

5-7-2019

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Recommended Citation

Waseem A. Qureshi, *Applying the Principle of Proportionality to the War on Terror*, 22 RICH. PUB. INT. L. REV. 379 (2019).

Available at: <https://scholarship.richmond.edu/pilr/vol22/iss3/4>

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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

¹ See Massoumeh Torfeh, *No End in Sight 17 Years After US Invasion of Afghanistan*, TRT WORLD (Oct. 11, 2018), <https://www.trtworld.com/asia/no-end-in-sight-17-years-after-us-invasion-of-afghanistan-20818>.

² See “*War on Terrorism*,” GLOBAL POL’Y F., <https://www.globalpolicy.org/war-on-terrorism.html> (last visited Feb. 10, 2019); see generally Authorization for Use of Military Force, S.J. Res. 23, 107th Congress, (2001) (authorizing the initial use

trillion dollars,³ the humanitarian crises due to this war have been beyond expectations. The WoT has caused the deaths of millions of innocent civilians,⁴ the destruction of several countries, and the displacement of millions more in the migrant crises.⁵ It has destabilized several regions, and terrorism and violence have counterproductively increased.⁶ The security of the Western world has not improved; instead it has deteriorated.⁷ Terrorism is on the rise, with the formation of new terrorist organizations every year.⁸ However, the war has no end in sight.⁹ New conflicts and new invasions in more countries are planned and executed even after seventeen years of the WoT.¹⁰ Scholars believe that by now we should have learned our lesson

of military force in what became known as the “War on Terror”).

³ Mehdi Hasan, *Reality Check: The Failure of the “War on Terror.”* AL JAZEERA (Sept. 12, 2015), <https://www.aljazeera.com/programmes/upfront/2015/09/reality-check-failure-war-terror-150911151414017.html>.

⁴ See Nafeez Mossadeq Ahmed, *Unworthy Victims: Western Wars Have Killed Four Million Muslims Since 1990*, MIDDLE EAST EYE (Apr. 8, 2015), <https://www.middleeasteye.net/opinion/unworthy-victims-western-wars-have-killed-four-million-muslims-1990>.

⁵ See *Afghan Citizens*, BROWN U., <https://watson.brown.edu/costsofwar/costs/human/civilians/afghan> (last visited Feb. 10, 2019) (stating that “the war in Afghanistan continues destroying lives, due to the direct consequences of violence and the war-induced breakdown of public health, security, and infrastructure”); see also Anthony H. Cordesman, *Syria: When and How Does This War End?*, CTR. FOR STRATEGIC & INT’L STUD. (Apr. 10, 2018), https://csis-prod.s3.amazonaws.com/s3fs-public/publication/180410Syria_When_War_End.Clean_Version.pdf (describing statistics of displaced citizens as a result of war in the Middle East); *Consequences of the War and Occupation of Iraq*, GLOBAL POL’Y F., <https://www.globalpolicy.org/humanitarian-issues-in-iraq/consequences-of-the-war-and-occupation-of-iraq.html> (last visited Feb. 10, 2019) (explaining that, “though Saddam Hussein did not use weapons of mass destruction nor set fire to Iraq’s oil fields nor attack Israel with rockets, and though the conflict was relatively short, the war has had many serious results ranging from death and destruction in Iraq to regional instability to a weakened world economy”); *Impact of Afghanistan’s Fourth Consecutive Year of War on Civilians “Far Too High,”* UN NEWS (Feb. 25, 2018), <https://news.un.org/en/story/2018/02/1003521> (stating that “the human cost of this ugly war in Afghanistan – loss of life, destruction and immense suffering – is far too high”).

⁶ A. TREVOR THRALL & ERIK GOEPNER, CATO INST., *STEP BACK: LESSONS FOR U.S. FOREIGN POLICY FROM THE FAILED WAR ON TERROR* 1, 9 (2017), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa-814.pdf>.

⁷ See Shirley Williams, *The Seeds of Iraq’s Future Terror*, GUARDIAN (Oct. 27, 2003), <https://www.theguardian.com/world/2003/oct/28/iraq.politics>.

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.¹¹ 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.¹² 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*.¹³ *Jus ad bellum* is the laws of war that are concerned with the justifiability and reasonableness of resorting to the use of force.¹⁴ 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.¹⁵ For instance, a war in self-defense to thwart aggression is considered to be a just reason to fight a war.¹⁶ However, a legitimate cause to fight a war does not allow the disregard of *jus ad*

¹¹ THRALL & GOEPNER, *supra* note 6, at 2.

¹² Peter M. Asaro, *How Just Could A Robot War Be?*, in CURRENT ISSUES IN COMPUTING AND PHILOSOPHY 50, 53 (Adam Briggles et al. eds., 2008).

¹³ Helen Frowe, *The Just War Framework*, in THE OXFORD HANDBOOK OF ETHICS OF WAR 41, 41 (Seth Lazar & Helen Frowe eds., 2018).

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).¹⁷ *Jus in bello*, on the other hand, is the laws of war that are concerned with the conduct of a war.¹⁸ These laws include the evaluation of war activities with the scope of humanitarian laws.¹⁹ For instance, *jus in bello* includes the principles of necessity, distinction, and proportionality.²⁰ 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.²¹ The principle of distinction mandates that military action in a war must only target combatants and should not deliberately target civilians or civilian property.²² 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.²³ 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.²⁴

The PoP is included in the humanitarian laws of war under Additional Protocol I 1977 to the Geneva Conventions of 1949 (API of GC).²⁵ 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.”²⁶

¹⁷ See *What Are Jus Ad Bellum and Jus In Bello?*, INT’L COMMITTEE RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

¹⁸ Frowe, *supra* note 13.

¹⁹ *What Are Jus Ad Bellum and Jus In Bello?*, *supra* note 17.

²⁰ See Asaro, *supra* note 12.

²¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protecting of Victims of International Armed Conflicts (Protocol I), art. 11, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Conventions Protocol I]; TOM RUYTS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER 518 (2010).

²² Geneva Conventions Protocol I, *supra* note 21, at art. 48; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protecting of Victims of Non-International Armed Conflicts (Protocol II), art. 13, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Conventions Protocol II]; ANICEE VAN ENGELAND, CIVILIAN OR COMBATANT?: A CHALLENGE FOR THE 21ST CENTURY 28 (2011).

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.²⁷ Intentional damage to civilians and property is otherwise forbidden under the principle of distinction.²⁸ The PoP forbids “incidental” collateral damage against civilians and property that exceed the direct military advantage.²⁹ However, it does allow the death of civilians as collateral damage if the direct military advantage is bigger than the damage caused.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 *just war theory*, such as the “reasonable hope of success” criterion,³¹ which a war will violate if it has no chance of achieving any good.³² But such a war also violates the PoP because the destruction is unnecessarily excessive and serves no military purpose.³³ Thus, a war with no hope of success is bound to be disproportionate.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-

²⁷ *Id.*

²⁸ *Id.* at art. 48; Geneva Conventions Protocol II, *supra* note 22.

²⁹ Geneva Conventions Protocol I, *supra* note 21, at art. 51(5)(b), art. 57(2)(a).

³⁰ KAREN HULME, WAR TORN ENVIRONMENT 127 (2004).

³¹ JONES, *supra* note 15.

³² Dr. Jeff McMahan, Vice Admiral James B. Stockdale Ctr. for Ethical Leadership, U.S. Naval Acad., The 2008 William C. Stutt Ethics Lecture, What Makes an Act of War Disproportionate? 16 (Mar. 25, 2008) (transcript available at <http://jeffersonmcmahan.com/wp-content/uploads/2012/11/Stutt-lecture.pdf>).

³³ *Id.*

³⁴ *Id.*

sive.³⁵ 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.³⁶ The actual reasonable hope of success condition limits the excesses of war against vague military objectives.³⁷ 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.³⁸ However, there is no authoritative person who can sign a peace treaty or surrender to end the WoT.³⁹ This means that the WoT will have no end, because the goals are so vague.⁴⁰ Therefore, the WoT does not satisfy the reasonable hope of success condition⁴¹ 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.⁴² 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.⁴³ The destruction here is caused unnecessarily and in excess to what could have been reasonably achieved diplomatically.⁴⁴ In the *Oil Platform Case*, the International Court of Justice (ICJ) estab-

³⁵ *Id.*

³⁶ *Id.* at 17.

³⁷ See JEFFREY CARR, *INSIDE CYBER WARFARE* 72 (2009); Jeff McMahan, *Proportionate Defense*, in *WEIGHING LIVES IN WAR* 139 (2017).

³⁸ See “*War on Terrorism*,” *supra* note 2.

³⁹ See William J. Chambliss & Mark D. H. Nelemans, *Transnational Organized Crime*, in *ROUTLEDGE HANDBOOK OF TRANSNATIONAL ORGANIZED CRIME* 58 (Felicia Allum & Stan Gilmore eds., 2012).

⁴⁰ *See id.*

⁴¹ *See* McMahan, *supra* note 32, at 16–17.

⁴² Thomas Hurka, *Proportionality in the Morality of War*, in *DRAWING MORALS: ESSAYS IN ETHICAL THEORY* 238, 241 (2011).

⁴³ Harry van der Linden, *Just War Theory and U.S. Military Hegemony*, in *RETHINKING THE JUST WAR TRADITION* 53, 68–69 (Henry van der Linden et al. eds., 2012).

⁴⁴ *See id.*

lished that the principles of proportionality and necessity are interlinked because a war or an attack cannot be proportional if it is unnecessary.⁴⁵ 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.⁴⁶

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.⁴⁷ This produces a result for whether the outcome of a war has achieved more good or more evil compared to its alternatives and justifiability.⁴⁸ 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.⁴⁹ 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.”⁵⁰

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.⁵¹ 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.⁵² 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?

⁴⁵ See *Oil Platforms (Islamic Republic of Iran v. U.S.)*, Advisory Opinion and Orders, 2003 I.C.J. No. 90, ¶ 76, ¶ 77 (Nov. 6).

⁴⁶ See JIMMY GURULE & GEOFFREY CORN, *PRINCIPLES OF COUNTER-TERRORISM LAW* 69–70 (2011).

