REUNITING "ACTIVE" AND "DIRECT" PARTICIPATION: THE INTERNATIONAL CRIMINAL COURT'S DPH DIVORCE IN *LUBANGA*

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ABSTRACT

Throughout treaty-making processes and turn-of-the-century international criminal tribunal decisions, scholars and judges alike determined that the terms "direct" and "active," when referring to participation in hostilities, were synonymous. However, the International Criminal Court ("ICC"), in interpreting the Rome Statute in the Lubanga *case, determined that they were not, creating disparity between interpretations of the same terms within International Criminal Law ("ICL") and the Law of Armed Conflict ("LOAC"). Not only is the ICC's interpretation legally wrong, it is also practically unworkable and distorts the well-established doctrine of DPH as defined in LOAC.* Lubanga *may have broadened protection for child soldiers, but also likely made those children more targetable under LOAC and the principle of distinction. The ramifications of this interpretation affect not only DPH and its future applications, both in courts and on the battlefield, but also fundamentally affect the relationship between ICL and LOAC.* Lubanga *is yet another unfortunate example of the ICC driving interpretive wedges between LOAC's ex ante regulation of the battlefield and ICL's ex post determinations in the courtroom.*

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The views expressed here are solely the personal views of the author and do not represent the views of Cravath, Swaine & Moore LLP or legal advice, and do not necessarily reflect those of the United States Army, the United States government, the New York Army National Guard, or the New York government.

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I. INTRODUCTION

Born of the horror and destruction of the Second World War, the 1949 Geneva Conventions sought to revolutionize the international legal framework for the Law of Armed Conflict ("LOAC"), also called International Humanitarian Law ("IHL"). All four conventions begin with the same common articles, emphasizing their special importance. Common Article 3 codified protections for noncombatants during armed conflicts "not of an international nature,"[1] also called non-international armed conflict ("NIAC"). The provision recognized that civilians might sometimes take up arms and participate in such conflicts,[2] as had occurred throughout World War II and in many prior

1 Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3].

2 INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION ¶ 526 (2d ed. 2020) [hereinafter 2020 COMMENTARY ON THE THIRD GENEVA CONVENTION]. The ICRC has published updated commentaries for the first

conflicts. These irregular fighters were not new to war.[3] Common Article 3 sought to thread this needle by protecting noncombatants from atrocities, but only for those "[p]ersons taking no active part in the hostilities."[4]

Subsequent treaties, including the 1977 Additional Protocols I and II to the Geneva Conventions of 1949, built upon Common Article 3's premise. Those treaties included protection for civilians "unless and for such time as they take a direct part in hostilities."[5] The language of both the Additional Protocols and Common Article 3 that legally protects only those civilians who do not participate actively or directly in hostilities is couched in the theory of distinction. Distinction is the cardinal LOAC requirement that parties to conflicts only target combatants and not direct attacks against civilians, thereby protecting them from harm.[6] Combatants may only target civilians if they participate actively in hostilities, as they have given up their protected status in exchange for fighting.[7] In interpretation of the Statutes and Additional Protocols, a significant question arose: Does the loss of protection from Common Article 3 for "active" participation mean the same thing as for "direct" participation in the Additional Protocols? The International Committee of the Red Cross ("ICRC") and international criminal tribunals answered resoundingly: yes.[8] And so, the interpretive doctrine of Direct Participation in Hostilities ("DPH")

three Geneva Conventions. All three commentaries are identical for Common Article 3. I cite the third commentary in this piece, which is the most recent. It remains to be seen if the ICRC will update the Common Article 3 commentary in the fourth commentary.

3 *See, e.g.*, Letter from Francis Lieber to General H.W. Halleck, General-in-Chief, U.S. Army (Aug. 6, 1862), *in* Series III, 2 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 301, 301-09 (Fred C. Ainsworth & Joseph W. Kirkley eds., 1899) (Lieber recounting historical examples of irregular fighters and the applicability of the law of war).

4 Common Article 3, *supra* note 1.

5 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13(3), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

6 *Principle of Distinction*, INT'L COMM. OF THE RED CROSS, https://casebook.icrc.org/law/principle-distinction [https://perma.cc/RW6X-654A] (last visited Feb. 8, 2024).

7 *See, e.g.*, Additional Protocol I, *supra* note 5, art. 48 (outlining the principle of distinction).

8 *See infra* Part II.

began to take form as a method of analysis to determine if a civilian had lost—or regained—their protected status from targeting under both Common Article 3 and the Additional Protocols, or whether they were combatants who could be lawfully targeted.[9]

Treaty provisions beyond those that provide protection to civilians, like Common Article 3 and the Additional Protocols, also use the language of DPH. The Rome Statute, which established the International Criminal Court ("ICC"), bans using child soldiers "to participate actively in hostilities."[10] At first, international criminal tribunals like the Special Court for Sierra Leone ("SCSL") interpreted this provision synonymously with the language of Common Article 3 and Additional Protocols I and II.[11] The SCSL expressly recognized that, by finding a person guilty of using child soldiers—which required a finding that the child soldiers were active participants as an element of the crime—the Court was also legally finding that those child soldiers lost their protected status under international law and were therefore legitimate military targets.[12]

The ICC, however, diverted from this analysis in the *Lubanga* prosecution. In *Lubanga*, the Court interpreted the Rome Statute's requirement for active participation in hostilities more broadly than direct participation.[13] The Trial Chamber recognized that direct participation included those "on the front line," but that some "indirect" participation also constituted active participation under the Rome Statute.[14] This analysis both broadened the scope of active participation under the Rome Statute, thereby increasing protection for child soldiers, and expanded the scope of conduct for which an accused could

9 *See generally* NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). Throughout this piece, I use the abbreviation DPH to refer to the doctrine and idea as a whole, regardless of whether the analysis is technically under "active" or "direct" participation, as DPH has become common shorthand.

10 Rome Statute of the International Criminal Court arts. 8(2)(b)(xxvi), 8(2)(e)(vii), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

11 *See infra* Part III.A; Prosecutor v. Fofana, SCSL-04-14-T, Judgment, ¶ 131 (Aug. 2, 2007) (citing Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, ¶ 629 (Sept. 2, 1998)); Prosecutor v. Sesay, SCSL-04-15-T, Judgment, ¶ 102 (Mar. 2, 2009), http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf [https://perma.cc/74KQ-HQM2].

12 *See infra* Part III.A; *Sesay*, SCSL-04-15-T, ¶ 1723.

13 Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment, ¶ 627 (Mar. 14, 2012), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF [https://perma.cc/G25Z-H68U] [hereinafter Lubanga Trial Judgment].

14 *Id.* ¶ 628.

be held criminally liable for using child soldiers. As a result, however, *Lubanga*'s new interpretation logically also risked expansion of the definition of "active" participants for the purposes of distinction under Common Article 3, which also uses the language of "active." This broadening would expand the scope of conduct by which a civilian loses their protected status under DPH and becomes lawfully targetable by a belligerent party.

This Article explores the ICC's reasoning in *Lubanga* and its potential implications for DPH analysis, as well as the increasing rift that cases like *Lubanga* drive between International Criminal Law ("ICL") and LOAC. In the wake of the ICC decisions, both at the Trial and Appeals Chambers levels, scholars have critiqued and attempted to rationalize the ICC's reasoning. However, the purported justifications fail to uphold the ICC's analysis.[15] Furthermore, applying the *Lubanga* framework in actual combat situations would exacerbate the current ambiguities in DPH analysis, which is already a difficult process. The *Lubanga* approach to DPH, while pursuing the important goal advancing the ability of ICL to hold individuals criminally accountable for their atrocities—including in the situation of strengthening protections for children—undermines the important process that legal combatants use during targeting analysis and in determining who is a lawful combatant, which is a core principle of LOAC. International courts, legal practitioners, and states should, therefore, seek to return to the synonymity of active and direct participation. This will avoid disparate analyses under different treaties based on whether they use the term "active" or "direct" and bring DPH analysis back in line with decades of international jurisprudence.

Ultimately, such synonymity will enable future tribunals to engage in more consistent DPH analysis, which will result in greater clarity for lawful combatants to act without fear of unexpected criminal liability. It will remove the wedge driven between ICL and LOAC, two inherently linked fields of law. Lastly, such synonymity between terms will maintain adequate protection for child soldiers, allowing the ICC and states to punish those who employ them, while also protecting noncombatants from military targeting when they do not truly participate in hostilities, as understood under the Geneva Conventions and the Additional Protocols.

Part II of this Article provides the historical background of DPH and highlights how early interpretations determined that active and direct participation were synonymous. This analysis begins with the

15 *See infra* Part IV.A.

treaties that established DPH—namely, Common Article 3 and Additional Protocols I and II, as well as ICRC commentary. It then reviews DPH jurisprudence under the first international criminal tribunals since World War II, the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR"). Ultimately, the courts and the ICRC found that active and direct participation were equivalent terms, which the ICRC expressed in its Interpretive Guidance on DPH. Part III delves into international courts' applications of DPH in the context of child soldiers, first exploring how the SCSL analyzed DPH and the active participation requirement for bans on child soldiers together and concluded that a child loses their protected status if they are found to be an active participant. It then examines the ICC's *Lubanga* judgments that distinguished between, and effectively divorced, active participation and direct participation. Part IV reveals how *Lubanga* was wrong legally and practically, first turning to scholarly and linguistic justifications offered to support the *Lubanga* analysis, and showing how the potential justifications fail. It then refutes the *Lubanga* approach by demonstrating its inapplicability to real DPH analyses conducted during combat. It next examines how the *Lubanga* analysis may or may not be maintained, and why it should not. Finally, this Article concludes by highlighting the ICC's departure from longstanding definitional interpretations in other realms of LOAC, showing that *Lubanga*'s divorce of terms may be part of a worrying trend.

It is worth noting what this Article does not do. It does not evaluate any of the tribunals' factual analyses of the crimes, such as if the conduct actually constituted active or direct participation. Rather, this Article focuses purely on the legal questions. Namely, is there a legal difference between active and direct participation in hostilities? Should there be? Can courts and legal practitioners effectively apply the *Lubanga* DPH framework to future factual scenarios? This Article argues that the answer to all three questions is no.

II. THE HISTORICAL SYNONYMITY BETWEEN ACTIVE AND DIRECT PARTICIPATION

As the DPH doctrine has evolved, it has typically been understood as encompassing both "active" and "direct" participation in hostilities. Such understanding is evident from both the text of treaties and jurisprudence of international legal tribunals, and it is reinforced by interpretations of international legal scholars and bodies. International tribunals have historically applied the terms synonymously when

analyzing DPH in cases involving the principle of distinction and determinations of who is protected during armed conflict.

