ATTACK DECISIONS: EXPANDING THE APERTURE OF ACCOUNTABILITY

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I. INTRODUCTION

The conflict in Ukraine has placed the International Criminal Court (ICC) in the spotlight of public interest.[1] The seemingly endless images of what appear to be deliberate attacks on civilians and civilian property and indiscriminate uses of force by Russian forces have generated an expectation of criminal accountability for those responsible for these apparently blatant war crimes.[2] In response, the ICC Office of the Prosecutor (OTP) announced investigations into suspected war crimes falling within the jurisdiction of the court.[3]

It is, however, unrealistic for the international community to expect these investigations, and perhaps subsequent prosecutions, to result in broad-based accountability for conduct of hostilities war crimes. This is because of two simple but undeniable realities about the offenses within the court's jurisdiction.[4] First, conduct of hostilities offenses are defined in terms of conduct, not result, meaning that any successful prosecution requires proof that the *decision* to launch the attack was criminal and not merely the consequence of the attack.[5] Second, criminal culpability for such decisions requires proof of a high level of criminal *mens rea*—an intent to attack civilians or civilian property and/or actual knowledge[6] that an attack on a military objective will produce a *clearly* excessive collateral consequence on civilians and civilian property.[7] Intent, in turn, is widely understood to require proof of purpose or, in the alternative, a high degree of knowledge.[8]

In practical prosecutorial terms, this means that a conviction for allegations of conduct of hostilities war crimes requires the prosecutor to prove beyond a reasonable doubt—meaning proof that excludes any alternate rational hypothesis—what a defendant/commander *actually* intended or knew when an attack was ordered.[9] While the pernicious effects of an attack are probative as circumstantial evidence to help meet this burden, they are

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1. *What Is a War Crime and Could Putin Be Prosecuted over Ukraine?*, BBC NEWS (July 20, 2023), https://www.bbc.com/news/world-60690688.

2. *See id.*

3. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, INT'L CRIM. CT. (Mar. 2, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states.

4. Rome Statute of the Int'l Crim. Ct. art. 8(2)(b), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

5. *Id.*

6. *Id.* art. 30.

7. *Id.* art. 8(2)(b)(iv).

8. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-424, Confirmation of Charges, ¶ 357 n.447, ¶ 360 n.452 (June 15, 2009).

9. *See* Rome Statute, *supra* note 4, art. 30.

not dispositive.[10] This means that the prosecutor cannot simply rely on effects evidence to prove the subjective intent or knowledge of the defendant at the time the attack decision was made.[11] Instead, the evidence must recreate the situation the defendant understood at the time of the decision and demonstrate that intent to attack civilians or civilian property—or knowledge of a clearly indiscriminate consequence of the attack—is the *only* rational explanation for launching the attack.[12]

This high-level *mens rea* requirement for criminal sanction of attack judgments is arguably aligned with the ICC's function: to impose accountability on only the most serious violations of international law.[13] Nonetheless, it also creates a genuine risk that the court will be perceived as ineffective, in turn contributing to the perception that international law is incapable of imposing accountability for what seems to be pervasive violations.[14]

But perhaps there is an alternate approach to this culpability challenge: to reinforce the primacy of national jurisdiction to impose accountability on war criminals. This foundational pillar of the ICC is reflected in the principle of complementarity.[15] In this regard, it is important to note that criminal accountability for conduct of hostilities attack judgments need not be based exclusively on the same high-level *mens rea* required for ICC liability.[16]

Instead, national jurisdictions have the prerogative, opportunity, and arguably obligation[17] to better align culpability with the international humanitarian law (IHL) framework for regulating attack judgments.[18] In so doing, the nature of the *actus reus* for such offenses should remain that of conduct and not result.[19] However, that conduct—the decision to launch an attack—should be judged against the same standard applicable to IHL's

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10. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

11. Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT'L L. 79, 87 (2013) ("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. But the language of intent might also be used to describe situations where the actor is practically certain that their [sic] actions will cause a particular result, though they are generally indifferent to that result.").

12. *See* Rome Statute, *supra* note 4, art. 66(3).

13. *Id.* art. 1.

14. Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 FORDHAM INT'L L.J. 1584, 1588 (2011) (highlighting the ICC's legitimacy concerns and the need to strengthen the Rome Statute in order to improve ICC's perceived effectiveness in international forums).

15. *See* Rome Statute, *supra* note 4, art. 12(1).

16. *Id.*

17. *Id.* art. 1.

18. *Id.*

19. Mirjan R. Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMPAR. L. 455, 468 (2001) ("[P]rinciple that conviction and sentence for a morally disqualifying crime should be related to the actor's own conduct and culpability.").

targeting framework: that of the hypothetical reasonable commander acting under similar circumstances.[20] In the context of criminal law, this necessitates greater emphasis on imposing accountability for reckless attack decisions.[21]

In a recent article, Professor Gabriela Blum explores the influence international criminal law (ICL) is having on the understanding and implementation of IHL.[22] As she eloquently explains, the two domains are not synonymous, and the focus on ICL as a basis for implementing IHL produces an inevitable distorting effect.[23]

I will attempt to come at the same issue from a different direction: Why is the criminal *accountability* regime for conduct of hostilities offenses not better aligned with the IHL targeting *regulatory* regime? My focus will be exclusively on rules related to the conduct of hostilities because the demanding standard incorporated into ICC jurisdictions risks undermining the efficacy of a system that should be capable of imposing accountability for unreasonable attack decisions.[24] As the ongoing hostilities in Ukraine indicate, there is a widespread public view that Russian forces are engaging in blatant war crimes by attacking civilians and civilian property and by conducting indiscriminate attacks.[25] This may very well be true, but the definition of conduct of hostilities war crimes makes proving such crimes immensely challenging.[26]

II. REGULATING THE CONDUCT OF HOSTILITIES: THE *EX ANTE* STANDARD

IHL was developed as a preventive regime that would ideally ensure violations did not occur.[27] As a result, the focal point for regulating the conduct of hostilities is almost entirely conduct-based (with the odd exception of perfidy, which focuses on result, and not merely conduct).[28]

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20. AP I, *supra* note 10, art. 85(3).

21. *See id.*

22. Gabriela Blum, *The Shadow of Success: How International Criminal Law Has Come to Shape the Battlefield*, 100 INT'L L. STUD. 133, 135 (2023).

23. *Id.* at 136.

24. *See infra* Parts III–IV (analyzing war crimes accountability and reckless culpability).

25. Statement of ICC Prosecutor, *supra* note 3.

26. *See infra* Part II (noting the complications in applying the rule).

