

ARTICLE

WHY SHOULD THE INNOCENT SUFFER? MENTAL HARM AS DISABILITY AND THE ESTABLISHMENT OF A POST BELLUM DUTY OF CARE FOR ENEMY CIVILIANS

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ABSTRACT

Over the last few years, scholars have argued that civilian mental harm should be taken into consideration as a measure in the realms of targeting decision and have proceeded to define such civilian mental harm as associated with post-traumatic stress disorder (PTSD) or brain injuries. Yet, nothing has been said on the need for civilian mental harm to establish duties not only in the heat of the battle, but also in its aftermath. Along these lines, discussing the correlation of civilian mental harm with the notion of disability, given that the latter has been delineated in the U.N. Convention on the Rights of Persons with Disabilities, this Essay analyzes how civilian mental harm should be seen as the basis and factual background of a post bellum duty of care towards enemy civilians.

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I. INTRODUCTION

In the context of warfare, civilian mental harm has been stressed so far only during the conduct of hostilities, in *jus in bello*. With international law originally placing the emphasis on the intentional causation of such harm to the affected civilians,¹ over the last few years scholars have highlighted underlined how incidental mental harm should be seen as able to beget legal repercussions for the legality of the applied force.² Yet, nothing has been written so far on how civilian

1. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 241 (2000); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1, 1 (2004); Solon Solomon, *Targeted Killings and the Soldiers’ Right to Life*, 14 ILSA J. INT’L & COMP. L. 99, 107 (2007).

2. Sarah Knuckey, Alex Moorhead, Audrey McCalley & Adam Brown, *The Proportionality Rule and Mental Harm in War*, in NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW 367 (Claus Kress & Robert Lawless eds., Oxford Univ. Press 2020); Eliav Lieblich, *Beyond Life and Limb: Exploring Incidental Mental Harm in International Humanitarian Law*, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 185 (Derek Jinks, Jackson Maogoto & Solon Solomon, eds., TMC Asser Press 2014); Michael Schmitt & Chad Highfill, *Invisible Injuries: Concussive Effects and International Humanitarian Law*, 9 HARV. NAT’L SEC. J. 73, 73 (2018); Solon Solomon, *Bringing Psychological Harm to the Forefront: Incidental Civilian Fear as Trauma in the case of Recurrent Attacks*, EJIL:TALK! (Apr. 25, 2018), <https://www.ejiltalk.org/bringing->

mental harm can constitute the factual background upon which a post bellum duty of care is established. The question is important given the all-augmenting cognizance of the fact that the end of hostilities does not necessarily signal ‘an end to the human cost of armed conflict.’³

The term “duty of care” is intentionally used although it does not exist in the realms of the laws of war and rather comes from tort law. Some scholars, for example Rebecca Crootof, have argued for the creation of an international “war torts regime” that would hold warring parties strictly liable for all civilian harms.⁴ This Essay argues that the “war torts” idea should equally lead to the establishment of a post bellum duty of care under which States—irrespective of their lawful or unlawful behavior during warfare—will undertake the obligation, once hostilities end, to share the burden of the enemy civilians’ rehabilitation.

This Article focuses on civilians’ mental harm and trauma because it is this type of harm that is generally underestimated in the realms of any legal debate pertaining to warfare and its aftermath.⁵ Equally, mental harm was not stressed in the initial documents drafted in the first decades after WWII and pertaining to the international protection of persons with disabilities.⁶ Moreover, this Author refers to a post bellum duty to the extent that *jus post bellum* is meant to create a framework of post-conflict arrangements that bolster the peaceful co-existence of the former warring parties, by inter alia, accommodating

psychological-civilian-harm-to-the-forefront-incident-civilian-fear-as-trauma-in-the-case-of-recurrent-attacks/ [https://perma.cc/X9VL-4RUG]; ILA Study Group, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INT’L L. STUD. 322, 328–29 (2017); Noam Lubell & Amichai Cohen, *Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts*, 96 INT’L L. STUD. 159, 174 (2020).

3. See Rep. of the U.N. Special Rapporteur on the Rights of Persons with Disabilities, U.N. Doc. A/76/146, ¶ 1 (2021); Kelisiana Thynne & Thomas de Saint Maurice, *IHL in the aftermath of battles and conflicts: What do we want to achieve? Humanitarian Law & Policy*, INT’L RED CROSS BLOG (Jul. 14, 2022), <https://blogs.icrc.org/law-and-policy/2022/07/14/ihl-aftermath-conflicts/> [https://perma.cc/MP64-VQW5].

4. Rebecca Crootof, *War Torts*, 97 NYU L. REV. 1063, 1066 (2022).

5. See Lieblich, *supra* note 2, at 185.

6. See, e.g., Rep. of the U.N. Secretary-General to the Social Commission, *Social Rehabilitation of the Physically Handicapped*, U.N. Doc. E/CN.5/197 (1950).

claims arising from the armed conflict.⁷ In particular, *jus post bellum* comprises the restoration of the damage warfare has inflicted.⁸

When it comes to material objects, the restoration of the *status quo ante* may be easy to take place through the rebuilding of destroyed infrastructure. This restorative process may not be so easy—or is even impossible—in cases where the damage is intangible,⁹ referring to a wider concept rather than an isolated object. Nevertheless, scholars have noted how the intangible character of the incurred harm should not be an obstacle per se for international law to address the repercussions of the incurred harm on a legal level.¹⁰ For example, legal scholars have stressed that, in cases of adverse impact to the environment, the former warring parties have an obligation to either restore the situation in the *status quo ante*¹¹, or, in cases when this is not possible, to alleviate the scope of the undertaken damage.¹²

Non-legal scholars have made similar arguments regarding the emotional harm and enmity that war creates among warfare's protagonists, combatants, and civilians alike. Coming from a health care ethics and theology background, Allman and Winright have stated how following exposure to warfare acts, the soldier is affected in a manner that makes imperative for the State and the wider society to institute ways that will heal and address this war trauma.¹³ Legal scholars have been silent, but taking the thread from Allman and Winright, in the current article I discuss how a *jus post bellum* duty of care can legally address the enduring trauma of enemy civilians even long after the end of hostilities.¹⁴

7. Ilias Plakokefalos, *Reparation for Environmental Damage in Jus post bellum*, in ENVIRONMENTAL PROTECTION AND TRANSITIONS FROM CONFLICT TO PEACE: CLARIFYING NORMS, PRINCIPLES AND PRACTICES 259 (Carsten Stahn, Jens Iverson & Jennifer Easterday eds., Oxford University Press, 2017).

8. See *infra* pt. 5.

9. For discussion of why the intangible character of mental harm should not be a reason for not taking it into account in the laws of war, see Lieblich, *supra* note 2, at 206–08.

10. See Lieblich, *supra* note 2, at 185.

11. Douglas Lackey, *PostWar Environmental Damage: A Study in Jus post bellum*, in INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY 141 (Larry May & Zachary Hoskins eds., Cambridge Univ. Press 2010).

12. Plakokefalos, *supra* note 7, at 8.

13. Mark Allman & Tobias Winright, *Growing Edges of Just War Theory: Jus ante bellum, jus post bellum and Imperfect Justice*, 32 J. SOC'Y CHRISTIAN ETHICS 173, 185 (2012).

14. See Rep. of the U.N. Special Rapporteur on the Rights of Persons with Disabilities, U.N. Doc. A/76/146, ¶ 31 (2021) (noting “conflicts tend to leave profound intergenerational scars, especially in terms of mental health and trauma.”).

The argument here is not that such a duty should be introduced on a *de lege ferenda* basis. The argument is rather that such a duty of care should be viewed as the natural development of the duty of care framework that *jus in bello* and *jus post bellum* already establish. For example, international humanitarian law (IHL) entails a scope of obligations towards the wounded and the sick. These obligations relate not only to the physical wounds of the soldiers, but also to the status of their mental health. The 2016 International Red Cross Commentary of the Geneva Conventions states in paragraph 741, which discusses Article 3, that

as far as the relevant medical condition is concerned, the terms ‘wounded and sick’ are to be interpreted broadly to apply to anyone who is need of medical assistance or care . . . Mental or psychological conditions, including post-traumatic stress disorder, also qualify, provided they require medical assistance or care.¹⁵

Similar wording is included in the Commentary under the auspices of the analysis undertaken in the realm of Article 12 of the First Geneva Convention.¹⁶ Moreover, humanitarian disarmament treaties have pointed out to a victim assistance obligation that entails in the aftermath of hostilities, the obligation of primarily the territorial State to rehabilitate not only the physical, but also the psychological harm civilians have sustained.¹⁷ Scholars have discussed how the Convention on the Rights of Persons with Disabilities (“CRPD” or “the Convention”)¹⁸ has played a major role in putting these victim assistance provisions into a human rights context and how it has stressed the parameters for inclusivity that such assistance must encompass.¹⁹

15. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Commentary, ¶ 741, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 135.

16. *Id.*, art. 12, Commentary ¶ 1343.

17. See The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction pmbl., art. 6, ¶ 3, Sept. 18, 1997; see also Convention on Cluster Munitions, art. 5, May 30, 2008; Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, arts. 6–7; Bonnie Docherty & Alicia Sanders Zakre, *The Origins and Influence of Victim Assistance: Contributions of the Mine Ban Treaty, Convention on the Rights of Persons with Disabilities and Convention on Cluster Munitions*, 105 INT’L REV. RED CROSS 252, 261 (2023).

18. Convention on the Rights of Persons with Disabilities, *adopted* Sept. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

19. Docherty & Sanders Zakre, *supra* note 17, at 261.

The duty of post bellum victim assistance should not be seen as befalling only on territorial States. International practice has shown examples where third parties have taken the lead in restoring the harm caused by landmines and cluster munitions.²⁰ Along these lines, some may argue that States that have been at war with a territorial State and are responsible for the damage to the latter's infrastructure and the harm caused to the affected civilians, should all the more have a duty to contribute to the restoration of that damage and harm. Moreover, victim assistance programs have helped not only the victims of landmines and of cluster munitions but also other civilians who, following a conflict, have the same medical problems landmine and cluster munition survivors have to address.²¹ On this account, by discussing such post bellum duty of care in conjunction with the CRPD for all the generic harm warfare causes and not only in the case of certain types of weaponry, this Article sheds light on the proper interpretation of the Convention's relevant provisions.

From the beginning it has to be rendered clear that this Article's analysis does not include instances where hostilities have ended with one State occupying another's territory or exercising effective control over the latter in order for the laws of occupation to apply. In these cases, it is clear that the occupying State or the State exercising effective control has duties vis-à-vis the enemy civilians and their mental health.²² This Article rather envisages a scenario under which the end of hostilities finds the warring parties in their original boundaries or armistice lines. Under international law as States currently understand it, in such cases, former warring parties have no obligation after hostilities end to mend the psychological havoc their wartime actions have caused.

20. *Id.* at 270.

21. *Id.*

22. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 55, 56, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 25 (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights art. 12, opened for signature Dec. 19, 1966, 933 U.N.T.S. 3 (entered into force Jan. 3, 1976); Solon Solomon, *Bringing Psychological Civilian Harm to the Forefront: Incidental Civilian Fear as Trauma in the case of Recurrent Attacks*, EJIL:TALK! (Apr. 25, 2018), <https://www.ejiltalk.org/bringing-psychological-civilian-harm-to-the-forefront-incident-civilian-fear-as-trauma-in-the-case-of-recurrent-attacks/> [<https://perma.cc/SP53-CPFW>].

