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APPLYING THE PRINCIPLE OF PROPORTIONALITY TO THE WAR ON TERROR

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ABSTRACT

This paper aims to discuss and apply the principle of proportionality (PoP) to the War on Terror (WoT). For this, vital characteristics and conditions of the PoP will be discussed in great detail. The paper argues that notions of the “just cause,” the “reasonable hope of success,” and the “requirement of the last resort” are incorporated within the PoP. This paper also defines how the harm caused by military actions is weighed against the direct military advantage to arrive at conclusions on the proportionality or disproportionality of an attack. After discussing the theoretical grounds of the PoP, this paper tries to apply the PoP to the WoT, most particularly in the wars in Afghanistan, Iraq, and Syria. This paper is an attempt to calculate the damage caused by the direct or reverberating effects of these wars, by considering the costs casualties, and effects of these wars on terrorism, to check their efficacy and achievements against their military objectives. This paper concludes that the destruction caused by these wars greatly outweighs the military advantages they have achieved. For instance, several countries have been destabilized and destroyed. Millions of people have been killed and millions more have been displaced. The infrastructure and the economies of these countries have been devastated. As regime change agendas have been pursued, rebels have been given arms and support to fight their own states. All of these have contributed to the rise of destabilization, violence, and terrorism in these regions, which exceeds the military objectives. These wars have been proven to be inefficient and counterproductive. The military objective of the WoT was to decrease terrorism but terrorism has significantly increased, which was reasonably foreseeable owing to past experiences. Therefore, this paper concludes that these wars can be considered disproportionate to their direct military advantage.

INTRODUCTION

The world has been in a state of war for seventeen years, since the events of 9/11 in 2001.1 The War on Terror (WoT) was started to decrease terrorism, to fight terrorist threats, and to increase the security of the Western world.2 However, after seventeen years of war at a cost of more than 4.4


trillion dollars, the humanitarian crises due to this war have been beyond expectations. The WoT has caused the deaths of millions of innocent civilians, the destruction of several countries, and the displacement of millions more in the migrant crises. It has destabilized several regions, and terrorism and violence have counterproductively increased. The security of the Western world has not improved; instead it has deteriorated. Terrorism is on the rise, with the formation of new terrorist organizations every year. However, the war has no end in sight. New conflicts and new invasions in more countries are planned and executed even after seventeen years of the WoT. Scholars believe that by now we should have learned our lesson

8 See generally Bureau of Counterterrorism, Foreign Terrorist Organizations, DEP’T STATE, https://www.state.gov/j/ct/rls/other/des/123085.htm (last visited Feb. 8, 2019) (listing Foreign Terrorist Organizations recognized by the Secretary of State, as well as their dates of designation).
9 See Torfeh, supra note 1.
10 See Message to Congress on Submitting Proposed Legislation to Authorize the Use of Military Force Against the Islamic State of Iraq and the Levant (ISIL) Terrorist Organization, 2015 DAILY COMP. PRES. DOC. 93 (Feb. 11, 2015).
from previous invasions, and that the WoT is inefficient and counterproductive. Therefore, to analyze the destruction caused by this war in contrast to its military advantages, this paper attempts to calculate the war’s proportionality. For this, the destruction caused by the war will be compared with the military objectives achieved by it.

This paper is divided into two main parts. Part I will theoretically discuss the principle of proportionality (PoP). This part will explain the general characteristics of the PoP, will analyze military advantage under the PoP, will discuss the “harm caused” under the PoP, and will describe the mechanism of weighing the harm caused against the military advantage, to arrive at conclusions on the proportionality or disproportionality of an attack. Then, Part II will discuss the WoT and the destruction caused by it in addition to the application of the PoP. Part II will apply the PoP to the Afghanistan War, the Iraq War, and the war in Syria. Ultimately, this paper will conclude that the harm and destruction caused by the WoT outweighs the benefits that military action has achieved.

I. PROPORTIONALITY

Just war theory sets out the foundations of the conditions for fighting a just war. Violating these conditions is considered wrong. However, the severity of the wrong done depends on the importance of the violated condition and the severity of the extent of this violation. These conditions are divided into two general groups: jus ad bellum and jus in bello. Jus ad bellum is the laws of war that are concerned with the justifiability and reasonableness of resorting to the use of force. These laws analyze whether a war itself is just or not. For this, a war must be entered into as a last resort, with a declaration of war by a legitimate authority, with a reasonable hope of success, and with the right intention. For instance, a war in self-defense to thwart aggression is considered to be a just reason to fight a war. However, a legitimate cause to fight a war does not allow the disregard of jus ad

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11 THRALL & GOEPNER, supra note 6, at 2.
14 Gregory Reichberg, Legitimate Authority, Just Cause, and the Decision to Invade Iraq, in 1 ETHICS, LAW, AND SOCIETY 243, 243 (Jennifer Gunning & Søren Holmes eds., 2005).
15 CHARLES JONES, MORE THAN JUST WAR 79 (2013).
16 Suzzane Uniacke, Self-Defence, Just War, and a Reasonable Prospect of Success, in HOW WE FIGHT: ETHICS IN WAR 62, 62 (Helen Frowe & Gerald Lang eds., 2014) (explaining that thwarting aggression is a just reason so long as the use of force is necessary and proportionate).
bellum conditions of international humanitarian law (IHL). Jus in bello, on the other hand, is the laws of war that are concerned with the conduct of a war. These laws include the evaluation of war activities with the scope of humanitarian laws. For instance, jus in bello includes the principles of necessity, distinction, and proportionality. The principle of necessity mandates that military action must only be taken as a last resort, assuring that it is not taken unnecessarily and without exhausting all peaceful means. The principle of distinction mandates that military action in a war must only target combatants and should not deliberately target civilians or civilian property. The PoP mandates that the damage caused by military action must not exceed its military objectives, such that the harm done by a war is not greater than the relevant good it achieves. Within proportionality, it is forbidden under the law of war to cause excessive destruction or killings that serve no military purpose or are disproportionate to the relevant good expected to be achieved from it.

The PoP is included in the humanitarian laws of war under Additional Protocol I 1977 to the Geneva Conventions of 1949 (API of GC). It forbids military attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

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18 Frowe, supra note 13.
19 What Are Jus Ad Bellum and Jus In Bello?, supra note 17.
20 See Asaro, supra note 12.
23 Geneva Conventions Protocol I, supra note 21, at art. 51(4).
24 See id. at art. 57(2)(a).
25 Id. at art. 51(4), art. 57(2)(a).
26 Id.
A. Conditions and Characteristics

There are numerous conditions and characteristics of proportionality. However, this paper is only concerned with the three main conditions and characteristics: collateral damage, hope of success, and last resort.

1. Collateral Damage

It is worth noting here that the Geneva Convention (GC) discusses unintentional collateral damage to civilians and property under the PoP.\textsuperscript{27} Intentional damage to civilians and property is otherwise forbidden under the principle of distinction.\textsuperscript{28} The PoP forbids "incidental" collateral damage against civilians and property that exceed the direct military advantage.\textsuperscript{29} However, it does allow the death of civilians as collateral damage if the direct military advantage is bigger than the damage caused.\textsuperscript{30} For instance, the PoP allows the death of a few civilians in a bomb attack on a building full of terrorists, if it would avoid the death of thousands of civilians at the hands of the terrorists targeted. However, it would not allow the targeting and killing of thousands of civilians in a military action against one terrorist; the military goal in this example is so trivial as compared to the excessive damage triggered by this action.

2. Hope of Success

If applied properly, the PoP can also incorporate other conditions of \textit{just war theory}, such as the "reasonable hope of success" criterion,\textsuperscript{31} which a war will violate if it has no chance of achieving any good.\textsuperscript{32} But such a war also violates the PoP because the destruction is unnecessarily excessive and serves no military purpose.\textsuperscript{33} Thus, a war with no hope of success is bound to be disproportionate.\textsuperscript{34} A similar statement is also true for a war where the probability of expected benefit is low, because a lower probability of expected benefit makes the harm incurred as a result of military actions exces-

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{Id.} at art. 48; Geneva Conventions Protocol II, \textit{supra} note 22.

\textsuperscript{29} Geneva Conventions Protocol I, \textit{supra} note 21, at art. 51(5)(b), art. 57(2)(a).

\textsuperscript{30} KAREN HULME, \textsc{War Torn Environment} 127 (2004).

\textsuperscript{31} JONES, \textit{supra} note 15.


