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# Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of *Jus in Bello* Proportionality as We Know It?

*Jann K Kleffner*[*]

*Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities asserts: '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'. The present article scrutinises arguments that have been, or can be, advanced in favour of and against a 'least harmful means' requirement for the use of force in situations of armed conflict as suggested in Section IX. The principal aim of the article is to examine the question whether such an additional proportionality requirement forms part of the applicable international* lex lata.

**Keywords**: law of armed conflict, direct participation in hostilities, proportionality, amount of force, Section IX ICRC Interpretive Guidance

## 1. Introduction

Under the contemporary law of armed conflict, the two factors in the proportionality equation are the expected incidental loss of civilian life, injury to civilians and damage to civilian objects (collateral damage) on the one hand, and the concrete and direct military advantage anticipated on the other. The law requires the former not to be excessive in relation to the latter. While this understanding is firmly rooted in both the conventional[1] and customary[2] law of armed conflict, some developments suggest that an additional conception of proportionality in armed conflicts might be evolving or, according to some, is already part of today's international *lex lata*. Section IX of the ICRC 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' ('ICRC Guidance') epitomises this additional conception when it asserts:[3]

[*] PhD, LLM, Head of the International Law Centre, Associate Professor of International Law, Swedish National Defence College. The research assistance of Ana-Sofia Valderas is gratefully acknowledged. Email: jann.kleffner@fhs.se.

[1] See, for example, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (entered into force 7 December 1978) 1125 UNTS 3 ('AP I'), arts 51(5)(b) and 57(2)(a)(iii).

[2] cf Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules*, (ICRC, CUP 2005) ('ICRC Study') Rules 14, 46.

[3] ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' ('ICRC Guidance'), 77, available at http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (emphasis added).

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> 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.*

Section IX forms part of a trend, mainly in doctrine[4] and some case law,[5] towards a 'least harmful means' requirement. This requirement shifts the focus away from the relation with which proportionality under the law of armed conflict is generally considered to be concerned – namely the relationship between the direct military advantage anticipated on the one hand, and collateral damage on the other. Instead, Section IX draws on the relationship between the amount of force used against a legitimate military objective on the one hand, and what is militarily necessary on the other hand, and requires the former to be no more harmful than the latter. Such a conception of proportionality is based on a range of arguments, including those that draw upon the restrictive dimension of the principle of military necessity and upon the principle of humanity,[6] the prohibition of causing superfluous injury and unnecessary suffering,[7] and the impact of human rights law on the use of lethal force in situations of armed conflict.[8] At the same time, a 'least harmful means' requirement in line with Section IX of the ICRC Guidance and the arguments in support of it have met with considerable criticism.[9]

This article scrutinises some of the arguments that have been, or can be, advanced in favour of and against a 'least harmful means' requirement for the use of force in situations of armed conflict. The article's principal aim is to examine the question whether – and, if so, to what extent – an additional proportionality requirement along the lines suggested in Section IX of the ICRC Guidance forms part of the applicable international *lex lata*. In pursuance of that aim, the article

[4] See, for example, Nils Melzer, *Targeted Killing in International Law* (OUP 2008) 297, 397–99; Nils Melzer, 'Targeted Killing or Less Harmful Means? – Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity' (2006) 9 Yearbook of International Humanitarian Law 87 ('Melzer, YIHL').

[5] Most notably, HCJ 769/02 *Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and Others* ILDC 597 (IL 2006) [2006] ('*Public Committee Against Torture*') para 40.

[6] ICRC Guidance (n 3) 78–82; Melzer, YIHL (n 4).

[7] Fourth Expert Meeting on the Notion of 'Direct Participation in Hostilities under IHL', Geneva, 27–28 November 2006, Background Document, 'Draft Interpretive Guidance on the Notion of Direct Participation in Hostilities', 47; Fifth Expert Meeting on the Notion of 'Direct Participation in Hostilities under IHL', Geneva, 5–6 February 2008, Background Document, 'Expert Comments and Elements of Response concerning the Revised Draft of the Interpretive Guidance on the Notion of Direct Participation in Hostilities', 39; Expert Meeting on the Notion of 'Direct Participation in Hostilities under IHL', Report, 19. Documents available at http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm.

[8] For situations of non-international armed conflict, see Marco Sassòli and Laura M Olson, 'The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts' (2008) 90 International Review of the Red Cross 599, 613–14.

[9] See, among others, Michael N Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 Harvard National Security Journal 5, 39–43; W Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 New York University Journal of International Law & Policy 769.

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discusses the arguments that Section IX finds a basis in the principles of military necessity and humanity (in Section 2), and in the prohibition of employing methods or means of a nature to cause superfluous injury and unnecessary suffering (in Section 3). We will then (in Section 4) consider human rights law as the most pertinent 'other applicable branch of international law' that, according to Section IX, is not prejudiced by it. The purpose of this last exercise is to determine the extent to which human rights law, as a distinct body of international law that is applicable in situations of armed conflict, informs the question whether the international *lex lata* imposes restraints as contemplated in Section IX.

## 2. THE PRINCIPLES OF HUMANITY AND MILITARY NECESSITY

The core of the ICRC's argument that the contemporary law of armed conflict imposes restraints as envisaged in Section IX of the ICRC Guidance rests on the principles of military necessity and humanity. According to the ICRC Guidance,[10]

> [i]n the absence of express regulation, the kind and degree of force permissible in attacks against legitimate military targets should be determined, first of all, based on the fundamental principles of military necessity and humanity, which underlie and inform the entire normative framework of IHL and, therefore, shape the context in which its rules must be interpreted. 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.

