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Direct Participation in Hostilities as a War Crime: America's Failed Efforts to Change the Law of War

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DIRECT PARTICIPATION IN HOSTILITIES AS A WAR CRIME: AMERICA'S FAILED EFFORTS TO CHANGE THE LAW OF WAR†

David J. R. Frakt*

I. INTRODUCTION

In recent armed conflicts, there have been a large number of participants who have engaged in hostilities but do not qualify as prisoners of war ("POW") under the Geneva Convention III, Article 4. That is, they are not "[m]embers of the armed forces of a Party to the conflict" or qualifying militia, volunteer corps, organized resistance movements, or *levee en masse*.¹ Such persons are often referred to as "unprivileged belligerents" because they are not entitled to the privilege of being treated as POWs if captured, nor are they entitled to combatant immunity for lawful acts of war—under POW status.² A synonym for unprivileged belligerents that has gained widespread use over the past decade is "unlawful combatants."³ While some unprivileged belligerents

† An early manuscript of this Article was awarded the Lieber Society Richard R. Baxter Military Prize Certificate of Merit at the 2012 Annual Meeting of the American Society of International Law ("ASIL"). The Baxter Prize is a yearly competition which recognizes "a paper that significantly enhances the understanding and implementation of the law of war" "by an active member of the regular or reserve armed forces." The Lieber Society "serves as ASIL's focal point for the study and dissemination of the law of armed conflict, or international humanitarian law, and other public international law related to the conduct of military operations."

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¹ Geneva Convention Relative to the Treatment of Prisoners of War, art. IV, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; see INT'L COMM. OF RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 20 (2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [hereinafter GUIDANCE].

² GUIDANCE, *supra* note 1, at 20; see Major Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 328 (1951) (defining unprivileged belligerents as "persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949"); Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, Program on Humanitarian Pol'y & Conflict Res., Harv. U., Occasional Paper Series No. 2, Winter 2005, available at <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf>.

³ The term "unlawful combatant" is misleading in that it implies (incorrectly as discussed in this Article) that it is a war crime to engage in combat. See *infra* Part III.

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are essentially full-time combatants belonging to organized armed groups, there have also been significant numbers of individuals who participate in armed conflicts on a sporadic or temporary basis, often while maintaining other civilian occupations. The phrase “farmer-by-day, fighter-by-night” has frequently been used to describe such persons.⁴ The official term for them under international humanitarian law (“IHL”) is “Direct Participants in Hostilities” (“DPH”).

The involvement of civilian DPHs in armed conflicts is a vexing problem for the professional armed forces who oppose them, primarily because such persons typically do not distinguish themselves (such as by wearing a uniform) from the civilian population with which they associate. Although a good deal of effort has been devoted in recent years to discussion of the DPH problem, there is much that is still unclear about their legal status and how the laws of war apply to them. One area of agreement about DPH is that: “Civilians who take up arms . . . lose their immunity from attack during the time they are participating in hostilities – whether permanently, intermittently, or only once – and become legitimate targets.”⁵ Because civilians who participate in hostilities can be targeted directly by the military forces they oppose, precisely defining the conduct that qualifies as DPH is a critically important exercise for the modern war-fighter. Accordingly, IHL experts have expended much effort to provide clear detailed guidance on DPH. The most important effort to clarify the concept of direct participation in hostilities was spearheaded by the International Committee of the Red Cross (“ICRC”), which, in 2003, embarked on a multi-year effort to reach a consensus among IHL experts.⁶ Although the ICRC convened several meetings involving numerous distinguished experts between 2003 and 2008, ultimately there were too many areas of contention to produce a unified document. But the ICRC determined that because there was sufficient consensus in key areas, and a substantial need for direction to military personnel in the field, that it

⁴ Dinah PoKempner et al., *Off Target on the Iraq Campaign: A Response to Professor Schmitt*, 6 Y.B. INT’L HUMANITARIAN L. 111, 118 (2003); see GUIDANCE, *supra* note 1, at 12, 72.

⁵ Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SEC. J. 45, 63 (2010); see also Avril McDonald, *The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities* 30 (Univ. of Teheran & Harvard Univ. Humanitarian Law Research Initiative on the Interplay Between Int’l Humanitarian Law & Int’l Human Rights Law, Working Paper, 2004), available at http://www.asser.nl/Default.aspx?site_id=9&level1=13337&level2=13379 (“The most serious consequence of taking a direct part in hostilities has already been alluded to: the civilian loses his or her protected status and may be attacked, for the duration of his or her participation, however long that is determined to be.”).

⁶ See GUIDANCE, *supra* note 1, at 9–10.

should publish some guidance. In 2009, the ICRC released its “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law” (“Guidance”).⁷

Since the release of this seminal document, there have been numerous law review articles critiquing it (including several by experts who participated in the process). In this volume, the reader will find additional discussions of the Guidance.⁸ There is a great deal of debate on certain aspects of DPH, particularly what actions short of direct attacks on enemy armed forces constitute direct participation in hostilities; whether there is an obligation to use the least force necessary when attacking DPHs; and when a civilian regains protection after direct participation in hostilities.⁹ Another important question is what to do with DPHs who are not killed by opposing armed forces, but are captured. The right to target and kill civilians who directly participate in hostilities (combatants) is the ultimate power in war, and by law and implication includes the right to capture and detain them. The appropriate treatment of DPHs and the detainer’s rights and responsibilities have been highly divisive subjects over the last decade. One important aspect of the debate revolves around the potential criminal prosecution of detained DPHs. The ability to detain provides an opportunity to the detaining power to prosecute the DPH “for an

⁷ See *id.*

⁸ See Iain D. Pedden, *Lex Lacunae: The Merging Laws of War and Human Rights in Counterinsurgency*, 46 VAL. U. L. REV. 803, 813–15 (2012); D.A. Jeremy Telman, *Introduction: Targeting in an Asymmetrical World*, 46 VAL. U. L. REV. 697, 701–03 (2012).

⁹ See Bill Boothby, “And for Such Time As”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741 (2010); Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT’L L. & POL. 637 (2010); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 831 (2010); Michael Meyer & Charles Garraway, *Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities*, 59 INT’L & COMP. L.Q. 180 (2010); W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697 (2010); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5 (2010); Major Richard S. Taylor, *The Capture Versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis when Attacking Civilians who are Directly Participating in Hostilities?*, 2010 ARMY LAW. 103 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010).

offence arising out of the hostilities.”¹⁰ But is it a crime for someone who does not meet the Geneva Convention requirements for POW status to directly participate in hostilities? In other words, are all DPHs criminals? If so, are they war criminals, or, rather, common domestic criminals? Contrary to the prevailing international view, the United States has attempted, through the military commissions of Guantánamo, to treat direct participation in hostilities as a war crime. This Article examines that effort.

II. DIRECT PARTICIPATION IN HOSTILITIES IS NOT AN INTERNATIONALLY RECOGNIZED WAR CRIME

As Professor Schmitt has noted, “[c]urrently contentious is the issue of whether mere direct participation, without more, is a war crime.”¹¹ If not a war crime, then the acts constituting direct participation would only be punishable under domestic law. Schmitt concludes that direct participation is not a war crime:

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).¹²

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. 45, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

¹¹ Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 520 (2005).

¹² *Id.* at 520–21 (footnotes omitted). The “dated support” Professor Schmitt references comes from The United Nations War Crimes Commission, 15 *Law Reports of Trials of War Criminals* 89 (1949) and *Ex Parte Quirin*, 317 U.S. 1 (1942). For a critique of the *Quirin* decision on this point, see YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 234 (2004); George P. Fletcher, *The Law of War and Its Pathologies*, 38 COLUM. HUM. RTS. L. REV. 517, 541 (2007) (referring to “the giant leap from the *status* of failing to qualify as a lawful combatant to the *crime* of being an unlawful combatant” in *Quirin* as “one of the greatest legal fallacies” ever); David J. R. Frakt, *Mohammed Jawad and the Military Commissions of Guantánamo*, 60 DUKE L.J. 1367, 1384 (2011);

The ICRC Guidance is even more unequivocal in stating that directly participating in hostilities does not violate the law of war:

[IHL] neither prohibits nor privileges civilian direct participation in hostilities. . . . [Therefore, such participation does not in itself constitute a war crime. However, civilians having directly participated in hostilities can be prosecuted for any offence that they may have committed under domestic law even if, in doing so, they did not violate IHL.] 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.¹³

The Guidance notes that:

Neither the statutes of the Military Tribunals that followed the Second World War (i.e. the International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East in Tokyo), nor the current statutes of the [International Criminal Tribunal for the former Yugoslavia ("ICTY")], the [International Criminal Tribunal for Rwanda ("ICTR")], the [International Criminal Court ("ICC")] and the Special Court for Sierra Leone (SCSL) penalize civilian direct participation in hostilities as such.¹⁴

While many aspects of the Guidance are controversial and the subject of considerable debate among experts, the assertion that "[IHL] neither prohibits nor privileges civilian direct participation in

Major E. John Gregory, *Trying Unlawful Combatants at General Courts-Martial: Amending the UCMJ in Light of the Military Commissions Experience*, 203 MIL. L. REV. 150, 167 (2010) ("Notwithstanding contrary language from *Quirin*, a mere lack of combatant immunity does not automatically render an accused's offense a violation of the law of war." (footnote omitted)).

¹³ GUIDANCE, *supra* note 1, at 83-84 (footnote omitted).

¹⁴ *Id.* at 84 n.226.

hostilities . . . certainly reflects the view of those who took part in the expert meetings.”¹⁵

III. THE ATTEMPTED CRIMINALIZATION OF DIRECT PARTICIPATION IN
HOSTILITIES BY THE UNITED STATES

Although the Guidance was quite correct in noting that no international war crimes tribunal categorizes direct participation in hostilities as a war crime, the Guidance failed to note that the United States, through President Bush’s Executive Order that created military tribunals,¹⁶ and subsequently through the Military Commissions Act (“MCA”) of 2006 and 2009,¹⁷ has attempted to do exactly that, albeit without using this exact terminology. Both the abortive Executive Order establishing military tribunals for Guantánamo detainees, and the subsequent federal legislation creating military commissions ostensibly make direct participation in hostilities into a crime punishable by the detaining power under the law of war. While there is significant controversy at the margins about what constitutes DPH, there are certain activities that unquestionably qualify. The clearest examples are direct attacks on lawful combatants (uniformed soldiers of a state party involved in the conflict) in a zone of conflict intended to kill or seriously injure them. Similarly, a direct attack on military equipment in the zone of conflict—such as tanks and other military vehicles, artillery pieces, and military aircraft—is indisputably DPH. According to the ICRC Guidance, “inflicting death, injury, or destruction” on military personnel and objects constitutes DPH.¹⁸ In fact, “[t]he use of weapons or other means to commit acts of violence against human and material enemy forces is probably the most uncontroversial example of direct participation in hostilities.”¹⁹ These are precisely the acts that U.S. law now criminalizes. Indeed (as will be discussed more fully below), the United States has actually prosecuted, with mixed success, individual civilians for attacks on lawful targets, and continues to assert the authority to do so under the MCA of 2009 and its implementing regulation, the Manual for Military Commissions (“MMC”).

