COLLATERAL DAMAGE AND THE ENEMY

By AUREL SARI* AND KIERAN TINKLER**

Abstract. The purpose of this paper is to determine whether a party to an armed conflict is bound to ensure that any incidental harm it may cause to enemy military personnel not or no longer liable to attack remains below a certain threshold. While the law of armed conflict provides that incidental harm to civilians must not be excessive in relation to the military advantage anticipated from an attack, the relevant treaty rules are silent on the position of protected enemy personnel. This could indicate that protected enemy personnel may be exposed to incidental harm without any limitations. However, this position is difficult to reconcile with the humanitarian considerations that underpin the law of armed conflict. Alternatively, this silence may hint at a gap in the treaties, though not necessarily in the customary rules governing the conduct of hostilities. If so, commanders would be left guessing what degree of collateral damage is permissible, which, in the absence of clarifying the applicable rules, may lead them to break the law inadvertently. Based on a detailed assessment of the law, state practice and the competing arguments put forward in the literature, we conclude that the principle of military necessity, more specifically the prohibition of causing unnecessary destruction, as complemented by the duty to 'respect and protect' certain classes of enemy personnel, imposes an obligation on belligerents to reduce the level of incidental harm inflicted on protected enemy personnel to what is unavoidable and to justify that harm with reference to the military benefit anticipated from an attack. We term this the 'non-civilian proportionality rule'. Based on our analysis, we believe that the non-civilian proportionality rule is a necessary part of any targeting process that attempts to reconcile humanitarian imperatives with operational requirements during times of armed conflict. The rule achieves this by safeguarding protected enemy personnel from disproportionate, and thus unnecessary, incidental harm without unduly impairing an attacking party's freedom of manoeuvre against the enemy. By developing these arguments in some depth, our aim is to provide a more compelling conceptual foundation for applying proportionality considerations to protected enemy personnel and thereby bring clarity to those planning, authorising, executing and advising on targeting in current and future operations.

Keywords: law of armed conflict, proportionality, protected enemy personnel, *hors de combat*, targeting, collateral damage.

'Clarity in law is a virtue. In the context of war, that virtue becomes a life-and-death necessity.'[1]

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1. *Al Bihani v Obama*, 619 F3d 1 (DC Cir 2010).

I. INTRODUCTION

This paper was borne out of a real-world targeting query: is a party engaged in an armed conflict bound to include persons rendered *hors de combat*[2] in its proportionality analysis prior to carrying out an attack on a military objective? Picture, by way of example, an air strike on a group of enemy combatants which, with the exception of one fighter, leaves them either dead or incapacitated by their wounds and therefore incapable of defending themselves. The remaining combatant now mounts a heavy machine gun and maintains effective fire on friendly ground forces. Rather than advance on foot and risk casualties, the most prudent way to neutralise the fighter would be to strike him from the air. However, the rule of proportionality—codified in articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I (AP I) of 1977—proscribes any attack 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.[3] If the protective scope of this rule is strictly confined to civilians, as the wording of articles 51 and 57 appears to suggest, it would not extend to any of the surviving incapacitated enemy combatants who feature in our scenario. A second strike could therefore be launched without having to include them in the commander's proportionality calculation. By contrast, if the proportionality rule does extend to *hors de*

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2. Persons who are, or should be recognised as, *hors de combat* enjoy immunity from direct attack under the law of armed conflict. See J–M Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules* (CUP 2005), Rule 47, 164–70. Pursuant to 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 (Additional Protocol I), art 41, a person is *hors de combat* if he (a) is in the power of an adverse Party; (b) clearly expresses an intention to surrender; or (c) has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself—provided that in any of these cases he abstains from any hostile act and does not attempt to escape. For a more detailed discussion, see section IV.B.6.
3. The literature on proportionality is extensive. Amongst other works, see BL Brown, 'The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification Note' (1976) 10 Cornell Int'l LJ 134; WJ Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 Mil L Rev 91; J Gardam, *Necessity, Proportionality, and the Use of Force by States* (CUP 2004) 85–137; HE Shamash, 'How Much Is Too Much: An Examination of the Principle of Jus in Bello Proportionality' (2005) 2 Israel Defense Forces L Rev 103; K Watkin, 'Assessing Proportionality: Moral Complexity and Legal Rules' (2007) 8 YB Int'l Hum L 3; APV Rogers, 'The Principle of Proportionality', in MH Hensel (ed), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (Aldershot 2008) 189; F Hampson, 'The Principle of Proportionality in the Law of Armed Conflict', in S Perrigo and J Whitman (eds), *The Geneva Conventions under Assault* (Pluto 2010) 42; I Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under additional Protocol I* (Martinus Nijhoff 2009) 197–231; RC Else, 'Proportionality in the Law of Armed Conflict: The Proper Unit of Analysis for Military Operations' (2010) 5 U St Thomas J L & Pub Pol 195; WH Boothby, *The Law of Targeting* (OUP 2012) 94–97; A Fellmeth, 'The Proportionality Principle in Operation: Methodological Limitations of Empirical Research and the Need for Transparency' (2012) 45 Israel L Rev 125; JD Wright, '"Excessive" Ambiguity: Analysing and Refining the Proportionality Standard' (2013) 94 Int'l Rev Red Cross 819; B Clarke, 'Proportionality in Armed Conflicts: A Principle in Need of Clarification' (2012) 3 J Int'l Hum L Stud 73; E Cannizzaro, 'Proportionality in the Law of Armed Conflict', in A Clapham and P Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 332; MA Newton and L May, *Proportionality in International Law* (OUP 2014); ED Gil, 'Trapped: Three Dilemmas in the Law of Proportionality and Asymmetric Warfare' (2015) 18 YB Int'l Hum L 153; RD Sloane, 'Puzzles of Proportion and the Reasonable Military Commander: Reflections on the Law, Ethics, and Geopolitics of Proportionality' (2015) 6 Harvard Nat Sec J 299; Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, CUP 2016) 149–64; For the application of the principle in specific operations, see WJ Fenrick, 'Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia' (2001) 12 EJIL 489, 492–502; RJ Barber, 'The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan' (2010) 15 J Conflict & Security L 467; M Wells-Greco, 'Operation "Cast Lead": *Jus in Bello* Proportionality' (2010) 57 Neth Int'l L Rev 397.

combat combatants, either through the operation of articles 51 and 57 or as a consequence of some other principle of the law of armed conflict, then the attacking force would have to ensure that any injury a second air strike is expected to inflict upon the incapacitated combatants is not excessive in relation to the concrete and direct military advantage anticipated from the attack.

The answer to this question is of some importance. The law of armed conflict is based on the principle of distinction, which demands that belligerents distinguish between members of the civilian population and combatants, and that they direct their operations only against the latter.[4] While civilians may not be made the object of direct attack,[5] the law accepts that incidental harm to civilians is an inevitable aspect of war.[6] However, belligerents must adopt all feasible precautions to avoid, or in any event minimise, such incidental harm and may never intentionally assume a degree of civilian injury that would be excessive when measured against the concrete and direct military advantage anticipated.[7] The principles of distinction, precautions and proportionality thus complement each other in a way that achieves a subtle balance between military necessity and humanitarian imperatives.[8] Extending the scope of the proportionality rule beyond civilians to cover enemy personnel enjoying special protection from attack could significantly expand the obligations that the rule imposes on belligerents.[9] This would come at a time when the rule's normative foundations are increasingly called into question[10] and, at times, are overshadowed by

4. Additional Protocol I, art 48; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 1, 3–8.
5. Unless and for such time as they are directly participating in hostilities: Additional Protocol I, art 51(3) and 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 (Additional Protocol II), art 13(3).
6. Eg Sentencia T-165/06, Judgment, 7 March 2006 (Colombia, Constitutional Court, First Appeals Chamber), sec 4 (an armed conflict necessarily produces unwanted effects on the civilian population and civilian objects); *United States v Ohlendorf and others* (Einsatzgruppen Case), 8 and 9 April 1948 (United States Military Tribunal at Nuremberg) 4 Trials of War Crimes Before the Nuremburg Military Tribunals 1, 467 ('it inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action'). See also United Kingdom Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2004), JSP 383, para 5.33.1.
7. Additional Protocol I, art 57; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rules 15–21, 51–67. Cf M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, Basic Books 2006) 151–59.
8. MN Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Va J Int'l L 795, 810. See also MN Schmitt, 'The Principle of Discrimination in 21 Century Warfare' (1999) 2 Yale Hum Rts & Dev LJ 143, 148 (describing distinction, proportionality and precautions as the three components of discrimination in attack).
9. Along these lines, see RS Adams, 'Lancelot in the Sky: Protecting Wounded Combatants from Incidental Harm', *Harvard National Security Journal* (8 August 2017) <http://harvardnsj.org/2017/08/lancelot-in-the-sky-protecting-wounded-combatants-from-incidental-harm/>.
10. Eg EJ Criddle, 'Proportionality in Counterinsurgency: A Relational Theory' (2011) 87 Notre Dame L Rev 1073 (advancing a 'relational' theory that imposes human rights proportionality standards in internal armed conflicts); L May, 'Targeted Killings and Proportionality in Law: Two Models' (2013) 11 J Int'l Crim Just 47, 58 ('[p]roportionality is increasingly being interpreted in human rights terms, even during war and armed conflict. In this sense, proportionality can be understood as putting restrictions on when combatants can be killed, especially if they could be captured instead'); J Andresen, 'Challenging the Perplexity over Jus in Bello Proportionality' (2014) 7 Eur J Legal Stud 18 (arguing that military advantage should be measured in the number of lives saved); G Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015) (proposing that further restrictions may be read into the proportionality rule with reference to human rights law); CP Trumbull IV, 'Re-Thinking the Principle of Proportionality Outside of Hot Battlefields' (2015) 55 Va J Int'l L 521 (arguing that a higher threshold of proportionality should apply to civilians located outside of zones of combat); A Haque, *Law and Morality at War* (OUP 2017) (arguing that an attack causing civilian harm is objectively proportionate only if it prevents opposing forces from inflicting substantially greater harm on attacking forces or civilians in current or future military operations). See also RM Giladi, 'Reflections on Proportionality, Military Necessity and

operational considerations demanding greater restraint in the use of force.[11] The simultaneous expansion of the range of persons protected by proportionality and the reduction of the acceptable level of incidental harm could, if it were to become part of the accepted law, substantially alter the balance between military necessity and humanitarian considerations.[12] Caution is therefore required lest we undermine proportionality as a critical component of the regulatory framework for the conduct of hostilities.[13]

Nevertheless, the exclusion of enemy personnel enjoying special protection from the scope of the proportionality calculation does not sit well with their protected status under the law of armed conflict. This tension is clear to see in the United States Department of Defense *Law of War Manual*.[14] The *Manual* accepts that combatants must take feasible precautions to reduce the risk of harm to civilians and 'other protected persons', which presumably includes enemy personnel protected from attack.[15] However, the *Manual* also declares that wounded, sick or shipwrecked enemy combatants on the battlefield, as well as military medical and religious personnel present among or in the proximity to combatant elements, generally do not need to be considered during the proportionality assessment.[16] The reason given by the *Manual* is that such personnel 'are deemed to have accepted the risk of death or further injury due to proximity to military operations'.[17] This suggests that protected enemy personnel may be exposed to any degree of incidental harm irrespective of the military advantage anticipated, as long as the attacking force takes feasible precautions to reduce the injury they may suffer. This is a puzzling position to take. Granted, a duty to minimise the exposure of protected enemy personnel to collateral damage would be valuable even in the absence of a corresponding rule that sets an upper limit to the degree of damage that may be inflicted upon them, as the proportionality rule does in relation to civilians.[18] Yet it still seems strange to suggest that the law of armed conflict requires belligerents to protect certain enemy personnel from incidental harm without also imposing on them a duty to give any thought to the extent of incidental harm they may cause.[19] The

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the Clausewitzian War' (2012) 45 Israel L Rev 323 (questioning whether the legitimacy of incidental harm can be taken for granted without reference to the political legitimacy of the war).

11. Eg General McChrystal, Headquarters International Security Assistance Force, *Tactical Directive* (9 July 2009) <http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf> (calling for the 'carefully controlled and disciplined employment of force' in light of the 'overriding operational imperative' of maintaining popular support in the context of counter-insurgency operations). On this policy, see JH Felter and JN Shapiro, 'Limiting Civilian Casualties as Part of a Winning Strategy: The Case of Courageous Restraint' (2017) 146 Daedalus 44. For a critical assessment of such 'super-proportionality', see P Margulies, 'Valor's Vices: Against a State Duty to Risk Forces in Armed Conflict', in WC Banks (ed), *Counterinsurgency Law: New Directions in Asymmetric Warfare* (OUP 2013) 87. But see also TW Smith, 'Protecting Civilians…or Soldiers? Humanitarian Law and the Economy of Risk in Iraq' (2008) 9 Int'l Stud Perspectives 144; V Epps, 'Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule' (2013) 41 Ga J Int'l & Comp L 307.
12. See J Rabkin, 'Proportionality in Perspective: Historical Light on the Law of Armed Conflict' (2014) 16 San Diego Int'l LJ 263 (cautioning that a 'restrictive view of proportionality lends itself to political propaganda' at the hands of ruthless defenders).
13. Hence there is more than just 'doctrinal purism' at issue here: *contra* Dinstein, *Conduct of Hostilities*, 155, para 416.
14. United States Department of Defense, *Law of War Manual* (updated edn, December 2016).
15. Ibid, §§ 5.2.3 and 5.11.
16. Ibid, § 5.10.1.
17. Ibid, §§ 7.3.3.1, 7.8.2.1, 7.10.1.1, 17.14.1.2, 17.15.1.2 and 17.15.2.2. However, the *Law of War Manual* declares that those planning or conducting attacks may, *as a matter of practice or policy*, consider such protected enemy personnel in applying the prohibition of attacks expected to cause excessive incidental harm.
18. Newton and May, *Proportionality*, 179 ('jus in bello proportionality delineates the outer boundaries of the commander's appropriate discretion'). On the function of the proportionality rule, see in greater detail section II.A below.
19. This is all the more so, given that the *Manual* elsewhere takes the position that 'the requirement to take

Law of War Manual thus raises two questions. If the right to cause incidental harm to protected enemy personnel is constrained by a duty to minimise the damage, does this not entail a proportionality requirement by implication? Conversely, if protected enemy personnel are not subject to proportionality considerations at all, does this not call into doubt whether they may be exposed to incidental harm in the first place? After all, one of the functions of the classic proportionality rule is to recognise that incidental harm to civilians is permissible.[20]

Commanders and their subordinates need to know where they stand in relation to the law.[21] Intentionally launching a disproportionate attack in the knowledge that it will cause excessive civilian harm constitutes a grave breach of Additional Protocol I.[22] Such an attack in the context of an international armed conflict also amounts to a war crime under the Rome Statute of the International Criminal Court if the incidental harm to civilians is *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated.[23] In both cases, criminal liability attaches only to attacks that cause excessive harm to civilians.[24] An attack that would cause injury or death to protected enemy personnel in excess of the military advantage anticipated does not, therefore, constitute a grave breach or a war crime under these provisions.[25] However, it is a war crime to kill or wound an individual who is *hors de combat*.[26] The Elements of Crimes adopted under the Rome Statute do not distinguish between harm done directly or incidentally, but merely require that the perpetrator should have injured or caused the death of one or more *hors de combat* or other protected enemy personnel whilst being aware of the factual circumstances that established their protected status.[27] This broad formula reflects the wording of common article 3 to the Geneva Conventions of 1949, which prohibits violence to the life and person of those who are *hors de combat* 'at any time and in any place whatsoever'.[28] No exception is made for incidental

feasible precautions in planning and conducting attacks and the prohibition on attacks expected to cause excessive incidental harm are fundamentally connected and mutually reinforcing obligations': DoD, *Law of War Manual* (December 2016), § 5.10.5.

20. See Fenrick, 'The Rule of Proportionality', 126 ('[f]rom a military standpoint, the rule of proportionality is useful as an acknowledgment of the unfortunate inevitability of incidental causalities of war').
21. See WB Huffman, 'Margin of Error: Potential Pitfalls of the Ruling in the Prosecutor v. Ante Gotovina' (2012) 211 Mil L Rev 1; M Maxwell and RV Meyer, 'The Innocent Combatant: Preserving Their *Jus in Bello* Protections' (2017) 5 Penn St J L & Int'l Aff 111, 137–47.
22. Additional Protocol I, art 85(3)(b).
23. Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 90, art 8(2)(b)(iv). On the difference between the Additional Protocol I and the Rome Statute standards, see J Kilcup, 'Proportionality in Customary International Law: An Argument Against Aspirational Laws of War' (2016) 17 Chi J Int'l L 244.
24. This is demonstrated by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia. See *Prosecutor v Galić* (Trial Chamber, Judgment) IT-98-29-T (5 December 2003), paras 58–59; *Prosecutor v Galić* (Appeals Chamber, Judgment) No IT-98-29-T (30 November 2006), para 190; *Prosecutor v Martić* (Trial Chamber, Judgment) IT-95-11-T (12 June 2007), para 69; *Prosecutor v Martić* (Appeals Chamber, Judgment) IT-98-29/1-A (12 November 2009), para 264. See also W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 263–66.
25. R Bartels, 'Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials' (2013) 46 Israel L Rev 271, 304.
26. Rome Statute, arts 8(2)(b)(vi) and 8(2)(c)(i). Although the law of armed conflict distinguishes between 'murder' in the context of non-international armed conflict and 'wilful killing' in the context of international armed conflict, the material elements of the two crimes are understood to be identical. See *Prosecutor v Delalić and others* (Trial Chamber, Judgment) IT-96-21-T (16 November 1998), para 422.
27. Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002, Official Records, ICC-ASP/1/3 and Corr.1, Elements of Crimes, 108, 132 and 144–45. See also K Dörmann, L Doswald-Beck and R Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP 2003) 38–43 and 394–95.
28. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31 (Geneva Convention I), art 3(1); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August

harm, at least not in express terms. Consequently, it is not clear whether causing incidental harm to *hors de combat* and other protected enemy personnel constitutes a war crime in all cases, is a war crime only if the harm expected exceeds a certain threshold or is not a war crime at all, irrespective of the degree of injury caused. Those responsible for planning and executing operations need clarity on this point.

The purpose of our paper is to determine whether or not an attacking force is bound to ensure that any incidental harm it inflicts upon *hors de combat* and other protected enemy personnel does not exceed a certain threshold, either pursuant to articles 51 and 57 of Additional Protocol I or another rule of the law of armed conflict.[29] In resolving this question, our aim is to provide greater clarity on a very practical matter that so far has not received the level of scrutiny it deserves. Indeed, in our experience, opinion among both scholars and practitioners is deeply divided. Some have argued that the law does not shield certain categories of protected personnel from collateral damage at all.[30] However, many would agree that it feels intuitively wrong and contrary to the humanitarian rationale of the law of armed conflict to accept that belligerents may expose protected personnel to incidental harm without limitation. Yet intuition and humanitarian sentiments only go so far. They do not explain the basis or the scope of the limits, if any, that the law imposes on belligerents. A compelling account of the position of the law on the subject of non-civilian incidental harm therefore requires a more sustained legal analysis that takes into consideration humanitarian motivations, operational concerns and the need to provide clear guidance to 'warfighters'. Our paper aims to offer such an analysis. We proceed in five steps.

Section II traces the two meanings of proportionality in the law of armed conflict. It shows that proportionality in a narrow sense emerged as a corollary to the concept of 'military objective' and that proportionality in a broader sense is best seen as an aspect of military necessity, rather than as a self-standing principle. Section III examines the scope of the proportionality rule *stricto sensu*. It demonstrates that the rule as codified in Additional Protocol I is limited to civilian harm, that the notion of 'civilian' excludes protected enemy personnel and that the customary proportionality rule is identical in scope to the conventional one. Since it would be illogical to apply proportionality considerations to persons who are liable to direct attack, in section IV we review the different categories of enemy personnel that enjoy protection from direct attack and thus may, in principle, be subject to proportionality considerations. In particular, we clarify under what circumstances enemy personnel qualify for protection as *hors de combat* or as wounded and sick. As the scenario we sketched in the opening paragraphs shows, clarity on this question is essential. In section V, we turn to the principal arguments advanced in support of extending the scope of the traditional proportionality rule to protected enemy personnel and explain why none of them provide a convincing justification for a re-interpretation of articles 51 and 57 of

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1949) 75 UNTS 85 (Geneva Convention II), art 3(1); Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135 (Geneva Convention III), art 3(1); Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287 (Geneva Convention IV), art 3(1).

29. For earlier contributions on this subject, see L Gisel, 'Can the Incidental Killing of Military Doctors Never be Excessive?' (2013) 95 Int'l Rev Red Cross 215; G Corn and A Culliver, 'Wounded Combatants, Military Medical Personnel, and the Dilemma of Collateral Risk' (2017) 45 Ga J Int'l & Comp L 445. See also J Merriam, 'Must Military Medical and Religious Personnel Be Accounted for in a Proportionality Analysis?', *Just Security* (8 July 2016) <https://www.justsecurity.org/31905/military-medical-religious-personnel-accounted-proportionality-analysis/>; M Lederman, 'A Quick Response to John Merriam on Proportionality and Military Medical Personnel', *Just Security* (9 July 2016) <https://www.justsecurity.org/31909/quick-response-john-merriam-proportionality-military-medical-personnel/>; J Kleffner, 'Wounded and Sick and the Proportionality Assessment', *Intercross* (12 October 2017) <http://intercrossblog.icrc.org/blog/transatlantic-workshop-on-international-law-and-armed-conflict-wounded-and-sick-and-the-proportionality-assessment>.

30. Eg Adams, 'Lancelot in the Sky'.

Additional Protocol I. Proceeding on the basis that protected personnel are liable to incidental harm under the law of armed conflict, we develop an alternative argument that focuses on the legal limitations to the amount of incidental harm that belligerents may lawfully inflict. We derive such a limit from the principle of military necessity, more specifically from the prohibition of unnecessary destruction, as complemented by the duty to respect and protect certain categories of enemy personnel. We suggest that the combined effect of these principles and obligations gives rise to a duty not to expose protected enemy personnel to a level of incidental harm that may be expected to be disproportionate in relation to the military benefit anticipated from an attack carried out against a lawful military objective. This 'non-civilian' proportionality rule is distinct from the traditional, civilian proportionality rule. In section VI, we therefore discuss the relationship between the two rules and how those who are planning, deciding upon and executing attacks should apply them on the battlefield. We suggest that the non-civilian proportionality rule is best expressed in the same language as the traditional test, but that non-civilian harm may be calculated differently from civilian collateral damage. Finally, we illustrate the practical operation of the 'non-civilian' proportionality rule with the help of two hypothetical scenarios. Overall, our argument is meant to provide a more compelling legal justification for the application of proportionality considerations to protected enemy personnel and a more robust guide to their implementation on the battlefield than alternative approaches.

II. PROPORTIONALITY IN THE LAW OF ARMED CONFLICT

Proportionality is widely recognised as a 'precept of justice'[31] that is firmly entrenched in both domestic and international law. The constitutional courts of many nations, including those of Canada, Israel and most European countries, have turned proportionality into a cornerstone of their jurisprudence on fundamental rights and freedoms.[32] The courts of other countries have also drawn upon the concept, for example in the field of administrative law.[33] Whilst proportionality has not evolved into a constitutional principle in the United States, its influence can be discerned in several areas of law.[34] Proportionality is a prominent feature of international law too. It can be found in such diverse areas as the dispute

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31. *Weems v United States*, 217 US 349 (1910). See *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 (Lord Reed, dissenting: '[t]he idea that proportionality is an aspect of justice can be traced back via Aquinas to the *Nicomachean Ethics* and beyond'). See also E Engle, 'The History of the General Principle of Proportionality: An Overview' (2012) 10 Dartmouth L J 1.
32. Eg *Doré v Barreau du Québec* [2012] SCC 12 (Supreme Court of Canada) (whether or not an interference with Canada's Charter of Rights and Values is reasonable centres on proportionality). The principle plays a particularly prominent role in German jurisprudence. See G Lübbe-Wolff, 'The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court' (2014) 34 Hum R L J 12. On the role of proportionality in balancing constitutional rights, see R Alexy, *A Theory of Constitutional Rights* (OUP 2002); A Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012); M Klatt and M Meister, *The Constitutional Structure of Proportionality* (OUP 2012).
33. Eg *Union of India v Ganayutham* [1997] 7 SCC 463 (Supreme Court of India); *Om Kumar and Other v Union of India* [2001] 2 SCC 386 (Supreme Court of India). See P Jalan and R Rai, 'Review of Administrative Action', in S Choudhry and others (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 432, 439–40. See also H Cheng-Yi and SL David, 'Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China', in F Bignami and D Zaring (eds), *Comparative Law and Regulation: Understanding the Global Regulatory Process* (Elgar 2016) 305, 323–24.
34. Eg *City of Boerne v Flores*, 521 US 507 (1997) (in enacting legislation under § 5 of the Fourteenth Amendment, Congress must ensure that the means adopted are proportional to the ends pursued); *Graham v Florida*, 560 US 48 (2010) ('the concept of proportionality is central to the Eighth Amendment'). Generally, see ET Sullivan and RS Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (OUP 2009); J Mathews and AS Sweet, 'All Things in Proportion: American Rights Review and the Problem of Balancing' (2010) 60 Emory LJ 797; VC Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale LJ 3094.

settlement rules of the World Trade Organization,[35] the law of state responsibility,[36] the sentencing practice of international criminal tribunals,[37] the jurisprudence of the European Court of Human Rights[38] and the law of the European Union.[39]

Expressed in general terms, the principle of proportionality demands that there must be a reasonable relationship between the means employed and the aims pursued by an actor. According to the Arbitral Tribunal appointed in the *Naulilaa* case, an act that exceeds its own justification is not proportionate and therefore must be regarded as illicit.[40] Proportionality also incorporates the notion that any harm an otherwise legitimate act inflicts must not outstrip the objectives pursued by the actor. By requiring a correlation between means and ends, and between harm and benefit, proportionality thus provides a normative framework that enables parties to weigh the legitimate interests of an actor against the competing interests of third parties affected by its actions.

Proportionality is an established aspect of the regulatory framework of warfare too. Under the rules of the *jus ad bellum*, recourse to the use of force in the exercise of the right of individual or collective self-defence must be proportionate to the armed attack a state seeks to avert.[41] Proportionality in this sense is concerned with maintaining a reasonable relationship between the nature and degree of force employed by a state and the defensive purpose of that force. Professor Ian Brownlie once called this the 'essence of self-defence'.[42] By contrast, proportionality under the law of armed conflict is understood in at least two different senses. Used in a narrow or strict sense, proportionality refers to the rule set out in articles 51 and 57 of Additional Protocol I. Used in a broad sense, proportionality refers to a general principle of the law of armed conflict. We will explore these two meanings of the term in detail below, as it is important for our purposes to distinguish between them.

35. Eg *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, para 159. See M Hilf, 'Power, Rules and Principles: Which Orientation for WTO/GATT Law?' (2001) 4 J Int'l Econ L 111, 120–21; AD Mitchell, 'Proportionality and Remedies in WTO Disputes' (2006) 17 EJIL 985.
36. International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) 2(2) YB ILC 20, art 51. See *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, para 85. See also E Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 EJIL 889.
37. *Prosecutor v Blaškić* (Trial Chamber, Judgment) IT-95-14 (3 March 2000), para 796.
38. Eg *Handyside v UK* (1976) Series A No 24, paras 48–50. See J McBride, 'Proportionality and the European Convention on Human Rights', in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 23; A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012) 177–99.
39. Consolidated Version of the Treaty on the European Union (7 February 1992) [2012] OJ C326/13, art 5(4). See Case C-331/88, *R v Ministry of Agriculture, Fisheries and Food, ex p Fedesa and others* [1990] ECR I-4023, para 13 ('[t]he Court has consistently held that the principle of proportionality is one of the general principles of Community law'). See also T Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 136–241.
40. *Naulilaa Case (Portugal v Germany)* (1928) 2 RIAA 1012, 1028.
41. This requirement forms part of customary international law. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, paras 176 and 194; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 41; *Case Concerning Oil Platforms (Iran v USA)* [2003] ICJ Rep 161, paras 43 and 73–77. See also Gardam, *Necessity*, 155–86; JA Green, *The International Court of Justice and Self-Defence in International Law* (Hart 2009) 86–96; O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 488–93; D Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (2013) 24 EJIL 235; S Etezazian, 'The Nature of the Self-Defence Proportionality Requirement' (2016) 3 J Use of Force & Int'l L 260.
42. I Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 279, n 2.

A. Proportionality stricto sensu

References to proportionality in the context of the law of armed conflict are typically concerned with the duty of an attacking force to ensure that the incidental harm civilians and civilian objects are expected to suffer is not excessive in relation to the military advantage anticipated. At the international level, this duty was set out in express terms for the first time in article 24 of the Hague Rules on Aerial Warfare of 1923,[43] albeit not in a formal legal instrument and thus without binding effect.[44] The purpose of article 24 was to adapt the existing rules of land and naval warfare for the circumstances of aerial attack. Article 25 of the Hague Regulations of 1907 barred belligerents from bombarding undefended towns, villages, dwellings and buildings 'by whatever means',[45] a phrase specifically chosen to include bombardment from the air.[46] However, the land-centric distinction between defended and undefended localities drawn in article 25 was difficult to reconcile with the practicalities of air warfare.[47] Since the mere presence of ground forces and fortifications does not enable a town or village to defend itself from aerial attack, a reasonable case could be made that localities lacking effective air defences were 'undefended' within the meaning of article 25 of the Hague Regulations and hence immune from aerial bombardment. Yet to deny belligerents the right to carry out air raids behind enemy lines against ground forces and other military targets present in such 'undefended' localities would have greatly reduced the strategic value of air power and was therefore an unrealistic proposition.

The Hague Rules on Aerial Warfare attempted to resolve this dilemma in two steps.[48] First, they abandoned the traditional distinction between defended and undefended localities and instead adopted the 'the nature of the objective or the use to which it is being put' as the appropriate test for establishing the legality of aerial bombardment.[49] Accordingly, the Hague Rules prohibited direct attacks on non-combatants and on private property not of a military character,[50] but permitted the bombardment of military objectives and of civilian buildings used for military purposes.[51] Second, article 24 of the Hague Rules distinguished between combat zones and rear zones for the purposes of civilian protection.

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43. But see Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War (18 October 1907) UKTS 13/1910, art 2 (naval commanders subjecting certain military objectives located in undefended localities to naval bombardment 'shall take all due measures in order that the town may suffer as little as possible').
44. Rules of Aerial Warfare, 'General Report of the Commission of Jurists at The Hague' (1923) 17 AJIL Sup 242, 245. On the Hague Rules generally, see WL Rodgers, 'Laws of War Concerning Aviation and Radio' (1923) 17 AJIL 629; JW Garner, 'Proposed Rules for the Regulation of Aerial Warfare' (1924) 18 AJIL 56; WH Parks, 'Air Law and the Law of War' (1990) 32 Air Force L Rev 1, 24–35; HM Hanke, 'The 1923 Hague Rules of Air Warfare: A Contribution to the Development of International Law Protecting Civilians from Air Attack' (2010) 33 Int'l Rev Red Cross 12.
45. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907) UKTS 9/1910 (Hague Regulations 1907).
46. Second Commission, Second Meeting, 14 August 1907, in JB (ed), *The Proceedings of the Hague Peace Conferences: Translation of the Original Texts*, vol III (OUP 1921) 14–15.
47. See JW Garner, *International Law and the World War*, vol 1 (Longmans, Green and Co 1920) §§ 297–99; J Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law* (Stevens & Sons 1954) 620–27; RY Jennings, 'Open Towns' (1945) 22 BYIL 258, 259–62.
48. Cf Stone, *Legal Controls*, 624.
49. Despatch from the first British Delegate to the International Commission for the Revision of the Rules of Warfare, together with the General Report of the Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, Cmd 2201, 27 (1924), partly reprinted in 32 Am J Int'l L Sup 1 (1938).
50. Rules of Aerial Warfare, art 22.
51. Rules of Aerial Warfare, arts 24–25.

The aerial bombardment of military objectives located in the immediate neighbourhood of ground operations was permitted, provided that the military concentration was 'important enough' to justify the danger to the civilian population. However, the bombardment of military objectives not in the vicinity of ground operations was not permitted if it entailed a risk of incidental harm to civilians.

While the Hague Rules attracted their fair share of criticism,[52] it is not accurate to suggest, as William Hays Parks has done, that they were the subject of 'virtually unanimous' condemnation.[53] On the contrary, the Hague Rules crystallised agreement on three points of fundamental importance. First, direct attacks on civilians are prohibited.[54] Second, 'military objectives' are the proper target of aerial attack,[55] rather than the broader notion of 'defended' localities.[56] Third, incidental harm to the civilian population is permissible, provided that the military benefits outweigh the harm.[57] In fact, the majority of commentators writing at the time accepted that these new targeting rules represented a viable compromise between military necessity and humanitarian sentiments.[58]

The Hague Rules of 1923 had a direct impact on articles 51 and 57 of Additional Protocol I, as is plain to see from their negotiating history.[59] By abandoning the distinction

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52. The list of military objectives set out in art 24(2) was often singled out as too restrictive. Eg PW Williams, 'Legitimate Targets in Aerial Bombardment' (1929) 23 AJIL 570, 576–79. Cf FE Quindry, 'Aerial Bombardment of Civilian and Military Objectives' (1931) 2 J Air L 474, 478 ('[t]here is no dispute that *military objectives* are the legitimate subjects of aerial attack. The differences in opinion arise from the attempts to define 'military objectives').
53. Parks, 'Air Law', 33.
54. Conference for the Reduction and Limitation of Armaments, Resolution adopted by the General Commission on July 23rd, 1932, 1 Conference Documents, Series of League of Nations Publications IX, Disarmament 1932.IX.63, 268, 269 ('[a]ir attack against the civilian population shall be absolutely prohibited'); League of Nations Assembly, Protection of Civilian Populations Against Bombing From the Air in the Case of War, Resolution, 30 September 1938, (1938) 186 League of Nations Official Journal, Spec Sup 48 (declaring the bombing of civilian populations to be contrary to international law); League of Nations Council, Reports of the Commission for the Investigation of Air Bombardments in Spain, Resolution, 20 January 1939, (1939) 20 League of Nations Official Journal 97 (deeming certain air attacks to have been intentionally or negligently directed against civilian populations, recalling the principles approved by the Assembly in its Resolution of 30 September 1938 and condemning recourse to methods which are contrary to the principles of international law).
55. Publicity Bureau, Navy Department, 'Aerial Bombardment and International Law' (September 1938) No 15 Tokyo Gazette 1, 5 (describing the abandonment of the undefended/defended distinction in favour of the concept of military objective 'not merely rational as a general step but also admittedly valid as applied particularly to aerial warfare'); 'Lord Chancellor On 'Open Towns', Times (London, England), 30 August 1943, 2 (Lord Simons, Lord Chancellor: '[t]he question whether a town can be legitimately bombarded from the air depends not on whether it calls itself open or undefended, but on whether it contains military objectives').
56. However, the old terminology remained in currency for some time. Eg League of Nations Assembly, Adoption of a Resolution dated September 27th, 1937, of the Far-East Advisory Committee set up under a Resolution of the Assembly dated February 24th, 1933, (1937) 177 League of Nations Official Journal, Spec Sup 27 ('aerial bombardment of open towns').
57. Garner, 'Proposed Rules', 72 ('…whatever injuries the civil population may be subjected to, they should be merely incidental or accessory and the military damage must be compensatory, that is, sufficiently great to justify the sufferings caused those who are not legitimate objects of attack').
58. See JM Spaight, 'Air Bombardment' (1923) 4 BYIL 21, 29–31; Garner, 'Proposed Rules', 80–81; JM Spaight, *Air Power and War Rights* (Longmans & Co 1924) 206–11, 214–15, 244 and 258; E Colby, 'Aerial Law and War Targets' (1925) 19 AJIL 702, 714; E Colby, 'Laws of Aerial Warfare' (1925) 10 Minn L Rev 309, 315 and 323–24; HA Gosnell, 'The Hague Rules of Aerial Warfare' (1928) 62 Am L Rev 409, 419–20; Williams, 'Legitimate Targets', 580–81. But see Quindry, 'Aerial Bombardment', who adopts an exceedingly broad definition of military objective and calls into question the principle of distinction (at 495) but insists that aerial bombardment should be conducted with 'due regard to the lives and property of civilians' (at 507).
59. Summary Record of the 2nd Meeting, Committee III, 12 March 1974, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian*

between defended and undefended localities in favour of permitting attacks against military objectives wherever located, the Hague Rules rendered civilians immune from direct attack, but at the same time exposed them to the risk of incidental harm in combat zones.[60] Article 24(4) of the Hague Rules was designed to mitigate this risk by imposing a duty on belligerents to justify civilian harm with reference to the importance of the military objectives to be attacked. The targeting rules of Additional Protocol I follow the same logic. The purpose of articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I is to complement the principle of distinction—which directs belligerents to spare the civilian population and to direct their attacks only against military objectives—in two ways. First, by recognising that incidental harm to civilians and civilian objects is an inevitable consequence of the conduct of attacks against military objectives and therefore not unlawful as such. Second, by imposing an upper limit on the level of incidental harm that may be inflicted upon civilians as a consequence of lawful attacks. It is important to realise that, contrary to popular accounts and parlance,[61] the *application* of these rules does not entail a balancing of military and humanitarian considerations.[62] Their purpose is to determine, with binding effect, what amounts to a proportionate relationship between the legitimate aims of warfare and its adverse effects on third parties. That relationship is permanently fixed by the law: the military advantage anticipated from an attack may never excessively outweigh the incidental harm it is expected to cause. It is not for the belligerents and individual warfighters to balance these competing considerations.[63] Rather, their duty is to calculate the military advantage and the civilian harm in each specific case and to apply a pre-determined balance, the rule of excessiveness, to the outcome.[64] If the civilian harm is

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Law Applicable in Armed Conflicts, vol XIV (1978), 13, para 5 (ICRC: referencing the Hague Rules of 1923 among the 'earlier efforts at codification' on which the drafts prepared by the ICRC built); Summary Record of the 5th Meeting, 14 March 1974, ibid, 37, para 12 (ICRC: pointing to art 24(4) of the Hague Rules as a predecessor of the proportionality rule); Summary Record of the 21st Meeting, Committee III, 17 February 1975, ibid, 181, para 15 (Canada: pointing out that the draft rules on precautions 'raised again the problem of formulating rules inspired by one type of warfare, eg air bombardment, which would applicable to all forms of conflict, including for instance land warfare'). See also International Committee of the Red Cross, Report on the Protection of the Civilian Population against Dangers of Hostilities, CE/3b, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, May 24–June 12, 1971*, vol III (1971) 105–06.

