I. Introduction

In some ways, the topics the International Committee of the Red Cross (ICRC) has engaged in over the last, say, twenty years, have been sufficiently complex and controversial that they could perhaps be best explained by what on the playground would be called ‘dares’. After all, surely few angels would dare to tread on the hazardous ground that amounted to the customary law of international and non-international armed conflict. Yet that is precisely what the ICRC did with its monumental Customary Humanitarian Law Study in 2005.\(^1\) Admittedly, at the other end of the spectrum in terms of success was the SIrUS project, which attempted to create objective measures for superfluous injury and unnecessary suffering, but floundered on the basis of State (at best) ambivalence a few years before.\(^2\) Somewhere in between, seemingly, is the most recent contribution of the ICRC to the debate on International Humanitarian Law (IHL). This is their interpretative guidance on direct participation in hostilities (DPH).\(^3\)

This is an area of law in which there has been a great deal of debate, by which is meant deep controversy, and that difficulty has only increased in the last ten or so years, with the advent of ‘targeted killings’ and the use of drone strikes by Western powers (even though the latter do not, as it

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stands, necessarily raise any particular IHL issues that other weapons do not).4 As a result, the simple fact of the attempt to grapple with such a vexed, albeit central, issue of IHL is a cause for at least two cheers. That said, the guidance has come in for considerable criticism, it is part of the purpose of this chapter to investigate, and appraise some of those critiques, and link them to broader debates about IHL.

II. Background to the Guidance

Prior to the ICRC guidance it must be said, there was little detailed commentary on DPH that could be prayed in aid. The treaty law on point was (and is) to say the least, fragmentary. The first provision on point is the Delphic reference in Common Article 3 of the 1949 Geneva Conventions to ‘Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat...’. Even the most detailed of the Red Cross Commentaries, that to the Fourth Convention merely says that ´this applies first and foremost to civilians – that is to people who do not bear arms’.5 The only other two treaty provisions that are directly on point are Article 51(3) of Additional Protocol I (API, for international armed conflicts), which reads ‘Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities’. Similarly, Article 13(3) of Additional Protocol II (APII, for non-international armed conflicts) states ‘Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities’.

The authoritative ICRC Commentary to API does provide some help here.6 So, for example, it asserts that hostile acts ‘should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.’7 In addition ‘It seems that the word ´hostilities’ covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is

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7 Ibid., p. 618.
carrying it, as well as situations in which he undertakes hostile acts without using a weapon.8 Finally, ‘direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target’, and this is to be differentiated from participation in the war effort in general.9

The commentary on Article 13(3) of APII adds that ‘direct’ implies that ‘there is a sufficient causal relationship between the act of participation and its immediate consequences’.10 Unfortunately, there was little further clarification.11

Although the issue of direct participation in hostilities is far from a new one, being traceable at least back to the Lieber code,12 the changing character of war led many to think that the time was ripe for a reappraisal of the concept.13 Therefore, in 2003, the ICRC set up a set of five meetings

8 Ibid., pp. 618–619.
10 Ibid., p. 1453.
of (about 50) experts on IHL coming from the military, academic, and governmental spheres to attempt to get clarity on point. The discussion centred around three questions: (1) Who is a civilian for the purposes of the principle of distinction? (2) What conduct amounts to direct participation in hostilities? and (3) What modalities govern the loss of protection against direct attack?

Unfortunately, the discussions with experts became fractious, and in the end the experts did not sign on to the document, a matter which clearly caused considerable bitterness amongst the participants. Instead of drafting by consensus, therefore the Guidance was written by Nils Melzer for the ICRC. Rather than lament this, though, it is better to see it as the dissensus backdrop to which the ICRC guidance attempts to bring some clarity. As such, we ought not to be too quick to condemn the guidance unless a better way of interpreting and applying this area of law can be found. As our mothers probably told us all, if we have nothing positive to say, say nothing. As an aside, whether the ICRC should have kept silent on point is another issue. My view is that, if nothing else, the guidance has started a debate that needs to be had, and previously, had been left to the material for the Guidance that was available at the time (Fenrick, ibid., p. 333), the judgment relied as much on human rights as on humanitarian law, see A. P. V. Rogers, ‘Direct Participation in Hostilities: Some Personal Reflections’, Military Law and Law of War Review, 48 (2009), pp. 143–164, 159 [hereinafter ‘Direct Participation’]; and was hardly the last word on point.

As such the ICRC Guidance cannot simply be seen as the musings of a group, sitting in their ivory towers, issuing the edicts of weltfremd scholars or pacifists who have no time, experience, or sympathy for the realities of conflict and the fact that IHL is intended to be a law that is at first instance intended to be used in practice, thus applied, thus operationalizable rather than academically pure, although see Rogers, ‘Direct Participation’, 160. For a sympathetically critical attempt to apply it in a specific conflict see D. van der Toorn, ‘Direct Participation in Hostilities: A Legal and Practical Road Test of the International Committee of the Red Cross’s Guidance through Afghanistan’, Australian International Law Journal, 17 (2010), pp. 7–28.


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individual judgment of States, more often than not in a non-transparent and essentially unreviewable way. Almost any light in the shadows is better than leaving things in the dark.

The Guidance itself is relatively brief. Unlike the Customary Humanitarian Law study, which ran to three volumes, one of pure prose, and two wrist-aching volumes of practice, the guidance on DPH, although accompanied by a commentary, runs, in all, to about 90 fairly well-spaced pages. After discussing aspects of the guidance, we will return to some more general comments about the authors and interpreters of IHL.

III. The Guidance and Its Critics

Before engaging directly with the Guidance itself, it is worth entering two caveats. The first is a limitation that the ICRC was right to impose upon itself. This was to limit the Guidance to the concept of DPH from the point of view of targeting, not detention, or, for example, use of child soldiers and the like. As experience has shown, the ICRC already had bitten off a huge chunk of IHL to chew with targeting. On detention, the Copenhagen Process had proved difficult enough, and that was only one other issue that arose. So, again, when appraising the guidance, its limited scope needs to be remembered. It is not intended, for example, as an interpretation of the war crime of using child soldiers in the Rome Statute.