The Commentary to Section IX of the ICRC Guidance ('Commentary') subsequently recounts the meanings of military necessity and humanity that are well known from certain national manuals. Accordingly, military necessity, on the one hand, permits

> only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.[11]

Humanity, on the other hand, forbids 'the infliction of suffering, injury or destruction not actually necessary for accomplishment of legitimate military purposes'.[12] According to the Commentary, humanity complements military necessity and is implicit in it.

The Commentary continues:[13]

> In conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.

[10] ICRC Guidance (n 3), 78–79.
[11] ibid 79.
[12] ibid.
[13] ibid.

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In the following paragraphs, the Commentary insists that what is being suggested is not an inflexible standard, but one that can only be applied contextually, taking due account of the circumstances in which the use of lethal force is being contemplated:[14]

> The practical importance of [the] restraining function [of the principles of military necessity and humanity] will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable 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.

It is in this latter context that reference is made to the 2006 judgment of the Israeli High Court of Justice in *Public Committee Against Torture*.[15] In particular, the Commentary considers that the following passage of the judgment supports its position:[16]

> [A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. … Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required. … It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities. … Of course, given the circumstances of a certain case, that possibility may not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used.

The Commentary subsequently illustrates how the suggested restraints would play out in a number of scenarios, including the situation in which a military commander of an organised armed group visits relatives in government-controlled territory.

The foregoing reasoning then leads the ICRC to draw the following conclusion:[17]

> In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force. In such situations, the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets.

[14] ibid 80–81.
[15] *Public Committee against Torture* (n 5).
[16] ibid.
[17] ICRC Guidance (n 3) 82.

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Let us then turn to a scrutiny of the aforementioned line of argument that considers military necessity and humanity as providing a basis for Section IX. A first observation concerns the starting point of the reasoning – namely that the law of armed conflict in general, and the notions of humanity and military necessity in particular – provide for restraints that are not expressly stipulated. Before examining the precise way in which this argument is constructed, the fundamental point here is whether one approaches the law of armed conflict on the conduct of hostilities in its entirety as one that provides restraints on what parties to an armed conflict may do, but leaves everything that is not expressly regulated to the discretion of those parties; or whether the law of armed conflict starts from the opposite assumption that parties are prohibited from doing anything that is not expressly permitted under the legal principles and rules that derive from a positive source of international law. Surely, there are valid arguments on either side of that debate – a debate that is an inherent structural feature of international legal argument and not limited to the law of armed conflict.[18]

It is submitted, however, that the grammar of the law of armed conflict relating to the conduct of hostilities is more in line with the first approach. Couched as they are in terms of prohibitions, the overwhelming majority of the rules and principles in the area of conduct of hostilities suggest that actions that are *not* prohibited are permissible.[19] Surely, the opening question of who and what is targetable does not follow that logic, since everything and everyone not expressly allowed to be targeted is protected from direct attack. However, the law reverses that logic in answering the subsequent question as to how such military objectives can be engaged. The law allows them to be engaged by all methods and means of warfare except those outlawed by the principles and rules of the law of armed conflict, such as those of a nature to cause superfluous injury and unnecessary suffering, those that are indiscriminate or those that are intended or may be expected to cause widespread, long-term and severe damage to the natural environment. This is one – although not the only – important structural difference from international human rights law, which by and large follows the logic of states being prohibited from restricting human rights unless permitted to do so. To approach the law on the conduct of hostilities from the opposite permissive starting point – that parties to an armed conflict are allowed to use those methods and means which are not expressly prohibited – is more in tune with the nature of the law of armed conflict as a law that governs a state of exception rather than normality. Hence, there are good reasons for maintaining that, in the area of the law governing the conduct of hostilities, any restriction on what parties to an armed conflict may do when using force against military objectives in their quest to overcome the adversary must derive from an express restriction stipulated in a rule or principle of positive international law.

[18] See, generally, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006).

[19] In this vein, see also Claude Pilloud, Jean Pictet, Yves Sandoz and Christophe Swinarski, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) ('AP I Commentary') 393 ('when the law of armed conflict does not provide for any prohibition, the Parties to the conflict are in principle free within the constraints of customary law and general principles').

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For this reason, it appears doubtful that the reference in the Martens Clause to the principles of humanity and dictates of public conscience can function as an independent basis for the restraints asserted in Section IX. The normative content and legal force of the Martens Clause have sparked debate, a detailed discussion of which is beyond the purview of this article.[20] However, an expansive interpretation to the effect that the Martens Clause reference to principles of humanity and dictates of public conscience provides restraints on the action of parties to an armed conflict, even though a given course of conduct is not explicitly prohibited by a rule of positive international law, is neither borne out by state practice that could establish an agreement between states on such an interpretation,[21] nor can one deduce such an understanding from the case law of international courts and tribunals.[22] It is therefore submitted that as long as, and to the extent that, the principles of humanity and dictates of public conscience mentioned in the Martens Clause have not found their expression in a treaty provision, a rule of customary international law, or other source of positive international law, they do not provide a basis for the restraints contemplated in Section IX. Principles of humanity and dictates of public conscience may be driving forces for the development of the law, but they do not constitute the law.

