

Quasi-judicial bodies and the establishment of assessment standards for the mental harm sustained by civilians exposed to hostilities

1. Introduction

Contemporary global governance has marked what has been termed as the ‘judicialization of international dispute settlement.’¹ Yet, whereas this has largely meant that international courts are perceived as the main adjudicators of international disputes, the last few years have noted an augmented tendency² both on a global³ as well as regional level,⁴ for international bodies to establish quasi-judicial bodies as accountability mechanisms for violations occurring in the course of either international or non-international armed conflicts.⁵ These bodies come officially under different titles such as fact-finding missions, panels or commissions of

¹ Benjamin Faude, How the Fragmentation of the International Judiciary Affects the Performance of International Judicial Bodies in *THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS* (Theresa Squatrito, Oran Young, Andreas Follesdal & Geir Ulfstein eds, Cambridge University Press, 2018) 234

² On this see Karen Alter, Emilie Hafner-Burton & Laurence Helfer, *Theorizing the Judicialization of International Relations*, 63 *Int’l. Studies Quarterly* 449 (2019). See also Ran Hirschl, *The Judicialisation of Politics* in *THE OXFORD HANDBOOK OF POLITICAL SCIENCE* (Oxford University Press, 2011) 253 (noting how ‘the reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies-is arguably one of the most significant phenomena of late twentieth and early twenty first century government’)

³ On a global level, the UN and its organs is the most characteristic example. Relevant quasi-judicial mechanisms that have been instituted along this mode include the International Commission of Inquiry on Darfur, the Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka, the Independent International Commission of Inquiry on the Syrian Arab Republic, the Independent Fact-Finding Mission on the Conflict in Georgia.

⁴ The Council of Europe and the Organization for Security and Co-operation in Europe constitute such examples in the European continent. On this see the Independent Fact-Finding Mission on the Conflict in Georgia conducted under the auspices of the Council of Europe, the report being available at https://www.echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf. For the fact that the Council of Europe can establish fact-finding missions also on issues that pertain to the domestic affairs of a Member State and not necessarily a dispute with another State entity see the example of the fact-finding mission called to examine Latvia’s decentralisation policies available at https://search.coe.int/congress/Pages/result_details.aspx?ObjectId=090000168079c2e8. See also the OSCE Rapporteur’s Report under the Moscow Mechanism on alleged Human Rights Violations and Impunity in the Chechen Republic of the Russian Federation, 21 December 2018 available at https://www.osce.org/files/Moscow%20Mechanism%20Document_ENG.pdf

⁵ See Laurence Helfer and Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 *Calif. L. Rev.* 889, 903 (2005) (discussing together the establishment of international tribunals and quasi-judicial bodies and noting that States resort to them because they can identify

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3 inquiry,⁶ yet they share similar features on how they are instituted and on how they view their
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5 role in the wider international dispute settlement framework through a stark retributive justice
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7 prism, where the punishment of international norms offenders is often advocated through the
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9 intervention of the International Criminal Court.⁷ This retributive justice, dispute settlement
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11 aura that these quasi-judicial bodies emit, is further underlined by the fact that in many cases
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13 their existence relates to conflicts that have been unable for years to find their place before
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15 international courts⁸ or they have but these international judicial bodies have either found
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17 themselves lacking jurisdiction or such jurisdiction has been highly disputed by one of the
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19 parties concerned.⁹
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25 It is in the realms of this task, that these bodies find themselves often before mental
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27 harm pleas that the civilians testifying before them present. This is particularly important given
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34 international law violations and augment chances of parties accepting their liability.) In recent international
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36 practice, there have been examples also of international commissions which are 'international' to the extent that
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38 their existence is prescribed by an international treaty, yet are in essence 'national' since they are established by
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40 one State. Along these lines, the fact that nationals of other States may assist these commissions, does not render
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42 them 'international' and they fall outside the scope of the current article. Such is the example of the Joint
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44 Investigation Team who conducted the criminal investigation of who downed the Malaysian Airlines Flight
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46 MH17. The Joint Investigation Team was instituted under Dutch law yet it involved cooperation with other
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48 countries such as Australia, Belgium, Malaysia and Ukraine. On this see Marieke de Hoon, Navigating the
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50 Legal Horizon: Lawyering the MH17 Disaster, 33 Utrecht J. Int'l. & Eur. L. 90.91 (2017); Role of the Public
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52 Prosecution Service in Dutch Criminal Law available at <https://www.prosecutionservice.nl/topics/mh17-plane-crash/role-public-prosecution-service-om>. Equally, fact-finding missions which are not instituted by
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54 international organs but by NGOs, such as the International Commission of Jurists, fall outside the realms of
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56 this article. On how the fact-finding missions of the International Commission of Jurists helped in the past States
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58 promote accountability for human rights violations see Howard B. Tolley Jr, THE INTERNATIONAL COMMISSION
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60 OF JURISTS: GLOBAL ADVOCATES OF HUMAN RIGHTS, University of Pennsylvania Press (1994) 131. For the fact
that such quasi-judicial bodies can be established in order to bring forth accountability also in situations not
linked to the existence of an armed conflict see UN Human Rights Council, Commission of Inquiry on Human
Rights in Eritrea established by UN General Assembly Resolution 26/24 of 14 July 2014; Commission of
Inquiry on Human Rights in the Democratic People's Republic of Korea.

⁶ In the case of Israel and Gaza see the establishment of panels of inquiry, fact-finding missions or of
commissions of inquiry. On this see Report of the Secretary-General's Panel of Inquiry on the 31 May 2010
Flotilla Incident, September 2011; Report of the detailed findings of the Independent Commission of Inquiry
established pursuant to Human Rights Council Resolution S-21/1, 24 June 2015 (the Schabas-Davis
Commission)

⁷ For the fact that retributive justice is juxtaposed to 'restorative' justice, the latter meant to complement the
retributive functions of punishment see Laurel Fletcher, Refracted Justice: The Imagined Victim and the
International Criminal Court in CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL
COURT INTERVENTIONS, Christian de Vos et als eds., Cambridge University Press, 2015 at 304. See also the

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3 that warfare leaves stains not only in people's bodies but also in their psyche.¹⁰ Nevertheless,
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5 so far, international judicial and quasi-judicial bodies either do not discuss incidental mental
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7 harm at all,¹¹ discuss it succinctly with no particular reference to specific incidents¹² or they do
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9 relate to specific symptoms the civilians testifying before these bodies have reported, with no
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11 further analysis of how these symptoms can lead to the conclusion that mental harm has been
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13 incurred.¹³
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19 Moreover, members of quasi-judicial bodies do not discuss whether the symptoms
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21 exhibited by the civilian who renders the particular testimony, should be deemed to generally
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23 relate to the wider affected population.¹⁴ In that sense, these bodies do not tell us if the reported
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28 relevant statement of the ICC's former president Sang Hyun Song that 'the ICC is about much more than just
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30 punishing the perpetrators. The Rome Statute and the ICC bring retributive and restorative justice together with
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32 the prevention of future crimes' cited in Malini Laxminarayan, *The International Criminal Court and Victim
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34 Well-being: A Restorative Approach?* The Hague Institute for Global Justice, 17 March 2015 available at
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36 <http://www.thehagueinstituteforglobaljustice.org/latestinsights/latest-insights/commentary/the-international-criminal-court-and-victim-well-being-a-restorativeapproach/>

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38 ⁸ This is the case with the Independent International Commission of Inquiry on the Syrian Arab Republic on
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40 account of the inability of the Syrian case to be brought before the ICC.

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42 ⁹ This is the case for example regarding Israel-Palestinian conflict and the intervention of the ICC or the conflict
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44 between Russia and Georgia that reached the ICJ which nevertheless found no jurisdiction. On this see
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46 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia
47
48 v. Russian Federation)*, Preliminary Objections. Judgment, ICJ Rep. 2011, para.187

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50 ¹⁰ Andrew Dubinsky, *An Examination of International Sentencing Guidelines and a Proposal for Amendments
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52 to the International Criminal Court's Sentencing Structure*, 33 *New England J. on Crim. & Civil Confinement*,
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54 609,634 (2007) (referring to the fear civilians in Darfur experience due to 'ongoing arbitrary arrest or rape,
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56 assault and murder.');

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58 ¹¹ On this see Eliav Lieblich, *Beyond Life and Limb: Exploring Incidental Mental Harm in International
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60 Humanitarian Law in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES*
(Derek Jinks, Jackson Maogoto & Solon Solomon, TMC Asser Press,2014) 185,199

¹² For the fact that this is also the case with the UN Human Council- instituted Independent Fact-finding
Commission has penned on account of the war in Syria. See for example Report of the Independent
International Commission of Inquiry on the Syrian Arab Republic, UN Human Rights Council, A/HRC/39/65, 9
August 2018; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN
Human Rights Council, A/HRC/39/65, 1 February 2018

¹³ See infra section 2

¹⁴ While this article focuses on trauma symptoms incurred as a result of exposure to warfare, international
commissions of inquiry and courts adopt the same approach also when they discuss the trauma incurred to civilians
as a result of their incarceration or their being under military custody. To the extent that such psychological harm
does not come as a result of these civilians' exposure to an attack or attacks, it falls outside the realms of this
article's analysis. On this see indicatively Human Rights Watch: *Up in Flames: Humanitarian Law Violations and
Civilian Victims in the Conflict over South Ossetia*, January 2009 at 190-196 contained in *Independent
International Fact-Finding Mission on the Conflict in Georgia, Volume I*, September 2009. For the fact that
incidental harm that does not come as a result of the physical effects of an attack, is not included in the civilian
injury concept of the jus in bello proportionality principle, see Emanuela-Chiara Gillard, *Joint Symposium:*