18 See e.g. Hays Parks, ibid., 796 (who is happy with this, and criticises the ICRC for going against it), Rogers, ‘Direct Participation’, pp. 158–159.


21 Schmitt, Critical Analysis, 14–5, suggests that there is a risk that separating them off may mean that some civilians may be deprived of their rights under the Fourth Geneva Convention, but this risk has, so far, seemed to be remote. That said, he rightly criticises (17) the ICRC for then referring to provisions that relate to POW status out of context.


The second is that the various parts of the Guidance cannot be entirely separated out and appraised. As the commentary says: ‘The sections and recommendations of the Interpretative Guidance are closely interrelated and can only be properly understood if read as a whole.’ As we will see, a number of commentators have taken individual parts and appraised them individually, often saying that certain parts (those they prefer) accurately reflect IHL, and others (which they are less happy with) do not. This is to misunderstand the nature of the guidance; the individual parts are like pieces of a jigsaw, and only make sense when placed together as a whole, the individual aspects are not completely severable.

It is also important to note that the Guidance is, as a whole, the official position of the ICRC on what constitutes DPH. As the Guidance itself says, it is not a proposal de lege ferenda:

The purpose of the interpretative guidance is to provide recommendations concerning the interpretation of international humanitarian law (IHL) as far as it relates to the notion of direct participation in hostilities. Accordingly, the 10 recommendations made by the interpretative guidance as well as the accompanying commentary, do not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC’s institutional position as to how existing IHL should be interpreted in light of the circumstances prevailing in contemporary armed conflicts.

This is important for a number of reasons, amongst them is that, although it is framed as guidance, and therefore ought to be appraised as such, it is also the official position of the ICRC, therefore, like the customary law study, it is the basis upon which the ICRC will make representations to States and (perhaps) make critiques of the State’s conduct. As such it cannot be ignored by States, even where they are not happy with it. We will return to this presently. However, it is now time to look directly at the Guidance itself. It consists of ten Recommendations; given space limitations, and in spite of the previous discussion of the importance of reading

24 Melzer, Guidance, 10. See also Melzer, Keeping the Balance Between Military Necessity and Humanity, 836.
26 As W. H. Boothby, ‘Direct Participation in Hostilities – A Discussion of the ICRC Interpretative Guidance’, Journal of International Humanitarian Legal Studies, 1 (2010), pp. 143–159, 144–145, notes though, States remain the masters of their treaty obligations, although, as we will see, this rather understates the role of the ICRC on point.
the guidance as a whole, this piece will limit itself to look at three deeply interlinked principles of the guidance, and one other, so as to understand the critiques that have been made of the *Guidance* and the nature of contemporary debates about the appropriate interpretation (and interpreters of) IHL. The first three principles are about the concept of civilians and combatants in armed conflicts and the level of force that may be used against the latter (principles I, II and IX). The final principle that is discussed is principle III, which relates to the status of private military and security companies and their employees. It is not the purpose of this chapter to write a hagiography of the *Guidance*, but engage in a friendly critique of it, and use other critiques as a means of investigating how IHL is discussed by its various interlocutors.

IV. Civilians, Combatants and the Use of Force in the Jus in Bello: Principles I, II and IX

Let us begin our investigation with principle I, which reads:

*Principle I. The Concept of Civilian in International Armed Conflict*

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

As can be seen, this recommendation (which draws on API) defines the civilians negatively, as not being members of the armed forces or participants in a *levée en masse* (the latter category now, to all intents and purposes having been relegated to history). The commentary, drawing on Article 43(1) of API (which, following the *Customary Study*, the ICRC considers customary) defines members of the armed forces as ‘all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.’

Given that the *Guidance* is about targetability rather than POW status, it, rightly, does not impose the four requirements in Article 4(A)(2) of Geneva Convention III on those who are not the regular armed forces. They are targetable whether they fulfil them or not.

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28 Ibid., p. 22.
All forces must, though, belong to a party to the conflict.\textsuperscript{29} This, often forgotten aspect, is said by the \textit{Guidance} to be determined by the rules of State responsibility.\textsuperscript{30} Unfortunately, the \textit{Guidance} does not really engage with the difficulties that surround this area, in particular owing to the disjunction between the jurisprudence of the ICJ and the international criminal tribunals. As is well known, the ICTY rejected the ICJ’s \textit{Nicaragua} test of ‘effective control’ in the 1999 Tadić Appeal.\textsuperscript{31} The ICTY’s approach (the using of the lower standard of ‘overall control’) was followed by the ICC in the \textit{Lubanga} case.\textsuperscript{32} This was in spite of the ICJ’s judgment in the \textit{Bosnian Genocide} case, which rejected the Tadić test in strong terms, differentiating international criminal law (and therefore, on point, IHL) and the law of State responsibility.\textsuperscript{33} It is therefore a matter of regret that, in spite of citing \textit{Nicaragua}, Tadić, and the \textit{Bosnian Genocide} case, the \textit{Guidance} does not explain the details of the relevant test further.\textsuperscript{34}

Another difficulty that is perhaps not sufficiently dealt with in the \textit{Guidance} is the question of membership. It asserts, ‘For the regular armed forces of States, individual membership is generally regulated by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, equipment and insignia’, whilst for irregular forces, the criteria have to be more functional, akin to those used for organised armed groups in non-international armed conflicts.\textsuperscript{35} The latter proposition is subject to similar discussion to that contained later on in relation to recommendation II, the former though is rather too sweeping, in that in modern Western armies such as those of the United States

\textsuperscript{29} Those not doing so are civilians according to the \textit{Guidance}, but may be parties to a separate non-international armed conflict, \textit{ibid.}, pp. 23–24. On such situations see E. Wilmshurst (ed.), \textit{International Law and the Classification of Armed Conflict} (Oxford: Oxford University Press, 2012).