⁴⁷ Hurka, *supra* note 42.

⁴⁸ *Id.*

⁴⁹ JONES, *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.⁵³ If the evil caused by a war is greater than the good caused by it, then such a war is considered to be disproportionate.⁵⁴ Similarly, if the benefit of a war is greater than the harm caused then the war is considered to be proportionate.⁵⁵ 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.⁵⁶ In addition, it is also essential that a war is for a just cause to be proportional.⁵⁷ 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.⁵⁸ 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.⁵⁹

A relevant good under the PoP is the “direct military advantage”⁶⁰ achieved by the war. Therefore, all the just causes and aims for a war are a relevant good 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 a relevant good.⁶¹ However, economic harm can be considered a relevant harm or relevant evil in a war.⁶² For instance in the WoT, since the just cause and military advantage were to eliminate terrorism,⁶³ 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.⁶⁴ 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.*

⁵⁶ JAMES TURNER JOHNSON, *MORALITY AND CONTEMPORARY WARFARE*, 27–28 (1999); *see also* JAMES TURNER JOHNSON, *CAN MODERN WAR BE JUST?* 3, 25, 62 (1984); JAMES TURNER JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR* 204 (1981).

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 actors⁶⁶ 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 force⁶⁹ 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 Osirak 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 proportional.⁷³

Contrary to the wording of the definition of proportionality in the GC protocols,⁷⁴ Thomas Hukra 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 war⁷⁸ when calculating the proportionality of a war.

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).

⁶⁷ U.N. Charter art. 2, ¶ 4; U.N. Charter art. 39–42; U.N. Charter art. 51.

⁶⁸ See U.N. Charter art. 2, ¶ 4; U.N. Charter art. 39–42; U.N. Charter art. 51.

⁶⁹ *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 23; see U.N. Charter art. 39–42; U.N. Charter art. 51.

⁷⁰ JANA DADOVA, *THE LEGALITY OF HUMANITARIAN INTERVENTION WITHOUT UN SECURITY COUNCIL AUTHORIZATION* 6 (2016).

⁷¹ See *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 195.

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.⁷⁹ Harm to civilian objects considers dysfunctional civilian objects and environmental damage.⁸⁰ Injury to civilians also includes illnesses and people's mental illnesses.⁸¹ The principle of distinction forbids the direct and indiscriminate targeting of civilians and their property, and allows the pursuit of only military objectives.⁸² This law requires some level of likelihood to hit the target.⁸³ For instance, random or blind firing without precisely targeting any military objects in populated areas is an example of an indiscriminate attack.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.⁸⁵ In fact, all incidental harm and normal harm of war come under the purview of proportionality.⁸⁶ For instance, damage to infrastructure, loss to the economy, death toll of civilians, damage to civilian property,⁸⁷ instability in governance, the rise of rebellions, the rise of terrorism or violence, damage to the environment,⁸⁸ 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-

ing women's rights as a military objective means targeting all Afghan men).

⁷⁹ Isabel Robinson & Ellen Nohle, *Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas*, 98 INT'L REV. RED CROSS 107, 129 (2016).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Geneva Conventions 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).

⁸³ *See* ROGERS, *supra* note 82, at 24.

⁸⁴ *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 118–19 (2004).

⁸⁵ Hurka, *supra* note 42, at 247.

⁸⁶ WILLIAM H. BOOTHBY & WOLFF HEINTSCHEL VON HEINEGG, THE LAW OF WAR: A DETAILED ASSESSMENT OF THE US DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 446 (2018).

⁸⁷ Laurent Gisel, *Relevant Incidental Harm for the Proportionality Principle*, 16 BRUGES COLLOQUIUM URB. WARFARE 118, 124–25 (2015).

⁸⁸ *See* Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict and the Struggle for a Moral High Ground*, 56 AIR FORCE L. REV. 1, 90 (2005) (citing CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT METHODOLOGY FOR ESTIMATING COLLATERAL DAMAGE AND CASUALTIES FOR CONVENTIONAL WEAPONS, CJCSM 3160.01A (Draft) A-4 (2004)).

dental harm under the PoP.⁸⁹ In this regard, Norway has expressed its support of the inclusion of the long-term effects of war within proportionality.⁹⁰ 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.⁹¹ Likewise, numerous states including the Czech Republic, Brazil, Norway, Switzerland, Sweden, New Zealand, Austria,⁹² and Ireland⁹³ 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 effects⁹⁴ in populated areas⁹⁵ under the PoP and the principle of precaution because their effects are less visible but cause greater damage to civilians.⁹⁶ Their effects include damage to civilian houses, electric systems, sewage systems, health services, water supplies, and civilian displacement.⁹⁷ Therefore, states and commentators agree that it is a legal obligation to foresee these reverberating effects and take precautionary measures during military activities.⁹⁸ Reverberating effects are the damages that do

⁸⁹ See Robinson & Nohle, *supra* note 79, at 128–29.

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).

⁹³ Statement by Ir. on the McCormack Report, CCW Thirteenth Meeting of the Group of Government Experts on ERW (Mar. 2006).

⁹⁴ See Robinson & Nohle, *supra* note 79, at 109.

⁹⁵ Geneva Conventions Protocol I, *supra* note 21, at art. 51; see also INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT 49 (2015).

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).

⁹⁷ Robinson & Nohle, *supra* note 79, at 108; INT'L COMM. OF THE RED CROSS, URBAN SERVICES DURING PROTRACTED ARMED CONFLICT 21–27 (2015) (discussing the cumulative impact of armed conflict on essential services and civilian well-being).

⁹⁸ Robinson & Nohle, *supra* note 79, at 109.

not “take place immediately.”⁹⁹ The International Committee of the Red Cross (ICRC) has determined that incidental damage also includes indirect incidental damage,¹⁰⁰ also known as “knock-on effects” or “indirect effects.”¹⁰¹ Various military manuals include consequential incidental damage within the rules of precaution and proportionality.¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ Similarly, Articles 54(2) and 56(1) explicitly forbid targeting protected objects,¹⁰⁶ which are objects that are crucial for the sustenance of the civilian population.¹⁰⁷ 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.¹⁰⁸ Similarly, scholars also believe that incidental damage includes the foreseeable damage of reverberating effects.¹⁰⁹

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.¹¹⁰ In the Third Review Conference on the Conventional Weapons Which May Be Deemed to Be Excessively Injurious to

⁹⁹ *Id.* at 128.

¹⁰⁰ *Id.* at 112–13 (citing Laurent Gisel, *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).

¹⁰⁴ See MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 309–10 (1982).

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.”).

¹⁰⁸ Cordula Droege, *Get Off My Cloud: Cyber Warfare, International Humanitarian Law and the Protection of Civilians*, 94 INT’L REV. RED CROSS 533, 573 (2012).

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.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.”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.”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.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.”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.¹¹⁶

2. Foreseeability

In addition to the ICRC, the declaration of the CCW,¹¹⁷ and the United States Army Manuals¹¹⁸ 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.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.”¹²⁰ Other scholars maintain that the word “ex-

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.].

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)).

¹¹³ THIRD REV. CONF., *supra* note 111.

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

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

¹¹⁶ Robinson & Nohle, *supra* note 79, at 118.

¹¹⁷ THIRD REV. CONF., *supra* note 111.

¹¹⁸ U.S. DEP’T OF THE ARMY, *supra* note 115.

¹¹⁹ INTER-AM. COMM’N ON HUMAN RIGHTS, THIRD REPORT ON THE HUMAN RIGHTS SITUATION IN COLOMBIA ch. IV ¶ 79 (Feb. 26, 1999), <http://www.cidh.org/countryrep/Colom99en/table%20of%20contents.htm>.

¹²⁰ Robinson & Nohle, *supra* note 79, at 118; see ROSCINI, *supra* note 107, at 221.

pected” only means “likely to occur.”¹²¹ They argue that even a forty per cent chance of likelihood is sufficient to conclude it is expected, although it is less likely than not.¹²² 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.¹²³

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.¹²⁴ This means that the subjective knowledge of a commander will determine whether the damage was foreseeable to him or not.¹²⁵ For instance the US Law of War Manual states that the question of determining an incidental harm “is subjective and imprecise.”¹²⁶ 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.¹²⁷ 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.”¹²⁸ An objective test includes “common sense” and “good faith for military commanders.”¹²⁹ One scholar also asserted that it is an objective test and that the attacker “must act reasonably and in good faith.”¹³⁰ Similarly, other scholars agree that the attacker must be “reasonable” and must reasonably use the information.¹³¹ 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?”¹³²

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.

¹²⁹ Marco Sassòli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, 90 INT’L L. STUD. 308, 335 (2014).

¹³⁰ Robinson & Nohle, *supra* note 79, at 120.

¹³¹ FRITS KALSHOVEN & LIESBETH ZEGVELD, INT’L COMM. OF THE RED CROSS, CONSTRAINTS ON THE WAGING OF WARS 115 (2011).

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 perpetrator” would have acted accordingly.¹³³ The ICTY suggested that the test is an objective test of the “reasonable military commander.”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.¹³⁵ Some scholars therefore maintain that the test of a reasonable commander is that of a subjective agent while testing him objectively.¹³⁶ Some states including Israel support the higher threshold of a reasonable commander as an objective test for analyzing the incidental damage.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.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.¹³⁹ For example, NATO forces in Kosovo used graph-

LEVELS: JOINT DOCTRINE MANUAL § 418 (2001)).

¹³³ Prosecutor v. Stanislav Galić, No. IT-98-29-T, Judgment, International Criminal Tribunal for the Former Yugoslavia, ¶ 58 (Dec. 5, 2003), <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>.

¹³⁴ FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA ¶ 50 (2008).

¹³⁵ Robinson & Nohle, *supra* note 79, at 121 (citing Marco Sassoli & Lindsey Cameron, *The Law of Air Warfare: Contemporary Issues*, in 1 *ESSENTIAL AIR & SPACE L.* 65 (Natalinio Ronzitti & Gabriella Venturini eds., 2006)).

