comparative Criminal Law Possible*, 54 BUFF. L. REV. 235, 240 (2006) (reviewing Markus Dubber’s *Einführung in das US-amerikanische Strafrecht*); John D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, UNIV. OF MIAMI INT’L AND COMP. L. REV. (2004).

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On top of this ambiguity, it is also unclear whether the civil law category of *dolus eventualis* qualifies as a form of intent.¹³ Although *dolus eventualis* is virtually unheard of among English-language trained lawyers, the term is central to the landscape of mens rea in most civil law jurisdictions.¹⁴ Although there are competing versions of *dolus eventualis*, one definition in Germany requires that the agent recognize the likely consequences of his action and, in deciding to move forward, “reconciles himself” with the result.¹⁵ To a criminal lawyer trained in the civil law it is fairly uncontroversial to consider *dolus eventualis* as a subcategory of intent. It is, after all, a form of *dolus*.¹⁶ But to a U.S. criminal lawyer, the idea that *dolus eventualis* is a form of “intent” is nonsensical.¹⁷ Only acting with purpose and acting with knowledge constitute bona fide variations of intent.¹⁸

In addition to asking and answering these questions, a satisfactory theory of “intentionally attacking civilians” must also contend with the origins of the norm in IHL, in particular Additional Protocol I of the Geneva Convention and the relevant customary norms that have emerged from the Geneva Conventions.¹⁹ International criminal law borrows the norm from IHL and then adds an additional aspect: individual criminal responsibility for violations of the norm. Consequently, the relevant question is how the concept of intent, or the idea of “directing an attack” against civilians, is understood by IHL lawyers, and in particular how the concept was understood by the negotiators of Additional Protocol I of the Geneva Conventions. More specifically, were there differences between common law and civil law trained lawyers involved in these negotiations? This is a complex matter, especially since the preceding analysis reminds us that one cannot assume that each

¹³ See Greg Taylor, *Concepts of Intention in German Criminal Law*, 24 OXFORD J. OF LEGAL STUDIES 99 (2004).

¹⁴ See GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW* 317 (2007).

¹⁵ FLETCHER, *RETHINKING*, *supra* note 10, at 317; Taylor, *supra* note 13, at 104; Mohamed Elewa Badar, *Dolus Eventualis and the Rome Statute Without It?*, 12 NEW CRIM. L. REV. 433, 459 (2009).

¹⁶ See generally F. Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer*, 1 J. INT’L CRIM. JUST. 26 (2003); Mohamed Elewa Badar, *The Mens Rea Enigma in the Jurisprudence of the International Criminal Court*, in Larissa van den Herik & Carsten Stahn (eds), *THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW* 504, 511 (2012).

¹⁷ Taylor, *supra* note 13, at 104.

¹⁸ *Id.* at 126.

¹⁹ See GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 383 n.263 (2nd ed. 2009) (2005) (concluding that the appropriate mental element is drawn from the “underlying norms of international humanitarian law”).

reference to the term “intent” means the same thing; different people mean different things when they talk the language of intent. Ironically, comparative analysis becomes more difficult – not less – when the participants use the same terms. When lawyers use different terms, one can safely assume that they are referring to different concepts. But when lawyers use the same terms, one can be lulled into falsely assuming that they are referring to the same concepts.

One might object that the interpretative reference to IHL is misplaced because whatever the contours of the IHL norm, the Rome Statute drafters changed the norm when they crafted the relevant provisions of the Rome Statute on *mens rea*.²⁰ However, this is an unsatisfactory response. First, IHL remains an applicable body of law, and whatever the Rome Statute did, it did not *change* the IHL rule – it simply criminalized it. Second, it is fine if the contours of the ICL norm and the IHL norm diverge, but the usual pattern is for the ICL crime to be narrower, on the assumption that prosecutors should meet additional requirements before punishment is warranted. In other words, it is fine if ICL *exculpates* individuals whose conduct violates a norm emerging from another body of law. But the opposite result would be curious. If ICL *inculcates* individuals who did not violate the IHL norm, this would be an odd and uncomfortable result indeed.

The following Article untangles this riddle by carefully considering the rich case law on targeting that has been carefully elucidated by the International Criminal Tribunal for the former Yugoslavia (ICTY).²¹ Part I sets out the problem of intent and explains what is at stake in this debate. Since the principle of proportionality is only triggered when civilians are killed collaterally, a lawyer can avoid the demands of proportionality by expanding his interpretation of intent so that all civilian deaths are interpreted as “intended.” Part II of this Article then asks whether this interpretation of the concept of intent could be justified by the passage of the Rome Statute of the International Criminal Court, which includes specific provisions on mental states. However, an analysis of the *travaux préparatoires* at Rome does not support this view. Part III of this article considers a set of ICTY targeting decisions that run counter to the received wisdom among IHL lawyers, where the international court has read the concept of intent very broadly in such a way that it includes the foreseen killing of civilians. These decisions, based on

²⁰ See, e.g., Rome Statute, *supra* note 6, art. 30(1) (“Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”).

²¹ For a general description of this jurisprudence, see WERLE, *supra* note 19, at 382-83. A full analysis of the cases is provided *infra* in Part III of this Article.

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the principle of *dolus eventualis*, have the effect of unwinding the core principles of targeting as expressed in IHL.

Part IV of this article then examines the principles of distinction and proportionality as they were codified in Additional Protocol I to the Geneva Convention. In particular, this Part analyzes whether negotiators were laboring under the civil or common law understanding of intent. Finally, Part V argues that collapsing the two tracks – distinction and proportionality – violates the Doctrine of Double Effect upon which the rule of collateral damage was modeled.²² Although violating the Doctrine of Double Effect does not necessarily provide, by itself, conclusive reason to reject the broad reading of intent, it does add to the cumulative weight of evidence that an overly broad reading of intent unwinds the foundational principles on which the positive law of IHL is built.

The Article concludes with some reasons for thinking that the Doctrine of Double Effect is normatively correct, though the overall structure of the Article’s argument does not depend on the acceptance of these reasons. From the perspective of legal interpretation it is sufficient to show that the IHL law on targeting was meant to express the Doctrine of Double Effect, independent of the doctrine’s moral defensibility.

I. THE TWO TRACKS OF TARGETING & THE DISAPPEARANCE OF PROPORTIONALITY

The central core of IHL is the prohibition against directly attacking civilians. The prohibition is embodied in the principle of distinction: an attacking force may deliberately kill combatants, but targeting civilians is strictly forbidden.²³ Though civilians might be collaterally killed in the course of targeting enemy combatants, these deaths are only permissible if they accord with the principle of proportionality.²⁴ Collateral civilian casualties must be proportional to the value of the military objective; otherwise the attack

²² See generally Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

²³ See Additional Protocol I, *supra* note 3, at art. 48; BOOTHBY, *supra* note 5, at 60-62 (“The law of armed conflict and the customary law of targeting are rooted in the principle that a distinction must be made throughout the conflict between those who may be lawfully attacked and those who must be respected and protected”); JOHN FABIAN WITT, LINCOLN’S CODE 18 (2012) (discussing early version of the protection of civilian populations in Vattel’s 18th century law of nations that spared “women, children, feeble old men, and sick persons” from the “calamities of war”).

²⁴ See generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES 46-50 (2005).

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violates IHL and might even trigger criminal liability.²⁵ The principle of distinction is often expressed without the word “intent”; usually the relevant provisions talk of “directing”²⁶ an attack against civilians or making civilians the “object”²⁷ of an attack. These are all references to intentional attacks, as the *travaux préparatoires*,²⁸ and relevant treatises make clear.²⁹

One might describe this as a two-track system, and what separates the two tracks is the concept of intent. Under the first track, an attack violates IHL if it is intentionally directed at civilians. Under the second track, an attack violates IHL, even in the absence of intent, if it produces disproportionate civilian casualties. More ink has been spilled analyzing the second track’s concept of proportionality than perhaps any other issue in the law of targeting.³⁰ It is fraught with vagueness and much is at stake. Some scholars claim that proportionality can only be understood relative to a value judgment regarding the underlying aim of the war (*jus ad bellum*),³¹ while other

²⁵ See generally Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, 8 YEARBOOK OF INT’L HUMANITARIAN L. 3 (2007).

²⁶ See Additional Protocol I, *supra* note 3, at art. 48.

²⁷ *Id.* at art. 51(2).

²⁸ See International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, May 3 – June 3, 1972, REPORT ON THE WORK OF THE CONFERENCE 148 (1972); International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, May 24 – June 12, 1971, REPORT ON THE WORK OF THE CONFERENCE 77-78 (1971).

²⁹ See, e.g., International Committee of the Red Cross (Sandoz et al, eds), COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987) [hereinafter cited as ICRC COMMENTARY], at 618 paras. 1938-41.

³⁰ See, e.g., GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 275 (2010); Amichai Cohen, *The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives*, 35 RUTGERS L. REC. 23 (2009); Janina Dill, *The Definition of a Legitimate Target of Attack: Not More Than A Moral Plea?*, 103 AM. SOC’Y INT’L L. PROC. 229 (2010). On distinguishing *jus in bello* proportionality from *jus ad bellum* proportionality, see Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities*, 43 CASE W. RES. J. INT’L L. 707 (2011); FLETCHER & OHLIN, DEFENDING HUMANITY, *supra* note 9, at 96-102.

³¹ Cf. Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 44 (2005) (“If *in bello* proportionality looks even partly at the just causes for war, it cannot be assessed independently of *ad bellum* considerations, and especially of the moral importance of those causes. Intuitively this seems right... But this claim contradicts the dominant view in the just war tradition, which treats the *jus in bello* as entirely independent of the *jus ad bellum*, so the same *in bello* rules apply to both sides of a conflict whatever the justice of their aims.”).

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scholars maintain that proportionality refers to the concrete military objective of that particular attack.³² Given the intensity of these legal disputes, it might seem surprising that there are almost no examples of track-two prosecutions before international tribunals that might provide guiding precedent on the nature of proportionality.³³

This Part concludes that there is a simple reason why the second track, and its principle of proportionality, has so rarely been applied by international tribunals. Instead of dealing with the fraught legal complications of proportionality, both prosecutors and international judges squeeze almost all of the targeting cases into the first track, thus accusing the commander in question of directly targeting civilians or indiscriminately bombarding civilian areas. When the analysis is shifted to the first track, proportionality is sidestepped as legally irrelevant.

How can this shifting be accomplished? Surely, at least some of these scenarios involve attacks that were not intentionally directed at civilians, and ought to be analyzed under the second track's rubric of proportionality. Simply put, the shifting is accomplished because the concept of intent is ambiguous to a degree that IHL and military lawyers do not fully realize. Even within the realm of criminal law, where the concept of intent is central and ought to be well settled, different legal cultures operate with far different intuitions about what mental states are covered by the concept of intent, and these ambiguities systematically frustrate our ability to understand what counts as an intentional action. Consequently, determining what counts as an intentional attack against civilians is far more complicated than at first it might appear.

In the United States and other common law countries, criminal lawyers have long been perplexed by the concept of intent. The concept of intent clearly covers cases where an individual acts with a desire to produce a particular result.³⁴ But the language of intent might also be used to describe situations where the actor is practically certain that their actions will cause a particular result, though they are generally indifferent to that result. Consider the following hypothetical: A is standing in front of B. Suppose that a perpetrator fires his weapon at them because he wants to kill B, though he is

³² For a discussion of this issue, see Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 46, 52 (2009).

³³ *Prosecutor v. Gotovina* is one of the few examples where the ICTY convicted a defendant for launching a disproportionate attack, but the conviction was overturned by the Appeals Chamber. See Judgement, *Prosecutor v. Gotovina*, ICTY Appeals Chamber, Case No. IT-06-90-A (Nov. 16, 2012), para. 82 (overturning Trial Chamber's finding that the attack against the town of Martić was disproportionate).

³⁴ See Model Penal Code, section 2.02(2).

genuinely indifferent to A's fate. The killing of B is clearly intentional, but did the perpetrator *intend* to kill A? In some sense yes, because it was his intention that the bullet travel through A and reach B in order to kill B. But in another sense no, because the perpetrator did not care what happened to A; the killing of A was a mere effect of his plan to kill B. So the killing of A could be described as intentional or not depending on what one means by the term intentional.

The great innovation of the U.S. Model Penal Code was to recognize that this dispute was unresolved – perhaps even *unresolvable* – because the language of intent was fundamentally ambiguous on this point. The MPC therefore banished the language of intent and replaced it with two categories, acting knowingly and acting purposely, to cover these distinct situations. So in the hypothetical above, the perpetrator's killing of B was performed purposely, while the perpetrator's killing of A was performed knowingly. Prior to the MPC, this move had been suggested by criminal law scholars writing in the Anglo-American tradition, who would refer to the killing of A as an "oblique intention."³⁵ The MPC codified this distinction but went even further by removing the ambiguous language of intent entirely from the formula.

Although the MPC scheme was a welcome innovation for criminal lawyers educated in the common law system, it was hardly new to criminal lawyers trained in civil law countries in Europe. These lawyers were already familiar with civil law concepts that covered the same ground as acting purposely and acting knowingly, which were referred to as *dolus directus* and *dolus indirectus* respectively.³⁶ In that respect, one might view the MPC as importing and codifying a civil-law scheme to replace the ambiguous language of intent that had reigned in the common law.³⁷

Unfortunately, though, the common law distinction between acting purposely and knowingly (and the analogous civil law distinction between *dolus directus* and *dolus indirectus*) does not exhaust the ambiguities of intent. The problems go at least one level deeper into the murky domain of mental states. In the Model Penal Code scheme, the mental state below knowledge is recklessness, which is defined in the following manner:

³⁵ See Glanville Williams, *Oblique Intention*, 46 CAMBRIDGE L.J. 417, 424 (1987).

³⁶ See Mohamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary From a Comparative Criminal Law Perspective*, 19 CRIM. L.F. 473, 474 (2008) (discussing *dolus indirectus* and oblique intention).

³⁷ See Confirmation Decision, *Prosecutor v. Bemba*, ICC Pre-Trial Chamber. *But see* Kai Ambos, *Critical Issues in the Bemba Confirmation Decision*, 22 LEIDEN J. INT'L L. 715, 717 (2009) (suggesting that the distinction between purpose and knowledge in civil law jurisdictions is not always clear cut).

