

## OPINION NOTE

# Can the incidental killing of military doctors never be excessive?

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### Abstract

*Military medical personnel and objects, as well as wounded and sick combatants, are protected against direct attack under the principle of distinction in international humanitarian law. However, some authors argue that they are not covered by the principles of proportionality and precautions. This opinion note explains that military medical objects constitute civilian objects under the rules governing the conduct of hostilities. It also demonstrates that, in view of the object and purpose of the First Additional Protocol to the Geneva Conventions, expected incidental casualties of military medical personnel and wounded and sick combatants must be included among the relevant incidental casualties under the principles of proportionality and precautions. This stems in particular from the interpretation of the obligation ‘to respect and protect’ as the overarching obligation of the special protection afforded to all medical personnel and wounded and sick. Support for this conclusion can be found in a number of military manuals and in the Additional Protocol’s preparatory work and Commentaries. This conclusion also reflects customary law.*

**Keywords:** international humanitarian law, conduct of hostilities, proportionality, precautions, incidental casualties, civilian objects, military objectives, military medical personnel, military medical objects, wounded and sick combatants, respect and protection of the medical mission.

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A century and a half ago, the first codification of what became known as ‘Geneva Law’ afforded protection to military medical personnel and objects, as well as wounded and sick combatants.<sup>1</sup> It is today undisputed that they are all protected against direct attack, under the specific rules protecting medical personnel, units, and transports, and the wounded and sick (hereinafter ‘the special protection’),<sup>2</sup> as well as under the rules governing the conduct of hostilities.<sup>3</sup>

However, some authors have recently claimed that military medical personnel and objects or wounded and sick combatants would not be protected by the principles of proportionality and precautions because the relevant rules in the First Additional Protocol refer only to incidental loss of *civilian* life, injury to *civilians*, and damage to *civilian* objects. Solis notably states that ‘the presence of noncombatant members of the armed forces at a military objective does not require an attacking enemy to take any special precautionary measures, as would the presence of civilians’,<sup>4</sup> while Henderson<sup>5</sup> and Bartels<sup>6</sup> argue that military medical units, military medical personnel, or persons *hors de combat* such as wounded soldiers do not benefit from the protection of the principle of proportionality. This reading would mean that, except for the prohibition on indiscriminate attacks, the rules governing the conduct of hostilities would not restrain the incidental killing or injuring of military medical personnel and wounded and sick combatants, nor

- 1 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864. In this note, the terms ‘wounded and sick’ are used as defined in Art. 8(a) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (hereinafter AP I). This definition is also relevant for non-international armed conflicts: see Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (hereinafter ICRC Commentary), para. 4637.
- 2 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (hereinafter GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (hereinafter GC II); Arts. 8ff of AP I; Arts. 7ff of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (hereafter AP II); ICRC, *Customary International Humanitarian Law, Vol. I: Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005 (hereinafter ICRC Customary Law Study), Rules 25–30 and 109–111.
- 3 Arts. 41 and 48 *in fine* of AP I; Rule 1, second sentence, of the ICRC Customary Law Study, above note 2.
- 4 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, p. 191.
- 5 Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 195–196 (for medical units) and p. 206 (for medical personnel).
- 6 Rogier Bartels, ‘Dealing with the principle of proportionality in armed conflict in retrospect: the application of the principle in international criminal trials’, in *Israel Law Review*, Vol. 46, No. 2, July 2013, p. 304. While Bartels argues on the basis of Art. 50 of AP I that persons *hors de combat* other than civilians, such as wounded soldiers, do not benefit from the protection of the principle of proportionality under AP I or the Rome Statute, he is not entirely clear on whether he considers that this protection exists under customary IHL; he indeed asserts that ‘[i]t is submitted here that the principle of proportionality is broader than the rules that codified the principle in Additional Protocol I. The principle underlying Articles 52 and 57 of Additional Protocol I would include prohibited attacks on military objects that would cause excessive damage to any person who cannot be targeted directly under IHL; not only civilians but also persons *hors de combat*’ (p. 304). Bartels’ arguments with regard to Art. 8(2)(b)(iv) of the Rome Statute are outside of the scope of this opinion note.

incidental damage to military medical objects, when attacks are directed against able-bodied combatants or military objectives.

The International Committee of the Red Cross (ICRC) holds the opposite view.<sup>7</sup> To be able to provide with the least possible delay the medical care and attention required by the wounded and sick, medical personnel, units, and transports – especially military ones – often have to operate in proximity to the fighting, especially during urban warfare. It is thus particularly important to uphold their protection against incidental loss of life, injury, or damage.

The issue at stake is limited to military medical personnel and objects, as well as wounded and sick combatants. Indeed, civilian medical personnel and objects, as well as wounded and sick civilians, remain civilian persons and objects and are protected as such under the rules governing the conduct of hostilities. This opinion note will thus consider the question of whether the expected incidental killing or injury of *military* medical personnel or wounded and sick *combatants* and damage to *military* medical objects are relevant under the principles of proportionality and precautions.

After recalling the content of the principles of proportionality and precautions, this note discusses the question of whether military medical objects fall under the definition of military objectives or actually constitute civilian objects. It then turns to persons, and analyses the protection against incidental loss of life or injury under both the specific rules protecting medical personnel and the wounded and sick, and the rules governing the conduct of hostilities. This note argues that it would run counter to these rules to exclude military medical personnel and objects as well as wounded and sick combatants from the evaluation of the relevant incidental harm for the purposes of applying the principles of proportionality and precautions. It finally shows that some support for an inclusive position can be found in state practice and in the preparatory work of the First 1977 Additional Protocol to the Geneva Conventions (AP I). This note thus concludes that all feasible precautions must be taken to avoid, or at least minimise, incidental harm to military medical personnel and objects as well as wounded and sick combatants. If such incidental harm is expected to be excessive compared to the direct and concrete military advantage, it renders the attack unlawful by virtue of the principle of proportionality.

