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## Targeting and the Concept of Intent

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## ARTICLES

### 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 unless 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 “reinterpretation” 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**

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*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.<sup>1</sup> Other examples include a well-known incident where an American drone allegedly fired upon civilians conducting a funeral in Yemen.<sup>2</sup> Both

1. See Isabel Kershner and Rick Gladstone, *Israel and Hamas Step Up Air Attacks in Gaza Clash*, N. Y. TIMES, Nov. 15, 2012, at A1.

2. Chris Woods, *Get the Data: Obama's terror drones*, BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 4, 2012), <http://www.thebureauinvestigates.com/2012/02/04/get-the-data-obamas-terror-drones/>. For a discussion of this and other alleged incidents involving funerals,

orthodox Just War Theory<sup>3</sup> and orthodox international humanitarian law (IHL) proclaim such attacks perfectly lawful as long as the primary objective is a legitimate military target and the anticipated civilian deaths are not disproportionate to the value of the military target.<sup>4</sup> 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.<sup>5</sup> 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

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see Robert Chesney, *Is DPH the Relevant Standard in Pakistan? An Important Element in the Debate Missing from BIJ's Report*, LAWFARE (Feb. 6, 2012, 5:08 PM), <http://www.lawfareblog.com/2012/02/is-dph-the-relevant-standard-in-the-debate-missing-from-bijs-report/>; Kevin Jon Heller, *Chesney on Attacking Mourners and Rescuers with Drones*, OPINIO JURIS (Feb. 7, 2012, 2:43 AM), <http://opiniojuris.org/2012/02/07/chesney-on-attacking-mourners-and-rescuers-with-drones/>; Dapo Akande, *US Drone Strikes in Pakistan: Can it be Legal to Target Rescuers & Funeralgoers?* EJIL: TALK! (February 12, 2012), <http://www.ejiltalk.org/us-drone-strikes-in-pakistan-can-it-be-legal-to-target-rescuers-funeralgoers/>.

3. Just War Theory is the branch of ethics dealing with the permissibility of the use of force, both in the decision to go to war (*jus ad bellum*) and in the conduct of war (*jus in bello*). The field is historically linked with the philosophers Augustine and Aquinas, as well as with the natural law theorists Hugo Grotius and Emerich de Vattel, who are considered foundational in the development of international law. The field was reinvigorated in 1977 with the publication of Michael Walzer's *Just and Unjust Wars*.

4. See Additional Protocol I of 1977 to the Geneva Conventions of 1949, art. 48, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 25 [hereinafter Additional Protocol I] (“Parties to the conflict shall at all times distinguish between the civilian population and combatants.”); *Id.* art. 51 (“The civilian population as such, as well as individual civilians, shall not be the object of attack.”). For additional codifications of the principle of distinction, see Hans-Peter Gasser, *Protection of the Civilian Population*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 237, 238-39, 248-51 (Dieter Fleck ed., 2nd ed. 2008); Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF INTERNATIONAL LAW, 119, 126-29 (Dieter Fleck ed., 2nd ed. 2008).

5. See U.S. v. Otto Ohlendorf et al. [Einsatzgruppen Case], 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No.10, at 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 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 WAR CRIMES AND INTERNATIONAL CRIMINAL LAW 103-04 (Willem-Jan van der Wolf ed., 2010).

clear and determinate.<sup>6</sup> This Article unpacks and analyzes this development.

Simply put, black-letter international criminal law (ICL) establishes that intentionally directing an attack against civilians constitutes a war crime.<sup>7</sup> The 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,<sup>8</sup> or “clearly excessive” in the language of the Rome Statute,<sup>9</sup> two similar expressions of the principle of proportionality.<sup>10</sup> 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.<sup>11</sup> 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 U.S. Model Penal Code (MPC) abandoned the ambiguous language of intent in favor of the more precise categories of purpose and knowledge to express these differences.<sup>12</sup> 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.<sup>13</sup>

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6. See WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 80 (2012); INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1863 [hereinafter ICRC COMMENTARY] (stating that the principle of distinction is the “foundation on which the codification of the laws and customs of war rests”).

7. Rome Statute of the International Criminal Court, art. 8(2)(b)(i), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

8. Additional Protocol I, *supra* note 4, art. 51(5).

9. See Rome Statute, *supra* note 7, art. 8(2)(b)(iv).

10. 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.* 519, 525 (2011) (stating that 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”).

11. See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 445-46 (2nd ed. 2000) (1978).

12. See MODEL PENAL CODE § 2.02(2)(a)-(b) (1985); Michael Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 179, 186-87 (R.A. Duff & Stuart Green eds., 2011); 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, 180 (2003).

13. 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*);

On top of this ambiguity, it is also unclear whether the civil law category of *dolus eventualis* qualifies as a form of intent.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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*.<sup>17</sup> But to a U.S. criminal lawyer, the idea that *dolus eventualis* is a form of “intent” is nonsensical:<sup>18</sup> only acting with purpose and acting with knowledge constitute bona fide variations of intent.<sup>19</sup>

In addition to asking and answering these questions, a satisfactory theory of what it means to intentionally attack 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.<sup>20</sup> ICL borrows these norms 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 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

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John D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT’L AND COMP. L. REV. 57, 62-63 (2004).

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

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

16. FLETCHER, *supra* note 11, at 325; Mohamed Elewa Badar, *Dolus Eventualis and the Rome Statute Without It?*, 12 NEW CRIM. L. REV. 433, 459 (2009); see also Taylor, *supra* note 14, at 109;

17. See Mohamed Elewa Badar, *The Mens Rea Enigma in the Jurisprudence of the International Criminal Court*, in *THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW* 504, 533 (Larissa van den Herik & Carsten Stahn eds., 2012); Ferrando Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer*, 1 J. INT’L CRIM. JUST. 26, 32-33 (2003).

18. Taylor, *supra* note 14, at 104.

19. Cf. *id.* at 106 (noting that there are two variations of intent recognized in German law that would also be broadly familiar to English speakers).

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

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*.<sup>21</sup> 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).<sup>22</sup> 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 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

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21. See Rome Statute, *supra* note 7, 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.”).

22. For a general description of this jurisprudence, see WERLE, *supra* note 20, at 382-83. For a full analysis of the relevant cases, see *infra* Part III.

of collateral damage was modeled.<sup>23</sup> 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 AND 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.<sup>24</sup> 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.<sup>25</sup> Collateral civilian casualties must be proportional to the value of the military objective; otherwise the attack violates IHL and might even trigger criminal liability.<sup>26</sup> The principle of distinction is often expressed without the word "intent"; usually the relevant provisions talk of "directing"<sup>27</sup> an attack against civilians or making civilians the "object"<sup>28</sup> of an attack. These are all references to

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

24. See Additional Protocol I, *supra* note 4, at art. 48; BOOTHBY, *supra* note 6, at 60 ("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: THE LAWS OF WAR IN AMERICAN HISTORY 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").