27. U.S. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 1.3.4. (2023) [hereinafter DOD LAW OF WAR MANUAL] ("The main purposes of the law of war are: protecting combatants, noncombatants, and civilians from unnecessary suffering."); *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 6-27: THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE ¶ 1-7 (Aug. 2019) [hereinafter FM 6-27] (stating that the purpose of laws of armed conflict is to protect individuals from suffering); *id.* ¶ 1-2 ("Unless troops are trained and required to draw the distinction between military and non-military killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense of that distinction for the rest of their lives . . . .") (quoting Telford Taylor on the purposes of the law of armed conflict).

28. DOD LAW OF WAR MANUAL, *supra* note 27, § 2.1.2.2 ("When no specific rule applies, the principles of the law of war form the general guide for conduct during war."); *see also* FM 6-27, *supra* note 27, ¶ 2-151 ("Acts of perfidy are acts that invite the confidence of enemy persons to lead them to

Accordingly, this regulatory regime focuses on judgment, not result. Characterized as "The Basic Rule" in the 1977 Additional Protocol I to the Four Geneva Conventions of 1949 (AP I),[29] the distinction rule obligates combatants and other fighters in armed conflict to constantly "distinguish" between lawful objects of attack and all other persons, places, and things.[30] The obligation is one of attack judgment. Specifically, the rule provides:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[31]

Note the ultimate obligation is one related to "directing" attacks.[32] Hence the focus on *ex ante* judgment.[33] A similar focus is central to compliance with two other foundational rules of targeting.[34] First, the rule of precautions, codified in article 57 of AP I, obligates those conducting attacks to implement all feasible precautions to mitigate civilian risk prior to the attack.[35] And the prohibition against launching an indiscriminate attack—which includes the so-called proportionality rule—provides, *inter alia*, that:

> 2. 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.
> 3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.
> 4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
> (a) those which are not directed at a specific military objective;
> (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
> (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
> 5. Among others, the following types of attacks are to be considered as indiscriminate:

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believe that they are entitled to, or are obligated to accord, protections under LOAC [law of armed conflict] with the intent to betray that confidence.").

29. AP I, *supra* note 10, art. 48.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* (explaining guidelines for expected military attacks).
34. *Id.* arts. 51, 57
35. *Id.* art. 57.

> (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
> (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.
>
> 6. Attacks against the civilian population or civilians by way of reprisals are prohibited.[36]

No aspect of this "targeting" rule requires a specific result; all aspects of the rule are focused on attack decisions.[37] What is prohibited is the *decision* to launch or conduct the attack in a manner that creates the risk of indiscriminate effects, not the effects themselves.[38]

There is good reason why these rules are focused on *ex ante* judgments: regulatory regimes are inherently preventive, not responsive.[39] In the context of conduct of hostilities, the ideal outcome of IHL is that it produces attack judgments that fall within the range of reasonableness in accordance with the rules.[40] This is reflected in the commonly-invoked "reasonable commander" standard for assessing compliance with these rules: Was the judgment under scrutiny within the range of reasonable decisions in the circumstances ruling at the time?[41] Or, in other words, was it a decision other reasonable

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36. *Id.* art. 51.

37. *Id.*

38. DOD LAW OF WAR MANUAL, *supra* note 27, § 2.5.2 ("*Distinction* requires parties to a conflict to discriminate in conducting attacks against the enemy."); *see also* FM 6-27, *supra* note 27, ¶ 2-22 ("In armed conflict, one of the most difficult tasks for Soldiers and Marines under LOAC is conducting an attack and making targeting decisions. Parties to a conflict must conduct attacks in accordance with the principles of distinction and proportionality.").

39. Blum, *supra* note 22, at 148 ("[T]he rules of IHL are prospective in nature, intended to guide the planning and execution of military operations on the battlefield . . . .").

40. *Id.*; *see also* John J. Merriam, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, 56 VA. J. INT'L L. 83, 85 (2016) (discussing the reasonable belief of "Affirmative Target Identification" and lawful military attacks); Geoffrey S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 BROOK. L. REV. 437, 477 (2012) (explaining the reasonableness requirement for targeted attacks and its components).

41. INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 1977 TO THE GENEVA CONVENTIONS OF 1949 ¶ 2187 (Yves Sandoz et al. eds., 1987) [hereinafter AP COMMENTARY]; *see also* Merriam, *supra* note 40, at 109 (explaining that a commander's actions are evaluated based on objective reasonableness); DOD LAW OF WAR MANUAL, *supra* note 27, § 5.2.3.2 ("[M]ilitary commanders must make reasonable efforts to reduce the risk of harm to civilians and civilian objects."); FM 6-27, *supra* note 27, ¶ 2-8 ("Military commanders attacking enemy military objectives must make reasonable efforts to reduce the risk of harm to the civilian population when conducting an attack. Military commanders do this by taking feasible precautions to reduce risk to protected persons and object. Military commanders must refrain from attacks that are disproportionate (where the expected harm to civilians and civilian objects would be excessive in relation to the concrete and direct military advantage expected to be gained). Military commanders may consider all relevant facts and circumstances, including the risk to forces under

commanders would have made, or one that deviates beyond that margin of reasonableness?[42]

This is why I have previously criticized what I called "effects-based condemnations" of attack decisions: the process of relying almost exclusively on attack effects to establish violations of the IHL targeting regulatory regime.[43] Such an approach is illogical and inequitable, as it may result in condemning a commander whose attack judgement, considered in context, was indeed reasonable; the commander who did everything right but produced an unavoidable or unexpected outcome.[44] At the same time, an effects-based approach risks ignoring the commander whose attack decision was clearly unreasonable, even the commander who launched an attack intending to inflict impermissible results but simply failed to do so.[45] As an *ex ante* standard, the proper inquiry *should* focus on the "conduct" of deciding to launch the attack—not the result. While attack results are *probative* when assessing *ex ante* compliance with conduct-based regulation, it is misleading to treat them as *dispositive*.[46]

III. WAR CRIMES ACCOUNTABILITY: *ACTUS REUS* AND *MENS REA*

Criminal sanction, whether for inflicting a prohibited result (like causing the death of a human being) or engaging in prohibited conduct (like attempting to murder), is inherently accountability focused.[47] This focus applies equally to domestic and international law violations.[48] By imposing individual accountability for violations of societal norms, the law seeks to enhance compliance with those norms through specific and general deterrent effect.[49] Accordingly, aligning the focus of criminal accountability for

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their command, the integrity of their command, and their mission in weighing the decision to use military force in any situation when military forces and civilians are intermingled.").

42. *See* Merriam, *supra* note 40, at 110 (noting the use of an objective test of reasonableness).

