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# The Protection of Mental Health under International Humanitarian Law

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## **ABSTRACT:**

Armed conflicts have a profoundly detrimental effect on mental health. Despite this, a comprehensive study on how International Humanitarian Law ('IHL') protects mental health is missing. This paper fills this research gap, identifying six main ways IHL tries to safeguard the mental health of those experiencing war. First, IHL protects the mental health of persons under the power of the adverse Party. Second, IHL protects persons who, because of psychological trauma, need medical assistance and care. Third, IHL prohibits psychological torture and ill-treatment. Fourth, IHL limits the type of mental harm that Parties to the conflict can inflict on civilians. Fifth, IHL forbids means and methods of warfare that cause unnecessary mental suffering. Sixth, IHL protects medical and humanitarian workers who provide mental health and psychosocial support. The analysis reveals that the drafters of IHL treaties were already aware, at least to some extent, of the importance of mental health; that various IHL norms aim to preserve mental health; and that the increasing acceptance of mental health as an integral part of health is influencing the interpretation of IHL.

## **KEYWORDS:**

Mental health; mental disorders; psychosocial disabilities; mental harm; armed conflict; prisoners of war; psychological torture; proportionality; unnecessary suffering; International Humanitarian Law.

## 1. Introduction

‘When [children] hear the drones, they get really scared, and they can hear them all the time so they’re always fearful that the drone is going to attack them... [B]ecause of the noise, we’re psychologically disturbed—women, men, and children...Twenty-four hours, [a] person is in stress and there is pain in his head.’ *Hisham Abrar (pseudonym), from Pakistan, 2012*<sup>1</sup>

‘They found me, tied my arms behind my back and forced me at gunpoint to drink blood and eat flesh. I was told that if I didn’t do this I would be killed. At night when I sleep, those who were killed come back in my nightmares. You may think I’m normal, but my mind is not good.’ *Philip (pseudonym), a survivor of the 2013 massacre in Gudele, Juba, South Sudan, 2016*<sup>2</sup>

‘From a medical and psychological standpoint, everything is difficult and tragic. Our new reality has induced a sense of apathy among both children and adults. We see the same horror repeat itself again and again. Nothing surprises us anymore; nothing makes us sad or happy. We have no joy.’ *Motaz al Aaraj, Program Officer for Project HOPE in Gaza, Palestine, 2024*<sup>3</sup>

Conflicts have several consequences for health.<sup>4</sup> To begin with, they cause deaths, injuries, and disabilities. For example, the war in Syria incited more than 350,000 deaths,<sup>5</sup> and after a decade of conflict, around 28% of the population now live with some form of disability.<sup>6</sup> In addition, during hostilities, rape and sexual violence are widespread and primarily affect women and girls as well as boys and men. For instance, patterns of sexual violence have been recently reported in countries such as Haiti and Ethiopia.<sup>7</sup> Conflicts also have serious repercussions for the underlying determinants of health, such as access to water, sanitation, and food. In Ukraine, there have been numerous reports of incidents involving water infrastructure, and especially at the start of the war in 2022, some areas experienced limited access to drinking water.<sup>8</sup> In Gaza, water and food shortages are severely impacting the population’s health, leading to malnutrition, dehydration and an increase in the spread of infectious diseases.<sup>9</sup>

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<sup>1</sup> Stanford Law School and NYU School of Law, ‘Living Under Drones: Death, Injury, and Trauma to Civilians from US Practice in Pakistan’ (2012) <<https://law.stanford.edu/wp-content/uploads/2015/07/Stanford-NYU-LIVING-UNDER-DRONES.pdf>> 86.

<sup>2</sup> Amnesty International, ‘South Sudan: “Our Hearts Have Gone Dark”: The Mental Health Impact of South Sudan’s Conflict’ (2016) <<https://www.amnesty.org/en/documents/afr65/3203/2016/en/>> 22.

<sup>3</sup> Meg Landis, ‘Gaza: “Profoundly Alarming” Mental Health and Medical Needs’ (*Project HOPE*, 4 January 2024) <<https://www.projecthope.org/news-stories/press-release/gaza-profoundly-alarming-mental-health-and-medical-needs/>>.

<sup>4</sup> For a comprehensive description of the effects of conflict on health, see Sylvia Garry and Francesco Checchi, ‘Armed Conflict and Public Health: Into the 21st Century’ (2020) 42 *Journal of Public Health* 287.

<sup>5</sup> Human Rights Watch, ‘“It Was Really Hard to Protect Myself”’ (8 September 2022) <<https://www.hrw.org/report/2022/09/08/it-was-really-hard-protect-myself/impact-armed-conflict-syria-children>> 1.

<sup>6</sup> International Center for Transitional Justice, ‘Disabilities in Syria: A “Hidden” Crisis’ (8 August 2023) <<https://www.ictj.org/latest-news/disabilities-syria-hidden-crisis>>.

<sup>7</sup> Office of the United Nations High Commissioner for Human Rights, ‘Sexual Violence in Port-au-Prince: A Weapon Used by Gangs to Instill Fear’ (14 October 2022) <<https://www.ohchr.org/en/documents/country-reports/sexual-violence-port-au-prince-weapon-used-gangs-instill-fear>>; Human Rights Council, ‘Report of the International Commission of Human Rights Experts on Ethiopia’, A/HRC/51/46 (19 September 2022).

<sup>8</sup> Oleksandra Shumilova and others, ‘Impact of the Russia–Ukraine Armed Conflict on Water Resources and Water Infrastructure’ (2023) 6 *Nature Sustainability* 578, 578.

<sup>9</sup> Samer Abuzerr and others, ‘The Silent Crisis: Effect of Malnutrition and Dehydration on Children in Gaza during the War’ (2024) 11 *Frontiers in Nutrition*; Abdo Hassoun and others, ‘The Implications of the Ongoing War on Gaza for Food Sustainability’ (2025) 9 *Sustainable Futures* 100473; United Nations, ‘UN News: Gaza Power Cut Impacts Safe Water Access for Hundreds of Thousands’ (10 March 2025) <<https://news.un.org/en/story/2025/03/1160961>>.

However, the words above of Hisham, a witness of the US drone practice in Pakistan, Philip, a survivor of the Gudele massacre in South Sudan, and Motaz, a humanitarian worker in Gaza, remind us that situations of conflict and violence do not only affect physical health but also mental health. Various circumstances negatively impact mental health in these contexts of conflict. During war, people often live with the fear of injury or death. They might experience the passing of relatives and friends, or be forced to leave their homes. They might lose their source of income; they might not have access to basic needs such as food, water, and housing. If they are ex-combatants or victims of sexual abuse, they might be rejected by their communities. Children are also subjected to several stressors in war times. They may be separated from their caregivers, who might be called to arms. Despite being underage, they themselves could also be forced or coerced into becoming soldiers. Education facilities might be destroyed or unsecured, and children might be prevented from going to school.

Unsurprisingly, exposure to conflict increases the possibility of developing a mental disorder. According to the World Health Organization (‘WHO’), one in every eight people globally lives with a mental health condition.<sup>10</sup> In conflict-affected areas, this figure rises to one in five.<sup>11</sup> Depression, anxiety, and post-traumatic stress disorder (‘PTSD’) are common mental disorders in war zones.<sup>12</sup> Given that around two billion people live in places affected by war, the scope of the problem is particularly significant. In turn, mental health conditions can affect the long-term social development and economic growth of the country. They also usually entail a higher use of medical services, increased incarceration, and homelessness.<sup>13</sup> In addition, even if a person is not experiencing a mental disorder, that individual might still experience high levels of mental distress during hostilities, and certain research reports are starting to recognise this by documenting mental harm beyond formal diagnostic criteria.<sup>14</sup> Finally, war can negatively impact mental health both immediately and in the future. In the latter case, experts talk about intergenerational trauma, which describes the phenomenon according to which the mental distress suffered by a group of people affects the health and well-being of future generations.<sup>15</sup>

Despite the significant impact of conflicts on mental health, how International Humanitarian Law (‘IHL’) protects mental health has not yet been properly explored. As is discussed in more detail below, only a few academics have addressed the topic of mental health in conflict from a legal perspective. However, those works mostly focus on a human rights perspective, rather than IHL, or the protection of persons with mental disorders and psychosocial disabilities, rather than the entire population. When they do take an IHL perspective, they almost exclusively concentrate on the concept of mental harm with reference to the IHL principle of proportionality in attack, without broadening the debate beyond this specific

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<sup>10</sup> World Health Organization, ‘Mental Disorders’ (8 June 2022) <<https://www.who.int/news-room/fact-sheets/detail/mental-disorders>>. The terms ‘mental health condition’ and ‘mental disorder’ are used as synonyms in this contribution, as explained in Section 2.

<sup>11</sup> Fiona Charlson and others, ‘New WHO Prevalence Estimates of Mental Disorders in Conflict Settings: A Systematic Review and Meta-Analysis’ (2019) 394 *The Lancet* 240, 245.

<sup>12</sup> Jaime Moreno-Chaparro and others, ‘Mental Health Consequences of Armed Conflicts in Adults: An Overview’ (2022) 50 *Actas Españolas de Psiquiatría* 68.

<sup>13</sup> Sarah Miller, ‘Mental Health and the Law: What Else Is Needed for Particularly Vulnerable Contexts Facing Armed Conflict and Development Obstacles?’ (2023) 105 *International Review of the Red Cross* 434, 436.

<sup>14</sup> Samantha Holmes, ‘Beyond Compliance Symposium – War Is Not Skin Deep – International Humanitarian Law and Mental Health’ (Lieber Institute West Point, 18 October 2024) <<https://lieber.westpoint.edu/war-not-skin-deep-international-humanitarian-law-mental-health/>>.

<sup>15</sup> Hamid Ullah and others, ‘Intergenerational Trauma: A Silent Contributor to Mental Health Deterioration in Afghanistan’ (2023) 13 *Brain and Behavior* 2905.

topic. As a result, a comprehensive discussion on how IHL protects mental health in general is missing from the literature. This article aims to fill this gap by answering the following research question: ‘How does IHL protect mental health?’. This paper examines how IHL addresses mental health in general, including that of persons without mental disorders and psychosocial disabilities. It mostly concentrates on IHL rules that aim to preserve mental health and avoid the onset of a mental disorder in the first place. For instance, it analyses IHL rules which protect those who experience mental distress or impose limits on the type of actions affecting mental health that Parties to a conflict can carry out.<sup>16</sup>

This article is structured as follows. Section 2 presents definitions and introduces two key premises that must be considered while reading this paper. Section 3 analyses the most relevant IHL and International Human Rights Law (‘IHRL’) literature on the protection of mental health in conflict, suggesting the existence of three main lines of research on this topic, and demonstrating the presence of a research gap. Section 4 describes six main ways IHL protects mental health, with a focus on mental health in general, rather than exclusively the mental health of persons with mental disorders and psychosocial disabilities. Section 5 concludes this contribution with a summary of the key points of this study and some final remarks.