A. Foundations of Active and Direct Participation in Treaties

While some of the first LOAC treaties aimed to alleviate the suffering of combatants, the First and Second World Wars showed the world the destruction that modern, industrialized warfare can inflict on civilian populations.[16] In addition to combatants, World War II ravaged cities, industries, and civilians with no role in the conflict. The killing and wounding of civilians—sometimes accidental, other times purposeful—led to treaty formulations designed to ensure the protection of civilians in armed conflicts. Those experiences motivated nations to codify treaty protections to cover civilians during war, most notably in the 1949 Geneva Conventions and, later, the 1977 Additional Protocols.[17]

1. Article 3 Common to the Geneva Conventions of 1949 and "Active" Participation

Common Article 3 provides baseline requirements for treatment of noncombatants in NIACs.[18] The provision requires that "[p]ersons taking no active part in the hostilities . . . be treated humanely,"[19] banning murder, cruel treatment, torture, hostage-taking, and executions or extra-judicial punishment.[20] In the drafting and early interpretations of Common Article 3, the requirement that protection only apply to those "taking no active part in hostilities" was noncontroversial. None of the ICRC's original Commentaries on the Geneva Conventions of 1949, published between 1952 and 1960, even include the word "active."[21] Rather, Common Article 3 was contentious because it was the only provision of the four Conventions to cover conduct in NIACs, as opposed to International Armed Conflicts ("IACs"), which are

16 *See* 3 INT'L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: Commentary 28 (Jean S. Pictet ed., 1960).

17 MELZER, *supra* note 9, at 4-5.

18 Common Article 3, *supra* note 1.

19 *Id.* ¶ 1.

20 *Id.* ¶ 1(a-d).

21 1 INT'L COMM. OF THE RED CROSS, *supra* note 16, at 38-61 (1952); 2 *id.* at 32-39; *3 id.* at 28-44; 4 *id.* at 26-44 (1958). All four volumes of the commentary, each volume corresponding to the numbered Geneva Convention, have a separate commentary section for Common Article 3. All four are very similar and largely identical in many parts, but none mention "active."

covered by all non-Common Article 3 text in the Conventions.[22] The second edition of the ICRC Commentary on Common Article 3, published first in 2016, mentions that, with regard to the definition of persons protected, "this part of the article did not give rise to much discussion at the 1949 Diplomatic Conference."[23]

While the ICRC commentaries are not law, they are a useful and respected reference for interpretation and application of the Geneva Conventions. In defining the scope of protected status for civilians under Common Article 3, the second edition states that "civilians benefit from the protection of common Article 3, except for such time as they take an active part in hostilities."[24] While recognizing that "active participation in hostilities is not defined in common Article 3, nor . . . in any other provision of the 1949 Geneva Conventions or earlier treaties,"[25] the commentary reflects the general understanding that "active" participation in Common Article 3 is synonymous with "direct" participation from Additional Protocols I and II.[26] As support, the commentary notes that "[t]he equally authentic French version of common Article 3 refers to 'personnes qui ne participent pas *directement* aux hostilités.'"[27] Finally, the commentary explains the role of Common Article 3's protection using the language of both active and direct synonymously:

Whichever view on the notion of *direct* participation in hostilities a Party to the conflict adopts for the purpose of its targeting decisions, as soon as a person ceases to take an *active* part in hostilities . . . that person comes under the protective scope of common Article 3 and must be treated humanely.[28]

Common Article 3, therefore, effectively requires that civilians and noncombatants who wish to avail themselves of the provision's protection refrain from actively participating in hostilities. The updated commentaries' interchangeable use of active and direct, and explicit recognition of the synonymity, indicates that later legal uses of "direct" participation, discussed next, are synonymous with "active" participation. Common Article 3 of the Geneva Conventions was the

22 *See, e.g.*, 1 *id.* at 43-44.
23 COMMENTARY ON THE THIRD GENEVA CONVENTION, *supra* note 2, ¶ 556.
24 *Id.* ¶ 555.
25 *Id.* ¶ 558.
26 *Id.* ¶ 559.
27 *Id.* ¶ 559 n.265 (alteration in original).
28 *Id.* ¶ 561 (emphasis added).

first of many treaty provisions to only permit protection for civilians who are not directly participating in hostilities.

2. The 1977 Additional Protocols and "Direct" Participation

While the English version of the Additional Protocols introduced the language of "direct participation" for the first time, the commentaries to the Protocols clearly indicate that the drafters intended for the Protocols to encompass the same legal definition as active participation in Common Article 3.

In 1977, many states ratified two Additional Protocols to the 1949 Geneva Conventions. The first covers conduct in IACs,[29] and the second covers conduct in NIACs.[30] The two include provisions that protect civilians who are not DPH with nearly identical language. Additional Protocol I, Article 51(3) reads: "Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities."[31] The sole difference in Additional Protocol II, Article 13(3) is that the provision uses "Part" instead of "Section."[32] Similarly to Common Article 3, the Additional Protocols do

29 Additional Protocol I, *supra* note 5, art. 1.

30 Additional Protocol II, *supra* note 5, art. 1.

31 Additional Protocol I, *supra* note 55, art. 51(3). It is worth noting that the interpretation that Article 51(3) prohibits civilians from directly participating in hostilities "for such time as they take a direct part in hostilities" is not uncontroversial. That temporal language created what has been called a "revolving door" of protection—civilians are protected when they are not DPH, but then regain protection upon completing their DPH. *See, e.g.*, MELZER, *supra* note 99, at 70-71. W. Hays Parks forcefully argued that this conceptualization of protection, and therefore Article 51(3), was a departure from customary international law. W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 118-19 (1990). The "revolving door" and its implications "were not militarily acceptable to the United States." *Id.* at 134. Rather, determinations of when civilians lose their protection should be "a policy decision made by national leaders," taking inspiration from a few "guidelines" that Parks proposed. *Id.* at 134-35; *see also* R. Scott Adams, *W. Hays Parks and the Law of War*, JAG REP., Mar. 26, 2020, at 5-6, https://www.jagreporter.af.mil/Portals/88/2020%20Articles/Documents/20200326%20Hays%20Parks.pdf [https://perma.cc/A66A-69ZW] (discussing the impact of Parks' view on Article 51(3) and DPH). Parks ultimately walked back this view and adopted the "direct" terminology, but only upon "equating the terms 'active' and 'direct' as synonymous." Sean Watts, *Hays Parks and Direct Participation in Hostilities*, LIEBER INST. W. POINT: ARTICLES OF WAR (Oct. 7, 2021), https://lieber.westpoint.edu/hays-parks-direct-participation-hostilities/ [https://perma.cc/9VZM-RYTM]; *see* W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 513-14 (2003) (discussing distinction in terms of "civilians not taking an *active or direct* part in hostilities" (emphasis added)).

32 Additional Protocol II, *supra* note 55, art. 13(3).

not define "tak[ing] a direct part in hostilities." The ICRC's 1987 Commentaries to each Protocol do, however, elucidate and further establish the equivalence of active and direct participation.

The Commentary to Additional Protocol I indicates that the DPH provision extends protection only to civilians who "abstain[] from all hostile acts" and defines hostile acts as "acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed force."[33] The commentary notes that not all participation in armed conflict constitutes DPH, and thus does not result in loss of protected status. The notes state: "There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees."[34] While the Additional Protocol I commentary does not compare active and direct participation, Additional Protocol II's commentary makes the comparison in the context of Article 13(3). In fact, the 1987 commentary specifically recognizes the intrinsic connection between the two terms, stating that "[t]he term 'direct part in hostilities' *is taken from common Article 3*."[35] This shows a clear equation of the level of participation in hostilities required by Common Article 3—which uses the term "active"—and the level of participation required for noncombatants to lose their protected status under Additional Protocol II, Article 13(3).

The Commentaries on the Additional Protocols reveal that, as early as 1987, most observers viewed active and direct participation as synonymous. Indeed, the commentary to Additional Protocol II, Article 13(3) tells us that the drafters took inspiration from Common Article 3's removal of protected status for civilians when they are active participants in the hostilities.[36] This means that the connection between direct and active participation goes back to at least the Additional Protocols' drafting in 1977.

It is important to not conflate the connections between various parts of different treaties. Article 13(3)—alongside Article 51(3) from Additional Protocol I—and Common Article 3 serve different regulatory functions within LOAC. Common Article 3 concerns "[t]he

33 Int'l Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 ¶ 1942 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter Commentary on the Additional Protocols].

34 *Id.* ¶ 1945.

35 *Id.* ¶ 4787 (emphasis added).

36 *Id.* ¶ 4787.

protection of persons in enemy hands"[37]—that is, it requires that the belligerent exercise control over the persons in order for Common Article 3 protections to apply. On the other hand, Article 13(3) of Additional Protocol II and Article 51(3) of Additional Protocol I regulate the conduct of hostilities and therefore include protections for civilians over whom the belligerent party does not exercise control.[38] Common Article 3 "does not include specific rules on the conduct of hostilities."[39] However, the distinct regulatory functions of these provisions—the Additional Protocols using "direct" in regulating the conduct of hostilities, and Common Article 3 using "active" for control of noncombatants—did not inhibit the ICRC Commentaries from pointing out that the drafters of Article 13(3) specifically looked to and invoked Common Article 3's requirement for active participation in hostilities.[40] Furthermore, no one seeking to uphold *Lubanga*'s eventual divorce of "active" and "direct" participation has invoked these differing regulatory functions as a potential justification.[41]

In addition to these clauses, a number of other Protocol articles also use the language of DPH. Most salient is Additional Protocol I, Article 77(2), which outlaws the use of children under the age of fifteen years to "take a direct part in hostilities."[42] The ICRC commentary notes that the original proposal for this provision did not include the DPH requirement, but that the drafters decided to add it.[43] Furthermore, the commentary queries—in the context of using children in hostilities—whether "indirect acts of participation are not covered."[44] It adds only that the drafters' intention was to keep children out of armed conflict and that children should still not be used for indirect acts of participation.[45] However, the treaty's text clearly prohibits only "direct" participation by children, a narrower category of participation than all participation in hostilities.

The Commentary also discusses Additional Protocol I, Article 43(2), which grants combatant status only to members of the armed forces and thereby permits only them "to participate directly in

37 Jelena Pejic, The Protective Scope of Common Article 3: More than Meets the Eye, 93 INT'L REV. RED CROSS 189, 205 (2011).

38 *See id.* at 221.

39 *Id.* at 219.

40 COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 33, ¶ 4787.

41 *See infra* Part IV.A.

42 Additional Protocol I, *supra* note 55, art. 77(2).

43 COMMENTARY ON THE ADDITIONAL PROTOCOLS', *supra* note 33, ¶ 3187.

44 *Id.*

45 *Id.*

hostilities."[46] Article 43(2)'s commentary invokes the commentary discussion on Article 51(3), which defines "hostilities" as including preparations for and return from combat, and illustrates—without defining—"direct" as encompassing more than merely actual combat, but not the entire war effort.[47] Another provision that uses the language of DPH is Additional Protocol II, Article 4(1), which lists "fundamental guarantees"[48] and protections for "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities."[49] The ICRC Commentary tells us that Article 4(1) "reiterates the essence of common Article 3."[50] This further supports interpreting synonymity between "active," as used in Common Article 3, and "direct," as used throughout the Additional Protocols.

As mentioned, the ICRC's commentaries, though illustrative, are not law. None of the treaty texts define active or direct participation in hostilities. The international criminal tribunals of Rwanda and the former Yugoslavia fleshed out the nuances of these terms when they were faced with applying these provisions to real situations.