43. Geoffrey S. Corn, *Targeting, Distinction, and the Long War: Guarding Against Conflation of Cause and Responsibility*, 46 ISR. Y.B. HUM. RTS. 135 (2016) [hereinafter *Targeting, Distinction, and the Long War*]; *see also* Geoff Corn, *Civilian Risk Mitigation: Why Context Matters*, LIEBER INST. W. POINT: ARTICLES OF WAR (Sept. 27, 2022) [hereinafter *Civilian Risk Mitigation*], https://lieber.westpoint.edu/civilian-risk-mitigation-why-context-matters/ (discussing the implications of focusing on attack effects); Geoff Corn, *War Accountability and the Elusive Objective of Objectivity*, DUKE L.: LAWFIRE BLOG (July 2, 2022), https://sites.duke.edu/lawfire/2022/07/02/guest-post-geoff-corn-on-war-accountability-and-the-elusive-objective-of-objectivity/ (arguing that war crime accountability requires more than the analysis of the "effects based" test).

44. *Targeting, Distinction, and the Long War*, *supra* note 43, at 159.

45. *See* Ohlin, *supra* note 11, at 94 (focusing on the different mental attitudes of attackers which can yield the same result on the ground in terms of civilian deaths).

46. *Targeting, Distinction, and the Long War*, *supra* note 43, at 139.

47. *See* Ohlin, *supra* note 11, at 94.

48. *See* Rome Statute, *supra* note 4, Preamble ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.").

49. *See, e.g.*, Graham v. Florida, 560 U.S. 48 (2010) (discussing the rationale for criminal punishment); *see also* MODEL PENAL CODE § 1.02(2)(a) (AM. L. INST. 1985) (indicating a general purpose

conduct of hostilities violations with IHL's regulatory regime, or more specifically defining offenses in terms of conduct and not result, is therefore logical.[50] This is because such alignment contributes to respect for IHL norms. And, as noted, those "operational" norms do not proscribe attack results—the infliction of death, injury, or destruction to civilians, civilian property, or other protected persons or places.[51] Instead, it is the decision to launch attacks creating the risk of such injury or destruction that is the focus of regulatory norms.[52]

Indeed, defining conduct of hostilities crimes in terms of result and not conduct would have the same distorting effect on the accountability process as it would on the regulatory process.[53] It would mean, in essence, that any infliction of civilian harm resulting from an attack would *ipso facto* satisfy the *actus reus* of such crimes.[54] And, while proof of a defined *mens rea* would also be required, such an approach would create a practical (if not legal) burden shift, requiring the defendant to offer evidence as to why the result was, under the circumstances, justified within the IHL framework and therefore lawful.[55]

To illustrate this point, consider an attack that inflicts death and injury on civilians. As currently codified in the ICC Elements of Crimes, alleging and proving a war crime derived from such evidence requires proof that the decision to launch the attack was either intended to produce this result or that the defendant commander had actual knowledge that an attack on a military objective would result in death or injury to civilians that was clearly excessive in comparison to the anticipated military advantage.[56] This requires the prosecution to produce evidence that essentially recreates the situation *at the time the attack judgment was made* and demonstrate that the only plausible inference[57] derived from this evidence is that the attack was launched with the requisite criminal intent or knowledge.[58] The result of the

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of the provisions of the Code include prevention of violations); KEVIN C. MCMUNIGAL, CRIMINAL LAW: PROBLEMS, STATUTES, AND CASES 28 (1st ed. 2018) ("What justifies the imposition of punishment? The rationales that most readily come to mind are [likely] those aimed at increasing public safety by preventing or reducing crime. One such rationale is deterrence. Deterrence is the notion of reducing crime through the fear of punishment. . . . ").

50. *See* AP I, *supra* note 10, art. 48.

51. *See* Rome Statute, *supra* note 4, art. 8(2)(b)(iv); *see also supra* notes 27–28 and accompanying text (describing conduct as the focal point of IHL as a preventative regime).

52. *See* Rome Statute*, supra* note 4, art. 8(2)(b)(iv).

53. *See supra* notes 43–44 and accompanying text (describing previous criticisms of condemning attacks only because of their effects).

54. *See supra* notes 47–49 and accompanying text (illustrating the utility of regulations predicated on accountability).

55. *But see* Ohlin, *supra* note 11, at 93–96 (discussing the current *mens rea* framework under IHL).

56. INT'L CRIM. CT., ELEMENTS OF CRIMES 13 (2013), https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf; *see also* AP I, *supra* note 10, art. 85(3) (proscribing willful attacks that cause civilian death or serious injury).

57. *See* Rome Statute, *supra* note 4, art. 66(3).

58. *Id.* art. 30.

attack would certainly be relevant and probative on this issue, but would rarely be dispositive. Unless the prosecution proves the *why* for the attack decision, those results would often point to multiple plausible conclusions, the very essence of reasonable doubt.[59]

If these conduct crimes were transformed into result crimes, the *actus reus* would be established simply by proving the resulting death and injury to civilians.[60] But the relevance of that result would not be limited to proving the *actus reus* of the crime; it would also support an inference that the defendant intended to produce that result or knew the result would be clearly excessive.[61] This would necessitate defense presentation of evidence to contradict this inference. In other words, it would be the defendant who would bear an implied burden of producing evidence indicating the "reasonableness" of the attack judgment.[62] Ultimately, by defining the crime in terms of result, the result of the attack attains a level of probative value that is inconsistent with the reality of the conduct of hostilities regulatory framework.[63]

But while there is logic in defining attack judgment as the *actus reus* of conduct of hostilities crimes, there is also the reality that linking that *actus reus* with the highest levels of *mens rea* imposes, what is in most situations, a near-insurmountable prosecutorial burden.[64] Yet this is the current state of the ICC accountability scheme—proving guilt for an alleged unlawful attack requires more than the type of unreasonable attack judgment that indicates an IHL violation; it requires proof that the attack was launched with what the court has indicated is "direct" or "oblique" intent (meaning purpose or knowledge of a high probability) to inflict unlawful results or knowledge that such results would be a consequence of attacking a military objective.[65]

While it may be that this demanding evidentiary equation is consistent with the function of the ICC—to impose accountability for only the most

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59. *See id.* art. 66(3) (noting that the ICC can only convict the accused upon a finding of guilt beyond a reasonable doubt).

60. *See supra* note 19 and accompanying text (arguing in favor of culpability predicated on conduct due to the implications regarding the *actus reus* requirement).

61. *See supra* note 56 and accompanying text (describing the current requirement regarding decisions to attack).

62. *See supra* note 55 and accompanying text (discussing different treatments of the *mens rea* framework under IHL).

63. *See supra* notes 47–49 and accompanying text (demonstrating the pragmatic nature of a conduct-based approach).

64. Blum, *supra* note 22, at 163 ("The ICL approach to doubt in the case of targeting thus imposes on the prosecution relatively high burdens of production and persuasion.").