Proceeding from the same premise that any restraint on the use of force in situations of armed conflict must derive from a positive rule of international law, the next question that arises is whether, and to what extent, humanity and military necessity possess that pedigree. In all fairness to the ICRC Guidance it is not suggested in the Commentary that humanity and military necessity operate as such positive rules of international law. Rather, in the ICRC's view, they 'constitute guiding principles *for the interpretation of* the rights and duties of belligerents'.[23] However, before we turn to a critique of this latter argument, it is crucial to understand the status, or lack thereof, of the two notions of humanity and military necessity as positive rules of international law. It is

[20] For that discussion in general see, among others: Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 American Journal of International Law 78; Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 European Journal of International Law 187; Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 37 International Review of the Red Cross 125. For the more specific discussion of the Martens Clause in connection with Section IX during the expert process that preceded the adoption of the ICRC Guidance, see Fifth Expert Meeting on the Notion of Direct Participation in Hostilities (n 7) 22.

[21] cf art 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('Vienna Convention'). For the disparate submissions of a number of states on the meaning of the Martens Clause in the course of the proceedings before the International Court of Justice (ICJ) that preceded its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226 ('*Nuclear Weapons*'), see the summary in Ticehurst (n 20).

[22] As for the ICJ, nothing in its *Nuclear Weapons* Advisory Opinion suggests such an interpretation, which led some Judges to dissent from it and express a different opinion: see, for example, *Nuclear Weapons* (n 21), Dissenting Opinion of Judge Shahabuddeen, 375–428, 406–11. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has applied the Martens Clause as an aid to *interpret* a given rule of positive international law (see, for example, ICTY, *Prosecutor v Kupreškić*, Judgment, IT-95-16-T, Trial Chamber, 14 January 2000, [525]) and as a justification to emphasise *opinio juris* over state practice when establishing a rule of customary international law (ibid [527]). Neither of these constructions suggests that the principles of humanity and dictates of public conscience, to which the Martens Clause refers, constitute independent sources of international law.

[23] ICRC Guidance (n 3) 79 (emphasis added).

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widely recognised that the two underlying considerations lack that quality. They do not constitute *legal* principles or rules. Rather, the law of armed conflict as a whole rests on the balance that states at a given point in time have struck between the two considerations.[24] Each and every legal rule and principle of the law of armed conflict therefore manifests and incorporates that balance. The two notions are 'within the law',[25] and they are so wholly and solely.

The foregoing should not be misunderstood to mean that the law does not contain openings for consideration of military necessity in manifold ways. The common clauses such as 'unless circumstances do not permit'[26] and exceptions to certain prohibitions on account of 'military necessity'[27] are examples. However, military necessity and humanity do not operate as independent legal norms in and of themselves. In other words, if the law is silent on a given issue, neither humanity nor military necessity can directly, and on its own force alone, provide an answer to the underlying question. If the law is permitting a given action, such as the use of force against a combatant or a fighter, considerations of humanity do not provide for further *legal* restraints on the use of that force, nor does the restrictive dimension of military necessity.[28] As a corollary, and at least equally importantly, the permissive dimension of military necessity does not allow for more than that which the positive rules of the law of armed conflict permit. If, for instance, the use of a given weapon is prohibited, such as poison, military necessity does not function as an independent legal standard on the basis of which that prohibition can be modified or overridden. To make the case for a different understanding of how considerations of humanity and military necessity operate in the realm of the law of armed conflict would have serious consequences. It would not only allow superimposing humanitarian requirements where the positive legal rules and principles of the law of armed conflict are permissive. Rather, it would also lead to a reintroduction of military necessity that allows for military actions that are otherwise prohibited. In the final analysis, to view the two fundamental principles of humanity and military necessity as not being fully incorporated into the law of armed conflict may hence lead to a reintroduction of concepts that strongly resemble the doctrine of *Kriegsraison*.[29]

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[24] Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Virginia Journal of International Law 796, 801.

[25] Hilary McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity' (1991) 30 Military Law and Law of War Review 215, 219–21.

[26] See, for example, the obligation to give advance warning as a precautionary measure 'unless circumstances do not permit': AP I, art 57(2)(c).

[27] See, for example, as regards attacking objects indispensable to the survival of the civilian population within a state's own territory, ibid, art 54(5).

[28] On the two dimensions (restrictive and permissive) of military necessity, see Melzer, YIHL (n 4) 104–11. He refers to the permissive function of military necessity as justifying 'those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war' and the 'justifying factor inherent in all rules of IHL which, in derogation from the rules applicable in peacetime, permit the resort to measures meeting the needs of the extreme circumstances prevailing in situations of armed conflict' (104). The restrictive function of military necessity, on the other hand, manifests itself in the maxim 'necessity is the limit of legality', essentially prohibiting 'the employment of any kind or degree of force in excess of what is required for the accomplishment of a legitimate military purpose in the concrete circumstances' (108).

[29] According to the nineteenth-century doctrine of *Kriegsraison geht vor Kriegsmanier* (the necessities of war take precedence over the rules of war), violations of the law of armed conflict were justified when compliance was considered to jeopardise the conflict's ultimate aim of overcoming the enemy. The doctrine has since been

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It is with the preceding considerations in mind that we can now turn to the assertion in the ICRC Guidance that Section IX finds its legal basis in the rights and duties of belligerents as stipulated in the law of armed conflict if and when such rights and duties are *interpreted* in light of the '*guiding principles*' of military necessity and humanity. The suggestion in the Guidance is that military necessity and humanity informs the interpretation of rules of the law of armed conflict in such a way that restraints are being imposed that the original rule does not stipulate. The silence on the amount of force that is permissible in engaging a civilian that has lost his or her protection from direct attack on account of directly participating in hostilities is being filled by reference to military necessity and humanity. In fact, the substance of the rule on loss of protection is changed from 'civilians who take a direct part in hostilities lose their protection from direct attack for such time' to 'civilians who take a direct part in hostilities lose their protection from direct attack for such time, provided that such a direct attack is militarily necessary'. It may be readily apparent from the preceding analysis that such an outcome is in substance no different from elevating the two notions of humanity and military necessity to independent normative standards that possess legal force in and of themselves, rather than being fully accommodated within the positive provisions of the law of armed conflict.