## 2. Definitions and Premises

Before delving into the subject, it is necessary to provide the definitions of mental health and mental disorder/mental health condition (the two expressions are used synonymously in this paper). Mental health is defined by the WHO as ‘a state of mental well-being that enables people to cope with the stresses of life, realize their abilities, learn well and work well, and contribute to their community’.<sup>17</sup> The WHO further states that mental health is ‘an integral component of health and well-being that underpins our individual and collective abilities to make decisions, build relationships and shape the world we live in’ and, as such, that ‘is more than the absence of mental disorders’.<sup>18</sup> A mental disorder is a syndrome characterised by a clinically significant disturbance in an individual’s cognition, emotional regulation, or behaviour, which is usually associated with distress or impairment in important areas of functioning.<sup>19</sup> Depression, schizophrenia, and PTSD are examples of mental disorders. We adopt the expression ‘persons with mental disorders and psychosocial disabilities’ because it comprehends both persons with mental disorders who do not consider themselves as persons with disabilities and persons with mental disorders who, on the contrary, consider themselves so in light of the barriers that they face to enjoy full participation in society.<sup>20</sup>

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<sup>16</sup> In this paper, the expression ‘mental distress’ is used to refer to mental anguish that does not necessarily reach the threshold of a mental disorder.

<sup>17</sup> World Health Organization, ‘Mental Health’ (17 June 2022) <<https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response>>. For a more detailed description of the origin of the concept of ‘mental health’, see Natalie Abrokwa, *The Right to Mental Health: A Human Rights Approach* (Intersentia 2023) 14–16.

<sup>18</sup> World Health Organization (n 17).

<sup>19</sup> World Health Organization (n 10).

<sup>20</sup> Some persons who experience mental health conditions might not identify as persons with a disability. According to a report by the European Agency for Fundamental Rights, the term ‘psychosocial disability’ is favoured by some NGOs, such as the International Disability Alliance, an NGO which advocates for the rights of persons with disabilities. However, it is not used by others, such as the European Network of (ex-)Users and Survivors of Psychiatry – a European NGO which represents the views of people who have received or are receiving psychiatric services – ‘because of on-going debates about the relationship between conceptions of mental health and disability and the reluctance of many people with psychiatric diagnoses to identify themselves as disabled’: European Union Agency for Fundamental Rights (ed), *Involuntary Placement and Involuntary Treatment of Persons with Mental Health Problems* (Public Office of the European Union, 2012) <[https://fra.europa.eu/sites/default/files/fra\\_uploads/2130-FRA-2012-involuntary-placement-treatment\\_EN.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/2130-FRA-2012-involuntary-placement-treatment_EN.pdf)> 11–12.

This paper acknowledges that the dichotomy between physical and mental health can be seen as artificial. This division between ‘body’ and ‘mind’ is based on modern Western medicine, and, in many cultures, it does not exist.<sup>21</sup> However, such a distinction is required for the purposes of this paper. Developing categories is an undertaking typical of legal disciplines. It enables us to examine how norms address certain subject matters or affect certain groups of persons and to investigate the potential differences between them. For instance, distinguishing between physical and mental health allows us to argue that IHL studies have long ignored the impact of conflict on the latter compared to its impact on the former. Moreover, this division is accepted in international legal theory and practice. It can be found in IHRL, which foresees the ‘right to the highest attainable standard of *physical and mental health*’.<sup>22</sup> It is also present in IHL, which explicitly refers to mental health in some of its norms, as will be seen below. For these reasons, we find it useful to distinguish between physical and mental health in this contribution. At the same time, we recognise the limits of this dichotomy.

At this point, two premises must be established. First, as mentioned above, this article does not focus extensively on the protection of persons with mental disorders and psychosocial disabilities but rather concentrates on the protection of mental health in general, including from a prevention perspective. IHL rules which protect persons with mental disorders and psychosocial disabilities constitute one of the ways IHL protects mental health and could very well be added to the six-point list set out in Section 4 below. However, as further developed in Section 3, there is already significant academic literature on the protection of persons with disabilities in armed conflict.<sup>23</sup> As a result, this article concentrates on other rules which have received less attention in the literature in order to provide a more comprehensive analysis of how IHL protects mental health beyond the protection of persons with mental disorders and psychosocial disabilities. Nonetheless, a short introduction to this topic is necessary to give the reader a full picture of the legal framework. For this reason, we dedicate a few paragraphs here to this matter.

Persons with mental disorders and psychosocial disabilities are commonly considered to fall under the IHL category of the ‘wounded and sick’, at least when they require medical care. This is because, under IHL, the wounded and sick are defined as those ‘persons, whether military or civilian, who, because of trauma, disease or other physical or *mental disorder or disability*, are in need of medical assistance or care and who refrain from any act of hostility’.<sup>24</sup> It is worth highlighting that this generally acknowledged

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It is also worth mentioning that the term ‘mental disabilities’ is commonly used as an umbrella term that includes intellectual disabilities (*i.e.* down syndrome) and psychosocial disabilities (which are generally associated with persons with mental disorders). The most relevant IHRL treaty protecting persons with disabilities is the Convention on the Rights of Persons with Disabilities (adopted on 12 December 2006, entered into force on 3 May 2008, 2515 UNTS 3) (‘CRPD’). Art. 1 CRPD defines persons with disabilities as ‘those who have 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’.

<sup>21</sup> Robert Evan Kendell, ‘The Distinction between Mental and Physical Illness’ (2001) 178 *British Journal of Psychiatry* 490.

<sup>22</sup> International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 (‘ICESCR’), art 12 (emphasis added).

<sup>23</sup> Alice Priddy, ‘Disability and Armed Conflict - Academy Briefing n. 14’ (The Geneva Academy of International Humanitarian Law and Human Rights, 2019); Robert Mardini, ‘Persons with Disabilities in Armed Conflicts: From Invisibility to Visibility’ (2023) 105 *International Review of the Red Cross* 1; Alexander Breitetgger, ‘Increasing Visibility of Persons with Disabilities in Armed Conflict: Implications for Interpreting and Applying IHL’ (2022) 105 *International Review of the Red Cross* 922; Emina Ćerimović, ‘At Risk and Overlooked: Children with Disabilities and Armed Conflict’ (2023) 105 *International Review of the Red Cross* 192.

<sup>24</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (‘AP I’), art 8 (emphasis added). According to ICRC, the notion of ‘wounded and sick’ includes both ‘persons whose health-care needs are caused by conflict, as well as [...] those whose needs predate the conflict and who see their access to continued health-care services affected by

definition of wounded and sick is the one provided by the 1977 Additional Protocol I. On the contrary, the 1949 Geneva Conventions, despite referring to the category of wounded and sick, do not provide an exact definition of what this notion means.<sup>25</sup> The 1952 and 1958 International Committee of the Red Cross (‘ICRC’) Commentaries to the Geneva Conventions I and IV, respectively, confirm the absence of a definition, adding that ‘the meaning of the words “wounded and sick” is a matter of common sense and good faith’.<sup>26</sup>

However, the new ICRC Commentary to Geneva Convention I, adopted in 2016, explains that, for the purposes of Article 12 on the protection of the wounded and sick, ‘mental or psychological conditions [...] qualify, provided that they require medical care’.<sup>27</sup> Thus, it is now accepted that persons with mental disorders and psychosocial disabilities can be considered wounded and sick even under the Geneva Conventions. It is clear from the above that the concept of wounded and sick under the Geneva Conventions has undergone an evolutionary interpretation, especially in light of the definition provided by Additional Protocol I, and it is now understood to encompass mental health conditions as well. In sum, persons with mental disorders and psychosocial disabilities can fall within the notion of ‘wounded and sick’ both within the Geneva Conventions and Additional Protocols.<sup>28</sup>

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a conflict’: International Committee of the Red Cross, ‘How Law Protects Persons with Disabilities in Armed Conflict’ (13 December 2017) 3  
<[https://www.icrc.org/sites/default/files/document/file\\_list/how\\_law\\_protects\\_persons\\_with\\_disabilities\\_in\\_war.pdf](https://www.icrc.org/sites/default/files/document/file_list/how_law_protects_persons_with_disabilities_in_war.pdf)>).

As a result, persons who already suffered from mental health conditions before the start of hostilities would fall within this notion. In addition, the health care to be provided to the wounded and sick ‘must not be restricted to only the minimum necessary for a person’s survival’ and the entitlement to care could also entail ‘providing rehabilitation for persons with disabilities’ (ibid).

<sup>25</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (‘GC I’); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (‘GC II’); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (‘GC III’); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (‘GC IV’). On the point, see also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004) 143.

<sup>26</sup> International Committee of the Red Cross, ‘Commentary of 1952: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949’ <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-12/commentary/1952>> art 12 paragraph 1 [C]; International Committee of the Red Cross, ‘Commentary of 1958: Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949’ <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-16/commentary/1958>> art 16 paragraph 1 [2]. The Commentary of 1958 to GC IV reads as follows: “The authors of the Convention have not defined what is meant by a “wounded or sick” civilian nor has there been any attempt to determine the degree of severity of a wound or the sickness entitling the wounded or sick person to respect. Any definition would necessarily be restrictive in character and would thereby open the door to every kind of misinterpretation and abuse. The meaning of the words “wounded and sick” is a matter of common sense and good faith.’ An almost exact wording can be found in the Commentary of 1952 to GC I.

<sup>27</sup> International Committee of the Red Cross, ‘Commentary of 2016: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949’ <<https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949>> art 12 [1343].

<sup>28</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (‘AP II’). Although AP II does not contain a definition of ‘wounded and sick’, ‘there appears to be general agreement among commentators that these terms have the same meaning in AP II as in AP I’ (see Dustin Lewis, Dan Modirzadeh and Gabriella Blum, ‘Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism’ (Harvard Law School Program on International Law and Armed Conflict 2015) 70, fn 7).