B. Synonymous Applications in the ICTY and ICTR

The ICTY was the first international criminal tribunal to apply DPH in an international criminal law context. After the atrocities of the wars from the dissolution of Yugoslavia in the early 1990s, the United Nations Security Council created a tribunal via Resolution 827 to prosecute war crimes committed in the former Yugoslavia.[51] The Statute of the ICTY established the court and gave it jurisdiction over four categories of crimes, including violations of the laws of war under Article 3 of the Statute.[52] One of the earliest ICTY decisions, the *Tadić* case, determined that Article 3 of the Statute "includes violations of the rules contained in Article 3 common to the Geneva Conventions . . . applicable to armed conflicts in general."[53] To show that the

46 Additional Protocol I, *supra* note 55, art. 43(2).

47 COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 33, ¶ 1679.

48 Additional Protocol II, *supra* note 5, art. 4 (The title of the article is "Fundamental Guarantees.").

49 *Id*. art. 4(1).

50 COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 33, ¶ 4515.

51 S.C. Res. 827, ¶ 6 (May 25, 1993).

52 Statute of the International Criminal Tribunal for the Former Yugoslavia, May 23, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute], adopted by S.C. Res. 827 (May 25, 1993).

53 Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 559 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997),

accused committed crimes in violation of Article 3 of the Statute, and therefore Common Article 3, prosecutors needed to demonstrate as an element of the crime that the victims were not active participants in hostilities at the time of the alleged offense.[54]

The ICTY also invoked the language of direct participation from the Additional Protocols for other crimes charged under Article 3 of the ICTY Statute. For example, in *Milošević*, charges under Article 3 of the Statute were brought "on the basis of Article 51(2) of Additional Protocol I and, alternatively, Article 13(2) of Additional Protocol II,"[55] which both protect noncombatants unless they are DPH. In *Karadžić*, the Trial Chamber cited Additional Protocol I, Article 51 for the proposition that civilians are not protected when they "take direct part in hostilities," and that this was part of the requirement that "the Chamber has to find that the victims of these attacks were civilians and that they were not participating in the hostilities."[56]

Tadić, *Milošević*, and *Karadžić* show that, as a matter of law, the ICTY analyzed whether victims were actively or directly participating in hostilities depending on the violation charged under Article 3 of the ICTY Statute—either a violation of Common Article 3 (using the term "active") or one of the Additional Protocols (using the term "direct"). The ICTY was not, however, required to analyze whether the standard for active participation, for charges stemming from Common Article 3, and the standard for direct participation, for those from the Additional Protocols, were the same, though the court found that they were largely equivalent in application.

The ICTR, in contrast, explicitly compared the two standards and concluded that active and direct participation were the same. The United Nations Security Council established the ICTR after the 1994 Rwandan Genocide.[57] Here, Article 4 of the ICTR Statute included

https://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf [https://perma.cc/MDD4-QF6B].

54 *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶ 420 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf [https://perma.cc/6TG5-GZZW].

55 Prosecutor v. Milošević, IT-98-29/1-A, Judgment, ¶ 57 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009), https://www.icty.org/x/cases/dragomir_milosevic/acjug/en/091112.pdf [https://perma.cc/HEV9-S54V].

56 Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 452 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf [https://perma.cc/9MNJ-3JCZ].

57 S.C. Res. 955 (Nov. 8, 1994).

crimes for violations of both Common Article 3 and Additional Protocol II.[58] Just like the ICTY, the ICTR analyzed DPH under the "active" standard from Common Article 3 and the "direct" standard from Additional Protocol II.

In *Akayesu*, one of the ICTR's earliest cases, the Court ruled that the terms "active" and "direct" are "so similar that . . . they may be treated as synonymous."[59] The Trial Chamber arrived at this conclusion during its analysis on whether the victims had been active participants in hostilities at the time of the alleged violation.[60] In its analysis, the Chamber compared the language of "active" from Common Article 3(1) to "direct" from Additional Protocol II, Article 4, and ruled that they were similar enough to be synonymous for evaluation of the victims' DPH conduct.[61] The ICTR applied this finding of synonymity throughout its cases. For example, in the *Kamuhanda* trial judgment, the Chamber found that "[t]he protections of both Common Article 3 and Additional Protocol II, as incorporated in Article 4 of the Statute, extend to persons taking no active part in the hostilities."[62] This language is a clear recognition that "direct" in Additional Protocol II, Article 4, is the same as "active" in Common Article 3. *Kamuhanda* cited seven prior judgments from the ICTR as support for this proposition, including *Akayesu*.[63]

In the earliest applications of DPH in international criminal tribunals, the ICTY and ICTR clearly found synonymity between "active" participation, as codified in Common Article 3, and "direct" participation, as written in the Additional Protocols. Regardless of the treaty from which the crimes charged arose, these tribunals applied the same DPH analysis.

58 *Id.*, art. 4. Additionally, Protocol I, which pertains to IACs, was inapplicable to Rwanda, which was predominately an intra-Rwanda NIAC.

59 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 629 (Sept. 2, 1998), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-04/MSC44787R0000619822.PDF [https://perma.cc/7S6M-GT6G].

60 *Id.*

61 *Id.*

62 Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Judgment and Sentence, ¶ 730 (Jan. 22, 2003), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-99-54A/MSC50236R0000542264.PDF [https://perma.cc/YZ2B-ERFC].

63 *Id.* ¶ 730 n.1304.

C. Synonymous Definition in the ICRC Interpretive Guidance

From 2003 to 2008, in order to provide clarity and recommendations on the interpretation and application of DPH, the ICRC held a series of expert meetings, resulting in the 2009 publication of their Interpretive Guidance on the Notion of Direct Participation in Hostilities.[64] The Interpretive Guidance, among other things, identified elements of DPH useful for determining whether an individual's conduct rose to the level of active or direct participation and issued ten recommendations for how practitioners could interpret and apply DPH.

Most notably, the Interpretive Guidance conceptualized a three-factor test for evaluating whether an individual's conduct rose to the level of DPH, which would result in loss of their protected status. The three "Constitutive Elements" of DPH are: (1) threshold of harm, (2) direct causation, and (3) belligerent nexus.[65] An act of DPH must meet all three elements.[66] For the threshold of harm, a noncombatant's "act must be likely to adversely affect the military operations" or "capacity" of a belligerent party, or "inflict death, injury, or destruction on" protected persons or objects.[67] Direct causation requires something beyond participation in "the general war effort,"[68] but rather a "close causal relation between the act and the resulting harm."[69] Finally, in order for an act of DPH to have a belligerent nexus, it "must be specifically designed to directly cause . . . harm in support of a party to the conflict and to the detriment of another."[70]

The ICRC's publication of the Interpretive Guidance was, however, so controversial that a number of the experts who originally convened decided to withdraw from the project.[71] But much of the contention related to aspects of DPH not concerning the relationship between "active" and "direct." For example, some of the strongest

64 *See* MELZER, *supra* note 9, at 9.

65 *Id.* at 46.

66 *Id.*

67 *Id.* at 47. Examples include "the killing and wounding of military personnel," "sabotage," "restricting or disturbing deployments, logistics and communications," "capturing . . . military personnel, objects and territory," "clearing mines," and "[e]lectronic interference." *Id.* at 48.

68 *Id.* at 52.

69 *Id.* (citing COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 33, ¶ 4787).

70 *Id.* at 58.

71 *See*, *e.g.,* Charles Garraway, The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of "Direct Participation in Hostilities", 87 INT'L L. STUD. 177, 180 (2011) (discussing the controversy and experts' withdrawal).

disagreement concerned Recommendation IX, relating to restraining the use of force in directly attacking those who were DPH or in a continuous combat function and had lost their protected status.[72] The definitions of "active" and "direct" escaped contention, and the Interpretive Guidance is therefore supportive of their synonymity.[73]

In their analysis of DPH, the experts of the Interpretive Guidance relied on all available sources, including the relevant treaties, their *travaux préparatoires*, international jurisprudence, and national military manuals.[74] The Interpretive Guidance ultimately concluded that "active" and "direct" participation are synonymous: "[T]he terms 'direct' and 'active' refer to the same quality and degree of individual participation in hostilities."[75] The Guidance favorably cited *Akayesu* as "affirm[ing] the synonymous meaning of the notions of 'active' and 'direct' participation in hostilities."[76] Furthermore, the Guidance found explicit support for the synonymity in the fact that the equally authoritative French versions of Common Article 3 and both Additional Protocols consistently use the language of "*participent directement*" throughout all three treaties, despite the English versions' interchangeable use of active and direct.[77]

In interpreting the text of treaties in different languages, international law—namely Article 33 of the Vienna Convention on the Law of Treaties ("VCLT")—requires that, for treaties "authenticated in two or more languages"—as the Geneva Conventions and Additional Protocols are—"the text is equally authoritative in each language."[78] Furthermore, the terms of the different versions of the treaty "are

72 *See generally* 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); MELZER, supra note 9, at 77-82.

73 For more on some of the disagreement in the Interpretive Guidance, see generally 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) (discussing some of the disagreements in the Interpretive Guidance, which includes four critical articles and a response article by Nils Melzer, the legal advisor to the ICRC).

74 MELZER, *supra* note 9, at 9.

75 *Id.* at 43.

76 *Id.* at 43 n.84 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 629 (Sept. 2, 1998)).

77 *Id.* at 43; *see also* U.S. DEP'T OF DEF., LAW OF WAR MANUAL § 5.8.1.1 (2023) ("Because the English and French language versions of the 1949 Geneva Conventions, AP I, and AP II are equally authentic, States negotiating these treaties may not have intended a difference between 'active' and 'direct.'").

78 Vienna Convention on the Law of Treaties art. 33(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

presumed to have the same meaning in each authentic text."[79] While we should be careful not to extend Article 33's rule regarding interpretation of treaty terms in *one* treaty to interpretation of *multiple* treaties, the provision provides the first logical step in interpreting the language of the texts. Under the VCLT, the French "*directement*" and English "direct" from both Additional Protocols must be "presumed to have the same meaning," just as the French "*directement*" and English "active" must have the same definition in Common Article 3. Logically, then, there is little reason not to equate the English and French terms of the Additional Protocols and Common Article 3 to find synonymity between active and direct in the English versions.[80]

Just like their Commentaries on the Geneva Conventions and the Additional Protocols, the ICRC's Interpretive Guidance is not law. Nonetheless, it is a useful analytical tool and a strong indicator of the predominant interpretation and application of DPH. Since publication, the Guidance has even become a resource for international tribunals in forming their DPH analysis.[81] The Guidance summarizes the weight of authorities, which indicate that, under international law, "active" and "direct" participation are synonymous. The ICRC Interpretive Guidance, however, predated the jurisprudence of the SCSL and the *Lubanga* decision from the ICC, to which this Article now turns.

III. ACTIVE PARTICIPATION IN SIERRA LEONE AND *LUBANGA*

By the mid-2000s, as the work of the ICTR and ICTY wound down and the ICRC published their Interpretive Guidance on DPH, the synonymity between "active" and "direct" seemed well-

79 *Id.* art. 33(3).

