2001

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PROTECTING CIVILIANS DURING OPERATION ALLIED FORCE: THE ENDURING IMPORTANCE OF THE PROPORTIONAL RESPONSE AND NATO'S USE OF ARMED FORCE IN KOSOVO

Randy W. Stone

"[The l]aws are silent in time of war."
—Cicero

"[T]o introduce into the philosophy of War . . . a principle of moderation would be an absurdity . . . . Let us not hear of Generals who conquer without bloodshed. If a bloody slaughter is a horrible sight, then that is a ground for paying more respect to War."
—Carl von Clausewitz

"There has always been a sentiment among mankind to mitigate the horrors of war, as far as the nature of the thing permits."
—William C. Sherman

In 202 B.C., the Roman general Scipio Africanus achieved a decisive victory over Hannibal, the great Carthaginian general, at the Battle of Zama, thus ending the Second Punic War. Scipio, moved by the splendor and beauty of Carthage, decided to spare the city from total destruction. Carthage again prospered in the years following Rome's victory.

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2. Gerald J. Adler, Targets in War: Legal Considerations, 8 HOUS. L. REV. 1, 7 & n.28 (1970) (quoting CARL VON CLAUSEWITZ, ON WAR 3, 288 (Graham trans., 1966)).


5. See PREVAS, supra note 4, at 7 (intimating that Scipio also spared Carthage due to his respect for Hannibal).
Fearing Carthage's new-found prosperity, Rome launched the Third Punic War, this time showing Carthage no mercy. The Romans set Carthage ablaze, took the city apart stone by stone, and either killed or enslaved its citizens. The Romans destroyed official Carthaginian records and threw salt over the area where Carthage once stood in order to prevent life from ever growing there again. In time, Rome destroyed all traces of Carthage and its great civilization. Rome devised the "Carthaginian solution," which refers to the total destruction and annihilation of one's enemy with equal disregard for combatants and civilians.

Throughout history, humankind has continually resorted to the use of force to resolve conflicts. Because international law developed limitations on the use of force in an attempt to minimize the horror of war, acts such as the "Carthaginian solution" became the exception rather than the norm. An example of an internationally recognized limitation gov-

6. See id. (clarifying how Carthage quickly prospered due to international trade and repaid its debt to Rome after the Second Punic War ahead of schedule).

7. See id. (noting Carthage's eventual demise due to Rome's three-year siege of the city). The story states that:

Legend has it that the Roman fear and hatred of Carthage had become so great... that a curse was placed over the ruins and salt plowed into the ground so nothing could ever live there again. So complete was the Roman destruction that little trace of the Carthaginian culture remains today.

Id.

8. See id. at 1. The story continues:

The city burned for seventeen days, and even after it no longer contained life the Romans weren't finished. Once the fires had cooled, soldiers worked amidst the rubble and the thousands of incinerated human remains to obliterate any physical trace of what had once been known as "the jewel of the Mediterranean."

Id.

9. See id.

10. See id.

11. Id.; cf. KAGAN, supra note 4, at 289-90 (providing a comparison of the peace treaty that concluded the First World War to a "Carthaginian Peace"). John Maynard Keyes, the noted economist, called the Treaty of Versailles "immoral and unworkable." Id. at 290. Referring to both the reparations and economic aspects imposed by the treaty and the total destruction of Carthage by Rome after the Third Punic War, Keyes argued that the proposed peace treaty "would bring economic ruin and war to Europe unless it was repudiated." Id.

12. See John Temple Swing, Foreword to LOUIS HENKIN ET AL., RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE at vii (1989) (admitting that humankind has a long history of attempts to limit the "scourge of war"). Swing describes this process as a "struggle to impose 'rationality on reality.'" Id. Swing postulates that this "central contest between reason and force" continues today. Id.; see generally JOHN KEEGAN, A HISTORY OF WARFARE 3-60 (1993) (summarizing the role war has played in the development of humankind).

13. See Swing, supra note 12, at vii (postulating that limitations on the use of force, culminating with the U.N. Charter, are as old as warfare itself); see also Lieutenant Colonel William J. Fenrick, The Rule of Proportionality and Protocol I in Conventional War-
The doctrine of proportionality requires a response of force to be proportional to the aggression that precipitated such force. This doctrine accepts wartime civilian casualties as inevitable, but the doctrine of proportionality requires that civilian casualties inflicted by military strikes not be excessive in relation to the anticipated military advantage gained by the strike. The doctrine initially applied to the *jus ad bellum* of warfare, the branch of law that defines the legitimate reasons a nation may conduct a military operation. The modern application of proportional-


14. See Commander Charles A. Allen, Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity, 86 AM. SOC'Y INT'L PROC. 39, 46 (1992) (defining proportionality as a concept of distinction, requiring that parties to a conflict "distinguish between civilian populations and combatants and between civilian objects and military objectives"); Fenrick, supra note 13, at 92; Judith Gail Gardam, Proportionality and Force in International Law, 87 AM. J. INT'L L. 391, 391 (1993) (introducing the doctrine of proportionality as it applied in the Gulf War); Bernard L. Brown, Note, The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification, 10 CORNELL INT'L L.J. 134, 134 (1976) (providing examples of attempts to codify and strengthen the international recognition of limitations on warfare); see also CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 294 (Roy Guthman & David Rieff, eds., 1999) [hereinafter CRIMES OF WAR] (stating that the principle of proportionality is "embedded in almost every national legal system and underlies the international legal order"). Proportionality is used to determine "the lawfulness in *jus ad bellum* of the strategic goals . . . [and] the lawfulness in *jus in bello* of any armed attack that causes civilian casualties." *Id.* Proportionality is involved in any situation where military action causes collateral civilian damage. *See id.*

15. See Gardam, supra note 14, at 391 & n.3 (expressing the importance of a proportional military response); Michael N. Schmitt, Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement, 20 LOY. L.A. INT'L & COMP. L.J. 727, 765 (1998) (defining proportionality, within the context of legal rules of engagement for no-fly zones, as allowing "no more force than necessary to counter the hostile act or demonstration of hostile intent"). The fundamental principle of proportionality states that belligerents are not entitled to utilize unlimited means to achieve particular military objectives at the expense of civilian casualties. See Gardam, supra note 14, at 391; see also Brown, supra note 14, at 134 & n.2 (noting the failure of recent codifications such as the Geneva Convention to address proportionality and to provide adequate civilian protection).

16. See Brown, supra note 14, at 134.

17. See Gardam, supra note 14, at 395-96; see also CRIMES OF WAR, supra note 14, at 223 ("*Jus ad bellum* is the title given to the branch of law that defines the legitimate reasons a state may engage in war and focuses on certain criteria that render a war just."). The modern principle of *jus ad bellum* derives from the U.N. Charter, which sets forth the only acceptable instances that permit the use force. *See id.*
ity, however, also covers the *jus in bello*, the actual means used in the conduct of the military operation, balancing the anticipated military advantage gained against expected civilian casualties.\textsuperscript{18}

On March 23, 1999, the North Atlantic Treaty Organization (NATO)\textsuperscript{19} commenced Operation Allied Force against targets in Kosovo and Serbia.\textsuperscript{20} Despite the Operation’s short duration, ability to keep NATO casualties low, and use of high-tech weapons, Operation Allied Force sparked debate over the international use of force.\textsuperscript{21}

This Comment explores both the legal foundation for the doctrine of proportionality and NATO’s application of the doctrine during Opera-

\begin{itemize}
  \item \textsuperscript{18} See Gardam, supra note 14, at 391, 395; see also Crimes OF WAR, supra note 14, at 223 (providing that the *jus in bello* is the “set of laws that come into effect once a war has begun” and noting that these rules depend upon international customary law); Fenrick, supra note 13, at 94 (setting forth the concepts underlying the rule of proportionality). The traditional approach toward armed conflict involves three concepts. See id. at 93. First, military necessity mandates that force can only be used to achieve a particular military objective, which is usually the “partial or complete submission of the enemy at the earliest possible moment with the least possible expenditure of lives, resources, and money.” Id. Second, humanity prohibits the infliction of unnecessary suffering upon combatants or noncombatants. See id. Third, chivalry recognizes the deference to certain formalities and courtesies in warfare. See id. at 94. The doctrine of proportionality balances these three concepts. See id.
  \item \textsuperscript{19} See North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. NATO was established as a U.S.–European alliance, “reaffirm[ing] their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments.” Id. at 2242. Frequently viewed solely as a defensive alliance against the Soviet Union, the Treaty granted NATO nations the ability to settle international disputes, including the use of force, under the auspices and direction of the U.N. See id.
  \item \textsuperscript{20} See generally NATO’s Role in Relation to the Conflict in Kosovo (visited June 17, 2000) <http://www.nato.int/kosovo/history.htm> [hereinafter NATO’s Role] (providing background information on the Kosovo conflict and an overview of NATO’s goals and methods).
  \item \textsuperscript{21} See Michael J. Kelly, Traveling the Road to Rambouillet: Is the Imposition of Federalism in Kosovo Pragmatic Foreign Policy or Unwise Meddling?, 40 S. TEX. L. REV. 789, 798-99 (1999) (considering various questions raised by NATO’s action in Kosovo, such as whether mass genocide justifies the use of armed force by a nation-state); Aaron Schwabach, The Legality of the NATO Bombing Operation in the Federal Republic of Yugoslavia, 11 PACE INT’L L. REV. 405, 407-08, 418 (1999) (suggesting sources of international law that would provide a legal basis for NATO’s bombing of Kosovo and Serbia); Kofi Annan, Two Concepts of Sovereignty, THE ECONOMIST, Sept. 18, 1999, at 49-50 (advancing both the importance of national sovereignty and the risks presented to international peace and stability by the use of force by regional arrangements without the previous and explicit approval of the U.N. Security Council); Other People’s Wars, THE ECONOMIST, July 31, 1999, at 13-14 (evaluating the opinions of legal scholars who argue that force for humanitarian intervention is wrong because it prolongs violence and unrest by prohibiting the same from running their natural courses to cessation and postulating that intervention does not produce lasting peace).
\end{itemize}
tion Allied Force. This Comment examines Operation Allied Force’s impact on the acceptance of proportionality as a workable tool in the endeavor to protect civilians during wartime. First, this Comment explores the foundation of the legal doctrine by considering the general principle of proportionality, existing international treaties and charters, International Court of Justice (ICJ) decisions that speak to proportionality, and examples of the use of force in state practice. Second, this Comment details the history of the conflict in Kosovo and provides a summary of Operation Allied Force. Third, this Comment considers specific Operation Allied Force attacks and analyzes them under the requirements of proportionality. Finally, this Comment argues that proportionality continues to be a workable tool in the effort to protect civilians during wartime. This Comment further argues that NATO intended to respond proportionally to the Serbian offensive within Kosovo’s borders. To this end, NATO succeeded in many of its attempts to protect civilians. Operation Allied Force shows, however, that in order to provide civilians with maximum protection, nations must apply proportionality consistently when using armed force.