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3 symptoms can be seen as part of a pattern able to be traced also among other civilians exposed
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5 to similar conditions. This is important for two reasons: first, each person has a different
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7 sensitivity in his or her reactions to reality and the resilience to a traumatic event. It is important
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9 to know if the civilian testifying before a court or a fact-finding commission constitutes the
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11 exception or the norm as far as his trauma responsiveness to an event is concerned.
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17 Secondly, international law puts an emphasis on harm that has been induced not on
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19 isolated cases but on a broader basis. Crimes against humanity must take place on a ‘widespread
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21 or systematic’ basis,¹⁵ and while this is not a requirement that the ICC Statute puts for war
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23 crimes, under the Rome Statute the number of the affected civilians does play a role on whether
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25 the Court will become seized of a case involving potential war crimes.¹⁶ Along these lines, if
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27 the symptoms reported by an individual relate also to the wider population, then it can be more
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29 easily argued that the incurred mental harm can be considered widespread and the norm among
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31 the affected population rather than an isolated case. Any civilian testimonies must therefore
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33 be in a position to provide to the persons called to assess them, the ability to discern whether
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35 these testimonies constitute isolated cases or part of a wider pattern.
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41 It is on these grounds that resorting to basic precepts of mental health sciences, this
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43 article would like to argue for the introduction of procedural and substantive standards for the
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45 assessment of civilian mental harm in warfare. The standards should not be seen as pertinent
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47 only to quasi-judicial bodies. They can easily apply also to the way international courts
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52 Chatham House Report on Proportionality in the Conduct of Hostilities-Some Key Elements, EJIL!Talk, 28
53 Jan.2019 available at <https://www.ejiltalk.org/joint-symposium-chatham-house-report-on-proportionality-in-the-conduct-of-hostilities-some-key-elements/comment-page-1/>

54 ¹⁵ See the ICC Statute, art.7

55 ¹⁶ IHL Database, Customary IHL: Rule 156, Definition of War Crimes available at [https://ihl-](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156)
56 [databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156); On this see art.8(1) of the Rome Statute stating that
57 the ICC will have jurisdiction over war crimes in particular when committed as part of a plan or policy or as part
58 of a large-scale commission of such crimes. See also ICC Prosecutor, Situation on Registered Vessels of
59 Comoros, Greece and Cambodia, Article 53(1) Report, 6 November 2014, paras.23-25
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3 undertake such an assessment. Both the ICJ and the ICC share one common disappointing point
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5 when it comes to the assessment of evidence and claims of non-material damage based on
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7 psychological harm; they are both ready to accept the existence of such harm without reliance
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9 on any scientific evidence.¹⁷
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13 The implications of such arbitrary assessment mode are mitigated in the case of the ICJ.
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15 The Court's Rules permit resort to witnesses, yet the proceedings are largely conducted through
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17 written documents. In that sense, the reliance on written documentation or facts that can be
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19 verified through recourse to written documentation,¹⁸ reduces the extent of any arbitrary
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21 pronouncements on the suffered mental harm. Similarly, the ICC has taken some steps to
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23 engage mental health experts in its rulings, especially in the sentencing phase.
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27 Nevertheless, when it comes to quasi-judicial bodies, the synergy between law and
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29 mental health sciences is a necessity. Members of quasi-judicial bodies are not judges. Their
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31 impartiality credentials can more easily come under attack.¹⁹ Moreover, quasi-judicial bodies
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33 do not have pre-set procedural rules they must follow. They must prove to the suspicious
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35 readers of their reports that the latter are not the arbitrary, political, personal dicta of these
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37 bodies' members, but the logical conclusions flowing out of the concrete application of certain
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39 norms and procedures, as would be the case with courts.²⁰ It is on this basis and in conjunction
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45 ¹⁷ When it comes to the ICJ see the Court's pronouncement at Diallo case, Republic of Guinea v. Democratic
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47 Republic of the Congo, Judgment, ICJ Rep. 2012, paras.18,21, the Court stating that 'in the view of the Court,
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49 non-material injury can be established even without specific evidence.' For the limited resort of the ICC to
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51 mental health experts in order to substantiate the existence of serious mental harm see Solon Solomon,
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53 International Criminal Courts and the Introduction of the Daubert standard as a mode of assessing the
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55 psychological impact of warfare on civilians: A Comparative Perspective, King's College London Doctoral
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57 Thesis (2019), chapter 2

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59 ¹⁸ In the case of Diallo see for example the fact that in order to reach the conclusion that Diallo had suffered
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non-pecuniary damage, the ICJ took into account the number of days he was in detention and the fact that he
was expelled from the Democratic Republic of Congo, facts which were not disputed in the case and could be
verified through external written sources. On this see ICJ, Diallo case, *ibid*, paras.22-23

¹⁹ Jernej Letnar Cernic, *Emerging Fair Trial Guarantees in INTERNATIONAL LAW AND...SELECT PROCEEDINGS OF
THE EUROPEAN SOCIETY OF INTERNATIONAL LAW* (August Reinisch, Mary Footer & Christina Binder eds., Hart
Publishing 2016) 357; Jonathan Graubart, *LEGALIZING TRANSNATIONAL ACTIVISM* (Pennsylvania State
University Press, 2008) 22

²⁰ On this see Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal,
The Concept of Legalisation, 54 *Int'l. Organizations* 401,414 (2000)

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3 with the deficient way they have treated so far issues stemming from warfare's psychological
4 impact on civilians, that the article will place its discussion of assessment standards in the
5 contours of quasi-judicial bodies. Given that it is expected for exposure to hostilities to lead to
6 the emergence of trauma, before embarking upon an analysis on how civilian mental harm can
7 be assessed in these cases, the article will proceed in the next section to first discuss the place
8 of mental harm in the laws of war.
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17 **2. Civilian mental harm and the laws of war**

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20 The laws of war started developing back in the 19th century with the Hague Regulations
21 and the relevant Geneva Convention on how soldiers should behave in the battlefield, and came
22 to be extended in the 20th century after World War II, with the IV Geneva Convention and the
23 protection the latter afforded to civilians. In 1977, two Additional Protocols to the Geneva
24 Conventions were adopted, one for international and one for non-international armed
25 conflicts.²¹ Deemed largely to encompass customary law in some of their provisions,²²
26 Additional Protocol I encompassed also the proportionality principle in the realms of which
27 the concept of civilian injury was introduced as a counterbalance to any anticipated military
28 advantage.²³
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42 Traditionally, the laws of war put an emphasis on physical harm.²⁴ Psychological harm
43 was to be met only in the realms of the war crime of the intentional terrorization of civilians.²⁵
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49 ²¹ On this see Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the Protection
50 of Victims of International Armed Conflicts, 8 June 1977; Additional Protocol II to the Geneva Conventions of
51 12 August 1949 and relating to the Protection of Victims of non-international Armed Conflicts, 8 June 1977

52 ²² Amanda Alexander, A Short History of International Humanitarian Law, 26 EJIL 109,128 (2015)

53 ²³ On this see article 51(5)(b) of Additional Protocol I

54 ²⁴ For the fact that this was the case in the 19th century with the Lieber code see General Orders No. 100: The
55 Lieber Code, Instructions for the Government of the Armies of the United States in the Field, art. 15 available at
56 http://avalon.law.yale.edu/19th_century/lieber.asp#art15. For more on the importance of the Lieber Code in
57 setting the tone for subsequent IHL instruments see Caroline Ehlert, PROSECUTING THE DESTRUCTION OF
58 CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW, Brill, Leiden (2014) 19; Sigrid Mehring, FIRST DO NO
59 HARM: MEDICAL ETHICS IN INTERNATIONAL HUMANITARIAN LAW, Brill, Leiden (2015) 80; Mary Ellen O'Connell,
60 Historical Development and Legal Basis in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (Fleck Dieter
ed., 3rd ed. 2013) 21

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3 The possibility of the psychological harm incurred to civilians as a result of their exposure to
4 an attack or series of attacks, was not accommodated.
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8 Only recently scholars started arguing that this should be the case.²⁶ They argued that
9 mental harm could be measured and quantified and thus should be deemed as a form of civilian
10 injury for the purposes of the proportionality balance.²⁷ Other scholars have appeared more
11 sceptical towards such a possibility. They have brought forth the fact that civilian mental harm,
12 even if exhibited after an attack, can have its roots in prior events. Yet, in the realms of the jus
13 in bello proportionality principle, the military commander is due to be held accountable for the
14 civilian injury that is incurred as a result of a specific attack.²⁸
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25 This question of how the military commander can know in advance that any incurred
26 psychological harm to the affected civilians stems from that specific attack and not from other
27 factors, can be answered by taking into account the fact that law uses presumptions to assume
28 knowledge. For example, common law jurisdictions hold the 'balance of probabilities' standard
29 as a standard of proof for civil cases.²⁹ In criminal cases, the standard of proof in common law
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40 ²⁵ On this see art.51(2) of AP I; Oona Hathaway, Paul Strauch, Beatrice Walton & Zoe Weinberg, What is a War
41 Crime? 44 Yale J. Int'l. L. 53, 73 (2019)