\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.}
Some scholars rightly believe that the reasonable hope of success condition is not applicable in situations where a small country is defending itself against the aggression of a superpower because in such a situation a small state is justified in defending itself even without having any hope of success. The actual reasonable hope of success condition limits the excesses of war against vague military objectives. For instance, fighting a unilateral war against all terrorists of the world without the consent of the host states can be considered a vague military objective, which seems to have no limits whatsoever. So, the military campaign to execute this objective can cause excessive destruction and unnecessary deaths without achieving substantial goals. In the WoT, the war is fought against all terrorists. However, there is no authoritative person who can sign a peace treaty or surrender to end the WoT. This means that the WoT will have no end, because the goals are so vague. Therefore, the WoT does not satisfy the reasonable hope of success condition and cannot be considered a just war under the PoP.

3. Last Resort

Similarly, the PoP can also incorporate the condition of necessity, which is the condition of last resort. For instance, consider that certain military actions achieve military objectives that could have been equally achievable by diplomatic negotiations. Here, the destruction caused by the military action may be proportionate to the military objectives, but it was not proportionate in light of the diplomatic measures that could have been taken instead of the military action. The destruction here is caused unnecessarily and in excess to what could have been reasonably achieved diplomatically. In the Oil Platform Case, the International Court of Justice (ICJ) estab...
lished that the principles of proportionality and necessity are interlinked because a war or an attack cannot be proportional if it is unnecessary. Under the principle of necessity, proportionality requires that only the least amount of force necessary for self-defense can be used to thwart an attack by the aggressors.

By contrast, the simple proportionality condition is the calculation of good versus evil produced by a war, from the baseline of doing nothing or continuing a war without just cause. This produces a result for whether the outcome of a war has achieved more good or more evil compared to its alternatives and justifiability. Within this analysis, the just war conditions of “necessity,” “just cause,” “last resort,” and “reasonable hope of success” are compared to the net effects of the war and its alternatives. By incorporating the last resort principle under the PoP, the “killing of the innocent in war can be licit only when it is done either accidentally or unintentionally (i.e., foreseen but not intended), but even then it is licit only where there is no alternative to it.”

However, in the subjective and objective tests of proportionality the results can be different for the same war. For instance, it is possible that a war is disproportionate because of its evil excesses and the little relevant benefit achieved, while the actions of a military person may be proportional to the facts at hand. The opposite is also possible. But in an overall calculation, if the harm done by the war is more than that of a good caused by it, then it is deemed to be disproportionate. This raises three relevant questions: 1) What is considered a relevant good or the “direct military advantage” in a war?; 2) What is considered the “harm caused” by a war?; and 3) How can military advantage be weighed against the harm caused to calculate the “excessive damage” or the proportionality of a war?

47 Hurka, supra note 42.
48 Id.
49 Id., supra note 15.
50 C.A.J. Coady, Bombing and the Morality of War, in BOMBING CIVILIANS 209 (Yuki Tanaka & Marilyn B. Young eds., 2009).
51 Hurka, supra note 42.
52 Id.
B. Military Advantage

The PoP is a “quasi-consequentialist” principle that weighs the good and evil caused by the war or by the military actions. If the evil caused by a war is greater than the good caused by it, then such a war is considered to be disproportionate. Similarly, if the benefit of a war is greater than the harm caused then the war is considered to be proportionate. James J. Johnson, a renowned legalist, agrees that for a war to be proportional it is vital that the relevant good outweighs the harm caused by it. In addition, it is also essential that a war is for a just cause to be proportional. This means that a proportionate war, where the relevant good has outweighed the harm caused, can still be disproportionate if it is fought without legal basis or without just cause. Because the military objective achieved in an unjust war must be aggressive and unjust in nature, it cannot be measured as a benefit but only as an evil.

A relevant good under the PoP is the “direct military advantage” achieved by the war. Therefore, all the just causes and aims for a war are relevant goods that can or cannot be achieved through a war, whereas all the indirect advantages such as the economic benefits of a war cannot be considered relevant goods. However, economic harm can be considered a relevant harm or relevant evil in a war. For instance in the WoT, since the just cause and military advantage were to eliminate terrorism, the defeat of terrorists is a relevant good in the WoT. Similarly, resisting aggression, deterring aggression, and disarming the enemy are just causes, and therefore can be considered relevant goods in a war. However, it is pertinent to note that, if the causation or aim of a war is not aligned with the international

53 Id. at 242.
54 Id.
55 Id.
57 See Peter A. French, War and Moral Dissonance 315 (2011).
58 See id. (citing Jeff McMahan, The Ethics of Killing in War, 34 PHILOSOPHIA 23, 28 (2006)).
59 See id.
60 Geneva Conventions Protocol I, supra note 21, at art. 51, art. 57(2)(a)(iii), art. 57(2)(b).
61 Hurka, supra note 42, at 247.
62 Id.
63 Letter from Barack Obama, U.S. President, to the U.S. Congress (Feb. 11, 2015) (on file with author).
64 Jeff McMahan, Just Cause for War, 19 ETHICS & INT’L AFF. 1, 2, 3, 4 (2005).
law of using force, then a cause cannot be just.\(^{65}\) Therefore, it cannot be considered a relevant good. For instance, the international law of using force does not allow the retaliatory use of force against nonstate actors\(^{66}\) without United Nations Security Council (UNSC) authorization.\(^{67}\) The only justified uses of forces are in self-defense and with UNSC authorization.\(^{68}\) International law does not allow the preemptive use of force\(^{69}\) or humanitarian intervention without UNSC authorization.\(^{70}\) Moreover, the law does not allow supporting rebels in another country by providing them arms.\(^{71}\) Therefore, any actions taken against the international law of using force will be considered disproportionate regardless of its causation or aims. For instance, the Israeli attacks on the Osirik Nuclear Reactor were preemptive in nature, and therefore disproportionate.\(^{72}\) Moreover, if the actions of war do not produce any relevant good, then these actions can never be proportionate.\(^{73}\)

Contrary to the wording of the definition of proportionality in the GC protocols,\(^{74}\) Thomas Hurka argues that a contributory good can also be a relevant good in a war.\(^{75}\) For instance, the liberation of women in Afghan war can be considered a relevant good, even though it was not a direct military objective.\(^{76}\) However, this paper maintains that, since the definition of proportionality explicitly includes “direct military advantage”\(^{77}\) within the relevant good, a contributory or incidental good cannot be considered a relevant good in a war\(^{78}\) when calculating the proportionality of a war.

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\(^{65}\) U.N. Charter art. 2, ¶ 4.
\(^{66}\) See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 211 (June 27) (stating that self-defense is not allowed against a neutral state in response to an armed attack by non-state actors, so long as the attack was not directed by a state. If a state orchestrated an armed attack through non-state actors, then there is a right to self-defense against such a state).
\(^{70}\) JANA DADOVA, THE LEGALITY OF HUMANITARIAN INTERVENTION WITHOUT UN SECURITY COUNCIL AUTHORIZATION 6 (2016).
\(^{72}\) SHIRLEY V. SCOTT ET AL., INTERNATIONAL LAW AND THE USE OF FORCE 136 (2009).
\(^{73}\) FRENCH, supra note 57.
\(^{74}\) Geneva Conventions Protocol I, supra note 21, at art. 49.
\(^{75}\) See Hurka, supra note 42, at 40–45.
\(^{76}\) See id.
\(^{77}\) Geneva Conventions Protocol I, supra note 21, at art. 51(5)(b).
\(^{78}\) See, e.g., LINA ABIRAFEH, GENDER AND INTERNATIONAL AID IN AFGHANISTAN: THE POLITICS AND EFFECTS OF INTERVENTION 51 (2009) (indicating that consider-
C. Harm Caused

Material harm under proportionality is the loss of civilian lives, injury to civilians, or damage to civilian objects in excess of the direct military advantage.\textsuperscript{79} Harm to civilian objects considers dysfunctional civilian objects and environmental damage.\textsuperscript{80} Injury to civilians also includes illnesses and people’s mental illnesses.\textsuperscript{81} The principle of distinction forbids the direct and indiscriminate targeting of civilians and their property, and allows the pursuit of only military objectives.\textsuperscript{82} This law requires some level of likelihood to hit the target.\textsuperscript{83} For instance, random or blind firing without precisely targeting any military objects in populated areas is an example of an indiscriminate attack.\textsuperscript{84}

In addition to direct damage to civilians, economic loss and instability in the region also come within the definition of incidental harm under the PoP.\textsuperscript{85} In fact, all incidental harm and normal harm of war come under the purview of proportionality.\textsuperscript{86} For instance, damage to infrastructure, loss to the economy, death toll of civilians, damage to civilian property, instability in governance, the rise of rebellions, the rise of terrorism or violence, damage to the environment,\textsuperscript{87} decline of health care, refugee and migration crises, famine, and sanctions can be considered incidental harms. If any of these harms are incidentally caused by a war, they can be considered inci-

\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Geneva Convetions Protocol I, supra note 21, at art. 51(4)(b); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 38–39 (2005); A. P. V. ROGERS, LAW ON THE BATTLEFIELD 23 (2004).
\textsuperscript{83} See ROGERS, supra note 82, at 24.
\textsuperscript{85} Hurka, supra note 42, at 247.
\textsuperscript{87} Laurent Gisel, Relevant Incidental Harm for the Proportionality Principle, 16 BRUGES COLLOQUIUM URB. WARFARE 118, 124–25 (2015).
dental harm under the PoP. In this regard, Norway has expressed its support of the inclusion of the long-term effects of war within proportionality. The report on the United Kingdom’s (UK) intervention in Iraq has also suggested the same: that, in addition to the direct damage to civilians and their property, the indirect economic and health costs must also be calculated within proportionality. Likewise, numerous states including the Czech Republic, Brazil, Norway, Switzerland, Sweden, New Zealand, Austria, and Ireland have explicitly supported the inclusion of the long-term repercussions of military action in the calculation of damage caused under the PoP.