¹⁵ A.P.V. Rogers, *Direct Participation in Hostilities: Some Personal Reflections*, 48 MIL. L. & L. WAR REV. 143, 155–56 (2009).

¹⁶ Proclamation No. 7463, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

¹⁷ See 10 U.S.C. §§ 948a–950w (2006 & Supp. II 2009); see also Jonathan Hafetz, *Redefining State Power and Individual Rights in the War on Terrorism*, 46 VAL. U. L. REV. 843, 849 (2012) (“Congress has twice legislated various offenses triable by military commissions.”).

¹⁸ GUIDANCE, *supra* note 1, at 47.

¹⁹ *Id.* at 47 n.96.

A. *President Bush's Early Military Tribunals*

The first attempt by the United States to seek the criminalization of DPH was introduced in the penal code implementing regulation for the military commissions,²⁰ which was established by executive order on November 13, 2001.²¹ This regulation included the new offense of "Murder by an unprivileged belligerent," which applied to all murders in the context of armed conflict by one who did not "enjoy combatant immunity."²² The term "unprivileged belligerent," while not coextensive with "DPH," unquestionably includes civilians who directly participate in hostilities. Specifically, unprivileged belligerent, according to the MCA:

means an individual (other than a privileged belligerent) who—

(A) has engaged in hostilities against the United States or its coalition partners;

(B) has purposefully and materially supported hostilities against the United States or its coalition partners; or

(C) was a part of al Qaeda at the time of the alleged offense under this chapter.²³

Thus, under the MCA, although the definition of unprivileged belligerents included persons other than civilian DPHs, civilians engaged in hostilities against the United States are clearly not privileged.

A comment in the regulation defining these offenses indicated that the lawfulness of the target under IHL was irrelevant if the attacker was a civilian directly participating in hostilities: "Even an attack on a soldier would be a crime if the attacker did not enjoy 'belligerent privilege' or 'combatant immunity.'"²⁴ No authority was offered to support this proposition. As Professor Schmitt has noted, under "humanitarian law, combatants enjoy no general protection from attack."²⁵ Professor Schmitt further acknowledged:

²⁰ 32 C.F.R. § 11.6 (2005).

²¹ Proclamation No. 7463, 66 Fed. Reg. at 57,833.

²² 32 C.F.R. § 11.6(b)(3) (emphasis omitted).

²³ 10 U.S.C. § 948a(7) (Supp. III 2010) (emphasis added). "The term 'privileged belligerent' means an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War." *Id.* § 948a(6). "The term 'hostilities' means any conflict subject to the laws of war." *Id.* § 948a(9).

²⁴ 32 C.F.R. § 11.6(b)(3)(ii)(B) (2005).

²⁵ Schmitt, *supra* note 11, at 520.

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No treaty (including the statutes governing international courts such as the [ICC, ICTY], and [ICTR]) suggests that targeting a combatant is unlawful. Rather, combatants are only protected from attack when they are *hors de combat* because they have surrendered, are sick or wounded and not carrying on the fight, are shipwrecked, or have parachuted from a disabled aircraft.²⁶

The penal code included a separate offense, “*Willful killing of protected persons*,”²⁷ to encompass attacks on such persons “protected under the law of war.”²⁸

In addition to criminalizing attacks on soldiers, the penal code also criminalized attacks on military property through the offense of “*Destruction of property by an unprivileged belligerent*.”²⁹ Although the elements of this offense did not specify that military property qualified, it is clear from the context that the offense was intended to cover military property rather than civilian property because the penal code separately listed the offense of “*Attacking civilian objects*.”³⁰ The elements of that offense specified that this provision applied only when “[t]he object of the attack was civilian property, that is, property that was not a military objective.”³¹ The regulation also listed a separate crime for “*Attacking Protected Property*,”³² (property with protected status under the law of war), leaving military property as the only type of property not explicitly covered by the other crimes.³³

The Department of Defense (“DOD”), which issued the implementing regulation, asserted that these offenses were nothing new, stating: “These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission.”³⁴ The regulation further stated that the “list of crimes triable by military

²⁶ *Id.* n.44.

²⁷ 32 C.F.R. § 11.6(a)(1) (2005).

²⁸ *Id.* § 11.6(a)(1)(C).

²⁹ *Id.* § 11.6(b)(4).

³⁰ *Id.* § 11.6(a)(3) (emphasis omitted); *see id.* (recognizing that only unprivileged belligerents were subject to the jurisdiction of the military tribunal, and thus the offense could just as well have been called *attacking civilian objects by an unprivileged belligerent*).

³¹ *Id.* § 11.6(a)(3)(i)(B).

³² *See id.* § 11.6(a)(4) (emphasis omitted).

³³ Given that all attacks on property of any kind by unprivileged belligerents were criminalized, it is not clear why three separate offenses were thought to be required.

³⁴ *Id.* § 11.3(a).

commission . . . [was] intended to be illustrative of applicable principles of the common law of war.”³⁵ While many of the offenses listed in the penal code were unquestionably part of the law of war (e.g., grave breaches of the Geneva Convention), criminalizing direct participation in hostilities was a novel and untested concept.

Of course, this initial attempt at establishing military commissions was invalidated by the U.S. Supreme Court in *Hamdan v. Rumsfeld* in the summer of 2006,³⁶ before any “unprivileged belligerent” was ever convicted of an offense based on direct participation in hostilities, or any other offense. But the Bush administration was determined to prosecute at least some detainees in military commissions, including civilians who had allegedly directly participated in hostilities. Shortly after *Hamdan*, the administration submitted proposed legislation to Congress authorizing the creation of military commissions.

B. *The MCA*

In October 2006, President Bush signed into law the MCA of 2006.³⁷ Congress largely incorporated the list of criminal offenses from the prior DOD regulation into the MCA, with a couple of exceptions. The offense “*Murder by an unprivileged belligerent*” was replaced with the offense of “*Murder in Violation of the Law of War*,”³⁸ while the related offense, “*Destruction of [P]roperty by an [U]nprivileged [B]elligerent*” was similarly amended to “*Destruction of Property in Violation of The Law of War*.”³⁹

Initially, it was not clear if Congress intended “*Murder in Violation of the Law of War*” to be substantively different than “*Murder by an unprivileged belligerent*” or was simply a cosmetic name change.⁴⁰ The definition of the offense referenced the killing of “lawful combatants,”

³⁵ *Id.* § 11.3(c). *But see id.* § 11.6 (noting, interestingly, that the offenses of murder and destruction of property “by an unprivileged belligerent” were not identified as “[s]ubstantive offenses – war crimes,” but rather as “[s]ubstantive offenses – other offenses triable by military commission”). This suggests that the drafters of the MCA were aware that such conduct could not properly be characterized as a war crime. The authority for trying non-war crimes in a military commission, particularly when regular courts are open for business, is unclear.

³⁶ 548 U.S. 557 (2006).

³⁷ Military Commissions Act of 2006, 10 U.S.C. §§ 948a–950w (2006).

³⁸ *See id.* § 950v(b)(15) (replacing the “*Murder by an unprivileged belligerent*” offense from 32 C.F.R. § 11.6(b)(3)).

³⁹ *See* 10 U.S.C. § 950v(b)(16) (replacing “*Destruction of property by an underprivileged belligerent*” offense from 32 C.F.R. § 11.6(b)(4)).

⁴⁰ Compare 10 U.S.C. § 950v(b)(15) (providing the text of *Murder in Violation of the Law of War*), with 32 C.F.R. § 11.6(b)(3) (presenting the text of *Murder by an unprivileged belligerent*).

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but also specified that such killing should be “in violation of the law of war,”⁴¹ a requirement not specifically included in the elements of Murder by an unprivileged belligerent under the DOD regulation. Regardless of Congress’ intent, the DOD interpreted the new offense to be identical to its predecessor by defining the new element of a law of war violation as being satisfied by simply being an unprivileged belligerent. According to a comment in the MMC (the implementing regulation for the MCA),⁴² “[f]or the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy.”⁴³ Taking acts as a combatant, or direct participation in hostilities was deemed a *per se* violation of the law of war.⁴⁴

This comment also cross-referenced two other offenses: “Destruction of [P]roperty in [V]iolation of the [L]aw of [W]ar” (making it a crime for an unlawful combatant to destroy any property belonging to another), and a newly introduced offense—“Intentionally causing serious bodily injury.”⁴⁵ The now defunct DOD regulation for the original military tribunals had listed an offense of “*Causing serious injury*” as a war crime, but the elements of the offense made no reference to privileged belligerents as a class of victims.⁴⁶ Rather, the only victims covered were persons “in the custody or under the control of the accused.”⁴⁷ It is a recognized war crime and a grave breach of the Geneva Conventions to cause serious injury to a protected person.⁴⁸

⁴¹ Compare 10 U.S.C. § 950v(b)(15) (using the phrase “lawful combatants” in the definition of the Murder in Violation of the Law of War crime), with *id.* § 950t(15) (Supp. III 2009) (changing lawful combatants to “privileged belligerents”).

⁴² U.S. MANUAL FOR MILITARY COMM’NS pt. IV, § 6(15)(b), at IV-12 (2007). The elements of the offense are as follows:

- (1) [o]ne or more persons are dead;
- (2) [t]he death [or deaths] of the persons resulted from the act or omission of the accused;
- (3) [t]he killing was unlawful;
- (4) [t]he accused intended to kill the person or persons;
- (5) [t]he killing was in violation of the law of war; and
- (6) [t]he killing took place in the context of and was associated with an armed conflict.

Id.

⁴³ *Id.* § 6(13)d, at IV-11.

⁴⁴ See Frakt, *supra* note 12, at 1383-85 (implying that there remains little or no legal support for this assertion).

⁴⁵ 10 U.S.C. § 950v(b)(13), (16) (2006).

⁴⁶ See 32 C.F.R. § 11.6(a)(12) (2011).