I. THE DOCTRINE OF PROPORTIONALITY: A HISTORICAL AND LEGAL FOUNDATION

A. Proportionality and the Use of Force: The Historical Development

“Proportionate” means to be “adjusted to something else according to [a] certain rate of comparative relation.” The concept of proportionality is used in various legal fields such as corporate, criminal, and international law. Within the international legal arena, proportionality developed as a response to the Christian theory of just war, which permitted any means of fighting a war if the cause of the war proved

22. BLACK’S LAW DICTIONARY 1219 (6th ed. 1990); see also WEBSTER’S NEW WORLD DICTIONARY 1139-40 (2d ed. 1980) (defining proportionate as “in proper proportion” or “to make proportionate” and defining proportion as “the comparative relation between parts, things or elements with respect to size, amount or degree”).


25. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1287-88, 1293 (2d ed. 1995) (discussing the concept of proportionality as it relates to the state of war among nations).
just. In order to achieve a just end, any means used were considered just even if those means adversely impacted civilians.

The proportionality doctrine experienced growing acceptance during the Nineteenth century. The doctrine initially centered on combatants, as warfare mainly involved armies of professional soldiers fighting far from civilian populations. The doctrine of proportionality in armed conflict became more applicable to civilians with the development of modern weapons, such as fighterplanes and bombers, which increasingly victimized civilian populations. This use of modern weapons prompted

26. See Gardam, supra note 14, at 394-95 (contending that proportionality “required an assessment as to whether the overall evil a war would cause was balanced by the good that would be achieved”). But see M. Shaw, International Law 539-41 (1986), reprinted in Carter & Trimble, supra note 25, at 1282-83 (insisting that later legal theorists began to include with the requirements of just war the “immunity of innocent persons from direct attack and the proportionate use of force to overcome the opposition”).

27. See Gardam, supra note 14, at 395 (conceding that no independent jus in bello doctrine existed during the early stages of the proportionality doctrine); see also Crimes of War, supra note 14, at 224 (reporting that the theory of just war originated from Roman Law). In the seventeenth century, the Dutch philosopher Hugo Grotius first espoused the seven criteria that formed the foundation for a just war:

The criteria for engaging in a just war . . . consists of seven elements: (1) that there be a just cause; (2) that there is a right authority (legitimate sovereign) to initiate the war; (3) a right intention on the part of the parties using force; (4) that the resort to force be proportional; (5) that force be a last resort; (6) that war is undertaken with peace as its goal (not for its own sake); (7) and that there be a reasonable hope of success.

Id. at 224.

28. See Gardam, supra note 14, at 397 (illuminating the early developmental stage of proportionality). The modern law of armed conflict developed during:

The period from the emergence of the modern nation state until the adoption of the Geneva Conventions of 1949 saw the development of the modern law of armed conflict; much of the law of the means and methods of warfare was codified between the middle of the nineteenth century and the Hague Conferences of 1899 and 1907. The foundation of the modern doctrine of proportionality in the law of armed conflict, that belligerents do not have an unlimited choice of means to inflict damage on the enemy, emerged during this period.

Id.

29. See id.

30. See id. at 397, 399-401; see also David G. Burwell, Note, Civilian Protection in Modern Warfare: A Critical Analysis of the Geneva Civilian Convention of 1949, 14 Va. J. Int'l L. 123, 126 (1973) (elaborating that “the atrocities of the Second World War . . . pointed out the need to extend protection to civilians, not only as against the acts of opposing belligerent powers, but also as against persecution by their own incumbent governments”); David MacIsaac, Voices from the Central Blue: The Air Power Theorists, in Makers of Modern Strategy from Machiavelli to the Nuclear Age 624, 630 (Peter Paret et al. eds., 1986) (detailing the argument that air warfare should avoid making distinctions between combatants and noncombatants because massive aerial bombing raids should be conducted against enemy centers of population, government, and industry).
nations to find a method that would limit excessive civilian casualties; the
doctrine of proportionality accordingly evolved.31

Legal limitations on armed force seemed obsolete with the creation of
the United Nations (U.N.) and the prohibition against the use of interna-
tional force under the U.N. Charter.32 Despite the U.N. founders' good
intentions, nations continued to use force and the doctrine of propor-
tionality maintained a vital role in international law.33

B. Proportionality and the Use of Force: International Treaties and
Charters

Article 2(4) of the U.N. Charter forbids one nation from using force
against another.34 The U.N. Charter, however, provides exceptions and
permits armed force in two situations: maintaining international peace
and security as authorized by the U.N. Security Council,35 and acting in
self-defense.36 Although the U.N. Charter does not expressly discuss a

31. See Gardam, supra note 14, at 400. But see id. (arguing that governments ex-
pressed concern regarding a strict adherence to proportionality because the doctrine may
nullify the effectiveness of military strikes). In addition to the desire to maximize military
effectiveness, a pessimism continued from the First World War into the Second over the
ability to maintain proportional armed force. See id. As methods of warfare became more
sophisticated and the practice of aerial bombardment became more accepted, distin-
guishing between military and nonmilitary targets and combatants and civilians became
increasingly difficult. See id.

32. See id. at 402.

33. See Allen, supra note 14, at 39 (concluding that a determination of whether force
is necessary and proportional "arouse[s] strong emotions and affect[s] political attitudes"
and citing as examples the Second World War, the Panamanian Invasion by the United
States, and the Korean, Vietnam, and Gulf Wars); see also Roberts, supra note 13, at 118
(noting the difficulty of applying proportionality). Roberts argues that:
Balancing the potential loss of innocent civilian lives against the attainment of an
important military objective requires a commander to undertake an impossible
ethical calculus. Nevertheless, the principle remains an integral part of the law of
war, serving as a method whereby judgments can be made as to the appropriateness
of the use of force in a given situation.

Id.

34. U.N. CHARTER art. 2, para. 4. The Charter states that: "All members shall re-
frain in their international relations from the threat or use of force against the territorial
integrity or political independence of any state, or in any other manner inconsistent with
the Purposes of the United Nations." Id.

35. U.N. CHARTER art. 39 ("The Security Council shall determine the existence of
any threat to the peace, breach of the peace, or act of aggression and shall make recom-
mendations, or decide what measures shall be taken . . . to maintain or restore interna-
tional peace and security."); U.N. CHARTER art. 42 ("Should the Security Council con-
sider that measures . . . [are] inadequate, it may take such action by air, sea, or land forces
as may be necessary to maintain or restore international peace and security.").

36. U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent
right of individual or collective self-defense if an armed attack occurs against a Member of
proportional limitation on the use of force, it is widely accepted that the doctrine of proportionality governs any use of force, including the use of force in self-defense.37

Prior to the U.N. Charter, nations entrusted the 1899 and 1907 Hague Conventions, which were important stages in the development of proportionality, to limit the means and methods of international warfare.38 Because governments sought to limit the way soldiers fought wars, the Hague Convention of 1899 prohibited the use of balloon-released projectiles, asphyxiating gases, and expanding bullets.39 The 1907 Hague Convention provided broader rules for the conduct of warfare by requiring all signatory nations to follow the principles of warfare observed by civilized nations.40 Both Hague Conventions protected enemy property from unneeded seizure and prohibited the destruction of buildings dedicated to nonmilitary purposes including religious, artistic, scientific, charitable, historic, and health purposes.41
Following the Second World War, nations adopted the Geneva Convention on the Protection of Civilians in Wartime, which not only limited the methods of armed force, but also sought protection for civilian populations. The Geneva Convention created safe neutral zones where belligerents could station injured and sick combatants and noncombatants, protected civilian hospitals organized to give care to the sick and wounded, and directed an occupying power to provide food and medical supplies to civilian populations under its control.

In 1977, Protocol I to the 1949 Geneva Convention (the Protocol) provided the first real attempt to codify the doctrine of proportionality. The Protocol drafters included new protections for civilians caught in the middle of armed conflict. The adoption of the Protocol allowed propor-
tionality to develop into an international conventional rule. Among other requirements, the Protocol limits military attacks to military objectives, prohibits indiscriminate attacks upon civilians, requires military planners to use caution in an order to avoid excessive civilian casualties, and outlaws indiscriminate attacks of civilian populations.

Since the creation of the Protocol, subsequent international treaties providing protections for the sick, wounded, medical personnel, and children, as well as providing a general prohibition on the intentional starvation of a civilian population as a tool of war. See id.; Fenrick, supra note 13, at 92 (introducing the two Protocols adopted in 1977 including Protocol I and Protocol II). International armed conflicts involve “regular armed forces engag[ing] the regular armed forces of a foreign state or enter[ing] the territory of a foreign state without permission” and those conflicts against a racist regime in the name of self-determination. Id. at 98.

46. See Gardam, supra note 14, at 406; see also Allen, supra note 14, at 47 (stating that the conventional rule of proportionality as codified in Protocol I requires more than simple intent not to harm civilians, but an active consideration of the likelihood of civilian casualties). Sixteen of the nineteen NATO member nations including: Belgium, Canada, the Czech Republic, Denmark, Germany, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Great Britain, and the United States, signed the Protocol. See Protocol Original Agreement (visited Nov. 20, 1999) <http://www.un.org/depts/treaty>. France, Greece, and Turkey did not sign the Protocol. See id. In addition to these NATO member nations, China recently acceded to the terms and conditions of the Protocol. See China’s National Defense in 2000 (visited Oct. 18, 2000) <http://www.chinadaily.com.cn/cndydb/2000/10/d1-dre-1.a17.html>. The terms of the Protocol bind NATO members because Article 18 of the Vienna Convention on the Law of Treaties requires a nation not to do anything to defeat the purpose of the treaty once the nation has signed it or once it has “expressed its consent to be bound by the treaty.” Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679.

