Should Mere Direct Participation in Hostilities Be Treated as a War Crime?

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Abstract:
This article attempts to argue that acts that constitute mere direct participation in hostilities during armed conflict should not be treated as war crimes, but rather should be criminalized domestically, or addressed through amnesties when appropriate. In order to support this argument, the author looks at both International Humanitarian Law (IHL) and International Criminal Law (ICL) and their respective treatment of direct participation in hostilities. The author then examines offenses within the 2009 Military Commissions Act which would normally be deemed as mere participation in hostilities and compares these to offenses normally found under international law. Finally, the author explains the reason why international law has not traditionally treated mere direct participation in hostilities as a war crime, and why it is important to continue this trend.

Introduction
In May of 2009, the International Committee of the Red Cross published its _Interpretive Guidance on the Notion of Direct Participation in Hostilities_. In that same month, President Obama announced that his administration was considering restarting the military commissions in Guantanamo. Both the _Interpretive Guidance_ and the 2009 Military Commissions Act (MCA) had been the product of years of debate and scholarly discourse. Like its 2006 predecessor, the 2009 MCA contained a number of offenses that specifically criminalized the types of behaviour that would be identified by the ICRC in its _Interpretative Guidance_ as “acts of direct participation in hostilities.”

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The objective of this paper is not to attack the 2009 MCA as such, but rather, to use it as a launching point from which to discuss the issue of whether acts that constitute mere direct participation in hostilities direct participation in hostilities should be considered as war crimes, or in US legal parlance, offenses against the laws of war? This paper will argue that in fact, these acts should not be criminalized as war crimes, but instead should be dealt with as domestic offenses — if amnesties are not made available.4

The first part of this article discusses how war crimes are defined under international law, and what offenses have been designated as war crimes (or other international crimes) under various treaties, statutes, or customary international law. Part II addresses the rules and jurisprudence of the U.S. Military commissions and looks at how the 2009 Military Commissions Act has made certain acts of mere direct participation in hostilities to be a war crime under U.S. law. Part III then reviews international law to see whether it would permit direct participation in hostilities to be treated as an international war crime. Part IV then sets out this author’s view on why direct participation in hostilities should not be treated the same as the war crimes discussed in Part I.

This paper argues that acts of mere direct participation in hostilities should not be treated as a war crime for three principal reasons: i) these acts are not considered war crimes under any international treaty or international customary rule, and therefore to criminalize them as such would violate the principle of legality by retroactively designating them as violations of the laws of war when they should be treated as domestic violations, ii) war crimes should be a

4 This paper will generally not consider offenses that amount to indirect participation (financing of terrorism, etc) but will focus on those acts which would normally constitute direct participation in hostilities, as defined by the ICRC’s Interpretative Guidance. It will also not look at inchoate “crimes” like conspiracy or solicitation, both of which have been hotly contested in the DC federal court of appeals.
distinct, universally abhorred set of actions and acts should not be designated as war crimes for certain individuals (ie, non-state actors) when they are perfectly legal and even praised for other individuals (ie, members of a State’s armed forces); and iii) taking away the distinction between war crimes and mere direct participation in hostilities deprives non-state actors of one of the only incentives available to convince them to respect the law of armed conflict. All three of these arguments will be discussed in further detail below.

I) Part I: How are war crimes generally defined under international law?

The definition of what behavior constitutes a war crime has developed over time as international criminal tribunals have evolved from ad hoc mechanisms like the International Military Tribunal (IMT) at Nuremburg and the International Tribunal for the Former Yugoslavia (ICTY) to the more sophisticated and permanent International Criminal Court (ICC).

Today, the definition of a war crime is generally agreed to be “serious violations of the laws and customs applicable in international armed conflict” and “serious violations of the laws and customs applicable in an armed conflict not of an international character”.\(^5\)

Traditionally, the grave breaches listed in the Geneva Conventions and Additional Protocols were considered those acts requiring prosecution (or extradition for prosecution elsewhere) as war crimes under IHL. Over time, with the advent of international tribunals and their jurisprudence, this grew to include the various war crimes listed below.