Similarly, this Article does not advocate the endorsement of such *jus post bellum* duty of care without certain caveats. It would be unrealistic to argue that such duty should exist towards all affected enemy civilians the moment warfare is used with the intent to beget fear.²³ Yet, in some instances, apart from the impact on various individuals, warfare has also a community-level facet.²⁴ In these cases, such impact is associated with the long-term legacies of the war that are bequeathed to those alive in the time of the hostilities, but also to their descendants.²⁵ To the extent thus that mental harm endures on a communal, long-term level, this Article argues that it cannot go unaddressed because the trauma induced as a result of the exposure to the hostilities must be seen as a form of disability. The reasons are twofold. First, the trauma itself constitutes a form of mental disability due to its debilitating effects.²⁶ Secondly, there is a high comorbidity between the emergence of trauma and the manifestation of various disabilities that can be not only physical, but pertain also to the person's ability to concentrate, learn, or remember.²⁷

On this account, the next two Parts will examine the notion of civilian mental harm in warfare the way legal scholars see it and, subsequently, the way it is discussed by mental health experts as war trauma. This Article then proceeds to discuss the junction between

23. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT* 119 (1st ed. 2004); see also CHRISTOPHER GREENWOOD, *ESSAYS ON WAR IN INTERNATIONAL LAW* 644 (2006).

24. Guy Elcheroth, *Individual-level and Community-level Effects of War Trauma on Social Representations Related to Humanitarian Law*, 36 *EUR. J. SOC. PSYCH.* 907, 907 (2006); see also Daya Somasundaram & Sambasivamoorthy Sivayokan, *Rebuilding Community Resilience in a Post-War Context: Developing Insight and Recommendations: a Qualitative Study in Northern Sri Lanka*, 7 *INT'L J. MENTAL HEALTH SYSTEMS* 1, 1 (2013).

25. See generally Pauline Grosjean, *Conflict and Social and Political Preferences: Evidence from World War II and Civil Conflict in 35 European Countries*, 56 *COMPAR. ECON. STUD.* 424 (2014); see also Eduard Miguel & Gerard Roland, *The Long-Run Impact of Bombing Vietnam*, 96 *J. DEV. ECON* 1 (2011).

26. Eva Lassemo & Inger Sandanger, *Potentially Traumatic Events As Predictors of Disability Pension: A 10-year Follow-Up Study in Norway*, 46 *SCANDINAVIAN J. PUB. HEALTH* 340 (2018).

27. Jennifer Vasterling & Sara Lippa, *Neurocognitive Alterations Associated with PTSD: Neuropsychological Deficits, Information-Processing Biases and Implications for Mild Traumatic Brain Injury in HANDBOOK OF PTSD: SCIENCE AND PRACTICE* 188–89 (Matthew Friedman et al. eds., 2014); see also Ayazi et al, *supra* note 26 at 3; Lisa A. Croen et al., *The Health Status of Adults on the Autism Spectrum*, 19 *AUTISM* 814 (2015); see also Jeffrey Sonis et al., *Probable Posttraumatic Stress Disorder and Disability in Cambodia*, 302 *JAMA* 527, 535 (2009).

mental harm and disability inside the realm of the CRPD and what this junction can mean for the establishment of a post bellum duty of care towards enemy civilians.

II. DISCUSSING CIVILIAN MENTAL HARM IN WARFARE

The concept of civilian mental harm in warfare should be seen as utterly linked—though not constrained—to the fear these civilians experience as a result of their exposure to hostilities. The assumption is that beyond a certain degree of gravity such sentiments of fear cannot be seen as bereft of repercussions for the legality of the applied force during hostilities. This idea is deeply rooted in the fact that the intentional causation of terror to civilians was awarded legal significance as a denounceable practice already in international documents dating from the first half of the 20th century.²⁸

Thus, for example, the First World War victorious countries established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The Commission, meant to examine the reasons that led to the war as well as recommend the individuals to be prosecuted for war crimes, denounced the fact that German forces had committed war crimes.²⁹ Pursuing a policy meant to deliberately instill “terror in every heart for the purpose of repressing all resistance” was enumerated among these crimes.³⁰ The Commission also included findings on “violations of the laws of humanity” pertaining to crimes Germany committed against its own nationals.³¹ Although States like the United States deemed expressions such as “laws of humanity” as too vague to be able to lead to any criminal accountability, the fact that the Commission’s report included the creation of terror set the tone for the prohibition’s inclusion in other international documents such as the Draft Rules of Aerial Warfare,

28. Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, 33 CALIFORNIA W.CAL. INT’L. L. J. 1, 11 (2002).

29. M. Adatci, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT’L. L. 95, 113 (1920).

30. *Id.*

31. MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 458 (Intersentia, 2002).

drafted in 1922,³² and the ILA Draft Convention on the Protection of the Civilian Populations Against New Engines of War.³³

Following World War II, U.N. Member States ratified the Geneva Conventions. Among the most important portions for this Article's purposes is Article 33 of the Fourth Geneva Convention, which stipulates that "collective penalties and likewise all measures of intimidation or of terrorism shall be prohibited."³⁴ The Commentary of the International Committee of the Red Cross has interpreted "terrorism" in the particular provision as measures of intimidation aimed to terrorize the civilian population.³⁵ The prohibition against spreading terror to civilians has been clearly articulated as a law of war violation in the Additional Protocols to the Geneva Conventions. With Additional Protocol I (AP I)³⁶ referring to international armed conflicts and Additional Protocol II (AP II)³⁷ to non-international ones, the two documents introduced identical arrangements regarding civilian protection from intentional terrorization.³⁸ In that sense, Article 51(2) of AP I and Article 13(2) of AP II have entrenched—from a positivist point of view—what some States, international courts and the International Committee of the Red Cross already considered already part of customary international law.³⁹

32. General Report of the Commission of Jurists at The Hague, 17 AM. J. INT'L. L. 242, 250 (1923).

33. Draft Conventions for the Protection of Civilian Populations against New Engines of War art. 4, Sept. 2, 1938, 345 I.H.L. 48. The convention was meant to establish safety zones for certain non-combatants. See Elizabeth Chadwick, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 73 (1996).

34. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 22, art. 33.

35. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 226 (Pictet ed., 1958).

36. Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

37. Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

38. Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict*, 22 EUR. J. INT'L. L. 219, 231 (2011).

39. Jean-Marie Henckaerts & Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES 8 (Cambridge Univ. Press, 2005). For the customary nature of article 13(2) AP II see Emily Crawford, *Blurring the Lines Between International and Non-International Armed Conflicts-The Evolution of International Customary Law Applicable In Internal Armed Conflicts*, AUSTRALIAN J. INT'L. L. 29,38 (n.52)(2008)

Neither the Protocols nor their Commentaries refer to the nexus between terror and fear.⁴⁰ On the other hand, the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Galic* case⁴¹ proceeded to make the association between the two notions by defining terror as extreme fear. Moreover, in some countries, military experts entrusted with the compilation of army manuals have gone one step further by even acknowledging that the fear created intentionally to the affected civilians, must not be necessarily “extreme” in order to be denounced. For example, in Sweden, a Committee appointed by the Government in order to compile a report on the laws of war by which the country is bound, underlined how Articles 51(2) and 13(2) should be seen as prohibiting acts of violence and relevant threats aimed at creating either fear or terror to the civilian population.⁴² Similarly, the Army Manual of the Netherlands stipulates that “acts of violence or the threat of violence, the main feature of which is to instill fear in the civilian population, are prohibited.”⁴³ Immediately after, the manual continues stating that “as a result, so called terror bombardment as well as any other form of terror attack is prohibited.”⁴⁴

Yet, no matter how much some manuals appear ready to render legal repercussions for civilian fear even below any intensity threshold, this accommodative stance towards the notion of civilian fear as a form of mental harm is limited to cases where such fear is intentionally aroused. When it comes to incidental civilian fear, meaning the fear that is incurred to the affected civilians as a result of their exposure to warfare but with no such intentions from the party applying military

40. See Commentary to the Additional Protocol I to the Geneva Conventions, 1987, § 1940; Commentary to the Additional Protocol II, 1987, § 4785 (referencing the concept of terror).

41. Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, ¶ 137 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003). See also ICTY Prosecutor v. Karadzic, IT-95-5/18-T, Judgment, ¶ 1460 (Int’l Crim. Trib. For the Former Yugoslavia Mar. 16, 2016) (citing the Galic judgment).

42. See International Law of Armed Conflict: A Swedish Interpretation and Application, SOU 2010:72 at 338 (Swed.), https://data.riksdagen.se/dokument/GYB372#page_135 [<https://perma.cc/J6FR-AWSV>]. See also Permanent Mission of Sweden to the United Nations submitted to the Sixth Committee of the UN General Assembly, ¶ 8 (July 27, 2016) https://www.un.org/en/ga/sixth/71/protocols/sweden_e.pdf [<https://perma.cc/EY5C-ZS2D>] (explaining that the recommendations of the Committee were endorsed by the country’s new war manual).

43. Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27-412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, ¶ 1051 (translation by the author).

44. *Id.*

force, the standard view that international law scholars took until recently can be synopsized in Dinstein's stance that "a large-scale aerial bombardment-inflicting extensive destruction on military units and objectives-is liable to terrify civilians and maybe inimical to their morale, but it does not per se taint such an attack with illegality."⁴⁵ This seems to be further buttressed by the fact that all the international humanitarian law structure seems to have been constructed on the notion of intention as far as certain occurring results are concerned. For example, Article 54(2) of Additional Protocol I prohibits attacking or destroying objects indispensable to the survival of the enemy civilian population.⁴⁶ Yet, these actions are prohibited when they come as part of a policy, not in other cases. As some legal scholars have noted about Article 54(2): "This paragraph does not prohibit the incidental distress of civilians resulting from otherwise lawful military operations."⁴⁷

Equally, war practices like starvation are denounced to the extent that a combatant intentionally employs them as a method of warfare according to Article 54(1) AP I. The explicit wording of the particular provision and the fact that it does not mention starvation *in abstracto* but only as a method of warfare has led the UK Armed Forces Manual drafters to state that "the law is not violated if military operations are not intended to cause starvation but have that incidental effect, for example . . . if civilians through fear of military operations abandon agricultural land" ⁴⁸ Yet, despite the manual's effort to place the emphasis on the intention of undertaking the certain practice of starvation rather than on the incurred results, it has been underlined how sieges which lead to incidental mass starvations, should also not be condoned under international law.⁴⁹

On this account, the nexus between the "intentional" and the "incidental" also becomes less relevant when discussing terror and fear.

45. DINSTEIN, *supra* note 23, at 119. ; MICHAEL SCHMITT, TALLIN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 33 (2013).

46. Protocol I, *supra* note 36, art. 54(2).

47. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 381 (2013).

48. JSP 383: THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.27.2 (2004) [hereinafter UK Manual].

49. Mark Lattimer, *Can Incidental Starvation of Civilians be Lawful under IHL?*, BLOG OF THE EUR. J. OF INT'L L. (Mar. 27, 2019), <https://www.ejiltalk.org/can-incidental-starvation-of-civilians-be-lawful-under-ihl/> [https://perma.cc/86D5-NPCS].

Quite interestingly, even AP I, with all its emphasis on intention, concedes that combatants may cause incidental harm to the civilian population and proceeds to measure this harm through the proportionality principle. Thus, Article 51(5)(b) of AP I prohibits an attack where the military commander expects incidental loss of civilian life or civilian injury, excessive to the concrete and direct military advantage anticipated.⁵⁰ Various other provisions in legal instruments relevant to the conduct of warfare employ similar wording.⁵¹

At the same time, AP I is vague on many issues concerning the incurrance of incidental harm to enemy civilians. It does not provide any standards against which the proportionality test must be analyzed. Furthermore, it does not clarify whether the incidental harm to the civilian population comprises only physical harm or whether this harm can be extended to include psychological aspects. The Commentary to the Protocol also does not provide any elucidation on these questions. It prohibits creating conditions conducive to surrender by means of attacks that incidentally harm the civilian population,⁵² but nonetheless does not explain whether this incidental harm also comprises psychological harm.