\textsuperscript{30} Melzer, \textit{Guidance}, p. 23.


\textsuperscript{32} Prosecutor v. Lubanga, Judgment, ICC-01/04–01/06, 14 March 2012, para. 541.

\textsuperscript{33} \textit{Case Concerning the Application of the Convention Concerning the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)}, Judgment, (2007) ICJ Reports 43, paras 404–5. As Al-Khasawneh noted, however in his dissenting opinion (para. 38), on the ICTY’s reasoning, the State responsibility point was crucial to the exercise of its primary, criminal, jurisdiction over grave breaches of the Geneva Conventions.


\textsuperscript{35} Melzer, \textit{Guidance}, p.25.
or United Kingdom, this is probably the case. However, these are not the universal norm. In the developing world, the idea of such formal criteria being determinative is optimistic to say the least. For example, the Taliban in 2002 were the national armed forces of Afghanistan, yet it seems extremely unlikely that they were appointed pursuant to a formal, legal process, and that a register of members of the armed forces were kept.

This may be an instance of a more general issue that may affect the reception of the Guidance, this is that it tends to assume, for both international and non-international armed conflicts, a rather traditional view of conflict, not taking into account for example, cyberwarfare, the use of autonomous weapons, intelligence officials becoming involved intimately at the coal face of targeting, and other recent developments in conflict.\(^{36}\)

On the other hand, care must also be taken about the illusion of novelty in international law, especially IHL, where such claims are often made to circumvent humanitarian protection.\(^{37}\)

As a final comment prior to moving on to non-international armed conflicts, it is very important, and telling that the Guidance has taken the view that there is no ‘third status’ between combatant and civilian. Therefore, the Guidance must be taken as rejecting the idea, propagated in particular that there is such a status (often, erroneously called ‘unlawful combatant’) that is separate to those other two statuses. This is in accordance with ICTY jurisprudence on point and the generally accepted position.\(^{38}\)

The Guidance enters more torrid waters, however, when it deals with non-international armed conflicts, in principle II, which reads:

**Principle II. The Concept of Civilian in Non-International Armed Conflict**

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities in non-international armed conflict, organized armed groups constitute the armed forces of a non-State party

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\(^{38}\) *Prosecutor v Delalić, Delić, Mucić and Lanžo (Čelebići)*, Judgment, IT-96–21 –A, para. 35.
to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’).

The ICRC, therefore, in spite of the attempts of the ICTY (and others) to render IHL the same whether or not a conflict is international or non-international, continues (rightly, given the lex lata on point) to distinguish international and non-international armed conflicts. Hence, unlike in international armed conflict, where there is generally equal applicability of IHL, in the sense of belligerent privilege for organised armed forces belonging to one side or the other, in the context of non-international armed conflicts the Guidance distinguishes State and non-State forces. In relation to the former, the Guidance takes the position that such personnel are to be determined by the same test as applies in international armed conflicts. As such, civilian status is only recovered when a person is discharged or becomes a deactivated reservist.

Although there are those that claim that international law simply does not regulate the status of governmental armed forces, the ICRC’s view is the most consistent with the State practice that exists, in particular that prosecutions of State armed forces for the mere fact of participation in hostilities are, to all intents and purposes, unheard of. Equally, the test set, being the same as that for international conflicts, is subject to the same comments that were made previously in relation to Recommendation I. In the specific context of non-international armed conflicts in certain contexts, law enforcement officials may be considered members of State armed forces, even though they are not statutorily considered to be so. Hence, the Guidance may be under-inclusive here.

40 Attempts to alter this position have, for very good reasons, been rejected, see e.g. N. Boister and R. Cryer, The Tokyo International Military Tribunal: A Reappraisal (Oxford: Oxford University Press, 2008), chapter 6.
42 Ibid., p. 31.
43 S. Watts, ‘The Status of Government Armed Forces in Non-International Armed Conflict’ in K. Watkin and A. J. Norris (eds.), Non-International Armed Conflict in the Twentieth Century (Newport, RI: US Naval War College, 2013), pp. 145–180, p. 149. Although, as he accepts, States have generally not looked to international law to legitimise their role in such conflicts.
Things become far more complex, though, when it comes to determining the categorisation of non-State forces in such conflicts.\(^{45}\) The *Guidance*, basing itself on the fragmentary treaty law on the subject, essentially adopts a tripartite structure for fighters in non-international armed conflicts: (1) dissident armed forces (i.e. members of what were State forces who have turned against the government), (2) members of other organised armed groups and (3) civilians who directly participate in hostilities. The first type, dissident armed forces, have their membership determined by the same criteria as the State forces that they were.\(^{46}\) This has proved uncontroversial.\(^{47}\)

The same cannot be said for the second category, members of other organised armed forces. Again, extrapolating from their interpretation of Common Article 3 and APII, the *Guidance* speaks of such forces as parties to armed conflicts. It was by no means clear prior to the *Guidance* that this category was clearly distinguished from civilians who directly participate in hostilities.\(^{48}\) The *Guidance*'s response is that such an approach ‘[W]ould seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population.’\(^{49}\)

As a result, the *Guidance* asserts that ‘civilians, armed forces, and organised armed groups of the parties are mutually exclusive categories also in non-international armed conflicts’.\(^{50}\) Although there is sense in this, and it can (perhaps at a stretch) be inducted from the relevant treaties, it assumes what it needs to prove, that there is such a category (of organised armed groups) that exists to be mutually exclusive to the others.\(^{51}\)

Assuming that such a distinction exists though, the *Guidance* then separates those organised groups opposing the government (or other such groups) into two subcategories. These are the armed forces of that group in the functional sense, and their political and humanitarian wings. Only the former are, according to the *Guidance*, to be considered the ‘organised armed group’.\(^{52}\) The others retain their civilian status. As we will see,

\(^{45}\) For an overview of the topic see Schmitt, ‘Opposition Fighters’.

