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Protections against cumulative mental harm under international humanitarian law

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Abstract

This article examines whether – and, if so, how – existing international humanitarian law (IHL) protects civilians from cumulative mental harm, understood as harm to mental health caused by the cumulative effect of multiple isolated or interrelated actions undertaken during a military operation. It explores three legal avenues under

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IHL – (1) the general protection of civilians from the dangers of military operations, (2) the obligation to take constant care to spare civilians in the conduct of military operations, and (3) the prohibition against launching attacks expected to cause excessive incidental civilian harm – to determine the degree to which cumulative mental harm is already addressed by existing law. The article contends that parties to conflict are required to establish a framework for operationalizing these protections and outlines the organizing principles for such a framework.

Keywords: international humanitarian law, mental harm, cumulative civilian harm, constant care, proportionality, precautions.

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Introduction

While the destruction of buildings and the infliction of physical injuries form the visible imprint of armed conflict, the minds of affected populations are its hidden victims. Recent studies examining the relationship between armed conflict and mental health provide strong evidence of their correlation and causal links.[1] According to the World Health Organization (WHO), "[o]ne in five people (22%) who have experienced war or conflict in the previous 10 years has depression, anxiety, post-traumatic stress disorder, bipolar disorder or schizophrenia".[2] Indeed, the devastating toll of armed conflict on the mental health of civilians has been documented, for example, in contexts ranging from the Democratic Republic of the Congo[3] and Bosnia,[4] through Palestine[5] and Sudan,[6] to Myanmar[7] and Ukraine.[8] Although the ways in which individuals and communities suffer is subjective,

1 Syed Hassan Ahmed *et al.*, "Prevalence of Post-Traumatic Stress Disorder and Depressive Symptoms among Civilians Residing in Armed Conflict-Affected Regions: A Systematic Review and Meta-Analysis", *General Psychiatry*, Vol. 37, No. 3, 2024, p. 6.

2 WHO, "Mental Health in Emergencies", 6 May 2025, available at: www.who.int/news-room/fact-sheets/detail/mental-health-in-emergencies (all internet references were accessed in May 2026).

3 Paulin Beya Wa Bitadi Mutombo, Genese Lolimo Lobukulu and Rebecca Walker, "Mental Healthcare among Displaced Congolese: Policy and Stakeholders' Analysis", *Frontiers in Human Dynamics*, Vol. 5, 2024, p. 2.

4 Reima Ana Maglajlic, Halida Vejzagić, Jasmin Palata and China Mills, "'Madness' After the War in Bosnia and Herzegovina – Challenging Dominant Understandings of Distress", *Health*, Vol. 28, No. 2, 2022, p. 217.

5 Belal Aldabbour *et al.*, "Psychological Impacts of the Gaza War on Palestinian Young Adults: A Cross-Sectional Study of Depression, Anxiety, Stress, and PTSD Symptoms", *BMC Psychology*, Vol. 12, No. 1, 2024.

6 Fatima Elbasri Abuelgasim Mohammed *et al.*, "Sudan's Forgotten Generation: Confronting the Mental Health Crisis", *BMJ Global Health*, Vol. 10, No. 6, 2025.

7 Andrew Riley *et al.*, "Systematic Human Rights Violations, Traumatic Events, Daily Stressors and Mental Health of Rohingya Refugees in Bangladesh" *Conflict and Health*, Vol. 14, 2020.

8 Argyroula Kalaitzaki *et al.*, "The Mental Health Toll of the Russian-Ukraine War Across 11 Countries: Cross-Sectional Data on War-Related Stressors, PTSD and CPTSD Symptoms", *Psychiatry Research*, Vol. 342, 2024.

cultural, contextual and dependent on the presence of particular vulnerabilities,[9] what is invariable is that armed conflict inflicts deep, distressing and often debilitating scars on the human mind.

Existing documentation leaves little room for doubt that situations of armed conflict generate widespread harm to the mental health of affected populations; more difficult to establish, however, is what precisely causes a particular mental health impact. Such impacts are often not the result of a single, discrete event. In contemporary conflicts, civilians are typically subjected to a succession of traumatic experiences with cumulative effects, from bombings and deprivation of essential goods and services to displacement, discrimination and marginalization. In his 2024 report on the protection of civilians in armed conflict, the United Nations (UN) Secretary-General writes that

> [c]ivilian harm in contemporary conflicts has multiple sources and is complex, overlapping, cumulative and long term. For example, it can be direct, in the form of death, injury and mental trauma. It can often be indirect, resulting from the destruction of critical infrastructure such as hospitals, water and power systems, as well as transport networks and agricultural and other means of production which impact the provision of essential services and health care and the availability of food and other essentials, leading to hunger, disease and further civilian deaths. Civilian harm is inherent in the displacement of civilians, who are at risk of further violence of different forms and have limited, if any, access to food, water, shelter and other assistance, causing yet further harm.[10]

The fact that the causes for mental suffering in armed conflict are numerous and interlinked can create significant challenges for assessing responsibility for the wrongful infliction of mental harm under international humanitarian law (IHL). Many of the foundational obligations governing the conduct of hostilities tend to "individualize" legal assessments – for instance, by focusing on the incidental harm and military advantage associated with *particular attacks*, and on protections in *concrete military operations*. Yet the reality of conflict's impact on human minds is more complex, stretching far in time and space and resisting neat categorization in isolated incidents. Here lies the concern at the heart of the present article. The following sections examine whether, and if so, how, existing IHL protects civilians from *cumulative mental harm* – that is, mental harm that originates from multiple isolated or entwined sources, be they a direct or indirect effect of (lawful or unlawful) military operations. In so doing, the aim of this article is to move beyond the bias towards individualized, fragmented assessments in IHL to determine the extent to which

9 For instance, it has been reported that women and children are at particular risk of mental harm stemming from armed conflict; see UN Women, "Inside The Crisis You Don't See: How War Impacts Women's Mental Health", 7 April 2025, available at: www.unwomen.org/en/articles/explainer/inside-the-crisis-you-dont-see-how-war-impacts-womens-mental-health; Petro Ferrara *et al.*, "The Silent Wounds of War: Psychophysical Impacts and International Legal Implications for Children in Conflict Zones", *Global Pediatrics*, Vol. 14, 2025.

10 *Protection of Civilians in Armed Conflict: Report of the Secretary-General*, UN Doc. S/2024/385, 14 May 2024, para. 54.

existing obligations protect against mental harm originating from a multitude of (lawful or unlawful) individual events. Absence of clarity over the law's protection against such harm has direct bearing on prospects of reparation, acknowledgment of responsibility and cessation of conduct contributing to cumulative mental harm.