International criminal courts and tribunals have, on the other hand, dealt with civilian mental harm in warfare by discussing the qualitative features such harm can take.⁵³ They have thus underlined the extent to which warfare's psychological impact amounts to more than a temporary and minor impairment of a person's mental faculties,⁵⁴ and instead instigates feelings of strong fear, of terror, and

50. Protocol I, *supra* note 36, art. 51(5)(b).

51. *See, e.g.*, Article 85(3)(b) of AP I (rendering to any article 51(5)(b) violation a grave breach status); Article 3(3)(c) of Protocol II to the Convention on Certain Conventional Weapons; Article 8(2)(b)(iv) of the ICC Statute.

52. Commentary to Protocol I of the Geneva Conventions, *supra* note 40, § 2218.

53. *See* SOLON SOLOMON, INTERNATIONAL CRIMINAL COURTS AND THE INTRODUCTION OF THE DAUBERT STANDARD AS A MODE OF ASSESSING THE PSYCHOLOGICAL IMPACT OF WARFARE ON CIVILIANS 37-56 (June 1 2019) (Ph.D. dissertation, King's College London) (on file with King's College London) (discussing civilian mental harm in the judgments of the international criminal courts and tribunals, including the ICC and the SCSR).

54. Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶ 291 (Int'l Crim. Trib. for Rwanda June 17, 2004); Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Judgment, ¶ 633 (Int'l Crim. Trib. for Rwanda Jan. 22, 2004); *see also* Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 59 (Int'l Crim. Trib. for Rwanda June 7, 2001).

of intimidation that go beyond “a state of anxiety.”⁵⁵ Civilians experiencing these emotional conditions as a result of war have thus sustained serious mental harm.

Moreover, such mental harm must extend beyond temporary unhappiness, embarrassment, or humiliation in order to acquire a legal importance, though they need not be permanent or irremediable.⁵⁶ Additionally, these harms must result “in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”⁵⁷ At the same time, in a number of instances, international criminal courts and tribunals have proceeded to also link serious mental harm with the notion of trauma.⁵⁸ Civilian mental harm’s association with trauma is important to the extent that it allows the discussion to be transmitted from the legal sphere to the mental health sciences sphere, as manifested by the reality of disorders or trauma symptoms. As such, this connection between the two areas demonstrates how the international legal community should view mental harm to civilians as rising to the level of warranting legal repercussions.

III. DISCUSSING CIVILIAN MENTAL HARM AS TRAUMA

War trauma has been historically associated with combatants. It was in the aftermath of World War I that mental health scientists first became interested in documenting the shell shock the soldiers had experienced.⁵⁹ Additional wars in the second half of the twentieth century such as the Vietnam War and the Yom Kippur War showed how “combat stress,” as this trauma was called, can persist for decades

55. Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Appeals Chamber Judgment, ¶¶45-48 (Int’l Crim. Trib. for Rwanda Mar. 12, 2008); Prosecutor v. Ntawukulilyayo, Case No. ICTR-05-82-T, Judgment, ¶ 452 (Int’l Crim. Trib. for Rwanda Aug. 3, 2010) (referencing to the jurisprudence of the ICTR).

56. Prosecutor v. Tolimir, Case No. IT-05-99/2-T, Judgment, ¶ 738 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012).

57. Prosecutor v. Krstic, Case No. IT-98-33-T, Trial Chamber Judgment, ¶ 513 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

58. See Prosecutor v. Blagojevic et al., Case No. IT-02-60-T, Trial Chamber Judgment, ¶¶ 647, 650, 652 (Int’l Crim. Trib. of the Former Yugoslavia Jan. 17, 2005); Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Chamber I Judgment, ¶ 1358 (Mar. 14, 2012); Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II Judgment, ¶¶ 1006, 1054-55 (Mar. 7, 2014).

59. L. STEPHEN O’BRIEN, TRAUMATIC EVENTS AND MENTAL HEALTH 9 (Cambridge Univ. Press, 1998); Nancy Andreasen, *Posttraumatic Stress Disorder: A History and a Critique*, 1208 ANNALS OF THE N.Y. ACAD. SCI. 67, 67 (2010).

after hostilities have ended.⁶⁰ The level of trauma differs from person to person and even from unit to unit. For example, studies have found that combat soldiers exposed to stressors such as killing enemy soldiers or civilians suffer from combat stress reactions more than non-combat troops.⁶¹ Moreover, elite unit soldiers can be less affected than other soldiers.⁶² Still, in mental health sciences literature, combat stress came to be associated with post-traumatic stress disorder (PTSD)⁶³ even though some mental health experts have voiced concerns as to whether this connection is a bit exaggerated.⁶⁴

War trauma's association with civilians tracks the progression of the combat stress discussion among mental health experts. Even after World War II and shortly after the middle of the twentieth century, any stressful effects on civilians were examined strictly outside a warfare context and related to these individuals' exposure to natural catastrophes like industrial accidents⁶⁵ or big fires.⁶⁶ It is only gradually that mental health experts came to acknowledge the fact that war trauma can also impact civilians.⁶⁷

60. Edgar Jones & Simon Wessely, *A Paradigm Shift in the Conceptualization of Psychological Trauma in the 20th Century*, 21 J. ANXIETY DISORDERS 164, 164 (2007).

61. David Anaki et al., *Faces in the Face of Death: Effects of Exposure to Life-Threatening Events and Mortality Salience on Facial Expression Recognition in Combat and Noncombat Military Veterans*, 12 EMOTION 860, 860 (2012).

62. A.C. Iversen et al., *Risk Factors for Post-traumatic Stress Disorder Among UK Armed Forces Personnel*, 38 PSYCH. MED. 511, 514 (2008).

63. Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey*, 52 ARCHIVES OF GEN. PSYCHIATRY 1048, 1048 (1995); C. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems and Barriers to Care*, 35 NEW ENG. J. MED. 13, 13 (2004).

64. BEN SHEPHARD, *A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN THE TWENTIETH CENTURY* 378–79, 386 (Harvard Univ. Press 2001).

65. John Nemiah, *Psychological Complications in Industrial Injuries*, 7 ARCHIVES OF ENV'T HEALTH: AN INT'L J., 481, 481 (1963).

66. Alexandra Adler, *Neuropsychiatric Complications in Victims of Boston's Cocoa-nut Grove Disaster*, 123 JAMA 1098, 1099 (1943). On details of the actual historical event and its contemporary recounting, see Don Aucoin, *Gripping Tale of Cocoanut Grove fire to Appear on Local Stage*, THE BOSTON GLOBE, Feb. 22, 2016, <https://www.bostonglobe.com/arts/2016/02/21/gripping-tale-cocoanut-grove-fire-finally-finds-boston-stage/11Y1BcQAv9F5vDRvuoluMN/story.html> [<https://perma.cc/62A8-4ZE5>].

67. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 274 (5th ed., 2013); Avi Bleich, Anat Dycian, Meni Koslowsky, Zahava Solomon & Michael Wiener, *Psychiatric Implications of Missile Attacks on a Civilian Population: Israeli Lessons from the Persian Gulf War*, 268 JAMA 613, 613 (1992).

Human resilience, namely the ability to regain functionality after a stressful event,⁶⁸ means that not all civilians will not experience trauma despite experiencing the same stressful event. For example, it is worth noting that of all the persons exposed to the traumatic event, only one tenth comes to develop PTSD.⁶⁹ There is not a single accepted hypothesis among mental health scientists on why certain individuals are more prone to trauma compared to others.⁷⁰ Yet, studies on civilians who have been subject to intermittent and recurrent attacks for long periods of time—for example, the Israeli civilians residing in the border with Gaza⁷¹—have shown that civilians who are exposed to chronic and repeated violence are more likely to develop some kind of trauma.. It is a mistake to think that, based on resilience, these individuals are “symptom-free” or only bear very few symptoms of distress.⁷² Furthermore, the havoc that warfare spreads and the dismantling of social fabric is an additional source of “collective trauma”⁷³ that

68. Rozanna Aitchison et al., *Resilience in Palestinian Adolescents Living in Gaza*, 9 PSYCH. TRAUMA: THEORY, RSCH., PRAC., AND POL’Y 36, 36 (2016).

69. Melanie Hetzel-Riggin & Ryan Roby, *Trauma Type and Gender Effects on PTSD, General Distress and Peritraumatic Dissociation*, 18 J. LOSS & TRAUMA 41, 49–50 (2013); Mark Creamer & Meagan O’Donnell, *Post-traumatic Stress Disorder*, 15 CURRENT OP. IN PSYCHIATRY 163, 164 (2002); Dusica Lecic-Tosevski et al., *Personality Factors and Posttraumatic Stress: Associations in Civilians One Year After Air Attacks*, 17 J. PERSONALITY DISORDERS 537, 545 (2003); Candice Monson et al., *A Psychological History of PTSD*, in HANDBOOK OF PTSD: SCIENCE AND PRACTICE, *supra* note 27, at 72; GA Wilson et al., *Anxiety, Panic and Phobias*, in ENCYCLOPEDIA OF MENTAL HEALTH 77 (Howard Friedman ed., 2d ed. 2016).

70. BEN SHEPHARD, *A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN THE TWENTIETH CENTURY* 389 (Harvard University Press 2001).

71. For example, the study conducted by US psychologist Katie Chipman and her colleagues on Israeli civilians affected by long exposure to rocket attacks, where 30% of the examined civilians reported impairments related to PTSD symptoms, yet only 5.5% was diagnosed with probable PTSD. Katie Chipman et al., *Predictors of Posttraumatic Stress-related Impairment in Victims of Terrorism and Ongoing Conflict in Israel*, 24 ANXIETY, STRESS & COPING 255, 264 (2011). *See also* Avi Besser et al., *Acute Symptoms of Posttraumatic Stress and Dissociative Experiences Among Female Israeli Civilians Exposed to War: The Roles of Intrapersonal and Interpersonal Sources of Resilience*, 70 J. CLINICAL PSYCH. 1227, 1229 (2014).

72. Dean Kilpatrick et al., *National Estimates of Exposure to Traumatic Events and PTSD Prevalence using DSM-IV and DSM-5 Criteria*, 26 J. TRAUMATIC STRESS 537, 545 (2013) (noting that the probability of PTSD increases with greater event exposure); Stevan Hobfoll et al., *The Limits of Resilience: Distress Following Chronic Political Violence among Palestinians*, 72 SOC. SCI. & MED. 1400, 1407 (2011); L. Stephen O’Brien, *TRAUMATIC EVENTS AND MENTAL HEALTH* 2 (1998).

73. Daya Somasundaram, *Recent Disasters in Sri Lanka: Lessons Learned*, 36 PSYCHIATRIC CLINICS OF N. AM. 321, 329–30 (2013). For the fact that continuous traumatic

emerges among affected civilians, underlining at the same time the beneficial buffering role of family and of wider social support.⁷⁴ The manifestation of war trauma can take the form of different psychological disorders, most notably depression and PTSD.⁷⁵ The latter has many manifestations,⁷⁶ some of which, like complex PTSD, have even been largely viewed as separate disorders.⁷⁷ In that sense, contrary to what legal scholars have largely done so far, it is wrong to only associate civilian mental harm with PTSD.⁷⁸

At the same time, it is true that PTSD has certain features that renders it the most plausible way to legally transliterate—in trauma-related terms—the concept of mental harm itself. For example, contrary to depression that may emerge due to different and disperse

experiences as these posed in warfare ultimately disrupt social support systems see Michael Weinberg et al., *Reactions of Civilians Exposed to Terrorism and War Trauma in Israel: The Role of Intra-and Interpersonal Factors*, in *ADVANCES IN PSYCH. RSCH.* 5 (Alexandra Columbus ed., 2012).