\(^{46}\) Melzer, *Guidance*, p. 32.


\(^{49}\) Melzer, *Guidance*, p. 28. As Rogers, ‘Direct Participation’, p. 158 has noted, it may just be the case that this is fine, just that the relevant civilians have lost their protection.

\(^{50}\) Melzer, *Guidance*, p. 28.

\(^{51}\) For very useful discussion on the nature of organised and armed in this context see Schmitt, ‘Opposition Fighters’, pp. 127–131.

\(^{52}\) Melzer, *Guidance*, p. 32.
this is a crucial distinction from the point of view of targeting. There is an intuitive appeal to this, but it cannot be ignored that such a distinction is by no means easy to make, as the two may be interlinked. To take a UK-based example, in the ‘Troubles’ in Northern Ireland, the political wing of the armed republican movement, Sinn Féin, always maintained it was a separate entity to the IRA, although it is now clear that at least some of its leadership was also active in the IRA Army Council.

Leaving this aside, the Guidance provides for different levels of targetability for the two types of supporters. The first (who is targetable at any time) are members of the organised armed forces of a group, and the second are civilians who remain immune from attack unless and for such time as they are directly participating in hostilities. As the Guidance accepts, membership of an organised armed force is more difficult to define than for State armed forces, as the membership of such forces is fluid, less binary, deformedalized and often clandestine. Therefore, the distinguishing criterion the Guidance sets out is that of a ‘continuous combat function.’ This requires ‘lasting integration into an organised armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involved the preparation, execution or command of operations amounting to direct participation in hostilities are assuming a continuous combat function.’ This includes those who have assumed such a role but have not yet directly participated.

There are two issues that arise with respect to this. The first is the term (and concept) itself. Even the most assiduous readers of IHL treaties will search in vain for it in the entire corpus of treaty-based IHL. It is a creation of the Guidance, and as such there is no real authority for it other than the alleged logic of the relevant conventions (Common Article 3 implying the existence of a category of non-State armed forces). This is not always clear. Indeed, some take the view that there is no status-based targeting in

53 Which, at least for a time, was considered by many to be a Common Article 3 conflict, see S. Haines, ‘Northern Ireland 1968–1998’ in E. Wilmshurst, (ed.), International Law and the Classification of Armed Conflict (Oxford: Oxford University Press 2012), p. 117.
54 Melzer, Guidance, pp. 32–33. Schmitt, ‘Opposition Fighters’ pp. 132–133, not without justification, asserts that the problems may be overstated as many organised armed groups operate in a manner similar to regular armed forces. This is true, but really identifies the necessity of avoiding totalising statements rather than a fatal objection to the Guidance’s point.
56 Van der Toorn, ibid.
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non-international armed conflicts at all, and targetability in such contexts can only be based on behavioural tests (i.e. DPH). Therefore, a strong case can be made that by adopting a concept of the continuous combat function, the ICRC has gone beyond what IHL permits in terms of targetability and expanded States’ rights in this regard. This is worth bearing in mind when evaluating the critiques of the Guidance that are canvassed later with respect to principle IX.

The second important and difficult issue is the line between an individual act of direct participation in hostilities. Put into the interrogative, where does the line lie between a civilian who sometimes/occasionally/quite often/frequently engages in individual acts of direct participation and someone who has assumed a continuous combat function (particularly if that person has not actually undertaken any individual act of direct participation)? This critical issue is not well elaborated upon in the Guidance. Given the importance that the distinction will have for targeting, this is, to say the least, unfortunate.

Perhaps the most stinging critique of the Guidance has come from Brigadier-General Kenneth Watkin. Watkin asserts that in addition to departing from the existing law, overreliance on untenable general assumptions, and being unclear, the Guidance fails to take into account the realities of modern conflict, and unacceptably favours non-State forces. With respect to this last aspect, the most important for our purposes, Watkin takes the view that State armed forces are all considered targetable at any time; for non-State forces, only those exercising a continuous combat function are subject to that regime. Furthermore, he is critical of the extent to which logistics and other supporting roles can be considered part of conflict, and thus argues that such roles should be included in DPH, and thus ought to form the basis for a continuous combat function, as State

58 See also W. H. Boothby, ‘Direct Participation in Hostilities – A Discussion of the ICRC Interpretative Guidance’, Journal of International Humanitarian Legal Studies, 1 (2010), pp. 143–159, 154–155. Van der Toorn, ibid., p. 28 considers it a high threshold, not including regular participation, but this is not clear.
59 Watkin, ‘Armed Groups’.
61 Little needs to be said about his criticism that the Guidance fails to take into account just war theory sufficiently (Watkin, ‘Armed Groups’, pp. 667–672). Such theories (there are more than one) may have had influence on IHL, but are not sources of positive law.
forces are targetable at will. Watkin also is uncomfortable with the Guidance adopting a ‘revolving door’ approach which allows civilians to occasionally participate in combat, then become immune again after having done so.64 His true preference though is that if there is repetitious participation (a term that is not exactly clear), then active disengagement would be required (as it is for State forces) for a person to return to civilian status and immunity.65

He is correct to note that there are different levels of organisation of different armed groups, such a critique has been made previously.66 However, his views have not gone without response from the Guidance’s author.67 Nils Melzer has replied that IHL (most importantly the Hague Regulations and the Third Geneva Convention of 1949) has always accepted the possibility of functional tests for non-State actors,68 and the concept of the continuous combat function solves many of the difficulties, and indeed Watkin’s critique really is about expanding that concept rather than critiquing it, and expanding it too broadly, in a manner that would not be easily applicable without being highly overinclusive.69 Any bias against States (which Melzer denies) is, according to him, simply based in the existing law on point.70

There is much to this, and Melzer is by no means alone in favouring functional criteria over formal ones.71 There may, in addition, be other arguments here that blunt Watkin’s critique. The first is that Watkin may be misdirecting his critique. The law applicable to international armed conflicts (Hague Regulation 3) accepts that the armed forces of a State party to a conflict may consist of combatants and non-combatants; as Ipsen parses the situation ‘armed forces are described as consisting also of “non-combatants”; this refers to the exception that, in addition to the medical and religious personnel, there may be other members of the armed forces which are not authorised to participate directly in hostilities’.72 As such, a more pointed critique might be that principle I of the guidance is overinclusive rather than principle II being the problem.