42 ²⁶ Eliav Lieblich, Beyond Life and Limb: Exploring Incidental Mental Harm in International Humanitarian Law
43 in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES (Derek Jinks,
44 Jackson Maogoto & Solon Solomon, TMC Asser Press,2014) 185; Emanuela-Chiara Gillard, Joint Symposium:
45 Chatham House Report on Proportionality in the Conduct of Hostilities-Some Key Elements, EJIL!Talk, 28
46 Jan.2019 available at <https://www.ejiltalk.org/joint-symposium-chatham-house-report-on-proportionality-in-the-conduct-of-hostilities-some-key-elements/comment-page-1/>; Solon Solomon, Bringing Psychological Harm to
47 the Forefront: Incidental Civilian Fear as Trauma in the case of Recurrent Attacks, EJIL!Talk, 25 April 2018
48 available at <https://www.ejiltalk.org/bringing-psychological-civilian-harm-to-the-forefront-incident-civilian-fear-as-trauma-in-the-case-of-recurrent-attacks/>; ILA Study Group, The Conduct of Hostilities and International
49 Humanitarian Law: Challenges of 21st Century Warfare, 25 June 2017 at 28-29

50 ²⁷ Eliav Lieblich, Beyond Life and Limb: Exploring Incidental Mental Harm in International Humanitarian Law
51 in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES (Derek Jinks,
52 Jackson Maogoto & Solon Solomon, TMC Asser Press,2014) 185. The jus in bello proportionality balance calls
53 for the person applying force to engage into a reckoning exercise of whether the incurred civilian injury will not
54 be excessive compared with the military advantage anticipated from a military attack or operation. On this see
55 Enzo Cannizzaro, Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War, 88 Int'l.
56 Rev. Red Cross 779, 785 (2006)

57 ²⁸ Noam Lubell & Amichai Cohen, Strategic Proportionality: Limitations on the Use of Force in Modern Armed
58 Conflicts, 96 Int'l. L. Studies 159, 174 (2020)

59 ²⁹ Mark Schweizer, The Civil Standard of Proof-what is it actually? 20 Int'l. J. Evidence & Proof 217 (2016)

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3 is that of ‘beyond reasonable doubt’,³⁰ which-although stricter than the balance of probabilities
4 test-entails also a probability threshold.³¹ In continental law jurisdictions on the other hand, in
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8 civil and criminal cases alike, the judge must form a full conviction over a fact, in order for it
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10 to be deemed as proved.³² This does not mean that such a conviction must be certain but rather
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12 that it must be ‘near certainty’,³³ minimizing thus-yet still entailing-the possibility of the judge
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15 wrongly appraising a particular fact.
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18 This need for any appraisal of facts not to be necessarily correct, but meticulous enough
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20 to reduce the margin of any errors in judgment, is depicted in the jus in bello proportionality
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22 principle. What is being asked from the military commander is not to be certain exactly that
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24 the incurred civilian mental harm is a result of the specific attack but to be aware of whether
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26 or not this can be reasonably the case. Such formation of reasonableness can be due to various
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28 factors, for example the kind of weapons used for the attack or its frequency rate. Studies have
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30 shown how civilians are deeply traumatized, exhibiting PTSD in high percentages due to their
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32 exposure to cluster bombs.³⁴ Equally, the frequency rate of an attack can be an important factor
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34 in intermittent and recurrent attacks. Such attacks can create patterns both in the operational
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36 mode.³⁵ Moreover, more importantly, the question is whether the attack patterns create also
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38 patterns in the symptoms experienced by the affected civilians. In other words, whether
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40 recurrent and intermittent attacks give rise to specific symptoms among the affected civilians
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47 ³⁰ Kevin Clermont & Emily Sherwin, A Comparative View of Standards of Proof, 50 Am. J. Comparative L.
48 243, 245 (2002)

49 ³¹ Federico Picinali, The Threshold Lies in the Method: Instructing Jurors about Reasoning beyond Reasonable
50 Doubt, 19 Int'l. J. Evidence & Proof 139 (2015); Jack Weinstein & Ian Dewsbury, Comment on the meaning of
51 ‘proof beyond a reasonable doubt’, 5 Law, Probability & Risk 167 (2006)

52 ³² For the fact that the notion of full conviction stems from the ‘conviction intime’ and the Napoleonic Codes
53 see Demetra Sorvatzioti & Allan Manson, Burden of Proof and L’Intime Conviction: Is the Continental
54 Criminal Trial Moving to the Common Law? 23 Canadian Crim. L. Rev. 107,113 (2017-2018)

55 ³³ Mark Schweizer, The Civil Standard of Proof-what is it actually? 20 Int'l. J. Evidence & Proof 217,218
56 (2016)

57 ³⁴ Jawad Fares et als, Post-traumatic stress disorder in adult victims of cluster munitions in Lebanon: a 10-year
58 Longitudinal Study, British Medical Journal (2017) 1

59 ³⁵ Solon Solomon, Bringing Psychological Harm to the Forefront: Incidental Civilian Fear as Trauma in the case
60 of Recurrent Attacks, EJIL!Talk, 25 April 2018 available at <https://www.ejiltalk.org/bringing-psychological-civilian-harm-to-the-forefront-incident-civilian-fear-as-trauma-in-the-case-of-recurrent-attacks/>

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3 which can be known or assumed a priori to the military commander on account of these
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5 civilians' prior exposure to similar attacks.
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9 Yet even if some symptoms emerge, they should not be seen as constituting ipso facto
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11 a parameter to be taken into account in the realms of the jus in bello proportionality balance.
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13 Rather, further discussion must take place on whether these symptoms are grave enough to
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15 qualify as serious mental harm. This, on account of the fact that for a number of reasons, it is
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17 'serious mental harm' rather than just 'harm' which should be viewed as a form of 'injury' in
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19 the realms of the jus in bello proportionality balance.
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23 First, as has been argued, the more serious the incurred civilian harm, the more difficult
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25 for it to be justified through recourse to the anticipated military advantage.³⁶ In other words, if
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27 the civilian mental harm is to serve as a reason for thwarting or reconsidering a military
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29 operation, it has to go beyond the levels of the mental harm war is expected by definition to
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31 cause to the affected civilians. Along these lines, in 2003, the Harvard Program on
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33 Humanitarian Policy and Conflict Research launched a manual meant to map the issues arising
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35 out of international humanitarian law application in the case of aerial strikes. The Manual
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37 written by experts in the field, was escorted also by a commentary. In the particular document,
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39 the experts explicitly held that
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46 "collateral damage does not include inconvenience, irritation, stress, fear or other
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48 intangible conditions caused to the civilian population. It is limited to death/injury to civilians
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50 or to damage/destruction of objects."³⁷ In the course also of cyber warfare, the Tallinn Manual
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52 on cyber-attacks comes to define such attacks against civilians as encompassing not only
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58 ³⁶ Isabel Robinson & Ellen Nohle, Proportionality and Precautions in Attack: The Reverberating Effects of
59 Using Explosive Weapons in Populated Areas, 98(1) Int'l. Rev. Red Cross 107,130 (2016)

60 ³⁷ Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare, Program on
Humanitarian Policy and Conflict Research, Harvard University, 2010 at 91

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3 attacks causing injuries and death, but also to serious illness and severe mental suffering that
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5 are tantamount to injury.³⁸
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9 Secondly, international criminal law instruments such as the Statutes of international
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11 criminal tribunals as well as the Rome Statute, hold the intentional causation of serious mental
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13 harm, rather than just mental harm, as an international crime.³⁹ The level of intensity thus of
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15 the caused mental harm is important to the question of whether the actus reus of the
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17 international crime has been asserted in the first place. The ICC has underlined how in case of
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19 intentional attacks against civilians, it is important for the caused injury to be ‘serious.’⁴⁰
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21 The same is true also for the Additional Protocols which hold as a laws of war violation, the
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23 ‘terrorization of civilians.’⁴¹ The concept of terrorization has been interpreted by international
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25 criminal tribunals as involving the creation of ‘extreme fear’ rather than just fear.⁴² Given the
26
27 gravity that any mental harm must undertake in the realms of its intentional causation, it would
28
29 be inconsistent to argue that a different more lax parameter should be in place in cases such
30
31 mental harm is incidentally incurred.
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37 Thirdly, the grammatical interpretation of article 51(5)(b) points out to the fact that the
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39 sanctioned mental harm should be only the incurred ‘serious mental harm’. The provision
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41 speaks about civilian ‘injury.’ The word injury denotes something that leaves a scar and has a
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47 ³⁸ Michael Schmitt, Tallinn Manual on the International Law applicable to cyber warfare: International group of
48 experts at the invitation of the NATO Cooperative Cyber Defence Centre of Excellence, Cambridge University
49 Press, 2013, 109. On this see also Anne-Marie L.M. de Brouwer, SUPRANATIONAL CRIMINAL PROSECUTION OF
50 SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR, Intersentia (2005) 51

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52 ³⁹ See indicatively art.8(2)(iii) of ICC Statute; ICTY Statute, art.2(c); Articles 3 &4 of Statute of the Special
53 Court for Sierra Leone

54 ⁴⁰ Pre-Trial Chamber I, Prosecutor v. Germain Katanga, Decision on the Confirmation of Charges, ICC-
55 01/0401/07, 30 September 2008, para.270

56 ⁴¹ On this see article 51(2) of Additional Protocol I and article 13 of Additional Protocol II

57 ⁴² For a historical overview of the concept see Art. 22, General Report of the Commission of Jurists at The
58 Hague, 1923, 17 Am. J. Int'l. L. Supp.242 (1923); Art. 4, ILA Draft Convention on the Protection of Civilian
59 Populations against New Engines of War, adopted by the International Law Association, 40th sess., Amsterdam,
60 29 Aug.-2 Sept. 1938; Special Court for Sierra Leone, Appeals Chamber, Prosecutor v. Fofana, Judgment, May
28, 2008, para.348