What is more, there is no apparent reason why the argument advanced by the ICRC Guidance should be limited to the use of force against civilians who are directly participating in hostilities. The purported restraints flowing from the principle of military necessity would be equally applicable to other persons who constitute legitimate targets – namely, combatants and fighters in non-international armed conflicts. If one were to take the reasoning of the Guidance underlying Section IX to its logical conclusion, it would mean, for instance, that combatants who sleep in their barracks or retreat may not be targeted with lethal force if there are less harmful means available. However, these are classic examples of instances in which states have considered the use of lethal force to be lawful.[30] As long as the use of such force is compliant with the restraints that emanate from the law governing the conduct of hostilities (including proportionality, precautions, denial of quarter, and weapons restrictions), parties to an armed conflict are entitled to put enemy combatants *hors de combat*, be it through capturing, injuring or indeed killing them. To posit otherwise would require a radical shift in the practice of states and their legal conviction that the use of lethal force against persons who do not enjoy protection from direct attack is always lawful in situations of armed conflict, within the above-

abandoned and rejected in a string of cases: see, for example, *United States v List* (*The Hostage Case*), Case no 47 (19 February 1948), United Nations War Crimes Commission. *Law Reports of Trials of War Criminals*, vol VIII, (1949) 66–67.

[30] On retreating armed forces see, for example, United States: Defense Department Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War (10 April 1992) 31 International Legal Materials 612, 631–32. See also United States Field Manual – Legal Support to the Operational Army, FM 27-100, 1 March 2000, para 8.2.5, available at http://www.loc.gov/rr/frd/Military_Law/pdf/legal_support_operations.pdf. See also Yoram Dinstein, 'The System of Status Groups in International Humanitarian Law' in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen* (Springer 2007), 145–56.

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mentioned legal parameters of proportionality, precautions, denial of quarter, and weapons restrictions.

At least equally important is that nothing in the reasoning underlying Section IX suggests that such an interpretive function of the notion of military necessity should be limited to the restrictive dimension of military necessity. The question therefore arises as to what would stand in the way of interpreting an absolute prohibition in the law of armed conflict into one that can be modified by considerations of military necessity. It could then be argued, for instance, that the prohibition to use cultural objects in support of the military effort that is contained in the two 1977 Additional Protocols to the Geneva Conventions[31] is a rule that prohibits such use only to the extent that it is not militarily necessary. Indeed, to accept such an interpretation would instil credence in the infamous statement of an ICTY Trial Chamber in the *Blaškić* case that '[t]argeting civilians or civilian property is an offence *when not justified by military necessity*',[32] which was rightly reversed on appeal.[33] In other words, one fails to see what prevents the reasoning of the ICRC to be used so that the permissive dimension of military necessity – the idea that the notion allows force and that such force is necessary to win the war – leads to an interpretation of a rule of the law of armed conflict in a way so as to allow more than that which is permitted under the original rule. It is readily apparent that such a result would not only undermine the humanitarian cause that the ICRC is pursuing in positing restraints on the use of force such as those envisaged in Section IX of its Guidance. It would, in the ultimate equation, open up the possibility that the law of armed conflict retrogresses towards something reminiscent of the doctrine of *Kriegsraison* with all its devastating effects.

In sum, much militates against construing the restraints contemplated in Section IX of the ICRC Guidance on the basis of the principles of humanity and military necessity.

## 3. THE PROHIBITION OF EMPLOYING METHODS AND MEANS OF A NATURE TO CAUSE SUPERFLUOUS INJURY AND UNNECESSARY SUFFERING

The second potential basis for Section IX of the ICRC Guidance is the prohibition of employing methods and means of a nature to cause superfluous injury and unnecessary suffering. Without doubt, that prohibition is a genuine legal principle of the law of armed conflict, firmly rooted in conventional and customary law.[34] The ICRC's Guidance does not develop the principle as a possible basis for Section IX. Instead, it merely restates that the prohibition of employing methods and means of a nature to cause superfluous injury and unnecessary suffering is one of the limitations that the law imposes, *in addition* to which the restraints

[31] See AP I (n 1) art 53(b); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 ('AP II'), art 16.
[32] ICTY, *Prosecutor v Tihomir Blaškić*, Judgment, IT-95-14-T, Trial Chamber, 2 March 2000, [180] (emphasis added).
[33] ICTY, *Prosecutor v Tihomir Blaškić*, Judgment, IT-95-14-A Appeals Chamber, 29 July 2004, [109].
[34] cf ICRC Study (n 2) 237, with further references to treaty provisions.

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contemplated in Section IX operate. However, the prohibition was discussed on a number of occasions in the expert process[35] and has also resurfaced in subsequent debates[36] about Section IX.