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70 Melzer, Guidance, pp. 850–852.
Furthermore, with respect to non-international armed conflicts, a distinction between State armed forces and non-State armed forces is already clearly accepted, in that the former are granted combatant immunity/belligerent privilege, whereas the latter do not; therefore, one reason for treating the two differently is that non-State forces remain domestically criminally liable for any death, injury or damage they cause whilst engaging in belligerency, a point the Guidance accepts in principle X. So, the advisability of treating the two types of forces the same may not be a given, or reflective of the existing international law on point, which (in all likelihood) grants State armed forces belligerent privilege, but remains ecumenical on that of non-State fighters.

Notwithstanding the previous, the Guidance’s approach to continuous combat function and targetability, especially in non-international armed conflicts, cannot be divorced from its treatment of the level of force that may be employed against those who may be lawful targets. The ICRC’s view is encapsulated in principle IX of the Guidance:

**Principle IX. Restraints on the Use of Force in Direct Attack**

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

This has, in accordance with early predictions on point, proved probably the most contentious of the principles enunciated in the Guidance. It has been the subject of considerable, bitter and strongly expressed critique. These will be canvassed next, largely to elucidate the more

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general point to be developed, about the dispute that has arisen about who
are the appropriate interpreters and guardians of IHL. To explain this prin-
ciple, though, it is important to understand what the Guidance meant by
this. The first aspect of this is that the ICRC has based this principle in part
on the ‘principles of distinction, precaution, proportionality, as well as the
prohibitions of denial of quarter and perfidy’, as well as the prohibition of
particular weapons, and the prohibition of the infliction of unnecessary
suffering. As the Guidance accepts though, outside of this ‘the specific
provisions of IHL do not expressly regulate the kind and degree of force
permissible against legitimate military targets.’

The second, and in many ways more important, issue is that this prin-
ciple must be read in context, i.e. that in international armed conflicts,
according to the Guidance, all members of the armed forces, and in
non-international armed conflict, all persons engaging in DPH are tar-
getable for such time as they do so, and those who have a continuous
combat function, are apodictically targetable. This last aspect is
one which may well expand the approach to targetability that previously
existed. Therefore, principle IX ought to be seen as a counterpoint to this
expansion of who is targetable. Furthermore, the scope of this limitation
ought to be read with respect to the commentary to this principle which
states:

The aim cannot be to replace the judgment of the military commander
by inflexible or unrealistic standards; rather it is to avoid error, arbitrar-
iness, and abuse by providing guiding principles for the choice of means and
methods of warfare based on his or her assessment of the situation… in
classic large-scale confrontations between well- equipped and organized
armed forces or groups, the principles of military necessity and of human-
ity are unlikely to restrict the use of force against legitimate military tar-
gets beyond what is already required by specific provisions of IHL. The
practical importance of their restraining function will increase with the
ability of a party to the conflict to control the circumstances and area in
which its military operation is conducted, and may become decisive where
armed forces operate against selected individuals in situations compara

Kleffner, ‘Section IX of the ICRC Interpretative Guidance on Direct Participation in Hos-
tilities: The End of Jus in Bello Proportionality as we Know It?’, Israel Law Review, 45 (2012),
pp. 35–52 [hereinafter ‘Section IX’]; and J. D. Ohlin, ‘The Duty to Capture’, Minnesota Law

76 Melzer, Guidance, pp. 77–78. 77 Melzer, Guidance, p. 78.
78 See principles VI and VII.
79 Subject to the previous commentary with respect to principles I and II.
to peacetime policing. In practice such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.\textsuperscript{80}

As such the \textit{Guidance} ought not to be overread in terms of its ambit; it speaks to specific circumstances, and in particular those where human rights law may also be applicable.\textsuperscript{81} Furthermore, it addresses itself largely to those higher up in the chain of command than the individual soldier being asked to make a particular call on the military necessity of engaging in lethal force.

That said, the principle is open to other interpretations, and its IHL basis has been subject to considerable critique. So, for example, the notional basis of the principle being founded on the principles of military necessity and humanity, as forming independent sources of IHL, has been excoriated by a number of the \textit{Guidance}’s critics.\textsuperscript{82} It is perhaps a little excessive to criticise the \textit{Guidance} on this point, given that it expressly asserts that ‘considerations of military necessity and humanity neither derogate from nor override the specific provisions of IHL, but constitute guiding principles for the interpretation of the rights and duties of belligerents within the parameters set by these provisions’.\textsuperscript{83} That said, the reliance that seems to have been put by the \textit{Guidance} on the Martens clause (on humanity) and its relationship to positive law, although not without precedent,\textsuperscript{84} is a little shaky.\textsuperscript{85}

The \textit{Guidance} does, though, also rely on interpretations of API (in particular Articles 52, 35, 40 and 41) and the asserted State understandings of those provisions.\textsuperscript{86} These are far from uncontroversial,\textsuperscript{87} but, as Ryan Goodman has shown, they have more of a pedigree than the

\textsuperscript{80} Melzer, \textit{Guidance}, pp. 80–81.


\textsuperscript{83} Melzer, \textit{Guidance}, pp. 78–79. \textsuperscript{84} \textit{Ibid.}, footnote 219.