60. Cf International Committee of the Red Cross, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War* (1956) 65 ('[d]evelopments in air warfare and, more recently, advances in the production of rockets has put belligerents in a position to bomb objectives scattered throughout the whole of enemy territory. The result has been to increase the dangers incurred by civilians within or in the vicinity of these objectives').

61. Eg Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (2007), NWP 1-14M, § 5.3.3 ('[t]he principle of proportionality requires the commander to conduct a balancing test'). See also WJ Fenrick, 'Attacking the Enemy Civilian as a Punishable Offense' (1997) 7 Duke J Comp & Int'l L 539, 545 (proportionality requires 'constant weighing of military and humanitarian values'); M Roscini, 'Targeting and Contemporary Aerial Bombardment' (2005) 54 ICLQ 411, 441 ('[a]s far as the principle of proportionality is concerned, the balance between collateral damage and military advantage gained from the operation should nowadays also take into account the long-term casualties of the attack…'); GD Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn, CUP 2016) 294 ('civilian losses…must be balanced against the military advantage'); LA Whittemore, 'Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases, and the Law' (2016) 7 Harvard Nat Sec J 577, 601 ('[t]he principle … requires a balancing').

62. To similar effect, see MN Schmitt, 'Fault Lines in the Law of Attack', in SC Breau and A Jachec-Neale (eds), *Testing the Boundaries of International Humanitarian Law* (British Institute of International and Comparative Law 2006) 277, 293 ('many wrongfully characterize [proportionality] as balancing').

63. *Contra* E Cannizzaro, 'Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War' (2006) 88 Int'l Rev Red Cross 779, 787 (arguing that proportionality *stricto sensu* 'is not a rule of conduct but a rule which requires a balancing of antagonistic values').

64. This point is sometimes overlooked: eg N Hayashi, 'Basic Principles', in R Liivoja and TLH McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 89, 99 (mistaking the contextual

excessive in relation to the military benefits, they must forego the attack. The application of the proportionality rule in practice has everything to do with comparisons and the avoidance of excessiveness, as the Department of Defense *Manual* correctly notes,[65] and nothing with balancing military benefits against civilian harm.

This point highlights the true nature and function of articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I. These provisions require belligerents not to exceed a pre-determined level of collateral civilian damage. Proportionality within the meaning of these provisions is therefore not a legal principle in the Dworkinian sense of a general standard that carries weight as part of a balancing exercise,[66] but a specific rule that operates in an all-or-nothing fashion.[67] Civilian harm may not be excessive. Further balancing is neither required nor permitted by the rule.

B. *Proportionality as a general principle*

In addition to its narrow meaning as a specific rule, proportionality is commonly described as a general principle of the law of armed conflict in the literature,[68] in official publications[69] and in judicial decisions.[70] The point is often expressed in sweeping terms. For example, Robert Kolb and Richard Hyde declare that '[a]ll military measures taken by belligerents must be proportionate to the aim they seek to accomplish'.[71] Despite its breadth, this statement is hardly objectionable. If the only legitimate aim which States may seek to accomplish during war is to 'weaken the military forces of the enemy',[72] any act of warfare must be proportionate to that sole objective, otherwise belligerents would exceed the scope of their lawful authority.[73] Nevertheless, expressed in these general terms, proportionality

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nature of the assessment of the threshold of excessive harm with the absence of a threshold).

65. DoD, *Law of War Manual* (December 2016), §§ 2.4.1.2 and 5.12.4. See ICRC, *Draft Rules for the Limitation*, 80. See also Boothby, *Law of Targeting*, 97 ('[t]he proportionality rule is not about a "balance" but, rather, is all about "excessiveness"').
66. R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 26 ('[p]rinciples have a dimension that rules do not—the dimension of weight or importance').
67. Cf Summary Record of the 21st Meeting, Committee III, 17 February 1975, *Official Records of the Diplomatic Conference*, vol XIV, para 83 (Hungary: declaring that the draft of what became art 57(2)(b) 'stated not a principle, but a special and very important rule').
68. Eg Brown, 'The Proportionality Principle', 136; R Kolb and R Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart 2008) 48; D Stephens, 'Human Rights and Armed Conflict: The Advisory Opinion of the International Court of Justice in the *Nuclear Weapons* Case' (2001) 4 Yale Hum Rts & Dev LJ 1, 15; APV Rogers, *Law on the Battlefield* (3rd edn, Manchester University Press 2012) 3; T Gill, 'Chivalry: A Principle of the Law of Armed Conflict?', in M Matthee and others (eds), *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald* (TMC Asser Press 2013) 33, 40–41; E Crawford and A Pert, *International Humanitarian Law* (CUP 2015) 41 and 44–45; Solis, *Law of Armed Conflict*, 268; J Kleffner, 'Sources of the Law of Armed Conflict', in R Liivoja and TLH McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 71, 81.
69. Eg DoD, *Law of War Manual* (December 2016), § 2.4; MoD, *Joint Service Manual*, para 2.6.
70. Eg HCJ 2056/04, *Beit Sourik Village Council v The Government of Israel* (2005) 38 Israel L Rev 83, para 37 (proportionality was applied outside the targeting context to a decision of the Israeli Government to erect a 'separation fence' under the law of belligerent occupation: '[p]roportionality is recognized today as a general principle of international law…[and] plays a central role in the law regarding armed conflict. During such conflicts, there is frequently a need to balance between military needs and humanitarian considerations'). See also HCJ 769/02, *Public Committee against Torture in Israel and others v Government of Israel and others (Targeted Killing Case)* [2006] ILDC 597 (IL 2006).
71. Kolb and Hyde, *Introduction*, 48.
72. Declaration Renouncing Uses, in Time of War, of Explosive Projectiles under 400 Grammes Weight (St Petersburg Declaration), 29 November and 11 December 1868, Preamble, Command Paper 4154, LXIV.659.
73. Cf FE Smith and J Wylie, *International Law* (4th edn, Dent and Sons 1911) 129 ('only such violence is permissible as is reasonably proportionate to the object to be attained, namely, the breaking down of

is little more than a restatement of the principle of military necessity.[74] If belligerents are entitled to take only those measures that are necessary to compel the submission of the enemy, their operations 'must be limited by that necessity and kept clearly within it'[75]—or at the very least there must be a 'reasonable connection' between those operations and the overall objective of overcoming the enemy.[76] This is precisely why it is not permissible to inflict wanton devastation and unnecessary suffering as ends in themselves. This is also how the latest update to the Department of Defense *Law of War Manual* presents proportionality. Whereas earlier versions of the *Manual* distinguished between proportionality as a general principle and proportionality as a specific rule,[77] the current update consistently describes proportionality as a general principle that requires belligerents not to exercise the right to engage in attacks against military objectives in an unreasonable or excessive manner.[78] Understood in this fashion, proportionality is the principle that prohibits the conduct of hostilities beyond the limits of military necessity. Consequently, to the extent that proportionality is conceived as a principle that governs the relationship between the means and ends of warfare, it is not truly a self-standing standard of the law of armed conflict, but a condition implicit in the notion of military necessity.[79]

Occasionally, proportionality is described in somewhat narrower terms as a core principle of the law of targeting.[80] This reflects the fact that many of the legal restraints imposed on belligerents may be derived either directly or indirectly from the principle of proportionality. For example, it is prohibited to conduct hostilities on the basis that no quarter will be given to enemy combatants who are, or should be recognised as, *hors de combat*.[81] The traditional justification for this rule is set out by Vattel, who suggests that there is no need to kill enemy combatants who have laid down their arms and have surrendered.[82] Vattel's argument is based on considerations of necessity, not proportionality. The unnecessary destruction of life is illicit not because it is out of proportion to the legitimate objective of war, but because no reasonable relationship exists between means and ends *at all* where an act of warfare is wholly unnecessary to weaken the enemy. However, Vattel's argument may be recast in the language of proportionality to say that killing a subdued enemy exceeds the legitimate object of war.[83] Indeed, it is not unreasonable to describe any

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the armed resistance of the enemy').

74. See also J McMahan, 'Proportionate Defense', in JD Ohlin and others (eds), *Weighing Lives in War* (OUP 2017) 131, 139–41.
75. Correspondence between Great Britain and The United States, respecting the Arrest and Imprisonment of Mr McLeod, for the Destruction of the Steamboat *Caroline*, No 2, Mr Webster to Mr Fox, 24 April 1848, in 29 British and Foreign State Papers 1840–41 (1857) 1126, 1138. Although these remarks were made in the context of the *jus ad bellum*, they highlight the relationship between necessity and proportionality more generally.
76. *Trial of Wilhelm List and Others (Hostages Trial)* (1946) 8 Law Reports of Trials of War Criminals 34.
77. United States Department of Defense, *Law of War Manual* (updated edn, June 2016) §§ 2.4 and 5.12.
78. DoD, *Law of War Manual* (December 2016) § 2.4.
79. Cf M Bothe, KJ Partsch and WA Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Nijhoff 1982) 225, § 2.3.3 (describing proportionality as a component of necessity); ME O'Connell, 'Historical Development and Legal Basis', in D Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 1, § 132 (treating necessity and proportionality as corollaries). See also JD Ohlin and L May, *Necessity in International Law* (OUP 2016) 89.
80. Eg Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict, UN Doc A/HRC/29/52 (24 June 2015), para 13; C Greenwood, 'The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign' (2002) 78 Int'l L Stud 35, 47.
81. Additional Protocol I, art 40. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 46, 161–63.
82. E Vattel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* (Carnegie Institution 1758), Livre III, § 140.
83. Eg Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martin Nijhoff 1987), para 1598 ('[t]he deliberate and pointless

act of warfare which exceeds the bounds of military necessity as disproportionate.[84]

These considerations bring to light a more general point. Proportionality is concerned with the existence of a reasonable connection between means and ends, while much of the law of armed conflict is concerned with imposing limits on the means and methods that belligerents may employ to weaken the enemy.[85] By striking a balance between military necessity and the dictates of humanity,[86] these legal limits determine what constitutes a reasonable connection between the conduct of hostilities and the legitimate object of warfare. Seen from this perspective, virtually all rules of the law of armed conflict appear to reflect the idea of proportionality.[87] Even the foundational principles of the law, such as the duty of distinction, may be derived from proportionality on this basis. For example, William Hall argued that the military advantage of killing civilians and other persons who do not participate in hostilities is too uncertain and too distant to justify their death.[88] Since the harm outweighs the benefits, Hall declared that belligerents must distinguish between non-combatants, who should enjoy immunity from attack, and combatants, who do not benefit from such immunity.[89]

While it is certainly plausible to describe proportionality as a general principle of the law of armed conflict along these lines, doing so risks turning it into a redundant synonym for the balance between military necessity and humanity.[90] Depicting proportionality as a general principle may also give rise to the misperception that every act of warfare is subject to a proportionality assessment. This is not the case. For instance, an object that constitutes a military objective within the meaning of article 52(2) of Additional Protocol I is liable to attack.[91] Nothing in the language of article 52(2) or its negotiating history suggests that belligerents must weigh humanitarian considerations against military advantage when deciding whether an object is a military objective.

While proportionality is commonly portrayed as a general principle of the law of armed conflict, closer inspection thus reveals that it typically features as an aspect of military necessity or as a synonym for the balance between military necessity and humanity. Treating proportionality as a self-standing principle of the law of armed conflict conceals the fact that its traditional function is to guide the development of the law, rather than to govern its implementation on the battlefield.[92] The law seldom directs warfighters to balance means and ends. More often than not, it requires them to respect certain thresholds and standards that reflect or incorporate the proportionality calculations made by those who drafted the rules.[93] The paucity of situations where the law demands a genuine balancing of means and

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extermination of the defending enemy constitutes disproportionate damage as compared with the concrete and direct advantage that the attacker has the right to achieve').

84. Eg Gardam, *Necessity*, 15–16.
85. Additional Protocol I, art 35(1) ('[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited').
86. St Petersburg Declaration, Preamble (referring to the 'limits at which the necessities of war ought to yield to the requirements of humanity').
87. Cf Cannizzaro, 'Contextualizing Proportionality', 785 ('the interplay which dominates the assessment of proportionality in *jus in bello* is concerned … with the military advantage that either belligerent intends to attain and the harm to humanitarian values').
88. WE Hall, *A Treatise on International Law* (Clarendon 1880) § 127.
89. Ibid.
90. Cf Australian Defence Headquarters, *The Manual of the Law of Armed Conflict* (2006), ADDP 0.64, § 2.8 ('[t]he principle of proportionality provides a link between the concepts of military necessity and unnecessary suffering').
91. See A Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice* (Routledge 2015).
92. Cf Hayashi, 'Basic Principles', 90–96 (describing certain basic principles of the law of armed conflict as the 'reason-giving considerations' for norm-creation).
93. See *Nuclear Weapons*, 583, para 20 (dissenting opinion by Judge Higgins) ('[t]he principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional

ends by warfighters often leads commentators to equate proportionality as a general principle with proportionality *stricto sensu*.[94] Needless to say, this merely calls into question whether it is meaningful to describe proportionality as a general principle of the law of armed conflict at all. Yoram Dinstein, for one, emphatically denies that this is the case.[95] While we do not have to go this far, the fact remains that not every rule of the law of armed conflict calls for a proportionality assessment. We should therefore guard against the fallacy of deducing a general principle of proportionality from certain rules of the law of armed conflict, only to project this principle onto other rules from which it is absent. As we examine in more detail below,[96] failure to heed this warning leads to a circular justification for extending the application of proportionality *stricto sensu* to enemy personnel shielded from direct attack.

III. Scope of the Proportionality Rule

The idea that lies at the heart of the proportionality rule as formulated in articles 51 and 57 of Additional Protocol I is simple: the incidental harm that an attack is expected to inflict upon civilians must not be excessive compared to the military benefit anticipated. Despite the simplicity of the underlying idea, the application of the rule is anything but straightforward.[97] The meaning of key elements is not fully settled.[98] For example, confusion surrounds the term 'excessive'. The authoritative Commentary to the Additional Protocols prepared by the International Committee of the Red Cross (ICRC) suggests that the proportionality rule could never justify extensive civilian harm, even if the military advantage involved is significant.[99] This position appears to be based on the notion that the duty to take precautions precludes extensive loss and destruction among the civilian population.[100] However, this conflates the precautionary duty to minimise incidental harm with proportionality *stricto sensu* and equates the term 'excessive' with 'extensive'.[101]

Protocol I to the Geneva Conventions of 1949').

94. Eg Kolb and Hyde, *Introduction*, 48; A Rubinstein and Y Roznai, 'Human Shields Modern Armed Conflicts: The Need for a Proportionate Proportionality' (2011) 22 Stan L & Pol'y Rev 93, 99–100; Crawford and Pert, *International Humanitarian Law*, 44; Solis, *Law of Armed Conflict*, 268 and 292ff. See also MoD, *Joint Service Manual*, para 2.6.1.
95. Y Dinstein, 'The Principle of Proportionality', in KM Larsen and others (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (CUP 2013) 72, 74.
96. See section V.A.2 below.
97. See International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 8 June 2000 (2000) 38 ILM 1257, para 48 ('[t]he main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied').
98. As Parks, 'Air Law', 175, noted more than 25 years ago, 'there remains a substantial lack of agreement as to the meaning of the provisions in Protocol I relating to proportionality'. This assessment still holds true today.
99. Sandoz, Swinarski and Zimmermann, *Commentary*, para 1980.
100. ICRC, *Draft Rules for the Limitation*, 81 (without the duty to take precautions, the proportionality rule 'might give the impression that these humanitarian rules envisage a priori extensive loss and destruction among the civilian population').
101. Eg State of Israel, *The 2014 Gaza Conflict (7 July–26 August 2014): Factual and Legal Aspects* (2015) 185, para 330 ('[e]xcessiveness…is not measured using absolute numbers. It is assessed on a case-by-case basis, in light of the specific military advantage anticipated by the commander based on the information reasonably available to him at the time of the attack. As long as there is no significant imbalance between the expected collateral damage and the anticipated military advantage, no excessiveness exists'). See also GS Corn and GP Corn, 'The Law of Operational Targeting: Viewing the LOAC through an Operational Lens Symposium' (2011) 47 Tex Int'l LJ 337, 365. Moreover, even extensive accidental or incidental civilian losses do not necessarily violate the duty to take precautions, provided that all feasible measures were taken to verify the nature of the target and to minimise civilian harm.

Substantial disagreement and uncertainty also surrounds other aspects of the rule, including the nature of the harm caused to civilians,[102] the extent to which 'reverberating effects' should be included in the calculation,[103] whether a series of near-indiscriminate attacks could serve as evidence of a policy of indiscriminate targeting[104] and how considerations of force protection affect the military advantage anticipated from an attack.[105] On top of these conceptual difficulties, it must be remembered that decisions in armed conflict are taken in a climate of 'danger, exertion, uncertainty and chance'.[106] More often than not, the proportionality rule has to be applied on the basis of incomplete, inaccurate and even contradictory information. The uncertainty of the law is thus compounded by the unpredictability of war.[107]

The difficulties that the interpretation and application of the proportionality rule gives rise to are well known and for the most part have been the subject of detailed assessment and debate.[108] Less attention has been paid to the rule's application to persons other than civilians. The most likely explanation for this is the clear and unambiguous language of articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I. All three provisions refer exclusively to the 'incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof'. On its face, the proportionality rule as articulated in Additional Protocol I is clearly limited to civilian harm and does not take cognisance of harm caused to military medical personnel and chaplains, enemy personnel rendered *hors de combat* or any other specially protected persons and objects that are not civilian in character. This interpretation is not in doubt. Applying the rules of treaty interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) of 1969 confirms its accuracy,[109] as we will show below. The limited scope of articles 51(5)(b), 57(2)(a)(iii) and

102. Eg E Lieblich, 'Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law', in D Jinks and others (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects* (TMC Asser 2014) 185; S Wilkinson, 'Incidental yet Monumental: Incorporating Mental Health Impacts into IHL Proportionality Assessments', *The ATHA Blog* (7 April 2017) <http://atha.se/blog/incidental-yet-monumental-incorporating-mental-health-impacts-ihl-proportionality-assessments>; MN Schmitt and CE Highfill, 'Invisible Injuries: Concussive Effects and International Humanitarian Law' (2018) 9 Harvard Nat Sec J 72, 83–95.
103. Eg Dinstein, *Conduct of Hostilities*, 159, para 425 ('the only consequences that count are those that occur directly'); Schmitt, *The Principle of Discrimination*, 168, para 55 ('reverberating effects were theoretically always calculated when assessing proportionality'). For a detailed assessment, see I Robinson and E Nohle, 'Proportionality and precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas' (2016) 98 Int'l Rev Red Cross 107.
104. See *Prosecutor v Kupreškić and others* (Trial Chamber, Judgment) IT-95-16 (14 January 2000), para 526 ('in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law'). But see ICTY, *Final Report to the Prosecutor*, para 52 ('the mere *cumulation* of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime').
105. Eg APV Rogers, 'Zero-Casualty Warfare' (2010) 82 Int'l Rev Red Cross 165; R Geiss, 'The Principle of Proportionality: 'Force Protection' as a Military Advantage' (2012) 45 Israel L Rev 71; R Ziegler and S Otzari, 'Do Soldiers' Lives Matter? A View from Proportionality' (2012) 45 Israel L Rev 53; Z Bohrer and MJ Osiel, 'Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers' (2013) 46 Vand J Transnat'l L 747.
106. C von Clausewitz, *On War* (Princeton University Press 1976) 104.
107. US Marine Corps, Warfighting (1997), MCDP 1, 7 ('[w]ar is intrinsically unpredictable'). Cf JA Vohr, 'Design in the Context of Operational Art' (2010) 94 Marine Corps Gazette 39 ('the reality of war as a competitive human endeavour rules against the achievement of perfect understanding and the reduction of friction and uncertainty').
108. For an excellent recent summary of the main areas of debate, see L Gisel (ed) *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law* (International Committee of the Red Cross 2018).
109. Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 332. The rules of interpretation set out in the Convention are widely considered to reflect customary international law: see, eg, *Legal*

57(2)(b) nevertheless raises two other questions. Even if the ambit of the proportionality rule is confined to civilian harm, does this include harm caused to all non-combatants and all civilians, as has occasionally been claimed? Moreover, bearing in mind that the proportionality rule forms part of customary international law, is the scope of the customary rule limited to civilian harm in the same way as its treaty-based equivalent? The purpose of this section is to address these matters.

A. The position under Additional Protocol I

The proportionality rule as worded in articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) refers to civilians and civilian objects only. Reading these provisions within their context suggests that the drafters deliberately excluded harm to non-civilian persons and objects from its scope. Article 57(2)(b) stipulates that an attack must be cancelled or suspended in three situations: where it becomes apparent, first, that the objective to be attacked is not a military one; second, that the objective is subject to special protection; or, third, that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. Since any civilians and civilian objects that benefit from special or heightened protection[110] are not military objectives, they fall within the ambit of the first situation mentioned in article 57(2)(b). This suggests that the second situation covers military objectives subject to special protection, such as *hors de combat* enemy personnel or military medical units.[111] This in turn suggests that the reference to civilians and civilian objects in the third situation detailed in article 57(2)(b), which sets out the proportionality rule, was adopted in contradistinction to non-civilian persons and objects. Evidently, the drafters could have specifically included non-civilian objectives enjoying special protection within its ambit but chose not to use this language. The context therefore confirms the clear meaning of the text of articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b): the proportionality rule as formulated in Additional Protocol I is confined to civilian harm only.

This interpretation is further confirmed by the Protocol's preparatory work. Historically, proportionality *stricto sensu* was preoccupied exclusively with collateral damage to the civilian population.[112] There is no sign in the preparatory work that the negotiating States intended to broaden the traditional scope of the rule. The first draft of the proportionality rule submitted by the ICRC to the second session of the conference of experts held in 1972 required those who order or launch an attack to calculate the 'probable losses and destruction' caused by the attack.[113] The draft failed to specify whether such losses and destruction were limited to damage among the civilian population or whether they also included damage caused to enemy personnel and other military objectives.[114] During the conference, a number of experts noted that it was therefore unclear whether the proposed rule applied between combatants and civilians, between opposing combatants or

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Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJ Rep 136, para 94. Generally, see RK Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015).

110. Eg Additional Protocol I, art 8(a) (including maternity cases, new-born babies and expectant mothers in the definition of 'wounded' and 'sick') and art 52(3) (identifying places of worship, houses and schools as objects normally dedicated to civilian purposes).

111. If it did not apply to protected military objectives, but only to protected civilian objectives, it would fall under the first situation and therefore be redundant.

112. See section II.A above.

113. International Committee of the Red Cross, Draft additional Protocol to the four Geneva Conventions of August 12, 1949, art 50, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, May 3–June 3, 1972*, vol II (1972) 1.

114. But see ICRC, Report on the Protection of the Civilian Population, *Conference of Government Experts*, vol III, 62–63.

both.[115] A joint proposal submitted by the experts of Egypt, Finland, Sweden and Switzerland sought to remedy this ambiguity by explicitly limiting the rule to civilian harm only.[116]

The draft Additional Protocol prepared by the ICRC for the diplomatic conference that opened in 1974 followed this narrower approach and made express reference to civilian harm only.[117] However, the ICRC's Commentary on the draft struck a more ambiguous note, suggesting that the concept of 'civilian objects' for the purposes of the proportionality rule extended to 'any object protected under existing treaty law or customary international law', including civilian and *military* hospitals.[118] This expansion of the concept of 'civilian object' to include military objects enjoying special protection from attack, such as military medical establishments or military medical aircraft,[119] undermines the binary logic of the principle of distinction. Nothing indicates that the negotiating States adopted this elastic understanding.[120] On the contrary, the records reveal that they employed the terms 'civilian' and 'civilian object' in their strict, technical meaning to exclude non-civilian persons and objects.[121] Nor did any government representative suggest that the proportionality rule should encompass anything other than harm to civilians and civilian objects.[122]

Accordingly, the negotiating history confirms the textual interpretation of articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b). The proportionality rule as codified in Additional Protocol I only applies to civilian harm and deliberately does not extend to harm caused to persons and objects that are not civilians or civilian objects.[123]

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115. International Committee of the Red Cross, Report of Commission III, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, May 3–June 3, 1972*, vol II (1972), 126, 153.
116. Proposal submitted by the experts of Egypt, Finland, Sweden and Switzerland, Draft Article 50, CE/COM III/PC 80, *Conference of Government Experts*, vol II, 78.
117. International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary* (1973), art 46(3)(b) and arts 50, 57 and 64.
118. Ibid, 65, n 25.
119. Geneva Convention I, arts 19 and 36.
120. *Contra* Gisel, 'Incidental Killing', 229.
121. Summary Records of the 21st Meeting, Committee III, 17 February 1975, *Official Records of the Diplomatic Conference*, vol XIV, 181, para 48 (US).
122. Cf the summary records of the discussions in Committee III at the 2nd Meeting, 12 March 1974, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol VI (1978), 16; 5th Meeting, 14 March 1974, 35; 6th Meeting, 16 March 1974, ibid, 43; 7th Meeting, 19 March 1974, ibid, 51; 8th Meeting, 19 March 1974, ibid, 59; 9th Meeting, 20 March 1974, ibid, 71; 21st Meeting, 17 February 1975, ibid, 181; 24th Meeting, 26 February 1975, ibid, 217; 31st Meeting, 14 March 1975, ibid, 299; and the Summary Record of the 41st Plenary Meeting, 26 May 1977, ibid, 141 and the Summary Record of the 42nd Plenary Meeting, 26 May 1977, ibid, 205. See also Report of Committee III, First Session (20 February–29 March 1974), Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol XV (1978), 229, para 48 and Report of Committee III, Second Session (3 February–18 April 1975), ibid, 259, para 57.
123. *Contra* International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (CUP 2016), para 1355. The Commentary speculates that the omission of wounded and sick military personnel from art 51(5)(b) of Additional Protocol I might have been motivated by editorial reasons, rather than an intentional decision to limit the proportionality rule to civilian harm. This is wrong, for the reasons explained in this section. Besides, editorial reasons did not prevent the drafters from referring to objects subject to special protection, a phrase which includes objects that constitute military objectives, in art 57(2)(a)(i) of Additional Protocol I, despite the fact that this provision too falls within a section of Additional Protocol I devoted to the general protection of the civilian population.

B. *The notion of 'civilian' harm*

Proportionality *stricto sensu* is closely related to the principle of distinction.[124] The principle stipulates that belligerents must discriminate between the civilian population and combatants and between civilian objects and military objectives, and they must only direct their operations against military objectives.[125] The principle of distinction plays a fundamental role in limiting the effects of hostilities by shielding civilians and channelling violence towards lawful targets. As such, it has been hailed as 'the greatest triumph of international law' in mitigating the evils of war.[126] Proportionality blunts the edge of the principle of distinction, in so far as it recognises that civilians cannot be shielded from the dangers of warfare in absolute terms. Moreover, matters are complicated by the fact that protecting a person against excessive incidental harm only makes sense if that individual is not a lawful target of attack in the first place. However, a person's liability to direct attack does not depend exclusively on the dichotomy between civilians and combatants.[127] Rather, liability to attack depends, first, on the classification of a person as a civilian or as a member of the armed forces and, second, on the applicability of any special regimes or special protections to that individual.[128] To understand the personal scope of proportionality *stricto sensu*, we must therefore concentrate on these distinctions.

Article 50 of Additional Protocol I defines a 'civilian' as anyone who is not a member of the regular armed forces of a party to the conflict, a member of other militias and volunteer groups belonging to such a party or a member of a *levée en masse*.[129] The gist of this definition is reflected in Rule 5 of the ICRC study on *Customary International Humanitarian Law*, which declares that civilians are persons 'who are not members of the armed forces'.[130] The armed forces of a state may consist of combatants and non-combatants.[131] Understood in a functional sense, the term non-combatant refers to those members of the armed forces who are not deployed in a combat role, such as cooks, technicians or administrative personnel. Despite their non-combatant function, such persons are not immune from attack due to their membership in the armed forces,[132] unless they are employed as hospital orderlies, nurses or auxiliary stretcher-bearers,[133] form part of the hospital personnel or crew of hospital ships[134] or have been assigned to civil defence organisations.[135] Used in a legal

124. Cf 'Remarks by Yoram Dinstein' (2014) 108 Proc Ann Meeting (Am Soc'y Int'l L) 84, 85 ('proportionality in the *jus in bello* is in essence an extrapolation of the principle of distinction').
125. Additional Protocol I, art 48.
126. Spaight, *War Rights on Land*, 37.
127. T Ruys and C de Cock, 'Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum', in ND White and C Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Edward Elgar 2013) 375, 379 ('the traditional dogma that every person is either a combatant or a civilian cannot be upheld in absolute terms').
128. *Contra* Y Dinstein, 'Distinction and Loss of Civilian Protection in International Armed Conflict' (2008) 84 Int'l L Stud 183, 183 (describing the dichotomy between civilians and combatants as the 'pivotal' one).
129. Specifically, art 50 of Additional Protocol I refers to individuals who do not fall within the categories of persons defined in Geneva Convention III, art 4(A) (1), (2) (3) and (6) and Additional Protocol I, art 43.
130. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 5, 17–19.
131. Hague Regulations 1907, art 3. On the difference between the legal and functional meanings of the term 'combatant' and 'non-combatant', see C Garraway, 'Combatants Substance or Semantics?', in MN Schmitt and J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines–Essays in Honour of Yoram Dinstein* (Brill 2007) 317.
132. Bothe, Partsch and Solf, *Commentary*, 273–74, § 2.4.3.
133. Geneva Convention I, art 25.
134. Geneva Convention II, art 36.
135. Additional Protocol I, art 67.

sense, the term non-combatant refers to two categories of persons—military medical personnel and chaplains—who are not entitled to participate directly in hostilities.[136] Since medical personnel and chaplains must be respected and protected at all times,[137] they are immune from attack, unless they commit acts harmful to the enemy outside their humanitarian duties.[138] In the different context of non-international armed conflict, the legal category of combatants entitled to participate directly in hostilities does not exist.[139] Accordingly, individuals who fight on behalf of a non-state actor as members of its organised armed group do not qualify as combatants in a legal sense. However, due to their membership of an armed organisation, we share the view that they do not qualify as civilians either.[140] Such persons are therefore not immune from attack and may be exposed to lawful acts of war based on their membership in the armed organisations to which they belong.[141]

In certain circumstances, the law of armed conflict assigns a secondary status to civilians and to members of the armed forces.[142] Civilians who directly participate in hostilities lose their general protection against the effects of hostilities, including their

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136. Additional Protocol I, art 43(2).

137. Geneva Convention I, art 24; Geneva Convention II, art 36. On the duty to 'respect and protect', see in greater detail section V.A.7 and V.B.2 below.

138. ICRC, *Commentary on the First Geneva Convention*, paras 1995–2010; International Committee of the Red Cross, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (CUP 2017), paras 2480–96.

139. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 3, 11 ('[c]ombatant status…exists only in international armed conflicts'). See also Y Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 219–20, paras 702–05; S Sivakumaran, *The Law of Non-international Armed Conflict* (OUP 2012) 359.

140. International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) 27 ('civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories'). This notion is widely accepted in state practice. See *Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel W wegen des Verdachts einer Strafbarkeit nach dem VStGB und anderer Delikte*, 3 BJs 6/10-4, 16 April 2010, 47 (Germany, Federal Prosecutor General) (insurgents who carry out a continuing combat function are not civilians, but legitimate military targets that may be attacked even outside active hostilities); State of Israel, *The 2014 Gaza Conflict*, §§ 264–265 ('members of organized armed groups may be attacked at any time by the sole virtue of their membership'); DoD, *Law of War Manual* (December 2016), § 5.7.3 ('individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack'); *Gherebi v Obama* 609 F Supp 2d 43 (DC 2009); *Hamlily v Obama*, 616 F Supp 2d 63 (DC 2009) ('Additional Protocol II recognizes a class of individuals who are separate and apart from the 'civilian population', i.e., members of enemy armed groups'). For further support, see *Galić* (2003), para 47 ('the term 'civilian' is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict'); *Blaškić* (2000), para 180 ('[c]ivilians within the meaning of [Common] Article 3 are persons who are not, or no longer, members of the armed forces'). See also G Corn and C Jenks, 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts' (2011) 33 U Pa J Int'l L 313; MN Schmitt, 'Status of Opposition Fighters in a Non-International Armed Conflict' (2012) 88 Int'l L Stud 119, 126–35.