This note assumes that military medical personnel and objects do not commit (or are not used to commit), outside of their humanitarian function, acts harmful to the enemy, and that wounded and sick combatants refrain from any act of hostility.<sup>8</sup>

7 'In the ICRC's view, any assessment of the expected incidental harm under the rule of proportionality must take into account possible deaths or injuries among all the medical personnel, including military medical personnel, as well as combatants who are *hors de combat*. This stems from the central obligation to respect and protect these persons': 14th Bruges colloquium, 17 and 18 October 2013, keynote address by Ms. Christine Beerli, ICRC vice-president, available at: [www.icrc.org/eng/resources/documents/statement/2013/10-18-protected-person-bruges.htm](http://www.icrc.org/eng/resources/documents/statement/2013/10-18-protected-person-bruges.htm) (last visited 3 April 2014). See also the article by Alexander Breitegger in this issue of the *Review*.

8 For medical persons and objects, see Art. 21 of GC I, Art. 13 of AP I, Art. 11 of AP II, and Rules 25, 28 and 29 of the ICRC Customary Law Study, above note 2. For the wounded and sick, see the definition under Art. 8(a) of AP I.

## The principles of proportionality and precautions

The principles of proportionality and precautions are mainly outlined in Articles 51, 57, and 58 of AP I, which reflect customary international humanitarian law (IHL) in international and non-international armed conflicts on most, if not all of these aspects.

The principles of proportionality and precautions do not forbid all incidental harm to persons and objects protected against direct attack. However, they do impose limits on such harm. The principle of proportionality forbids attacks that may be expected to cause incidental civilian casualties, and damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>9</sup> The principle of precautions requires the parties to the conflict to take constant care in the conduct of military operations to spare the civilian population and civilian objects; a number of specific rules are derived from this principle that are designed to avoid or at least minimise incidental casualties and damage when carrying out an attack.<sup>10</sup> The parties to the conflict must also take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.<sup>11</sup>

Among the rules stemming from the principle of precautions, the obligations to take all feasible precautions to verify that the target is a military objective, and to cancel or suspend an attack if it becomes apparent that this is not the case, expressly include the obligation to verify that the objective to be attacked is not subject to *special protection*. This is a verification that goes beyond the check that the targets are neither civilians nor civilian objects.<sup>12</sup> Military medical personnel and objects, as well as wounded and sick combatants, are obviously all subject to such special protection.

Conversely, all other rules stemming from the principle of precautions,<sup>13</sup> as well as the principle of proportionality,<sup>14</sup> mention only the expected incidental

9 Art. 51(4) of AP I; Rule 14 of the ICRC Customary Law Study, above note 2.

10 Art. 57 of AP I; Rules 15–21 of the ICRC Customary Law Study, above note 2.

11 Art. 58 of AP I; Rules 22–24 of the ICRC Customary Law Study, above note 2.

12 'Article 57 – Precautions in attack

[...]

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects *and are not subject to special protection* but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

[...]

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one *or is subject to special protection*' (emphasis added).

13 Arts. 57(1) and 57(5) of AP I speak of 'the civilian population, civilians and civilian objects'; Art. 57(2)(a)(ii) of 'loss of civilian life, injury to civilians and damage to civilian objects'; Art. 57(2)(c) of 'the civilian population'; Arts. 57(3) and 57(4) of 'civilian lives and civilian objects'; and Art. 58 of 'the civilian population, individual civilians and civilian objects'.

14 Arts. 51(5)(b), 57(2)(a)(iii), and (57)(2)(b), second sentence, of AP I all speak of 'loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof'.

civilian casualties and damage to civilian objects. On that basis, one could claim that these rules do not cover protected persons and objects other than civilians and civilian objects. It will be shown that a closer reading of the law does not support this conclusion.

## **Military medical objects are civilian objects under the rules governing the conduct of hostilities**

Military hospitals and other places for collecting sick and wounded combatants were already protected under the early expression of the principle of precautions found in the 1907 Hague Regulations – which have been considered to reflect customary IHL<sup>15</sup> – as it covered them without distinction based on their military or civilian character: ‘In sieges and bombardments all necessary steps must be taken to spare, as far as possible, . . . hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.’<sup>16</sup>

Under contemporary IHL, the matter can be put to rest easily for military medical transports and units, and more generally for all military medical objects (including blood bank reserves, medicines, or other purely medical supplies or equipment even outside of a medical unit). Insofar as objects are concerned, treaty and customary IHL defines military objectives as follows:

military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>17</sup>

By requiring that the object makes an effective contribution to military action, and that the military advantage be definite, this definition excludes notably objects that only make an indirect contribution or advantages that are only hypothetical or speculative.<sup>18</sup> It was carefully crafted to avoid an overly broad understanding of the notion of military objective that would undermine the principle of distinction.

15 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, para. 41. International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 87.

16 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (entered into force 26 January 1910), Regulations, Art. 27(1). The same provision is found in the 1923 Hague Rules on Air Warfare, Art. XXV; see ‘General Report of the Commission of Jurists at the Hague’, in *The American Journal of International Law*, Vol. 17, No. 4, Supplement: Official Documents, October 1923, pp. 242–260.