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A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.³⁸

The notion of a “conscious disregard” of a substantial and unjustifiable risk is not unknown to civil law lawyers, although they do not use the concept of recklessness to describe it. Rather, the same phenomenon of criminal risk-taking behavior is covered by the concept of *dolus eventualis*.³⁹ Under one common definition of *dolus eventualis*, a perpetrator acts with this mental state if he “foresees that his or her action is likely to produce its prohibited consequences, and nevertheless willingly takes the risk of so acting.”⁴⁰ A debate rages among international lawyers over whether *dolus eventualis* is exactly the same as recklessness, or whether it represents a mental state that is slightly more culpable than common law recklessness because it requires an identification with the evil result that represents a malignant heart.⁴¹

There are two positions regarding how to translate *dolus eventualis* into common law terms. Either it accords with the common law concept of recklessness, or it is a distinct mental state that resides above recklessness but below knowledge or *dolus indirectus*.⁴² If it is the former (the same as recklessness), it cannot be a form of intent, according to the common law law-

³⁸ See Model Penal Code, section 2.02(2)(c).

³⁹ See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 66 (2nd ed., 2008) (2003).

⁴⁰ *Id.*

⁴¹ See, e.g., FLETCHER, RETHINKING, *supra* note 10, at 446; SARAH FINNIN, ELEMENTS OF ACCESSORIAL MODES OF LIABILITY: ARTICLES 25 (3)(B) AND (C) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 159 (2012) (arguing that *dolus eventualis* represents a more culpable mental state than pure common law recklessness); ELIES VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 46 (2003) (*dolus eventualis* and recklessness both involve liability for risk-taking behavior though the latter is broader).

⁴² See also Albin Eser, *Mental Elements – Mistake of Fact and Mistake of Law*, in Antonio Cassese et al (eds), THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 889, 906 (2002) (*dolus eventualis* is a mental state where the “volitional element becomes even less strong and, thus, the cognitive elements gain more weight”); Jeroen Blomsma, *Fault Elements in EU Criminal Law*, in André Klip (ed), SUBSTANTIVE CRIMINAL LAW OF THE EUROPEAN UNION 135, 138 (2011).

yer, because acting recklessly is not the same as acting intentionally.⁴³ If it is the latter (slightly above recklessness), then it is an utter mystery what *dolus eventualis* means because there is no analogous U.S. concept that matches its exact contours and covers the nether-region between recklessness and acting knowingly.⁴⁴ Therefore it is no surprise that there remains substantial disagreement in both the case law and the scholarly literature over whether *dolus eventualis* is covered by Article 30 of the Rome Statute and its default rule on mens rea, which states that unless otherwise provided, defendants must act with knowledge and intent to be convicted of a crime before the International Criminal Court.⁴⁵ But we can set this debate to the side for the moment. What matters is that *dolus eventualis* is either the same as recklessness or closely resembles it because it represents liability for risk-taking behavior.

Here is the upshot of this comparative analysis. International tribunals are capable of squeezing most cases of civilian deaths into track one because they also conclude that, as a matter of law, *dolus eventualis* counts as a form of intent. Consequently, a military commander who launches an attack, and foresees the possibility of civilian casualties, has thereby *intentionally* directed an attack against civilians and has therefore violated the core IHL prohibition of track one. No analysis of proportionality is required because the attack was “intentional” in the sense in which civil law lawyers understand the concept.

For a common-law trained lawyer – either a criminal lawyer or a military lawyer working in the law of armed conflict – this result is curious or even absurd. The whole point of the first track’s categorical prohibition (as opposed to the second track’s qualified prohibition only in case of disproportionate damage) is that it only applies to intentional attacks, and recklessness is of a different species from the concept of intent. To a civil law trained lawyer, however, the inclusion of *dolus eventualis* within the more general category of intent is justifiable and even natural. After all, *dolus eventualis* is a form of *dolus*, and represents a culpable mental state that involves a conscious awareness on the part of a perpetrator. A common law trained lawyer would concede the latter point but not the former; recklessness is a culpable mental state infused with awareness (indeed all of the MPC states save neg-

⁴³ *But see* Neil Roughley, *Double Failure of ‘Double Effect’*, in Christoph Lumer & Sandro Nannini (eds), *INTENTIONALITY, DELIBERATION, AND AUTONOMY* 91, 106 n.16 (2007).

⁴⁴ *See, e.g.*, GABRIELLE KIRK McDONALD, OLIVIA SWAAK-GOLDMAN, *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW* 21 (2000) (describing *dolus eventualis* as “somewhere between purpose / knowledge and recklessness / negligence”).

⁴⁵ For a discussion of the controversy, see ELIES VAN SLIEDREGT, *INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW* 47 (2012).

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ligence involve some aspect of conscious awareness), but it would be an exaggeration to equate the conscious aspect of recklessness with the concept of intent. The concept of intent is reserved for cases of acting purposely and acting knowingly, *dolus directus* and *dolus eventualis* respectively.

Although this represents a simplification of views among a larger population of lawyers, the general attribution of views is correct.⁴⁶ As with any comparative assessment, it will be true that some American lawyers and courts will be unusually sympathetic to the European worldview, and some European scholars might be swayed by the MPC classification that reigns in the United States. That being said, these would be exceptions that prove the rule. As a comparative matter, it is undeniable that in Europe it is uncontroversial to classify *dolus eventualis* as a species of intent, and in the United States it would be odd to do so.

This presents a special challenge for the core IHL prohibition on directly attacking civilians. Should it include cases of *dolus eventualis* or not? Different legal cultures treat the underlying issue very differently, but IHL is supposed to be universal in scope, or at the very least transnational and trans-regional.⁴⁷ It would be intolerable if IHL meant one thing in the United States but quite another in Europe. The whole point of having an international legal regime is that it represents legal norms that are widely held so as to apply to all participants in a conflict.⁴⁸ Although some differences in *interpretation* might be shrugged off as inevitable,⁴⁹ the ambiguity over the concept of intent is so fundamental that it implicates the actual content of the norm in question. While international legal pluralism might be inevitable in some cases, the success of IHL as a normative regime presumes that the core

⁴⁶ Indeed, while *dolus eventualis* is a sub-category of intent in both German and German-based criminal law systems, the same cannot be said of French criminal law. See VAN SLIEDREGT, *supra* note 41, at 46 n.155.

⁴⁷ For a discussion of pluralism and fragmentation, see Elies van Sliedregt, *Pluralism in International Criminal Law*, 25 LEIDEN J. INT'L L. 847, 848 (2012); Alexander K. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063 (2011); M. Koskenniemi & P. Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002).

⁴⁸ DIETER FLECK, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* xiii (2d ed. 2009) (2008).

⁴⁹ Larissa J. Van den Herik & Carsten Stahn (eds.), *THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW* (2012); M. Koskenniemi & P. Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002).

norms will not be implicated by whatever pluralism might linger at the margins.⁵⁰

The current literature on the law of targeting has largely ignored the ambiguity of intent, ignoring the fact that lawyers trained in different disciplines, and from different legal cultures, might cash out the concept of intent in different ways.⁵¹ This unfortunate situation can only be rectified by combining comparative criminal law, criminal law theory, IHL, and ICL into a single, coherent analysis. So this Article now turns to the application of *dolus eventualis* by the ad hoc tribunals. Spurred by civil law criminal law theory, judges in The Hague have demonstrated a greater hospitability to *dolus eventualis*, both generally and specifically in the context of attacks against civilians. The following Part outlines these developments and demonstrates that the contentious issue of *dolus eventualis* explains the collapsing of the two tracks of IHL first introduced in Part I.

II. DOLUS EVENTUALIS AT THE HAGUE

As it happens, the wayward analysis of intent sketched out in the previous part is more than just an academic curiosity supported by a few innovative scholars with controversial readings of *dolus eventualis*. Rather, the view also dominates the international case law at the ICTY in cases where individuals have been prosecuted for attacking civilians.⁵² Instead of resolv-

⁵⁰ Cf. van Sliedregt, *supra* note 47, at 851; Yuval Shany, *One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?*, in Ole Kristian Fauchald & Andrew Nollkaemper (eds), *THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW* 15, 27-28 (2012).

⁵¹ One notable exception is Kevin Heller, who has explored this issue in a series of posts and comments on *Opinio Juris*. See, e.g., Kevin Jon Heller, *Chesney on Attacking Mourners and Rescuers with Drones*, *OPINIO JURIS* (February 7, 2012) (“A drone targets groups of people, not individuals, especially in a rescue/funeral situation where individuals are densely packed together. So my point is that, by attacking a legitimate target in a civilian population with a drone, the U.S. is attacking the civilian population — it can’t simply say that because there was a lone combatant in the population’s midst, the principle of distinction is satisfied and all that matters is proportionality.” See also Jens David Ohlin, *Targeting and the Concept of Intent*, *OPINIO JURIS* (Feb. 8, 2012) (responses and comments).

⁵² Similarly, the special report to the Office of the Prosecutor on the NATO bombing also defined the applicable mens rea as intention or recklessness. See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (June 13 2000), reprinted in 39 *I.L.M.* 1258 (2000), at para. 28. For analysis, see Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 *INT’L REV. RED CROSS* 445, 455 (2005).

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ing such cases under the rubric of proportionality, prosecutors and judges have avoided the thorny calculations of proportionality by squeezing their cases on to track one by using the concept of *dolus eventualis*. In so doing, they have effectively conflated the distinction between intentionally targeting civilians and unintentionally causing disproportionate damage to civilians. With a wide and expensive understanding of the former, the latter becomes superfluous and unnecessary. This result is surprising, because IHL and military lawyers still believe that the concept of proportionality is one of the core principles of their discipline. But in its application by criminal lawyers, the concept of proportionality has almost entirely disappeared.

A. The ICTY Case Law on Targeting Civilians

The root of this development can be traced to the *Galic* Trial Chamber judgment, delivered by the ICTY in 2003.⁵³ Stanislav Galic was a general of the Bosnian-Serb Army in command of the Sarajevo Romanija Corps between 1992 and 1994, overlapping with the siege of Sarajevo. He was charged with war crimes for a campaign of sniper fire and shelling executed by his troops against the civilian population of Sarajevo.⁵⁴ Among other counts, the charges included the war crime of launching attacks against civilians, rules which the Trial Chamber concluded were based on Article 51(2) of Additional Protocol I and Article 13(2) of the Additional Protocol II, either directly as treaty-based norms or indirectly as customary norms applicable to all armed conflicts regardless of their status as international or non-international.⁵⁵ The Trial Chamber also concluded that the “act of making the civilian population or individual civilians the object of attack” constituted a “serious” breach meeting the *Tadić* standard for defining war crimes. The *Tadić* standard was met because the defendant’s conduct transgressed a “core principle” of IHL that has “grave consequences” for its victims.⁵⁶ Furthermore, the Chamber concluded that the *Tadic* standard was met because the rule in question triggers individual criminal responsibility under both international law and domestic penal systems, including Yugoslavia.⁵⁷

As for the required mental element, the reasoning of the Trial Chamber was more difficult to discern. The Trial Chamber at first took great pains

⁵³ Judgment, *Prosecutor v. Galić*, ICTY Trial Chamber, Case No. IT-98-29-T (Dec. 5, 2003).

⁵⁴ *Id.* at para. 4.

⁵⁵ *Id.* at para. 149.

⁵⁶ *Id.* at para. 11.

⁵⁷ *Id.* at para. 28.

to distinguish between attacks that violate the principles of distinction and those that violate the principle of proportionality,⁵⁸ thus suggesting that the Chamber was aware that the two tracks were normatively distinct inquiries.⁵⁹ However, when discussing mens rea, the Trial Chamber analyzed the notion of “willfully... making the civilian population or individual civilians the object of attack,” the standard taken from Article 85 of Additional Protocol 1.⁶⁰ The Trial Chamber relied almost exclusively on the ICRC *Commentary*, which argues that the concept of willfully in Article 85 encompasses recklessness:

willfully: the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences.⁶¹

But what was the ICRC's rationale for this conclusion? The Trial Chamber did not bother to enquire with any degree of skepticism. If it had, it would have realized that the sole citation that the ICRC offered in favor of this proposition was a scholarly source that in fact conceded that these terms had different meanings in domestic penal systems.⁶²

Symptomatic of the same confusion is the Chamber's equation of launching indiscriminate attacks with directly targeting civilians.⁶³ Although

⁵⁸ *Id.* para. 26.

⁵⁹ *Id.* para. 48.

⁶⁰ *Id.* para. 43.

⁶¹ See ICRC COMMENTARY, *supra* note 29, at 994 para. 3474.

⁶² See ICRC COMMENTARY, *supra* note 29, at 994 n.14, citing G. Stefani, G. Levasseur, & B. Bouloc, DROIT PENAL GENERAL 213-34 (11th ed. 1980).

⁶³ See *Galić*, *supra* note 53, at para. 57 & n.101 (“Other Trial Chambers have found that attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to direct targeting of civilians.”). However, Additional Protocol I only suggests that disproportionate attacks can be equated with indiscriminate attacks, not that indiscriminate attacks can be equated with directly targeting civilians. See Additional Protocol I, *supra* note 3, art. 51(5)(b) (“Among others, the following types of attacks are to be considered as indiscriminate: ... an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”).

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both are war crimes, they are not the *same* war crime and must be kept conceptually and doctrinally distinct. An indiscriminate attack is one that is taken without regard to a specific target; the attacker launches the bomb in a general direction, does not bother to aim at a specific target, and cannot predict where the bomb will land. As an example, Hamas' firing of rockets into Israel has been criticized by some for being indiscriminate because they are not fired at specific targets.⁶⁴ Lacking precision technology to direct the rockets to a specific target, Hamas allegedly launches them into Israel without knowing where they will fall.⁶⁵ The whole reason to have "indiscriminate attacks" as a distinct prohibition in IHL – and a distinct war crime under ICL – is because it is normatively distinct from intentionally directing an attack against civilians. The latter is an intentional targeting of civilians; the former represents the complete lack of "targeting" entirely. Though they might yield the same result on the ground (in terms of the death of the civilians), they stem from different mental attitudes on the part of the attacker. In fact, Article 51(5) of Additional Protocol I makes clear that indiscriminate attacks, if they are to be equated with any war crime, are to be equated with creating disproportionate collateral damage to civilians: "[a]mong others, the following types of attacks are to be considered as indiscriminate: [...] (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."⁶⁶

The Appeals Chamber in *Galic* upheld the Trial Chamber's findings with regard to mens rea by simply citing the ICRC *Commentary* and not engaging in any deeper analysis.⁶⁷ To be fair, counsel for *Galic* could have

⁶⁴ See, e.g., PETER BERKOWITZ, *ISRAEL AND THE STRUGGLE OVER THE INTERNATIONAL LAWS OF WAR* 10 (2012).