74. Studies on Israeli and Palestinian adolescents affected by waves of violence have shown that social and family support can be an important buffering factor when it comes to war trauma, hindering the demonstration of PTSD symptoms as well as symptoms of depression among the affected civilians. See Nathan Stein et al., *The Differential Impact of Terrorism on Two Israeli Communities*, 83 *AM. J. ORTHOPSYCHIATRY* 528, 533 (2013); Christopher Henrich & Golan Shahar, *Social Support Buffers the Effects of Terrorism on Adolescent Depression: Findings from Sderot, Israel*, 47 *J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY* 1073, 1075 (2008); Golan Shahar & Christopher Henrich, *Perceived Family Social Support Buffers Against the Effects of Exposure to Rocket Attacks on Adolescent Depression, Aggression and Severe Violence*, 30 *J. FAM. PSYCH.* 163, 163–64 (2016); Brian Barber, *Political Violence, Social Integration and Youth Functioning: Palestinian Youth from the Intifada*, 29 *J. CMTY. PSYCH.* 259, 273 (2001); Rozanna Aitchison et al., *supra* note 68, at 42 (2016).

75. R. Srinivasa Murthy & Rashmi Lakshminarayana, *Mental Health Consequences of War: A Brief Review of Research Findings*, 5 *WORLD PSYCHIATRY* 25,26 (2006); Miro Claric et al., *Psychological Consequences of War Trauma and Postwar Social Stressors in Women in Bosnia and Herzegovina*, 48 *CROAT MED. J.* 167 (2007).

76. Quinn Biggs et al., *Daily Variation in Post Traumatic Stress Symptoms in Individuals With and Without Probable Post Traumatic Stress Disorder*, 19 *BMC PSYCHIATRY* 56, 56 (2019); David Fink et al., *Subthreshold PTSD and PTSD in a Prospective-Longitudinal Cohort of Military Personnel: Potential Targets for Preventive Interventions*, 35 *DEPRESS ANXIETY* 1048 (2018).

77. Chris Brewin, *Complex Post-Traumatic Stress Disorder: A New Diagnosis in ICD-11*, 26 *BJ PSYCH ADVANCES* 145, 145 (2020); Evangelia Giourou et al., *Complex Posttraumatic Stress Disorder: The Need to Consolidate a Distinct Clinical Syndrome or to Re-Evaluate Features of Psychiatric Disorders following Interpersonal Trauma?*, 8 *WORLD PSYCHIATRY* 12, 12 (2018).

78. See Lieblich, *supra* note 2, at 203–06, 209; Knuckey et al., *supra* note 2, at 379.

factors not necessarily relating to a violent traumatic event,⁷⁹ PTSD *does* need such an event as a trigger.⁸⁰ In other words, exposure to a specific incident involving the use of force preconditions PTSD. This incident either begets PTSD in the first place or—in cases of complex PTSD—exacerbates any other pre-existing symptoms.⁸¹

The existence of such a defining traumatic event is important for determining causation in legal terms, either on a tort law basis, international criminal law basis, or according to the laws of war. Law as a system does not award any damages or pronounce any punishment unless plaintiffs prove that the mental harm the civilians in question incurred is due to a specific attack or set of attacks.⁸² This is easier to prove in the case of PTSD rather than in the cases of depression or anxiety, which can also be caused by other circumstances not related to these attacks. Secondly, whereas depression is a manifestation of war trauma, it is usually comorbid with PTSD.⁸³ Studies have showed that individuals with PTSD have an eighty percent higher chance of displaying symptoms of depression or anxiety compared to individuals with no PTSD in the first place.⁸⁴

Thirdly, PTSD symptoms can last for years after the civilians' initial exposure to hostilities, something that is important for international trials where the affected civilians testify years after hostilities end. Trauma-related symptoms are meant to ordinarily disappear some months after the traumatic event.⁸⁵ Nevertheless, in civilians who have come to experience repeated attacks over a prolonged period of time—for example, in cases where attacks are intermittent and recurring or span the timeframe of the hostilities—

79. Nadine Recker Rayburn et al., *Trauma, Depression, Coping and Mental Health Service Seeking Among Impoverished Women*, 73 J. CONSULTING & CLINICAL PSYCH. 667,668,674 (2005).

80. Brewin, *supra* note 77, at 145.

81. *Id.*

82. This attribution parameter has been cited as one of the main hurdles for considering civilian mental harm in warfare, as a parameter in the jus in bello proportionality balance. Noam Lubell & Amichai Cohen, *Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts*, 96 INT'L L. STUD. 159, 174 (2020).

83. Yuval Neria & Evelyn Bromet, *Comorbidity of PTSD and Depression: Linked or Separate Incidence*, 48 BIOLOGICAL PSYCHIATRY 878,878 (2000).

84. Hillary Smith et al., *Is Worst-Event Trauma Type Related to PTSD Symptom Presentation and Associated Features?*, 38 J. ANXIETY DISORDERS 55, 55 (2016).

85. Arieh Shalev, *Posttraumatic Stress Disorder and Stress-Related Disorders*, 32 PSYCHIATRIC CLINICS OF N. AM. 687,688 (2009).

these symptoms are likely to persist for years. Studies of Israeli civilians exposed to continuous or even sporadic attacks,⁸⁶ of the Serbian civilians exposed to the NATO bombings,⁸⁷ and of civilians in Kosovo and Bosnia once the hostilities there have ended, have all shown this.⁸⁸

On these grounds, quasi-judicial organs such as prosecutors, have appeared ready both on a national and international level to associate serious mental harm with the exhibition of PTSD.⁸⁹ This has been the case before the Dutch courts, where in the aftermath of Saddam Hussein's chemical attacks against the Kurds, the Prosecutor spoke of civilians suffering from "grievous bodily and/or mental harm . . . existing in that those persons . . . have found themselves in a (permanent) situation of (serious) fear."⁹⁰ Coming to further transliterate this 'serious fear' on psychiatric terms, mental health studies have showed how civilians, victims of chemical attacks, suffer

86. Avi Besser & Yuval Nuria, *PTSD Symptoms, Satisfaction with Life and Prejudicial Attitudes toward the Adversary among Israeli Civilians Exposed to Ongoing Missile Attacks*, 22 J. TRAUMATIC STRESS 268, 273 (2009); Mooli Lahad & Dmitry Leykin, *Ongoing Exposure versus Intense Periodic Exposure to Military Conflict and Terror Attacks in Israel*, 23 J. TRAUMATIC STRESS 691, 693 (2010).

87. Jelena Gavrilovic et al., *Predictors of Posttraumatic Stress in Civilians 1 Year after Air Attacks: A Study of Yugoslavian Students*, 190 J. NERVOUS & MENTAL DISEASE 257,261 (2002) (finding levels of intrusion and avoidance symptoms, characteristic clusters of PTSD-related symptoms, remained significant with 11% percent experiencing high rates of PTSD); Dusica Lecic-Tosevski et al., *Posttraumatic Stress Disorder in a Serbian Community Seven Years after Trauma Exposure*, 201 J. NERVOUS & MENTAL DISEASE 1040,1043 (2013) (finding that, seven years after the NATO bombings in a sample of 640 people, the prevalence rates of PTSD were 18.8% for current and 32.3% for lifetime PTSD).

88. Barbara L. Cardozo et al., *Mental Health, Social Functioning and Attitudes of Kosovar Albanians following the war in Kosovo*, 284 JAMA 569,572 (2000) (finding 17.1% of civilians diagnosed with PTSD shortly after the end of the war); Ariel Eytan et al., *Determinants of Postconflict Symptoms in Albanian Kosovars*, 192 J. NERVOUS & MENTAL DISEASE 664, 666 (2004) (finding 23.5% of civilians exposed to the conflict in Kosovo were found to have PTSD 2 years after the end of the conflict); William Fernandez et al., *Mental Health Status among Ethnic Albanians seeking Medical Care in an Emergency Department Two Years after the war in Kosovo: A Pilot Project*, 43 ANNALS EMERGENCY MED. (2004), (finding 306 Kosovar patients reaching emergency hospital departments two years after the end of hostilities almost universally reported at least one traumatic event, and 14.1% reporting symptoms meeting PTSD criteria); Mevludin Hasanovic, *Posttraumatic Stress Disorder in Bosnian Internally Displaced and Refugee Adolescents from three different regions after the 1992-1995 war in Bosnia and Herzegovina*, 8 PAEDIATRICS TODAY 22, 29 (2012) (finding that three-and-a-half years after the end of the war in Bosnia, civilians suffered very frequently from PTSD).

89. Prosecutor v. Frans van Anraat, Case No. 09/7510003-04, Judgment (Dec. 23, 2005).

90. *Id.*

from high PTSD rates.⁹¹ The ICC Prosecutor has also stated how internally displaced persons persecuted by the Bashir regime in Sudan suffered from “serious mental harm”⁹² in a setting where mental health studies have shown high rates of PTSD among Sudanese refugees.⁹³

Given the aforementioned reasons, it is plausible to assume that the mental harm discussion will continue to be waged also in the future on PTSD terms. Yet, to the extent that war trauma is broader than PTSD alone, as discussed above, the association between trauma and disability should be seen under this broad lens. On this account, it is important to note that, as discussed above,⁹⁴ the ICTY definition of serious mental harm that the ICC has not contested is also much broader and refers to any trauma that can cause non-minor impairment of the person’s daily functions. Furthermore, the way international criminal tribunals have associated such an impairment with serious mental harm opens a subsequent discussion on whether serious mental harm can also be associated with the concept of disability as the latter has been delineated in the CRPD. The next Part discusses this question.

IV. CIVILIAN MENTAL HARM IN WARFARE AS A FORM OF DISABILITY UNDER THE CRPD

The CRPD is the first human rights treaty of this century concluded under the U.N. auspices and open for signature by regional organizations.⁹⁵ The speed with which States negotiated and ratified the

91. Farnoosh Hashemian et al., *Anxiety, Depression and Posttraumatic Stress in Iranian Survivors of Chemical Warfare*, 296 JAMA 560, 565 (2006).

92. Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Warrant of Arrest, 6 (Mar. 1, 2009), <https://www.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>.

93. Elkhansa Hassabo Mohamed & Dalia Kheir, *Prevalence of Post-Traumatic Stress Disorder and Depression and Associated Factors among Internally Displaced Persons in Al-Galga, Sudan*, 20 *Neuropsychiatric Disease & Treatment* 1155, 1155 (2024) (noting that 75% of the children in internally displaced camps in Darfur suffer from PTSD).