The article proceeds in three steps. First, it theorizes the concept of "cumulative mental harm" and discusses the state of the literature at the intersection of mental health protection and cumulation of harm in armed conflict. Second, it analyzes three possible legal avenues for grounding protection from such harm under IHL: (1) the general protection of civilians from the dangers of military operations, (2) the obligation to take constant care to spare civilians in the conduct of military operations, and (3) the prohibition against launching attacks expected to cause excessive incidental civilian harm. Third, in analyzing these three legal avenues under IHL, the article suggests interpretations of existing IHL that would operationalize protections against cumulative mental harm.

Conceptualizing "cumulative mental harm"

To assess the legal protections against cumulative mental harm under IHL, it is first necessary to define the parameters of the concept for the purposes of the present analysis. To begin with, there are no universally agreed definitions of either "mental harm" or "cumulative harm". Moreover, both the notions of "mental harm" and "cumulative harm" are capable of wide-ranging interpretations, encompassing a broad array of conditions, processes and consequences. In light of this, the demarcations proposed here are made solely for the purposes of the present article, and without prejudice to wider or narrower interpretations of the terms in other contexts and for other purposes.

Mental harm, as understood here, means an adverse impact on a person's mental health. Anxiety, depression, post-traumatic stress disorder (PTSD) and acute stress disorder are all examples of mental harm. While the concept of mental harm can be conceptualized as a broad category, it bears emphasizing that specific obligations under IHL can operate with thresholds for the types of mental harm that fall within their purview; this can be explained by the very context of armed conflict, which inevitably gives rise to feelings of fear and anxiety. Because of this, the literature on IHL often refers to mental health *disorders* as a specific form of mental harm. Mental health disorders are characterized by "a clinically significant disturbance in an individual's cognition, emotional regulation, or behaviour, which is usually associated with distress or impairment in important areas of functioning".[11] Examples of such disorders are PTSD, schizophrenia, depression, adjustment and anxiety disorders; these are disorders capable of diagnosis, and which are separate from a general

11 WHO, "Mental Disorders", 30 September 2025, available at: www.who.int/news-room/fact-sheets/detail/mental-disorders.

sense of fear or apprehension related to armed conflict. Admittedly, the conceptualization of mental harm as linked to a mental health *disorder* capable of diagnosis is not the only way to understand mental harm,[12] and it may risk imposing a hegemonic understanding of such harm that is at odds with the relevant socio-cultural and economic circumstances.[13] That said, a focus on mental health disorders as a form of mental harm can be a first step towards establishing the relevance of mental harm to IHL obligations and the foreseeability of such harm based on prior studies of trauma.

Cumulative harm, on the other hand, captures harms that are caused by a cumulation of factors or events, rather than from a single, identifiable cause. For instance, PTSD could result from a single traumatic event (for instance, an act of sexual violence), but could equally be caused by a sequence of events. In situations of armed conflict, such a sequence could be caused by various types of belligerent action: a series of attacks in a given area, for instance, can generate escalating fear and anxiety among those present, ultimately leading to mental health disorders within the affected population. Such disorders may also be caused by other sequences, such as when individuals are compelled to relocate in order to avoid attacks or because their homes have been destroyed, and during their displacement endure further risks from attacks in their vicinity as well as food insecurity, inadequate shelter and lack of access to medical assistance. The factors causing such cumulative harm can occur simultaneously (for instance, the simultaneous absence of medical aid and food in camps for the internally displaced) or sequentially (for instance, an attack followed by displacement, in turn followed by deprivation, in turn followed by discrimination and marginalization). As a concept, cumulative harm can be virtually unbounded, covering all traumatic events, processes and experiences that occur following an onset event or series of events.

For the purposes of this article, the concept of "cumulative harm" is employed to refer to harms that are the direct or reasonably foreseeable indirect consequence of a cumulation of events and processes related to the military operations of a party to conflict.[14] The term "military operation" means "all the movements and activities carried out by armed forces related to hostilities".[15] More precisely, it "must be construed to mean the movements, manoeuvres and other action taken

12 See, for instance, on "idioms of distress" offering "an alternative lens into cultural manifestations of trauma-related distress", Anushka Patel and Brian Hall, "Beyond the DSM-5 Diagnoses: A Cross-Cultural Approach to Assessing Trauma Reactions", *Focus*, Vol. 19, No. 2, 2021, p. 198.

13 See the article by Samantha Holmes in this issue of the *Review*: Samantha Holmes, "Incidental Mental Harm through a Decolonial Lens: A Culturally and Contextually Sensitive Implementation of the Principle of Proportionality", *International Review of the Red Cross*, Vol. 108, No. 932, 2026.

14 For a similar conceptualization of cumulative harm, see Oona A. Hathaway, Azmat Khan and Mara V. Revkin, *The Dangerous Rise of Dual-Use Objects in War*, Duke Law School Public Law and Legal Theory Series, No. 2024-56, 2024, p. 2741.

15 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, International Committee of the Red Cross (ICRC), Geneva, 1987 (ICRC Commentary on AP I), para. 1936.

by the armed forces *with a view to fighting*",[16] and includes not only ground operations but also the establishment of military installations, defensive preparations and fortifications, among others.[17] The term is thus broader than "attack",[18] and it captures activities that are preparatory and otherwise related to fighting. Thus, orders to civilians to leave a particular area, or the closure of aid or other humanitarian centres in view of military action, would be captured by the concept of "military operation".

Despite the prevalence of mental harm resulting from a cumulation of events in armed conflict, the literature on IHL has so far failed to address the phenomenon comprehensively. Analysis exists only in fragments, in some cases addressing mental harm and IHL, while in others focusing on the cumulation of harm in the use of force in armed conflict. For instance, legal scholars increasingly focus on the IHL protections against conflict-related mental harms. Lieblich,[19] Schmitt and Highfill,[20] Solomon,[21] and Knuckey, Moorehead, McCalley and Brown[22] have provided analysis of the obligation of parties to conflict to refrain from attacks that may be expected to cause excessive incidental civilian harm, suggesting, in narrower or broader terms, that this should be understood to require consideration of reasonably foreseeable incidental mental harm to civilians. Priddy,[23] Mardini[24] and Breitegger[25] have examined the relationship between disability law and armed conflict, while Bosi has provided an overview of existing literature and a brief mapping of various legal protections against mental harm in armed conflict.[26]

16 ICRC, *Commentary on the Fourth Geneva Convention: Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 2nd ed., Geneva, 2025, para. 3370 (emphasis in original).

17 *Ibid.*

18 The term "attack" under IHL means "an act of violence against the adversary, whether in offence or in defence". Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 49.