The construction of the prohibition as a basis for Section IX is largely inspired by the writings of Jean Pictet, who in the 1970s and 1980s asserted on a number of occasions: 'If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil'.[37]

In support of the prohibition of employing methods and means of a nature to cause superfluous injury and unnecessary suffering as a basis for Section IX, reference is also at times made to the statement of the International Court of Justice (ICJ) in its Advisory Opinion on Nuclear Weapons.[38] According to the Court, the prohibition does not only constitute an intransgressible principle of international customary law and a cardinal principle of the law of armed conflict, but it outlaws the infliction of 'harm greater than that unavoidable to achieve legitimate military objectives'.[39]

If one examines the precise contours of the prohibition of employing methods and means of a nature to cause superfluous injury and unnecessary suffering,[40] a conceivable argument for its providing the basis for Section IX would seem to be the following. The prohibition has been extended from covering weapons to apply also in the realm of methods of warfare in Article 35(2) of AP I, subsequent treaties and customary international law. 'Methods' are generally understood to mean the way in which weapons are used, such as tactics, strategies etc. Tactics and strategies which employ avoidable force against legitimate targets would violate the prohibition.[41]

Such an argument would seem to be compatible with the ordinary meaning of the terms 'methods of a nature to cause superfluous injury and unnecessary suffering' if interpreted in good faith in their context and in the light of the object and purpose of the prohibition.[42] In fact, an interpretation along the lines suggested would instil meaning into a prohibition that is otherwise shrouded in mystery as far as 'methods' are concerned.[43] However, one needs to

[35] See above (n 7).
[36] Nils Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 New York University Journal of International Law & Politics 831, 905–6.
[37] See Jean Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985) 76; ICRC, Report on the Work of Experts relating to 'Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects, 1973, 13: 'if a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided'.
[38] Melzer (n 36), 905–6.
[39] *Nuclear Weapons* (n 21), 257.
[40] For an exhaustive treatment of the principle, see Theo Boutruche, *L'Interdiction des maux superflus: Contribution à l'étude des principes et règles relatifs aux moyens et méthodes de guerre en droit international humanitaire* (PhD thesis, Geneva/Marseille, 2008).
[41] For an exploration of that argument, ibid, 34–58, especially 47–58.
[42] Vienna Convention (n 21) art 31(1).
[43] The negotiating history of extending the otherwise well-established prohibition beyond means of warfare (i.e. weapons, projectiles and material) to also include 'methods' in art 35(2) AP I reveals that states were less than certain about what was meant. See, for example, the statement of Australia, CDDH/III/SR.38,

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acknowledge at the same time that there is no evidence that states share such an interpretation. There is no practice in the application of the prohibition of methods of warfare of a nature to cause superfluous injury and unnecessary suffering which establishes the agreement[44] that it amounts to a 'least harmful means' requirement as contemplated in Section IX of the ICRC Guidance. Even the lone domestic judgment that suggests a restraint on the use of lethal force that closely resembles Section IX of the ICRC Guidance – the judgment of the Israeli High Court of Justice in *Public Committee Against Torture*[45] – does not support such a construction of the prohibition. The Israeli High Court of Justice reached its conclusion on the basis of the principle of proportionality under domestic law and human rights law, rather than the prohibition of methods of warfare of a nature to cause superfluous injury and unnecessary suffering, or, for that matter, the law of armed conflict more generally. Indeed, the ICRC Study does not clarify the meaning of what constitute 'methods of a nature to cause superfluous injury and unnecessary suffering' and nothing in the collected material suggests that such an interpretation is accepted by states.[46] Admittedly, there is nothing to prevent states from adopting such an interpretation in the future, but currently they do not interpret the prohibition of methods of warfare of a nature to cause superfluous injury and unnecessary suffering in a way so as to provide a legal basis for Section IX.

## 4. HUMAN RIGHTS LAW

Let us then turn to the question of whether, and to what extent, human rights law could provide a legal basis for the restraints on the use of force contemplated in Section IX of the ICRC Guidance. To answer that question, one first has to consider the applicability of human rights law in times of armed conflict. Secondly, the relationship between human rights law and the law of armed conflict needs to be addressed.

As to the first question, human rights law applies, as a rule, in the territory of a state that is subject to the conventional or customary human rights norm in question, also in times of armed conflict. However, the existence of an armed conflict may bring with it certain exceptions to the general rule that a state is so bound. This may notably be the case, for instance, where a part of that state's territory is under the control of another state in the course of belligerent occupation, or under the control of an organised armed group in the course of a non-international armed conflict.

Committee III, Summary Records of the 38th meeting, 10 April 1975, para 51. It is equally telling that, while the ICRC Study includes the notion of 'methods' in the customary prohibition in Rule 70, the interpretive section accompanying Rule 70 and the examples provided address weapons exclusively: see ICRC Study (n 2) 237, 241–44.

[44] Vienna Convention (n 21) art 31(3)(b).

[45] *Public Committee against Torture* (n 5).

[46] ICRC Study (n 2) 237, 241–44.