⁶⁵ See Isabel Kershner & Rick Gladstone, *Israel Destroys Hamas Prime Minister's Office*, *NEW YORK TIMES* (Nov. 16, 2012) (noting that Israeli military strike was in retaliation for Hamas' firing of "more than 700 rockets into southern Israel over the last year").

⁶⁶ See Additional Protocol I, *supra* note 3, art. 51(5)(b).

⁶⁷ See Judgment, *Prosecutor v. Galić*, ICTY Appeals Chamber, Case No. IT-98-29-A (Nov. 30, 2006), para. 140 (In its discussion of the mens rea of the crime at issue, the Trial Chamber found that the perpetrator must undertake the attack 'wilfully', which it defines as wrongful intent, or recklessness, and explicitly not 'mere negligence'. The Trial Chamber relied on the ICRC Commentary to Article 85 of Additional Protocol I, which defines intent for the purposes of Article 51(2) and clearly distinguishes recklessness, 'the attitude of an agent who, without being certain of a particular result, accepts the possibility of its happening', from negligence, which describes a person who 'acts without having his mind on the act or its consequences'. The Trial Chamber's reasoning in this regard is correct and *Galić* offers no support for his contention

pressed the issue far more strenuously and carefully in the defendant's appellate brief.⁶⁸ Rather than excavate the interesting fissure between common law and civil law understandings of "intent," a point that might have generated some traction with the judges interested in comparative law arguments, Galic simply argued that the Trial Chamber had conflated intentional, indiscriminate, and disproportionate attacks.⁶⁹ Although this was certainly true – the Trial Chamber did indeed conflate them – nowhere did Galic's attorneys explain that the conflation was based on a particular civil law reading of the notion of intent as contained in the basic prohibitions of Additional Protocol I. Given that the Additional Protocol specifically, and IHL in general, is supposed to represent universal and cross-cultural norms, one should not automatically or cavalierly support a civil law interpretation at the expense of a common law interpretation. This argument might have appealed to the judges committed to the legitimacy of international criminal justice as a universal enterprise.⁷⁰

In *Blaskic*, an ICTY Trial Chamber concluded that an attack against civilians was criminal if it was "conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity."⁷¹ The question is what the Trial Chamber meant by the phrase "impossible not to know."⁷² Presumably that is a reference to willful blindness – a subject of much debate in the criminal law literature.⁷³ However, the Trial Chamber also concluded that the although "[d]efence claimed that it is not sufficient to prove that an offence was the result of reckless acts... the mens rea constituting all the violations

that the Trial Chamber committed an error of law. Thus, to the extent that Galic impugns this specific finding, his argument is without merit and accordingly dismissed."), also citing ICRC COMMENTARY, *supra* note 29, at 994 para. 3474.

⁶⁸ See Defence Appellant's Brief, *Prosecutor v. Galic*, Case No. IT-98-29-A (July 19, 2004), paras. 48-49

⁶⁹ *Id.* at para. 50 ("Indiscriminate and disproportionate attacks can not be qualified as direct attacks, as erroneously concluded by the Trial Chamber. A clear distinction must be made between indiscriminate and disproportionate attacks.")

⁷⁰ See, e.g., Cassese, *supra* note 39, at 13-14.

⁷¹ See Judgment, *Prosecutor v. Blaskic*, ICTY Appeals Chamber, Case No. IT-95-14-T (March 3, 2000), para 180.

⁷² *Id.*

⁷³ Judgment, *Prosecutor v. Delalic et al.*, ICTY Trial Chamber, Case No. IT-96-21-T (Nov. 16, 1998), para. 387. See Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990); William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1029 (2003).

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of Article 2 of the Statute includes both guilty intent and recklessness which may be likened to serious criminal negligence.”⁷⁴ This statement is even broader than what was offered in *Galic*, though the Trial Chamber offered no supporting analysis for its conclusion that recklessness suffices to meet the mens rea standard for attacking civilians.⁷⁵

In *Kordić & Čerkez*, the defendant and prosecution brought this issue to the Trial Chamber by offering directly competing accounts of the required objective and mental elements for the crime of directly attacking civilians.⁷⁶ Strangely, the Trial Chamber pretended not to notice the difference and declined to resolve the ambiguity.⁷⁷ The prosecution argued that an unlawful attack required that “the civilian status of the population or individual persons killed or seriously injured was known or should have been known,” (thus suggesting a version of recklessness or even negligence) and that “the attack was willfully directed at the civilian population or individual civilians.”⁷⁸ On the other hand, the defense argued that the actor must intend to direct the attack against civilians and explicitly defined “intent” as *dolus directus* – the highest form of intent and clearly inconsistent with a standard of *dolus eventualis* or recklessness.⁷⁹ Incredibly, the Trial Chamber concluded that there was “little difference between the definitions” offered by the prosecution and defendant and declined to resolve any differences between them.⁸⁰ On appeal, the Appeals Chamber did not seriously discuss the issue, though it did take pains to distinguish intentional attacks from indiscriminate attacks in its analysis.⁸¹

Part of the problem is the *lex specialis* nature of the IHL prohibition. Under regular rules of ICL, it may be the case that recklessness (or reckless

⁷⁴ *Prosecutor v. Delalic*, *supra* note 73, at para. 152.

⁷⁵ On appeal, the Appeals Chamber did not address the issue of the mens rea for attacking civilians, although it did include a lengthy discussion of *dolus eventualis* and recklessness within the context of the mode of liability for planning, ordering, or instigating. See Judgment, *Prosecutor v. Delalic et al.*, ICTY Appeals Chamber, Case No. IT-96-21-A (date), para. 27 et seq.

⁷⁶ See *Prosecutor v. Kordić & Čerkez*, ICTY Trial Chamber, Case No. IT-95-14/2-T (Feb. 26, 2001), paras. 322-25.

⁷⁷ *Id.* at para. 326 (“There is little difference between the definitions given by the Prosecution and the Defence.”).

⁷⁸ *Id.* at para. 322.

⁷⁹ *Id.* at para. 324.

⁸⁰ *Id.* at para. 326.

⁸¹ See *Prosecutor v. Kordić & Čerkez*, ICTY Appeals Chamber, Case No. IT-95-14/2-A (Dec. 17, 2004), para. 396.

disregard) satisfies the appropriate mens rea for committing a willful murder.⁸² In such cases, the Trial Chambers argue that murder requires acting with intent, although again intent is read broadly here.⁸³ Trial Chambers have also held that recklessness is sufficient for the underlying mode of liability being used in the case, whether ordering, aiding and abetting, participating in a Joint Criminal Enterprise, or command responsibility -- any one of which allow convictions based on recklessness.⁸⁴ The problem is that the specific war crime of attacking civilians has a more specific mental requirement that arguably changes the default mens rea applicable for other international crimes. The whole point of the IHL rule is that directly attacking civilians is *per se* illegal, while causing collateral damage -- even if it is envisioned -- is only illegal if it is disproportionate. To collapse the two on the basis of a general ICL finding that recklessness is satisfactory for the crime of murder is to undermine the more specific rule and the distinction between its two tracks.

Strugar is a good example of this phenomenon.⁸⁵ In *Strugar*, the Trial Chamber engaged in a lengthy analysis of the required mens rea for murder as a war crime, and concluded that:

to prove murder, it must be established that death resulted from an act or omission of the accused, committed with the intent either to kill or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission. In respect of this formulation it should be stressed that knowledge by the accused that his act or omission might possibly cause death is not sufficient to establish the necessary mens rea. The necessary mental state exists when the accused knows that it is probable that his act or omission will cause death.⁸⁶

⁸² Cf. Schabas, *supra* note 73, at 1020-21.

⁸³ See, e.g., *Prosecutor v. Kordić & Čerkez*, *supra* note 81, at para. 229.

⁸⁴ See, e.g., Judgment, *Prosecutor v. Delalic*, ICTY Trial Chamber, paras. 386-89 (mens rea for command responsibility). James Stewart notes this phenomenon and considers it a major failing of ICL substantive doctrine. See James G. Stewart, *The End of 'Modes of Liability' for International Crimes*, 25 LEIDEN J. INT'L L. 165, 192-93 (2012). This is a general problem with ICL because modes of liability are used water down the mens rea requirements (rather than upgrade the requirements as the American system does with the purpose requirement for accomplice liability under federal law). However, some US jurisdictions pursue accomplice liability on the basis of knowledge as a mental state, and *Pinkerton* liability (and its corollary in accomplice liability based on natural and probable consequences) is built around recklessness. See *Pinkerton v. United States*, 328 U.S. 640 (1946).

⁸⁵ See Judgment, *Prosecutor v. Strugar*, ICTY Trial Chamber, Case No. IT-01-42-T (Jan. 31, 2005).

⁸⁶ *Id.* at para 236.

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As a statement of general criminal law, and the mens rea for murder, this might be defensible. But it is undeniably false if one mechanically applies it to the more specific crime of attacking civilians, wherein non-desired consequences are only criminal if they result in disproportionate killings. One cannot redefine intent to do an “end-run” around the requirement of proving disproportionate civilian casualties.

But relying on the *Galic* and *Kordic* decisions, this is precisely what the Trial Chamber in *Strugar* did.⁸⁷ After citing *Galic* and *Kordic* for the proposition that both indiscriminate attacks and attacks carried out recklessly met the standard for an intentional attack against civilians,⁸⁸ the Trial Chamber then concluded that:

On the basis of the foregoing analysis, it would seem that the jurisprudence of the Tribunal may have accepted that where a civilian population is subject to an attack such as an artillery attack, which results in civilian deaths, such deaths may appropriately be characterized as murder, when the perpetrators had knowledge of the *probability* that the attack would cause death. Whether or not that is so, given the acceptance of an indirect intent as sufficient to establish the necessary mens rea for murder and willful killing, there appears to be no reason in principle why proof of a deliberate artillery attack on a town occupied by a civilian population would not be capable of demonstrating that the perpetrators had knowledge of the probability that death would result.⁸⁹

As if to further complicate the issue, the Trial Chamber claimed that it was *not* reaching the issue of whether a standard lower than intent was being applied, claiming that “the issue whether a standard lower than that of a direct intent may also be sufficient does not arise in the present case.”⁹⁰ This is hard to fathom, especially since the Chamber concluded that mere “knowledge of the probability that death would result” was sufficient to establish liability – a standard that is far lower than direct intent under the common law.⁹¹ On appeal, the Appeals Chamber disavowed these statements and noted that it was now settled ICTY jurisprudence that the crime of directly attacking civilians included the notions of direct intent, indirect intent, as well as recklessness.⁹² This conclusion alone demonstrates a lack of familiarity with, and fi-

⁸⁷ *Id.* at paras. 236-37.

⁸⁸ *Id.* at paras. 237-39 & n.798.

⁸⁹ *Id.* at para. 240.

⁹⁰ *Id.* at para. 283.

⁹¹ *Id.* at para. 240.

⁹² See Judgment, *Prosecutor v. Strugar*, ICTY Appeals Chamber, Case No. IT-01-42-A (July 17, 2008). para. 270.

delity to, basic concepts of comparative criminal law, since the Appeals Chamber appeared to equate recklessness with indirect intent, whereas most common law lawyers are trained today to equate indirect intent with the mental state of acting knowingly (requiring virtual or practical certainty), a mental state that most definitely *does not* include the concept of recklessness.

B. Consequences of the ICTY Case Law

This is where the tribunal's jurisprudence remains. Recent cases such as *Prosecutor v. Perisic* continue this line of thinking.⁹³ Trial Chamber judges now almost mechanically apply the usual sources without even considering the issue, citing *Galic*, the ICRC *Commentary*, and now the *Strugar* Appeal Judgment; they even use the same language verbatim: "the concept of 'wilfulness' encompasses both the notions of direct intent and indirect intent, that is, the concept of recklessness, excluding mere negligence."⁹⁴ For a tribunal that claims to operate with no principle of *stare decisis*, this appears to be an issue that is now immune from reexamination and is firmly entrenched in the background jurisprudence of the ICTY.⁹⁵ The result of this reinterpretation of intent is that the "settled" jurisprudence of the ICTY is entirely inconsistent with equally well-settled notions of Anglo-American criminal law. For a field of law that is supposed to govern attacking forces across the globe, from diverse legal cultures, this failure to appreciate the basic landscape of common law mental states has deep and unfortunate consequences, including the further estrangement of the United States from the project of international criminal justice,⁹⁶ and a growing disconnect between how military lawyers in IHL and European-trained ICL lawyers understand one of the most basic prohibitions of the Law of War: the crime of directly attacking civilians.

This creates an odd situation. The rule in ICL is effectively wider than it is in IHL. The opposite result would be permissible. Sometimes criminal norms are narrower than the underlying legal principle that is criminalized. So the rule might be wider in IHL, but only a sub-class of IHL violations

⁹³ See Judgment, *Prosecutor v. Perisic*, ICTY Trial Chamber, Case No. IT-04-81-T (Sept. 6, 2011).

⁹⁴ *Id.* at para. 100.

⁹⁵ See Alphons M.M. Orié, *Stare Decisis in the ICTY Appeal System? Successor Responsibility in the Hadžihasanović Case*, 10 J. INT'L CRIM. JUST. 635, 640-41 (2012).

⁹⁶ On the estrangement, see generally Megan A. Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage*, 29 BERKELEY J. INT'L L. 528 (2011); MARK D. KIELSGARD, *RELUCTANT ENGAGEMENT: U.S. POLICY AND THE INTERNATIONAL CRIMINAL COURT* (2010).

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might yield criminal liability out of an abundance of caution for when criminal punishment is appropriate. In many situations this is appropriate because the deprivation of liberty associated with punishment often requires special normative justification, and the infringement of an underlying legal norm does not necessarily entail a level of personal culpability deserving of punishment.⁹⁷ But here we have the potential for the opposite result, which makes no sense. Military lawyers understand the rule narrowly when it is discussed exclusively within the context of IHL, but when criminal judges apply the norm at the ICTY they suddenly widen the rule by reinterpreting the concept of intent.