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2
3 degree of permanency. This point has been captured by scholars who have thus linked
4
5 incidental mental harm with the emergence of brain injury or psychological disorders to the
6
7 affected civilians⁴³ and is in tandem with how national courts have opted to see the concept of
8
9 mental harm in other fields such as that of tort law. For example, before the U.S. District Court
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11 Western District of Washington at Seattle, the plaintiffs, affected by sonic boom flights
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13 conducted by the U.S. army, asked for the cessation of the practice citing its impact on their
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15 mental and physical health. The Court dismissed the motion, not because it deemed that such
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17 flights could not be potentially detrimental, but because the plaintiffs had not proven any
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19 damage to their health.⁴⁴
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25 Addressing civilian mental harm as serious mental harm is one part of the endeavour to
26
27 accommodate civilian plight in warfare. It brings us though to the further question of how such
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29 serious mental harm can be assessed both on a procedural as well as on a substantive basis.
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31 This will be discussed in the next sections.
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34 **3. Quasi-judicial bodies, civilian mental harm and the establishment of** 35 36 **procedural standards** 37 38 39 40

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42 In domestic law, questions of mental status are solved with the aid of mental health
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44 experts. It could be argued that similarly, quasi-judicial bodies could invite psychologists or
45
46 psychiatrists to assess the level of mental harm the civilian testifying as witness has sustained.
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48 Yet, any attempts to simply copy in international proceedings before quasi-judicial bodies the
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55 ⁴³ Michael Schmitt & Chad Highfill, *Invisible Injuries: Concussive Effects and International Humanitarian Law*,
56 9 *Harvard National Security J.* 73 (2018)

57 ⁴⁴ U.S. District Court Western District of Washington at Seattle, *Citizens of the Ebey's Reserve for a Healthy,*
58 *Safe and Peaceful Environment v. U.S. Department of Navy et als.*, Order, Aug. 11, 2015 available at
59 <http://citizensofebaysreserve.com/Files/Injunction%202015/Zilly-Ruling.pdf>
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3 solution promoted by domestic courts when it comes to mental health experts, can prove
4
5 challenging for two reasons.
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8 The first is that in domestic trials, mental health scientists are invited to testify whether
9
10 the person in question suffers from a mental disease or disorder. They have to answer with a
11
12 ‘yes’ or ‘no’, their task is binary. In the case though of the affected civilians and incidental
13
14 mental harm, what is being asked from these mental health experts is not only to attest on
15
16 whether or not the person suffers from mental harm, but also whether this mental harm is
17
18 ‘serious’. This may prove tricky given that mental health scientists may have a different
19
20 perception on what they consider as serious mental harm according to their discipline’s
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22 standards. Moreover, the calling in of a mental health expert in order for him to utter an opinion
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24 on the level of the experienced harm rather than just on its existence, may prove a rather
25
26 subjective task, the level of harm more likely to constitute a disagreement point among mental
27
28 health scientists themselves.
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33 The second reason stems from the fact that an approach which ties the assertion of
34
35 mental harm only to the diagnosis of trauma, completely disregards situations where the
36
37 civilian in question may not display a psychological disorder, yet may suffer from trauma
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39 symptoms so grave in intensity, as able to constitute ‘serious mental harm’ per the
40
41 international criminal courts’ definition.
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44 Along these lines, what is needed is a more nuanced approach in the assessment of
45
46 civilian mental harm which will include the setting of procedural standards meant to govern a
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48 process that will be infused by a synergy between quasi-judicial bodies and mental health
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50 experts, where members of quasi-judicial bodies keep the independence of their assessment
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52 mode on one hand, but on the other hand also nourish it with the findings of mental health
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54 experts. Once thus involving questions of civilian mental harm assessment, quasi-judicial
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56 bodies should follow certain procedural standards which would lead to scientific reliability and
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3 credibility of their utterances. These standards are like steps in a manual and they unveil like
4
5 this: the moment a civilian testifying relates to a trauma symptom he/she experienced due to
6
7 his/her exposure to an attack or series of attacks, quasi-judicial bodies must call in mental health
8
9 experts to opine on the civilian's mental health status. Once these experts draft a report on the
10
11 extent of mental harm this civilian has sustained, quasi-judicial bodies must return to discuss
12
13 whether the mental health experts' findings can justify also the legal characterization of this
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15 civilian's suffering as 'serious mental harm.' This means that quasi-judicial bodies must
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17 develop also substantive standards along which they can assess any provided psychological or
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19 psychiatric reports vis a vis the criteria international law sets for mental harm. These standards
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21 will be discussed in the next section.
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28 **4. Quasi-judicial bodies, civilian mental harm and the establishment of** 29 30 **substantive standards** 31 32

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35 The need for quasi-judicial bodies to consider psychological or psychiatric opinions
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37 and reports does not mean that these bodies cannot set their own criteria for what constitutes
38
39 'serious mental harm.' Nor should these criteria always coincide with the dicta of mental health
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41 sciences. Thus, in the realms of international criminal justice, international criminal courts and
42
43 tribunals have held in the past that 'serious mental harm' involves the infliction of strong fear or
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45 terror, intimidation or threat. Furthermore, it is 'more than a minor or temporary impairment of
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47 mental facilities'.⁴⁵ It involves more than 'a vague state of anxiety,' going 'beyond temporary
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56 ⁴⁵ ICTR, Prosecutor v. Seromba, ICTR-2001-66-A, Appeals Chamber, Judgment, March 12, 2008, para.45-47;
57 ICTR, Prosecutor v. Kajelijeli, ICTR-98-44A-T, Trial Chamber, Judgment, December 1, 2003, para.815; ICTR,
58 Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T, Trial Chamber, Judgment, May 21, 1999, para.110;
59 ICTR, Prosecutor v. Semanza, ICTR-97-20-T, Trial Chamber, Judgment, May 15, 2003, para.321. On this
60 account see also the relevant similar jurisprudence of the ICTY in ICTY, Prosecutor v. Blagojevic, IT-02-60-T,
Trial Chamber, Judgment, January 17, 2005, para.645

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3 unhappiness.⁴⁶ Without having to be permanent or irremediable, in order to be asserted, serious
4
5 mental harm must nevertheless bear the characteristics of a ‘grave and long disadvantage to a
6
7 person’s ability to lead a normal and constructive life.’⁴⁷
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12 These utterances by the international criminal courts and tribunals are important, because
13
14 no where in other branches of international law we find any attempts of judges to delineate
15
16 serious mental harm. They further provide the features that serious mental harm must entail from
17
18 an international law point of view. These features can be put down to three principles which they
19
20 should be used as assessment standards. This setting of principles in the assessment of serious
21
22 mental harm is important to the extent that similar to the discussion on the ICSID tribunals,⁴⁸ it
23
24 touches upon the very essence of quasi-judicial bodies and the question of whether they should
25
26 be seen only as dispute-oriented bodies or as bodies functioning as ‘quasi-legislators’ and meant
27
28 to pose general rules that can be pertinent also to other disputes. It is with this in mind that the
29
30 relevant principles are hereby discussed, together with an analysis of how they align with the
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32 way serious mental harm has been seen in a tort law context as a ground for the award of
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34 damages.
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42 **i) Principle 1: Serious mental harm must relate to situations arousing ‘strong**
43 **fear’ or ‘terror’**
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58 ⁴⁶ ICTR, Prosecutor v. Seromba, *ibid*, paras.47-48

59 ⁴⁷ ICTR, Prosecutor v. Semanza, *ibid*, para.322; ICTY, Prosecutor v. Tolimir, IT-05-88/2-T, para.738

60 ⁴⁸ Ole Kristian Fauchald, The Legal Reasoning of ICSID Tribunals-An Empirical Analysis, 19 EJIL 301,307 (2008)

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3 Fear is a sentiment. In the context of warfare, it is expected to emerge.⁴⁹ Reference
4
5 though to 'terror' echoes the prohibition against the terrorization of civilians as a laws of war
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7 violation and an international crime. Such reference thus awards legal implications to any such
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9 experienced fear. This transition from the world to emotions to that of law, takes place through
10
11 an expression-'strong fear'-which corresponds to how in two different cases referring to the
12
13 besiege of Sarajevo, the ICTY discusses 'terror' as fear going beyond certain expectable levels.⁵⁰
14
15 Other international criminal courts, like the Special Court for Sierra Leone have equally held
16
17 that the crime of intentional causation of terror in warfare should be viewed as linked to the
18
19 creation of extreme fear among the affected civilians.⁵¹ The implication is that such extreme
20
21 fear ceases to be an expected sentiment and acquires pathogenic features which the law
22
23 condemns.⁵² As the ICTY put it in the Galic case, 'the crime of acts or threats of violence the
24
25 primary purpose of which is to spread terror among the civilian population is not a case in which
26
27 an explosive device was planted outside of an ongoing military attack but rather a case of
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29 'extensive trauma and psychological damage' being caused by attacks which were designed to
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31 keep the inhabitants in a constant state of terror'.⁵³
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40 **ii) Principle 2: Serious mental harm must be tangible**
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48 ⁴⁹ Yoram Dinstein, *THE CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT*,
49 Cambridge University Press, 2004, 119. See also Christopher Greenwood, *ESSAYS ON WAR IN INTERNATIONAL*
50 *LAW* (2006) 644;

51 ⁵⁰ On this see the Galic case where the ICTY defined terror as 'extreme fear' and the case of Dragomir
52 Milosevic, where the Trial Chamber delineated terror as fear that goes beyond certain levels. ICTY, *Prosecutor*
53 *v. Galic*, IT-98-29, Trial Chamber, Judgment, 5 December 2003, para.47; ICTY, *Prosecutor v Dragomir*
54 *Milosevic*, Trial Chamber, Case No.IT-98-29/1-T, Judgment, 12 December 2007, para.888

55 ⁵¹ *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber, Judgement,
56 28 May 2008, para. 350

57 ⁵² On this account juxtapose also with the crime of terrorism in peacetime, where as noted by the Special
58 Tribunal for Lebanon, the intent to spread fear is one of the elements of the crime. No degradation to the
59 experienced fear is provided. On this see Special Tribunal for Lebanon, Appeals Chamber

60 ⁵³ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgement, 30 November 2006, para.
102.