19 Eliav Lieblich, "Beyond Life and Limb: Exploring Incidental Mental Harm under International Humanitarian Law", in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, T. M. C. Asser Press, The Hague, 2014, p. 185.

20 Michael N. Schmitt and Chad Highfill, "Invisible Injuries: Concussive Effects and International Humanitarian Law", *Harvard National Security Journal*, Vol. 9, No. 1, 2018.

21 Solon Solomon, "Why Should the Innocent Suffer? Mental Harm as Disability and the Establishment of a Post Bellum Duty of Care for Enemy Civilians", *Fordham International Law Journal*, Vol. 48, No. 1, 2024.

22 Sarah Knuckey, Alex Moorehead, Audrey McCalley and Adam Brown, "The Proportionality Rule and Mental Harm in War", in Claus Kreß and Robert Lawless (eds), *Necessity and Proportionality in International Peace and Security Law*, Oxford University Press, New York, 2020, p. 367.

23 Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, April 2019.

24 Robert Mardini, "Persons with Disabilities in Armed Conflicts: From Invisibility to Visibility", *International Review of the Red Cross*, Vol. 105, No. 922, 2023.

25 Alexander Breitegger, "Increasing Visibility of Persons with Disabilities in Armed Conflict: Implications for Interpreting and Applying IHL", *International Review of the Red Cross*, Vol. 105, No. 922, 2023.

26 Giulia Bosi, "The Protection of Mental Health under International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, 2025, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5444439.

With regard to cumulative harm, drawing on the Martens Clause, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) suggested over a quarter of a century ago that

> in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law.[27]

At the time, this interpretive stance, which was arguably an exercise in progressive development, was thought by some to be out of step with existing law.[28] More recently, Lubell and Cohen have initiated a conversation not only on the application of IHL and the law on the resort to force to cumulative harms, but also on the limitations of the law and the potential need for further normative development.[29] Noting that international law "does not sufficiently consider the aggregate impacts of protracted armed conflict on civilian populations" and drawing from "feminist theories of harm and continuums of violence, undergirded by a recognition of the political economy of war as it affects women", Ní Aoláin too has argued in favour of a progressive development placing attention on cumulative civilian harm.[30] Hill-Cawthorne has examined the extent to which IHL (and *jus ad bellum*) accounts for the overall civilian harm accumulated across a conflict, surveying contrasting views on this matter; while acknowledging that the contrary view may not be straightforwardly *contra legem*, he has nevertheless argued in favour of the view that cumulative civilian harm must be accounted for.[31]

The present article aims to connect the discussions on mental harm and cumulative harm and to explain how their intersection affects the scope of legal protection. It focuses on the law as it is, rather than on arguments regarding progressive development. Accordingly, the following section turns to an analysis under three legal avenues established in IHL that may provide protection to individuals from cumulative mental harm.

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27 ICTY, *The Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 526.

28 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 8 June 2000, *ILM*, Vol. 39, 2000, p. 1257, paras 51–52 (observing that "where individual (and legitimate) attacks on military objectives are concerned, the mere *cumulation* of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime" (emphasis in original)).

29 Noam Lubell and Amichai Cohen, "Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts", *International Law Studies*, Vol. 96, 2020. Lubel and Cohen, along with six other co-investigators, are also engaged in an ongoing research project on cumulative civilian harm. See SBE-UKRI, "Cumulative Civilian Harm in War: Addressing the Hidden Human Toll of the Law's Blind Spot" (Project Ref. ES/X01097X/1, 2023-26, PI: Noam Lubell).

30 Fionnuala Ní Aoláin, "Cumulative Civilian Harm in Gaza: A Gendered View", *Just Security*, 25 June 2025, available at: www.justsecurity.org/115407/cumulative-civilian-harm-gaza-gendered-view/.

31 Hill-Cawthorne reasons that there would otherwise be a risk, first, that humanitarian protections would be unduly compromised by considerations of military necessity, and second, that international law's apologetic propensities would overshadow its normative function. Lawrence Hill-Cawthorne, *International Law in Extremis*, University of Bristol Law Working Paper Series, No. 1, 2025.

Protections against cumulative mental harm in the conduct of hostilities

Protecting civilians from the dangers of military operations

Under Additional Protocol I (AP I), "[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations".[32] According to the International Committee of the Red Cross (ICRC) Commentary on AP I, this provision confirms a "principle" of "general protection".[33] Without a doubt, the mental health cost of armed conflict, both as an immediate effect of hostilities and in its cumulative and longer-term manifestations, is a danger that arises from military operations. The key legal question here is whether this principle enshrined in AP I has a self-standing regulatory function and, if so, what type of decision-making it requires or proscribes.

To begin with, one may query whether the protection of civilians from the dangers arising from military operations imposes a self-standing obligation on parties to conflict. According to the second sentence of Article 51(1) of AP I, "[t]o give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances", and the provision outlines, in further paragraphs, specific obligations against, *inter alia*, indiscriminate attacks and making civilians the object of attack. On the one hand, this can be interpreted to mean that the first sentence of Article 51(1) is meant to postulate a principle without substantive scope and regulatory reach, merely manifested in the specific obligations subsequently established. The language used in the ICRC Commentary to Article 51(1) could be taken as supporting this reading of the provision.[34] Under this view, the principle would, at most, have interpretative significance for specific obligations under the treaty. On the other hand, it could be argued that the principle outlined in the first sentence of Article 51(1) has independent regulatory significance, giving rise to obligations extending over and beyond those specified in the rules listed in subsequent paragraphs of the article. On the latter view, Article 51(1) requires that the dangers for the civilian population "be reduced to a minimum",[35] a more general positive obligation operating alongside other obligations. Little can be gleaned from practice, jurisprudence or academic writings on this question. Even instruments that do mention this provision do so in an equivocal way – for instance, the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas merely recalls "the obligations under

32 AP I, Art. 51(1).

33 ICRC Commentary on AP I, above note 15, para. 1935.

34 *Ibid.*, para. 1938 stating that "[t]he first sentence gives substance to the principle of general immunity formulated in the preceding paragraph" (thereby implicitly suggesting that the general principle formulated in Article 51(1) does not establish a substantive obligation).

35 *Ibid.*, para. 1935.