¹³⁶ Enzo Cannizzaro, *Proportionality in the Law of Armed Conflict*, in *THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT* 339 (Andrew Clapham & Paola Gaeta eds., 2014).

¹³⁷ STATE OF ISRAEL, *THE 2014 GAZA CONFLICT (7 JULY–26 AUGUST 2014)* 181 (2015).

¹³⁸ See Robinson & Nohle, *supra* note 79, at 121.

¹³⁹ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, *NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY*, CJCSI 3160.01A D1 (2012).

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.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.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.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.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,¹⁴⁴ because the electricity capacity reached a level that was fifteen percent of its pre-conflict capacity, which affected the health care system.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.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.¹⁴⁷ In support of acknowledging the reverberating effects of war on ci-

¹⁴⁰ Dana Priest, *France Played Skeptic on Kosovo Attacks*, WASH. POST (Sept. 20, 1999), <https://www.washingtonpost.com/wp-srv/national/daily/sept99/airwar20.htm> (noting some potential effects of electricity failures).

¹⁴¹ Robinson & Nohle, *supra* note 79, at 123–24 (citing INT'L COMM. OF THE RED CROSS, URBAN SERVICES DURING PROTRACTED ARMED CONFLICT 28–32 (2015); INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT 52 (2015); INT'L COMM. OF THE RED CROSS, EXPLOSIVE WEAPONS IN POPULATED AREAS: HUMANITARIAN, LEGAL, TECHNICAL, AND MILITARY ASPECTS 23 (2015)).

¹⁴² *Id.*

¹⁴³ *Millions of Children in Syria at High Risk of Disease amid Water Scarcity and Summer Heat*, UNICEF (July 10, 2015), https://www.unicef.org/media/media_82509.html.

¹⁴⁴ William Arkin, *Tactical Bombing of Iraqi Forces Outstripped Value of Strategic Hits, Analyst Contends*, AVIATION WK & SPACE TECH., Jan. 27, 1992, at 63.

¹⁴⁵ J.W. Crawford, III, *The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems*, 21 FLETCHER F. WORLD AFF. 101, 109–10 (1997).

¹⁴⁶ Louis Maresca & Eleanor Mitchell, *The Human Costs and Legal Consequences of Nuclear Weapons Under International Humanitarian Law*, 97 INT'L REV. RED CROSS 621, 634 (2015).

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.”¹⁴⁸

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.¹⁴⁹ Past experiences in Libya,¹⁵⁰ Lebanon,¹⁵¹ Iraq,¹⁵² Afghanistan,¹⁵³ and Syria¹⁵⁴ 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.¹⁵⁵ ISIS is primarily using weapons provided by coalition members that were originally meant to change the regime or fight terrorism.¹⁵⁶ 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.¹⁵⁷ 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

neva ¶ 21 (Int’l Comm. Red Cross, Working Paper)).

¹⁴⁸ Louis Maresca, *Cluster Munitions: Moving Towards Specific Regulation*, 4 UNIDIR DISARMAMENT F. 27, 29 (2006), <http://www.unidir.org/files/publications/pdfs/cluster-munitions-en-337.pdf>.

¹⁴⁹ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 242, 247 (June 27); G.A. Res. 3314 (XXIX) (Dec. 14, 1974).

¹⁵⁰ See Seumas Milne, *Coups and Terror are the Fruit of NATO’s War in Libya*, GUARDIAN (May 22, 2014), <https://www.theguardian.com/commentisfree/2014/may/22/coups-terror-nato-war-in-libya-west-intervention-boko-haram-nigeria>.

¹⁵¹ See BILAL Y. SAAB, SABAN CTR. AT BROOKINGS, LEVANTINE RESET: TOWARD A MORE VIABLE U.S. STRATEGY FOR LEBANON 17 (2010), https://www.brookings.edu/wp-content/uploads/2016/06/07_lebanon_saab.pdf.

¹⁵² See Seumas Milne, *Now the Truth Emerges: How the US Fuelled the Rise of Isis in Syria and Iraq*, GUARDIAN (June 3, 2015), <https://www.theguardian.com/commentisfree/2015/jun/03/us-isis-syria-iraq>.

¹⁵³ See Michel Chossudovsky, *Al-Qaeda and the “War on Terror,”* GLOBAL POL’Y F. 20, 20 (2008), <https://www.globalpolicy.org/component/content/article/154/26821.html>.

¹⁵⁴ Mara Karlin, *After 7 Years of War, Assad Has Won in Syria. What’s Next for Washington?* BROOKINGS (Feb. 13, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/02/13/after-7-years-of-war-assad-has-won-in-syria-whats-next-for-washington/>; Wire Staff, *Assad: U.S. Trying to Destabilize Syria*, CNN (July 8, 2012), <https://www.cnn.com/2012/07/08/world/meast/syria-unrest/index.html>.

¹⁵⁵ Mallory Shelbourne, *Study Shows US Weapons Given to Syrian Rebels Ended Up in ISIS Hands*, HILL (Dec. 14, 2017), <https://thehill.com/policy/defense/364917-study-shows-us-weapons-given-to-syrian-rebels-ended-up-in-isis-hands>.

¹⁵⁶ *Id.*

¹⁵⁷ See Karlin, *supra* note 154; Wire Staff, *supra* note 154.

the host state and the region, resulting in increased violence, increased terrorism, and increased destruction.¹⁵⁸ Since the international law of using force does not allow the arming of rebels,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.¹⁶⁰

In practice under PoP, Ireland has advised that military commanders must be informed of the long-term effects of conflicts on civilians,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.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.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.”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.”¹⁶⁵

In sum, the reverberating effects of an attack are reasonably foreseeable in populated areas under the PoP and the principle of precaution.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.¹⁶⁷ Therefore, it is only reasonably foreseeable that there

¹⁵⁸ See Chossudovsky, *supra* note 153; Karlin, *supra* note 154; Milne, *supra* note 152; Wire Staff, *supra* note 154.

¹⁵⁹ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶¶ 242, 292(3) (June 27).

¹⁶⁰ See *id.*

¹⁶¹ Delegate of Ir., United Nations Office at Geneva: Explosive Remnants of War Intervention, Address Before the Main Committee II at the Convention on Certain Conventional Weapons Review Conference at the Palais des Nations (Nov. 9, 2006).

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

¹⁶³ MINISTRY OF DEFENCE, JSP 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 5.32.4, at 82–83 (2004) (U.K.).

¹⁶⁴ *Id.* at 86.

¹⁶⁵ U.S. DEP’T OF THE ARMY, *supra* note 115.

¹⁶⁶ KATHLEEN LAWAND ET AL., INT’L COMM. OF THE RED CROSS, A GUIDE TO THE LEGAL REVIEW OF NEW WEAPONS, MEANS AND METHODS OF WARFARE 15, 18 (2006).

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.¹⁶⁸

5. Precaution

The duty of precaution obliges the military to verify that the target serves as a valid military objective¹⁶⁹ and to assess the expected incidental damage¹⁷⁰ to avoid all unnecessary incidental damage.¹⁷¹ Not taking precautions, or not cancelling the mission upon knowing¹⁷² that it does not serve a military objective, may violate the PoP.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.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.”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.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.¹⁷⁷ Some scholars say that these actions and precautions are based

¹⁶⁸ *Id.*

¹⁶⁹ Geneva Conventions Protocol I, *supra* note 21, at art. 48 art. 51; HENCKAERTS & DOSWALD-BECK, *supra* note 82, at 55.

¹⁷⁰ Robinson & Nohle, *supra* note 79, at 111–12.

¹⁷¹ HENCKAERTS & DOSWALD-BECK, *supra* note 82, at 55.

¹⁷² INT’L COMM. OF THE RED CROSS, DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR art. 8 (1956), <https://ihl-databases.icrc.org/ihl/INTRO/420?OpenDocument>.

¹⁷³ Geneva Conventions Protocol I, *supra* note 21, at art. 57; HENCKAERTS & DOSWALD-BECK, *supra* note 82, at 60, 62.

¹⁷⁴ CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949, at 679 (Yves Sandoz et al. eds., 1987).

¹⁷⁵ Robinson & Nohle, *supra* note 79, at 134.

¹⁷⁶ See Michael N. Schmitt & Eric W. Widmar, “On Target”: Precision and balance in the Contemporary Law of Targeting, 7 J. NAT’L SECURITY L. & POL’Y 379, 401 (2014).

¹⁷⁷ HENCKAERTS & DOSWALD-BECK, *supra* note 82, at 58.

on the information actually available,¹⁷⁸ while others believe that these obligations are based on the information *reasonably* available.¹⁷⁹ 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”¹⁸⁰ 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.¹⁸¹ 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.¹⁸² 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.¹⁸³ In fact, some states already require experts to analyze the incidental harm of certain weaponry.¹⁸⁴ For instance, US war manuals involve civil engineers to calculate the incidental damage to water supplies, power grids, and sewage networks from an attack.¹⁸⁵ 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.¹⁸⁶ In fact, the US explicitly refers to and prohibits “incidental damage” in excess of the military objectives and military advantage achieved.¹⁸⁷ It also mandates the attack be in harmony with the IHL principles of necessity, proportionality, and distinction.¹⁸⁸ 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.

¹⁸³ See WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 414 (2012).

¹⁸⁴ INT’L COMM. OF THE RED CROSS, *supra* note 114, at 36.

¹⁸⁵ U.S. DEP’T OF DEF., DEP’T OF THE ARMY, *INTELLIGENCE SUPPORT TO URBAN OPERATIONS* 3-2 (2008).

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*].

¹⁸⁷ U.S. DEP’T OF THE ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE* 5 (1976); see Jason D. Wright, *Excessive Ambiguity: Analysing and Refining the Proportionality Standard*, 94 INT’L REV. RED CROSS 819, 830 (2012).