141. *Contra* Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 5, 19 ('practice is not clear as to whether members of armed opposition groups are civilians subject to Rule 6 on loss of protection from attack in case of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6'). We agree with N Melzer, *Targeted Killing in International Law* (OUP 2008) 316 ('[t]he lack of formal regulation on this sensitive issue does not, however, necessarily indicate "ambiguous" State practice. Rather, it suggests that the qualification of organized armed groups as civilians is one of those questions where relevant State practice and *opinio juris* are more reliably deduced from operational conduct, conclusive indirect statements, and the absence of condemnation, than from formal statements prone to political misinterpretation. … In sum, State practice suggests that, as far as the principle of distinction is concerned, members of organized armed groups belonging to a non-State party to the conflict are not regarded as civilians, but as approximately equivalent to State armed forces').

142. K Ipsen, 'Combatants and Non-Combatants', in Fleck, *Handbook*, 79 (distinguishing between primary and secondary status).

immunity from direct attack.[143] Enemy combatants who are *hors de combat* are no longer liable to direct attack[144] and may benefit from additional protections based on their circumstances.[145] In both cases, the persons concerned gain a secondary status which modifies the scope of their legal protection without altering their primary status as civilians or members of the armed forces.[146] There has been some confusion on this point in the jurisprudence of the two *ad hoc* international criminal tribunals. In *Akayesu*, the International Criminal Tribunal for Rwanda declared that '[m]embers of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause'.[147] In *Blaškić*, the Trial Chamber of the International Criminal Court for the Former Yugoslavia (ICTY) distinguished civilians 'in the strict sense of the term' from 'former combatants' who are placed *hors de combat*, claiming that a person's standing as a civilian had to be determined on the basis of their specific circumstances, rather than their status.[148] Taken to their logical conclusion, these judgments would deprive the Third Geneva Convention of its purpose, since the interment of enemy combatants would fall under the rules governing the internment of civilians pursuant to the Fourth Geneva Convention. This manifestly erroneous position was corrected by the Appeal Chamber in *Blaškić*, which rightly held that it is a person's membership in the armed forces, and not their specific circumstances, which determines their civilian or non-civilian status.[149] Accordingly, the fact that members of an armed organisation are unarmed or *hors de combat* does not accord them civilian status.[150]

These points have important implications for the proportionality rule. Since articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I apply only to civilian harm, any collateral damage caused to persons whose primary status is not that of a civilian falls outside their scope.[151] Incidental damage caused to members of armed forces, militias and volunteer groups belonging to a state party to an armed conflict, members of organised armed groups fighting on behalf of a non-state party and members of a *levée en masse* is

143. Additional Protocol I, art 51(3).
144. Additional Protocol I, art 41(1).
145. Eg the special protections due to wounded and sick members of the armed forces. See Geneva Convention I, art 13.
146. Regarding civilians directly participating in hostilities, see ICRC, *Interpretive Guidance*, 44–45. See also DoD, *Law of War Manual* (December 2016), § 5.8.3. Regarding *hors de combat* enemy personnel, see n 150.
147. *Prosecutor v Akayesu* (Trial Chamber, Judgment) ICTR-96-4 (2 September 1998), para 582. Confirmed by, eg, *Prosecutor v Bisengimana* (Trial Chamber, Judgment) CTR-00-60-T (13 April 2006), para 48; *Prosecutor v Muvunyi* (Trial Chamber, Judgment) ICTR-00-55 (12 September 2006), para 513; *Prosecutor v Seromba* ((Trial Chamber, Judgment) ICTR-01-66 (13 December 2006), para 358.
148. *Blaškić* (2000), para 214. Confirmed by *Galić* (2003), para 143 and *Prosecutor v Limaj* (Trial Chamber, Judgment) IT-03-66 (30 November 2005), para 186. Followed by *Prosecutor v Bagilishema* (Trial Chamber, Judgment) ICTR-95-1A (7 June 2001), para 79. See also *Prosecutor v Kordić and Čerkez* (Appeals Chamber, Judgment) IT-95-14/2 (17 December 2004), para 421.
149. *Prosecutor v Blaškić* (Appeals Chamber, Judgment) IT-95-14 (29 July 2004), para 114. See also *Prosecutor v Fofana and Kondewa* (Special Court for Sierra Leone, Trial Chamber, Judgment) SCSL-04-14-T (2 August 2007), para 116; *Prosecutor v Bemba* (Pre-Trial Chamber, Decision on the Confirmation of Charges) ICC-01/05-01/08 (15 June 2009), para 78.
150. Ibid, para 113. Confirmed by *Galić* (2006), para 144; *Martić* (2007), para 55; *Martić* (2009), para 302; *Prosecutor v Mrkšić* (Trial Chamber, Judgment) IT-95-13/1 (27 September 2007), para 461.
151. In this respect, it is worth noting that only members of armed forces and groups belonging to parties to the conflict are not civilians. Members of armed forces affected by an armed conflict without being parties to it are civilians for the purposes of the law of armed conflict. Cf Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 33, 112 ('[s]tate practice treats peacekeeping forces, which are usually professional soldiers, as civilians because they are not members of a party to the conflict and are deemed to be entitled to the same protection against attack as that accorded to civilians, as long as they are not taking a direct part in hostilities').

therefore excluded from the proportionality rule as defined in Additional Protocol I. Whether or not these persons benefit from special protections is immaterial. As we saw, the fact that enemy personnel enjoy special protections, either as non-combatant members of the armed forces or as *hors de combat* persons, does not alter their primary status as members of the armed forces and does not turn them into civilians.[152]

By contrast, the secondary status of civilians is relevant to the application of the proportionality rule. The rule is designed to protect civilians against the incidental effects of warfare. This rationale does not apply in situations where civilians forfeit their immunity from direct attack due to their direct participation in hostilities. It would be entirely illogical and contrary to the principle of military necessity to accept that civilians directly participating in hostilities are lawful targets of attack,[153] but to insist that any incidental harm they may suffer must not be excessive compared to the military advantage anticipated from an attack targeting other objectives.[154] This is why article 51(3) of Additional Protocol I provides that civilians directly participating in hostilities do not enjoy the protection against the effects of hostilities afforded by Section I of Part IV of Additional Protocol I. This section includes articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b), which are therefore inapplicable to civilians directly participating in hostilities in their entirety.[155]

While the position of civilians directly participating in hostilities is regulated in express terms, the effect that other special protections or circumstances affecting civilians may have on the application of the proportionality rule is less clear. Since the proportionality rule applies to all civilians, there is no reason to doubt its applicability, in principle, to civilians enjoying special protections, for instance civilian medical personnel.[156] However, the fact that belligerents are bound to respect and protect such civilians may cast doubt over the extent of their liability to incidental harm. As a matter of principle, there is no reason why the special protections accorded to certain civilians could not increase an individual's normative value in relation to other civilians not enjoying such protections and thus in relation to the military advantage anticipated from an attack.[157] Whether or not this is the case depends on the content of the special protections in question.[158] For example, it would

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152. According to Sandoz, Swinarski and Zimmermann, *Commentary*, para 1602, 'an enemy soldier is no longer a combatant because he is *hors de combat*'. This is correct in so far as any person who is *hors de combat* cannot, by definition, be a combatant in a factual sense. The law may even restrict or suspend the right of certain *hors de combat* combatants to directly engage in hostilities. For example, under Additional Protocol I, art 93, escaping or escaped prisoners of war are liable to disciplinary and penal punishment by the detaining power upon recapture for certain acts that would be lawful acts of war if committed by combatants who are not prisoners of war. However, in none of these cases do the persons concerned lose their primary status as members of the armed forces.
153. ICRC, *Draft Additional Protocols*, 58 ('a civilian taking part in fighting, whether singly or in a group, becomes ipso facto a lawful target for such time when he takes a direct part in hostilities').
154. *Targeted Killings Case*, para 46. This position would lead to absurd outcomes. For example, while it would be lawful to directly target and kill a group of ten civilians directly participating in hostilities, it is not inconceivable that a strike which directly targeted only one of the individuals, but was expected to injure or kill the remaining nine persons incidentally, might not pass the proportionality test and therefore could not be carried out lawfully.
155. But cf *Targeted Killings Case*, para 40 (relying on human rights law to hold that the less harmful means must be employed against civilians directly participating in hostilities and equating that with the principle of proportionality under domestic law).
156. Additional Protocol I, art 15.
157. By analogy, it is worth noting that Additional Protocol I, art 56 essentially creates a heightened proportionality regime by prohibiting attacks against dams, dykes and nuclear electrical generating stations, or against military objectives located in their vicinity, if such attacks may cause the release of dangerous forces and consequent *severe*, rather than *excessive*, losses among the civilian population. The US takes the position that this provision does not reflect customary international law to the extent that it deviates from the regular application of the proportionality rule. See DoD, *Law of War Manual* (December 2016), § 5.13.1.
158. Eg the special protection conferred on women against incident assault under Geneva Convention IV,

not be unreasonable to demand a greater military advantage to justify incidental harm to civilian medical personnel compared to inflicting the same harm on the same number of 'ordinary' civilians. Conversely, it is undeniable that civilians who accompany the armed forces and those who are located inside military objectives run the risk, as a matter of fact, of exposing themselves to the effects of hostilities.[159] Whether this risk justifies excluding such civilians from the proportionality calculation altogether, as the initial version of the Department of Defense *Law of War Manual* published in 2015 claimed,[160] or decreasing their normative value compared to 'ordinary' civilians, is a more contentious question.[161] We will not pursue these matters here, as it is not necessary to resolve them at this stage.[162] The key point for our purposes is that the proportionality rule under Additional Protocol I does not apply to members of armed forces and groups, irrespective of their non-combatant status or circumstances, or to civilians directly participating in hostilities.

C. *The customary rule of proportionality*

The fact that a particular rule of international law derives from an international agreement does not preclude the possibility that it may also exist separately under customary international law.[163] Notwithstanding its codification in articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b), it is universally accepted that proportionality *stricto sensu* forms part of international custom.[164] In principle, there is no reason why the customary manifestation of the rule could not be broader in scope than the conventional one articulated in Additional Protocol I.[165] A number of writers argue that this is indeed the case. Leslie Green, for example, suggests that customary international law directs belligerents to take into account 'potential collateral

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art 27 is not relevant in the context of the proportionality rule and does not affect its application.

159. Draft additional Protocol, art 45(5), *Conference of Government Experts*, vol II ('[n]evertheless, civilians who are within a military objective run the risks consequent upon any attack launched against this objective').
160. United States Department of Defense, *Law of War Manual* (2015), §§ 5.12.3.2 and 5.12.3.3. Responding to sustained criticism of this position (see n 161), the latest update of the Manual no longer excludes such civilians from the proportionality rule: DoD, *Law of War Manual* (December 2016), §§ 4.15.2.3 and 5.16.4. For remaining concerns, see O Hathaway, M Lederman and M Schmitt, 'Two Lingering Concerns about the Forthcoming Law of War Manual Amendments', *Just Security* (30 November 2016) <https://www.justsecurity.org/35025/lingering-concerns-forthcoming-law-war-manual-amendments/> and M Lederman, 'Thoughts on Distinction and Proportionality in the December 2016 Revision to the Law of War Manual', *Just Security* (19 December 2016) <https://www.justsecurity.org/35617/thoughts-distinction-proportionality-december-2016-revision-law-war-manual/>.
161. Eg AA Haque, 'Off Target: Selection, Precaution, and Proportionality in the DoD Manual' (2016) 92 Int'l L Stud 31, 58–72; O Hathaway, 'The Law of War Manual's Threat to the Principle of Proportionality', *Just Security* (23 June 2016) <https://www.justsecurity.org/31631/lowm-threat-principle-proportionality/>; M Lederman, 'Troubling Proportionality and Rule-of-Distinction Provisions in the Law of War Manual', *Just Security* (27 June 2016) <https://www.justsecurity.org/31661/law-war-manual-distinction-proportionality/>.
162. We return to these matters in section VI.B below.
163. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Jurisdiction) [1984] ICJ Rep 394, para 73; *Nicaragua* [1986], paras 174–79.
164. The inclusion of the proportionality rule in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, has prompted no principled objections and is indicative of this consensus. See *Kupreškić*, para 524. Cf MN Schmitt, 'The Law of Targeting', in E Wilmshurst and S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 131, 134. This may be contrasted with the reception of other aspects of the study. Eg see JB Bellinger III and WJ Haynes II, 'A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law' (2007) 89 Int'l Rev Red Cross 443.
165. Cf *Nuclear Weapons*, para 84 ('Additional Protocol I in no way replaced the general customary rules applicable to all means and methods of combat').

damage caused to civilians, civilian objects *and other protected persons or installations*'.[166] Similarly, in their commentary to Additional Protocol I, Bothe, Partsch and Solf assert that *hors de combat* personnel should not be exposed to incidental harm that is excessive in relation to the military advantage anticipated.[167]

The existence and content of a rule of customary international law must be established with reference to two elements, state practice and *opinio juris*.[168] This is so irrespective of the process that gave birth to the customary norm concerned. Three scenarios may be distinguished in this respect.[169] First, the relevant provisions of Additional Protocol I may be declaratory of pre-existing custom. Second, they may have 'crystallised' an emerging customary norm. Third, they may have initiated the development of a new rule of customary international law.

The negotiating history of Additional Protocol I suggests that articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) did not codify a pre-existing rule of custom.[170] While the United States representative at the diplomatic conference convened in Geneva claimed that proportionality was 'already established by custom and in practice',[171] other delegations were more ambivalent[172] and a few representatives expressly contradicted the US position.[173] A substantial number of delegations strongly objected to proportionality *stricto sensu* as such,[174]

166. LC Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester University Press 2008) 391 (emphasis added).
167. Bothe, Partsch and Solf, *Commentary*, 253, § 2.2.1. The authors make this point in the context of Additional Protocol I, art 41, which implies that it is based on custom, rather than on arts 51(5)(b), 57(2)(a)(iii) or 57(2)(b).
168. For classic statements of this position, see eg *North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3, para 77; *Continental Shelf (Libya v Malta)* (Judgment) [1985] ICJ Rep 13, para 27. For more recent confirmation, see *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Judgment) [2012] ICJ Rep 99, para 55; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, para 99.
169. Cf *North Sea Continental Shelf Cases*, paras 60–80. See also RR Baxter, 'Treaties and Custom' (1970) 129-I Recueil des Cours 27; Y Dinstein, 'The Interaction between Customary International Law and Treaties' (2006) 322 Recueil des Cours 243; BB Jia, 'The Relations between Treaties and Custom' (2010) 9 Chinese J Int'l L 81.
170. Contemporary commentators held competing views on whether or not proportionality *stricto sensu* already formed part of customary international law at the time. Cf BM Carnahan, 'The Law of Air Bombardment in Its Historical Context' (1975) 17 Air Force L Rev 39, 56–58; PJ Goda, 'The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War Comment' (1966) 33 Mil L Rev 93. See also *Shimoda and others v State* (1964) 8 Japanese Ann Int'l L 212 (7 December 1963) 238 (declaring the prohibition of indiscriminate attacks under the Hague Rules on Aerial Warfare to be part of customary international law).
171. Summary Record of the 8th Meeting, 19 March 1974, Committee III, *Official Records of the Diplomatic Conference*, vol XIV, 59, para 67. See also Summary Record of the 21st Meeting, Committee III, 17 February 1975, ibid 181, para 91. See also ibid, para 32 (UK). Cf 'Letter dated September 22, 1972 from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary' (1973) 67 AJIL 122, 123–24 (suggesting that the proportionality rule embodied in Article 2 of Hague Convention IX of 1907 applied to aerial bombardment by way of analogy).
172. Summary Record of the 41st Plenary Meeting, 26 May 1977, Annex, *Official Records of the Diplomatic Conference*, vol IV, 175, 193 (Mexico), 199 (Sweden).
173. Summary Record of the 8th Meeting, Committee III, 19 March 1974, *Official Records of the Diplomatic Conference*, vol XIV, 59, para 79 (Hungary); Summary Record of the 21st Meeting, Committee III, 17 February 1975, ibid, 181, para 81 (Democratic Republic of Vietnam); Summary Record of the 31st Meeting, Committee III, 14 March 1975, ibid, 299, para 42 (Romania).
174. See Summary Record of the 6th Meeting, Committee III, 15 March 1974, *Official Records of the Diplomatic Conference*, vol XIV, 43, para 48 (Syria) and para 50 (Hungary); Summary Record of the 7th Meeting, Committee III, 19 March 1974, ibid, 51, para 16 (Mongolia), para 25 (Iraq), para 48 (German Democratic Republic), para 49 (Egypt), para 55 (Romania); Summary Record of the 8th Meeting, Committee III, 19 March 1974, ibid, 59, para 13 (Poland); para 17 (Democratic People's Republic of Korea), para 20 (Uganda), para 81 (Hungary), para 82 (Czechoslovakia), para 83 (Indonesia), para 88

questioning its compatibility with the law of armed conflict on the basis of an absolutist reading of the principle of distinction.[175] Despite these differences, a consensus eventually emerged in support of the rule on the back of a compromise to strengthen the duty to take precautions.[176]

While the negotiations thus demonstrate a lack of agreement regarding the customary nature of proportionality as it stood at the time, it is not farfetched to treat them as having crystallised it as an emerging norm of customary international law.[177] The United Kingdom, Ukraine and the United States used language to this effect in explaining their votes at the diplomatic conference.[178] Indeed, even before the conference came to an end, the United States Department of the Army revised its field manual on *The Law of Land Warfare* to mirror the wording of the draft proportionality rule.[179] In any event, whether the adoption of Additional Protocol I has crystallised proportionality as an emerging norm or has triggered its development as a new rule of customary international law, in both cases this customary rule descended from the terms of articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b), which restrict proportionality *stricto sensu* to civilian harm. Consequently, the burden rests on those who claim that the customary rule applies to non-civilian harm to prove, with reference to state practice and *opinio juris*, that its scope has somehow expanded beyond the terms of articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) since their adoption in 1977. Since the task, therefore, is to establish whether the customary rule deviates from the conventional one, the practice of States that are parties to Additional Protocol I is equally relevant as the practice of States that are not. If the customary proportionality rule really is broader in scope than the conventional one, we should expect the practice of all States to reflect this, irrespective of

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(Albania); Summary Record of the 21st Meeting, Committee III, 17 February 1975, ibid, 181, para 11 (Romania), para 25 (Egypt).

175. Several delegations supporting the proportionality rule pointed out that such absolutist positions ignored the realities of warfare: eg Summary Record of the 7th Meeting, Committee III, 19 March 1974, *Official Records of the Diplomatic Conference*, vol XIV, 51, para 36 (Canada); Summary Record of the 8th Meeting, Committee III, 19 March 1974, ibid, 59, para 30 (Australia), para 48 (UK), para 59 (Finland); Summary Record of the 21st Meeting, Committee III, 17 February 1975, ibid, 181, para 30 (UK), paras 53–4 (Finland), para 73 (Australia), para 85 (US), para 94 (Egypt).

176. Report of Committee III, Second Session (3 February–18 April 1975), *Official Records of the Diplomatic Conference*, vol XV, 259, para 97.

177. Cf *Kupreškić*, para 524 (holding that the proportionality rule is 'now part of customary international law', partly because it 'specif[ies] and flesh[es] out general pre-existing norms').

178. Summary Record of the 41st Plenary Meeting, 26 May 1977, *Official Records of the Diplomatic Conference*, vol IV, 141, para 120 (UK: 'the 'rule of proportionality' was a useful codification of a concept that was rapidly becoming accepted by all States as an important principle of international law relating to armed conflict'); ibid, Annex, 175, 202 (Ukraine: 'Paragraphs 4 and 5 [of what is now Additional Protocol I, art 51] also widen the scope of, and give concrete form to, another generally recognized principle of humanitarian law, [namely the] prohibition of indiscriminate attacks'); Summary Record of the 42nd Plenary Meeting, 27 May 1977, Annex, ibid, 219, 241 (US: Additional Protocol I, art 57 'represents a major step in the reaffirmation and development of humanitarian law applicable in armed conflict' as 'it codif[ies] for the first time the rule of proportionality').

179. Department of the Army, *The Law of Land Warfare* (1956), FM 27-10 C1, § 41 (revision of 15 July 1976). Cf Draft Protocol I, art 50(2)(a)(iii) and 50(b) in Annex to Report of Committee III, Second Session (3 February–18 April 1975), *Official Records of the Diplomatic Conference*, vol XV, 297, 313–14. See also Department of the Air Force, *International Law: The Conduct of Armed Conflict and Air Operations* (1976), AFP 110-31, § 5-3(c)(2)(b) (belligerents 'must refrain from launching an attack if injury or damage [to civilians or civilian objects] would be excessive or disproportionate compared with the military advantage anticipated'); Joint Chiefs of Staff, Memorandum for the Secretary of Defense, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949, 3 May 1985, 48 (JCSM-152-85) ('[m]any legal experts believe that this rule is already binding on the United States as part of customary international law. Even if this rule is not already legally binding, considerations of proportionality have always been a major factor underlying political and practical restraints on military operations of the United States').

whether they are parties to Additional Protocol I.[180]

Whilst evidence of practice must be looked for 'primarily in the *actual* practice' of States,[181] national military manuals may be relied on as useful indicators for our purposes.[182] As documented by the ICRC's customary humanitarian law study, the majority of national military manuals and other relevant doctrinal publications, including those of Belgium, Benin, Cameroon, Croatia, Ecuador, France, Hungary, Israel, Madagascar, the Netherlands, Nigeria, Spain, Switzerland and Togo, set out the proportionality rule in the same or close to identical terms as Additional Protocol I.[183] For example, the German *Law of Armed Conflict Manual* declares that 'attacks on military objectives which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of these, and which would be excessive in relation to the concrete and direct military advantage anticipated are prohibited'.[184]

The position adopted in the latest revision of the US Department of Defense *Law of War Manual* is of particular interest. The *Manual* describes proportionality as a general principle that gives rise to two obligations: first, a duty to refrain from attacks in which the expected incidental harm would be excessive in relation to the concrete and direct military advantage anticipated and, second, a duty to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects.[185] In effect, the *Manual* suggests that proportionality *stricto sensu* and the duty to take precautions both derive from the underlying principle that belligerents may not conduct hostilities in a manner that is unreasonable or excessive. There is no fault with this approach, except that labelling this underlying principle the 'proportionality principle' gives rise to unnecessary confusion. This is so because it obscures the fact that proportionality *stricto sensu* and precautionary duties are conceptually distinct and entail discrete legal obligations,[186] leading the *Manual* to embrace a seemingly self-contradictory position regarding the applicability of what it calls the proportionality principle to enemy personnel and objects protected from direct attack. On the one hand, the Manual declares that belligerents must take feasible precautions in planning and conducting attacks to reduce the risk of harm to protected enemy personnel and objects.[187] On the other hand, it also states that the prohibition of excessive incidental harm 'generally does not require consideration

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180. The 'Baxter paradox' therefore does not apply here. See RR Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965–1966) 41 BYIL 275, 296–97 and Baxter, 'Treaties and Custom', 64.
181. *North Sea Continental Shelf Cases*, para 27 (emphasis added).
182. According to *Prosecutor v Tadić* (Trial Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-T (2 October 1995), para 99, in establishing the position of the customary law of armed conflict, 'reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions'. However, national military manuals must be handled with care. Not every aspect of a manual reflects *opinio juris*, nor do all manuals carry the same legal weight. See D Turns, 'Military Manuals and the Customary Law of Armed Conflict', in N Hayashi (ed), *National Military Manuals on the Law of Armed Conflict* (2nd edn, Torkel Opsahl 2010) 65; C Garraway, 'The Use and Abuse of Military Manuals' (2004) 7 YB Int'l Hum L 425. Moreover, as Professor Dinstein has highlighted, some alleged manuals are not genuine manuals at all: Y Dinstein, 'The ICRC Customary International Humanitarian Law Study' (2006) Israel YB Hum R 1, 6–7. In the present context, we are relying on military manuals merely to determine, *prima facie*, whether a discrepancy exists between the customary and the conventional expressions of the proportionality rule.
183. J-M Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law, Volume II: Practice* (CUP 2005) §§ 14–44, 299–305.
184. Bundesministerium der Verteidigung, *Law of Armed Conflict Manual* (2013), Joint Service Regulation (ZDv) 15/2, § 404.
185. DoD, *Law of War Manual* (December 2016), § 2.4.1.2.
186. See Lederman, 'Thoughts on Distinction and Proportionality' (fittingly describing this as a 'systemic error').
187. DoD, *Law of War Manual* (December 2016), § 5.10.1.

of military personnel and objects, even if they may not be made the object of attack, such as military medical personnel, the military wounded and sick, and military medical facilities'.[188] Consequently, according to the *Manual*, the proportionality principle applies to protected enemy personnel as regards the duty to take feasible precautions, but it does not apply as far as the prohibition of excessive incidental harm is concerned. The *Manual* thus confirms that proportionality *stricto sensu* is confined to civilian harm only, although the more categorical position adopted in earlier editions[189] is now qualified by the proviso that proportionality considerations do not 'generally' apply to protected enemy personnel.

This may be contrasted with the position adopted by Australia. The Australian *Manual of the Law of Armed Conflict* treats proportionality as one of three foundational principles that govern the conduct of warfare. It proclaims that proportionality requires commanders to 'choose the least destructive method or axis [of attack] compatible with military success' and to 'weigh the military value arising from the success of the operation against the possible harmful effects to protected persons and objects'.[190] Taken at face value, the Australian manual thus seems to extend the application of the proportionality rule to direct attacks against military objectives and to incidental harm affecting non-civilian persons and objects, though it should be noted that the text is not entirely consistent in its approach.[191] A handful of other national manuals also appear to suggest that proportionality extends to non-civilian harm.[192] For example, the Canadian manual declares that proportionality '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'.[193] However, on closer reading, this formula seems to be the result of poor drafting rather than any deliberate expression of *opinio juris*,[194] not least because subsequent passages of the manual limit the proportionality test exclusively to civilian harm.[195] The position in the United Kingdom *Manual of the Law of Armed Conflict* can only be described as confused. The fact that the manual's definition of the proportionality rule is limited to civilian harm suggests that the UK does not consider itself bound by a broader customary proportionality rule.[196] This is confirmed by the manual's position on civil defence personnel, which implies that only civilian (but not military)[197] personnel assigned to civil defence duties need to be included in the proportionality calculation.[198] By contrast, when dealing with maritime warfare, the UK manual defines collateral damage to include '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'.[199] The manual thus suggests that incidental harm to protected non-civilian persons, though not objects, must be included in the proportionality calculation in the context of maritime, and possibly aerial, warfare, but not in the context of land warfare. This position lacks logic and consistency.

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188. Ibid, § 5.10.1.
189. DoD, *Law of War Manual* (June 2016), §§ 7.3.3.1 (wounded, sick or shipwrecked 'need not be considered as incidental harm in assessing proportionality in conducting attacks'), 7.8.2.1, 7.10.1.1 and 17.14.1.2.
190. Australian Defence Headquarters, *Manual of the Law of Armed Conflict*, §§ 2.9 and 5.9.
191. Ibid, § 5.2 (defining collateral damage and incidental injury in the context of targeting as 'damage to civilian property and incidental death or injury to civilians').
192. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol II, § 31 (Kenya) and § 34 (New Zealand).
193. Office of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Levels* (2001), B-GJ-005-104/FP-021, § 204(5) (emphasis added).
194. The manual cites Additional Protocol I, arts 51(5)(b), 57(2)(a)(iii) and 57(2)(b) in support of this passage, yet these provisions apply to civilian harm only and thus do not carry the weight placed upon them.
195. Office of the Judge Advocate General, *Law of Armed Conflict*, §§ 414, 414, 417(1)(c) and 716(3).
196. MoD, *Joint Service Manual*, para 5.33 (citing Additional Protocol I, arts 51(5)(b), 57(2)(a)(iii) and 57(2)(b)).
197. Cf Additional Protocol I, art 67(1).
198. MoD, *Joint Service Manual*, para 5.46, n 290.
199. Ibid, para 13.5(g) (emphasis added).

Turning to treaty practice and jurisprudence, both the original and the amended version of Protocol II on the Use of Mines, Booby-Traps and Other Devices to the Conventional Weapons Convention of 1980 reproduce the proportionality rule found in Additional Protocol I verbatim.[200] The fact that the amended version of Protocol II applies to non-international armed conflicts suggests that proportionality *stricto sensu* is limited to civilian harm under the customary law of non-international armed conflict too.[201] By contrast, article 8(2)(b)(iv) of the Rome Statute includes 'widespread, long-term and severe damage to the natural environment' in its rendition of the rule. However, closer reading reveals that article 8(2)(b)(iv) simply combines two distinct norms of international law, the duty not to cause excessive incidental civilian harm and the duty not to cause wide-spread, long-term and severe damage to the natural environment, into a single provision.[202] At first sight, the International Court of Justice appears to have adopted a broader understanding of proportionality in the *Nuclear Weapons* case when it held that 'States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives'.[203] However, to the extent that the environment is composed of civilian objects, it is covered by the proportionality rule as formulated in Additional Protocol I, unless a particular component of the environment qualifies as a military objective.[204] There is no discrepancy, therefore, between the Court's advisory opinion and Additional Protocol I on this point. The traditional understanding of proportionality is also reflected in the dissenting opinion of Judge Higgins in the same case, who stated that 'even a legitimate military target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack'.[205] Similarly, in *Kupreškić*, the ICTY Trial Chamber held that the principle of proportionality demands that 'any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack'.[206] The Eritrea-Ethiopia Claims Commission declared article 51(5) of Additional Protocol I to be an expression of customary international humanitarian law.[207] National courts have adopted the same position.[208]

Manuals prepared by international experts present a somewhat more mixed picture. The *Manual on the Law of Non-International Armed Conflict* reproduces the proportionality test found in Additional Protocol I.[209] The *Tallinn Manual* follows the same approach, adding

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200. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (10 October 1980) 1342 UNTS 137, art 3.3(c); Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (3 May 1996) 2048 UNTS 133, art 3(8)(c).
201. To similar effect, see Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102 Doc 9 rev 1 (26 February 1999), paras 75 and 78.
202. Dörmann, Doswald-Beck and Kolb, *Elements of War Crimes*, 166. See also MN Schmitt, 'Humanitarian Law and the Environment' (2000) 28 Denv J Intl'l L & Pol'y 265, 283–84; Y Dinstein, 'Protection of the Environment in International Armed Conflict' (2001) 5 Max Planck YB UN L 523, 536.
203. *Nuclear Weapons*, para 30.
204. Cf Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 43(A) and (B), 143. See also C Droege and M-L Tougas, 'The Protection of the Natural Environment in Armed Conflict – Existing Rules and Need for Further Legal Protection', in RG Rayfuse (ed), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict* (Brill 2014) 11.
205. *Nuclear Weapons*, 583, para 20 (dissenting opinion by Judge Higgins).
206. *Kupreškić*, para 524. See also the cases cited above at n 24.
207. Eritrea-Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 (2005) 26 RIAA 291, para 95.
208. Eg Oberlandesgericht Köln, *Kunduz Tankers Case*, 7 U 4/14 (30 April 2015), para 42, as confirmed by Bundesgerichtshof, III ZR 140/15 (12 January 2017); *Targeted Killings Case*, paras 42–43.
209. International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict: With Commentary* (2006) § 2.1.1.4.

that the proportionality rule formulated in articles 51 and 57 of Additional Protocol I 'is generally accepted as customary international law applicable in international and non-international armed conflicts'.[210] Given the depth and breadth of the research underpinning the ICRC's study on *Customary International Humanitarian Law*, it is noteworthy that its formulation of the customary proportionality rule is identical in all material respects with the wording of article 57(2)(a)(iii) of Additional Protocol I.[211] The *Manual on Air and Missile Warfare*, however, includes 'incidental loss of civilian life, injury to civilians and damage to civilian objects *or other protected objects*' within its definition of 'collateral damage'.[212] The commentary explains that this definition is drawn from articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I.[213] However, as Ian Henderson has pointed out, those provisions are limited to civilian harm and as such do not support the manual's broader definition of proportionality.[214] Also, it seems somewhat peculiar to extend the notion of 'collateral damage' to other protected objects but not to other protected persons. The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* also adopts a broader approach and defines collateral damage to encompasses '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'.[215] As the commentary explains, the experts drafting the manual adopted this definition because 'in practice the rule extends to damage or injury caused to all persons or objects that may not be directly attacked'.[216] However, the manual fails to offer any evidence to substantiate this claim. Also, it should be borne in mind that targeting directives and rules of engagement routinely impose constraints on the use of force for policy, rather than legal, reasons. One should be slow to interpret such self-imposed constraints as indications of *opinio juris*.

Finally, reference must be made the Chairman of the United States Joint Chief of Staff's Collateral Damage Estimation (CDE) Methodology.[217] The CDE is a process designed to afford military decision-makers a reasonable estimate of certain types of collateral damage that will result from the employment of a weapon on a lawful target. It requires planners to determine whether any collateral concerns are present within the projected hazard area of a weapon to be utilised in an attack. If collateral concerns are identified, progressively more demanding mitigation techniques will be employed to avoid collateral damage.[218] Once the CDE has exhausted potential mitigation techniques, meaning that no technical options exist to prevent collateral damage short of not conducting the planned attack, a decision is made on whether the attack would comply with the proportionality rule. In this way, CDE directly facilitates the legal requirement to take

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210. MN Schmitt (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (CUP 2013) 159.
211. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 14, 46–50. See also J Kellenberger, President, ICRC, Keynote Address at the 26th Round Table, Sanremo, 5–7 September 2002, 13 <http://www.iihl.org/wp-content/uploads/2015/12/The-two-Additional-Protocol-25-years-later.pdf> ('[t]he First Additional Protocol reaffirms and clearly codifies for the first time the customary requirement of proportionality in the conduct of hostilities. Pursuant to this principle attacks on lawful targets only remain lawful if the incidental civilian casualties or damages are not excessive').
212. Program on Humanitarian Policy and Conflict Research, *HPCR Manual on International Law Applicable to Air and Missile Warfare* (CUP 2013), Rule 1(l), 19.
213. Ibid, 19.
214. I Henderson, 'Manual on International Law Applicable to Air and Missile Warfare: A Review' (2010) 49 Mil L & L War Rev 169, 175.
215. L Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 1995), Rule 13(c), 9 (emphasis added).
216. Ibid.
217. Chairman of the Joint Chiefs of Staff, No-Strike and the Collateral Damage Estimation Methodology, 12 October 2012, CJCSI 3160.01A.
218. They include the use of precision guided munitions, delayed fusing/bomb burial, specific attack headings that help shape the focus of the blast or fragmentation effects away from the collateral concern, shielding and aim point off-set.

precautions in attack and helps implement the proportionality rule by, amongst other things, giving a numeric estimate of the number of protected persons it is anticipated will be injured or killed in a proposed attack.[219]

The notion of collateral damage is at the core of the CDE. The latest publicly available version of the Joint Chief's CDE Methodology defines collateral damage as 'the unintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time'.[220] All persons protected from direct attack, including protected enemy personnel, are therefore included in the CDE. This reflects the Methodology's understanding that the law of armed conflict demands that neither civilian nor 'non-combatant' injury or loss of life be excessive in relation to the military advantage anticipated from an attack.[221] Non-combatants are defined as 'military medical personnel, chaplains, and those out of combat, including prisoners of war and the wounded, sick, and shipwrecked.'[222]

Although the Joint Chief's CDE Methodology thus extends the proportionality rule to protected enemy personnel, it is open to question to what extent this supports the conclusion that the scope of proportionality *stricto sensu* is broader under customary international law than treaty law. The Methodology is a means of accommodating policy and other limitations that the US Government may impose on its forces beyond legal requirements. The Methodology therefore specifically warns that it should not be construed as state practice with respect to customary international law.[223] We should remember that the last publicly available iteration of the document was published in 2012, that is three years before the Department of Defense *Law of War Manual*. Although the most recent version is not in the public domain,[224] it should not come as a surprise if it had been brought in line with the legal position adopted in the *Manual*. Any remaining discrepancy between the Methodology and the *Manual* would suggest, at the most, that there is some disagreement within the US about the scope of the proportionality rule. We should also note that whilst the Joint Chief's CDE Methodology has been widely adopted by other nations and partners,[225] its extended definition of collateral damage has not always been followed. For example, the Collateral Damage Estimation Methodology approved by the European Union Military Committee in 2016 for the purposes of EU-led military operations defines collateral damage to include civilian harm only and expressly excludes harm to other non-combatants from the scope of the CDE process.[226]

Whilst our review does not amount to an exhaustive assessment of state practice, the material nevertheless generally points in the same direction and permits a firm conclusion. The evidence suggests that the scope of the proportionality rule under customary

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219. For an example, see Committee of Privy Counsellors, The Report of the Iraq Inquiry: Volume XII, HC 265-XII, 6 July 2016, paras 54-80.
220. Collateral Damage Estimation Methodology, D-2.
221. Ibid, D-1.
222. Ibid, GL-5.
223. Ibid, D-4.
224. Chairman of the Joint Chiefs of Staff, No-Strike and the Collateral Damage Estimation Methodology, 9 April 2018, CJCSI 3160.01C. See CJCS Active Directives Report as of 10 May 2018 <http://www.jcs.mil/Portals/36/Documents/Library/SupportDocs/CJCS%20Reports/CJCS%20CURRENT%20DIRECTIVES%20-%204%20May%202018v2.pdf?ver=2018-05-10-130109-313>.
225. For example, its use has been approved during NATO combat operations and is serving as the framework for the emerging NATO methodology for air-to-surface and surface-to-surface lethal operations. See NATO Collateral Damage Estimation (CDE) Course, N3-97 <http://www.natoschool.nato.int/Academics/Resident-Courses/Course-Catalogue/Course-description?ID=95>.
226. European Union Military Committee, Avoiding and Minimizing Collateral Damage in EU-led Military Operations Concept, EEAS(2015) 772 REV 8, 3 February 2016, enclosure to Council of the European Union, Doc 5785/16, 3 February 2016, 7 and 21.

international law has not expanded to include non-civilian harm at any stage since the rule's formation on the basis of Additional Protocol I. Although some material does exist that may suggest otherwise, the weight of this contrary practice is limited. This is so partly because of the small number of States concerned and partly because it is questionable whether it reflects their *opinio juris*. It certainly does not amount to 'a settled practice',[227] nor does it carry sufficient weight to indicate that the traditional rule, as codified in Additional Protocol I, is in the process of transformation.[228] Accordingly, the scope of the conventional and the customary rule of proportionality is identical.[229] However, the absence of absolute uniformity may be taken as a sign of States recognising that protected enemy personnel do raise proportionality considerations of some sort.