International Humanitarian Law related to the general protection of civilians against dangers arising from military operations".[36]

If the provision contained in the first sentence of Article 51(1) does indeed posit a self-standing general obligation, then the next question is what this general obligation actually requires of parties to conflict. To begin with, it is worth comparing its text to that of Article 58 on passive precautions, which requires parties to "take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers *resulting* from military operations".[37] This language slightly differs from that found in Article 51(1), which speaks of dangers *arising* from military operations; while "resulting" may be read to imply a certain standard of causation,[38] the term "arising" seems broader. Further, it is clear that the drafters were mindful of the psychological impact of military operations at the time of adopting the Protocol. Article 51(2) prohibits "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population"[39] – since the prohibition on terrorizing civilians, which proscribes purposeful conduct to inflict a *mental* state of terror, is set in one of the rules implementing the principle in Article 51(1), it is only logical to infer that the principle itself extends to mental harm. And finally, the language of Article 51(1) – "dangers arising from military operations" – is generic. It does not relate exclusively to particular dangers that existed at a particular point in time, but can be interpreted dynamically to include emerging dangers in changing conflict landscapes. This use of generic language therefore makes the provision capable of interpretative extension to dangers of military operations as they evolve through time.[40] Such an interpretation would comport with the object and purpose of AP I, which is anchored in the continuous and meaningful protection of civilians.[41]

If one were to adopt the view that the principle of general protection from the dangers of military operations has a self-standing regulatory function, and that it requires the taking of positive measures to reduce dangers (including those capable

36 Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas, 18 November 2022, para. 2.3.

37 AP I, Art. 58(c) (emphasis added).

38 A similar discussion can be had on the meaning of "resulting" found in Human Rights Committee, General Comment No. 36, "Article 6 (Right to Life)", UN Doc. CCPR/C/GC/36, 30 October 2018, para. 70, which posits that "States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant".

39 Laura Paredi, *The War Crime of Terror: An Analysis of International Jurisprudence*, International Crimes Database, Brief No. 11, June 2015.

40 A dynamic, "living instrument approach" to the interpretation of IHL provisions is also supported by Tadesse Kebebew in "Evolutive Interpretation of Proportionality and Precautions to Strengthen Protections under International Humanitarian Law", *Opinio Juris*, 19 June 2025, available at: https://opiniojuris.org/2025/05/19/evolutive-interpretation-of-proportionality-and-precautions-to-strengthen-protections-under-international-humanitarian-law/.

41 The preamble of AP I suggests a strong focus on the protection of victims of armed conflict. For an analysis on the object and purpose of another IHL treaty, Geneva Convention IV, see Kubo Macák and Ellen Policinski, "In Pursuit of a Treaty's Soul: A Study of the Object and Purpose of the Fourth Geneva Convention", *International and Comparative Law Quarterly*, Vol. 37, No. 2, 2024.

of resulting in harm to mental health), this would align IHL to international human rights law (IHRL).[42] Of course, IHL and IHRL are two separate legal frameworks, and although they must, to the extent possible,[43] be read harmoniously, they need not mirror one another. As acknowledged by the International Court of Justice (ICJ), "[s]ome rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may concern both these branches of international law".[44] That being said, relevant and applicable rules of IHRL bear on the interpretation of rules under IHL, and there are insights to be drawn from the comparison between human rights and a general obligation to protect civilians from the dangers of military operations.

Protections under IHRL do not cease in times of armed conflict,[45] and human minds are protected from harm under, *inter alia*, the right to health, recognized, notably, in the International Covenant on Economic, Social and Cultural Rights.[46] Health, according to the WHO Constitution, is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".[47] Protections of health logically extend to "the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, [and] healthy occupational and environmental conditions".[48] States have an obligation to respect, protect and fulfil the right to health, including through immediate steps towards its full realization, and to ensure non-discrimination, with a presumption against the taking of retrogressive steps.[49] The fact of armed conflict may affect the feasibility of certain measures to protect mental health, but does not displace the right to health of individuals under a State's jurisdiction.[50]

42 The view that provisions of IHL and IHRL should be interpreted to align with each other is based on the idea that international law should be understood as a coherent system "in which different sets of rules cohabit in harmony". See Cordula Droege, "Elective Affinities? Human Rights and Humanitarian Law", *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 521–522.

43 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980) (VCLT), Art. 31(3)(c); European Court of Human Rights, *Ukraine and The Netherlands v. Russia*, Appl. Nos 8019/16, 43800/14, 28525/20, 11055/22, Judgment (Grand Chamber), 9 July 2025, paras 427–428.

44 ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 19 July 2024 (Israel Advisory Opinion), para. 99.

45 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25; Israel Advisory Opinion, above note 44, para. 99.

46 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976), Art. 12.

47 Constitution of the World Health Organization, 22 July 1946 (entered into force 7 April 1948), Preamble, available at: www.who.int/about/governance/constitution.

48 Committee on Economic, Social and Cultural Rights, General Comment No. 14, "The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)", UN Doc. E/C.12/2000/4, 11 August 2000, para. 11.

49 *Ibid.*, paras 30–33.

50 *Ibid.*, para. 47, clarifying that "a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations" arising from the right to health.

The right to health covers mental health[51] and acknowledges the effect of cumulative conditions that lead to health impacts.[52] It requires the taking of positive measures to protect individuals. Similarly, one can argue that through the operation of Article 51(1), if understood to entail a self-standing general obligation, parties to conflict must take measures to protect civilians from the dangers of military operations capable of impacting their mental health. The present authors submit that, at the very least, this would mandate acquiring the capacity to assess the potential mental health harms of military operations, and making efforts to consider how military operations can cumulate to create or exacerbate such harms. It must be emphasized that even if the provision of Article 51(1) is not accepted as establishing a self-standing obligation, an obligation to take similar measures to the ones envisioned here would in any event also arise under the duty of constant care in Article 57(1) of AP I and customary law, as analyzed in the following section.

Constant care

As part of a broader effort to "diminish the evils of war as far as military requirements permit",[53] and as a supplement to other rules aimed at protecting the civilian population and civilian objects,[54] IHL requires parties to an armed conflict to take precautionary measures.[55] While many of the requisite precautions relate specifically to attacks, IHL also contains a more general provision – codified in Article 57(1) of AP I, which is reflective of customary international law – providing that "[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects".[56]

As with the principle laid down in Article 51(1) of AP I, some might take the view that Article 57(1) does not in fact establish a self-standing obligation, and that it instead merely enunciates a general principle whose practical application is then subsumed in the more concrete rules on precautions in attack codified in the remaining subsections of Article 57.[57] However, this view is objectionable on a number of

51 *Ibid.*, para. 2.

52 *Ibid.*, paras 10–11. See also Office of the UN High Commissioner for Human Rights and WHO, "The Right to Health", Fact Sheet No. 31, 1 June 2008, p. 6; Stephen P. Marks, "The Right to Health", in Elizabeth Wicks and Nataly Papadopoulou (eds), *Research Handbook on Human Rights Law and Health*, Edward Elgar, Cheltenham, 2025, p. 27.