IHL affords the wounded and sick a strong level of protection. For instance, the wounded and sick cannot be attacked,<sup>29</sup> and parties to a conflict must take all possible measures to search for, collect, and evacuate them.<sup>30</sup> They must be treated humanely in all circumstances and given the medical care required by their condition to the fullest extent practicable and with the least possible delay.<sup>31</sup> Since persons with mental disorders and psychosocial disabilities may be classified as ‘wounded and sick’, these provisions also apply to them. However, as noted by Alice Priddy, it is important to stress that it is not automatic that all persons with mental disorders and psychosocial disabilities qualify as wounded and sick, since they can only qualify as such if they require medical care.<sup>32</sup> If they do not require medical care, they do not fall within the notion of wounded and sick, but are still protected as civilians and entitled to ‘special respect and protection under IHL’.<sup>33</sup>

Notwithstanding that a detailed discussion on the protection of persons with mental disorders and psychosocial disabilities under IHL is out of the scope of this paper, it should be emphasised that classifying persons with mental health conditions who require medical care as wounded and sick (and thereby affording them the corresponding protections just explained), raises a series of complex issues in the context of targeting operations. For instance, one may wonder which type of medical care would be necessary for a person with a mental disorder to be considered wounded and sick, since the notion of medical care is not defined under IHL.<sup>34</sup> Another question could be whether a certain threshold of mental suffering should be reached, such as having PTSD or depression, to fall within that notion.<sup>35</sup> Finally, rather than excessively focusing on persons with mental disorders and psychosocial disabilities, one may argue that targeting decisions should pay attention to civilians who are more susceptible to trauma, such as children.<sup>36</sup>

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<sup>29</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (Cambridge University Press 2005) rule 47. These rules can also be found at ‘Rules - Customary IHL - ICRC’ <<https://ihl-databases.icrc.org/en/customary-ihl/v1>>. See also GC I (n 25), arts 12(1) and 35(1); GC II (n 25), art 12(1); GC III (n 25), art 3(1)(2); GC IV (n 25), art 16; AP I (n 24) art 10(1); AP II (n 28), art 7(1).

<sup>30</sup> Henckaerts and Doswald-Beck (n 29) rule 109; GC I (n 25) art 15; GC II (n 25) art 18; GC III (n 25) art 16; AP I (n 24) art 10; AP II (n 28) art 8; GCs Common art 3.

<sup>31</sup> Henckaerts and Doswald-Beck (n 29) rule 110; GC I (n 25) art 12(2); GC II (n 25) art 12(2); AP I (n 24) art 10(2); AP II (n 28) art 7(2).

<sup>32</sup> Priddy (n 23) 56. According to Priddy, this requirement is problematic, especially for those who have impairments that do not necessitate a medical response, such as people affected by types of blindness that cannot be cured.

<sup>33</sup> Alexander Breitegger, ‘Towards a Disability-Inclusive IHL: ICRC Views and Recommendations’ (Humanitarian Law & Policy Blog, 6 July 2023) <<https://blogs.icrc.org/law-and-policy/2023/07/06/towards-disability-inclusive-ihl-icrc-views-recommendations/>>. More specifically, see GC (n 25) art 16(1) and Henckaerts and Doswald-Beck (n 29) rule 138. See also Breitegger, ‘Increasing Visibility of Persons with Disabilities in Armed Conflict’ (n 23) 111–112. Breitegger explains that the obligation that persons with disabilities must be afforded special respect and protection ‘requires that parties to armed conflict refrain from attacking, otherwise harming or ill-treating persons with disabilities, and that those parties take active measures to assist and protect such persons from harm’. He further observes that this obligation applies to persons with both physical and mental disabilities and argues that ‘in attacks or troop movements, and in screening operations at military checkpoints or during house-to-house searches, more specific awareness by weapons bearers of potential reactions to their presence by persons with psychosocial or intellectual disabilities should be raised through training, and some basic guidance on appropriate military behaviour when encountering persons with psychosocial or intellectual disabilities should be provided’.

<sup>34</sup> Priddy (n 23) 56. According to Priddy, it is uncertain whether medical care under IHL comprises non-urgent care that people with disabilities might need.

<sup>35</sup> On the observation that discussions on mental harm caused by conflict are often waged on PTSD terms, and the limits of this approach, see Solon Solomon, ‘Why Should the Innocent Suffer? Mental Harm as Disability and the Establishment of a Post Bellum Duty of Care for Enemy Civilians’ (2024) 48 *Fordham International Law Journal* 168–171.

<sup>36</sup> See Eliav Lieblich, ‘Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law’ in Derek Jinks, Jackson N Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects* (TMC Asser Press 2014) 188–193.

The second premise is the following. We have restricted our observations to IHL provisions that seek to protect mental health in a particularly direct manner. We have considered IHL rules in which the protection of mental health can be viewed as one of their principal aims. We recognise that differentiating between rules that protect mental health in a more ‘direct’ or ‘indirect’ way could be tricky. It also risks diminishing the relevance of underlying determinants of mental health, *i.e.* those factors, such as the social and physical environment, that affect mental health. For instance, IHL rules protecting the natural world, such as flora and fauna, could be seen as especially relevant for the mental health and spiritual well-being of Indigenous communities.<sup>37</sup> Nonetheless, we adopt such a distinction as it is helpful to circumscribe the discussion.

### 3. Mental Health and Conflict in the International Legal Scholarship

The topic of mental health in armed conflict has long been overlooked. Scientific articles addressing mental health during hostilities commonly tackle it from a public health point of view.<sup>38</sup> A legal perspective on this matter has only lately emerged, and there are relatively few academic works by international lawyers addressing it. Among them, we distinguished three main lines of research: 1) research adopting an IHRL perspective, mostly dealing with the protection of mental health in general without a specific focus on persons with mental disorders and psychosocial disabilities; 2) research adopting an IHRL/IHL perspective, mostly concentrated on the protection of persons with mental disorders and psychosocial disabilities; 3) research adopting an IHL perspective, mostly discussing the role of mental harm in the proportionality assessment.

**First line of research.** In recent times, a few publications have started dealing with the protection of mental health during hostilities in IHRL terms. These works usually concentrate on the right to mental health. In some cases, the article is just a list of the main human rights instruments protecting this right, and not much more.<sup>39</sup> However, a few works are especially valuable. For instance, Lisa Laplante and Roxana Castellon propose a series of scenarios in which a State can violate the right to mental health of victims of armed conflict.<sup>40</sup> In an article on socio-economic rights in war, Evelyne Schmid underlines how mental health has become one of the key substantive areas of attention when the Committee on Economic, Social and Cultural Rights, the monitoring body of the International Convention on Economic, Social and Cultural Rights (‘ICESCR’), analyses conflict-related matters.<sup>41</sup> In the end, under this line of research, it is worth mentioning the work of Solon Solomon, who, in addressing the issue of mental harm in armed conflict, offers some reflections within the framework of IHRL.<sup>42</sup> However, he

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<sup>37</sup> See Helen Obregón Gieseken and Vanessa Murphy, ‘The Protection of the Natural Environment under International Humanitarian Law: The ICRC’s 2020 Guidelines’ (2023) 105 *International Review of the Red Cross* 1180.

<sup>38</sup> See, for example, Nagendra P Luitel and others, ‘Conflict and Mental Health: A Cross-Sectional Epidemiological Study in Nepal’ (2013) 48 *Social Psychiatry and Psychiatric Epidemiology* 183; Vaughan Bell and others, ‘Characteristics of the Colombian Armed Conflict and the Mental Health of Civilians Living in Active Conflict Zones’ (2012) 6 *Conflict and Health* 10.

<sup>39</sup> See Inka Weissbecker, ‘Mental Health as a Human Right in the Context of Recovery after Disaster and Conflict’ (2009) 22 *Counselling Psychology Quarterly* 77.

<sup>40</sup> Lisa J Laplante and Roxana Castellon, ‘Expanding the Definition of the Right to Mental Health: Attending to Victims of Political Violence and Armed Conflict in Their Communities of Origin’ (2008) 2 *Essex Human Rights Review*.

<sup>41</sup> Evelyne Schmid, ‘Socio-Economic and Cultural Rights and Wrongs after Armed Conflicts: Using the State Reporting Procedure before the United Nations Committee on Economic, Social and Cultural Rights More Effectively’ (2013) 31 *Netherlands Quarterly of Human Rights* 241, 256.

<sup>42</sup> Solon Solomon, ‘The Psychological Impact of Military Operations on Civilians and the UN Human Rights Committee Japalali Decision: Exploring Mental Anguish under a *Vida Digna*, Right to Life Prism’ (2021) 26 *Journal of Conflict and Security Law* 401. Other interesting contributions by Solomon on mental harm and conflict include Solon Solomon, ‘Quasi-

does so mostly in relation to civil and political rights, such as the right to life and the right to a fair trial, rather than the right to mental health.<sup>43</sup>

**Second line of research.** Another research stream focuses on the protection of persons with mental disorders and psychosocial disabilities under IHRL and IHL. In this case, publications often regard people with disabilities in general. Since disabilities include psychosocial disabilities, these articles also consider disabilities related to mental disorders. One of the major recent contributions produced on this topic is a hundred-page publication by Priddy, who describes persons with disabilities as ‘the forgotten victims of armed conflict’, quoting the UN Committee on the Rights of Persons with Disabilities.<sup>44</sup> Other scientific works that must be cited under this line of research are the ones by Alexander Breitegger, legal adviser of the ICRC, specialised in the legal protection of persons with disabilities during hostilities. In his work, he also pays attention to psychosocial disabilities.<sup>45</sup> In this regard, it must be pointed out that in 2023, the International Review of the Red Cross dedicated an entire journal issue to the topic of persons with disabilities in armed conflict.<sup>46</sup>

**Third line of research.** Finally, some researchers adopt an IHL perspective on the issue of mental harm, focusing on the role of the latter in the proportionality assessment. Otherwise stated, they have examined whether the IHL notion of proportionality in attack should take into account not only physical harm, but also mental harm caused to civilians. A seminal article on this point is the one by Eliav Lieblich on incidental mental harm under IHL.<sup>47</sup> This topic has also been touched upon, albeit briefly, by other academics, such as Jasmine Moussa, Emanuela-Chiara Gillard, Isabel Robinson and Ellen Nohle, to mention a few.<sup>48</sup> An analysis of the literature reveals two opposing views. Some experts are against including mental harm in the proportionality assessment, and others are in favour of it. What seems to be agreed upon by all is the fact that this topic entails many complex practical matters, such as how to measure and foresee mental harm. Another scholar worth mentioning under this third research line is Nele Verlinden. In her work on IHL and emotions, she reflects on how this branch of International Law addresses mental harm.<sup>49</sup>

To conclude, the legal protection of mental health in armed conflict is a topic generally overlooked in the literature. Although some contributions have brought attention to this topic, their focus is often limited to the human rights realm, the protection of persons with mental disorders and psychosocial disabilities,

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Judicial Bodies and the Establishment of Standards and Principles for Assessing Mental Harm Sustained by Civilians Exposed to Hostilities’ (2021) 12 *Journal of International Dispute Settlement* 104; Solon Solomon, ‘International Criminal Courts and the Introduction of the Daubert Standard as a Mode of Assessing the Psychological Impact of Warfare on Civilians’ (King’s College London 2019).