1. Reverberating Effects

Similarly, IHL may implicitly prohibit the use of explosive weapons with mass effects in populated areas under the PoP and the principle of precaution because their effects are less visible but cause greater damage to civilians. Their effects include damage to civilian houses, electric systems, sewage systems, health services, water supplies, and civilian displacement. Therefore, states and commentators agree that it is a legal obligation to foresee these reverberating effects and take precautionary measures during military activities. Reverberating effects are the damages that do

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90 Memorandum to CCW Delegates on States Parties’ Responses to “International Humanitarian Law and ERW” Questionnaire 5 (Mar. 2006) hereinafter States Parties’ Responses to “International Humanitarian Law and ERW” Questionnaire (on file with author).
91 See COMM. OF PRIVY COUNCILLORS, REPORT OF THE IRAQ INQUIRY, 2016-17, HC 265-XII, at 181 (UK).
92 States Parties’ Responses to “International Humanitarian Law and ERW” Questionnaire, supra note 90 (noting that Czech Republic did not explicitly agree but made statements indicating it was positive).
96 INT’L COMM. OF THE RED CROSS, supra note 95, at 40–43; see also Michael N. Schmitt, Wired Warfare: Computer Network Attack and Jus in Bello, 84 INT’L REV. RED CROSS 365, 392 (2002) (discussing examples of how military cyber-attacks on infrastructure often have residual second tier effects on the civilian population).
not “take place immediately.” The International Committee of the Red Cross (ICRC) has determined that incidental damage also includes indirect incidental damage, also known as “knock-on effects” or “indirect effects.” Various military manuals include consequential incidental damage within the rules of precaution and proportionality. Under the PoP and the principle of precaution, Articles 51(5)(b) and 57(2)(a)(iii) and (b) of API of GC include the “may be expected” phrase to avoid damages to civilians in terms of incidental damages. This phrase is not limited by time or space, and the 1974–1977 Diplomatic Conference explicitly maintained that the scope of this phrase cannot be limited to immediate vicinities. This means that it includes reverberating effects. Likewise, Article 51 of API of GC must also be read in conformity with the principle of precaution to protect civilians from dangers of arising from military operations. Similarly, Articles 54(2) and 56(1) explicitly forbid targeting protected objects, which are objects that are crucial for the sustenance of the civilian population. As a result, some scholars argue that the phrase “may be expected” is not limited to the direct effects of an attack but includes the foreseeable long-term damages or third-tier damages. Similarly, scholars also believe that incidental damage includes the foreseeable damage of reverberating effects.

State practice also supports the idea that the reverberating effects of military actions, especially the “explosive remnants of war” (ERW), must be incorporated in judging the legality of war and analyzing the PoP and the principle of precaution. In the Third Review Conference on the Conventional Weapons Which May Be Deemed to Be Excessively Injurious to

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99 Id. at 128.
100 Id. at 112–13 (citing Laurent Gisèl, Relevant Incidental Harm for the Proportionality Principle, 16 BRUGES COLLOQUIUM URB. WARFARE 125 (2015)).
101 Id.
102 Id. at 112; see Dinstein, supra note 84, at 150.
103 See Geneva Conventions Protocol I, supra note 21, at art. 51(5)(b), 57(2)(a)(iii), art 57(2)(b).
105 Geneva Conventions Protocol I, supra note 21, at art. 51(1).
106 Id. at art. 54(2), 56(1).
107 MARCO ROSCINI, CYBER OPERATIONS AND THE CONDUCT OF HOSTILITIES 222 (2014) (citing Eric Talbot Jensen, Cyber Attacks: Proportionality and Precautions in Attack, 89 INT’L L. STUD. 198, 206–07 (2013)) (posing the question of “whether incidental ‘damage’ on protected objects includes not only physical damage, but also loss of functionality.”).
109 See Robinson & Nohle, supra note 79, at 114.
110 Id. at 115.
Have Indiscriminate Effects (CCW) of 2006, a majority of states agreed that the reverberating effects of ERW must be incorporated.\textsuperscript{111} Switzerland maintained that “military commanders … must take into account … the foreseeable long-term effects of an attack such as the humanitarian costs caused by duds becoming ERW.”\textsuperscript{112} As a result, the CCW of 2006, adopted by consensus, noted that “the foreseeable effects of explosive remnants of war are [a] relevant factor to be considered in applying the international humanitarian rules on proportionality and precaution in attack.”\textsuperscript{113} Similarly, in 2015, at the ICRC meeting on the effects of explosive weapons in populated areas, numerous states agreed that the military action must take into account the reverberating effects of an attack.\textsuperscript{114} Even the US Army Counterinsurgency Manual of 2006 states that “leaders must consider not only the first-order, desired effects of a munition or action but also possible second- and third-order-effects – including undesired ones.”\textsuperscript{115} Thus, humanitarian laws and the PoP do include the reverberating effects of military actions, in addition to the direct damage caused to civilian objects.\textsuperscript{116}

2. Foreseeability

In addition to the ICRC, the declaration of the CCW,\textsuperscript{117} and the United States Army Manuals\textsuperscript{118} discussed above, the Inter-American Commission on Human Rights of 1999 stated that the PoP implies that the foreseeable damages to civilians must not be in excess to the direct military objectives.\textsuperscript{119} Scholars and the Commentary on Harvard Humanitarian Policy and Conflict Research Manual on International Law Applicable to Air and Missile Warfare (AMW Manual) found that foreseeable damage is damage that is “more likely than not.”\textsuperscript{120} Other scholars maintain that the word “ex-

\textsuperscript{111} THIRD REV. CONF. OF THE HIGH CONTRACTING PARTIES TO THE CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS 4 (2006) [hereinafter THIRD REV. CONF.].

\textsuperscript{112} Robinson & Nohle, supra note 79, at 115 (citing Response from Switz. to Document CCW/GGE/X/WG.1/2P.2, CCW/GGE/XI/WG.1/WP.13 § 15 (Aug. 3, 2005)).

\textsuperscript{113} THIRD REV. CONF., supra note 111.

\textsuperscript{114} INT’L COMM. OF THE RED CROSS, EXPLOSIVE WEAPONS IN POPULATED AREAS: HUMANITARIAN, LEGAL, TECHNICAL, AND MILITARY ASPECTS 23 (2015).

\textsuperscript{115} U.S. DEP’T OF THE ARMY, COUNTERINSURGENCY 7-7 (2006).

\textsuperscript{116} Robinson & Nohle, supra note 79, at 118.

\textsuperscript{117} THIRD REV. CONF., supra note 111.

\textsuperscript{118} U.S. DEP’T OF THE ARMY, supra note 115.


\textsuperscript{120} Robinson & Nohle, supra note 79, at 118; see ROSCINI, supra note 107, at 221.
pected” only means “likely to occur.” They argue that even a forty percent chance of likelihood is sufficient to conclude it is expected, although it is less likely than not. Moreover, they consider that the standard of foreseeability is a vital characteristic in calculating the reverberating effects of a military action with regard to the PoP.

3. Objective Test

A few people and states are of the view that the foreseeability of incidental harm in respect of military advantage under the PoP is based on the subjective test of the commanding officer. This means that the subjective knowledge of a commander will determine whether the damage was foreseeable to him or not. For instance the US Law of War Manual states that the question of determining an incidental harm “is subjective and imprecise.” However, the inclusion of the words “may be” and “expected” in the relevant provisions establish that the test of foreseeability under the PoP is not a subjective one but rather an objective one. The IRC Commentary on Article 57 supports the proposition that the test is objective by stating that “the interpretation must above all be a question of common sense and good faith for military commanders.” An objective test includes “common sense” and “good faith for military commanders.” One scholar also asserted that it is an objective test and that the attacker “must act reasonably and in good faith.” Similarly, other scholars agree that the attacker must be “reasonable” and must reasonably use the information. The Canadian Manual on the Law of Armed Conflicts also states that the criterion for analyzing the incidental damage is an “objective one: Did the commander, planner or staff officer do what a reasonable person would have done in the circumstances?”