94. See *supra* notes 79–81.

95. U.N. Department of Economic and Social Affairs, *10th 10th Anniversary of the Adoption of the Convention on the Rights of Persons with Disabilities (CRPD)*, U.N., <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/the-10th-anniversary-of-the-adoption-of-convention-on-the-rights-of-persons-with-disabilities-crpdcrpdc-10.html> [<https://perma.cc/TE3G-VDLB>]; _UNU.N. Human Rights Office of the High Commissioner, *The Convention on the Rights of Persons with Disabilities, Training Guide*, U.N. Professional Training Series No. 19, U.N. Doc. HR/P/PT/19, at 46 (2014), <https://hritc.co/wp-content/uploads/2020/06/The-Convention-on-the-Rights-of-Persons-with-Disabilities-Training-Guide.pdf>; Michael Ashley Stein & Janet Lord, *Monitoring the*

Convention⁹⁶ demonstrates the consensus around its provisions and arrangements.⁹⁷ The Convention closes a gap in the field of IHRL by addressing solely the needs of disabled persons.⁹⁸ These needs thus cease to be addressed only as part of human rights arrangements in other international documents.⁹⁹ It has been already noted how the CRPD differs from other IHRL conventions to the extent that it does not comprise just a list of rights, but brings to the forefront the right of disabled persons to shape their own future through article 4 of the CRPD, including the active involvement in any process that affects them.¹⁰⁰

Moreover, Article 1 of the CRPD further delineates the features that should be in place in order for the international community to recognize “disability” as a legal notion. Relatedly, Article 11 extends the scope of the CRPD’s application to peacetime—as all other IHRL

Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential, 32 Hum. Rts. Q. 689, 690 (2010).

96. Michael Ashley Stein & Janet Lord, *supra* note 95. For the phases prior to the adoption of the Convention and the relevant debates see Andrew Begg, *From Invisibility to Positive Legal Protection: The Drafting of Article 11 of the Convention on the Rights of Persons with Disabilities*, 105 INT’L. REV. RED CROSS 135, 140–154 (2023).

97. Kjersti Skarstad & Michael Ashley Stein, *Mainstreaming Disability in the United Nations Treaty Bodies*, 17 J. HUMAN RIGHTS 1, 2 (2017) (noting that the UN General Assembly adopted the CRPD by consensus in December 2006).

98. On this see the CRPD preamble which speaks in point (y) about the need for “a comprehensive and integral convention to promote and protect the rights and dignity of persons with disabilities.” *Convention on the Rights of Persons with Disabilities*, pmbl., Dec. 13, 2006, 2515 U.N.T.S. 3.

99. Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75, 114 (2007) (noting that “disability-based human rights-reflected in both existing soft laws and the evolving Draft Articles-are the most recent instruments empowering a socially excluded group with human rights.”). Prior to the adoption of the CRPD, protection to the rights of disabled persons was granted through recourse to other general provisions which were read in conjunction with soft-law documents related to the disabled persons. *See generally* Victor Rosario Congo v. Ecuador, Case 11.427, Inter-Am. Comm’n H.R., Report No. 63/99, ¶ 54 (1999) (applying article 5 of the American Convention on Human Rights together with the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care since the applicant was deemed to be suffering from a mental disability). For a similar approach, also see *Ximenes Lopez v. Brazil*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149 (July 4, 2006).

100. Gerard Quinn & Anna Arstein-Kerslake, *Restoring the ‘human’ in ‘human rights’*: *Personhood and Doctrinal Innovation in the UN Disability Convention*, in *THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* 38-39 (Conor Gearty & Costas Douzinas eds., 2012).

treaties do¹⁰¹—but also to armed conflict.¹⁰² Whereas nowadays it is largely established that IHRL applies concurrently with IHL,¹⁰³ the CRPD is the first IHRL treaty to explicitly hold so.¹⁰⁴ Along these lines, these two provisions, Articles 1 and 11 of the CRPD, are important for the discussion of civilian mental harm in warfare as a form of disability.

Article 1 is crucial due to the features it comes to attribute to situations of disability. Without defining disability, the provision does describe it in a way that lets the legal interpreter understand which situations would constitute disability for the CRPD purposes. The Convention thus speaks of “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”¹⁰⁵ This delineation of the notion of disability is met with exactly the same terms in regional documents that have come to entrench the rights of disabled persons. For example, the Protocol to the African Charter on Human and People’s Rights on the Rights of Persons with Disabilities in Africa, drafted in 2014, borrows the exact language of the Convention to define who should be deemed a disabled person under Article 1.¹⁰⁶ Combined with the fact that already in the stages of the Convention’s drafting there were delegations, such as the one from Mexico, that argued likewise,¹⁰⁷ this inclusion of the functional impairment-disability association should be seen as something embedded in the way disability comes to be defined in IHRL.

101. Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?* 19 EUR. J. INT’L L. 161, 162 (2008).

102. Convention on the Rights of Persons with Disabilities, *supra* note 18, arts. 1 & 11.

103. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 241 (2000).

104. Naomi Hart et al., *Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts*, 40 MONASH UNIV. L. REV. 148, 150 (2014).

105. Convention on the Rights of Persons with Disabilities, *supra* note 18, art. 1.

106. Draft II Protocol to the African Charter on Human and People’s Rights on the Rights of Persons with Disabilities in Africa, Mar. 14, 2014, <https://blogs.sun.ac.za/afrinead/files/2014/05/africa-disability-protocol-draftII-for-public-comment.pdf> [<https://perma.cc/QV8N-69H3>].

107. For example, the Mexican delegation proposed for disability to be defined as “a physical, mental (psychic) or sensory impairment, whether permanent or temporary that limits the capacity to perform one or more essential activities of daily life.” See Emily Kakoullis & Yoshikazu Ikehara, *Article 1: Purpose*, in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY, at 44 (Ilias Bantekas et al., eds., 2018).

In proposing such a definition for disability,¹⁰⁸ the Mexican delegation used the Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities (IACED) as a blueprint.¹⁰⁹ Yet, quite interestingly to the existing definition there, the Mexican delegation came to add the word “psychic” in parenthesis, after the word “mental.”¹¹⁰ Along these lines, the extent which the Mexican proposal was not contested by other States¹¹¹ sheds light on how the word “mental” should be interpreted in the CRPD Article 1’s accepted form.

The CRPD Committee affirmed this in its 2015 Guidelines on Article 14 of the Convention, which explicitly stated that “all persons with disabilities, and especially persons with mental disabilities or psychosocial disabilities are entitled to liberty pursuant to [A]rticle 14 of the Convention.”¹¹² The autonomous role the psychological parameter plays in the context of the Convention’s Article 1 and the discussion on mental impairment is further reinforced by the definition the Committee itself provides for the concept of impairment. In the same 2015 Guidelines, the Committee clarifies that “impairment . . . is understood as a physical, psycho-social, intellectual or sensory health condition which may or may not come with functional limitations of the body, mind or senses.”¹¹³

The mental impairment inclusion, read in essence as psychological impairment, opens the possibility for defining disability in psychosocial terms.¹¹⁴ If psychological impairment is a form of disability, nothing precludes such disability to emerge also in cases

108. *Id.*

109. For a wider discussion on the similarities and differences between the CRPD and the IACED, see Diana Guarnizo-Peralta, *Disability Rights in the Inter-American System of Human Rights: An Expansive and Evolving Protection*, 36 *NETH. Q. HUM. RTS.* 43, 43 (2018).

110. Emily Kakoullis & Yoshikazu Ikehara, *supra* note 107.

111. For the fact that in other issues the CRPD did not manage to go beyond the cultural relativism that transcends IHRL, see James Rice, *Anthropology, Disability and the CRPD*, in *RECOGNIZING HUMAN RIGHTS IN DIFFERENT CULTURAL CONTEXTS: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 49–51* (Emily Julia Kakoullis & Kelley Johnson eds., 2020).

112. Comm. on the Rts. of Persons with Disabilities, Rep. on the Work of Its Thirteenth, Fourteenth, Fifteenth, and Sixteenth Sessions, U.N. Doc. A/72/55, at 1 (2017).

113. *Id.* at 16.

114. Faraaz Mahimed et al., *Involuntary Mental Health Treatment in the era of the United Nations Convention on the Rights of Persons with Disabilities*, 15 *PLOS MED.* 1, 1–2 (2018), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002679> [<https://perma.cc/9X68-9YA6>].

civilians experience such an impairment under warfare situations. On this account, it has to be further stressed that since the notion of disability in the CRPD is not only seen from a medical point of view but also from a social one, linked to the ability of the disabled person to interact with the wider society the same way a non-disabled person does.¹¹⁵ The exhibition of war civilian trauma symptoms that fall short of a PTSD or depression diagnosis, yet equally gravely impair the person's daily activities, can also constitute a manifestation of civilian mental harm as a form of disability.¹¹⁶

Furthermore, Article 11 of the Convention explicitly stipulates that the latter will apply in situations of armed conflict.¹¹⁷ The 2021 and 2022 Reports of the Special Rapporteur on the Rights of Disabled Persons have already rendered clear that the concept of armed conflict should be read broadly as also encompassing stages beyond the end of the hostilities.¹¹⁸ Accordingly, when Article 11 comes to refer to the protection of disabled persons in situations of armed conflict, this must mean not only as long the armed conflict is in place, but also in its aftermath. Arguing otherwise would go against the conclusions the U.N. Special Rapporteur reached, as this Article discussed above, and would create a temporal lacuna in the protection that the provision wants to afford to disabled persons affected by armed conflicts.

115. ILIAS BANTEKAS & LUTZ OETTE, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 589 (3d. ed. 2020); Anna Lawson & Mark Priestley, *The Social Model of Disability: Questions for Law and Legal Scholarship?* in *ROUTLEDGE HANDBOOK OF DISABILITY LAW AND HUMAN RIGHTS 3* (Peter Blanck & Eilionoir Flynn eds., Routledge 2017); Eliza Varney & Abigail Pearson, *Disability in EU Transport Legislation* in *RESEARCH HANDBOOK ON DISABILITY LAW* 189 (Delia Ferri & Andrea Broderick eds., Elgar 2020) (delineating how this social disability approach has impacted also the European Court of Justice).

116. Kathryn Ringland et al., *Understanding Mental Ill-Health as Psychosocial Disability: Implications for Assistive Technology*, *ASSETS: THE 21ST INTERNATIONAL ACM SIGACCESS CONFERENCE ON COMPUTERS AND ACCESSIBILITY* at 156 (Oct. 2019), <https://dl.acm.org/doi/pdf/10.1145/3308561.3353785> [<https://perma.cc/U884-VW68>] (“[A]nxiety, depression and many mental health concerns can be categorized as psychosocial disabilities, recognizing the actual or perceived impairment these concerns produce in daily life” and that “many individuals may not meet the medical ‘threshold’ for mental health conditions but may still find their daily living activities impaired by mental health symptoms.”); See Jurgen Barth et al., *Posttraumatic Stress Disorders and Extent of Psychosocial Impairments Five Years after a Traffic Accident*, 2 *GMS PSYCHO-SOCIAL MEDICINE* 1, 2 (2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2736498/pdf/PSM-02-09.pdf> [<https://perma.cc/R3RQ-8QPC>] (psychosocial impairments manifest themselves in forms other than PTSD).

117. Convention on the Rights of Persons with Disabilities, *supra* note 18, art. 11.

118. See *supra* note 3; *infra* note 132.

Furthermore, the grammatical interpretation points to this direction. The provision does not speak about the rights of disabled persons “in armed conflicts,” but in “situations of armed conflict”—with the addition of the word “situation” arguably denoting a larger circumstantial context that goes beyond the strict temporal confines of the armed conflict itself.

The fact that Article 11 of the CRPD entails an obligation for States to protect disabled persons not only when hostilities are under way, but also in their aftermath, is further reinforced by U.N. Security Council Resolution 2475.¹¹⁹ The Resolution urges parties to a conflict to protect disabled civilians, but also relates to the post bellum reality, referring to the reparations, the reintegration, the integration and the psychosocial support that the former belligerents must provide to these persons.¹²⁰ This post bellum extension of the Resolution’s scope is further mirrored in the relevant declarations of the U.N. Security Council Member States Representatives.