IV. Enemy Personnel Protected from Direct Attack

So far, we have found that proportionality *stricto sensu* is limited, both under conventional and customary international law, to incidental harm caused to civilians not directly participating in hostilities and to civilian objects. Members of national armed forces, irregular formations and *levées en masse*, members of non-state organised armed groups and military objectives are excluded from the scope of the proportionality rule as traditionally understood. Nonetheless, it has been argued that the rule should be interpreted or applied so as to cover incidental harm caused to certain non-civilian persons as well. Before we turn to these arguments in section V below, it is necessary to clarify, as a preliminary matter, what categories of non-civilians might benefit from the rule at all. For the reasons we discussed in connection with civilians directly participating in hostilities,[230] it would be contradictory if the law entitled belligerents to attack lawful targets directly but prohibited exposing them to incidental damage. An individual who is liable to direct attack cannot enjoy immunity against the incidental effects of lawful attacks directed against other military objectives.[231] Accordingly, it only makes sense for the law to protect persons from excessive incidental harm if they are protected against direct harm in the first place. In this section, we will first clarify which enemy combatants are liable to direct attack, before turning to the categories of enemy personnel who are not liable to direct attack.

A. Enemy personnel liable to direct attack

Based on the foregoing discussion, the legal position of enemy combatants who do not enjoy special protections would appear to be straightforward. Given that such enemy combatants are liable to direct harm, it would be illogical to include them in the calculation of incidental harm. However, it has been suggested that even harm caused to combat effective personnel, in other words adversaries who are not incapacitated or defenceless for other reasons, should be subject to some form of proportionality assessment.[232] Ryan Goodman in particular has argued that the law of armed conflict directs belligerents to choose means and methods of attack that render enemy combatants *hors de combat* with the

227. *Nicaragua* [1986], para 77.
228. Cf *North Sea Continental Shelf Cases*, para 186.
229. See also Boothby, *Law of Targeting*, 71.
230. See section III.B above.
231. DoD, *Law of War Manual* (December 2016), § 5.10.1.1 ('[f]or example, an attack against an enemy combatant might also injure other enemy combatants who were not the specific targets of the attack. Harm to these individuals or damage to military objectives would not need to be taken into account in applying the proportionality rule, even if this harm was an unintended result of the attack').
232. Newton and May, *Proportionality*, 300–03.

least amount of harm to their person.[233] In essence, Professor Goodman suggests that this principle of 'least-restrictive-means' (LRM) demands that in each individual case belligerents must employ only such degree of violence against enemy combatants liable to attack as is necessary and proportionate to accomplishing a military objective.[234] Accordingly, if the LRM principle forms part of the law and restricts the degree of harm that may be caused to enemy personnel directly, as Goodman suggests it does, then there would be no reason why proportionality *stricto sensu* could not, in principle, extend to cover harm suffered by such personnel incidentally.

Professor Goodman's argument has been criticised in detail elsewhere.[235] We will not repeat those objections here but instead confine ourselves to a few observations relevant in the present setting. At the heart of Goodman's thesis lies the claim that the prohibition of superfluous injury and unnecessary suffering includes a prohibition of unnecessary killing.[236] This misreads the impact the St Petersburg Declaration of 1868 has had on the law of armed conflict.[237] The Declaration's preamble proclaims as follows:

> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
> That for this purpose it is sufficient to disable the greatest possible number of men;
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable[.]

The prohibition of arms that uselessly aggravate the suffering of combatants, as articulated in the fourth preambular paragraph quoted above, is well established. The Hague Regulations of 1899[238] and 1907[239] outlaw weapons which are of a nature to cause superfluous injury or which are calculated to cause unnecessary suffering. This principle is confirmed by article 35(2) of Additional Protocol I, which reformulates it to cover both the means and methods of warfare.[240] By contrast, state practice has not carried the prohibition of weapons that render death inevitable over from the preamble of the St Petersburg Declaration into the general corpus of the law of armed conflict. Had it done so, any weapon system that causes fatal injuries in the course of its ordinary operation would contravene the law.[241] That this is not the case is demonstrated by the fact that neither the

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233. R Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 EJIL 819. See also G Blum, 'The Dispensable Lives of Soldiers' (2010) 2 J L Analysis 115.
234. Goodman, 'Kill or Capture', 836–39.
235. Eg GS Corn and others, 'Belligerent Targeting and the Invalidity of the Least Harmful Means Rule' (2013) 89 Int'l L Stud 536; MN Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"' (2013) 24 EJIL 855. See also JD Ohlin, 'The Duty to Capture' (2012) 97 Minn L Rev 1268; JD Ohlin, 'Sharp Wars are Brief', in Ohlin and others (eds), *Weighing Lives in War* 58, 66–69.
236. Goodman, 'Kill or Capture', 839.
237. See also L May, 'Humanity, Necessity and the Rights of Soldiers', in JD Ohlin and others (eds), *Weighing Lives in War*, 77, 97–102.
238. Hague Convention (II) With Respect to the Laws and Customs of War on Land, Annex: Regulations Respecting the Laws and Customs of War on Land (29 July 1899) UKTS 11/1901 (Hague Regulations 1899), art 23(e).
239. Hague Regulations 1907, art 23(e).
240. Additional Protocol I, art 35(2) ('[i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering').
241. The St Petersburg Declaration refers to weapons that render (in the original French: *rendraient*) death inevitable. The decisive factor is therefore a weapon's actual battlefield performance, not its intended effect. It is often overlooked that the principle applies to any weapon, including conventional arms, that render death inevitable. Cf HS Levie, 'Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals during Armed Conflict' (1998) 70 Int'l L Stud 129, 141.

Hague Regulations nor Additional Protocol I prohibit means and methods of warfare that render death inevitable. The permissibility of such means and methods is confirmed by the consistency with which states have deployed weapons capable of causing fatal injuries in theatres all over the world during the last century and a half.[242] Indeed, the operative part of the St Petersburg Declaration itself falls significantly short of the sentiments articulated in its preamble. While the Declaration bans the use of explosive projectiles under 400 grams in weight, projectiles above that limit—such as artillery shells, mortar rounds or multiple rocket launcher munitions—remain permissible, despite the fact that these heavier projectiles render the death of their targets no less inevitable than do their lighter counterparts.[243]

Commentators, courts and governments frequently pay lip service to the idea that rendering enemy combatants *hors de combat* is sufficient to achieve the object of war, as asserted by the third preambular paragraph of the St Petersburg Declaration, but they rarely admit that this proposition, if taken literally and followed through to its logical conclusion, implies that killing is an excessive method of warfare.[244] Most treatments of the subject simply gloss over this matter or quietly correct it.[245] Hall, for instance, cites the preamble of the Declaration with approval, but hastens to add that 'the amount of destruction or of suffering which may be caused is immaterial if the result obtained is conceived to be proportionate'.[246] James Spaight accepts that the end of war is the disabling of the greatest possible number of men, but in the same breath recalls that '[k]illing, of course, is not forbidden by war law; neither custom nor convention prohibits the rifleman from aiming at his enemy's heart and brain; such a prohibition would not be practical politics'.[247] In the *Shimoda* case, which assessed the legality of the bombing of Hiroshima and Nagasaki under the law of armed conflict, the Tokyo District Court cited the St Petersburg Declaration as authority for the unnecessary suffering rule.[248] The International Court of Justice did the same in the *Nuclear Weapons* advisory opinion.[249] However, despite the fact that nuclear weapons are a prime example of weapons that render death inevitable, neither court invoked this principle in its reasoning.[250] Doctrinal publications often adopt the same approach and cite the St Petersburg Declaration solely as authority for the prohibition of unnecessary suffering.[251]

Professor Goodman's argument rests largely on the support expressed for the LRM principle in connection with the drafting of the Additional Protocols, including by the

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242. Cf Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom, *Nuclear Weapons*, paras 3.65–3.66.
243. See also F Kalshoven, 'Arms, Armaments and International Law' (1985) 191-II Recueil des Cours 183, 208. It is worth noting that subsequent state practice has eroded even the prohibition of explosive projectiles weighing less than 400 grams: see T Ruys, 'The XM25 Individual Airburst Weapon System: A Game Changer for the (Law on the) Battlefield: Revisiting the Legality of Explosive Projectiles under the Law of Armed Conflict' (2012) 45 Israel L Rev 401, 407–10.
244. Cf Summary Record of the 26th Meeting, Committee III, 27 February 1975, *Official Records of the Diplomatic Conference*, vol XIV, 233, para 2 (ICRC: describing the prohibition to employ means and methods of warfare that render death inevitable as 'a question of proportionality').
245. Eg TJ Lawrence, *The Principles of International Law* (Macmillan & Co 1895), § 228; AP Higgins, *The Hague Peace Conferences and Other International Conferences concerning the Laws and Usages of War* (University Press 1909) 7; CC Hyde, *Land Warfare* (Government Printing Office 1918) 45–46.
246. Hall, *Treatise on International Law*, § 185. This directly contradicts the notion that warfare must be limited to disabling the greatest number of men as a sufficient means of weakening the enemy.
247. JM Spaight, *War Rights on Land* (Macmillan 1911) 75.
248. *Shimoda*, 241.
249. *Nuclear Weapons*, para 77.
250. Cf *Shimoda*, 241–42; *Nuclear Weapons*, paras 90–95.
251. Eg Department of the Air Force, *Conduct of Armed Conflict*, § 6.3(b); DoD, *Law of War Manual* (December 2016) § 19.6.

ICRC[252] and by some of the experts and government representatives studying the use of certain conventional weapons at meetings held in parallel with the main diplomatic conference.[253] However, contrary to what Goodman suggests,[254] these expressions of support do not prove that article 35 of Additional Protocol I was meant to codify the LRM principle. The draft version of article 35 prepared by the ICRC prohibited the use of 'weapons, projectiles, substances, methods and means which uselessly aggravate the sufferings of disabled adversaries or *render their death inevitable in all circumstances*'.[255] As the ICRC explained, the draft was based on the notion, expressed in the St Petersburg Declaration, that it is sufficient to disable the greatest possible number of men in order to weaken the forces of the enemy.[256] While government representatives expressed support for the unnecessary suffering rule, no delegation explicitly embraced the proposed prohibition of means and methods of warfare that render death inevitable.[257] In fact, several amendments put forward by the negotiating States omitted this prohibition from the scope of the draft rule.[258] In this respect, the UK representative declared that it was preferable to follow, as the UK had done in its manual on *The Law of War on Land* of 1958,[259] the Hague Regulations of 1907, which he suggested reflected customary international law, rather than the broader formulation of the St Petersburg Declaration.[260] This was not an isolated view. The Brazilian delegate believed that the draft of article 35 'should be limited to the general rules related to the prohibition of unnecessary injuries',[261] while the Australian delegate questioned in more general terms whether the ICRC text accurately reflected what he thought was the more limited scope of the existing law.[262] These objections carried the day, for article 35 of Additional Protocol I omits any reference to means and methods of warfare that render death inevitable. In so far as Additional Protocol I confirms the St Petersburg Declaration, it confirms the unnecessary suffering rule only.[263]

252. International Committee of the Red Cross, Memorandum on Protection of Civilian Populations against the Dangers of Indiscriminate Warfare, 19 May 1967, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts* (1969) 49, 59; International Committee of the Red Cross, Rules Relative to Behavior of Combatants, CE/4b, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, May 24–June 12, 1971*, vol 4 (1971) 6.
253. International Committee of the Red Cross, *Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects: Report on the Work of Experts* (1973), para 23, Ad Hoc Committee on Conventional Weapons, Summary Record of the 1st Meeting, 13 March 1974, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol XVI (1978), 7, para 18 (Sweden), para 18 (Australia); Summary Record of the 2nd Meeting, 14 March 1974, ibid, 17, para 5 (New Zealand).
254. Goodman, 'Kill or Capture', 824, 841 and 848.
255. ICRC, *Draft Additional Protocols*, art 33, 41 (emphasis added).
256. Ibid.
257. Eg Summary Record of the 26th Meeting, Committee III, 27 February 1975, *Official Records of the Diplomatic Conference*, vol XIV, 233, para 25 (Greece: failing to mention the prohibition of using weapons that render death inevitable among the 'fundamental principle[s] of international law' set out in the draft provision).
258. CDDH/III/108, 11 September 1974, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol III (1978) 155 (German Democratic Republic); CDDH/III/91, 4 October 1974, ibid, 155 (Finland); CDDH/III/225, 24 February 1975, ibid, 156 (German Democratic Republic); CDDH/III/237, 25 February 1975, ibid, 157 (Australia).
259. Cf War Office, *The Law of War on Land: Part III of the Manual of Military Law* (HMSO 1958), para 109.
260. Summary Record of the 26th Meeting, Committee III, 27 February 1975, *Official Records of the Diplomatic Conference*, vol XIV, 233, para 28 (UK: 'it would be better to follow The Hague Regulations of 1907 which had become the expression of customary international law, rather than the Declaration of St Petersburg').
261. Summary Record of the 26th Meeting, Committee III, 27 February 1975, *Official Records of the Diplomatic Conference*, vol XIV, 233, para 33.
262. Ibid, para 8.
263. This is consistent with other aspects of the negotiations, which explicitly confirm the second, rather

While the LRM principle enjoys a measure of support in international practice,[264] this support carries considerably less weight than what Professor Goodman suggests. Even proponents of the principle were prone to describe it as a 'philosophy' rather than as a rule of law.[265] As we have seen earlier, the prohibition of denying quarter and the duty to spare *hors de combat* enemies are justified at least in part with reference to the principle of necessity.[266] However, except as embodied in such specific rules, the law of armed conflict does not subject the killing of lawful targets to a necessity or proportionality requirement. On the contrary, it recognises that certain acts, including the destruction of enemies liable to direct attack, are inherently necessary and therefore legitimate in warfare.[267] Far from codifying a general prohibition of unnecessary killing, the drafting history of Additional Protocol I demonstrates that the negotiating States rejected the idea that means and methods of warfare which render death inevitable should be prohibited.[268] This is consistent with earlier rejections of the St Petersburg Declaration's far-reaching implications.[269]

The fact that it is permissible to employ means and methods of warfare against enemies liable to attack that render their death inevitable leaves no room for the LRM principle. The law cannot permit belligerents to expose lawful targets to inevitable death, but at the same time insist that any harm inflicted upon them must be kept to a minimum. Since the law of armed conflict does not constrain the level of direct harm that may be caused to enemy personnel in the employment of lawful means and methods of warfare, it would be absurd to protect them from incidental harm by extending proportionality *stricto sensu* to them. Accordingly, only enemy personnel who are not liable to direct attack may, in principle, benefit from the proportionality rule.

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than the third and fourth, preambular paragraph of the St Petersburg Declaration. See Summary Record of the 2nd Meeting, Committee III, 12 March 1974, *Official Records of the Diplomatic Conference*, vol XIV, 13, para 7 (ICRC), para 30 (Federal Republic of Germany); Summary Record of the 4th Meeting, Committee III, 13 March 1974, ibid, 25, para 8 (Venezuela).

264. In addition to the examples cited by Goodman, see also eg Prussia, *Kriegsbrauch im Landkriege* (Mittler und Sohn 1902) 10 (the usages of war request that severe force should not be employed if milder means are available and sufficient to attain the object of war and that certain means of warfare causing unnecessary suffering should be excluded completely); Letter dated 19 June 1995 from the Permanent Representative of Solomon Islands to the United Nations, together with Written Statement of the Government of Solomon Islands, 19 June 1995, § 3.53 ('in its use of force a State must not injure its enemy when it can capture him, nor cause serious injury when it can cause only light injury, and not kill the enemy if he can be injured'); Australian Defence Headquarters, *Manual of the Law of Armed Conflict*, §§ 6.1.1 and 6.1.2 ('[a]ny weapon that goes beyond what is needed to achieve the military object of disabling the enemy combatant would be difficult to justify on the grounds of military necessity').
265. ICRC, *Weapons that may Cause Unnecessary Suffering*, para 23 (1973); Ad Hoc Committee on Conventional Weapons, Summary Record of the 1st Meeting, 13 March 1974, *Official Records of the Diplomatic Conference*, vol XVI, 7, para 18 (Sweden).
266. See section II.B above.
267. *Hostages Trial*, 66 (military necessity 'permits the destruction of life of armed enemies').
268. The LRM principle is therefore not 'the law of the Protocol', as suggested by Goodman, 'Kill or Capture', 824.
269. See War Department, *Rules of Land Warfare* (Government Printing Office 1917) § 175 (stating that the preamble of the St Petersburg Declaration 'are now considered as limiting too much the legitimate methods of making war'). Cf Final Protocol, Brussels Conference on the Rules and Usages of War, 27 August 1875, in Correspondence respecting Brussels Conference on Rules of Military Warfare, Miscellaneous, No 1, C.1128, 181 (1875) (recalling that 'the only legitimate object which States should have in view during war, is to weaken the enemy without inflicting upon him unnecessary suffering', whilst omitting any mention of a prohibition to render death inevitable). Further, see TE Holland, *The Laws of War on Land Written and Unwritten* (Clarendon 1908) 78 (describing the St Petersburg Declaration as 'possibly too sweeping' in its statement of general principles).

B. *Enemy personnel not liable to direct attack*

We now turn to the categories of enemy personnel who enjoy immunity from direct attack. They include non-combatant members of enemy armed forces, that is military medical personnel and chaplains, as well as enemy combatants and members of organised armed groups who benefit from certain special protections due to their specific function or circumstances.

1. Military medical personnel, chaplains and auxiliary medical personnel

Military medical personnel are members of an adversary's armed forces who are assigned by the Party to the conflict to which they belong to engage exclusively in the search for the wounded or sick, in their collection, transport or treatment, in the prevention of disease or in the administration of medical units and establishments.[270] Military chaplains are members of an adversary's armed forces who are attached to those forces and assigned by the Party to the conflict to which they belong to serve exclusively in a religious function.[271] In both cases, the assignments may be temporary or permanent.[272] Auxiliary medical personnel are those members of an adversary's armed forces who are specially trained for employment as hospital orderlies, nurses or auxiliary stretcher-bearers in the search for or the collection, transport or treatment of the wounded and sick.[273]

Military medical personnel and chaplains must be 'respected and protected' in all circumstances.[274] Auxiliary medical personnel must likewise be 'respected and protected', but only if they are carrying out their duties at the time when they come into contact with the enemy or fall into its hands.[275] At a minimum, the duty to 'respect and protect' entails an obligation not to make these three categories of personnel the subject of direct attack, unless they commit acts harmful to the enemy outside their humanitarian functions.[276] Military medical personnel and chaplains also benefit from a range of additional privileges, facilities and protections,[277] for instance the benefits due to prisoners of war, should they be retained by an adverse Party.[278] However, these additional protections do not affect their position for the purposes of the proportionality rule and therefore are not relevant here. Article 9 of Additional Protocol II provides that '[m]edical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties'. Accordingly, medical and religious personnel are immune from direct attack in non-international armed conflict as well.[279]

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270. Geneva Convention I, art 24; Additional Protocol I, art 8(c). See ICRC, *Commentary on the First Geneva Convention*, paras 1953–63.
271. Geneva Convention I, art 24; Additional Protocol I, art 8(d). See ICRC, *Commentary on the First Geneva Convention*, paras 1964–68.
272. Additional Protocol I, arts 8(c) and 8(d).
273. Geneva Convention I, art 25.
274. Ibid, art 24.
275. Ibid, art 25.
276. ICRC, *Commentary on the First Geneva Convention*, paras 1987 and 2040. See also JK Kleffner, 'Protection of the Wounded, Sick, and Shipwrecked', in Fleck, *Handbook*, 321, 340; N Kumar, 'Protection of Religious Personnel', in ibid, 413, 419.
277. Kleffner, 'Protection of the Wounded, Sick, and Shipwrecked', 343; Kumar, 'Protection of Religious Personnel', 421–24.
278. Geneva Convention I, art 28; Geneva Convention III, art 33.
279. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 25, 79–86 and Rule 27, 88–91. See also Sivakumaran, *Law of Non-international Armed Conflict*, 277–80.

2. Religious, medical and hospital personnel of hospital ships and their crews

The religious, medical and hospital personnel of hospital ships and their crews must be respected and protected under the Second Geneva Convention.[280] The words 'religious, medical and hospital personnel' are not defined in the Convention. They are, however, broad in scope and so include medical personnel exclusively engaged in the treatment of the wounded or sick, technical personnel in charge of the upkeep of medical equipment and anyone else who works on or helps operate a hospital ship.[281] The religious personnel of hospital ships should be seen as akin to chaplains under the First Geneva Convention.[282] The protection afforded these individuals essentially mirrors that provided to religious and medical personnel under the First Geneva Convention.[283] The religious, medical and hospital personnel of hospital ships and their crews may not, therefore, be the subject of direct attack, unless they commit acts harmful to the enemy outside their humanitarian functions.[284]

As we have already noted, the effect of article 9 of Additional Protocol II is that 'medical and religious personnel' are immune from direct attack in non-international armed conflict. Additional Protocol II does not define 'medical and religious personnel', but the definitions set out in article 8(c) of Additional Protocol I, which encompasses the medical personnel of hospital ships, can be applied *mutatis mutandis*.[285]

3. Parlementaires

A person is regarded as a *parlementaire* when authorised by a belligerent to enter into communication with an opposing belligerent, generally under a flag of truce.[286] *Parlementaires* are, therefore, individuals designated by a commander to negotiate with enemy forces over matters such as surrenders, cease-fires or casualty collection.[287] In contemporary conflicts, such negotiations are likely to be conducted via radio or similar means of communication. However, more traditional methods for communication between commanders remain relevant. For example, during the battle for Goose Green in the Falklands War, the British forces area commander sent an individual under a flag of truce to call upon his Argentine opposite to surrender.[288]

Article 32 of the Hague Regulations declares that a *parlementaire* 'has a right to inviolability'. That same provision also provides that any trumpeter, bugler, drummer, flag-bearer or interpreter accompanying a *parlementaire* must not be made the object of attack too. The UK *Manual on the Law of Armed Conflict* clarifies that in modern warfare this protection from direct attack would extend, more realistically, to any driver, radio operator or interpreter accompanying a *parlementaire* and thus travelling under the protection of a flag

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280. Geneva Convention II, art 36.
281. J Pictet, *Humanitarian Law and the Protection of War Victims* (Sijthoff 1975) 90; K Ipsen, 'Combatants and Non-Combatants', in D Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 79, 79; ICRC, *Commentary on the Second Geneva Convention*, paras 2448–49.
282. ICRC, *Commentary on the Second Geneva Convention*, para 2448. The term 'religious personnel' is a generic term and covers all religions, whereas the word 'chaplain' has Christian connotations. However, the use of the term chaplain should not be understood to refer only to Christian religious personnel. See S Lunze, *The Protection of Religious Personnel in Armed Conflict* (Peter Lang 2004) 87.
283. ICRC, *Commentary on the Second Geneva Convention*, para 2439.
284. Ibid, paras 2462 and 2480.
285. Sandoz, Swinarski and Zimmermann, *Commentary*, para 1598. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 25, 82–83.
286. Hague Regulation 1907, art 32. However, *parlementaires* need not physically carry a white flag to benefit from lawful protection from direct attack: DoD, *Law of War Manual* (December 2016), § 12.5.1.1.
287. DoD, *Law of War Manual* (December 2016), § 12.5.1.
288. Green, *Contemporary Law of Armed Conflict*, 114.

of truce.[289] Under the Hague Regulations, a parlementaire and his party will lose their inviolability if it is proved, in a clear and incontestable manner, that he or she has taken advantage of their privileged position to commit an 'act of treason'.[290] Such an abuse could take the form of taking photographs of defensive positions or secretly gathering information.[291] It should also be recalled that feigning an intent to negotiate under a flag of truce is a perfidious act[292] that would amount to a grave breach of Additional Protocol I if committed wilfully and caused serious injury or death.[293]

4. Parachutists descending from an aircraft in distress

A person parachuting from an aircraft in distress is protected from direct attack during the period of their descent,[294] provided they do not engage in a hostile act.[295] The ICRC,[296] military manuals[297] and many commentators[298] consider parachutists descending from an aircraft in distress as a specific case of persons temporarily placed *hors de combat*. The better view, however, is to treat enemy combatants parachuting in distress as a distinct class of protected personnel. This is so not only because Additional Protocol I deals with such persons separately from those who are *hors de combat*,[299] but also because not all individuals parachuting from an aircraft in distress are protected. Airborne troops, including paratroopers and special forces, are expressly denied the benefit of protection during their descent from an aircraft,[300] regardless of whether they are parachuting in distress and whether they refrain from any hostile act.[301] This suggests that the mere predicament of jumping from an aircraft in distress does not render an enemy combatant *hors de combat* within the meaning of article 41 of Additional Protocol I. Parachutists protected during their descent must first be given an opportunity to surrender before being made the object of attack, provided they have reached the ground in territory controlled by an adverse Party and unless it is apparent that they are engaging in hostile act.[302]

5. Military civil defence personnel

Civil defence personnel are persons assigned by a party to the conflict exclusively to the

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289. MoD, *Joint Service Manual*, para 10.4. The *Joint Service Manual* also asserts that vehicles, aircraft or naval vessels used by *parlementaires* are similarly protected, with the personnel on board such naval vessels (known as 'cartel ships') afforded the same rights as *parlementaires* (ibid, para 10.12). The DoD, *Law of War Manual* (December 2016) makes no such assertion.
290. Hague Regulation 1907, art 34.
291. War Office, *The Law of War on Land*, para 410, n 1.
292. Additional Protocol I, art 37(1)(a).
293. Ibid, art 85(3)(f).
294. Ibid, art 42(1). This rule of special protection was first recognised in the Hague Rules of Air Warfare, art 20.
295. Ibid, art 42(2).
296. Sandoz, Swinarski and Zimmermann, *Commentary*, para 1644; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 48, 170.
297. DoD, *Law of War Manual* (December 2016), § 5.9.5; MoD, *Joint Service Manual*, para 5.7.1.
298. Eg Henderson, *Contemporary Law of Targeting*, 89; R Sabel, 'Chivalry in the Air? Article 42 of the 1977 Protocol I to the Geneva Conventions' (2000) 75 Int'l L Stud 439, 443; Dinstein, *Non-International Armed Conflicts*, 194, para 517.
299. Additional Protocol I, art 41 sets out an exhaustive list of circumstances in which military personnel are to be considered *hors de combat*, at least in the context of international armed conflicts. Cf ICRC, *Commentary on the First Geneva Convention*, para 539.
300. Additional Protocol I, art 42(3).
301. Boothby, *Law of Targeting*, 337; Crawford and Pert, *International Humanitarian Law*, 218.
302. Additional Protocol I, art 42(2). See Rogers, *Law on the Battlefield*, 49. But see Henderson, *Contemporary Law of Targeting*, 91.

performance of civil defence tasks, such as evacuation, fire-fighting or decontamination,[303] or to the administration of civil defence organisations.[304] This definition includes not just civilians, but also members of the armed forces permanently assigned and exclusively devoted to civil defence tasks.[305] Provided that these members of the armed forces do not perform any other military duties during the conflict and fulfil certain additional conditions, they are to be respected and protected.[306] As in other cases, this duty to 'respect and protect' implies that military civil defence personnel are not liable to direct attack.[307] Although the United States supports the principle that *civilian* civil defence personnel shall be respected and protected, it does not accept that the provisions of Additional Protocol I on civil defence reflect customary international law.[308] The Department of Defense *Law of War Manual* suggests that these provisions 'may be understood not to preclude an attack on an otherwise lawful military objective'.[309] Given that military personnel permanently assigned and exclusively devoted to civil defence tasks are lawful military objectives were it not for the provisions of Additional Protocol I, the *Manual* appears to suggest that *military* civil defence personnel do not benefit from a protected status under customary international law. If this position is correct,[310] such personnel would remain liable to direct attack and thus could not be subject to the proportionality rule as a matter of customary international law.

Additional Protocol II makes no express reference to civil defence. Some have argued that permitting direct attacks against military civil defence personnel in non-international armed conflicts would run counter to the principle of distinction, assuming that such personnel are assigned to civil defence duties permanently and are prohibited from directly participating in hostilities.[311] Professor Dinstein offers an alternative view when he asserts that the decision of the negotiating parties not to include the subject of civil defence among the provisions of Additional Protocol II demonstrates its 'palpable irrelevance' in the context of non-international armed conflict.[312] Regrettably, the ICRC's study on customary international humanitarian law does not address the matter.[313] The position of customary international law on military civil defence personnel in non-international armed conflict thus remains unclear.

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303. The list of qualifying civil defence task is set out in Additional Protocol I, art 61(a).
304. Ibid, art 61(c).
305. Ibid, art 67(1)(a).
306. Ibid, art 67(1).
307. Report of Committee III, Fourth Session (17 March–10 June 1977), Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol XIII (1978) 349, para 57 ('the words 'respected and protected' mean that the personnel must not knowingly be attacked or unnecessarily prevented from discharging their proper functions').
308. DoD, *Law of War Manual* (December 2016), §§ 4.22 and 19.20.1.4.
309. Ibid.
310. It appears that the US position is not fully settled. See Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (1995), NWP 1-14M, § 5.3 (declaring that members of the armed forces who have acquired civil defence status are not combatants entitled to directly participate in hostilities). But see Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (2017) § 5.4.2 (limiting the concept of 'non-combatant' to medical personnel and chaplains as well as *hors de combat*).
311. N Melzer, *The Principle of Distinction Between Civilians and Combatants*, in Clapham and Gaeta, *Oxford Handbook*, 296, 308. This reasoning suffers from an obvious weakness as far as members of organised armed groups belonging to a non-state actor are concerned. Since such persons have no right to engage in hostilities in the first place, it is difficult to envisage a customary rule prohibiting them from engaging in hostilities when they are permanently assigned to a civil defence function.
312. Dinstein, *Non-International Armed Conflicts*, 137, para 422.
313. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, xxxvi.

6. Persons hors de combat

Pursuant to article 41(1) of Additional Protocol I, a 'person who is recognized or who, in the circumstances, should be recognized to be 'hors de combat' shall not be made the object of attack'. This prohibition is well-established and forms part of the customary law applicable in international and non-international armed conflicts.[314] Article 41(2) of Additional Protocol provides that a person is *hors de combat* if that individual is (a) in the power of an adverse Party; (b) clearly expresses an intention to surrender; or (c) has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself. In all three cases, the individual concerned does not qualify as *hors de combat* unless he abstains from any hostile act and does not attempt to escape. Despite this detailed definition, the personal scope of the rule is not fully settled.

It was common ground in the lead-up to the diplomatic conference on the Additional Protocols that the definition of *hors de combat* would benefit from certain clarifications.[315] Proposals to expand its scope were also made. Under the Hague Regulations, enemies who exhausted their means of defence did not qualify as *hors de combat*, unless they surrendered.[316] In his second report on Respect for Human Rights in Armed Conflicts, the United Nations Secretary-General proposed that the rule should be extended to combatants who have not surrendered, but who 'obviously' no longer have any weapons.[317] The ICRC suggested that the rule could be given more 'specific content'[318] and distinguished between three situations in this respect.[319] First, it submitted that enemy combatants may become *hors de combat* in cases of 'automatic surrender' where all resistance has come to an end or where they lie wounded in the field. Second, they may become *hors de combat* by clearly indicating their intention to surrender. Third, an armed force may become *hors de combat* in a case of 'circumstantial surrender' where it is reduced to actual powerlessness by being outclassed by its adversary. In line with this broader approach, the ICRC removed surrender as a condition from the definition of *hors de combat* in its 1973 draft of the Additional Protocols.[320] Under the draft, an enemy combatant could thus qualify as *hors de combat* either on an objective basis after having lost his means of combat or on a subjective basis after having clearly indicated his intention to surrender.[321]

At the diplomatic conference, much of the debate among government representatives was concerned with the dividing line between *hors de combat* and prisoners of war status.[322] Some delegations argued that an *hors de combat* enemy could be within the hands of an adversary without being a prisoner of war. In their view, it was therefore necessary to confirm that such persons were protected from torture and ill-treatment.[323] Other delegations argued that as soon as a person came within the hands of an adversary, he was entitled to prisoner of war status and immediately protected by the Third Geneva Convention. In their view, it was inappropriate to include enemy combatants who have fallen into the hands of the enemy within the definition of *hors de combat* and to reiterate the

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314. Ibid, Rule 47, 164–70. See also UK Ministry of Defence, Closing Submissions on Modules 1–3 on behalf of the Ministry of Defence, *The Baha Mousa Public Inquiry*, 25 June 2010, para 12.1.
315. See ICRC, *Reaffirmation and Development*, 76–78.
316. Hague Regulations 1899, art 23(c); Hague Regulations 1907, art 23(c). Cf Spaight, *War Rights*, 88–101.
317. Respect for Human Rights in Armed Conflicts: Report of the Secretary-General, UN Doc A/7720 (18 September 1970), para 107.
318. ICRC, Rules Relative to Behavior of Combatants, *Conference of Government Experts*, vol 4, 9.
319. Ibid, 7.
320. ICRC, *Draft Additional Protocols*, art 38.
321. Summary Record of the 29th Meeting, Committee III, 7 March 1975, *Official Records of the Diplomatic Conference*, vol XIV, 271, para 30 (ICRC).
322. Ibid, paras 30–75.
323. Ibid, para 37 (Afghanistan), para 49 (Algeria), para 53 (Ukraine), para 67 (Soviet Union).

prohibition of torture and ill-treatment in this context.[324] Article 41(2) of Additional Protocol I attempts to reconcile these two opposing positions by including combatants who have fallen into the hands of the enemy within the definition of *hors de combat*, but leaving to other provisions their protection from mistreatment.[325]

Nevertheless, the wording of article 41(2) is ambiguous. Subparagraph (a) refers to persons who are 'in the power' of an adverse Party. On a narrow reading, this phrase may be understood to refer to persons within the physical custody of an adversary.[326] However, as the ICRC Commentary to the Additional Protocols points out,[327] being 'in the power' is not necessarily the same as having 'fallen into the hands' of the enemy for the purposes of the Third Geneva Convention.[328] The meaning of 'in the power' appears to be wider than being in physical custody. On this reading of article 41(2)(a), an enemy may qualify as *hors de combat* even where he has not surrendered, is not incapacitated or has not been apprehended. By way of illustration, the ICRC Commentary suggests that an attack by air assets may bring ground troops within their power, while 'land forces might have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat'.[329] If the interpretation advanced in the ICRC Commentary is correct, combatants who have lost their means of defence or face overwhelming firepower would be immune from direct attack. This could potentially also bring them within the scope of an expanded proportionality rule.