65. *See* Sarah Finnin, *Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, 61 INT'L & COMPAR. L.Q. 325, 330–33 (2012); *see also* Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-424, Confirmation of Charges, ¶ 71 (June 15, 2009) (describing the charges against Jean-Pierre Bemba, namely, crimes against humanity, including murder, rape, and torture); *id.* ¶ 357 ("The Chamber stresses that the terms 'intent' and 'knowledge' as referred to in article 30(2) and (3) of the Statute reflect the concept of *dolus*, which requires the existence of a volitional as well as a cognitive element.").

serious violations of international law[66]—the conflict in Ukraine is revealing how it is creating a chasm between international expectation of accountability for what appears to be a total disregard for IHL's civilian protection rules and imposition of accountability for such results.[67] While it may be inevitable that international public expectations of accountability for the consequences of hostilities tend to focus on attack results, it is not inevitable that accountability for such results necessitates proof of the highest levels of *mens rea*.[68] Instead, providing for an alternative basis for criminal accountability, one that aligns with IHL's "reasonable commander" standard, would potentially allow for a more realistic approach for conduct of hostilities accountability.[69]

The "targeting" crimes within the jurisdiction of the ICC provide a solid foundation for such alignment.[70] Each of these crimes is obviously based on IHL's regulatory framework, proscribing attack *judgments* as criminal, and not attack *results*.[71] The source of this chasm is therefore not a disconnect between the conduct-based focus of IHL and ICL.[72] Instead, it is the disconnect between the mental element of the proscribed conduct—IHL proscribes objectively unreasonable attack decisions,[73] while ICL proscribes such decisions only when actuated by direct or oblique intent.[74] Furthermore, the IHL targeting rule that is perhaps the most operationally effective means

66. *See* Rome Statute, *supra* note 4, art. 1.

67. *Briefing with Ambassador-at-Large for Global Criminal Justice Beth Van Schaack on Justice and Accountability for Russia's Atrocities in Ukraine*, U.S. DEP'T OF STATE (Nov. 21, 2022), https://www.state.gov/briefing-with-ambassador-at-large-for-global-criminal-justice-beth-van-schaack-on-justice-and-accountability-for-russias-atrocities-in-ukraine/ ("Russia's reinvasion of Ukraine and the damage it has wrought has inspired an unprecedented array of accountability initiatives. United States is supporting all existing international efforts to investigate and examine atrocities in Ukraine, and this includes ongoing investigations by the International Criminal Court, given that Ukraine has consented to its jurisdiction."); *see also* Press Release, Antony J. Blinken, Secretary of State, Imposing Additional Sanctions on Those Supporting Russia's War Against Ukraine (July 20, 2023), https://www.state.gov/imposing-additional-sanctions-on-those-supporting-russias-war-against-ukraine-2/ ("The Departments of State and Treasury are imposing sanctions on nearly 120 individuals and entities today to further hold Russia accountable for its illegal invasion of Ukraine and degrade its capability to support its war efforts. These sanctions will restrict Russia from accessing critical materials, inhibit its future energy production and export capabilities, curtail its use of the international financial system, and crack down on those complicit in sanctions evasion and circumvention. Since Russia launched its full scale invasion of Ukraine, the United States, working with our allies and partners, has taken unprecedented steps to impose costs on Russia and promote accountability for the individuals and entities who support its illegal war. We will continue to stand with Ukraine for as long as it takes.").

68. *See* Rome Statute, *supra* note 4, art. I (describing the high *mens rea* requirement for criminal sanctions predicated on attack judgments).

69. *See* discussion *infra* Part V (urging the adoption of IHL's reasonable commander standard).

70. *See supra* notes 20–21 and accompanying text (discussing the utility of the reasonable commander standard as applied to IHL's targeting framework).

71. *See* AP I, *supra* note 10, art. 85(3).

72. *See supra* notes 27–28, 56 and accompanying text (discussing the conduct-based focus of both IHL and ICL).

73. *See* Rome Statute, *supra* note 4, art. 30.

74. *See id.* art. 8(b)(i).

of mitigating civilian risk—the precautions obligation[75]—is not included as a crime within the jurisdiction of the ICC.[76]

Consider the war crimes of attacking civilians and launching an indiscriminate attack.[77] Consistent with IHL, neither of these offenses require proof of a proscribed result, only proscribed conduct in the form of criminal attack judgment.[78] Specifically:

> Article 8(2)(b)(i)[—]War [C]rime of [A]ttacking [C]ivilians Elements[:]
>
> 1. The perpetrator directed an attack.
> 2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
> 3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
> 4. The conduct took place in the context of and was associated with an international armed conflict.
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[79]

Note that the *actus reus* of this offense is "directing" an attack, not actually causing a prohibited result.[80] As for the war crime of launching an indiscriminate attack:

> Article 8(2)(b)(iv)[—]War [C]rime of [E]xcessive [I]ncidental [D]eath, [I]njury, or [D]amage Elements:
>
> 1. The perpetrator launched an attack.
> 2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
> 3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of [such an] extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
> 4. The conduct took place in the context of and was associated with an international armed conflict.

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75. AP I, *supra* note 10, art. 57.
76. *See* Rome Statute, *supra* note 4, art. 8.
77. *See* ELEMENTS OF CRIMES, *supra* note 56, arts. 8(2)(b)(i), 8(2)(b)(iv).
78. *Id.*
79. *Id.* art. 8(2)(b)(i).
80. *Id.*

> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[81]

Again, the *actus reus* is the decision to launch the attack, not the result.[82]

What diverges from the IHL analogue for these offenses is the requisite criminal mental state.[83] Each of these crimes requires proof that the defendant engaged in the proscribed conduct with intent or knowledge that the attack will inflict an illicit result on civilians, civilian property, or other protected persons or things.[84]

Where evidence establishes this level of mental culpability, criminal sanction is obviously warranted.[85] But in the context of complex combat operations, it will be a rare case where such evidence is readily available. Consider a potential prosecution arising from attacks that caused widespread destruction of civilian property and loss of civilian life in an urban area of Ukraine.[86] In order to satisfy the burden of proof for an allegation of attacking civilians, civilian property, or both, or directing an indiscriminate attack, the prosecutor would have the evidentiary burden to persuade the court what the defendant intended or knew at the time the attack was launched.[87] While the illicit effects would, as in assessing regulatory violations, support an inference of this requisite criminal mental state, consider how many impediments would exist to a finding of such criminal *mens rea beyond a reasonable doubt*?[88] Will the attack effects be sufficiently probative to exclude all alternate rational conclusions as to what the defendant intended or knew at the time of the attack decision? This is what beyond a reasonable doubt requires.[89]

In such cases, the chaos and uncertainty of hostilities—especially when there is an indication that civilians may be directly participating in hostilities,[90] or when presumptive civilian property could be assessed as a military objective[91]—almost inevitably presents plausible alternatives to the requisite criminal mental state.[92] Did the commander reasonably believe he

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81. *Id.* art 8(2)(b)(iv).