¹⁸⁸ U.S. DEP’T OF DEF., JOINT CHIEFS OF STAFF, *JOINT PUBLICATION 3-60, JOINT TARGETING A-1* (2007) [hereinafter *JOINT TARGETING*].

vilians to depart the area, if possible,¹⁸⁹ or even cancel the attack if the target serves no military objective.¹⁹⁰

Within this structure, the US considers the destruction of infrastructure that increases civilian hardship.¹⁹¹ The US also gives special consideration to the environmental, chemical, biological, and radiological damage assessment of an attack,¹⁹² with regard to the incidental harm under the precaution heading, including the secondary and tertiary effects of an attack.¹⁹³ Similarly, Australia also gives special consideration to the secondary and tertiary incidental reverberating effects of an attack.¹⁹⁴ Norway and Israel oblige their commanders to minimize the destruction of essential infrastructure.¹⁹⁵ Jeff McMahan gives a very good example of analyzing the reasonable foreseeability of an attack in a densely populated area.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.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.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.¹⁹⁹ Through modernization in technology, there are several ways to re-

¹⁸⁹ *Id.* at A-5; Wright, *supra* note 187, at 831.

¹⁹⁰ JOINT TARGETING, *supra* note 188, at A-5; Wright, *supra* note 187, at 31.

¹⁹¹ JOINT URBAN OPERATIONS, *supra* note 186, at III-9.

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].

¹⁹³ *See id.* at Appendix A, Enclosure D.

¹⁹⁴ AUSTL. DEP'T OF DEFENCE, OPERATIONS SERIES, ADDP 3.14, TARGETING § 1.21 (2009).

¹⁹⁵ *See Operational Response*, ISRAELI DEF. FORCE, <https://www.idf.il/en/minisites/questions-and-answers-concerning-the-violent-riots-and-attacks-occurring-on-the-border-between-gaza-and-israel-during-2018-9/gaza-border-events-qa/operational-response/> (last visited Feb. 25, 2018) (explaining the general principles of distinction and proportionality in Israeli Defense Force operations); *The Values and Standards of the Norwegian Armed Forces: Human Dignity*, NORWEGIAN ARMED FORCES (July 29, 2015), <https://forsvaret.no/en/ForsvaretDocuments/ValuesAndStandards.pdf> (laying out a responsibility to distinguish civilians and civilian objects and avoid unnecessary collateral damage).

¹⁹⁶ *See McMahan*, *supra* note 32, at 14–15.

¹⁹⁷ *See id.*

¹⁹⁸ BOOTHBY & HEINTSCHEL VON HEINEGG, *supra* note 86, at 136.

¹⁹⁹ *See Schmitt & Widmar*, *supra* note 176, at 402; *see also HENCKAERTS & DOSWALD-BECK*, *supra* note 82, at 56.

duce incidental harm.²⁰⁰ For instance, “precision-based guided missile systems” and “physics-based computer modeling” can effectively decrease the incidental reverberating effects of an attack.²⁰¹ Some scholars support the argument that guided missiles can reduce incidental damage,²⁰² and others suggest that filament bombs can do so too.²⁰³ The rule of precaution also obliges attackers to not target densely populated areas, and allows certain areas to have restricted attacks, if possible.²⁰⁴ In compliance, the US also allows the creation of no-fire zones²⁰⁵ and prohibits targets located in densely populated areas to protect civilians.²⁰⁶ In addition, the US also mandates its commanders to abort an attack if the accuracy of the target is not certain.²⁰⁷ 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.²⁰⁸

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.²⁰⁹ Moreover, the conduct of drone strikes must fulfill all the IHL principles, including proportionality, distinction, and necessity.²¹⁰ Drones are disproportionate, because on average a drone strike kills about ten innocent people as collateral damage.²¹¹ 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.²¹² For this, he

²⁰⁰ Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. J. 143, 168 (1999).

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.

²⁰⁴ Jean-François Quéguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 INT’L REV. RED CROSS 793, 800 (2006).

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.

²⁰⁹ See Michael N. Schmitt, *Drone Attacks Under the Just ad Bellum and Jus in Bello: Clearing the “Fog of Law”*, 13 YEARBOOK INT’L HUM. L. 311, 315 (2010).

²¹⁰ DRONE WARS: TRANSFORMING CONFLICT, LAW, AND POLICY 151 (Peter L. Bergen & Daniel Rothenberg eds., 2014).

²¹¹ NETA C. CRAWFORD, ACCOUNTABILITY FOR KILLING: MORAL RESPONSIBILITY COLLATERAL DAMAGE IN AMERICA’S POST-9/11 WARS 209 (2013).

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 Kosovo²¹³ with the deaths resulting from drone strikes.²¹⁴ Even if the combatants are present in urban areas with the civilians, the Law of Armed Conflict (LOAC) guidelines protect civilians from any attack,²¹⁵ unless it is absolutely necessary,²¹⁶ 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.²¹⁷ 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.²¹⁸ However, other scholars warn about altering universally accepted rules owing to the possible pitfalls of doing so.²¹⁹ Andersen believes in alteration only because the US policy for identifying the "immediate threat" is wider than the established conditions,²²⁰ 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.²²¹ Other states are also following the example of using airstrikes in populated areas, away from hostilities.²²² Therefore, the use of airstrikes in civilian populated areas must be restricted to abso-

²¹³ *Id.* at 431.

²¹⁴ *Id.*

²¹⁵ Prosecutor v. Stanislav Galić, No. IT-98-29-T, Judgment, International Criminal Tribunal for the Former Yugoslavia, ¶ 58 (Dec. 5, 2003), <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>; see also Geneva Conventions Protocol I, *supra* note 21, at art. 50, art. 51.

²¹⁶ HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. State of Isr. 53(4) PD 817 (1999) (Isr.) (translation available at http://elyon1.court.gov.il/Files_ENG/94/000/051/A09/94051000.A09.htm).

²¹⁷ See Andresen, *supra* note 212, at 432.

²¹⁸ See CHRISTOPHER D. KOLENDA ET AL., OPEN SOC'Y FOUND., THE STRATEGIC COSTS OF CIVILIAN HARM: APPLYING LESSONS FROM AFGHANISTAN TO CURRENT AND FUTURE CONFLICTS 23–25 (2016); JASON LYALL, BOMBING TO LOSE? AIRPOWER, CIVILIAN CASUALTIES, AND THE DYNAMICS OF VIOLENCE IN COUNTERINSURGENCY WARS 4 (2017), <https://ssrn.com/abstract=2422170>.

²¹⁹ See Jeremy Waldron, *Can Targeted Killing Work as a Neutral Principle?* 1 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 11-20, 2011).

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).

²²² See W.J. Hennigan, *A Fast Growing Club: Countries That Use Drones for Killing by Remote Control*, L.A. TIMES (Feb. 22, 2016), <https://www.latimes.com/world/africa/la-fg-drone-proliferation-2-20160222-story.html>.

lutely necessary cases,²²³ but its overuse by misuse must be curtailed.²²⁴ Andersen argues that, since the drone strikes are counterproductive in decreasing terrorism and increasing US security,²²⁵ their cessation would be efficient in the execution of military objectives of US security.²²⁶

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,²²⁷ 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.²²⁸ 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.²²⁹ The proportionality requires the use of defensive force to repel an attack.²³⁰ Proportionality weighs in the force used by both sides.²³¹ 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.²³² 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 devastating characteristics,²³³ though only if the existence of a nation is under threat.²³⁴ This view of the ICJ is

²²³ See H CJ 5100/94 Pub. Comm. Against Torture in Isr. v. State of Isr. 53(4) PD 817 (1999) (Isr.) (translation available at http://elyon1.court.gov.il/Files_ENG/94/000/051/A09/94051000.A09.htm).

²²⁴ See Itamar Mann & Omer Shatz, *The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987-2009*, 6 UNBOUND: HARV. J. LEGAL LEFT 59, 63 (2010).

²²⁵ THRALL & GOEPNER, *supra* note 6, at 1.

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

²²⁷ THRALL & GOEPNER, *supra* note 6, at 2.

²²⁸ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 237 (June 27).

²²⁹ Oil Platforms (Islamic Republic of Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 77 (Nov. 6).

²³⁰ GURULÉ & CORN, *supra* note 46, at 80–81.

²³¹ See D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 110 (1958).

²³² See TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 148 (2005).

²³³ YORUM DINSTEIN, WAR, AGGRESSION & SELF-DEFENCE 210 (2001).

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.²³⁵ The moment they become aggressive in nature and stop being defensive, they become disproportionate.²³⁶

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.²³⁷ 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.²³⁸ Similarly, to determine the excessive damage in terms of incidental civilian deaths and injuries,²³⁹ the Israeli Supreme Court decided that this must be decided on a case-by-case basis²⁴⁰ by the objective test of a reasonable commander.²⁴¹ 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.²⁴² The concurring opinion agreed that severe collateral damage cannot be justified, even against substantial military benefits, under the PoP.²⁴³ 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.²⁴⁴ It is interesting to note that the term “overall” instead of “direct” raises the threshold of excessiveness.²⁴⁵ However, it is very useful and intriguing to analyze the overall excess of damage in relation to the overall military ob-

²³⁵ See H. VICTOR CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 208–09 (2004).

²³⁶ See *id.*

²³⁷ See *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).

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.

²⁴⁰ H CJ 796/02 Pub. Comm. Against Torture in Isr. v. State of Isr. 53(4) PD ¶ 46 (2005) (Isr.).

²⁴¹ *Id.* at ¶ 57.

²⁴² *Id.* at ¶ 46.

²⁴³ *Id.* ¶ 5.

²⁴⁴ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, art. 8(a)(b)(iv), U.N. Doc. A/CONF. 183/13 (Vol. 1) (1998).

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 counterproductive²⁴⁶ 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.²⁴⁷ For instance, if the military objective is to thwart aggression, direct force used against legitimate targets is proportional.²⁴⁸ 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.²⁴⁹ Similarly, if a war is unjust, then no relevant good can be achieved, therefore an unjust war will always be a disproportionate war.²⁵⁰ 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.²⁵¹ 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.²⁵² 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.²⁵⁵ A similar conclusion was drawn in 2006 by the National Intelligence Estimate, comprising sixteen intelligence agencies.²⁵⁶ Moreover, scholar Cornelia Beyer noted that terrorism has increased because of the economic policies of the West.²⁵⁷ 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.²⁶⁰ The US also provided safe havens to a designated terrorist, Louis Posada Carriles.²⁶¹ 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.²⁶³ Rebel groups are often trained and armed by the coalition partners in the WoT.²⁶⁴ Usually, most of the US aided weapons to these groups end up in the hands of terrorists.²⁶⁵ The rebel

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).