\(^5\) Rome Statute, Article 8 (cited in Vol. II, Ch. 44, § 3).
According to the ICRC’s Customary Law Study Rule 156, the following represent a non-exclusive but fairly comprehensive list of war crimes and violations of IHL, which is important to note in order to have a comprehensive idea of what offenses are most commonly designated as war crimes under international law:

A. **Grave Breaches of IHL**

- wilful killing;
- torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering or serious injury to body or health;
- extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial;
- unlawful deportation or transfer;
- unlawful confinement;
- taking of hostages.

B. **Other serious violations of IHL committed during an international armed conflict:**

- committing outrages upon personal dignity, in particular, humiliating or degrading treatment and desecration of the dead;
- enforced sterilization;
- compelling the nationals of the adverse party to take part in military operations against their own party;
- killing or wounding a combatant who has surrendered or is otherwise hors de combat;
- declaring that no quarter will be given;
- making improper use of distinctive emblems indicating protected status, resulting in death or serious personal injury;
- making improper use of the flag, the military insignia or uniform of the enemy resulting in death or serious personal injury;
- killing or wounding an adversary by resort to perfidy;
- making medical or religious personnel, medical units or medical transports the object of attack;
- pillage or other taking of property contrary to international humanitarian law;
- destroying property not required by military necessity.

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C. Serious violations of common Article 3 of the Geneva Conventions:

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- taking of hostages;
- the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

D. Other serious violations of IHL committed during a non-international armed conflict:

- making the civilian population or individual civilians, not taking a direct part in hostilities, the object of attack;
- pillage;
- committing sexual violence, in particular, rape, sexual slavery, enforced prostitution, enforced sterilization and enforced pregnancy.
- using prohibited weapons;
- launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage;
- using human shields;
- using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies.\(^7\)

This article will not discuss any of the war crimes listed above. Rather, this list serves as a tool in which one can compare the kinds of acts almost universally treated as war crimes with those acts that this paper will later discuss as acts typically associated with direct participation in hostilities.

The Rome Statute codified a number of violations of both international and non-international armed conflict in addition to the ones listed above.\(^8\) Of particular note are those provisions

\(^7\) The Customary Law Study lists a number of additional crimes considered to be war crimes that were not included in this list for the sake of brevity.
\(^8\) See Art. 6 (genocide) and Art. 7 (crimes against humanity) of the Rome Statute.
on genocide and crimes against humanity, as these violations were not originally part of the grave breaches regime of the Geneva Conventions or their Additional Protocols.\(^9\)

The next section will look at whether acts considered to constitute “direct participation in hostilities” have ever been defined or treated as war crimes under international law.

II) Part II: Is mere participation a war crime under international law?

A key question that must be addressed is what exactly constitutes direct participation in hostilities? There have been many articles written on what it means to be “directly participating in hostilities,” particularly after the ICRC published its *Interpretive Guidance*, which provided the ICRC’s position on a number of issues related to direct participation.

The concept of direct participation in hostilities hails from the Additional Protocols to the Geneva Conventions, both of which provide that civilians must be protected from direct attack “unless and for such time as they take a direct part in hostilities.”\(^{10}\) Even States like the US which are not a party to API or APII agree have generally agreed that this is part of customary international humanitarian law. Nonetheless, the vagaries surrounding what conduct constitutes direct participation in hostilities is still contentious.

The text of the Geneva Conventions and their Additional Protocols does not prohibit direct acts of participation. The only mention of direct participation in hostilities is to specify that those persons directly participating in hostilities may be targeted as legitimate military

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\(^9\) It not the intent of this article to provide a treatise on war crimes generally, but the above provide a list of “core” war crimes for use of reference throughout this document.

\(^{10}\) Additional Protocol 1 (AP I), Art. 51(3)(“Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”). A similar provision is found in Additional Protocol II (AP II), Art. 13(3)(“Civilians shall enjoy the protection afforded by this Par, unless and for such time as they take a direct part in hostilities.”).
objectives. Unfortunately, the text of the Conventions and their Protocols do not provide a definition for what conduct constitutes direct participation in hostilities.