121 Robinson & Nohle, supra note 79, at 118.
122 Id.
123 Id. at 119.
124 Id.
125 BOTHE ET AL., supra note 104, at 310.
126 U.S. DEP’T OF DEF., LAW OF WAR MANUAL 266 (2016).
127 Robinson & Nohle, supra note 79, at 119.
128 Geneva Conventions Protocol I, supra note 21, at art. 57.
130 Robinson & Nohle, supra note 79, at 120.
132 Robinson & Nohle, supra note 79, at 120 (citing CAN., OFFICE OF THE JUDGE ADVOCATE GEN., LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL...
The International Criminal Tribunal for the Former Yugoslavia (ICTY) held that the test is to analyze “whether a reasonable well-informed person in the circumstances of the actual perpetuator” would have acted accordingly.\textsuperscript{133} The ICTY suggested that the test is an objective test of the “reasonable military commander.”\textsuperscript{134} A “reasonable commander test” is a higher objective test for the foreseeability than the test of “a reasonable man” because, in a situation of a war, a reasonable man cannot be implied to possess as intricate a knowledge of the affairs of war as a knowledgeable commander.\textsuperscript{135} Some scholars therefore maintain that the test of a reasonable commander is that of a subjective agent while testing him objectively.\textsuperscript{136} Some states including Israel support the higher threshold of a reasonable commander as an objective test for analyzing the incidental damage.\textsuperscript{137} Therefore, the foreseeability of incidental harm can be considered to have the standard of a reasonable commander in calculating the reverberating effects of a military action, using the available information reasonably. This objective test of a reasonable commander in lieu of a subjective test eliminates the negligent actions of a commander from the calculations of incidental harm caused.\textsuperscript{138}

4. State Practices and Past Experiences

It is noted that future practices are based on the lesson learned from past experiences to calculate the reverberating effects of incidental damage on civilian lives and property. For instance, the US Joint Services and the Collateral Damage Estimation Methodologies rely heavily on empirical data and the past experiences of damage assessments to calculate the collateral damage from attacks.\textsuperscript{139} For example, NATO forces in Kosovo used graph-
ite filaments to temporarily disable the electricity system to avoid long-term permanent failure, bearing in mind the reverberating effects of electricity failures in the long-term.\textsuperscript{140} This is because the general public and numerous states are presently well aware of the interconnected reverberating effects of incidental damage to infrastructure on civilians’ lives and property.\textsuperscript{141} An ICRC report on the reverberating effects of explosives in populated areas under the PoP also noted that electricity failures diminish water supplies, obstructs evacuations, and compromises waste disposal systems.\textsuperscript{142} Similarly, UNICEF reported that failures of electricity and water supplies in Syria have reduced health and increased breakouts of a number of deadly diseases due to unhygienic conditions.\textsuperscript{143} In evaluating electricity failure due to armed attacks and its reverberating effects on the civilians, two scholars, Arkin and Crawford, noted that the electricity failure in Iraq in 1991 caused the deaths of 70,000 civilian people,\textsuperscript{144} because the electricity capacity reached a level that was fifteen percent of its pre-conflict capacity, which affected the health care system.\textsuperscript{145} Moreover, the reverberating effects of nuclear bombs on the children born in Hiroshima and Nagasaki are common knowledge these days. Therefore, they cannot be treated as a remote, speculative, or unexpected damage.\textsuperscript{146} For these reasons, international organizations and states are including the reverberating effects of military actions in their reports and manuals. For instance, the ICRC explicitly mentioned that the PoP must include the reverberating effects of submunitions, especially on the food, water, health care, and daily activities of civilians.\textsuperscript{147} In support of acknowledging the reverberating effects of war on ci-


\textsuperscript{142} Id.


\textsuperscript{147} Robinson & Nohle, supra note 79, at 98 (citing CCW/GGE/XI/WG.1/WP.7, Ge-
vilians based on past experiences, the ICRC also noted that “past experiences has put users on notice about the long-term dangers that cluster munitions cause to civilians.”

In considering the past practices and experiences, the Nicaragua Case in the ICJ is a landmark case of common knowledge, with utmost relevance. In that case, the ICJ established that arming rebels in another state is not allowed and is considered to be an act of war, aggression, and an armed attack. Past experiences in Libya, Lebanon, Iraq, Afghanistan and Syria have established clearly that arming and training rebels yields catastrophic long-term reverberating effects under the PoP. For instance, first, the arms provided to rebels mostly end up in the hands of terrorists. ISIS is primarily using weapons provided by coalition members that were originally meant to change the regime or fight terrorism. Second, the fight against terrorism is effective if the government of the host state is strong. But supporting rebels to change the regime and fight the state’s own government destabilizes the state and decreases the state’s capacity to fight terrorism effectively. It is now a known fact that arming rebels to fight a proxy war or to change the regime not only is illegal but also destabilizes

\footnote{\textit{Nicaragua Case} in the ICJ is a landmark case of common knowledge, with utmost relevance. In that case, the ICJ established that arming rebels in another state is not allowed and is considered to be an act of war, aggression, and an armed attack. Past experiences in Libya, Lebanon, Iraq, Afghanistan and Syria have established clearly that arming and training rebels yields catastrophic long-term reverberating effects under the PoP. For instance, first, the arms provided to rebels mostly end up in the hands of terrorists. ISIS is primarily using weapons provided by coalition members that were originally meant to change the regime or fight terrorism. Second, the fight against terrorism is effective if the government of the host state is strong. But supporting rebels to change the regime and fight the state’s own government destabilizes the state and decreases the state’s capacity to fight terrorism effectively.}


\footnote{See Seumas Milne, \textit{Coups and Terror are the Fruit of NATO’s War in Libya}, \textit{Guardian} (May 22, 2014), https://www.theguardian.com/commentisfree/2014/may/22/coups-terror-nato-war-in-libya-west-intervention-boko-haram-nigeria.}


\footnote{See Michel Chossudovsky, \textit{Al-Qaeda and the “War on Terror,” Global Pol’y F.} (Jan. 20, 2008), https://www.globalpolicy.org/component/content/article/154/26821.html.}


\footnote{\textit{id.}}

\footnote{See Karlin, \textit{supra} note 154; Wire Staff, \textit{supra} note 154.}
the host state and the region, resulting in increased violence, increased terrorism, and increased destruction.\textsuperscript{158} Since the international law of using force does not allow the arming of rebels,\textsuperscript{159} and because the reverberating effects of doing so include increases in terrorism, violence, destruction, and instability, it is only reasonably foreseeable that providing support to rebels in another country is disproportionate under the rules of international law of using force and the PoP and the principles of precaution.\textsuperscript{160}

In practice under PoP, Ireland has advised that military commanders must be informed of the long-term effects of conflicts on civilians,\textsuperscript{161} and Norway has expressed its opinion that past experiences in Laos and Vietnam are sufficient to establish that munitions have long-term reverberating effects on civilians.\textsuperscript{162} The UK in its Joint Services Manual of the Law of Armed Conflict says that incidental damage needs to be considered in relation to the anticipated military advantage.\textsuperscript{163} It also explicitly says that “injury … excessive in relation to the military advantage anticipated … would be disproportionate and unlawful, owing to the excessive collateral damage.”\textsuperscript{164} Similarly, the United States (US), in its Counterinsurgency Manual, states that military action should avoid “the use of area munitions to minimize the potential harm inflicted on non-combatants located nearby.”\textsuperscript{165}

In sum, the reverberating effects of an attack are reasonably foreseeable in populated areas under the PoP and the principle of precaution.\textsuperscript{166} Likewise, long-term effects of economic sanctions and denial of access owing to the inability to repair essential services in the basic infrastructure are also reasonably known.\textsuperscript{167} Therefore, it is only reasonably foreseeable that there

\textsuperscript{158} See Chossudovsky, supra note 153; Karlin, supra note 154; Milne, supra note 152; Wire Staff, supra note 154.


\textsuperscript{160} See id.


\textsuperscript{162} SIMON CONWAY, CLUSTER MUNITIONS: HISTORICAL OVERVIEW OF USE AND HUMAN IMPACTS (2007).


\textsuperscript{164} Id. at 86.

\textsuperscript{165} U.S. DEP’T OF THE ARMY, supra note 115.