17 Art. 52(2) of AP I; Rule 8 of the ICRC Customary Law Study, above note 2.

18 Knut Doermann, ‘Obligations of international humanitarian law’, in *Military and Strategic Affairs*, Vol. 4, No. 2, September 2012, pp. 11–23, p. 15; Michael Bothe, Karl Josef Partsch and Waldermar A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1982, p. 326; Marco Sassòli and Lindsey Cameron, ‘The protection of civilian objects: current state of the law and issues de lege ferenda’, in Natalino Ronzitti and Gabriella Venturini (eds), *The Law of Air Warfare: Contemporary Issues*, Eleven International, The Hague, 2006, pp. 35–74, p. 48.

Despite the fact that they form part of the military, at least as long as they are not used outside of their humanitarian function to commit acts harmful to the enemy,<sup>19</sup> military medical objects do not make an effective contribution to military action and their destruction cannot be considered to offer a definite military advantage. As they do not fulfil either of the two cumulative conditions set by the definition of military objective, they do not constitute military objectives. Henderson's assertion that military medical units *prima facie* would meet the test for a military objective is thus not supported by a closer reading of the definition of military objective under IHL.<sup>20</sup>

Civilian objects are defined in Article 52(1) of AP I and customary IHL<sup>21</sup> as *all* objects which are not military objectives as defined in Article 52(2) of AP I. Whatever the usual or colloquial meaning of the terms, military medical transports, units, and other military medical objects are therefore 'civilian objects' under the law governing the conduct of hostilities.<sup>22</sup> This conclusion is reinforced by the ICRC Commentary on the 1973 Draft Additional Protocols.<sup>23</sup> As long as they do not fulfil the definition of military objectives, military medical objects are thus covered by all the protections afforded to civilian objects under the rules governing the conduct of hostilities. This includes the obligation to take into consideration the expected incidental damage to military medical transports, units, or other military medical objects in proportionality assessments, and the obligation to take all feasible precautions to avoid or at least minimise incidental damage to such objects. It has to be noted that this conclusion also stems from the provisions affording special protection to medical objects, as will be developed below for persons.

19 'To be used, outside of their humanitarian function, to commit acts harmful to the enemy', is the standard leading to the loss of the special protection afforded to medical objects because of their function (subject to other safeguards such as the obligation to issue a warning); cf. Art. 21 of GC I and Art. 13 of AP I; Rules 28–29 of the ICRC Customary Law Study, above note 2.

20 Henderson, above note 5, p. 195. Henderson also develops a somewhat circular reasoning according to which medical objects were granted special protection because they were military objectives in the first place, which proves they are not entitled to the general protection granted to civilian objects. This would arguably mean that civilian medical units – or any other specially protected object (or person) – should also be considered a military objective because otherwise they would not need the special protection. In the view of this author, this argument is therefore also not convincing.

21 Rule 9 of the ICRC Customary Law Study, above note 2.

22 Rule 22(a) of the *Manual on International Law applicable to Air and Missile Warfare*, HPCR, Bern, 2009 (hereafter *HPCR Air and Missile Warfare Manual*) specifically excludes medical transports from military vehicles when giving examples of military objectives by nature. Dinstein gives the same argument with regard to POW camps: see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2<sup>nd</sup> ed., Cambridge University Press, Cambridge, 2010, para. 305.

23 The ICRC Commentary on the 1973 Draft Additional Protocols makes it clear when talking about paragraphs that included notably the draft proportionality rules (draft Arts. 50(1)(a) and (b), which became Arts. 57(2)(a)(i) and (iii) and 57(2)(b) of AP I): 'All these various factors with their probable or possible effects on protected civilians and civilian objects must therefore be borne in mind when planning, deciding (sub-paragraph (a)) and launching (sub-paragraph (b)) the attack'. A footnote attached to the words 'civilian objects' clarifies: 'Not only within the meaning of Art. 47 (2) [which listed 'objects designed for civilian use ... and all objects which are not military objectives'], but any object protected under existing treaty law or customary international law (civilian and *military hospitals*, cultural objects, hospital and safety zones, etc.)' ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary*, Geneva, 1973, p. 65, fn. 32 (emphasis added).

## Military medical personnel and wounded and sick combatants must be included in the notion of ‘incidental casualties’

Article 50(1) of AP I defines civilians as follows:

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43.

Article 43 of AP I defines the armed force of a party to a conflict. Thus, put otherwise, civilians are persons who are not members of state armed forces,<sup>24</sup> or (for non-international armed conflicts) of an organised armed group of a non-state party to a conflict.<sup>25</sup> Henderson’s and Bartels’ positions excluding medical personnel and wounded and sick combatants from the relevant ‘incidental casualties’ evaluation under the principle of proportionality is based on the definition of civilians as expressed in Article 50 of AP I.<sup>26</sup>

The argument developed above for objects cannot simply be mirrored for persons. It is nevertheless submitted that military medical personnel and wounded and sick combatants must be included in the notion of ‘incidental casualties’ for the purposes of applying the principles of proportionality and precautions. This stems from the interpretation of the specific rules protecting medical personnel and the wounded and sick, as well as of the rules governing the conduct of hostilities.

### Persons cannot be less protected than objects

It would make no sense that military medical *objects* would be protected by the principles of proportionality and precautions while military medical *personnel* would not. Beyond setting little store on the value of human life compared to objects, this would go against the fundamental rationale of the special protection, which is the same for both military medical personnel and objects – namely, to grant them this protection on account of their function of ensuring medical care and attention to the wounded and sick.

### The special protection is more stringent than the rules protecting the civilian population

The specific rules protecting medical personnel, transports, and units are in some aspects more stringent than the rules protecting the civilian population.<sup>27</sup> Protective

24 Rule 5 of the ICRC Customary Law Study, above note 2. Participants in a *levee en masse* are also not civilians: see Art. 4(A)(6) of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

25 For the concept of civilian in non-international armed conflict, see ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 2009, pp. 27ff.