For the purposes of this article, it is only necessary to give a very basic definition of direct participation in hostilities. The ICRC’s *Interpretive Guidance* provides such a definition:

“The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict…In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and

2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).”

This definition has been used by the US military and referred to other by international and foreign domestic courts alike.

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11 *Interpretive Guidance*, pp. 45-46.
The ICRC’s *Interpretive Guidance* discusses a number of examples of the kinds of activities that might constitute direct participation in hostilities, in addition to the obvious example of an individual using a weapon against the adversary or the civilian population. These included such acts as:

- “guarding captured military personnel to prevent them from being forcibly liberated;”\(^{13}\)
- “clearing mines placed by the adversary;”\(^{14}\)
- “transmitting tactical targeting information for an attack;”\(^{15}\)
- recruitment and training for a “for the execution of a pre-determined hostile act;” and\(^{16}\)
- serving as a lookout during an ambush.\(^{17}\)

While these constitute just a few basic examples, it is clear that these types of activities are those that are typically associated with the conduct of hostilities, and for at least some of them, may even be *necessary* for a party to be able to effectively engage in any kind of warfare.

The ICRC’s *Interpretive Guidance* also clearly establishes that *direct participation in hostilities is a lawful act of war*, although it may be domestically characterized as a crime against the State:

\(^{13}\) See *Interpretive Guidance*, p. 48.
\(^{14}\) See *Interpretive Guidance*, p. 48.
\(^{15}\) See *Interpretive Guidance*, p. 48.
\(^{16}\) See *Interpretive Guidance*, p. 53.
\(^{17}\) See *Interpretive Guidance*, p. 54.
"The absence in IHL of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by IHL nor criminalized under the statutes of any prior or current international criminal tribunal or court. However, because civilians...are not entitled to the combatant privilege, they do not enjoy immunity from domestic prosecution for lawful acts of war, that is, for having directly participated in hostilities while respecting IHL."\(^{18}\)

The ICRC is not alone in this belief, as many prominent academics, including U.S. military scholars, have reached the same conclusion. For example, Michael Schmitt has asserted the same in an article on direct participation in hostilities:

"Despite dated support for the assertion that being an unprivileged belligerent can constitute a war crime, the better position is that only the acts underlying direct participation are punishable. If they amount to war crimes (for example, killing civilians), the acts may be tried as such. Further, because civilians who directly participate lack combatant immunity, they may be convicted for offenses against the domestic law of a State that enjoys both subject matter and personal jurisdiction. This is the position proffered by leading scholars, as well

as that in operational guidance such as the US Army’s Operational Law Handbook (2004).”

There would also seem to be no provision in the Rome Statute or Tribunals that would criminalize acts that constitute mere direct participation in hostilities. Art. 8 of the Rome Statute, Art. 3 of the ICTY Statute, and Art. 4 of the ICTR Statute, for example echo the list of war crimes listed in Part I above. The ICTR statute, in fact, merely copies the text of Common Article 3 to define what conduct constitutes war crimes within its jurisdiction. This author was also not able to find any jurisprudence within the tribunals or the International Criminal Court that would seem to contradict this assumption. Perhaps worth noting (although also perhaps of less academic value), this author was unable to locate any discussions about acts of mere participation in hostilities being treated as war crimes in either the travaux prepatoires of any of the Geneva Conventions and their Additional Protocols or in the Rome Statute negotiations.