82. *Id.*

83. *See* Rome Statute, *supra* note 4, art. 30.

84. *Id.*

85. *Id.* art. 13.

86. *See id.* art. 8.

87. *Id.* art. 30; *see also id.* art. 15 (providing that a prosecutor must request that the court analyze a case where they believe there is a reasonable basis to proceed with further investigation).

88. *See id.* art. 66(3).

89. *See id.*

90. *See* AP I, *supra* note 10, art. 51(3).

91. *See id.* art. 51(5); *see also* Rome Statute, *supra* note 4, art. 8(2)(b)(ii) (alluding that it is not a war crime to intentionally direct attacks against civilian objects if the object falls within military objectives).

92. *See* Rome Statute, *supra* note 4, art. 30.

was attacking a military objective? Did the commander make a reasonable mistake as to the nature of the target? Did prior enemy activity contribute to one of these judgments? In these situations, a conclusion the commander acted recklessly may be viable to prove, but a reckless judgment is a long distance from intending or knowing the illegal objects of attack.[93]

IV. RECKLESS CULPABILITY

A. Attack Judgments: A Need for Proscription

It is true that in some situations, available objective evidence derived from attack effects will support a sufficiently strong inference of guilt.[94] But it will often be the case that when effects are assessed within the totality of the available information, that inference will fail to exclude all other rational hypotheses other than guilt, thereby raising reasonable doubt.[95] This is not intended to suggest the ICC accountability regime has no significance. But its viability as a mechanism for imposing accountability for attacks that result in substantial civilian harm in situations of operational complexity is questionable.[96]

With so many variables involved in the conduct of hostilities, absent a proverbial "smoking gun," even the most disturbing effects may fail to satisfy the ICC's demanding *mens rea* standard for illegal attack decisions.[97] And even in the rare case where the prosecution believes it has offered sufficient evidence—for example in the trial of General Gotovina, where the prosecutor offered an order by the defendant to his subordinate artillery commander to place the city of Knin under attack[98]—broader context may negate the purported conclusive inference derived from such evidence.[99]

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93. *See* Ohlin, *supra* note 11, at 93–94 (highlighting the differences between reckless, indiscriminate attacks, and the intentional targeting of civilians, stating that, "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 . . . normatively distinct from intentionally directing an attack against civilians").

94. *See, e.g.*, Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 30, 2000) (finding intent could be assumed because it was evident that civilians and civilian property were targeted).

95. *See* Rome Statute, *supra* note 4, art. 66(3).

96. *See Blaskic*, Case No. IT-95-14-T, ¶ 180; *see also* Ohlin *supra* note 11, at 95 ("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.'").

97. *See* Rome Statute, *supra* note 4, art. 30.

98. Prosecutor v. Gotovina, Case No. IT-06-90-A, Appeals Judgment, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (discussing Gotovina's contribution to a joint criminal enterprise, "whose common purpose was to permanently remove the Serb civilian population from the Krajina region, by ordering unlawful attacks against civilians and civilian objects in Knin").

99. *See* Ohlin, *supra* note 11, at 86 n.34.

As noted, this criminal culpability standard is more demanding than the regulatory standard from which it is derived.[100] The test for compliance with IHL's targeting regulatory regime is one of reasonableness: was the attack decision consistent with the "reasonable commander" standard?[101] Thus, an *intent* to attack civilians or civilian objects or *knowledge* that an attack will result in an indiscriminate effect are unnecessary to establish a regulatory violation (although such proof will certainly do so).[102] The ultimate test is whether the attack judgment, considering all the circumstances prevailing at the time, was unreasonable.[103]

Reasonableness is, by definition, an objective mental standard, for it is determined by contrasting the actual judgment to that of the hypothetical "reasonable" commander.[104] Accordingly, a reckless attack decision—one where the commander ignored a substantial and unjustifiable risk of inflicting unjustifiable harm on civilians or civilian property—indicates a regulatory violation.[105]

Recklessness—often referred to as *dolus eventualis*[106] in the civil law tradition—is normally defined as a conscious disregard of a substantial and unjustifiable risk.[107] While there is a subjective component to recklessness—the conscious awareness of risk creation[108]—the assessment of the nature of risk is purely objective. Accordingly, the same objective evidence of attack

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100. Blum, *supra* note 22, at 150 (stating that war crimes under the Rome Statute are "arguably more demanding (in terms of what the prosecutor would be required to prove) than their IHL counterparts").

101. Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 55 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) ("[T]he Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant."); *see also supra* note 41 and accompanying text (defining the "reasonable commander" standard).

102. AP I, *supra* note 10, art. 51(4).

103. Bundesgerichtshof [BGH], Oct. 6, 2016, III ZR 140/15, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=071de1999c01f5114ea9e467f0e843dd&nr=76401&pos=1&anz=2 (testing whether the commander refrained from acting "honestly," "reasonably," and "competently").

104. *See* AP COMMENTARY, *supra* note 41, ¶ 2187 (defining the hypothetical "reasonable commander").

105. *See, e.g.*, MODEL PENAL CODE § 2.02(14) (AM. L. INST. 1985) (defining recklessness).

106. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-424, Confirmation of Charges, ¶ 357 (June 15, 2009).

107. *See, e.g.*, MODEL PENAL CODE § 2.02(14) (AM. L. INST. 1985) (defining recklessness as follows: "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").

108. *See* Ohlin, *supra* note 11, at 88; *see also* STATE BAR OF TEX., COMM. ON CRIM. PATTERN JURY CHARGES, TEXAS CRIMINAL PATTERN JURY CHARGES § 22.21 (2011) ("A person recklessly engages in conduct that places another in imminent danger of serious bodily injury if—1. there is a substantial and unjustifiable risk that his conduct will place another person in imminent danger of serious bodily injury; 2. this risk is of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint; and 3. the person is aware of but consciously disregards that risk.").

effects that would normally be used to establish an inference of intent or knowledge of clearly indiscriminate effect when launching an attack would play a different probative role.[109]

First, that evidence could be used to support the inference that the defendant was subjectively aware there was *risk* of inflicting civilian casualties and/or destruction of civilian property.[110] At that point, the culpability inquiry would shift to whether, under the circumstances, the risk created by launching the attack was substantial and *unjustifiable.*[111] Open source information about the nature of the targeted area coupled with the actual attack effects would, in relation to this assessment, carry increased probative value.[112] As for the second component, this is where the ultimate question of reasonableness becomes dispositive: from all available objective evidence, was the creation of risk resulting from *this* attack decision consistent with what a reasonable commander would have accepted, or beyond that scope?[113] Thus, instead of relying on the objective evidence to prove a purely subjective mental state beyond a reasonable doubt, that evidence would be used to prove an objective standard: unreasonable risk creation.