⁴⁷ *Id.*

⁴⁸ See Rome Statute of the International Criminal Court, art. 8, ¶2(a)(iii), July 17, 1998, 2187 U.N.T.S. 3, 90, available at [http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf); Updated Statute of the International Criminal Tribunal for the Former

Persons under the custody or control of enemy belligerents are protected persons. The description of the new offense “Intentionally causing serious bodily injury” in the MCA is not limited to such detained persons, and specifically included “lawful combatants.”⁴⁹

The MCA’s penal code also includes the inchoate offense of “Attempt[],” making any intentional attempt to commit another listed offense punishable to the same extent as the target offense.⁵⁰ Ultimately, under the 2006 MCA, any attacks aimed at seriously injuring or killing a U.S. or coalition soldier, or destroying U.S. or coalition military property, successful or otherwise, was considered a crime punishable by a military commission. According to U.S. law, all direct participation in hostilities by an unlawful combatant was a war crime.

IV. THE CRIMINALIZATION OF INDIRECT PARTICIPATION IN HOSTILITIES

The United States actually went beyond merely criminalizing DPH; indirect participation in hostilities is also punishable by a military tribunal. Under IHL, those who indirectly participate in hostilities are not lawful targets of attack, but, according to the United States, they may nevertheless be lawful targets for prosecution as war criminals. The MCA authorizes punishment for several offenses that are appropriately characterized as indirect participation in hostilities. First, there is the crime of solicitation, which punishes “[a]ny person . . . who solicits or advises another or others to commit one or more substantive offenses triable” under the MCA.⁵¹

Thus, asking or encouraging another to directly participate in hostilities against the United States or our coalition partners (by attacking our forces or materiel) is a punishable offense under the MCA. The controversial offense of Material Support to Terrorism, another freshly invented war crime, allows for the punishment of even more indirect participation in hostilities by subjecting those “who intentionally

Yugoslavia, art. 2(c), Sept. 2008, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 116; Geneva Convention Relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 3420, 75 U.N.T.S. 135, 238; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 3618, 75 U.N.T.S. 287, 388.

⁴⁹ 10 U.S.C § 950v(b)(13)(a). The phrase “privileged belligerents” was substituted for “lawful combatants” in the 2009 MCA. See *supra* note 43 and accompanying text.

⁵⁰ 10 U.S.C § 950t.

⁵¹ 10 U.S.C § 950u.

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provide[] material support or resources to an international terrorist organization engaged in hostilities against the United States” to prosecution.⁵²

The 2006 MCA gave jurisdiction to the military commissions over an unlawful enemy combatant, defined as a person “who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant.”⁵³ Thus, proof of direct or indirect participation in hostilities served both to establish both the basis for jurisdiction under the MCA and that an offense was committed.

V. THE PROSECUTION OF DIRECT PARTICIPATION IN HOSTILITIES

The fact that both direct and indirect participation in hostilities were made punishable under the MCA should have meant that virtually all

⁵² *Id.* § 950v(b)(25); *see, e.g.*, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Addendum*, Human Rights Council 12, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007) (by Martin Scheinin) (“[T]he offences listed in Section 950v(24)-(28) of the [MCA] (terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying, and conspiracy) go beyond offences under the laws of war.”); PETER VICKERY ET AL., *ADVICE: IN THE MATTER OF THE LEGALITY OF THE CHARGE AGAINST DAVID HICKS 4* (2007), available at http://cigj.anu.edu.au/cigj/link_documents/Media/LCA-Hicks_Advice_8_March_2007.pdf (“[T]here is no agreed definition of the international crime of terrorism in the Law of War as it currently stands and so there can be no crime of ‘providing material support for terrorism’ in the Law of War either.”); George P. Fletcher, *Hamdan Confronts the Military Commissions Act of 2006*, 45 COLUM. J. TRANSNAT’L L. 427, 446 (2007) (“[N]either conspiracy nor membership in a terrorist organization meets the standards of an international crime acceptable to the leading legal systems of the world.”); David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 177 (2008) (“[W]hile providing material support to terrorism is clearly an offense against U.S. federal law, its trial as a war crime seems unprecedented.” (footnote omitted)). *But see* *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1268 (U.S. Ct. Military Comm’n Review 2011) (en banc) (explaining that material support to terrorism is properly within Congress’ authority to define and punish war crimes and is consistent with the law of war).

⁵³ 10 U.S.C. § 948a(1)(A)(i). The term unlawful enemy combatant was changed to “[u]nprivileged [e]nemy [b]elligerent” in 10 U.S.C. § 948a(7) (Supp. III 2009). The revised MCA also changed the term “co-belligerents” to “coalition partners.” 10 U.S.C. § 948a(7) (Supp. III 2009). The statute provides the following:

The term “unprivileged enemy belligerent” means an individual (other than a privileged belligerent) who—

- (A) has engaged in hostilities against the United States or its coalition partners;
- (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
- (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

lawful detainees at Guantánamo were subject to prosecution under the MCA. The current standard for detention, asserted by the United States in habeas corpus litigation in March 2009, is, in pertinent part:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.⁵⁴

Comparing this definition to the jurisdictional provision of the MCA suggests that any detainee who met the standard for detention should also have been prosecutable under the MCA. Certainly, any detainee who had directly participated in hostilities against the United States was eligible for prosecution. In practice, only a small fraction of detainees were considered suitable candidates for prosecution,⁵⁵ and only a small number of prosecutions have been attempted. Disturbingly, of seven persons convicted in military commissions thus far (two by trial, five by guilty plea), none have been prosecuted for any war crimes recognized by modern international war crimes tribunals. Rather, as described below, in five of seven cases, they have been charged and convicted solely of terrorism offenses.⁵⁶ In two of these cases, direct participation in hostilities served, at least in part, as the factual predicate for the convictions. In the sixth and seventh cases, the charges combined

Id.

⁵⁴ Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantanamo Bay Detainee Litigation*, No. 08-0442 (D.D.C. filed March 13, 2009), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>.

⁵⁵ GUANTANAMO REVIEW TASK FORCE, FINAL REPORT ii (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>. At most, about seventy-five of the nearly eight hundred persons detained at Guantánamo were seriously considered for prosecution. *Id.* at ii, 2. After a review by the Obama administration of all remaining detainees, about three dozen were considered solid candidates for prosecution. *Id.* at ii.

⁵⁶ See *infra* Part V.A.1-5 (providing the terrorism offenses, including terrorism, material support to terrorism, and conspiracy (to commit acts of terrorism)).

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terrorism offenses, spying,⁵⁷ and the new offenses under the MCA explicitly designed to criminalize direct participation in hostilities. In addition to the seven cases resulting in conviction, one other commission case, which was based exclusively on alleged direct participation in hostilities, was dismissed during pre-trial litigation.

A. *Prosecutions under the MCA of 2006*

1. David Hicks

The first person to be convicted by military commission, in March 2007, was an Australian, David Hicks. Hicks pled guilty to one charge of material support to terrorism. A review of the charges to which he pled guilty, and the factual predicate for them, reveals that his conviction was largely based on attending al Qaeda training camps before 9/11, and fighting, or attempting to fight, U.S. and coalition forces in the fall of 2001 in Afghanistan. Hicks admitted to traveling from Pakistan into Afghanistan and joining front-line Taliban and al Qaeda forces in Kunduz as a combatant during active hostilities. The charge against Hicks is of dubious validity, and it is clear that he pled guilty solely because of the highly favorable plea offer negotiated by his defense counsel.⁵⁸ Certainly, there is no legal basis under the law of war for punishing an Australian citizen for attending a training camp in Afghanistan during peacetime. And it is not clear why engaging in combat with opposing armed forces in an international armed conflict supports a charge of providing material support to terrorism.⁵⁹ There was no evidence tying Hicks to any terrorist attacks on civilians. In essence, Hicks was prosecuted for his voluntary and direct participation in hostilities against the United States.⁶⁰

⁵⁷ 10 U.S.C. § 950t(27). Acts of espionage are not prohibited under the law of armed conflict and are not war crimes. However, spies are not entitled to protection as prisoners of war and may be prosecuted under the domestic law of the capturing state. Spying is an offense traditionally triable by a military tribunal.

⁵⁸ Hicks received a nine month sentence, which he was allowed to serve in Australia, then released.

⁵⁹ At the time of Mr. Hicks' involvement, the United States and coalition forces were engaged in an international armed conflict with the Taliban, then the Afghanistan government.

⁶⁰ See Schmitt, *supra* note 11, at 520 (referring to an earlier attempted prosecution of David Hicks under President Bush's executive order authorizing military tribunals, scholar, Michael N. Schmitt, noted that Hicks' alleged crimes did not appear to violate the law of war, and surmised "[p]erhaps, then, prosecution [was] based on Hicks' alleged status as an unprivileged belligerent").

2. Salim Hamdan

The next person to be convicted by military commission was Salim Hamdan, Osama bin Laden's driver. Although charged with multiple specifications of conspiracy and providing material support to terrorism, Hamdan was acquitted of the most serious charges.⁶¹ He was convicted of providing material support to terrorism. His conviction was based on the following acts:

- (a) Received training at an al Qaeda training camp;
- (b) Served as a driver for [O]sama bin Laden transporting him to various locations in Afghanistan;
- (c) Served as [O]sama bin Laden's armed bodyguard at various locations throughout Afghanistan;
- (d) Transported weapons or weapons systems or other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to Taliban or al Qaeda members and associates.⁶²

The commission found that Hamdan intentionally provided support to al Qaeda knowing that al Qaeda was "an international terrorist organization engaged in hostilities against the United States," and "such organization ha[d] engaged or engages in terrorism," and that his contributions would "facilitate[] communication and planning used for . . . act[s] of terrorism."⁶³

Was Hamdan a DPH? Of the four acts offered by the prosecution, only section "d" could arguably be considered a hostile act. According to the ICRC Guidance, the civilian driver of an ammunition truck would be considered a DPH if delivering "to an active firing position at the front line" whereas he would not be if "[t]ransporting ammunition from a factory to a port for further shipping to a storehouse in a conflict zone" because such transportation would be "too remote from the use of that ammunition in specific military operations."⁶⁴ The same logic would apply to the transportation of weapons. Although arguably he was punished in part for direct participation in hostilities, the gravamen of his offense was his direct support to al Qaeda before the outbreak of

⁶¹ Mr. Hamdan was acquitted of conspiracy to attack civilians, commit murder in violation of the law of war, destroy property, engage in terrorism and murder of U.S. and coalition members. See *United States v. Hamdan*, Report of Result of Trial (August 7, 2008).