80 But see Joshua Yuvaraj, When Does a Child 'Participate Actively in Hostilities' Under the Rome Statute? Protecting Children from Use in Hostilities After Lubanga, 32 UTRECHT J. INT'L & EUR. L. 69, 79 (2016) (finding different meanings for the terms based on language). Comparing treaty terms in plurilingual treaties is tricky business, and rote equation, as I have largely done here, may not be the best way to interpret them. However, multilingualism can be an element of interpretation, and the differing uses of the French and English terms of active and direct actually confirm their synonymous definitions in the treaties. See infra Part IV.A; Daniella F. Martino, Note, *Determining Indeterminacy: Plurilingual Treaty Interpretation Under Article 33 of the Vienna Convention on the Law of Treaties*, 62 COLUM. J. TRANSNAT'L L. 461, 496-500 (2024).

81 *See, e.g.*, Prosecutor v. Đorđević, Case No. IT-05-87/1-T, Public Judgment, ¶ 2054 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011), https://www.icty.org/x/cases/djordjevic/tjug/en/110223_djordjevic_judgt_en.pdf [https://perma.cc/VNF2-7G8D] (citing the ICRC Interpretive Guidance for discussion on the functions of DPH and the continuous combat function).

established.[82] But international law expanded into new contexts and new tribunals—namely the SCSL and ICC—which had to analyze DPH in a new scenario: the active participation of child soldiers. The issue in both tribunals was whether the accused were guilty of using child soldiers as active participants in hostilities. In an effort to provide broad protection for children in conflict, both tribunals—first the SCSL, then the ICC in *Lubanga*—significantly expanded the definition of active participation in hostilities.

A. The SCSL's Application of Active Participation to Child Soldiers

The United Nations Security Council established the SCSL in 2000 via a direct partnership agreement with Sierra Leone.[83] The Sierra Leone Civil War saw mass atrocities largely committed by an internal rebel group, the Revolutionary United Front ("RUF"), with support and direct intervention from head of state Charles Taylor's National Patriotic Front of Liberia ("NPFL"). Eventually, members of the Sierra Leone Army rebelled and formed the Armed Forces Revolutionary Council ("AFRC") to overthrow the Sierra Leone government alongside the RUF, committing widescale atrocities. In the wake of the conflict, the Security Council agreed to form the SCSL, which it formally established via its Statute.[84]

Like the ICTR Statute, Article 3 of the SCSL Statute included jurisdiction over violations of Common Article 3 and Additional Protocol II.[85] Article 4(c) included jurisdiction for using child soldiers: "Conscripting or enlisting children under the age of 15 years into armed forces or groups or *using them to participate actively in hostilities*."[86] This provision used the exact language of Article 8(2)(e)(vii) of the Rome Statute establishing the ICC.[87] At the time the United Nations Security Council adopted the SCSL Statute, the Rome Statute remained unratified. However, state parties signed the Rome Statute

82 *See, e.g.*, Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 24 (2010) ("It is well accepted in international law that the terms 'active' and 'direct' are synonymous, whether the concept is applied in [NIAC] or [IAC].").

83 *See* S.C. Res. 1315, ¶ 1 (Aug. 14, 2000).

84 Lansana Gberie, A Dirty War in Africa: The RUF and the Destruction of Sierra Leone 100-06 (2005).

85 Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Sierra Leone-U.N., Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter SCSL Statute].

86 *Id.* art. 4(c) (emphasis added).

87 Rome Statute, *supra* note 10, art. 8(2)(e)(vii).

in 1998,[88] and it became effective in 2002 after sixty states ratified the Statute, so the final text was already on its way to ratification at the time of drafting of the SCSL Statute in 2000.

For the SCSL to find a defendant guilty of using children as soldiers, it had to determine, under Article 4(c) of the SCSL Statute, whether the defendant used child soldiers "to participate actively in hostilities." In considering such charges, the SCSL applied a DPH analysis similar to the analysis applied by the ICTY and ICTR. Indeed, multiple judgments of the SCSL explicitly held that "active" and "direct" participation were "synonymous," just as the ICTR had determined in *Akayesu*, and even cited *Akayesu* for that proposition.[89]

The *Brima* prosecution, also called the AFRC Case, was the first SCSL case to apply the active participant requirement for the use of child soldiers. The Trial Judgment recognized that active participation "is not limited to participation in combat" because "[a]n armed force requires logistical support."[90] Therefore, "[a]ny labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation."[91] The Trial Chamber listed examples of activities that would constitute such support, including carrying loads, finding food, acting as a decoy, messenger, or scout, and manning checkpoints.[92] When applied to the facts of the case, they ruled that guarding diamond mines was active participation. The mine was an important military target, as its diamonds raised revenue for the war effort. Its importance created "sufficient risk" to the children who worked there, thereby making them active participants in the hostilities.[93]

The second SCSL case ruled the same way regarding DPH. The *Sesay* Trial Chamber explicitly concluded that their finding that a child soldier was an active participant in the hostilities also resulted in the child's loss of protected status under LOAC.[94] The court stated,

88 *See generally id.*

89 Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, ¶ 131 (Aug. 2, 2007) (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 629 (Sept. 2, 1998)); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶ 102 (Mar. 2, 2009), https://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf [https://perma.cc/74KQ-HQM2] (same).

90 Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶¶ 737, 1266 (June 20, 2007), http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf [https://perma.cc/P43K-6QWD].

91 *Id.*

92 *Id.* ¶ 737.

93 *Id.* ¶ 1267.

94 *Sesay*, SCSL-04-15-T at ¶ 1723 ("The Chamber is mindful that an overly expansive definition of active participation in hostilities would be inappropriate as its

unequivocally, that such "children would constitute legitimate military targets."[95] *Sesay* did not delve into legal interpretations of active or direct participation, and did not link their findings explicitly to Common Article 3 or the Additional Protocols. Rather, the Court simply found that the child soldiers lost their protected status "under the law of armed conflict" generally as active participants in hostilities when they committed other crimes against civilians.[96] This included crimes such as "killing and raping civilians"; burning houses, cars, and towns; and looting.[97] It also included combat activities like attacking towns, ambushing UN peacekeepers, conducting armed patrols, "guarding of military objectives," acting as bodyguards for commanders, and operating as spies and intelligence gatherers.[98] The Trial Chamber, however, found that neither deploying unarmed children to conduct food-finding missions to bring back to the armed forces nor performance of basic household chores for commanders constituted active participation.[99]

The *Taylor* case—which involved the prosecution of former Liberian head of state Charles Taylor—largely applied the same analyses from *Brima* and *Sesay* and cited both cases favorably in applications of the active participation standard.[100] For example, the *Taylor* judgment found that children were active participants when carrying ammunition for rebel forces, guarding military objectives, committing crimes against civilians, conducting patrols and ambushes, and serving as bodyguards.[101] As in *Sesay*, *Taylor* held that "the performance of domestic chores . . . [was] not related to the hostilities," and therefore did not "directly support the military operations of the armed groups."[102]

The SCSL, through its prosecution of adults who used child soldiers as active participants, clearly broadened the level of conduct that

consequence would be that children associated with armed groups lose their protected status.").

95 *Id.* ¶ 1721.

96 *Id.* ¶¶ 1723-24.

97 *Id.* ¶¶ 1711-13.

98 *Id.* ¶¶ 1715-16, 1718, 1725-27, 1729, 1731.

99 *Id.* ¶¶ 1730, 1739, 1743.

100 *See, e.g.*, Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 1459 (May 18, 2012), http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf [https://perma.cc/KC4P-KPAY] (citing *Sesay*, SCSL-04-15-T, ¶ 1725, and Prosecutor v. Brima, SCSL-04-16-T, Judgment, ¶ 3409 (June 20, 2007)).

101 *Id.* ¶¶ 1459, 1523-28, 1565, 1591-92.

102 *Id.* ¶ 1411.

falls within active participation.[103] Their analysis was firmly connected to the principle of distinction: When a child was an active participant in the hostilities, such participation violated Article 4(c) of the SCSL Statute. Therefore, whoever used that child soldier was legally culpable, but that child also lost their protected status and was therefore legally targetable.[104]

The SCSL broadened the meaning of active participation while their opinions recognized the synonymous definitions of "active" and "direct" and held that broad levels of conduct fell within "active" participation.[105] The SCSL's analysis of DPH is, therefore, best interpreted as an expansion of the *conduct* that falls within DPH, but not a change to the theoretical principles set forth by the ICTR, ICTY, and the ICRC's interpretations in its Commentaries and Interpretive Guidance. Although the SCSL qualified a greater range of activities as DPH, the doctrine's core tenets of synonymity between "active" and "direct"—and premise on the principle of distinction—remained intact. The ICC in *Lubanga* would reinterpret that synonymity, however, with a very different approach.

B. Lubanga's Divorce of Active and Direct

Thomas Lubanga Dyilo founded and led the Union of Congolese Patriots ("UPC") in 2001, during the Ituri conflict in the Democratic Republic of the Congo ("DRC").[106] Under his leadership, the UPC committed many atrocities and, as in the Sierra Leone conflict, used child soldiers.[107] Lubanga was the first person arrested under a warrant from the ICC,[108] and he would also become the first person convicted. The ICC issued an arrest warrant for Lubanga for "the war crime of using children under the age of fifteen to participate actively in

103 *See* Cecile Aptel, *Unpunished Crimes: The Special Court of Sierra Leone and Children*, *in* THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW 340, 347 (Charles Chernor Jalloh ed., 2014); Yuvaraj, *supra* note 8080, at 78.

104 Gus Waschefort, Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone, 1 J. INT'L HUMANITARIAN LEGAL STUD. 189, 199-200 (2010).

105 *Id.* at 199.

106 Special Rep. on the Events in Ituri, January 2002-December 2003, Letter dated 16 July 2004 from the Secretary-General addressed to the President of the Security Council, annex I, U.N. Doc. S/2004/573 (July 16, 2004).

107 See generally *id.* ¶ 1.

108 *ICC - First Arrest for the International Criminal Court*, INT'L CRIM. CT. (Mar. 2, 2006), https://www.icc-cpi.int/news/icc-first-arrest-international-criminal-court [perma.cc/R9BQ-9PRU].

hostilities," in violation of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.[109] These two Rome Statute articles use language that is identical to Article 4(c) of the SCSL Statute.[110]

An early step in ICC procedure is the Confirmation of Charges, akin to a probable cause hearing in U.S. criminal procedure. At this early stage in *Lubanga*, the ICC first considered the issue of "active" versus "direct" participation in hostilities. In the Confirmation of Charges, the ICC ruled that "'[a]ctive participation' in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities."[111] This language clearly differentiates active as something broader than direct participation, and narrows direct participation only to "combat," though the decision does not expressly define how combat is different from direct or active participation in hostilities. That is, the Confirmation of Charges set forth a new rule where the court would determine whether or not the conduct of the child soldier victim was combat-related.[112] Actions like "food deliveries to an airbase or the use of domestic staff in married officers' quarters" were "clearly unrelated to hostilities,"[113] but using children "to guard military objectives . . . or to safeguard the physical safety of military commanders . . . (in particular, where children are used as bodyguards)" constituted active participation.[114] The ICC invoked both the Report of the Preparatory Committee that drafted the Rome Statute and the ICRC's Commentary of Article 77(2) of Additional Protocol II as support for this idea.[115]

The ICC's Trial Judgment further differentiated the two concepts when the Court ruled that "the expression 'to participate actively in hostilities', as opposed to the expression 'direct participation' . . . was clearly intended to import a wide interpretation to the activities and roles that are covered."[116] In short, as opposed to the old dichotomy of

109 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Warrant of Arrest, (Feb. 10, 2006), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_02234.PDF [https://perma.cc/24QN-SCTU].