III. DOLUS EVENTUALIS AT ROME

One possible explanation for the ICTY's broad interpretation of the principle of distinction is that international criminal law has moved wholesale towards an acceptance of *dolus eventualis* as an appropriate mental state. At least some scholars conclude that this movement began with the adoption of the Rome Statute in 1998.⁹⁸ The Rome Statute includes a default provision on mental states, article 30, which states that the minimum requirement for criminal liability under the statute is "intent and knowledge."⁹⁹ The Statute defines intent as "in relation to conduct, that person means to engage in the conduct" and "in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."¹⁰⁰ The reference to "ordinary course of events" neatly tracks the common law definitions of purpose and knowledge, and certainly suggests a mental state requirement far more demanding than mere recklessness.¹⁰¹ However, at least some ICC judges have ruled that *dolus eventualis* satisfies this standard. This Part provides a critical examination of this claim, and finds the evidence wanting.

⁹⁷ See generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 92 (2008).

⁹⁸ See Badar, *supra* note 15, at 467.

⁹⁹ See Rome Statute, *supra* note 6, art. 30.

¹⁰⁰ *Id.*

¹⁰¹ See Donald K. Piragoff & Darryl Robinson, *Mental Element*, in Otto Triffterer (ed), *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 849, 860-61 (2nd ed. 2008) (1999).

A. *The Article 30 Default Rule*

There are multiple complications to the analysis. First, Article 30 starts with the caveat that the default rule on mental states applies “unless otherwise provided.”¹⁰² This statement perplexes scholars because they cannot decide how to finish the statement – unless otherwise provided *where*? On one reading, unless otherwise provided refers to other sections of the Rome Statute, or even potentially other international instruments generating individual criminal responsibility.¹⁰³ The other far broader reading is that “unless otherwise provided” refers to any other area of international criminal law, including customary prohibitions and their customary definitions of international criminality.¹⁰⁴ Under this view, the default requirement can be circumvented rather easily every time a clear rule of customary international law permits criminal liability for reckless behavior.¹⁰⁵

Even without the circumventing power of the “unless otherwise provided” carve-out, plenty of courts have recognized that the concept of intent as used in Article 30 might include recklessness, based on the civil law concept of *dolus eventualis* as a species of *dolus*.¹⁰⁶ These decisions represent a decidedly civil law reading of Article 30, and other courts have expressed caution regarding this reading.¹⁰⁷

¹⁰² Rome Statute, *supra* note 6, art. 30(1).

¹⁰³ See Piragoff & Robinson, *supra* note 101, at 856.

¹⁰⁴ See Badar, *supra* note 15, at 440-41; Cassese, *supra* note 39, at 74.

¹⁰⁵ Cf. Gerhard Werle & Florian Jessberger, “*Unless Otherwise Provided*”: Article 30 of the ICC Statute and the Mental Elements of Crimes under International Criminal Law, 3 J. INT’L CRIM. JUST. 35, 41 (2005).

¹⁰⁶ See, e.g., Decision on Confirmation of Charges, *Prosecutor v. Lubanga*, ICC Pre-Trial Chamber, Case No. ICC-01/04-01/06 (Jan. 29, 2007), para. 344. This finding was upheld by the Trial Chamber. See Judgment, *Prosecutor v. Lubanga*, ICC Trial Chamber, para. 1011. However, the Trial Chamber defined the phrase “in the ordinary course of events” as a “high risk” – a standard which covertly embraces *dolus eventualis* or recklessness through the back door. The Trial Chamber’s weak rationale for this definition, *supra* para. 1012, was that a defendant can never truly “know” what will happen in the future, and therefore all assessments of future consequences involve risk. However, the Trial Chamber’s definition fell well short of the common law definition for knowledge that a consequence will occur as a “practical certainty.” See Model Penal Code, section 2.02(2)(c).

¹⁰⁷ See Confirmation of Charges, *Prosecutor v. Bemba*, ICC Pre-Trial Chamber, Case No. ICC-01/05-01/08 (June 15, 2009), para. 360. *But see* Steffen Wirth, *Co-Perpetration in the Lubanga Trial Judgment*, 10 J. INT’L CRIM. JUST. 971, 990 (2012) (arguing that “*Bemba* would lead to disturbing results”).

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Some proponents of the European view on mental states look to the Rome Statute for guidance on what constitutes culpable intent. One interpretive guide to structure the analysis is to ask what the drafters of the Rome Statute had in mind when they drafted Article 30. However, the drafting history of the Rome Statute suggests that *dolus eventualis* was explicitly considered and rejected by the drafters of the Rome Statute, because doing so “might send the wrong signal that these forms of culpability were sufficient for criminal liability as a general rule.”¹⁰⁸ In particular, an early draft for Article 30 of the Rome Statute included a fourth paragraph specifically dealing with recklessness, but it was dropped from the final text after it proved impossible to gain agreement on the issue.¹⁰⁹ Commentators and negotiators have generally concluded that most delegations were skeptical about including *dolus eventualis* and recklessness within the Statute’s default mental rule.¹¹⁰ This reading of the negotiations was also supported by the ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision.¹¹¹

Nonetheless, commentators and some judges continue to maintain that *dolus eventualis* falls within the Rome Statute’s Article 30 default rule.¹¹² In essence, this argument attempts to do by textual interpretation what negotiators failed to accomplish at Rome: get recklessness or *dolus eventualis* within the standard Rome Statute framework on mental states. Or, as the negotiator Roger Clark put the point sharply, “*dolus eventualis* and its common law cousin, recklessness, suffered banishment by consensus. If it is to be read into the Statute, is in the teeth of the language and history.”¹¹³ Schabas agrees, concluding that *dolus eventualis* was rejected early in

¹⁰⁸ See Piragoff & Robinson, *supra* note 101, at 850.

¹⁰⁹ See WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 473 (2010), *citing* “Chairman’s Text,” UN Doc. A/AC.249/1997/WG.2/CRP.4. *See also* UN Doc. A/CONF.183/DC/R.76.

¹¹⁰ See SCHABAS, *supra* note 109, at 474; Roger S. Clark, *Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations of the Rome Statute of the International Criminal Court and by the Court’s First Substantive Law Discussion in the Lubanga Dyilo Confirmation Proceedings*, 19 CRIM. L. FORUM 619 (2008).

¹¹¹ See *Prosecutor v. Bemba*, *supra* note x, at para. 366 & n.461, *citing Report of the Working Group on General Principles of Criminal Law*, UN Doc. A/CONF.183/C.1/WGGP/L.4, at 255.

¹¹² See Badar, *supra* note 15, at 442-43; Wirth, *supra* note 107, at 995 (arguing that applying customary international law to read *dolus eventualis* into the Rome Statute under the “unless otherwise provided” clause of article 30 “leads to practicable outcomes that are consistent with both the law and a common sense approach to justice”).

¹¹³ See Roger Clark, *Elements of Crimes in Early Decisions of Pre-Trial Chambers of the International Criminal Court*, *NEW ZEALAND YEARBOOK OF INT’L L.* (2009); Badar, *supra* note 15, at 441 n.32.

the Rome Statute negotiations.¹¹⁴ The textual argument for its banishment could not be clearer. The 1996 report from the Preparatory Committee included a draft proposal of Article 30 with a fourth paragraph, reading:

For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstances or a consequence if:

(a) the person is aware of a risk that the circumstance exists or that the consequence will occur;

(b) the person is aware that the risk is highly unreasonable to take;

[and]

(c) the person is indifferent to the possibility that the circumstance exists or that the consequence will occur.]¹¹⁵

The proposal explained the fourth paragraph with the following note:

The concepts of recklessness and *dolus eventualis* should be further considered in view of the seriousness of the crimes considered. Therefore, paragraph 4 would provide a definition of “recklessness”, to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly. In all situations, the general rule, as stated in paragraph 1, is that crimes must be committed intentionally and knowingly.¹¹⁶

What is interesting about the preceding clarification is that it explains the significance of the criminal lexicon being used by the drafters. *Dolus eventualis* and recklessness were viewed as separate and apart from intent and knowledge, not a subcategory of one global principle of intent that covered all forms of *dolus*. It would then seem absurd to read *dolus eventualis* back into the language of “intent and knowledge” when the drafters were, all the while, working on the assumption that *dolus eventualis* was a mental state that resided below intent and knowledge on the ladder of culpability.¹¹⁷

¹¹⁴ See SCHABAS, *supra* note 109, at 476.

¹¹⁵ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. 1 (Proceedings of the Preparatory Committee During March – April and August 1996), paras. 52-53, UN Doc. A/51/22(1996), *cited in* Badar, *supra* note 15, at 447-48.

¹¹⁶ *Id.*

¹¹⁷ *Cf.* Ambos, *supra* note 37, at 718 (“While the *travaux* confirm a restrictive approach as to Article 30, they are only a ‘supplementary means of interpretation’ (*cf.* Article 32 Vienna Convention on the Law of Treaties) and thus not decisive in the light of a clear or different literal interpretation.”). However, Ambos concurs in the result that *dolus eventualis* is not consistent with Article 30 of the Rome Statute.

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The fourth paragraph of the disputed section survived all the way to the April 1998 Preparatory Committee meeting, where a draft Article 29 still included the paragraph on recklessness and *dolus eventualis*.¹¹⁸ Thereafter, however, the fourth paragraph was excised from the article and never made it further into the Statute's text when the final version was presented at Rome in July of 1998.¹¹⁹ The only possible way of interpreting the exclusion was that there was no consensus among the drafters that recklessness and *dolus eventualis* were sufficiently culpable mental states to satisfy the proposal default rule.

B. The Notion of Dolus

Given the limitations of appealing to the *travaux préparatoires*, what are the potential arguments for reading *dolus eventualis* back into the Rome Statute or international law generally?

First, there's the claim that it is implicit in the notion of *dolus*, i.e. it is a form of intent – a claim that ought to be taken seriously. If civil law trained lawyers are inclined to understand the term “intent” as encompassing three subparts (*directus*, *indirectus*, and *eventualis*), then it is perhaps too swift to automatically reject *dolus eventualis* from the umbrella of intent. Just as the civil law classification violates the common law scheme, so too the common law scheme violates the civil law classification. In order to understand the proper classification, it is necessary to understand what is meant by intent here. If one understands intent broadly and as encompassing a volitional component (the will) and an awareness component (or cognition), then there is some merit in the inclusion.¹²⁰ Acting with purpose (*dolus directus*) involves the highest form of volition, i.e. a desire to bring a particular state of affairs into being. Acting with knowledge (*dolus indirectus*) also involves a volitional component because the actor brings about a state of affairs that is practically certain to obtain, even though that state of affairs is not his or her purpose for acting. As for *dolus eventualis*, though, the question is whether there is a volitional component here at all.

¹¹⁸ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/CONF.183/2/Add.1, cited in Badar, *supra* note 15, at 451.

¹¹⁹ See SCHABAS, *supra* note 109, at 476, citing *Prosecutor v. Bemba*, *supra*, at para. 363 (“had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words ‘may occur’ or ‘might occur in the ordinary course of events’ to convey mere eventuality or possibility, rather than near inevitability or virtual certainty”).

¹²⁰ See Lubanga, Confirmation of Charges, *supra* note 106, at para. 351.

Scholars have staked out a seemingly infinite supply of positions on this issue, and at least part of the disagreement stems from the fact that even *dolus eventualis* does not have a settled meaning.¹²¹ Just as intent is ambiguous, so too *dolus eventualis* is ambiguous at a second level, meaning different things in different legal systems and sometimes even within a legal system depending on which theory of *dolus eventualis* is supported by a judge or scholar. The immense variety of *dolus eventualis* usually goes unrecognized by academic commentators, although some are sensitive to the radical multiplicity. Darryl Robinson, for example, concludes that:

the concept ‘dolus eventualis’ does not have a monolithic or uniform meaning within all civil law systems. Nevertheless, in all civil law systems, it appears to include the concept connoted by the phrase ‘will occur in the ordinary course of events’; i.e., an awareness of a substantial or high degree of probability that the consequence will occur. However, in some civil law systems, it also includes the situation of an awareness of a substantial or serious *risk* that a consequence will occur and indifference whether it does, which is similar to the concept of ‘recklessness’ in many common law countries. Additionally, some civil law countries may also consider some mental states of inadvertence to be included in this concept. Due to different national conceptions, attempts to define the concepts were abandoned during the negotiations. Whatever may be the merits of the distinction under national legal systems, it was clear that the first-noted meaning of ‘dolus eventualis’ is included (i.e. ‘will occur in the ordinary course of events’). The latter meanings of ‘dolus eventualis’ or ‘recklessness’ were not incorporated explicitly into article 30, although it may be open to the Court to interpret the inclusion of some aspects of these meanings, which import a high degree of advertence or probability.”¹²²

On the first interpretation, *dolus eventualis* might mean that the actor is aware of the consequence of his action occurring in the “ordinary course of events.”¹²³ However, this definition of *dolus eventualis* is really closer in substance to *dolus indirectus*, or the common law standard of acting knowingly, which in the MPC is defined as acting with “virtual certainty” that a result will occur.¹²⁴

¹²¹ See Thomas Weigend, *Intent, Mistake of Law and Co-Perpetration in the Lubanga Decision on Confirmation of Charges*, 6 J. INT’L CRIM. JUST. 471, 482 (2008); FINNIN, *supra* note 41, at 157 (“There is no one test or definition for *dolus eventualis*.”); MICHAEL BOHLANDER, *PRINCIPLES OF GERMAN CRIMINAL LAW* 64 (2009).

¹²² See Piragoff & Robinson, *supra* note 101, at 860 n.67.

¹²³ See Badar, *supra* note 15, at 461 (discussing possibility and probability versions of *dolus eventualis*).

¹²⁴ See MPC §2.02(2)(b).

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On a second interpretation, *dolus eventualis* might mean that the actor “reconciles himself,” “accepts” or “approves” of the result, all phrases that have been associated with the “consent and approval theory” of *dolus eventualis* applied by some German courts.¹²⁵ But it is totally mysterious what it means for an actor to reconcile himself to a *future* occurrence. If it means that he is aware of the possible result but simply decides to engage in the action anyway, then this seems no different than recklessness. If it means something more, how can he approve of the result without it sliding into purpose?¹²⁶ The basic problem here is that the “consent and approval” version of *dolus eventualis* exists in a liminal region *in between* recklessness and knowingly -- a region for which common law lawyers have no associated legal term or concept.¹²⁷ It is therefore no surprise that common law trained lawyers stumble over themselves when trying to understand and express the mental state associated with this version of *dolus eventualis*. Simply put, it does not exist in American law. American lawyers are trained to punch up or punch down an actor whose mental state resides in this region.¹²⁸

On a third interpretation, one can understand *dolus eventualis* based on a “probability theory” where the defendant is aware that his risk-taking behavior will probably produce a given result.¹²⁹ It is clear that this version of *dolus eventualis* comes closest to common law recklessness, thus explaining why some commentators take the position that *dolus eventualis* and recklessness are one and the same.¹³⁰ On some theories of *dolus eventualis*, this is

¹²⁵ See Badar, *supra* note 15, at 459; Taylor, *supra* note 13, at 113; FLETCHER, RETHINKING, *supra* note 10, at 445. See also *The Doner Shop Case*, NStZ-RR 2000, 165 (Germany, February 22, 2000).

