Concretizing Mental Harm: Warfare's Psychological Impact on Civilians and the Return to Domestic Law for Establishing a Standards-Setting Paradigm

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Abstract

International criminal courts and tribunals do not assess warfare's psychological impact on civilians in a scientifically consistent way. In some instances, they refer to mental health expert opinions in general, whereas in others they completely ignore any such expert opinions. The problem is further exacerbated by the fact that domestic courts avoid referring not only to expert opinions, but also to the notion of the civilians' sustained mental harm altogether. This acquires additional importance given the augmenting role domestic courts have come to play the last few years in conducting the trials of crimes related to warfare.

On that account, this Article lays out the way mental harm has been discussed in domestic law in a number of jurisdictions and how it can set a standard for such mental harm discussion both by other domestic courts as well as by the International Criminal Court.

I. INTRODUCTION

The establishment of the International Criminal Court (ICC) in 2002 took place with "a grandiose ambition."[1] Yet, while that court has so far made important contributions to the field of international criminal justice, its treatment of the issue of civilian mental harm in warfare has not been thoroughly explored. It is not only that such harm is assessed without recourse to the opinions of mental health experts or with recourse only to opinions relating to the wider affected civilian population rather than to the individual civilians testifying before the judges,[2] but also that the ICC has not delineated any features such harm must have in order to be deemed "serious" and thus lead to international criminal liability.[3] On this, the ICC sits in contrast to the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which have held that serious mental harm is harm that goes beyond temporary unhappiness, embarrassment, or humiliation and leads to a grave and long-term disadvantage to that person's ability to lead a normal and constructive life.[4]

Moreover, as criticism against the ICC has mounted for focusing on Africa and for being selective in cases,[5] the last few years—and particularly the crimes committed in the Syrian civil war—have underlined the potential for national courts to emerge as agents of international criminal justice.[6] These courts have equally avoided dealing with civilian mental harm, and this is true not only on a criminal but also on a tort law level.[7]

Along these lines, looking into various national jurisdictions, this Article endeavors to demonstrate how notions of mental harm share certain common features that should serve as standards in the definition of the term by national courts, enabling them to concretize and ultimately discuss it. These features include, on the one hand, the fact that mental harm must be seen as comprising instances of psychiatric disorders—PTSD and depression being

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[1] Ernst Hirsch Ballin, *The Value of International Criminal Justice: How Much International Criminal Justice Can the World Afford?*, 19 INT'L CRIM. L. REV. 201, 206 (2019).

[2] *See* Solon Solomon, International Criminal Courts and the Introduction of the Daubert Standard as a Mode of Assessing the Psychological Impact of Warfare on Civilians 40, 40–54 (Oct. 5, 2019) (D.Phil. thesis, King's College London), https://perma.cc/29NT-C6UF.

[3] *Id.* at 55–56.

[4] Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 513 (Aug. 2, 2001); *see also* Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 814 (Dec. 1, 2003) (where the ICTR held that mental harm had to involve "some type of impairment of mental faculties"); Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, ¶ 291 (June 17, 2004); Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgment, ¶ 633 (Jan. 22, 2004); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 59 (June 7, 2001).

[5] Catherine Gegout, *The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace*, 34 THIRD WORLD Q. 800, 801 (2013).

[6] *See infra* Part III.

[7] *Id.*

among the most common ones as far as war trauma is concerned—and, on the other hand, instances where the trauma symptoms are so intense and persistent that they cause long-term impairment of the affected civilian's ability to live a normal life.

The concretizing of these standards through resort to domestic law would not only help domestic courts take a stance on mental health issues in the course of relevant trials, but the existence of these common mental harm features deriving from national jurisdictions could also instigate the ICC to adopt a definition of serious mental harm similar to the one endorsed by the ICTY and the ICTR. Under Article 21(1)(c) of the Rome Statute, to the extent that a domestic arrangement pervades a number of different jurisdictions and constitutes a general principle, it can constitute a source of international criminal law.[8] The need for serious mental harm to be delineated is cardinal, especially given the legality principle that pervades both criminal and international criminal law and according to which the elements of the criminal conduct must be expressly defined in advance.[9]

If civilian suffering is left undefined, with no parameters to delineate it, it risks being interpreted either too broadly or too narrowly. If interpreted too broadly, all cases where fear exists among civilians in warfare would incur criminal liability for the instigators or architects of a particular military operation. Yet, the general perception is that it is expectable for war to create feelings of fear among civilians. Broad incurrence of criminal liability for incidental civilian fear would run contrary to this perception. On the other hand, interpreting civilian mental harm too narrowly would also be problematic. For example, interpreting serious mental harm to comprise only serious psychiatric illnesses would leave outside the court's scope cases where the civilians, albeit not suffering from psychiatric illnesses, have nevertheless sustained psychological trauma.

This Article will proceed as follows: Part II will discuss how civilian mental harm in the context of warfare finds expression in the laws of war as well as in international criminal law. Consequently, Part III will pose the problem of how such harm has not been adequately addressed so far by national courts. Trying to trace the features of mental harm in domestic law, Part IV will explore how mental harm in criminal law goes beyond the notion of insanity and also comprises mental disorders. Going one step further, Part V will further discuss how such harm in tort law must not be necessarily demonstrated through the diagnosis of a psychiatric disorder, but can be equally asserted if the trauma symptoms experienced by the individual in question are severe enough to persist. Finally, Part VI will look at the significance these observations have

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[8] *See* Rome Statute of the International Criminal Court art. 21(1)(c), July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute]. For the fact that general principles of law need to have a universality in order to constitute sources of international law, see Portugal's submission to the ICJ in the Right to Passage case, cited by the ICJ in Case Concerning Right to Passage over Indian Territory (Portugal v. India), Judgment, 1960 I.C.J. 6, 9 (Apr. 12). For a discussion of Article 21(1)(c) of the Rome Statute, see Solomon, *supra* note 2, at 82–90.

[9] ANTONIO CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW 27–28 (3d ed. 2013).

for the way serious mental harm is to be discussed in an international criminal judicial context.

II. DISCUSSING CIVILIAN MENTAL HARM IN THE CONTEXT OF WARFARE

Discussion of civilian mental harm in the context of warfare has two legs. One rests in the laws of war and the other in international criminal law. When it comes to the laws of war, the notion of harm gradually came to encompass cases of psychological scarring inflicted on the victims.[10] Cardinal in this respect has been the role of the Geneva Conventions, which came to view the person holistically, as body and soul, holding that the willful causation of great suffering constitutes a grave breach of the laws of war.[11] In that sense, the Conventions were meant to be seen as alluding to "the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers."[12]

Based on this expanded emphasis on mental health, both Additional Protocol I to the Geneva Conventions regarding international armed conflicts, as well as Additional Protocol II on non-international ones, hold that the intentional terrorization of civilians constitutes a laws of war violation.[13] Yet, for years, the attribution of legal significance to civilian mental harm in warfare did not go beyond this intentional causation framework.

For example, scholars found no legal blemish in a "shock and awe" air offensive designed to pound military objectives and break the back of the enemy armed forces, noting that "a large-scale aerial bombardment-inflicting extensive destruction on military units and objectives-is liable to terrify civilians and maybe inimical to their morale, but it does not per se taint such an attack with illegality."[14] Similarly, provisions like Article 54(2) of

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[10] Eliav Lieblich, *Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law*, *in* APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES: INTERNATIONAL AND DOMESTIC ASPECTS 185 (Derek Jinks et al. eds., 2014).

[11] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

[12] 1 INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 201 (Jean S. Pictet ed., 1958).

[13] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts art. 51(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts art. 13(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

[14] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT 119 (2004); *see also* CHRISTOPHER GREENWOOD, ESSAYS ON WAR IN INTERNATIONAL LAW 644 (2006); MICHAEL SCHMITT, TALLIN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 33 (2013).

Additional Protocol I, referring to the prohibition on attacks against objects indispensable to the survival of the enemy civilian population, came to be read as not prohibiting the incidental distress of civilians resulting from otherwise lawful military operations entailing a military objective.[15]

Nevertheless, in the last few years, scholarly voices have augmented the argument for the inclusion of civilian mental harm as a legal parameter embedded in the concept of harm that *jus in bello* proportionality entails.[16] For their part, international organizations like NATO have yet to consider incidental mental harm as a parameter in the way their modus operandi affects the local civilian population. [17]

Equally, in international criminal law, war violations that may give rise to criminal liability can take place within the realm of genocide, but, more importantly, such acts constitute war crimes.[18] While the concept of a war crime first appeared in international law in the 19th Century,[19] it did not appear in conjunction with individual criminal responsibility, but rather as a facet of state responsibility; put simply, states had to punish the conduct of their soldiers and officers that went beyond the precepts of the accepted combat behavior each state had set. This was the case, for example, with the Lieber Code, which was meant to punish "all cruelty and bad faith concerning engagements concluded with the enemy during the war."[20] In the 19th Century, and well past the dawn of the 20th Century, The Hague Regulations and the Geneva Conventions called for states to bring to justice and penalize any behaviors that went beyond the accepted norms on issues such as the treatment of war prisoners and the conduct of warfare.[21]

The atrocities committed during World War II changed the way international law came to see the concept of a "war crime." International law stressed the perception that any state responsibility implications which would normally flow from violations of the laws of war—i.e., any wrongful breach of a rule—were not enough to punish the severity of the violations occurring and, thus, such violations must also bear criminal law implications on an individual

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[15] MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 381 (2d ed. 2013).

[16] Lieblich, *supra* note 10, at 185; Solon Solomon, *Bringing Psychological Harm to the Forefront: Incidental Civilian Fear as Trauma in the Case of Recurrent Attacks*, EJIL:TALK! (Apr. 25, 2018), https://perma.cc/XTS7-RWDC; Michael Schmitt & Chad Highfill, *Invisible Injuries: Concussive Effects and International Humanitarian Law*, 9 HARV. NAT'L SEC. J. 72, 93 (2018). *See also* ILA Study Grp., *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, 93 INT'L L. STUD. 322, 359–60 (2017).

[17] BEN KLAPPE, PREVENTION AND REPRESSION OF (SEXUAL) VIOLENCE, EXPLOITATION AND ABUSE IN THE CONTEXT OF PEACE OPERATIONS IN TERRY GILL & DIETER FLECK, THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 496 (1st ed. 2010).

[18] Oona Hathaway et al., *What Is a War Crime?*, 44 YALE J. INT'L. L. 53, 54 (2019).

[19] *Id.* at 60.

[20] General Orders No.100: Instructions for the Government of Armies of the United States in the Field, art. 11 (Apr. 24, 1863).