110 *See supra* notes 85-88 and accompanying text.

111 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 261 (Jan. 29, 2007), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2007_02360.PDF [perma.cc/6KFS-8KLL].

112 *Id.* ¶ 262.

113 *Id.*

114 *Id.* ¶ 263.

115 *Id.* ¶¶ 243, 246 (citing Rep. of the Preparatory Comm. on the Establishment of an Int'l Crim. Ct., U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998)).

116 Lubanga Trial Judgment, *supra* note 13, ¶ 627.

DPH, which held that conduct was either active/direct, resulting in a loss of protected status and illegal use of a child in hostilities, or not, the ICC effectively created three categories: (1) conduct that is direct participation, and therefore clearly active participation, such as "those on the front line"; (2) conduct that is indirect participation, yet still active participation, in situations "absent from the immediate scene of the hostilities," yet where "the support provided by the child to the combatants exposed him or her to real danger as a potential target"; and (3) conduct that is indirect and not active because it does not expose the child to "real danger as a potential target."[117]

As support for this expansion, the Trial Judgment relied on the SCSL's *Brima* opinion.[118] Specifically, the *Lubanga* judgment cited *Brima*'s conceptualization that active participation includes "[a]ny labour or support that gives effect to, or helps maintain, operations in a conflict"[119] and that "'[u]sing' children to 'participate actively in the hostilities' encompasses putting their lives directly at risk."[120] The *Lubanga* judgment did not, however, consider that the SCSL had, in the *Sesay* and *Fofana* judgments, adjudged active and direct to be synonymous, nor did it note that the *Sesay* judgment categorically linked the active participation analysis for child soldiers to the principle of distinction in LOAC.[121] In other words, the ICC's divorce of active and direct participations was entirely unique to *Lubanga*. It quoted from the SCSL judgments for support but ignored their other explicit findings of synonymity between active and direct participation.

On appeal, the Appeals Chamber slightly reworked this interpretation but did not cure it entirely. Instead, the *Lubanga* Appeal Judgment merely tweaked the standard for analyzing active participation. Whereas in the *Lubanga* Trial Judgment the ICC found that active participation depended on the level of risk that the child soldier's conduct exposed them to,[122] the Appeal Judgment effectively ruled that the risk associated with the conduct is an indication of active participation, but

117 *Id.* ¶ 628; see also Sylvain Vité, Between Consolidation and Innovation: The International Criminal Court's Trial Chamber Judgment in the Lubanga Case, 15 Y.B. INT'L HUMANITARIAN L. 61, 76-77 (2012).

118 Lubanga Trial Judgment, *supra* note 13, ¶ 594.

119 *Id.* ¶ 624 (quoting Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶ 737 (June 20, 2007)).

120 *Id.* ¶ 626 (quoting *Brima*, SCSL-04-16-T, ¶ 736).

121 *See supra* notes 89-95 and accompanying text.

122 Lubanga Trial Judgment, *supra* note 13, ¶ 628; *see also* Lubanga, Case No. ICC-01/04-01/06 A 5, Appeal Judgment, ¶ 329 (Dec. 1, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_09844.PDF [https://perma.cc/JR9A-4UV2] [hereinafter Lubanga Appeal Judgment].

is not the touchstone.[123] While the Appeals Chamber found that the risk-based standard for active participation was erroneous,[124] the Appeal Judgment did not alter the lower judgments' decisions to analyze active participation separately from direct participation.

In reworking the Trial Chambers' definition of active participation, the Appeal Judgment cited to the Report of the Preparatory Committee on the Establishment of an ICC to support the proposition that active and direct participation were separate analyses.[125] That 1998 report discussed characterizing "using them [children] to participate actively in hostilities" as a war crime,[126] language that would ultimately be used in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.[127] The report defined "participate" as "cover[ing] both direct participation in combat and also active participation in military activities linked to combat."[128] Based on this footnote, the Appeals Chamber established the active participation test as one analyzing "the link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged."[129] This discussion of the "link" is relegated only to discussion of active participation, showing the Appeals Chamber's tacit affirmance of analyzing active and direct participation separately. In effect, the ICC, both at the Trial and Appeals Chambers, defined active participation as an analysis separate from direct participation. They did so despite decades of analyses holding that the two terms are synonymous.[130]

This divorce—and resulting confusion of DPH standards and analysis—was entirely unnecessary. Had the *Lubanga* opinions

123 Lubanga Appeal Judgment, *supra* note 122, ¶ 333 ("[T]he crime of using children to participate actively in hostilities requires the existence of a link between the activity and the hostilities. Although the extent to which the child was exposed to risk . . . may well ban an indicator of the existence of a sufficiently close relationship . . . an assessment of such risk cannot replace an assessment of the relationship itself."); *see also* Yuvaraj, *supra* note 80, at 83-84 (finding the Appeal Chamber's approach "more faithful" to a proper interpretation).

124 Lubanga Appeal Judgment, *supra* note 122, ¶ 332.

125 *Id.* ¶ 334 (citing Rep. of the Preparatory Comm. on the Establishment of an Int'l Crim. Ct., U.N. Doc. A/CONF-183/2/Add.1 (Apr. 14, 1998)).

126 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2 (Vol. III), art. 5 n.12 (1998) [hereinafter *Report of the ICC Preparatory Committee*].

127 Rome Statute, *supra* note 10, arts. 8(2)(b)(xxvi), 8(2)(e)(vii).

128 *Report of the ICC Preparatory Committee*, *supra* note 126, art. 5 n.12; Lubanga Appeal Judgment, *supra* note 122, ¶ 334 (quoting *id.*).

129 Lubanga Appeal Judgment, *supra* note 122, ¶ 335.

130 *See supra* Part II.

applied the traditional dichotomous DPH analysis—active/direct participation or not—they likely would have arrived at the same conclusions and result that they ultimately reached.[131] The Trial Chamber ultimately found beyond a reasonable doubt that Lubanga used children actively in hostilities in violation of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii).[132] Conduct included in active participation comprised actual combat, use as military guards, and use as bodyguards.[133] Even under the Appeals Chamber's approach to analyzing active participation, modified from the Trial Chamber's analysis, it still affirmed all of the Trial Chambers' findings regarding child soldiers and their active use in hostilities.[134] These rulings are very similar to the conclusions reached in the SCSL line of cases. Domestic work in *Lubanga*, as in the SCSL's line of cases, did not constitute active participation.[135] Such a finding about the content of the participation also comported with previous findings from the SCSL, where active and direct participation were held as synonymous.[136] And under the interpretations of DPH advanced by the ICTY, ICTR, and ICRC Interpretive Guidance, there is little reason to doubt that the ICC would have found Lubanga guilty.

The issue with the *Lubanga* decision, therefore, was not its result, but how it arrived there. The ICC's differentiation of active and direct participation effectively created three categories of noncombatant conduct during armed conflict. Direct participation—that is, combat—would result in a child soldier losing their protected status and would create criminal liability for individuals that used child soldiers. Indirect participation that was active, such as guarding military objectives or otherwise supporting the combatant's logistics, might not result in a loss of protection, but would still create criminal liability for defendants who use child soldiers. And finally, indirect and inactive participation, like domestic work, results in neither a loss of protection nor criminal liability. As the next Part details, this analysis is not only

131 *See* Vité, *supra* note 117, at 80 ("[C]omparing 'active' and 'direct' participation in hostilities was not necessary for the purposes of the [*Lubanga*] judgment.").

132 Lubanga Trial Judgment, *supra* note 13, ¶ 1358.

133 *Id.* ¶¶ 915-16.

134 Lubanga Appeal Judgment, *supra* note 122, ¶¶ 336-40.

135 *Id.* ¶¶ 913-14. The Trial Chamber found that Lubanga violated Articles 8(2)(e)(vii) and 8(2)(b)(xxvi) when he used the girls solely for domestic work only because he had conscripted and enlisted them into his forces. Those girls, however, were not found to be active participants.

136 *See* Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶¶ 1730, 1739 (Mar. 2, 2009) (finding that domestic chores were not active participation); Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 1411 (May 18, 2012) (same).

unworkable in application, but has significant impacts beyond the Rome Statute and the protection of children in war.

IV. THE UNWORKABLE IMPACT OF *LUBANGA* ON THE DOCTRINE OF DPH

This Part will show that *Lubanga*'s three categories of participation—direct/active, indirect/active, and indirect/inactive—are not only legally unnecessary and confusing, but unworkable outside of a courtroom. Despite *Lubanga*'s landmark status as the first-ever ICC conviction, the decision quickly came under scrutiny for its interpretation of active participation in hostilities. This Part reviews these criticisms and refutes the critiques that attempt to rationalize and support the *Lubanga* approach. It then analyzes the significance of the *Lubanga* analysis and demonstrates its unworkability. It demonstrates that, when attempting to consider active participation—such as for child soldiers—in new wartime scenarios—such as cyber operations—the synonymity between active and direct is a preferable approach for regulating targeting, even if potentially at the expense of expanded or gradated criminal liability for those who use child soldiers.

A. Criticisms of the ICC's Lubanga Approach

The first possible justification for the *Lubanga* approach divorcing active and direct participation is linguistic. Of course, "active" and "direct" are different words, with slightly different meanings and connotations.[137] Yet many international legal provisions, including the 1977 Additional Protocols, relied upon a synonymity between the two words.[138] For Additional Protocol II, "[t]he term 'direct part in hostilities' is taken from common Article 3,"[139] which uses "active" participation. Courts and interpreters were willing to look past such linguistic differences, determining that active and direct were synonymous.[140]

Lubanga's holding, however, may find support not in the English definitions, but in the equally authentic French versions of the treaties. Recall that, in French, both Common Article 3 and the Additional

137 *See* Gus Waschefort, International Law and Child Soldiers 63 (2015).

138 *See supra* Part II.

139 COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 33, ¶ 4787.

140 *See supra* Part II.

Protocols use the language of "*participent directement*."[141] The ICRC invoked this as evidence of synonymity between the English terms active and direct, as used in LOAC and the principle of distinction.[142] In stark contrast to Common Article 3 and the Additional Protocols, the French version of the Rome Statute uses the term "*participer activement*" in both Articles 8(2)(b)(xxvi) and 8(2)(e)(vii).[143] Professor Joshua Yuvaraj advanced an argument based on this difference: "[O]ne can . . . argue that the Statute's drafters intended for a meaning to be applied in the child protection provisions that is different from the meaning attributed to 'direct' at IHL according to the principle of distinction."[144] Article 4(c) of the SCSL Statute also uses "*participer activement*" in the French version, as well as "active" participation in the English version,[145] just like the Rome Statute provisions.