26 I. Henderson, above note 5, p. 206; R. Bartels, above note 6, p. 304.

27 For example, the special protection afforded to medical personnel, transports, and units, whether military or civilian, will cease only after due warning has been given (Art. 21 of GC I, Art. 19 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

emblems have been established to display this special protection, precisely to ensure that these personnel, transports, and units are protected against the danger of hostilities. Besides being counterintuitive, it is thus contrary to the system of the special protection to claim that specially protected persons are less protected than those afforded general protection for being civilians.

### The obligation to ‘respect and protect’ medical personnel and the wounded and sick encompasses the obligation to avoid their incidental killing or injury

Fundamentally, the obligation to avoid or at least minimise the incidental killing or injury of medical personnel and the wounded and sick, as well as the prohibition of causing excessive incidental harm to them, stems directly from the obligation to ‘respect and protect’ them.

Contrary to the prohibition on direct attacks against medical units or combatants *hors de combat*,<sup>28</sup> the prohibition on direct attacks against *military medical personnel* is nowhere expressly stated. It is however undisputed and stems directly from the broader obligation to respect and protect medical personnel. There is no apparent reason why the obligation stemming from this broader protection would be limited to the prohibition on direct attacks and not extend to all the rules on the conduct of hostilities. In that regard, it is telling that the very same words, to ‘respect and protect’, are used in the basic rule protecting civilians against the danger of hostilities<sup>29</sup> and in the rules protecting the wounded and sick and medical personnel, civilian and military alike.<sup>30</sup> With regard to wounded and sick soldiers, the ICRC Commentary on the First Geneva Convention, which came out 20 years before the adoption of AP I, already clarified that:

The word ‘respect’ . . . means . . . ‘to spare, not to attack’ . . . whereas ‘protect’ . . . means ‘to come to someone’s defence, to lend help and support’ . . . . The introduction of these words made it unlawful for an enemy to attack, kill, illtreat or in any way harm a fallen and unarmed soldier, while it at the same time

of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (hereafter GC IV), Art. 13 of AP I, and Art. 11 of AP II), whereas no warning is required before directing an attack against a civilian (other than civilians entitled to special protection such as civilian medical personnel) who takes a direct part in hostilities.

28 See Art. 19(1) of GC I, Art. 12(1) of AP I, and Art. 11(1) of AP II for medical units, and Art. 41 of AP I for persons *hors de combat*. The rules on the protection of the medical mission neither expressly prohibit direct attacks on civilian medical personnel (see Art. 20 of GC IV and Art. 9 of AP II), though they enjoy the protection of the general prohibition of directing attacks against civilians.

29 See Art. 48 of AP I, which opens Part IV of the First Additional Protocol, in which all three principles of distinction, proportionality, and precautions are developed.

30 For the wounded and sick, see Art. 12 of GC I, Art. 10 of AP I, and Art. 7 of AP II. For medical personnel, see Art. 24 of GC I, Art. 20 of GC IV, Art. 15 of AP I, and Art. 9 of AP II; Rule 27 of the ICRC Customary Law Study, above note 2. The ICRC Commentary on Art. 48 of AP I (above note 1, para. 1872) makes the link between the words used in Arts. 10 and 48 of AP I.

imposed upon the enemy an obligation to come to his aid and give him such care as his condition required.<sup>31</sup>

This understanding was equally valid for the obligation to respect and protect military medical personnel<sup>32</sup> and was confirmed after the adoption of AP I.<sup>33</sup> Bugnion explains that ‘protection is a duty to act. It requires the belligerents to take all precautions in attack and defense so as to avoid exposing wounded and sick military personnel gratuitously to danger.’<sup>34</sup>

In the context of civilian hospitals, the ICRC Commentary on the 1949 First Geneva Convention already emphasised that the special protection was meant to extend to incidental damages:

The prohibition must therefore be regarded as wider in its significance [than the prohibition of attacks deliberately directed against hospitals]; . . . the belligerents are under a general obligation to do everything possible to spare hospitals. . . . When attacking such [military] objectives, the attacking force is bound . . . to take special precautions to spare hospitals as far as is humanly possible. . . . The general obligation to spare hospitals requires . . . that the two belligerents should take precautions to ensure that hospitals should suffer as little as possible from the attacks and from hostilities in general.<sup>35</sup>

According to Parks, ‘[t]he provisions [Article 19 GC I and 18 GC IV] are important in their recognition of the *shared* responsibility for limiting collateral damage or, put another way, for not placing the responsibility for limiting collateral damage or injury exclusively on an attacker’.<sup>36</sup> This implies that an attacker also has the

31 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 1952, pp. 134–135, on Art. 12 of GC I.

32 *Ibid.*, p. 220, on Art. 12 of GC I. The ICRC Commentary on Art. 19 of GC I again refers to it with regard to military medical units: *ibid.*, p. 196.

33 ICRC Commentary on Art. 10(1) of AP I (above note 1), para. 446: “‘Respect’ means “to spare, not to attack”, while “protect” means “to come to someone’s defence, to lend help and support”. Thus it is prohibited to attack the wounded, sick or shipwrecked, to kill them, maltreat them or injure them in any way, and there is also an obligation to come to their rescue.’ The understanding of the terms ‘respect and protect’ as explained in the Commentaries to GC I and AP I could imply a stronger protection than the prohibition of excessive incidental harm, as they state that it is prohibited to harm, kill or injure them ‘in any way’. On the face of it, this could be said to prohibit *any* incidental harm to these specially protected persons.