Regrettably, the negotiating history of article 41 sheds only limited light on the meaning of the phrase 'in the power'. Delegations at the diplomatic conference agreed to move beyond article 23(c) of the Hague Regulations by recognising enemy combatants incapacitated by their injuries as *hors de combat*, whether or not they had surrendered. However, beyond this point, it is difficult to identify a shared position. A few negotiating States supported the idea that defenceless combatants should be recognised as *hors de combat*.[330] Other delegations rejected this and proposed to limit the definition to combatants who have either surrendered or become incapacitated.[331] However, the fact that disagreement among the delegations centred on whether the concept of *hors de combat* included detainees suggests that the phrase 'in the power' must be interpreted in this light. A report by Committee III confirmed this link in express terms and explained that the definition of *hors de combat* adopted by the negotiating States was designed to include 'persons who had already fallen into the power of the enemy'.[332] This suggests that article 41(2)(a) should be understood to refer to persons who have either been apprehended or who, as a minimum, are liable to physical apprehension,[333] even if this means construing the

324. Ibid, para 40 (UK), para 46 (Iran), para 59 (Netherlands), para 63 (Belgium).
325. Report of Committee III, Third Session (21 April–11 June 1976), *Official Records of the Diplomatic Conference*, vol XV, 373, para 22.
326. Eg DoD, *Law of War Manual* (December 2016), § 5.9.2.
327. Sandoz, Swinarski and Zimmermann, *Commentary*, para 1611.
328. Geneva Convention III, art 4; Additional Protocol I, art 44(1).
329. Sandoz, Swinarski and Zimmermann, *Commentary*, para 1612.
330. Summary Record of the 29th Meeting, Committee III, 7 March 1975, *Official Records of the Diplomatic Conference*, vol XIV, 271, para 34 (Brazil).
331. CDDH/III/242, 5 March 1975, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol III (1978) 170 (Belgium, Iran and UK). See also Summary Record of the 29th Meeting, Committee III, 7 March 1975, *Official Records of the Diplomatic Conference*, vol XIV, 271, para 72 (Spain: preferring the more limited scope of the Hague Regulations, art 23(c)).
332. Report of Committee III, Third Session (21 April–11 June 1976), *Official Records of the Diplomatic Conference*, vol XV, 373, para 22.
333. Including individuals who are 'liable to physical apprehension' within the definition reflects the fact that the concept of 'in the power' is broader than physical custody. A person is 'liable to physical apprehension' if he finds himself in circumstances where the adversary is able, as a matter of fact, to take him into physical custody without apparent risk. Of course, to qualify as *hors de combat*, the individual

phrase 'in the power' more narrowly for the purposes of the *hors de combat* rule[334] than in the context of other provisions of Additional Protocol I.[335]

A number of military manuals make clear that a person is 'in the power' of an adversary if that individual has been apprehended or is subject to control.[336] The majority of expert opinion supports this approach.[337] It is also worth noting that the ICRC study on Customary International Humanitarian Law declares it to be 'uncontested that a person who is in the power of an adverse party is *hors de combat*'.[338] This statement is unproblematic if it was meant to refer to persons who have fallen into the hands of the adversary, but it is clearly not accurate if it was meant to suggest that States regard enemy combatants who have exhausted their means of combat to be *hors de combat*. This is simply not the case.[339] Indeed, such a rule would not be viable. Some forces have weapons at their disposal against which their adversaries have no effective means of defence. For example, if the ICRC Commentary is taken literally, all surviving enemy aircrews confronting a state that has achieved complete air superiority may have to be considered *hors de combat*.[340] This is divorced from reality and nothing in the negotiation of Additional Protocol I or in state practice suggests that it reflects the law.[341] Accordingly, article 41(1)(a) should be understood to apply to those

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concerned must abstain from any hostile act and must not attempt to escape.

334. Identical phrases used in different provisions of the same treaty do not necessarily have to carry the same meaning, as in each case the phrase has to be interpreted within its specific context. See *Case Concerning the Auditing of Accounts Between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine Against Pollution by Chlorides of 3 December 1976* (2004) 25 RIAA 267 ('[n]aturally, each treaty is presumed to be consistent in the way it uses its terms, but this presumption cannot be regarded as an absolute rule').

335. Eg the fundamental guarantees set out in Additional Protocol I, art 75 apply to persons 'in the power' of a party to the conflict. It has been suggested by Bothe, Partsch and Solf, *Commentary*, 499, § 2.4, that in this provision the 'expression "in the power" is used in a general sense; it means simply that the person or object is located in a place which is actually under the control of the authorities of a Party to the conflict, either within that Party's national territory or in territory that is occupied or otherwise controlled by it'. Applied to art 41(2), this interpretation would mean, for example, that special forces and aircrews active in non-occupied territory would be 'in the power' of their adversary for the purposes of the *hors de combat* rule, purely by virtue of being present in non-occupied territory. This evidently does not reflect the intention of the drafters or the logic of the law. Consequently, the phrase 'in the power' does not carry the same meaning in all provisions that employ it.

336. Australian Defence Headquarters, *Manual of the Law of Armed Conflict*, § 7.8 (interpreting the 'in the power' limb to mean 'is under the control of an enemy'); Office of the Judge Advocate General, *Law of Armed Conflict*, § 608 (equating 'in the power' with being a prisoner); DoD, *Law of War Manual* (December 2016), § 5.9.2 (equating persons 'in the power' with detainees).

337. Eg F Kalshoven and L Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th edn, CUP 2011) 97; Corn and others, 'Belligerent Targeting', 586–88; Schmitt, 'Wound, Capture, or Kill', 860; Dinstein, *Conduct of Hostilities*, 190, para 507; WJ Fenrick, 'Methods of Land Warfare', in Liivoja and McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, 251, 253; J Dill, 'Just War Theory in Times of Individual Rights', in C Brown and R Eckersley (eds), *The Oxford Handbook of International Political Theory* (OUP 2018) 221, 222. See also Ohlin and May, *Necessity*, 217.

338. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, 166.

339. Eg Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol II, § 350, 963 ('[t]he *opinio juris* of the United States is that quarter must not be refused to an enemy who communicates an offer to surrender under circumstances permitting that offer to be understood and acted upon by US forces. A combatant who appears merely incapable or unwilling to fight, eg, because he has lost his weapon or is retreating from the battle, but who has not communicated an offer to surrender, is still subject to attack').

340. Eg air crews and other military personnel defending an air base with weapons that are completely ineffective against superior air-delivered missiles would thus be *hors de combat*.

341. See also Henderson, *Contemporary Law of Targeting*, 85 ('combatant is not *hors de combat* merely due to being no longer capable of offering effective resistance'). In support of its position, Sandoz, Swinarski and Zimmermann, *Commentary*, para 1612 observe that 'a formal surrender is not always realistically possible, as the rules of some armies purely and simply prohibit any form of surrender, even when all means of defence have been exhausted'. However, nothing in the law of armed conflict compels a

enemy combatants who have fallen into the hands of the enemy as a consequence of having been apprehended or becoming liable to apprehension.

In practice, cases involving incidental damage to *hors de combat* enemies who are in the power of an adverse party or who have expressed an intention to surrender are likely to be less frequent than cases involving persons who have been rendered unconscious or are otherwise incapacitated by wounds or sickness, and who are therefore incapable of defending themselves. Examples falling into the first category may include situations where a detaining power uses armed force against certain detainees who are rioting or attempting to escape and in doing so causes incidental harm to other detainees.[342] Cases in the second category may include situations where enemy combatants in the process of surrendering are injured as a result of attacks directed against other adversaries who have not laid down their arms. By contrast, cases involving incidental damage to enemy combatants who are incapacitated by their injuries are likely to occur in a wide range of battlefield scenarios, in particular where a specific target is subject to repeated attacks, as in the example we offered in the introduction to this paper.

7. Wounded, sick and shipwrecked

The protection of wounded and sick enemy combatants has been at the heart of the modern law of armed conflict.[343] Today, the relevant protections are found in the Geneva Conventions, as complemented by Additional Protocols I and II. Pursuant to articles 12 of the First and Second Geneva Conventions, wounded, sick or shipwrecked members of the armed forces, other militias and volunteer corps of a party to the conflict, as well as members of *levées en masse*, must be 'respected and protected in all circumstances'. Article 7(1) of Additional Protocol II extends the duty to 'respect and protect' to all the wounded, sick and shipwrecked in non-international armed conflicts.[344]

Neither the First nor the Second Geneva Convention defines when a person is to be considered wounded, sick or shipwrecked. Reference should therefore be made to article 8 of Additional Protocol I, which defines 'wounded and sick' to mean persons 'who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility' and 'shipwrecked' to mean individuals 'who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility'.[345] As the ICRC's new Commentaries to the First and Second Convention point out,[346] it would be wrong to restrict the definition of wounded and sick only to those enemies whose medical condition is of such severity as to render them physically incapable of fighting.[347] This would

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belligerent to instruct its forces to lay down their weapons and surrender. It is absurd to impose the costs of that decision on the attacking forces.

342. Cf Geneva Convention III, art 42.

343. Sivakumaran, *Law of Non-international Armed Conflict*, 273. See Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, 22 Stat 940. For a practical example of the protection and care afforded to wounded enemy combatants, see J Adetunji, 'MoD defends hospital treatment for Taliban', *The Guardian* (23 January 2009) <https://www.theguardian.com/uk/2009/jan/23/military-afghanistan>.

344. Cf Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rules 109–11, 396–05.

345. Additional Protocol I, art 8(a) and (b).

346. ICRC, *Commentary on the First Geneva Convention*, para 1344; ICRC, *Commentary on the Second Geneva Convention*, paras 1382 and 1384.

347. *Contra* A Bellal, 'Who Is Wounded and Sick?', in A Clapham and others (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2016) 757, 764, para 28 ('[t]he 1949 Geneva Conventions' protection of the wounded and sick is entirely based on the idea that they cannot participate in hostilities or have laid down their arms, precisely because they are wounded or sick').

impose a duty of care on belligerents only in relation to enemy combatants who are *hors de combat* due to injury,[348] but would absolve them from providing any medical assistance or care to enemy personnel in their power who suffer from less serious ailments. Such a restrictive interpretation cannot be reconciled with the terms of the Geneva Conventions.[349] The notion of 'wounded' and 'sick' therefore should not be interpreted narrowly.[350] Nevertheless, the decisive factor under article 8 of Additional Protocol I is whether a person suffering from wounds or sickness is 'in need' of medical assistance or care.[351] A number of delegations at the diplomatic conference expressed their understanding that this requirement excluded trivial injuries.[352] It is therefore misleading for the ICRC Commentary to assert that 'any medical condition requiring care, *no matter the severity*, suffices to trigger the application' of articles 12 of the First and Second Geneva Conventions.[353] Rather, it is any medical condition of such severity as to render a person 'in need' of medical assistance or care that suffices to trigger the application of the Conventions.

Even with the exclusion of trivial injuries, the Geneva Conventions' scope of application remains broad. This presents certain difficulties. The duty to 'respect and protect' wounded, sick or shipwrecked enemy combatants entails, as a minimum, an obligation not to subject them to direct attack.[354] However, no express exception is made in the Geneva Conventions for enemy combatants who continue to participate in hostilities despite their wounds, sickness or shipwrecked position. It would be bizarre if such enemies had to be respected and protected. Article 8 of Additional Protocol I addresses the matter by stipulating that only persons 'who refrain from any act of hostility' qualify as wounded, sick or shipwrecked. Although not a particularly elegant solution,[355] article 8 thus confirms that injured enemy combatants who engage in hostile acts remain liable to attack. The ICRC Commentary suggests that this limitation should be regarded as implicit in the Geneva Conventions. This not only reflects common sense, but also the fact that other protected enemy personnel, including *hors de combat* combatants, prisoners of war and military medical personnel,[356] forfeit their protected status or their special protections if they engage in hostile acts or attempt to escape.

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348. However, note that some support for this interpretation was expressed during the negotiation of Additional Protocol I. See Summary Record of the 5th Meeting, Committee II, 13 March 1974, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol XI (1978), 33, para 38 (Denmark).
349. Eg the restrictive interpretation might imply that medical personnel engaged in the treatment of less seriously wounded persons would not qualify as medical personnel or that auxiliary medical personnel engaged in the search, collection, transport or treatment of less seriously wounded persons would not enjoy protection when they come into contact with the enemy under Geneva Convention I arts 24 and 25, respectively.
350. Cf ICRC, *Commentary on the First Geneva Convention*, para 1342; ICRC, *Commentary on the Second Geneva Convention*, para 1380.
351. See Kleffner, 'Protection of the Wounded, Sick, and Shipwrecked', 324.
352. Summary Record of the 4th Meeting, Committee II, 12 March 1974, *Official Records of the Diplomatic Conference*, vol XI, 25, para 27 (UK), para 31 (Netherlands); Summary Record of the 5th Meeting, Committee II, 13 March 1974, ibid, 33, paras 26 and 32 (Soviet Union), para 34 (UK), para 36 (US), para 37 (France).
353. ICRC, *Commentary on the First Geneva Convention*, para 1344; ICRC, *Commentary on the Second Geneva Convention*, para 1382 (emphasis added).
354. ICRC, *Commentary on the First Geneva Convention*, para 1354; ICRC, *Commentary on the Second Geneva Convention*, para 1400.
355. As a result of Additional Protocol I, art 8, an enemy combatant who engages in hostile acts is not wounded, sick or shipwrecked in a *legal* sense, though he may well be wounded, sick or shipwrecked within the ordinary meaning of these words. A better solution, though one that would have required a revision of Geneva Conventions I and II and hence was not available to the drafters of Additional Protocol I, would have been to limit or suspend the duty to 'respect and protect' in circumstances where wounded, sick or shipwrecked enemy personnel do not refrain from hostile acts or attempt to escape.
356. Additional Protocol I, art 41(2); Geneva Convention III, art 42; Geneva Convention I, art 24.

In this context, the ICRC Commentary states that it would be 'unrealistic and impossible' to interpret the law so that 'every combatant who is in need of medical care would automatically be entitled to be respected and protected and could thus no longer lawfully be attacked'.[357] The Commentary therefore suggests that enemy personnel who are being treated in medical establishments and who do not engage in hostile acts may qualify as wounded or sick, while combatants who have resumed their normal military duties do not so qualify, even if they are still be in need of medical assistance or care.[358] This is an eminently sensible interpretation of the law. It implies, as the Commentary points out,[359] that the primary, though not exclusive, factor that attacking forces may rely on in order to distinguish between combatants who qualify as wounded or sick and those who do not qualify is the fact that the former are being treated in a medical facility. In other words, enemy combatants should be presumed to be wounded or sick if they are receiving treatment inside medical facilities.

This still leaves open the question under what conditions enemy combatants are entitled to protection outside medical facilities, in particular when they are injured during active combat. At least two aspects of such a situation are clear from doubt. If a combatant injured during active fighting does not refrain from acts of hostility, he will not qualify as wounded or sick in the legal sense and will not enjoy immunity from further attack. By contrast, if his injuries render him unconscious or otherwise incapacitate him, so that he is incapable of defending himself, he will qualify as *hors de combat* and must not be made the object of direct attack. However, what is the position of enemy combatants who do not visibly engage in acts of hostility and whose injuries are not such as to render them incapable of defending themselves? Similarly, what is the position of enemy combatants whose physical condition cannot be verified by the attacking force? The ICRC Commentary answers these questions by declaring that 'those who have the task of determining a person's status on the battlefield, may not proceed with an attack if they recognize or would have reason to believe that a person is wounded or sick'.[360] This position is not quite correct.

The law of armed conflict imposes different precautionary duties at different stages of an attack.[361] Before launching an attack, those who plan or decide upon it must do everything feasible to verify that, amongst other things, the target to be engaged is not subject to special protections, but constitutes a military objective liable to attack.[362] The fact that there is reason to believe that the attack will affect wounded or sick enemy combatants does not in any way increase the scope of the duty to do everything feasible to verify the target.[363] Nor does it prevent those who plan or decide upon the attack from proceeding to launch it, provided they have in fact done everything 'practical or practically possible'[364] to verify the status of the target. It makes no difference in this respect whether the attack prosecutes a new target or re-engages one that has been attacked before: the duty to verify its status is the same. Once an attack has been launched, those who execute it are not subject to a separate duty to verify the target, but instead must cancel or suspend the ongoing attack

357. ICRC, *Commentary on the First Geneva Convention*, para 1345; ICRC, *Commentary on the Second Geneva Convention*, para 1400.
358. ICRC, *Commentary on the First Geneva Convention*, para 1346.
359. Ibid, para 1346.
360. Ibid, para 1347.
361. See Summary Record of the 21st Meeting, Committee III, 17 February 1975, *Official Records of the Diplomatic Conference*, vol XIV, 181, para 4 (ICRC), para 30 (UK), paras 38 and 43 (Netherlands). Cf ibid, para 69 (Sweden).
362. Additional Protocol I, art 57(2)(a)(i).
363. Eg it does not transform the obligation into a duty to do 'everything feasible and a bit more' or to do what is not feasible.
364. Report of Committee III, Second Session (3 February–18 April 1975), *Official Records of the Diplomatic Conference*, vol XV, 259, para 97 ('the word "feasible" … was intended to mean that which is practicable or practically possible').

'if it becomes apparent' that, amongst other things, the target benefits from special protection.[365] Firing a rifle at an advancing soldier, dropping a 1,000 lbs bomb on an enemy dugout or releasing a missile against a hostile pick-up truck should give most reasonable observes grounds to believe that the persons targeted will have sustained some injury. If this 'reason to believe' were sufficient to trigger the duty to cancel or suspend the attack, attacking forces would have to grind to a halt in order to establish the status of their target immediately after they have fired the first bullet, dropped the first bomb or released the first missile. Using a rifle in burst mode would be unlawful, as would dropping two bombs in succession or switching from missile to cannon fire in one continuous engagement. This approach does not reflect the law. As the ICRC Commentary concedes, during combat, the fact that 'a combatant is wounded or sick must be visible or have some outward manifestation such that an opposing combatant is able to be aware of it'.[366] An attack must be cancelled or suspended only if the protected status of the target 'becomes apparent' on the basis of observable, external factors, rather than on the basis of a mere 'reason to believe'.[367] This conclusion finds support in the fact that *hors de combat* enemy personnel are entitled to protection either when their protected status has in fact been recognised or when it should be recognised by a reasonable person based on their actual circumstances.[368] The same standard should apply to the wounded and sick.

However, the scope of the duty to 'respect and protect' wounded or sick enemy personnel must be interpreted and applied consistently with the *hors de combat* rule. As we saw earlier, pursuant to article 41(2)(c) of Additional Protocol I, a combatant is no longer liable to direct attack if he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself.[369] Whilst different standards of protection applicable on the basis of distinct rationales may accumulate,[370] in the present case, articles 12 of the First and Second Geneva Conventions and article 41(2)(c) of Additional Protocol I are concerned with the same matter and motivated by the same rationale: restricting the liability of enemy combatants to harm on the basis of their medical condition. Interpreting the duty to 'respect and protect' so as to confer immunity from attack upon all wounded or sick enemy combatants would render article 41(2)(c) of Additional Protocol I redundant: why should this provision prohibit attacks against enemy combatants rendered unconscious or otherwise incapacitated by wounds or sickness, if all wounded and sick enemy combatants are immune from attack already? As Judge Hsu Mo pointed out in his dissenting opinion in the *Ambatielos* case, '[i]t is a well-recognized principle of interpretation that a specific provision prevails over a general provision'.[371] In the present context, the *hors de combat* rule is the more specific provision, as it is specifically designed to deal with a wounded or sick combatant's liability to direct attack, whereas the 'respect and protect' rule is wider in scope and addresses their liability to attack only implicitly. Accordingly, the duty to 'respect and protect' the wounded or sick under articles 12 of the First and Second Geneva Conventions must be interpreted in such a way that it does not

365. Additional Protocol I, art 57(2)(b).
366. ICRC, *Commentary on the First Geneva Convention*, para 1344.
367. This is reinforced by the fact that a proposal to replace the expression 'if it becomes apparent' with the phrase 'if they perceive' garnered no support at the diplomatic conference. See Summary Record of the 21st Meeting, Committee III, 17 February 1975, *Official Records of the Diplomatic Conference*, vol XIV, 181, para 14 (Brazil).
368. Report of Committee III, Third Session (21 April–11 June 1976), *Official Records of the Diplomatic Conference*, vol XV, 373, para 23.
369. Provided he abstains from any hostile act and does not attempt to escape.
370. Eg women who are sick and have dependent infants will benefit both from the protection due to the wounded and sick and from the privileged treatment accorded by Additional Protocol I, art 76(2).
371. *Ambatielos (Greece v United Kingdom)* (Preliminary Objections) [1952] ICJ Rep 28, 88 (dissenting opinion by Judge Hsu Mo).

render enemy combatants outside medical facilities immune from direct attack unless they are unconscious or otherwise incapacitated by their wounds or sickness, and therefore incapable of defending themselves. In our experience, state practice endorses such a conclusion.[372]

Wounded or sick members of hostile armed forces or groups are thus protected from direct attack on the basis of their medical condition if they are receiving medical assistance or care in a medical facility without having resumed their normal military duties or if they are unconscious or otherwise incapacitated by their wounds or sickness, and therefore incapable of defending themselves, and their condition has become apparent to the attacking force or should have been recognised in the circumstances.[373] Since in these cases enemy combatants are protected from direct harm, there is no reason why they could not be included, in principle, in the calculation of incidental harm under an extended proportionality rule.

V. EXTENDING PROPORTIONALITY TO NON-CIVILIAN PERSONNEL

Most commentators accept that the proportionality rule, as codified in Additional Protocol I and reflected in customary international law, is limited to civilian harm. Bill Boothby, Yoram Dinstein and Ian Henderson take this view,[374] amongst others.[375] However, several authors support the extension of the proportionality rule to military objectives benefitting from special protection by analogy. Professor Dinstein, for example, adopts this position and suggests that specially protected military objectives should be assimilated to civilians or civilian objects.[376] Bill Boothby and Wolff Heintschel von Heinegg suggest that a powerful argument can be made in favour of interpreting the rule to encompass incidental harm to protected enemy personnel.[377] Others have gone further.[378] Laurent Gisel, a legal advisor at

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372. It also reflects the position adopted in the original ICRC commentary to Geneva Convention I. See International Committee of the Red Cross, *Commentary on Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952) 136 ('[t]he meaning of the words 'wounded and sick' is a matter of common sense and good faith. They cover combatants who have fallen by reason of a wound or sickness of any kind, or who have ceased to fight and laid down their arms as a consequence of what they themselves think about their health. It is the fact of falling or laying down of arms which constitutes the claim to protection') (footnote omitted). On the synonymous use of the notion of wounded and *hors de combat*, see M Milikowsky, 'There Are No Enemies after Victory: The Laws against Killing the Wounded' (2015) 47 Geo J Int'l L 1221, 1223–41.

373. Of course, we should not forget that wounded and sick enemy combatants at all times are immune from attack if they clearly express an intention to surrender.

374. Boothby, *Law of Targeting*, 71 and 94–97; Dinstein, *Conduct of Hostilities*, 154, para 415 ('the LOIAC principle of proportionality has everything to do with injury/damage to civilians/civilian objects and nothing to do with combatant losses or damage to military objectives'); Henderson, *Contemporary Law of Targeting*, 206–07 ('any injury or loss of life caused to a combatant or to a military objective, even if unintended, is not collateral damage').

375. Eg M Sassòli, 'The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan' (2009) 85 Int'l L Stud 431, 440; Blum, 'Dispensable Lives', 131 ('[t]he principle of proportionality in jus in bello has never been interpreted, nor does its language suggest that it should be interpreted, as applying to enemy combatants'); Corn and others, 'Belligerent Targeting', 579 ('civilians are the exclusive beneficiaries of the rule's protections').

376. Dinstein, *Conduct of Hostilities*, 155, para 416. See also A Breitegger, 'The Legal Framework Applicable to Insecurity and Violence Affecting the Delivery of Health Care in Armed Conflicts and Other Emergencies' (2013) 95 Int'l Rev Red Cross 83, 108 and 113.

377. WH Boothby and WH von Heinegg, *The Law of War: A Detailed Assessment of the US Department of Defense Law of War Manual* (CUP 2018) 184–85.

378. Eg RJ Erickson, 'Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict' (1978) 19 Va J Int'l L 557, 572; International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 27–28, Final Report: Presented at the 77th International Law Association Conference, Johannesburg,

the ICRC, has argued that incidental harm caused to military medical personnel and wounded and sick combatants falls within the scope of the proportionality rule, properly construed, under both Additional Protocol I and customary international law.[379] This reflects the position of the ICRC itself. In its view, 'any assessment of the expected incidental harm under the rule of proportionality must take into account potential harm among all medical personnel and objects, including military medical ones'.[380]

The purpose of this section is to review the principal legal arguments that have been advanced in support of extending the proportionality rule to non-civilian harm. For the reasons we explain below, none of these arguments are convincing. Faced with this outcome, we revisit the liability of protected enemy personnel to incidental harm in order to clarify its legal basis and limits. We suggest that such personnel are liable to incidental injury as a consequence of attacks carried out against lawful military objectives, but that such harm must be justified with reference to the principle of military necessity. We believe that this approach offers a legally and intellectually more compelling rationale for applying proportionality considerations to enemy personnel benefiting from special protections.

A. Arguments advanced in favour of extending the proportionality rule

1. The object and purpose of Additional Protocol I

Relying on the law of treaties, Laurent Gisel has suggested that the rules governing the conduct of hostilities must take into account incidental harm suffered by all persons protected against direct attack, irrespective of their military or civilian status, as any other interpretation would contradict the object and purpose of Additional Protocol I.[381] This argument raises both methodological and substantive questions. The interpretation of Additional Protocol I is governed by the rules of treaty interpretation codified in articles 31 and 32 of the VCLT. Despite combining elements drawn from different schools of interpretation,[382] the starting point and ultimate object of interpretation is the actual text of a treaty. This is reflected in the general rule of interpretation set out in article 31 of the VCLT, which stipulates that a treaty is to be construed 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The interpretation of a treaty's terms thus takes priority over other, subsidiary means of interpretation.[383] As the International Court of Justice explained in the *Admission of a State to the United Nations* case,

> [i]f the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek

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South Africa, 7–11 August 2016, reprinted in (2017) 93 Int'l L Stud 322, 357–59.

379. Gisel, 'Incidental Killing'.
380. House of Commons Defence Committee, Written Evidence from the International Committee of the Red Cross, UK Armed Forces Personnel and the Legal Framework for Future Operations, Twelfth Report of Session 2013–14, Ev14, para 25, HC 931 (2013).
381. Ibid, 225–26.
382. Cf G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 BYIL 1, 1–2 (identifying the textual, subjective and teleological schools of interpretation). See also FG Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 ICLQ 318; Gardiner, *Treaty Interpretation*, 57–79.
383. VCLT, art 32.

to ascertain what the parties really did mean when they used these words.[384]

Recourse to the object and purpose of a treaty is not one of the 'other methods of interpretation' mentioned by the Court but forms an integral part of ascertaining the meaning of its terms under the general rule of interpretation. The relationship between the ordinary meaning of a treaty's terms and its object and purpose is therefore complementary, rather than hierarchical. Precisely for this reason, one may not override the other. An interpretation that construes the terms of a treaty in a manner that contradicts its object and purpose is difficult to sustain.[385] Similarly, appeals to a treaty's object and purpose cannot supersede the express meaning of its terms.[386] As we have seen earlier,[387] the meaning of articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I is free from ambiguity: the scope of the proportionality rule is confined to civilian harm and does not extend to collateral damage caused to military personnel and other military objectives. We have also seen that this meaning is consistent with the traditional scope of the rule and is confirmed by the drafting history of Additional Protocol I. Under these circumstances, relying on the object and purpose of the Protocol to extend the scope of articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) to non-civilian harm contradicts the express meaning of these provisions as well as the intentions of its drafters. Such a purposive reading would represent a revision, rather than an interpretation, of Additional Protocol I.[388]

Even if relying on the object and purpose of Additional Protocol I in the manner suggested by Gisel were permissible under the rules of treaty interpretation, it is questionable whether they actually support his argument. Determining the object and purpose of a treaty is a notoriously difficult undertaking.[389] In the case of the founding treaties of the law of armed conflict, there is a tendency to assume that their object and purpose is to maximise the protection of persons adversely affected by war.[390] Humanitarianism is certainly one of the principal drivers of the law, but it is not its sole concern or priority. If it were, the founding treaties would have proscribed all war. Instead, they regulate the conduct of warfare in an attempt to confine it within certain boundaries. The proportionality rule itself illustrates this point.[391] Gisel is therefore right to suggest that the object and purpose of the rules governing the conduct of hostilities, including

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384. *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 8. It should be noted that the Vienna Convention is not quite as strict, though: VCLT, art 32 sanctions the use of the *travaux préparatoires* to confirm the meaning of an interpretation arrived at under art 31.
385. Eg *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 15, para 445.
386. *Federal Reserve Bank v Bank Markazi* (2000) 36 Iran-US Claims Tribunal Rep 5, para 58 ('a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text'). See also *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua intervening)* (Judgment) [1990] ICJ Rep 92, paras 375–76; *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] ICJ Rep 53, paras 51–56; International Law Commission, Draft Articles on the Law of Treaties with Commentaries [1966] 2 YB ILC 172, 219. Further, see Jacobs, 'Varieties of Approach', 338; ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 428; O Dörr, 'Article 31: General Rule of Interpretation', in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 521, para 58.
387. See section III.A above.
388. Cf *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion, Second Phase) [1950] ICJ Rep 221, 229.
389. See I Buffard and K Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 Austrian Rev Int'l & Eur L 311; J Klabbers, 'Some Problems regarding the Object and Purpose of Treaties' (1997) 8 Finnish YB Int'l L 138.
390. Eg *Prosecutor v Tadić* (Appeals Chamber, Judgment) IT-94-1-T (15 July 1999), para 168; *Delalić*, para 266.
391. The rule accepts that collateral damage to civilians and civilian objects is inevitable and therefore imposes merely a maximum ceiling, rather than a comprehensive ban, on incidental civilian harm.

proportionality *stricto sensu*, is to find an 'appropriate balance between the principles of military necessity and humanity'.[392] Indeed, it is not unreasonable to treat this as the object and purpose of Additional Protocol I more generally.[393] However, this means that a re-interpretation of the proportionality rule to expand its scope with reference to the object and purpose of Additional Protocol I is actually a *non sequitur*.

The purpose of the conventional law of armed conflict is, in the words of the St Petersburg Declaration, to fix the 'limits at which the necessities of war ought to yield to the requirements of humanity'.[394] The terms of Additional Protocol I reflect whatever the negotiating States decided was the appropriate balance between military necessity and humanity. Relying on the object and purpose of Additional Protocol I to alter that balance defeats the very idea of codifying it in the first place and arrogates a law-making function to those who are meant to interpret and apply the law. Moreover, even if recourse is made to the object and purpose solely to guide the interpretation of ambiguous terms—rather than to override the meaning of clear provisions, as is the case here—it does not follow that such ambiguities must be resolved in favour of humanitarian considerations at the expense of military necessity. Such a bias contradicts the idea that the object and purpose of Additional Protocol I is to strike a *balance* between military necessity and humanity.

Nevertheless, Gisel suggests that excluding military medical personnel and wounded and sick combatants from the proportionality calculation would introduce an arbitrary distinction into the rules governing that conduct of hostilities.[395] This is so, we are told, because civilian and military medical personnel and civilian and military wounded and sick are immune from direct attack irrespective of their civilian or military status and therefore can be said to have the same 'value' under the principles of military necessity and humanity. Consequently, limiting the proportionality rule to civilian harm would distinguish between these persons on the basis of their civilian or military status, which Gisel suggests would be arbitrary in relation to the object and purpose of finding an appropriate balance between military necessity and humanity.[396] This argument rests on a false premise. If it was for the drafters of Additional Protocol I to determine where the appropriate balance between military necessity and humanity lies, then by definition the balance drawn by the individual provisions of Additional Protocol I cannot be inappropriate and thus arbitrary.[397]

In this respect, it is important to recognise that the law does not accord the same value to civilian and military medical personnel and to civilian and military wounded and sick. Civilians enjoy general protection against dangers arising from military operations,[398] yet

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392. Gisel, 'Incidental Killing', 225.
393. The *raison d'être* of Additional Protocol I is spelt out most clearly in its third preambular paragraph, which recalls the need to 'reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application'. Cf Sandoz, Swinarski and Zimmermann, *Commentary*, paras 25–6. The phrase 'provisions protecting the victims of armed conflicts' does not refer only to those rules that are directly concerned with the protection of persons affected by armed conflict, but also includes the rules governing the conduct of hostilities. See Summary Record of the 54th Plenary Meeting, 7 June 1977, Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, vol VII (1978), 165, paras 16–23. This confirms that the object and purpose of Additional Protocol I is the regulation of the conduct of hostilities more broadly, rather than maximising the protection of the victims of armed conflict more narrowly.
394. St Petersburg Declaration, Preamble.
395. Gisel, 'Incidental Killing', 225.
396. Ibid.
397. Lest we be accused of sophistry, the underlying question is this: must those who interpret Additional Protocol I accept the clear balance reflected in its terms, or may they invoke the legislative intent embodied in the object and purpose of the Protocol in order to revise those terms to suit their own tastes? For a spirited defense of the notion that treaties *'sunt servanda'*, see G Fitzmaurice, 'Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of it?' (1971) 65 AJIL 358.
398. Additional Protocol I, art 51(1).

this does not confer upon them absolute immunity against the effects of warfare.[399] In particular, the general protection conferred upon them includes the proportionality rule, meaning that civilians are protected against incidental harm only if it is excessive in relation to the concrete and direct military advantage anticipated. Causing non-excessive incidental harm to civilians is therefore permissible not because it is an exception to the general protection they enjoy against the dangers of military operations, but because civilians are not protected against such harm in the first place.[400] By contrast, any immunity that specially protected members of enemy forces enjoy from direct and indirect harm constitutes an exception to their general liability to attack and collateral damage. The two sets of protections are based on completely different rationales. Civilian medical personnel and wounded and sick civilians are protected against excessive incidental harm as a result of their general protection by virtue of being *civilians*, not by virtue of being medical personnel or being wounded or sick.[401] Consequently, there is no reason why members of the armed forces that qualify as medical personnel, wounded or sick should enjoy the same protections that civilians derive on the basis of their civilian status. It is not arbitrary to confer different levels of protection on civilians and military personnel finding themselves in comparable situations, and thus weigh military necessity and humanity differently, precisely because the underlying status of these two categories of persons is and remains different.