\textsuperscript{85} See the critiques of these authorities in e.g. C. Greenwood, ‘Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’ in H. Fischer, C. Kreß and S. R. Lüder (eds.), \textit{International and National Prosecution of Crimes Under International Law} (Berlin: de Gruyter, 2001), pp. 359–558.

\textsuperscript{86} Melzer, \textit{Guidance}, pp. 77–78. \textsuperscript{87} See e.g. Corn et al., \textit{Cyber Conflicts}, pp. 568ff.
critics admit.\textsuperscript{88} The strict legal position with respect to the existing IHL on point,\textsuperscript{89} as well as the domestic authorities, such as the \textit{Targeted Killings} case, may be subject to legitimate debate,\textsuperscript{90} but the \textit{Guidance} is not, as has been implied by some of its critics, spurious as a matter of law.\textsuperscript{91} Still further, and as will be elaborated upon later, the idea that the ICRC, in engaging in debate upon this issue is stepping outside its mandate, betrays an underlying approach to IHL that, sources doctrine (important though it is) aside, is antithetical to a pluralistic understanding of the international legal order. Prior to engaging in such a discussion, though it is worthwhile looking at one other principle in the \textit{Guidance}, that shows how the relevant experts and critics have, in spite of some comments to the contrary, defined aspects of the debate, whilst being deeply critical of an attempt by the ICRC to seek to strike out upon their own path.

\section*{V. A Counterpoint: Private Companies in Armed Conflict}

Finally, turning to a slightly different issue, albeit one that is also telling in terms of the issues this chapter seeks to investigate, let us turn to the way in which the \textit{Guidance} deals with a matter that States, particularly, albeit by no means only, in the West are interested in, but perhaps do not wish (at least in the post-colonial era) to see regulated in detail. This is the regulation of the participation of private military and security companies in armed conflicts. In spite of their importance in modern conflicts, the \textit{Guidance} deals with them quickly and with little commentary. The relevant principle is as follows:

\begin{quote}
\textbf{Principle III. Private Contractors and Civilian Employees}

Private contractors and employees of a party to an armed conflict who are civilians (see above i and ii) are entitled to protection against direct
\end{quote}

\begin{footnotes}
\item[89] Space prevents the detailed elaboration of the question of the relationship between IHL and human rights law on point, see though Kleffner, ‘Section IX’, pp. 49–52 (whose scepticism about the \textit{Al-Skeini} decision must be doubted).
\item[91] See, albeit critically, Kleffner, ‘Section IX’, p. 39.
\end{footnotes}
attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.

This principle has been the subject of relatively little critical attention in the debate on the Guidance. This is in spite of the fact of the fact that such contractors are now a major part of the way in which Western States undertake armed conflict, and the tasks such employees are asked to undertake raise significant issues with respect to the extent to which they may DPH.

It may be the case that it is a specific application of the previously discussed principles to such actors, but it is notable that, in spite of the detailed critiques which military sources have engaged in with respect to the Guidance with regard to rebel forces, there has been little discussion of these non-State actors in this regard. There are two linked aspects to this, the first is that although States frequently employ such actors, their responsibility for them is by no means easy to establish. This is, of course, a source of attraction for States. The second is related to the approach of the experts that were consulted by the ICRC. As Michael Schmitt, one of the experts, and a friendly critic of the Guidance, has said, the issue of private military companies was looked at in the early days of the development of the Guidance; however, the experts moved the debate on to irregular forces such as Hamas and al-Qaeda, as this was more central to State concerns than private contractors. Experts from States where such

92 Schmitt, ‘Critical Analysis’, pp. 9–10. Reports that there were more privately contracted staff in Iraq in 2009 than any State forces other than US service members. As he says, at pp. 9–10, ‘Contractors also have been involved in numerous incidents involving civilian deaths, the most notorious being the 2007 killing of seventeen Iraqis by Blackwater employees while escorting a US Department of State convoy […] Contractor participation in operations extends beyond providing security. For instance, Blackwater employees have reportedly participated in both CIA-led Predator strikes against al Qaeda operatives and ‘capture or kill’ operations conducted in Iraq and Afghanistan. The precise nature of Blackwater’s involvement, however, remains murky.’


94 This is not to say that only States employ such contractors, see e.g. Tonkin, ibid., chapter 1, and p. 37.


96 I.e. those States the experts took as representing the general interest in this regard.

contractors have been deployed may have had other views on this, as might others who view such actors with considerable suspicion. The fact that the experts steered discussion away from this shows that the ICRC was not unsolicitous of their views.

VI. Direct Participation and/in the Struggle for Interpretation

In their insightful introduction to the symposium that has largely defined the debate about the Guidance, Ryan Goodman and Derek Jinks noted that there can be critiques of it from both sides, i.e. human rights and from the point of view of military personnel. As they say, both have their legitimate points: the law ought to be humane but also implementable, but to take either side’s points to their (il)logical conclusion would lead to results that would not be acceptable to each. That said, there is no question that ‘humanising’ developments have had a surprising record in IHL in the last few decades, beyond what many on the military necessity/law of war end of the equation would accept. The rapid acceptance by States of the now seminal decision of the ICTY in the 1995 Tadić appeal is an exemplar in this regard. It is true that thoughtful and humane scholars such as Schmitt and others have criticised the ICTY for being too much on the humanity side of IHL, but the work of Antonio Cassese and the jurisprudence of the ICTY on many issues (although not all) have been on the kind end of the judgment of history, so care ought to be taken

98 It is notable that the experts, insofar as can be deduced (their names and affiliations have not been officially released) seem to have been primarily, if not solely from four States (the United States, United Kingdom, Canada and Israel) see, Hays Parks, ‘Part IX’, p. 795.
99 The overlap with what many would consider mercenarism, at least lato sensu, cannot be ignored here.
101 Ibid.
105 Ibid., See also R. Cryer, ‘International Criminal Tribunals and The Sources of International Law: Antonio Cassese’s Contribution to the Canon’, Journal of International Criminal Justice, 10 (2012), pp. 1045–1061; although the rejection of the Kupreškić decision in this regard cannot be ignored, not least given its controversial interpretation of the
before the ICRC’s work on DPH is dismissed, as some have done, on the basis that, in the words of one critic (speaking in relation to principle IX), has ‘failed to heed [its] expert advice, constructing a theory not supported by treaty law, State practice or court decisions. Its ill-constructed theory is flawed beyond repair’. As explained earlier, although the Guidance is not beyond reproach, it represents a significant development in the framework of debate on what has, and is, a hugely difficult area of IHL, a point accepted by many of its critics.