[21] Hathaway et al., *supra* note 18, at 58–59.

level.[22] Following the Nuremberg trials, international law has underlined the individual criminal facets of war crimes in a number of cases—for example, in the concept of grave breaches contained in the Geneva Conventions and its Additional Protocol.[23]

Along these lines, war crimes became a core element of international criminal law, embedded in the various statutes of the international criminal courts and tribunals. War crimes are enumerated in Article 8 of the ICC Statute.[24] There, drawing from a similar enumeration in the ICTY[25] and the ICTR[26] Statutes, the drafters of the ICC Statute either incorporated some of the war crimes punishable by the previous international tribunals or included new crimes.[27]

International criminal courts generally acknowledge the fact that fear is an accompanying effect of violence in an armed conflict[28] and that "a certain degree of fear and intimidation among the civilian population is present in nearly every armed conflict."[29] At the same time, international criminal judges have acknowledged that, if such fear exceeds certain levels, then it should lead to international criminal accountability. For example, in the *Galić* case, the ICTY described terror as "extreme fear," namely fear that is distinct and beyond the level of the fear that develops among civilians in the wake of an attack.[30] In the *Milošević* case, the ICTY reiterated this position,[31] further clarifying the notion by referring to terror as "a fear calculated to demoralize,

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[22] Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L. CRIM. JUST. 830, 839 (2006). For a general discussion on the role the individual plays in the assertion of war crimes by international criminal law, see GERRY SIMPSON, LAW, WAR AND CRIME: WAR CRIMES, TRIALS AND THE REINVENTION OF INTERNATIONAL LAW 54–55 (2007).

[23] *See* Geneva Convention I, *supra* note 11, art. 49; Protocol I, *supra* note 13, art. 85(5); Marko Divac Oberg, *The Absorption of Grave Breaches Into War Crimes Law*, 91 INT'L. REV. RED CROSS 163, 166 (2009). For the fact that the 1949 Geneva Conventions do not explicitly refer to war crimes, yet the penalization of the grave breaches should lead to such a conclusion, see CASSESE ET AL., *supra* note 9, at 67.

[24] Rome Statute, *supra* note 8, art. 8.

[25] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 2, 3, Sept. 2009, https://perma.cc/78BU-ABDE.

[26] S.C. Res. 955, annex, art. 4 (Nov. 8, 1994) (adopting the Statute of the International Tribunal for Rwanda).

[27] *See* Rome Statute, *supra* note 8, art. 8 (for examples of new crimes that the Rome Statute came to include, see art. 8 (2)(b)(viii) on the creation of settlements by an occupying power to an occupied territory and art. 8 (2)(iv) regarding the damage caused to the natural environment).

[28] *See* Prosecutor v. Milošević, Case No. IT-98-29/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007), https://perma.cc/MA95-YB3M.

[29] *Id.* ¶ 888.

[30] Prosecutor v. Galić, Case No. IT-98-29-T, Judgment and Opinion, ¶ 137 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); *see also* Prosecutor v. Fofana, Case No. SCSL-04-14-A, Judgment, ¶ 352 (May 28, 2008).

[31] *Milošević*, *supra* note 28, ¶ 888 (noting that "to constitute terror, an intent to instil fear beyond this level is required.").

to disrupt, to take away any sense of security from a body of people who have nothing [...] to do with the combat."[32]

Moreover, in the jurisprudence of international criminal courts and tribunals, the criminally denounceable character of spreading fear and terror to civilians is not always associated with the crime of terrorism.[33] For example, in *Kupreškić*, the ICTY Trial Chamber held that the killing and wounding of Bosnian residents of a small village had been undertaken with the intent to "spread terror among the population,"[34] yet the asserted crime for these physical attacks, as well as for the destruction of the civilians' property, was persecution.[35] This broadened view of civilian mental harm—as able to be detached from the crime of terrorizing civilians—was further underlined in the Strugar case, where the ICTY pointed out that the fact that a civilian was at risk of becoming victim to war crimes and other war atrocities was in itself a grave consequence of an unlawful attack, notwithstanding any physical injuries.[36]

In that sense, questions of mental harm fall equally under both categories. The war crime of intentionally causing serious mental harm is a crime found in the ICC Statute as well as in the statutes of the aforementioned international criminal tribunals.[37] At the same time, incidental civilian mental harm can fall under the auspices of a war crime under certain strict circumstances, which are nevertheless included only in the ICC Statute and not in its predecessors.[38]

The prosecution of international crimes can also take place by national courts through the notion of universal jurisdiction.[39] As a separate branch in international law, universal jurisdiction is a concept that predates the institution of international criminal law. It stems from the 18th Century perception that pirates should be deemed "enemies of mankind," or *hostis*

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[32] *Id.* ¶¶ 885–86 (quoting the prosecution's closing arguments).

[33] *See* S.C. Res. 955, *supra* note 26, art. 4; Statute for the Special Court for Sierra Leone, S.C. Res. 1315 (Aug. 14, 2000), art. 3(d).

[34] Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 749 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

[35] *Id.* ¶¶ 629–31.

[36] Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 221 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

[37] *See* S.C. Res. 827, art. 2 (May 25, 1993); S.C. Res. 955, *supra* note 26, art. 2; Rome Statute, *supra* note 8, art. 8(2)(a).

[38] *See* Rome Statute, *supra* note 8, art. 8(2)(b)(iv) (referring to incidental injury to civilians). Scholars argue such incidental injury includes mental harm. *See infra* Part III. For insight on the difficulties facing indictments on the basis of this particular provision, see generally Jessica C. Lawrence & Kevin Jon Heller, *The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute*, 20 GEO. INT'L ENV'T L. REV. 61 (2008).

[39] Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 INT'L REV. RED CROSS 375 (2006).

humanis generis,[40] with every nation in the world having jurisdiction to try any crimes of piracy on the high seas even if no specific bond exists between that nation and the defendants or the *locus delicti*, meaning the territory where the crime took place.[41] Throughout the centuries, the concept of universal jurisdiction has been broadened to include other cardinal crimes or *jus cogens* prohibitions, such as the crime of genocide,[42] the prohibition against slavery, and the prohibition against torture.[43]

At the same time, as much as the concept of universal jurisdiction broadened the potential scope of punishment for international crimes, a series of important cases in the last few decades have highlighted the procedural limitations of international criminal justice. For example, cases like that of Augusto Pinochet,[44] or the case of Sudan's Omar Bashir, have underscored the tensions between the prosecution of war crimes and the concept of immunities in international law.[45]

The war in Syria, the emergence of the Islamic State, and the fact that any crimes committed in the territories of Iraq or Syria could not be tried by the ICC due to lack of jurisdiction[46] render new prospects for universal jurisdiction to apply as a mechanism for ensuring justice. Yet, as this Author will argue in the following section, in the case of war crimes involving the incurrence of mental harm to the affected victims, national courts have placed new, substantive limitations on universal jurisdiction by not referring fully and holistically to such mental harm as a distinct legal measure.

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[40] Mark Chadwick, *Emerging Voices: Theorising Universal Jurisdiction—Time to Reappraise the "Piracy Analogy"?*, OPINIO JURIS (Aug. 19, 2019), https://perma.cc/H2ST-W6WG.

[41] SIMPSON, *supra* note 22, at 162; Luise K. Müller, *Universal Jurisdiction, Pirates and Vigilantes*, 22 CRITICAL REV. INT'L SOCIAL & POL. PHIL. 390, 392 (2019).

[42] See the utterance of the Israeli Supreme Court in the trial of Eichmann that "[t]he substantive basis underlying the exercise of universal jurisdiction in respect of the crime of piracy also justifies its exercise in regard to the crimes with which we are dealing in this case." CrimC 40/61 Eichmann v. A-G Israel, 36 ILR 227, ¶ 12 (1968) (Isr.).

[43] MARK CHADWICK, PIRACY AND THE ORIGINS OF UNIVERSAL JURISDICTION: ON STRANGER TIDES? 4 (Brill Nijhoff, 2018).

[44] Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 EUR. J. INT'L L. 237 (1999), https://perma.cc/S53R-2D2W.

[45] Dapo Akande, *The Immunity of Heads of States of Nonparties in the Early Years of the ICC*, 112 AJIL UNBOUND 172 (2018); Jessica Needham, *Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law*, 17 AUCKLAND U. L. REV. 219 (2011).

[46] *See Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS*, INT'L CRIM. CT. (Apr. 8, 2015), https://perma.cc/VF2X-SKMS; for a critical reading of the Prosecutor's statement, see Mohammad Hadi Zakerhossein, *To Bury a Situation Alive – A Critical Reading of the ICC Prosecutor's Statement on the ISIS Situation*, 16 INT'L CRIM. L. REV. 613 (2016).

III. THE QUESTION OF CIVILIAN MENTAL HARM IN THE JUDGMENTS OF NATIONAL COURTS

The war in Syria and the emergence of ISIS have forced national courts, especially in Europe,[47] to once again examine the nexus between criminal law and war crimes.[48] Several investigations have opened in various European countries,[49] and judicial decisions have been issued by national courts relating to war crimes in Syria.[50] These cases can be largely separated into cases involving charges against Assad regime officials, cases relating to war crimes committed by anti-Assad forces, and cases relating to war crimes perpetrated by ISIS members.[51] The cases regarding Assad regime officials have not produced any tangible judicial results so far, and those concerning anti-Assad regime forces are fewer.[52] Along these lines, the focus falls on the cases involving ISIS members. Even the latter category can be distinguished into two distinct subgroups: one involving war crimes against civilians, including their maltreatment before their executions, and the other involving cases where emphasis is placed on the defilement of these civilians' bodies.[53] In both these subgroups of cases, reference to mental harm is absent from the courts' judgments.

For example, in a case involving an ISIS member who was accused of participating in the execution of seven soldiers in Syria, the Stockholm District Court referred to the fact that the victims seemed to have been maltreated before their execution.[54] The court explicitly cited, as a legal basis for its verdict,

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[47] Patrick Kroker & Alexandra Lily Kather, *Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany*, EJIL:TALK! (Aug. 12, 2016), https://perma.cc/N6TA-QNQP. For the question of why particularly European national jurisdictions undertook this task, see Beth Van Schaack, *National Courts Step Up: Syrian Cases Proceeding in Domestic Courts*, Feb. 14, 2019, at 8–15, https://perma.cc/U5E9-DT9X. For a list of Syria-related cases that opened in European jurisdictions over the last few years, see *Syrian Civil/Criminal Cases & Investigations of War Crimes (2011–present)*, CTR. FOR JUST. & ACCOUNTABILITY (Jan. 2020), https://perma.cc/9MQP-29MC.

[48] *See* Christophe Paulussen et al., *The Prosecution of Foreign Fighters Under International Humanitarian Law: Misconceptions and Opportunities*, ICCT (Dec. 13, 2019), https://perma.cc/Z8ZS-WTME; Beth Van Schaack, *Domestic Courts Step Up: Justice for Syria One Case at a Time,* JUST SECURITY (Mar. 25, 2019), https://perma.cc/NG3B-HQUD.