\textsuperscript{167} Robinson & Nohle, supra note 79, at 125.
will be a stronger reverberating effect on civilian lives in the states of Syria, Yemen, and Libya due to the sanctions and destruction of the infrastructure.\textsuperscript{168}

5. Precaution

The duty of precaution obliges the military to verify that the target serves as a valid military objective\textsuperscript{169} and to assess the expected incidental damage\textsuperscript{170} to avoid all unnecessary incidental damage.\textsuperscript{171} Not taking precautions, or not cancelling the mission upon knowing\textsuperscript{172} that it does not serve a military objective, may violate the PoP.\textsuperscript{173}

The ICRC commentary on Article 57 of API of GC says that the rule of precaution is indispensable in highly populated areas owing to a dense civilian presence.\textsuperscript{174} The previous subsections discussed the obligation of military commanders to consider reasonable and foreseeable reverberating effects of an attack with regard to incidental damage under the PoP. This subsection will explain how in the practical sense of taking precautions a commander must act reasonably to execute this obligation. Precautions can be defined as considering and avoiding actions that “are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”\textsuperscript{175} These considerations include the objective test of a reasonable commander with the considerations of foreseeable and reasonably available information at that time and place.\textsuperscript{176} The rule of precaution obliges the commander to take all reasonable steps to avoid disproportionate incidental harm by the actions and prohibits the commander from taking any action that is reasonably disproportionate.\textsuperscript{177} Some scholars say that these actions and precautions are based
on the information actually available, while others believe that these obligations are based on the information reasonably available. This differentiation is that of a subjective or objective test; which as discussed above, it was established that proportionality is to be judged objectively rather than subjectively.

As a slightly higher objective standard than that of a reasonable commander, many states oblige their commanders to obtain the “best possible intelligence” to determine the incidental harm of an attack. For instance, Australia obliges its commanders to obtain the “best possible intelligence” of densely populated areas and town structures with regard to military objectives and their incidental harm. In this context, the best information will include: a complete understanding of the essential infrastructure, secondary and tertiary infrastructure, and their interconnectedness with other services. One scholar, William Boothby, argues that the precaution must also include technical expertise in understanding the intricate relationship between infrastructure, services, and their effects to calculate incidental harm. In fact, some states already require experts to analyze the incidental harm of certain weaponry. For instance, US war manuals involve civil engineers to calculate the incidental damage to water supplies, power grids, and sewage networks from an attack. The US guidelines also consider in depth the reverberating effects of incidental harm and try to protect and minimize the damage against infrastructure and essential facilities. In fact, the US explicitly refers to and prohibits “incidental damage” in excess of the military objectives and military advantage achieved. It also mandates the attack be in harmony with the IHL principles of necessity, proportionality, and distinction. Moreover, it requires commanders to warn ci-

178 Robinson & Nohle, supra note 79, at 135.
179 Id.
180 HENCKAERTS & DOSWALD-BECK, supra note 82.
181 Law of Armed Conflict 2006 (Cth) ss 5.53, 5.54 (Austl.).
182 Robinson & Nohle, supra note 79, at 136.
184 INT’L COMM. OF THE RED CROSS, supra note 114, at 36.
186 U.S. DEP’T OF DEF., JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-06, JOINT URBAN OPERATIONS I-8 (2013) [hereinafter JOINT URBAN OPERATIONS].
vilians to depart the area, if possible, or even cancel the attack if the target serves no military objective.\footnote{189} Within this structure, the US considers the destruction of infrastructure that increases civilian hardship.\footnote{190} The US also gives special consideration to the environmental, chemical, biological, and radiological damage assessment of an attack,\footnote{192} with regard to the incidental harm under the precaution heading, including the secondary and tertiary effects of an attack.\footnote{193} Similarly, Australia also gives special consideration to the secondary and tertiary incidental reverberating effects of an attack.\footnote{194} Norway and Israel oblige their commanders to minimize the destruction of essential infrastructure.\footnote{195} Jeff McMahan gives a very good example of analyzing the reasonable foreseeability of an attack in a densely populated area.\footnote{196} He says that the attacker must see the innocent civilians in the targeted area as the citizens of the attacker’s own country; that way, they would know how many people they should be willing to harm in the attack.\footnote{197} Therefore, the principle of precaution under proportionality is infringed where a commander chooses to ignore the reasonably available information about the considerations of the reverberating effects of an attack, irrespective of the planned or unplanned operational context.\footnote{198} In sum, commanders are obliged to take all foreseeable precautions to try to minimize civilian damage and the reverberating incidental harm of an attack.\footnote{199} Through modernization in technology, there are several ways to re-

\footnote{189} Id. at A-5; Wright, supra note 187, at 831.  
\footnote{190} JOINT TARGETING, supra note 188, at A-5; Wright, supra note 187, at 31.  
\footnote{191} JOINT URBAN OPERATIONS, supra note 186, at III-9.  
\footnote{192} U.S. DEP’T OF DEFENSE, JOINT CHIEFS OF STAFF, NO-STRIKE AND COLLATERAL DAMAGE ESTIMATION METHODOLOGY Appendix A, Enclosure A (1976) [hereinafter NO-STRIKE AND COLLATERAL DAMAGE ESTIMATION METHODOLOGY].  
\footnote{193} See id. at Appendix A, Enclosure D.  
\footnote{194} AUSTL. DEP’T OF DEFENCE, OPERATIONS SERIES, ADDP 3.14, TARGETING § 1.21 (2009).  
\footnote{196} See McMahan, supra note 32, at 14–15.  
\footnote{197} See id.  
\footnote{198} BOOTHBY & HEINTSCHEL VON HEINEGG, supra note 86, at 136.  
\footnote{199} See Schmitt & Widmar, supra note 176, at 402; see also HENCKAERTS & DOSWALD-BECK, supra note 82, at 56.  
https://scholarship.richmond.edu/pilr/vol22/iss3/4
duce incidental harm. For instance, “precision-based guided missile systems” and “physics-based computer modeling” can effectively decrease the incidental reverberating effects of an attack. Some scholars support the argument that guided missiles can reduce incidental damage, and others suggest that filament bombs can do so too. The rule of precaution also obliges attackers to not target densely populated areas, and allows certain areas to have restricted attacks, if possible. In compliance, the US also allows the creation of no-fire zones and prohibits targets located in densely populated areas to protect civilians. In addition, the US also mandates its commanders to abort an attack if the accuracy of the target is not certain. Similarly, Israel prohibits the use of artillery in urban populated areas in addition to its IHL requirements, but exceptionally allows the same only to pursue the necessary military objectives.

6. Drones

Drones strikes are target killing, which are only legitimate if taken with the consent of the host state because, without consent, drone strikes violate the sovereignty of a host state. Moreover, the conduct of drone strikes must fulfill all the IHL principles, including proportionality, distinction, and necessity. Drones are disproportionate, because on average a drone strike kills about ten innocent people as collateral damage. Likewise, Joshua Andersen established that drones actually put more civilian lives at risk, disproportionately, and the assumption that precise-targeting drones decrease possible civilian casualties is based on false premises. For this, he

201 See NO-STRIKE AND COLLATERAL DAMAGE ESTIMATION METHODOLOGY, supra note 192; Gisel, supra note 87, at 128.
202 DINSTEIN, supra note 84, at 142.
203 See Schmitt & Widmar, supra note 176, at 402.
205 JOINT URBAN OPERATIONS, supra note 186, at IV-18.
206 Id. at IV-16.
207 Id.
208 See STATE OF ISRAEL, supra note 137, at 192.
210 DRONE WARS: TRANSFORMING CONFLICT, LAW, AND POLICY 151 (Peter L. Bergen & Daniel Rothenberg eds., 2014).
212 See Joshua Andresen, Putting Lethal Force on the Table: How Drones Change the Alternative Space of War and Counterterrorism, 8 HARV. NAT’L SECURITY J. 426, 427, 431 (2017).
compared the results of civilian casualties resulting from strikes from manned aircrafts in the known disproportionate NATO war in Kosovo with the deaths resulting from drone strikes. Even if the combatants are present in urban areas with the civilians, the Law of Armed Conflict (LOAC) guidelines protect civilians from any attack, unless it is absolutely necessary, proportional, and justifiable under the theory of collateral damage. The rules of proportionality and distinction are actually meant for hostile battlefields, not for civilians’ residences. Therefore, these rules must be reformulated to include the need to use airstrikes in civilian areas, away from hostilities, by keeping in view the long-term reverberating effects, such as increases in violence and terrorist recruitment in relationship with drone airstrikes. However, other scholars warn about altering universally accepted rules owing to the possible pitfalls of doing so. Andersen believes in alteration only because the US policy for identifying the “immediate threat” is wider than the established conditions such as that US drone strikes almost never include as targets immediate threats away from active hostilities, which presumably never require immediate responses or the use of lethal force. Other states are also following the example of using airstrikes in populated areas, away from hostilities. Therefore, the use of airstrikes in civilian populated areas must be restricted to abso-

213 Id. at 431.
214 Id.
217 See Andresen, supra note 212, at 432.
220 See Andresen, supra note 212, at 449.
221 Id. at 451; see also Jennifer C. Daskal, The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone, 161 Univ. Pa. L. Rev. 1165, 1219 (2013).
D. Excessive Damage: Weighing Military Advantage against Harm Caused

There is no formula for weighing incidental harm against military objectives, but we can generally formulate the premises of calculating proportionality. To calculate this, one can list all the harm done by a war and compare those with the military objectives achieved. If the harm done is in excess of what was achieved by the war, or if the war is producing ineffective or counterproductive results, then such a war can be considered disproportionate. In the *Nicaragua Case*, the ICJ established that the PoP cannot be justified in self-defense if the attack of aggression or the threat of an attack has ceased to exist. Similarly, in the *Oil Platform Case* the ICJ also established that the principles of proportionality and necessity are interlinked because a war or an attack cannot be proportional if it was unnecessary. The proportionality requires the use of defensive force to repel an attack. Proportionality weighs in the force used by both sides. In proportionality, the legitimate aim cannot be the complete annihilation of the enemy; rather, it must be weighed against the threat from the other side. However, in its advisory opinion on nuclear weapons the ICJ maintained that the use of weapons of mass destruction (WMDs) in self-defense is legitimate, despite its disproportionate devastative characteristics, though only if the existence of a nation is under threat. This view of the ICJ is

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225 *Thrall & Goepner*, supra note 6, at 1.