⁶² *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1258 (U.S. Ct. Military Comm'n Review 2011) (en banc).

⁶³ *Id.* at 1258, 1274.

⁶⁴ GUIDANCE, *supra* note 1, at 56.

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armed conflict in Afghanistan. Like Hicks, Hamdan received an exceedingly light sentence (sixty-one months, with credit for fifty-five months served).

3. Ali Hamza al Bahlul

The next person to be convicted in a military commission was Ali Hamza al Bahlul.⁶⁵ Mr. al Bahlul was convicted of conspiracy to commit various offenses, solicitation to commit various offenses, and providing material support to terrorism. Mr. al Bahlul was a long-time member of al Qaeda and served as a personal secretary and media advisor to Osama bin Ladin. The charges were based largely on pre-9/11 activities.⁶⁶ It was not alleged that Mr. al Bahlul attacked U.S. or coalition troops, or otherwise participated directly or indirectly in the armed conflict in Afghanistan. Mr. al Bahlul received a life sentence. His appeal of his conviction was denied by the U.S. Court of Military Commission Review on September 9, 2011.⁶⁷

4. Mohammad Jawad

Hicks, Hamdan, and al Bahlul were the only persons convicted under the 2006 MCA, but there was one other case initiated under the law that presents the clearest example of prosecution of a detainee for direct participation in hostilities. The case ended not in conviction, but in dismissal of all charges, followed by release.

The prosecution of Mr. Jawad, whom I represented,⁶⁸ was perhaps the most notable failure of the military commissions.⁶⁹ It was also the case that relied most clearly on a direct participation in hostilities theory. As one military commentator has observed, the case was based

⁶⁵ In addition to my civilian position as a law professor, I am a Lieutenant Colonel in the U.S. Air Force Reserve Judge Advocate General's ("JAG") Corps. In my JAG capacity, I served as a Defense Counsel with the Office of Military Commissions from April 2008 to August 2009. During this time, I was Mr. al Bahlul's appointed military counsel, but he requested that I remain silent during the trial, a request that I honored. Because Mr. al Bahlul's request to represent himself was denied, no defense was offered at his trial.

⁶⁶ Charge Sheet of Ali Hamza al Bahlul at 1-2, *United States v. al Bahlul* (Military Comm'n Guantánamo Bay, Cuba Feb. 8, 2008), available at <http://www.defense.gov/news/AE%201-13.pdf>.

⁶⁷ *United States v. al Bahlul*, CMCR 09-001 (U.S. Ct. Military Comm'n Review Sept. 9, 2011) (en banc), available at <http://www.lawfareblog.com/wp-content/uploads/2011/09/al-Bahlul-USCt-Mil-Comm-Review-Sept-9-2011-1.pdf>.

⁶⁸ See *supra* note 65 (providing Frakt's credentials and presenting another case where he represented a defendant in his JAG capacity).

⁶⁹ See Frakt, *supra* note 12.

exclusively on Jawad's alleged direct participation in hostilities.⁷⁰ In fact, Jawad is the only person to have been charged in the military commissions to date who was not charged with at least one terrorism-related offense (conspiracy, material support to terrorism, or terrorism), and who was not alleged in the charges to be a member of al Qaeda, the Taliban, or an associated group. Rather, Jawad, an Afghan citizen, was charged with attacking U.S. soldiers. Specifically, Jawad was alleged to have thrown a hand-grenade that injured two uniformed U.S. soldiers and their civilian interpreter. The grenade attack occurred in a crowded bazaar in downtown Kabul, Afghanistan on December 17, 2002. The assailant threw the hand-grenade through the rear window of a military vehicle.

Based on this incident, Jawad was charged with three specifications (counts) of "Attempted Murder in Violation of the Law of War" and three specifications of "Intentionally Causing Serious Bodily Injury."⁷¹ The serious bodily injury charges were later dismissed by the judge on a motion by the defense,⁷² when he found them to be a lesser included offense of the attempted murder charge. The defense also filed a motion to dismiss the attempted murder charges on the basis that the facts alleged did not constitute a violation of the law of war. The defense's motion asserted that throwing a hand grenade—a lawful weapon—at enemy soldiers in a military vehicle—a lawful target—did not violate the law of war, and therefore the military commission lacked subject matter jurisdiction over the offense.⁷³ The government responded that Jawad's

⁷⁰ See Gregory, *supra* note 12, at 150–51 (arguing that in light of the difficulty of prosecuting alleged unlawful combatants, such as Jawad, in the military commissions, the UCMJ should be revised to provide jurisdiction over those who directly participate in hostilities, enabling Jawad to be prosecuted for criminal offenses not amounting to a violation of the law of war).

⁷¹ Charge Sheet of Mohammed Jawad at 3–4, *United States v. Jawad* (U.S. Ct. Military Comm'n Review Oct. 9, 2007), available at <http://www.defense.gov/news/Jan2008/d20080130jawadcharge.pdf>.

⁷² Defense Motion to Dismiss Charge II and its Specifications for Multiplicity and Unreasonable Multiplication of Charges (D-006) at 1, *United States v. Jawad* (Military Comm'n Guantánamo Bay, Cuba May 23, 2008), available at <http://www.defense.gov/news/Jawad%20-%20D%20-%20006%20Motion%20to%20Dismiss%20Charge%20II.pdf>. This motion was granted orally by the military judge. See Transcript of Record at 411, *United States v. Jawad* (Military Comm'n Guantánamo Bay, Cuba June 19, 2008).

⁷³ Defense Motion to Dismiss for Failure to State an Offense and for Lack of Subject Matter Jurisdiction under R.M.C. 907 (D-007) at 7, *United States v. Jawad* (Military Comm'n Guantánamo Bay, Cuba May 28, 2008), available at <http://www.defense.gov/news/d20080528DefenseMotionToDismissforFailuretoStateanOffense-LackofSubjectMatterJurisdictionD-007.pdf> ("In sum, Mr. Jawad did not commit an attack against a protected person or through a prohibited means. Even assuming he qualifies for personal jurisdiction as an unlawful enemy combatant, this status does not convert his alleged

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status as an unlawful combatant, a civilian not entitled to participate in the conflict, rendered any hostile acts in which he engaged violations of the law of war.

The military judge flatly rejected the government's theory. In his ruling, issued September 24, 2008, the judge held that "the propriety of the charges in this case must be based on the nature of the act" – the "method, manner or circumstances" of the attack – not merely the status of the actor.⁷⁴ He rejected "the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war."⁷⁵ However, based on an assertion by the government that it had additional evidence to support a law of war violation,⁷⁶ a claim the prosecution later admitted was untrue,⁷⁷ the judge declined to grant the defense motion to dismiss the charges. Interestingly, although the prosecution ostensibly won the motion because the charges were not dismissed, the government was so dissatisfied with the judge's ruling that it filed a motion for reconsideration.⁷⁸ In the reconsideration motion, the government took the unusual step of requesting the judge to dismiss the charges if he was unwilling to amend his ruling to permit the government to proceed on its unlawful combatancy theory, so that it could have the option of filing an interlocutory appeal to the U.S. Court of Military Commission Review.⁷⁹ The government took great pains to emphasize the critical nature of the ruling on this "central and hotly contested issue" to the viability of the military commissions themselves, by noting the "seminal

grenade toss into a war crime. This Commission therefore has no subject matter jurisdiction to try Mr. Jawad for attempted murder and causing serious bodily injury.").

⁷⁴ United States v. Jawad, 1 M.C. 331, 334 (Military Comm'n Guantanamo Bay, Cuba Sept. 24, 2008) (ruling on Defense Motion to Dismiss – Lack of Subject Matter Jurisdiction (D-007)).

⁷⁵ *Id.* at 332.

⁷⁶ See Transcript of Record, *supra* note 72, at 583 ("We'll play out a lot more facts and circumstances to show that it goes beyond just a mere status as the basis of the charge." (quoting Lieutenant Colonel Stevenson, Assistant Trial Counsel)); *id.* at 706 ("At one of the previous sessions, Colonel Stevenson, my recollection is, when asked by myself, you offered a position that the government would be able to prove a law of war violation without reference to status." (quoting Colonel Henley, Military J.)).

⁷⁷ See Government Reply to Defense Response to Motion for Reconsideration (D-007) at 12, United States v. Jawad (Military Comm'n Guantánamo Bay, Cuba Oct. 21, 2008), available at <http://www.defenselink.mil/news/d20081104JawadD007Reconsider.pdf> (beginning on p. 15) ("Under the military judge's current construction of the M.C.A., the evidence the government intends to offer at trial will *not* establish the requirement of the 'in violation of the law of war' element as the military judge construes it.").

⁷⁸ Government Motion for Reconsideration (D-007), United States v. Jawad (Military Comm'n Guantánamo Bay, Cuba Oct. 9, 2008), available at <http://www.defense.gov/news/d20081104JawadD007Reconsider.pdf> (beginning on p. 2).

⁷⁹ See Government Reply to Defense Response to Motion for Reconsideration, *supra* note 77, at 12.

importance of this issue to multiple pending and anticipated cases for which this case may appear to set a precedent," and by articulating "the importance of this ruling to this and future cases."⁸⁰ Lest there be any doubt about it, the government reiterated in the closing paragraph of its filing "that [the] issue is of central importance to this case, specifically, and to the military commission process, in general."⁸¹

Despite these pleas, the motion for reconsideration was summarily rejected by the judge, who called the government's arguments "unpersuasive." He reiterated that "proof that the Accused is an alien unlawful enemy combatant alone will be insufficient at trial to find the alleged acts of attempted murder in this case were in 'in violation of the law of war.'"⁸² Nevertheless, Judge Henley declined to dismiss the charges, informing the prosecutors that it was their ethical obligation to do so if they could not prove them.⁸³

Judge Henley's ruling was not an aberration. In the two other cases to consider the issue, the military commission judges similarly rejected the prosecution's theory that the mere status of being an unlawful combatant amounted to a violation of the law of war. Several weeks before the ruling in *Jawad*, in *United States v. Hamdan*, Judge Keith Allred refused to give a government requested jury instruction "that unlawful belligerency is a per se violation of the law of war,"⁸⁴ stating "there is no offense under the law of war of murdering a lawful combatant."⁸⁵ A few weeks after the *Jawad* ruling, in *United States v. al Bahlul*, Judge Ronald Gregory also refused to give the prosecution's requested jury instruction identifying unlawful belligerency as a violation of the law of war, adopting instead Judge Henley's formulation from his ruling in the *Jawad* case.⁸⁶ These rulings placed the continued viability of some military commission cases in serious jeopardy, as the government planned to rely

⁸⁰ *Id.* at 6, 10, 12; see also *infra* Part V.A.4.b.1 (discussing an example of one of the pending cases to which the prosecution refers).