[49] *See* Thierry Cruvieller, *European Justice Strikes on Crimes in Syria*, JUSTICEINFO.NET (Feb. 21, 2019), https://perma.cc/7NC6-EJJQ.

[50] For example, see the case of Germany, where it was reported in 2019 that the state had approximately 80 international criminal law-related investigations under way, around half of which related to Syria and Iraq. *See* Van Schaack, *supra* note 47, at 18. For the fact that April 2020 marked the opening of the first case in Germany of state torture regarding Syrian officials, see *Dates Announced for Trial of Anwar R., Syrian Official Accused of War Crimes*, OPEN SOCIETY JUST. INITIATIVE (Mar. 10, 2020), https://perma.cc/3KGL-5M93. *See also generally supra* Part II.

[51] *See Syrian Civil/Criminal Cases & Investigations of War Crimes (2011–present)*, *supra* note 47.

[52] *Id.*; *see also Prosecutor v. Mouhannad Droubi*, INT'L CRIM. DATABASE, https://perma.cc/383Z-NN96 (last visited Oct. 5, 2021) (discussing the case before the Sodertorn District Court in Sweden and the relevant judgment).

[53] *Syrian Civil/Criminal Cases & Investigations of War Crimes (2011–present)*, *supra* note 47.

[54] Tingsrätt [TR B] [District Court: Criminal] 2017 p.1 Ö 3787-16 (Swed.).

Article 4 of Additional Protocol II,[55] which prohibits "violence to the life, health and physical or mental well-being of persons."[56] By not making any reference to the mental suffering these persons endured before their executions, the court seems to hold that, under Article 4 of Additional Protocol II, it is enough for one of these parameters to be fulfilled. According to this stance, once judges find that one of these parameters is met, they do not have to examine whether any of the other criminalized behaviors in the particular provision have also been committed. It would be superfluous to further discuss any criminal liability for the incurred mental harm once violence to life has been asserted.

Yet, such an approach is not substantiated by the wording of Article 4, which explicitly holds forfeit of life on one hand and infliction of physical or mental harm on the other as separate bases for criminal liability.[57] Along these lines, an automatic subjugation of mental harm to any murder discussion on the court's part does not do justice to the volition of the international lawmaker to portray mental harm as an explicit ground that can trigger international criminal liability.

The same is true also in cases referring to the decapitation of dead bodies by ISIS members, who then proceeded to be photographed next to the corpses. National courts have held that these actions constitute an insult to the dignity of the deceased.[58] On this account, these courts have sufficed to examine non-physical harm questions as relating only to the violations of the deceased persons' dignity and have not gone further to explore whether these persons also suffered mental harm prior to their deaths.[59] In that sense, national courts take a very restrictive approach, which may be correct on a positivist basis but which is dubious on whether it serves the interests of justice.

For example, in the *Oussama* judgment, both the District and the Appeal Courts focused on whether the acts of the defendant entered the realm of Common Article 3 of the Geneva Conventions.[60] The judges did not discuss whether any of the Additional Protocol II provisions could be deemed applicable as mirroring customary law.[61] Such a discussion would add to the legal analysis given that, apart from reference to outrages upon personal dignity on par with Common Article 3, Article 4 of Additional Protocol II

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[55] *Id.* ¶ 6.

[56] Protocol II, *supra* note 13, art. 4(2)(a).

[57] *Id.* (referring to "the life, health and physical or mental well-being of persons").

[58] For a list of such judgments issued by courts in Sweden, Finland, and Germany, see *Prosecuting War Crimes of Outrage Upon Personal Dignity Based on Evidence from Open Sources: Legal Framework and Recent Developments in the Member States of the European Union*, EUR. UNION AGENCY FOR CRIM. JUST. COOP. (Feb. 1, 2018), https://perma.cc/Q45Z-8CFK.

[59] *Id.*

[60] Prosecutor v. Oussama A., District Court, The Hague, ECLI:NL 2019:09/, Judgment, July 23, 2019, https://perma.cc/R23B-6KAV [hereinafter *Oussama A.*, District Court]; Prosecutor v. Oussama A., Court of Appeal, The Hague, ECLI:NL:GHDHA:2021:103, Judgment, Jan. 26, 2021, https://perma.cc/A9VV-FZCP [hereinafter *Oussama A.*, Court of Appeal].

[61] *See Oussama A.*, District Court, *supra* note 60; *Oussama A.*, Court of Appeal, *supra* note 60.

additionally includes acts of violence against the mental well-being of victims.[62] Such reference is absent from Common Article 3.[63] Thus, to the extent that Article 4 complements Common Article 3 in the modes of harm that can trigger international criminal liability, the judges should have examined whether the former mirrors customary international law. In case they held it did, the mental harm suffered by the victims before their deaths could be added as a separate basis for liability to their post-mortem humiliation or as an aggravating element to the sentencing calculation.

Similarly, in Germany, although judges have discussed how the decapitation of dead corpses constitutes a despicable act capable of impacting the aggravation of a sentence,[64] they have opted to look at such cases as falling only under § 8(1)(9) of the Volkerstrafgesetzbuch—roughly translated as the "Code of Crimes against International Law"—that refers to the degradation of persons, and judges have not opened the analysis to § 8(1)(3), which speaks about the infliction of mental harm.[65]

It could be argued that national courts opt not to discuss mental harm issues in these cases since such mental harm discussion is not pertinent to cases involving infringements on a person's right to dignity; yet, a look at the jurisprudence of the international criminal tribunals shows this is not true. For example, the ICTY Trial Chamber held in *Furundzija* that the rapes of the victim in front of the soldiers who were watching and laughing caused "severe physical and mental pain, along with the public humiliation" and, as a result, amounted to "outrages upon her personal dignity."[66] In *Kvocka*, the Trial Chamber held that the fact that detainees in camps were held in "constant fear of being subjected to physical, mental or sexual violence" constituted outrages upon their personal dignity.[67]

Similarly, in *Niyitegeka*, in a case where the defendant instructed his men to sharpen and insert a piece of wood into the genitals of a female corpse, the woman having been shot dead, the ICTR Trial Chamber concluded that the relevant acts caused mental suffering to civilians—in particular, Tutsi civilians—and thus constituted a serious attack on the human dignity of the Tutsi community as a whole.[68] In other words, in the particular case, the ICTR also included the mental harm parameter in each analysis on human dignity,

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[62] *See* Protocol II, *supra* note 13, art. 4.

[63] Geneva Convention I, *supra* note 11; Geneva Convention II, *supra* note 11; Geneva Convention III, *supra* note 11; Geneva Convention IV, *supra* note 11.

[64] Kammergericht [KG] [Higher Regional Court of Berlin] Mar. 1, 2017, 172 OPEN JOURNAL SYSTEM [OJS] 26/16 (3/16) (Ger.).

[65] *See* Völkerstrafgesetzbuch [VStGB] [International Criminal Code], § 8, translation at https://perma.cc/Z96Q-Y8XH (Ger.).

[66] Prosecutor v. Furundzija, Case No. IT 95-17/1, Judgment, ¶ 272 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

[67] Prosecutor v. Kvocka, Case No. IT 98-30/1-T, Judgment, ¶ 173–74 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

[68] Prosecutor v. Niyitegeka, Case No. ICTR-96-14, Judgment (June 26, 2000).

thus enabling a transition from the subjective feelings of the particular victims of an attack to those of the community as a whole.

One could reasonably postulate that, in the aforementioned cases, national courts decided not to discuss mental harm due to its nature as well as due to the high evidentiary standards governing the criminal procedure vis-à-vis other procedures governed by tort law or vis-à-vis civil remedies. When exercising their criminal jurisdiction, as in the cases regarding the war crimes committed in Syria, courts must be sure "beyond reasonable doubt" that mental harm has been inflicted.[69] This poses certain evidentiary burdens to the extent that, contrary to physical damage, mental harm is amorphous and cannot be easily quantified.[70] Moreover, as noted by scholars, especially in cases of prolonged exposure to hostilities, it is difficult to prove that a particular attack caused the mental harm the civilian is found to have sustained.[71]

This line of argument, posing the inability to prove the incurred mental harm "beyond reasonable doubt" as the reason why courts have been reluctant to discuss it, is called into question once one takes into account that national courts have appeared equally reluctant to discuss such harm as a source of damages in cases where an attack is seen as part of a larger pattern and policy.[72]

For example, despite plaintiffs bringing forth claims of mental harm suffered by them as a result of the U.S. air raids toward the end of World War

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[69] This is true both in common law as well as continental law jurisdictions. Continental law jurisdictions refer to a "full" or "reasoned" conviction as a standard of proof. For the fact that this phraseology corresponds to "beyond reasonable grounds," see CASSESE ET AL., *supra* note 9, at 384 (with reference to further sources). *See also* Jack Weinstein & Ian Dewsbury, *Comment on the Meaning of 'Beyond Reasonable Doubt',* 5 L. PROBABILITY & RISK 167, 172 (2006). For an application of the "beyond reasonable doubt" standard in the realms of international criminal justice, see Rome Statute, *supra* note 8, art. 66; Niamh Hayes, *Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court*, *in* THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES 27, n.87 (William Schabas et al. eds., 2013). For the fact that the "beyond reasonable doubt" standard was also the standard in the jurisprudence of the ICTY and the ICTR, see Prosecutor v. Blaskic, Case No. IT-95-14, Judgment, ¶ 410 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (noting that "[t]he Trial Chamber is therefore convinced beyond reasonable doubt that no military objective justified these attacks."); Prosecutor v. Jelisic, Case No. IT-95-10, Judgment ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999); Prosecutor v. Akayeshu, Case No. ICTR-96-4, Judgment ¶ 711 (Sept. 2, 1998).

[70] Lieblich, *supra* note 10, at 185.

[71] Noam Lubell & Amichai Cohen, *Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts*, 96 INT'L L. STUD. 159, 174 (2020).

[72] For the fact that terrorist attacks constitute an exception and U.S. courts have awarded damages for the harm victims of terrorist attacks have sustained on multiple occasions, see Solon Solomon, *The Palestinian Authority Jury Award: Implications on Liability of Non-States and Damages for Psychological Harm*, EJIL:TALK! (Feb. 26, 2015), https://perma.cc/5TG2-CZ8P.