2. The general principle of proportionality

Behind the specific rules of the law of armed conflict we find, as Jean Pictet has put it, 'a number of principles which inspire the entire substance' of the law.[402] Proportionality is widely regarded as one of these principles.[403] Some have relied on proportionality as a general principle to suggest that belligerents must take into account collateral damage suffered by specially protected military personnel and objectives when calculating the proportionality of an attack. In their commentary to Additional Protocol I, Bothe, Partsch and Solf argue that proportionality as a general principle of the law of armed conflict is not restricted to the protection of the civilian population.[404] They suggest that for this reason, collateral damage caused to military medical units is subject to a proportionality requirement. Similarly, Rogier Bartels has argued that proportionality as a general principle is broader in its scope than the proportionality rule codified in Additional Protocol I. In his view, the 'principle underlying articles 52 and 57 of Additional Protocol I' applies to attacks that cause excessive collateral damage to protected military personnel.[405]

This line of argument is not convincing. According to Bothe, Partsch and Solf, the

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399. Cf ICRC, Report on the Protection of the Civilian Population, *Conference of Government Experts*, vol III, 31 ('it has to be stated that the norm of international law which establishes the general protection of the civilian population against the effects of military operations does not confer absolute immunity on it against the effects of attacks').
400. This is reflected in the structure of Additional Protocol I, art 51, which declares that the proportionality rule is one of the rules designed to give effect to the general protection conferred on civilians. Accordingly, proportionality *stricto sensu* reflects the content of the general protection and is not an exception to it. Cf Bothe, Partsch and Solf, *Commentary*, 341, § 2.2, n 1 ('[g]eneral protection as used in Section I of Part IV involves … a requirement to avoid excessive collateral loss or damage as a result of attacks on military objectives'); Sandoz, Swinarski and Zimmermann, *Commentary*, para 1923 (Additional Protocol I, art 51 'explicitly confirms the customary rule that innocent civilians must be kept outside hostilities *as far as possible*') (emphasis added).
401. The link drawn between civilian and military medical personnel and between civilian and military wounded and sick is therefore a false one. See also section V.A.3 below.
402. J Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985) 59.
403. See section II.B above.
404. Bothe, Partsch and Solf, *Commentary*, 128, § 2.2.
405. Bartels, 'Principle of Proportionality', 304.

principle of proportionality applies to incidental harm caused to military medical units because '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'.[406] It is not immediately clear what, according to these authors, constitutes the 'problem' that needs to be addressed. One issue that was clearly on their minds is the fact that incidental harm to specially protected military personnel and objectives is an inevitable feature of warfare just as much as collateral damage to civilians and civilian objects is.[407] The law would not be viable if it rendered protected military objectives immune from incidental harm. To support this argument, Bothe, Partsch and Solf point to the existence of sickbays on warships, stating that '[i]f it were inadmissible to subject medical units to collateral damage, no attempt to sink a warship with a sickbay aboard would be permissible'.[408] This is a powerful reason for accepting that military objectives benefiting from special protection are liable to incidental harm. However, it does not follow that they must also be protected from excessive collateral damage. The conduct of hostilities is perfectly viable, and the 'problem' solved, even without imposing an upper limit on the amount of incidental harm to which protected military objectives may be exposed. Of course, shielding such military objectives from excessive incidental harm would be in line with the generic notion of proportionality, which demands that there should be a reasonable relationship between means and ends. Yet the question is not whether extending proportionality *stricto sensu* to non-civilian harm is compatible, in theory, with the general principle of proportionality—it clearly is. The question is whether the general principle has the effect of extending proportionality *stricto sensu* to non-civilian harm as a matter of existing law. Two variants of the argument must be distinguished in this respect.

The first variant postulates that the proportionality rule codified in Additional Protocol I represents only one aspect of a broader, uncodified proportionality rule that prohibits causing excessive incidental harm to civilian and non-civilian persons and objects. This appears to be the position taken by Bartels. In essence, this argument suggests that the customary proportionality rule is wider in scope than the conventional one. We have already examined this matter and found it not to be the case: the customary and conventional rule are identical in scope.[409] The second variant, which appears to be the one adopted by Bothe, Partsch and Solf, holds that the general principle of proportionality alters the scope of proportionality *stricto sensu* by extending it to non-civilian harm. There is a degree of circularity in this argument. Proportionality *stricto sensu* is widely regarded as one of the main manifestations of proportionality as a general principle of the law of armed conflict, yet this general principle is now being relied upon to expand the scope of the rule from which it supposedly derives. Leaving the circularity aside, there is little evidence in state practice to support this variant of the argument. For example, we may recall that the Canadian manual defines the principle of proportionality to involve the weighing of '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'.[410] However, there is no trace of this broader approach in the manual's definition of the 'proportionality test', which faithfully replicates the terms of articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I.[411] If the general principle of proportionality really did expand the scope of proportionality *stricto sensu*, we would expect to see this widely reflected in national military manuals and other statements

406. Bothe, Partsch and Solf, *Commentary*, 128, § 2.2.
407. Ibid, 341, n 4 ('[u]navoidable collateral casualties of civilians and otherwise protected persons is inherent in the nature of warfare').
408. Ibid, 128, § 2.2.
409. See section III.C above.
410. Office of the Judge Advocate General, *Law of Armed Conflict*, § 204(5) (emphasis added).
411. Ibid, §§ 414, 414, 417(1)(c) and 716(3).

of the rule, yet this is not the case.

3. Specially protected military personnel cannot be less protected than civilians

In certain fields, the special protections accorded to military personnel are more stringent than the general protection enjoyed by civilians against the dangers arising from military operations. For example, while the protection of military medical establishments and units ceases only after due warning has been given,[412] no such warning needs to be issued before belligerents may attack civilians directly participating in hostilities.[413] Based on this, Laurent Gisel argues that it would contradict the system of special protection to claim that military personnel subject to special protection may benefit from fewer safeguards than civilians.[414] This argument does not stand up to closer scrutiny.

As Bill Boothby points out in relation to civilian objects subject to special protection, '[t]he adjective "special" implies that there is an identifiable feature to the protection that in some way exceeds that accorded to civilian objects in general'.[415] For example, civilian schools,[416] the natural environment[417] and cultural objects[418] enjoy protections that in some respects extend beyond the general protection conferred on other civilian objects. From this perspective, special protections may be described as a form of enhanced protection.[419] However, an entirely different logic is at work in the case of military objectives. Military objectives do not enjoy general protection against dangers arising from military operations. Consequently, the legal protection conferred upon certain military objectives is 'special' not because it grants them a form of enhanced protection compared to a baseline of general protection, but because it affords them more favourable treatment in comparison to other military objectives that remain liable to attack. There is no reason, therefore, why the special protections enjoyed by military personnel must exceed the general protection enjoyed by civilians. The two are unrelated.

Claims to the contrary overlook the fact that the content of special protection varies across different contexts and beneficiaries. For example, civilian internees and prisoners of war find themselves in broadly similar circumstances. Yet civilians in occupied territory may be interned only if 'imperative reasons of security' justify this measure,[420] whereas prisoners of war may be interned irrespective of such considerations.[421] The fact that specially protected military objectives may be less protected than civilians is not counterintuitive at all,[422] but reflects the logic of the principle of distinction. In fact, what is counterintuitive is to suggest that civilians and military personnel falling within the same class of protected persons, for instance the wounded and sick, must necessarily enjoy the same level of

412. Geneva Convention I, art 21.
413. Pursuant to Additional Protocol I, art 51(3), civilians directly participating in hostilities do not benefit from any of the protections set out in Section I of Part IV of Additional Protocol I, including the duty to give effective advance warning under art 57(2)(c). Consequently, while civilians directly participating in hostilities retain their civilian status, they do not have to be warned about an attack that may affect them.
414. Gisel, 'Incidental Killing', 221–22.
415. Boothby, *Law of Targeting*, 232.
416. Additional Protocol I, art 52(3).
417. Ibid, art 35(3).
418. Ibid, art 53.
419. Cf Geneva Convention IV, art 16(1) ('[t]he wounded and sick, as well as the infirm, and expectant mothers, shall be the object of *particular* protection and respect') (emphasis added).
420. Ibid, art 78.
421. Cf Geneva Convention III, art 21.
422. Gisel, 'Incidental Killing', 222.

protection.[423] Wounded and sick civilians benefit from special protection *on top* of their general protection, whereas wounded and sick military personnel benefit from special protection *despite* their general liability to attack. Wounded and sick civilians are protected both against direct attacks and against excessive incidental harm as a consequence of their general protection against the dangers of military operations. By qualifying as wounded or sick, military personnel do not become civilians. Accordingly, the fact that wounded and sick civilians are protected against excessive incidental harm as a result of their general protection does not mean that wounded and sick military personnel must be protected against excessive incidental harm on account of their specially protected status. There is simply no logical connection here.

4. Specially protected persons cannot be less protected than objects

As an alternative argument, Gisel suggests that military medical units do not meet the definition of a military objective under article 52(2) of Additional Protocol I. An object constitutes a military objective provided that it makes an effective contribution to the enemy's military action by its nature, location, purpose or use and its total or partial destruction, capture or neutralisation offers a definite military advantage in the circumstances ruling at the time. Gisel denies that military medical units make an effective contribution to enemy military action and that their destruction can be considered to offer a definite military advantage.[424] In turn, this means that military medical units are civilian objects and as such fall within the ambit of the proportionality rule. If we accept that it would be wrong for the law to accord greater levels of protection to military medical *objects* than to military medical *personnel*, it follows that military medical personnel must benefit from the same protection against excessive incidental harm as military medical units do under the preceding analysis.[425] This intricate argument involves several steps, but at its foundation lies the claim that military medical units do not make an effective contribution to enemy action and that their destruction offers no definite military advantage. This claim is mistaken, rendering the rest of the argument unsustainable.

Gisel does not explain why, in his view, military medical units do not make an effective contribution to military action or why their destruction does not offer a definite military advantage. Presumably, the threshold of 'effectiveness' and 'definiteness' are not met. It is broadly accepted that the notion of a 'definite' military advantage entails a concrete and perceptible military advantage rather than a hypothetical and speculative one.[426] By contrast, it is less clear what an 'effective' contribution to enemy military action must entail.[427] It seems logical to assume, *a contrario*, that an object which makes an 'ineffective' contribution to military action does not qualify. However, effectiveness and ineffectiveness are relative concepts. An armoured personnel carrier may be totally ineffective in an anti-aircraft role, but it may lend effective support to enemy ground forces. An antiquated tank may be no match against a modern equivalent, but it may still make an effective contribution against dismounted troops. A disabled aircraft may only be a source of spare parts, but those parts may keep other aircraft flying.[428] Given the many different forms in which an object may contribute to enemy action, some care is required before one can safely conclude that an object is incapable of making *any kind* of effective contribution at all. Moreover, it is the

423. Cf ibid, 224–25.
424. Ibid, 219–20.
425. Ibid, 221.
426. DoD, *Law of War Manual* (December 2016), § 5.6.7.3; MoD, *Joint Service Manual*, para 5.4.4(j). See Bothe, Partsch and Solf, *Commentary*, 352, § 2.4.6; Sandoz, Swinarski and Zimmermann, *Commentary*, para 2024.
427. See Jachec-Neale, *Military Objectives*, 83–110.
428. We owe the last example to Henderson, *Contemporary Law of Targeting*, 56.

effectiveness of the contribution, not the effectiveness of the military action itself, that matters. An object that makes an effective contribution to a totally futile military action, such as using a dinghy in an attempt to ram an aircraft carrier, could still qualify as a military objective, provided that the other conditions of the definition are satisfied.

Military medical units perform a humanitarian function, yet it strains credibility to suggest that this function is devoid of military benefits. The point was made with unusual clarity in a report submitted to the plenary assembly of the diplomatic conference that drafted the Geneva Conventions of 1949. The key passage merits quoting at length:

> [a]t present the Medical Service is an integral part of the armed forces, and is closely bound up with every aspect of their activity. The part it plays in the recruiting and selection of the troops, the supervision which it exercises over training, the numerous preventive measures which it takes in the field of hygiene and epidemiology, all these functions result in the fact that it makes an important contribution to the creation and maintenance of the fighting value of the troops. The efficacity of its power of restoring to physical fitness has even become so great in the case of a sufficiently prolonged conflict that it is thanks to the Medical Service that the numerical strength of the troops is maintained; it may even be said that the concluding battles are won by former wounded who have been cured and sent back to the front.
>
> It is tempting to conclude from these facts that the enemy would have every reason to diminish the efficiency of the Medical Service, either by reducing its numerical size, by making prisoners of war of those of its members who fall into his hands, or by limiting its activity by ceasing to protect it on the field of battle. It is only a step from such a realization to the planning of systematic bombing of medical units, or the organization of raids on these units with the deliberate intention of capturing the greatest possible number of the members of the Medical Service.
>
> There is no need of long arguments to prove that, if such a point of view were adopted, it would be the negation of all the work done by the Conventions to protect the wounded and sick.[429]

It is apparent from this passage, which has lost none of its relevance in the face of contemporary warfare, that the special protections afforded by the Geneva Conventions of 1949 to military medical personnel and units were largely meant to counteract the fact that such personnel and units do make an effective contribution to an adversary's military action and that their destruction may well offer a definite military advantage. From a functional perspective, military medical personnel and units play a role that is in some respects comparable to the role played by combat service support personnel and units. While it would be too crude an analogy to suggest that field hospitals fix soldiers just like mechanics fix tanks, the fact is that both contribute to preserving a force's fighting power. As Ian Henderson rightly points out, a military medical unit carrying out its ordinary medical function therefore 'prima facie meets the test for a military objective' under article 52(2) of Additional Protocol I.[430] The fact that such medical units contribute to military action only indirectly is not relevant,[431] as long as they do so effectively. There can be no serious doubt that maintaining the combat effectiveness of military personnel constitutes an effective contribution to military action, irrespective of the impact this contribution has on the effectiveness of the military action itself.[432] Nor can there be any serious doubt that the

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429. Report of Committee I to the Plenary Assembly of the Diplomatic Conference of Geneva, in Federal Political Department, *Final Record of the Diplomatic Conference of Geneva of 1949*, vol II, Sec A (1949), 183, 85.
430. Henderson, *Contemporary Law of Targeting*, 195. In response, Gisel, 'Incidental Killing', 220, n 20, suggests that Henderson's argument leads to absurdity, since it would imply that civilian medical units would not merit special protection unless they were military objectives too. This counter-argument is not well founded. As we indicated earlier (section V.A.1 above), the special protections of civilians and civilian objects apply in addition to their general protection, whereas the special protections of military objectives apply despite their general liability to attack.
431. Bothe, Partsch and Solf, *Commentary*, 365, § 2.4.3 (an effective contribution to military action 'does not require a direct connection with combat operation').
432. In other words, a military medical unit makes an effective contribution to military action because its very function is to strengthen the combat effectiveness of the enemy, regardless of whether it treats a

destruction, capture and neutralisation of military medical units is capable, in principle, of offering a definite military advantage. For example, destroying a fixed medical establishment may force the enemy to rely on mobile medical units that are less effective and may consume more resources. There is nothing hypothetical or speculative about such a military advantage.

To avoid any misunderstandings, let us emphasise that we are not suggesting that military medical personnel and units should be treated as military objectives liable to attack. Rather, our point is that they benefit form special protections under the law of armed conflict *precisely because* without those protections they would, prima facie, qualify as military objectives subject to direct attack. Accordingly, since military medical personnel and units are not civilians and civilian objects, they are not covered by the proportionality rule as traditionally understood.

5. *Safeguarding the effectiveness of the law*

The reality of warfare is such that incidental harm to the civilian population cannot be avoided completely. Faced with this fact, belligerents would not be able to conduct their operations lawfully if the law of armed conflict were to protect civilians and civilian objects against collateral damage in absolute terms. As the Prosecution conceded in the *Galić* case,[433] the law must accept that at least some degree of incidental civilian harm is permissible if it is to serve as a viable framework for regulating the conduct of hostilities.[434] The link between the inevitability of incidental harm and its permissibility has long been recognised. For example, the drafters of Hague Convention IX Concerning Bombardment by Naval Forces in Time of War of 1907 decided that commanders should not bear responsibility for 'any unavoidable damage' resulting from lawful naval bombardments,[435] since prohibiting the bombardment of undefended localities in a manner that was 'too absolute would be placing commanders of naval forces in a position where it would be impossible to obey it'.[436] In the context of aerial bombardment, Hugh Trenchard, Marshal of the Royal Air Force, expressed the point in the following terms in 1928:

> The fact that [an air attack against a military objective may result in the incidental destruction of civilian life and property] is no reason for regarding the bombing as illegitimate, provided that all reasonable care is taken to confine the bombing to the military objective. Otherwise a belligerent would be able to secure complete immunity for his war manufactures and depots merely by locating them in a large city, which would, in effect, become *neutral* territory—a position which the opposing belligerent would never accept.[437]

The modern proportionality rule is grounded in this reality. By imposing an upper ceiling on the amount of incidental harm that may be inflicted on the civilian population, the rule recognises that collateral damage falling below this threshold is permitted.[438] The fact that

small or large number of wounded and sick combatants and regardless of how valuable, from a military point of view, those wounded and sick are to the enemy.

433. *Galić* (2006), para 144 ('lawful combat would, in effect, become impossible').
434. Cf L Doswald-Beck, 'Implementation of International Humanitarian Law in Future Wars' (1998) 71 Int'l L Stud 39, 45 ('[b]elief in the appropriateness of humanitarian rules is the single most important factor for effective implementation of the law').
435. However, as we noted earlier (n 7 above), belligerents must adopt all feasible precautions to avoid, or in any event minimise, such incidental harm in accordance with Additional Protocol I, art 57(2)(a)(ii) and customary international law.
436. Third Commission, Third Meeting, 8 August 1907 in JB Scott, *Proceedings*, vol III, 343, 348 (France).
437. H Trenchard, Memorandum by the Chief of the Air Staff for the Chiefs of Staff Sub-Committee on The War Object of an Air Force, 2 May 1928, in C Webster and N Frankland (eds), *The Strategic Air Offensive Against Germany 1939-1945: Annexes and Appendices*, vol 4 (HMSO 1961) 71, 73.
438. See n 43 above. This is why some negotiating states opposed its codification in Additional Protocol I:

civilians do not enjoy absolute protection against dangers arising from military operations is therefore in large measure a consequence of proportionality *stricto sensu*.[439]

Seen from this perspective, one benefit of extending the proportionality rule to non-civilian harm is that doing so would confirm that specially protected military personnel are, in principle, liable to incidental harm. If collateral damage to protected enemy personnel and objects is an inevitable feature of warfare, then inflicting at least some degree of incidental harm upon them must be permissible, otherwise the lawful conduct of military operations becomes impossible. We are thus compelled, it seems, to extend proportionality *stricto sensu* to non-civilian harm in order to safeguard the effectiveness of the law. Bothe, Partsch and Solf rely on precisely this reasoning in support of an expansive interpretation of proportionality.[440] However, as we have indicated earlier,[441] their argument proves too much. Since civilians are immune from direct attack and enjoy general protection against dangers arising from military operations, their liability to incidental harm needs to be demonstrated. However, military personnel and objectives subject to direct attack are also liable to indirect attack. There is no need, therefore, to draw on proportionality to establish their underlying liability to incidental harm. At the most, the proportionality rule might prove that military personnel and objectives remain liable to incidental injury even when they are subject to special protections. However, the law already recognises that protected military personnel and objects are subject to incidental harm.

Military necessity, says the Lieber Code, admits the destruction of the life or limb of armed enemies and of 'other persons whose destruction is incidentally unavoidable in the armed contests of the war'.[442] This principle renders all persons other than armed enemies, including protected enemy personnel, such as medical personnel and *hors de combat* combatants, liable to incidental harm. In the past, this point was widely recognised.[443] The government representatives drafting the Brussels Declaration of 1874, for example, were

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eg see Summary Record of the 31st Meeting, Committee III, 14 March 1975, *Official Records of the Diplomatic Conference*, vol XIV, 299, para 42 (Romania: the proportionality rule 'amounted to legal acceptance of the fact that one part of the civilian population was to be deliberately sacrificed to real or assumed military advantages and it gave military commanders the power to weigh their military advantage against the probable losses among the civilian population during an attack against the enemy'); Summary Record of the 41st Plenary Meeting, 26 May 1977, Annex, *Official Records of the Diplomatic Conference*, vol IV, 175, 236 (Romania: the rule 'permits attacks causing loss of human life among the civilian population').

439. Cf Eritrea-Ethiopia Claims Commission, Partial Award, para 97 ('[a]ll of these casualties and losses were regrettable and tragic consequences of the war, but they do not in themselves establish liability for [indiscriminate aerial bombardment] under international law'); *Ermittlungsverfahren gegen Oberst Klein*, 63 (the protection of civilians is not unlimited); International Criminal Court, Office of the Prosecutor Response to Communications Received Concerning Iraq, 5, 9 February 2006 ('the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime'); ICTY, *Final Report to the Prosecutor*, para 51; *Shimoda*, 238 ('it is naturally anticipated that the aerial bombardment of a military objective is attended with the destruction of non-military objectives or casualty of non-combatants; and this is not illegal if it is an inevitable result accompanying the aerial bombardment of a military objective').

440. Bothe, Partsch and Solf, *Commentary*, 128, § 2.2.

441. See section V.A.2 above.

442. US Department of War, Instructions for the Government of the Armies of the United States in the Field, General Orders No 100, 24 April 1863 (Lieber Code), art 15. This principle has been affirmed repeatedly: eg *Hostages Trial*, 66; War Department, *Rules of Land Warfare* (1917), § 12; *Prosecutor v Bemba* (Trial Chamber, Judgment) ICC-01/05-01/08 (21 March 2016), paras 123–24.

443. Eg Hall, *Treatise on International Law*, § 128 ('though non-combatants are protected from direct injury, they are exposed to all the personal injuries indirectly resulting from military or naval operations directed against the armed forces of the state, whether the mode in which such operations are carried out by reasonably necessary or not'); Lawrence, *Principles of International Law*, 492 ('[i]t is obvious that in the hurry and turmoil of an engagement incidental damage must frequently be done to the persons and things connected with the hospital service on either side').

agreed that non-combatants, including medical and religious personnel, 'are exposed to the same vicissitudes and dangers of war as the corps to which they are attached, but that they can only be engaged in isolated combat in consequence of a mistake'.[444] According to the sixth edition of the British *Manual on Military Law* published in 1914, there is 'no just cause for complaint … if in the execution of their duty members of the medical personnel and army chaplains are accidentally killed or wounded; they are only protected from deliberate attack'.[445] The point was reiterated in the 1958 edition of the manual.[446] In a similar vein, successive editions of the United States Army's manual on *The Law of Land Warfare* interpreted the duty to 'respect and protect' to mean that military medical personnel and chaplains must not be knowingly attacked, but that 'the accidental killing or wounding of such personnel, due to their presence among or in proximity to combatant elements actually engaged, by fire directed at the latter, gives no just cause for complaint'.[447]

The states that negotiated Additional Protocol I shared these understandings. As originally formulated by the ICRC, the draft of what became article 41 of Additional Protocol I prohibited the killing or injuring of enemy *hors de combat*.[448] The delegates decided to revise this wording and prohibit making *hors de combat* the object of attack so as 'to make clear that what was forbidden was the deliberate attack against persons *hors de combat*, not merely killing or injuring them as the incidental consequence of attacks not aimed at them *per se*'.[449] Drawing these different strands together, the US Air Force Pamphlet 110–31, published in 1976, declared that all military personnel and objects protected under the Geneva Conventions of 1949 are liable to incidental harm.[450] More recently, the Department of Defense *Law of War Manual* confirmed that incidental harm to wounded, sick or shipwrecked enemy personnel[451] and to military medical and religious personnel[452] is not prohibited.

The underlying principle is clear, notwithstanding the absence of a single norm or restatement expressing it in general terms: military personnel benefitting from special protections are liable to incidental harm notwithstanding their special protections. Consequently, there is no need to extend the application of the proportionality rule to protected enemy personnel merely to confirm their liability to incidental harm.

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444. Protocol No 13 of the Committee appointed by the Conference, 17 August 1874, in Correspondence respecting Brussels Conference on Rules of Military Warfare, Miscellaneous, No 1, C.1128, 257, 258 (1875).
445. War Office, *Manual of Military Law* (6th edn, HMSO 1914) 262, para 184. See also JE Edmonds and L Oppenheim, *Land Warfare: An Exposition of the Laws and Usages of War on Land, for the Guidance of Officers of His Majesty's Army* (HMSO 1912) para 184.
446. War Office, *The Law of War on Land*, para 346, n 1 ('[t]he purely accidental killing or wounding of protected personnel when in or near the area of combat is not a legitimate cause for complaint'). See also Edmonds and Oppenheim, *Land Warfare*, para 396 (*parlementaires* and their party).
447. War Department, *Rules of Land Warfare* (1917), § 12; War Department, *Rules of Land Warfare* (Government Printing Office 1934) § 183; War Department, *Rules of Land Warfare* (Government Printing Office 1940), FM 27-10, § 182; Department of the Army, *Law of Land Warfare*, § 225. See also US Army Command, General Staff College, *Military Aid to the Civil Power* (General Service Schools Press 1925) 43 ('except as may be incidentally unavoidable in the armed contests of war, it is a crime to kill or commit violence against non-combatants and private individuals not in arms').
448. ICRC, *Draft Additional Protocols*, art 38.
449. Report of Committee III, Third Session (21 April–11 June 1976), *Official Records of the Diplomatic Conference*, vol XV, 373, para 23.
450. Department of the Air Force, *Conduct of Armed Conflict*, § 5-5(a) ('[t]he protection accorded to [specially protected] persons and objects means they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper function. The accidental injury of such personnel, or damage to objects, due to their presence among or in proximity to military targets actually attacked, by fire directed against the latter, gives no just cause for complaint').
451. DoD, *Law of War Manual* (December 2016), §§ 7.3.3.1 and 17.15.1.2.
452. Ibid, §§ 7.8.2.1 and 17.15.1.2. See also ibid, §§ 7.10.1.1 and 17.15.2 regarding medical units and transports.

6. The Martens Clause

In a recent paper, Geoffrey Corn and Andrew Culliver argue that a qualified duty to extend the proportionality rule to protected military objects and personnel may be derived from the Martens Clause.[453] The modern restatement of the Clause may be found in article 1(2) of Additional Protocol I,[454] which declares as follows:

> [i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Describing the Martens Clause as an important 'gap filler' designed to address areas of uncertainty in the law of armed conflict, Corn and Culliver argue, in essence, that the Clause could provide a rationale and normative foundation for extending the proportionality rule to non-civilian harm in certain circumstances.[455] They suggest that relying on the Martens Clause in this manner would allow the proportionality rule to be applied with greater nuance compared to what competing approaches permit. Accordingly, Corn and Culliver propose that the Martens Clause should trigger the application of the proportionality rule only where 'elemental considerations of humanity' are at play.[456] Such considerations would apply where protected enemy personnel are present in 'mature medical treatment locations', but not where they are incidentally harmed in the midst of active combat engagements.[457]

While this approach successfully reconciles humanitarian concerns with operational logic, it is less convincing from a normative perspective. The meaning and effect of the Martens Clause is subject to disagreement.[458] In particular, opinions diverge as to whether the Clause has recognised the 'principles of humanity' and the 'dictates of public conscience' as distinct sources of law,[459] whether it merely serves as a reminder that, beyond their conventional obligations, states remain bound by the customary principles of the law of

453. Corn and Culliver, 'Wounded Combatants'. See also Lederman, 'Quick Response'.

454. The Clause originally appeared in the preamble of the Hague Regulations 1899, where it was formulated in the following terms:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

The Clause has since been restated in the preamble of the Hague Regulations 1907, Geneva Convention I, art 63, Geneva Convention II, art 62, Geneva Convention III, art 142, Geneva Convention IV, art 158 and the preambles of Additional Protocol II and the Conventional Weapons Convention. On the background of the Clause, see VV Pustogarov, 'The Martens Clause in International Law' (1999) 1 J History Int'l L 125; R Giladi, 'The Enactment of Irony: Reflections on the Origins of the Martens Clause' (2014) 25 EJIL 847.

455. Corn and Culliver, 'Wounded Combatants', 464–66.

456. Ibid, 465.

457. Ibid.

458. See G Distefano and E Henry, 'Final Provisions, Including the Martens Clause', in Clapham and others, *The 1949 Geneva Conventions*, 155, 183–88. For a range of views, see R Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 37 Int'l Rev Red Cross 125; A Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 EJIL 187; T Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 AJIL 78; E Crawford, 'The Modern Relevance of the Martens Clause' (2006) 6 ISIL YB Int'l Human & Refugee L 1; M Salter, 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause' (2012) 17 J Conflict & Security L 403.

459. Eg *Nuclear Weapons*, 405–09 (dissenting opinion by Judge Shahabuddeen). See also Salter, 'Reinterpreting', 421–32.

armed conflict,[460] or whether its real purpose lies somewhere in-between these two extremes and consists of guiding the interpretation of the law.[461] Corn and Culliver press the Martens Clause into a quasi-legislative function to increase the scope of an existing treaty rule in an effort to close a perceived gap in the law. This reflects the broadest and most controversial use of the Clause. As such, it comes up against the force of countervailing authority, including the *Kupreškić* case, where the ICTY Trial Chamber declared that the Martens Clause 'may not be taken to mean that the 'principles of humanity' and the 'dictates of public conscience' have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice'.[462] Leaving aside such principled objections against employing the Martens Clause for quasi-legislative purposes,[463] its use in the present context is barred by its own terms. The Clause applies in cases not covered by Additional Protocol I, other international agreements or the law of armed conflict more generally. However, the present case is covered by articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I. Rather than being faced with a gap in the law, we are confronted by the fact that the proportionality rule as codified in Additional Protocol I is limited to civilian harm. We have shown that this is not a mere oversight, an editorial omission or a drafting error, but a deliberate choice by the States that negotiated the text, confirmed by their corresponding practice and *opinio juris* under customary international law.[464] Under these circumstances, invoking the Martens Clause to broaden the scope of proportionality *stricto sensu* amounts to an exercise in treaty revision, not gap filling. This cannot be reconciled with the terms of the Clause and raises similar objections as attempts to revise the scope of the proportionality rule with reference to the object and purpose of Additional Protocol I.[465]

Nor is Corn and Culliver's attempt to justify recourse to the Martens Clause on the basis that it permits a more nuanced approach entirely convincing. It is difficult to see why the 'principles of humanity' and the 'dictates of public conscience' should compel the application of the proportionality rule to non-civilian harm solely in situations where 'elemental considerations of humanity' are involved, as Corn and Culliver insist.[466] The authors introduce this threshold in order to prevent the proportionality rule from applying to enemy military objects and personnel in situations of active combat. In doing so, they essentially seek to avoid the full implications of their own reliance on the Martens Clause. While it is perfectly legitimate to set limits to the logic of humanitarianism, such limits can hardly be justified under the Martens Clause itself. The Clause either imposes a duty to extend proportionality *stricto sensu* to non-civilian harm or it does not. If it does, the application of the proportionality rule to non-civilian harm in the midst of combat depends on whatever the 'principles of humanity' and the 'dictates of public conscience' demand. This question is left unanswered by Corn and Culliver's reasoning.

Revisiting and clarifying the circumstances in which the proportionality rule may apply to non-civilian harm offers a more coherent way of reconciling humanitarian and operational considerations. As we have shown, the proportionality rule can apply only to persons who are immune from direct attack. This limits the range of enemy personnel who

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460. Eg *Nuclear Weapons*, Verbatim Records, CR/95/34 (15 November 1995), 78 (US) (the Martens Clause does not 'transform public opinion into rules of customary international law. Rather, it simply makes clear the important protective role of the law of nations and clarifies that customary international law may independently govern cases not explicitly addressed by the Conventions').
461. Eg Cassesse, 'Martens Clause', 212–15.
462. *Kupreškić*, para 525. See also Letter dated 16 June 1995, para 3.58.
463. Cf Meron, 'Martens Clause', 88.
464. See section III above.
465. See section V.A.1 above.
466. Corn and Culliver, 'Wounded Combatants', 465.

may, in principle, benefit from proportionality *stricto sensu*.[467] We have also shown that the law does not require belligerents to afford special protections to enemy personnel merely because there are 'reasons to believe' that they are entitled to those protections.[468] Rather, protections are due to enemy personnel whenever belligerents have ascertained their protected status before launching an attack or because their protected status has become apparent during the course of an ongoing attack. The duty of belligerents to afford special protection to enemy personnel in situations of active combat therefore is not absolute but circumscribed by the extent of their precautionary duties. The scope of these duties takes full account both of humanitarian and of operational considerations.