The 2009 Military Commissions Act (MCA) did not just criminalize certain acts that would normally be regarded as direct participation in hostilities – the MCA defined these acts war crimes triable by a military commission. According to this author’s interpretation of direct participation in hostilities, the following crimes under the 2009 MCA are acts that would likely be considered as mere direct participation in hostilities so long as they are committed

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20 Art. 8 Rome Statute, Art. 3 ICTY Statute, Art. 4 ICTR Statute.
21 10 U.S.C. Chapter 47A.
against combatants/fighters or military objectives and are otherwise in keeping with the rules of IHL.

i) Intentionally causing serious bodily injury,

ii) Murder in violation of the law of war,

iii) Destruction of property in violation of the law of war,

iv) Material Support of Terrorism, and

v) Wrongfully aiding the enemy

Most of the above list are unquestionably acts that constitute direct participation in hostilities, at least as defined by the ICRC’s Guidance on direct participation in hostilities. Material Support of Terrorism was included even though it might normally be regarded as an inchoate crime like conspiracy, or at least as “indirect” participation in hostilities. This was done because the definition given to it in the 2009 MCA is broad enough to include acts of direct participation. For instance, 18 U.S.C. 2339A(b) which serves as the definition for “material support” in the 2009 MCA, includes the provision of weapons or training to designated

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23 Note that the Act itself refers to act “in violation of the law of war,” but as we will explore below, the definition provided for these crimes are not actually likely to be violations of the IHL.

24 10 U.S.C. §950t(13). INTENTIONALLY CAUSING SERIOUS BODILY INJURY.—“(A) OFFENSE.—Any person subject to this chapter who intentionally causes serious bodily injury to one or more persons, including privileged belligerents, in violation of the law of war shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

25 10 U.S.C. §950t(15). MURDER IN VIOLATION OF THE LAW OF WAR.—Any person subject to this chapter who intentionally kills one or more persons, including privileged belligerents, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.

26 10 U.S.C. §950t(16). DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR.—Any person subject to this chapter who intentionally destroys property belonging to another person in violation of the law of war shall be punished as a military commission under this chapter may direct.

27 10 U.S.C. § 950t(25). PROVIDING MATERIAL SUPPORT FOR TERRORISM.—“(A) OFFENSE.—Any person subject to this chapter who provides material support or resources, knowing or H. R. 2647—422 intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24) of this section), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

28 10 U.S.C. § 950t(26). WRONGFULLY AIDING THE ENEMY.—Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.
terrorist groups or transportation of persons of members of these organizations. These acts, if occurring on or near the battlefield, would also constitute direct participation in hostilities. However, as the current jurisprudence in U.S. courts would seem to have precluded the offense of Material Support to Terrorism as a war crime – at least with the current set of military commission defendants – this will not be discussed in detail.

In at least two military commission convictions, the defendants were originally convicted based solely on acts which constitute mere direct participation in hostilities, but several of the ongoing military commissions also include charges that would normally be characterized as direct participation in hostilities.

In order to demonstrate the kinds of acts that would normally be considered direct participation in hostilities, but which are charged as war crimes in the U.S. military commissions, it is worth looking at how the defendant in Al Nashiri has been charged for his alleged participation in the bombing of the USS COLE in 2000. Specifically, the next section will analyse the following charges: i) intentionally causing serious bodily injury, ii) murder in violation of the laws of war, and iii) destruction of property in violation of the law of war.

i) Intentionally causing serious bodily injury [10 U.S.C. § 950t(13)]

In Al Nashiri, the defendant was charged with intentionally causing serious bodily injury in violation of the laws of war for the act of attacking a U.S. naval vessel and injuring several

29 For example, Omar Khadr was convicted for “murder in violation of the laws of war” for throwing a hand grenade at U.S. soldiers during a firefight in Afghanistan, which resulted in the death of one soldier. Had this grenade been thrown by a U.S. soldier (ie, a “privileged belligerent”) at Khadr, this act would have been considered an integral part of the job, not a war crime. See David Frakt, “Direct Participation in Hostilities as a War Crime: America’s Failed Efforts to Change the Law of War,” Valparaiso University Law Review, Vol. 46, p. 741, 752-53 (2012).
military servicemen. No civilians were injured in this attack, so that the principle of distinction or proportionality were not an issue.