226 *Andresen, supra* note 212, at 471.

227 See *Thrall & Goepner*, supra note 6, at 2.


234 See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep.* 226, ¶ 89 (July 8).
justified under the principle of necessity – that as a last resort, to defend a nation, a state can take all necessary measures. Moreover, it is interesting to note that military actions are proportional so long as they are defensive in nature. The moment they become aggressive in nature and stop being defensive, they become disproportionate.

For determining the excessiveness under the proportionality, the ICTY in the case of Prosecutor v. Galic (2003) used the objective test for a military general had violated the PoP because the attacks resulted in the deaths of thousands of civilians. The court also weighed in the mens rea requirement of war crimes under Article 83 of API of GC to conclude that the commander had knowledge that the attack would cause excessive civilian casualties. Similarly, to determine the excessive damage in terms of incidental civilian deaths and injuries, the Israeli Supreme Court decided that this must be decided on a case-by-case basis by the objective test of a reasonable commander. The Israeli Supreme Court also established that a missile attack on a building, resulting in several civilian deaths, to eliminate one combatant is bound to be considered a disproportionate act. The concurring opinion agreed that severe collateral damage cannot be justified, even against substantial military benefits, under the PoP. The Rome Statute of the International Criminal Court, in furtherance to API of GC, provides an innovative mechanism to judge excessive damage. It says that the knowledge of clear excessive damage in collateral damage in relation with the “overall military advantage” is sufficient to prove disproportionality. It is interesting to note that the term “overall” instead of “direct” raises the threshold of excessiveness. However, it is very useful and intriguing to analyze the overall excess of damage in relation to the overall military ob-

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236 See id.
238 Id. at ¶ 59; Wright, supra note 187, at 842 (citing Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgment and Opinion, ¶ 58 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003)).
239 See Galić, Case No. IT-98-29-T, at ¶¶ 58, 59.
241 Id. at ¶ 57.
242 Id. at ¶ 46.
243 Id. ¶ 5.
245 Wright, supra note 187, at 843.
jective achieved. It gives some perspective on the efficacy of a war, and the results achieved within it, to calculate the overall proportionality of a war.

For instance, if the war had been started for the cause of eliminating terrorism, and instead it is increasing terrorism, destabilization, and violence, costing trillions of dollars in damage and causing millions of deaths, then such a war can be easily considered disproportional—since the military objectives are not met, the war is counterproductive to its objectives, the loss on one side is far greater than the perceived future threats, and the harm caused was reasonably foreseeable. However, if the damage caused by military action is in direct relation to the military objectives, then the actions can be considered proportional.

For instance, if the military objective is to thwart aggression, direct force used against legitimate targets is proportional. Moreover, in accordance with traditional theory, if the harm of a war outweighs its relevant good, then such a war is not only disproportionate but also an unjust war because of its disproportionality. Similarly, if a war is unjust, then no relevant good can be achieved, therefore an unjust war will always be a disproportionate war. For these reasons, Part II will list the damage caused by some prominent wars of this century and compare them with the military objectives for which they were commenced, to analyze the overall proportionality of the military action.

II. THE WAR ON TERROR [WOT] (2001–PRESENT)

The WoT pursues an unidentifiable enemy, general terrorism, which cannot be put to an end by military means. The WoT has been recognized as having counterproductively increasing violence in the Middle East and insecurity against the West, rather than increasing the security of the world or decreasing terrorism. The world has seen a perpetual state of war since 2001. After seventeen years of the WoT, there is still no hope for its end. On its commencement, then-US-president George W. Bush admitted that the WoT “will not end until every terrorist group of global reach

246 Ahmed, supra note 4; Milne, supra note 150; THRALL & GOEPNER, supra note 6, at 1–2.
247 See Geneva Conventions Protocol I, supra note 21, at art. 51.
248 See GURULÉ & CORN, supra note 46, at 80.
249 McMahan, supra note 32, at 10.
250 Id. at 13.
251 Todd Richissin, “War on Terror” Difficult to Define, SEATTLE TIMES (Sept. 2, 2004).
252 THRALL & GOEPNER, supra note 6, at 13–14; Williams, supra note 7.
has been found, stopped and defeated.”^253 He also admitted that the WoT is “a task that does not end.”^254

Regarding the increase in terrorism after and during the WoT, Robert Pape has noted that US military occupations have increased terrorism rather than decreased it. A similar conclusion was drawn in 2006 by the National Intelligence Estimate, comprising sixteen intelligence agencies. Moreover, scholar Cornelia Beyer noted that terrorism has increased because of the economic policies of the West. Shirley Williams, a British politician, warned that the US and UK are “sowing … the seedbed of the future terrorism.”^258 Ivor Roberts, a British Ambassador to Italy, deadpanned that Bush was “the best recruiting sergeant ever for Al Qaeda.”^259 More controversially, it has also been noted that the US has granted the Mojahedin-e Khalq (a terrorist organization according to the US Department of State) the status of “protected persons” under the GC. The US also provided safe havens to a designated terrorist, Louis Posada Carriles. A three-star US general and a former National Security Agency director has also pointed out that “the US has a long record of supporting terrorists and using terrorist tactic.”^262

Support for rebel groups is also noted as one of the largest factors in increasing terrorism and violence. Rebel groups are often trained and armed by the coalition partners in the WoT. Usually, most of the US aided weapons to these groups end up in the hands of terrorists. The rebel

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^253 George W. Bush, President, Address to a Joint Session of Congress and the American People (Sept. 20, 2001).
^254 Id.
^255 See Robert A. Pape, Dying to Win: The Strategic Logic of Suicide Terrorism 103 (2006).
^258 Williams, supra note 7.
^263 See U.S. Dep’t of the Army, supra note 115, at B-15.
^264 See Shelbourne, supra note 155.
^265 Id.
groups are often divided or designated as terrorist groups. More specifically, the rebels fight their states, which destabilizes the governments and injures law enforcement officials and the infrastructure of a country. This contributes to an increase of violence and turns regions into breeding grounds for terrorism. Likewise, the regime change agenda is also seen as one of the greatest factors in increasing terrorism. The intervening hands remove authoritative political regimes to serve their political interests, and a political vacuum is created in the region, which is then filled by rebels, terrorists, and other organizations. The subsequent vacuum in the governing state gives wide room for the breeding of terrorism. This was the case with the removal of Saddam Hussein in Iraq as well as with the removal of Muammar al-Qaddafi in Libya. Without learning any lessons, the same goals – regime change and supporting rebels – are being pursued in Syria. As a result, Syrian territory has been destabilized and terrorism is on the rise. In conclusion, a former head of MI5 has labeled the WoT as a massive “overreaction” and maintained that this war is an erroneous tactic to fight terrorism.

The WoT has caused complete devastation and destabilization in several countries, including Afghanistan, Iraq, Syria, and Libya, where
the governmental machinery is made incapable of fighting terrorism. The civilian infrastructure including electric grids and basic services like roads and markets is in complete ruins. The WoT has caused the death of several million civilians. It has cost more than 4.4 trillion dollars in its pursuit, until 2015 alone. Yet, the results have been ineffective. The WoT has increased violence and terrorism and decreased world security – the complete opposite of its intentions. Presently, ISIS has about 30,000 fighters in Iraq and Syria. In fact, the deaths due to terrorism, when compared to the start of WoT, have increased by 4500%. Suicide attacks in Iraq rose from zero in 2003 to 1,892 in 2015. In Pakistan, they rose from one in 2001 to 486 in 2015. The story is similar for Nigeria, Syria, Yemen, Libya, and Somalia.