53 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907 (entered into force 26 January 1910), Preamble.

54 See, in particular, AP I, Arts 48, 51–52; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 1–13, available at: https://ihl-databases.icrc.org/en/customary-ihl/rules.

55 AP I, Arts 57–58; ICRC Customary Law Study, above note 54, Rules 15–24.

56 Multiple sources affirm the customary status of the rule. See e.g. ICRC Commentary on AP I, above note 15, para. 2191; ICRC Customary Law Study, above note 54, Rule 15; ICTY, *Kupreškić*, above note 27, para. 524; US Department of Defense, *Law of War Manual*, June 2015 (updated 2016), p. 190, para. 5.3.2.

57 This is implied in the ICRC Commentary on AP I, above note 15, para. 2191 (where it is observed that "the other paragraphs are devoted to the practical application of this principle").

grounds.[58] First, the word "shall" in Article 57(1) indicates that it is a prescriptive provision imposing a duty.[59] Second, pursuant to the principle of effectiveness (*effet utile*), treaty provisions must be interpreted so that each has meaning and effect, and Article 57(1) should therefore not be construed in a manner that renders it devoid of independent normative force.[60] Third, and relatedly, the view that Article 57(1) establishes obligations beyond those specified in the remainder of Article 57 better accords with the object and purpose of AP I as it obliges belligerents to strive to reduce civilian harm arising from all aspects of their military operations, thereby closing a protection gap that would arise if such precautions were required only with respect to the harmful effects of individual attacks.[61]

Based on the ordinary meaning of the terms it employs, and following other authors, it is contended here that the duty affirmed in Article 57(1) of AP I is "general, broad, and flexible".[62] The general and wide-ranging nature of the duty can be deduced first from the opening words of the provision explicitly indicating that it applies to "military operations" in general and not merely to attacks.[63] While the term "constant care" is not defined in IHL, the adjective "constant" clearly implies that the duty is not subject to temporal limitations and applies at all times.[64] Rather than listing specific types of harm that should be mitigated, the provision contains an open-ended injunction "to spare" civilians. The plain meaning of this directive, certainly when read in light of the protective object and purpose of AP I, suggests that belligerents must constantly strive to spare civilians from any harm that might be caused by their military operations in armed conflict. Indeed, it has been argued that the provision "should be taken literally: total avoidance of damage to the civilian population is the standard that combatants should seek to achieve in all cases".[65] This reading aligns well with the UN General Assembly's affirmation that "[i]n the

58 Jean-François Quéguiner, "Precautions under the Law Governing the Conduct of Hostilities", *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 796–797 (insisting that this provision is not merely inspirational and establishes concrete legal obligations).

59 International Law Association Study Group on the Conduct of Hostilities in the 21st Century (ILA Study Group), "The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare", *International Law Studies*, Vol. 93, 2017, p. 381.

60 See e.g., ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Preliminary Objections, *ICJ Reports 2011*, para. 134, referring to "the principle that words should be given appropriate effect whenever possible".

61 ICRC Commentary on AP I, above note 15, para. 3685 indicates that the object and purpose of AP I is "to improve the protection provided by the [Geneva] Conventions to the victims of international armed conflicts". The Commentary further indicates (at para. 1863) that "the foundation on which the codification of the laws and customs of war rests" is to ensure that the civilian population and civilian objects are respected and protected in armed conflict.

62 Asaf Lubin, "The Duty of Constant Care and Data Protection in War", in Laura A. Dickinson and Edward Berg (eds), *Big Data and Armed Conflict: Legal Issues Above and Below the Armed Conflict Threshold*, Oxford University Press, Oxford, 2023, p. 236. See also ICRC, *Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas*, Geneva, 2022, p. 102.

63 ILA Study Group, above note 59, p. 380.

64 A. Lubin, above note 62, p. 238.

65 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 4th ed., Cambridge University Press, New York, 2011, p. 113.

conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations".[66] Further indication that the "ravages of war" from which IHL seeks to spare civilians encompass a wide range of dangers has been deduced from the language of Article 58 of AP I concerning precautions against the effects of attacks, which calls for precautions "against the *dangers* resulting from military operations".[67]

The present authors submit that the "ravages", "dangers" and "injury, loss or damage" from which parties to conflict must constantly endeavour to spare civilians pursuant to Article 57(1) of AP I and the related rule of customary international law should be understood to extend beyond physical harm and encompass mental harm.[68] It is further submitted that "[c]onstant care requires situational awareness of the violence and harm that has befallen the civilian population before another operation or attack is commenced"[69] – that is, that the general injunction to spare civilians from harm mandates that parties to an armed conflict attend to the cumulative harmful effects of their actions, including any cumulative mental harm they cause, and constantly seek to avoid or mitigate them.

While serving to establish a broad obligation to seek the total avoidance of civilian harm at all times and in all military operations, the term "constant care" also serves to circumscribe the scope of the obligation. Referring to required conduct rather than a mandated outcome, this wording indicates that the obligation is an obligation of means, not result. It obliges parties to conflict to do everything that can reasonably be expected of them under the circumstances ruling at the time to avert civilian harm. Accordingly, the duty of constant care has been characterized as "a positive and continuous obligation aimed at risk mitigation and harm prevention and the fulfillment of which requires the exercise of due diligence".[70] Similarly, it has been contended that the duty of constant care imposes a "clear and simple" demand to, "whenever operationally feasible, take measures designed to mitigate risk to civilians and civilian property",[71] and that "the commander will have to bear in mind the

66 UNGA Res. 2675, "Basic Principles for the Protection of Civilian Populations in Armed Conflict", 9 December 1970, para. 3.

67 Emphasis added. See A. Lubin, above note 62, p. 235.

68 For a similar view, see Eliza Watt, "The Principle of Constant Care, Prolonged Drone Surveillance and the Right to Privacy of Non-Combatants in Armed Conflicts", in Russell Buchan and Asaf Lubin (eds), *The Rights to Privacy and Data Protection in Times of Armed Conflict*, NATO CCDCOE Publications, Tallinn, 2022, p. 176.