34 François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, ICRC, Geneva, Macmillan, Oxford, 2003, pp. 471ff.

35 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, pp. 147–148, on Art. 18. Here again, Henderson’s argument that ‘nothing in the drafting history of article 19 of GC I . . . indicates that “respected and protected” extends so far as to mean that collateral damage to military medical units must be considered when determining the proportionality of an attack on a nearby military objective’ is unconvincing, even if it would have been made for persons rather than objects (I. Henderson, above note 5, p. 196). In 1949, the proportionality rule had not yet emerged in such clarity as it did in Art. 51 of AP I, so few conclusions can be drawn about it from the drafting history of the Geneva Conventions on proportionality specifically, but the drafting history makes clear that the obligation to respect and protect must be understood broadly.

36 W. Hays Parks, ‘Air war and the law of war’, in *The Air Force Law Review*, Vol. 32, No. 1, 1990, p. 57.

responsibility to limit incidental damage to military hospitals. Though the Commentary and Parks discuss the protection of hospitals, they are relevant here because they shed light on the meaning of the obligation ‘to respect and protect’ in provisions dealing with the special protection of the delivery of medical care and attention.<sup>37</sup>

Similarly, when analysing the scope of the special protection granted to medical units under Article 12 of AP I, the two leading commentaries on the Additional Protocols not only assert that medical units must be included in the relevant incidental damages under the principles of proportionality and precautions; they also express the understanding that this protection extends to persons enjoying the special protection. The ICRC Commentary on AP I confirms that even in the face of violations by the enemy, ‘[a]lthough not explicitly mentioned, these precautions [the precautionary measures provided for in Article 57 (Precautions in attack)] should also be taken with regard to *the wounded and sick*, and consequently the medical units where they are being cared for.’<sup>38</sup> The commentary by Bothe, Partsch and Solf states that:

The first sentence of para. 4 [of Art. 12] is a corollary of Art. 51, para. 7. *Protected* objects and *persons* may not be used to “shield” military targets. . . . Article 12, para. 4 and Art. 19 of the First Convention show that, with respect to collateral damage, the rules which protect the civilian population against such damage constitute also, at least in principle, an adequate solution concerning the same problem as it arises in relation to medical units. Thus, the principle of proportionality applies in this case as well.<sup>39</sup>

Again, this sheds light on the extent of the special protection.

The special protection is granted without distinction with regard to the military or civilian status of the persons entitled to it

The fundamental purpose of the law governing the protection of medical personnel and the wounded and sick codified in the First Additional Protocol is to afford protection *without distinction* with regard to the civilian or military status of these protected persons. The ICRC Commentary on AP I emphasises this point in relation to the wounded and sick: ‘the Protocol covers all wounded, sick and shipwrecked persons, with no distinction between military and civilian persons.’<sup>40</sup> As civilian

37 Such as Art. 10 of AP I and Art. 7 of AP II for wounded and sick, and Art. 24 of GC I and Art. 9 of AP II for medical personnel.

38 ICRC Commentary on Art. 12 of AP I (above note 1), para. 540 (emphasis added).

39 M. Bothe, K. J. Partsch and W. A. Solf, above note 18, p. 118f (emphasis added). The next paragraph confirms that this refers to the principle as stated in Arts. 51(5)(b) and 57(2)(a)(iii) of AP I: ‘In applying the proportionality test to the protection of medical units against collateral damage, everything depends on the concrete situation. The yardstick of proportionality is the concrete and direct military advantage anticipated’ (p. 119).

40 ICRC Commentary on Art. 10 of AP I (above note 1), para. 444. See in particular Arts. 8, 10(1), and 12(1) of AP I, as well as Art. 15 of AP I, which extends to civilians the protection already afforded to military medical personnel by Art. 24 of GC I. The Commentary’s introduction on Part II of AP I states:

medical personnel and wounded and sick civilians are undoubtedly protected by the principles of proportionality and precautions, it would be contrary to this fundamental purpose to exclude military medical personnel or wounded and sick combatants from the protection afforded by these principles.

In view of their object and purpose, the rules governing the conduct of hostilities must take into account incidental harm to persons protected against direct attack without distinction with regard to their military or civilian status

The obligation to afford the same protection to all medical personnel and wounded and sick, whether civilian or military, stems also directly from the rules governing the conduct of hostilities when interpreted in the light of their object and purpose. The rules governing the conduct of hostilities, and in particular the principle of proportionality, aim at finding an appropriate balance between the principles of military necessity and humanity.<sup>41</sup> Civilian and military wounded and sick are entitled to the same care. Both the law and medical ethics impose upon civilian and military medical personnel the same obligation to treat civilian and military wounded and sick, friend or foe, alike. None of them are among the targets considered lawful to weaken the military forces of the enemy, and military medical personnel do not have the right to participate directly in hostilities.<sup>42</sup> They can therefore be said to have the same ‘value’ – or lack thereof – in terms of the principles of military necessity and humanity. To exclude military medical personnel, or wounded and sick combatants, from the protection afforded by the principles of proportionality and precautions would thus introduce in the rules governing the conduct of hostilities a distinction that would be arbitrary in view of their object and purpose – namely, to find an appropriate balance between military necessity and humanity.<sup>43</sup>

‘Finally, let us summarize the points which seem to reflect the essence of the contribution of Part II of Protocol I to the Geneva Conventions:

[...]

2) recognized civilian medical personnel, as well as civilian medical units, will henceforth receive the same protection as that formerly reserved for military medical personnel and units’.