²⁵⁶ Mark Mazzetti, *Spy Agencies Say Iraq War Worsens Terrorism Threat*, N.Y. TIMES (Sept. 24, 2006), <https://www.nytimes.com/2006/09/24/world/middleeast/24terror.html>.

²⁵⁷ See CORNELIA BEYER, VIOLENT GLOBALISM 80 (2008).

²⁵⁸ Williams, *supra* note 7.

²⁵⁹ GLENN WESLEY PERUSEK, SHIFTING TERRAIN: ESSAYS ON POLITICS, HISTORY AND SOCIETY 8 (2006).

²⁶⁰ Marc Warren, *Belligerent Occupation*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 676 (2015).

²⁶¹ Peter Kornbluh, *A Safe Harbor for Luis Posada Carriles*, NACLA (Sept. 25, 2007), <https://nacla.org/article/safe-harbor-luis-posada-carriles>.

²⁶² Anthony Richards, *The Importance of an Agreed Definition of Terrorism*, in CONCEPTUALIZING TERRORISM 25 (2015) (citing William Odom, *American Hegemony: How to Use It, How to Lose It* (Middlebury Coll., Rohatyn Ctr. for Int'l Affairs, Working Paper Series No. 24, 2006)).

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.²⁶⁶ More specifically, the rebels fight their states, which destabilizes the governments and injures law enforcement officials and the infrastructure of a country.²⁶⁷ This contributes to an increase of violence and turns regions into breeding grounds for terrorism.²⁶⁸ Likewise, the regime change agenda is also seen as one of the greatest factors in increasing terrorism.²⁶⁹ 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.²⁷⁰ The subsequent vacuum in the governing state gives wide room for the breeding of terrorism.²⁷¹ This was the case with the removal of Saddam Hussein in Iraq,²⁷² as well as with the removal of Muammar al-Qaddafi in Libya.²⁷³ Without learning any lessons, the same goals – regime change and supporting rebels – are being pursued in Syria.²⁷⁴ As a result, Syrian territory has been destabilized and terrorism is on the rise.²⁷⁵ 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.²⁷⁶

The WoT has caused complete devastation and destabilization in several countries, including Afghanistan,²⁷⁷ Iraq,²⁷⁸ Syria,²⁷⁹ and Libya,²⁸⁰ where

²⁶⁶ See U.S. DEP’T OF THE ARMY, *supra* note 115, at 1-2.

²⁶⁷ See Will Todman, *Syria is Forcing Former Rebels to Fight Their Friends*, DEF. ONE (Sept. 6, 2018), <https://www.defenseone.com/ideas/2018/09/syria-forcing-former-rebels-fight-their-friends/151039/>.

²⁶⁸ Williams, *supra* note 7.

²⁶⁹ See Wire Staff, *supra* note 154.

²⁷⁰ See ANTHONY H. CORDESMAN, *TERRORISM: U.S. STRATEGY AND THE TRENDS IN ITS “WARS” ON TERRORISM* 2, 5 (2018).

²⁷¹ Milne, *supra* note 152.

²⁷² Ewen MacAskill & Oliver Burkeman, *Power Vacuum That Has Taken US by Surprise*, GUARDIAN (April 11, 2003), <https://www.theguardian.com/world/2003/apr/11/usa.iraq>.

²⁷³ Milne, *supra* note 150.

²⁷⁴ Wire Staff, *supra* note 154.

²⁷⁵ *Why Is There a War in Syria?*, BBC (Sept. 7, 2018), <https://www.bbc.com/news/world-middle-east-35806229> (noting the Islamic State and al-Qaeda are allowed to flourish in Syria because of the existing conflict); see *Syrian President Bashar al-Assad: Facing Down Rebellion*, BBC (Sept. 3, 2018), <https://www.bbc.com/news/10338256> (commenting that Syria is overrun by Islamic State militants).

²⁷⁶ Richard Norton-Taylor, *Response to 9/11 was ‘Huge Overreaction’-ex-MI5 Chief*, GUARDIAN (Oct. 17, 2008), <https://www.theguardian.com/politics/2008/oct/18/stella-rimington-9-11-mi5>.

²⁷⁷ See Chossudovsky, *supra* note 153 (noting that the country has been through 25 years of civil war); Simon Tisdall, *The US Has Ruined Afghanistan. It Can’t Just Walk Away Now*, GUARDIAN (Feb. 8, 2019), <https://www.theguardian.com/commentisfree/2019/feb/08/us-afghanistan-civil-war-fundamentalist> (commenting that American departure from Afghanistan would

the governmental machinery is made incapable of fighting terrorism.²⁸¹ The civilian infrastructure including electric grids and basic services like roads and markets is in complete ruins.²⁸² The WoT has caused the death of several million civilians.²⁸³ It has cost more than 4.4 trillion dollars in its pursuit, until 2015 alone.²⁸⁴ 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.²⁸⁵ In fact, the deaths due to terrorism, when compared to the start of WoT, have increased by 4500%.²⁸⁶ Suicide attacks in Iraq rose from zero in 2003 to 1,892 in 2015.²⁸⁷ In Pakistan, they rose from one in 2001 to 486 in 2015.²⁸⁸ The story is similar for Nigeria, Syria, Yemen, Libya, and Somalia.²⁸⁹

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.²⁹⁰ 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-

lead to “[a] rapid descent into civil war, involving government forces, jihadist groups and rival warlords, in a rerun of not-forgotten 1990s anarchy, is a strong possibility. Last year saw record civilian deaths, caused by terror bombings, intensified fighting and increased US airstrikes.”)

²⁷⁸ Michael Knights, *Infrastructure Targeting and Postwar Iraq*, WASH. INST. FOR NEAR E. POLICY (Mar. 14, 2003),

<https://www.washingtoninstitute.org/policy-analysis/view/infrastructure-targeting-and-postwar-iraq>; Milne, *supra* note 152.

²⁷⁹ Karlin, *supra* note 154.

²⁸⁰ Milne, *supra* note 150.

²⁸¹ *Id.*; *The Current Situation in Iraq*, U.S. INST. PEACE (Sept. 1, 2017), <https://www.usip.org/publications/2017/09/current-situation-iraq>; see Tisdall, *supra* note 277.

²⁸² CATHERINE LUTZ, *RECONSTRUCTING IRAQ: THE LAST YEAR AND THE LAST DECADE I* (2013); Knights, *supra* note 278.

²⁸³ Ahmed, *supra* note 4.

²⁸⁴ Hasan, *supra* note 3.

²⁸⁵ Bethan McKernan, *Up to 30,000 Isis Fighters Remain in Iraq and Syria, Says UN*, INDEPENDENT (Aug. 15, 2018), <https://www.independent.co.uk/news/world/middle-east/isis-fighters-iraq-syria-un-report-jihadis-raqqa-iraq-a8492736.html>.

²⁸⁶ Hasan, *supra* note 3.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Marjorie Cohn, *Bombing of Afghanistan is Illegal and Must Be Stopped*, MARJORIECOHN.COM (Nov. 6, 2001), <https://marjoriecohn.com/bombing-of-afghanistan-is-illegal-and-must-be-stopped/>.

sion.²⁹¹ Therefore, some argue that the Afghan war was illegal.²⁹² The law of war does not allow the use of force in self-defense against non-state actors²⁹³ but it does acknowledge that non-state actors can carry out armed attacks.²⁹⁴ But this attack must be of the gravest nature to result in a valid claim of self-defense.²⁹⁵ Therefore, few other scholars and states agree that the US had a right to self-defense in response to the 9/11 attacks,²⁹⁶ when in 2001 the US authorized its war against the people responsible.²⁹⁷ The US fought Al Qaeda for being responsible for 9/11 attacks and the Taliban for harboring Al Qaeda.²⁹⁸ Apart from fighting terrorists, the US supported the Tajiks and Uzbeks in the Afghan civil war, which destabilized the country.²⁹⁹ Scholars accuse the US of fostering the Taliban and Osama bin Laden, before the invasion, for its political interests under Operation Cyclone.³⁰⁰ The UNSC and United Nations General Assembly (UNGA) even called for a stop to these interferences in the sovereign grounds of Afghanistan.³⁰¹ As of 2009, Al Qaeda forces were diminished to the meager number of one hundred members.³⁰² However, as of 2019, US forces have not yet pulled out from the war, and there is no end in sight to this fight.³⁰³

1. Damage

According to the UN, opium production dramatically increased after the US invasion.³⁰⁴ The Afghan war is costing about 100 million dollars per

²⁹¹ *Id.*

²⁹² PAUL STREET, *THE EMPIRE'S NEW CLOTHES: BARACK OBAMA IN THE REAL WORLD OF POWER* 64 (2015).

²⁹³ See Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1, 2 (2015).

²⁹⁴ See Eric A. Heinze, *Nonstate Actors in the International Legal Order: The Israeli-Hezbollah Conflict and the Law of Self-Defense*, 15 GLOBAL GOVERNANCE 87, 92 (2009).

²⁹⁵ Hakimi, *supra* note 293, at 16.

²⁹⁶ See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 206 (2018).

²⁹⁷ Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

²⁹⁸ *See id.*

²⁹⁹ See NEYIRE AKPINARLI, *THE FRAGILITY OF THE 'FAILED STATE' PARADIGM* 56 (2010).

³⁰⁰ *See, e.g., id.* at 53.

³⁰¹ *See id.*

³⁰² Peter Bergen & Katherine Tiedemann, *The Almanac of Al Qaeda*, FOREIGN POL'Y (Apr. 26, 2010), <https://foreignpolicy.com/2010/04/26/the-almanac-of-al-qaeda-2/>.

³⁰³ *See* Torfeh, *supra* note 1.