69 F. Ní Aoláin, above note 30.

70 ILA Study Group, above note 59, p. 381.

71 Geoffrey S. Corn and Tyler R. Smotherman, "Improving Compliance with International Humanitarian Law in an Era of Maneuver War and Mission Command", *SMU Law Review*, Vol. 78, No. 1, 2025, p. 34. The qualifier "feasible" is understood to signify that which is "practicably possible, taking into account all circumstances ruling at the time"; see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, Rule 15, available at: https://ihl-databases.icrc.org/en/customary-ihl/v2/rule15. This qualifier, which features elsewhere in AP I Article 57, is not expressly specified in Article 57(1), but as observed, the duty of constant care *is* clearly dictated by what is reasonably possible in the prevailing circumstances.

effect on the civilian population of what he is planning to do and take steps to reduce that effect as much as possible".[72]

The flexibility of the duty to take precautions stems on the one hand from the temporally unlimited and otherwise broad injunction that it imposes on the parties to an armed conflict, and on the other hand from the wide margin of discretion that it leaves them to determine what is reasonably possible under the prevailing circumstances.[73] These contrasting forms of flexibility carry corresponding positive and negative implications for the purpose of averting cumulative mental harm. As submitted, the breadth of the injunction lends credit to the view that parties to conflict have a legal duty to mitigate such harm. Conversely, the wide discretion that the parties have at their disposal raises concern that even if such a duty were to be recognized in principle, it would have limited practical import.

Even a good-faith assessment of what is reasonably possible under the circumstances may limit the extent to which belligerents will be required to mitigate cumulative mental harm. Certain levels of mental anguish among civilians, such as fear, anxiety and apprehension, are an inevitable feature of situations of armed conflict, especially when hostilities occur in proximity to the civilian population, and it would not be reasonably possible for belligerents to fully spare civilians from such harm. At the same time, the duty of constant care should be understood as requiring parties to conflict to seek to avoid or at least minimize, to the extent possible, such mental harm, especially with respect to military operations that are expected to cause mental harm of a particularly traumatizing, disruptive and pernicious nature.

The scope of the obligation to spare civilians from mental harm may be further limited because of practical difficulties in anticipating it. Indeed, while it is generally relatively straightforward to predict physical harm resulting from military operations undertaken in physical space, it may not always be reasonably possible to foresee how such operations will affect people's mental well-being. The practical difficulties associated with anticipating harm to civilians (especially mental harm), and thus with taking steps to avoid it, will of course only be compounded when the assessment concerns the cumulative effect of multiple actions as opposed to an individual act.

While there are thus reasons for concern that parties to conflict will take advantage of the wide margin of discretion that they have in implementing their duty of constant care to effectively sidestep the obligation, at least when it comes to cumulative mental harm, there are also considerations that serve to temper such concerns. As the Trial Chamber of the ICTY has observed, the Martens Clause enjoins reference to the "principles of humanity" and to the "dictates of public conscience" whenever interpreting a rule of IHL that "is not sufficiently rigorous or precise".[74] Accordingly, the Trial Chamber asserted that

72 UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004, § 5.32.1.

73 See Amichai Cohen and David Zlotogorski, *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures*, Oxford University Press, New York, 2021, p. 199, referring to a "zone of reasonableness".

74 ICTY, *Kupreškić*, above note 27, para. 525.

> the prescriptions of Articles 57 and 58 [of AP I] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.[75]

In line with the interpretive approach thus prescribed, the duty of constant care must be understood to mandate that parties to conflict take concrete positive steps to implement their obligation to spare civilians from harm, including cumulative mental harm. Accordingly, it is posited here that the parties must, at the very least, establish a framework to ensure that any members of their personnel involved in military operations are duly instructed and trained to take constant care to avert such harm and that guidelines are set in place to that end. Among other things, such guidelines should instruct those responsible for implementing military operations on specific measures that they must implement to assess the possible harmful implications of such operations – including the cumulative implications of various elements that they entail – for the physical *and mental* well-being of the civilian population. The guidelines should further specify how the findings of such assessments should be used to inform the subsequent planning and implementation of the operation, notably in the choice of means and methods of warfare, with a view to averting civilian harm, including cumulative civilian harm, to the fullest extent reasonably possible. Importantly, such instruction, training and guidelines must take into account the context-specific likelihood of particular types of harm, including mental harm.[76]

Since the duty is "constant", measures to spare civilians must be undertaken throughout the entire cycle of the armed conflict (and arguably even during peacetime preparations), from the training of troops through to the planning of the operation and in assessments conducted during and after completion of the operation. In implementing these measures, the parties will still benefit from a considerable margin of discretion as they assess what is feasible or reasonably possible under the circumstances. That said, a party that fails to set in place any meaningful framework or guidelines for sparing civilians from cumulative mental harm could clearly not be said to be taking constant care to avert such harm. There is, therefore, a twofold duty encompassed under constant care: first, to establish an internal infrastructure that enables assessment of cumulative mental harm, and second, to implement that internal capacity in specific military operations.

75 *Ibid.*

76 See similarly, in relation to the rule on proportionality, S. Holmes, above note 13. Across many obligations, IHL accommodates such context-specific considerations; for instance, on "effective advance warning", the concept of "effectiveness" has been considered to entail an assessment "in the light of the overall circumstances that prevailed and the subjective view of conditions that the civilians concerned would take in deciding upon their response to the warning". *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009, para. 542.

Proportionality

Pursuant to the principle of proportionality, established both in treaty law and customary international law,[77] parties to conflict must refrain from "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".[78] Two key questions arise in the application of this obligation to cumulative mental harms. First, does the obligation apply to mental harm? Second, if it does, how far does its protection reach? In other words, mental harms of what temporal, geographical and causal proximity fall within its scope?

Mental harm as "injury"

Whether conflict-related mental harm can be addressed through the principle of proportionality is a matter of treaty interpretation for the provision in Article 51 of AP I,[79] and a matter of customary law identification for its customary equivalent.[80] What matters here is whether the term "injury" used in Article 51, and accepted as part of the customary rule, can be interpreted to cover not only physical harm but also forms of mental harm.

As a matter of semantics, the ordinary meaning of the term "injury" is "hurt or loss caused to or sustained by a person or thing; harm, detriment, damage".[81] The term is therefore capable of accommodating a wide variety of harms, of both a physical and mental nature. What matters for the purposes of interpreting AP I, however, is how its drafters understood "injury", both at the time of drafting and in the term's capacity to evolve through time. Neither the discussions at the Diplomatic Conference leading to the adoption of AP I nor the ICRC Commentary on Article 51 address – let alone resolve – this question, but importantly, they do not suggest any restriction of the term to physical harms.

What seems clear is that the drafters of AP I intended the treaty to be of long-lasting relevance. The use of the generic term "injury" suggests that the provision in question was drafted in a way capable of accommodating change through time via evolutionary interpretation,[82] but how a term evolves is a more complex question. In this regard, Courts have looked at societal understandings and

77 AP I, Art. 51(5)(b); ICRC Customary Law Study, above note 54, Rule 14.

78 AP I, Art. 51(5)(b).

79 VCLT, above note 43, Arts 31–34.

80 International Law Commission, *Draft Conclusions on the Identification of Customary International Law*, 2018.

81 "Injury", *Oxford English Dictionary*, available at: www.oed.com/search/dictionary/?scope=Entries&q=injury.