⁸¹ Government Reply to Defense Response to Motion for Reconsideration, *supra* note 77, at 12.

⁸² Transcript of Record at 708, *United States v. Jawad* (Military Comm'n Guantanamo Bay, Cuba Sept. 25, 2008) (on file with *Valparaiso University Law Review*).

⁸³ See *id.* ("[T]he government always has an ethical obligation to not proceed to trial, knowing that it can't prove a case beyond a reasonable doubt."). The prosecutors declined multiple requests from the defense to voluntarily dismiss the charges while awaiting a decision on their interlocutory appeal of another ruling by Judge Henley, granting a defense motion to suppress. *Id.*

⁸⁴ Transcript of Record at 3765, *United States v. Hamdan* (Military Comm'n Guantánamo Bay, Cuba Aug. 1, 2008), available at <http://www.defense.gov/news/20-21-Hamdan-1 Aug and 4 Aug 08-FINAL-3648-3890 Redacted.pdf>.

⁸⁵ *Id.* at 3823.

⁸⁶ See Frakt, *supra* note 12, at 1388–89 nn.119–20.

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on the status of the accused in other cases. For example, the government was also relying on an unlawful combatancy theory in the pending case against Canadian juvenile Omar Khadr. Khadr's trial was next on the military commission docket when Judge Henley issued his rulings in the *Jawad* case.

Both Jawad's and Khadr's cases were put on hold when President Obama suspended all military commission activity shortly after assuming office in January 2009. During this suspension period, the U.S. District Court took up Jawad's long dormant habeas corpus petition.⁸⁷ Initially, the Justice Department asserted that Jawad met the standard for detention as an enemy combatant because he had thrown a hand-grenade at U.S. forces, the same factual basis underlying the military commission charges. In July 2009, after more than six and a half years in U.S. military custody, the Justice Department changed its mind, concluding that Jawad was not an enemy combatant after all, and dropped its opposition to the petition.⁸⁸ The writ was granted on July 30, 2009, and Jawad was ordered released.⁸⁹ The next day, the military commission charges were dismissed.⁹⁰ In August 2009, Jawad returned to Afghanistan.⁹¹

On the same day of Jawad's final habeas hearing, I was invited to testify before a House Judiciary Subcommittee considering proposals to reform the military commissions. I attempted to convince Congress that the MCA should be amended to make it clear that simply participating in hostilities without legal authority, in other words, being an unprivileged belligerent, did not convert all hostile acts into war crimes. In my testimony, I urged Congress to adopt Judge Henley's reasoning in the *Jawad* case and include the following language in the MCA: "The

⁸⁷ See Amended Petition for Writ of Habeas Corpus on Behalf of Mohammed Jawad (Also Known as Saki Bacha) at 2, *Al Halmandy v. Bush*, No. 05-cv-2385 (D.D.C. Jan. 13, 2009), available at http://www.aclu.org/pdfs/natsec/amended_jawad_20090113.pdf; see also *Al Halmandy v. Obama*, 612 F. Supp. 2d 45, 46-48 (D.D.C. 2009) (providing the order amending the Case Management Order and directing the government to respond to the petition and illustrating that the original petition was filed in 2005, and an amended petition was not filed until nearly four years later in January 2009).

⁸⁸ See Notice that Respondents Will No Longer Treat Petitioner as Detainable Under the AUMF and Request for Appropriately Tailored Relief, *Al Halmandy v. Obama*, No. 05-cv-2385 (D.D.C. July 24, 2009), available at http://www.aclu.org/files/pdfs/safefree/alhalmandyvobama_govtfiling.pdf.

⁸⁹ See *Bacha v. Obama*, No. 05-2385, 2009 WL 2365846, at *1 (D.D.C. July 30, 2009) (presenting the order granting Jawad's petition for a writ of habeas corpus).

⁹⁰ See Letter from Susan J. Crawford, Convening Auth. for Military Comm'ns (July 31, 2009), available at <http://www.defense.gov/news/Direction%20of%20CA%20-%20Jawad%2031%20JUL%202009.pdf>.

⁹¹ See, e.g., Associated Press, *Guantanamo Detainee Released*, N.Y. TIMES, Aug. 25, 2009, at A8, available at <http://www.nytimes.com/2009/08/25/world/asia/25gitmo.html>.

mere status of being an unprivileged enemy belligerent, without more, is insufficient to establish that an act was 'in violation of the law of war.'"⁹² I proposed that Congress define the phrase "in violation of the law of war" to mean "in a method or manner or under circumstances which violate the law of war."⁹³ But I also warned Congress that if it properly limited the military commissions to traditional law of war violations, "there is not going to be anybody to try."⁹⁴ This assertion prompted a follow-up question to me from Committee Chair Jerrold Nadler:

Mr. Nadler. Thank you. Can I just clarify one question before we go on to the next statement? Why did you say there would be nobody to try in . . . properly constituted military commissions for law of war violations?

Major Frakt. Because, Mr. Chairman, none of the people that have been charged have been charged with actual law of war offenses.

Now, I want to say there is one exception to that. There is a crime called murder in violation of the law of war, which sounds like a war crime. Certainly, if a murder was in violation of the law of war, that would be a war crime.

However, the prior Administration took the position that murder in violation of the law of war was simply murder by an unprivileged belligerent or murder by an enemy combatant.

In other words, the mere status of being an unlawful combatant—the jurisdictional prerequisite was—converted any act of fighting, any act of attempt to kill U.S. soldiers, into a war crime . . . that has been challenged by the defense counsel in the military commissions.

We have [had] three different judges in three different cases decide that the government's interpretation of that law was wrong and that what Congress really intended was that in violation of the law of war means that there was something in the manner or

⁹² *Proposals for Reform of the Military Commissions System: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 90, 105 (2009) (statement of Major David J. R. Frakt, U.S. Air Force Reserve, Lead Defense Counsel, Office of Military Commissions—Defense).*

⁹³ *Id.*

⁹⁴ *Id.* at 91.

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method or circumstances that violated the law of war beyond simply being an unlawful combatant.

So we don't have examples of during the actual armed conflict of people committing traditional law of war offenses.⁹⁵

Perhaps not surprisingly, given many Congress members' strong preference to try Guantánamo detainees before military commissions,⁹⁶ my suggestion to amend the MCA in a way that would limit the number of detainees who could be tried was not adopted. In fact, the MCA of 2009 made no significant changes to the list of crimes that could be charged. All of the offenses that potentially criminalized direct participation in hostilities were left intact. But the question remained whether the DOD would continue to pursue its interpretation of these crimes, in light of the multiple decisions at the trial level rejecting its theory. It took several months before this question was answered.

As it had been in 2006, the DOD was the lead agency responsible for drafting implementing regulations to the MCA of 2009.⁹⁷ In April 2010, the DOD issued a new MMC,⁹⁸ which included the elements of the crimes, as well as explanatory comments. Interestingly, the new MMC omitted the prior comment upon which the government had relied in earlier prosecutions based on unlawful combatant status,⁹⁹ instead substituting the following perplexing language:

[A]n accused may be convicted in a military commission . . . if the commission finds that the accused . . . engaged in conduct traditionally triable by military commission (e.g., spying, murder committed while the accused did not meet the requirements of

⁹⁵ *Id.* at 107-08.

⁹⁶ In fact, this preference is now enshrined in law, as Congress has barred the transfer of detainees to the United States even to face criminal charges in federal court. *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137, 4351 (2011); Ann Riley, *Obama Signs Law Barring Transfer of Guantanamo Detainees to US for Trial*, JURIST (Jan. 9, 2011), <http://jurist.org/paperchase/2011/01/obama-signs-law-barring-transfer-of-guantanamo-detainees-to-us-for-trial.php>.

⁹⁷ *See* 10 U.S.C. § 949a(a) (Supp. III 2009) ("Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense.").

⁹⁸ *See* U.S. MANUAL FOR MILITARY COMMISSIONS (2010).

⁹⁹ *See id.* pt. IV, § 6(13)(d), at IV-11 (2007) ("For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy.").

privileged belligerency) *even if such conduct does not violate the international law of war.*¹⁰⁰

The italicized language seems to be an acknowledgment that the mere act of fighting by an unprivileged belligerent, even if it results in killing an enemy soldier, does not violate the international law of war.

What prompted the DOD to withdraw the earlier comment? Why did they abandon their steadfast position that direct participation in hostilities (“tak[ing] acts as a combatant without having met the requirements for lawful combatancy”) violates the international law of war? According to an article in the New York Times, the change was prompted by concerns expressed by the Legal Advisor to the State Department, Harold Koh, that the continued use of such language would have implications for the CIA Predator drone program.¹⁰¹ Specifically, Mr. Koh “pointed out that such a definition could be construed as a concession by the United States that C.I.A. drone operators were war criminals.” The Obama administration has repeatedly claimed that CIA drone strikes are consistent with the law of war since only enemy combatants (lawful military targets) are attacked. But it would be impossible to argue that CIA drone operators, civilian government employees or government contractors, are themselves lawful enemy combatants. What they are, in fact, are civilians directly participating in hostilities. Thus, when “top lawyers for the State Department and the Defense Department . . . tried to square the idea that the C.I.A.’s drone program is lawful with the United States’ efforts to prosecute Guantánamo Bay detainees accused of killing American soldiers in combat,”¹⁰² they couldn’t do so.

But while the DOD may have been willing to finally acknowledge that the international law of war does not support the theory of DPH as a war crime, they were clearly not ready to give up on the possibility of prosecuting DPH in a military commission. So “[t]hey redrafted the manual so that murder by an unprivileged combatant would . . . be treated like espionage—an offense under domestic law not considered a war crime.”¹⁰³ Thus, the comment asserts that if an unprivileged

¹⁰⁰ *Id.* § 5(15)(c), at IV-13 (2010) (emphasis added). This comment also purports to apply to three other offenses (intentionally causing serious bodily injury, destruction of property in violation of the law of war, and spying) and is repeated four times in the MMC. *See id.*

¹⁰¹ Charlie Savage, *U.N. Official to Ask U.S. to End C.I.A. Drone Strikes*, N.Y. TIMES, May 28, 2010, at A8; *see also* Morris Davis, *Combatant Immunity and the Death of Anwar al-Awlaqi*, JURIST (Oct. 17, 2011), <http://jurist.org/forum/2011/10/morris-davis-anwar-al-awlaqi.php>.