A. Afghanistan War (2001–Present)

According to Professor Marjorie Cohn, the United Nations (UN) Charter only allows the use of force in self-defense or with UNSC authorization. But neither requisites was met in Afghanistan. The Taliban had not invaded the US – Al Qaeda did – and the UNSC did not authorize the US inva-
Therefore, some argue that the Afghan war was illegal. The law of war does not allow the use of force in self-defense against non-state actors, but it does acknowledge that non-state actors can carry out armed attacks. But this attack must be of the gravest nature to result in a valid claim of self-defense. Therefore, few other scholars and states agree that the US had a right to self-defense in response to the 9/11 attacks when in 2001 the US authorized its war against the people responsible. The US fought Al Qaeda for being responsible for 9/11 attacks and the Taliban for harboring Al Qaeda. Apart from fighting terrorists, the US supported the Tajiks and Uzbeks in the Afghan civil war, which destabilized the country. Scholars accuse the US of fostering the Taliban and Osama bin Laden, before the invasion, for its political interests under Operation Cyclone. The UNSC and United Nations General Assembly (UNGA) even called for a stop to these interferences in the sovereign grounds of Afghanistan. As of 2009, Al Qaeda forces were diminished to the meager number of one hundred members. However, as of 2019, US forces have not yet pulled out from the war, and there is no end in sight to this fight.

1. Damage

According to the UN, opium production dramatically increased after the US invasion. The Afghan war is costing about 100 million dollars per
day and it has incurred a cost of more than a trillion dollars; 6,800 US soldiers have been killed in this war and more than 30,000 innocent civilian lives have been lost, with more than 210,000 total casualties. Millions of more people are displaced and 1.17 million reports of war crimes in Afghanistan have been submitted to the ICJ. The infrastructure of Afghanistan, including the electric grid, roads, hospitals, schools, and other essential services, have been dysfunctional since the war began. Violence and terrorism in the country are on the rise and the economy has been devastated.

2. Application

To apply the PoP to the Afghanistan War, I will retrospectively analyze the overall military objective achieved against the overall harm caused, while evaluating its reasonableness and foreseeability. As discussed above, the reverberating effects of using explosives in civilian areas are foreseeable. Similarly, the effects of supporting rebels in a state are also known:

311 See General Security Situation in Afghanistan and Events in Kabul, supra note 309.
313 See General Security Situation in Afghanistan and Events in Kabul, supra note 309.
armed support to rebels is tantamount to terrorism/armed attack itself.\textsuperscript{315} It increases violence and terrorism while destabilizing the country.\textsuperscript{316} This war had the military objectives of dealing with the people responsible for the 9/11 events and of decreasing terrorism.\textsuperscript{317} Any harm that does not directly benefit this goal is outside the military objective and is disproportionate.\textsuperscript{318} In the Afghanistan War, the efforts to change the regime to justify military funding,\textsuperscript{319} support to rebels,\textsuperscript{320} support to drug/war lords,\textsuperscript{321} and seventeen years of military occupation\textsuperscript{322} are additional to the direct military objective of dealing with the people responsible for the events of 9/11 because, if the results of a war are such that the harm caused by it is more than the military objective achieved, then such a war is disproportionate.\textsuperscript{323}

While the US claims that Al Qaeda has been decimated,\textsuperscript{324} it acknowledges that this war is inefficient and counterproductive and it has given rise to terrorism,\textsuperscript{325} violence,\textsuperscript{326} and drugs,\textsuperscript{327} rather than decreasing those. The counter-productivity of this war has instead decreased US security owing to the

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\begin{itemize}
\item \textsuperscript{315} See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 242 (June 27); see, e.g., Shelbourn, supra note 155 (explaining a study that shows US weapons ended up in the hands of ISIS fighters).
\item \textsuperscript{318} See Geneva Conventions Protocol I, supra note 21, at art. 51(5)(b).
\item \textsuperscript{319} See Torfeh, supra note 1.
\item \textsuperscript{320} Austin Bodetti, How the US Is Indirectly Arming the Taliban, DIPLOMAT (June 13, 2018), https://thediplomat.com/2018/06/how-the-us-is-indirectly-arming-the-taliban.
\item \textsuperscript{322} Matthew Fay, The War in Afghanistan is 17, NISKANEN CTR. BLOG (Oct. 11, 2018), https://niskanencenter.org/blog/the-war-in-afghanistan-turns-17/.
\item \textsuperscript{324} Susan Crabtree, WH Insists al Qaeda Core is ‘Decimated’, WASH. EXAMINER (Sept. 26, 2014), https://www.washingtonexaminer.com/wa -h-insists-al-qaeda-core-is-decimated.
\item \textsuperscript{325} THRALL & GOEPNER, supra note 6, at 2 (citing BRAD STEPLETON, THE PROBLEM WITH THE LIGHT FOOTPRINT: SHIFTING TACTICS IN LIEU OF STRATEGY 11 (2016)).
\item \textsuperscript{326} Why Afghanistan Is More Dangerous Than Ever, supra note 312.
\item \textsuperscript{327} Jeffrey James Higgins, After 16 Years of War, Afghanistan Still World’s Heroin Supplier, AM. CONSERVATIVE (Aug. 23, 2017), https://www.theamericanconservative.com/articles/after-16-years-of-war-afghanistan-still-worlds-heroin-supplier.
\end{itemize}
increase in terrorism. The Taliban still governs forty percent of the land, and warlords are occupying key high positions in Afghanistan. Al Qaeda has spread to Iraq, Algeria, and Syria from Afghanistan. Contrary to its goals, the US is ready to talk to the Taliban for a settlement, and the Taliban claims that the talks have already begun. Therefore, it can be rightly concluded that the Afghan war was counterproductive, and it caused less good than harm. In reality, the war has caused a tremendous amount of damage to Afghanistan, cost billions of dollars to the US, killed millions of innocent civilians, destabilized the region, destroyed a country, destroyed its infrastructure and basic essential service systems, and consumed seventeen years of time. In sum, it can be concluded that, since the harm caused by the Afghan war significantly outweighs the good it has achieved, it can be considered disproportionate to its military advantage.

B. Iraq Invasion (2003–Present)

The Iraq War was commenced in 2003 to deter the threat posed by Iraq. The Iraq War was fought on the pretenses of preventive self-

328 See THRALL & GOEPNER, supra note 6, at 9 (discussing how the expansive counterterrorism campaign did not protect Americans from terrorist attacks).
329 Torfeh, supra note 1.
331 See id.
332 See generally THRALL & GOEPNER, supra note 6, at 9. (discussing how the number of Islamic-inspired terrorist groups and terror attacks in the Middle East and elsewhere has increased).
334 REICH & DOMBROWSKI, supra note 305, at 36; Hasan, supra note 3.
335 CRAWFORD, supra note 333; General Security Situation in Afghanistan and Events in Kabul, supra note 311 (discussing the state of Afghanistan after decades of warfare); Why Afghanistan Is More Dangerous Than Ever, supra note 312 (discussing how violence in Afghanistan is getting worse since the US-led invasion in 2001).
336 Torfeh, supra note 1.
defense by the coalition partners of the US, the UK, Australia, and other states.\textsuperscript{338} However, preventive or preemptive self-defense is not recognized by the international law of using force.\textsuperscript{339} The UK and the US argued that the invasion was authorized by previous UNSC authorizations in the defense of Kuwait’s 1990 invasion by Iraq\textsuperscript{340} and by the Disarmament Resolution.\textsuperscript{341} However, Russia, France, and China issued a joint resolution in which they stated that previous resolutions did not authorize the invasion and a separate resolution was required to invade Iraq.\textsuperscript{342} Richard N. Haass, president of the Council on Foreign Relations, noted that, in the 2003 intervention, Iraq did not pose any imminent threat to the US or any other coalition partner states.\textsuperscript{343} The Iraq War was a war of choice, and it was waged without exhausting alternative options and without pursuing any American interests.\textsuperscript{344} The Iraq War was also primarily focused on the presence of WMDs. The US alleged that Iraq violated UNSC Resolution 1441 by possessing WMDs.\textsuperscript{345}

Some scholars believe that the Iraq War was an unjust war because it cannot be justified as a war for preemptive self-defense or as a humanitarian intervention.\textsuperscript{346} There were no WMDs found, which was the justification for the whole intervention.\textsuperscript{347} The intelligence reports for the WMDs were false.\textsuperscript{348} The conventional forces were already defeated. Similarly, despite the fact that the Iraqi people despised their leader, there was no compelling evidence to prove that they wanted intervention and exposure to the subse-