82 On evolutionary interpretation, Eirik Bjorge, *The Evolutionary Interpretation of Treaties*, Oxford University Press, New York, 2014. See also, on the interpretation of "objetos de comercio", ICJ, *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *ICJ Reports 2009*, p. 213.

particular trends in the practice of States.[83] While there is limited practice of States on the question of mental harm under the principle of proportionality,[84] societies have come to understand injury more broadly, and to include mental harms in its definition. This is particularly obvious in the treatment of injury as it relates to the experience of veterans.[85] Further, the context of AP I confirms a view that "injury" is not to be limited to physical harms. The concept of "injury" is also dealt with in Article 85 of AP I, the provision on the repression of grave breaches. Under this provision, a set of violations under IHL, when committed wilfully and causing death or serious injury to body and health, trigger special repressive duties for the parties.[86] Of particular note is the reference to "injury to body *and health*" (emphasis added), which seems to extend the scope of the term beyond pure bodily harm. And finally, some have argued that this extended interpretation of the term is supported by the object and purpose of AP I.[87]

In the literature, "injury" has typically been associated with physical harms, such as burns, blindness or loss of limbs.[88] In recent years, however, academics have put forward a number of interpretations of this provision that tie it more closely to mental harms. Schmitt and Highfill, for instance, state that

> cognitive or psychological conditions should be understood to be encompassed within the "incidental injury" when they are caused by physical brain trauma, which undeniably qualifies as incidental injury for the purpose of the rule of proportionality when suffered by a civilian.[89]

In tying such cognitive and psychological conditions to the occurrence of traumatic brain injury, they exclude harm that is purely psychological in nature.[90] Others disagree with such an exclusion: Lieblich, relying on a textual and teleological interpretation of Article 51, advances the argument that even stand-alone mental harm can qualify as "injury" under the provision.[91] A similar argument is made by Knuckey, Moorehead, McCalley and Brown, who accept that serious and long-term

83 European Court of Human Rights, *Vallianatos and Others v. Greece*, Appl. Nos 29381/09, 32684/09, Judgment (Grand Chamber), 7 November 2013, para. 91.

84 The NATO *Allied Joint Doctrine for Joint Targeting* acknowledges, under the heading "Collateral Damage Considerations", that "[e]mploying a range of capabilities in engagements can result in effects in the virtual and cognitive dimensions, some of which may be undesirable". NATO, *Allied Joint Doctrine for Joint Targeting*, AJP-3.9, Edition B, Version 1, November 2021, p. 1-28. The paragraph continues by discussing the need for a gender analysis and understanding the human environment in order to reduce risks, though it cautions that "the risk estimate for effects in these two dimensions may not achieve the same level of prediction as the physical one". Under the *Joint Doctrine*, "cognitive" is understood as "psychological/behavioural" effects (p. 1-2).

85 Frank Ochberg, "An Injury, Not a Disorder", *Military Review*, Vol. 93, No. 2, 2003; Sonya B. Norman and Shira Maguen, "Moral Injury", US Department of Veterans' Affairs, available at: www.ptsd.va.gov/professional/treat/cooccurring/moral_injury.asp.

86 AP I, Art. 85(3).

87 E. Lieblich, above note 19, p. 201.

88 S. Knuckey *et al.*, above note 22, p. 367.

89 M. N. Schmitt and C. Highfill, above note 20, p. 93.

90 *Ibid.*, p. 92.

91 E. Lieblich, above note 19, pp. 200–201.

harm to mental health following exposure to a traumatic event qualifies as "injury".[92] More and more, we see authors whose views favour the inclusion of mental harms under the term "injury" in the rule of proportionality.[93]

Thus, the IHL obligation to abstain from disproportionate attacks provides no cogent reasons to restrict the interpretation of "injury" to physical harms only. That it is not so confined does not mean that it covers all forms of impact on mental health, however; if "injury" were to be equated with *any* mental harm, including the experience of fear and intimidation intrinsic to conflict, this reading may constrain virtually all attacks against lawful targets that occur in the vicinity of civilians. Given this, authors have sought to constrain the application of the rule to impacts on mental health of a particular severity, such as PTSD and other mental health disorders. While it is not the intention of this article to set a precise boundary of relevant mental harm, it agrees with existing literature that the rule should, first, exclude general feelings of fear, and second, lend itself to capturing mental harms of a particular severity. The law can begin to operate with certain categories of mental harm deemed "injurious", either because the cognitive and psychological conditions are the result of specific physical effects,[94] or because of the crossing of a severity line[95] (for instance, PTSD as a result of experiencing – including by witnessing – an attack).[96]

Reasonably foreseeable cumulating causes of mental harm

Parties to conflict are not required to consider every civilian harm consequent to an attack in their proportionality assessments; rather, they are required to make decisions on the basis of "expected" incidental civilian harm. This expectation has been interpreted to cover "reasonably foreseeable" civilian harm.[97] The use of the phrase "may be expected" in Article 51(5)(b) of AP I clarifies that the inquiry is not into whether the attacker *foresaw* the harm, but whether the harm was *foreseeable* to a reasonable person in the circumstances of the attacker.[98]

All relevant effects that are foreseeable, both direct and reverberating, are covered by Article 51(5)(b) and must guide the decision-making of the party to

92 S. Knuckey *et al.*, above note 22.

93 G. Bosi, above note 26; Isabel Robinson and Ellen Nohle, "Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas", *International Review of the Red Cross*, Vol. 98, No. 901, 2016, p. 129; Emanuela Chiara-Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, Chatham House, London, December 2018, pp. 33, 41.

94 M. N. Schmitt and C. Highfill, above note 20, p. 94.

95 Thresholds of severity for mental harm have also been considered within the ambit of other rules, such as the crime of genocide. In *Akayesu*, for instance, the Trial Chamber of the International Criminal Tribunal for Rwanda considered that while mental harm must transcend minor or temporary impairment, it need not be permanent or irreversible. International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 502.