¹²⁶ See BOHLANDER, *supra* note 121, at 63 (concluding that *dolus eventualis* “straddles the fence between the German concepts of conditional intent and advertent negligence”).

¹²⁷ See Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1024-28 (1998); see also FLETCHER, RETHINKING, *supra* note 14, at 445-47.

¹²⁸ It would be interesting to empirically compare intuitive judgments from German criminal lawyers with judgments made by American-trained lawyer. For an example of how an empirical study of mental states might be constructed, see Pam Mueller et al., *When Does Knowledge Become Intent? Perceiving the Minds of Wrongdoers*, 9 J. EMPIRICAL LEG. ST. 859 (2012).

¹²⁹ See Michaels, *supra* note 127, at 1025 n.288 (“The ‘probability theory’ requires awareness of a higher degree of risk, specifically that the defendant consider the forbidden circumstance or result to be probable.”).

¹³⁰ Indeed, there are some reasons to equate the two mental states. It is often said that common-law recklessness includes a cognitive component but no volitional component, while *dolus eventualis* includes both cognitive and volitional components. But on many formulations recklessness does indeed include a volitional component be-

indeed true. At this point, it seems clear that this “probability” version of *dolus eventualis* is precluded by Article 30 of the Rome Statute, which requires that the actor be aware that the event “will occur” rather than “might occur” or “probably occur.”¹³¹ The language of Article 30 is about future events and the defendant’s awareness of them, not simply risk-taking behavior and the actor’s callousness with regard to risky outcomes.¹³² *Dolus eventualis* is about risk, but the plain language of Article 30 is about events that *will* occur, not *might* occur.¹³³

C. ‘Unless Otherwise Provided’

A second argument might support the inclusion of *dolus eventualis* as an applicable mental state in the Rome Statute and international law generally: the claim that the Rome Statute’s reference to “unless otherwise provided” provides a back door through which *dolus eventualis* might enter. On this reading, Article 30 does not usually allow for *dolus eventualis*, unless otherwise provided, and several commentators have concluded that one can look to customary international law to find that *dolus eventualis* is “otherwise provided” as an appropriate mental state for international criminal law.¹³⁴

This view, though widespread in the scholarly literature, finds little support in the *travaux préparatoires*. As Robinson notes, the standard view of

cause a reckless actor proceeds with his course of action in spite of the risks. *See, e.g.*, Guyora Binder, *Meaning and Motive in the Law of Homicide*, 3 BUFF. CRIM. L. REV. 755, 767 (2000) (though describing this as a reinterpretation of recklessness); Kenneth Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992). *Compare with* Itzhak Kuglar, *Israel*, in Markus Dubber & Kevin Jon Heller (eds), *THE HANDBOOK OF COMPARATIVE CRIMINAL LAW* 352, 365 (2011) (describing recklessness without volitional component).

¹³¹ Indeed, Judge Van den Wyngaert’s concurring opinion in the recent Ngudjolo Chui acquittal makes precisely this point. *See* Concurring Opinion of Judge Christine Van den Wyngaert, *Prosecutor v. Mathieu Ngudjolo Chui*, ICC Trial Chamber Judgment, Case No. ICC-01/04-02/12 (Dec. 18, 2012), para. 38 (“reliance on ‘risk’ as an element under Article 30 of the Statute is tantamount to accepting *dolus eventualis* dressed up as *dolus directus* second degree”).

¹³² *See* Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT’L L. 693, 724 (2011).

¹³³ *Id.* *See also* Van den Wyngaert Concurring Opinion in *Ngudjolo Chui*, *supra* note 131, at paras. 37-39; Separate Opinion of Judge Fulford, *Prosecutor v. Lubanga*, ICC Trial Chamber Judgment, para. 15 (referring to *Lubanga* Trial Judgment definition and application of *dolus eventualis* as “confusing”).

¹³⁴ *See, e.g.*, Werle & Jessberger, *supra* note 105, at 45-46; Wirth, *supra* note 107, at 993; Badar, *supra* note 15, at 444.

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the phrase is that it refers to other provisions in the Rome Statute, such that intent and knowledge are the default mental states unless a separate provision of the Rome Statute provides for a different mental state – as in, for example, the specific intent provisions regarding genocide.¹³⁵ This scheme liberated the drafters from having to specify a mental state for every single crime in the special part of the Rome Statute.¹³⁶ A more controversial reading of the Article 30 “unless otherwise provided” clause suggests that it might refer to the Elements of Crimes, a document negotiated and passed by the Assembly of State Parties, which codifies the doctrinal elements for each crime in the Statute.¹³⁷ But even this view is controversial, since by its own terms the Elements of Crimes are only meant to assist judges in interpreting the statute as a secondary source or aid in the process of interpretation.¹³⁸ Is it permissible – or was it intended – that the “unless otherwise provided” clause could be triggered by a secondary document like the ICC Elements of Crimes which is undeniably a lower source of statutory law on the hierarchy of codification?¹³⁹

Whatever view one takes on the merits of appealing to the Elements of Crimes as a source for an “unless otherwise provided” argument, there is virtually no support in the *travaux préparatoires* for the even-more-radical view that the “unless otherwise provided” clause might point back to lower and less stringent mental elements found in unwritten customary international law.¹⁴⁰ There are several reasons why this argument is unappealing and unacceptable. First, it runs completely counter to the entire *raison d’être* of the Rome Statute process, which was to liberate ICL from its customary origins in favor of a stringent and rigorous codification process that met the demands of the principle of legality.¹⁴¹ A *written* Penal Code, with all of its

¹³⁵ See Piragoff & Robinson, *supra* note 101, at 857 n.46

¹³⁶ *Id.* at 856-57.

¹³⁷ *Id.* at 856; see also Kevin Jon Heller, *Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis*, 6 J. INT’L CRIM. JUST. 419, 435 (2008).

¹³⁸ See ICC Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), general introduction sec. 1 (“the following Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute”). *But see supra* sec. 2 (“exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below”).

¹³⁹ See SCHABAS, *supra* note 109, at 474.

¹⁴⁰ *Id.* at 475.

¹⁴¹ For a discussion of this normative trajectory of criminal law, see George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT’L CRIM. JUST. 539 (2005).

specificity and completeness not found in either the ICTY or ICTR Statutes, would help place ICL on a level playing field with domestic penal systems, giving adequate notice to future defendants regarding the scope and content of criminal prohibitions.¹⁴² To then allow the “unless otherwise provided” clause to point back to customary international law is to turn one’s back on this salutary trajectory, and unwind the greatest developments in the field in the last 25 years.¹⁴³

Second, it is not clear how customary international law could provide a basis to support a lower mental element. Customary international law, traditionally defined, consists of state practice and *opinio juris*; the decisions of international tribunals, whether the ICTY or the Nuremberg and Tokyo tribunals, cannot serve as originators of customary norms since they are not examples of state practice.¹⁴⁴ They are international criminal *precedent*, a source of law as of yet unrecognized as a basis for customary international law.¹⁴⁵ Moreover, even an appeal to mental states in domestic penal systems would not fit the criteria for customary international law, since such actions are rarely if ever taken with a reciprocal sense of legal obligation in the sense required for *opinio juris*.¹⁴⁶ Perhaps such domestic developments might constitute general principles of law, but this move is radically under-theorized in the contemporary literature.¹⁴⁷ Finally, it would be odd if a “general principle of law” could undo the default mental state explicitly codified in Article 30 by virtue of the “unless otherwise provided” clause. In what sense is it *provided*?

¹⁴² *Id.* at 551.

¹⁴³ *Id.*

¹⁴⁴ See International Law Association, Committee on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, at 18 (2000) (“Although international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice.”). Compare with Tullio Treves, *Customary International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2006), at para. 53 (“As the authority of international courts and tribunals to settle a dispute between States derives from agreement of the States involved, judgments of such courts and tribunals may be seen, indirectly, as manifestations of the practice of the States that have agreed to confer on them such authority and the mandate to apply international—including customary—law.”).

¹⁴⁵ For an early discussion of this issue, see Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT’L L.Q. 153 (1947).

¹⁴⁶ See ILA Principles of Customary Law, *supra* note 144, at 18.

¹⁴⁷ See ICJ Statute, article 38. See generally Vladimir-Djuro Degan, *On the Sources of International Criminal Law*, 4 CHINESE J. INT’L L. 45 (2005).

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Wirth argues, as a few other commentators have, that customary international law should be permitted to displace the default mental element, and that accordingly *dolus eventualis* should count as an appropriate mental state.¹⁴⁸ The warrant for this position is the contention that Article 30 does not explicitly list which sources of law are appropriate for this exercise.¹⁴⁹ Under this argument, it is taken as significant that the drafters of the Rome Statute did not write the provision to state: “unless otherwise provided in this statute or in the Elements of Crimes.”¹⁵⁰

Wirth then argues that if the appropriate sources of law can be extended to the ICC Elements of Crimes, it should also be extended to customary international law because the reasoning in support of the former extension applies with equal force in the latter extension.¹⁵¹ This, however, is decidedly not the case. The Elements of Crimes are a codified instrument, negotiated by the Assembly of State Parties, and was clearly designed to provide added content to the scope of the criminal provisions in the Rome Statute.¹⁵² To suggest that “unless otherwise provided” might apply to the Elements of Crimes is simply a modest extension outside the four corners of the Rome Statute. An appeal to customary international law, however, is not modest under any stretch of the imagination; it moves the legal analysis away from textual interpretation into the realm of customary law and in so doing infringes the principle of legality.¹⁵³ It opens up problems regarding notice and vagueness that challenge the very foundation of international criminal law as

¹⁴⁸ Wirth, *supra* note 107, at 992 n.174 (implying falsely that Schabas supports this view). See SCHABAS, *supra* note 109, at 475 (concluding that the Elements of Crimes might be used to trigger the “unless otherwise provided” rationale but making no mention of custom). Similarly, see Heller, *supra* note 137, at 435 (evaluating status of the Elements of Crimes and concluding that they can be used to trigger exceptions to Article 30).

¹⁴⁹ Wirth, *supra* note 107, at 992-95. See also Werle & Jessberger, *supra* note 105, at 45-46 (supporting the possibility that an Article 30 exception could derive from a rule of customary law).

¹⁵⁰ For example, it is true that Article 31 of the Rome Statute includes the phrase “in this statute,” thus suggesting that the absence of this phrase in Article 30 implies that the drafters envisioned other sources of law besides the statute. A similar phrase is used in Article 57 of the Rome Statute. See Wirth, *supra* note 107, at 993.

¹⁵¹ See Wirth, *supra* note 107, at 993.

¹⁵² See SCHABAS, *supra* note 109, at 475. See also M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 352 (2011).

¹⁵³ See Fletcher & Ohlin, *Reclaiming*, *supra* note 141, at 551-53.

a system of criminal justice as opposed to international justice.¹⁵⁴ As a final point, this issue is already addressed in the general introduction to the Elements of Crimes, which anticipates deviations from the Article 30 default rule and notes that the relevant exceptions *are noted below* in the Elements of Crimes.¹⁵⁵ No reference to customary international law appears here.

A purposive interpretation of the Rome Statute and Elements of Crimes yields the same legal result. One might argue that since the advent of JCE III as a mode of liability (establishing responsibility for the foreseeable acts of collaborators who stray from the common plan), *dolus eventualis* effectively meets the standard for most crimes under ICL at the level of modes of liability. Perhaps the use of modes of liability to lower the mens rea requirements has effectively transformed the default mental state of ICL from intent and knowledge to *dolus eventualis*.¹⁵⁶ But if that is what the drafters of the Rome Statute intended, why did they not just set the default mental state at *dolus eventualis*? According to these proponents, *dolus eventualis* would satisfy the mental element for almost every crime, with the exception of genocide requiring special intent. The problem with this view is that *dolus eventualis* would no longer remain an exception to the Article 30 default rule; it would become a *new* default rule, accomplishing by interpretation what diplomatic negotiation could not.¹⁵⁷

¹⁵⁴ For a discussion of this dilemma, see Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925 (2008); John D. Ciorciari, *Liberal Legal Norms Meet Collective Criminality*, 109 MICH. L. REV. 1109, 1118 (2011) (discussing Oisel and Roxin's views and the degree to which these theories of liability put offenders on notice regarding their criminal exposure).

¹⁵⁵ See Elements of Crimes, *supra* note 138, general introduction section 2 ("Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.").

¹⁵⁶ See Stewart, *supra* note 84, at 192 (criticizing lack of coherent approach to mens rea caused by modes of liability with lower mental state requirements).

¹⁵⁷ True, Article 21 of the Rome Statute, *supra* note 6, lists the appropriate sources of law before the court as including, "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict." Guzman notes in the Triffterer *Commentary* – a conclusion often repeated in the literature – that "rules of international law" include customary international law, an inference that one would think is supported by Article 38 of the ICJ Statute and its inclusion of customary international in its codified hierarchy of sources. See Margaret McAuliffe deGuzman, *Article 21 Applicable Law*, in Otto Triffterer (ed), COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 701, 707-08 (2nd ed. 2008) (1999) ("since custom represents the primary source of rules in the international legal system, the phrase 'rules of international law' must be interpreted as encompassing customary rules"). However, while Guzman's interpretation of Article 21 may be correct, it is of little help to Wirth's argument that the

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IV. INTENT IN GENEVA

Having analyzed the historical development of mental states at the Rome Statute drafting conference, we must now turn to how the concept of intent was understood by the drafters of the Geneva Conventions and the Additional Protocols. What exactly did the negotiators intend—no pun intended—when they codified the rules against directly attacking civilians and launching disproportionate attacks? In considering the negotiating history, not only are the two tracks not collapsed, they are as distinct as can be.