¹⁰² Savage, *supra* note 101.

¹⁰³ *Id.*

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belligerent kills a soldier, he can be prosecuted if such conduct is deemed by a commission to be conduct “traditionally triable in a military commission.” While Congress purported to authorize military commissions to try crimes that are traditionally triable by military commissions even if not recognized as war crimes by modern international tribunals,¹⁰⁴ it is hard to reconcile the assertion that murder in violation of the law of war can be committed “*even if such conduct does not violate the international law of war*” with the title or the elements of this offense. Indeed, one of the listed elements of the offense in the MMC is that “[t]he killing was in violation of the law of war.”¹⁰⁵ Although comments in the Manual are not binding on military commission judges,¹⁰⁶ the views of the Manual’s drafters carry significant weight in the military commissions, which have virtually no precedents to guide them. Would a military judge follow the new comment in the Manual and actually instruct a military commission jury that murder in violation of the law of war could be based on conduct that does not violate the law of war? The first potential opportunity to answer this question came almost instantly, as the 2010 MMC was released just as pretrial hearings in *United States v. Khadr* were about to resume.¹⁰⁷

B. Prosecution of Omar Khadr under the MCA of 2009

Canadian juvenile Omar Khadr is the clearest example of a detainee being prosecuted and convicted for direct participation in hostilities. Among other offenses, Khadr was charged with murder in violation of

¹⁰⁴ See 10 U.S.C. § 948b (2006) (“Military commissions generally (a) Purpose.—This chapter establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission.” (emphasis added)); 10 U.S.C. § 950p(d) (“The provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission.”).

¹⁰⁵ *Id.* § 5(15)(b)(5), at IV-13.

¹⁰⁶ The Manual for Courts-Martial, upon which the MMC is based, indicates in its Preamble that the supplementary “Discussion” in the Manual for Courts-Martial “[does] not constitute rules” and “[does] not create rights or responsibilities that are binding on any person, party, or other entity.” U.S. MANUAL FOR COURTS-MARTIAL pt. I, § 4, at I-1 (2008). Further, “[f]ailure to comply with matter set forth in the supplementary materials does not, of itself, constitute error.” *Id.* at I-2; see also *United States v. Mance*, 26 M.J. 244, 252 (C.M.A. 1988) (noting that interpretations of substantive elements of punitive articles by the executive branch are not binding on the judiciary).

¹⁰⁷ See David Frakt, *New Manual for Military Commissions Disregards the Commander-in-Chief, Congressional Intent and the Laws of War*, HUFFINGTON POST (Apr. 29, 2010, 6:23 PM), http://www.huffingtonpost.com/david-frakt/new-manual-for-military-c_b_557720.html (noting the release of the new MMC “on the eve of Omar Khadr’s suppression hearing, the first major military commission hearing at Guantanamo since President Obama took office”).

the law of war for killing a U.S. soldier with a hand grenade during a prolonged battle between U.S. forces and al Qaeda and affiliated fighters. "The specification of Charge I against Mr. Khadr merely alleges that he took part in a conventional battle, during which he used a conventional weapon (a hand grenade) in response to a conventional assault by U.S. forces."¹⁰⁸

The stipulation of fact entered into evidence at Khadr's trial stated that Khadr was in a fortified compound with other fighters surrounded by U.S. and coalition forces. The coalition forces allowed the women and children inside the compound to exit unharmed and urged the fighters inside to give themselves up before the battle began. When they refused, the battle commenced. Khadr fought back, throwing a hand grenade that proved fatal to a U.S. soldier. During the firefight, Khadr was shot multiple times and severely injured.¹⁰⁹ Khadr's defense team filed multiple pre-trial motions seeking to have the murder charge dismissed on the basis that it was not a legitimate war crime, all of which were rejected.¹¹⁰ The defense also requested that the judge provide jury findings instructions defining this offense in advance of the trial.¹¹¹ The defense wanted the jury instructions to reflect the rulings of the other commission judges, which was the mere status of being an unprivileged belligerent and engaging in hostilities was insufficient to satisfy the required element of a law of war violation, contrary to the government's theory.¹¹² The government wanted the judge to indicate that he would give jury instructions consistent with the comment in the manual that

¹⁰⁸ Defense Motion to Dismiss Charge I for Failure to State an Element of the Offenses in Violation of Due Process at 1, *United States v. Khadr (Military Comm'n Guantánamo Bay, Cuba July 11, 2008)*, available at <http://www.defense.gov/news/Khadr%20D071%20-%20Motion%20to%20Dismiss%20-%20Due%20Process.pdf>.

¹⁰⁹ Stipulation of Fact at 7-9, *United States v. Khadr (Oct. 13, 2010)*, available at <http://www.cbc.ca/news/pdf/omar-khadr-charges.pdf>.

¹¹⁰ See Defense Motion to Dismiss Charge I for Failure to State an Offense and for Lack of Subject Matter Jurisdiction at 2, *United States v. Khadr (Military Comm'n Guantánamo Bay, Cuba Dec. 7, 2007)*, available at <http://www.defense.gov/news/Feb2008/Khadr%204%20-%208%20Feb%202008%20Motion%20Session.pdf> ("The charge of murder in violation of the law of war must be dismissed because the specification fails to state an offense; it does not allege a killing that violates the law of war.").

¹¹¹ Defense Response to Government's Request for Finding's Instruction on Charges I, II and III (as it pertains to Murder in Violation of the Law of War) and Defense Cross-Motion to Dismiss and Strike (P-009), Appellate Ex. 295 at 14, *United States v. Khadr (Military Comm'n Guantánamo Bay, Cuba Nov. 28, 2008)*, available at [http://www.defense.gov/news/AE-295-AE295-E\(P009\).pdf](http://www.defense.gov/news/AE-295-AE295-E(P009).pdf).

¹¹² In fact, the defense requested the same instruction as given in *United States v. al Bahlul*. See CMCR 09-001 (U.S. Ct. Military Comm'n Review Sept. 9, 2011) (en banc), available at <http://www.lawfareblog.com/wp-content/uploads/2011/09/al-Bahlul-USCt-Mil-Comm-Review-Sept-9-2011-1.pdf>; Defense Cross-Motion to Dismiss and Strike, *supra* note 111, Appellate Ex. 295-B at 24.

allowed murder in violation of the law of war to be proved based on unprivileged belligerency.¹¹³ The judge refused to reveal the instructions he intended to give, leaving both sides unclear as to what proof would satisfy the elements of the offense. The uncertainty over the legal standard to be applied at the trial was one factor that drove both sides to enter into plea negotiations, which ultimately led to Khadr's guilty plea to all charges in the fall of 2010. Thus, Omar Khadr became not only the first child soldier to be convicted of war crimes in modern history, but also the first person to be convicted in the military commissions explicitly under a direct participation in hostilities theory.

Unfortunately, because of the guilty plea, the government's new theory—as reflected in the comment in the 2010 manual—that murder of a soldier by an unprivileged belligerent need not violate the international law of war in order to constitute murder in violation of the law of war was not tested at trial and will not be reviewed on appeal. The prosecution's awareness of the weakness of the legal theory behind the murder charge may have been a factor in the very favorable plea bargain Mr. Khadr received.¹¹⁴ It remains to be seen whether the military

¹¹³ See Defense Cross-Motion to Dismiss and Strike, *supra* note 111, Appellate Ex. 295. The government's requested instruction read, in pertinent part:

For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy.

The term "lawful enemy combatant" means a person who is:

(A) a member of the regular forces of a State party engaged in hostilities against the United States;

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities which meet *all* of the following criteria:

(1) are under responsible command,

(2) wear a fixed distinctive sign recognizable at a distance,

(3) carry their arms openly, and

(4) abide by the law of war; or

(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

Failure to meet at least one of the above three criteria renders an individual an unlawful combatant making any combatant acts by that individual violations of the law of war.

Id. at 12.

¹¹⁴ Khadr, facing a maximum life sentence, received an eight-year sentence, which was to be served in Canada after one more year in Guantánamo. Paul Koring, *Verdict's in: Khadr is Ottawa's Problem Now*, GLOBE & MAIL (Oct. 31, 2010), <http://www.theglobeandmail.com/news/politics/verdicts-in-khadr-is-ottawas-problem-now/article1779878/>. However, as of April 2012, the transfer to Canada has not taken place. The United States blamed Canada for the stalled transfer. See Charlie Savage, *Delays*

commission judges (and appellate courts) will overlook the apparent contradiction in the non-binding comment in the manual, or follow the more compelling reasoning of Judge Henley. However, two recent rulings by the U.S. Court of Military Commission Review strongly suggest that this first-level appellate court would be likely to uphold a military judge who followed the comment in the manual.

C. *The Court of Military Commission Review, United States v. Hamdan*

The first significant indication about the reception that the government's unprivileged belligerency theory is likely to receive on appeal arrived in June 2011. It was the U.S. Court of Military Commission Review's first review of a military commission conviction. As discussed previously, Salim Hamdan was convicted in August 2008 of providing material support for terrorism. On appeal, Hamdan argued that his conviction was void for several reasons. Most importantly, the subject of this article was his first argument:

First, he contends the military commission, established pursuant to Congress's Article I power to "define and punish . . . Offenses against the Law of Nations," lacked subject matter jurisdiction over the offense of providing material support for terrorism, because it is not a violation of the international law of war.¹¹⁵

The question of whether material support for terrorism violates the international law of war is, of course, different than whether direct participation in hostilities violates the international law of war, but the two issues are closer than they may initially appear. The MCA version of providing material support for terrorism requires both that the perpetrator be an unlawful enemy combatant and that the conduct take

Keep Former Qaeda Child Soldier at Guantánamo, Despite Plea Deal, N.Y. TIMES, Mar. 25, 2012, at A24. The Canadian government blamed the United States. See Jeff Davis, *Federal Government Blames U.S. for Stalled Omar Khadr Repatriation*, POSTMEDIA NEWS (Mar. 27, 2012), <http://www2.canada.com/story.html?id=6368760>. He is now reportedly likely to be transferred to Canada by late May 2012. See Colin Perkel, *Deal Could See Omar Khadr Return to Canada by End of May: Source*, GLOBE & MAIL (Mar. 28, 2012), <http://m.theglobeandmail.com/news/politics/deal-could-see-omar-khadr-return-to-canada-by-end-of-may-source/article2384731/?service=mobile>. Under Canadian law, he will be eligible for parole as soon as he arrives, based on his eight years of confinement in Guantánamo before sentencing. *Id.*

¹¹⁵ *United States v. Hamdan*, CMCR 09-002, at 10 (U.S. Ct. Military Comm'n Review June 24, 2011) (en banc) (alteration in original), available at <http://www.defense.gov/news/0621hamdan.pdf>.