47. See Protocol I, supra note 44, art. 48 (requiring that all parties to a conflict shall attack only military objectives after distinguishing between military and civilian objectives and civilian populations and combatants); see also Allen, supra note 14, at 50 (citing sources of international customary law that accept Article 52(2) including the United States Army’s Field Manual and the Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations).

48. See Protocol I, supra note 44, art. 51; see also Fenrick, supra note 13, at 99-100.

49. See Protocol I, supra note 44, art. 57; see also Fenrick, supra note 13, at 100-01 (detailing Article 57); Protocol I, supra note 44, art. 58 (mandating that nations remove civilians from the vicinity of military objectives and take other precautions required to protect the civilian population).

50. See Protocol I, supra note 44, art. 85 (calling the deliberate planning and execution of indiscriminate attacks as grave breaches of the Protocol). In sum, Article 85 states that when conducted willfully, grave breaches of Protocol I include: (1) making civilian populations or individual civilians the object of attacks; (2) launching indiscriminate attacks with the knowledge that such an attack will cause excessive injuries or death to civilians; (3) and knowingly launching attacks on works or installations that contain dangerous forces that might result in excessive injury or death to civilians. See id.; see also Fenrick, supra note 13, at 110. The violator of this provision may be subject to “universal jurisdiction” if the breach causes death or injury. See id. Further, it is the commander who orders, and not the subordinate who executes the attack, who will be punished for the grave breach. Id.

C. Proportionality and the Use of Force: The ICJ's Recognition of Proportionality's Role in International Law

In addition to treaties and charters, International Court of Justice (ICJ) decisions refer to the doctrine of proportionality. In Corfu Channel, the ICJ held that Great Britain's Operation Retail, a minesweeping operation of the Corfu Channel that began after two British warships suffered damage from striking mines, did not violate Albania's sovereignty. The ICJ held that the number of ships used in the operation was a proportional response to the existing threat of both possible Albanian...
offensive action and mines in the area.\textsuperscript{57} 

In \textit{Nicaragua v. United States},\textsuperscript{58} the ICJ rejected the claim of the United States that its actions in Nicaragua constituted collective self-defense under the U.N. Charter.\textsuperscript{59} While discussing the various factors that justify self-defense, the court recognized proportionality as “well-established in customary international law.”\textsuperscript{60} The court further suggested that acts of national self-defense must be proportional to the initial armed attack.\textsuperscript{61} The dissent noted that state practice supports the application of proportionality to acts of self-defense; in addition, proportionality must have a flexible application to meet the specific circumstances of a certain situation.\textsuperscript{62}

In \textit{Legality of the Threat or Use of Nuclear Weapons},\textsuperscript{63} the ICJ recognized the limitations placed on a military planner’s ability to meet the requirements of proportionality and other laws of war if nuclear weapons were used in battle.\textsuperscript{64} The court declared that the use of nuclear weapons would violate the principles of humanitarian law because such weapons could not be used in a manner that would discriminate between combatants and civilians.\textsuperscript{65} Even though the court failed to conclude whether the

\textsuperscript{57} See id. at 35. After previously sweeping the Corfu Channel for mines in 1945 and declaring it a safe passageway, two British warships hit mines on October 22, 1946 and suffered severe damage. See id. at 12-13. Despite Albania’s sovereignty protests, the British Navy swept the Corfu Channel again for mines under Operation Retail on November 13, 1946. See id. at 13. As part of that operation, and in preparation for any offensive Albanian action, the British Navy sent a covering force of warships to accompany the mine-sweepers, including an aircraft carrier, cruisers, and other war vessels. See id. at 14. The ICJ deemed this covering force to be proportional to the perceived threat of Albanian offensive action and possible existing mines in the area. See id. at 35. The court further held Albania responsible for deaths and injuries caused by the detonations. See id. at 36.

\textsuperscript{58} Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27).

\textsuperscript{59} Id. at 146 (providing the court’s conclusions).

\textsuperscript{60} Id. at 103.

\textsuperscript{61} See id. at 176 (separate opinion of Judge Ruda).

\textsuperscript{62} See id. at 367-68 (dissenting opinion of Judge Schwebel) (asserting the importance of a flexible application of proportionality). But see id. (dissenting opinion of Judge Schwebel) (noting that self-defense must be proportional to the precipitating use of force, but asserting that the use of force in self-defense will sometimes fail to be “commensurate with the attack”). The dissent considered Judge Ago’s opinion, which stated that the defensive act may sometimes be disproportionate to the initial act of aggression. See id. (dissenting opinion of Judge Schwebel). According to Judge Ago, the important point to consider was the result to be achieved by the defensive act, not the forms, substance, and strength of the defensive act. See id.

\textsuperscript{63} Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (Jul. 8).

\textsuperscript{64} Id. at 259-63, 266 (exposing the court’s inability to decide the legality of the threat or use of nuclear weapons under international law even if a nation uses nuclear weapons within the guidelines of humanitarian law).

\textsuperscript{65} See id.; see also Smis & Van der Borght, supra note 13, at 386 (summarizing the
use of nuclear weapons would be unlawful, it stressed that nations can not deliberately target civilians during military operations and should not use weapons that would help in such an effort.\textsuperscript{66}

\section*{D. Proportionality in State Practice}

A full review of the application of the doctrine of proportionality in state practice, which defines the manner in which a nation conducts itself, is extensive and beyond the scope of this Comment.\textsuperscript{67} A few examples, however, are illustrative.

The United States strictly adhered to the principle of minimizing civilian casualties during its bombing campaigns over North Vietnam from 1965 to 1968 and 1972 to 1973.\textsuperscript{68} Even though the effectiveness of the 1965 to 1968 campaigns was limited due to targeting constraints, the bombing campaigns of 1972 to 1973 were deemed militarily effective and in compliance with the laws of war.\textsuperscript{69} These later bombing campaigns avoided intentional attacks on civilian populations and the subsequent collateral casualties that would have resulted.\textsuperscript{70} When balanced against the anticipated military advantage of a strike, such caution is indicative of the doctrine of proportionality.\textsuperscript{71}

After conducting Operation Just Cause, the 1989 full-scale invasion of Panama, the United States was criticized for responding disproportionately to the threats of Panamanian dictator Manuel Noreiga.\textsuperscript{72} It also has

ICJ's conclusion that it had “established customary rules of humanitarian law applicable to any present and future weapon”).

\textsuperscript{66} See Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 257.

\textsuperscript{67} See, e.g., Fenrick, supra note 13, at 117-19 (citing the 1856 bombardment of Canton by Royal Navy ships, pre-D-Day bombing of French territory in 1944, and the battle to recapture Manila in 1945 as examples of proportionality in state practice).

\textsuperscript{68} See id. at 122-23 (introducing two studies of proportionality’s impact on the effectiveness of the 1965 to 1968 and 1972 to 1973 bombing campaigns).

\textsuperscript{69} See id. (citing studies attributing the failure of Operation Rolling Thunder and other bombing campaigns in North Vietnam to the Johnson Administration’s overextensive demand that the bombing campaign minimize civilian casualties rather than merely lessen collateral civilian casualties). The 1972 to 1973 campaign, however, was effective despite proportionality’s rigorous application. See id. at 123.

\textsuperscript{70} See id.

\textsuperscript{71} See id.

been argued that the United States' response to Iraq's armed invasion of Kuwait during the 1991 Persian Gulf War failed to meet the requirements of proportionality. In 1995, NATO ordered airstrikes of select targets in Bosnia-Herzegovina to end a humanitarian crisis caused by conflict in that country. In 1998, the United States claimed self-defense after conducting missile strikes against targets in Sudan and Afghanistan in order to prevent future attacks by a terrorist group led by Osama bin Laden. The United States chose these targets in an effort to limit possible collateral damage to civilians and to comply with the rules of necessity and proportionality.

Two more recent examples of the use of armed force in self-defense present questions of whether nations strictly adhere to proportionality. Russia invaded neighboring Chechnya in 1999 because it allegedly housed terrorists who had attacked Russian cities. In launching these

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73. See Gardam, supra note 14, at 404-05. The massive bombardment of the Iraqi infrastructure was troubling; moreover, it "appeare[d] that more was done than was proportionate to [expel] Iraq from Kuwait." Id. at 405.

74. See Michael P. Roch, Military Intervention in Bosnia-Herzegovina: Will World Politics Prevail Over the Rule of International Law?, 24 DENV. J. INT'L L. & POL'Y 461, 468-72 (1996) (describing the events leading to NATO's airstrikes). Fighting erupted when various ethnic factions of the country, including the Bosnian Croats, Muslims, and Serbs, declared independence. See id. at 468-69. After these declarations, a civil war erupted, which resulted in NATO's use of armed force for the first time in its history. See id. at 487.

75. See Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 93 AM. J. INT'L L. 161, 161-64 (1999). The United States attacked targets in response to the bombings of the U.S. embassies in Kenya and Tanzania. See id. at 161. The United States believed that the first set of targets, paramilitary camps in Afghanistan, were training grounds for the terrorist organization that perpetrated the embassy bombings. See id. The U.S. identified the second target, a Sudanese pharmaceutical plant, as a chemical weapons facility, the products of which were to be used in future attacks against U.S. targets. See id.

76. See id. at 163 & n.6 (quoting a letter dated August 20, 1998 from the Permanent Representative of the United States to the United Nations, which was addressed to the President of the Security Council). But see Jules Lobel, The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan, 24 YALE J. INT'L L. 537, 539-40, 557 (1999) (postulating that the airstrikes against Sudan and Afghanistan failed to meet the requirements of proportionality because of factual insufficiencies and a disregard for the U.N. Charter and international law); Leah M. Campbell, Comment, Defending Against Terrorism: A Legal Analysis of the Decision To Strike Sudan and Afghanistan, 74 TUL. L. REV. 1067, 1096 (2000) (arguing that the U.S. missile strikes failed to meet the requirements of necessity and proportionality because international law did not condone the use of force to retaliate against terrorists).