II,[73] Japanese courts have refused to award damages on account of the mental harm these civilians sustained.[74] In other cases, reference to the psychological harm of the plaintiffs is not at all mentioned in the judgment, despite relevant claims raised by the plaintiffs themselves. For example, in the *El Hameidi* case, concerning NATO strikes in Libya and the destruction of the plaintiff's house, the Belgian Court of First Instance opted to toss out the case on jurisdictional grounds without referring at all in passim to the plaintiff's suffering.[75] Similarly, concerning the *Al Jaber* claims for compensation on account of a drone strike that had killed his brother in Afghanistan, the U.S. courts cited the political question doctrine and tossed the case out on justiciability grounds.[76] No mention was made in the U.S. court's judgment about the mental harm the particular drone attacks caused to the affected civilians, despite the issue having been brought by the plaintiff in his submissions to the court.[77]

Whereas one could contend that this should be expectable given these courts' refusal to consider the merits of the cases, the answer becomes less equivocal once the Belgian court's approach is juxtaposed to that undertaken by Israel's Supreme Court, as well as to the stance of the German courts in the case of the Kunduz strike.[78] In Israel, its Supreme Court considered the question of whether the government was unable to provide the Bedouins in the Negev Desert appropriate shelter from the rockets stemming from Gaza, and the court refused to oblige the government to do so, accepting the government's position that it was striving to do so to the same extent it did so for the rest of the local population.[79] At the same time, the court cited the Bedouins' fearful sentiments not as an individual ground able to dictate governmental action due to its mental health implications, but as part of the right to life.[80] In that sense, mental harm, albeit not deemed to be an individual ground leading to judicial intervention, was mentioned in the court's rationale as one of the grounds which, under other circumstances, could have guided the government to take action.

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[73] In March 1945, a U.S. air raid against Tokyo destroyed a large part of Tokyo's urban area, killed about 100,000 people, injured at least another 40,000, and displaced another one million people from their homes. *See* Cary Karacas, *Fire Bombings and Forgotten Civilians: The Lawsuit Seeking Compensation for Victims of the Tokyo Air Raids*, 9 ASIA-PACIFIC J.: JAPAN FOCUS 1, 1–12 (2011), https://perma.cc/R9CK-D2FF.

[74] Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Dec. 2009 (Japan), https://perma.cc/9X8Q-P9LV; Kyodo, *Damages Suit Over 1945 Air Raids on Osaka Dismissed,* JAPAN TIMES (Dec. 9, 2011), https://perma.cc/V3K6-FFVC.

[75] Antonio Buschardini, *Khaled El Hamini Will Not Stop His Fight Against NATO*, BRUSSELS EXPRESS (Jan. 29, 2018), https://perma.cc/4EJZ-G59X; Civ. [Tribunal of First Instance] Bruxelles (11th ch.), Oct. 22, 2012, 283/11/12, para. 2.4 (Belg.).

[76] Ali Jaber v. United States, 861 F.3d 241, 249–50 (D.C. Cir. 2017).

[77] Salim bin Jaber et al. v. United States et. al., 155 F. Supp. 3d 70 (D.C. Cir. 2016).

[78] OVG, Mar. 19, 2019, 4 A 1361/15 (Ger.), unofficial translation at https://perma.cc/6T3H-QZCV.

[79] HCJ 5019/14, Abu Afash v. Home Front Commander (2015) (Isr.) (unpublished).

[80] *Id.*

In the Kunduz case, due to the German nationality of the NATO officer ordering an Afghanistan strike that resulted in considerable civilian casualties,[81] compensation claims were brought before German courts.[82] The German courts did not enter the merits of the case, resorting to the fact that the State is not liable for tortious damages incurred in the course of warfare.[83] Yet, still, in some of these courts' judgments on the case, like the one of the Regional Court of Cologne,[84] reference was made to the harm sustained by the affected civilians, although not to the mental harm or their suffering. Similarly, the Northern Rhine Westphalia Higher Administrative Court highlighted, in a case concerning Germany's liability to potential war crimes conducted through the U.S. drone policy, that Germany had an obligation to protect the life and limb of the affected civilians.[85] No mention was made to these civilians' mental health.

These tort law cases indicate that, ultimately, if a reason is to be sought for why national courts are averse to acknowledging mental harm as a distinct basis of liability, the reason is not the high evidentiary standard governing criminal law. Discussion of physical harm in the Israeli and German cases further demonstrates that the reason is also not generic reluctance and unwillingness to touch upon the harms caused in realms of warfare. It should rather be assumed that the reason national courts do not cite to much mental harm lies in their genuine inability to assess it, either because, as noted by scholars, they cannot attribute it to a certain event[86] or because judges have no indications on how to address such harm.

One quick solution would be for mental health experts to be called to assess the mental harm the civilians in question have sustained. Yet, this route does not solve the problems. Mental health experts can diagnose the level of mental harm a civilian has sustained from a medical point of view; yet, given the autonomy of courts as adjudicators of expert issues, this does not mean that the judges have to necessarily align the legal meaning of mental health with the characteristics that psychologists or psychiatrists report.

What is important is for domestic courts to be able to develop standards and features that civilian mental harm must take on in order to be legally assessable. The next sections will discuss how domestic courts have indeed developed such standards. On the one hand, as the next section will show, they

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[81] For the facts of the case, see *German State Not Liable to Pay Compensation to Victims of 2009 Kunduz Airstrike*, DEUTSCHE WELLE (Oct. 6, 2016), https://perma.cc/2J23-JCFA.

[82] Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 6, 2016, Entscheidungen des Bundesgerichtshofes in Zivilsenats [BGHZ] III ZR 140/15 (Ger.).

[83] *Id.*

[84] Verwaltungsgericht [VG] [Administrative Trial Courts] Feb. 9, 2012, Entscheidungen des Bundesverwaltungsgerichts [BVERWGE] 26 K 5534/10 (Ger.).

[85] Oberverwaltungsgericht NRW [Higher Administrative Court for North Rhine-Westphalia] Mar. 19, 2019, Entscheidungen des Bundesgerichtshofes in Zivilsenats [BGHZ] 4 A 1361/15 (Ger.), https://perma.cc/HZ53-6PNE.

[86] *See* Lubell & Cohen, *supra* note 71.

have broadened the notion of mental harm beyond the concept of insanity. On the other hand, and in order for mental harm not to end up being a lax notion, domestic courts have equally insisted that such harm demonstrates a degree of gravity in order to be legally appraisable. As the article will further discuss, the elucidation of these standards can also prove valuable for international criminal jurisprudence.

IV. MENTAL HARM AND A CRIMINAL LAW DISCUSSION BEYOND THE INSANITY FRAMEWORK

Both common law as well as continental law jurisdictions have approaches dictating how mental harm is to be discussed in the realm of criminal law trials. Such discussions mainly concern the mental health statuses of the defendants, but they are indicative of how mental harm can be seen as sharing some universally common features.[87] In that sense, to the extent that it offers a common ground for dissecting the notion of mental harm, such a criminal law-embedded discussion of mental health bolsters the ability of domestic courts to also relate these features in cases where mental harm appears as an internationalized notion—for example, in the case of domestic trials concerning crimes perpetrated as a result of an armed conflict. Along these lines, it is useful to look at the insanity frameworks already in place in domestic criminal law systems. These insanity frameworks relate mostly to "mental disorders," giving rise to the question of what kind of harm such disorder may include.

On this account, when it comes to common law, the role of insanity as a defense has deep roots in English criminal law. In 1843, in the *M'Naghten* case where M'Naghten shot a person, believing erroneously that he was the British Prime Minister, the discussion amongst a panel of judges confronted the defense of insanity, leading to the formulation of certain principles which came to be known as the "M'Naghten rules."[88] Core in them was the instruction to the jury that a defendant was deemed to be sane unless it was proven that, at the time they committed the offense, the defendant, due to a disease of mind, did not know the nature and quality of the act they were committing and, if they did have cognizance of their actions, that they did not know that these actions constituted a wrong.[89]

The M'Naghten rules have been criticized on the grounds, inter alia, that they are not encompassing enough regarding all possible cases where defendants may suffer from a mental health disease yet still have knowledge of their actions.[90] The rules have also come under the scrutiny of later English courts; particularly regarding the concept of "wrong," they examine whether

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[87] *See generally infra* Parts IV–V.

[88] M'Naghten's Case (1843) UKHL J16, [1843] 8 Eng. Rep. 718.

[89] *Id.*

[90] Francis Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 495, 497–98 (1962).

this concept should comprise only "legal" or also "moral" wrongs.[91] Yet, the main precept the rules introduce, namely that the defendant who suffers from a mental disease and as a result does not understand their actions or any legal implications, is a core precept that remains undisputed[92] and has further advanced the discussion in the English jurisprudence on how broadly the notion of mental harm should be viewed. Thus, the litmus test goes beyond the question of whether or not the defendant suffers from a mental health disorder and instead considers whether he is able to formulate reasonable judgments.

For example, in *R v. Clarke*, it was decided that the notion of "defect of reason" should not be seen as comprising instances where the defendant failed to exercise their reasoning ability, which nevertheless remained intact.[93] Similarly, in *R v. Kemp*, a case where the defendant had attacked his wife with a hammer and claimed that arteriosclerosis had caused congestion in his brain and made him lose consciousness of his acts, the court held that such a situation could fall within the precepts of "disease of mind" due to the effect on the defendant's reasoning.[94] In *R v. Sullivan*, the court held that epilepsy could qualify as a disease of mind, despite not being permanent or not being related to insanity per se.[95]

The fact that any disruption to a person's reasoning does not necessarily have to be permanent in order for the defense of insanity to be put forth was also underlined in *R v. Burgess*.[96] In that particular case, the defendant was accused of wounding a woman while sleepwalking.[97] Lord Lane held that sleepwalking, and particularly violence in sleep, could not be deemed to constitute a normal condition and, thus, could fall within the insanity precept.[98] Lord Lane was led to that particular view on account of the opinions of mental health experts who testified before the court that, in the particular case, the sleepwalking phenomenon should be deemed an internal condition, likely to reoccur.[99] For Lord Lane, the internal, re-occurring element was enough to brand sleepwalking as a disease of mind and, thus, enough to enter the realm of the defense of insanity. In that sense, the *Burgess* judgment does reach a different conclusion from that reached in the case of *Bratty v. A-G* (Northern Ireland). In that case, Lord Denning held that involuntary acts

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[91] *See* R v. Windle [1952] 2 QB 826 (Eng.) (demonstrating the fact that traditionally the concept of "wrong" was interpreted by English courts as encompassing only cases of "legal wrong"); *but see* Norval Morris, *'Wrong' in the M'Naughten Rules*, 16 MOD. L. REV. 435 (1953) (demonstrating the fact that the High Court of Australia held otherwise in the case of Stapleton v. R.).

[92] Allen, *supra* note 90, at 497–98.

[93] *See* R v. Clarke [1972] 1 All ER 219 (Eng.).

[94] *See* R v. Kemp [1957] 1 QB 399 (Eng.).

[95] *See* R v. Sullivan [1984] AC 156 (HL) (Eng.).

[96] *See* R v. Burgess [1991] 2 QB 92 (Eng.).

[97] *Id.* at 95.