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In such a case of a lack of territorial control exercised by the state, the latter's human rights obligations may be temporarily inoperative.[47]

Under certain circumstances, human rights law also applies extraterritorially. This is specifically the case if and when the action of the state concerned is such that it renders the individual concerned, in the words of the International Covenant on Civil and Political Rights, 'subject to its jurisdiction'.[48] While a detailed analysis of the findings by human rights bodies on, and the academic debate about, the extra-territorial applicability of human rights would go beyond the purview of this article, considerable agreement exists that human rights law does apply in territory other than the state's own if and when it exercises effective control over territory or persons.[49] Situations of belligerent occupation and extraterritorial detention are fairly widely, albeit not unanimously,[50]

[47] See, for example, *Ilascu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004), para 312, in which the European Court of Human Rights held: '[The presumption that jurisdiction within the meaning of art 1 of the European Convention on Human Rights] is exercised normally throughout the state's territory may be limited in exceptional circumstances, particularly where a state is prevented from exercising its authority in part of its territory. That may be as a result of military occupation by the armed forces of another state which effectively controls the territory concerned (see *Loizidou v Turkey*, Preliminary Objections, Judgment, 23 March 1995, Series A no 310, and *Cyprus v Turkey* [GC], no 25781/94, ECHR 2001/IV, paras 76–80, as cited in the above-mentioned *Banković* decision, paras 70–71), acts of war or rebellion, or the acts of a foreign state supporting the installation of a separatist state within the territory of the state concerned.' See also para 330. Note, however, that the Court nevertheless held (at para 331) a State Party to have the positive obligation under art 1 of the European Convention to take the diplomatic, economic, judicial or other measures that are in a State Party's power and in accordance with international law to secure to individuals the rights guaranteed by the Convention (all emphases added). See also UN Human Rights Committee, Concluding Observations: Cyprus (1998) UN Doc CCPR/C/79/Add.88, para 3; and Concluding Observations on Lebanon (1997) UN Doc CCPR/C/79/Add.78 paras 4–5.

[48] International Covenant on Civil and Political Rights (opened for signature 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'), art 2(1). Note the differing wording in the European Convention on Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 ('European Convention'), art 1 ('to everyone within their jurisdiction'), and the American Convention on Human Rights (opened for signature 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 ('ACHR'), art 1(1) ('to all persons subject to their jurisdiction').

[49] HRC General Comment no 31: Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [108]–[112]; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, 19 December 2005, [2005] ICJ Rep 168 [216]; *Loizidou v Turkey*, Preliminary Objections, 23 March 1995, ECHR (ser A) 310, para 62; *Loizidou v Turkey*, Merits, ECHR 1996-VI, paras 52, 56; *Cyprus v Turkey* ECHR 2001-IV, para 77; *Ilascu* (n 47); *Al Skeini and Others v United Kingdom* App no 55721/07 (ECtHR, 7 July 2011), paras 138–140. For an overview of domestic court judgments, see Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310, 325–30. Note that the Inter-American Commission on Human Rights ('IACHR') and Court employ instead the notions of 'authority and control': *Coard and Others v United States*, Case 10.951, Report no 109/99, 29 September 1999, IACHR, para 37. However, these latter notions of 'authority and control' overlap to a significant extent with the notion of effective control, although they are not identical.

[50] See, for example, the positions taken by the Netherlands, Israel, UK and the USA before the Human Rights Committee, referred to in Droege, ibid, 326 (fn 64). For a critique of the position taken by the Human Rights Committee, see Michael J Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 American Journal of International Law 119.

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accepted scenarios where the level of control reaches the required threshold of control,[51] whereas air operations are contested.[52]

States remain bound by human rights law also in times of armed conflict in the aforementioned cases, except to the extent that they may have properly exercised their right to take measures to derogate from certain human rights in times of public emergency which threatens the life of the nation.[53] As a result, human rights law and the law of armed conflict may apply simultaneously during a situation of armed conflict.

In such a situation of simultaneous application, the question arises as to the relationship between human rights law and the law of armed conflict. This is especially pertinent where the two regimes differ, as is the case in relation to the use of lethal force, with which we are concerned in the present context. Here, human rights law is stricter than the law of armed conflict.

In order for a deprivation of life not be arbitrary and hence a violation of human rights, the use of lethal force must not only have a legal basis, but the amount of force used may not exceed that which is necessary to achieve a legitimate purpose – such as self-defence or the defence of others against an imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting arrest, or to prevent his or her escape. Furthermore, the force must be proportionate to the actual danger that is being countered. Last but not least, reasonable measures need to be taken so as to minimise the amount of force used, such as a warning or giving the opportunity to surrender. Reasonable non-violent means need to be exhausted before resorting to the use of potentially lethal force.[54] It follows from these requirements that human rights law clearly establishes a least harmful means requirement that bears considerable resemblance to that suggested in Section IX of the ICRC Guidance.

According to the law of armed conflict, on the other hand, our previous analysis suggests that no such requirement exists. Lethal force may be used against members of the armed forces of a

[51] See, for example, UN Human Rights Committee, *Delia Saldias de Lopez v Uruguay*, UN Doc CCPR/C/13/D/52/1979, 29 July 1981, para 12.1; UN Human Rights Committee, Concluding Observations on Israel, UN Doc CCPR/C/79/Add.93, 18 August 1998, para 10; Concluding Observations on Israel, UN Doc CCPR/CO/78/ISR, 21 August 2003, para 11; *Loizidou* (n 49); *Ocalan v Turkey* ECHR 2005-IV, para 91; *Issa and Others v Turkey*, App no 31821/96 (ECtHR, 16 November 2004), para 71; IACHR, Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), 12 March 2002, (2002) 41 International Legal Materials 532.

[52] Against: *Banković and Others v Belgium and Others*, Decision on Admissibility, App no 52207/99 (ECtHR, 12 December 2001), paras 75–80; Pro: IACHR, *Armando Alejandre Jr and Others v Cuba* ('Brothers to the Rescue'), Report no 86/99, Case no 11.589, 29 September 1999, para 25, available at http://www.cidh.org/annualrep/99eng/merits/cuba11.589.htm.