<sup>43</sup> Solomon argues that connecting mental anguish with rights like the right to life ‘has the advantage of turning the civilians’ psychological suffering from a mental harm issue associated with the right to mental health and socioeconomic rights group whose value in litigation has tended to be less appreciated and understood, to a civil and political rights issue’: Solomon, ‘The Psychological Impact of Military Operations on Civilians and the UN Human Rights Committee Japalali Decision: Exploring Mental Anguish under a *Vida Digna*, Right to Life Prism’ (n 42) 418.

<sup>44</sup> Priddy (n 23) 14.

<sup>45</sup> For instance, see Breitegger, ‘Increasing Visibility of Persons with Disabilities in Armed Conflict’ (n 23); and Alexander Breitegger, ‘Disability-Inclusive International Humanitarian Law (IHL): ICRC Views’ (*Humanitarian Law & Policy Blog*, 6 July 2023) <<https://blogs.icrc.org/law-and-policy/2023/07/06/towards-disability-inclusive-ihl-icrc-views-recommendations/>>.

<sup>46</sup> International Review of the Red Cross, Issue 922, April 2023.

<sup>47</sup> Lieblich (n 36).

<sup>48</sup> See Section 4, letter d) for a detailed discussion and references.

<sup>49</sup> Nele Verlinden, ‘To Feel or Not to Feel? Emotions and International Humanitarian Law’ in Max Deland, Mark Klamberg and Pål Wrange (eds), *International Humanitarian Law and Justice* (Routledge 2018) 139–141.

and the issue of mental harm in the proportionality assessment. By contrast, a comprehensive overview of how IHL protects mental health, including that of persons without mental disorders and psychosocial disabilities, is missing. In the next section, we conduct this type of examination. In particular, we will examine how IHL safeguards mental health not only by ensuring the protection and treatment of those with mental health conditions but also by prohibiting or limiting actions that can cause mental distress in the first place.

#### 4. The Protection of Mental Health under International Humanitarian Law

Beyond norms that specifically concern persons with mental disorders and psychosocial disabilities, such as the one which classifies these persons as wounded and sick when they require medical care, we identified six other main ways in which IHL concerns the preservation of mental health in armed conflict:

- (a) IHL requires States not to endanger the mental health of persons under the power of the adverse party to the conflict;
- (b) IHL protects persons who, because of psychological trauma, are in need of medical assistance and care;
- (c) IHL prohibits psychological torture and other psychological forms of ill-treatment;
- (d) IHL imposes limits on the type of mental harm that Parties to the conflict can inflict on civilians;<sup>50</sup>
- (e) IHL prohibits weapons and methods of warfare that cause unnecessary suffering, including mental suffering;
- (f) IHL protects the medical and humanitarian personnel who provide mental health and psychosocial support to the population.<sup>51</sup>

##### a) Protection of the mental health of persons who are under the power of the adverse party

There are few IHL provisions that explicitly mention ‘mental health’ and they usually have one common feature: they refer to the mental health of persons who are under the power of the adverse party. That is the case, for instance, in the Geneva Convention Relative to the Treatment of Prisoners of War of 1949 (‘Geneva Convention III’). According to Article 49, ‘the Detaining Power may utilise the labour of prisoners of war who are physically fit [...] with a view particularly to maintaining them in a good state of physical and *mental health*’.<sup>52</sup> The 2020 ICRC Commentary on this treaty explains that this provision is based on the awareness of States that boredom has a negative effect on prisoners’ mental health.<sup>53</sup> Through this rule, States acknowledged that the disorientation caused by the passing of time, the lack of purposeful activities, and the feelings of isolation and uncertainty about the future may cause mental disorders in persons detained by the adverse party. This is also why IHL permits the Detaining Power to make prisoners of war work.

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<sup>50</sup> Letter d) includes an overview of the literature on mental harm and proportionality, which, as argued above, is a field that has received some attention in the past years. We included it to provide a complete overview of the subject matter.

<sup>51</sup> This list does not purport to be exhaustive. While other IHL rules may also contribute to the protection of mental health, they will not be addressed in this discussion, as they were deemed less relevant than the six examined herein and excluded due to scope and space limitations. These rules are: a) GC III (n 25) art 99(2) and GC IV (n 25) art 31 which prohibit moral coercion against prisoners of war for inducing an admission of guilt and against protected persons to obtain information from them; b) GC IV (n 25) art 100, according to which the disciplinary regimes of places of internment must not include regulations involving moral victimisation; and c) GC IV (n 25) art 33, which prohibits all measures of intimidation or terrorism against protected persons.

<sup>52</sup> GC III (n 25) art 49 (emphasis added).

<sup>53</sup> International Committee of the Red Cross, ‘Commentary of 2020: Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949’ <<https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949>> art 49 [2675].

Additional Protocol I relating to the protection of the victims of international armed conflicts expressly cites mental health in Article 11. According to this norm, ‘the physical or *mental health* and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty [...] shall not be endangered by any unjustified act or omission’.<sup>54</sup> The 1987 ICRC Commentary on this treaty elucidates that this provision concerns, for instance, medical experiments that have an impact on the mental stability of the person; the practice of placing a person in full isolation for an extended length of time; and the so-called ‘brainwashing’, that is the massive injection of propaganda by using systematic and often violent means.<sup>55</sup> Article 5(2)(e) of Additional Protocol II relating to the protection of the victims of non-international armed conflicts also expressly mentions mental health with a norm almost identical to Article 11 of Additional Protocol I.<sup>56</sup>

The analysis of these norms brings three main observations. To begin with, the drafters of IHL treaties recognised that health included mental health and not just physical health. Explicit references to mental health are scarce and mostly connected to the protection of prisoners of war. Nonetheless, this explicit mention is noteworthy, considering that the Geneva Conventions and the Additional Protocols were written more than 70 and 40 years ago, respectively, when minimal importance was attributed to mental health considerations. In addition, the drafters decided to expressly address mental health in relation to persons without mental disorders, thus adopting a prevention perspective, which also could be seen as especially progressive for those times. Finally, among the various categories of persons in vulnerable conditions to whom IHL could have granted mental health protection, the treaties focus on the mental health of those under the power of the adverse party. The reason for this is not certain, but may be that the experiences of those who suffered mental distress due to detention during the two World Wars helped shape the content of the treaties.

#### **b) Protection of persons who, because of trauma, need medical assistance and care**

Another way in which IHL safeguards the mental health of persons without mental disorders concerns those persons who, ‘because of *trauma*, [...] are in need of medical assistance and care’.<sup>57</sup> Indeed, these persons would fall within the notion of wounded and sick, as illustrated above. Such a conclusion deserves a detailed explanation since it is based on two assumptions. First, it implies that the ‘trauma’ mentioned in the treaties is a psychological trauma and not, or not only, a physical one. Second, it assumes that a psychologically traumatised person might not suffer from a mental disorder.

The notion of trauma is not explicitly defined either in the IHL treaties or the ICRC Commentaries to the treaties. Preparatory works are also not revealing in this regard. Even relevant academic literature dedicated to explaining the meaning of ‘wounded and sick’ does not provide any explanation of the concept of trauma.<sup>58</sup> However, according to Annex I to the Geneva Convention III:

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<sup>54</sup> AP I (n 24) art 11 (emphasis added). In addition, any wilful act or omission which seriously endangers the physical or mental health or integrity of a person in the power of the adverse party in violation of Article 11 constitutes a grave breach of the Protocol: AP I (n 24) art 11(4).

<sup>55</sup> International Committee of the Red Cross, ‘Commentary of 1987: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977’ <<https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/title/commentary/1987>> art 11 [463].

<sup>56</sup> AP II (n 28) art 5(2)(e).

<sup>57</sup> AP I (n 24) art 8 (emphasis added).

<sup>58</sup> Key IHL works in this area which fail to deal with the interpretation of ‘trauma’ include Annyssa Bellal, ‘Who Is Wounded and Sick?’ in Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), *Oxford Public International Law* (2015) 764; Jann K Kleffner, ‘Protection of the Wounded, Sick, and Shipwrecked’ in Dieter Fleck (ed), *Oxford Public International Law* (2013) 323;

The following shall be repatriated directly: 1) All prisoners of war suffering from the following disabilities as the result of *trauma*: loss of limb, paralysis, articular or other disabilities, when this disability is at least the loss of a hand or a foot, or the equivalent of the loss of a hand or a foot.<sup>59</sup>

A few paragraphs later, the Annex provides that '[p]risoners of war who have sustained several wounds, none of which, considered by itself, justifies repatriation, shall be examined [...] with due regard for the *psychic traumatism* due to the number of their wounds'.<sup>60</sup> Thus, the Annex seems to suggest a notion of trauma that covers both physical and mental trauma. In addition, although the ICRC Commentaries to the treaties do not provide a definition of trauma, one might argue that the trauma they refer to could also be psychological. A few references in the commentaries support this conclusion. The Commentary to the Geneva Convention I mentions 'combat-related stress and mental disorders' as examples of trauma in dealing with Article 24 (protection of permanent personnel).<sup>61</sup> The same Commentary mentions the prevention of 'psychological trauma' in dealing with Article 19 (protection of medical units and establishment).<sup>62</sup>

All of these references seem to suggest a notion of trauma that covers both physical and mental trauma, and that the latter does not necessarily imply the insurgence of a mental disorder. The Commentary to the Geneva Convention I considers 'combat-related stress *and* mental disorders' as examples of trauma.<sup>63</sup> This conclusion would also be in line with the standard dictionary definition of 'trauma', which is defined by the Cambridge dictionary as 'severe and lasting emotional shock and pain caused by an extremely upsetting experience, or a case of such shock happening'.<sup>64</sup> Thus, trauma commonly refers to either the traumatic event or the psychological consequences of it. These consequences might reach the threshold of a mental disorder, but they could also not reach this threshold and thus not lead to a mental health condition.