[98] *Id.*

[99] Peter Ridgway, *Sleepwalking – Insanity or Automatism*, 3 MURDOCH UNIV. ELEC. J. L. 1 (1996), https://perma.cc/QB5E-U6TY.

should be encompassed under the prism of automatism rather than that of insanity, and that sleepwalking should be seen as such an act of automatism because it could not be deemed to constitute an involuntary act stemming from a disease of mind.[100] Yet, the fact that a disease of mind, comprising a mental disorder which leads to violent acts and is prone to recur, should fall under the defense of insanity is a conclusion that was expressed both by Lord Denning in *Bratty* and accepted and applied to sleepwalking by the court in *Burgess*.

This association with mental harm, not only with the concept of insanity but with mental disorders in general, is further encapsulated in statutory English law. At the same time, the fact that the notion of mental disorders is interpreted more broadly by courts than by mental health experts points similarly to the fact that mental harm in criminal law can be defined broadly. In 1989, the Law Commission drafted a Criminal Code for England and Wales that, although not ultimately enacted, defined mental disorder as "severe mental illness" and proceeded to further define "severe mental illness" as comprising not only diagnosed psychiatric cases, but also lasting impairment of intellectual functions and lasting alteration of mood leading to delusions.[101]

At the same time, the Criminal Procedure (Insanity) Act 1964 holds that disability can render a person unfit for trial.[102] Reference to "disability" rather than to the concepts of "insanity" or "mental disorder" shows how English criminal law has viewed mental harm on an instrumental rather than doctrinal level. For the English lawmaker, the question is not only whether the defendant suffers from a mental health condition, but also whether this mental health condition is severe enough to impact the defendant's ability to function in a reasonable manner. Moreover, the severity of the condition and whether it amounts to insanity is to be decided by the jury only after the latter has been addressed by mental health experts. Thus, the Criminal Procedure (Insanity and Unfitness to Plead) Act of 1991 stipulates that the jury will reach a verdict of insanity only after having attained written or oral evidence from at least two medical practitioners.[103]

The English jurisprudence has followed a similar, steady line. In *R v. Robertson*, the case concerned a defendant who suffered generally from a persecution mania, yet, when he came to stab and kill his victim, he described the event vividly, arguing that he acted in self-defense.[104] The UK judges were called to decide whether the defendant was fit to stand trial. The Court of Appeals held that he was fit since, although he might suffer from delusions which might at any given moment interfere with his ability to instruct his

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[100] *See* Bratty v. Attorney-General for Northern Ireland [1963] AC 386 (Eng.).

[101] LAW COMMISSION NO. 177, A CRIMINAL CODE FOR ENGLAND AND WALES: VOLUME 2 COMMENTARY ON DRAFT CRIMINAL CODE BILL, cl. 34, ¶¶ 11.13–11.14, at 221–22 (Apr. 17, 1989), https://perma.cc/ES25-L5MM.

[102] Criminal Procedure (Insanity) Act 1964, c. 84, § 4 (Eng.), https://perma.cc/7S5K-LV46.

[103] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, c. 25, § 1 (Eng.), https://perma.cc/7FWP-U3W7.

[104] R v. Robertson [1968] 1 WLR 1767 (Eng.).

lawyers, he nevertheless had full understanding of the proceedings. [105] Similarly, in *R v. Berry*, it was held that, although the defendant suffered from schizophrenia, he could be deemed fit to stand trial since he was in a position to instruct his counselors and understand the evidence.[106]

Equally, mental health is defined elsewhere in English criminal law in broad terms, not only regarding the question of whether or not the defendant is fit to stand trial, but also regarding the question of whether or not they had the mental capacity at the time they committed the offense to understand their actions and such actions' repercussions pertaining to diminished responsibility. Such a defense exists only for killing offenses and is entrenched in § 2 of the Homicide Act 1957.[107] Following its amendment by § 52 of the Coroners and Justice Act 2009, the provision holds that abnormality of mental functioning caused by a recognized medical condition which substantially impairs the defendant's ability to either understand the nature of their conduct, form a rational judgment, or exercise self-control can lead to a diminished responsibility pronouncement.[108] A simple reading of the provision renders evident the fact that the defense of diminished responsibility, while also narrower compared to the defense of insanity to the extent that it covers only cases of murder, is broader than the insanity defense because diminished responsibility may apply.[109]

More importantly, answering the question of how the notion of mental health is to be determined, § 2 of the Homicide Act 1957 also has a broad scope of application. Whereas, prior to the Coroners and Justice Act 2009 amendment the provision referred to "abnormality of mind,"[110] the current reference to "abnormality of mental functioning"[111] makes it clear that such abnormality does not necessarily have to relate to disorders of the mind, but can also encompass any cases that hinder a person from mentally functioning as expected. The need for this abnormality to stem from a "medical condition" rather than just an "underlying . . . pre-existing mental or physiological condition," as had been proposed, entrenches the role of medical experts and

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[105] *Id.* at 1773.

[106] R v. Berry [1978] 66 Cr. App. R 156 (Eng.); *see also* R v. John M [2003] EWCA (Crim) 3452 (Eng.) (assessing the defendant's fitness to stand trial through his ability to instruct jurors, consult with his counsel, and give evidence in his defense).

[107] Homicide Act 1957, c. 11, § 2 (Eng.), https://perma.cc/RT97-QAT9.

[108] Coroners and Justice Act 2009, c. 25, § 52(1) (Eng.), https://perma.cc/JU42-VA25.

[109] For a comparative discussion on the relation between loss of self-control and diminished responsibility in the English and French criminal law systems, see Catherine Elliott, *A Comparative Analysis of English and French Defences to Demonstrate the Limitations of the Concept of Loss of Control*, *in* LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES 231, 231–46 (Alan Reed & Michael Bohlander eds., 2011).

[110] Homicide Act 1957, c. 11, § 2 (Eng.), https://perma.cc/6QPC-WNT3 (as enacted).

[111] Homicide Act 1957, c. 11, § 2 (Eng.), https://perma.cc/RT97-QAT9 (as amended by the Coroners and Justice Act 2009, c. 25, § 52 (Eng.), https://perma.cc/JU42-VA25).

qualifies cases of psychiatric disorders to fall under this category.[112] At the same time, the fact that such a medical condition does not have to be permanent equally enters under the scope of the provision for impulsive violent reactions.[113] On this account, English courts have held that such abnormality of mental functioning can also encompass cases where the defendant suffered from chronic depression,[114] pre-menstrual tension,[115] or jealousy.[116]

U.S. law has been traditionally averse to considering mental health problems as an element that could lead to the assertion of diminished responsibility[117] or even the absolution of any criminal liability.[118] Still, the Model Penal Code, drafted by the American Law Institute, holds in § 4.02 that "[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense."[119] The delineation of mental health by referencing not only mental disease but also mental defect broadens the scope of potential mental harm in a similar way to English law. While the Model Penal Code is not law per se in any of the U.S. states, it forms a basis that most U.S. jurisdictions look to when seeking to amend state criminal provisions.[120] Equally, Title 18 of the United States Code § 17 states that it is an affirmative defense for a defendant to prove that, at the time they committed the offense, the defendant "was unable to appreciate the nature and quality or the wrongfulness of his acts" because of "a severe mental disease or defect."[121]

This view of mental health as going beyond the realm of insanity is also shared in other Commonwealth countries, most notably Australia and Canada. In Australia, the Criminal Code Act 1995 incorporated the M'Naghten rules on

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[112] Rudi Fortson, *The Modern Partial Defence of Diminished Responsibility, in* LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES 21, 28–29 (Alan Reed & Michael Bohlander eds., 2011); Paul H. Robinson, *Abnormal Mental State Mitigations of Murder: The U.S. Perspective*, *in* LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES 291, 297–98 (Alan Reed & Michael Bohlander eds., 2011).

[113] Fortson, *supra* note 112.

[114] R v. Seers [1984] 79 AC 261 (Eng.); R v. Gittens [1984] 79 AC 272 (Eng.).

[115] R v. Craddock [1981] 1 CL 49 (Eng.); R v. Smith [1982] CLR 531 (Eng.); R v. Reynolds [1988] Crim. LR 679 (Eng.).

[116] R v. Vinagre [1979] 69 AC R 104 (Eng.).

[117] Robinson, *supra* note 112, at 291.

[118] U.S. states like Idaho, Pennsylvania, and Kansas do not recognize insanity as a defense for guilt, but only as a reason for a defendant not to be sent to prison. *See* I.C. § 18-207 (1982); 18 Pa. C.S. § 314 (1983); *see generally* Kahler v. Kansas, 140 S. Ct. 1021 (2020) (showing that the U.S. Supreme Court has upheld the above states' stances).

[119] MODEL PENAL CODE § 4.02 (AM. L. INST., Adopted Draft 1962).

[120] Paul Robinson & Markus Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320 (2007); Louis Kachulis, *Insane in the Mens Rea: Why Insanity Defence Reform Is Long Overdue,* 26 REV. L. & SOC. JUST. 245, 250 (2017).

[121] 18 U.S.C. § 17.

a federal level, referring to "mental impairment" and defining such impairment as comprising "senility, intellectual disability, mental illness, brain damage and severe personality disorder."[122] The Act thus clarifies that mental illness is just one manifestation of mental health and harm. In Canada, mental health issues can serve as a basis either for an insanity claim or for the mitigation or aggravation of any imposed sentence. For example, § 16 of the Criminal Code reads, "[n]o person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong."[123]

By referring not just to insanity but to the wider notion of "mental disorder," the provision shows that the Canadian government views mental health in broad terms. The same broad framework has been acknowledged regarding the definition of mental health itself as well as the role it is expected to play in the pronouncement of legal judgments. The Canadian Criminal Code does not explicitly identify mental health issues as a mitigating ground in the pronouncement of sentences.[124] Along these lines, Canadian courts have cited mental harm issues in order to aggravate pronounced sentences rather than to mitigate.[125]

This was evident in the *R v. Zaakir* case. In that particular case, the defense cited the defendant's brain injury and his suffering from a Fetal Alcohol Spectrum Disorder (FASD) as reasons for him not to be sent to prison, but the judge disagreed and cited imprisonment as the only way the public could be protected since, due to the defendant's mental issues, any other measures would not be able to rehabilitate him according to the judge's view.[126] On the other hand, there have also been cases like *R v. Harper*, where courts have acknowledged that FASD can be a reason for a defendant not to be imprisoned because the defendant would not be able to grasp the rehabilitation purpose of a prison sentence.[127] Yet, irrespective of the conclusions drawn as

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[122] *See Criminal Code Act 1995* (Cth) s 7.3(8) (Austl.). For the incorporation of the M'Naghten rules in Australia on a state level, see *Criminal Code Act 1899* (Qld) s 27 (Austl.); *Criminal Code Act 1902* (WA) s 22 (Austl.); *Criminal Code Act 1924* (Tas) s 16 (Austl.); *Crimes Act 1900* (ACT) s 428 (Austl.); *Criminal Law Consolidation Act 1935* (SA) s 269C (Austl.); *Criminal Code Act 1983* (NT) s 43C (Austl.).