25. E.g., CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES 46-50 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

26. E.g., Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, 8 Y.B. INT'L HUMANITARIAN L. 3, 28-29 (2005).

27. See Additional Protocol I, *supra* note 4, art. 48.

28. *Id.* art. 51(2).



intentional attacks, as the *travaux préparatoires*<sup>29</sup> and relevant treatises make clear.<sup>30</sup>

One might describe this as a two-track system, where 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.<sup>31</sup> 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*),<sup>32</sup> while other scholars maintain that proportionality refers to the concrete military objective of that particular attack.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> Instead of dealing with the fraught legal complications

29. See Int'l Comm. of the Red Cross [ICRC] Conference of Gov't Experts on the Reaffirmation and Dev. of Int'l Humanitarian Law Applicable in Armed Conflicts, 2d Session, May 3 - June 3, 1972, Report on the Work of the Conference 148 (1972); ICRC Conference of Gov't Experts on the Reaffirmation and Dev. of Int'l Humanitarian Law Applicable in Armed Conflicts, 2d Session, May 24 - June 12, 1971, Report on the Work of the Conference 77-78 (1971).

30. See, e.g., ICRC COMMENTARY, *supra* note 6, ¶¶ 1938-41.

31. 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, 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, 232 (2010). On distinguishing *jus in bello* proportionality from *jus ad bellum* proportionality, see FLETCHER & OHLIN, *supra* note 10, at 96-102; 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, 711 (2011).

32. 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.").

33. 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. 47, 52-53 (2009).

34. 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. Prosecutor v. Gotovina, Case No. IT-06-90-A, Appeals Judgment, ¶ 82, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012)(overturning the Trial Chamber's finding that the attack against the town of Martić was disproportionate).

35. The one exception remains *Prlic*, where an ICTY Trial Chamber held that the defendant's attack against a bridge was disproportionate to its military value. However, the

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.<sup>36</sup> 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 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.<sup>37</sup> So in the hypothetical above, the perpetrator's killing of B was performed purposely, while the perpetrator's killing of A was per-

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defendant was not charged with intentionally targeting civilians because no civilians died during the attack. See Prosecutor v. Prlic, Case No. IT-04-74-T, Judgment, ¶ 1584 (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013). Consequently, the *Prlic* case falls outside the scope of this paper, which is confined to the interplay between the principles of distinction and proportionality with regard to the war crime of intentionally targeting civilians.

36. See MODEL PENAL CODE, §2.02(2)(a)(i) (1985).

37. MODEL PENAL CODE, § 2.02(2)(b) (1985); MODEL PENAL CODE, § 2.02(2)(a) (1985).

formed 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.”<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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:

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.<sup>41</sup>

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*.<sup>42</sup> 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

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

39. 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, 482, 485-86 (2008) (discussing the connections between the Model Penal Code’s concept of “purposely” and *dolus directus* and the connection between “knowingly” and *dolus indirectus*).

40. See Kai Ambos, *Critical Issues in the Bemba Confirmation Decision*, 22 LEIDEN J. INT’L L. 715, 717 (2009). For a discussion of how the Rome Statute incorporates the concepts of *dolus directus* and *dolus indirectus*, see Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment, ¶ 135 (June 15, 2009).

41. See MODEL PENAL CODE, § 2.02(2)(c) (1985).

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

risk of so acting.”<sup>43</sup> 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.<sup>44</sup>

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*.<sup>45</sup> If it is the former (the same as recklessness), it cannot be a form of intent, according to the common law lawyer, because acting recklessly is not the same as acting intentionally.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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

43. *Id.*

44. See, e.g., FLETCHER, *supra* note 11, at 446-47; SARAH FINNIN, ELEMENTS OF ACCESSORIAL MODES OF LIABILITY: ARTICLES 25 (3)(B) AND (C) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 159-60 (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) (stating that *dolus eventualis* and recklessness both involve liability for risk-taking behavior though the latter is broader).

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

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

47. See, e.g., Kai Ambos, *Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis—From Nuremberg to the Hague*, in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 5, 21 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) (describing *dolus eventualis* as “somewhere between purpose/knowledge and recklessness/negligence”).

48. For a discussion of the controversy, see ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 47-48 (2012).

a form of intent.<sup>49</sup> 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.<sup>50</sup> 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 mental states save negligence 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.<sup>51</sup>

Although this represents a simplification of views among a larger population of lawyers, the general attribution of views is correct.<sup>52</sup> 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

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49. See *infra* notes 57-58 and accompanying text.

50. See HÉCTOR OLÁSULO, UNLAWFUL ATTACKS IN COMBAT SITUATIONS: FROM THE ICTY’S CASE LAW TO THE ROME STATUTE 217-18 (2008).

51. See Michael S. Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 179, 195-196 (R.A. Duff & Stuart P. Green eds., 2011).

52. 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 44, at 46.

trans-regional.<sup>53</sup> 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.<sup>54</sup> Although some differences in *interpretation* might be shrugged off as inevitable,<sup>55</sup> 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 norms will not be implicated by whatever pluralism might linger at the margins.<sup>56</sup>

The current literature on the law of targeting has largely ignored the ambiguity of intent, disregarding the fact that lawyers trained in different disciplines, and from different legal cultures, might cash out the concept of intent in different ways.<sup>57</sup> 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.<sup>58</sup> Spurred by civil law criminal law theory, judges in The Hague have demonstrated a greater hospitality 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.

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53. For a discussion of pluralism and fragmentation, see Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 *IND. L.J.* 1063, 1064 (2011); Martii Koskeniemi & Päivi Leino, *Fragmentation of International Law?: Postmodern Anxieties*, 15 *LEIDEN J. INT'L L.* 553, 558 (2002); Elies van Sliedregt, *Pluralism in International Criminal Law*, 25 *LEIDEN J. INT'L L.* 847, 848 (2012).

54. See Dieter Fleck, *Introduction*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW*, *supra* note 4, at xi-xiii.

55. Flavia Lattanzi, *Introduction*, in *THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW* (Larissa van den Herik & Carsten Stahn eds., 2012); *see also*, Koskeniemi & Leino, *supra* note 53, at 578.

56. See Yuval Shany, *One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?*, in *THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW* 15, 27-28 (Ole Kristian Fauchald & Andrew Nollkaemper eds., 2012). *But see* van Sliedregt, *supra* note 53, at 851,

57. One notable exception is Kevin Heller, who has explored this issue in a series of posts and comments on *Opinio Juris*. Heller, *supra* note 2 (“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* Comments and Responses to Jens David Ohlin, *Targeting and the Concept of Intent*, *OPINIO JURIS* (Feb. 8, 2012, 10:13 PM), <http://opiniojuris.org/2012/02/08/targeting-and-the-concept-of-intent/>.

58. The ICC has not extensively addressed the legal issue of targeting civilians, so the relevant case law to date stems from the ad hoc tribunals, in particular the ICTY.

## 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.<sup>59</sup> Instead of resolving 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 extensive 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.<sup>60</sup> 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.<sup>61</sup> 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 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.<sup>62</sup> 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.<sup>63</sup> The *Tadić* standard was met because the defen-

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

60. Prosecutor v. Galic, Case No. IT-98-29-T, Trial Chamber Judgment and Opinion, ¶ 136 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>.

61. *Id.* ¶¶ 3-4.

62. *Id.* ¶¶ 16-20.