³⁰⁴ *See* Vanda Felbab-Brown, *Afghanistan's Opium Production is Through the Roof-Why Washington Shouldn't Overreact*, BROOKINGS (Nov. 21, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/11/21/afghanistans-opium-production-is-through-the-roof-why-washington-shouldnt-overreact/>.

day³⁰⁵ and it has incurred a cost of more than a trillion dollars;³⁰⁶ 6,800 US soldiers have been killed in this war³⁰⁷ and more than 30,000 innocent civilian lives have been lost, with more than 210,000 total casualties.³⁰⁸ Millions of more people are displaced³⁰⁹ and 1.17 million reports of war crimes in Afghanistan have been submitted to the ICJ.³¹⁰ The infrastructure of Afghanistan, including the electric grid, roads, hospitals, schools, and other essential services, have been dysfunctional since the war began.³¹¹ Violence and terrorism in the country are on the rise³¹² and the economy has been devastated.³¹³

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.³¹⁴ Similarly, the effects of supporting rebels in a state are also known:

³⁰⁵ SIMON REICH & PETER DOMBROWSKI, *THE END OF GRAND STRATEGY: US MARITIME OPERATIONS IN THE TWENTY-FIRST CENTURY* 36 (2017).

³⁰⁶ *Economic Costs*, WATSON INST. FOR INT'L & PUB. AFF., <https://watson.brown.edu/costsofwar/costs/economic> (last visited Feb. 10, 2019).

³⁰⁷ *US & Allied Killed and Wounded*, WATSON INST. FOR INT'L & PUB. AFF., <https://watson.brown.edu/costsofwar/costs/human/military> (last visited Feb. 10, 2019).

³⁰⁸ *Civilians Killed & Wounded*, WATSON INST. FOR INT'L & PUB. AFF., <https://watson.brown.edu/costsofwar/costs/human/military> (last visited Feb. 10, 2019).

³⁰⁹ *Afghanistan*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/afghanistan.html> (last visited Feb. 6, 2019) (noting that “there are almost 2.5 million registered refugees from Afghanistan”); *General Security Situation in Afghanistan and Events in Kabul*, EUROPEAN COUNTRY ORIGIN INFO. NETWORK (Jan. 18, 2019), <https://www.ecoi.net/en/countries/afghanistan/featured-topics/general-security-situation-in-afghanistan-and-events-in-kabul> (stating that roughly 2.7 million Afghani refugees still remain outside the country).

³¹⁰ Kathy Gannon, *Afghans Submit 1.17 Million War Crimes Claims to International Court*, INDEPENDENT (Feb. 17, 2018), <https://www.independent.co.uk/news/world/middle-east/afghanistan-war-crimes-claims-victims-millions-submitted-court-isis-taliban-a8214301.html>.

³¹¹ See *General Security Situation in Afghanistan and Events in Kabul*, *supra* note 309.

³¹² *Why Afghanistan Is More Dangerous Than Ever*, BBC (Sept. 14, 2018), <https://www.bbc.com/news/world-asia-45507560>.

³¹³ See *General Security Situation in Afghanistan and Events in Kabul*, *supra* note 309.

³¹⁴ See Robinson & Nohle, *supra* note 79, at 108 (citing Michael N. Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello*, 84 INT'L REV. RED CROSS 365, 392 (2002)).

armed support to rebels is tantamount to terrorism/armed attack itself.³¹⁵ It increases violence and terrorism while destabilizing the country.³¹⁶ This war had the military objectives of dealing with the people responsible for the 9/11 events and of decreasing terrorism.³¹⁷ Any harm that does not directly benefit this goal is outside the military objective and is disproportionate.³¹⁸ In the Afghanistan War, the efforts to change the regime to justify military funding,³¹⁹ support to rebels,³²⁰ support to drug/war lords,³²¹ and seventeen years of military occupation³²² 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.³²³ While the US claims that Al Qaeda has been decimated,³²⁴ it acknowledges that this war is inefficient and counterproductive and it has given rise to terrorism,³²⁵ violence,³²⁶ and drugs,³²⁷ rather than decreasing those. The counter-productivity of this war has instead decreased US security owing to the

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).

³¹⁶ See *President Assad Accuses US of 'Destabilizing' Syria*, BBC (July 9, 2012), <https://www.bbc.com/news/world-middle-east-18763672>; Karlin, *supra* note 154.

³¹⁷ Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

³¹⁸ See Geneva Conventions Protocol I, *supra* note 21, at art. 51(5)(b).

³¹⁹ See Torfeh, *supra* note 1.

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>.

³²¹ *US Invaded Afghanistan Largely to Restore Heroin Industry: Scholar*, PRESSTV (Nov. 21, 2017), <https://www.presstv.com/Detail/2017/11/20/542871/US-invaded-Afghanistan-largely-to-restore-heroin-industry>; Johnny Dwyer, *The U.S. Quietly Released Afghanistan's Biggest Drug Kingpin from Prison. Did He Cut a Deal?*, INTERCEPT (May 1, 2018), <https://theintercept.com/2018/05/01/haji-juma-khan-afghanistan-drug-trafficking-cia-dea>.

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/>.

³²³ See Geneva Conventions Protocol I, *supra* note 21, at art. 51; *Practice Relating to Rule 14. Proportionality in Attack*, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule14 (last visited Feb. 10, 2019).

³²⁴ Susan Crabtree, *WH Insists al Qaeda Core is 'Decimated'*, WASH. EXAMINER (Sept. 26, 2014), <https://www.washingtonexaminer.com/wh-insists-al-qaeda-core-is-decimated>.

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)).

³²⁶ *Why Afghanistan Is More Dangerous Than Ever*, *supra* note 312.

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>.

increase in terrorism.³²⁸ The Taliban still governs forty percent of the land, and warlords are occupying key high positions in Afghanistan.³²⁹ Al Qaeda has spread to Iraq, Algeria, and Syria from Afghanistan.³³⁰ 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.³³¹ Therefore, it can be rightly concluded that the Afghan war was counterproductive,³³² and it caused less good than harm. In reality, the war has caused a tremendous amount of damage to Afghanistan,³³³ cost billions of dollars to the US,³³⁴ killed millions of innocent civilians, destabilized the region, destroyed a country, destroyed its infrastructure and basic essential service systems,³³⁵ and consumed seventeen years of time.³³⁶ 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.³³⁷ 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.

³³⁰ See *Does the US Have an Exit-Strategy for Afghanistan?*, TRTWORLD VIDEO: NEWS MAKERS, <https://www.trtworld.com/video/the-newsmakers/does-the-us-have-an-exit-strategy-for-afghanistan/5bc979ec315f18291a6c73d7> (last visited Feb. 1, 2019) (discussing the 17-year-long war against the Taliban).

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).

³³³ NETA C. CRAWFORD, UPDATE ON THE HUMAN COSTS OF WAR FOR AFGHANISTAN AND PAKISTAN 2–9 (2016), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2016/War%20in%20Afghanistan%20and%20Pakistan%20UPDATE_FINAL_corrected%20date.pdf (discussing the costs of war for Afghanistan); EMERGING TRENDS IN GLOBAL HEALTH 73 (2008) (discussing how since the US invasion of Afghanistan, the opium markets has drastically grown); *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); *Does the US Have an Exit-Strategy for Afghanistan?*, *supra* note 330.

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.

³³⁷ Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

defense by the coalition partners of the US, the UK, Australia, and other states.³³⁸ However, preventive or preemptive self-defense is not recognized by the international law of using force.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 Iraq³⁴⁰ and by the Disarmament Resolution.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.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.³⁴³ The Iraq War was a war of choice, and it was waged without exhausting alternative options and without pursuing any American interests.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.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.³⁴⁶ There were no WMDs found, which was the justification for the whole intervention.³⁴⁷ The intelligence reports for the WMDs were false.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-

³³⁸ *See id.*

³³⁹ IAN BROWNLIE, *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).

³⁴⁰ Press Release, United States Explanation of Vote on UN Security Council Resolution 1441, U.N. Press Release 187 (Nov. 8, 2002); Press Release, United Kingdom Explanation of Vote on UN Security Council Resolution 1441, U.K. Press Release (Nov. 8, 2002).

³⁴¹ *See, e.g.*, S.C. Res. 1441 (Nov. 8, 2002).

³⁴² Joint Statement of China, France, and the Russian Federation on UN Security Council Resolution 1441 (Nov. 8, 2002).

³⁴³ RICHARD N. HAASS, *WAR OF NECESSITY, WAR OF CHOICE: A MEMOIR OF TWO IRAQ WARS* 222 (2010).

³⁴⁴ *See id.* at 233.

³⁴⁵ *Powell Presents US Case to Security Council of Iraq's Failure to Disarm*, UN NEWS (Feb. 5, 2003), <https://news.un.org/en/story/2003/02/58372-powell-presents-us-case-security-council-iraqs-failure-disarm>.

³⁴⁶ *See* McMahan, *supra* note 32, at 17–18.

³⁴⁷ TRT World, *9/11 Anniversary: Seventeen Years Since Deadly Sept 11 Attacks*, YOUTUBE (Sep. 11, 2018), <https://www.youtube.com/watch?v=JKqjLLS99Vk>.

³⁴⁸ *Id.*

quent devastation.³⁴⁹ Kofi Annan said in 2004 that the Iraq invasion “was not in conformity with the UN Charter” and “was illegal”³⁵⁰ because the UNSC did not specifically authorize the Iraq invasion.³⁵¹ Similarly, renowned world politicians, including Russian president Vladimir Putin,³⁵² UK deputy Prime Minister John Prescott,³⁵³ and UK/Iraq Inquiry legal expert John Chilcot,³⁵⁴ 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.³⁵⁵ American legal expert Professor Marjorie Cohn³⁵⁶ and former US attorney general Ramsey Clark also believed that the Iraq War was a “war of aggression.”³⁵⁷ UK foreign secretary Jack Straw admitted that “regime change per se is no justification for military action” and it required a “fresh UN mandate.”³⁵⁸ Similarly, the Dutch inquiry, headed by Netherlands Supreme Court president Williboord David, found that the Iraq invasion was unlawful.³⁵⁹ The actions to propel regime change had “no legal basis in the international law,”³⁶⁰ and UNSC Resolution 1441 could not have authorized the invasion: it was misinterpreted and misused.³⁶¹ The International Commission of Jurists at the ICJ in Geneva also viewed the Iraq invasion as unlawful aggression without UNSC authorization.³⁶² The German Federal Ad-

³⁴⁹ See McMahan, *supra* note 32, at 18.