[123] Canada Criminal Code, R.S.C. 1985, c C-46, s. 16(1).

[124] *See* Canada Criminal Code, R.S.C. 1985, c C-46, pt. XX.1.

[125] For the fact that Canadian courts have made this point based on Section 718.1 of the Canada Criminal Code, see R v. Harper, 2009 YKTC 18 (CanLII), paras. 32, 41 (Can. Yukon) (mental health is relevant as a mitigating factor based on Canada Criminal Code, R.S.C. 1985, c C-46, s. 718.1, which requires the sentence to be "proportionate to the gravity of the offense and the degree of responsibility of the offender").

[126] GAIL S. ANDERSON, BIOLOGICAL INFLUENCES ON CRIMINAL BEHAVIOR 295 (2d ed. 2019) (citing R. v. Zaakir, 2011 ONCJ 862 (Can.)).

[127] *Harper*, *supra* note 125, paras. 30, 48; *see* David Milward, *The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways*, 47 U.B.C. L. REV. 1025, 1049–52 (2014) (discussing more cases where the Canadian courts ruled that Fetal Alcohol Syndrome should be seen as a ground for mitigating the pronounced sentence).

to what should be the practical legal ramifications of mental health issues, what the aforementioned cases demonstrate is that Canadian courts do broadly define mental health to involve more than brain injury. Furthermore, in order to decide this, Canadian courts rely on the opinions of mental health experts.[128]

The broad way mental health is viewed as a ground leading to arguments of insanity as well as to diminished responsibility is further entrenched in countries whose criminal law provisions follow the continental law tradition. Equally, recourse to mental health expert opinions on the defendant's mental health status is expected to be undertaken by the presiding judges.

In France, Article 122-1 of the Penal Code embodies both the insanity as well as the diminished responsibility defenses.[129] It first covers the insanity defense by removing criminal liability if a person suffered from a psychological or neuropsychological disorder that destroyed their ability to discern or control their actions at the time they committed the offense.[130] The provision continues by stating that a person remains punishable if, at the time that they committed the offense, they suffered from a psychological or neuropsychological disorder that impaired their discernment or their control over their actions.[131] The distinction in the terminology is acute. Total absence of discernment or control leads to unfitness to stand trial.[132] On the other hand, partial absence leads to diminished responsibility. Following the amendment to the provision undertaken by Law No. 2014-896, such diminished responsibility serves as a ground for the reduction of the defendant's prison service[133] or for the imposition of a penalty other than imprisonment.[134] The fact that the French Penal Code refers to psychological disorders is an indication of how mental health is regarded in broad terms within French criminal law. Moreover, while mental health experts tend to opine less often that defendants totally lack

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[128] On the use of experts as well as a detailed analysis of the mental health disorders that have been considered by the Canadian courts as grounds for their sentencing policy, see Jennifer A. Chandler, *The Use of Neuroscientific Evidence in Canadian Criminal Pr*oceedings, 2 J.L. & BIOSCIENCES 550 (2015). *See also* Canada Criminal Code, R.S.C. 1985, c C-46, s. 672.11 (containing detailed provisions on how courts should invite the opinion of mental health experts).

[129] Code pénal [C. pén.] [Penal Code] art. 122-1 (Fr.).

[130] *Id.*

[131] *Id.*

[132] For the fact that, in such instance, an order is issued for the enclosure of the person to a psychiatric institution, see Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-235QPC, Apr. 21, 2012, J.O. 00095, para. 27 (Fr.), https://perma.cc/Y2KA-892Y.

[133] Contrôleur Général des Lieux de Privation de Liberté [CGLPL] [General Controller of Places of Deprivation of Liberty], *Avis du 14 Octobre 2019 relatif a la prise en charge des personnes detenues atteintes de troubles mentaux,* Nov. 22, 2019, J.O. 0271 (Fr.), https://perma.cc/43L2-NG6Z [hereinafter CGLPL].

[134] Conseil constitutionnel [CC] [Constitutional Court] *Observations du Gourvenement sur les recours diriges contre la loi d'orientation et de programmation pour la performance de la securite interieure,* Mar. 15, 2011, J.O. 0062 (Fr.), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT00002 3708212.

discernment of their actions,[135] their opinions are still being sought by judges to enable the latter to reach their decisions.[136]

The same observations regarding the broadening scope of mental health and the need for judges to rely on expert mental health opinions for its attestation are also relevant in Dutch criminal law. The Dutch Criminal Code holds in § 39 that "[a]ny person who commits an offence for which he cannot be held responsible by reason of mental disease or defect shall not be criminally liable."[137] By also referring to the concept of "mental defect" apart from that of "mental disease," the particular provision defines mental health in broad terms and does not limit it only to cases of psychiatric disorders. This aspect of the particular provision is further highlighted by the fact that, until 1886, the Netherland's Criminal Code spoke of "dementia" (*demence*) as a ground for excluding liability, similar to the French Penal Code.[138] At the same time, while reference to mental defect broadens the definition of mental harm to cases beyond the world of psychiatry, the provision still requires such harm to have a certain gravity, thus excluding cases of mere anxiety or anger.[139]

The importance of § 39 in delineating the concept of mental health is further underlined by the fact that Dutch criminal law does not have a statutory provision for diminished responsibility.[140] Still, as has been

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[135] CGLPL, *supra* note 133.

[136] The French Supreme Court (the Cour de Cassation) discusses in its judgments the reliance that courts of lower instance have put on mental health experts in order to decide on whether a defendant is granted the insanity or the diminished responsibility defense. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., May 27, 2015, No. 14-81.989 (Fr.), https://perma.cc/Y5XT-6KNR; Cour de cassation [Cass.] [supreme court for judicial matters] crim., Apr. 12, 2016, No. 15-80.207 (Fr.), https://perma.cc/HJ2Y-HBV5; Cour de cassation [Cass.] [supreme court for judicial matters] crim., Feb. 26, 2020, No. 19-80.120 (Fr.), https://perma.cc/G6HM-VUJV. For the fact that such expert opinions are necessary in criminal law cases and yet judges still retain the discretion to decide as they see fit in cases of conflicting opinions, see Fiona Conan & Clément Bossard, *Affaire Sarah Halimi: reflexion sur la Question de l'abolition du discernment applicable au trouble d'origine toxicologique*, DALLOZ ACTUALITE (Feb. 10, 2020), https://perma.cc/G8D3-PTPA.

[137] Art. 1:39 SR (Neth.) (quoting the English translation available at https://perma.cc/C87W-NL3M).

[138] Hein D. Wolswijk, *Provacation and Diminshed Responsibility in Dutch Homicide Law*, *in* LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE, AND INTERNATIONAL PERSPECTIVES 336 (Aland Reed & Michael Bolhlander eds., 2011).

[139] *Id.* at 337.

[140] *Id.* at 336. For the fact that previous versions of § 39, enumerated at that time as § 37, and not ultimately endorsed by Parliament, read: "He who committed a fact is not punishable, while as a result of either the state of unconsciousness in which he is, or of a mental defect or mental disease, he is not in the condition to determine his will with regard to that fact[,]" thus including unconsciousness as a separate ground, see Anton van Kalmthout, *Intoxication and Criminal Responsibility in Dutch Criminal Law*, 4 EUR. ADDICTION RES. 102, 104 (1998). For the fact that unconsciousness is a defense to a charge of criminal homicide and as such should be distinguished from the defense of insanity, see Philip Adelson, *Diminished Capacity: The Middle Ground of Criminal Responsibility*, 15 SANTA CLARA L. REV. 911, 925 (1975). For the fact that unconsciousness as a defense extends not only to cases where the defendant is altogether

demonstrated by empirical research, most cases where mental health experts are called to testify are in cases of diminished responsibility.[141] Judges are meant to form an opinion on defendants' mental health statuses only after consulting these experts.[142] The latter are called to answer a series of questions developed by the Dutch judge following a certain formula.[143] These questions relate not only to whether the defendant suffers from a psychiatric disorder, but also to how the cited mental health condition may be associated with the possible commission of the offense for which the defendant is charged.[144] On this account, personality disorders have been deemed by Dutch courts as a ground for diminished responsibility.[145]

In other jurisdictions, acknowledgement of such personality disorders has equally widened the way mental health is viewed, establishing such disorders both as an insanity defense as well as a ground for diminished responsibility depending on the extent of mental suffering. For example, the German Criminal Code stipulates in § 20 that "whoever . . . is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound disturbance of consciousness, mental deficiency or any other serious mental abnormality is deemed to act without guilt."[146] The following § 21 renders clear that a mitigated sentence will be pronounced if the reasons contained in § 20 render the person partially incapable of appreciating the wrongfulness of their actions and those actions' consequences.[147] In that sense, German criminal law broadly defines the role mental health can play, both in insanity as well as in diminished responsibility claims. There is no need for pathological disorders to be diagnosed or for other disturbances to be permanent; and yet, grave impact on the defendant's ability to understand the wrongfulness of their actions and those actions' consequences can be cited as a legal defense.[148]

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unconscious but also when they are unconscious of what they are doing, see UK LAW COMMISSION, CRIMINAL LIABILITY: INSANITY AND AUTOMATISM: A DISCUSSION PAPER 96 (2013), https://perma.cc/4KVJ-D5EV.

[141] *See* C.H. de Kogel & E.J.M.C. Westgeest, *Neuroscientific and Behavioral Genetic Information in Criminal Cases in the Netherlands*, 2 J.L. & BIOSCIENCES 580, 587 (2015).

[142] *See* Tijs Kooijmans & Gerben Meynen, *Who Establishes the Presence of a Mental Disorder in Defendants? Medicolegal Considerations on a European Court of Human Rights Case*, 8 FRONTIERS PSYCHIATRY 1, 2 (2017).

[143] On the role and significance that mental health experts have in criminal law proceedings, see the case of S.H., where the Court of Appeal of Leeuwarden turned murder charges to manslaughter on account of the fact that the defendant—a young woman accused of suffocating her four children—was found by psychiatrists to be suffering from a personality disorder. For the text of the case, as well as its discussion, see Hof's-Leeuwarden 11 oktober 2012, NJFS 2012, 24-000973-11, m.nt. M. Zevenhuizen (Neth.); de Kogel & Westgeest, *supra* note 141, at 580.

[144] De Kogel & Westgeest, *supra* note 141, at 580.

[145] *Id.*

[146] Strafgesetzbuch [StGB] [Penal Code], § 20, translation at https://perma.cc/38JK-BKWH (Ger.).

[147] *Id.* § 21.

[148] MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 132 (2d ed. 2009).