63. Under this standard, a war crime involves: i) a breach protecting important values with grave consequences for the victim; ii) a breach of a rule stemming from customary law

dant's conduct transgressed a "core principle" of IHL that has "grave consequences" for its victims.<sup>64</sup> Furthermore, the Chamber concluded that the *Tadić* standard was met because the rule in question triggers individual criminal responsibility under both international law and domestic penal systems, including Yugoslavia.<sup>65</sup>

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 to distinguish between attacks that violate the principles of distinction and those that violate the principle of proportionality,<sup>66</sup> thus suggesting that the Chamber was aware that the two tracks were normatively distinct inquiries.<sup>67</sup> 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 I.<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup>

Symptomatic of the same confusion is the Chamber's equation of launching indiscriminate attacks with directly targeting civilians.<sup>71</sup> Al-

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or applicable treaty; and iii) a breach entailing individual criminal responsibility for the individual violator. See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 65 (3d ed., 2013).

64. Prosecutor v. *Galić*, *supra* note 60, ¶¶ 11, 25-32.

65. *Id.* ¶¶ 29, 31.

66. *Id.* ¶¶ 57-58.

67. *Id.* ¶ 58.

68. *Id.*

69. See ICRC COMMENTARY, *supra* note 6, ¶ 3474.

70. See *id.* ¶ 3474 n.14 (citing G. STEFANI, G. LEVASSEUR, & B. BOULOC, *DROIT PÉNAL GÉNÉRAL*, 213-34 (11th ed. 1980)).

71. See Prosecutor v. *Galić*, *supra* note 60, ¶ 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



though 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.<sup>72</sup> Lacking precision technology to direct the rockets to a specific target, Hamas allegedly launches them into Israel without knowing where they will fall.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> To be fair, counsel for Galic could have

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with directly targeting civilians. See Additional Protocol I, *supra* note 4, 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.").

72. See, e.g., PETER BERKOWITZ, *ISRAEL AND THE STRUGGLE OVER THE INTERNATIONAL LAWS OF WAR* 10, 15 (2012).

73. See Isabel Kershner & Rick Gladstone, *Israel Destroys Hamas Prime Minister's Office*, N.Y. TIMES, Nov. 16, 2012, at A1, available at <http://nyti.ms/XLqK7J> (noting that the Israeli military strike was in retaliation for Hamas' firing of "more than 700 rockets into southern Israel over the last year").

74. See Additional Protocol I, *supra* note 4, art. 51(5)(b).

75. See *Prosecutor v. Galic*, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶ 140 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006), <http://www.icty.org/x/cases/galic/acjud/en/gal-acjud061130.pdf> (describing the Trial Chamber's reliance on the ICRC Commentary to Article 85 of Additional Protocol I, distinguishing intent from recklessness). (citing ICRC COMMENTARY, *supra* note 6, ¶ 3474). 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

pressed the issue far more strenuously and carefully in the defendant's appellate brief.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup>

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."<sup>79</sup> The question is what the Trial Chamber meant by the phrase "impossible not to know."<sup>80</sup> Presumably that is a reference to willful blindness—a subject of much debate in the criminal law literature.<sup>81</sup> However, the Trial Chamber also concluded that although the "[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 of Article 2 of the Statute includes both guilty intent and recklessness which may be likened to serious criminal negli-

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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 Galic offers no support for his contention 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." *Id.*

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

77. *Id.* ¶ 50 ("Indiscriminate and disproportionate attacks can both be qualified as direct attacks, as erroneously concluded by the Trial Chamber. A clear distinction must be made between indiscriminate and disproportionate attacks.").

78. See, e.g., CASSESE, *supra* note 42, at 13-14.

79. *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Appeals Chamber Judgment, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia March 30, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>.

80. *Id.*

81. *Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 387 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), [http://www.icty.org/x/cases/mucic/tjug/en/981116\\_judg\\_en.pdf](http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf); see also 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).

gence.”<sup>82</sup> 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.<sup>83</sup>

In *Kordić and Ćerkez*, 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.<sup>84</sup> Strangely, the Trial Chamber pretended not to notice the difference and declined to resolve the ambiguity.<sup>85</sup> 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.”<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup>

Part of the problem is the *lex specialis* nature of the IHL prohibition.<sup>90</sup> Under regular rules of ICL, it may be the case that recklessness (or reckless disregard) satisfies the appropriate mens rea for committing a willful

82. Prosecutor v. Delalić, *supra* note 81, ¶ 152.

83. On appeal, the Appeals Chamber did not address the issue of 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 *Prosecutor v. Delalić*, Case No. IT-96-21-T, Appeals Chamber Judgment, ¶ 152 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>.

84. See *Prosecutor v. Kordić and Ćerkez*, Case No. IT-95-14/2-T, Trial Chamber Judgment, ¶¶ 322-25 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kor-tj010226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf).

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

86. *Id.* ¶ 322.

87. *Id.* ¶ 324.

88. *Id.* ¶ 326.

89. See *Prosecutor v. Kordić & Ćerkez*, Case No. IT-95-14/2-A, Appeals Chamber Judgment, ¶ 396 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004), [http://www.icty.org/x/cases/kordic\\_cerkez/acjug/en/cer-aj041217e.pdf](http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf).

90. *Lex specialis* is a legal doctrine that states that where two legal regimes apply to one situation, those laws designated *specialis*—that is, laws specially designed for the given situation—take precedence over a more general set of applicable laws, or *lex generalis*. See JAN RÖMER, KILLING IN A GRAY AREA BETWEEN HUMANITARIAN LAW AND HUMAN RIGHTS 34 (2010).

murder.<sup>91</sup> In such cases, the Trial Chambers argue that murder requires acting with intent, although again intent is read broadly here.<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup>

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-de-

91. Cf. Schabas, *supra* note 81, at 1020-21.

92. See, e.g., *See* Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Trial Chamber Judgment, ¶ 229 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kor-tj010226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf).

93. See, e.g., Prosecutor v. Delalić, *supra* note 81, ¶¶ 386-89. 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 to 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 U.S. 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).

94. See Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Chamber Judgment, ¶ 152 (Int'l Crim. Trib. for the Former Yugoslavia (Jan. 31, 2005), <http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf>).

95. *Id.* ¶ 236.

sired 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.<sup>96</sup> 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,<sup>97</sup> 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.<sup>98</sup>

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.”<sup>99</sup> 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.<sup>100</sup> 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 and indirect intent, as well as recklessness.<sup>101</sup> This conclusion alone demonstrates a lack of familiarity with, and fidelity 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.

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96. *Id.* ¶¶ 236-37.

97. *Id.* ¶¶ 237-39 & n.798.

98. *Id.* ¶ 240.

99. *Id.* ¶ 283.

100. *Id.* ¶240.

101. See Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Chamber Judgment, ¶ 270 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008), <http://www.icty.org/x/cases/strugar/acjug/en/080717.pdf>.

### 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.<sup>102</sup> 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."<sup>103</sup> 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.<sup>104</sup> The result of this re-interpretation 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,<sup>105</sup> 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 subclass of IHL violations 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.<sup>106</sup> 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.

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102. See *Prosecutor v. Perisic*, Case No. IT-04-81-T, Trial Chamber Judgment, ¶ 152 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011), [http://www.icty.org/x/cases/perisic/tjug/en/110906\\_judgement.pdf](http://www.icty.org/x/cases/perisic/tjug/en/110906_judgement.pdf).