Many of the same combat operational variables would obviously influence this latter determination, but objective circumstantial evidence would play a more significant role in relation to this assessment.[114] Indeed, in many situations an attack may have been launched against what was assumed to be a military objective, yet the scale, duration, and intensity of the attack itself would support only one rational inference: the risk created by the attack decision was outside the realm of reasonableness.[115] In other words, there would be no need to prove beyond a reasonable doubt the commander had actual knowledge of that excessive risk, nor that he or she intended to inflict civilian casualties. The requisite mental element is established so long as a fact finder was persuaded the risk was one a reasonable commander would not have created.[116]

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109. *See* Ohlin, *supra* note 11, at 95 (discussing intentionality and knowledge of civilian harm).

110. *See id.* (connecting subjective awareness and risk of civilian casualties).

111. *See* MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985) ("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.").

112. *Id.*

113. Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 55 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

114. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-424, Confirmation of Charges, ¶ 353 (June 15, 2009).

115. *See* AP COMMENTARY, *supra* note 41, ¶ 2187 (discussing the "reasonable commander" standard).

116. *See id.* (defining the "reasonable commander" standard).

When considering the nature of Russian attacks in Ukraine, the significance of this different standard becomes apparent. An attack on an area of dense civilian population, resulting in substantial death and injury and destruction to civilian property, logically supports an inference of an intentional attack on civilians (or an attack launched with knowledge of the clearly excessive effects it would produce).[117] But to prove that beyond a reasonable doubt, a prosecutor would need to have evidence that, *inter alia*, establishes whether there was an assessed target; what that assessed target was; what the anticipated civilian risk was; whether the weapons employed performed as expected; what other attack options were available; and whether efforts to avoid civilian risk were dismissed.[118] Absent access to the attack deliberation process, such evidence will rarely be available.[119]

In contrast, these factors, when viewed objectively, do not require "inside" information into the deliberative process. Instead, knowledge of the nature of the military organization, to include resources available for identifying and engaging targets, would support findings that the decision to launch the attack was unreasonable.[120] In this context, as when seeking to prove subjective intent or knowledge, attack effects might not be dispositive, but they would certainly be more persuasive on the ultimate *mens rea* issue.[121]

Lowering the *mens rea* bar may be criticized as creating a functional "effects-based" test for criminal culpability. This is not so. Proscribing reckless attack decisions would still necessitate proving beyond a reasonable doubt that attack effects were the result of an unreasonable judgment—a judgment no other "reasonable commander" would make under similar circumstances.[122] This in turn would necessitate consideration of the totality of the circumstances related to the attack.[123] In many cases, those circumstances might result in inconclusive outcomes, which, when coupled with the prosecutorial burden, would equate to reasonable doubt.[124] But where such evidence was mustered, there is no logical reason why criminal

117. *See* Ohlin, *supra* note 11, at 95 (discussing intentionality in civilian attacks).

118. Blum, *supra* note 22, at 163 ("The ICL approach to doubt in the case of targeting thus imposes on the prosecution relatively high burdens of production and persuasion, which seems to raise the bar for proof of noncompliance with IHL to something closer to 'near certainty' or 'beyond a reasonable doubt' than 'reasonable suspicion.'").

119. *Id.*; *see also* Ohlin, *supra* note 11, at 95 (discussing the ability to infer intentionality).

120. DOD LAW OF WAR MANUAL, *supra* note 27, § 5.4.3.2 ("[C]ommanders and other decision-makers must make the decision [to attack] in good faith based on the information available to them in light of the circumstances ruling at the time. A legal presumption of civilian status in cases of doubt may demand a degree of certainty that would not account for the realities of war.").

121. *See* Rome Statute, *supra* note 4, art. 8(2)(b) (discussing *mens rea* issue and criminal culpability).

122. *See* AP COMMENTARY, *supra* note 41, ¶ 2187 (defining "reasonable commander").

123. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 458 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

124. *See* Rome Statute, *supra* note 4, art. 8(2)(b) (considering requirement of proof for successful prosecution).

liability should not result.[125] While the gravity of an offense based on a reckless attack judgment would logically be lesser than an intentional attack on civilians or knowingly launching an indiscriminate attack, providing this bridge between the existing binary culpability equation would better align ICL with IHL and enhance the perception of accountability for conduct of hostilities IHL violations.[126]

Imposing criminal accountability for reckless attack judgments will also contribute to elevating the relevance of precautionary measures.[127] When the law condemns the creation of unjustifiable risk, measures implemented to mitigate that risk play an important role in the culpability assessment.[128] Where evidence indicates a commander had the opportunity to implement precautions and ignored that opportunity, it is probative to both criminal intent and recklessness.[129] But when the ultimate question is whether the risk created by launching the attack was unjustifiable and therefore unreasonable, this evidence is far more significant.[130] And the inverse is also true—a commander accused of recklessly launching an attack would benefit substantially from evidence indicating a good-faith effort to implement civilian risk mitigation precautions.[131] Indeed, in many situations this evidence alone could create reasonable doubt as to the unjustifiable nature of the risk creation—if a commander did all that was feasible to reduce civilian risk, it is much harder to conclude the risk created was ultimately unreasonable.[132]

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125. *See* Ohlin, *supra* note 11 (discussing notion of intent and evidentiary standards).

126. *See id.* at 97 ("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.").

127. AP I, *supra* note 10, art. 57; *see also* Geoffrey S. Corn & James A. Schoettler, Jr., *Targeting and Civilian Risk Mitigation, The Essential Role of Precautionary Measures*, 223 MIL. L. REV. 785, 834–35 (2015) (discussing precautions as a principle); *see also* Press Release, Department of Defense, Defense Department Updates Its Law of War Manual (July 31, 2023), https://www.defense.gov/News/Releases/Release/Article/3477385/defense-department-updates-its-law-of-war-manual/ ("The Manual also includes a new section discussing the obligation to take feasible precautions to verify that potential targets are military objectives, including providing examples of common precautionary measures. The update affirms that the law of war does not prevent commanders and other personnel from making decisions and acting at the speed of relevance, including in high-intensity conflicts, based on their good-faith assessments of the information available at the time.").

128. *See* Corn & Schoettler, *supra* note 127.

129. *Id.*

130. *Id.*

131. *Id.*; *Civilian Risk Mitigation*, *supra* note 43.