The offense of intentionally causing serious bodily injury seems to be intended to prosecute attacks on soldiers, and indeed it has been charged that way in ongoing commission proceedings. First of all, this must be distinguished from acts encompassing torture, inhuman or degrading treatment, which are covered under separate provisions.

This offense criminalizes one type of direct participation in hostilities, but IHL does not penalize such conduct if it is carried out by combatants/fighters against military objectives. This conduct would therefore not be a violation of the laws of war under international law.

ii) Murder in violation of the laws of war [10 U.S.C. § 950t(15)]

In Al Nashiri, the defendant was charged with murder in violation of the laws of war for the same act of attacking the U.S.S. Cole and killing members of the U.S. armed forces, although in this case, there was an accompanying charge of perfidy, which would indeed be a traditional violation of the laws of war. Again, no civilians were killed in the attack.

Murder, as it is traditionally defined under IHL treaties and international criminal tribunal statutes would normally be a war crime, so long as there is indeed a nexus to the armed conflict. However, the 2009 MCA defines murder essentially as any killing of privileged

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31 10 U.S.C. § 950t(11) and (12).
33 See e.g., Art. 8(2)(a)(i) of the Rome Statute which prohibits the wilful killing of protected persons (by definition civilians or persons who are hors de combat).
combatants by "unprivileged combatants," even if it is within the context of hostilities between persons who belong to one of the parties to the conflict. This type of conduct would constitute another form of criminalizing direct participation in hostilities, so long as the killing is otherwise not unlawful (e.g., the killing of a soldier who is *hors de combat* or the use of means to kill a combatant which are intended to cause unnecessary suffering).

**iii) Destruction of property in violation of the law of war [10 U.S.C. §950t(16)]**

Al Nashiri was also charged with “detonating concealed explosives, resulting in the destruction of USS COLE… destruction of supplies and rations located on board…. and destruction of personal effects located on board USS COLE.”

The definition of this offense would seem to suggest that a defendant could only be charged for destruction of property that is “in violation of the law of war,” but under the laws of war, it is only specifically prohibited to attack civilian objects. As the USS COLE was undeniably by its nature, use, and purpose a military object, the attack would not seem to be in violation of the laws of war, as the attack is against a legitimate military objective. The U.S. military also defines a lawful attack as one that is directed only against a military objective, in keeping with the principles articulated in Arts. 51-52 of Additional Protocol I.

It would seem, therefore, that these particular actions by Al Nashiri (if the allegation of perfidy is discounted for the moment) are permissible under the laws of war. This is due to

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35 Art. 52(2) of Additional Protocol I establishes that attacks may only be directed against military objectives. Military objectives are defined as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

36 See e.g., *Operational Law Handbook*, International and Operational Law Department, JAG Legal Center and School, U.S. Army, 2012, pp. 22-23
the fact that the attacks – which did in fact cause destruction, injury and death – were properly directed against military objectives only.

U.S. scholars have also questioned the wisdom (or legality) of the 2009 MCA’s automatic characterization of certain acts of direct participation in hostilities as war crimes. For instance, Sean Watts and Mark David “Max” Maxwell have argued that:

…it is invalid to conclusively presume that the killing of a US soldier in the context of a non-international armed conflict is a violation of the law of war. Although such a killing may be an unjustified homicide in violation of applicable domestic law, it is not a ‘war crime’ unless the manner of the killing transgresses the laws and customs of war applicable to such conflicts, principally Common Article 3.37

IV) Part IV: Why direct participation in hostilities should only be criminalized domestically, rather than internationally

This application of the international laws of war to acts of mere direct participation in hostilities is concerning for several reasons: First, it is a violation of the principle of legality because it characterizes as a war crime an act which has always been categorized as a domestic crime.38 Second, it is a misinterpretation of international law that sets a dangerous precedent. International crimes are supposed to be distinct because they reflect universally abhorred actions, regardless of who is the victim or perpetrator in the specific case. Third, one of the principal tools the international community possesses to encourage non-state actors to comply with IHL (ie, to encourage them not to commit violations of IHL!), is by encouraging amnesties

