Abandoned Explosive Ordnances; see: Explosive Remnants of War

Acts Harmful to the Enemy. The specific function of those caring for the wounded, sick, and/or shipwrecked, as well as of the objects dedicated to such care, translates into particular protection under IHL [see: Wounded and Sick; Shipwrecked]. However, if such persons or objects (are used to) commit acts harmful to the enemy outside their humanitarian duties (“act(s) harmful to the enemy”), the rationale for their protection dissipates [art. 21 GC I; art. 34(1) GC II; art. 19(1) GC IV; arts. 13(1), 65(1) API; art. 11(2) APII]. The possibility of loss of protection forms part of the customary rules of IHL concerning the protection of medical personnel or objects [rules 25, 28, 29 ICRC Customary IHL Study].

It is not clear whether an act harmful to the enemy constitutes a distinct basis for the loss of protection of the persons and objects concerned, or whether it is a specific application of the military objective test [see: Military Objectives]. The entrenchment of acts harmful to the enemy in the GCs and APs supports a disjunction between these notions. In this regard, the ICRC has stated that “[t]he question of whether such an establishment or unit may be the object of an attack [...] depends on it fulfilling the criteria for qualifying as a ‘military objective’” [2016 ICRC Commentary GC I, para. 1847]. This seems to entail that, after establishing an act harmful to the enemy, it must be separately established that the requirements regarding a military objective have been met. However, the ICRC has also considered that “it is hard to conceive of circumstances in which the commission of an ‘act harmful to the enemy’ would not transform the facility in question into a military objective” [2016 ICRC Commentary GC I, para. 1847]. This may, conversely, mean that the notions overlap.

On the basis of the wording of the GCs and APs, the possibility of forfeiting protection on the basis of an act harmful to the enemy applies to: (i) (civilian) fixed establishments and mobile medical units [art. 21 GC I; art. 13(1) API; art. 11(2); APII; see: Medical Units and Establishments]; (ii) hospital ships and sick-bays [art. 34(1) GC II; see: Hospital Ships; Sick-Bays]; (iii) civilian hospitals [art. 19 GC IV; see: Hospitals]; and (iv) civil defence organizations [art. 65(1) API; see: Civil Defence]. Moreover, although not mentioned in the GCs or APs, medical and religious personnel and medical transports may, pursuant to the same rationale, also be deprived of protection under the same conditions [2016 ICRC Commentary GC I, paras. 1837 (fn. 2), 1995–1996; see: Medical Personnel; Religious Personnel; Medical Transports]. Separate (but comparable) rules have been created for the protection of medical aircraft and air transports.
[arts. 36–37 GCI; arts. 39–40 GCII; art. 22 GCIV; see: Medical Aircrafts; Medical Transports]. However, it is not entirely clear whether coastal rescue craft are subject to this regime [2017 ICRC Commentary GCII, para. 2372; see: Coastal Rescue Craft].

Other than the use of encrypted means of communication by hospital ships [art. 34(2) GCII], the GCs and APs do not define acts harmful to the enemy. However, it is not contested that certain forms of military use or activity may amount to an act harmful to the enemy. Examples include direct participation in hostilities, sheltering able-bodied combatants, and stockpiling weapons [2016 ICRC Commentary GCI, paras. 1841–1842]. Due to the absence of a definition, the determination concerning an act harmful to the enemy must be made on a case by case basis and may, therefore, involve diverging (and possibly inconsistent) assessments.

Whilst acts harmful to the enemy are not defined, the GCs and APs specify scenarios that do not reach the threshold. The most common scenarios regarding (civilian) medical units and establishments, hospital ships, and sick-bays concern: (i) the presence of armed personnel and the use of weapons to maintain order and/or in self-defence or in defence of persons in their care [art. 22(1) GCI; art. 35(1) GCII; art. 13(2)(a) AP1; see also: art. 65(3) AP1]; and (ii) small arms and ammunition found on wounded, sick, and/or shipwrecked persons and not yet handed over to the proper service [art. 22(3) GCI; art. 35(3) GCII; art. 13(2)(c) AP1; similarly regarding civilian hospitals: art. 19(2) GCIV]. Furthermore, the extension of care to wounded, sick, and/or shipwrecked civilians by medical services of a military nature and the nursing of sick and wounded armed forces and/or other combatants in medical institutions of a civilian nature may also not be construed as an act harmful to the enemy [art. 22(5) GCI; art. 35(4) GCII; art. 13(2)(d) AP1; art. 19(2) GCIV; similarly regarding civil defence organizations: art. 65(2)(c) AP1]. More specific scenarios are set forth in the GCs and AP1, depending on the person or object in question [art. 22(2), (4) GCI; art. 35(2), (5) GCII; arts. 13(2)(b), 65(2)(a), (b), (4) AP1]. According to the ICRC, these lists are non-exhaustive [2016 ICRC Commentary GCI, para. 1860]. Such scenarios have not been defined in relation to non-international armed conflict surpassing the threshold of AP1 [art. 11(2) AP1]. Although the list of scenarios contained in Article 13(2) AP1 may “help the interpretation” of Article 11(2) AP1 [1987 ICRC Commentary AP1, para. 4723], it remains uncertain to what extent these scenarios specifically apply in this context.

Where it is determined that an act is harmful to the enemy, protection is not inevitably lost. It must, in addition, be established that such an act has been committed outside the humanitarian duties of the person or object concerned. This means that an act that may be qualified as harmful to the enemy