In summary, the expression 'trauma' in the IHL treaties seems to refer (if not only, at least also) to psychological trauma. The analysis above also appears to suggest that trauma does not necessarily entail the insurgence of a mental health condition. Following this line of reasoning, persons who live through a traumatic event and who do not develop a mental disorder but need medical care fall within the category of the wounded and sick and, as such, are entitled to receive the reinforced IHL protection explained above. A person who has undergone a traumatic event is likely to develop a mental disorder. However, it might not always be the case. Everyone reacts to events in different ways, and some people are less genetically predisposed to develop a mental disorder and/or have more abilities and instruments to deal with a traumatic experience.

### **c) Prohibition of psychological torture and other forms of ill-treatment**

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and Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross 2016) 134.

<sup>59</sup> Annex I to GC III (n 25) 136 (emphasis added).

<sup>60</sup> *ibid* 139 (emphasis added).

<sup>61</sup> International Committee of the Red Cross, 'Commentary of 2016: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949' (n 27) art 24 [1958]. It reads as follows: 'The activities of psychologists involved in the prevention of trauma, such as combat-related stress and mental disorders, [...]'.  
<sup>62</sup> *ibid* art 19 [1781].

<sup>62</sup> *ibid* art 19 [1781].

<sup>63</sup> *ibid* art 24 [1958] (emphasis added).

<sup>64</sup> 'Trauma' (Cambridge Dictionary) <<https://dictionary.cambridge.org/dictionary/english/trauma>>.

Under IHL (and also IHRL), torture and other cruel, inhuman or degrading treatment is banned. Torture consists of ‘severe physical or mental pain or suffering’ with the aim of ‘obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind’.<sup>65</sup> Inhuman treatment is also characterised by severe physical or mental pain or suffering. The difference between inhuman treatment and torture is the level of severity of the pain and whether there is a specific purpose behind the act.<sup>66</sup> Degrading treatment consists of acts that grossly humiliate and degrade the person.<sup>67</sup> The European Court of Human Rights has described the treatment as degrading when it is ‘such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical and moral resistance’.<sup>68</sup>

The prohibition of torture and other forms of ill-treatment finds its normative basis in several provisions of the Geneva Conventions and Additional Protocols.<sup>69</sup> Furthermore, the prohibition of torture is considered a norm of customary IHL in both international and non-international armed conflicts,<sup>70</sup> and it is regarded as a *jus cogens* norm of International Law.<sup>71</sup> In the context of IHRL, the main treaty of reference is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘CAT’), but the prohibition of torture and other forms of ill-treatment can be found in other IHRL treaties as well, such as in Article 7 of the International Covenant on Civil and Political Rights (‘ICCPR’) and Article 37 of the Convention on the Rights of the Child (‘CRC’).<sup>72</sup> It is also present in several regional human rights instruments.<sup>73</sup>

The infliction of severe pain or suffering that characterises torture and ill-treatment can be physical but also mental. The canonical definition of torture in International Law, included in the 1984 CAT, elucidates this.<sup>74</sup> The United Nations (‘UN’) Special Rapporteur on Torture published a ground-breaking

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<sup>65</sup> Henckaerts and Doswald-Beck (n 29) rule 90. See also International Criminal Court, *Elements of Crimes* (2013), art 8(2)(a)(ii) and (c)(i); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (‘CAT’), art 1.

<sup>66</sup> *ibid* rule 90.

<sup>67</sup> *ibid* rule 90. See also International Criminal Court, *Elements of Crimes* (2013) art 8(2)(b)(xxi) and (c)(ii); International Committee of the Red Cross, ‘What Is the Definition of Torture and Ill Treatment?’ (2005) <<https://www.icrc.org/en/doc/resources/documents/faq/69mjxc.htm>>.

<sup>68</sup> Martin Curtice, ‘The European Convention on Human Rights: An Update on Article 3 Case Law’ (2010) 16 *Advances in Psychiatric Treatment* 199, 200. See European Court of Human Rights *Kudle v Poland* (2000) application 30210/96 [92].

<sup>69</sup> The principal IHL instruments that forbid torture and other forms of ill-treatment include GC I (n 25) art 12; GC II (n 25) art 12; GC III (n 25) arts 13, 17 and 87; GC IV (n 25) arts 27 and 32; GCs Common art 3; AP I (n 24) art 75(2)(a)(ii); AP II (n 28) art 4(2)(a).

<sup>70</sup> Henckaerts and Doswald-Beck (n 29) rule 90. See also rule 156, according to which serious violations of IHL, including torture and other inhuman treatment, constitute war crimes in both international and non-international armed conflicts.

<sup>71</sup> See Erika De Wet, ‘The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law’ (2004) 15 *European Journal of International Law* 97.

<sup>72</sup> International Covenant on Civil and Political Rights (adopted on 19 December 1966, entered into force 23 March 1976), 999 UNTS 171 (‘ICCPR’), art 7; Convention on the Rights of the Child (adopted on 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (‘CRC’), art 37(a).

<sup>73</sup> These are the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11, 14 and 15 (adopted on 4 November 1950, entered into force 3 September 1953) ETS 005 (‘ECHR’), art 3; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) ETS 126; African Charter on Human and Peoples’ Rights (Banjul Charter) (adopted on 1 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (‘ACHPR’), art 5; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123 (‘ACHR’), art 5(2); Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS TS no. 67; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), CHR/NONE/2004/40/Rev.1, art 8; Association of Southeast Asian Nations, ASEAN Human Rights Declaration (2012), art 14.

<sup>74</sup> CAT (n 65) art 1.

report on psychological torture in 2020.<sup>75</sup> Within the IHL realm, the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) observed, in the *Kunarac* case, that the fact that torture can be ‘physical or mental’ is one of the elements of the definition of torture which is ‘uncontentious’ and ‘accepted as representing the status of customary international law’.<sup>76</sup> The violation of the prohibition of torture under IHL, including psychological torture, has already been the subject of various judgments. By way of example, in the *Furundžija* case, the ICTY condemned the accused for having committed torture by also taking into account the mental suffering caused.<sup>77</sup>

The difference between physical and psychological torture (or ill-treatment) is that the latter does not cause direct physical harm to the person, but rather causes harmful psychological effects. For perpetrators, the ‘advantage’ of mental torture is that it may not leave any physical injury, and as such, it could be less detectable. Nonetheless, physical and psychological torture are often connected, and in practice, frequently overlap. Physical torture commonly leads to long-term effects on the mind, and mental torture can turn into physical symptoms. In any event, ‘the distinction between psychological and physical methods of torture should not obscure the fact that, as a matter of law, “torture” is a unified concept’.<sup>78</sup> In other words, all methods, whether physical or psychological, are subject to the same prohibition.

However, while there is consensus about which forms of physical ill-treatment constitute torture, ‘[t]he same cannot be said for those that cause mental suffering’, as observed by Irfan Neziroğlu.<sup>79</sup> It is widely accepted that torture can also be psychological, but not everyone agrees on which types of methods amount to it. Due to the fragmentation of the use of the term mental torture, both in jurisprudence and advocacy work, various experts have asked for its clarification.<sup>80</sup> In general, it is considered that psychological torture encompasses methods such as sleep deprivation, sensory deprivation, long exposure to loud music or bright lights, mock executions, prolonged isolation, death threats, provocation of personal or cultural phobias, and sexual or religious humiliation.<sup>81</sup>

It must finally be noted that, unlike IHRL, IHL does not require the subject who commits torture to be a public official for there to be a breach. Under the CAT, mental torture can only be committed by, or at the instigation of, or with the consent of a public official or other person acting in an official capacity.

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<sup>75</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, ‘Report of the Special Rapporteur’, A/HRC/43/49 (20 March 2020).

<sup>76</sup> International Tribunal for the former Yugoslavia (‘ICTY’) Trial Chamber, *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (2001) IT-96-23-T & IT-96-23/1-T [483] (emphasis added).

<sup>77</sup> ICTY Trial Chamber, *Prosecutor v Anto Furundžija* (1998) IT-95-17/1-T [264]–[269]. The Appeals Chamber (21 July 2000) dismissed the appeal and affirmed the convictions and sentences.

<sup>78</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (n 75) [21].

<sup>79</sup> Irfan Neziroğlu, ‘A Comparative Analysis of Mental and Psychological Suffering as Torture, Inhuman or Degrading Treatment or Punishment under International Human Rights Treaty Law’ (2007) 4 *Essex Human Rights Review* 3.

<sup>80</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (n 74) [14].

<sup>81</sup> El-Khoury and others observe that, according to some experts, psychological torture includes only those practices that ‘inflict pain or suffering without resorting to physical violence’, such as death threats and mock executions, whereas according to others it also includes methods that, although have a physical health component, ‘do not aim to hurt the body or leave physical marks’. See Joseph El-Khoury, Riwa Haidar and Andres Barkil-Oteo, ‘Psychological Torture: Characteristics and Impact on Mental Health’ (2021) 67 *International Journal of Social Psychiatry* 500, 501. On the forms of psychological torture, see also Hernán Reyes, ‘The Worst Scars Are in the Mind: Psychological Torture’ (2007) 89 *International Review of the Red Cross* 591.

This ‘public official requirement’ is not prescribed by IHL.<sup>82</sup> As a result, the range of individuals that can be prosecuted for mental torture under IHL is broader because even persons who are not public officials fall within this provision. In this sense, IHL protects the individual from mental torture in a manner which is different from IHRL.