For example, the Polish representative spoke of the fact that the negotiations for the adoption of the Resolution had, *inter alia*, as one of their goals “the building capacity and knowledge on the rights of persons with disabilities among peacebuilders and peacekeepers” as well as “empowering persons with disabilities in conflict and post-conflict situations.”¹²¹ The references to “peacebuilders” and to the “post-conflict” contours clearly signal the Resolution’s volition to apply even once hostilities end.¹²² This was further underlined in the announcement the Polish Ministry of Foreign Affairs issued following the Resolution’s adoption, where the Ministry states “reconstruction and post-conflict reconciliation” as one of the Resolution’s goals.¹²³ The U.K. representative to the U.N. Security Council equally referred

119. S.C. Res. 2475, U.N. Doc. S/RES/2475, ¶ 1 (June 20, 2019).

120. *Id.* ¶¶ 1, 2, 4.

121. Press Release, Security Council, Security Council Unanimously Adopts Resolution 2475 (2019), Ground-Breaking Text on Protection of Persons with Disabilities in Conflict, U.N. Press Release SC/13851, (Jun. 20, 2019), <https://www.un.org/press/en/2019/sc13851.doc.htm> [<https://perma.cc/F9KP-KNP7>].

122. *Id.*

123. See Press Release, Ministry of Foreign Affairs, Republic of Poland, Polish Success at the UN Forum—Security Council Unanimously Adopts Resolution 2475 on Protection of Persons with Disabilities in Armed Conflicts (Jun. 20, 2019), <https://www.gov.pl/web/diplomacy/polish-success-at-the-un-forum-security-council-unanimously-adopts-resolution-2475-on-protection-of-persons-with-disabilities-in-armed-conflict> [<https://perma.cc/UM9Z-CJL7>].

to how the Resolution made it imperative for the international community to “better understand the disproportionate impacts of conflict on persons with disabilities.”¹²⁴

Given that the impact of conflict extends beyond the stage of the actual hostilities, the U.K. representative’s statement is another indication that the particular Resolution also covers the post bellum phase. Along these lines, China’s representative also opted to focus on the causes of conflicts as a way to minimize the impact of conflicts on disabled people and stressed that the “countries concerned must shoulder the primary responsibility of assisting such persons.”¹²⁵ By referring to “countries” in plural rather than one country, it can be argued that the Chinese representative envisioned a situation where all countries prior their involvement in a conflict would take steps to ensure the traumas of the conflict are healed so that it does not repeat itself. In fact, Resolution 2475 has been seen as able to apply beyond national borders, posing duties regarding disabled civilians who hold a different nationality than this of the duty-bearers.¹²⁶

Resolution 2475 has not been adopted under Chapter VII and thus it cannot be deemed to be automatically binding.¹²⁷ Yet, it sets forth parameters, which are seen also in other binding U.N. Security Council Resolutions. For example, the emphasis the international community must place on the needs of disabled persons and address them as part of its response to a humanitarian crisis, is further depicted in Resolution 2459 on South Sudan.¹²⁸ Furthermore, contrary to the CRPD,¹²⁹

124. *Press Release, supra* note 119121.

125. *Press Release, supra* note 121.

126. For the fact that this can be the case for peacekeeping groups whose members hold different nationalities from the local civilian population in the territory where these groups are dispatched see Paras Shah, *U.N. Security Council Resolution on Protecting People with Disabilities in Armed Conflict* (Jul. 12, 2019), LAWFARE, <https://www.lawfareblog.com/un-security-council-resolution-protecting-people-disabilities-armed-conflict> [<https://perma.cc/54A7-RWZ3>].

127. For the fact that in case they have not been adopted under Chapter VII of the UN Charter, UN Security Council Resolutions may be binding depending on the wording of a given provision, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. Rep. 16, 114 (Jun. 21).

128. *See* Shah, *supra* note 126.

129. Int’l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions* (2019), https://reliefweb.int/sites/reliefweb.int/files/resources/4427_002_IHL-Challenges-

Resolution 2475's applicability is not constrained only to States, but also puts on the table the possibility for non-State actors to be held accountable for the post bellum implications of their warfare activities.¹³⁰ On this account, scholars have stressed that any post bellum rebuilding task should be entrusted to the agent who "can most justifiably discharge this duty."¹³¹

Another element that has to be discussed regarding Article 11, beyond its temporal scope, is its transnational character which is not at all clear. On the contrary, international human rights law instruments apply extraterritorially only to individuals that find themselves subject to the jurisdiction of a certain state.¹³² With no military occupation involved or the exertion of effective control over a particular territory,¹³³ it would be difficult to argue that in the scenario the current article focuses upon, the CRPD should be seen as applying extraterritorially beyond a State's own citizens. At the same time, as an international treaty, the CRPD should be interpreted according to its aim and purpose.¹³⁴ Article 11 mentions that State parties shall take measures to ensure the safety and protection of persons with disabilities *inter alia* in "situations of armed conflict" and in the "occurrence of natural disasters."¹³⁵ Scholars have underlined how in the case of

Contemporary-Armed-Conflicts_WEB_7.pdf [https://perma.cc/TXJ9-TP8B]; Ivan Mugabi, *Armed Conflicts as Impediments to Enforcing the State-Centric nature of Human Rights Obligations: Case Study of the Convention on Rights of Persons with Disabilities* (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776744 [https://perma.cc/J739-45WW].

130. Armed non-State groups must also be seen as having to uphold human rights. Press Release, U.N. Office of the High Commissioner of Human Rights, Joint Statement by Independent United Nations Human Rights Experts on Human Rights Responsibilities of Armed Non-State Actors, (Feb. 25, 2021), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797&LangID=E> [https://perma.cc/T6F3-DPH4].

131. James Pattison, *Jus post bellum and the Responsibility to Rebuild*, 45 BRIT. J. POL. SCI. 635, 636 (2015).

132. See International Covenant on Civil and Political Rights, art. 2, Dec. 16, 1966, 999 U.N.T.S. 171; see also Michael Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 122 (2005).

133. For the role that the effective control criterion plays in the extraterritorial application of human rights, see Solon Solomon, *Migrant Boats on the High Seas and their Interception through Psychologically Coercive Measures: Is there a Case to Extraterritorially Apply Human Rights Law?*, 37 NETH. Q. HUM. RTS. 36, 41–46 (2019).

134. See Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

135. Convention on the Rights of Persons with Disabilities, *supra* note 18, art. 11.

natural disasters, States can be held accountable for not undertaking measures to reduce disaster risks¹³⁶ and for the “lack of adequate action by those who could have otherwise ameliorated the harm.”¹³⁷ Equally, it could be argued that States should be held accountable for not reducing disaster risks in the realms of an armed conflict. This certainly covers *jus in bello* where, under the proportionality principle, belligerent parties are required to make sure that the incidental harm incurred to enemy civilians is not excessive compared to the anticipated military advantage. Such an expectation should extend to *jus post bellum* given that the harm hostilities cause continues to exist even after these have ended.¹³⁸

With the CRPD aiming to also cover the stages following the end of hostilities, the question that thus emerges asks what legal duties arise toward disabled persons as a result of this concern with affected civilians’ post bellum psychological suffering. This will be discussed in the next Part.

V. CIVILIAN MENTAL HARM AS DISABILITY IN THE CONTEXT OF *JUS POST BELLUM*

The association between mental harm and disability, as discussed in the previous Part, should be examined in the background of *jus post bellum* as a distinct legal field.¹³⁹ If *jus ad bellum*, as the normative stage preceding hostilities, encompasses the concept of a just war, *jus post bellum*, as the normative stage following the culmination of

136. Megan Bradley, *More than Misfortune: Recognizing Natural Disasters as a Concern for Transitional Justice*, 11 INT’L J. TRANSITIONAL JUST. 400, 401 (2017).

137. GABRIELLA BLUM & NATALIE LOCKWOOD, EARTHQUAKES AND WARS: THE LOGIC OF INTERNATIONAL REPARATIONS IN *JUS POST BELLUM* AND TRANSITIONAL JUSTICE 202–03 (Larry May & Elizabeth Edenberg eds., Cambridge Univ. Press 2013).

138. See Geneva Convention III, art. 68 (holding that “any claim by a prisoner of war for compensation in respect of any injury or disability arising out of work shall be referred to the Power on which he depends”). FIHL is not clear in the particular provision regarding the nature and level of disability that has to be present and how the CRPD can close the interpretative gap, see. See Mugabi, *supra* note 153, at 13.

139. LARRY MAY, *JUS POST BELLUM, GROTIUS AND MEIONEXIA IN *JUS POST BELLUM** 15 (Carsten Stahn, Jennifer Easterday & Jens Iverson eds., Oxford University Press 2014); Alex Bellamy, *The responsibilities of Victory: Jus post bellum and the Just War*, 34 REV. INT’L. STUDIES 601, 601 (2008).

hostilities, endorses the concept of just peace¹⁴⁰ and entails the post-conflict conditions that must be in place in order for transitional justice to be distributed to the persons affected by the hostilities.¹⁴¹ As noted, compared to *jus ad bellum* and *jus in bello*, *jus post bellum* has been largely left under-developed.¹⁴² Only recently have scholars started stressing the fact that in the way that *jus ad bellum* rests on Articles 2 and 51 of the U.N. Charter and *jus in bello* on The Hague Regulations or the Geneva Conventions, *jus post bellum* must also acquire its own normative foundations.¹⁴³

So far, these foundations have been largely seen in the context of legal philosophy and arguments pertaining to the Just War theory. Scholars like Larry May have taken an additional step by referring to *jus post bellum* not *in abstracto* but dissecting it to its constituent principles. These are the principles of retribution, reconciliation, rebuilding, restitution, and of reparations,¹⁴⁴ which become six if the proportionality principle is also taken into account as a principle coming to answer how wrongs committed during warfare should be addressed in a way proportionate to fault.¹⁴⁵ The core feature in all of these principles is the idea that is in the heart of *jus post bellum* and refers to the accountability that has to take place for the wrongdoings the enemy warring side committed through the war or armed conflict that has terminated.¹⁴⁶

140. See MAY *supra* note 139, at 16; Albert Klein, *Attaining Post-Conflict Peace using the Jus post bellum Concept*, 11 RELIGIONS 173, 173 (2020).

141. For the fact that there is a nexus between transitional justice and *jus post bellum*, see LARRY MAY, REPARATIONS, RESTITUTION AND TRANSITIONAL JUSTICE IN MORALITY, *JUS POST BELLUM AND INTERNATIONAL LAW* 33 (Larry May & Andrew Forcehimes eds., Cambridge University Press ed, 2012); Carsten Stahn, '*Jus Ad Bellum*', '*Jus in Bello*' . . . / '*Jus post bellum*'? *Rethinking the Conception of the Law of Armed Force*, 17 EUR. J. INT'L L. (2007) 821, 937; Ruti Teitel, *Rethinking Jus post bellum in an Age of Global Transitional Justice: Engaging with Michael Walzer & Larry May*, 24 EUR. J. INT'L L. 335, 339 (2013).

142. JENS IVERSON, *JUS POST BELLUM: THE REDISCOVERY, FOUNDATION AND THE FUTURE OF THE LAW OF TRANSFORMING WAR INTO PEACE* 2 (Brill Nijhoff 2021).

143. *Id.* at 34.