77. See Richard C. Paddock, Russia Takes Page from NATO Playbook, L.A. TIMES, Sept. 29, 1999, at A1 (describing the Russian air offensive in Chechnya as identical to NATO's air operation in Kosovo). Russian airstrikes targeted the Chechen economy in an attempt to devastate it just as NATO attacked Serbia's infrastructure and industry to bring Milosevic's government to the negotiating table. See id. Russian warplanes attacked
cross-border attacks, the Russian government was accused of failing to take necessary precautions to promote the safety of Chechen civilians. In early 2000, Israeli military forces conducted retaliatory airstrikes against Hezbollah guerrilla targets in southern Lebanon. The Israeli Government permitted military strikes against targets even if located in predominately civilian areas.

II. KOSOVO: THE CONTINUING CRISIS IN THE BALKANS

On March 23, 1999, NATO ordered its warships and aircraft to initiate Operation Allied Force and to begin bombing selected targets in Kosovo and Serbia. NATO's main objectives included halting further humanitarian catastrophe caused by a Serbian military offensive against Kosovar civilians and preventing further destabilization of the Balkan region, produced by the thousands of refugees fleeing into neighboring countries such as Macedonia and Albania. NATO's operation, which only con-
sisted of airstrikes and lasted seventy-eight days, ended with the signing of the mutual Military Technical Agreement.

A. Kosovo: The Anatomy of a Conflict

"The Yugoslav crisis began in Kosovo, and it will end in Kosovo." 

Kosovo, a small region located in the southwest corner of Serbia, has been called the "lost heart of the Balkans." Geographically, the region

1999) <http://www.usia.gov/kosovo/texts/99032504.htm>. Regarding this matter, President Clinton stated that:

We act to protect thousands of innocent people in Kosovo from a mounting military offensive. We act to prevent a wider war; to diffuse a powder keg at the heart of Europe that has exploded twice before in this century with catastrophic results... ending this tragedy is a moral imperative.

United States Information Agency (visited Aug. 24, 1999) <http://www.usia.gov/kosovo/texts/990324wh.htm> (statement by President Clinton, Mar. 24, 1999); see also Guardian Unlimited (visited Feb. 28, 2001) <http://www.guardian.co.uk/Archive/Article/0,4273,385403,00.html> (statement by British Prime Minister Tony Blair, Apr. 13, 1999). Additional goals included ending Serbian violence, establishing the withdrawal of all Serbian forces, providing a safe return of all refugees, and guaranteeing access to humanitarian aid organizations. See id. Further objectives included an end to all military action and the immediate suspension of violence and suppression, the withdrawal of military forces from Kosovo, the stationing of U.N. peacekeepers in Kosovo, the safe and unconditional return of all refugees, and the establishment of a more secure political framework for Kosovo.

See NATO's Role, supra note 20, at 1; see generally U.S. and NATO Objectives and Interests in Kosovo (visited Aug. 24, 1999) <http://www.state.gov/www/regions/eur> [hereinafter U.S. and NATO Objectives] (detailing three strong interests for the mission in Kosovo: stopping the humanitarian crisis caused by the Serbian military, preventing a wider Balkan war, and securing NATO's credibility).

83. See Dana Priest, A Decisive Battle That Never Was, WASH. POST, Sept. 19, 1999, at A1 (addressing the use of air power as the main vehicle of Operation Allied Force and describing the initial planning for a ground invasion of Kosovo and Serbia by NATO troops if the airstrike phase of Operation Allied Force failed to achieve its objectives).


86. NOEL MALCOLM, KOSOVO: A SHORT HISTORY xxvii (1999).

87. Id. at 1; see also DAVID FROMKIN, KOSOVO CROSSING: AMERICAN IDEALS
is isolated because its southern border is formed by the Sar Mountain Range extending eastward from northern Albania, its western border is formed by the “Accursed Mountains,” its northern border consists of the Kopaonik Range, and its southeastern border is formed by a range of hills known as the Skopska Crna Gora. In Kosovo, ninety percent of the civilian population is Albanian and the remaining ten percent is Serbian. This region has been the site of constant ethnic, religious, and political conflicts for over 600 years.

The cycle of violence that led to NATO’s military operation can be traced to the fall of the Soviet-dominated communist system and the eventual dissolution of Yugoslavia. In September 1991, Kosovar Albanian separatists declared Kosovo an independent republic.

MEET REALITY ON THE BALKAN BATTLEFIELDS 158 (1999) (describing the geography of the Kosovo region).

88. See FROMKIN, supra note 87, at 84 (addressing the effects of the mountainous terrain on the development of the Balkan people); see also MALCOLM, supra note 86, at 1-2 (attributing the name of the “Accursed Mountains” to “their fierce impenetrability: rivers have sliced through their dry limestone like wires through cheese, creating a network of vertiginous gorges”). The mountains have internally divided the Balkan region, thereby decreasing unity among the people. See FROMKIN, supra note 87, at 84. For example, the “inhabitants... have retained their own religions,... languages,... style of dress,... architecture,... and their own calendars.” Id.

89. See MALCOLM, supra note 86, at 2.


91. See id. The origin of this conflict is commonly attributed to the Ottoman Turks’ defeat of Serbia during the Battle of Kosovo Polje in 1389. See id. Since then, relations between the Serbs, who are predominantly Eastern Orthodox Christian, and Kosovo Albanians, who are predominantly Islamic due to Ottoman rule, have suffered. See id.

92. See MALCOLM, supra note 86, at 264-65 (noting that the Yugoslav state came into existence on December 1, 1918, after the First World War ended). The state officially took the name Yugoslavia in 1929. See id.; FROMKIN, supra note 87, at 135 (contending that the victors of the First World War divided the Austrian-Hungarian Empire into three states: Poland, Czechoslovakia, and the Kingdom of the Serbs, which included the Croats and Slovenes and would later be called Yugoslavia). Following the Second World War, Yugoslavia was divided into the six republics of Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, and Macedonia. See id. at 146. Belgrade, the capital of Serbia, became the capital of this new federal system and retained the bulk of federal power. See id.; see also Why Kosovo?, supra note 90 (describing the modern history of Kosovo, including the effect of Yugoslavia’s internal ethnic conflict on the region).

largest Yugoslavian state, paid little attention to this declaration because it was embroiled in conflict, first with Croatia, and then with Bosnia. By 1996, Kosovar separatists, who would later become the Kosovo Liberation Army (KLA), had increased their attacks on Serbia’s military forces and its Interior Ministry. Due largely to Serbian military attacks against KLA forces, NATO asserts that approximately 1.5 million Kosovars had been displaced from their homes by March 1999, while more than 250,000 Kosovars had fled to neighboring countries such as Macedonia and Montenegro, over 225,000 Kosovar men were missing, and 5,000 Kosovars had been executed.

B. The International Community’s Response

Spurred by the escalation of fighting in Kosovo, the U.N. Security Council adopted Resolution 1160 on March 31, 1998, which called upon all parties involved to enter into meaningful dialogue in order to reach a political solution. In April 1998, the members of “the Contact Group” for Yugoslavia, which consisted of the United States, Great Britain, France, Germany, and Italy, sanctioned Serbia for its role in worsening the situation in Kosovo.

On May 28, 1998, the North Atlantic Council of NATO issued two major objectives regarding the conflict in Kosovo. The first objective

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95. See Why Kosovo?, supra note 90 (describing the escalation of violence between KLA and Serbian forces during the mid-1990s). The KLA consequently took control of almost a third of Kosovo before Serbian forces became more involved in the fighting. See id.

96. See NATO’s Role, supra note 20, at 6.

97. See U.S. and NATO Objectives, supra note 82.

98. See SCOR Res. No. 1160, 3868th mtg., at 1 (1998) (visited Aug. 24, 1999) <http://www.nato.int/kosovo/docu/u980331a.htm>. The resolution “[c]alled upon the Federal Republic of Yugoslavia immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue . . . .” Id. The resolution demanded that both sides cease hostilities and prohibited the sale of military equipment to the Federal Republic of Yugoslavia. See id.

99. See Why Kosovo?, supra note 90, at 1; NATO’s Role, supra note 20, at 3. The Contact Group met on January 29, 1992 to convene “urgent negotiations between the parties to the conflict, under international mediation.” Id. at 2.

100. See NATO’s Role, supra note 20, at 2.
attempted to help achieve a peaceful solution to the conflict, while the second promoted stability and security in the Balkan region. On September 23, 1998, the U.N. Security Council adopted Resolution 1199, which renewed its demand for all parties to cease hostilities, evaluated measures that may have been helpful in achieving international peace and security, and expressed concern over the excessive and indiscriminate force used by both Serbian government and KLA forces.

On October 13, 1998, the North Atlantic Council acted again by authorizing activation orders for airstrikes against Serbian targets. In response to these threatened airstrikes and growing international pressure, Serbian President Slobodan Milosevic agreed to a cease-fire. To assist in maintaining the cease-fire, the U.N. Security Council authorized NATO and the Organization for Security and Cooperation in Europe (OSCE) to establish surveillance missions in Kosovo.

Despite the cease-fire and the verification missions, violence among the Serbian military, police forces, and the KLA reignited in Kosovo. This resumption of violence prompted the Contact Group to convene in

101. See id. During a subsequent meeting held on June 12, 1998, the North Atlantic Council considered further measures, including various military measures. See id.


103. See NATO's Role, supra note 20, at 2 (describing NATO's authorization of airstrikes as "designed to support diplomatic efforts to make the Milosevic regime withdraw forces from Kosovo, bring an end to the violence, and facilitate the return of refugees to their homes").

104. See id. Milosevic agreed only after intense negotiations and diplomatic initiatives, including visits from NATO Secretary General Solana, United States Envoys Holbrooke and Hill, and General Clark, the Supreme Allied Commander in Europe. See id.