[53] ICCPR (n 48) art 4(1); ECHR (n 48) art 15; ACHR (n 48) art 27.

[54] On these requirements, see Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 'UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' (1990), Principles 4, 5, and 9. For a succinct account of relevant jurisprudence of the Human Rights Committee, the European Court of Human Rights and the Inter-American Commission and Court of Human Rights, see University Centre for International Humanitarian Law, Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation (2005), 8–14, available at http://www.adh-geneva.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf.

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party to an armed conflict and civilians who directly participate in hostilities, regardless of whether they could be captured or arrested.

In such a situation of conflict between a norm of human rights law on the one hand, and a norm of the law of armed conflict on the other, the question arises as to which norm prevails. According to the ICJ, the maxim *lex specialis derogat legi generali* resolves such an instance of a normative conflict with the more specific rule prevailing over the more general rule.[55] In the words of the ICJ:[56]

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

This statement of the ICJ suggests a *lex specialis* between the regulation of the right to life according to the law of armed conflict in the area of the conduct of hostilities and the regulation of the right to life according to human rights law. In subsequent findings, however, the ICJ appears to have extended the *lex specialis*/*lex generalis* relation beyond the specific area of the conduct of hostilities in as much as it has asserted that, in situations of simultaneous application of human rights law and the law of armed conflict, 'the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law'.[57] The latter statement could be understood to mean that, in times of armed conflict, the rules of the law of armed conflict will at all times prevail over incompatible norms of human rights law. Such an understanding would be based on the general premise that the law of armed conflict is specifically devised to regulate situations of armed conflict.

However, it may very well be argued that the rule that the law of armed conflict functions in the aforementioned way as *lex specialis* to human rights law in times of armed conflict is not absolute. In certain areas, human rights law may supply the more specific standards even in such times. This is notably the case in situations that, while occurring during an armed conflict, closely resemble those for which human rights standards have been developed with a higher degree of specificity. Operations during an armed conflict that for all sense and purposes are law enforcement operations provide a pertinent example. Accordingly, it has been argued that the use of force in relatively calm situations of occupation for the purpose of maintaining public

[55] cf *Nuclear Weapons* (n 21) [25]; *Legal Consequences of the Construction of a Wall* (n 49) [106]; *Armed Activities on the Territory of the Congo* (n 49) [216].
[56] *Nuclear Weapons*, ibid.
[57] *Legal Consequences of the Construction of a Wall* (n 49) [106].

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order and safety,[58] or in areas under the firm control of state authorities in times of non-international armed conflict,[59] should be governed by the legal parameters that human rights law (as the *lex specialis*) provides for the use of force. Indeed, between the clear outer extremes of situations that can be contemplated – between operations that constitute law enforcement operations that occur during situations of armed conflict on the one hand, and fully fledged, large-scale combat operations, on the other – some have suggested that the interplay between the law of armed conflict and human rights law leads to a gradation of the amount of force that can lawfully be used.[60]

Such a graded approach appears to find some support in the judgment of the Israeli High Court of Justice in *Public Committee Against Torture*,[61] in which the Court stated:[62]

> [A]mong the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.

It then contextualised that requirement in the following way:[63]

> Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers that it is not required. However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities. Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used.

To construe the restraints on the use of force contemplated in Section IX of the ICRC Guidance on the basis of human rights law nevertheless raises a number of concerns.

First, on a conceptual level, to rely on human rights law would result in the creation of disparate regimes for the use of lethal force if and when non-state actors (organised armed groups) are parties to an armed conflict, which in turn would undermine one of the fundamental precepts of the law of armed conflict – namely the legal equality of belligerent parties[64] – as the applicability of human rights law to organised armed groups is at least debatable. While some evidence

[58] University Centre for International Humanitarian Law (n 54) 23–24. Whether and to what extent human rights law also governs the use of force in calm situations of occupation for other purposes is subject to divergent opinions amongst experts: ibid.
[59] Sassòli and Olson (n 8) 613–14.
[60] ibid.
[61] *Public Committee against Torture* (n 5).
[62] ibid para 40.
[63] ibid.
[64] See generally on that precept, Henri Meyrowitz, *Le principe de l'égalité des belligérants devant de droit de la guerre* (Pedone 1970); Francois Bugnion, 'Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts' (2003) 6 Yearbook of International Humanitarian Law 167, 174.

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suggests that organised armed groups are gradually brought into the reach of international human rights law by virtue of a process of international customary law formation,[65] the better view seems to remain that such evidence is insufficient for the time being to conclude that such a customary process has already reached the point of crystallising into a firm rule.[66] If one accepts the latter view, the restraints in Section IX would be binding only upon states, but not on organised armed groups. Such inequality before the law may ultimately impact negatively on a party acting in conformity with its international legal obligations, as the reciprocal expectation of compliance by parties to an armed conflict remains one of the central motivating factors for compliance.

At the same time, it needs to be acknowledged that there may be more to the notion of equality of belligerent parties before the law than meets the eye. Any recognition that human rights law remains applicable in times of armed conflict and may supply the normative standard with which states must comply already creates a certain inequality in the legal obligations of states vis-à-vis organised armed groups. Indeed, the fundamental conceptual notion that parties to an armed conflict are equal before the law is genuine only to the law of armed conflict, not to other areas of law. The notion is certainly absent from domestic law, whereby members of non-state armed forces remain subject to criminal sanctions for the mere fact of having participated in hostilities, whereas state armed forces have a legal privilege under domestic law to do so. But the notion is equally not a feature of human rights law, which binds states but not individuals. Nevertheless, one needs to acknowledge that a construction of Section IX on the basis of human rights law would mean that only states are bound by the restraints that it purports exist, whereas non-state organised armed groups would be allowed to use force under the law of armed conflict without being subject to the same restraints.