144. MAY, *supra* note 139, at 15–18.

145. MAY, *supra* note 139, at 16 (discussing this idea as stemming from Francisco Vitoria).

146. MAY, *supra* note 139, at 16.

Further, scholars have underlined how these principles can lead to practical legal ramifications and are not just theoretical precepts.¹⁴⁷ In fact, if there were a trend or tendency worth noting in the way *jus post bellum* has developed in the last few years, it would be one towards the further entrenchment of the concept on legal doctrinal terms such that it acquires a position in the international law literature next to *jus ad bellum* and *jus in bello*—as the third leg of international law’s interaction with war-related situations and scenarios.¹⁴⁸ In that sense, the aforementioned *jus post bellum* principles should not be seen as isolated precepts, but also as notions that interact with each other, which the subsequent paragraph discusses.

For example, retribution but also restitution and reparations, are seen as essential in order for reconciliation to be reached. In turn, reconciliation is essential for rebuilding to take place. Proportionality is the pervading principle that dictates how restitution and reparations should apply in practice.¹⁴⁹ It is inside this normative framework that the duty of care for the mental health of enemy civilians should be placed. Such duty should be seen as a topic in the restitution agenda. Although restitution following war or hostilities is largely a domestic issue, this should not be necessarily so in cases of long-term trauma.

This further raises the questions of whether restitution can be possible for non-physical harm in the first place and, if so, how it can practically take place. As far as the first question is concerned, it has to be noted that indeed, in principle, the concept of restitution in *jus post bellum* evidently focuses on the physical return of any objects to their original proprietors.¹⁵⁰ Yet, already in the writings of Grotius, restitution has been deemed to encompass more generally a return of things to the *status quo ante*, even when such return refers to intangible things like a country’s regime and state of affairs.¹⁵¹ Along these lines,

147. Iverson. IVERSON, *supra* note 142, at 4.

148. IVERSON, *supra* note 142, at 10.

149. See Ruti Teitel, *Rethinking Jus post bellum in an Age of Global Transitional Justice: Engaging with Michael Walzer & Larry May*, 24 EURO. J. INT’L L. 335, 340 (2013) referring to the fact that some scholars resort to proportionality in *jus post bellum* measures as the yardstick of measuring whether such measures are more about “peace” or “justice.”

150. Albert Klein, *Attaining Post-Conflict Peace using the Jus post bellum Concept*, 11 RELIGIONS 173 (2020).

151. See Alex Bellamy, *The Responsibilities of Victory: Jus post bellum and the Just War*, 34 REV. INT’L STUD. 601, 605–06 (2008) (discussing the view according to which just belligerents are required to do more than just return the *status quo ante*).

it could be argued on a *de lege ferenda* basis that non-physical notions like mental health can equally constitute the object of restitution given that the latter must be seen as “a return to normalcy in light of the experience of war.”¹⁵²

Any restitution for mental harm caused to enemy civilians should be satisfied the same way States award restitution for other types of harm. It should thus be the object of negotiation talks between the former warring parties. It could also form the object of international litigation. Apart from paying reparations to the affected enemy civilians,¹⁵³ former warring parties could be deemed obliged as part of their post-conflict reconstruction of the wider society institutions,¹⁵⁴ to contribute also towards the mental rehabilitation of these individuals.

In that sense, fulfilling the restorative aspect of *jus post bellum*, the former warring party might be called to undertake steps in order to close the gap between the mental health *status quo ante* and the mental health status of these civilians following their long-term trauma related exposure to the hostilities. In addressing this gap, the former belligerent party might need to contribute to the rebuilding of the destroyed enemy infrastructure which relates to the level of enjoyment of the right to health and of mental health in particular. This would involve not only the rebuilding of hospitals that will be able to cater for the psychiatric needs of the enemy civilian population, but generally of any destroyed infrastructures linked with fundamental living standards—such as access to clean drinking water or to basic food. The improvement in the people’s quality of life that the provision of these basic food and

152. Albert Klein, *Attaining Post-Conflict Peace using the Jus post bellum Concept*, 11 RELIGIONS 173 (2020).

153. The International Law Commission has stressed that compensation can be owed also for non-material damage such as pain or suffering. See Int’l Comm’n, *Rep. on the Work of its Fifty-Third Session, Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/10, at 16 (2003).

154. The reconstruction of Iraq after the 2003 US-led invasion was entrusted to the Coalition Provisional Authority which became responsible inter alia for the reconstruction and upgrading of essential services and infrastructure. See Andrew Rathmell, *Planning post-conflict Reconstruction in Iraq: What can we learn?* 81 INT’L AFFS. 1013, 1025 (2005). For the fact that following the recent round of hostilities in Nagorno Karabakh, Azeri officials plan to file lawsuits against Armenia in order to reclaim the money Azerbaijan is spending for the reconstruction of the territories where hostilities took place, see *Nagorno-Karabakh: Tough Rebuilding ahead for Devastated City of Agdam*, FRANCE24FRANCE 24 (Nov. 28, 2020), <https://www.france24.com/en/europe/20201128-nagorno-karabakh-tough-rebuilding-ahead-for-devastated-city-of-agdam> [<https://perma.cc/H6S8-EN2M>].

sanitary needs will entail¹⁵⁵ would further help them to overcome any uncertainties and anxieties they may have for their future.¹⁵⁶

Moreover these restoration efforts of the civil society to the pre-conflict levels could take place not only through active initiatives, for example through the State sending builders or doctors to its former enemy, but also indirectly, through the State in question permitting building material to reach the territory of its former enemy for reconstruction purposes.¹⁵⁷ More importantly, even in cases where the cessation of hostilities has not also meant the conclusion of a peace treaty and the mutual recognition of the former warring sides, the aforementioned restitutive steps are possible through third parties or through international organizations. For example, in the framework of the Israeli-Gaza conflict, Israel has permitted third countries like Qatar and Egypt to undertake construction work in the Strip in the aftermath of Israeli operations that have seen certain infrastructure being destroyed.¹⁵⁸ In the aftermath of the war in Nagorno-Karabakh, Armenia has allowed the stationing of a Russian mission entrusted with the reconstruction of the Nagorno-Karabakh territory that has now passed to Azeri hands.¹⁵⁹

In that sense, the discussed duty of care means nothing than the equalization of duties in the *jus in bello* and *jus post bellum* phases. Just as belligerent parties must legally care for the mental health of enemy

155. See Alexandra Cassivi, Owen Waygood & Caetano Chang Dorea, *Quality of Life Impacts related to the Time to Access Drinking Water in Malawi*, 5 J. TRANSP. & HEALTH 15 (2017); John Scanlon, Angela Cassar & Noemi Nemes, *Water as a Human Right?*, 51 IUCN ENV'T POL'Y & L Paper 1, 3–4 (2004) (noting access to drinking water impacts the quality of life).

156. See *Risks to Mental Health: An Overview of Vulnerabilities and Risk Factors*, WORLD HEALTH ORGANIZATION (Aug. 27, 2012), at 4 (stating the people's inability to access basic commodities can have an adverse impact on their mental health).

157. This has been the case for example with Israel and Gaza, the former having permitted in the past third countries like Turkey to transfer building material to the Strip for its reconstruction. See Amos Harel, *In a Gesture to Turkey, Israel Allowing Building Materials and Medical Supplies into Gaza*, HAARETZ (Mar. 27, 2014), <https://www.haaretz.com/2014-03-27/ty-article/premium/israel-lets-supplies-into-gaza/0000017f-e260-df7c-a5ff-e27a0b810000> [https://perma.cc/LP3K-5CUF].

158. *Qatar pledges \$500m for Gaza Reconstruction*, AL JAZEERA (May 26, 2021), <https://www.aljazeera.com/news/2021/5/26/qatar-pledges-500-million-to-gaza-reconstruction> [https://perma.cc/Y6UJ-SU7B].

159. *Improving Prospects for Peace after the Nagorno-Karabakh war*, INT'L CRISIS GROUP, Briefing No. 91 (Dec. 22, 2020), <https://www.crisisgroup.org/europe-central-asia/caucasus/nagorno-karabakh-conflict/b91-improving-prospects-peace-after-nagorno-karabakh-war> [https://perma.cc/X9L8-P46H].

civilians during warfare, they must equally demonstrate a similar care also once hostilities have ended. Transposing the legal obligations entailed towards civilian mental health from *jus in bello* to *jus post bellum* is neither arbitrary or radical. Post bellum notions and perceptions already source from the laws of war. For example, The Hague Regulations and the Fourth Geneva Convention contain relevant provisions on how military occupations must be conducted in the aftermath of hostilities.¹⁶⁰

Similarly, this duty of care stems from IHRL. The UN Special Rapporteur on the Rights of Persons with Disabilities has noted how both IHL and IHRL are meant to protect, in a non-conflicting way, persons with disabilities who are caught in the midst of warfare.¹⁶¹ International human rights instruments like the Convention on the Rights of the Child (UNCRC),¹⁶² the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD),¹⁶³ all establish a duty for States to protect children and people with disabilities in the case of armed conflict. To the extent that human rights conventions establish obligations not only vis-a-vis State nationals, but also vis-a-vis all individuals under the State's jurisdiction and effective control,¹⁶⁴ this duty to protect also applies to enemy civilians.

Moreover, if these conventions underline the “continuity of the State's duties to protect human rights even in situations of armed conflict,”¹⁶⁵ that should mean that these duties exist throughout the entirety of a “situation” of armed conflict, including the phase following the termination of the actual hostilities. It would go against the spirit of the maximized protection they want to afford to read

160. See Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 42 et seq.; Convention (IV) Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, art. 60 et seq.

161. Rep. of the UN Special Rapporteur on the Rights of Persons with Disabilities, ¶ 9, U.N. Doc. A/77/203 (2022).

162. Convention on the Rights of the Child, art. 38(4), Nov. 20, 1989, 1577 U.N.T.S. 3.

163. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

164. See International Covenant on Civil and Political Rights, art. 2, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention on Human Rights, art. 1, Sept. 3, 1953, 213 U.N.T.S. 221.

165. Ivan Mugabi, An Analysis of the Adequacy of Protection Afforded by the Convention on the Rights of Persons with Disabilities (CRPD) in Situations of Armed Conflict, 8 *SOCIETIES* 1, 6 (2018).

provisions like Article 11 of CRPD on the State's need to protect the rights of disabled persons in "situations of armed conflict" as if these provisions want to restrict their ambit *only* in situations of armed conflict, meaning the actual phase of the conduct of hostilities.¹⁶⁶ Rather, given that human rights instruments apply primarily in peacetime, any reference to situations of armed conflicts must be interpreted as encompassing the need for the relevant human rights protection to exist not only during the conflict, but also in its aftermath.¹⁶⁷

Under this lens, the introduction of a duty of care relating to the mental health of enemy civilians could constitute an important step towards the reign of transitional justice and the assurance that any long-term trauma warfare has caused will be treated. At the same time, it goes without saying that arguing for a duty of care regarding the mental health of enemy civilians presupposes that the States to be benefited address first on their own the mental health needs of their civilians. On this account, the post bellum duty of care towards enemy civilians does not function outside the right to mental health and the socioeconomic framework within which it is situated; it is a progressive duty that is meant to be executed subject to the available resources.¹⁶⁸ It should thus be subject to a prioritization policy, with money first being given to projects and initiatives meant to alleviate the mental harm caused to the enemy population's most vulnerable segments, like women and children.¹⁶⁹

Furthermore, the duty should be also viewed under the post bellum proportionality principle mentioned above.¹⁷⁰ Restitutions should be provided by State A to State B civilians but only to the extent that the finances of State A permit this and any such restitutions do not hinder the ability of State A to cater for the wounds that the conflict has

166. Convention on the Rights of Persons with Disabilities, *supra* note 18, art.11

167. Rep. of the U.N. Special Rapporteur on the Rights of Persons with Disabilities, ¶ 1, U.N. Doc. A/76/146, at 19 (2021).