Furthermore, not only is the concept of mental health broadly defined in German criminal law, but so are the concepts of insanity and diminished responsibility, with insanity also covering intoxication and diminished responsibility applying to all offenses, not only in cases of murder.[149] Moreover, any claims on the defendant's mental status are assessed by mental health experts.[150]

Italian criminal law and jurisprudence equally takes a broad stance vis-à-vis the concept of mental health. In the *Raso* judgment, the Italian Supreme Court (Corte di Cassazione) held that personality disorders can also be included in the concept of insanity, [151] although the relevant provision in the Italian Criminal Code speaks of "illness" (*infermita*),[152] which excludes the person's ability to fully intend or desire the consequences of their actions.[153] This is also the case with the provision in the code that holds that illness causing such partial intention or desire can lead to diminished responsibility and mitigation of the pronounced sentence.[154] While the Italian Supreme Court has held that personality disorders can be included in the generic category of mental illnesses—and thus fall under the term "illness" used in Articles 88 and 89 of the Italian Criminal Code—the court has also noted that simple abnormalities in character, or an intense state of emotions, cannot be seen as satisfying the code's illness requirement.[155] By requiring such mental harm to be of a certain gravity and not transient,[156] the Italian Supreme Court has not only delineated the concept of mental health on a quantitative basis, but also on a qualitative one.

The delineation of mental health that domestic courts have undertaken in criminal proceedings resembles the requirements that international criminal courts have attributed to serious mental harm. This will be discussed in Part VI.

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[149] *Id.* at 116.

[150] *See* Strafprozessordnung [STPO] [Code of Criminal Procedure], § 246a, translation at https://perma.cc/QAJ7-QH7R (Ger.).

[151] Cass. pen., sez. un., 8 marzo 2005, n. 9163, Foro it. 2005, II (It.).

[152] *See* Maria Gemma Barone, *Il Vizio Totale Di Mente: L'Evoluzione del Concetto di Infermita*, SALVIS JURIBUS (Sept. 6, 2018), https://perma.cc/PF2S-37Z3 (showing that the word "infermita" in the Italian language implies an organic disease that is of certain duration and has the potential to immobilize the individual, rendering them totally or partially unable to perform their daily functions).

[153] *See* Art. 88 CODICE PENALE [C.P.] (It.) (stipulating that individuals who, due to illness at the time of the offence, were in such a mental state that they could not intend or want the consequences of their actions are not to be held criminally responsible).

[154] Art. 89 CODICE PENALE [C.P.] (It.) (specifying that individuals, who, due to illness at the time of the offence, are in such a mental state that they cannot fully intend or want the consequences of their actions are to be granted a reduced sentence).

[155] Cass. pen., sez. un., 8 marzo 2005, n. 9163, Foro it. 2005, II (It.); Corte Suprema Di Cassazione Ufficio Del Massimario, *Rassegna Della Giurisprudenza di Legittimitá: La Guirisprudenza Delle Sezioni Unite Penali Della Corte Di Cassazione: Anni 2002–2004*, at 156 (2005).

[156] *See* Corte Suprema Di Cassazione Ufficio Del Massimario, *supra* note 155.

V. MENTAL HARM AND A TORT LAW DISCUSSION ON THE IMPORTANCE OF THE GRAVITY OF TRAUMA SYMPTOMS

Resorting to tort law to decipher characteristics of civilian mental harm should not be seen as an arbitrary exercise. In fact, tort law liability in warfare and civilian mental harm hold a common characteristic to the extent that states view both the causation of some injuries as well as the instigation of some fear among civilians as a natural outcome of hostilities for which states should not be held liable in any case. While such a stance has been held to be unconstitutional in countries where similar laws absolving the state from any tort liability were passed,[157] the extent to which civilian mental harm claims can be equally restricted has not merited a broad discussion. On the other hand, the junction between tort law and mental harm has been addressed in domestic courts on the question of whether mental harm can be the basis for tort law damages. On this, domestic courts have largely answered in the positive, though they impose conditions under which damages may be awarded.

Thus, for example, English courts have required such harm to stem from a "recognised psychiatric illness" that is shock-induced.[158] Along these lines, transient shock or just emotions of fear and grief are not enough to trigger any compensation claims.[159] Moreover, the incurred mental harm must be foreseeable according to the standards of a reasonable person.[160] Such foreseeability is considered ex post and refers to the question of whether a reasonable person would have suffered the mental harm that the plaintiff did as a result of exposure to the particular event.[161] It is irrelevant whether the defendant could foresee the mental harm incurred.[162] At the same time, the damage sustained by the plaintiff must be linked in regards to the time and place of the contested event in order to help establish causation.[163] However, temporal and geographic proximity alone do not suffice; bonds of love and affection must also exist between the plaintiff and the victim.[164] English law does not award damages to mere bystanders who have witnessed a traumatic event.[165]

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[157] *See* HCJ 8276/05 Adalah v. Minister of Defence, (2) IsrLR 352 (2006) (Isr.) (demonstrating the fact that this has been the case in Israel); *see also* Overseas Operations (Service Personnel and Veterans) Bill 2019, HC Bill [117] (Gr. Brit.).

[158] *See* LAW COMMISSION, LIABILITY FOR PSYCHIATRIC ILLNESS, 1995, Cm. 137, at 10–13 (UK); LAW COMMISSION REPORT, LIABILITY FOR PSYCHIATRIC ILLNESS, 1997, Cm. 249, at 9–10 (UK).

[159] *See* LAW COMMISSION REPORT, LIABILITY FOR PSYCHIATRIC ILLNESS, 1997, Cm. 249, at 9–10 (UK)*;* LAW COMMISSION, LIABILITY FOR PSYCHIATRIC ILLNESS, 1995, Cm. 137, at 10 (UK).

[160] LAW COMMISSION REPORT, LIABILITY FOR PSYCHIATRIC ILLNESS, 1997, Cm. 249, at 10–12 (UK).

[161] *Id.* at 11–12.

[162] *Id.* at 12–13.

[163] *Id.* at 20.

[164] *Id.* at 19.

[165] *Id.* at 27.

Similar terms can be found in U.S. tort law. The Third Restatement of Torts provides for an award of damages even in cases of emotional harm.[166] The earlier Second Restatement mentioned "severe emotional distress" as a ground for damages,[167] and U.S. courts awarded such damages, even if the mental distress was unaccompanied by any physical harm.[168]

On this account, the Third Restatement refers to "serious" emotional harm as the basis of any tortious claims.[169] The other elements present in English law which render a tort suit successful on mental harm grounds are also present in U.S. jurisprudence. Even before the adoption of the Third Restatement, in coming to discuss compensation based on the inflicted emotional harm, courts in different U.S. state jurisdictions resorted either to the criterion of foreseeability or to the special relationship between the plaintiff and another person who had sustained injury or death.[170] In these cases, damages were not to be awarded to strangers who had just witnessed an event, but only to relatives who had witnessed the death or injury of a family members.[171]

Equally, mental harm has been defined by Australian legislation on a state level as "impairment of the person's mental condition."[172] There is no indication in the legislation itself as to whether such an impairment should be restricted only to psychiatric illnesses; yet, in Victoria, the Wrongs Act 1958 indicates that this should not be so as it speaks about mental harm as a form not only of psychiatric, but also of psychological injury—the latter denoting an effect on a person's psyche which does not amount to a psychiatric illness such as insanity or psychosis or to a psychiatric disorder like PTSD or depression.[173] The requirement that such harm is shock-induced[174] is equally important since

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[166] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 45–48 (AM. L. INST. 2012).

[167] ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS 81 (Aspen Publishers, 2d ed. 2007).

[168] *See* Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751, 757 (2001). For the fact that this reality was also sanctioned in the drafts of the Third Restatement on the Liability for Physical and Emotional Harm, see Jeffrey A. Ehrich, *Negligent Infliction of Emotional Distress: A Case for an Independent Duty Rule in Minnesota*, 37 WM. MITCHELL L. REV. 1402, 1407 n.21 (2011).

[169] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 45–48 (AM. L. INST. 2012). The Restatement distinguishes between "intentional infliction of emotional distress" and "negligent infliction of emotional distress," and, while the general requirements vary at some points, the required level of sustained harm remains the same. *See* Betsy J. Grey*, The Future of Emotional Harm*, 83 FORDHAM L. REV. 2605, 2610–13 (2015).

[170] Ehrich, *supra* note 168, at 1412–22.

[171] Chamallas, *supra* note 168, at 764.

[172] Danuta Mendelson, *The Modern Australian Law of Mental Harm: Parochialism Triumphant*, 13 J.L. & MED. 164, 165 (2005).

[173] *See Wrongs Act 1958* (Vic) s 67 (Austl.).

[174] *Id.* §§ 72(2), 73.

it excludes cases where the mental suffering has accumulated over time, thus making it difficult to attribute it to a particular event.

An interesting stance on the nature of mental harm, as well as the questions surrounding its assessment in tort law, has been taken by the Canadian Supreme Court. In *Saadati v. Moorhead*, a case where the claimant sued for damages on account of the psychological harm he had sustained as a victim of a road accident, the Canadian Supreme Court held that mental harm could qualify as an independent ground for the award of such damages, even in the absence of any physical harm.[175] Moreover, coming to discuss the nature of the mental harm that had to be sustained, the court refused to strictly tie it to the emergence of a psychiatric disorder, sufficing to determine only whether the symptoms the claimant experienced were serious enough to justify the award of damages.[176]

The emphasis the Canadian Supreme Court put on the nature and gravity of the experienced psychological harm instead of whether it could satisfy the criteria of a known mental disease to be tagged as "serious" largely corresponds to the approach European continental jurisdictions have taken toward mental harm.[177]

In Germany, Article 253 of the German Federal Civil Code mentions only that non-pecuniary damages are to be awarded for any injuries "to body, health, freedom or sexual self-determination," without setting a gravity threshold for which non-bodily injuries must surpass.[178] And yet, the German Federal Supreme Court puts an emphasis on the level and extent of the sustained pain and suffering.[179] The more severe this is, the more likely that damages will also be awarded on mental harm grounds. German law does not acknowledge any damages for the mental harm sustained by the relatives of deceased or injured persons.[180]

Until recently, this was also the case in Dutch tort law.[181] Moreover, the Dutch Civil Law embeds in Article 6:106 the so called *pretium doloris*, namely

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[175] Saadati v. Moorhead, [2017] S.C.R. 543 (Can.).

[176] Ian Freckelton & Tina Popa, *'Recognisable Psychiatric Injury' and Tortious Compensability for Pure Mental Harm Claims in Negligence: Saadati v Moorhead [2017]* 1 SCR 543 (McLachlin CJ and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ), 25 PSYCHIATRY, PSYCH. & L. 641 (2018).

[177] *Saadati*, *supra* note 175; *see also* EUR. GRP. ON TORT L., PRINCIPLES OF EUROPEAN TORT LAW art. 10:202 (2005) (attempting to harmonize the different tort law provisions on a European level, and speaking of a "recognized illness.").