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3 In their judgments, international criminal courts and tribunals have underlined how
4 serious mental harm must go beyond temporal impairment. In other words, it must have some
5 duration, be evident, able to substantiate an existence of its own rather than just being seen as
6 attached to the incurred physical harm and damage. This requirement that civilian mental harm
7 must meet some levels of gravity in order to be able to beget legal repercussions, is met also in
8 the jurisprudence of the European Court of Human Rights, in cases the latter has been called to
9 award non pecuniary damages for the harm civilians have sustained as a result of their exposure
10 to hostilities.
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24 In the case of Isayeva, Yusupova and Bazayeva v Russia, while Isayeva and Yusupova
25 claimed they had sustained also physical harm, the third applicant, Bazayeva, did not sustain
26 any physical injuries from the attack on the civilian convoy. As a result of the attack, Bazayeva
27 had her car targeted and ultimately destroyed.⁵⁴ Consequently, she claimed compensation
28 based on the first Protocol to the European Convention which protects the right to property.
29 But more importantly and despite having sustained no physical injuries, Bazayeva sustained
30 psychological harm as a result of the incident. This psychological harm has acute elements of
31 PTSD as the latter is described in previous chapters. Thus, as recounted by the Court, since the
32 attack, Bazayeva found herself plagued by nightmares and was sick every time she saw a
33 dummy in the shop windows, because she was reminded of the dead she saw due to the incident.
34 This effect was so strong that had let to her fainting in shops on a number of occasions. In her
35 words,
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59 ⁵⁴ European Court of Human Rights, *Isayeva, Yusupova and Bazayeva v. Russia*, Application Nos. 57947/00,
60 57948/00 & 57949/00, Judgment, Feb. 24,2005, paras.22,100

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3 “A month ago I walked into a phone company store in Nazran. They had a model of a hand
4 in the shop window. That brought back the memory of a hand cut off and a woman's leg that I
5 saw right in front of me on the road on 29 October 1999. I felt sick and fainted. I was sick for
6 some days afterwards. Now I simply can't walk into a shop with dummies or with models of
7 human bodies”.⁵⁵
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17 Similar to its judgment also regarding the other two applicants, the Court awarded non-
18 pecuniary damages to Bazayeva for the anguish and fear she experienced. The Court did not
19 explicitly state that such damages were awarded due to the fact that the applicant had suffered
20 ‘serious mental harm’, but linked the suffered mental harm with a severity element, by linking
21 it to the seriousness of the found violations.⁵⁶
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32 Moreover, the severity of the experienced mental harm has been linked by scholars to the
33 emergence of trauma in general and of PTSD in particular.⁵⁷ Although civilians are more likely
34 to equally experience depression, PTSD may be more pertinent to be linked with a specific attack
35 to the extent that in contrast to depression, one of the PTSD constituent elements is exposure to
36 a specific traumatic event. This does not mean that PTSD will always stem from a single
37 traumatic attack. The concept of complex PTSD expresses the reality where the individual is
38 exposed to different traumatic events and may have come to develop PTSD on an accumulative
39 basis. This is truer in warfare scenarios where the civilian may be exposed to attacks over a
40 considerable period of time.
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55 European Court of Human Rights, *Isayeva, Yusupova and Bazayeva v. Russia*, Application Nos. 57947/00, 57948/00 & 57949/00, Judgment, Feb. 24,2005, para.99

56 *Ibid*, para.251

57 Eliav Liebllich, *Beyond Life and Limb: Exploring Incidental Mental Harm in International Humanitarian Law* in *APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES* (Derek Jinks, Jackson Maogoto & Solon Solomon, TMC Asser Press,2014) 185

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3 Yet still, the plausibility of connecting PTSD with a single attack has rendered
4 scholars viewing it as the transliteration in mental health terms of the serious mental harm legal
5 requirement. When it comes to domestic courts and international quasi-judicial bodies, such
6 linkage can be inferred. The chemical attacks against the Kurds in the late 80s provide such an
7 example. In the aftermath of the attacks, higher rates of PTSD were traced among the victims.⁵⁸
8 Given the fact that these PTSD feature the issue of permanence and repetitiveness, the question
9 is whether they were discussed and under which form in any legal analysis on the Frans van A.
10 case which came exactly to sentence some of the culprits of these attacks.
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24 On this issue, the Prosecutor's language in Count 1 against the defendant is
25 characteristic. The Prosecutor stated that the civilian victims suffered inter alia from
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31 'grievous bodily and/or mental harm...existing in that those persons...have found
32 themselves in a (permanent) situation of (serious) fear.'⁵⁹ (parenthesis in the original)
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38 While the Prosecutor did not explicitly refer to PTSD, granted that mental health
39 studies documented it among the civilians surviving these attacks and given the fact that
40 'serious' or 'grievous' mental harm must have the elements of permanency in order to be
41 asserted,⁶⁰ it is difficult to fathom how the grievous mental harm mentioned by the Prosecutor
42 should be seen as associated with a form of psychological harm, other than PTSD.
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53 ⁵⁸ Farnoosh Hashemian et als., Anxiety, Depression and Posttraumatic Stress in Iranian Survivors of Chemical
54 Warfare, 296(5) JAMA 560,565 (2006)

55 ⁵⁹ District Court of The Hague (Criminal Law section), Judgment against Frans van A., (Sentence) Dec.23, 2005

56 ⁶⁰ Thus the ICTY has clarified that 'serious mental harm and emotional or psychological damage' must be
57 distinguished from cases where the attacks do not cause 'lasting impairment'. On this see ICTY, Prosecutor v.
58 Krstic, Case No. IT-98-33-T, August 2, 2001, para.510. For the fact that also in the realms of the crime of
59 genocide, the causation of mental harm means 'impairment of mental faculties' see Draft Code of Crimes
60 against the Peace and Security of Mankind with commentaries, 1996, United Nations 2005, article 17, p.46
available at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf

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3 Another case that underlies this is the persecution of Sudanese villagers by the Bashir
4 regime. Applying force and entering the villages, looting, killing and raping, pro-Bashir forces
5 obliged survivors of these attacks to be forcibly expelled from their homes.⁶¹ Even if physically
6 not sustaining any injuries, the psychological scars to these persons obliged to be distanced
7 from their native land were immense.⁶² In that sense, the ICC Prosecutor, noted in the warrant
8 request for Bashir that these internally displaced persons suffered from ‘serious mental harm.’⁶³
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10 The indictment itself did not proceed to further elaborate on whether this ‘serious mental harm’
11 is translated in PTSD. This piece of information can be though inferred through mental health
12 studies which recorded a high rate of PTSD among Sudanese refugees.⁶⁴
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26 In the Schabas-Davis report, exploring after a relevant UN Human Rights Council
27 mandate whether Israel and the Palestinians had committed war crimes in the Gaza warfare
28 that erupted in the summer of 2014, Israeli civilians testified how the rockets from Gaza as well
29 as the existence of underground tunnels from where Hamas militants penetrated into Israeli
30 territory, constituted a source of identified trauma and persistent fear.⁶⁵ The civilians referred
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43 ⁶¹ Prosecutor’s Application for Warrant of Arrest under article 58 against Omar Hassan Ahmad Al Bashir,
44 Summary of the case, p.p.3-4 available at <https://www.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>

45 ⁶² Prosecutor’s Application for Warrant of Arrest under article 58 against Omar Hassan Ahmad Al Bashir,
46 Summary of the case, p.p.5-6 available at <https://www.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>

47 ⁶³ Prosecutor’s Application for Warrant of Arrest under article 58 against Omar Hassan Ahmad Al Bashir,
48 Summary of the case, p.6 available at <https://www.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>

49 ⁶⁴ Refugee children at ‘high risk’ of mental health problems, IRIN Global, London, August 11, 2011 available at
50 <http://www.irinnews.org/report/93484/global-refugee-children-at-high-risk-of-mental-health-problems> (noting
51 that 75% of the children in internally displaced camps in Darfur suffer from PTSD.)