103. *Id.* ¶ 100.

104. See Alphons M.M. Orie, *Stare Decisis in the ICTY Appeal System? Successor Responsibility in the Had\_ithasanovic Case*, 10 J. INT'L CRIM. JUST. 635, 640-41 (2012).

105. On the estrangement, see generally MARK D. KIELSGARD, *RELUCTANT ENGAGEMENT: U.S. POLICY AND THE INTERNATIONAL CRIMINAL COURT* (2010); 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).

106. See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 92 (2008).

## 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.<sup>107</sup> 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."<sup>108</sup> 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."<sup>109</sup> 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.<sup>110</sup> However, at least some ICC judges have ruled that *dolus eventualis* satisfies this standard.<sup>111</sup> This Part provides a critical examination of this claim, and finds the evidence wanting.

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."<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> Under this view, the default requirement can be circumvented rather easily every time a clear rule of

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107. See Badar, *supra* note 16, at 467.

108. See Rome Statute, *supra* note 7, art. 30.

109. *Id.*

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

111. See, e.g., Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 344 (Jan. 29, 2007) [hereinafter Lubanga I]. This finding was upheld by the Trial Chamber. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment of the Trial Chamber, ¶ 1011 (March 14, 2012) [hereinafter Lubanga II].

112. Rome Statute, *supra* note 7, art. 30(1).

113. See Piragoff & Robinson, *supra* note 110, at 856.

114. See Badar, *supra* note 16, at 440-41; CASSESE, *supra* note 42, at 74.

customary international law permits criminal liability for reckless behavior.<sup>115</sup>

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*.<sup>116</sup> These decisions represent a decidedly civil law reading of Article 30, and other courts have expressed caution regarding this reading.<sup>117</sup>

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.”<sup>118</sup> 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 reach agreement on the issue.<sup>119</sup> Commentators and negotiators have generally concluded that most delegations were skeptical about including *dolus eventualis* and recklessness within the Statute’s default mental rule.<sup>120</sup> This reading of the negotiations

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115. 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).

116. See, e.g., Lubanga I, *supra* note 111, ¶ 344. This finding was upheld by the Trial Chamber. See Lubanga II, *supra* note 111, ¶ 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 was that a defendant can never truly “know” what will happen in the future, and therefore all assessments of future consequences involve risk. *Id.* ¶ 1012. 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 § 2.02(2)(c) (1985).

117. See Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Confirmation of Charges, ¶ 360 (June 15, 2009). 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”).

118. See Piragoff & Robinson, *supra* note 110, at 850.

119. See WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 473-78 (2010) (citing Preparatory Comm. on the Establishment of an Int’l Criminal Court, Chairman’s Text, Feb. 11—Feb. 21 1997, UN Doc. A/AC.249/1997/WG.2/CRP.4 (Feb. 20, 1997)).

120. See SCHABAS, *supra* note 119, at 475-76; 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 519, 525 (2008).



was also supported by the ICC Pre-Trial Chamber in the *Bemba* Confirmation of Charges Decision.<sup>121</sup>

Nonetheless, commentators and some judges continue to maintain that *dolus eventualis* falls within the Rome Statute's Article 30 default rule.<sup>122</sup> 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."<sup>123</sup> Schabas agrees, concluding that *dolus eventualis* was rejected early in the Rome Statute negotiations.<sup>124</sup> 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.]<sup>125</sup>

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 consid-

121. See Prosecutor v. Bemba, *supra* note 117, ¶ 366, (citing Working Group on General Principles of Criminal Law, Report of the Working Group on General Principles of Criminal Law, UN Doc. A/CONF.183/C.1/WGPP/L.4).

122. See Badar, *supra* note 16, at 442-43; Wirth, *supra* note 117, 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"); OLASOLO, *supra* note 50, at 208.

123. Roger Clark, *Elements of Crimes in Early Confirmation Decisions of Pre-Trial Chambers of the International Criminal Court*, 6 NEW ZEALAND Y.B. INT'L L. (2008); see Badar, *supra* note 16, at 441 n.32.

124. See SCHABAS, *supra* note 119, at 476.

125. See Badar, *supra* note 17, at 447-48 (citing Preparatory Comm. on the Establishment of an Int'l Crim. Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. 1, ¶¶ 52-53, UN Doc. A/51/22 (1996)).

ered. 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.<sup>126</sup>

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.<sup>127</sup>

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*.<sup>128</sup> 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.<sup>129</sup> 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*, that is, 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

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126. *Id.* at 518.

127. *Cf.* Ambos, *supra* note 40, 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.

128. *See* Preparatory Comm. on the Establishment of an Int’l Crim. Court, 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 (1998).

129. *See* SCHABAS, *supra* note 119, at 474, 476 (citing Prosecutor v. Bemba, *supra* note 117, ¶ 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”).

intent.<sup>130</sup> 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.<sup>131</sup> 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.

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.<sup>132</sup> 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.<sup>133</sup> Donald Piragoff and Darryl Robinson, for example, concludes that:

[t]he 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 eventu-*

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130. See, e.g., OLÁSOLO, *supra* note 50, at 209.

131. See Lubanga I, *supra* note 111, ¶ 351.

132. See MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 64-65 (2009); FINNIN, *supra* note 44, at 157 (“There is no one test or definition for *dolus eventualis*.”); 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).

133. See Weigend, *supra* note 132, at 482 (“it is thus far from clear that speakers from different backgrounds mean the same thing when they use the same Latin expression”).

*alis*” 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.<sup>134</sup>

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.”<sup>135</sup> 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 “practical certainty” that a result will occur.<sup>136</sup>

On a second interpretation, *dolus eventualis* might mean that the actor “reconciles himself,” “accept[s]” 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.<sup>137</sup> 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?<sup>138</sup> 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.<sup>139</sup> 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 law-

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134. See Piragoff & Robinson, *supra* note 110, at 860 n.67.

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

136. See Model Penal Code §2.02(2)(b) (1985).

137. Badar, *supra* note 16, at 459; see also Taylor, *supra* note 14, at 113; FLETCHER, *supra* note 11, at 445; Greg Taylor, *Concepts of Intention in German Criminal Law*, 24 OXFORD J. LEGAL STUD. 99, 99-101 (2004).

138. See BOHLANDER, *supra* note 132, at 63 (concluding that *dolus eventualis* “straddles the fence between the German concepts of conditional intent and advertent negligence”); OLÁSULO, *supra* note 50, at 209 (concluding that “a person can perfectly carry out dangerous conduct while trusting his skills to avoid the forbidden result. This would be the case if an artillery officer, despite being aware of the likelihood of hitting an apartment building occupied only by civilians due to his mortar’s lack of precision, is confident that his skills will allow him to ensure that the projectile hits the small munitions warehouse located near the apartment building.”).

139. See Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1024-28 (1998); FLETCHER, *supra* note 11, at 445-47; OLÁSULO, *supra* note 50, at 209 n.828.

yers are trained to punch up or punch down an actor whose mental state resides in this region.<sup>140</sup>

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.<sup>141</sup> 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.<sup>142</sup> On some theories of *dolus eventualis*, this is 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.”<sup>143</sup> 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.<sup>144</sup> *Dolus eventualis* is about risk, but the plain language of Article 30 is about events that *will* occur, not events that *might* occur.<sup>145</sup>

### 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 gen-

140. It would be interesting to empirically compare intuitive judgments from German criminal lawyers with judgments made by American-trained lawyers. 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 LEGAL ST. 859 (2012).