As this Article will explain further, however, this French language differentiation is the only argument that could possibly support the ICC's approach in *Lubanga*. Even though the linguistic comparison does add some credence to the idea of different applications of active and direct participation, it is not enough to overcome the other shortcomings of the ICC's approach.[146] Furthermore, nothing indicates that the ICC relied on this language distinction in *Lubanga*, as neither the Appeals nor the Trial Chambers made any references to the French versions of the Rome Statute in their judgments.

A possible alternative explanation is that the drafters of the SCSL and Rome Statutes, in both the English and French versions, applied an inherent synonymity between active and direct that extended to the French terms "*activement*" and "*directement*."[147] It is unlikely that the drafters of the SCSL and Rome Statutes created an intentional divorce between active and direct/*directement* when Common Article 3 and the Additional Protocols clearly intended synonymity between "active," "direct," and "*directement*," and when such interpretation had been bolstered by criminal tribunals and ICRC Commentaries.

141 MELZER, *supra* note 9, at 43.

142 *See id.*

143 Rome Statute, *supra* note 10, arts. 8(2)(b)(xxvi), 8(2)(e)(vii) (French version); *see also* Yuvaraj, *supra* note 80.

144 Yuvaraj, *supra* note 80.

145 SCSL Statute, *supra* note 85, art. 4(c) (both French and English versions).

146 *See* WASCHEFORT, *supra* note 137, at 66 ("[T]he standards of direct/active participation in armed conflict should be interpreted to be the same standard as regards both the principle of distinction and the child soldier prohibition.").

147 *See id.* at 65 ("[T]he answer cannot be found in the language itself.").

A second justification advanced by Yuvaraj is that the SCSL and Rome Statutes, as aspects of ICL, not IHL or LOAC, require a different application and analysis for regulating child soldiers than DPH as applied under the principle of distinction.[148] Yuvaraj argues that "the use of different principles to interpret the different IHL and Statute provisions addresses these concerns."[149] In his interpretation, one would use "[t]he principle of distinction . . . to interpret provisions like Common Article 3, and the purpose of protecting children used to interpret provisions like Article 8(2)(e)(vii)."[150] Therefore, distinguishing between active participation for protection of child soldiers permits a "broach approach . . . to cover as wide a range of activities as possible" to protect children from being forced to fight.[151] While the result of this approach, ideally expanding protection against the use of child soldiers, is, of course, a noble and important goal of international law—or as Professor Gus Waschefort calls it, an "appealing" interpretation—it is "not necessarily consonant with IHL as a regime of international law."[152]

As Yuvaraj identified, the SCSL and Rome Statute's prohibitions on using child soldiers to participate actively in hostilities are based on Article 77(2) of Additional Protocol I, which uses the language of "direct" participation.[153] The *Lubanga* Appeal Judgment also identified Article 77(2) of Additional Protocol I as a "corresponding provision[]" to the Rome Statute's child protection provisions.[154] On the one hand, Yuvaraj argued for using the different purposes of the treaty provisions to permit a broad interpretation of "active" for protecting child soldiers, and a narrow interpretation of "active" and "direct" under the principle of distinction.[155] On the other, he expressly

148 *See* Yuvaraj, *supra* note 80, at 79-80; *see also* Alexandre Andrade Sampaio & Matthew McEvoy, *Little Weapons of War: Reasons for and Consequences of Treating Child Soldiers as Victims*, 63 NETH. INT'L L. REV. 51, 54-55 (2016).

149 Yuvaraj, *supra* note 80, at 79.

150 *Id.*

151 *Id.* at 80.

152 WASCHEFORT, *supra* note 137, at 65; *see also* Vité, *supra* note 117, at 80 (rejecting the potential justification of "different interpretations of this [DPH] notion under international criminal law and international humanitarian law" because it would result in "unwelcome practical consequences").

153 Yuvaraj, *supra* note 80, at 80 (citing KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 376 (2003)); Additional Protocol I, *supra* note 5, art. 77(2) (providing that belligerents shall strive to ensure that "children who have not attained the age of fifteen years do not take a *direct* part in hostilities") (emphasis added).

154 Lubanga Appeal Judgment, *supra* note 122, ¶ 333 n.615.

155 Yuvaraj, *supra* note 80, at 80.

recognized "the need for consistency in the terminology between related IHL and ICL provisions."[156] Without the synonymity between IHL and ICL terms, including definitions of "active" and "direct" participation between related "corresponding provisions,"[157] the two fields of law risk growing apart.[158]

Ultimately, however, *Lubanga*'s divorce of direct and active participation, which some scholars attempted to reconcile, ignores that "once a child participates directly in armed conflict . . . he/she will be a legitimate target."[159] As many commentators noted, a broad interpretation of "active" participation may result in a broader category of civilians—including children—who become targetable under Common Article 3 and the Additional Protocols because it is impracticable to interpret active and direct participation differently for purposes of lawful military targeting.[160] In the Rome Statute, the term "active" also

156 *Id.*

157 Lubanga Appeal Judgment, *supra* note 122, ¶ 333 n.615.

158 *See* Agnieszka Jachec-Neale, *The Unintended Consequences of International Court Decisions*, LIEBER INST. W. POINT: ARTICLES OF WAR (Nov. 19, 2020), https://lieber.westpoint.edu/unintended-consequences-international-courts-decisions/ [https://perma.cc/4X29-DAJR]:

"[W]ar crimes are what link the two branches of law. To work effectively, the two branches should share terminology, concepts, and meanings. If terms are interpreted differently in the criminal process there are consequences. Tension may ensue between the branches of law. Moreover, the risk arises that the two bodies of law will drift apart on a material level, causing practical complications for domestic courts, practitioners, and military operators."

159 *See* WASCHEFORT, *supra* note 137, at 68 (discussing the context of Recommendation IX of the ICRC's Interpretive Guidance); *see also* Prosecutor v. Sesay, SCSL-04-15-T, Judgment, ¶ 1723 (Mar. 2, 2009), http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf [https://perma.cc/74KQ-HQM2]. Some commentators argue that children may *never* be legitimate military targets, regardless of their degree of participation in hostilities. However, for the purposes of this Article, I assume the opposite and follow the current majority view. *See* Sampaio & McEvoy, *supra* note 148, at 64. *But see* Anaise Muzima, *Reimagining the Scope of Children's Legal Protection During Armed Conflicts Under International Humanitarian Law and International Criminal Law*, 8 W. J. LEGAL STUD. 1, 16 (2017) ("[Children] can never be considered as lawful military targets, unlike combatants.").

160 See, e.g., Vité, supra note 117, at 79-80; Natalie Wagner, A Critical Assessment of Using Children to Participate Actively in Hostilities in Lubanga: Child Soldiers and Direct Participation, 24 CRIM. L.F. 145, 175 (2013) (concluding that Lubanga's analysis subjects civilians "to being 'legitimate' targets during widened participation, at which time they would otherwise be protected under IHL"); Chris Jenks, Law as Shield, Law as Sword: The ICC's Lubanga Decision, Child Soldiers and the Perverse Mutualism of Participation in Hostilities, 3 UNIV. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 106, 123-24 (2013) (calling Lubanga's divorce a "glaring and problematic discrepancy" in defining participation in hostilities).

appears in Article 8(2)(c).[161] That provision merely re-states Common Article 3, and the French version of the Rome Statute repeats the language of the French Common Article 3—"*directement*."[162] Throughout Article 8 of the Rome Statute, where the English text refers to taking a "direct part in hostilities,"[163] the French version uses the term "*directement*."[164] As a result, the ICC interpretation of "active" under *Lubanga* cannot logically be confined only to the child support provisions, unless *Lubanga* and its proponents agree that the term "active" has different meanings in different parts of the Rome Statute.

Under the *Lubanga* logic, future interpretations of the Rome Statute, even when interpreting the same exact text as Common Article 3 and the Additional Protocols, would have to conduct two analyses in each of three different scenarios. First, as in *Lubanga*, "active" and "*activement*"—the terms used by the Rome Statute—can include "indirect" participation that is still "active participation."[165] Second, for provisions where the Rome Statute uses "active" and "*directement*," the terms are interpreted to be synonymous, and there are only two categories: direct and indirect. This analysis comports with the prior jurisprudence of the ICTY and ICTR, as well as the scholarly work of ICRC. Third, when the English and French versions both use the terms "direct" and "*directement*," the terms would be read synonymously and analysis of DPH would mirror the second category, where "active" and "*directement*" are used.

This reasoning shows the impracticability of distinguishing *Lubanga*'s framing of DPH just because it is ICL and not LOAC. The ICC inherently uses linguistics to interpret treaty provisions that affect the real world of hostilities that LOAC regulates. Conflating treaty terms from different textual versions of various treaties, amalgamated

161 *See* Rome Statute, *supra* note 10, art. 8(2)(c) ("any of the following acts committed against persons taking no *active* part in the hostilities") (emphasis added).

162 *Id.* (English and French versions).

163 *Id.* arts. 8(2)(b)(i), 8(2)(e)(i) (English version).

164 *Id.* (French version).

165 Lubanga Trial Judgment, *supra* note 13, ¶ 628.

in the Rome Statute, and applying different interpretations to them is textually incorrect[166] and practically unworkable.[167]

While international law should strive to protect children as much as possible, the *Lubanga* approach is not the way to do so. It is both unwise and impractical to divorce the meaning of "active" and "direct," destroying their synonymity. Even though the jurisprudence of the ICTY and ICTR did not need to conduct DPH analysis for child soldiers, the conflict in Sierra Leone and the DRC did not justify a new interpretation. To do so creates a new, unworkable standard. Adapting a keen observation from Waschefort, while "[i]t is unfortunate that only children directly participating in hostilities enjoy the protection of instruments" like Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), "the development of international law" is the proper method for expanding protection, rather than creative interpretations of old, firmly established law and doctrines like DPH.[168] Had the drafters of the Rome Statute wanted to provide the broadest possible prohibition against using child soldiers, they could have simply left out "actively" and "*activement*" entirely and instead included a blanket prohibition on using child soldiers in conflict, regardless of the nature of their involvement.[169] They did not do so, however.

While some may argue for a gradation of legal consequences for participation in hostilities, particularly for children who are often

166 VCLT, *supra* note 78, art. 33. As all four terms, in French and English, appear in the Rome Statute, interpreters, such as the ICC, should "presume[]" that the terms "have the same meaning in each authentic text." *Id.* art. 33(3). Therefore, at the very least, within the Rome Statute, "active" and "*directement*" must have the same meaning, resulting in "*activement*" and "direct" also having the same meaning. The arguments for DPH synonymity that motivated the ICTR, ICTY, drafters of the Additional Protocols, and commentators of the ICRC, all prior to the Rome Statute, apply equally when interpreting those same terms *within* the Rome Statute. I initially warned against using the VCLT in interpreting treaty terms in different treaties. However, the VCLT's commands for treaty interpretation certainly apply to the Rome Statute and its incorporation of all the various terms—active, direct, *activement*, and *directement*—within one treaty, even if those terms were originally inspired from external treaties. *Cf. supra* notes 78-80.