52 ⁶⁵ See on this the exact wording of paragraph 74 of the Schabas-Davis report ‘Witnesses told the commission
53 that in another incident several weeks later, the siren sounded and an explosion was heard resulting in damage to
54 all the cars in Netiv Ha’sara. Many residents then decided to leave, including three other migrant co-workers of
55 the Thai victim. Witnesses identified trauma and persistent fear of the tunnels as core features of everyday life
56 for people in the kibbutz during the hostilities, and many members are said to require therapeutic counselling.’
57 Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights
58 Council Resolution S-21/1
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3 explicitly not just to trauma but to PTSD and described this trauma and fear as core features of
4
5 everyday life for people in the villages bordering Gaza.⁶⁶ The Report came to conclude that
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10 ‘Many Israelis experienced what they describe as indelible suffering caused by the constant
11
12 threat of attacks by Palestinian armed groups. The stress and trauma had serious effects on
13
14 their well-being, particularly for persons who live in the south in areas near Gaza.....the fear
15
16 of rocket and mortar strikes from Gaza has been long-standing.’⁶⁷
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21 The Report further mentioned how the continuous attempts of Hamas members to
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23 infiltrate Southern Israel through the tunnels, created a feeling of ‘persistent fear’ to local
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25 residents⁶⁸ and discussed such fear through the display of trauma symptoms among the
26
27 affected civilian population, stressing that
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33 ‘The psychological impact of the conflict on Israeli civilians is also manifest in numerous
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35 accounts of anxiety disorders that were brought to the attention of the commission..... The
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37 psychological consequences reported in submissions from Israelis include fear, restlessness,
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39 decreased ability to focus, post-traumatic stress disorder and other stress-related symptoms.’⁶⁹
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44 Whereas PTSD is a way of setting a standard for how the serious mental harm sustained by
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46 civilians should be viewed, other scholars have linked the concept of serious mental harm as a
47
48 psychological injury with that of brain injury as a result of exposure to hostilities.⁷⁰ Such
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52 ⁶⁶ In the words of one of the witnesses ‘It isn’t post traumatic stress because it’s on-going. It is sequential
53 trauma, one thing after another. It wears you down and makes you more vulnerable.’ See *ibid*, para.74

54 ⁶⁷ Report of the detailed findings of the independent commission of inquiry established pursuant to Human
55 Rights Council Resolution S-21/1, paras.560-561

56 ⁶⁸ Report of the detailed findings of the independent commission of inquiry established pursuant to Human
57 Rights Council Resolution S-21/1, paras.104,561

58 ⁶⁹ Report of the detailed findings of the independent commission of inquiry established pursuant to Human
59 Rights Council Resolution S-21/1, para.563

60 ⁷⁰ Michael Schmitt & Chad Highfill, *Invisible Injuries: Concussive Effects and International Humanitarian Law*,
9 Harvard National Security J. 73 (2018)

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2
3 threshold for acknowledging civilian mental harm is quite high and links with no reason the
4 sustaining of psychological harm with the sustaining of physical brain injury. This linkage
5
6 heavily imparts on the ability of mental harm to be acknowledged in the laws of war as a
7
8 separate form of harm, detached from physical damage and does not correspond to reality to
9
10 the extent that serious mental harm in the legal meaning international criminal courts and
11
12 tribunals have given to the notion, can be in place also in cases where the affected civilian,
13
14 without having sustained any brain injury or exhibited any psychological disorder, experiences
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16 some of the trauma symptoms which are so grave that impair his/her ability to perform the
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18 daily functions.
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25 To the extent that such an impairment meets the characteristics international criminal
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27 courts and tribunals have given to serious mental harm, it would be wrong for quasi-judicial
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29 bodies to simply dismiss any serious mental harm claims. Rather, these bodies must engage
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31 into a refined analysis of why or why not, an exhibited symptom should be seen as grave
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33 enough to lead to such serious mental harm contention.
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39 The need for mental harm to be evident in order to be recognized as being able to lead
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41 to legal repercussions, is acknowledged also in tort law. Apart from the U.S. where emotional
42
43 distress can be a ground for damages, in common law jurisdictions, the archetype approach
44
45 stems from English law and Lord Denning's utterance in the *Hinz v Berry* case, that damages
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47 are to be awarded for a recognized psychiatric illness.⁷¹ A person is not be held liable on a
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49 tortious basis for being a cause of distress, fear or anxiety without these conditions resulting to
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51 a recognized psychiatric illness.⁷²
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59 ⁷¹ *Hinz v Berry* [1970] 2 QB 40 at 42

60 ⁷² *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 469. For the fact that this is the case also in Australia see High Court of Australia, *Tame v New South Wales* [2002] HCA 35, para.285

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3 Yet, when it comes to the question of whether the palpable character of the incurred
4 mental harm must be demonstrated only through the emergence of psychiatric illnesses and
5 disorders, recent judgments by courts such as the Supreme Court of Canada, come to underline
6 also the importance individual symptoms play without the diagnosis of a psychiatric disorder.
7
8 Along these lines, the Canadian Supreme Court has held that any inquiry on whether damages
9 should be awarded for incurred mental harm, should relate to ‘the level of harm that the
10 claimant’s particular symptoms represent, not to whether a label could be attached to them.’⁷³
11
12 For the court, confining the award of damages only to conditions identifiable by the American
13 Psychiatric Association’s Diagnostic Manual (DSM), as is the case with PTSD, is ‘inherently
14 suspect as a matter of legal methodology.’⁷⁴
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iii) Principle 3: Serious mental harm must relate to the civilians’ mode of exposure to the traumatic event

International criminal jurisprudence has underlined how serious mental harm must relate to more than just a temporary impairment to a person’s daily functions. Similarly, mental health studies have demonstrated how the closer the person is to the epicentre of the traumatic event, the more likely it is for him to develop graver trauma symptoms or psychological disorders.⁷⁵ The combined conclusion is that serious mental harm comes to refer to civilians directly exposed to an attack or series of attacks. It is them who are more likely to develop trauma

⁷³ Saadati v Moorhead [2017] 1 SCR 543 at 31

⁷⁴ Ian Freckelton & Tina Popa, ‘Recognizable Psychiatric Injury’ and Tortious Compensability for Pure Mental Harm Claims in Negligence, 25 Psychiatry, Psychology and Law 641,644 (2018)

⁷⁵ For the fact that in the aftermath of the 9/11 attacks, recovery and clean-up workers who came into direct contact with dead bodies developed PTSD on a persistent basis compared to the wider NYC residents who were diagnosed with probable depression and probable PTSD, see B.J. Luft et als, Exposure, Probable PTSD and Lower Respiratory Illness among Respiratory Illness among World Trade Center rescue, recovery and clean-up workers, 42 Psychological Medicine 1069,1070 (2012). For the fact that NYC citizens living closest to the World Trade Center ran three times the risk of developing PTSD compared to residents living further away see William Schlenger et als., Psychological Reactions to Terrorist Attacks: Findings from the National Study of Americans’ Reaction to September 11, 288(5) JAMA 581,582,584 (2007)

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3 symptoms that impair their ability to perform daily functions as before. Along these lines,
4
5 quasi-judicial bodies, before holding whether or not a civilian has suffered serious mental harm,
6
7 must discuss this civilian's mode of exposure to the applied force. This does not mean that it
8
9 will be always impossible to assert the incurrence of serious mental harm in cases of civilians
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11 indirectly affected by warfare. It does mean though that quasi-judicial bodies have a higher
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13 threshold of showing in these cases that the indirectly affected civilian did demonstrate
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15 symptoms that gravely impaired his/her ability to go on with his/her daily life as before.
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22 The element of the civilians' mode of experiencing of an attack or attacks as a decisive
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24 parameter for the assessment of the incurred mental harm, resembles the distinction prevalent
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26 both in domestic legal systems as well as supranational ones, like EU one,⁷⁶ between bearers
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28 of direct and indirect harm in general and mental harm in particular. Although the criteria upon
29
30 which the distinction rests, are not universally accepted,⁷⁷ still the distinction itself is something
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32 that pervades the foundation of tort law systems.
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38 **5. Calling for a synergy between law and psychology: Transposing the serious** 39 40 **mental harm principles into the diagnostic language of mental health experts** 41 42 43 44

45 The utterances that delineate the framework inside which any serious mental harm
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47 standards must be developed, call for quasi-judicial bodies to assess the features of the mental
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52 ⁷⁶ Trevor Hartley, *Jurisdiction in Tort Claims for non-physical harm under Brussels 2012*, Article 7(2), 67 ICLQ
53 987 (2018)

54 ⁷⁷ For example, although in English law the primary/secondary victims distinction is based according to their
55 proximity to the event which constitutes the triggering cause for damages, this distinction has been rejected by
56 the Australian High Court. Still, whereas the Australian High Court judges have rejected the suggestion that the
57 non-immediate hearing or seeing of a traumatizing event must automatically disqualify someone from pursuing
58 damages, they have equally acquiesced to the fact that such not direct exposure to the event may impact upon
59 the causation and remoteness of the damage. On this see Simon Deakin, Angus Johnston & Basil Markesinis,
60 TORT LAW, Oxford University Press (6th eds, 2008) 140; High Court of Australia, *Tame v New South Wales*
[2002] HCA 35, para.225

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3 health experts' diagnosis of a particular civilian's mental health status against these
4 characteristics that international criminal jurisprudence has attributed to serious mental harm.
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10 The task seems to be simple but can be also arduous. In cases mental health experts
11 reach the conclusion that the civilian in question suffers from PTSD or depression, quasi-judicial
12 bodies must proceed and discuss how the symptoms these disorders entail, meet the serious
13 mental harm legal requirements. Moreover, quasi-judicial bodies must proceed to articulate how
14 the diagnosed psychological disorder should be seen as linked to the attack or the series of attacks
15 the civilian in question experienced.
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26 With members of quasi-judicial bodies not being psychologists or psychiatrists, such a
27 task is an additional ground for the calling in for mental health experts to engage in the process
28 and for an interdisciplinary dialogue to develop. Additionally, pursuant to the model in place
29 already in some of the UN Committees, such as the UN Committee on the Rights of the Child,⁷⁸
30 psychologists can be invited to be members of these quasi-judicial fact-finding bodies in the first
31 place.
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42 At the same time, in coming to assess the importance of any cited trauma symptoms,
43 members of quasi-judicial bodies can rely also on already published mental health studies. For
44 example, although symptoms like the increase in heart beats or the startling effect of someone
45 jolting each time he/she is exposed to a traumatic sudden event, are considered to be expected
46 and meant to fade away after a short period of time, studies on civilians exposed to intermittent
47 and recurrent rocket attacks have shown how even these symptoms can acquire more
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58 ⁷⁸ In the UN Committee on the Rights of the Child, sits Mr Philip Jaffe who has a doctorate in clinical
59 psychology . On this see the details in the official page of the Committee at
60 <https://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx>