- 41 See Michael N. Schmitt, ‘Military necessity and humanity in international humanitarian law: preserving the delicate balance’, in *Virginia Journal of International Law*, Vol. 50, No. 4, 2010, pp. 795–839, p. 798. On the principle of proportionality as a specific expression of these two principles, see M. Bothe, K. J. Partsch and W. A. Solf, above note 18, p. 309; M. Sassòli and L. Cameron, above note 18, p. 63; W. J. Fenrick, ‘The rule of proportionality and Protocol I in conventional warfare’, in *Military Law Review*, Vol. 98, 1982, p. 125; United Kingdom, *The Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004, paras. 2.6.2 and 5.33.2.
- 42 Art. 43(2) of AP I. Wounded or sick combatants who directly participate in hostilities are excluded from the definition of wounded and sick under Art. 8(a) of AP I, which requires that they refrain from any act of hostility.
- 43 Though referring to the prohibition of direct attack against an enemy *hors de combat* under Art. 41 of AP I, the ICRC Commentary on AP I recalls that ‘[i]t is a fundamental principle of the law of war that those who do not participate in the hostilities shall not be attacked. In this respect harmless civilians and soldiers “hors de combat” are a priori on the same footing’ (above note 1, para. 1605, emphasis added).

When discussing the protection of persons *hors de combat*, which appears in Part III of AP I on means and methods of warfare, Bothe, Partsch and Solf consider that the principle of proportionality also covers these individuals as they assert that ‘any anticipated collateral casualties of *hors de combat* persons should not be excessive in relation to the military advantage anticipated.’<sup>44</sup>

Finally – and quite to the contrary of Henderson – Bothe, Partsch and Solf use the principle of proportionality to assert the legality of attacks causing collateral damage to medical units: ‘An obvious example that medical units cannot be exempted by law from suffering collateral damage is the existence of sickbays on men of war. If it were inadmissible to subject medical units to collateral damage, no attempt to sink a warship with a sickbay aboard would be permissible.’<sup>45</sup> While this concerns medical units, it is relevant here because it sheds light on the interaction between the rules governing the conduct of hostilities and the special protection.

### Using any protected persons as human shields is a war crime

Finally, the Rome Statute provision on the war crime of using human shields supports the conclusion that all persons protected against direct attack are also protected under the principle of proportionality. Article 8(2)(b)(xxiii) of the Rome Statute lists civilians or other protected persons as those whose presence it is forbidden to use to render certain points, areas, or military forces immune from military operations. It has been recalled in that framework that ‘the presence of protected persons would in the vast majority of cases only influence the proportionality test as defined in Articles 51(5)(b) and 57(2)(a)(iii).’<sup>46</sup> Protected persons other than civilians influence the proportionality test – and thus shield – only insofar as they are included in the relevant expected incidental casualties under that rule. The unqualified inclusion of ‘other protected persons’ in Article 8(2)(b)(xxiii) of the Rome Statute thus confirms that military medical persons and wounded and sick combatants are to be included for the purpose of applying the principle of proportionality.

All these elements demonstrate that, when interpreted in their context and in light of their object and purpose, the specific rules protecting medical personnel and the wounded and sick, as well as the rules governing the conduct of hostilities, must be understood as protecting military medical personnel and wounded and sick combatants against incidental loss of life and injury for the purposes of applying the principles of proportionality and precautions.

44 M. Bothe, K. J. Partsch and W. A. Solf, above note 18, p. 221.

45 *Ibid.*, p. 119

46 Knut Doermann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2002, p. 345.

## Military manuals

Military manuals, which constitute verbal state practice,<sup>47</sup> support the inclusion of protected persons and objects other than civilians and civilian objects among the relevant incidental casualties and damage under the principles of proportionality and precautions. While unsurprisingly many military manuals simply reproduce the wording of the relevant AP I articles, a number of military manuals give definitions that include protected persons and objects other than civilians or civilian objects in the notion of ‘incidental casualties and damages’,<sup>48</sup> or expressly refer to non-combatants or to protected persons and objects when discussing the principles of proportionality,<sup>49</sup> precautions in

47 ICRC Customary Law Study, above note 2 p. xxxviii. On state practice relevance, see Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Art. 31(3)(b).

48 Australia: *Law of Armed Conflict*, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, does not limit its definition of collateral damage to civilians or civilian objects in its Glossary (though it does in para. 5.2). United States: *Joint Targeting*, Joint Publication 3-60 (3 January 2013) defines collateral damage as ‘[u]nintentional or incidental injury or damage to *persons or objects that would not be lawful military targets* in the circumstances ruling at the time’ (p. GL – 4 Terms and definitions), a definition which includes protected persons and objects other than civilians and civilian objects, and informs the entire publication when the term ‘collateral damage’ is used in an unqualified manner. *JP 3-60* also emphasises that ‘[t]he United States of America places a high value on preserving civilian and noncombatant lives and property and seeks to accomplish its mission through the discriminate application of forces with minimal collateral damage’ (p. III – 1; all emphasis added). The definition of collateral damage given in *JP 3-60* is included in the *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02 (As Amended Through 15 March 2014). Though now rescinded, the US Air Force pamphlet *Commander’s Handbook on the Law of Armed Conflict*, 1980, generally defined civilians as follows: ‘Civilians, in this pamphlet, are all persons other than those who are subject to direct attack under paragraphs 2–6 through 2–8’ (paras. 3-1); paras. 2–7 of the pamphlet excluded military medical personnel and the sick and wounded from those subject to direct attack. So for the pamphlet, through a definition more akin to Art. 52 than Art. 50 of AP I, military medical personnel and wounded and sick combatants directly fell under the definition of civilians despite the usual meaning of that term (see above for the discussion of Art. 52 of AP I).