38 U.S. const. Art. I, sect. 9, cl. 3. “No Bill of Attainder or ex post facto law shall be passed.”
for mere direct participation in hostilities. As amnesties may not be permitted in the case of
war crimes, categorizing mere participation as such not only confuses the situation, but risks
incentivizing non-state actors to commit actual war crimes as the consequences for respecting
or violating IHL would be the same.

i) The principle of legality

Both international and U.S. law are based upon the principle of legality. The principle of
legality, or *nullum crimen sine lege, nulla poena sine lege* ("no crime without law, no
punishment without law") encompasses the prohibition on any ex post facto application of
the law. The U.S. Supreme Court has interpreted this prohibition to include a prohibition
against any law that "aggravates a crime, or makes it greater than it was, when committed."\(^{39}\)
In this author’s view, at least, characterizing an offense as a war crime which was
traditionally only characterizes as a domestic offense, would indeed violate this prohibition.
The U.S. argued in Hamdan’s military commission case that even if certain offenses under
the Military Commissions Act could not be deemed to be war crimes under international law,
they could still violate the “U.S. common law of war."\(^{40}\) The Court of Appeals quickly
rejected this argument, however, finding that in order for an offense to be deemed a war
crime and to be triable by a military commission, it did indeed have to be recognized as a war
crime under international law.\(^{41}\) The Court made this ruling with respect to material support
to terrorism, however, and did not address many of the acts discussed in the present article.

ii) The uniqueness of war crimes

\(^{39}\)See *Calder v. Bull*, 3 U.S. 386, 390 (1798).

\(^{40}\) See Brief for the United States, *Hamdan v. U.S.*, On Petition for review from the U.S. Court of Military

\(^{41}\) *Hamdan v. U.S.*, (D.C. Cir. 2012) No. 11-1257, p. 27, available at: http://lawfare.s3-us-west-
When discussing this question, one might ask, “why are war crimes so special in the first place?” Why is murder of an individual during peacetime somehow a “lesser” crime than murdering a civilian during wartime, such that it necessitates a different set of laws, sentencing guidelines, and even courts? This is by no means an easy question to answer, but in this author’s view, it has to do with the fact that the existence of war or armed conflict rips at the very fabric of society and turns social norms and standards upside down. The use of lethal force as a last resort becomes the use of lethal force as a first resort. Children put down their books and pick up their Kalashnikovs. Basic necessities like food become (albeit illegal) weapons of warfare. In such a socially disrupted context, it becomes difficult to find a reference point for right and wrong.

Since killing another human being may be perfectly legal under the rules of warfare, how can one distinguish when that killing becomes illegal? There is little motivation to make such a distinction during times of war, and thus it becomes necessary to raise the stakes. Unlawful killing becomes a war crime, with more severe consequences and with more serious implications, hopefully incentivizing both soldiers and civilians to maintain at least the most basic sense of humanity, even in the midst of horror and bloodshed. This may be idealistic, but the hope is that by stigmatizing war crimes as being worse than common law crimes, one brings just a bit of civilization to chaos.

iii) Incentives for non-state actors

While amnesties are not required by IHL, they are certainly encouraged. Article 6(5) of Additional Protocol II expressly states that “at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict,
whether they are interned or detained.” Amnesties have been employed after non-
international armed conflicts, although not always appropriately, although many States have
shown an unwillingness to grant amnesties due to concerns about legitimizing non-state
actors in the eyes of the population.\footnote{The ICRC’s Customary Law Study provides an excellent list of past amnesties granted during non-international armed conflicts. See notes 2-4 of Rule 159 of the Study with respect to Amnesty (listing amnesties such as the Quadripartite Agreement on Georgian Refugees and Internally Displaced Persons, Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, Cotonou Agreement on Liberia).}

While amnesties may be optional, that does not mean that such acts may be criminalized as
international crimes. Article 6(5) is referring to amnesties for domestic crimes and has been
widely recognized as not applying to serious war crimes.\footnote{See e.g., ICTY, \textit{Furundžija case}, Judgment, 1998.} States should not fear that by
acknowledging that mere participation is not a war crime will grant legitimacy to armed
groups by admitting that direct participation hostilities is not a war crime is simply not
justified. Additional Protocol II or Common Article 3 pertaining to non-international armed
conflicts can only apply in situations where non-state actors are in fact directly participating,
so it would make no sense to have these treaties regulating the conduct of the parties if almost
every act by the non-state actor was going to be a war crime in any case.