132. Corn & Schoettler, *supra* note 127, at 835.

B. Avoiding Reliance on Unintentional Criminal Homicide

Most national criminal jurisdictions already impose criminal responsibility for certain harms resulting from reckless conduct.[133] For example, the U.S. military criminal code, the Uniform Code of Military Justice (UCMJ), proscribes unintentional manslaughter, which according to article 119 is defined as causing the death of another human being as the result of culpable negligence.[134] That culpable mental state includes recklessness, but also includes gross negligence.[135] According to the Military Judge's Bench Book:

> Culpable negligence is a degree of carelessness greater than simple negligence. Simple negligence is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; th[is] is what due care means. Culpable negligence is a negligent act or failure to act [accompanied by] a gross, reckless, wanton, or deliberate disregard for the foreseeable result[s] to others . . . .[136]

Many national jurisdictions likely include similar unintentional homicide offenses in the criminal codes applicable to their armed forces,[137] and also for the lesser offense of criminal battery based on a reckless state of mind.[138]

However, relying on such offenses to fill the culpability gap between intending to attack civilians and an offense based on recklessly launching an attack shifts the focus of the *actus reus* from conduct to result.[139] Crimes such as unintentional manslaughter, negligent homicide, or reckless battery all require proof of a criminal result.[140] While the criminal state of mind may align with IHL's targeting regulatory focus, relying on these offenses will reinforce an effects-based approach[141] to attack judgment critiques. While

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133. *See* MICHAEL DORE, LAW OF TOXIC TORTS § 32:4 (2018) (discussing how many states impose criminal liability for recklessness).

134. 10 U.S.C. § 919.

135. *Id.*

136. *Pamphlet 27-9: Military Judges' Benchbook*, DEP'T OF THE ARMY 258 (Feb. 29, 2020), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN21189_P27_9_FINAL.pdf.

137. U.K. MINISTRY OF DEF., MANUAL OF THE LAW OF ARMED CONFLICT ¶ 16.26.1 (2004) [hereinafter U.K. LOAC MANUAL]; *see also* AUSTRALIAN DEF. FORCE, LAW OF ARMED CONFLICT ¶ 13.28 (2006).

138. *See* U.K. LOAC MANUAL, *supra* note 137, ¶ 16.39.1.

139. *See supra* notes 17–21 and accompanying text (discussing conduct and result in the context of *actus reus*).

140. *See supra* note 11 and accompanying text (discussing multiple countries' acceptance of criminal result proof).

141. Geoffrey S. Corn, *Comment and Analysis: Ensuring Experience Remains the Life of the Law: Incorporating Military Realities into the Process of War Crimes Accountability*, 1 GLOB. CMTY. Y.B. INT'L L. & JURIS. 189, 189 (2015), https://academic.oup.com/book/32632/chapter-abstract/270523904?

there may be cases where such offenses are warranted by the evidence, they provide an incomplete solution to the existing gap between regulatory and proscriptive norms.[142]

Amending national laws to proscribe not only intentional, but also reckless attack judgments, avoids this shift in focus. Such laws will expand the risk of criminal responsibility for conduct of hostilities decisions, a consequence likely to garner criticism.[143] Indeed, one obvious consequence of limiting conduct of hostilities war crimes to only those involving intent or knowledge is that most combat decisions will be beyond the scope of criminal scrutiny.[144] Certainly, subjecting every attack decision implicating civilian risk to criminal investigation would risk compromising combat aggressiveness and subjecting too many commanders to unjustifiable scrutiny.[145]

However, any crime creates risk of overzealous prosecution.[146] A faithful application of the law is central to the legitimacy of any criminal prosecution. Nor should proving recklessness in the context of attack decisions be considered an insignificant burden. While it may be less demanding than proving intent or knowledge,[147] any prosecution would still necessitate evidence to support, at a minimum, a prima facie showing that an attack decision fell beyond the broad scope of reasonable judgment.[148]

The rarity of prosecutions for reckless manslaughter arising out of conduct of hostilities in U.S. practice indicates that assessing an attack decision as reckless would likely be uncommon, especially where a commander exercises reasonable due diligence in the attack decision-making process.[149] Manslaughter under the UCMJ, a result crime, has for decades been an available prosecutorial option for a commander who inflicts death as

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redirectedFrom=fulltext; *see also* Laurie R. Blank, Geoffrey S. Corn, & Orde F. Kittrie, *Legal Implications Surrounding the Use of Human Shields*, FOUND. FOR DEF. OF DEMOCRACIES, https://www.fdd.org/wp-content/uploads/2018/03/Legal-Implications-Surrounding-the-Use-of-Human-Shields.pdf (last visited Sept. 19, 2023).

142. *See supra* notes 51–52 and accompanying text (discussing gaps in regulatory norms).

143. *See supra* note 64 and accompanying text (discussing *mens rea* as it relates to conduct of hostilities crimes).

144. *See supra* note 11 and accompanying text (discussing a prosecutor's difficulty in proving the subjective intent or knowledge).

145. *See* Ohlin, *supra* note 11, at 81 (discussing Just War Theory and IHL allowing for attacks on legitimate military targets, even with anticipated civilian deaths, provided that the civilian losses "are not disproportionate to the value of the military target").

146. *See id.*

147. *Id.* at 90. Common law-trained lawyers would proffer that "it would be an exaggeration to equate the conscious aspect of recklessness with the concept of intent." *Id.*

148. *See supra* note 122 and accompanying text (discussing the difficulty of proving an unreasonable judgment).

149. *See infra* note 154 and accompanying text (discussing due diligence when making attack judgments).

the result of a reckless attack decision. Yet such prosecutions are extremely rare.[150]

Some may assert that this is the consequence of dismissing credible cases of unlawful killings by U.S. personnel during armed conflict. In fact, this is better explained by the strong presumption of reasonableness that attaches to attack decisions by commanders in an institution committed to IHL compliance.[151] When coupled with the complexity of recreating such decisions through information that can be mustered as evidence in a criminal trial, it is understandable why U.S. commanders are rarely subjected to criminal investigation—much less prosecution—for combat attack decisions.[152]

This does not mean, however, that the risk of such criminal responsibility is somehow inequitable or illogical.[153] Instead, potential liability for both decisions resulting from criminal intent, knowledge, *or* criminal recklessness should ideally enhance due diligence and the quality of attack judgments.[154] Furthermore, crimes based on recklessness—whether they proscribe conduct or result—are not strict liability in nature; the complexities of attack decision-making will often militate against seeking to impose criminal responsibility on those responsible for these difficult decisions.[155]

Ultimately, incorporating crimes based on reckless attack judgments into national jurisdiction over armed forces will afford national prosecutorial authorities the opportunity to criminally sanction what IHL prohibits: not death, injury, or destruction caused by reckless attack decisions, but decisions that by their nature create an unjustifiable and substantial risk of such harm because the decision-maker deviated substantially from the standard of reasonableness.[156]

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150. Press Release, CENTCOM, CENTCOM Releases Investigation into Airstrike on Doctors Without Borders Trauma Center (Apr. 29, 2016), https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/904574/april-29-centcom-releases-investigation-into-airstrike-on-doctors-without-borde/.