141. See Michaels, *supra* note 139, 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.”).

142. 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 because 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, 489-90 (1992); cf. Itzhak Kuglar, *Israel*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 352, 365 (Markus Dubber & Kevin Jon Heller eds., 2011) (describing recklessness without volitional component).

143. Indeed, Judge Van den Wyngaert’s concurring opinion in the recent Ngudjolo Chui acquittal makes precisely this point. Prosecutor v. Ngudjolo Chui, Case No. ICC-01/04-02/12, Concurring Opinion of Judge Christine Van den Wyngaert, ¶ 38 (Dec. 18, 2012) (“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”).

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

145. *Id.*; See also Prosecutor v. Ngudjolo Chui, Case No. ICC-01/04-02/12, Concurring Opinion of Judge Christine Van den Wyngaert ¶¶ 37-39 (Dec. 18, 2012); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Separate Opinion of Judge Fulford, ¶ 15 (March 14, 2012) (referring to Lubanga Trial Judgment definition and application of *dolus eventualis* as “confusing”).

erally: 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.<sup>146</sup>

This view, though widespread in the scholarly literature, finds little support in the *travaux préparatoires*. As Robinson notes, the standard view of 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.<sup>147</sup> This scheme liberated the drafters from having to specify a mental state for every single crime in the special part of the Rome Statute.<sup>148</sup> 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.<sup>149</sup> 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 to aid in the process of interpretation.<sup>150</sup> 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?<sup>151</sup>

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.<sup>152</sup> 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

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146. See, e.g., Werle & Jessberger, *supra* note 115, at 45-46; Wirth, *supra* note 117, at 993; Badar, *supra* note 16, at 444.

147. See Piragoff & Robinson, *supra* note 110, at 856, 857 n.46

148. *Id.* at 856-57.

149. *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).

150. See Preparatory Comm. For the Int'l Criminal Court, Report of the Preparatory Committee for the International Criminal Court, Mar. 13-31 & June 12-30, 2000, § 1, U.N. Doc. PCNICC/2000/1/Add.2 (2000) ("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 id.* § 2("exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below").

151. See SCHABAS, *supra* note 119, at 474-75.

152. See *id.* at 475.

its customary origins in favor of a stringent and rigorous codification process that met the demands of the principle of legality.<sup>153</sup> A *written* Penal Code, with all of its 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.<sup>154</sup> 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.<sup>155</sup>

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.<sup>156</sup> They are international criminal *precedent*, a source of law as of yet unrecognized as a basis for customary international law.<sup>157</sup> 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*.<sup>158</sup> Perhaps such domestic developments might constitute general principles of law, but this move is radically under-theorized in the contemporary literature.<sup>159</sup> 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*?

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153. 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).

154. *Id.* at 551.

155. *Id.*

156. See Int’l Law Ass’n, Comm. on Formation of Customary (General) Int’l Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, at 18-19 (2000) [hereinafter ILA Principles of Customary Law] (“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.”); *but see* Tullio Treves, *Customary International Law*, in 2 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 937, 948 (Rüdiger Wolfrum et al. eds., 2012) (“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.”).

157. 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, 153-56 (1947).

158. See ILA Principles of Customary Law, *supra* note 156, at 18-19.

159. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 3 Bevans 1153. See generally Vladimir-Djuro Degan, *On the Sources of International Criminal Law*, 4 CHINESE J. INT’L L. 45 (2005).

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.<sup>160</sup> The warrant for this position is the contention that Article 30 does not explicitly list which sources of law are appropriate for this exercise.<sup>161</sup> 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.”<sup>162</sup>

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.<sup>163</sup> 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.<sup>164</sup> 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.<sup>165</sup> It opens up problems regarding notice and vagueness that challenge the very foundation of international criminal law as a system of criminal justice as opposed to international justice.<sup>166</sup> 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

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160. Wirth, *supra* note 117, at 992 n.174 (implying falsely that Schabas supports this view); *see also* SCHABAS, *supra* note 119, at 474-75 (concluding that the Elements of Crimes might be used to trigger the “unless otherwise provided” rationale but making no mention of custom); Heller, *supra* note 149, at 435 (evaluating status of the Elements of Crimes and concluding that they can be used to trigger exceptions to Article 30).

161. Wirth, *supra* note 110, at 992-93; *see also* Werle & Jessberger, *supra* note 108, at 45-46 (supporting the possibility that an Article 30 exception could derive from a rule of customary law).

162. 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. Rome Statute, *supra* note 7, at art. 30. A similar phrase is used in Article 57 of the Rome Statute. *See* Wirth, *supra* note 110, at 993.

163. *See* Wirth, *supra* note 110, at 993.

164. *See* SCHABAS, *supra* note 119, at 474-75; M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* 352 (2011).

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

166. 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 Osiel and Roxin's views and the degree to which these theories of liability put offenders on notice regarding their criminal exposure).



relevant exceptions *are noted below* in the Elements of Crimes.<sup>167</sup> 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 Joint Criminal Enterprise 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*.<sup>168</sup> 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.<sup>169</sup>

#### 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 ci-

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167. See Preparatory Comm. For the Int'l Criminal Court, *supra* note 150, § 2 (“Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.”).

168. See Stewart, *supra* note 93, at 192 (criticizing lack of coherent approach to mens rea caused by modes of liability with lower mental state requirements).

169. Article 21 of the Rome Statute 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.” Rome Statute, *supra* note 7, art. 21. Margaret deGuzman 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 COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 110, 701, 707-08 (“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 deGuzman’s interpretation of Article 21 may be correct, it is of little help to Wirth’s argument that the 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).

vilians 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.<sup>170</sup> However, Additional Protocol II (regulating non-international armed conflicts) codifies the principle of distinction but includes no similar codification of the principle of proportionality.<sup>171</sup> 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 of Protocol I and Protocol II 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.<sup>172</sup> Also, the United States made clear during the discussions that distinction and proportionality were different, and that what later became Article 51 of Protocol I 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.”<sup>173</sup> 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

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170. See Additional Protocol I, *supra* note 4, art. 48, 51(5)(b).

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

172. See *Ukrainian Soviet Socialist Republic Statement*, in 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 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 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).

173. *United States of America Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 172, at 204.

first sentence of the paragraph was to prohibit only such attacks as might be directed against non-military objectives.<sup>174</sup>

This issue was so important that several other delegations, including Germany,<sup>175</sup> the Netherlands,<sup>176</sup> and Canada,<sup>177</sup> repeated this understanding almost *verbatim*.

Furthermore, the leading commentary on the Additional Protocols makes clear that the two tracks are normatively distinct.<sup>178</sup> 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.<sup>179</sup> Specifically, the *Commentary* concludes that the grave breach “consists in directing an attack against the protected persons ‘as such’.”<sup>180</sup> 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(3).<sup>181</sup> 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.<sup>182</sup> 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

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174. *United Kingdom Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 172, at 169.