49 Australia: *Law of Armed Conflict*, above note 48, includes non-combatants other than civilians when setting out the principle of proportionality (para. 2.8). Canada: *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, para. 204.5: ‘In deciding whether the principle of proportionality is being respected, the standard of measurement is the anticipated contribution to the military purpose of an attack or operation considered as a whole. The anticipated military advantage must be balanced against other consequences of the action, such as the adverse effect upon civilians or civilian objects. It involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon *protected persons and objects* on the other.’ New Zealand: *Interim Law of Armed Conflict Manual*, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, November 1992, para. 207: ‘The principle of proportionality establishes a link between the concepts of military necessity and humanity. This means that the commander is not allowed to cause damage to *non-combatants* which is disproportionate to military need . . . It involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon *protected persons and objects* on the other.’ Philippines: *Air Power Manual*, Philippine Air Force, Headquarters, Office of Special Studies, May 2000, paras. 1–6.4: ‘However, LOAC should not serve as an obstacle in the conduct of operations. In fact, the law recognizes the belief that the destruction of vital targets, especially if it shortens the conflict, has its long term humane effects. The chief unifying principle always applies – that the importance of the military mission (military necessity) determines, as a matter of balanced judgment (proportionality), the extent of permissible collateral or incidental injury to [an] *otherwise protected person or object*.’ United States: *No-Strike and the Collateral Damage Estimation Methodology*, CJCSI 3160.01, 13 February 2009, Glossary, GL-4: ‘*Collateral damage*. Unintentional or incidental injury or damage to *persons or objects that would not be lawful*

attack in general,<sup>50</sup> precautions in the choice of means and methods of warfare,<sup>51</sup> the obligation to issue effective advance warnings,<sup>52</sup> or precautions against the effects of attacks.<sup>53</sup>

## The preparatory work of the First Additional Protocol

During the 1974–1977 Diplomatic Conference that adopted AP I, most of the draft articles and declarations on the principles of proportionality and precautions mentioned only civilians and civilian objects. However, while Articles 46(3)(b) and 50 of the 1973 Draft Additional Protocol submitted to the Diplomatic Conference (which became Articles 51(5)(b) and 57 of AP I respectively) only referred to civilians and civilian objects, the ICRC Commentary on the 1973 Draft Additional Protocols uses the terms ‘civilians’ and ‘protected persons’ almost interchangeably with regard to these articles. The 1973 Commentary indeed explains that ‘[t]he first sentence [of draft Article 50] lays down the general rule governing the behaviour of combatants with regard to the risks which military operations, and especially attacks, involve for *protected persons and objects*.’ It later states that ‘[p]roportionality covers the accidental effects of attacks on *protected persons and objects*, as the word “incidental” indicates.’ And finally: ‘Within the scope of this Chapter [what became AP I Chapter IV on Precautionary measures containing Articles 57 and 58 of AP I], precautionary measures are meant to strengthen the protection of *all persons and objects protected*.’<sup>54</sup>

*military targets* in the circumstances ruling at the time. Such damage is not unlawful so long as it is not excessive in light of the overall military advantage anticipated from the attack’ (all emphasis added; New Zealand and Philippines Manuals as quoted in the practice related to Rules 14 and 15 of the ICRC Customary Law Study, above note 2).

- 50 Australia: *Law of Armed Conflict*, above note 48, extends the precautions in attacks to protected persons, places, and objects other than civilians and civilian objects (para. 5.53). Hungary: *A Hadijog, Jegyzet a Katonai, Főiskolák Hallgatói Részére*, Magyar Honvédség Szolnoki Repülőtisztí Főiskola, 1992, p. 45: ‘All possible measures must be taken to spare civilian persons and objects [and] *specifically protected persons and objects*’ (emphasis added; Hungary Manual as quoted in the practice related to Rule 15 of the ICRC Customary Law Study, above note 2).
- 51 United Kingdom: *The Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004, para. 5.32.5: ‘In considering the means or methods of attack to be used, a commander should have regard to the following factors: . . . f. factors affecting incidental loss or damage, such as the proximity of civilians or civilian objects in the vicinity of the target or *other protected objects or zones*’ (emphasis added).
- 52 Australia: *Operations Law for RAAF Commanders*, AAP 1003, Royal Australian Air Force, para. 10.4: ‘When circumstances permit, advance warning should be given of attacks that might endanger *non-combatants*’ (emphasis added).
- 53 United States: *Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M, July 2007, pt. 8.3.2, p. 8-3: ‘A party to an armed conflict has an affirmative duty to remove civilians under its control (*as well as the wounded, sick, shipwrecked, and prisoners of war*) from the vicinity of objects of likely enemy attack.’ While this appears in the *Commander’s Handbook* Chapter 8 on the law of targeting, it might be a reference to the precautionary obligations under the specific rules on medical units (Art. 19(2) of GC I and Art. 12(4) of AP I).
- 54 ICRC Commentary on the 1973 Draft Additional Protocols, above note 23, pp. 65–66 (all emphasis added). In respect to draft Art. 51 on what became precautions against the effects of attacks (Art. 58 of AP I), which again spoke only of the civilian population, individual civilians, and civilian objects, the ICRC 1973 Commentary states ‘[t]hat Party [attacked or liable to be attacked] can contribute to the safeguard of *protected persons and objects* in its power’, *ibid.*, p. 67 (emphasis added).