#### **d) Limits on the types of mental harm that Parties to the conflict can inflict on civilians**

IHL prohibits what can be defined as *intentional* mental harm since acts or threats of violence, whose primary purpose is to spread terror among the civilian population, are forbidden.<sup>83</sup> There is no definition of ‘terror’ in IHL treaties, but it is reasonable to conclude that the notion of terror includes mental harm, as suggested by Eliav Liebllich.<sup>84</sup> It is clear that acts of war generate some level of terror among the population and that attacks during armed conflict are often carried out in a brutal way to persuade adversary combatants to capitulate. Does this mean that they are unlawful? The ICRC Commentary on Additional Protocol I explains that this is not the type of terror prohibited by IHL. Rather, IHL forbids those acts and threats of violence that have the primary purpose of spreading terror among the civilian population ‘without offering substantial military advantage’.<sup>85</sup>

A few judgments of the ICTY included charges of violating the IHL prohibition on terror, such as the *Karadžić* case and the *Galić* case.<sup>86</sup> In these cases, the ICTY describes how the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population, is a case of ‘extensive trauma and psychological damage’.<sup>87</sup> In the *Karadžić* case, the ICTY reports a series of testimonies which give an idea of what a state of terror in the civilian population implies. Paragraph 4585 of ICTY’s first instance judgment issued in 2016 reads as follows:

According to Banbury, the siege of Sarajevo was “clearly a campaign of terror” and the people who lived through it “suffered immensely”. Nakaš, a doctor in the Sarajevo State Hospital, testified that many people in Sarajevo were in fact “visibly traumatised” and suffered from “post-traumatic stress disorder”. Bell confirmed this by stating that he had “never seen such anxiety etched on everybody’s faces” and that “some [people] looked almost grey with fear”. Mandilović, another doctor from the Sarajevo State Hospital, testified that Sarajevo’s civilian population eventually became “numb to everything going on around them” and that people were in a state of “permanent fear”. Hajir, a doctor working in Dobrinja Hospital, testified that the civilian population suffered deep psychological scars as a result of the siege; life in Sarajevo was hard for everyone and people experienced psychological problems and paranoia.<sup>88</sup>

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<sup>82</sup> On the relationship between torture in IHL and IHRL, see Katharine Fortin, ‘R v TRA: Article 1 of the Convention Against Torture and the Public Official Requirement’ (*EJIL: Talk!*, 20 November 2019) <<https://www.ejiltalk.org/r-v-tra-article-1-of-the-convention-against-torture-and-the-public-official-requirement/>>.

<sup>83</sup> AP I (n 24) art 51(2); AP II (n 28) art 13(2); and Henckaerts and Doswald-Beck (n 29) rule 2.

<sup>84</sup> Liebllich (n 36) 195.

<sup>85</sup> International Committee of the Red Cross (n 55) art 51 [1940].

<sup>86</sup> ICTY Appeals Chamber, *Prosecutor v Stanislav Galić* (2006) IT-98-29-A; ICTY Trial Chamber, *Prosecutor v Rodovan Karadžić* (2016) IT-95-5/18-T [4585], [4629]–[4635]. For an overview of how international courts and tribunals have addressed the prohibition of terror, see Ben Saul, ‘Terrorism, Counter-Terrorism, and International Humanitarian Law’ (Legal Studies Research Paper No. 16/37, Sydney Law School, 2016).

<sup>87</sup> *Prosecutor v Stanislav Galić* (n 86) [102].

<sup>88</sup> *Prosecutor v Rodovan Karadžić* (n 86) [4585]. See also [4629]–[4635].

Whether *incidental* mental harm is also prohibited under IHL is more uncertain. According to the IHL principle of proportionality, attacks against military objectives that are ‘expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’ are prohibited.<sup>89</sup> The fact that ‘injuries’ refers to physical injuries is self-evident. What remains to be explored is whether those injuries can also be mental.<sup>90</sup> Although the majority of experts assert that unintended mental harm is excluded from the proportionality analysis,<sup>91</sup> others argue there is no reason in principle not to consider it.<sup>92</sup> Some even claim that the fact that civilian harm also embraces psychological injury is becoming increasingly accepted.<sup>93</sup> There appears to be no relevant jurisprudence on the point.<sup>94</sup> In practice, it appears that States have been reluctant to consider mental harm since it would pose a notable hurdle for those making decisions on targets.<sup>95</sup> It has also been observed that the military ‘lack(s) the tools to measure these harms in a way that lends itself to the calculations made during attack planning and proportionality assessments’.<sup>96</sup>

The principal arguments in favour of the inclusion of psychological injury in the proportionality assessment can be summarised as follows. First, IHL already addresses *de facto* mental harm in the prohibition of terror. As a result, this concept is not completely extraneous to this body of law. Second, mental harm has already been considered in connection with the crime of genocide since the latter is defined as conduct which (*inter alia*) causes ‘serious bodily or mental harm’ to members of a group.<sup>97</sup> This shows the feasibility of covering such an aspect within the international legal framework.<sup>98</sup> Furthermore, according to the Tallinn Manual on the International Applicable to Cyber Operations, it is reasonable to extend the definition of injury to ‘severe mental suffering that [is] tantamount to injury’.<sup>99</sup> Finally, there

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<sup>89</sup> AP I (n 24) art 51(5)(b); AP II (n 28) art 57(2)(b); and Henckaerts and Doswald-Beck (n 29) rule 14.

<sup>90</sup> As noted by Solomon, neither AP I nor its Commentary offers any clarification on this issue: Solomon, (n 35) 164).

<sup>91</sup> Jasmine Moussa, ‘A Closer Look at the Prohibition of Indiscriminate Attacks and Disproportionate Attacks’, *The Additional Protocols 40 years later: New Conflicts, New Actors, New Perspectives* (International Institute of Humanitarian Law 2017) 71.

<sup>92</sup> Emanuela-Chiara Gillard, ‘Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment’ (Chatham House 2018) 41.

<sup>93</sup> Isabel Robinson and Ellen Nohle, ‘Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas’ (2016) *International Review of the Red Cross* 129.

<sup>94</sup> Other experts come to the same conclusion. See Laurent Gisel, ‘International Expert Meeting (22–23 June 2016 – Quebec): The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law’ (International Committee of the Red Cross, 2018) 34.

<sup>95</sup> Solon Solomon, ‘Bringing Psychological Civilian Harm to the Forefront: Incidental Civilian Fear as Trauma in the Case of Recurrent Attacks’ (*EJIL: Talk!*, 25 April 2018) <<https://www.ejiltalk.org/bringing-psychological-civilian-harm-to-the-forefront-incident-civilian-fear-as-trauma-in-the-case-of-recurrent-attacks/>>.

<sup>96</sup> Noam Lubell and Amichai Cohen, ‘Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts’ (2020) 96 *International Law Studies* 174.

<sup>97</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (‘Genocide Convention’), art 2.

<sup>98</sup> On this point, see Sarah Knuckey and others, ‘The Proportionality Rule and Mental Harm in War’ in *Necessity and Proportionality in International Peace and Security Law* (Oxford University Press 2020) 371.

<sup>99</sup> International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence, ‘Part IV - The Law of Cyber Armed Conflict’, in *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press 2017) rule 92 [8]. The Commentary reads as follows: ‘While the notion of attack encompasses injury and death caused to individuals, the International Group of Experts agreed that it is, in light of the law of armed conflict’s underlying humanitarian purposes, reasonable to extend the definition to serious illness and severe mental suffering that are tantamount to injury. In particular, note that Article 51(2) of Additional Protocol I prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” (see also Rule 98). Since terror is a psychological condition resulting in mental suffering, inclusion of such suffering in this Rule is supportable through analogy’. Although the Commentary refers to the notion of injury within the definition of cyber-attack, many sustain that the reasoning carried out ‘is equally valid for the notion of injury in the proportionality rule’. See Gisel (n 94) 34. However, it must be noted that the Tallinn Manual is a non-binding study, despite being a highly authoritative one.

is an increasing recognition of the detrimental effects of conflict on the population's mental health. As a result, the interpretation of IHL norms should also be cognisant of this.

The mental health consequences of US drone practice in Pakistan or the use of sonic booms in Gaza demonstrate that the issue of mental harm is not so rare. A 2012 report by Stanford Law School and NYU School of Law showed the detrimental mental health consequences on civilians, especially children, of the US's use of drones in Pakistan at that time.<sup>100</sup> The permanent presence of US drones and the inability to know if and when they were going to strike caused significant mental distress to members of the population. People endured ongoing fear of death at any moment. On a similar note, the use of sonic booms by the Israeli Air Force in 2005-2006 in the Occupied Palestinian Territories had a negative impact on the mental health of the persons affected.<sup>101</sup> Sonic booms happen when an object moves faster than sound and, in so doing, creates a loud noise similar to an explosion. According to the Israeli Information Centre for Human Rights in the Occupied Territories, the main aim of the sonic booms was to keep people from sleeping and to create a constant feeling of fear and anxiety.<sup>102</sup>

However, taking into account both intentional and incidental mental harm in the IHL discourse poses serious practical challenges. For example, how does one identify when the spread of terror is a primary or secondary purpose of an act or threat of violence? If the primary purpose of an act or threat of violence is to spread terror, but the party gains a substantial military advantage as a consequence of it, is the act or threat of violence always legitimate? Does requiring a military commander to incorporate incidental mental harm in the proportionality assessment constitute an overcomplication of IHL? How can the potential incidental effects on mental health be practically assessed when determining whether and how to carry out an attack? Is mental harm measurable and foreseeable? Which level of severity should be considered?<sup>103</sup>

The answers to these questions are far from settled. Despite the challenges highlighted above, it may be argued that, when feasible, parties to a conflict should consider the consequences of their actions also on the mental health of civilians rather than just on their physical health and property. This is because IHL should be interpreted in light of a modern understanding of health, which includes mental health. In many situations, it could be difficult, if not impossible, to verify in practice whether the mental harm is justified in terms of military necessity or to incorporate it in the proportionality assessment. However, in other cases, considering mental health might be more straightforward. For instance, it seems reasonable to ask a military commander to bear in mind the psychological trauma that children might suffer if they witness a violent attack close to their school.

This potential evolutive interpretation of IHL should not come as a surprise. At the end of the day, the interpretation of IHL 'evolves in time with contemporary sensitivities, social norms and

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<sup>100</sup> Stanford Law School and NYU School of Law (n 1) 80.

<sup>101</sup> 'Israeli Sonic Booms Terrorising Gaza' *Al Jazeera* (2 January 2006) <<https://www.aljazeera.com/news/2006/1/2/israeli-sonic-booms-terrorising-gaza>>.

<sup>102</sup> B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, 'The Sonic Booms in the Sky over Gaza' (2016) <[http://www.btselem.org/gaza\\_strip/supersonic\\_booms](http://www.btselem.org/gaza_strip/supersonic_booms)>.