175. *See Federal Republic of Germany Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 172, 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.”).

176. *See Netherlands Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 172, 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 maybe directed against non-military objectives and consequently does not deal with the question of collateral damage caused by attacks directed against military objectives.”).

177. *See Canada Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 172, 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 legitimate attack on military objectives and incidental damage that such attack may cause.”).

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

179. *Id.* at 516.

180. *Id.* (citing Additional Protocol I, *supra* note 4, art. 51(2)).

181. *Id.*

182. *Id.*

more: the knowledge (not only the presumption) that such attack *will cause* excessive losses in kind.”<sup>183</sup>

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.<sup>184</sup> 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 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.”<sup>185</sup>

During the negotiations leading to the Additional Protocol, the rule of proportionality passed by a margin of 56 to 6 with 3 abstentions.<sup>186</sup> 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*.<sup>187</sup> 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 were to be excluded from the calculations by virtue of their speculative nature.<sup>188</sup> Other delegations complained that the Article 85 grave breaches regime, particularly with regard to what counted as excessive damage, was worrisomely impre-

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

184. *Id.* at 363.

185. *Id.* at 366.

186. *Id.* at 365.

187. *France Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 164, at 161-62; *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, 1996 I.C.J. 226, ¶ 97 (July 8).

188. *NEW RULES FOR VICTIMS OF ARMED CONFLICT*, *supra* note 178, at 365.

cise.<sup>189</sup> Several members noted that subparagraph (5) of Article 51 (on proportionality) was subject to multiple interpretations.<sup>190</sup> 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 to lower 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).<sup>191</sup> However, there was also broad agreement that the principles of distinction and proportionality codified in the Additional Protocol represented substantial advancement in the codification of the laws of war.<sup>192</sup>

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189. See *Italy Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 164, 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.”).

190. See *France Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 172, 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.”).

191. 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 intermixing of civilian and military personnel in the same location.

192. The *travaux préparatoires* once again establish that discrimination and proportionality are two separate concepts. See, e.g., *United States of America Statement*, in 7 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 172, 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.”<sup>193</sup> But concessions in favor of military necessity need not be understood in a negative light.<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup> 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.<sup>197</sup> States were particularly concerned about the pliability of 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

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193. NEW RULES FOR VICTIMS OF ARMED CONFLICT, *supra* note 188, at 361 (suggesting that the rule of proportionality is based on the principle of lesser evils) (citing INT’L COMM. OF THE RED CROSS, 3 CONFERENCE OF GOVERNMENT EXPERTS 85 (1971)).

194. *Id.* (“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.”).

195. Cf. Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert It*, 87 INT’L L. STUD. 483, 488 (2011).

196. 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.”).

197. It should be noted that the United States is not a party to 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 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES, *supra* note 25, at 51.

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.<sup>198</sup> 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 underlie the Doctrine of Double Effect.<sup>199</sup>

Thomas Aquinas first formulated the Doctrine of Double Effect, though not under that title or banner.<sup>200</sup> But the underlying principle was certainly all Aquinas and it is traditionally associated with Catholic moral theology.<sup>201</sup> The philosopher's concern was the moral permissibility of killing in self-defense.<sup>202</sup> 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.<sup>203</sup> His answer was to separate the intended effects of the defender's actions from the secondary effects of that same action.<sup>204</sup> The defender intends to neutralize the unwarranted threat and this effect is morally per-

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198. 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, 58-59 (1981).

199. The basic distinction finds credence in other cultures that have no direct connection to Catholic moral theology. See, e.g., *THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYAR* 102 (Majid Khadduri ed., 1966) ("I asked: Would it be permissible for the Muslims to attack them with swords and lances if the children were not intentionally aimed at? He replied: Yes."); JOHN KELSAY, *ARGUING THE JUST WAR IN ISLAM* 109 (2007) ("The reasoning is quite reminiscent of Western just-war tradition and its approach to collateral damage. One would be quite wrong, in the case of just war or of Shari'a reasoning, to read such a passage as negating respect for the immunity of noncombatants. The point is that the attacks are not directly and intentionally aimed at noncombatants.").

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

201. 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.").

202. *Id.*

203. *Id.*

204. *Id.*

missible, 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.<sup>205</sup>

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.<sup>206</sup> Frances Kamm argues that the Doctrine of Double Effect represents a conceptual distinction best expressed by something called the Counterfactual Test.<sup>207</sup> The Counterfactual Test asks the following hypothetical: “an evil would not occur if you acted but all else remained the same; would you, as a rational agent, have a reason not to act?”<sup>208</sup> According to Kamm, the counterfactual explains the intent-foresight distinction because “the agent who intends the evil at least has some reason not to act, but an agent who merely foresees the evil would have no reason not to act.”<sup>209</sup> Ultimately, Kamm concludes that the Doctrine of Double Effect, as traditionally formulated, is both under- and over-inclusive, and ought to be revised. However, Kamm's arguments for when the Doctrine of Double Effect appears to permit impermissible actions deal with non-war cases that have little or nothing to do with the wartime bombing of combatants and civilians.<sup>210</sup>

Regardless of the recent academic criticisms in the domain of moral philosophy, the Doctrine of Double Effect proved hugely successful as a moral theory that expresses the relevance of the intent-foresight distinction.<sup>211</sup> 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

205. *Id.*

206. For competing theories of self-defense, see GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY*, *supra* note 10 at 30-62 (2008).

207. FRANCES M. KAMM, *THE MORAL TARGET: AIMING AT RIGHT CONDUCT IN WAR AND OTHER CONFLICTS* 41 (2012).

208. *Id.*

209. *Id.*

210. *Id.* at 55 (discussing arguments originally offered by Philippa Foot). In fact, Kamm deploys examples from wartime bombing to show that in other areas the Doctrine of Double Effect is too restrictive, because she believes that the intentional bombing of civilians might be morally justified in situations where the civilians are causally responsible for supporting the war or where their deaths might otherwise have been justified as collateral damage. *Id.* at 74. So any bombing during wartime consistent with the Doctrine of Double Effect would be justified under Kamm's theory as well, though perhaps on the basis of some alternate moral principle.

211. See, e.g., Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY*, 19, 19-32 (1978); G.E.M. Anscombe, *Action, Intention and Double Effect*, in *HUMAN LIFE, ACTION AND ETHICS* 207, 221-224 (Mary Leach & Luke Formally, eds. 2005); THOMAS NAGEL, *THE VIEW FROM NOWHERE* 179 (1986).



morally or legally permissible.<sup>212</sup> The bombing of targets in wartime is precisely one of these situations.<sup>213</sup>

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 principles 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, Part V(B) shall make precisely this argument, though within the context of this paper this point is purely supererogatory. 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 plenty)<sup>214</sup> 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.

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212. 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) available at <http://www.guardian.co.uk/commentisfree/2012/dec/19/newtown-drones-children-deaths>, 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 United States and England. Greenwald canvasses multiple differences between Sandy Hook and drone strikes, though nowhere discusses the moral difference between intentional killings and secondary effects. *Id.*

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

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

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.<sup>215</sup> 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
  - (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.<sup>216</sup>

The specifics of the Doctrine of Double Effect have generated no shortage of commentary, and there are competing formulations.<sup>217</sup>

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.<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup> As it happens, the best way to make the public think the civilians are dead is to actually kill them, though this is not

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

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

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

218. See Warren S. Quinn, *Actions, Intentions and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334 (1989) (offering Kantian explanation for the doctrine of double effect).