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3 permanent features in the civilians' psyche.⁷⁹ Similarly, quasi-judicial members must assess
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5 whether it should be expected of the civilian in question to report such symptoms. For example,
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7 studies have shown how children are more prone than adults in viewing nightmares as a result
8
9 of their exposure to traumatic events.⁸⁰
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15 Yet, it is not enough for quasi-judicial bodies to demonstrate that the particular civilian
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17 testifying before them suffers from PTSD or depression and thus of 'serious mental harm' as a
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19 result of his/her exposure to hostilities. In order to establish the widespread nature of such
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21 serious mental harm, quasi-judicial bodies must further demonstrate that the particular
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23 individual's suffering constitutes the norm rather than the exception among the affected
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25 population.
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31 The need for quasi-judicial bodies to make a leap in their legal thinking and transfer
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33 from the partial to the holistic and from the individual case to the wider picture is undertaken
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35 through an exercise of assumption which like the assumption of innocence or guilt which is
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37 meant to host the minimal margin of error through resort to the beyond reasonable doubt
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39 threshold, is equally meant to be based on scientific data and thus minimize any arbitrary
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41 conclusions. In particular, quasi-judicial bodies are called to establish assumptions on the
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43 unknown-namely the incurred mental harm to the affected civilian population-based on
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45 parameters that are known to them. These are none other than the frequency or number of
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47 attacks a particular group of civilians sustained over a particular course of time.
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55 ⁷⁹ Amit Shrira et als, Older Adults Exposed to ongoing versus intense time-limited Missile Attacks: Differences
56 in Symptoms of Posttraumatic Stress Disorder, 80 *Psychiatry* 64 (2017)

57 ⁸⁰ Brant Hasler & Anne Germain, Correlates and Treatments of Nightmares in Adults, 4 *Sleep Med. Clin.* 507
58 (2009). For the fact that children are generally more susceptible to trauma than adults see Abdelaziz Mousa
59 Thabet & Sanaa Thabet, Stress, Trauma and Posttraumatic Stress Disorder Among Adolescents in the Gaza
60 Strip, 1 *J. Trauma & Critical Care* 25 (2017)

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3 As patterns of force intensify the degree of the applied force, chances are higher that
4 also the levels of fear are intensified too and as a result the psychological implications for the
5 victims become more pervasive. Studies have shown that assault survivors reported more
6 pervasive psychological disturbances than survivors of non-assaultive trauma.⁸¹ Pervasive
7 psychological results mean in turn that we are talking not just about fear, but about PTSD.⁸²
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17 Indeed, studies have shown that “20-30% of a population affected by war and civil strife
18 develop some level of mental distress”. The linkage between war, civil strife and mental
19 distress has been asserted in Kosovo,⁸³ Afghanistan,⁸⁴ Algeria,⁸⁵ Cambodia⁸⁶ and Iran.⁸⁷ Yet,
20 beyond simple mental distress, ‘multiple exposure to traumatic events or cumulative trauma is
21 associated with higher levels of psychopathologic conditions’⁸⁸ and higher levels of PTSD
22 symptoms.⁸⁹ At the same time, this multiple exposure to traumatic events may relate not only
23 to the same type of events but also to different event types.⁹⁰
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36 This correlation between intensity in applied force and the psychological impact, was
37 tested in the case of Iran cited in the previous paragraph. ‘High-intensity’ warfare was
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42 ⁸¹ David Forbes et als., Trauma at the hands of another: Distinguishing PTSD Patterns following Intimate and
43 Nonintimate Interpersonal and Noninterpersonal Trauma in a nationally Representative Sample, 75 J. Clinical
44 Psychiatry 147 (2014)

45 ⁸² Research has held that PTSD is accompanied inter alia by a pervasive sense of fearfulness even in absence of
46 any actual danger. On this see Sarah Garfinkel et als., Impaired Contextual Modulation of Memories in PTSD:
47 An Fmri and Psychophysiological Study of Extinction Retention and Fear Renewal, 34(40) J. Neuroscience
48 13435 (2014)

49 ⁸³ Barbara Lopes Cardozo et als., Mental Health, Social Functioning and Attitudes of Kosovar Albanians
50 following the war in Kosovo, 284 JAMA 569 (2000)

51 ⁸⁴ Barbara Lopes Cardozo et als., Mental Health, Social Functioning and Disability in Postwar Afghanistan,
52 292(5) JAMA 575,576 (2004)

53 ⁸⁵ Joop T.V.M. de Jong et als., Lifetime Events and Post traumatic stress disorder in 4 Post conflict Settings,
54 286(5) JAMA 555,560 (2001)

55 ⁸⁶ Ibid

56 ⁸⁷ Farnoosh Hashemian et als., Anxiety, Depression and Posttraumatic Stress in Iranian Survivors of Chemical
57 Warfare, 296(5) JAMA 560,565 (2006)

58 ⁸⁸ Joop T.V.M. de Jong et als., Lifetime Events and Post traumatic stress disorder in 4 Post conflict Settings,
59 286(5) JAMA 555,556 (2001)

60 ⁸⁹ Ibid at 561

⁹⁰ Ibid

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3 considered to comprise the bombing of the same urban centers for more than 60 or 75 times.
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5 Town bombings which occurred less than 10 times did not meet the criteria.⁹¹ In a study
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7 conducted on civilians exposed to hostilities in Iran, the results showed that as far as victims
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9 of conventional warfare are concerned, partial or full lifetime PTSD prevalence was
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11 considerably higher to people exposed to 'high-intensity' warfare than to those exposed to low-
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13 intensity warfare.⁹² The fact that the study considered as 'high-intensity' strikes that happened
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15 over 60 and 70 times, namely strikes that followed a repeated pattern recurring over and over
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17 again means that in such cases, the application of force leads not just to incidental fear among
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19 civilians, but to something more severe and intense, namely PTSD. But even if not leading to
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21 PTSD, attack patterns can have a detrimental effect on the civilians' psyche and along these
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23 lines, they may constitute a parameter that quasi-judicial bodies would like to comment upon.
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25 While due to human resilience,⁹³ only approximately one tenth of the people exposed to
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27 stressors develop PTSD,⁹⁴ once exposure to violence becomes chronic and repeated, the
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35 ⁹¹ Farnoosh Hashemian et als., Anxiety, Depression and Posttraumatic Stress in Iranian Survivors of Chemical
36 Warfare, 296(5) JAMA 560,562 (2006)

37 ⁹² The relevant percentage ratio was 31-8. On this see Farnoosh Hashemian et als., Anxiety, Depression and
38 Posttraumatic Stress in Iranian Survivors of Chemical Warfare, 296(5) JAMA 560,565 (2006)

39 ⁹³ As noted, resilience is described not only as the ability to 'regain functionality after a stressful event' but also
40 as a set of reactions or processes aiming at achieving successful adaptation despite challenging circumstances. On
41 this see Rozanna Aitcheson et als., Resilience in Palestinian Adolescents Living in Gaza, Psychological Trauma:
42 Theory, Research, Practice and Policy, 1 (2016). See also the fact that although 50-69% of people experience a
43 traumatic event at least once in their life, not all persons experiencing such an event will develop psychological
44 trauma in general or PTSD in particular. For further bibliography on this see Melanie Hetzel-Riggin & Ryan
45 Roby, Trauma Type and Gender Effects on PTSD, General Distress and Peritraumatic Dissociation, 18 J. Loss &
46 Trauma 41 (2013); Mark Creamer & Meagan O'Donnell, Post-traumatic Stress Disorder, 15(2) Current Opinion
47 in Psychiatry 163, 164 (2002); Dusica Lecic-Tosevski et als., Personality Factors and Posttraumatic Stress:
48 Associations in Civilians one Year after Air Attacks, 17(6) J. Personality Disorders 537,545 (2003); Candice
49 Monson et als, A Psychological History of PTSD in HANDBOOK OF PTSD: SCIENCE AND PRACTICE (Matthew
50 Friedman et als., eds., 2nd ed., The Guilford Press, 2014) 72; GA Wilson et als, Anxiety, Panic and Phobias in
51 ENCYCLOPAEDIA OF MENTAL HEALTH (Howard Friedman ed., 2nd ed., 2016) 77; Sharon Gil et als., Risk Factors
52 for DSM-5 PTSD Symptoms in Israeli Civilians during the Gaza War, 5(4) Brain & Behaviour (2015) available
53 at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4402039/pdf/brb30005-e00316.pdf>.