³⁵⁰ *Lessons of Iraq War Underscore Importance of UN Charter – Annan*, UN NEWS (Sept. 16, 2004), <https://news.un.org/en/story/2004/09/115352-lessons-iraq-war-underscore-importance-un-charter-annan>.

³⁵¹ Poorvi Chitalkar & David M. Malone, *The UN Security Council and Iraq 6* (United Nations Univ., Working Paper No. 1, 2013).

³⁵² *Iraq War Was Unjustified, Putin Says*, ABC NEWS (Dec. 18, 2003), <https://www.abc.net.au/news/2003-12-19/iraq-war-was-unjustified-putin-says/108124>.

³⁵³ *John Prescott: Iraq Invasion “Cannot be Justified,”* BBC NEWS (Mar. 1, 2013), <https://www.bbc.com/news/uk-politics-21626668>.

³⁵⁴ *Chilcot Report: Tony Blair’s Iraq War Case Not Justified*, BBC NEWS (July 6, 2016), <https://www.bbc.com/news/uk-politics-36712735>.

³⁵⁵ *See id.*

³⁵⁶ MARJORIE COHN, *IRAQ: A WAR OF AGGRESSION. NO WMDs, NO CONNECTION TO AL QAEDA* (2013), <https://www.globalresearch.ca/iraq-a-war-of-aggression-no-wmds-no-connection-to-al-qaeda/5327548>.

³⁵⁷ Jim W. Dean, *Ramsey Clark Leads Lawsuit Against US Iraq War Officials*, VETERANS TODAY (June 18, 2015), <https://www.veteranstoday.com/2015/06/18/ramsey-clark-leads-lawsuit-against-us-iraq-war-officials/>.

³⁵⁸ Jack Straw, *Straw’s Leaked Letter to Blair on Iraq*, GUARDIAN (Jan. 18, 2010), <https://www.theguardian.com/commentisfree/2010/jan/18/straw-leaked-letter-blair-iraq>.

³⁵⁹ *Report on the Dutch Committee of Inquiry on the War in Iraq*, 57 NETH. INT’L L. REV. 81, 81–83 (2010).

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.”³⁶³

1. Damage

The Iraq War costs 190 million dollars per day.³⁶⁴ The war has caused the deaths of about a half-million people³⁶⁵ and it has completely destroyed the civilian infrastructure³⁶⁶ while terrorism and violence have increased in Iraq.³⁶⁷ Until 2003, there had been no suicide attacks in the history of Iraq.³⁶⁸ By 2015, Iraq had witnessed 1,892 suicide attacks on its soil.³⁶⁹ About three million Iraqis are internally displaced,³⁷⁰ and about a quarter-million are registered refugees.³⁷¹ Approximately 8.7 million people need humanitarian assistance in Iraq.³⁷² The invasion destroyed the Iraqi system of governance,³⁷³ and the US Army has still not pulled out of Iraq, despite not having given any justified reasons for remaining.³⁷⁴

2. Application

The military objective, to clear the threat of the WMDs, was based on false intelligence reports.³⁷⁵ In contrast, the regime change agenda was pur-

COMMISSION JURISTS (March 18, 2003), <https://www.icj.org/icj-deplores-moves-toward-a-war-of-aggression-on-iraq/>.

³⁶³ Nikolas Schultz, *Was the War in Iraq Illegal? – The German Federal Administrative Court’s Judgment of 21st June, 2005*, 7 GERMAN L.J. 25, 32 (2005).

³⁶⁴ REICH & DOMBROWSKI, *supra* note 305.

³⁶⁵ *Costs of War*, WATSON INST. FOR INT’L. & PUB. AFF. (2019), <https://watson.brown.edu/costsofwar/> (last visited Feb. 10, 2019).

³⁶⁶ UNITED NATIONS HIGH COMM’R FOR REFUGEES, POSITION ON RETURNS TO IRAQ 19 (2016) [hereinafter POSITION ON RETURNS TO IRAQ]; JOËLLE GARRIAUD-MAYLAM, THE WAR IN SYRIA AND IRAQ: HUMANITARIAN ASPECTS 5 (2017).

³⁶⁷ See POSITION ON RETURNS TO IRAQ, *supra* note 366, at 1 (discussing the rapid expansion of ISIS and the subsequent increase in conflict and violence) (citing INST. FOR ECON. & PEACE, GLOBAL PEACE INDEX 2016, at 11 (2016), http://reliefweb.int/sites/reliefweb.int/files/resources/GPI%202016%20Report_2.pdf (charting Iraq as the third least peaceful country)).

³⁶⁸ Hasan, *supra* note 3.

³⁶⁹ See *id.* (explaining since 2003, Iraq had witnessed 1892 suicide attacks, and the video was made in 2015).

³⁷⁰ *The State of the World’s Human Rights — Iraq*, AMNESTY INT’L (Feb. 22, 2018), <http://www.ecoi.net/en/document/1425072.html> [hereinafter *Amnesty Int’l. Rep. 2017/2018*].

³⁷¹ GARRIAUD-MAYLAM, *supra* note 366, at 9.

³⁷² U.N. Secretary-General, *Security Council Resolution 2367 (2017)*, ¶ 84, U.N. Doc. S/2018/359 (Apr. 17, 2018).

³⁷³ McMahan, *supra* note 32, at 18.

³⁷⁴ See *id.* at 16–18.

³⁷⁵ See Peter Taylor, *Iraq War: The Greatest Intelligence Failure in Living*

sued.³⁷⁶ The threat that “justified” invasion never existed³⁷⁷ and still, after seventeen years, the destruction of civilian infrastructure, the deaths of a quarter-million people,³⁷⁸ millions more displaced,³⁷⁹ and the cost of trillions of dollars,³⁸⁰ the military occupancy has no end in sight.³⁸¹ Therefore, it can be concluded that the prolonged presence in Iraq³⁸² – even where there was no threat³⁸³ – and the subsequent devastation due to this presence,³⁸⁴ 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 2011.³⁸⁵ But the US and coalition partners started the invasion of Syria in 2015³⁸⁶ for two basic rea-

Memory, TELEGRAPH (Mar. 18, 2013), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/9937516/Iraq-war-the-greatest-intelligence-failure-in-living-memory.html> (explaining that Saddam Hussein did not have any WMDs and that there was a misrepresentation of such in the intelligence reports).

³⁷⁶ Hans Blix, *Blair Sold Iraq on WMD, But Only Regime Change Adds Up*, GUARDIAN (Dec. 14, 2009), <http://www.theguardian.com/commentisfree/cifamerica/2009/dec/14/blair-iraq-regime-change-inspections>.

³⁷⁷ See HAASS, *supra* note 343.

³⁷⁸ *Costs of War*, *supra* note 365 (noting that 370,000 people have been killed as a direct result of the wars in Afghanistan, Iraq, and Pakistan).

³⁷⁹ *Amnesty Int’l. Rep. 2017/2018*, *supra* note 370.

³⁸⁰ See Hasan, *supra* note 3 (explaining that the war cost over 4 trillion dollars).

³⁸¹ See Torfeh, *supra* note 1 (discussing unending military invasion and control of the country).

³⁸² See Tuqa Khalid, *U.S. Forces to Stay in Iraq as Long as Needed: Spokesman*, REUTERS (Aug. 19, 2019), <http://www.reuters.com/article/us-mideast-crisis-iraq-usa/u-s-forces-to-stay-in-iraq-as-long-as-needed-spokesman-idUSKBN1L408A> (explaining the reasoning for maintaining presence in Iraq during the war).

³⁸³ See Blix, *supra* note 376 (explaining that there was no defiance in Iraq that could have justified the U.S.’s use of armed force).

³⁸⁴ GARRIAUD-MAYLAM, *supra* note 366, at 5; POSITION ON RETURNS TO IRAQ, *supra* note 366, at 3 (explaining the destruction and damage done to homes, water, sewage systems, schools, and government facilities) (citing *Returns Begin to Iraq’s Fallujah*, MUSINGS ON IRAQ (Sept. 29, 2016), <http://musingsoniraq.blogspot.com/2016/09/returns-begin-to-iraqs-fallujah.html>); *Plight of Displaced In Iraq’s Anbar Province*, MUSINGS ON IRAQ (Aug. 11, 2016), <http://musingsoniraq.blogspot.com/2016/08/plight-of-displaced-in-iraqs-anbar.html>.

³⁸⁵ *A Look at US Involvement in Syria*, NATIONAL (Apr. 14, 2018), <http://www.thenational.ae/world/mena/a-look-at-us-involvement-in-syria-1.721352>.

³⁸⁶ *A Look at US Involvement in Syria’s Civil War*, ASSOCIATED PRESS (Dec. 19, 2018), <http://www.militarytimes.com/news/your-military/2018/12/19/a-look-at-us-involvement-in-syrias-civil-war/> (discussing the first time Americans entered Syria and the partners they recruited).

sons. The first justification is the necessity of fighting non-state actors that pose a threat to Iraq³⁸⁷, 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-

³⁸⁷ See Kevin Jon Heller, *The Invention of the Khorasan Group and Non-Imminent Imminence*, OPINIO JURIS (Sept. 29, 2014), <http://opiniojuris.org/2014/09/29/invention-khorasan-group-non-imminent-imminence/>.

³⁸⁸ Federica D'Alessandra, *Jus ad Bellum in Syria: The Meaning of the US Airpower Campaign*, HUM. RTS. L. WORKING GROUP NEWSLETTER (Int'l Bar Ass'n: Pub. and Prof'l Interest Div.), Mar. 2015, at 38.

³⁸⁹ Zeke J. Miller, *White House: Iraq War Vote: Obama Opposed Could Be Used for ISIS Strikes*, TIME (Sept. 13, 2014), <http://time.com/3362683/obama-isis-iraq-syria-war-aumf/>.

³⁹⁰ *Id.*; Gregory A. Wagner, *Warheads on Foreheads: The Applicability of the 9/11 AUMF to the Threat of ISIL*, 46 U. MEMPHIS L. REV. 235, 255 (2015).