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place in the context of an armed conflict.¹¹⁶ In finding that material support for terrorism did, in fact, violate the international law of war, the U.S. Court of Military Commission Review made clear its view that virtually any direct participation in an armed conflict by an unlawful combatant would constitute a war crime. In support of this proposition, the court cited authorities going back to the Civil War, including the Lieber Code and other Civil War era precedents regarding guerrilla fighters.¹¹⁷ The opinion also quoted this passage from a 1914 Army Field Manual:

Persons who take up arms and commit hostilities without having complied with the conditions prescribed for securing the privileges of belligerents, are, when captured by the enemy, liable to punishment for such hostile acts as war criminals.¹¹⁸

The Court then noted that the 1956 version of the Army Field Manual also “permits prosecution of unlawful combatants or unprivileged belligerents as war criminals.”¹¹⁹ There was no discussion of any of the voluminous contrary authority from the past fifty-five years, including recent U.S. Army publications.¹²⁰ The fact that this

¹¹⁶ *Id.* at 30-32.

¹¹⁷ GENERAL ORDERS NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863).

¹¹⁸ WAR DEP’T: OFFICE OF THE CHIEF OF STAFF, RULES OF LAND WARFARE 130, ¶ 369 (Gov’t Printing Office 1914).

¹¹⁹ *Hamdan*, CMCR 09-002, at 71 (citing DEP’T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE (1956)). The Army Field Manual states the following:

80. Individuals Not of Armed Forces Who Engage in Hostilities

Persons, such as guerrillas and partisans, who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents, are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.

81. Individuals Not of Armed Forces Who Commit Hostile Acts

Persons who, without having complied with the conditions prescribed by the laws of war for recognition as belligerents, commit hostile acts about or behind the lines of the enemy are not to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment. Such acts include, but are not limited to, sabotage, destruction of communications facilities, intentional misleading of troops by guides, liberation of prisoners of war, and other acts not falling within Articles 104 and 106 of the Uniform Code of Military Justice and Article 29 of the Hague Regulations.

Id. at A-21, ¶¶ 80-81 (internal citations omitted).

¹²⁰ *See, e.g.*, JUDGE ADVOCATE GENERAL, UNITED STATES ARMY, OPERATIONAL LAW HANDBOOK 16 (2011), available at http://www.loc.gov/rr/frd/Military_Law/pdf/

opinion was issued by the court *en banc* and without dissent is a powerful indication that the U.S. Court of Military Commission Review, at least, is likely to affirm any military commission conviction based upon direct participation in hostilities by an unprivileged belligerent. Whether higher federal courts will follow suit remains to be seen.¹²¹ The U.S. Court of Military Commission Review issued its second ruling on an appeal from a conviction in *United States v. al Bahlul*, on September 9, 2011. Al Bahlul was not a DPH, and his appeal did not directly raise the issue of whether unprivileged belligerency was a war crime, but the court once again took the opportunity to endorse the theory of unprivileged belligerency as a punishable offense under the law of war, as it cited *Ex parte Quirin* for the proposition that unlawful combatants could be tried and punished “for acts which render their belligerency unlawful.”¹²² However, there was one passage in the opinion that suggested that the U.S. Court of Military Commission Review might balk at approving a conviction for belligerent acts *even if such conduct does not violate the international law of war*. The opinion, in pertinent part, states:

We are not persuaded by the Government’s suggestion that Congress’ power to “define and punish . . . Offences against the Law of Nations,” U.S. Const., art. I, § 8, cl. 10, even when exercised in collaboration with the President in a time of armed conflict, includes the power to make conduct punishable by military commission *without any reference to international norms*.¹²³

This passage suggests that if there are future prosecutions of detainees based on direct participation in hostilities, such as a charge of murder in violation of the law of war based on killing a U.S. soldier, the government may have to convince the U.S. Court of Military Commission Review that such a crime finds support in IHL, something

operational-law-handbook_2011.pdf (“Unprivileged belligerents may include . . . civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts. Unprivileged belligerents (a/k/a unlawful combatants) are not entitled to POW status and may be prosecuted under the domestic law of the captor.”); *see also* DINSTEIN, *supra* note 12, at 233–37 (explaining the distinction between unlawful combatants and war criminals).

¹²¹ *See* *United States v. al Bahlul*, CMCR 09-001 (U.S. Ct. Military Comm’n Review Sept. 9, 2011) (*en banc*), *available at* <http://www.lawfareblog.com/wp-content/uploads/2011/09/al-Bahlul-USCt-Mil-Comm-Review-Sept-9-2011-1.pdf>. The CMCR ruling is currently on appeal to the U.S. Court of Appeals for the D.C. Circuit and may ultimately be decided by the Supreme Court.

¹²² *Ex Parte Quirin*, 317 U.S. 1, 31(1942).

¹²³ *al Bahlul*, CMCR 09-001 at 23–24 (emphasis added).

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that the government has thus far been unable to do at the trial level, and which the government itself no longer is asserting.

D. Current U.S. Practice Related to the Prosecution of DPH

In addition to Khadr, there have been three other guilty pleas under the MCA of 2009.¹²⁴ Although none of these cases have involved direct participation in hostilities, one of the cases merits some discussion because it includes charges of murder and attempted murder in violation of the law of war. In March 2012, Majid Khan pled guilty to conspiracy, spying, material support to terrorism, murder in violation of the law of war, and attempted murder in violation of the law of war and agreed to cooperate with the prosecution in other military commission cases in exchange for a nineteen year sentence.¹²⁵ The charges, referred February 15, 2012,¹²⁶ reflect a possible change in the prosecution's approach to the offense of murder in violation of the law of war. The charge of murder in violation of the law of war is based on Mr. Khan's involvement in the bombing of the J.W. Marriott Hotel in Jakarta Indonesia in August 2003. According to the charge, what made this murder "in violation of the law of war" was that the persons killed were "protected persons" (civilian

¹²⁴ Ibrahim Ahmed Mahmoud al Qosi, Noor Uthman Muhammed, and Majid Shoukat Khan. Mr. al Qosi and Mr. Muhammed both pled guilty to conspiracy and providing material support to terrorism. See Report of Result of Trial, United States v. al Qosi (Aug. 11, 2010), available at <http://www.defense.gov/news/Report%20of%20Result%20of%20Trial,%20US%20v.%20al%20Qosi.pdf>; Charge Sheet of al Qosi, United States v. al Qosi (Mar. 5, 2008), available at http://www.defense.gov/news/d20080305alqosi_charges.pdf; Charge Sheet of Muhammed, United States v. Muhammed (Dec. 5, 2008), available at <http://www.defense.gov/news/Referred%20Charge%20Sheet.pdf>; Offer for Pretrial Agreement, Appellate Ex. 123 at 2, United States v. Muhammed, available at <http://www.defense.gov/news/AE%20123%20-%20Offer%20for%20Pretrial%20Agreement.pdf>. Mr. al Qosi admitted to being a long time driver and bodyguard for Osama bin Laden before 9/11. Charge Sheet of al Qosi, *supra*. He was not alleged to have participated in the post-9/11 armed conflict in Afghanistan, other than "provid[ing] security and transportation for bin Laden and other al Qaeda members." *Id.* at 4. Mr. Muhammed was convicted solely for his pre-9/11 activities with al Qaeda and was not alleged to have participated, directly or indirectly, in the post-9/11 armed conflict in Afghanistan. Charge Sheet of Muhammed, *supra*.

¹²⁵ Pre-Trial Agreement, Majid Shoukat Khan (Feb. 29, 2012), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (click Majid Shoukat Khan, then "Show all Case Documents," then "Majid Shoukat Khan Pre-Trial Agreement"); Pre-Trial Agreement, App. A, Majid Shoukat Khan (Feb. 29, 2009), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (click Majid Shoukat Khan, then "Show all Case Documents," then "Appendix A to Pre-Trial Agreement").

¹²⁶ Referred Charges, United States v. Majid Shoukat Khan (Feb. 15, 2012), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (click Majid Shoukat Khan, then "Show all Case Documents," then "Referred Charges Dated 2/15/2012").

tourists) under the law of war.¹²⁷ Mr. Khan was also charged with attempted murder in violation of the law of war for the same bombing (to account for all the hotel guests who were not actually killed) under the same theory. Mr. Khan was charged with an additional count of attempted murder in violation of the law of war for an assassination plot against then President of Pakistan, Pervez Musharraf. The charge indicates that this attempt violated the law of war and not merely Pakistani domestic law, because Khan wore a vest containing an “improvised explosive device” to a “mosque where he expected President Musharraf to be.”¹²⁸ The wearing of an explosive vest under civilian clothes violates the general requirement that combatants carry their arms openly and also could be construed as perfidy under the law of war.¹²⁹ Also, according to a stipulation of fact signed by Mr. Khan, “the vest was outfitted with small ball bearings that would scatter upon detonation in order to create what the Accused called a ‘killing machine’ that inflicts maximal death and damage.”¹³⁰ Such a weapon could arguably be considered an indiscriminate weapon, which might also violate the law of war.

Mosques are protected places under the law of war and generally not subject to attack, so a bombing that took place in a mosque, particularly when filled with civilian worshippers, could also plausibly be considered a violation of the law of war.¹³¹ If the charges against Mr. Khan are any indication, the prosecution may no longer seek to rely solely on the accused’s status as an unprivileged belligerent as the basis for an assertion that an accused’s direct participation in hostilities violates the law of war. The three other active military commission cases tend to confirm this view.

The only other charges brought under the MCA of 2009 thus far are against the alleged 9/11 co-conspirators, an alleged co-conspirator in the bombing of the U.S.S. Cole, Abd al Rahim Hussayn Muhammad al Nashiri, and Ali Musa al Daquduq al Masawi (commonly referred to as

¹²⁷ In fact, “Murder of Protected Persons” is a specific offense under the MCA. See 10 U.S.C. § 950t(1) (2006). One wonders why the prosecution did not simply charge this offense.

¹²⁸ Khan Referred Charges, *supra* note 126.

¹²⁹ Perfidy is also a specific offense under the MCA. See 10 U.S.C. § 950t(17); see also Laurie Blank, *Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians*, 46 VAL. U. L. REV. 765, 785–86 (2012) (explaining how the concept of perfidy has been defined under international conventions).