96 E. Lieblich, above note 19, p. 205; S. Knuckey *et al.*, above note 22, p. 395.

97 E. Chiara-Gillard, above note 93, pp. 15–18.

98 ICTY, *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment and Opinion (Trial Chamber), 5 December 2003, para. 58.

conflict.[99] While the direct effects of attacks, at least in the kinetic context, typically involve death, injury and destruction of property, and directly follow the point of impact, reverberating effects cover a wider range of impacts that may be temporally and geographically distant from the attack. Thus, the reverberating effects of an attack can manifest in a number of steps. Gillard provides an example of attack which "damages an object providing vital services to the civilian population, such as an electricity generation and distribution system, which in turn prevents water purification systems from operating, leading to an outbreak of waterborne diseases among the civilian population".[100]

If these harms are reasonably foreseeable, they should be included in the act of weighing harm against military advantage. Foreseeability will depend, among other factors, on the type and context of the attack,[101] its location, and the weapons used.[102] Importantly, foreseeability would depend on the population affected by the attack – certain populations would be more susceptible to mental harm, given their particular vulnerability (for instance, if they have been subjected to long-term conflict, or a conflict of a particular intensity, or have been displaced or malnourished). Even if the vulnerability of the civilian population, and thereby its higher likelihood of suffering from mental harm, is the consequence of a prior *lawful* attack (or attacks), the party to the conflict must factor in this vulnerability when making a proportionality assessment.

Importantly for the purposes of compliance with their obligation of proportionality, parties to a conflict must be equipped with the tools and knowledge to assess the types of incidental civilian harms they ought to reasonably foresee under the rule. If the rule requires consideration of relevant mental harms, then logic dictates that parties to conflict must possess the capacity to engage in such consideration. Applied to the context of cumulative mental harms, this means that parties to conflict must, *inter alia*, develop an understanding of the sources of mental harm in armed conflict; plan their operations in ways that would minimize the risk of such harm; acquire sufficient knowledge of the particular vulnerabilities of a civilian population that would make it more likely to suffer such mental harm; and consider the impact of context on the manifestation of mental harm. Admittedly, it may be difficult to causally tie a particular attack to a particular mental harm manifesting in

99 ILA Study Group, above note 59, p. 24.

100 E. Chiara-Gillard, above note 93, p. 18.

101 In the context of recurrent attacks, see Solon Solomon, "Bringing Psychological Civilian Harm to the Forefront: Incidental Civilian Fear as Trauma in the Case of Recurrent Attacks", *EJIL: Talk!*, 25 April 2018, available at: www.ejiltalk.org/bringing-psychological-civilian-harm-to-the-forefront-incidental-civilian-fear-as-trauma-in-the-case-of-recurrent-attacks/.

102 Laurent Gisel (ed.), *The Principle of Proportionality in the Rules governing the Conduct of Hostilities under International Humanitarian Law*, report of the International Expert Meeting, ICRC and Université Laval, 22 June 2016, p. 36: "From a different angle, it was suggested that mental harm could be analysed with regard to specific weapons, identifying whether there are means or methods of warfare that would be more prone than others to cause mental harm, such as the use of high-explosive weapons in urban areas. This was viewed as primarily relevant for precautions in the choice of means and methods of warfare. However, assuming that mental harm constitutes relevant incidental harm for precautions in attack, it would, from that angle, also be relevant for proportionality."

a particular individual, but establishing a connection between attacks and relevant mental harms is not impossible. For instance, statistical analysis of the prevalence of mental disorders in a population could allow parties to conflict to understand how their attacks might create or exacerbate harmful mental health conditions in that population.

As noted, the sequence of events causing cumulative mental harm during an armed conflict will not necessarily consist only of attacks. Relocation directives causing mass displacement of civilians, for instance, may cause or contribute towards mental harm.[103] Even if the rule of proportionality established in Article 51(5)(b) of AP I cannot extend to harms caused within operations wider than individual attacks, some have argued that a broader general principle of proportionality constrains the behaviour of parties to conflict. Under this view, proportionality is a general principle of law in the meaning of Article 38(1) of the Statute of the ICJ, which requires an equitable balance between competing legal interests for all conduct of parties to conflict (not limited to attacks).[104] The conventional and customary rules on proportionality in attack represent, according to this argument, a concrete manifestation of this general principle of law in IHL; however, it has been posited that these rules "do not exhaust the normative content of proportionality as a general principle of the law of armed conflict".[105] On the view that proportionality is a general principle of law, it could be argued that the incidental civilian harm assessment under proportionality as a general principle of IHL reaches beyond the harmful effects of attacks to encompass civilian harm, including cumulative mental harm, caused by other activities undertaken in military operations. While the present article does not take a position on the viability of this line of argument, it bears emphasizing that protections under this claimed principle could arguably be covered, at least in part, by the duty of constant care under Article 57(1) of AP I and customary law: a party to conflict cannot discharge its proportionality duties unless it has secured an internal assessment capacity and put that capacity to practice in its battlefield conduct.

Conclusion

Civilian harms arising from armed conflict are neither confined to the physical realm nor uniquely caused by singular, isolated events. Reporting from armed conflicts strongly suggests that civilians are left with mental scars – in the form of PTSD, depression and other disorders – as a consequence of multiple isolated or interrelated actions undertaken during military operations which, taken individually, may have been lawful. What this article has sought to demonstrate is that, first, human minds are protected from harm under existing IHL, and second, despite the many

103 Eitan Diamond and Ellen Nohle, "Humanitarian Displacement? The (Mis)Appropriation of Humanitarian Principles to Justify Mass Displacement", *Yearbook of International Humanitarian Law*, Vol. 27, 2024, p. 59.

104 Jann Kleffner, "Military Collaterals and *Ius in Bello* Proportionality", *Israel Yearbook on Human Rights*, Vol. 48, 2018, p. 56.

105 *Ibid.* See also, A. Cohen and D. Zlotogorski, above note 73, Chap. 3.

legally mandated *individualized* assessments of attacks, the law is also capable of capturing harms that emerge during and from a cumulation of events in the course of military operations.

Given the practical difficulties in foreseeing precise forms of mental harm and their relation to conduct in military operations, the most important question is one of meaningful operationalization of existing protections. A core argument of this article is that to comply with the law, parties to conflict must ensure a baseline capacity to understand, assess and mitigate mental harms likely to arise from military operations. This baseline capacity would require work with psychologists and psychiatrists, and training of the relevant military personnel. Further, it will come into play at different stages of actual hostilities, sometimes requiring the taking of positive measures to limit the risk of cumulative mental harm, and sometimes even requiring parties to refrain from particular attacks.

Addressing cumulative mental harm is not an operational impossibility, and the occurrence of such harm is not an inevitability of armed conflict. With advances in our understanding of the human mind, and with better and more comprehensive reporting from armed conflicts, it becomes easier to appreciate the extent and severity of cumulative mental harms suffered by civilian populations. Properly understood and construed, IHL does and must provide protection from such harms for the civilian population.