7. The duty to 'respect and protect'

Speaking in 2013, the Vice-President of the ICRC suggested that belligerents are bound to take into account incidental harm caused to military medical personnel and *hors de combat* combatants in their proportionality calculations as part of their 'central obligation to "respect and protect" these persons'.[469] Laurent Gisel has developed this point in greater detail, arguing that the duty to 'respect and protect' medical personnel and enemy wounded and sick encompasses a prohibition of exposing them to excessive incidental harm.[470] This is so, according to Gisel, because there is no reason why the obligation to 'respect and protect' should be limited to a prohibition of direct attacks and 'not extend to all the rules on the conduct of hostilities'.[471] The new ICRC Commentaries to the First and Second Geneva Conventions adopt the same position. The Commentary to the First Convention declares that 'the obligation to respect imposes an obligation not to directly or indiscriminately attack'[472] and affirms the application of the proportionality rule to enemy wounded and sick as follows:

> in view of the specific protections accorded to the wounded and sick, namely the obligation to respect (and to protect) them in all circumstances, *a fortiori* they should also benefit from the protection accorded to civilians. In other words, if civilians are to be included in the proportionality assessment all the more so should the wounded and sick. Indeed, if the wounded and sick were not to be considered for purposes of the proportionality principle, their presence in the vicinity of legitimate military objectives would be legally irrelevant. However, this would contradict the explicit obligation to respect them in all circumstances and the basic rationale of according special protection to them. It would be unreasonable to consider that direct or indiscriminate attacks against the wounded and sick would be strictly prohibited and would amount to a grave breach, while incidental harm and even excessive incidental casualties would not be prohibited.[473]

The Commentary to the Second Convention extends this reasoning to shipwrecked personnel,[474] subject to a minor variation.[475] In addition, the two Commentaries suggests that the duty to 'respect' entails an obligation not to attack military medical personnel, chaplains, the religious, medical and hospital personnel of hospital ships and their crews in

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467. See section IV.B above.
468. See section IV.B.7 above.
469. C Beerli, ICRC Vice-President, Vulnerabilities in Armed Conflicts, Keynote Address at the 14th Bruges Colloquium (17 October 2013) <http://www.icrc.org/eng/resources/documents/statement/2013/10-18-protected-person-bruges.htm>.
470. Gisel, 'Incidental Killing', 222.
471. Ibid.
472. ICRC, *Commentary on the First Geneva Convention*, para 1354.
473. Ibid, para 1357.
474. ICRC, *Commentary on the Second Geneva Convention*, paras 1400 and 1403.
475. It suggests (ibid, para 1403) that *a fortiori* the wounded, sick and shipwrecked should benefit from the protection accorded to medical objects too. We have dismissed this argument in section V.A.4 above.

violation of the principle of proportionality.[476]

The reasoning offered in the passage quoted above is not convincing. In suggesting that the special protection accorded to sick and wounded should *a fortiori* include the protections accorded to civilians, the ICRC Commentary appears to be inspired by Gisel's claim that protected civilians and military personnel have the same 'value' under the principle of military necessity and humanity.[477] As we have explained,[478] this overlooks the fact that the special protections enjoyed by wounded and sick civilians are additional to their general protection against dangers arising from military operations, whereas the special protections accorded to wounded and sick military personnel operate as an exception to their general liability to attack. Since civilians benefit from the prohibition of excessive incidental harm on account of their general protection, in other words by virtue of their civilian status, the fact that civilians and military personnel may both qualify as wounded and sick presents no reason for extending the proportionality rule to protected military personnel. The *a fortiori* reasoning is therefore misplaced. Corn and Culliver suggest that the ICRC's argument suffers from an additional logical flaw.[479] If the duty to 'respect and protect' shields military personnel from direct and indirect harm, whereas the proportionality rule implicitly renders individuals liable to incidental harm, then proportionality can only operate as an exception to the duty to 'respect and protect'. If this is so, the proportionality rule cannot be derived from the duty to 'respect and protect', contrary to what the ICRC suggests. However, this objection is predicated on the assumption that the duty to 'respect and protect' prohibits all incidental harm. We will examine below whether this is in fact the case.[480]

The Commentary also claims that the presence of wounded and sick military personnel in the vicinity of legitimate military objectives would be legally irrelevant if they were not covered by the proportionality principle. This is true, but it merely amounts to saying that the principle must apply or else it would not apply. Nor is it more convincing when the Commentary argues that not extending the proportionality rule to wounded and sick enemy personnel would contradict the obligation to respect them 'in all circumstances'. While the duty to 'respect and protect' is often said to apply 'at all times and in all places',[481] the obligations it imposes are not absolute. Nor do they apply in a unitary manner across different contexts. For example, should they engage in acts harmful to the enemy outside their humanitarian duties, military medical and religious personnel retain their status as non-combatants, but lose their protection from direct attack.[482] Belligerents are thus not obliged to 'respect and protect' them literally under *all* circumstances. Similarly, in the context of an ongoing attack, the attacking force is bound to comply with the duty to 'respect and protect' only if the protected status of the target has 'become apparent'.[483] This means that it is possible for enemy combatants to qualify as wounded or sick without the adverse party being bound to 'respect and protect' them. Whilst on board a medical aircraft present in or over areas controlled by the adversary or areas the physical control of which is not clearly

476. ICRC, *Commentary on the First Geneva Convention*, para 1987; ICRC, *Commentary on the Second Geneva Convention*, para 2462.
477. Gisel, 'Incidental Killing', 225.
478. See section V.A.1 above.
479. Corn and Culliver, 'Wounded Combatants', 455–56.
480. See section V.B.2 below.
481. G Giacca, 'The Obligations to Respect, Protect, Collect, and Care for the Wounded, Sick, and Shipwrecked', in Clapham and others, *The 1949 Geneva Conventions*, 781, 785.
482. See n 276 above. Medical personnel and chaplains engaging in harmful acts therefore retain their status as protected persons but lose the benefit of their protection. By contrast, wounded, sick, shipwrecked and *hors de combat* combatants who engage in hostile acts lose their special protections because they no longer qualify as wounded, sick, shipwrecked or *hors de combat* at all.
483. See section IV.B.7 above.

established, any wounded, sick, shipwrecked, medical personnel and chaplains share the same risk of misidentification and accidental attack as the aircraft itself.[484] Moreover, in areas controlled by an adverse party, medical aircraft recognised as such are subject to attack should they fail to comply with an order to land or to alight on water, or to take other measures to safeguard their own interests.[485] This rule implies that any protected persons on board such aircraft may be attacked too, at least indirectly. In the context of naval warfare, should fighting occur on board a warship, sick-bays are to be respected and spared 'as far as possible'.[486] This too implies that any protected personnel inside such sick-bays must be shielded from the fighting only 'as far as possible'.[487] It is also worth noting that the duty to 'respect and protect' military and other hospital ships applies 'on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed'.[488] If this condition is not met, protected personnel on board such vessels must bear the risk that the absence of protection for the ship entails. Nor is it convincing for the Commentary to suggest that it would be unreasonable to prohibit direct attacks on wounded and sick enemy personnel without protecting them from incidental harm. On this logic, the proportionality rule as codified in Additional Protocol I itself must be considered unreasonable.

By contrast, the Commentary does make a compelling point when it declares that not considering the wounded and sick for the purposes of the proportionality principle would seem to contradict the 'basic rationale of according special protection to them'.[489] However, the solution to this incongruity does not lie in extending the application of articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I to protected military personnel. The arguments advanced in favour of expanding the scope of the proportionality rule do not enable us to do so without arrogating to ourselves a quasi-legislative competence to override the clear meaning of Additional Protocol I and the corresponding norm of customary international law. Rather, the solution lies in revisiting and clarifying the relationship between the liability of protected military personnel to incidental harm and the duty to 'respect and protect'. The ICRC Commentary thus points broadly in the right direction, even though its reasoning is unconvincing. In what follows, we therefore attempt to place the prohibition of exposing protected military personnel to excessive incidental harm on a more solid foundation.

B. *The limits of the liability to incidental harm*

At the outset, it is useful to recall that members of enemy forces are, as a general rule, subject to direct attack and incidental harm. Special protections alter this baseline position. Accordingly, it is firmly established that directly attacking specially protected personnel is incompatible with their protected status.[490] This is confirmed by several treaty provisions, which stipulate that the duty to 'respect' entails an obligation not to directly attack protected

484. Cf Additional Protocol I, arts 26 and 27.
485. Ibid, art 27(2).
486. Geneva Convention II, art 28.
487. Sick-bays are protected only when fighting occurs on board the warship, but not in the event an attack is carried out at a distance without fighting on board. Cf Third Commission, Second Meeting, 16 July, 1907, Annex A, in Scott, *Proceedings*, vol III, 305, 308 ('naturally it was hard to understand how during [fights at a distance] the sick wards could be respected. But the provision refers to a fight on board, which makes it perfectly comprehensible'). In such cases, protected persons present in sick-bays are subject to the general rules of the law of armed conflict as they apply in the context of naval warfare: see text accompanying n 361–368.
488. Geneva Convention II, arts 22 and 24–27.
489. ICRC, *Commentary on the First Geneva Convention*, para 1357.
490. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 25, 83–84.

persons or objects.[491] By contrast, it is unclear to what extent, if any, the duty to 'respect and protect' shields protected military personnel from incidental harm. We may distinguish between two hypotheses. The first suggests that the duty to 'respect and protect' comprehensively prohibits causing any kind of injury to protected enemy personnel. Their liability to incidental harm thus constitutes an exception to their comprehensive protection. The second hypothesis holds that the duty to 'respect and protect' shields protected enemy personnel from direct injury, but not from all forms of incidental harm.

The first hypothesis is unlikely. Although the duty to 'respect and protect' prohibits violence against protected personnel, this prohibition is neither absolute nor complete. Military medical and religious personnel are subject to direct attack should they engage in acts harmful to the enemy outside their humanitarian duties,[492] while all protected personnel are exposed to harm when present in protected objects that enjoy only limited immunity from attack.[493] In both cases, the liability to harm is the result of an absence of protection, not an exception to protection. This supports the conclusion, reflected in our second hypothesis, that protected military personnel are liable to incidental harm because the duty to 'respect and protect' does not comprehensively shield them from collateral damage. This corresponds with the long-held understanding that the law safeguards protected enemy personnel only against deliberate attack, but not against incidental harm resulting from lawful attacks.[494] It also reflects the logic of civilian liability to incidental harm. Civilians are exposed to collateral damage not by way of exception to their general protection against the dangers arising from military operations, but because they do not benefit from protection against incidental harm unless it is excessive.[495] This suggests that protected personnel are liable to incidental harm because the duty to 'respect and protect' does not exempt them from this kind of damage under all circumstances.

While this conclusion sheds light on the legal basis of protected personnel's liability to incidental harm, it does not reveal whether that liability is unlimited in scope or subject to restrictions. Should limits exist, we may expect them to be inherent in the right of belligerents to expose protected enemy personnel to incidental injury or to derive from the duty to 'respect and protect'. We explore these avenues below.

1. Limitations flowing from the principle of military necessity

At the core of the modern law of armed conflict lies the idea that a reasonable connection must exist between the harm caused by a belligerent and the overall objective of overcoming the enemy.[496] The principle that violence and devastation 'must be part and parcel of some military design to overcome the hostile army' thus 'furnishes the criterion of the right or wrong of any given destruction or seizure'.[497] The idea is embodied in the principle of

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491. Geneva Convention I, art 18 ('[t]he civilian population shall respect these wounded and sick, and in particular abstain from offering them violence'), art 36 (medical aircraft 'shall not be attack, but shall be respected'), Annex I, art 11 ('[i]n no circumstances may hospital zones be the object of attack. They shall be protected and respected at all times by the Parties to the conflict'); Geneva Convention II, art 39 (medical aircraft 'may not be the object of attack, but shall be respected'); Additional Protocol I, art 17(2) ('[t]he civilian population shall respect the wounded, sick and shipwrecked and shall commit no act of violence against them').
492. See n 482 and the accompanying text above.
493. See n 484–488 and the accompanying text above.
494. See section V.A.50 above.
495. See n 400 and the accompanying text above.
496. St Petersburg Declaration, Preamble. See J Dill and H Shue, 'Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption' (2012) 26 Ethics & Int'l Aff 311, 319–24.
497. Spaight, *War Rights on Land*, 113. See also N Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28 BU Int'l LJ 39, 45.

distinction, which permits belligerents to attack certain persons and objects due to the inherent or actual military benefit that their neutralisation entails. The liability of enemy combatants to attack thus flows from the military benefit inherent in their destruction,[498] while objects are liable to attack if the military benefit of their destruction, capture or neutralisation can be established on a case-by-case basis with reference to article 52(2) of Additional Protocol I.[499] By contrast, attacks that do not pursue a legitimate military benefit are not permissible.[500] The harm resulting from such an attack, whether caused directly or indirectly, would be wanton and unnecessary.[501] The underlying logic of the law of armed conflict thus suggests that incidental harm inflicted upon protected enemy personnel must be justifiable with reference to the principle of military necessity.[502]

In the case of enemy combatants who are liable to attack, the military benefit that permits targeting them directly also justifies exposing them to comparable incidental harm.[503] If an enemy solider may be killed directly due to his battlefield status, he may also be harmed indirectly for the same reason. However, different considerations apply to persons protected against attack. Since such persons are immune from direct harm, their liability to incidental injury must rest on some other basis. Under the traditional proportionality rule, causing incidental harm to civilians is permissible as long as it is not excessive in relation to the concrete and direct military advantage anticipated from the attack. The military advantage invoked by the rule serves a dual purpose. It justifies the decision to prosecute the military objective which is the actual target of the attack and it also justifies the harm that civilians and civilian objects are expected to suffer incidentally.[504] Protected military personnel are in a comparable position. Since making protected personnel the objects of direct attack provides no legitimate military advantage, injuring them indirectly cannot confer a permissible military benefit either.[505] The military benefit

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498. DoD, *Law of War Manual* (December 2016), §§ 5.7.1 and 5.7.3. Cf FJ Hampson, 'Proportionality and Necessity in the Gulf Conflict' (1992) 86 Am Soc Int'l L Proc 45, 53 ('[t]he destruction of the opposing armed forces, however, does not appear to require the justification of military necessity. It is lawful by virtue of the existence of a state of war').
499. As far as objects are concerned, military objectives are 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'.
500. As the International Law Commission remarked in the context of its work on state responsibility, the role of military necessity is not to serve as a circumstance precluding the wrongfulness of an act not in conformity with international law, but rather that military 'non-necessity' operates 'as a circumstance precluding the lawfulness of conduct which that rule normally allows'. See International Law Commission, Report of the International Law Commission on the Work of its Thirty-Second Session (5 May–25 July 1980), (1980) YB ILC, vol II(2) 1, 45–46. It is the pursuit of a military benefit that matters, not whether the benefit was anticipated accurately or whether the attack is successful in realising it. See *Prosecutor v Strugar* (Trial Chamber, Judgment) IT-01-42 (31 January 2005), para 295 ('[w]hether a military advantage can be achieved must be decided, as the Trial Chamber in the Galić case held, from the perspective of the 'person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action').
501. Cf Department of the Army, *Law of Land Warfare*, § 56 ('[t]he measure of permissible devastation is found in the strict necessities of war').
502. This point is overlooked by Adams, 'Lancelot in the Sky', who seems to assume that the liability of wounded and sick enemy combatants to incidental harm is unlimited.
503. Since direct attacks and incidental harm may produce exactly the same permissible military benefit, both forms of harm are justified under the principle of military necessity.
504. See E Rauch, 'Le Concept de Necessite Militaire dans le Droit de la Guerre' (1980) 19 Mil L & L War Rev 205, 213–14.
505. This is not to suggest that harming protected enemy personnel, whether directly or indirectly, could not offer a military advantage. For example, causing further injury to wounded or sick combatants might delay or prevent their return to combat. Rather, our point is that if this military benefit does not provide a *lawful* justification for inflicting harm directly, it cannot provide a *lawful* justification for inflicting harm indirectly.

that justifies exposing them to incidental harm must therefore derive from elsewhere. The only alternative source is the military advantage anticipated from prosecuting another target that constitutes a lawful military objective, as in the case of civilians. Accordingly, any incidental harm that protected military personnel are expected to suffer as a consequence of an attack on a lawful military objective must be justified with reference to the military advantage anticipated from engaging that objective.

Provided that an attack against a military objective is anticipated to offer *some* permissible military benefit, it follows that any incidental injury that this attack is expected to inflict upon protected enemy personnel would not, in principle, be wanton and unnecessary. However, could a minimum of military advantage justify a maximum of incidental harm? To use a hypothetical and deliberately extreme example: could the military advantage anticipated from an attack designed to destroy a small ammunition dump justify the incidental destruction of hundreds of enemy military medical personnel congregating for a training event nearby, assuming that it is beyond doubt that the attack would be excessive if the persons involved were civilians? Intuitively, this cannot be right. We suggest that it would not be lawful either.

As the Lieber Code underlines, the principle of military necessity sanctions the destruction of the life or limb of persons other than armed enemies only to the extent that such destruction is 'incidentally unavoidable'.[506] Similarly, article 2 of Hague Convention IX of 1907 absolves naval commanders from liability for 'any unavoidable damage' caused by the bombardment of lawful objectives situated in undefended localities. These provisions render explicit what is implied in the principle of military necessity, namely that only that amount of incidental harm is permissible which is unavoidable and hence necessary in order to achieve the lawful military objective pursued by an attack.[507] What amounts to 'unavoidable' harm is a question of fact and law. Experience shows that collateral damage cannot be prevented completely, short of avoiding combat and military operations all together. Accidents and mistakes are inevitable in warfare. The law of armed conflict recognises this fact, but imposes a duty on belligerents to 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.[508] As a result of this precautionary duty, 'unavoidable' incidental harm to civilians and civilians objects means harm which a belligerent could not avoid or further minimise by taking all feasible precautions in its choice of means and methods of attack.

As formulated in article 57(2)(a)(ii) of Additional Protocol I, the precautionary duty to minimise incidental harm is limited to damage caused to civilians and civilian objects. However, if, as we have established, military necessity permits belligerents to cause incidental harm to protected enemy personnel only to the extent that this is unavoidable, it follows that belligerents knowingly exposing protected personnel to such harm must undertake affirmative measures to minimise the damage. Accordingly, a positive duty to minimise incidental harm is implicit in the rule that collateral damage against protected personnel must be confined to what is unavoidable.[509] This connection between the permissibility of collateral damage and efforts to minimise it is confirmed by article 2 of Hague Convention IX of 1907, which expressly directs naval commanders embarking on the bombardment of military objectives in an undefended locality to 'take all due measures in order that the town may suffer as little harm as possible'. The link was also evident at the

506. Lieber Code, art 15.
507. Cf Sandoz, Swinarski and Zimmermann, *Commentary*, para 1395.
508. Additional Protocol I, art 57(2)(a)(ii). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 15, 51–55.
509. Cf *Kupreškić*, para 524 (noting that causing incidental harm to civilians triggers a duty to take reasonable care to avoid needless injury).

diplomatic conference drafting the Additional Protocols, where the adoption of the duty to minimise incidental civilian harm proved instrumental in overcoming the objections initially voiced against the proportionality rule by many delegations.[510] In this context, it is also worth noting that the Department of Defense *Law of War Manual* declares that combatants must take feasible precautions to reduce the risk of harm to 'the civilian population and *other protected persons* and objects'.[511]

Earlier in this paper, we questioned the appropriateness of portraying proportionality as a general principle of the law of armed conflict.[512] We did so partly because the core demand of proportionality—the existence of a reasonable relationship between means and ends—is embedded in the principle of military necessity. In the law of armed conflict, the generic idea of proportionality thus manifests itself largely as an aspect of military necessity and its interplay with considerations of humanity, rather than as a self-standing principle. It is important to recall at this juncture that the principle of military necessity has both an enabling and a constraining function within the law of armed conflict.[513] The Department of Defense *Law of War Manual* focuses on military necessity as a justification for violence.[514] Yet the Lieber Code makes clear that military necessity also acts as a limit on belligerent action.[515] Any act of violence visited upon the enemy must be necessary for securing the permissible ends of war. Hence the requirement that there must be some reasonable connection between the destruction and the overcoming of enemy forces,[516] that is some reasonable connection between means and ends.

To the extent that the principle of military necessity requires belligerents to establish a reasonable connection between means and ends when conducting attacks, it follows that there must also be a reasonable connection between the military benefit anticipated from prosecuting a lawful military objective and the incidental harm the same attack is expected to cause to protected military personnel. Not only must there be a direct causal link between the military benefit and the incidental harm, in the absence of which the harm would be wanton and unnecessary, but that the military advantage pursued by the former must be capable of justifying the collateral damage expected. If it were otherwise, belligerents would be entitled to inflict an evil that exceeds whatever legitimacy they may derive from pursuing a permissible military objective, thus breaking the reasonable connection between means and ends. Put differently, the extent of the incidental harm must be proportionate to the level of the military advantage anticipated, or else the harm could not be reasonably justified with reference to the military benefit sought.[517]

510. See Report of Committee III, Second Session (3 February–18 April 1975), *Official Records of the Diplomatic Conference*, vol XV, 259, para 97.
511. DoD, *Law of War Manual* (December 2016), §§ 5.3 and 5.11 (emphasis added). Regrettably, the *Manual* does not identify the legal basis for applying such a precautionary duty to non-civilians.
512. See section II.B above.
513. MoD, *Joint Service Manual*, para 2.2.1. See CJS Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts' (2006) 37 Cal W Int'l LJ 177, 179ff; G Venturini, 'Necessity in the Law of Armed Conflict and in International Criminal Law' (2011) 41 Neth YB Int'l L 45, 48–54; Y Beer, 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity' (2015) 26 EJIL 801, 803.
514. DoD, *Law of War Manual* (December 2016), § 2.2.
515. Lieber Code, art 16 ('[m]ilitary necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult'). See BM Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 AJIL 213, 215–19; Henry, *Le Principe*, 225–80; Ohlin and May, *Necessity*, 95–105.
516. *Hostages Trial*, 66.
517. See N Hayashi, 'Contextualizing Military Necessity' (2013) 27 Emory Int'l L Rev 190, 237–40. Cf MS MacDougal and FP Feliciano, *International Law of War: Transnational Coercion and World Public Order*

This conclusion is reinforced by the prohibition, laid down in article 35(2) of Additional Protocol I, to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. The rule is widely understood to prohibit the use of weapons which, in their normal or expected use, would inevitably cause injury or suffering that is manifestly disproportionate in relation to their military effectiveness.[518] Although the harm envisaged under this rule is principally the injury and suffering inflicted upon the person targeted by the weapon directly, the wording of article 35(2) is not limited to direct harm. Any injury or suffering that results from the normal or expected use of a weapon, whether caused directly or indirectly, must be accounted for. Even harm inflicted upon enemy combatants incidentally could be superfluous or unnecessary if it manifestly exceeded the military benefit entailed by its use.[519] To the extent that this rule applies to protected enemy personnel, and there is no reason to believe that it does not, it requires belligerents to ensure that they do not employ means and methods of combat that expose such personnel to incidental injury or suffering 'greater than that unavoidable to achieve legitimate military objectives'.[520] Accordingly, this rule requires the application of proportionality considerations to protected enemy personnel in the use of means and methods of warfare.[521] The broader point, however, is that article 35(2) reflects the underlying proportionality considerations that flow from the principle of military necessity.[522]

2. Limitations flowing from the duty to 'respect and protect'

The duty to 'respect and protect' certain categories of persons is well-established in the law of armed conflict, stretching back to the first Geneva Convention of 1864.[523] Today, it

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(Martinus Nijhoff 1958) 524 ('[p]roportionality is commonly taken to refer to the relation between the amount of destruction effected and the military value of the objective sought in the operation being appraised. Disproportionate destruction is thus, almost by definition, unnecessary destruction').

518. WH Parks, 'Means and Methods of Warfare' (2006) 38 Geo Wash Int'l L Rev 511, 517, n 25; WH Boothby, *Weapons and the Law of Armed Conflict* (2nd edn, OUP 2016) 54–55. But cf Program on Humanitarian Policy and Conflict Research, *HPCR Manual*, 64–65.
519. This could be the case, for example, where a weapon has secondary effects, such as radiation, on enemy combatants not directly affected by its primary effect.
520. *Nuclear Weapons*, para 78.
521. Cf Bothe, Partsch and Solf, *Commentary*, 225, § 2.3.1 ('[the] rule is therefore another way of stating the rule of proportionality defined in the context of the protection of the civilian population'); ML Gross, 'The Deaths of Combatants: Superfluous Injury and Unnecessary Suffering in Contemporary Warfare', in Ohlin and others, *Weighing Lives in War*, 111, 113–14. But see H Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol 1 of 1977' (2010) 34 Int'l Rev Red Cross 98, 109–10.
522. See also WG Downey Jr, 'The Law of War and Military Necessity' (1953) 47 AJIL 251, 261–62 ('[r]egulated violence is generally considered as that violence directed or authorized by superior authority for the purpose of disabling the greatest possible number of the enemy, but the military effect of which is not disproportionate to the suffering it entails. … Under this definition of regulated violence the paramount military interest is to kill or disable the greatest possible number of the enemy and the subservient humanitarian interest is to relieve the individual soldier from all unnecessary suffering'); JG Gardam, 'Proportionality and Force in International Law' (1993) 87 AJIL 391, 406; C Greenwood, 'Historical Development and Legal Basis', in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP 2008) 1, 35.
523. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, arts 1 and 5.

features prominently in the First,[524] Second[525] and Fourth Geneva Conventions,[526] as well as in Additional Protocols I[527] and II.[528] Despite the mass of treaty provisions incorporating the standard, no single provision exhaustively defines what 'respect and protect' means. Nevertheless, there is broad agreement on its general outlines. As the ICRC's 1952 Commentary to the First Geneva Convention explains, to 'respect' involves a negative duty 'to spare, not to attack', while to 'protect' entails a positive duty 'to come to someone's defence, to lend help and support'.[529]

As we have noted already, it is firmly established that the duty to 'respect' involves an obligation to refrain from directly targeting protected personnel.[530] This is precisely why belligerents cannot justify exposing protected personnel to incidental harm other than by reference to the military advantage anticipated from attacking another, lawful, military objective. The duty to 'respect' also entails an obligation to refrain from various forms of mistreatment and violence, including murder, torture and biological experiments.[531] This obligation is generally understood to apply not only to the wounded, sick or shipwrecked, but to all personnel protected under the First and Second Geneva Conventions,[532] as confirmed by their grave breaches provisions.[533] However, the duty to refrain from mistreatment and violence arises only in relation to protected personnel who are 'in the power'[534] of an adverse party. It cannot restrict the liability of protected personnel to incidental harm in other circumstances, including during active combat. Nevertheless, it is certainly true that it would contradict its 'basic rationale'[535] if the duty to 'respect' left protected personnel exposed to incidental harm without restrictions. If belligerents were

524. Geneva Convention I, art 12 (wounded and sick), art 19 (fixed establishments and mobile medical units), art 24 (military medical personnel and chaplains), art 25 (auxiliary military medical personnel), art 35 (transports of wounded and sick or of medical equipment), Annex I, art 11 (hospital zones). In addition, medical aircraft (art 36) must simply be respected.
525. Geneva Convention II, art 12 (wounded, sick or shipwrecked), art 22 (military hospital ships), art 24 (hospital ships utilised by National Red Cross Societies, by officially recognised relief societies or by private persons), art 25 (hospital ships utilised by National Red Cross Societies, officially recognised relief societies, or private persons of neutral countries), art 26 (hospital ships of any tonnage and their lifeboats), art 27 (coastal rescue craft), art 36 (religious, medical and hospital personnel of hospital ships and their crews), art 37 (religious, medical and hospital personnel assigned to the medical or spiritual care of members of the armed forces). In addition, medical aircraft (art 39) must simply be respected.
526. Geneva Convention IV, art 16 (wounded, sick, infirm and expectant mothers), art 18 (civilian hospitals), art 20 (persons engaged in the operation and administration of civilian hospitals), art 21 (medical transport by land or sea), Annex I, art 11 (hospital and safety zones). In addition, civilian aircraft employed for medical transport (art 22), and, in the case of occupation, the hospital and safety zones therein (Annex I, art 12) are to simply be respected, while protected persons (art 27) are entitled, in all circumstances, to respect for their persons.
527. Additional Protocol I, art 10(1) (wounded, sick and shipwrecked), art 12(1) (medical units), art 15(1) and (5) (civilian medical and religious personnel), art 21 (medical vehicles), art 23(1) (medical ships and certain other craft), art 24 (medical aircraft), art 33(4) (members of teams that search for, identify and recover the dead from battlefield areas), art 48 (the civilian population), art 62(1) (civilian civil defence organizations), art 67(1) (members of the armed forces assigned to civil defence organizations) and art 71(2) (relief personnel). Women (art 76(1)) and children (art 77(1)) shall be the object of special respect and particular protection.
528. Additional Protocol II, art 7(1) (wounded, sick and shipwrecked), art 9(1) (medical and religious personnel), art 11(1) (medical units and transports).
529. J Pictet (ed), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary* (International Committee of the Red Cross 1952) 134–35.
530. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 25, 83–84.
531. Geneva Convention I, art 12; Geneva Convention II, art 12.
532. Eg ICRC, *Commentary on the First Geneva Convention*, para 1987; ICRC, *Commentary on the Second Geneva Convention*, para 2462.
533. Geneva Convention I, art 50; Geneva Convention II, art 51.
534. Cf Geneva Convention I, art 12; Geneva Convention II, art 12.
535. ICRC, *Commentary on the First Geneva Convention*, para 1357.

entitled to inflict any amount of harm on protected persons as long as they did so indirectly, would that not negate their protection from direct attack? The duty to 'respect' thus provides a compelling reason for imposing some kind of limit on the liability of protected personnel to incidental harm. However, for the reasons we gave earlier,[536] the duty is incapable of justifying the extension of the traditional proportionality rule to non-civilian harm in contradiction to the clear terms of Additional Protocol I. Nor does it provide any guidance as to where exactly these limits should be drawn.

The duty to 'protect' requires belligerents to undertake affirmative action to safeguard the essential interests of protected personnel. The obligations involved are broad. For example, belligerents must adopt a wide range of positive measures to provide for the health, welfare, maintenance and protection of enemy wounded, sick and shipwrecked.[537] However, this duty applies only to enemy personnel who find themselves 'in the power' of their adversary. Consequently, it cannot limit the liability to incidental harm of protected personnel who are not in the power of the enemy. By contrast, the duty to search for and collect the wounded, sick and shipwrecked applies even before these protected persons are in the power of the adversary.[538] The purpose of searching for and collecting the wounded, sick and shipwrecked is to provide them with the care they require, including by removing them from the battlefield and other zones of danger if their condition and the circumstances so warrant.[539] Accordingly, belligerents may not remain indifferent to the fate of the wounded, sick or shipwrecked, but are bound to undertake positive steps aimed at alleviating their condition even when they are not yet within their power. Evidently, these obligations are difficult to reconcile with the idea that belligerents may expose the wounded, sick or shipwrecked to incidental harm without limitations. Incidental harm resulting from attacks against lawful military objectives is one of the dangers against which such persons ought to be protected. The obligation to search for and collect the wounded, sick and shipwrecked thus provides another compelling reason for rejecting the idea that incidental harm is without limitations. However, just like the duty to 'respect', this obligation furnishes no guidance as to where those limits lie. Moreover, its application is limited to the wounded, sick and shipwrecked and it cannot be simply extended to cover all protected personnel.

Overall, the duty to 'respect and protect' underscores that any incidental harm inflicted upon protected enemy personnel is in need of justification. The duty also supplies powerful reasons for recognising that at least certain categories of protected persons cannot be liable to incidental injury without limitations. However, contrary to what Gisel and the ICRC suggest, no specific limits flow from the duty to 'respect and protect'. This is so because the duty does not contain a substantive standard, whether one of excessiveness, reasonableness or something else altogether, which would determine where such a limit should lie. The duty to 'respect and protect' thus lends support to our earlier conclusion that disproportionate incidental harm to protected enemy personnel is not permitted, but it does not provide a distinct and sufficient legal basis for this prohibition without recourse to the principle of military necessity and the concept of military advantage.

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536. See section V.A.7 above.

537. Giacca, 'Obligations', 789–90. See also ICRC, *Commentary on the First Geneva Convention*, paras 1381–91; ICRC, *Commentary on the Second Geneva Convention*, paras 1425-36.

538. Geneva Convention I, art 15; Geneva Convention II, art 18.

539. Cf Geneva Convention I, art 15 (referring to the 'removal, exchange and transport of the wounded left on the battlefield'). See also ICRC, *Commentary on the First Geneva Convention*, paras 1483–84; ICRC, *Commentary on the Second Geneva Convention*, paras 1425–36. A similar obligation of evacuation also applies to prisoners of war under Geneva Convention III, art 19.

VI. THE NON-CIVILIAN PROPORTIONALITY RULE

In the preceding section, we established that protected enemy personnel are liable to incidental harm as a consequence of attacks carried out against lawful military objectives, but that such harm must be justified with reference to the principle of military necessity. This finding has three implications. First, incidental harm caused to protected personnel must be justified on the basis of the military advantage anticipated from prosecuting the lawful military objective that is the intended target of the attack. Second, the attacking force is subject to a precautionary duty to minimise any incidental harm that protected enemy personnel are expected to suffer in order to confine that injury to what is unavoidable. Finally, belligerents must ensure that the incidental harm they expect to cause is proportionate to the military benefit anticipated from the attack. Taken together, these considerations impose a legal obligation on belligerents not to expose protected enemy personnel to incidental harm that is disproportionate to the military advantage expected from an attack directed against a lawful military objective. This legal obligation, which sets an upper limit on the amount of incidental harm that may befall protected enemy personnel, merely reflects what is demanded by the principle of military necessity. Though one should be slow to extract a novel rule of law from the wellspring of necessity,[540] we have argued that in our case the rule flows from the underlying duty to justify violence in armed conflict and from the corresponding prohibition of inflicting unnecessary and wanton destruction. We are not therefore wringing a new rule from a general principle,[541] nor are we engaged in re-drawing the underlying balance between military necessity and humanity by appealing to the constraining function of the former.[542] Instead, we are applying a pre-existing rule of a general character—the prohibition of destruction and harm that is unnecessary to secure a military advantage[543]—to a question that falls within the ambit of that general rule, but is not explicitly addressed by more specific conventional or customary norms.[544] It is important to underline that we are *not* suggesting that the principle of military necessity has the effect of extending the scope of the proportionality rule as codified in Additional Protocol I to non-civilian harm. We have considered in depth the various arguments advanced in favour of re-interpreting the rule in this manner and have found them wanting. Rather, our argument is that the law of armed conflict renders protected military personnel liable to incidental harm only in proportion to the military advantage anticipated from the attack, because inflicting more extensive incidental injury cannot be justified with reference to the principle of military necessity and the prohibition of unnecessary and wanton destruction. This rule, which we will term the 'non-civilian proportionality rule',[545] is distinct

540. Cf the much-criticised section IX of the ICRC, *Interpretive Guidance*, 77–82. See WH Parks, 'Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect Forum: Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance' (2009) 42 NYU J Int'l L & Pol 769.

541. Cf Carnahan, 'Lincoln, Lieber and the Laws of War', 231 ('[t]oday, military necessity is widely regarded as something that must be overcome or ignored if international humanitarian law is to develop, and its original role as a limit on military action has been forgotten. As a result, the principle has not been applied in new situations where it could serve as a significant legal restraint until more specific treaty rules or customs are established').

542. See Schmitt, 'Military Necessity and Humanity', 805. Indeed, we objected to such an approach in section V.A.1 above.

543. Michael N Schmitt, 'Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement' (1998) 72 Int'l L Stud 239, 247.

544. See N Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28 BU Int'l LJ 39, 44–49.

545. We prefer the phrase '*non-civilian* proportionality rule' over '*military* proportionality rule', as the latter may give rise to the impression that proportionality considerations apply to the targeting of *all* enemy military personnel.

from proportionality *stricto sensu*. The protection that proportionality *stricto sensu* confers upon civilians and civilian objects against excessive incidental harm forms part of their general protection from the dangers of military operations, as codified in articles 51 and 57 of Additional Protocol I. By contrast, the safeguard that specially protected enemy personnel enjoy against disproportionate incidental harm flows from their limited liability to incidental damage, which results from the combined effect of their protected status and the need to justify acts of warfare with reference to military necessity.

The fact that proportionality *stricto sensu* and the non-civilian proportionality rule rest on distinct legal foundations means that belligerents are confronted with two separate assessments of 'harm', 'advantage' and 'proportionality'. Proportionality *stricto sensu* is a codified rule that benefits from specific terms of art, in particular the notions of 'excessive', 'concrete and direct' and 'military advantage'. Although the rule is generally seen as allowing for a broad margin of judgment,[546] its contours are fairly well understood. The non-civilian proportionality rule, in contrast, remains uncodified and thus lacks this specialised terminology. As a derivative of the principle of military necessity, it simply demands that the extent of any incidental harm caused to enemy personnel protected from direct attack must be proportionate to the military benefit anticipated. Due to their distinct genesis and the contrasting level of specificity, *lex lata* dictates that proportionality *stricto sensu* and the non-civilian proportionality rule require discrete proportionality assessments by military forces prior to an attack.