219. *Id.*

220. This point was made by Jonathan Bennett in *Morality and Consequences*, in *THE TANNER LECTURES ON HUMAN VALUES* 47, 111 (S. McMurrin ed., 1981).

the only logical means of doing so.<sup>221</sup> But the use of terrorism is clearly impermissible, so the current formulation of the Doctrine of Double Effect must be erroneous.<sup>222</sup>

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.<sup>223</sup>

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.<sup>224</sup> 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.<sup>225</sup>

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.<sup>226</sup> 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.<sup>227</sup> 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

221. *Id.*

222. *See* McMahan, *supra* note 215 at 202-03 (1994) (noting that Quinn's proposed revision is a response to the potential "vitiating" of the Doctrine of Double Effect caused by the "narrow conception of an intended means").

223. *See* Quinn, *supra* note 218, at 343 (emphasis in original).

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

225. *Id.*, at 344. For further discussion of this problem, see Foot, *supra* note 211, at 21; McMahan, *supra* note 215, at 202.

226. *See, e.g.*, Foot, *supra* note 211, at 21; McMahan, *supra* note 215, at 210; Quinn, *supra* note 218, at 347.

227. *See, e.g.*, Alison Hills, *Defending Double Effect*, 116 *PHIL. STUD.* 133, 133 (2003).

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 formulation of the Doctrine requires amendment. This demonstrates the close conceptual connection between the Doctrine of Double Effect 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.<sup>228</sup>

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.<sup>229</sup> Rather, the attacker must *intend not* to kill the innocent civilians.<sup>230</sup> 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*.<sup>231</sup> 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.<sup>232</sup> In Walzer’s famous example, World War I soldier Frank Richards shouted warnings before dropping grenades into basements where enemy soldiers were suspected of hiding.<sup>233</sup> These warn-

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228. WALZER, *supra* note 213, at 152-53.

229. *Id.* at 155-56.

230. *Id.* at 155.

231. *Id.*

232. *Id.* at 156.

233. *Id.* at 152-53 (citing FRANK RICHARDS, *OLD SOLDIERS NEVER DIE* 198 (1966)). For an illuminating discussion on soldiers’ moral duties to civilians in wartime, see David Luban, *Risk-Taking and Force Protection*, in *READER WALZER* (Itzhak Benbaji & Naomi Sussman eds., 2011).

ings 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.<sup>234</sup> For Walzer, such precautions were not only laudatory but also morally necessary.<sup>235</sup>

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.<sup>236</sup> Additional Protocol I requires that attacking forces “take all feasible precautions” to ensure that innocent civilians are spared in the attack.<sup>237</sup> 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.<sup>238</sup> 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?<sup>239</sup> That question is only answered by a pre-existing standard of what level of risk attacking soldiers are required to endure.<sup>240</sup> How much are attacking forces permitted to value their own “force protection” over the duty of due care to the innocent civilians?<sup>241</sup> Unfortunately, the Additional Protocol does not provide an answer.

However, the negotiators of the Additional Protocol were well aware of the limitations of the formulation that they were adopting.<sup>242</sup> 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.<sup>243</sup> Nonetheless, there was wide understanding that

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234. WALZER, *supra* note 213, at 152; Luban, *supra* note 233.

235. WALZER, *supra* note 213, at 156.

236. For a discussion of the required level of precautions, see OLÁSOLO, *supra* note 50, at 219-20. See also IAN HENDERSON, *THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I* 159-61 (2009).

237. Additional Protocol I, *supra* note 4, at art. 57(2)(a)(ii).

238. However, the rule is certainly listed in many national military field manuals. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1, *supra* note 25, at 57.

239. See Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, in *ESSAYS ON LAW AND WAR AT THE FAULT LINES* 89, 97 (2012) (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)) (The “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’”). Participants in the negotiations for the Additional Protocol also used this language. See, e.g., *United Kingdom Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 172, at 214.

240. Luban, *supra* note 233.

241. *Id.*

242. See, e.g., *France Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 172, at 213.

243. See, e.g., *Iran Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 172, at 213.

failure to include the word “feasible” would render the provision unsupported by many nations, and further, that a black-and-white provision without a feasibility constraint would be difficult for state parties to comply with.<sup>244</sup> 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*.<sup>245</sup> 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.

### 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.

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244. See, e.g., *Madagascar Statement*, in 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 172, 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.”).

245. See WALZER, *supra* note 213, at 156.

### 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.<sup>246</sup> 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.<sup>247</sup> 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.<sup>248</sup>

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.<sup>249</sup> Motorists drive knowing full well that their decision to drive will increase the risk (relative to not driving) of an auto accident that will injure or kill an innocent party.<sup>250</sup> 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

246. See, e.g., McMahan, *supra* note 215, at 211; Mark P. Aulisio, *On the Importance of the Intention/Foresight Distinction*, LXX AM. CATHOLIC PHIL. QUAR. 189, 194-95 (1996). But see Anscombe, *War and Murder*, *supra* note 198, at 55-59.

247. See, e.g., McMahan, *supra* note 215, at 201; Aulisio, *supra* note 246, at 194.

248. 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”).

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

250. See Kenneth W. Simons, *Negligence*, in RESPONSIBILITY 52, 62 (Ellen Frankel Paul et al. eds., 1999); Aulisio, *supra* note 246, 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.”).

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,<sup>251</sup> 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.<sup>252</sup> Both the terrorist and the tactical bomber cause civilian casualties; what distinguishes them is their intent.<sup>253</sup> 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.<sup>254</sup> If one rejects the distinction between intent and foresight, one is committed to the moral proposition 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.<sup>255</sup> 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.<sup>256</sup> 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.<sup>257</sup> 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.<sup>258</sup>

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251. 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 PHIL. QUAR.* 189 (1996).

252. See, e.g., McMahan, *supra* note 215, at 202.

253. *Id.*

254. See Hills, *supra* note 227, at 135.

255. See, e.g., FINNIS, *supra* note 251, at 183-84; NAGEL, *supra* note 211, at 179; WALZER, *supra* note 213, at 255-63; Aulisio, *supra* note 246, at 196-97.

256. 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”).

257. *Id.* at 27-28.

258. *Id.* at 29.



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.<sup>259</sup> 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).<sup>260</sup> 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.<sup>261</sup> Although this does not demonstrate the moral rectitude of the Doctrine of Double Effect, it does demonstrate that its substance is a widely shared intuition.<sup>262</sup>

### 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.<sup>263</sup> In other words, you intend what you foresee.<sup>264</sup> 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.<sup>265</sup> Each action of ours results in a potentially infinite number of consequences that, in our

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259. FINNIS, *supra* note 251, at 183.

260. *Id.* at 184.

261. *See 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); WALZER, *supra* note 213, 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)).

262. *See* Aulisio, *supra* note 246, at 192-98 (arguing that the intent-foresight distinction tracks ordinary, common-sense intuitions about morality).