There are substantial textual reasons for why distinction and proportionality must be understood as two normatively distinct prohibitions. First, Additional Protocol I codifies both the principles of distinction and proportionality.¹⁵⁸ However, Additional Protocol II (regulating non-international armed conflicts) codifies the principle of distinction but includes no similar codification of the principle of proportionality.¹⁵⁹ The two principles must represent different norms otherwise there would be no significant reason to include the principle of proportionality in Additional Protocol I but not in Additional Protocol II. Second, the grave breaches regime in Additional Protocol I codifies *separate* grave breaches for making civilians the object of attack and launching a disproportionate attack.

The negotiating history supports this textual reading. For example, the Ukrainian delegation made clear that attacks against civilians were only impermissible if this was the primary reason for the attack, as opposed to a collateral consequence.¹⁶⁰ Also, the US made clear during the discussions that

Article 30 default requirement can be displaced by customary international law. Article 21's reference to principles of international law, if indeed it incorporates custom, is only a secondary ("where appropriate") source after the "first" instance sources are exhausted, including the Statute, Elements of Crimes, and the Rules of Procedure and Evidence. It is therefore singularly odd to allow a deviation from the statutory default element based on custom when the statute is a primary source and custom is only a secondary source (if it is a relevant source at all).

¹⁵⁸ See Additional Protocol I, *supra* note 3, art. 48, 51(5)(b).

¹⁵⁹ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of Non-International Armed Conflicts (Protocol II), art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

¹⁶⁰ See *Ukrainian Soviet Socialist Republic Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974-1977) 200-01 (1978) [hereinafter cited as OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE] ("In common with the previous articles of this Section, Article 46 widens the scope of protection for the civilian population and individual civilians, who under no circumstances shall be the object of attack. In particular, paragraph 2 explicitly prohibits acts or

distinction and proportionality were different, and that what later became Article 51 only dealt with intentional attacks: “The first sentence of Article 47 paragraph 2 prohibits only such attacks as may be directed against non-military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.”¹⁶¹ Furthermore, the UK made a similar point:

His delegation also welcomed the reaffirmation in paragraph 2, of the customary law rule that civilian objects must not be the direct object of attack. It did not, however, interpret the paragraph as dealing with the question of incidental damage caused by attacks directed against military objectives. In its view, the purpose of the first sentence of the paragraph was to prohibit only such attacks as might be directed against non-military objectives.¹⁶²

This issue was so important that several other delegations, including Germany,¹⁶³ the Netherlands,¹⁶⁴ and Canada,¹⁶⁵ repeated this understanding almost *verbatim*.

threats of violence the *primary* purpose of which is to spread terror among the civilian population; this is in line with the generally recognized rules of international law, which lay down that Parties to the conflict shall not make the civilian population an object of attack”) (emphasis added).

¹⁶¹ See *United States of America Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 204.

¹⁶² See *United Kingdom Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 169.

¹⁶³ See *Federal Republic of Germany Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 188 (“Article 47... The first sentence of Article 47, paragraph 2 is a restatement of the basic rule contained in Article 43, namely that the Parties to a conflict shall direct their operations only against military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.”)

¹⁶⁴ See *Netherlands Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 195 (“Furthermore, it is the view of the Netherlands delegation that the first sentence of Article 47, paragraph 2, prohibits only such attacks as may be directed against non-military objectives and consequently does not deal with the question of collateral damage caused by attacks directed against military objectives.”).

¹⁶⁵ See *Canada Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 179 (“Article 47... In the view of the Canadian delegation, a specific area of land may also be a military objective if, because of its location or other reasons specified in Article 47, its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. It is also our understanding that the first sentence of paragraph 2 prohibits only attacks that could be directed against non-military objectives. It does not deal with the result of a legiti-

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Furthermore, the leading commentary on the Additional Protocols makes clear that the two tracks are normatively distinct.¹⁶⁶ Explaining the relationship between the various subsections of Article 51 and the grave breaches definition in Article 85, the *Commentary* makes clear that the rules of proportionality apply whenever collateral damage occurs.¹⁶⁷ Specifically, the *Commentary* concludes that the grave breach “consists in directing an attack against the protected persons ‘as such’.”¹⁶⁸ According to the *Commentary*, legitimate attacks against military targets with secondary effects on civilians are dealt with by subparagraphs (b) and (c) of Article 85.¹⁶⁹ In defining the relevant mental state, the *Commentary* concludes that “[i]t is not sufficient that the will to launch an indiscriminate attack exists... [i]n addition the person taking the action has to have the knowledge that certain consequences will follow.”¹⁷⁰ As for disproportionate attacks, mere recklessness is not sufficient either: “A high degree of precaution is required. A grave breach on the other hand presupposes more: the knowledge (not only the presumption) that such attack *will cause* excessive losses in kind.”¹⁷¹

There is a simple reason why proportionality calculations cannot be governed by a mental state lower than knowledge. Although proportionality assessments involve collateral effects of bombing a legitimate target, the effects cannot come completely by surprise and still violate the underlying norm. They must be explicitly envisioned. According to the *Commentary*, the relevant criterion is whether the attack will cause disproportionate casualties to civilians, as evaluated *ex ante* by the military commander.¹⁷² A military commander can only make an *ex ante* decision about proportionality by assuming that some result will occur and then making assessments regarding it. But this mental state – envisioning the killing of civilians and coming to some conclusion as to whether the number of deaths will be proportionate or

mate attack on military objectives and incidental damage that such attack may cause.”).

¹⁶⁶ See Michael Bothe, Karl Josef Partsch, & Waldemar A. Solf (eds), *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* 511-22 (1982) [hereinafter cited as *NEW RULES FOR VICTIMS OF ARMED CONFLICT*].

¹⁶⁷ *Id.* at 516.

¹⁶⁸ *Id.*, citing Article 51(2).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (also noting that subparagraphs (b) and (c) require a higher degree of intention than Article 57).

¹⁷² *Id.* at 363.

disproportionate – does not violate the principle of distinction. Simply envisioning the deaths of civilians does not mean that the commander has directed the attack against the civilians. If this mental state violates the principle of distinction, then no commander could *ever* engage in a proportionality track-two analysis without having first violated the principle of distinction. This would, in essence, render the rule of proportionality completely superfluous, and stop the analysis at the level of distinction. This runs counter to the whole point of having the rule of proportionality, which is implicated when there is “recognition that collateral civilian casualties or damage to civilian objects may be expected.”¹⁷³

During the negotiations leading to the Additional Protocol, the rule of proportionality passed by a margin of 56 to 6 with 3 abstentions.¹⁷⁴ France argued that over-zealous regulation of civilian casualties impermissibly infringed on the national right of legitimate defense, an issue that came into the forefront during the ICJ *Advisory Opinion on Nuclear Weapons*.¹⁷⁵ In other words, if a state is faced with an existential threat of defeat, is it permissible to cause excessive damage to enemy civilians? Other objections included concerns over the indeterminacy of the concept of “excessive” civilian damage. However, other states emphasized that “excessive” damage was to be understood relative to a “concrete” and “direct” military advantage and that remote gains in the future are to be excluded from the calculations by virtue of their speculative nature.¹⁷⁶ Other delegations complained that the Article 85 grave breaches regime, particularly with regard to what counted as excessive damage, was worryingly imprecise.¹⁷⁷ Several members noted that subparagraph (5) of Article 51 (on proportionality) was subject to multiple interpreta-

¹⁷³ *Id.* at 366.

¹⁷⁴ *Id.* at 365.

¹⁷⁵ See *France Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 161-62; *Legality of the Threat or Use of Nuclear Weapons* [hereinafter *Nuclear Weapons*], *Advisory Opinion*, International Court of Justice, 8 July 1996, at § 97.

¹⁷⁶ NEW RULES FOR VICTIMS OF ARMED CONFLICT, *supra* note 166, at 363.

¹⁷⁷ See *Italy Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 292 (“Secondly the formulation of numerous hypothetical instances of grave breaches was often dangerous because of its lack of precision, and in criminal matters that was a highly serious situation, for here above all each hypothetical breach should have been described with precision and clarity. In many cases that had not been done, for example in paragraph 3 (b) and (e), where it was left to the judge to decide whether or not the advantage obtained from an attack had been excessive. The same criticism could be made of paragraph 4 (c), in which the basic notion, was acceptable but the ‘practices’ which the text condemned were not described.”).

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tions.¹⁷⁸ In this vein, did participants in the negotiations believe that by enacting Article 85 on grave breaches, which defined the appropriate mental state as acting “willfully,” they were effectively altering the required mental state from Article 51? If they were, it was arguably to increase the required mental state – to make it a *grave* breach – rather than lowering the mental state. The inclusion of the stricter mental state requirement in Article 85 helped temper concerns about the uncertain application of the standard of excessive damage. There were also concerns about the prohibition against placing military units in civilian areas (a prohibition designed to prevent states from impermissibly leveraging the principle of distinction by using civilians as human shields).¹⁷⁹ However, there was also broad agreement that the principles of distinction and proportionality codified in the Additional Protocol represented substantial advancement.¹⁸⁰

¹⁷⁸ See *France Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 295 (“The French delegation could not approve paragraph 3(b), for the same reason as that expressed in connexion with Article 46, namely the ambiguity of the definition of indiscriminate attacks. It could not accept that military actions which were so inadequately defined should be considered to be grave breaches and, according to paragraph 5, to constitute war crimes.”).

¹⁷⁹ Did this rule entail that military units could never be placed in civilian areas to protect them? This would entail that civilian areas go completely unguarded – clearly an absurd result from a purely normative perspective. The better reading of the rule is that offensive military units should never be placed in civilian areas, but defensive units may be stationed in close proximity to protected persons. However, this does place intense pressure on the individual rule, since this inevitably leads to intermingling of civilian and military personnel in the same location.

¹⁸⁰ The *travaux préparatoires* once again establish that discrimination and proportionality are two separate concepts. See, e.g., *United States of America Statement*, 7 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 294 (“His delegation was also satisfied with a number of other important advances in the law made by that Protocol. In particular it noted the prohibition of indiscriminate attacks, including target area bombardment in cities, the clear and helpful definition of military objectives, the prohibition of the starvation of civilians as a method of warfare and of the destruction of crops and food supplies, and the special protection, with reasonable exceptions, accorded to dams, dikes and nuclear power stations. His delegation believed that the Conference would draw satisfaction from having achieved the first codification of the customary law rule of proportionality, from having worked out a good definition of mercenaries that should not be open to abuse, and from having set minimum humanitarian standards that must be accorded to anyone not entitled to better treatment.”).

The rule of proportionality is based partially on a lesser evils argument because it “makes large concessions in favor of military necessity.”¹⁸¹ But concessions in favor of military necessity need not be understood in a negative light.¹⁸² Rather, IHL norms have practicality and enforcement concerns built into them at the ground level. Indeed, this is a distinguishing feature of IHL as compared with international human rights law, which has historically favored aspirational norms that serve a guiding function. In contrast, IHL is designed to codify rules that can and will be followed; once participants start rejecting the rules they risk sliding towards total war with an endless spiral of reprisals.¹⁸³ For this reason IHL takes baby steps; to the extent that it outruns current practice it runs the risk of being irrelevant. Indeed, that is the exact problem with the ICTY’s application of the rules regarding distinction and proportionality; it is not consistent with current practice. If you redefine intent in this way, it will be ignored, and is being ignored, by military powers both large and small.

There is, however, one area where recklessness might be sufficient to meet the mental state requirement. Article 57 of Additional Protocol I requires that attacking forces “take all feasible precautions” to minimize civilian deaths. Insofar as this article codifies a duty of due care, it would be transgressed by an attacking force that is reckless in its conduct and fails to take the appropriate precautions. This is the one area where recklessness, or *dolus eventualis*, would be appropriate for applying a prohibition from Additional Protocol I.¹⁸⁴ States were particularly concerned about the pliability of

¹⁸¹ NEW RULES FOR VICTIMS OF ARMED CONFLICT, *supra* note 166, at 361 (suggesting that the rule of proportionality is based on the principle of lesser evils), *citing* ICRC, 3 Conference of Government Experts 85 (1971).

¹⁸² *Id.*, *citing* CDDH/III/SR.21 at para. 7 (“The ICRC constantly had to bear in mind the fact that the ideal was the complete elimination, in all circumstances, of losses among the civilian population. But to formulate that ideal in terms of impracticable rules would not promote either the credibility or the effectiveness of humanitarian law. In order to establish a balance between the various factors involved, the ICRC was proposing a limited rule, the advantages of which was that it would be observed.”).

¹⁸³ On the need to construct enforceable rules of IHL, see Janina Dill & Henry Shue, *Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption*, 26 ETHICS & INT’L AFF. 311, 324 (2012) (“Consequently, rules that are incompatible with all effective military action risk being ignored and, thereby, not preventing any harm from occurring.”).

¹⁸⁴ It should be noted that the U.S. is not a party to the Additional Protocol I and that the customary status of the Article 57 “feasibility” standard is the subject of intense dispute in international relations. A precursor to the principle was codified in article 2(3) of the 1907 Hague Convention (IX). See Henckaerts & Doswald-Beck, *supra* note 24, at 51.

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the word “feasible” precisely because a “duty of care” mental standard was lower than for the other prohibitions contained in the protocol. Indeed, this lower mental state was one of the reasons why the provision needed to be watered-down with the notion of feasibility so as to remove any concerns about it devolving into a strict liability scheme. The need to take precautions – and the possibility of engaging in reckless behavior that flouts the required precautions – will be directly addressed *infra* in Part V.

V. THE DOCTRINE OF DOUBLE EFFECT

The conflation of tracks one and two does more than simply violate the negotiating history of the Geneva Convention Additional Protocols. More importantly, it eviscerates the underlying conceptual framework upon which the principles of distinction and proportionality were modeled. The core principles of IHL, both in their design and implementation, codify the basic moral intuition behind the Doctrine of Double Effect.¹⁸⁵ So the separation of the two tracks is mandated not just by law and history but also by theory and philosophy. Collapsing the tracks, as the ICTY has done, unmoors the principles of distinction and proportionality from the original philosophical theory that gave birth to them. The result is a set of erroneous legal conclusions that violate the deeply held moral intuitions that underlay the Doctrine of Double Effect.