January 1999 and to engage in negotiations in Rambouillet, France.\textsuperscript{108} The Rambouillet talks involved two rounds of negotiations.\textsuperscript{109} By the end of the second round, the KLA representatives agreed to the proposed peace agreement.\textsuperscript{110} The Serbian government, on the other hand, did not agree, in part because of its refusal to permit U.N. peacekeeping troops in Kosovo.\textsuperscript{111} Serbian forces then increased their attacks upon Kosovar civilians and the KLA.\textsuperscript{112}

On March 20, 1999, the OSCE withdrew the Verification Mission from Kosovo because of the looming prospect of NATO military intervention.\textsuperscript{113} Because Serbia refused to stop attacking Kosovar civilians and KLA units, NATO authorized Operation Allied Force on March 23, 1999, and commenced airstrikes against Serbian targets.\textsuperscript{114}

C. NATO's Response to Serbian Aggression: Operation Allied Force

Operation Allied Force, NATO's response to Serbia's refusal to sign the Rambouillet Accords and maintain peace in the Kosovo region, proceeded along two lines of attack.\textsuperscript{115} The first line included a strategic attack against Serbian targets such as its integrated air defense, command and control centers, military supply routes, and infrastructure.\textsuperscript{116} The second line identified, isolated, and interdicted Serbian targets strictly in the Kosovo region, including troops, weapons, and other military supplies.\textsuperscript{117}

These two lines of attack proceeded in five phases.\textsuperscript{118} First, NATO deployed air assets to the European theater to prepare for the operation.\textsuperscript{119}

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\textsuperscript{108} See NATO's Role, supra note 20, at 3.
\textsuperscript{109} See id. The first round took place February 6-23, 1999, and the second round took place March 15-18, 1999. See id.
\textsuperscript{110} See id.
\textsuperscript{111} See id.; Gellman, supra note 81, at A1 (reporting that during last-minute meetings, Milosevic was "adamant in rejecting any deployment of NATO peacekeepers").
\textsuperscript{112} See NATO's Role, supra note 20, at 3.
\textsuperscript{113} See id.
\textsuperscript{114} See id. (stating that airstrikes began only after Ambassador Holbrooke failed in his last attempt at mediation after flying to Belgrade and meeting with President Milosevic).
\textsuperscript{115} See id.; Kosovo Strike Assessment, supra note 84.
\textsuperscript{116} See Kosovo Strike Assessment, supra note 84.
\textsuperscript{117} See id. (stating that at the beginning of the campaign, the second line of strikes against Serbian military targets within Kosovo would be the critical focus of NATO's efforts because these were the Serbian elements conducting the attacks against Kosovar civilians and KLA units).
\textsuperscript{118} See Report to Congress, supra note 107, at 7.
\textsuperscript{119} See id.
Second, NATO established air superiority over Kosovo and degraded Yugoslavia's command and control and integrated air-defense system.\(^{120}\) Third, NATO attacked Serbian targets in Kosovo and Yugoslavia, south of its capital Belgrade, which provided support for Serbia's war effort.\(^{121}\) Fourth, NATO expanded its air operations to include “high-value military and security force targets” throughout the Kosovo region and Serbia.\(^{122}\) Fifth, NATO redeployed forces as required.\(^{123}\)

NATO selected a variety of targets throughout Serbia during its operation.\(^{124}\) Examples of such targets included: tanks, armored fighting vehicles, artillery, mortars, aircraft, airfields, ordinance repair facilities, and ammunition storage sites.\(^{125}\) Further, NATO targeted the Serbian Ministry of Defense and Army General Staff buildings in Belgrade, electrical power transformer yards and power generation facilities, television and radio transmitters, and highway and railroad bridges.\(^{126}\) Subsequent estimates concluded that NATO pilots flew 35,000 sorties and dropped over 20,000 bombs on targets.\(^{127}\) Despite some estimates of high accuracy in NATO bombing, approximately five thousand Yugoslavian citizens were killed during Operation Allied Force.\(^{128}\)

III. PROPORTIONALITY AND OPERATION ALLIED FORCE

A. The Importance of Assessing the Individual Attack

The modern doctrine of proportionality addresses the *jus ad bellum*, the reasons given for the military operation, as well as the *jus in bello*, the

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120. See id.
121. See id.
122. Id. at 8.
123. See id.
124. See Kosovo Strike Assessment, supra note 84, at 3, 7.
125. See id.
126. Operation Allied Force Update (visited June 10, 2000) <http://www.nato.int/kosovo/all-force.htm> (providing a daily update of the missions flown and the targets attacked during Operation Allied Force). Additional targets included: military barracks, petroleum storage sites, military radio relay sites, communications centers, border posts, and a Serbian presidential retreat and leadership command center. See id.
128. See Dana Priest, Bombing by Committee: France Balked at NATO Targets, WASH. POST, Sept. 20, 1999, at A10 [hereinafter Priest, Bombing by Committee] (providing lower estimates of 500 to 1,000 for the number of civilian casualties caused by Operation Allied Force).
means used to conduct the operation. Historically, the means of an attack were justified if the cause was just, but proportionality now requires that the means of an attack be assessed by balancing the anticipated military advantage against expected civilian casualties. This reasoning requires an assessment of proportionality for each individual attack of a military operation at its planning stage, which must be completed prior to approving a military strike.

B. Making the Assessment: The Important Factors of Proportionality

The factors used to assess the proportionality of a military attack include: target selection, the means and methods chosen for the military strike, the lack of negligence in the execution of the military strike, and the determination of what constitutes the military advantage of a particular military strike.

1. Target Selection

Selecting a target is extremely important, especially when targets are near civilian populations. Proper assessment of a target requires knowledge of the precise location of the target, a determination of whether the target contains any potentially dangerous forces, an estimate of the importance of the military objective to an opponent's mili-

129. See Gardam, supra note 14, at 391 & n.1 (discussing the difference between the jus ad bellum and the jus in bello); see also supra notes 15-18 and accompanying text (discussing both doctrines).

130. See Gardam, supra note 14, at 411 (rationalizing the theoretical independence of the jus ad bellum from the jus in bello); cf. Protocol I, supra note 44, art. 49, para. 1 (defining both offensive and defensive military attacks as “act[s] of violence against the adversary”).

131. See Brown, supra note 14, at 140; Gardam, supra note 14, at 407.

132. See Brown, supra note 14, at 140. If the decision is made in “hindsight,” the effectiveness of proportionality is nullified. Id.

133. See id. at 140-47; Gardam, supra note 14, at 407. In addition to these factors, the party planning the military attack must determine whether the object identified for attack is a civilian or a legitimate military object. See Brown, supra note 14, at 139.

134. See Gardam, supra note 14, at 407; see also Brown, supra note 14, at 145-46. Although the importance of military intelligence and increased technology is recognized, this analysis greatly enhances the ability to plan and to execute a proportional military attack. See Brown, supra note 14, at 145-46. The failure to plan may lead to indiscriminate attacks on insignificant military targets in large civilian population centers. See id. at 147. This is not to suggest, however, that the doctrine of proportionality is free from error. See id. at 146.

135. See Brown, supra note 14, at 146.

136. See id. Nuclear reactors, which could cause additional civilian casualties if struck, are examples of potentially dangerous forces. See id.
tary capabilities, and an assessment of the vulnerability of the target to destruction by the military attack.

2. Means and Methods and Lack of Negligence

The means and methods of a military strike, as well as negligent execution of the strike, are critical when determining the proportionality of a particular strike. Controllability is a particularly important factor to consider when choosing which weapon or technique to use in a military strike. Controllability connotes the ability to limit the strike's damage to the military objective while avoiding civilian casualties and damage to civilian areas. A military planner must ascertain a weapon or technique's controllability by considering the immediate damage and the long-term effects that may result from the use of the weapon or technique. Such effects will include not only physical damage to the intended target, but also a long-term impact on the environment surrounding it.

In addition to controllability, military planners must strive to avoid negligence in the execution of the military strike that may result in unnecessary civilian casualties. A cunning strategy and good intentions do not guarantee an error-free and perfect execution of a military operation. Accidents occur and result in the loss of human life despite a military planner's preparation and best efforts. Planners must account for variables over which they have little control, including pilot error, weapon malfunction, enemy defenses, and sudden changes in weather.

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137. See id.
138. See id.
139. See Gardam, supra note 14, at 407; Brown, supra note 14, at 146-47.
140. See Brown, supra note 14, at 142; Gardam, supra note 14, at 407 (noting that the use of aerial bombardment may be indiscriminate and therefore disproportional).
141. See Brown, supra note 14, at 142.
142. See id. at 143.
143. See id. (noting that nuclear weapons cause crop destruction and defoliation and citing A. THOMAS & A.J. THOMAS, JR., LEGAL LIMITS ON THE USE OF CHEMICAL AND BIOLOGICAL WEAPONS, 210 (1970)).
144. See Gardam, supra note 14, at 407.
145. See Allen, supra note 14, at 48.
146. See id. (discussing variables beyond the control of military planners). No "rational planner assumes either human or mechanical infallibility." Id. But see NATO Bombed Chinese Deliberately (visited Jul. 31, 2000) <http://www.guardianunlimited.co.uk/Archive/Article/0,24273,39,5246,00.html> (stating that NATO intentionally bombed the Chinese Embassy in Belgrade because the embassy transmitted Serbian military communications for the Serbian government and monitored U.S. cruise missile strikes in order to develop effective countermeasures against the United States).
147. See Allen, supra note 14, at 48. One example includes a British bomber attack on
3. The Guidance of Protocol I

Protocol I provides guidance regarding what constitutes a proportional response. In addition to the relevant articles of Protocol I discussed above, Article 57 requires a military planner, when presented with several military targets of equal military advantage, to select the target expected to cause the fewest civilian casualties. In particular, Article 53 prohibits attacks against cultural objects or places of worship. Similarly, Article 54 prohibits attacks against objects that are indispensable for the survival of the civilian population.

4. The Interpretation of Military Advantage

The final factor in analyzing the proportionality of a military strike involves deciding which of two "military advantage" approaches to use. The first approach, the "cumulative" approach, balances expected civilian casualties against the contribution of an anticipated military advantage to a party's overall strategic goals. In the Operation Allied Force context, this approach would have required NATO to determine the proportionality of a military strike involving deciding which of two "military advantage" approaches to use.

a bridge located in the Iraqi town of Falluja during the Persian Gulf War that missed its target, hit a marketplace, and caused many civilian casualties. See id.; see also Priest, Bombing by Committee, supra note 128, at A10 (listing mistakes during NATO bombing missions). This list of mistakes includes the killing of 17 civilians in the mining town of Aleksinac, the accidental bombing of a passenger train, the killing of dozens of refugees in a convoy heading for the Macedonian border, the deaths of more than 20 civilians due to a laser-guided bomb in Surdulica, and the killing of 47 civilians when a bus was attacked on a bridge. See id. Most notably, 15 people were killed when bombs accidentally struck a marketplace and a hospital in Nis on May 7, 1999. See id. In addition, three Chinese citizens were killed when NATO forces accidentally attacked the Chinese Embassy in Belgrade. See id.