The ICRC Commentary on the 1973 Draft Additional Protocols therefore shows that the rules under discussion on proportionality and precautions were understood as covering *all* protected persons through the word ‘civilians’. This understanding also appears in the ICRC representative’s statements when introducing draft Articles 46 and 50 to the Diplomatic Conference Third Committee.<sup>55</sup> Insofar as this understanding might have to some extent informed the Diplomatic Conference debates with regard to the principles of proportionality and precautions, it could arguably be considered as the intended meaning of the term ‘civilians’ in these provisions.<sup>56</sup>

In view of this broad understanding of the scope of application of the principles of proportionality and precautions at the time of their drafting – despite the fact that the draft articles expressly mentioned only civilians and civilian objects – one should not overemphasise the importance of the fact that Articles 51 and 57 of AP I, like the draft articles, expressly mention only civilians and civilian objects in the principle of proportionality and some rules on precautions.<sup>57</sup>

## Conclusion

To consider expected incidental casualties of protected persons other than civilians as being included among the persons whose incidental loss of life or injury is relevant for the purpose of applying the principles of proportionality and precautions could be seen as broader than a literal reading of Articles 51 and 57 of AP I would suggest. It is however submitted that any other conclusion would be unreasonable in view of the context and in light of the object and purpose of the Protocol.<sup>58</sup> As shown above, this conclusion stems from the interpretation of the specific rules protecting medical personnel and objects and the wounded and sick, and of the rules governing the conduct of hostilities. In particular, it stems from the

55 Diplomatic Conference, Official Records, CDDH/III/SR.5, Vol. XIV, p. 35, para. 10, and CDDH/III/SR.21, Vol. XIV, p. 181, para. 3.

56 1969 Vienna Convention on the Law of Treaties, above note 47, Arts. 31(4) and 32.

57 Cf. above notes 12–14 and accompanying text. With regard to the obligation to verify that the objective is a lawful target, Art. 50 of the 1973 Draft Additional Protocol spoke of ensuring that the objectives to be attacked are duly identified as ‘military objectives’. No indication was found in the Official Records of the Diplomatic Conference as to why this was changed to ‘verify that the objectives to be attacked are *neither civilians nor civilian objects and are not subject to special protection*’ (Art. 57(2)(a)(i) of AP I, emphasis added), or why the other rules stemming from the principles of precautions and proportionality should have a less protective scope. Henderson draws an additional argument from the fact that Art. 56(1) (second sentence) of AP I expressly protects works and installations containing dangerous forces against collateral damage. This would show that ‘there are no grounds for presuming that the drafters of AP I intended protection from attack necessarily to always include protection from collateral damage. Rather, each class of object must be assessed separately’ (above note 5, p. 196). However, this argument fails to note that Art. 56 of AP I introduces a prohibition on *any* attack expected to release dangerous forces, not only those in which the incidental casualties and damages are expected to be excessive. The absence of such a provision for other specially protected objects only means that they are not afforded the stronger protection of Art. 56(1) of AP I, not that they should be excluded from the ‘normal’ protection against incidental damage under the principles of proportionality and precautions.

58 1969 Vienna Convention on the Law of Treaties, above note 47, Art. 31(1).

interpretation of the obligation ‘to respect and protect’ as the overarching obligation of the special protection afforded to all medical personnel and the wounded and sick. It finds some support in the preparatory work of AP I and in the leading Commentaries to AP I. Beyond AP I, it is submitted that the interpretation of customary law leads to the same conclusion.<sup>59</sup> Finally, support for this conclusion can be found in a number of states’ military manuals.

In light of the above, the protection against incidental harm granted to civilians and civilian objects by the principles of proportionality and precautions must actually be understood as extending to other persons and objects protected against direct attack.

Beyond civilians and civilian objects (which include notably military medical transports, units, and other military medical objects as long as they do not fall under the definition of military objective), all feasible precautions must be taken to avoid, or at least minimise, incidental casualties of other protected persons such as military medical personnel or wounded or sick combatants. If such incidental casualties are expected to be excessive compared to the direct and concrete military advantage – alone, or in combination with the expected civilian casualties and damage to civilian objects, if any – they render the attack unlawful by virtue of the principle of proportionality.

59 The paragraph on ‘Definitions’ in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* states that ‘collateral casualties or collateral damage means the loss of life of, or injury to civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives’: see Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, International Institute of Humanitarian Law, Cambridge University Press, Cambridge, 1995, p. 9, para. 13(c); see also ‘Explanation’, p. 87, para. 13.9. The *HPCR Air and Missile Warfare Manual*, above note 22, includes ‘other protected objects’ beside ‘civilian objects’ in its definition of collateral damage in Rule 1(l), and ‘other protected persons and objects’ in its Rules 33 and 43 which concern precautions in the choice between several military objectives and precautions against the effects of attacks respectively. Specifically with regard to persons: in its Final Report to the Prosecutor, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia mentioned ‘injury to non-combatants’ (and not ‘injury to civilians’) when speaking of incidental harm under the principle of proportionality (paras. 49 and 50); Schmitt does not distinguish between civilian and military medical personnel or those *hors de combat* on board medical aircraft when recalling that they have to be taken into consideration during proportionality calculation and when assessing feasible precautions (Michael N. Schmitt, ‘Targeting in operational law’, in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2010, pp. 244–275, para. 18.19(1); cf. also para. 16.08(1)). More generally, when discussing the application of the principle of proportionality to medical units (though underlining the ‘permissive’ aspect of an attack which would cause non-excessive incidental damages), Bothe, Partsch and Solf state that ‘[t]he principle of proportionality is a general principle of the law of armed conflict which has found its expression in such provisions as the prohibition of “unnecessary” suffering (Article 23(c) of the Hague Convention no IV of 1907). It is not restricted to the question of the protection of the civilian population for which it has now been codified by Part IV of Protocol I’ (M. Bothe, K. J. Partsch and W. A. Solf, above note 18, p. 119). For Bartels, see above note 6.