This said, the Guidance and the response to it is an instantiation of a broader conflict over the ownership of IHL and its interpretation, between those who are, or have been, involved with IHL as members of (Western) armed forces, and others. The critiques of the Guidance have tended to come from the military law side of IHL. As mentioned earlier, it is important to remember that IHL is intended to be a practical, implementable law. As such, military perspectives are indispensable in its formulation and application. But that is not the whole of the law, so to speak. There is a risk of this type of reasoning falling into Kriegsraison, a position that was rejected, at the very latest, by the end of the nineteenth century. If the human rights law critiques can be criticised for being a little utopian, the military critiques can also be sometimes a little apologetic, to adopt Koskenniemi’s famous formula.

The issue of DPH is one where the strict written (and probably customary) law is one which is Delphic. As such (even if not elsewhere) interpretation is the life of the law here. As Martti Koskenniemi has said, ‘[l]egal argument is never deduction from self-evident rules. It always adds to our


It must be noted at this juncture that the point of this part is not to traduce military lawyers, who have (as the ‘War on Terror’ has shown) often operated as a considerable brake on unfortunate civilian interpretations of IHL, and whose expertise is undoubtedly important in the development of the law here. The point is more limited, being that such actors are not the sole appropriate authors and interpreters of the law in this regard.

M. Koskenniemi, From Apology to Utopia (Cambridge: Cambridge University Press, reprint with new epilogue, 2005). Kleffner, ‘Section IX’, p. 39, also references such a point.
understanding of the law, and thus to the identity, objective and principles of the community.\footnote{M. Koskenniemi, ‘The Place of Law in Collective Security’, \textit{Michigan Journal of International Law}, 17 (1996), pp. 455–490, 480.} Furthermore, as Friedrich Kratochwil has noted, the life of law, and indeed its meaning is embodied in the use that is made of rules more than the rules themselves.\footnote{See e.g. F. Kratochwil, \textit{The Status of Law in World Society: Meditations on the Role and Rule of Law} (Cambridge: Cambridge University Press, 2014).} This is fundamentally important in areas such as this, where it is not necessary to subscribe to the tenets of radical indeterminacy to accept that there are contesting, plausible interpretations of the law.

It is against this background that discussions of the \textit{Guidance} ought to be seen as an embodiment of the life of law and indeed its meaning. This is because, at least here, the meaning of DPH is embodied in the use that is made of the skeletal rules that exist more than the rules themselves. As Carlo Focarelli has said:

\begin{quote}
If law is a social construct ultimately founded in mythic belief, there must be a constant struggle engaged by different groups to control the generation and prevalence about its belief and reality. While science looks for truth in the world 'before us', like mountains, law is 'among us'. Scientists are not part of the process of creating mountains but jurists and people do participate in the making and unmaking of law. Law is mythic because we are a part thereof. When dealing with law 'observers' become 'agents' whether they like it or not. The 'we' who make or unmake law is in constant struggle, whether actively or tacitly, to shape the law one way or another.\footnote{C. Focarelli, \textit{International Law as Social Construct: The Struggle for Global Justice} (Oxford: Oxford University Press, 2012), pp. 55–56.}
\end{quote}

In a similarly general manner (whether or not such a manner is generalizable or not need not concern us here) Ingo Venzke has commented that actors in international law through interpretation try to seek semantic authority and influence discourse to their own ends.\footnote{I. Venzke, \textit{How Interpretation Makes International Law: On Semantic Change and Normative Twists} (Oxford: Oxford University Press, 2012), p. ix.} Some of the military critics of the \textit{Guidance} show this in no short order. For example, Corn \textit{et al.} make such a commitment open, stating that:

\begin{quote}
We are under no illusion that we will persuade proponents of this least harmful means rule to reconsider their position. Nor are we insensitive to the profound human consequences of a rule that legally authorises attack with methods and means of warfare that are likely to cause death as a measure of first resort with no obligation to consider lesser means to incapacitate the target – even against an individual who may in fact pose little or no threat to an attacking force at that precise moment. If anything,
\end{quote}
the combined sixty-two years of military experience shared by three of the authors – experience that required a very personal sensitivity to the human dimension of warfare – makes it impossible for us not to appreciate these consequences. But this experience, and our continued collective experience of working closely with those who remain engaged in the physically, mentally, and morally demanding business of fighting our nations’ wars, also informs our view that the LOAC must, as it historically has, remain rationally grounded in the realities of warfare. We are confident that anyone grappling with this issue understands that decisions related to the employment of combat power are not resolved in the quiet and safe confines of law libraries, academic conferences, or even courtrooms, they are resolved in the intensely demanding situations which our nation thrusts our armed forces.115

Their approach is not an isolated one.116 It can, with little extension, be seen as an attempt to create or maintain an interpretative hegemony over IHL, by the assertion of special expertise, relying on a form of military ‘common sense’ approach to IHL which cannot go unchallenged. As Bonaventura de Sousa Santos has shown, legal ‘common sense’ is as constructed as any other form of knowledge,117 and, as Cemenceau famously put it, war is far too important to be left to the military on their own.