<sup>103</sup> Another issue is the risk of imposing a Western concept of mental harm: see Samantha Holmes, 'Beyond Compliance Symposium - Strategies to Reduce Harm and Need in War Through a Decolonial and Intersectional Lens' (*Lieber Institute West Point*, 26 September 2024) <<https://lieber.westpoint.edu/strategies-reduce-harm-need-war-through-decolonial-intersectional-lens/>>.

understandings'.<sup>104</sup> By way of illustration, it is possible to think of how IHL norms regarding women are understood nowadays in comparison to the past and how the work carried out by the ICRC, jurisprudence and scholarship has contributed to developing non-sexist interpretations of IHL. In the same vein, IHL could be interpreted in a manner that aligns more closely with the current perception of mental health, according to which mental health is an integral part of health and concerns every individual. Sarah Knuckey and others also refer to scientific knowledge as a source of the evolution of IHL: '[a]s scientific understanding of the destructive effects of exposure to trauma has evolved, so too should the law and military practice'.<sup>105</sup> Some military manuals already provide 'some indications of awareness [...] that the psychological effects of hostilities should be taken into account'.<sup>106</sup>

Be that as it may, further discussion on this topic will require engaging military personnel and ascertaining their real-world experience and opinions. Mental health professionals and civilians should also be involved. While a progressive interpretation of IHL is essential for reflecting evolving societal perceptions, it must also be mindful of the practical feasibility of implementation by military forces. After all, IHL is fundamentally about finding a balance between humanitarian concerns and operational realities. In the realm of mental harm, reconciling these competing interests proves to be particularly complex. Work currently conducted by Solon Solomon on the notion of mental harm in international and national criminal and tort law jurisprudence could prove to be particularly useful in the attempt to provide some answers to the questions listed above.<sup>107</sup>

#### **e) The prohibition of weapons or methods of warfare that cause unnecessary mental suffering**

Another rule that could be seen as incorporating mental health considerations is Article 35 of Additional Protocol I, which prohibits weapons or methods of warfare that cause superfluous injuries or unnecessary suffering.<sup>108</sup> This norm is considered customary and applicable to international and non-international armed conflict.<sup>109</sup> This rule can be seen as protecting mental health, as the 'suffering' it refers to could arguably encompass mental suffering. The ICRC Commentary to Additional Protocol I notes that the expression 'superfluous injury and unnecessary suffering' was chosen as the favourite translation of the French '*maux superflus*', which includes both physical and moral suffering.<sup>110</sup>

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<sup>104</sup> Cordula Droege and Eirini Giorgou, 'How International Humanitarian Law Develops' (2022) 104 *International Review of the Red Cross* 1798, 1818.

<sup>105</sup> Knuckey and others (n 98) 408.

<sup>106</sup> International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2019) 17.

<sup>107</sup> See, for instance, Solon Solomon, 'Concretizing Mental Harm: Warfare's Psychological Impact on Civilians and the Return to Domestic Law for Establishing a Standards-Setting Paradigm' (2022) 31 *Transnational Law & Contemporary Problems*. Solomon highlights at the beginning of this article the two main interrelated risks associated with discussions on civilian mental harm: 'If civilian suffering is left undefined, with no parameters to delineate it, it risks being interpreted either too broadly or too narrowly. If interpreted too broadly, all cases where fear exists among civilians in warfare would incur criminal liability for the instigators or architects of a particular military operation. Yet, the general perception is that it is expectable for war to create feelings of fear among civilians. [...] On the other hand, interpreting civilian mental harm too narrowly would also be problematic. For example, interpreting serious mental harm to comprise only serious psychiatric illnesses would leave outside the court's scope cases where the civilians, albeit not suffering from psychiatric illnesses, have nevertheless sustained psychological trauma'. Although he makes these considerations within the framework of criminal liability, these risks might also be viewed as relevant to other areas of law.

<sup>108</sup> AP I (n 24) art 35.

<sup>109</sup> Henckaerts and Doswald-Beck (n 29) rule 70.

<sup>110</sup> International Committee of the Red Cross, 'Commentary of 1987: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977' (n 55) art 35 [1426]. See also 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974 -1977) Volume XV' (1978) 267 [21] <[https://tile.loc.gov/storage-services/service/ll/llmlp/RC-records\\_Vol-15/RC-records\\_Vol-15.pdf](https://tile.loc.gov/storage-services/service/ll/llmlp/RC-records_Vol-15/RC-records_Vol-15.pdf)>.

This broad interpretation, according to which suffering encompasses both the physical and psychological impact of weapons, seems widely accepted by academics. In the words of Yoram Dinstein, superfluous injury and unnecessary suffering comprehend ‘both measurable-objective (mostly physical) injury and subjective-psychological suffering and pain’.<sup>111</sup> According to Judith Gardam, ‘the factors that fall to be considered in the equation in terms of suffering or injury encompass both the physical and psychological effects of weapons’.<sup>112</sup> William Boothby claims that Article 35 encompasses ‘both physically observable and psychological elements’,<sup>113</sup> and Stuart Casey-Maslen and Steven Haines observe that suffering ‘denotes primarily pain, but also extends to comprehend severe psychological distress’.<sup>114</sup> Rain Liivoja argues that the fact that suffering includes psychological suffering ‘does not seem controversial’.<sup>115</sup> Finally, Sandesh Sivakumaran notes the deeper understanding of psychiatric injury which exists nowadays and argues this should also be covered by the concept of suffering (even though he appears to maintain that psychological harm alone would not be sufficient to amount to suffering in this context).<sup>116</sup>

Even the report of the SIrUS Project, released in 1997, mentions mental suffering as one of the elements included in the notion of ‘superfluous injury and unnecessary suffering’.<sup>117</sup> The SIrUS Project was an ICRC study that aimed to provide more clarity to this latter concept. According to that report, what constitutes superfluous injury and unnecessary suffering must be determined ‘by design-dependent, foreseeable effects of weapons’ when they cause, among others, a ‘specific abnormal psychological state’ (Criterion I).<sup>118</sup> The study further indicates that ‘[w]hilst all weapons produce fear and stress, these reactions are neither specific nor abnormal’, ‘Criterion I would apply to a weapon designed to disorientate, confuse, induce calm or precipitate seizures or psychosis’.<sup>119</sup>

However, superfluous injuries or unnecessary suffering is a concept that continues to be unclear and challenging to implement when the legality of weapons must be evaluated.<sup>120</sup> Academics underline that this rule needs further clarification and note that this task has turned out to be demanding even for the ICRC, which subsequently abandoned the SIrUS project.<sup>121</sup> Therefore, although there seems to be agreement among experts on the inclusion of mental suffering within this notion, in practice, the impact of such an interpretation is limited. Nevertheless, it remains worthy of mention as one of the ways in which IHL pays attention to mental health.

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<sup>111</sup> Yoram Dinstein (ed), ‘Prohibited Weapons’, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 74.

<sup>112</sup> Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004) 69.

<sup>113</sup> William H Boothby, ‘Customary Principles—Superfluous Injury and Unnecessary Suffering’ in William Boothby (ed), *Weapons and the Law of Armed Conflict* (Oxford University Press 2009) 58.

<sup>114</sup> Stuart Casey-Maslen and Steven Haines, *Hague Law Interpreted: The Conduct of Hostilities under the Law of Armed Conflict* (Bloomsbury Publishing Plc 2018) 211.

<sup>115</sup> Rain Liivoja, ‘Protecting Warfighters from Superfluous Injury and Unnecessary Suffering’ in Matt Killingsworth and Tim McCormack (eds), *Civility, Barbarism and the Evolution of International Humanitarian Law: Who do the Laws of War Protect?* (Cambridge University Press 2024) 184.

<sup>116</sup> Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (1st edn, Oxford University Press 2012) 388.

<sup>117</sup> International Committee of the Red Cross, ‘The SIrUS Project; Towards a Determination of Which Weapons Cause “Superfluous Injury or Unnecessary Suffering”’ (1997) <<https://tile.loc.gov/storage-services/service/ll/lmlp/SIrUS-project/SIrUS-project.pdf>>.

<sup>118</sup> *ibid.* 23.

<sup>119</sup> *ibid.*

<sup>120</sup> Verlinden (n 49) 141.

<sup>121</sup> Sivakumaran (n 116) section 3.2.1.

In this regard, a few reflections must be made. Firstly, it is important to highlight that the inclusion of mental distress within the notion of superfluous injury and unnecessary suffering is generally accepted. In this sense, this rule differs from other IHL rules, such as the one on proportionality in attack, which are afforded different views among experts on whether they include mental health considerations. In addition, taking into account mental suffering within the notion of superfluous injuries or unnecessary suffering could be especially useful in assessing current and future weapons affecting mental states. Although weapons are typically thought of in terms of their physical impact, some can primarily induce mental distress. For instance, loud music for a prolonged period can lead to mental exhaustion,<sup>122</sup> and neuropharmacological agents can affect mental states.<sup>123</sup> Unsurprisingly, the mind has been described as an emerging sixth dimension of warfare and new weapons effectively targeting it might be developed in the near future.<sup>124</sup>

#### **f) Protection of medical and humanitarian personnel who provide mental health and psychosocial support**

Under IHL, medical personnel must be respected and protected in all circumstances, unless they commit acts harmful to the enemy outside their humanitarian function.<sup>125</sup> Medical personnel include those persons assigned by a party to the conflict, exclusively for medical purposes, the administration of medical units, or the operation or administration of medical transports.<sup>126</sup> Medical purposes are the ‘search for, collection, transportation, diagnosis or treatment [...] of the wounded, sick and shipwrecked, or for the prevention of disease’.<sup>127</sup> It follows that not everyone who performs medical duties falls within the definition of medical personnel. Health professionals not included under the definition above (for instance, because they are not assigned by a party to the conflict) do not enjoy a reinforced level of protection. Yet, they are still protected by IHL as civilians and, thus, cannot be attacked (unless and for such time as they take a direct part in hostilities).

In the context of mental health, psychiatrists and psychologists can be classified as medical personnel, provided that the conditions mentioned above are met. The reference to the ‘prevention of disease’ among the medical purposes to which medical personnel must be assigned is particularly relevant. The 2016 Commentary to the Geneva Convention I, that is the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, highlights that ‘[t]he activities of psychologists involved in the prevention of trauma, such as combat-related stress and mental disorders, can also fall within the term “prevention of disease”, as well as of the term “treatment” once the trauma is present’.<sup>128</sup> *Mutatis mutandis*, it is arguable that the concept of prevention of disease also comprises the

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<sup>122</sup> See ‘Music Torture: How Heavy Metal Broke Manuel Noriega’ *BBC News* (30 May 2017) <<https://www.bbc.com/news/world-latin-america-40090809>>.

<sup>123</sup> Joseph DeFranco, Diane DiEuliis and James Giordano, ‘Redefining Neuroweapons: Emerging Capabilities in Neuroscience and Neurotechnology’ (2020) 50 <[https://ndupress.ndu.edu/Portals/68/Documents/prism/prism\\_8-3/prism\\_8-3\\_DeFranco-DiEuliis-Giordano\\_48-63.pdf](https://ndupress.ndu.edu/Portals/68/Documents/prism/prism_8-3/prism_8-3_DeFranco-DiEuliis-Giordano_48-63.pdf)>.