167 *See infra* Parts IV.B-C.

168 WASCHEFORT, *supra* note 137, at 68.

169 Yuvaraj indeed advocates for this standard. Notably, he acknowledges that, in order to provide the broadest possible protection to child soldiers, "'active' should be removed from the [Rome] Statute's child protection provisions." And, "[f]or further consistency, Article 77(2) of [Additional Protocol] I should be amended to remove the word 'direct.'. . ." Yuvaraj, *supra* note 80, at 77. Until that occurs, if it ever does, we must employ the language of active and direct participation synonymously.

forced into hostilities against their will,[170] the *Lubanga* analysis is the improper way to achieve that result. LOAC is designed to regulate the conduct of a party to a conflict, and it is therefore essential to view international law's applicability through the lens of a belligerent party.[171] The next two Parts show that the *Lubanga* analysis fails that.

B. Lubanga's Analysis is an Unworkable Standard

Even if a separate standard of active and direct participation were legally tenable, it would be impossible and unwise to apply such a standard in the real world. In theory, the *Lubanga* analysis does not merely outlaw the use of children's active participation in hostilities, but its broad interpretation would likely apply to, at minimum, Common Article 3, which also uses the language of "active" participation.[172]

To assess the applicability of the *Lubanga* standard within the context of the conduct of hostilities, one must analyze the three categories that *Lubanga* contemplates. Those categories are (1) active and direct participation, resulting in loss of protected status; (2) active, but indirect, participation, resulting in no loss of protected status, but resulting in criminality under the Rome Statute for use of child soldiers; and (3) inactive and indirect, or activities clearly unrelated to the hostilities.[173] This threefold approach fails for its impracticability in actual combat. Importantly, a core principle of LOAC is regulating combatant parties' conduct *on the battlefield* to prevent violations ex ante, not just in the courtroom ex post.

The United States' Department of Defense Law of War Manual was recently updated in July 2023 and maintains synonymity between active and direct participation in hostilities, citing much of the rationale discussed throughout this piece.[174] The Manual adds that "the

170 *See generally* Aptel, *supra* note 103 (recounting various methods and actions that child soldiers were forced into against their will).

171 *See* W. Hays Parks, Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces 12-13 (2005), https://www.icrc.org/data/rx/en/assets/files/other/2005-07-expert-paper-icrc.pdf [https://perma.cc/Y6S4-TXGX] ("[T]he issue of whether a civilian may be regarded as taking a direct part in hostilities must be viewed not only from the standpoint of the government employing the civilian, but also how the civilian and his or her duties may be viewed by an enemy.").

172 *See* WASCHEFORT, *supra* note 137, at 66 (arguing for the same standard for active and direct participation).

173 *See supra* note 117 and accompanying text.

174 *See* U.S. DEP'T OF DEF., LAW OF WAR MANUAL § 5.8.1.1 (2023) ("[A]lthough the English language version of the 1949 Geneva Conventions uses 'active,' and the

terms 'active' and 'direct'" . . . are understood to be terms of art addressing a particular legal standard."[175]

Using examples from the Manual provides insight on how *Lubanga*'s three categories of participation are ineffective. Consider the following hypothetical: In a targeting analysis cell, where military planners determine how to allocate various attack resources against potential enemy targets, a military task force commander asks for review of three targets, all of whom are civilians participating in the armed conflict in various capacities. The first is a civilian child who is plainly DPH: she is an armed guard for a military outpost not far from the front lines.[176] The second is a civilian child who is clearly not DPH; he is manufacturing munitions a couple hundred miles from the front lines.[177] The third target is a civilian child at a transit route or rail hub between the first and third child's locations. His job is to help oversee the logistical transport of munitions from the factory to the guard at the military base.[178] This situation represents a difficult middle ground. The third target is closer to the front lines, but not yet in close proximity to combat. He provides logistical support to frontline troops, as the SCSL and *Lubanga* legally deemed "active" participation,[179] but does not meet the constitutive elements of directness that the ICRC's Interpretive Guidance lays out.[180] Is the child targetable, or would striking the rail hub require a proportionality analysis factoring in the risk of the loss of his life? DPH analysis was already difficult to codify for soldiers during military operations that require "split second decision[s]" in the heat of battle.[181] Adding a third category complicates such frontline determinations further.

English language versions of AP I and AP II use 'direct,' the French language versions of these treaties use the same word, '*directement*.'").

175 *Id.*

176 *See id.* § 5.8.3.1 (listing "defending military objectives against enemy attack" as an example of DPH).

177 *See id.* § 5.8.3.2 (listing "working in a munitions factory . . . that is not in geographic or temporal proximity to military operations" as an example of conduct that does not rise to the level of DPH).

178 For the inspiration for this example, see MELZER, *supra* note 9, at 56 (using the example of driving an ammunition truck as not DPH, but requiring a proportionality analysis).

179 *See, e.g.*, Prosecutor v. Brima, SCSL-04-16-T, Judgment, ¶¶ 737, 1266 (June 20, 2007).

180 *See* MELZER, *supra* note 9, at 46.

181 Nils Melzer, Int'l Comm. of the Red Cross, Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report 10 (2005) (discussing the experts' determination of the difficulty of adding the civilian's subjective motive for DPH based on the soldier's perspective); *see also* Melzer, *supra* note 9, at 59 n.150.

While the line between indirect and direct participation always has some ambiguity,[182] the *Lubanga* analysis would inject additional ambiguities that might inhibit lawful combatants from executing military operations. After *Lubanga*, the question is no longer one black-and-white issue with a shade of gray in the middle, but instead requires the consideration of three categories with two separate gray areas each.[183] Hypotheticals concerning real-time armed conflict decision-making show the difficulty of applying a three-tiered test in the heat of the moment. Such decisions are difficult even in situations with perfect information regarding the targets and their on-the-ground contexts with ample time for legal analysis and contemplation.

C. Lubanga's Analysis in the Cyber Domain

Lubanga's three categories also appear to inadequately account for scenarios of cyber warfare. While no international tribunals have reviewed what cyber warfare conduct rises to the level of DPH, there is significant literature speculating about what conduct would constitute DPH.[184] And if a person or belligerent party were to use child soldiers in cyber warfare, under *Lubanga*, the analysis would be even more unworkable than demonstrated above.

Generally, scholars agree that, like most conduct related to hostilities, some cyber conduct can constitute DPH, but other conduct does not. For instance, Professor Turns analyzed ten types of cyber conduct under the three elements of DPH from the ICRC Interpretive Guidance.[185] Some, like generalized research, writing code, or conducting regular maintenance of cyber systems, met some, but not all, of the DPH elements, and were therefore not DPH.[186] Others, like exploiting a computer system vulnerability to damage a State system or

182 *See, e.g.*, MELZER, *supra* note 9, at 12 (discussing the inherent tension between the competing risks to both civilians and armed forces under the principle of distinction, DPH, and IHL).

183 *See supra* text accompanying note 173.

184 Professor Schmitt was one of the first to analyze the role of DPH in cyber warfare in 2004, then referring to it as a "Computer Network Attack." *See generally* Michael N. Schmitt, *"Direct Participation in Hostilities" and 21st Century Armed Conflict*, *in* CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FÜR DIETER FLECK 505, 525-28 (Horst Fischer et al. eds., 2004).

185 David Turns, *Cyber Warfare and the Notion of Direct Participation in Hostilities*, 17 J. CONFLICT & SEC. L. 279, 295 (2012). Recall that the three elements of DPH are threshold of harm, direct causation, and a belligerent nexus. The noncombatant's conduct must satisfy all three elements to be considered DPH. MELZER, *supra* note 9, at 46.

186 Turns, *supra* note 185, at 295.

entering the specific code commands "to activate the hostile agent," could be DPH, as long as the cyber-attack satisfied the elements of DPH.[187]

Unfortunately, just as we have seen child soldiers used in Sierra Leone or the DRC, there is reason to expect that armed groups will use children for cyber operations.[188] Experts in the law of cyber warfare have attempted to get out ahead of this scenario before it becomes widespread. For example, the Tallinn Manual 2.0 is a respected, though nonbinding, academic study on the intersection of international law and cyber warfare, and is purported to reflect customary international law.[189] Rule 138 expressly prohibits allowing children to "take part in cyber hostilities."[190] Regarding the language of "take part," the Manual emphasizes that, due to the open dispute concerning synonymity between "active" and direct" participation in hostilities caused by the recent ICC *Lubanga* decisions,[191] the International Group of Experts decided to use neither term, despite their heavy use in child protection provisions in various treaties.[192] Instead, the experts adopted

187 *Id.*; *see also* Sean Watts, *Combatant Status and Computer Network Attack*, 50 VA. J. INT'L L. 391, 427-30 (2010) (discussing various cyber operations, like writing and researching code, or intelligence gathering, in the context of combatant status); Schmitt, *supra* note 184, at 526-27; Ido Kilovaty, *ICRC, NATO and the U.S. – Direct Participation in Hacktivities – Targeting Private Contractors and Civilians in Cyberspace Under International Humanitarian Law*, 15 DUKE L. & TECH. REV. 1, 5-6 (2016).

188 After all, most readers of this piece—and myself—will readily admit that most people younger than them are more adept and confident with new technologies. And research supports that. *See* OFCOM, THE COMMUNICATIONS MARKET REPORT 33-42 (2014), https://www.ofcom.org.uk/__data/assets/pdf_file/0031/19498/2014_uk_cmr.pdf [https://perma.cc/VZC8-WUZ5] (discussing higher digital confidence, enthusiasm, and competence among younger people, including those below the age of fifteen—the general cutoff for determination of child status under LOAC and the Rome Statute, as well as other provisions of international law).

189 *See* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 4 (Michael N. Schmitt ed., 2017) (stating that Rules adopted in the Tallinn Manual reflect customary international law unless referencing a treaty) [hereinafter TALLINN MANUAL 2.0]. *But see* Michael J. Adams, *A Warning About Tallinn 2.0 . . . Whatever It Says*, LAWFARE (Jan. 4, 2017, 8:30 AM), https://www.lawfareblog.com/warning-about-tallinn-20-%E2%80%A6-whatever-it-says [https://perma.cc/K4GW-9JC8] (expressing concern that audiences will conflate content in the Tallinn Manual as "final answers" on international law's applicability to cyber warfare, even though it may not).

190 TALLINN MANUAL 2.0, *supra* note 189, at 524.

191 *See id.* at 526 n.1290 (contrasting *Lubanga*, which did not find synonymity between "active and "direct," with *Akayesu* and the ICRC Interpretive Guidance, which did).

192 *Id.* at 525.