\textsuperscript{338} See id.
\textsuperscript{339} IAN BROWNLE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275 (1963); see also ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 73 (1993); DINSTEIN, supra note 233, at 183 (citing D. Rezac, President Bush’s Security Strategy and Its “Pre-Emptive Strikes Doctrine” - A Legal Basis for the War Against Iraq?, 7 ARIEL 223, 227 (2002)); PHILIP C. JESSUP, MODERN LAW OF NATIONS 166 (1952).
\textsuperscript{341} See, e.g., S.C. Res. 1441 (Nov. 8, 2002).
\textsuperscript{342} Joint Statement of China, France, and the Russian Federation on UN Security Council Resolution 1441 (Nov. 8, 2002).
\textsuperscript{343} RICHARD N. HAASS, WAR OF NECESSITY, WAR OF CHOICE: A MEMOIR OF TWO IRAQ WARS 222 (2010).
\textsuperscript{344} See id. at 233.
\textsuperscript{346} See McMahan, supra note 32, at 17–18.
\textsuperscript{347} TRT World, 9/11 Anniversary: Seventeen Years Since Deadly Sept 11 Attacks, YOUTUBE (Sep. 11, 2018), https://www.youtube.com/watch?v=JKqiLLS99Vk.
\textsuperscript{348} Id.
quent devastation. Kofi Annan said in 2004 that the Iraq invasion “was not in conformity with the UN Charter” and “was illegal” because the UNSC did not specifically authorize the Iraq invasion. Similarly, renowned world politicians, including Russian president Vladimir Putin, UK deputy Prime Minister John Prescott, and UK/Iraq Inquiry legal expert John Chilcot, have also expressed that the Iraq invasion lacked a legal basis. Prescott further expressed that the Iraq War, as Kofi Annan pointed out, was unlawful and was only formulated to change the regime. American legal expert Professor Marjorie Cohn and former US attorney general Ramsey Clark also believed that the Iraq War was a “war of aggression.” UK foreign secretary Jack Straw admitted that “regime change per se is no justification for military action” and it required a “fresh UN mandate.” Similarly, the Dutch inquiry, headed by Netherlands Supreme Court president Williboard David, found that the Iraq invasion was unlawful. The actions to propel regime change had “no legal basis in the international law,” and UNSC Resolution 1441 could not have authorized the invasion: it was misinterpreted and misused. The International Commission of Jurists at the ICJ in Geneva also viewed the Iraq invasion as unlawful aggression without UNSC authorization. The German Federal Ad-

349 See McMahan, supra note 32, at 18.
355 See id.
360 Id. at 83.
361 Id. at 105.
362 See ICJ Deplores Moves Toward a War of Aggression on Iraq, INT’L
ministrative Court also declared German participation in the Iraq War downright “illegal.”

1. Damage

The Iraq War costs 190 million dollars per day. The war has caused the deaths of about a half-million people and it has completely destroyed the civilian infrastructure while terrorism and violence have increased in Iraq. Until 2003, there had been no suicide attacks in the history of Iraq. By 2015, Iraq had witnessed 1,892 suicide attacks on its soil. About three million Iraqis are internally displaced, and about a quarter-million are registered refugees. Approximately 8.7 million people need humanitarian assistance in Iraq. The invasion destroyed the Iraqi system of governance, and the US Army has still not pulled out of Iraq, despite not having given any justified reasons for remaining.

2. Application

The military objective, to clear the threat of the WMDs, was based on false intelligence reports. In contrast, the regime change agenda was pur-
The threat that “justified” invasion never existed and still, after seventeen years, the destruction of civilian infrastructure, the deaths of a quarter-million people, millions more displaced, and the cost of trillions of dollars, the military occupancy has no end in sight. Therefore, it can be concluded that the prolonged presence in Iraq — even where there was no threat — and the subsequent devastation due to this presence, exceeds its military advantage. That is why the Iraq War can be considered disproportionate to its military advantage.

C. Syrian Intervention (2011–Present)

Intervention in the Syrian civil war began in 2011. But the US and coalition partners started the invasion of Syria in 2015 for two basic rea-
sons. The first justification is the necessity of fighting non-state actors that pose a threat to Iraq\(^{387}\), at the Iraqis’ request, under preventive collective self-defense.\(^{388}\) The second justification is that intervention allows the fighting of ISIL/Daesh (a terrorist organization) under the WoT, in connection with the 9/11 events,\(^{389}\) because ISIL was once connected with Al Qaeda.\(^{390}\) However, the ICJ has explicitly maintained in the Nicaragua Case that there is no right to self-defense against non-state actors.\(^{391}\) It is pertinent to note here that the international community has long rejected the legality of the preventive self-defense.\(^{392}\) The international community believes that the coalition forces had no valid legal basis to use force in Syria without UNSC authorization.\(^{393}\) UNSC authorizations to use force in Syria have been repeatedly vetoed, in particular by Russia.\(^{394}\)

Apart from this military objective, the White House has admitted its agenda to seek regime change in Syria to serve its political interests by supporting the rebels.\(^{395}\) It has also publicly acknowledged its support for re-


\(^{391}\) Self-defense is not allowed against a neutral state in response to an armed attack by non-state actors, so long as the attack was not directed by a state. If a state orchestrated an armed attack through non-state actors, then there is a right to self-defense against such a state. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 32 (June 27).


bels in Syria that fight the Bashar al-Assad regime. In turn, this support and fight against the state is destabilizing the region, destroying civilian property and essential infrastructure, and increasing violence and terrorism in Syria and the neighboring regions.

1. Damage

About half-a-million people have been killed and about two million people have been injured in Syria in six years. Millions more have been kidnapped, tortured, and deprived of food, water, shelter, education and health care. Over five million Syrians have migrated as registered refugees, and more than 7.6 million Syrians (about half its population by some estimates) have been displaced. Humanitarian laws are being violated by the government, ISIS, and the foreign-backed rebels. Food, electricity, water, housing, health care, the economy, governance, and infrastructure have collapsed.

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397 GARRIAUD-MAYLAM, supra note 366, at 4–6, 10–11.


399 GARRIAUD-MAYLAM, supra note 366, at 4–5.

400 Id. at 4.


403 UNITED NATIONS HIGH COMM’R FOR REFUGEES, supra note 401, at 15–23 (discussing government forces, ISIS, anti-government armed groups, and people’s protection units as violators of humanitarian law).

404 Id. at 28 (citing The Economic and Social Consequences of the Conflict in Syria, WORLD BANK (July 10, 2017), http://bit.ly/2A6nTgx).
2. Application

To analyze the proportionality of this war, it is interesting to note that the use of force in Syria does not have just cause under international law. In respect to the military objectives to fight terrorists in Syria, arms-support to rebels has increased violence and terrorism in Syria rather than decreased it. Past experiences in Afghanistan and Iraq are sufficient to prove the foreseeability of this increase in violence and terrorism to a reasonable commander with intelligence. There is no good achieved in Syria. The deaths of civilians, damage to the infrastructure, and destabilization of the region are serious harms compared to no benefit achieved. Moreover, the support to rebels, the regime change agenda, and the targeting of the government are also in excess of the direct military objectives. Therefore, it can be rightly concluded that because the harms caused were reasonably foreseeable, and they outweighed any good achieved, the Syrian war is disproportionate to its military advantage.

CONCLUSION

In the wars in Syria, Iraq, and Afghanistan under the WoT, the military objective has been to fight terrorism. The legality and justification of fighting these wars are debated, questioned, and challenged by Congress itself, as well by renowned scholars and countries around the world. More
notably, support for rebels in other states and regime change agendas are seen not only as acts of aggression that destabilize nations and increase terrorism but also as counterproductive actions that exceed the military objectives. The harm caused by these wars includes the destruction of civilian infrastructure, the deprivation of basic human needs, such as food, water, electricity, education, and health care, the deaths of millions of innocent civilians, the increase of violence and terrorism, the destabilization of regions, and migration crises of millions of refugees and the displacement of millions more. About 1.17 million reports of war crimes have been submitted to the ICJ. The relevant promised benefit – to decrease terrorism and increase security – has not been effectively achieved. Rather, these wars have been considered proven cases of counterproductive missions. Therefore, it can be concluded that the devastation due to military actions in these wars was foreseeable to a reasonable commander. These wars have caused a great deal of harm to several coun-
tries; the migration crises and increases in terrorism have affected the world and decreased Western security. Moreover, they have completely destroyed and destabilized several nations.\textsuperscript{424} The good has not been effectively achieved and the wars have proven to be counterproductive.\textsuperscript{425} These wars have caused more harm than they have achieved relevant good. Therefore, they can be considered to be disproportionate to their direct military advantage.

\textsuperscript{424} BITORSOLI, supra note 408, at 1; DANISH IMMIGRATION SERV., supra note 423; GARRIAUD-MAYLAM, supra note 366, at 1; POSITION ON RETURNS TO IRAQ, supra note 366, at 2; Afghanistan, supra note 309; Amnesty Int’l. Rep. 2017/2018, supra note 370, at 202–05; General Security Situation in Afghanistan and Events in Kabul, supra note 309; Hasan, supra note 3; Why Afghanistan Is More Dangerous Than Ever, supra note 312.

\textsuperscript{425} THRALL & GOEPNER, supra note 6, at 2.