148. See supra notes 44-52 and accompanying text.
149. See supra notes 44-55 and accompanying text (articulating specific articles of Protocol I that apply to proportionality).
150. Protocol I, supra note 44, art. 57, para. 3.
151. Protocol I, supra note 44, art. 53. Protocol I states that:
[I]t is prohibited (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; [and] (c) to make such objects the object of reprisals.

id.

152. Protocol I, supra note 44, art. 54, para. 2 ("[O]bjects indispensable to the survival to the civilian population [include] foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population . . . .")

153. Brown, supra note 14, at 141-42 (introducing the "cumulative" and "case-by-case" analyses).
154. Id.
overall strategic goals of its operation in Kosovo.\textsuperscript{155} The anticipated military advantage of any specific attack would have been measured by determining whether that advantage would help achieve those strategic goals.\textsuperscript{156} Cumulative analysis has been interpreted to condone civilian casualties that result from military strikes because these casualties will prevent future civilian casualties.\textsuperscript{157} This interpretation, however, deprives civilians of meaningful protection and creates a vague standard of review because it is difficult to predict accurately the consequences of military strikes.\textsuperscript{158}

The second approach, the “case-by-case” approach, requires the anticipated military advantage of any strike to be measured by the specific tactical advantage gained.\textsuperscript{159} This approach defines the term “military advantage” as the “specific tactical objective of a particular action.”\textsuperscript{160}

\textsuperscript{155} See \textit{id.} at 141.

\textsuperscript{156} Cf. \textit{id.} (providing a discussion of a cumulative analysis and justification for military strikes in Japan, the Second World War, and Vietnam). One example is the use of nuclear weapons in Hiroshima and Nagasaki in 1945 to cripple and destroy the Japanese war industry. \textit{See id.} The United States justified the use of atomic weapons by arguing that they brought a quick Japanese surrender, which saved countless lives on both sides, including those that may have been lost in a ground invasion. \textit{See id.} In \textit{Shimoda v. State}, however, a Japanese court deemed the use of nuclear weapons illegal because they could not discriminate between military and non-military objects. \textit{Shimoda v. State}, 32 I.L.R. 626, 627 (Dist. Ct. of Tokyo, Japan 1963); \textit{see also Brown, supra note 14, at 141-42.} The Vietnam Conflict provides another example of the cumulative approach, as the United States destroyed large areas of the Vietnamese countryside in which enemy guerillas reportedly operated. \textit{See Brown, supra note 14, at 141-42.} The United States justified this tactic “on the grounds that their cumulative effect was to keep the enemy forces constantly on the move and to separate the guerillas from their base of support.” \textit{Id.} at 142. These attacks received wide criticism because of the belief that Vietnamese civilian casualties outnumbered Vietcong guerilla casualties. \textit{See id.}

\textsuperscript{157} See \textit{Brown, supra note 14, at 142.}

\textsuperscript{158} See \textit{id.} (identifying the weakness of the cumulative approach and stating that the language of the Articles support the “case-by-case” approach); \textit{see also Protocol I, supra note 44, art. 51, para. 5(b); Gardam, supra note 14, at 407 (interpreting the Protocol’s “concrete and direct” language to mean that military advantage is assessed “in relation to each individual attack, rather than on a cumulative basis”). The individual assessment of the “case-by-case” approach provides more protection for civilians. \textit{Gardam, supra note 14, at 407.} Consequently, this approach is preferred over the cumulative approach.

\textsuperscript{159} \textit{Brown, supra note 14, at 141.}

\textsuperscript{160} \textit{Id.} at 140-41 (stressing that a case-by-case analysis refers to the specific tactical objective of a military strike); \textit{cf. Gardam, supra note 14, at 407 (postulating that the case-by-case language creates a subjective test that is often difficult to satisfy consistently). This “lack of precision” benefits military operations rather than civilian protection. Id.}
C. Final Assessment and Execution: What did the Planners of Operation Allied Force Decide?

The initial phase of Operation Allied Force concentrated firepower upon Serbian military targets including tanks, artillery, bunkers, barracks, ammunition depots, and enemy troops. It is difficult to question the proportionality of these strikes because they were carried out in areas far from civilian population; moreover, the anticipated military advantage outweighed civilian concerns because the Serbian military forces were judged to be responsible for most of the humanitarian disaster.

As the operation entered the later phases, however, NATO increasingly began to focus on targets that were not only closer to civilian areas, but those that arguably had military and civilian purposes.

Operation Allied Force involved thousands of individual attacks, many of which affected civilians. Specific attacks, such as the bombing of Serbian infrastructure targets and the Socialist Party Headquarters in Belgrade, illustrate the use of the doctrine of proportionality in the planning and execution of NATO’s operation.

1. The Socialist Party Headquarters in Belgrade

In the early morning hours of April 21, 1999, four cruise missiles struck the Socialist Party Headquarters in downtown Belgrade. Before

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161. See Priest, Bombing by Committee, supra note 128, at A10 (discussing briefly the initial intended targets of Operation Allied Force); see also Dana Priest, Tension Grew with Divide Over Strategy, WASH. POST, Sept. 21, 1999, at A1 [hereinafter Priest, Divide Over Strategy] (stating that Allied warplanes destroyed or damaged 93 tanks, 153 armored personnel carriers, 339 military vehicles, and 389 artillery pieces and mortars).

162. See Priest, A Decisive Battle, supra note 83, at A30 (detailing a bombing raid upon two battalions of Serbian troops stationed on Mount Pastrik).

163. See U.S. and NATO Objectives, supra note 82, at 1 (stating that one of NATO's objectives included stopping the humanitarian disaster in Kosovo and in the surrounding areas). The KLA began an offensive against Serbian positions, but the tide soon turned as the KLA forces were pinned down on Mount Pastrik. See Priest, A Decisive Battle, supra note 83, at A30. On June 7, 1999, two B-52 bombers bombed the Serbian positions to relieve the KLA forces. See id. At the time, it was believed the Serbian forces sustained heavy casualties, but this has yet to be confirmed. See id.

164. See Priest, Divide Over Strategy, supra note 161, at A16; cf. Adler, supra note 2, at 24-25 (discussing some of the difficulties that arise when a target has probable military value as opposed to possible military value).

165. See Thompson, supra note 127, at 1 (estimating that NATO dropped 20,000 bombs).

166. See Priest, Bombing by Committee, supra note 128, at A10 (discussing briefly the repair and salvage efforts after the Socialist Headquarters building was destroyed).

167. See id. Unconfirmed Serbian reports estimated that ten civilians perished because of this attack. See id. No official casualty figure exists, but reports indicate that these ten casualties resulted from two attacks: the attack on the Socialist Party Headquar-
launched this attack, operation planners used a picture of the building and an intelligence report to determine the possible consequences, including the number of civilians (e.g., employees) that might be killed.\textsuperscript{168} The availability of modern weapons, which could implode a building, provided military planners with some confidence that civilian casualties would be minimized.\textsuperscript{169} For example, modern weapons allowed NATO military planners to predict the path and distance of propelled concrete and shattered glass, which provided an additional method of protecting civilians.\textsuperscript{170}

NATO appears to have applied the doctrine of proportionality properly during the planning and execution stages of its bombing of the Socialist Party Headquarters.\textsuperscript{171} Accordingly, NATO satisfied Article 57 of the Protocol, which requires planners to do everything within their ability to verify that an object is truly military in nature.\textsuperscript{172} NATO chose means and methods to ensure maximum damage with minimum collateral damage and does not appear to have acted negligently.\textsuperscript{173}

Article 51(5)(b) of the Protocol requires a balancing of the anticipated
military advantage gained and the expected civilian casualties caused by a specific military strike.\footnote{174}{Protocol I, supra note 44, art. 51(b).} This balancing is important because proportionality will only achieve its goal of lessening civilian casualties if those expected casualties do not exceed the anticipated military advantage.\footnote{175}{See Gardam, supra note 14, at 412.} Article 48 of the Protocol mandates that the target is a true military objective,\footnote{176}{Protocol I, supra note 44, art. 48.} and Article 52(2) specifically limits all attacks to military objectives.\footnote{177}{Id. art. 52(2).} Therefore, NATO could only justify the attack on the Socialist Party Headquarters building by establishing, during the planning stage, that the building served military purposes.\footnote{178}{See id. (requiring a military strike to be conducted only against a military target).} NATO planners described the Socialist Party Headquarters as an alternative headquarters for the Milosevic government.\footnote{179}{See id. art. 52(2).} By establishing that the Serbian government converted an otherwise civilian-oriented building into a government building, NATO acquired and attacked a target of true military advantage.\footnote{180}{See id. (requiring a military strike to be conducted only against a military target).}

2. The Serbian Infrastructure: Electricity, Water, and Bridges

Some operation planners, particularly the members of the United States’ Armed Forces wanted to strike Serbia’s power grid.\footnote{181}{See Priest, Bombing by Committee, supra note 128, at A10.} The French Government, however, opposed this plan.\footnote{182}{See Priest, Bombing by Committee, supra note 128, at A10 (detailing Allied efforts to strike Serbia’s electrical system); cf. Allen, supra note 14, at 50-51 (describing Allied attacks during the Gulf War against electrical power generating stations). Because attacks on power stations normally do not incur high civilian casualties, they do not raise a proportionality concern, except for the issue of whether electrical grids are military objects. See id. But see Protocol I, supra note 44, art. 54 (protecting objects that are indispensable to the survival of the civilian population).} In order to allay French concerns, the Allies turned to a top-secret weapon that would disrupt the electricity for only a few hours.\footnote{183}{See id. (detailing the CBU-94 as a then top-secret United States weapon invented to disable electrical grids).} Once France agreed to this
plan, NATO commenced the attack. In subsequent weeks, the Allies conducted additional attacks on Yugoslavia’s electrical system that disabled power for days. These tactics not only disabled electrical power, but disrupted the Serbian water supply.

In addition to the disruption of Serbia’s electrical power and water supplies, airstrikes destroyed twenty-four bridges. NATO planners spared one bridge, known as the “Rock-n-Roll” bridge, from Allied attack. The Allies refrained from bombing this bridge because they wanted to avoid excessive civilian casualties. That Serbian volunteers stood on the bridge to prevent its destruction also contributed to the decision not to bomb the “Rock-n-Roll” bridge. In sum, NATO planners refused to attack the “Rock-n-Roll” bridge because the anticipated civilian casualties outweighed any expected military advantage.