"take part" from Additional Protocol II, Article 4(3)(c), which bans the use of child soldiers in NIACs and uses neither the term "active" nor "direct."[193]

Applying *Lubanga*'s three categories to child warfare in cyber operations is just as messy as in the more traditional armed conflict scenarios described above.[194] Consider another hypothetical: Three technologically savvy children are engaged in the military cyber operations of a belligerent party. The first conducts general research into code that might one day be used for cyber warfare. This would likely be neither direct nor active participation.[195] The child is protected from targeting, and the university professor that employed her is not criminally liable under *Lubanga* and the Rome Statute. The second child is a crucial part of a civilian "hackathon" group that intends to dismantle a State's missile defense networks in advance of a follow-on kinetic missile strike against that State. This is clearly direct and active participation.[196] The child is targetable and the hackathon ringleader (and perhaps any state official sponsor or supporter) is liable under the Rome Statute.

Again, there is a quagmire in the amorphous middle ground. Under *Lubanga*'s broad interpretation of "active" participation, how can judges, let alone commanders and combatants conducting military operations, differentiate? Is the child who lays Ethernet cables or moves servers that will imminently be used to launch the hacking attack against a missile defense network, only engaged in active—but not direct—participation? Must a military commander promulgate rules of engagement dictating that their personnel can only target those

193 *Id.* at 526; Additional Protocol II, *supra* note 5, art. 4(3)(c). The "take part" language deserves a brief explanation. While DPH and this Article attempt to differentiate between active/direct and inactive/indirect participation, "take part" is a broader, less qualified description of conduct. As with DPH, evaluating conduct under "take part" requires analysis of what is and is not "taking part" in a conflict. That is an entirely different standard than DPH, though clearly related.

194 *See supra* Part IV.B.

195 Such conduct falls into categories one and two of Turns's hypothetical cyber conduct, and his determination that they are not DPH. *See* Turns, *supra* note 185, at 295.

196 Such conduct falls into categories eight and ten of Turns's hypothetical cyber conduct, and his determination that they are DPH. *Id.*; *see also* Schmitt, *supra* note 184, at 526 (reciting this example); MELZER, *supra* note 9, at 48 (discussing, in the context of threshold of harm, cyber operations, such as "computer network attacks," as potentially DPH). *See generally* Matthew C. Waxman, *Cyber Attacks as "Force" Under UN Charter Article 2(4)*, 87 INT'L L. STUD. 43 (2011) (discussing under what circumstances a cyber operation can be considered a use of force).

presently at the computer terminals? Yet is the hackathon ringleader criminally liable for both the child hacker and the server-maintainer?[197]

Lubanga's attempt to clarify what is active but indirect participation provides little guidance. Its standard is to determine "the link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged."[198] In cyber operations, the "combat" occurs wherever a cyber operation conducts an action that rises to the level of hostilities.[199] The *Lubanga* Appeal Judgment referred to activities listed in the ICRC Additional Protocols commentary and the Preparatory Committee of the Rome Statute's Draft Statute as "guide[s]."[200] However, the ICRC commentary was published in 1987 and the Preparatory Committee's Draft Statute in 1998,[201] well before cyber warfare became a prevalent concern. Often, the child server-maintainer or hacker will be far from the front lines and the link to combat may be tenuous. Yet, under the academic analyses to date, the hacker from our second example in the hypothetical above is certainly DPH, but the server-maintainer from our amorphous third category is likely only an active indirect participant. Unlike the examples in the prior Part, these two roles work directly alongside each other.

These ambiguities arising from *Lubanga*'s three categories of (1) direct and active, (2) indirect and active, and (3) indirect and inactive participation in hostilities showcase why the ICC should not have divorced the synonymity between "active" and "direct." The new distinction is entirely unworkable, particularly for military decisionmakers making targeting determinations, where LOAC generally requires the categorical protection of noncombatants.

D. Lubanga as One Bug of Greater ICC Jurisprudential Interpretive

197 Turns included "regular/routine maintenance for [a cyber warfare]-equipped system" as not DPH, but it would likely fall within the "logistical support" that *Lubanga* and the SCSL found to be "active" participation under the Rome Statute language. Turns, *supra* note 185, at 295; Prosecutor v. Brima, SCSL-04-16-T, Judgment, ¶ 737 (June 20, 2007) ("Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation."); *accord* Lubanga Trial Judgment, *supra* note 13, ¶ 628.

198 Lubanga Appeal Judgment, *supra* note 122, ¶ 335.

199 Collin Allan, *Direct Participation in Hostilities from Cyberspace*, 54 VA. J. INT'L L. 173, 182 (2013).

200 *Id.*

201 *See generally* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 33; *Report of the ICC Preparatory Committee*, *supra* note 126.

Concerns

Unfortunately, *Lubanga*'s divorce of active and direct participation is not the only instance of the ICC adopting new interpretations for terms that have long been defined under LOAC. In the *Ntaganda* case, the ICC Prosecutor advanced an interpretation of "attack"[202] that was likely contrary to—and substantially broader than—previously understood definitions under LOAC.[203] The *Ntaganda* Trial Judgment held that two actions—looting a hospital and removing/damaging cultural property in a church—were not legally an "attack" because they did not occur in the conduct of hostilities, leading the ICC to acquit on those charges.[204] This ruling was largely in line with previous interpretations of the legal requirements for an "attack" under LOAC. The Prosecutor appealed, however, arguing for a broader interpretation of "attack"—one that would only require "an act of violence" regardless "of whether this conduct occurred in the conduct of hostilities."[205]

Many scholars quickly pointed out that the Prosecutor's definition was broader than how "attack" had been previously understood at LOAC.[206] The Appeals Chamber even solicited *amicus curiae* briefs to help it decide this issue.[207] Ultimately, the *Ntaganda* Appeals Chamber split on the definition of "attack." While the judges rejected

202 The term "attack" was relevant in *Ntaganda* under Article 8(2)(e)(iv) of the Rome Statute, which prohibits attacking certain buildings, such as hospitals and religious sites. The ICC had to interpret whether the conduct charged constituted an "attack" under Article 8(2)(e)(iv).

203 Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment, ¶¶ 1141-42 (July 8, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF [https://perma.cc/2MWX-4S82]; *see* Ronald Alcala & Sasha Radin, *Symposium Intro: The ICC Considers the Definition of "Attack"*, LIEBER INST. W. POINT: ARTICLES OF WAR (Oct. 27, 2020), https://lieber.westpoint.edu/symposium-intro-icc-definition-attack/ [https://perma.cc/S83J-MPYH] (discussing the legal issues and potential effects).

204 *Ntaganda*, ICC-01/04-02/06, ¶¶ 1141-42.

205 Prosecutor v. Ntaganda, ICC-01/04-02/06, Prosecution Appeal Brief, ¶ 21 (Oct. 7, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_05927.PDF [https://perma.cc/6ENN-9ACH].

206 Articles of War, a digital publication on the website of the Lieber Institute at the United States Military Academy, dedicated an entire symposium to this issue that provides in-depth background, analysis, and discussion of the ramifications. *Attack Symposium*, LIEBER INST. W. POINT: ARTICLES OF WAR https://lieber.westpoint.edu/category/attack-symposium/ [https://perma.cc/W62T-TDQN] (last visited Mar. 3, 2024).

207 Alcala & Radin, *supra* note 203.

the Prosecution's broad definition of "attack" 4-1,[208] thus denying the appeal, Judge Ibáñez Carranza dissented, stating that she would have granted the appeal and agreed with the Prosecutor's definition of "attack."[209] Moreover, among the four judges who denied the appeal, three separate determinations were advanced for why the appeal failed.[210] Scholars have analyzed these three disparate views of "attack" and their potential implications,[211] but the details of that scholarly discourse are not relevant to this Article's analysis. *Ntaganda*'s disparate analyses of "attack," like *Lubanga*'s of DPH, exemplify how the ICC is separating ICL terms from well-established meanings under LOAC. If this phenomenon continues, there may be further concerns "that the two bodies of law will drift apart on a material level."[212]

Perhaps that is why the ICC has, at least implicitly, avoided invoking *Lubanga*'s DPH analysis of a separate active participation standard for child protection provisions. In the *Ntaganda* Confirmation of Charges, the ICC analyzed Article 8(2)(e)(vii) as requiring "direct/active participation in hostilities" and did not separate those definitions.[213] The *Ntaganda* Trial Judgment—issued five years after the *Lubanga* Appeal Judgment—favorably cited the *Lubanga* Appeal Judgment for its definition of active participation for Article 8 crimes.[214] The Trial Chamber, while largely avoiding the "direct/active" language and couching the analysis under "active" participation, as the term is used in the Rome Statute, largely adopted the Pre-Trial Chamber's analysis and definition of the scope of active participation.[215] If the *Ntaganda* Judgment's analysis holds, then perhaps the legal and practical untenability of *Lubanga*'s divorce of "active" and

208 Prosecutor v. Ntaganda, ICC-01/04-02/06 A A2, Judgment, ¶ 1164 (Mar. 30, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_03027.PDF [https://perma.cc/5JBA-QL4R].

209 *Id.* ¶¶ 1165-68.

210 *Id.* ¶ 1164.

211 *See, e.g.*, Ori Pomson, *Ntaganda Appeals Chamber Judgment Divided on Meaning of "Attack"*, LIEBER INST. W. POINT: ARTICLES OF WAR (May 12, 2021), https://lieber.westpoint.edu/ntaganda-appeals-chamber-judgment-divided-meaning-attack/ [https://perma.cc/ENL3-A5P2].

212 Jachec-Neale, *supra* note 158.

213 Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision on the Charges, ¶¶ 77-79 (June 9, 2014), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_04750.PDF [https://perma.cc/5VVU-L3LB].

214 Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment, ¶ 1113 & n.3089 (July 8, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF [https://perma.cc/2MWX-4S82].

215 *Id.*

"direct" will be relegated to history as a jurisprudential mistake and avoid a long-lasting effect on international law.[216]

V. CONCLUSION

Ultimately, the *Lubanga* analysis of active participation unnecessarily departs from prior interpretations of DPH, which held that "active" and "direct" were synonymous. The Court's justifications, based on the differences between the uses of "active" and "direct" in French and English, do not persuasively defeat the reasons against supporting such an interpretation. Chief among the reasons for rejecting the *Lubanga* analysis is the fact that children and civilians everywhere would become more targetable under Common Article 3 and the Additional Protocols. The drafters of the Rome Statute could have prohibited the use of children in *all* participation in hostilities, rather than limiting it to "active" participation, a term already well-established in international law. Alternatively, they could have prohibited "direct and indirect participation in hostilities," thereby broadening the prohibited range of conduct. Instead, the Rome Statute uses the term "active," and re-interpreting that language, as *Lubanga* did, is legally dubious and practically impossible in actual conflict situations.

Importantly, *Lubanga*'s analysis is one of a troublesomely increasing number of ICC interpretations that are divorced from longstanding, well-reasoned definitions of LOAC. Going forward, the ICC must seek to maintain congruity in definitions and applications of international legal terms both at ICL and LOAC. Otherwise, the two bodies of law may drift apart and lose their longstanding definitional synchrony, risking the loss of predictability and connection in defining war crimes in armed conflict and determinations of attaching war crimes liability.

216 There was no appeal on the definition or application of DPH in *Ntaganda*.