54 ⁹⁴ Marc Perrin et als., Determinants of the Development of Posttraumatic Stress Disorder in the general
55 population, 49 Social Psychiatry & Psychiatric Epidemiology 447 (2014). Thus for example, as demonstrated in
56 a relevant study, prevalence rates for PTSD have ranged from 0% in a conflict-affected region of Iran to 99% in
57 Sierra Leone. On this see Zachary Steel et als, Association of Torture and Other Potentially Traumatic Events
58 with Mental Health Outcomes Among Populations exposed to Mass Conflict and Displacement, 302(5) J.
59 *American Med. Ass.* 537 (2009). See also Ben Shephard, A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN
60 THE TWENTIETH CENTURY, Harvard University Press, 2001, 389 (writing that any hypotheses do not explain why
certain people develop PTSD and others not). See also the study conducted by U.S. psychologist Katie Chipman
and her colleagues on Israeli civilians affected by long exposure to rocket attacks, where 30% of the examined

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3 affected civilians are more likely to develop some kind of trauma⁹⁵ and it is a mistake to think
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5 that based on resilience, these individuals can be tagged as ‘symptom-free’ or as bearing only
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7 very few symptoms of distress.⁹⁶
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10 Equally, the civilian’s unique features such as age or sex, should be taken into account.
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12 This, given that women, children and persons coming from a lower socioeconomic status have
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14 a higher risk of exhibiting PTSD.⁹⁷ Such an approach mirrors that international criminal
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16 tribunals have taken in the past. For example, in the Martić case, the ICTY stated that it would
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18 assess on a case to case basis whether the acts of torture caused ‘severe physical or mental pain
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20 or suffering’⁹⁸ and that for such an assessment, it would take a number of factors into account,
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22 ‘including the duration of the suffering inflicted, the nature of the crimes, the physical or mental
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34 civilians reported impairments related to PTSD symptoms, yet only 5.5.% was diagnosed with probable PTSD.
35 (Katie Chipman et als., Predictors of Posttraumatic Stress-related Impairment in victims of terrorism and
36 ongoing conflict in Israel, 24 *Anxiety, Stress & Coping* 255,264 (2011) .

37 ⁹⁵ Andrew Dubinsky, An Examination of International Sentencing Guidelines and a Proposal for Amendments to
38 the International Criminal Court’s Sentencing Structure, 33 *New England J. on Crim. & Civil Confinement*,
39 609,634 (2007) (referring to the fear civilians in Darfur experience due to ‘ongoing arbitrary arrest or rape, assault
40 and murder.’); Civilians in Central African Republic Fear Ugandan Rebel Attacks, PressTV, Nov. 13, 2014
41 available at <http://www.presstv.ir/detail/2014/11/13/385901/car-civilians-fearing-rebel-attacks/>; Document-
42 Sudan: Civilians Under attack in Southern Kordofan, Amnesty International available at
43 [http://www.amnesty.org/en/library/asset/AFR54/011/2014/en/191eb174-baeb-4620-a0f6-
44 ac86de4e3f71/afr540112014en.html](http://www.amnesty.org/en/library/asset/AFR54/011/2014/en/191eb174-baeb-4620-a0f6-ac86de4e3f71/afr540112014en.html); Myanmar Army Accused of Civilian Attacks as Thousands Flee, NBC
45 News, June 9, 2014 available at [http://www.nbcnews.com/news/asian-america/myanmar-army-accused-civilian-
47 attacks-thousands-flee-n126166](http://www.nbcnews.com/news/asian-america/myanmar-army-accused-civilian-
46 attacks-thousands-flee-n126166) (referring to civilian fears of attacks by the Myanmar army as well as the rebels);
48 David Benedek et al, Disaster Psychiatry: Disasters, Terrorism and War in KAPLAN AND SADOCK’S
49 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY (Benjamin Sadock et al. 9th ed., 2012), Vol. II, 2617; Avi Besser et
50 als., Acute Symptoms of Posttraumatic Stress and Dissociative Experiences Among Female Israeli Civilians
51 Exposed to War: The Roles of Intrapersonal and Interpersonal Sources of Resilience, 70(12) *J. Clinical
52 Psychology* 1227,1229 (2014). For the fact that in rocket attacks the experienced fear by civilians can lead to
53 deaths see the case of the Israeli civilians during the Gulf War where from the 1059 war-related incidents of
54 hospital admission related to the war, only 22% referred to direct casualties from the missiles. The rest 78% of
55 the cases were incidents involving heart attacks or wrong use of the gas masks because of the reigning fear when
56 the air raid sirens sounded. Ultimately, more people died from fear than from the missiles themselves. On this see
57 Avi Bleich et als., Psychiatric Implications of Missile Attacks on a Civilian Population: Israeli Lessons from the
58 Persian Gulf War, 268 (5) *J. American Medical Association* (1992) 613; Zahava Solomon, The Pathogenic Effects
59 of War Stress: The Israeli Experience in EXTREME STRESS AND COMMUNITIES: IMPACT AND INTERVENTION (Stevan
60 Hobfoll & Marten de Vries eds., Kluwer, 1995) 230

⁹⁶ Dean Kilpatrick et als., National Estimates of Exposure to Traumatic Events and PTSD Prevalence using DSM-
IV and DSM-5 Criteria, 26 *J. Traumatic Stress* 537,545 (2013) (noting that the probability of PTSD increases with

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3 condition of the victim, the effect of the acts on the victim, the victim's age and the victim's
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5 position of inferiority to the perpetrator.⁹⁹
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9 With a particular civilian's mental health status not being necessarily indicative of the
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11 mental harm suffered by the general civilian population, what is needed is a meta-regression
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13 analysis in the realms of which quasi-judicial bodies will discuss the mental harm of the
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15 particular civilian testifying between them in the context of the wider mental harm suffered by
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17 the affected population. Recourse to mental health experts may be needed for a second time.
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19 The latter may be called to testify on the trauma experienced on a collective basis as a result of
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21 an attack or series of attacks. The process has partially taken place before international courts
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23 and tribunals, where there have been cases like the one involving the Srebrenica massacre,
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25 where mental health experts have related to the general trauma experienced by the affected
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27 civilians in general and the ICTY has relied on these opinions in order to hold that such trauma
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29 should be presumed to have been experienced also by the civilian testifying before its docket.
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35 Additionally, quasi-judicial bodies can rely on relevant published mental health articles
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37 and reports. This will not be always possible but there have been cases-especially once the
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39 attacks are repeated-where the psychological toll these attacks exert on the affected civilian
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41 population, is recorded by mental health experts in their studies. To the extent that they are
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43 meant to issue recommendations on possible laws of war violations which incur also
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45 international criminal implications, the ability of these quasi-judicial bodies to rely from their
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47 own initiative to such sources should be seen as resembling more the function of other quasi-
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52 greater event exposure);Stevan Hobfoll et als., The Limits of Resilience: Distress Following Chronic Political
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54 Violence among Palestinians, 72 Social Science & Medicine 1400,1407 (2011); L. Stephen O'Brien, TRAUMATIC
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56 EVENTS AND MENTAL HEALTH (Cambridge University Press, 1998) 2

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58 ⁹⁷ Fran Norris et als., Epidemiology of Trauma and Posttraumatic Stress Disorder in Mexico, 112(4) J.
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60 Abnormal Psychology 646 (2013); Katie Chipman et als., Predictors of Posttraumatic Stress-related Impairment
in victims of terrorism and ongoing conflict in Israel, 24 Anxiety, Stress & Coping 255,257 (2011); Bruce Perry,
Stress, Trauma and Post-Traumatic Stress Disorders in Children, The Child Trauma Academy, November 2013
at 5 available at https://childtrauma.org/wp-content/uploads/2013/11/PTSD_Caregivers.pdf

⁹⁸ ICTY, Trial Chamber, Prosecutor v. Martić, IT-95-11--T, Judgment, 12 June 2007, para.75

⁹⁹ Ibid

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3 judicial bodies tied to the international criminal justice, like the ICC Prosecutor, when it comes
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5 to the collection and assessment of incriminating evidence.
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10 11 **6. Conclusion** 12

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14 Quasi-judicial bodies play an all-increasing role as accountability mechanisms for the
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16 establishment of war crimes in the realms of major international and non-international
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18 conflicts. The question of how warfare's psychological impact upon civilians is to be assessed
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20 has been largely left unexplored. Tracing such psychological impact as having legal
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22 repercussions once it reaches the level of 'serious mental harm', the current article proceeded
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24 to argue for the introduction of both procedural as well as substantive standards for such an
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26 assessment to take place. On a procedural level, the article argued for such standards to
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28 encompass a clearly delineated step by step process which would see quasi-judicial bodies
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30 inviting mental health experts to assess the mental health status of the civilian testifying as
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32 witness, the moment he/she refers to traumatic symptoms he/she experienced. Consequently,
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34 the process would continue with quasi-judicial bodies discussing whether the mental health
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36 experts' findings on whether the civilian suffers or not from a psychological disorder
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38 constitutes serious mental harm from a legal point of view, with mental health experts invited
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40 a second time to opine on how the mental harm sustained by the particular individual should
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42 be viewed in comparison with that sustained by the general civilian population.
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50 At the same time and regarding the transposal of any mental health findings to the legal
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52 features international law aspires to render to serious mental harm through the jurisprudence
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54 of international criminal courts and tribunals, the article proceeded to discuss substantive
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56 standards which can govern the quasi-judicial bodies' assessment task.
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3 Furthermore, arguing for a synergy between quasi-judicial bodies and mental health
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5 experts, the article demonstrated how the former can draw from the literature on psychological
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7 disorders or on trauma symptoms in order to buttress the stance that any conclusions reached
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9 by psychologists or psychiatrists on the mental status of a particular civilian, can also be legally
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11 viewed as serious mental harm in tandem with the features international criminal courts and
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13 tribunals have given to the notion.
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18 The establishment of such standards is a necessity given the amorphous, grey areas that
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20 quasi-judicial bodies entail, both regarding the identity and credentials of their members as
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22 well as the procedural rules they are called to apply. It is on this account that the article aspired
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24 to open the discussion for a more transparent assessment of civilian mental harm. The fact that
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26 such harm is connected to the suffering of persons like civilians who most often are caught in
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28 the midst of hostilities, should render us even more sensitive in properly addressing it.
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