The bombings of the electrical system and bridges, and the disruption of the water supply, raise questions under Article 54 of the Protocol, which prohibits attacks against targets that are indispensable to the survival of the civilian population.

Shelton, Chairman of the United States’ Joint Chiefs of Staff, provided information about backup electricity that hospitals could use. See id.

184. See id. The article continues:
And in the post-midnight darkness . . . dispensers the size of a can of tennis balls dropped from the sky, each with its own parachute. As they reached . . . power grids and transformer yards, spools of specially treated carbon-graphite thread unraveled into a web causing instant short circuits. The rubber duckies, as the military dubbed the weapon, knocked out power to 70 percent of Yugoslavia. Most of it was back on within a day.

Id.

185. See id.

186. See id.; Michael Mandelbaum, A Perfect Failure: NATO’s War Against Yugoslavia, FOREIGN AFF., Sept.-Oct. 1999, at 2, 6. (describing NATO’s attack on Serbia’s electrical grids and water facilities as an indirect attack on the civilian population, which violated the Protocol).

187. See Priest, Divide Over Strategy, supra note 161, at A16. These airstrikes caused additional damage to 24 bridges, 12 railway stations, 36 factories, 7 airports, 16 fuel plants and storage depots, 17 television transmitters, and several electrical facilities. See id.

188. Priest, Bombing by Committee, supra note 128, at A10 (detailing France’s refusal to approve NATO’s plan to bomb Belgrade’s “Rock-n-Roll” bridge).

189. See id.; cf. Allen, supra note 14, at 48-49 (contending that during the Gulf War, Allied Forces disproportionately attacked the physical endpoints of bridges, which were near civilian populations, instead of attacking the center portions). In addition, commentators have argued that the Allies should have conducted bridge attacks during the Gulf War at night when most bridges would be empty of civilians. See id.

190. Priest, Bombing by Committee, supra note 128, at A10.

191. See id.

192. Protocol I, supra note 44, art. 54.
pressly protects water supplies, which are solely for civilian use. This language does not, however, define electrical grids or bridges as indispensable for civilian survival. When considering the evidence beyond the language of the Protocol, however, facts suggest that the directors of Operation Allied Force wanted to control the amount of damage these attacks caused, as evidenced by the choice of weapons.

The question was whether any anticipated military advantage could be gained by attacking elements of the Serbian infrastructure when balanced against expected civilian casualties. Military advantage may be gained only through the attack of military objects because Protocol I prohibits attacks against civilian targets. It is arguable that electrical grids and bridges satisfy the Article 52(2) definition of military objects because they may be used for military and domestic purposes; the water supply, on the other hand, is expressly protected by the Protocol because the supply supported the civilian population and not the military.

IV. OPERATION ALLIED FORCE: A PROPORTIONAL RESPONSE?

A. NATO's Intention: A Proportional Effort To Maintain Balkan Stability

Operation Allied Force demonstrated the modern application of the doctrine of proportionality. Examples of NATO attacks, namely those against the Socialist Party Headquarters building in Belgrade and Serbian infrastructure targets, show that NATO planners had intended to avoid excessive civilian casualties.

193. Id. para. 2.
194. See id.
195. But see Roger Normand & Chris af Jochnick, The Legitimation of Violence: A Critical Analysis of the Gulf War, 35 HARV. INT'L L.J. 387, 403-05 (1994) (arguing that the Allied attacks against Iraqi electrical power grids during the Gulf War produced more civilian suffering than military gain). During the Gulf War, the destruction of targets, such as command and control centers and communications facilities, decreased the need to attack actual electrical power sources. See id.
196. Cf. id. at 404 (asserting that the Gulf War's military strikes "created conditions for a public health catastrophe"). Attacks on Iraqi infrastructure paralyzed the country and deprived civilians of basic services and life support systems. See id. at 403-05.
197. See Allen, supra note 14, at 43.
198. Protocol I, supra note 44, art. 54(2), (3). In determining whether a particular target is a true military objective, two elements must be satisfied: (1) the object makes an effective contribution to the military action, and (2) the elimination of the object must offer a definite military advantage. See Allen, supra note 14, at 43; see also supra note 172 and accompanying text.
199. See supra notes 163-71 and accompanying text (illustrating that NATO planners...
In addition, political leaders of NATO member nations took active roles in target selection. Current information does not indicate any intentional or indiscriminate bombings of civilian populations, which the doctrine of proportionality strictly prohibits. NATO planners reviewed the range of possible civilian collateral damage for each target, gathered intelligence, and used weapons that would minimize civilian casualties. Finally, NATO postponed a ground invasion of Kosovo and an attack upon Serbian computer systems, both of which would have negatively impacted Serbian civilian life.

B. Operation Allied Force: NATO’s Proportional Failures

An analysis of Operation Allied Force’s individual attacks, particularly took extraordinary measures to assess their recommended actions in order to prevent excessive civilian casualties during the operation’s attacks).

200. See Priest, *Bombing by Committee*, supra note 128, at A10. The heads of state, including U.S. President Bill Clinton, British Prime Minister Tony Blair, and French President Jacques Chirac, conversed frequently and expressed reservations about which targets would be attacked because of their desire to avoid any international political ramifications created by civilian casualties. See id.

201. See Protocol I, *supra* note 44, art. 54, para. 2; see *supra* notes 115-24 and accompanying text (discussing various targets of Operation Allied Force).

202. See Anthony H. Cordesman, *The Lessons and Non-Lessons of the Air and Missile War in Kosovo* (visited Sept. 30, 1999) <http://www.csis.org/kosovo/lessons.html> at 60 [hereinafter The Lessons and Non-Lessons] (evaluating the effort made by NATO forces to minimize the amount of collateral civilian damage); see generally Thompson, *supra* note 127, at 1. Examples of weapons used in Operation Allied Force include: B-2 and B-52 bombers, F-117 Nighthawks, and cruise missiles. See Thompson, *supra* note 127, at 1. These weapons are designed to maximize damage to the target while minimizing collateral damage to the civilian population. See id. Initial reports reveal that these weapons performed well. See id. Ironically, the good performance of the older weapon systems, such as the B-52 and the B-1 bombers, will make it harder for the Pentagon to justify spending money on the newer systems, such as cruise missiles and the F-22 Stealth Fighter. See id.

203. See Priest, *A Decisive Battle*, supra note 83, at A1. At the start of the operation, NATO publicly stated that there would be no ground invasion of Kosovo; however, plans were soon underway to conduct such an invasion. See id. The CIA began working closely with the KLA, while NATO engineering units began reinforcing roads leading into Kosovo for a ground thrust. See id. In the end, the Milosevic regime capitulated and no ground invasion was required. See id.; Bradley Graham, *Military Grappling with Rules for Cyber Warfare*, WASH. POST, Nov. 8, 1999, at A1 (noting that the Pentagon rejected a plan to hack Serbian computer systems in an effort to disrupt military operations and civilian services during Operation Allied Force because of its concern of the probable adverse effects upon civilians). The Defense Department’s legal office issued warnings that certain attacks upon computer systems could subject American authorities to charges of war crimes. See id. American forces did target some Serbian air defense computers through electronic-jamming aircraft, but did not execute plans to raid Serbian President Milosevic’s bank accounts. See id. Commanders were warned to stay away from attacking civilian computer systems such as banking systems, stock exchanges, communications, energy, transportation, universities, and other basic services due to the detrimental effects on civilians. See id.
the attacks that disrupted the water supply, reveals NATO’s failure to protect civilians.\textsuperscript{204} Attacks on electrical power grids and bridges also raise questions as to whether the anticipated military advantage truly outweighed civilian concerns.\textsuperscript{205} Further, accidental strikes occurred and led to civilian casualties.\textsuperscript{206}

Operation Allied Force shows that nations use a combination of the cumulative and case-by-case approaches when determining anticipated military advantage.\textsuperscript{207} When the case-by-case analysis does not justify a particular attack, nations may apply the cumulative analysis of the anticipated military advantage, which provides a lower standard of protection for civilians during wartime.\textsuperscript{208} The strategic goals of Operation Allied Force included expelling Serbian forces from Kosovo, ending the humanitarian disaster, and preventing further instability in the Balkan region.\textsuperscript{209} NATO’s use of force was not intended to punish Serbian civilians, but rather to apply only that amount of force necessary to achieve these strategic goals.\textsuperscript{210}

NATO planners frequently balanced civilian concerns when they
planned individual attacks, as evidenced in the attack upon the Socialist Headquarters building and the refusal to bomb the "Rock-n-Roll" bridge. They planned for a minimum amount of potential civilian casualties, acted upon intelligence to minimize such casualties, and discussed possible strategies that would decrease unwanted casualties.

At times, however, NATO planners measured the anticipated military advantage through a cumulative analysis, determining whether a specific attack would help achieve the overall strategic goals. NATO understood that attacking Serbian military targets in Kosovo and Serbia would not be enough to make the Serbian government capitulate. The Serbian government would have acquiesced only after NATO targeted more sensitive and civilian-related objects, including electricity grids, ministry buildings, and bridges. NATO, therefore, attacked targets that affected Serbia’s military capability, as well as its ability to gain Serbian-civilian support for its military action in Kosovo.

211. See discussion supra Parts III.C.1. and III.C.2.
212. See discussion supra Parts III.C.1. and III.C.2.; see also Dana Priest, Target Selection Was Long Process, WASH. POST, Sept. 20, 1999, at A11 (detailing the selection process of targets during the operation). The U.S. Joint Analysis Center in Molesworth, England initially selected the targets. See Priest, supra. During the preliminary selection phase, planners analyzed the proposed targets considering various sources of intelligence. See id. Planners “worked and reworked” proposed attacks if those attacks involved a target where more than twenty civilians might be killed. Id. Targets were not attacked until the White House, the British prime minister's office, and the French presidential administration gave final approval. See id.

213. See Report to Congress, supra 107, at xvii (“At the outset of the air operation, NATO set specific strategic objectives for its use of force in Kosovo...These objectives would be accomplished by attacking strategic targets throughout...Yugoslavia and fielded forces in Kosovo.”).

214. See supra notes 115-26 and accompanying text (describing the two lines of attack which Operation Allied Force used during the 78-day air campaign); Priest, Divide Over Strategy, supra note 161, at A16 (presenting a possible consensus that NATO military strikes needed to focus on more sensitive targets in an order to increase the pressure upon the Milosevic government).