263. The argument is discussed and rejected in Anscombe, *supra* note 198, 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).

264. The issue is famously discussed in H.L.A. HART, *Intention and Punishment*, in *PUNISHMENT AND RESPONSIBILITY* 119 (1968).

265. *See* Aulisio, *supra* note 246, 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.”).

actuarial age, can be catalogued with a precise risk associated with each one.<sup>266</sup> 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.<sup>267</sup> Our own experience of our intentions is necessarily discrete and quantifiable because agents have special epistemic access to their intentional states.<sup>268</sup> Agents inwardly experience intent far differently than they experience predicted consequences. Furthermore, all cases of negligence would be transformed into cases of intentional wrongdoing.<sup>269</sup>

#### 4. Practical Certainty, Knowledge, and Collateral Damage

The appeal to the Doctrine of Double Effect might suggest an even stronger argument. This Article concluded that mere knowledge of the *risk* to nearby civilians is insufficient to establish a violation of the principle of distinction. But the Doctrine of Double Effect is often used to describe situations where the attacker is *virtually* or *practically* certain that innocent civilians will be killed, though the attacker's *purpose* is to kill a legitimate target.<sup>270</sup> Such situations are best described as acting with knowledge, a much higher mental state than acting recklessly or with *dolus eventualis*. In short, defenders of the Doctrine of Double Effect sometimes trade on the Model Penal Code distinction between acting with purpose (*dolus directus*) and acting with knowledge (*dolus indirectus*). Under this view, it would be permissible to kill protected persons if the *purpose* of the attack is to kill legitimate targets.<sup>271</sup> In other words, violating the principle of distinction requires that the attacking force act with full-blown *dolus directus*.

This represents the most extreme version of the Doctrine of Double Effect argument. However, determining the argument's plausibility depends on assessing the purpose-knowledge distinction in IHL.<sup>272</sup> Were the negotiators of the Additional Protocols drafting the principle of distinction

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

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

268. 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).

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

270. See Aulisio, *supra* note 246, at 193-94.

271. See, e.g., FIONA LEVERICK, *KILLING IN SELF-DEFENCE* 63 (2006); MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 468 (2010).

272. See Kevin Jon Heller, *A Response to Dapo Akande—Part I*, *OPINIO JURIS* (February 12, 2012), <http://opiniojuris.org/2012/02/12/a-response-to-dapo-akande-part-i/> (discussing the difference between purpose and knowledge in various IHL targeting provisions).

with the mental state of purpose in mind? Resolving this question runs head-first into the original ambiguity of intent that prompted the drafters of the Model Penal Code to break up the concept of intent into two separate mental states, one for purpose and for knowledge.<sup>273</sup> This move was required by the simple fact that the concept of intent is inherently ambiguous. Sometimes intent means purpose and sometimes intent means knowledge.

Within the context of the Doctrine of Double Effect, intent clearly tracks the mental state of acting with purpose.<sup>274</sup> The whole point of the doctrine is to immunize agents for foreseeable collateral actions; the fact that the foreseeable consequence was practically certain to occur is no reason to exclude the Doctrine of Double Effect from applying. Indeed, in the philosophical literature on the Doctrine of Double Effect, philosophers refer to the intent-foresight distinction—an expression that only makes sense if intent means purpose.<sup>275</sup> If intent meant knowledge, then the expression would equate with the knowledge-foresight distinction, which is no distinction at all. The concept of knowledge would be on both sides of the putative distinction. As a final point, the historical pedigree of the Doctrine of Double Effect from Aquinas teaches us that the doctrine applies in situations of self-defense where the defender knows, with practical certainty, that his defensive force will kill his aggressor.

However, there are legal obstacles to grafting this stronger version of the Doctrine of Double Effect onto the law of targeting. First, the Rome Statute default rule on mens rea, codified in Article 30, refers to acting with intent and knowledge.<sup>276</sup> In previous parts, this Article rejected a *dolus eventualis*-inspired interpretation of the principle of distinction because *dolus eventualis* is inconsistent with this default mens rea. The same argument would not apply to an interpretation of the principle of distinction that required a mental state of acting with knowledge. It would be entirely consistent with recent international case law developments regarding mental states.<sup>277</sup>

There is evidence that cuts in the other direction, of course. Article 51(2) of Additional Protocol I specifically states that “the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”<sup>278</sup> First, the phrases “directed” and “shall not be the *object* of attack” suggest a volitional com-

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273. See generally Michael S. Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 179, 186 (R.A. Duff, Stuart Green eds., 2011).

274. See Aulisio, *supra* note 246, at 194.

275. See *id.*

276. See Rome Statute, *supra* note 7, art. 30(2).

277. See *infra* Parts II and III.

278. See Additional Protocol I, *supra* note 4, art. 51(2).

ponent associated with purpose.<sup>279</sup> Also, as the ICRC *Commentary* notes, the second sentence then undoubtedly applies an intent standard that accords with purpose, not mere knowledge.<sup>280</sup> This provides evidence that the principle of distinction should be understood with regard to the mental state of purpose. That being said, it is unclear whether the mental state expressed in this second sentence—primary purpose—is designed only to cover acts of terror bombing or whether the more general principle of distinction expressed in the first sentence of Article 51 is also governed by the primary purpose standard. Article 51(2) is inherently ambiguous in this regard. Perhaps it expresses a single principle of distinction and the second sentence simply adds more content to the principle expressed in its more general form in the first sentence. Or, in the alternative, it expresses two separate principles, each of which have different mental state requirements: the first being the general principle of distinction governed by the knowledge standard, and the second being an entirely separate prohibition against terror bombing governed by the purpose standard. But if this is the correct parsing of the provision, why are two separate principles lumped together in a single sub-section?

In the end, there may be no resolution to this ambiguity, because the dispute is once again representative of a fundamentally irresolvable tension in the concept of intent. One way of understanding the tension is again as a clash of legal cultures. Common law lawyers are more inclined to view intent through the lens of purposive conduct, while civil law-trained lawyers might be more inclined to view *dolus directus* and *dolus indirectus* as two elements of intent.<sup>281</sup> Another way of understanding the tension is a repetition of the old Model Penal Code debate over intent. However, the Model Penal Code solved the problem by essentially *dissolving* it—splitting the concept into two separate mental states, purpose and knowledge. Unfortunately, no such solution is available here, unless IHL were to take a page from the Model Penal Code and banish the language of intent from its pages. This would involve rewriting the Additional Protocols with explicit reference to the concepts of purpose and knowledge and defining what these terms mean. Given the difficulty with which those instruments were initially negotiated and drafted, such an undertaking represents a quixotic hope. Furthermore, retained ambiguities are often essential for international negotiations—they allow both sides of a debate to agree on a common text with the understanding that each will carry forward its preferred interpretation and argue for it in both international tribunals and the court of world opinion. Scholars love precision, but excessive precision is no virtue from the perspective of diplomatic exigency.

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279. See Akande, *supra* note 2 (provision “suggests that a violation would require that the attacker wishes to target the civilian population, knowing that they are a civilian population and making them a part of his objectives”).

280. See ICRC COMMENTARY, *supra* note 6, at 618 para. 1940.

281. For an illustration of the differing views, see the comment section to Heller, *supra* note 259.

## 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*.