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[65] That customary process consists, among others, of instances in which UN organs and other bodies have addressed organised armed groups in monitoring human rights and/or condemning human rights violations. See, for example, Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights: Situation of Human Rights in the Darfur Region of the Sudan' Commission on Human Rights, UN Doc E/CN.4/2005/3, 7 May 2004, para 47, in which the Human Rights Commission stated that '[t]he rebel forces also appear to violate human rights and humanitarian law'; Report of the Special Rapporteur, Philip Alston, Addendum, 'Mission to Sri Lanka' (28 November to 6 December 2005), UN Doc E/CN.4/2006/53/Add.5, 27 March 2006, especially paras 24–27 and accompanying footnotes. For the Security Council, see, for example, UNSC Res 1814(2008) on the situation in Somalia, 15 May 2008, para 16, addressed to 'all parties in Somalia'; UNSC Res 1778(2007) on the situation in Chad, the Central African Republic and the subregion, 25 September 2007, Preamble ('activities of armed groups and other attacks in eastern Chad, the north-eastern Central African Republic and western Sudan which threaten the security of the civilian population, the conduct of humanitarian operations in those areas and the stability of those countries, and which result in serious violations of human rights and international humanitarian law'). For further relevant resolutions of the Security Council and the General Assembly pertaining to violations of human rights (as well as humanitarian law) committed in the Former Yugoslavia, Afghanistan, the Sudan, Sierra Leone, Ivory Coast, the Congo, Angola, Liberia and Somalia, and further discussion, see Christian Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements' in Horst Fischer and others (eds), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection, Festschrift für Dieter Fleck* (BWV, Berlin 2004) 577–85.

[66] For contrary practice that supports this conclusion, see Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (CUP, 2002) 39–46.

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Secondly, the construction of Section IX on the basis of human rights law encounters considerable difficulties in situations where force is used extraterritorially. The jurisprudence of the ICJ and of several human rights bodies – most notably the Human Rights Committee and the European Court of Human Rights – with the arguable exception of the Inter-American Commission on Human Rights,[67] would mean that the extraterritorial applicability of human rights law would be excluded as a matter of principle, except in cases where the control of a state over foreign territory is effective enough to trigger the obligations of that state under the respective human rights treaty.[68] Where that required level of control is not attained, there would therefore be no room for restraint on the use of force as contemplated in Section IX.

Thirdly, human rights are generally held to be indivisible and interdependent so that they apply either in their totality or not at all. A manifestation of such a holistic understanding of the applicability of human rights law is the European Court of Human Rights determination in the case of *Banković* that the obligation of a state to secure to everyone within its jurisdiction the rights and freedoms defined in Section I of the European Convention cannot be divided and tailored in accordance with the particular circumstances of the act in question.[69] What the European Court thereby appeared to suggest is that if one right (*in casu* the right to life) is applicable, all the other rights enshrined in the European Convention equally apply, except in cases where a state has properly exercised its right to take measures to derogate from certain human rights in a time of public emergency which threatens the life of the nation. In contrast, the graded approach would call for more differentiation, in which the control exercised by a state may very well be sufficient to secure the right to life by effectuating an arrest instead of using lethal force, but insufficient to secure certain other rights, such as the right to marry and to found a family. Cases such as *Banković* and the human rights discourse in inter-governmental organisations that subscribes to the indivisibility and interdependence of human rights would therefore, proverbially speaking, throw out the baby with the bath water.

Ultimately, the holistic understanding of the applicability of human rights law militates against that body of law providing the legal basis for a graded approach along the lines suggested in Section IX of the ICRC Guidance. Whether human rights law moves away from such a holistic understanding remains to be seen. At least the more recent case law of the European Court of Human Rights seems to suggest that it might. In particular, in *Al Skeini*, the Court in an apparent diversion from its earlier findings in *Banković*, held that[70]

> It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'.

[67] *Armando Alejandre Jr* (n 52) para 23.
[68] See nn 49–52 and accompanying text.
[69] *Banković* (n 52) para 75.
[70] *Al Skeini and Others v United Kingdom* (n 49) para 137.

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However, at the present time, it seems premature to conclude from that case alone that human rights law has undergone a transformation that would allow for a graded approach to the use of lethal force along the lines suggested in Section IX of the ICRC Guidance.

## 5. CONCLUSION

The aim of this paper was not to assess the usefulness or desirability, from a normative standpoint, of the restraints on the use of force as suggested by Section IX of the ICRC Guidance. Nor was it to answer the question of whether any use of force along those lines is realistic from an operational standpoint. Rather, the aim was solely to examine the question whether, and to what extent, the substance of Section IX forms part of the *lex lata* as it currently stands. The preceding analysis suggests an answer in the negative. Considerations of humanity and military necessity do not provide such a legal basis. Furthermore, the prohibition of methods of a nature to cause superfluous injury and unnecessary suffering could only supply a basis if one could derive from the practice of states an agreement that the prohibition should be interpreted in such a way. That agreement is presently absent. Last but not least, to derive restraints on the use of force contemplated in Section IX from human rights law is open to a number of considerable objections. Section IX, therefore, is not firmly rooted in international law as it presently stands.

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