¹³⁰ Stipulation of Fact, Majid Shoukat Khan (Feb. 29, 2012), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (click “Majid Shoukat Khan,” then “Show all Case Documents,” then “Majid Shoukat Khan Stipulation of Fact”).

¹³¹ “Attacking Protected Property” is another distinct offense under the MCA. See 10 U.S.C. § 950t(4).

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Daqduq), a Lebanese man who is suspected of being a Hezbollah operative accused of killing several American soldiers in Iraq in 2007.¹³² However, the charges against these individuals are not based on direct participation in hostilities. Although all of these individuals are charged with the ubiquitous murder and attempted murder in violation of the law of war offenses, each of the charges indicate a specific violation of the law of war beyond the status of unprivileged belligerency. In Mr. al Nashiri's case, the one charge of murder in violation of the law of war and the two charges of attempted murder in violation of the law of war that he is facing all recite acts of perfidy as the specific violations of the law of war.¹³³ In the case against Khalid Sheikh Mohammed, *et al*, better known as the 9/11 case, the alleged co-conspirators are also charged with murder in violation of the law of war and destruction of property in violation of the law of war for their involvement in the plot to use hijacked civilian airliners as guided missiles to attack civilian targets and kill civilians.¹³⁴ If one accepts the premise that 9/11 was part of an armed conflict, then the manner, method and nature of these attacks acts clearly were in violation of the law of war. The charges against Daqduq have echoes of the charges against Mohammed Jawad and Omar Khadr in that he is accused of murdering, attempting to murder, and intentionally causing serious bodily injury to U.S. soldiers with firearms and grenades, in violation of the law of war.¹³⁵

However, unlike the charges against Mr. Jawad and Mr. Khadr, each charge cites at least one, and in some cases, two reasons why the attacks on the U.S. soldiers violated the law of war. Each of the charges asserts that Daqduq's crimes occurred "while wearing the U.S. military or Iraqi police uniform in violation of the law of war." Donning the uniform of the enemy in order to gain their confidence and get close enough to kill

¹³² Charlie Savage, *Man Tied to Hezbollah Faces U.S. Military Charges*, N.Y. TIMES, Feb. 24, 2012, at A12. Daqduq is currently in Iraqi custody and is the first person from the conflict in Iraq to face military commission charges.

¹³³ Referred Charges, *United States v. Abd al Rahim Hussayn Muhammad al Nashiri*, (Military Comm'n Guantánamo Bay, Cuba Dec. 19, 2011), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (click "Abd al Rahim Hussayan Muhammad al Nashiri," then "Show all Case Documents," then "Referred Charges Dated 12/19/2008"). Interestingly, Mr. al Nashiri is also charged with perfidy as a separate offense. *Id.* at 8.

¹³⁴ Referred Charges, *United States v. Khalid Sheikh Mohammed* (Military Comm'n Guantánamo Bay, Cuba Apr. 4, 2012), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (click "Khalid Sheikh Mohammed et al (2)," then "Show all Case Documents," then "Referred Charges Dated 4/4/2012").

¹³⁵ The charges against Mr. al-Musawi, unlike all the other military commission cases, are not posted on the official military commissions website, www.mc.mil, but rather can be found at: <http://www.documentcloud.org/documents/302052-daquq-tribunal-charge-sheet.html>.

or capture them is a perfidious act clearly prohibited by the law of war. Four of the charges also assert that Daqduq is responsible for the shooting of individual U.S. soldiers while the soldier “was a protected person placed out of combat.”¹³⁶ Soldiers become protected persons under the law of war when they are “hors de combat” due to incapacitating injuries, or have been captured, which is what is alleged to have occurred in this case.¹³⁷

Although Congress declined to adopt my proposed formulation that “in violation of the law of war means in a manner or method or under circumstances which violate the law of war,” the charges in the three active military commission cases suggest that the prosecutors at the military commissions have now adopted this approach voluntarily.

At this point, it seems unlikely that we will see any more prosecutions in military commissions at Guantánamo for simple attacks on coalition soldiers, such as the attack originally alleged to have been committed by Mohammed Jawad. The U.S. government stopped transporting detainees to Guantánamo several years ago, and the Obama administration has determined not to bring any more detainees there.¹³⁸ Although the current administration identified thirty-six potential candidates for prosecution in military commissions, the focus of prosecutorial efforts appears to be on those believed to be responsible for major terrorist attacks on the United States and its allies, such as 9/11 and the attack on the destroyer U.S.S. Cole, rather than foot soldiers.¹³⁹

In the United States’ recent conflict in Iraq, the prosecution of civilians who directly participated in hostilities was, quite properly, handled by the domestic court system.¹⁴⁰ Indeed, in Iraq, the United

¹³⁶ Charge Sheet of Ali Musa Daqduq al Musaw; United States v. al Musaw: (Military Comm’n Guantanamo Bay, Cuba), available at <http://www.documentcloud.org/documents/302052-daquduq-tribunal-chargesheet.html>.

¹³⁷ Although it is not clear from the charges themselves, Mr. Daqduq is not alleged to have personally participated in the attack that resulted in the deaths and injuries of the U.S. service members, but rather is charged in his role as an organizer of the attacks. In this respect, his case is similar to the case against KSM et al and al-Nashiri. Those defendants did not personally participate in the attacks, which were carried out by suicide bombers, but rather are alleged to have organized or “masterminded” the attacks, making it even more difficult for the prosecution to rely on a direct participation in hostilities as a war crime theory in these cases.

¹³⁸ Josh Gerstein, *John Brennan: No New Prisoners to Guantanamo Bay*, POLITICO (Sept. 8, 2011), <http://www.politico.com/news/stories/0911/62990.html>. Of course, this was before Daqduq was charged. If the Iraqis ever hand him over to the United States, it is unclear where he would be tried. There is no legal requirement that military commissions be held at Guantánamo.

¹³⁹ GUANTANAMO REVIEW TASK FORCE, *supra* note 55, at 13.

¹⁴⁰ See David Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT’L SECURITY L. & POL’Y 1, 32 n.82 (2011). Daqduq could potentially be the first exception to this policy.

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States followed this approach from early in the conflict, turning over captured insurgents to the Iraqi Central Criminal Court to be prosecuted under domestic criminal or anti-terrorism laws. Under the Obama administration, the United States has now also adopted this model in Afghanistan, building the Parwan Detention Center, which is intended to be an Afghan-run prison complex, and turning over responsibility for prosecution of captured insurgents to the Afghani legal system.¹⁴¹ Thus, current U.S. practice is consistent with customary international law of war in treating direct participation in hostilities as a domestic crime rather than a war crime.

VI. CONCLUSION

America's unprecedented effort to characterize all direct participation in hostilities as a war crime and punish it as such has largely been a failure—yielding only one guilty plea based on a direct attack on U.S. soldiers—after nearly a decade of efforts to prosecute Guantánamo detainees in military tribunals. The prosecution of Omar Khadr, a juvenile at the time of his participation in the conflict, was widely criticized by the international community. His unappealable guilty plea is unlikely to be viewed as setting new precedent in customary international law that direct participation in hostilities is a war crime.

Given that prosecutors could not convince even a single military commission judge to endorse the theory of direct participation in hostilities as a war crime, it seems doubtful that this theory might have ever have gained much traction in the international community. With the publication of the 2010 MMC, it appears that the United States has abandoned the claim that DPH is a war crime, even while continuing to assert that civilians who take up arms against U.S. forces can be punished in a military commission for non-war crimes triable by military commission.

While the reason that the United States abandoned the position that DPH was a *per se* war crime is clear, what is not clear is why the United States pursued this novel theory of war criminality so vigorously in the first place when it had such weak support. By declaring that there were no lawful combatants on the other side of the war on terror, and that all hostile acts against U.S. soldiers were war crimes, the United States

¹⁴¹ However, the handover of this facility's control to the Afghan government has been delayed "well beyond January 2012." Kevin Sieff, *Afghan Prison Transfer Delayed*, WASH. POST (Aug. 12, 2011), http://www.washingtonpost.com/world/asia-pacific/afghan-prison-transfer-delayed/2011/08/12/gIQApcGMBJ_story_1.html.

appears to have been seeking to provide U.S. soldiers general protection, or immunity from attack, similar to that enjoyed by U.N. Peacekeepers.¹⁴² But while there is a clear interest of the international community in protecting international peacekeepers, there is no similar concern in the international community with protecting U.S. soldiers. Accordingly, the United States' effort to unilaterally alter the law of war through its prosecution practices was doomed to fail, even if the CIA's drone program had not caused the United States to reconsider.

In the future, if the United States seeks to create new customary international law, it should focus on criminalizing acts that are of greater global concern than routine attacks on U.S. troops. For example, one problem that the United States has encountered in Afghanistan and Iraq is the presence of foreign fighters, jihadists, drawn across international borders to the fight because of ideological opposition to the United States or the U.S.-backed governments. These foreign fighters are akin to mercenaries, albeit motivated by ideology rather than "the desire for private gain."¹⁴³ Such ideological mercenaries increasingly participate in armed conflicts around the globe, a very unwelcome development for the international community. A more narrowly drafted war crime focused on penalizing direct participation in hostilities by those who cross international borders—as alien insurgents—for the specific purpose of engaging in hostilities would be more likely to gain international recognition as a viable new offense under the law of war. Australian David Hicks would have been a good candidate for prosecution for such an offense, as would Canadian Omar Khadr—although Khadr's youth, and the fact that he was brought to Afghanistan by his father would make the case against him considerably weaker. Daqduq, a Lebanese citizen who travelled to Iraq to help train insurgents to fight coalition soldiers, would perhaps be the ideal test case for such a crime. The prosecution of alien insurgents is far more likely to resonate with world sentiment than the prosecution of someone like Mohammed Jawad, an Afghan citizen, for allegedly committing a hostile act against a foreign Army in his own country during an internal armed conflict. Indeed, given the increasing international recognition of the right of citizens to take up arms against oppressive, tyrannical, and corrupt governments as part of the universal right of self-determination (as seen

¹⁴² See Rome Statute of the International Criminal Court, *supra* note 48, at art. 8, ¶ 2(b)(iii) (establishing as a war crime acts of "[i]ntentionally directing attacks against personnel . . . involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations").

¹⁴³ Protocol I, *supra* note 10, at art. 47(2)(c).

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most clearly in the recent civil war in Libya), the trend is likely to be greater protection for at least some DPHs, rather than less.