Thomas Aquinas first formulated the Doctrine of Double Effect, though not under that title or banner.¹⁸⁶ But the underlying principle was certainly all Aquinas and it is traditionally associated with Catholic moral theology.¹⁸⁷ The philosopher’s concern was the moral permissibility of killing in self-defense.¹⁸⁸ Although defensive force against an imminent threat is clearly legitimate, it would appear *prima facie* that exercising that force violates the moral prohibition against killing, thus resulting in a paradox. Aquinas therefore sought to explain how killing in self-defense could be consistent with the moral prohibition against killing another human being.¹⁸⁹

¹⁸⁵ See J. CARL FICARROTTA, KANTIAN THINKING ABOUT MILITARY ETHICS 98 (2010); G.E.M. ANSCOMBE, *War and Murder*, in 3 ETHICS, RELIGION & POLITICS: COLLECTED PHILOSOPHICAL PAPERS 51 (1981).

¹⁸⁶ See Anthony Kenny, *The Principle of Double Effect*, in ESSAYS ON THE ARISTOTELIAN TRADITION 47, 47-48 (2001).

¹⁸⁷ THOMAS AQUINAS, SUMMA THEOLOGICA 2674-75 (“I answer that, Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention.”).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

His answer was to separate the intended effects of the defender's actions from the secondary effects of that same action.¹⁹⁰ The defender intends to neutralize the unwarranted threat and this effect is morally permissible, even though it also results in a secondary effect – the killing of the attacker. Under Aquinas' view, the defender's act has a *double* effect: one that is intended and one that is merely foreseen. The defender's intent is to neutralize the threat – the permissible effect – and he merely foresees but does not particularly desire the secondary effect. This explains why defensive force is morally permissible.¹⁹¹

Whether the Doctrine of Double Effect represents the correct moral or legal framework for self-defense is controversial and doubtful; there are many competing theories of self-defense.¹⁹² Regardless, though, the Doctrine of Double Effect proved hugely successful as a moral theory that expresses the relevance of the intent-foresight distinction.¹⁹³ There are many areas of human life where agents intend an action but foresee secondary consequences, and we take the agent's primary intent to be relevant for answering the question of whether the action was morally or legally permissible.¹⁹⁴ The bombing of targets in wartime is precisely one of these situations.¹⁹⁵

Consequently, this Part makes two, logically distinct arguments. First, the core IHL principles on distinction and proportionality are direct outgrowths of the Doctrine of Double Effect, such that collapsing the princi-

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² For competing theories of self-defense, see GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 30-62 (2008).

¹⁹³ See, e.g., Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, in *VIRTUES AND VICES* (1978); G.E.M. Anscombe, *Action, Intention and Double Effect*, *PROCEEDINGS OF THE AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION* 12 (1982); THOMAS NAGEL, *THE VIEW FROM NOWHERE* 179 (1986).

¹⁹⁴ Similarly, common sentiment views intentional killings as a greater moral wrong than allowing foreseeable deaths. This explains why, for example, the public reacted with horror to the Sandy Hook massacre while news reports about children killed as collateral damage during drone strikes do not provoke the same reaction. *But see* Glenn Greenwald, *Newtown kids v Yemenis and Pakistanis: what explains the disparate reactions?*, *THE GUARDIAN* (Dec. 19, 2012), who is apparently unaware of both the Doctrine of Double Effect and the intent-foresight distinction, and the importation of both distinctions into the criminal law of both the U.S. and England. Greenwald canvasses multiple differences between Sandy Hook and drone strikes, though nowhere discusses the moral difference between intentional killings and secondary effects.

¹⁹⁵ There is a lengthy discussion of this issue in MICHAEL WALZER, *JUST AND UNJUST WARS* 257-83 (3d ed. 2000) (1977).

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ples eviscerates the underlying moral theory that they were designed to codify. Second, the Doctrine of Double Effect is normatively correct in the context of warfare, and so the legal doctrine, when properly interpreted, gets the issue exactly right, and should not be interpreted away into oblivion.

It should be emphasized that these two arguments are conceptually distinct. For purposes of this Article's core thread, only the first argument is necessary. In order to conclude that the ICTY's collapsing of the two tracks is legally problematic, it is sufficient to argue that the legal doctrine is modeled after the Doctrine of Double Effect, so any legal interpretation of the doctrine that violates the Doctrine of Double Effect represents a poor legal argument. To reach this conclusion, one need not accept that the Doctrine of Double Effect is normatively correct as a matter of moral philosophy. As it happens, though, Part VB shall make precisely this argument, though within the context of this paper this point is purely superogatory. The point is useful, though, because the normative defense of the Doctrine of Double Effect adds great urgency to the need to correct the recent missteps in the legal precedents from the international tribunals. Since the Doctrine of Double Effect is morally correct, the collapsing of the two tracks results in legal outcomes that are morally indefensible. However, even opponents of the Doctrine of Double Effect (and there are plenty¹⁹⁶) should take heed and recognize that the core principles of IHL are meant to codify the Doctrine of Double Effect, whatever they might feel about its moral legitimacy. As a matter of legal interpretation, such opponents would be duty bound to interpret the core IHL principles in the correct light, though perhaps they might have moral reasons for prospectively seeking doctrinal revisions.

A. Convergence of the Doctrine of Double Effect and IHL

The Doctrine of Double Effect is a central element of the philosophical literature on intent and foresight, and there have been many attempts to codify the philosophical principle.¹⁹⁷ Although the specifics of the codification vary considerably by author, there is broad agreement that the Doctrine of Double Effect includes the following principles. An agent may perform an action that he foresees will have a negative effect, if and only if:

- (1) The act is morally good or neutral; and

¹⁹⁶ See, e.g., Neil Roughley, *The Double Failure of "Double Effect,"* in Christoph Lumer & Sandro Nannini (eds.), *INTENTIONALITY, DELIBERATION, AND AUTONOMY* 91, 92 (2007).

¹⁹⁷ For an alternate formulation, consider Jeff McMahan, *Revising the Doctrine of Double Effect*, 11 *J. OF APPLIED PHIL.* 201–12 (1994). See also JONATHAN BENNETT, *THE ACT ITSELF* 194–225 (1995).

- (2) The agent intends the good effect and not the negative effect; and
- (3) The evil effect is not a means to produce the good effect; and
- (4) The evil effect is not disproportionate to the good effect.¹⁹⁸

The specifics of the DDE have generated no shortage of commentary, and there are competing formulations.¹⁹⁹

For example, in a very well known alteration of the doctrine, Warren Quinn argues that the standard formulation is inadequate because there may be situations where an impermissible action is not *necessarily* the means to an evil result, though in *most* cases it will be the means to that evil result.²⁰⁰ So, for example, consider the terrorist who wants to attack a residential building in order to achieve a larger political objective. The standard response is that even if that political objective were legitimate and morally desirable, the attack would still be condemned by the Doctrine of Double Effect because the death of the civilians is a *means* to produce the positive effect -- a causal pathway deemed impermissible by the traditional formulation of the Doctrine of Double Effect.²⁰¹ However, strictly speaking, the terrorist does not need for the civilians to die to achieve the political objective; he only needs the public or the government to *think* that they are dead.²⁰² As it happens, the best way to make the public think the civilians are dead is to actually kill them, though this is not the only logical means of doing so.²⁰³ But the use of terrorism is clearly impermissible, so the current formulation of the Doctrine of Double Effect must be erroneous.²⁰⁴

¹⁹⁸ See generally Joseph Mangan, *An Historical Analysis of the Principle of Double Effect*, 10 THEOLOGICAL STUDIES 41 (1949).

¹⁹⁹ See, e.g., Nancy Davis, *The Doctrine of Double Effect: Problems of Interpretation*, 65 PACIFIC PHILOSOPHICAL QUARTERLY 107 (1984); T.A. CAVANAUGH, DOUBLE-EFFECT REASONING: DOING GOOD AND AVOIDING EVIL 74 & *passim* (2006).

²⁰⁰ See Warren Quinn, *Actions, Intentions and Consequences: The Doctrine of Double Effect*, 18 PHILOSOPHY & PUBLIC AFFAIRS 194 (1989) (offering Kantian explanation for the doctrine of double effect).

²⁰¹ *Id.*

²⁰² This point was made by Jonathan Bennett in *Morality and Consequences*, in S. McMurrin (ed.), THE TANNER LECTURES ON HUMAN VALUES 110 (1981).

²⁰³ *Id.* at 111.

²⁰⁴ See also Jeff McMahan, *Revising the Doctrine of Double Effect*, 11 J. APPLIED PHIL. 201, 202-03 (1994) (noting that Quinn's proposed revision is a response to the potential "vitiation" of the Doctrine of Double Effect caused by the "narrow conception of an intended means").

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Consequently, Quinn argues that the Doctrine of Double Effect should be reformulated to track the distinction between direct and indirect agency:

To put things in the most general way, we should say that it distinguishes between agency in which harm comes to some victims, at least in part, from the agent's deliberately involving them in something in order to further his purpose precisely by way of their being so involved (agency in which they figure as intentional objects) and harmful agency in which either nothing is in that way intended for the victims or what is so intended does not contribute to their harm.²⁰⁵

Both the original formulation and Quinn's reformulation accurately track the IHL principles on distinction and proportionality. According to Quinn's version of the Doctrine of Double Effect, an army unit attacking a target that will cause civilian deaths is only permissible if the attacking force is somehow deliberately involving them in the situation so as to further its project.²⁰⁶ This direct agency is impermissible, but an attacking force complying with IHL would not be violating this principle since the attacking force has no interest in killing the civilians. On the other hand, the terrorist would run afoul of this principle precisely because the terrorist directly involves the civilians and intends their deaths to further his larger purpose.²⁰⁷

Indeed, the Doctrine of Double Effect so closely tracks the core IHL principles of distinction and proportionality that the moral philosophical literature on IHL uses the distinction between lawful tactical bombing and illegal terror bombing as signposts against which their formulations of the Doctrine of Double Effect ought to be judged.²⁰⁸ As a matter of methodology, moral philosophers often take as their starting point our intuitions that terror bombing is impermissible and tactical bombing is permissible, even if both produce the same number of civilian deaths.²⁰⁹ On the basis of these firmly held intuitions, philosophers then attempt to construct a technical formulation of the Doctrine of Double Effect that yields the right outcomes in these two situations, i.e. it declares the terror bombing impermissible and the tactical bombing permissible. If it does not, philosophers assume that their formu-

²⁰⁵ See Quinn, *supra* note 200, at 343.

²⁰⁶ *Id.* at 343-44 (distinguishing between direct and indirect agency).

²⁰⁷ Quinn, *supra* note 200, at 344. For further discussion of this problem, see McMahan, *supra* note 204, at 202; Foot, *supra* note 193, at 21.

²⁰⁸ See, e.g., McMahan, *supra* note 204, at 210; Quinn, *supra* note 200, at 347; Foot, *supra* note 193, at 21.

²⁰⁹ See, e.g., Alison Hills, *Defending Double Effect*, 116 *PHILOSOPHICAL STUDIES* 133, 133 (2003).

lation of the Doctrine requires amendment. This demonstrates the close conceptual connection between the DDE and the IHL principles of distinction and proportionality.

Michael Walzer includes an extensive and justly famous discussion of the Doctrine of Double Effect in his *Just and Unjust Wars*, and describes it as the central justification for military action which inevitably causes civilian casualties:

I have often found it being used in military and political debates. Officers will tend to speak in its terms, knowingly or unknowingly, whenever the activity they are planning is likely to injure noncombatants. Catholic writers themselves frequently use military examples; it is one of their purposes to suggest what we ought to think when 'a soldier in firing at the enemy foresees that he will shoot some civilians who are nearby.' Such foresight is common enough in war; soldiers could probably not fight at all, except in the desert and at sea, without endangering nearby civilians. And yet it is not proximity but only some contribution to the fighting that makes a civilian liable to attack. Double effect is a way of reconciling the absolute prohibition against attacking noncombatants with the legitimate conduct of military activity.²¹⁰

Walzer goes on to offer his own revision to the Doctrine of Double Effect that owes much to the recent developments in codified IHL (specifically the duty to reduce civilian casualties) examined in Part IV of this Article.

Specifically, Walzer argues that it is insufficient for the attacker to *not intend* to kill the innocent civilians.²¹¹ Rather, the attacker must *intend not to kill* the innocent civilians.²¹² For this reason, Walzer describes his variation, the Doctrine of Double Intention, as a way of capturing this distinction between *not intending* and *intending not*.²¹³ How does one know whether an attacker intends not to kill the innocent civilians? According to Walzer, the intention not to kill the innocent civilians is made manifest by the attacker's taking all reasonable precautions to prevent the innocent civilians from being killed.²¹⁴ In Walzer's famous example, World War I soldier Frank Richards shouted warnings before dropping grenades into basements where enemy

²¹⁰ WALZER, *supra* note 195, at 153.

²¹¹ *Id.* at 155-56.

²¹² *Id.* at 155.

²¹³ *Id.*

²¹⁴ *Id.* at 156.

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soldiers were suspected of hiding.²¹⁵ These warnings offered an opportunity for hiding civilians to emerge unarmed, but it also increased the risk that enemy troops would emerge shooting and place Richards and his fellow soldiers at greater risk.²¹⁶ For Walzer, such precautions were not only laudatory but also morally necessary.²¹⁷

Walzer's requirement that the attacker take precautions – or viewed from the opposite side, that the victims are owed a duty of care – completely tracks the most recent developments of IHL. Additional Protocol I requires that attacking forces “take all feasible precautions” to ensure that innocent civilians are spared in the attack.²¹⁸ It should be noted that there is considerable doubt as to whether the Additional Protocol rules have had as much influence as its drafters had intended.²¹⁹ Specifically, the inclusion of the term “feasible” is meant to hedge against an interpretation of the principle that demands greater risk to the attacking force in order to satisfy their duty of due care to innocent civilians who might be harmed during the attack. Who is to say what is feasible and what is not?²²⁰ That question is only answered by a pre-existing standard of what level of risk attacking soldiers are required to endure.²²¹ How much are attacking forces permitted to value their own “force protection” over the duty of due care to the innocent civilians?²²² Unfortunately, the Additional Protocol does not provide an answer.

²¹⁵ *Id.* at 152-53, citing FRANK RICHARDS, *OLD SOLDIERS NEVER DIE* 198 (1966). For an illuminating discussion, see David Luban, *Risk-Taking and Force Protection*, in Itzhak Benbaji & Naomi Sussman (eds), *READER WALZER* (forthcoming)

²¹⁶ WALZER, *supra* note 195, at 152; Luban, *supra* note 215, at x.

²¹⁷ WALZER, *supra* note 195, at 156.

²¹⁸ Additional Protocol I, *supra* note 3, at art. 57(2)(a)(ii).