Consider a detention example. While non-state actors may have no legal right to detain
persons in a particular jurisdiction, both Common Article 3 and Additional Protocol II
presume that they will. Now imagine one of the fighters of the organized armed group is
guarding the detention facility, perfectly respecting every applicable international rule like
humane treatment of detainees. He never picks up a gun, his sole job in the organized armed
group is to guard detainees. If mere direct participation in hostilities is treated as a war
crime, then this fighter could be prosecuted for a war crime for the simple fact that he

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\footnote{See e.g., ICTY, \textit{Furundžija case}, Judgment, 1998.}
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guarded detainees and treated them well, because the act of detention is certainly direct participation in hostilities. This might lead to the perverse incentive to kill detainees outright, since the resulting consequences would appear to be the same, at least from the perspective of the guard.

It would far more appropriate to treat these crimes as domestic ones (e.g. kidnapping, unlawful imprisonment) so as to encourage individuals to respect the laws of war even though their acts may be punished after the fact, should they lose the conflict. If they merely participate they may be domestically prosecuted, but if they also commit war crimes, they open themselves up to prosecution by the ICC or other States with universal jurisdiction. Making it clear that direct participation in hostilities and war crimes are different categories of crimes may actually encourage compliance with IHL if this distinction can be made clear under domestic law.

This is why, in this author’s opinion, it is essential to maintain the separation between war crimes and domestic crimes, no matter what the actual actus reus may be. The context of armed conflict necessitates different treatment for the reasons explained above, and war crimes should be reserved to those acts during armed conflict that truly represent something beyond the pale even in a situation of armed conflict.

Direct participation in hostilities is not beyond the pale in armed conflict…it is simply a matter of fact. If no one was directly participating in hostilities there would be no armed conflict in the first place. So long as those persons who are directly participating do not commit unlawful acts like targeting civilians, then they should not be prosecuted as war criminals, even though they may be domestically prosecuted.
Part V: Concluding Remarks

As discussed above, States have a sovereign right to enact domestic laws to criminalize attacks or other acts against their soldiers, but States must not forget that by muddying the line between direct participation in hostilities and war crimes, they tear away at what little incentive there is for non-State actors to respect IHL in the first place. The very philosophy behind having rules for armed conflict is based on a recognition that war is as abhorrent as it is inevitable. It is this inevitability that has necessitated rules that allow belligerents to set aside basic peacetime principles and resort to lethal force in the first instance, to detain outside of the criminal process, and to commit acts that would otherwise be prohibited, if it were not for military necessity.

This article is not meant to be a condemnation of a State’s right to prosecute persons who violate domestic law by engaging in an unlawful use of force, but it is meant to encourage States to think twice about designating such acts as “war crimes” under their domestic legal systems. In practice, the U.S. has shifted away from the war crimes model encompassed by the current military commissions for Guantanamo detainees. Instead, it has improved upon and regularly used its own domestic criminal laws on material support for terrorism and other terrorism offenses to convict nearly 500 individuals since 9/11. Nonetheless, the option to convict non-citizens for the “war crime” of mere direct participation in hostilities remains.

States have other ways of penalizing persons who fight against it, including domestic prosecution, detention, or targeting, depending on the circumstances. Categorizing mere

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direct participation in hostilities as a war crime may bring political gains to a State, but it
misuses international law and confuses the very reasons for which rules to govern warfare
were created in the first place. War is horrific enough and enforcement of the rules of IHL is
already an uphill battle. Let’s not make it even more difficult by taking away one of the most
viable incentives for urging compliance with the rules.