168. See G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) for the fact that this is in tandem with the general spirit of how socio-economic rights are to be satisfied.

169. The Sierra Leone Truth and Reconciliation Commission focused on the award of reparations only to the most vulnerable civilians such as the physically wounded, widows, children, and victims of sexual violence. See WITNESS TO TRUTH REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, ch. 4, ¶¶ 6, 22–26, 57, 82, 100, <http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf> [<https://perma.cc/M7LP-N7L7>].

170. See IVERSON, *supra* note 142, at 10.

left to its own population. Moreover, this post bellum proportionality principle should be seen as embedding a cost-benefit approach, endorsing in essence an economic analysis of any legal obligations.¹⁷¹ In coming to apply civilian mental harm as a post bellum legal basis of restorative justice, an offset takes place with the damage the side called to pay has also sustained. If, for example, State A destroys extensively the infrastructure of State B, the height of any rebuilding claims against State A must also take into account the damage caused by State B to the infrastructure of State A.

VI. *THE JUS POST BELLUM DUTY OF ADDRESSING ENEMY CIVILIANS' TRAUMA AND THE WAR TORTS DEBATE*

The post bellum duty of care concerning the enemy civilians' mental health also touches upon the question of whether any restitution to enemy civilians should take place only in instances where international accountability is established. According to tort law, such accountability is a prerequisite in order for damages to be awarded. Practically, it means that the States are called to award such damages only if they are held responsible for breaking the laws of war.¹⁷² There are some noteworthy hurdles in establishing such a requirement.

Firstly, it must be proven that military commanders proceeded with an attack or attacks foreseeing that the incurred psychological harm to the affected civilians would be greater to any anticipated military advantage.¹⁷³ This raises the level of proof to a high threshold. Judges, even if they sympathize with the plight of the victims, cannot award any damages for the mental harm suffered as a result of an attack if the latter is found to comply with the *jus in bello* proportionality standards. This would be the case for example with recurrent attacks that, on an isolated basis, perhaps abide with the laws of war, yet nonetheless incur long-term trauma on a cumulative basis.¹⁷⁴

171. George Cohen, *Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench*, 133 U. PA. L. REV. 1117, 1123–24 (1985); Louis Kaplow & Steven Shavell, *Economic Analysis of Law in 3 HANDBOOK OF PUB. ECON.* 1661 (Alan Auerbach & Martin Feldstein eds., Elsevier 2002).

172. G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, art. 1, (Dec. 12, 2001).

173. Knuckey et al., *supra* note 2, at 368; Lieblich, *supra* note 2, at 186; Schmitt & Highfill, *supra* note 2, at 73.

174. See SOLOMON, *supra* note 53.

Secondly, in order to hold some liable for the mental harm enemy civilians incur, courts must have jurisdiction in the first place. State immunity for acts of warfare or for decisions relating to foreign policy¹⁷⁵ often hinder any judicial intervention. The courts are left to convey only their moral sympathy to the victim without being able to address his plight. For example, in Israel, the country's Supreme Court expressed its sympathy to Dr. Izzeldin Abuelaish whose three daughters and niece were killed following an Israeli missile strike over the course of the hostilities between Israel and Hamas in Gaza.¹⁷⁶ Still, the Court equally declared its inability to award any damages given that the strike was an act of war for which tort law liability could not be established.¹⁷⁷ In other instances, it is procedural hurdles that prevent courts from examining in the first place whether attacks have violated the laws of war even if these attacks have caused widespread psychological harm to the affected civilians. This was the case of the US drone strikes during the war on terror.¹⁷⁸ US courts have cited the political question doctrine and have thus not entered the merits of the cases asking for judicial review of the particular policy and of the extensive civilian mental harm such strikes have caused.¹⁷⁹ Equally, in Japan, domestic courts have declared inadmissible cases where victims of the US raids against Tokyo and other cities towards the end of World War II had created extensive trauma to the affected civilians.¹⁸⁰

175. See SOLON SOLOMON, THE JUSTICIABILITY OF INTERNATIONAL DISPUTES: THE ADVISORY OPINION ON ISRAEL'S SECURITY FENCE AS A CASE STUDY 25–40 (2009).

176. Abuelaish et al. v. Ministry of Defense, Judgment, H.C.J 220/19, (Nov. 24, 2021), <https://supremedections.court.gov.il/Home/Download?path=HebrewVerdicts\19/200/002/E10&fileName=19002200.E10&type=4->

177. *Id.*

178. Christopher Coyne & Abigail Hall, *The Drone Paradox: Fighting Terrorism with Mechanized Terror*, 23 INDEP. REV. 51, 52 (2018); *Living Under Drones: Death, Injury and Trauma to Civilians from U.S. Drone Practices in Pakistan*, INT'L HUM. RTS. & CONFLICT RESOL. CLINIC, STAN. L. SCH. & GLOB. JUST. CLINIC, N.Y.U., Sept. 2012, <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/07/Stanford-NYU-Living-Under-Drones.pdf> [<https://perma.cc/2XHP-56T7>].

179. Lesley Wexler, *The Role of the U.S. Judicial Branch during the long war: Drone Courts, Damage Suits and Freedom of Information Act (FOIA) Requests*, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 61 (Derek Jinks et al. eds., 2014); *Jaber v. United States*, 861 F.3d 241, 250 (D.D.C. 2018).

180. Solon Solomon, *Concretizing Mental Harm: Warfare's Psychological Impact on Civilians and the Return to Domestic Law for Establishing a Standards-Setting Paradigm*, TRANSNAT'L L. & CONTEMP. PROBS. (2022).

It is in face of these hurdles that ultimately render civilians unable to find justice, that scholars have argued for the introduction of strict liability when it comes to war torts. This strict liability obligation entails the need for the warring party to restore the damage caused to enemy civilians even from lawful operations or mistaken operations which do not incur criminal accountability.¹⁸¹ In that spirit, this article wants to enforce these voices by arguing that the post bellum duty of care should be seen as the further stage of the war torts discussion to the extent that also the post bellum duty of care discussed therein highlights how international law should look on how wrongs should be addressed beyond the concept of illegality. Illegality is a starting point but it is not the crucial one to this extent. Rather, the issue is to repair wrongs and to alleviate the suffering of civilians that hostilities have brought. The aforementioned cases clearly point out to how, when it comes to the addressing of the mental harm warfare causes to the affected civilians, there is a lacuna that needs to be addressed regarding the ability of the international community to distribute justice and side with the victims.

Yet, at the same time, and broadening in a sense the discussion framework that war torts want to introduce, the post bellum duty of care has a restorative justice function that serves a wider social and humane purpose, namely the restoration-to the extent possible-of the overall broken social and psychological fiber when it comes to the enemy civilians affected by warfare. Not linked to a particular attack or a string of attacks in order to give rise to a causation link and to damages quests before domestic and international courts, the post bellum duty of care, meant to fix the injustices of war when it comes to civilian suffering, should be seen as constituting a more symbolic-but substantial-gesture towards the affected civilians. It can thus take the form of a lump sum awarded as compensation for the enemy civilians' suffering or it can be expressed through the participation in projects meant to bolster the enemy civilians' mental health status, such as for example the building of psychological or psychiatric structures and services. In that sense, the post bellum duty of care to the extent that it refers to the civilians' mental health, a socioeconomic right, resembles on this the stance international law takes for socioeconomic rights in general, namely their gradual satisfaction according to the available resources.

181. See Crootof, *supra* note 4, at 1081–1082.

It can be asked whether it would be fair for a country finding itself on the 'good part of history' and fighting for its survival or freedom to have to award any money to the enemy civilians. Especially if the enemy himself does not respect the laws of war, such an arrangement would give him an impetus to start a war, knowing that in the end, the State that has been attacked will have to pay back for any damage caused in response. Yet, this ethical equation between two warring parties should be also taken into account together with the other caveats mentioned above in coming to determine the scope of a party's post bellum duty. In principle though, such duty does exist even in these cases since it derives not from *jus ad bellum* and the justified or not cause of fighting, but from *jus in bello* and the equality of the belligerents.

Along these parameters, a further related question is whether it is fair for such a duty of care to exist even in the instances where attacks did not violate international law. Nevertheless, the fact that civilians experience high trauma in a specific area or situation should not be seen as isolated from the war tactics, the frequency of the attacks or the use of weapons in heavily populated areas. Whereas each of these parameters might not necessarily violate the laws of war on an isolated basis, their combined usage over an extended period of time may be deemed problematic from a legal point of view.¹⁸²

The second question relates to whether the implementation of a duty of care would demotivate military commanders from abiding with the laws of war in the first place. If rehabilitation is to be due even in cases where armies have taken the relevant precautions to minimize civilian casualties to the detriment of the military advantage, then the question is why such precautions should be kept in the place. Armies can operate unhindered, wreak havoc and then argue that they should not be held accountable because they are ready to pay for any damage incurred to enemy civilians. Nevertheless, respecting the laws of war could be a mitigating factor in the height or the extent of the

182. For example, although white phosphorus weapons are not per se banned, their use in heavily populated areas has been deemed to violate international law. See Matthew Aiesi, *The Jus in Bello of White Phosphorus: Getting the Law Correct*, LAWFARE BLOG 26 (Nov. 2019), <https://www.lawfareblog.com/jus-bello-white-phosphorus-getting-law-correct> [https://perma.cc/2FRP-YSGI]; HUMAN RIGHTS WATCH, RAIN OF FIRE: ISRAEL'S UNLAWFUL USE OF WHITE PHOSPHOROUS IN GAZA (Mar. 25, 2009), <https://www.hrw.org/report/2009/03/25/rain-fire/israels-unlawful-use-white-phosphorus-gaza> [https://perma.cc/D3YF-38GP].

rehabilitation efforts the former belligerent must exert towards the mental health of the other side's civilians. More than that, the fact that both parties, irrespective of culpability, are called to lift the burden of the other side's suffering should be seen as an extension to *jus post bellum* of the *jus in bello* equality of arms, where all parties to a conflict bear the same rights and duties.¹⁸³

VII. CONCLUSION

Scholars have tended so far to discuss civilian mental harm in warfare only in the course of *jus in bello* and as mainly associated with PTSD. This article argued that such harm can extend beyond *jus in bello* and PTSD. Linked with the notion of disability as delineated in the CRPD, the article discussed how the proper interpretation of the particular Convention's provisions should unveil the post bellum duty of care towards enemy civilians and the war trauma they have sustained. At the same time, the article underlined how such duty must be seen as falling under certain caveats, most notably the proportionality principle as well as the need for it to be limited to certain instances and to certain infrastructure directly linked to the mental health needs of the relevant civilian population.

The aftermath of warfare has always been characterized by a tension between a transformative facet and another opposing one, advocating the strict observance of the status quo.¹⁸⁴ This article delineated how this debate finds expression in the context of the mental health of enemy civilians and their hopes to enjoy again the levels of mental health they had prior to their exposure to hostilities. The Author's aspiration was to walk over a fine line without crossing the red limits that would render any approach unrealistic. In that sense, the policy implications that a post bellum duty of care based on civilian mental harm entails, are implications that can constitute the platform for a future discussion of civilian mental harm in warfare beyond the strict confines of *jus in bello* and targeting decisions.

183. Vaios Koutroulis, *And Yet it Exists: In Defence of the "Equality of Belligerents" Principle*, 26 *LEIDEN J. INT'L L.* 449, 528 (2013).

184. See Jean Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for "Interim Occupations"*, 51 *N.Y. L. SCH. L. REV.* 497, 505 (2006) (discussing this clash when it comes to regimes of belligerent occupation).