[178] Ulrich Magnus, *Damages for Non-Pecuniary Loss in German Contract and Tort Law*, 3 CHINESE J. COMP. L. 289, 297, 307 (2015).

[179] *See* BASIL S. MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS A COMPARATIVE TREATISE 919 (4th ed. 2002) (citing the Federal German Supreme Court in BGHZ 18, 49).

[180] Magnus, *supra* note 178, at 300.

[181] Rianka Rinjhout & Jessy Emaus, *Damages in Wrongful Death Cases in the Light of European Human Rights Law: Towards a Rights Based Approach to the Law of Damages*, 10 UTRECHT L.

the damages that someone has to pay for the pain (*dolore*) that they have caused to another person—in other words, the damages due to mental suffering or pain.[182] The provision also states that, "if the injured person sustained physical injuries or if his honour or reputation is injured or if he is harmed otherwise in person," then he is entitled to non-pecuniary damages.[183] The language of "harmed otherwise" is quite broad and also encompasses cases of mental harm. Based on this provision, the Supreme Court of the Netherlands ruled that strong mental discomfort does not constitute mental harm[184] and that, whereas such harm must generally be seen through the lens of psychiatric diseases,[185] it can also be asserted in cases of psychological damage once the party in question provides sufficient and specific information that such harm has occurred.[186] As such, the factors that judges take into account in order to award non-pecuniary damages are the gravity of the suffered injury and the extent to which the claimant will be able to come to terms with what happened.[187]

Similarly, in Italy, emotional harm was included within non-patrimonial damages allowed under Article 2059 of the Italian Civil Code only in cases determined by legislation.[188] Gradually, Italian jurisprudence, together with some scholarly works, developed a broader reading of the provision.[189] The Corte di Cassazione eventually held that, to the extent that the right to health is a constitutionally protected right, Article 2059 of the Civil Code cannot but cover psychological injuries and infringements to a person's psychological health.[190] Both the Italian Corte di Cassazione, as well as the country's Constitutional Court, referred in the past to mental harm damages comprising both claims that could be proven through resort to mental health experts (what

REV. 91, 102 (2014); *see also* Anna van Duinen & Eva Schothorst-Gransier, *New Law in Netherlands Compensates Family Members for Emotional Loss*, LEXOLOGY (Apr. 20, 2018), https://perma.cc/5GFJ-ACBA.

[182] Art. 6:106 BW (Neth.); *see also* Giovanni Comande, *Compensation for Personal Injury in a Comparative Perspective: The Need to Bridge Legal and Medicolegal Knowledge*, *in* PERSONAL INJURY AND DAMAGE ASCERTAINMENT UNDER CIVIL LAW 57 n.15 (Santo Davide Ferrara et al. ed., 2016).

[183] Art. 6:106(b) BW (Neth.).

[184] HR februari 2002, NJ 2002, 240 m.nt. JBM Vranken (N.V. Verzekering Maatschappij Woudsend Anno 1916/ Verweerster) (Neth.).

[185] *Id.*; Rinjhout & Emaus, *supra* note 181, at 98.

[186] HR 9 mei 2003, NJ 2005, 168 m.nt. van W.D.H. Asser (Eiser/De Provincie Noord-Brabant) (Neth.).

[187] William H. van Boom, *Compensation for Personal Injury in the Netherlands*, *in* COMPENSATION FOR PERSONAL INJURY IN A COMPARATIVE PERSPECTIVE 211 (Bernhard Koch & Helmut Koziol ed., 2003).

[188] Art. 2059 CODICE CIVILE [C.c.] (It.), https://www.altalex.com/documents/news/2014/02/19/dei-fatti-illeciti.

[189] Pietro Sirena, *The Concepts of 'Harm' in the French and Italian Laws of Civil Liability*, *in* FRENCH CIVIL LIABILITY IN COMPARATIVE PERSPECTIVE 209 (Jean-Sebastien Borghetti & Simon Whittaker eds., 2019).

[190] *Id.* at 210.

the courts have termed as "biological damage") as well as claims relating to the suffering the claimant sustained.[191] While such suffering could support tort law claims on an independent basis, the Corte di Cassazione held that mere uncomfortableness, annoyance, or disappointment could not give rise to any claims of damages.[192]

The analysis of all these jurisdictions demonstrates that, in order to be able to beget legal effects, the sustained mental harm must have a certain gravity. The repercussions for international criminal jurisprudence will be discussed in the next section.

VI. BACK TO THE INTERNATIONAL FIELD: IMPLANTING THE DOMESTIC LAW MENTAL HARM PRECEPTS INTO THE JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The way domestic jurisdictions attach legal repercussions to mental harm in cases that go beyond insanity to also encompass psychiatric disorders, as well as impacts on mental health that reach a certain gravity even in the absence of a psychiatric diagnosis, can further instruct the way international criminal courts and tribunals, most notably the ICC, address mental harm sustained by civilians exposed to acts of warfare.

In the past, international criminal judges seemed to have shared the view that mental harm requires a certain degree of intensity in order to be able to beget legal repercussions. The fact that these judges have not yet resorted to a comparative analysis of domestic laws to draw some guiding standards leaves their conclusions amorphous, indecisive, and unpersuasive. For example, in the *Krstic* case, concerning the criminal liability of a Bosnian Serb officer in the aftermath of the massacre in Srebrenica,[193] the ICTY Trial Chamber referred to the testimony of an NGO officer who provided psychological support for the survivors and noted that younger children had developed adjustment problems—such as low levels of concentration, nightmares, and flashbacks—and that the level of the assessed trauma was "high."[194] The judges did not further explain how "high" the level of the sustained trauma must be to constitute serious mental harm. It would have been possible for the judges to answer that question had they resorted to the domestic law-derived standard of gravity. Similarly, the domestic law-derived standard of mental harm that also encompasses cases of psychiatric disorders could have been useful in the case of *Akayesu*, where the ICTR Trial Chamber held that the civilian in

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[191] *See, e.g.*, Cass. civ., sez. III, 31 maggio 2003, n.8827 (It.) (author's translation). *See also* Paolo Cendon, *Vincitori e vinti dopo la sentenza n. 233/2003 della Corte Costituzionale*, ALTALEX (July 28, 2003), https://www.altalex.com/documents/news/2004/12/16/vincitori-e-vinti-dopo-la-sentenza-n-233-2003-della-corte-costituzionale (discussing judgment n. 233/2003 of the Italian Constitutional Court).

[192] Cass. civ., sez. un., 11 novembre 2008, n. 26972 (It.), https://perma.cc/9UWG-YQAQ.

[193] *Krstic*, *supra* note 4, ¶ 3.

[194] *Id.* ¶¶ 92–93.

question suffered from PTSD without further elaborating why PTSD constituted serious mental harm.[195]

Incorporation of the features domestic law has identified for mental harm would further make its discussion by international criminal courts and tribunals more specific. For example, references in the *Milošević* ICTY judgment to the "deep and irremovable scars" that were left on the civilian population as a result of its exposure to a series of attacks[196] would be further concretized by a discussion of how such scars displayed a certain gravity and how they could be associated with a psychiatric disorder. In such cases, the need for mental health experts to provide opinions would not be limited to a procedural requirement that international criminal judges should fulfill,[197] but would extend to the substantive merits, as well. Instead of having to provide a report *in abstracto* on how certain attacks have impacted the examined civilian witness's psyche, the mental health experts would opine *in concreto* on whether the civilian in question suffered from a psychiatric disorder or, if not, whether the impact of the attack or attacks on the civilian's psyche was so grave as to leave a more than transient impact. By thus making the mandate of mental health experts more content-specific, the incorporation of the domestic law-derived standards in international justice would contribute towards its procedural coherency.

This procedural coherency is essential for the ICC, which, in its jurisprudence, has not yet defined standards for the delineation of mental harm. For example, in the case of *Lubanga*, the ICC referred to the serious trauma caused to child soldiers because of their recruitment.[198] The Trial Chamber reached that conclusion through reliance on an opinion provided by a mental health expert,[199] but with no further elucidation from the judges on which parts of the provided opinion conveyed that the incurred trauma reached the required level of gravity. The lack of specific standards for the delineation of mental harm was even more evident in the case of *Katanga*, where the ICC referred to the serious mental harm sustained by a woman who had been repeatedly raped and assaulted.[200] In the particular case, the judges' assertion that the victim had suffered "serious mental harm" did not derive from any opinions or reports provided by mental health experts. The crime's particular elements associated with the "serious mental harm" conclusion were never elucidated by the judges. Acknowledging that rape undoubtfully constitutes a traumatic event that can lead to non-transitory harm, the judges opted to discuss "serious mental harm" as synonymous to the grave psychological

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[195] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 143, (Sept. 2, 1998).

[196] *Milošević*, *supra* note 28, ¶ 910.

[197] *See* Solomon, *supra* note 2 (for the imposition of such a procedural requirement for international criminal judges to turn to experts for matters of expertise).

[198] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Judgment, ¶ 1358 (Mar. 14, 2012).

[199] *Id.* ¶ 605.

[200] Prosecutor v. Germain Katanga, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶ 1006 (Mar. 7, 2014).

impact of rape on a victim's psyche rather than as a technical notion that can legally substantiate a certain level of harm required by law in order for the incurred mental harm to be tagged as "serious."

VII. CONCLUSION

Courts, international and domestic alike, have always been prone to not properly assessing the mental harm sustained by civilians exposed to acts of warfare. To the extent that international criminal law requires such mental harm to be serious in order to constitute an international crime, a lack of any standards for the definition of this seriousness element means that the assessment of civilian mental harm has been an exercise neither international nor domestic courts have properly undertaken.

By resorting to comparative law, this Article examined the interpretation of mental harm in the main jurisdictions of both the common as well as continental law world. It thus delineated two major precepts that pervade mental harm jurisprudence, namely: (1) the fact that mental harm goes beyond the concept of insanity and can also comprise psychiatric disorders; and (2) that, even in the absence of any mental abnormalities, the existence of grave symptoms which considerably impair the person's ability to lead a normal daily life can be equally deemed to fall within the realm of "serious mental harm."

Judges need standards against which they can assess complex issues. This is all the more true for matters of expertise, such as issues pertaining to warfare's psychological impact. In coming to discuss such impact, international criminal courts have to be specific in order to not leave any shadows in their judgments and thus open themselves to the possibility of being accused of politicization. Equally, if national judges want to meet the challenges that war-related cases raise, they too must be able to delve into these domestic law-derived mental harm standards.

Such understanding is important. If law, and criminal law specifically, is to be able to embrace the aims of justice—not only from a positivist point of view, but also from a wider socio-legal one—judges must realize that it is in the interest of justice for them to align their approaches between tort law and criminal law on one hand, and domestic criminal and international criminal law on the other. Doing so will ensure that reference to mental health precepts in general, and to civilians' mental harm and suffering in particular, will take place more often in future judgments and will advance justice for victims suffering mental harms.