151. DOD LAW OF WAR MANUAL, *supra* note 27, Foreword ("The law of war is of fundamental importance to the Armed Forces of the United States . . . . The law of war is a part of our military heritage, and obeying it is the right thing to do.").

152. Blum, *supra* note 22, at 157 (noting the difficulties of prosecuting commanders).

153. *See id.*

154. *See* Ohlin, *supra* note 11, at 82.

155. Blum, *supra* note 22, at 158 ("Though the IHL principle of proportionality could arguably incorporate such standards as negligence and recklessness, for purposes of [s]tate responsibility, the corollary war crime under the ICC would exclude any liability for, among other things, disproportionate harms resulting from mistake.").

156. Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 55 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

C. Command Responsibility: A Useful Analogue

Subjecting commanders to criminal accountability for reckless failures to discharge their IHL responsibilities is not a novel concept.[157] This theory of criminal culpability is central to the doctrine of command responsibility.[158] While a mode of liability and not a crime in itself, the essence of command responsibility is that commanders are personally accountable for the objectively foreseeable war crimes committed by subordinates where the commander failed to prevent those crimes.[159] This "should have known" liability is premised on a dereliction of duty that creates an objectively unjustifiable risk that subordinates will engage in war crimes.[160]

Accordingly, where objective information indicates a commander was subjectively aware of a serious *risk* that subordinates would engage in war crimes, or even *should* have been aware, and the commander fails to act to prevent that risk, he becomes responsible for those crimes.[161] The "should have known" standard is essentially a theory of derivative liability based on reckless disregard of available information.[162]

As with conduct of hostilities violations, the logic of this theory of reckless liability is clear: to incentivize commanders to identify and avert unjustifiable risk and deter indifference to indicators of such risk.[163] When commanders know they will be accountable for such indifference, they are more likely to be diligent in discharging their command responsibility.[164] Likewise with targeting: where commanders know they risk accountability for indifference to civilian risk when due diligence might mitigate or negate that risk, they are more likely to exercise due diligence in the target decision-making process.[165]

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157. *See* DOD LAW OF WAR MANUAL, *supra* note 27, at 140.

158. *In re* Yamashita, 327 U.S. 1, 41 (1946); *see also* DOD LAW OF WAR MANUAL, *supra* note 27, § 18.23.3 ("Commanders have duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war. Failures by commanders of their duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war can result in criminal responsibility."); Military Commissions Act of 2009, 10 U.S.C. § 950q(3) (2018) (reiterating commanders' responsibilities for subordinates); Geoffrey Corn & Rachel VanLandingham, *Strengthening American War Crimes Accountability*, 70 AM. U. L. REV. 309, 362 (2020) ("[A]dding command responsibility to the UCMJ is a simple exercise of cutting and pasting from the extant MCA. Congress need only amend [a]rticle 77 to align it with the scope of principal liability established in section 950q of the MCA.").

159. Damaska, *supra* note 19, at 455.

160. *Id.*

161. *Id.* at 463 & n.18.

162. *Id.*

163. *Id.* at 471.

164. *Id.*

165. *Id.* at 473 ("If hierarchical superiors can be held responsible for subordinates' delinquency on an imputed liability basis, they must realize that their conviction for hideous crimes critically depends on *ex post* assessments of what was predictable in the disorienting conditions of combat. They also realize that these assessments are likely to be made by judges without experience with pressures of acting under conditions of warfare. The disturbing uncertainty flowing from this realization will induce such superiors

V. THE WAY AHEAD

It is unlikely that "lesser included" unlawful attack offenses will be incorporated into ICC jurisdiction in the foreseeable future. But that does not mean that advocating for such incorporation is futile.[166] The conflict in Ukraine has placed a spotlight on the ICC's capacity to impose accountability for what appears to be widespread conduct of hostilities war crimes.[167] Perhaps the existing proscriptive jurisdiction will prove effective in meeting this expectation, although it seems unlikely. Indeed, since the resurrection of international criminal tribunals in the mid-1990s, there have been very few cases of successful prosecution of conduct of hostilities crimes.[168] Why should anything else be expected?

But this has never been the result of lack of prosecutorial effort, and there can be little doubt that ICC prosecutors are working diligently to develop solid cases to impose such accountability.[169] They are, unfortunately, bound to a binary culpability equation: either they are able to prove the highest level of criminal *mens rea*, or they have no case.[170]

Moving ICL in the direction of a better alignment with the reasonable commander standard of IHL is both logical and necessary.[171] This need not, however, be solely an issue of ICC jurisdiction. National jurisdictions can move this proverbial ball forward by including offenses based on reckless attack decisions in their domestic law, either by incorporating these offenses into domestic war crimes statutes, or by charging such reckless decisions under existing domestic criminal laws such as reckless manslaughter or reckless endangerment.[172]

The United States should lead this effort. As I (along with my co-author Rachel VanLandingham) advocated in a prior article, the time is ripe for the U.S. Congress to incorporate an enumeration of war crimes into the Punitive Articles of the UCMJ.[173] In that article, we advocated for using the enumeration of war crimes in the Military Commission Act (MCA) as a template for this incorporation.[174] But not even the MCA establishes

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to closely monitor subordinate behavior, and be constantly on the look out [sic] for signs of potential criminality. Like snails with their antennae directed toward possible menace, they will be quick to retreat to the house of caution.").

166. *See* Blum, *supra* note 22, at 136–37 (disabling the effects of lesser violations).

167. *See* Blinken, *supra* note 67 (explaining the various war crimes).

168. Blum, *supra* note 22, at 137–38 (pointing to the "rare and sporadic" occurrences of criminal prosecutions of just a few individuals for their respective violations).

169. Statement of ICC Prosecutor, *supra* note 3.

170. *See* Rome Statute, *supra* note 4, art. 30 (delineating the mental elements for intent and knowledge).

171. Corn, *supra* note 40, at 441.

172. *See* Rome Statute, *supra* note 4, art. 12(1).

173. Corn & VanLandingham, *supra* note 158, at 318.

174. *Id.*

jurisdiction over reckless attack decisions.[175] Instead, like the ICC, jurisdiction extends only to intentional attacks on civilians, civilian property, or other protected persons or places.[176] These offenses should be supplemented with lesser included offenses based on reckless attack decisions, and such offenses should be incorporated into the UCMJ.[177]

175. *Id.* at 362.
176. *See* Rome Statute, *supra* note 4, art. 8(e).
177. *See* Blum, *supra* note 22, at 136–37 (describing lesser violations and their impact).