This leads to a more general point, that IHL is not simply the purview of the military. Michael Bothe has made the very important point that there needs to be civilian control over the military: ‘In democratic systems, the values pursued by the military and those by society cannot be far apart. The value system on the basis of which the military is operating has to conform to that of the civil society and not vice versa’.118 After all, what is done by the military is done in the name of the State, and therefore the name of its citizens, who have a right to a say in the laws that govern those who at some level act for them. Indeed, it is possible to go further to say that IHL, of necessity, has to have an external evaluative element if it is to be law worthy of the name, in that it is not simply a system of self-regulation. There is a risk, if the interpretation of IHL is left entirely

115 G. S. Corn, L. R. Blank, C. Jenks and E. Talbot Jensen, ‘Belligerent Targeting and the Invalidity of a Least Harmful Means Rule’ in A. Deeks (ed.), The Geography of Cyber Conflict: Through a Glass Darkly (Newport, RI: US Naval War College, 2013), pp. 536–626, the use of ‘our’ in the quote further shows the specific milieu in which the authors write, and who their intended audience are.
116 See also, e.g. Hays Parks, ‘Part IX’, p. 796.
to military practitioners (although again, experience shows the many are
*bona fide* supporters of what they would call the LOAC (although the ter-
mimology on both sides is telling), that IHL becomes simply a meek form
of self-regulation. The banking crisis has shown us that, although expert-
tise in the area is very important for ensuring that the law is relevant, it
cannot be the sole source of reference.

All constituencies have their own conscious or unconscious interest,
and IHL is no exception. Given that indeed the rights that combatants
are granted under IHL to do what would otherwise clearly be a domestic
crime, careful scrutiny needs to be engaged in unless a consumerist atti-
dute is taken on the part of those IHL empowers to kill. Sadly, consumerist
attitudes to IHL, especially in the ‘war on terror’, cannot be ruled out.

What the ICRC has provided us with is a framework in which to eval-
uate such matters, and what is notable is that the critics have tended not
to provide coherent alternatives, and in their absence, we are thrown back
to ad hoc determinations, which do not advance the rule of law, but priv-
ilege deformalised decision makers, who are empowered, not limited by
law. Thus, although the *Guidance* is not unimpeachable, it is far better than
the alternative. Free interpretation all too often becomes a free-for-all, and
in armed conflict, that is not a good thing. Although some military critics
of the *Guidance* have complained (unfairly) that the ICRC have stepped
outside its mandate in promulgating the *Guidance*,¹¹⁹ the ICRC is a huge
operator in the area of IHL,¹²⁰ and its views cannot simply be dismissed
on the basis of an alleged lack of expertise. Even were it to lack such expert-
tise, it is also important to accept that not all legitimate participants in the
development of law are necessarily experts, and to define such a concept
in and of itself may be problematic.

VII. Conclusion

The point of the chapter is not to eulogise the *Guidance* but to show how,
although it is not beyond critique, it represents an important contribution
to the development of IHL. Such developments are not solely, if they ever
were, the remit of States, or more narrowly, the military representatives
of those States. One well-regarded military critic of the *Guidance* has said

2012), p. 146.

¹²⁰ S. R. Ratner, ‘Persuading to Comply: On the Deployment and Avoidance of Legal Argu-
mentation.’ in J. L. Dunoff and M. A. Pollack (eds.), *Interdisciplinary Perspectives on Inter-
national Law and International Relations: The State of the Art* (Cambridge: Cambridge
that ‘the deficiencies identified [in the Guidance] demonstrate a general failure to fully appreciate the operational complexity of modern warfare. Accordingly, States involved in twenty-first–century warfare are unlikely to view the document favourably, let alone use it to provide direction to their forces in the field.’

This comment reflects a rather unreflective and insular view of how IHL works, and one that assumes that military legal advisors, and their view of IHL is the be-all-and-end-all of IHL. Such a view is inadequate. It forgets that IHL is not an entirely self-referential system, and there is a plurality of interpreters of the law, admittedly of varying levels of authority, but such authority is not entirely binary, and the ICRC has a strong, State-mandated role in this respect.

Indeed, in spite of the critiques that have come from some commentators, the Guidance is likely to become the frame of reference for discussing the issues it raises. At the very least, it represents the ICRC’s official view on point, and, as such where it is making representations to national interlocutors about targeting, this is what the ICRC will use. Whether such interlocutors agree or not is relevant, but the terms of the debate, and the standards upon which the ICRC will take a view on compliance, will now be those contained in the Guidance. Therefore, States would be ill-advised to ignore them.

The ICRC has now set out its institutional view on the law. If the experience of the commentaries to the Geneva Conventions, and Additional Protocols, as well as the Customary Humanitarian Law study, is anything to go by, it will become increasingly difficult to reject the Guidance as an accurate interpretation of the law without strong reasoning. As was noted by David Caron with regard to the ILC draft Articles on State Responsibility, the simple fact of reducing controversial issues to propositions of law, in writing, has its own inertia, and States come to discuss even controversial issues in the terms that have been written down rather than deny the terms of reference that have been set. Anecdotal evidence is that some States are already treating the Guidance as the law on point. This

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is not to say that the *Guidance* is the alpha and omega of the law on DPH, but that it is already having an impact in practice, and the more practice that accumulates that conforms with the *Guidance*, the more difficult it may be to deny its normative status.124 The *Guidance* is not perfect, but it is now what we have. Governments have so far shown themselves incapable of writing a similar piece of guidance, and so if they wish to reject the ICRC’s views, the impetus is now for them to show that they can create (and get broad agreement thereupon) something better.

124 See the discussion on previous practice and its relationship to *opinio juris* in Corn *et al.*, *Cyber Conflicts*, pp. 608–609; and C. Goodman, ‘The Power to Kill or Capture Enemy Combatants’, *European Journal of International Law*, 24 (2013), pp. 819–853, 825–826. I am grateful for the discussions I have had on this point with Dapo Akande, who has, to say the least, considerably influenced my views on how practice had solidified what is initially asserted to be a matter of policy. See also on point F. Kirgis, ‘Custom on a Sliding Scale’, *American Journal of International Law*, 81 (1987), pp. 146–151.