Accordingly, those who plan, decide upon and conduct attacks must calculate both the civilian and the non-civilian harm expected and compare it to the military advantage anticipated from the attack. Carrying out this assessment in two steps using two separate formulas would impose an additional burden on warfighters and complicate what is already a difficult legal assessment. From a *practical* point of view, it therefore seems expedient to streamline, to the extent possible, the application of the two proportionality rules during the targeting process. This could be achieved, for example, by restating proportionality *stricto sensu* to include a reference to protected enemy personnel and by instructing warfighters, in the form of military manuals, doctrine and procedures, to apply this combined test. However, combining the civilian and non-civilian proportionality rules into a single test compounds the conceptual and practical dilemmas that have beset the application of proportionality *stricto sensu*. Two difficulties in particular need to be overcome in this respect, as we discuss below. If these difficulties can be addressed, it would be open for States to choose, as a matter of policy, to combine proportionality *stricto sensu* and the non-civilian proportionality rule into a single test.[547]

A. Formulating the rule

Whereas proportionality *stricto sensu* is codified in Additional Protocol I, the terms of the non-civilian proportionality rule remain uncodified. If states were to choose, as a matter of policy and expediency, to combine the two rules into a single test, the non-civilian proportionality rule would take on a degree of specificity and exactness that it does not possess in its uncodified form. Rather than prohibiting incidental harm that is disproportionate to the military benefit anticipated from the attack, the non-civilian proportionality rule would thus be recast to prohibit incidental harm that is 'excessive' in

546. Sandoz, Swinarski and Zimmermann, *Commentary*, para 2210.
547. Essentially, a combined test would direct warfighters to apply arts 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I *as if* these provisions extended to protected enemy personnel. The appeal of this approach is that it would simplify the application of the two proportionality rules, though the legal basis of the two rules is and remains distinct.

relation to the 'concrete and direct' military advantage anticipated. This formula would be inappropriate, and thus open to serious objections, if it were to increase the burden that the non-civilian proportionality rule actually imposes on belligerents. However, as we will demonstrate, this is not necessarily the case.

The excessiveness standard adopted in articles 51 and 57 of Additional Protocol I is widely regarded to grant commanders a broad margin of discretion.[548] Depending on the circumstances, it may permit an attacking force to assume greater levels of incidental harm than a rule which simply required collateral damage to be proportionate to the military benefit,[549] given that not every instance of disproportionality will reach the point of excessiveness.[550] Adopting the excessiveness standard should also make it easier for belligerents to demonstrate that their actions comply with the law. The normative function of excessiveness is to fix the relationship between the competing values of collateral damage and military advantage. A rule which simply required incidental harm suffered by protected personnel to be proportionate to the military benefit anticipated would not offer guidance as to the relative weight to be accorded to the competing values, other than that they should be balanced in a reasonable manner.[551] In the absence of more precise guidance, targeting decisions based on proportionality assessments involving protected enemy personnel would remain forever contestable on the basis of alternative balancing ratios.[552] The excessiveness standard is therefore critical for greater legal certainty. Moreover, the law could be dismissed as idiosyncratic if incidental harm to civilians is judged against the standard of excessiveness, only for incidental harm caused to *hors de combat* enemies on the battlefield to be potentially more restrictive in nature.

Adopting the language of articles 51 and 57 also means that the military benefit anticipated would have to amount to a 'concrete and direct' military advantage. The first part of this formula does not increase the burden on the attacking party if one bears in mind that all attacks expected to cause incidental harm must offer, as a minimum, a 'definite' military advantage. This is so because any object that constitutes the intended target of an attack may be engaged only if its destruction, capture or neutralisation offers a definite military advantage in line with article 52(2) of Additional Protocol I.[553] The word 'definite' is widely understood to refer to a concrete and perceptible benefit.[554] Attacks directed against persons must satisfy this condition too, given that the duty of target verification imposed by article 57(2)(a)(i) requires an attacking party to specifically direct its operations only against individuals liable to direct attack, whose neutralisation offers a definite military advantage by definition. Accordingly, it is only the second part of the formula, the requirement of directness, which might give cause for concern.

Bothe, Partsch and Solf suggest that the word 'direct' means 'without intervening

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548. Eg *Ermittlungsverfahren gegen Oberst Klein*, 66 (an infringement is only to be assumed in cases of obvious excess, where the commander, in ignorance of all proportionality considerations, did not act honestly, reasonably and competently). See JD Wright, '"Excessive" Ambiguity: Analysing and Refining the Proportionality Standard' (2013) 94 Int'l Rev Red Cross 819, 839–44; I Porat and Z Bohrer, 'Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More than They Would Endanger Their State's Civilians' (2015) 47 Geo Wash Int'l L Rev 99, 153; Sloane, 'Puzzles of Proportion', 316–18.
549. Eg AJ Gaughan, 'Collateral Damage and the Laws of War: D-Day as a Case Study' (2015) 55 Am J Legal Hist 229.
550. *Contra* WJ Fenrick, 'Applying IHL Targeting Rules to Practical Situations: Proportionality and Military Objectives Special Issue' (2009) 27 Windsor YB Access J 271, 277 ('[t]he expression "excessive," considered in the *API* context, is synonymous with disproportionate').
551. Barak, *Proportionality*, 377.
552. Cf DoD, *Law of War Manual* (December 2016), § 2.4.1.2.
553. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 8, 29–32.
554. DoD, *Law of War Manual* (December 2016), § 5.6.7.3; MoD, *Joint Service Manual*, paras 5.4.4.j and 5.33.3. See Bothe, Partsch and Solf, *Commentary*, 367, § 2.4.6 and 407, § 2.7.2. See also Henderson, *Contemporary Law of Targeting*, 200; Rogers, *Law on the Battlefield*, 99; Jachec-Neale, *Military Objectives*, 124–27.

condition or agency'.[555] In other words, no intervening causal link may separate the use of violence and the military advantage anticipated: the latter must be an immediate consequence of the former. This condition might be thought to preclude an attacking party from justifying incidental harm in situations where the attack serves a broader purpose, for example where it is designed to deceive the enemy.[556] However, we should not rush to this conclusion. The fact that attacking an object offers a definite military advantage as part of a deception operation is not sufficient to transform it into a military objective unless that object also makes an effective contribution to the enemy's military action by its nature, location, purpose or use.[557] In the majority of cases, the neutralisation of an object that makes such a contribution will offer a military advantage in its own right.[558] Destroying a tank, for example, weakens the military capability of the enemy and thus offers a military advantage that is both concrete and direct, whether or not the strike also contributes to deceiving the enemy. This means that, as a minimum, an attacking party will be able to justify incidental harm that is not excessive in relation to the immediate military advantage it derives from neutralising an individual target. Moreover, while the ultimate purpose of a diversionary attack is to support another operation, we should not lose sight of the fact that its immediate aim is to mislead the enemy. Altering the enemy's perception of reality may offer as direct a military advantage as weakening its military capability.[559] Accordingly, the burden imposed by the directness requirement should not be overestimated. Attacks that pursue an indirect military advantage will almost inevitably pursue a direct advantage as well. Although the direct advantage of an attack may be narrower than its indirect benefit,[560] the higher the collateral damage and the more remote the benefit, the less likely it is that appeals to indirect military advantage will actually offer a compelling justification for incidental harm.

Overall, casting the non-civilian proportionality rule in the familiar terminology of the proportionality *stricto sensu* provides an attacking party with more exact guidance at little to no opportunity cost. Most importantly, it avoids the confusion that the use of two differently worded proportionality tests would generate. On balance, we therefore suggest that the non-civilian proportionality rule should be stated in the same terms as proportionality *stricto sensu*. Accordingly, to give effect to their obligations towards protected enemy personnel, belligerents should instruct their forces to complement the civilian proportionality rule codified in articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I with the following rules:

(1) An attack is to be considered indiscriminate if it may be expected to cause incidental loss of life of or injury to members of the armed forces of a Party to the conflict[561] or

555. Bothe, Partsch and Solf, *Commentary*, 407, § 2.7.2.
556. Cf JM Meyer, 'Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine' (2001) 51 Air Force L Rev 143, 173.
557. Additional Protocol I, art 52(2).
558. Cf Decisions of the IDF Military Advocate General Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge', Update No 6, 15 August 2018, 15–16.
559. Cf DoD, *Law of War Manual* (December 2016), § 5.12.2.
560. However, this question also depends on what counts as the 'attack' for these purposes. Thus, it is widely accepted that the military advantage anticipated refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of an attack. See DoD, *Law of War Manual* (December 2016), § 5.6.7.3; MoD, *Joint Service Manual*, para 5.4.4.j. See also Eritrea-Ethiopia Claims Commission, Partial Award, para 113 ('[t]he Commission is of the view that the term 'military advantage' can only properly be understood in the context of the military operations between the Parties taken as a whole, not simply in the context of a specific attack').
561. The phrase 'members of the armed forces of a Party to the conflict' is found throughout the Geneva Conventions and Additional Protocol I. It is employed here in the same sense as in Additional Protocol I, art 43(1) to refer to 'all organized armed forces, groups and units which are under a command

members of other organised armed groups[562] subject to special protection,[563] or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

(2) Those who plan or decide upon an attack shall refrain from deciding to launch any attack which may be expected to cause incidental loss of life of or injury to members of the armed forces of a Party to the conflict or members of other organised armed groups subject to special protection, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

(3) An attack shall be cancelled or suspended if it becomes apparent that it may be expected to cause incidental loss of life of or injury to members of the armed forces of a Party to the conflict or members of other organised armed groups subject to special protection, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

B. Calculating non-civilian harm

The second difficulty concerns the calculation of incidental harm. By combining proportionality *stricto sensu* and the non-civilian proportionality rule into a single test, belligerents would have to aggregate the harm that civilians, civilian objects and protected enemy personnel are expected to suffer and compare this combined harm against the concrete and direct military advantage anticipated from the attack. The difficulty lies in the fact that the law does not place the same value on the physical integrity of combatants and civilians.

Combatants are liable to attack because their destruction constitutes a lawful means of forcing an adversary into submission, while civilians enjoy immunity from attack because of their non-combatant character. In the eyes of the law of armed conflict, the value of enemy combatants is first and foremost instrumental, whereas the value of civilians is intrinsic.[564] This difference is reflected in the proportionality rule itself. Harm inflicted upon enemy combatants that are subject to lawful direct attack falls to be considered under the heading of military advantage. The value of this harm is contextual, rather than constant. Other things being equal, killing a brigadier offers a greater military advantage than killing a private soldier. Similarly, neutralising an infantry section poised to attack friendly forces provides a greater advantage than engaging the same soldiers on their way to the canteen. Civilians, by contrast, benefit from general protection against the dangers arising from military operations by virtue of not being members of the armed forces.[565] Their immunity from attack and protection against excessive incidental harm derives from this baseline status. While most commentators agree that criteria such as nationality do not adversely affect their value,[566] it would contradict neither the letter nor the spirit of the law to accord greater weight to civilians benefitting from relevant special protections, as we noted

responsible to that Party for the conduct of its subordinates'. In other words, it covers not only members of the armed forces of a Party, including combatant and non-combatant members, but also members of other militias and other volunteer corps belonging to that Party.

562. The term 'other organized armed groups' derives from Additional Protocol II, art 1(1). Its inclusion is designed to extend the applicability of these rules to members of the armed forces of non-state parties in a non-international armed conflict.
563. Additional Protocol I employs the term 'special protection' repeatedly, including in art 57(2)(a)(i). It refers to the special protections that render members of enemy forces immune from direct attack.
564. C McKeogh, *Innocent Civilians: The Morality of Killing in War* (Palgrave 2002) 120.
565. Additional Protocol I, art 50(1).
566. Eg Henderson, *Contemporary Law of Targeting*, 215; E Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians' (2014) 39 Israel L Rev 81, 87.

earlier.[567] However, this does not seem to reflect state practice. The United States CDE Methodology, for example, assigns the same value to all civilian collateral concerns. This indicates that, in practice, the value of civilians appears to be constant.

It is not immediately clear what value the law of armed conflict assigns to the life and limb of protected enemy personnel,[568] in particular whether it is contextual or constant in nature. We saw earlier that the protections conferred by the law of armed conflict do not rest on a single rationale. Humanitarian concerns outweigh the instrumental significance of enemy soldiers at different points. While combatants rendered *hors de combat* gain immunity from attack, an enemy solider who has laid down his weapons to take a rest remains a lawful target.[569] Humanitarian considerations do not, as a matter of law,[570] override his instrumental value. By contrast, military medical personnel benefit from protection despite generally making an effective contribution to enemy action.[571] The humanitarian nature of their function thus outweighs instrumental considerations. We also saw that the duty to respect and protect does not impose identical obligations of care.[572] There is no obligation to search for and collect enemy military medical personnel, for instance.

With this in mind, it does not seem unreasonable to assign different values to different categories of protected personnel for the purposes of applying the non-civilian proportionality rule. For example, exposing military medical personnel to incidental harm may prevent them from discharging their medical functions, which in turn may have further adverse effects on those who need their assistance.[573] The humanitarian impact is thus more severe compared to the incidental killing or injuring of soldiers rendered *hors de combat* by their wounds. Seen from this perspective, incidental harm suffered by military medical personnel should carry more weight than comparable harm suffered by those who are *hors de combat*. Nevertheless, this logic, though legally sound, runs into difficulties. Some may find ascribing different values to human lives objectionable as a matter of principle.[574] While the law of armed conflict does not shy away, as we saw, from drawing such distinctions, it offers little guidance as to what the relative weight of different categories of protected enemy personnel is.[575] It may seem reasonable to place greater weight on military medical personnel, but should we then not also differentiate between those who are wounded and those who have been rendered *hors de combat* by their wounds? Does inflicting incidental harm on a person in greater medical need not require more justification than causing identical harm to a person suffering from a less serious condition?[576] If so, how should we

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567. See section III.B above. A more difficult question, which we need not decide here, is whether the law actually requires greater weight to be given to civilians that are subject to special protections. It is also worth underlining that according a greater value to civilians enjoying special protections compared to 'ordinary' civilians is not the same as suggesting that the value attaching to 'ordinary' civilians could decrease in certain circumstances, for instance if they assume the risk of incidental harm. That is a separate question which we also need not decide here.
568. See also Corn and Culliver, 'Wounded Combatants', 452.
569. DoD, *Law of War Manual* (December 2016), § 5.7.1.
570. Walzer, *Just and Unjust Wars*, 138–43.
571. Cf section V.A.4 above.
572. See section V.B.2 above.
573. The provision of care is the reason why military medical personnel benefit from protection in the first place. See J Miné, 'The Geneva Conventions and Medical Personnel in the Field' (1987) 27 Int'l Rev Red Cross 180, 182.
574. *Prosecutor v Erdemović* (Appeals Chamber, Judgment) IT-96-22 (7 October 2007), Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras 80–81.
575. This is not to suggest that the different values are incommensurate or incomparable. Rather, the point is that it is not readily apparent what, as a matter of law, the relevant comparator is. Cf VA da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 Oxford J Legal Stud 273.
576. Geneva Convention I, art 12 and Geneva Convention II, art 12 provide for the prioritisation of treatment for the wounded, sick and shipwrecked for 'urgent medical reasons'. Additional Protocol I,

quantify the difference? And to what extent is it feasible to implement such a differentiated assessment on the battlefield?[577]

In the absence of authoritative guidance to these questions, states are faced with two options. Bearing in mind the practical difficulties involved,[578] they may choose not to adopt a differentiated regime that assigns different values to diverse categories of protected enemy personnel, but instead treat them as equal to civilians. Incidental harm inflicted on any type of protected personnel would thus carry the same weight as incidental harm caused to civilians. Normatively, this approach can be justified on the basis that protected personnel and civilians are 'on the same footing'[579] in so far as they are all immune from direct attack, even though they benefit from this immunity for different reasons. Immunity from attack thus represents a common baseline that warrants according protected personnel the same value as civilians in relation to the military advantage anticipated from an attack. The attraction of this approach lies in its simplicity. There is no need to distinguish, as part of the targeting process, between different persons raising collateral concerns in order to determine their exact legal status. It is sufficient to know that they are individuals not liable to direct attack and who all carry the same value. This also allows proportionality *stricto sensu* and the non-civilian proportionality rule to be applied as a single, combined test. The weakness of this approach is that it sets aside the normative differences that do exist between different categories of protected personnel and between such personnel and civilians. In doing so, it potentially imposes greater constraints on commanders than what the law requires.

According to the Department of Defense *Law of War Manual*, wounded, sick and shipwrecked combatants and military medical and religious personnel are deemed to have accepted the risk of death and injury due to their proximity to military operations.[580] Earlier editions of the *Manual* invoked this point as a justification for excluding such personnel from proportionality assessments altogether.[581] This has been criticised,[582] and rightly so. However, the fact remains that protected enemy personnel and units not only bear the risk of suffering incidental harm, as civilians do too,[583] but in certain circumstances also bear some responsibility for that risk.[584] Article 30 of the Second Geneva Convention thus stipulates that hospital ships 'act at their own risk' during and after each engagement.[585] The ICRC's Commentary of 1960 suggests that this phrase should be understood to mean that a hospital ship 'must take the responsibility for any damage which it may incur accidentally'.[586] The idea that hospital ships bear sole responsibility for *any* incidental harm they may suffer is not tenable in the light of an attacking party's precautionary duty to limit collateral damage to what is unavoidable.[587] The updated ICRC Commentary of 2017 takes

art 10(2) prohibits distinction among the wounded, sick and shipwrecked 'on any grounds other than medical ones'.

577. See also Corn and Culliver, 'Wounded Combatants', 456–57.
578. Cf MN Schmitt, 'Human Shields in International Humanitarian Law' (2008) 47 Colubmia J Tran'l L 292 (suggesting that ascribing different values to civilians under proportionality *stricto sensu* 'would only render a sibylline determination more so').
579. Sandoz, Swinarski and Zimmermann, *Commentary*, para 1605.
580. DoD, *Law of War Manual* (December 2016), §§ 7.3.3.1, 7.8.2.1, 7.10.1.1, 17.14.1.2, 17.15.1.2 and 17.15.2.2.
581. DoD, *Law of War Manual* (2015), §§ 5.12.3.2 and 5.12.3.3.
582. Hathaway, 'The Law of War Manual's Threat'; Lederman, 'Troubling Proportionality'.
583. Eg ICRC, Draft additional Protocol, art 45(5), *Conference of Government Experts*, vol II.
584. See also Additional Protocol I, art 26 (medical aircraft in contact or similar zones).
585. The rule originates in the Additional Articles Relating to the Condition of the Wounded in War, art 13, 20 October 1868, reprinted in (1907) 9 AJIL Sup 92.
586. J Pictet (ed), *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces in Sea: Commentary* (International Committee of the Red Cross 1960) 181.
587. See section V.B.1 above.

a different view and declares that hospital ships may not be exposed to excessive incidental harm.[588] We agree with the new Commentary that the incidental harm may not be excessive in relation to the military advantage anticipated, though for different reasons than those advanced by the ICRC.[589] Nevertheless, to give effect to the allocation of risk in article 30, the attacking party may take into account whether the ship has increased the risk of incidental harm through its own actions when determining whether or not the expected harm is excessive.

The same principle may be applied to opposing forces more generally. During and after each engagement, an attacking party may take into account the fact that enemy personnel not or no longer liable to attack have exposed themselves to the risk of incidental harm as a result of their prior actions. This is the case, for example, when military medical personnel tend to the wounded in the proximity of military objectives[590] or when combatants are incapacitated by their wounds as a consequence of their participation in combat. In both situations, the persons concerned have placed themselves in harm's way. While this does not lessen the attacking party's precautionary duties, it is a factor to be considered in assessing whether unavoidable incidental harm is excessive or not. Consequently, an attacking party may assign a lower weight to protected enemy personnel who, through their actions during and after an engagement, have assumed the risk of incidental harm compared to the weight accorded to civilians[591] and to protected enemy personnel in other circumstances.

This second approach recognises that the normative value of protected enemy personnel is neither uniform nor necessarily identical with the normative value of civilians. Its principal downside is that it requires a differentiated treatment of different collateral concerns. Doctrinally, such a differentiated treatment could be accommodated by existing procedures without too much difficulty. For example, the Joint Chief's CDE Methodology already operates with fractional values of harm. Indoor collateral concerns that fall within the outer half of the collateral effects radius of a weapon's intended impact point carry a casualty factor of 0.25.[592] All other collateral concerns carry a value of 1.[593] This fractional value of 0.25 is designed to account for the decreased likelihood that persons inside structures located in the outer half of the collateral hazard area will suffer collateral damage. In principle, a fractional value could also be assigned to protected enemy personnel who expose themselves to the risk of incidental harm during or after an engagement. However, this approach creates substantial practical difficulties. Planners and those conducting attacks would have to distinguish protected enemy personnel who carry a fractional value from other collateral concerns on the battlefield, yet the available intelligence and the speed with which the tactical situation changes will not allow for this at all times. In situations where the exact legal status of a collateral concern cannot be determined, it would have to be assigned a full casualty factor, rather than a reduced one. A process which assigns different weight to different classes of collateral concerns thus risks increasing the complexity of the targeting process whilst potentially generating only marginal operational benefits. States will therefore need to decide how they wish to deal with this facet of the non-civilian

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588. ICRC, *Commentary on the Second Geneva Convention*, para 2271.

589. The commentary derives the prohibition of excessive harm from the duty to respect and protect hospital ships. We set out our objections to this reasoning at length at section V.A.7 above.

590. The principle underlying Geneva Convention I, art 30 directly applies to this situation.

591. It should be noted that there is some support for applying the same approach to the use of human shields in situations when the latter are not considered to be directly participating in hostilities. See DoD, *Law of War Manual* (2015), § 2.7.2; DoD, *Law of War Manual* (December 2016), §§ 5.16.4 and 5.12.3.4. See also Bothe, Partsch and Solf, *Commentary*, 336, § 2.2.2; Dinstein, *Conduct of Hostilities*, 185, para 495; Boothby, *Law of Targeting*, 137.

592. Collateral Damage Estimation Methodology, D-A-33.

593. Ibid.

proportionality rule, based on these competing operational considerations.

C. *Putting the Law in to Practice*

The genesis of this paper was a real-world targeting query. In the present section, we therefore address two fictitious targeting scenarios to expound the non-civilian proportionality rule and demonstrate its application to targeting decisions in a practical context.[594]

1. Scenario A

A mortar team positively identified as belonging to an organised armed group, known as the Non-State Freedom Fighters (NSFF), has recently been observed firing on the armed forces of Adana, a state engaged in a non-international armed conflict against the NSFF on its territory. The three-man mortar team is positioned close to friendly forces in an unpopulated area. The team is under surveillance by an unmanned aerial vehicle operated by the armed forces of Borovia, a third state supporting the government of Adana. To remove the threat to friendly forces on the ground, and acting at their request, Borovian fast jets use a laser guided bomb to attack the mortar team. It becomes apparent after the attack that two members of the team were killed, while the third was severely wounded. Video imagery supplied by the unmanned aerial vehicle overhead reveals that the surviving member is *hors de combat*.

Not long after the initial attack, a pick-up truck is observed driving towards and stopping alongside the *hors de combat* fighter. The vehicle has a machine gun fixed to its rear and is known as a 'technical'. Intelligence confirms that the same technical had been observed firing on friendly forces earlier that day. Two men in distinctive camouflage clothing and rifles slung over their backs, confirmed through intelligence as the sole occupants of the technical, carry the injured fighter and place him in the back of the vehicle. Friendly forces request that the Borovian fast jets use a precision-guided munition to attack and destroy the technical.

There is no doubt that the technical constitutes a military objective liable to attack, whether on account of its nature, use or purpose.[595] The fact that the vehicle is employed to carry a person who is *hors de combat* due to his wounds does not transform it into a medical transport protected from attack.[596] Customary international law applicable to both international and non-international armed conflicts provides that vehicles must be assigned *exclusively* to medical transportation to be immune from attack,[597] which is not the case here. There also seems to be little doubt that the two original occupants of the technical are members of the NSFF and as such are liable to attack.[598] Assuming that there are no civilians or civilian objects within the collateral effects radius of the weapon to be utilised, there are no collateral concerns to be considered under proportionality *stricto sensu*. Finally, it is also beyond doubt that the fighter rendered *hors de combat* cannot be made the object of attack.[599]

This leaves us with one unanswered question: would a strike on the technical be lawful, notwithstanding the presence of the *hors de combat* fighter in the back? Since the intended

594. For the reasons we set out in section VI.A above, we adopt the language of arts 51 and 57 of Additional Protocol I for applying the non-civilian proportionality rule to these two scenarios.
595. Cf Additional Protocol I, art 52(2).
596. Additional Protocol II, art 11(1).
597. Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol I, Rule 29, 100.
598. See ICRC, *Interpretive Guidance*, 32.
599. Additional Protocol I, art 41.

target of the attack is the technical, rather than the incapacitated fighter, the attack would not contravene the prohibition of making a *hors de combat* person the object of attack. However, it must be expected that the use of a precision-guided munition against the vehicle will expose the protected fighter to incidental harm. This triggers a duty, as we have explained earlier,[600] to take precautionary measures to minimise this harm by confining it to what is unavoidable. For example, the Borovian pilots may consider employing a different weapon if this were to reduce the likelihood of incidental harm. They may also decide to strike the technical after it has dropped off the *hors de combat* fighter, provided that the pilots could be certain that the opportunity to attack the vehicle, or to do so without the risk of further collateral damage, would not be lost.[601] Either way, the duty to take precautionary measures is limited to what is feasible. The law does not require an attacking party to forego the military advantage presented by an attack should the feasible precautions open to that party fail to avoid all incidental harm, provided the harm is not excessive in relation to the military advantage anticipated. In the present case, the technical may be attacked even if this renders the death of the protected fighter inevitable, as long as all feasible precautions to avoid this outcome were taken and his death does not exceed the concrete and direct military advantage anticipated from disabling the vehicle.

Assuming that the technical cannot be engaged without exposing the *hors de combat* fighter to the risk of further injury, we are left with the application of the non-civilian proportionality rule to the proposed strike. The concrete and direct military advantage anticipated from the attack is the destruction of the technical and the two fighters operating it. It would be for the military commander to determine whether or not the harm the *hors de combat* fighter is expected to suffer is excessive when measured against this military advantage. In our view, the harm would not be excessive, and the attack could lawfully proceed. Such a conclusion would be reasonable even if the fighter rendered *hors de combat* was accorded the same relative value as a civilian.

This scenario highlights that the law of armed conflict, through the application of the non-civilian proportionality rule, does not dismiss as wholly irrelevant the life of the *hors de combat* fighter and yet, at the same time, would not prevent an attack from occurring where the advantage to be gained is sufficient to conclude that the action is proportionate. Scenario B builds on this analysis by exploring further practical issues stemming from the application of this rule.[602]

2. Scenario B

A United Nations Security Council Resolution has authorised the use of all necessary means to protect a minority group from ethnic cleansing by the authoritarian government of Colimar. A coalition of the willing has sent expeditionary forces to Colimar to implement the Security Council mandate. Coalition forces on the ground have taken control of the North of the country and are approaching the capital, where most members of the persecuted minority group are located. To reach the capital, coalition forces must cross a river, but its sparsely populated east bank has been fortified by large numbers of Colimaran troops. The coalition commander has ordered joint fires on enemy positions along the river bank. An initial battle damage assessment indicates that the attack has eliminated the majority of enemy forces and that a sizeable number of the surviving troops are now

600. See section V.B.1 above.
601. In practice, it would be rare to benefit from such certainty.
602. Scenario B is largely borrowed from Corn and Culliver, 'Wounded Combatants', 456–57, with some adaptations. We rely on their scenario in order to lay to rest some of the concerns that these two authors expressed over applying proportionality obligations to protected enemy combatants.

wounded, with some incapacitated by their wounds. Reliable intelligence also indicates that substantial Colimaran reinforcements are on their way to boost the defences along the river in an attempt to prevent coalition forces from crossing. The coalition commander now seeks to understand what his options are.

Corn and Culliver argue that if the attacking party were bound by proportionality obligations towards enemy personnel in situations such as this one, then every decision to press on with an attack once the 'first salvo' has been fired would require a proportionality assessment to protect any wounded enemy soldiers and military medical personnel in the target area.[603] Corn and Culliver fear that a commander would therefore be compelled to postpone any further attacks until such an assessment has been completed. In their view, this is bound to undermine a commander's ability 'to press tactical advantage and set the tempo of the engagement in order to maximize the collective impact on the enemy force'.[604] They suggest that such an approach does not reflect the reality of ground manoeuvre warfare and does not ring true with state practice.

These are legitimate concerns. However, we should recall that the duty not to make enemy combatants the object of attack is engaged only when their protected status has become apparent on the basis of observable, external factors.[605] The mere fact that there is reason to believe that an enemy combatant has been wounded is insufficient to trigger the obligation to respect and protect him. Moreover, we found that wounded combatants present outside medical facilities do not enjoy protection from attack during active hostilities unless they are unconscious or otherwise incapacitated by their wounds or sickness, and therefore incapable of defending themselves.[606] We should also bear in mind that the attacking party must take precautionary measures before re-attacking any targets[607] as well as during an ongoing attack.[608] Prior to launching a renewed attack, a commander would therefore need to assess whether the civilian harm expected remains at a level that is not excessive in relation to the military advantage anticipated. Therefore, one might ask to what extent the application of the non-civilian proportionality rule would blunt the momentum of an attack if some assessment of civilian collateral concerns must already take place as a matter of law.

In the present scenario, it has become apparent to the allied commander that some of the surviving Colimaran troops have become *hors de combat*. Allied forces must therefore take feasible precautions to minimise incidental harm to these individuals. For example, if allied troops were able to neutralise Colimaran reinforcements on route to their defensive positions on the river bank without sacrificing the military advantage anticipated or causing more extensive collateral damage to civilians and civilian objects, they would have to target those reinforcements before they reach their destination. Doing so would avoid or at least reduce the need to re-attack an area where enemy *hors de combat* are present. If this course of action is not available and allied forces have exhausted all feasible options to minimise the risk of incidental harm without, however, completely eliminating that risk, the allied commander would have to apply the non-civilian proportionality rule.

In the present case, neutralising the enemy defensive positions along the river bank offers a concrete and direct military advantage. Without overcoming those fortifications, coalition forces would not be able to cross the river and advance on the Colimaran capital. The military advantage anticipated from re-attacking the river bank positions is therefore considerable. Indeed, the advantage is such that a reasonable commander would need to be

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603. Corn and Culliver, 'Wounded Combatants', 457.
604. Ibid.
605. See section IV.B.7 above.
606. Ibid.
607. Additional Protocol I, art 57(2)(a).
608. Ibid, art 57(2)(b).

faced with the risk of causing incidental harm to a very significant number of protected enemy personnel before the threshold of excessiveness is met. This is all the more the case if one takes the position that the protected personnel in our scenario carry a diminished collateral value for the purposes of the non-civilian proportionality rule as a result of having exposed themselves to the risk of incidental harm through their prior actions in battle.

VII. Conclusion

The purpose of this paper was to determine whether a party to an armed conflict must ensure that any incidental harm it causes to enemy military personnel not or no longer liable to attack remains below any form of threshold. As we indicated in the opening pages of the paper, this question is of considerable practical importance. It is an unfortunate, but inevitable, consequence of warfare that persons protected from direct attack may suffer incidental harm. The law of armed conflict requires belligerents to take all feasible measures to avoid, or in any event to minimise, inflicting such harm on civilians and civilian objects. However, the law also recognises that collateral damage cannot be prevented completely and accepts that incidental harm which is not avoidable is not unlawful, provided it falls below a maximum ceiling. The purpose of proportionality *stricto sensu* set out in articles 51(5)(b), 57(2)(a)(iii) and 57(2)(b) of Additional Protocol I is to codify these rules. Yet these provisions only refer to civilian harm, despite the fact that enemy military personnel protected from attack, such as military medical personnel or combatants rendered *hors de combat*, raise similar collateral concerns.

The silence of the law on the position of protected enemy personnel is puzzling and troubling in equal measure. It may be taken to indicate that the law of armed conflict imposes no limits at all on the level of incidental harm that belligerents may visit on protected personnel. Yet this is difficult to reconcile with the humanitarian considerations that sustain the law. Alternatively, it may hint at a gap in the body of treaty law, but not necessarily in the customary rules governing the conduct of hostilities. But this would leave commanders guessing what level of collateral damage is or is not permissible and may lead them to break the law inadvertently. Given this uncertainty, it is imperative to clarify what obligations the law of armed conflict imposes on belligerents and individual commanders in this context.

We approached this task in a number of steps. The first part of our analysis revealed that proportionality *stricto sensu* does not extend to protected enemy personnel. The scope of the rule, as codified in articles 51 and 57 of Additional Protocol I, is limited to civilian harm only. Based on an extensive analysis of state practice, we also found that the proportionality rule is identical in scope under customary law and treaty law. Members of enemy forces do not fall within the ambit of either rule, since they do not acquire civilian status upon gaining immunity from further attack, but instead retain their military character. Nor do proportionality considerations extend to protected enemy personnel by way of a generic principle of proportionality.

In a second step, we clarified under what circumstances enemy personnel could nevertheless benefit, at least in principle, from proportionality considerations. Contrary to what proponents of the least-restrictive-means principle suggest, we argued that enemy combatants who are liable to attack may be engaged with means and methods of warfare that render their death inevitable. No proportionality considerations apply to them. By contrast, enemy personnel who are not liable to direct attack may, in theory, benefit from the proportionality rule. However, it is important to understand when exactly enemy troops gain immunity from further attack, especially in conditions of active combat. We therefore clarified the scope of the *hors de combat* rule and the conditions in which wounded and sick combatants are protected from attack.

In a third step, we reviewed the arguments put forward by the ICRC and commentators in favour of extending the application of the proportionality rule to protected enemy personnel. Although some of these arguments are more compelling than others, we found that none of them withstood closer scrutiny. In a final step, we therefore revisited the liability of protected personnel to incidental harm in an attempt to place these arguments onto more solid foundations. We suggested that the principle of military necessity, more specifically the prohibition of causing unnecessary destruction, as complemented by the duty to 'respect and protect' certain classes of enemy personnel, imposes an obligation on belligerents to reduce the level of incidental harm inflicted on protected personnel to what is unavoidable and to justify that harm with reference to the military benefit anticipated from an attack. Although our argument is mostly deductive in character,[609] it is anchored in the application of existing rules, rather than more elusive normative considerations. We therefore concluded that the law of armed conflict, as it currently stands, imposes an obligation on belligerents not to inflict incidental harm on protected enemy personnel that is out of proportion to the military benefit pursued by an attack. We termed this the 'non-civilian proportionality rule'.

Ultimately, it is for states to operationalise the non-civilian proportionality rule in practice. In the absence of a codified norm, there is no formal reason to express the non-civilian rule in the same terms as those employed by articles 51 and 57 of Additional Protocol I. Commanders who order, and troops which carry out, attacks that cause incidental harm to protected enemy personnel are not guilty of violating the laws of war, including the crime of injuring or killing persons *hors de combat*,[610] as long as they take feasible precautions and ensure that any collateral damage is not disproportionate in relation to the military benefit anticipated from an attack. However, there are good policy reasons for adopting the language of Additional Protocol I for the purposes of the non-civilian proportionality rule. Formulating the rule in the familiar terminology of proportionality *stricto sensu* helps to avoid confusion and, as we have demonstrated, provides war fighters with more robust guidance and greater legal certainty. Moreover, these advantages come at no real opportunity cost to belligerents. States will also have to decide what collateral value to assign to protected enemy personnel. They will have to weigh the benefits of simplicity that come with according the same value to all categories of protected personnel against the greater operational freedom that could potentially derive from operating a differentiated collateral value regime. We believe that both approaches are legally permissible, and we set out their relative advantages and disadvantages in detail.

Based on our analysis, we believe that the non-civilian proportionality rule is a necessary part of any targeting process that attempts to reconcile humanitarian imperatives with operational requirements during times of armed conflict.[611] The rule achieves this by safeguarding protected enemy personnel from disproportionate, and thus unnecessary, incidental harm without, however, unduly impairing an attacking party's freedom of manoeuvre against the enemy. Our aim in this paper was to bring clarity to a complex legal problem that involves the taking of human life. We hope that the paper will serve as a catalyst for states to express their position on the law in this area and that we have provided a cogent case for what that position should be. Adopting the non-civilian proportionality rule would bring clarity to those planning, authorising, executing and advising on targeting in current and future operations.

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609. Cf *Jurisdictional Immunities of the State*, para 57.
610. Rome Statute, arts 8(2)(b)(vi) and 8(2)(c)(i).
611. See Fenrick, 'The Rule of Proportionality', 125.