²¹⁹ However, the rule is certainly listed in many national military field manuals. See *See Henckaerts & Doswald-Beck, supra* note 24, at 57.

²²⁰ See Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, *ESSAYS ON LAW AND WAR AT THE FAULT LINES* 89, 97 (2012) (“term ‘feasible precautions’ is generally understood as ‘those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations’”), citing Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), article 1(5), 1342 U.N.T.S. 171 (October 10, 1980). Participants in the negotiations for the Additional Protocol also used this language. See, e.g., *United Kingdom Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 214.

²²¹ Luban, *supra* note 215, at x.

²²² *Id.* at x.

However, the negotiators of the Additional Protocol were well aware of the limitations of the formulation that they were adopting.²²³ Plenty of negotiators complained that the inclusion of the word “feasible” would potentially water-down the provision to the point where it could not be consistently enforced.²²⁴ Nonetheless, there was wide understanding that failure to include the word “feasible” would render the provision unenforceable by many nations, and further, a black-and-white provision without a feasibility constraint would be difficult for state parties to comply with.²²⁵ If attacking forces are required to take all precautions to prevent civilians from being killed, then presumably they must give the civilians both the opportunity and means to evacuate, and if they do not have the means, the attacking forces must provide the means to them. By the time this is all accomplished, the enemy forces would have long since fled the area and probably killed the attacking force from the rear. This is hardly a workable standard. Consequently, *some* constraint was required to limit the black and white nature of the prohibition. In any event, regardless of the desirability of the feasibility constraint, the Additional Protocol’s precautionary rule directly tracks the moral consequence that Walzer identifies as flowing directly from the Doctrine of Double Effect.

There is another anxiety about Walzer’s requirement, which is the exact dividing line between *not intending* and *intending not*.²²⁶ What is the difference between these two mental states? If an attacker wants to kill enemy soldiers but is aware of a risk that enemy civilians will be killed when the building is struck, does the attacker not intend or intend not? It is hard to say, since the distinction is elusive. Walzer cashes out the distinction by relying on its external manifestation, e.g. the precautions that the attacker takes in order to reduce the likelihood that the civilians will be killed. While there is nothing wrong with charting the external manifestations of an intentional state, there is something suspicious about substituting a reference to external manifestations for an explanation of the underlying mental state. Should it not be possible to offer a clear explanation of the distinction between intending not and not intending, without making reference to the attacker’s actions? It is, after all, a set of mental states that we are describing.

²²³ See, e.g., *France Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 213.

²²⁴ See, e.g., *Iran Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 213.

²²⁵ See, e.g., *Madagascar Statement*, 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 160, at 212 (“The article reflected a laudable desire to narrow the gap between the ideal and the possible, and to deal from a humanitarian standpoint with two opposite positions, namely, the aggressor’s and the victim’s.”).

²²⁶ WALZER, *supra* note 195, at 156.

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B. Normative Validity of the Intent-Foresight Distinction

In the previous section I defended the claim that the core IHL principles are based on the Doctrine of Double Effect, such that any interpretation of IHL that fails to accord with the Doctrine ought to be recognized as a substantial misstep deserving of correction. Now, in the present section, I argue that the Doctrine of Double Effect is also normatively correct, thus adding urgency to any legal interpretation that fails to respect the Doctrine. I shall offer two major reasons for this moral defense.

1. The Reductio ad Absurdum to Pacifism

First, several authors note that rejecting the Doctrine of Double Effect inevitably leads to unvarnished pacifism – a morally untenable position given the number of unjustified threats and aggression that we and others face in the world today.²²⁷ Here's why: Tactical bombing during armed conflict will always kill some civilians; it is virtually impossible to conduct offensive operations without harming at least some innocent civilians in the process.²²⁸ Moreover, it will always be possible to foresee this result. If the Doctrine of Double Effect is rejected then these deaths become morally impermissible, and with it, the military campaign becomes morally impermissible because one is an inevitable outgrowth of the other. Consequently, the only solution is pacifism, since military force always results in some collateral damage.²²⁹

This is a common complaint, though it understates the problem. Rejecting the Doctrine of Double Effect not only leads to pacifism – it leads to full-blown paralysis. In our everyday lives, we engage in a range of activities that foreseeably result in collateral consequences. Doctors dispense injections knowing full well that there is a risk that a small percentage of patients will have a negative reaction and die.²³⁰ Motorists drive knowing full well that their decision to drive will increase the risk (relative to not driving) of an auto

²²⁷ See, e.g., McMahan, *supra* note 204, at 201; Mark P. Aulisio, *On the Importance of the Intention/Foresight Distinction*, LXX AM. CATHOLIC PHILOSOPHICAL QUAR. 189, 195 (1996). *But see* Anscombe, *War and Murder*, *supra* note 185, at 58.

²²⁸ See, e.g., McMahan, *supra* note 204, at 201; Aulisio, *supra* note 232, at 194.

²²⁹ See *U.S. v. Otto Ohlendorf et al. [Einsatzgruppen Case]*, IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO.10 467 (1949) (“an unavoidable corollary of hostile battle action”).

²³⁰ See Dan W. Brock, *Medical Decisions at the End of Life*, in Helga Kuhse & Peter Singer (eds), *A COMPANION TO BIOETHICS* 271 (2d ed. 2009) (1998).

accident that will injure or kill an innocent party.²³¹ Farmers sell food knowing that a small percentage of their shoppers will run the risk of a fatal or near-fatal allergic reaction to the food. These outcomes are all foreseen. If these consequences make the underlying actions impermissible, then the only permissible course of action is to stay home and do nothing. The rejection of the Doctrine of Double Effect leads not just to pacifism but to complete paralysis.

But wait, a consequentialist might respond, without the Doctrine of Double Effect, the correct moral position is to maximize the correct outcome, and the world is a better place because motorists drive cars, farmers sell food, and doctors administer life-saving injections. On this account, the intention does not matter – what matters is the overall increase to expected utility. The problem with this thorough-going consequentialism is that its rejection of the significance of intent – i.e. rejecting the distinction between doing harm and allowing harm – fails to accord with our closely held moral intuitions about both the criminal law and the law of armed conflict. The criminal law is based around the notion that intentionally killing someone is far worse than merely foreseeing the risk of death as a consequence. Although there is some debate about this mental element in the literature on the philosophy of criminal law,²³² it would be odd to suggest that intention never matters.

2. *The Distinction Between Terrorists and Lawful Combatants*

Second, the failure to distinguish between intent and foresight would effectively collapse the moral distinction between terrorism and tactical bombing.²³³ Both the terrorist and the tactical bomber cause civilian casualties; what distinguishes them is their intent.²³⁴ The terrorist intends to kill the civilians while the tactical bomber intends to kill enemy soldiers but foresees that civilians will be killed as collateral damage.²³⁵ If one rejects the distinction between intent and foresight, one is committed to the moral proposi-

²³¹ See Kenneth W. Simons, *Negligence*, in Ellen Frankel Paul et al (eds), *RESPONSIBILITY* 52, 62 (1999); Aulisio, *supra* note 232, at 194 (“In a world such as ours one will inevitably bring about harm. Activities as mundane as driving a car bring about certain harms.”).

²³² See, e.g., R.A. DUFF, *INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 17 (1990); JOHN FINNIS, *Intention and Side-Effects*, in *COLLECTED ESSAYS: INTENTION AND IDENTITY* 173, 180-81 (2011). For a comprehensive discussion, see Mark P. Aulisio, *On the Importance of the Intention/Foresight Distinction*, *LXX AM. CATHOLIC PHILOSOPHICAL QUAR.* 189 (1996).

²³³ See, e.g., McMahan, *supra* note 204, at 202.

²³⁴ *Id.*

²³⁵ See Hills, *supra* note 209, at 135.

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tion that terrorism and tactical bombing are moral equivalents, with moral permissibility to be determined not by their methodology but rather by the legitimacy of their political goals. But that violates our intuition that there is something crucially different between the terrorist and the tactical bomber.

John Finnis and Walzer both discuss the intentional bombing of civilian targets by British and German airmen during World War II.²³⁶ According to at least some historical accounts, Churchill realized that while British forces excelled in strategic bombing capability, they lagged in air-to-air fighting capability.²³⁷ Consequently, if the air war only involved dogfights, the British would lose, but if the air war included strategic bombing of German cities, the British would gain a comparative advantage.²³⁸ Hitler responded with reprisals against British civilian centers, thus leading to a new round of reprisals from the British, and then eventually, total air war against the civilian populations of both countries.²³⁹

Finnis takes note that the British government took great pains to insist to the public that British bombers were directing their attacks against German military installations and that any civilian deaths were purely collateral.²⁴⁰ Although subsequent information casts some doubt on the veracity of that claim, Finnis is less interested in the underlying truth of the claim and more interested in the motivation behind the lie (if there was one).²⁴¹ The public would not have accepted the deliberate bombing of German civilian populations precisely because the British public believed that there was an acute difference between deliberately killing civilians and foreseeing their collateral deaths while striking a bona fide military operation.²⁴² Although

²³⁶ See, e.g., FINNIS, *supra* note 232, at 183-84; WALZER, *supra* note 195, at 255-63; Aulisio, *supra* note 232, at 196-97. See also NAGEL, *supra* note 193, at 179.

²³⁷ See ALEXANDER GILLESPIE, 2 A HISTORY OF THE LAWS OF WAR: THE CUSTOMS AND LAWS OF WAR WITH REGARDS TO CIVILIANS IN TIMES OF CONFLICT 27 (2011) (“Churchill reasoned that if he could turn the war from one involving fighters to bombers, Britain had a chance of staying in the conflict”).

²³⁸ *Id.* at 27-28.

²³⁹ *Id.* at 29.

²⁴⁰ FINNIS, *supra* note 232, at 183.

²⁴¹ *Id.* at 184.

²⁴² *Id.* at 184 n.19 (noting that the “distinction was preserved only for public consumption” and that orders to Bomber Command made it clear that attacks were being directed against civilian houses). See also WALZER, *supra* note 195, at 261 (quoting Churchill as referring to the bombing of German cities “for the sake of increasing terror, though under other pretexts”), citing George Quester, DETERRENCE BEFORE HIROSHIMA 156 (1966).

this does not demonstrate the moral rectitude of the Doctrine of Double Effect, it does demonstrate that its substance is a widely shared intuition.²⁴³

3. *The Objection from Practical Rationality*

There is one final conceptual objection to the Doctrine of Double Effect, one that flows from our conception of practical rationality. Arguably, rational agents understand that actions have consequences. When an agent wills an action, he also wills the consequences of his action because he accepts that the two are a package deal.²⁴⁴ In other words, you intend what you foresee.²⁴⁵ As applied to tactical bombing, the bomber wills that the enemy soldiers are killed, and since the civilian deaths are a consequence of that action, he wills that as well, since they are a package deal. So the distinction between intent and foresight is illusory; we intend what we foresee once we can envision the consequences of our actions.

However, this portrait of practical rationality fails to accord with our common-sense understanding of our own mental states.²⁴⁶ Each action of ours results in a potentially infinite number of consequences that, in our actuarial age, can be catalogued with a precise risk associated with each one.²⁴⁷ Given this capacity, a simple intention is turned into a near-infinite conjunction of multiple intents that stretch as far as the eye can see (or calculate). This logical conclusion flies in the face of our own phenomenological experience of our intentions, which are often discrete and logically distinct from future consequences that we foresee might happen.²⁴⁸ Our own experience of our inten-

²⁴³ See Aulisio, *supra* note 232, at 192-98 (arguing that the intent-foresight distinction tracks ordinary, common-sense intuitions about morality).

²⁴⁴ The argument is discussed and rejected in Anscombe, *supra* note 193, at 21 (concluding that if the package deal argument were correct, all foreseen deaths would qualify as murder). Cf. Alison McIntyre, *Doing Away With Double Effect*, 111 ETHICS 219, 222 (2001).

²⁴⁵ The issue is famously discussed in H.L.A. HART, *Intention and Punishment*, in PUNISHMENT AND RESPONSIBILITY (1968).

²⁴⁶ See Aulisio, *supra* note 232, at 197 (“In the event that I choose to spend thirty dollars on compact discs, rather than on, say, famine relief, I may run afoul of consequentialism but not ordinary morality. Yet, each time I choose a particular option I foresee that those who would have been aided had I chosen otherwise will suffer. If ordinary morality is to maintain options, then it must maintain the intention/foresight distinction. Furthermore, it must place the far greater moral weight on that which is intended.”).

²⁴⁷ See generally BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2006).

²⁴⁸ See also J.M. Boyle Jr., *Toward Understanding The Principle of Double Effect*, 90 ETHICS 527 (1980).

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tions is necessarily discrete and quantifiable because agents have special epistemic access to their intentional states.²⁴⁹ Agents inwardly experience intent far differently than they experience predicted consequences. Furthermore, all cases of negligence would be transformed into cases of intentional wrongdoing.²⁵⁰

CONCLUSION

It is important to understand what precisely is at stake in this debate: nothing less than the distinction between the terrorist and the soldier. Although it is frequently said that one nation's freedom fighter is another's terrorist, neither ordinary morality nor international law takes this position. There are morally and legally relevant distinctions to be made between these actions, and failure to understand these distinctions risks undermining the very foundations of *jus in bello*. As military conflicts in Israel and Gaza spark calls for criminal investigations, either by UN fact-finding missions or even the International Criminal Court, it is imperative that we continue to insist upon distinguishing between terrorists who deliberately target civilians and soldiers who foresee that civilians will be killed as collateral damage while striking a military target. The former is a war crime, while the latter represents lawful conduct. To be sure, even the latter might be illegal if the anticipated civilian deaths are disproportionate to the value of the military target. However, one cannot make this judgment until one goes through the messy business of valuing the military advantage and comparing it against the value of civilian loss – a disgusting intellectual exercise but one that is mandated both by IHL and the Doctrine of Double Effect. It is inescapable. Any attempt to circumvent the rule of proportionality is an intellectually disreputable maneuver designed to conflate the tradecraft of lawful military force with the morally suspect killing that forms the backbone of the terrorist's *modus operandi*.

²⁴⁹ Regarding our special epistemic access to our own intentional states, see generally AKEEL BILGRAMI, *SELF-KNOWLEDGE AND RESENTMENT* (2012) (arguing that because agents have intentional states that are irreducibly normative, this implies that the states are transparent to the agent and that he has special authority regarding them).

²⁵⁰ See Heidi M. Hurd, *The Moral Magic of Consent*, 2 *LEGAL THEORY* 121 (1996).