<sup>124</sup> On the point see Armin Krishnan, ‘From Psyops to Neurowar: What Are the Dangers?’ (2014) <<https://web.isanet.org/Web/Conferences/ISSS%20Austin%202014/Archive/b137347c-6281-466d-b9e7-ef7e0e5d363c.pdf>>.

<sup>125</sup> GC I (n 25) arts 24 and 25; GC II (n 25) arts 36 and 37; AP I (n 24) art 15; AP II (n 28) art 9; and Henckaerts and Doswald-Beck (n 29) rule 25. In this paragraph, we focus on medical and humanitarian personnel, but similar protection is also granted to the healthcare infrastructures where these persons operate, provided that they meet certain requirements.

<sup>126</sup> AP I (n 24) art 8; Henckaerts and Doswald-Beck (n 29) rule 25 For a detailed description of the persons included within the definition of medical personnel, see Dieter Fleck, *The Handbook of International Humanitarian Law* (2021) 377–378.

<sup>127</sup> AP I (n 24) art 8(e).

<sup>128</sup> International Committee of the Red Cross, ‘Commentary of 2016: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949’ (n 27) art 24 [1958].

activities that psychiatrists and psychologists carry out with civilians to prevent the insurgence of mental health conditions. As seen above, if psychiatrists and psychologists do not possess all the requirements to be classified as medical personnel, they are protected under IHL as civilians.

Humanitarian professionals, *i.e.*, persons working for humanitarian organisations such as staff of the Red Cross or Red Crescent, the UN or non-governmental organisations (‘NGOs’), also generally enjoy protection under IHL as civilians, such that they are protected from attack unless directly participating in the hostilities.<sup>129</sup> This general protection is then strengthened by specific IHL rules related to a) the possibility for certain humanitarian organisations to use the red cross/red crescent emblem; and b) the protection of humanitarian personnel taking part in relief operations, which, according to Article 71 of the Additional Protocol I, must be respected and protected.<sup>130</sup>

Staff working for the ICRC, the International Federation of Red Cross and Red Crescent Societies, UN agencies and NGOs in the field of mental health and psychosocial support can be considered humanitarian professionals and granted the protection described above. This would include, for example, UN agency personnel working for a project that helps children and adolescents acquire the skills needed to deal with mental distress, or staff of an NGO that provides psychological support to the victims of a conflict. In safeguarding humanitarian personnel working in the sphere of mental health, either through the basic protection of civilians or through reinforced protection (if these personnel are authorised to display the red cross/red crescent emblem or are taking part in relief operations), IHL seeks to protect individuals’ access to mental health support in circumstances of conflict.

However, in practice, attacks on medical and humanitarian personnel and infrastructures are common during hostilities, as demonstrated by the current pattern of Israeli attacks on healthcare workers and facilities in Gaza.<sup>131</sup> Other notorious cases of violence against medical and humanitarian professionals include the bombing of the Médecins Sans Frontières Kunduz Trauma Centre in Afghanistan in 2015 by the US forces and of Al Quds Hospital in Aleppo, Syria, in 2016 by the Syrian government. In 2023, the Safeguarding Health in Conflict Coalition documented more than 2500 incidents of violence against healthcare in conflict across 30 countries.<sup>132</sup> The importance of protecting healthcare in armed conflict has been highlighted in resolutions by the UN Security Council, such as resolution 2286/2016.<sup>133</sup> However, only a few cases concerning attacks on medical personnel and infrastructures have been

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<sup>129</sup> Stuart Casey-Maslen and Tobias Vestner (eds), ‘Protection of Civilians under International Humanitarian Law’, *International Law and Policy on the Protection of Civilians* (Cambridge University Press 2022) 36. For a critical analysis of the protection of humanitarian workers under IHL see also Julia Brooks, ‘Humanitarians Under Attack: Tensions, Disparities, and Legal Gaps in Protection’ (Harvard Humanitarian Initiative 2015); Francesco Seatzu, ‘Revitalizing the International Legal Protection of Humanitarian Aid Workers in Armed Conflict’ (2017) *La Revue des droits de l’homme. Revue du Centre de recherches et d’études sur les droits fondamentaux*.

<sup>130</sup> AP I (n 24) art 71(2); Henckaerts and Doswald-Beck (n 29) rule 31. For a comprehensive description of this strengthened legal protection, see International Committee of the Red Cross, ‘Respect for and Protection of the Personnel of Humanitarian Organizations’ (1998) <<https://www.icrc.org/en/doc/resources/documents/report/57jp85.htm>>.

<sup>131</sup> United Nations Office of the High Commissioner for Human Rights, ‘Thematic Report: Attacks on Hospitals during the Escalation of Hostilities in Gaza (7 October 2023 – 30 June 2024)’ (31 December 2024) <<https://www.ohchr.org/sites/default/files/documents/countries/opt/20241231-attacks-hospitals-gaza-en.pdf>>.

<sup>132</sup> Safeguarding Health in Conflict Coalition, ‘Critical Condition: Violence Against Healthcare in Conflict 2023’ (2024) 7 <<https://insecurityinsight.org/wp-content/uploads/2024/05/2023-SHCC-Critical-Conditions.pdf>>.

<sup>133</sup> UNSC Res 2286 (3 May 2016) Un Doc S/RES/2286.

litigated at the judicial level, either nationally or internationally.<sup>134</sup> In general, these types of violations are difficult to investigate, and impunity often prevails.

## 5. Conclusion

Exposure to war affects not only physical health but also mental health. The words of Hisham from Pakistan, Philip from South Sudan and Motaz from Gaza made at the beginning of this article illustrate this. According to the WHO, one in five people living in hostilities suffers from a mental disorder. Despite this, the protection of mental health in armed conflict is a topic generally overlooked in the international legal literature. When addressed, three main lines of research could be identified. First, the protection of mental health during hostilities has sometimes, albeit rarely, been considered from an IHRL perspective with a focus on the right to mental health. Second, it has been addressed from an IHRL and IHL point of view in relation to the protection of persons with mental disorders and psychosocial disabilities. Third, it has been dealt with in the specific and limited context of the IHL rule of proportionality in attack. However, how IHL safeguards mental health in general, including from a prevention perspective, has not been comprehensively explored in the literature.

This contribution has aimed to contribute to this research gap by identifying six main ways IHL protects mental health beyond the rules regarding persons with mental disorders and psychosocial disabilities. First, IHL safeguards the mental health of persons under the power of the adverse party. For instance, Article 11 of Additional Protocol I provides that the mental health of these people must not be endangered by any unjustified act or omission. Second, IHL protects persons who, because of psychological trauma, need medical assistance and care. These persons fall under the category of wounded and sick. Third, IHL prohibits psychological torture and other forms of ill-treatment. Forms of psychological torture include sleep deprivation, sensory deprivation, mock executions and sexual humiliation. Fourth, IHL limits the type of mental harm that Parties to the conflict can inflict on civilians. Intentional mental harm is prohibited, whereas whether incidental mental harm is also forbidden is debated. Fifth, IHL forbids means and methods of warfare that cause superfluous injury or unnecessary suffering, and experts largely agree that this latter notion includes mental suffering. Sixth, IHL safeguards health and humanitarian workers who provide mental health and psychosocial support. These persons must be respected and protected at least as civilians, and, in certain cases, they might be entitled to receive a strengthened protection under legal provisions specifically designed to protect medical and humanitarian workers.

Three key results emerge from the analysis above, which collectively contribute to a deeper understanding of the subject matter and provide directions for further research and policy considerations. First, this paper has revealed that the drafters of IHL treaties were aware, at least to some extent, of the importance of mental health, as evidenced by its explicit mention in certain provisions, such as those concerning prisoners of war. This is not to suggest that drafters of IHL treaties shared our contemporary conception of mental health, nor that those norms provided a comprehensive protection. Rather, the point we want

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<sup>134</sup> Lara Hakki, Eric Stover and Rohini J Haar, 'Breaking the Silence: Advocacy and Accountability for Attacks on Hospitals in Armed Conflict' (2020) 102 *International Review of the Red Cross* 1201, 1202. For a recent example of national investigation regarding an attack on paramedics and rescue workers, see Gary O'Donoghue, "'Professional Failures' Led to Killing of Gaza Medics, IDF Inquiry Says' (*BBC* 21 April 2025) <<https://www.bbc.com/news/articles/c24q6201d8yo>>.

to make is that this inclusion of mental health considerations is remarkable, especially given the relatively limited recognition and relevance the issue held during the period in which these treaties were drafted.

In addition, this study has shown that IHL norms not only consider mental health in terms of treatment, with norms that recognise specific protections for persons with mental disorders and psychosocial disabilities, but also in terms of prevention, with norms that aim to preserve mental health and avoid the onset of mental disorders. This is exemplified by IHL rules forbidding psychological torture, limiting the mental harm that can be inflicted on the population, and protecting medical and humanitarian staff that provide mental health and psychosocial support. Taken together, these provisions reflect a broader understanding within IHL of the necessity to impose boundaries on the mental suffering that can be inflicted on individuals and to provide support for those experiencing mental distress.

Finally, this contribution has demonstrated that the increasing recognition of mental health as an integral part of health and the growing acknowledgement of the mental distress caused by conflict can influence the development and interpretation of IHL, making it more sensitive to mental health issues. For instance, the notion of wounded and sick, which did not expressly mention mental disorders when the Geneva Conventions were ratified, was expanded by Additional Protocol I to include an explicit reference to this. More recently, evolutionary interpretations of IHL norms which take into account the impact of conflict on mental health have been suggested in connection with the rule on proportionality in attack and the notion of superfluous injury and unnecessary suffering.

Invisible wounds are no less harmful than visible ones. In 2023, Olena Zelenska, the wife of the Ukrainian President, started the campaign ‘How are you?’ as part of the ‘All-Ukrainian mental health program’.<sup>135</sup> Mental health is gaining more and more attention, even in conflict settings. Examining whether and how IHL protects mental health is not merely an academic endeavour, but a contribution to broader discussions aimed at improving the conditions and experiences of those affected by armed conflict, without imposing unrealistic burdens on the military.

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<sup>135</sup> “How Are You?” As Part of Olena Zelenska’s Initiative, Ukrainians Will Be Told about the Importance of Taking Care of Mental Health’ (*Official website of the President of Ukraine*, 24 March 2023) <<https://www.president.gov.ua/en/news/ti-yak-u-mezhah-iniciativi-oleni-zelenskoyi-ukrayincyam-rozk-81777>>.