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).

³⁹² See UNITED NATIONS, A MORE SECURE WORLD, OUR SHARED RESPONSIBILITY: REPORT OF THE SECRETARY-GENERAL ON THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND SECURITY 63 (2004).

³⁹³ See William Partlett, *Does It Matter That Strikes Against Syria Violate International Law?*, PURSUIT (April 16, 2018), <https://pursuit.unimelb.edu.au/articles/does-it-matter-that-strikes-against-syria-violate-international-law>; see Tess Bridgeman, *When Does the Legal Basis for U.S. Forces in Syria Expire?*, JUST SECURITY (Mar. 14, 2018), <https://www.justsecurity.org/53810/legal-basis-u-s-forces-syria-expire/>.

³⁹⁴ See Russian Fed'n, UNSC VETO LIST, <http://research.un.org/en/docs/sc/quick> (last visited Feb. 10, 2019).

³⁹⁵ See *A Look at US Involvement in Syria*, *supra* note 385; Hannah Allam, "Assad Must Go" Demand Should Go, *Ex-White House Official Says*, MIAMI HERALD (May 12, 2016), <https://www.miamiherald.com/news/nation-world/world/article77313747.html>; Scott Wilson, *Assad Must Go, Obama Says*, WASH. POST (Aug. 18, 2011), <https://www.washingtonpost.com/politics/assad-must-go-obama->

bels in Syria that fight the Bashar al-Assad regime.³⁹⁶ 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.³⁹⁷

1. Damage

About half-a-million people have been killed and about two million people have been injured in Syria in six years.³⁹⁸ Millions more have been kidnapped, tortured, and deprived of food, water, shelter, education and health care.³⁹⁹ Over five million Syrians have migrated as registered refugees,⁴⁰⁰ and more than 7.6 million Syrians (about half its population by some estimates⁴⁰¹) have been displaced.⁴⁰² Humanitarian laws are being violated by the government, ISIS, and the foreign-backed rebels.⁴⁰³ Food, electricity, water, housing, health care, the economy, governance, and infrastructure have collapsed.⁴⁰⁴

says/2011/08/18/gIQAelheOJ_story.html?utm_term=.cd5b98800339.

³⁹⁶ Adam Gallagher, *How Will History Judge Obama's Actions in Syria?*, HILL (Feb. 21, 2017),

<https://thehill.com/blogs/pundits-blog/foreign-policy/320199-how-will-history-judge-obamas-actions-in-syria>; see also Tara McKelvey, *Arming Syrian Rebels: Where the US Went Wrong*, BBC (Oct. 10, 2015), <https://www.bbc.com/news/magazine-33997408>; Faysal Itani, *The End of American Support for Syrian Rebels Was Inevitable*, ATLANTIC (July 21, 2017), <https://www.theatlantic.com/international/archive/2017/07/trump-syria-assad-rebels-putin-cia/534540/>; *Obama Signs Secret Order to Aid Syria Rebels*, AL JAZEERA (Nov. 18, 2013), <https://www.aljazeera.com/news/middleeast/2012/08/20128264510724249.html>.

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

³⁹⁸ *Id.* at 4; *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic*, United Nations High Commissioner for Refugees, 14–15 (2017), <https://www.refworld.org/pdfid/59f365034.pdf>.

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

⁴⁰⁰ *Id.* at 4.

⁴⁰¹ UNITED NATIONS HIGH COMM'R FOR REFUGEES, INTERNATIONAL PROTECTION CONSIDERATIONS WITH REGARD TO PEOPLE FLEEING THE SYRIAN ARAB REPUBLIC 24 (2017), <https://www.refworld.org/pdfid/59f365034.pdf>.

⁴⁰² AL MARSAD, *The Syrian Situation - International Humanitarian Law Violations and the Call for Justice: A Summary*, <http://golan-marsad.org/wp-content/uploads/The-Syrian-Situation-International-Law-Violations-and-the-Call-for-Justice-A-Summary.pdf> (last visited Feb. 11, 2019).

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>).

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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.⁴⁰⁵ In respect to the military objectives to fight terrorists in Syria, arms-support to rebels⁴⁰⁶ has increased violence and terrorism in Syria rather than decreased it.⁴⁰⁷ 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,⁴⁰⁸ compared to no benefit achieved. Moreover, the support to rebels,⁴⁰⁹ the regime change agenda, and the targeting of the government⁴¹⁰ 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.⁴¹¹ 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.⁴¹² More

⁴⁰⁵ Partlett, *supra* note 393; see Bridgeman, *supra* note 393.

⁴⁰⁶ Gallagher, *supra* note 396; see McKelvey, *supra* note 396.

⁴⁰⁷ See Michael Shank & Kate Gould, *Let's Keep Syria's Blood Off America's Hands*, USA TODAY (July 23, 2013), <https://www.usatoday.com/story/opinion/2013/07/23/arming-syrian-rebels-civil-war-column/2578667/>.

⁴⁰⁸ See MARTA BITORSOLI, AL-MARSAD, THE SYRIAN SITUATION: INTERNATIONAL HUMANITARIAN LAW VIOLATES AND THE CALL FOR JUSTICE 7 (2016), <http://golan-marsad.org/wp-content/uploads/Syrian-case-ICC-Report.pdf>; GARRIAUD-MAYLAM, *supra* note 366, at 4.

⁴⁰⁹ Gallagher, *supra* note 396; Itani, *supra* note 396; Mark Mazzetti, Adam Goldman, & Michael S. Schmidt, *Behind the Sudden Death of a \$1 Billion Secret C.I.A. War in Syria*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/world/middleeast/cia-syria-rebel-arm-train-trump.html>; McKelvey, *supra* note 396; *Obama Signs Secret Order to Aid Syria Rebels*, *supra* note 396.

⁴¹⁰ See Allam, *supra* note 395

⁴¹¹ See Authorization for Use of Military Force 2001, Pub. L. No. 107-40, 115 Stat. 224.

⁴¹² See, e.g., H. Amend. 1216, 114th Cong. (2016); H. Amend. 482, 114th Cong. (2015); H. Amend. 484, 114th Cong. (2015); H.R. Con. Res. 55, 114th Cong., 1st Sess. (2015); H.R. 1303, 114th Cong., 1st Sess. (2015); H.R. 1304, 114th Cong., 1st Sess. (2015); H.R.J. Res. 30, 114th Cong., 1st Sess. (2015); S. 526, 114th Cong., 1st Sess. (2015); Wagner, *supra* note 390, at 256 (citing Jack Goldsmith,

notably, support for rebels in other states and regime change agendas are seen not only as acts of aggression⁴¹³ that destabilize nations and increase terrorism but also as counterproductive⁴¹⁴ actions that exceed the military objectives. The harm caused by these wars includes the destruction of civilian infrastructure,⁴¹⁵ the deprivation of basic human needs, such as food, water, electricity, education, and health care,⁴¹⁶ the deaths of millions of innocent civilians,⁴¹⁷ the increase of violence and terrorism,⁴¹⁸ the destabilization of regions, and migration crises of millions of refugees and the displacement of millions more.⁴¹⁹ About 1.17 million reports of war crimes have been submitted to the ICJ.⁴²⁰ The relevant promised benefit – to decrease terrorism and increase security⁴²¹ – has not been effectively achieved. Rather, these wars have been considered proven cases of counterproductive missions.⁴²² Therefore, it can be concluded that the devastation due to military actions⁴²³ in these wars was foreseeable to a reasonable commander. These wars have caused a great deal of harm to several coun-

History Suggests That Congress Will Only Authorize Force Against the Islamic State if the President Proposes and Pushes for an Authorization (or Screws Up Unilateral Force Badly), LAWFARE (Oct. 7, 2014), <http://www.lawfareblog.com/2014/10/history-suggests-that-congress-will-only-authorize-force-against-the-islamic-state-if-the-president-proposes-and-pushes-for-an-authorization-or-screws-up-unilateral-force-badly/>; MATTHEW C. WEED, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE 5–9 (2017).

⁴¹³ See G.A. Res. 2625 (XXV), at 123 (Oct. 24, 197) (defining an armed attack); Shelbourne, *supra* note 155.

⁴¹⁴ See THRALL & GOEPNER, *supra* note 6, at 2.

⁴¹⁵ GARRIAUD-MAYLAM, *supra* note 366, at 5; POSITION ON RETURNS TO IRAQ, *supra* note 366, at 19.

⁴¹⁶ GARRIAUD-MAYLAM, *supra* note 366, at 1; POSITION ON RETURNS TO IRAQ, *supra* note 366, at 21.

⁴¹⁷ See Ahmed, *supra* note 4.

⁴¹⁸ GARRIAUD-MAYLAM, *supra* note 366, at 4.

⁴¹⁹ *Afghanistan*, *supra* note 309; *General Security Situation in Afghanistan and Events in Kabul*, *supra* note 309.

⁴²⁰ Gannon, *supra* note 310.

⁴²¹ Authorization for Use of Military Force 2001, Pub. L. No. 107-40, 115 Stat. 224.

⁴²² See Pierce Rand, *Back to the Congressional Drawing Board: Inapplicability of the AUMF to Al-Shabaab and Other New Faces of Terrorism*, 37 LOYOLA L.A. INT'L & COMP. L. REV. 117, 137 (2015).

⁴²³ BITORSOLI, *supra* note 408, at 1; DANISH IMMIGRATION SERV., THE KURDISTAN REGION OF IRAQ: ACCESS, POSSIBILITY OF PROTECTION, SECURITY AND HUMANITARIAN SITUATION 11 (2016), <https://www.nyidanmark.dk/NR/rdonlyres/4B4E8C12-84B7-4ACB-8553-5E0218C5689A/0/FactfindingreportKurdistanRegionofIraq11042016.pdf>;

GARRIAUD-MAYLAM, *supra* note 376, 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.

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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.⁴²⁴ The good has not been effectively achieved and the wars have proven to be counterproductive.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.

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.

⁴²⁵ THRALL & GOEPNER, *supra* note 6, at 2.

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