215. Cf. Desmond Seward, The Hundred Years War: The English in France 1337-1453, at 38 (1978) (articulating the English view that total war was the quickest way of making the French people sick of war during the One Hundred Years War). Total war involved the destruction of an enemy's territory with equal disregard for combatants or non-combatants and privately-owned or government-owned property. See id. The enemy government (France) would be weakened quicker with more extensive damage to towns and the countryside. See id.

216. Cf. Adler, supra note 2, at 40-42 (evaluating attacks meant to decrease the morale of an enemy population). By the end of the Second World War, targeting the morale of an enemy population had become accepted international practice. See id. at 90. Since proportionality's codification, nations are limited in their ability to target an enemy nation's morale because such a strategy normally involves civilian targets. See id. Moreover, some critics argue that attacking such sensitive targets will only create intense hatred and
As applied in Kosovo, this strategy combined the case-by-case analysis with the cumulative analysis and, at times, sacrificed the protective umbrella created by the doctrine of proportionality. Continuing this predominant aspect of warfare, which focuses military force on an enemy's civilian population and government in order to compel an enemy to accept certain terms, fails to provide the full protection found in the express language of the Protocol.

Operation Allied Force illustrates the continuing influence of the *jus ad bellum* of a military operation upon the *jus in bello*. Theoretically, the two maxims are distinct, but frequently, the means of an operation are considered just if the cause is considered just. Increased acceptance of proportionality, a development marked most notably by its codification in the Protocol, may be expected to dull the *jus ad bellum* influence; however, the tactics of the Gulf War and Operation Allied Force show the strong belief that achieving an end, when deemed just, permits a wide range of means.

bitterness, thereby reducing the chances of obtaining a peaceful settlement to the conflict. *See id.* at 41.

217. *See supra* notes 77-78 and accompanying text (discussing the Russian invasion of Chechnya in 1999).

218. *See supra* notes 45, 47-50 and accompanying text (providing provisions of Protocol I that relate to proportionality); Gardam, *supra* note 14, at 407 (restating the Protocol language of “concrete and direct” military advantage). Moving away from such language provides a “considerable degree of latitude” to determine whether an attack is indiscriminate. Gardam, *supra* note 14, at 407.

219. *See supra* notes 17-18 and accompanying text (defining *jus ad bellum* and *jus in bello*); Normand & af Jochnick, *supra* note 195, at 412 (arguing that the Gulf War provides evidence that the *jus in bello* is jeopardized by the “legitimation of Coalition attacks on civilian infrastructure unrelated to military advantage”). The conduct of Coalition forces emphasized the modern tactic of warfare dedicated to achieving strategic objectives, rather than focusing on the tactics used in the military operation. *See* Normand & af Jochnick, *supra* note 195, at 412. *But see* MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, THE GENERAL'S WAR: THE INSIDE STORY OF THE CONFLICT IN THE GULF 468-69 (1995) (introducing the limitations and successes of General Colin Powell's strategy (“the Powell Doctrine”)). This doctrine was used extensively during the Persian Gulf War and requires the use of overwhelming force whereby the “enemy would be given no sanctuary . . . [or] diplomatic pauses to . . . catch their breath.” *Id.* at 468. This doctrine permitted the generals to choose the targets of the operation rather than civilian targets located elsewhere. *See id.* at 468-69. It has been described as “insufficient for many of the smoldering conflicts the United States faces today, where the military is called on . . . to support diplomacy, protect peacekeepers, or carry out humanitarian tasks . . . .” *Id.* at 469.

220. *See Gardam, supra* note 14, at 411-12 (expanding upon the view that the *jus ad bellum* and the *jus in bello* are distinct).

221. *See id.* The international community regarded Iraq's invasion of Kuwait as unjust and illegal, but it considered the Allied response—Operation Desert Storm—as just. *See id.* at 411. The United States and other allied members wanted to keep the Gulf War casualty figures low; this became the prevalent factor when considering the proportionality of any attack. *See id.* at 412. Moreover, civilians and combatants of the enemy side were
C. Operation Allied Force: A Criminal Law Application?

As required by the Protocol, an operation is not analyzed as a whole to determine whether it constituted a proportional response, but the proportionality of each attack within an operation is assessed individually. Proportionality, within the context of the Protocol, stresses the *jus in bello* of warfare, speaking to the anticipated military advantage of a specific attack rather than the overall political or humanitarian advantages of an operation.

Proportionality in the criminal law context, which mandates that the punishment fit the crime, provides another analytical tool for the *jus ad bellum* of a military operation. Considering whether NATO's operation, taken as a whole, was a proportional response to the humanitarian crisis created in Kosovo, the appropriate question asks whether the operation, inclusive of both civilian and combatant injuries, properly fits the crimes committed by Serbia against the citizens of Kosovo. The answer to this question will differ according to individual moral, political, legal, and ethical views.

D. The Direction of the Doctrine of Proportionality in the 21st Century

As the hearts and minds of the world soar and embrace the new opportunities of the 21st century, they sink when remembering the carnage of wars fought in the 20th century, including the current trend of violence in the Balkans. Is it possible to regulate war and maintain rules intended

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222. *See supra* notes 131-32 and accompanying text (discussing proportionality).

223. *See* Ros Taylor, *Is it a Just War? British Religious Communities Have Their Say*, (visited July 31, 2000) (<http://www.guardianunlimited.co.uk/Archive/Article/0,4273,3845052,00.html>) (surveying the broad range of opinions of various British religious groups as to whether the use of force in Kosovo was just). Bishop David Konstant of the Roman Catholic Church stated that the use of force, albeit regrettable, “aimed solely at stopping intolerable aggression against civilians and at re-starting negotiations might well be . . . legitimate.” *Id.* At the same time, a British Buddhist group deplored NATO’s action, while an Islamic group supported it and claimed that Serbian forces were treating the Kosovo Muslim minority cruelly. *See id.*

224. *See supra* note 24 and accompanying text (discussing the role of proportionality within criminal law).

225. *See supra* note 24 and accompanying text.

226. *See supra* note 223 and accompanying text (providing various viewpoints pertaining to NATO’s action in Kosovo).

227. Operation Joint Guardian, a U.N. peacekeeping force authorized by the U.N. Security Council under Resolution 1244, and the Military Technical Agreement replaced Operation Allied Force. *See NATO’s Role, supra* note 20, at 3-4 (summarizing the subsequent peacekeeping mission in Kosovo following Operation Allied Force). To date, KFOR, the peacekeeping force’s designation, totals approximately 50,000 personnel from
to protect civilians?" Although nations once chose to settle conflicts by engaging large armies on battlefields, airstrikes are now popular military tools. Governments prefer surgical airstrikes, which maintain the false promises of decreasing combatant and civilian casualties. Despite the best efforts and intentions of any military planner to apply the doctrine of proportionality, civilian casualties in wartime are inevitable. More than twelve NATO nations and Russia. See id. at 4. Despite its large force and international mandate, violence continues in Kosovo as returning ethnic Albanians resume threats of violence against Serbs living there. See id. at 5; see also Ethnic Albanians Urged To Stop Threatening Serbs in Kosovo (visited Aug. 15, 2000) <http://www.cnn.com/world/europe/9910/07/kosovo.01/index.html> (detailing the violence directed toward Serbian citizens of Kosovo). The violence prodded an official of the Socialist Party of Yugoslav and then-President Milosevic to state that this violence showed that a Serbian military presence was needed in Kosovo. See id. Despite this violence, the Clinton Administration's sources claimed that secession of Kosovo from Serbia is inevitable, as Kosovo will likely become a viable and free democracy with a vibrant economy. See R. Jeffrey Smith, U.S. Officials Expect Kosovo Independence, WASH. POST, Sept. 24, 1999, at A1. Further, continuing instability in the region exists beyond the borders of Kosovo, as Montenegro, another region of Serbia, is in danger of collapse. See Paddy Ashdown, The Next Domino Is About To Go (visited July 31, 2000) <http://www.guardianunlimited.co.uk/Archive/Article/0,4273,3916768,00.html>.

228. See MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 129 (1977) (indicating that proportionality is a “hard criterion to apply, for there is no ready way to establish an independent or stable view of the values against which the destruction of war is to be measured”). Proportionality introduces the idea of fighting limited wars that reduce the suffering of those affected by war, and decreasing the bitterness among belligerents, thereby increasing the chances for peace and the resumption of pre-war activities. See id. at 131-32.

229. See supra notes 67-80 and accompanying text (providing examples of state practice that involve the use of airstrikes).

230. See Cordesman, supra note 202, at 56. Cordesman reports:

Some of the problems that NATO, the U.S., and Western military forces now face in dealing with an unrealistic set of expectations about the efficacy of force, and the “perfect” and “bloodless” character of modern war, are self-inflicted wounds. Individual officers and spokesman often stressed the fact that equipment and weapons fail, targeting and battle damage assessment are not perfect, and casualties and collateral damage are unavoidable. Id.

Cordesman applauds NATO forces for the small number of injuries they incurred; however, he argues that this success is “another factor ... that may create unrealistic expectations and demands for ‘perfect’ or ‘bloodless’ war.” Id. at 59. The U.S. Department of Defense should endeavor to educate the public about the injuries, dangers, and risks related to war. See id.

231. See Fenrick, supra note 13, at 92. Protocol I accepts the fact that civilians will be injured and killed in armed conflicts, but nevertheless attempts to maximize their protection. See id. Specifically, Protocol I addresses this issue by referring to “excessive incidental losses to civilians” in Articles 51(5), 57(2), and 85(3)(b) and (c). Id. In order to achieve greater protection for civilians during its military operations, the U.S. Department of Defense (DoD) issued the DoD Law of War Program Directive in 1998. See Department of Defense Directive, Number 5100.77, Dec. 9, 1998 (visited Jan. 10, 2001) <http://www.192.156.19.100/jao/sources/sources.htm>. The directive reaffirms, inter alia, Defense Department policy that the laws of war are observed and enforced by the De-
cause of this truth of war, some suggest that General Robert E. Lee surmised correctly that "[i]t is well that war is so terrible; otherwise we [w]ould grow too fond of it." 232

V. CONCLUSION

The doctrine of proportionality, most recently codified in the Protocol, continues to be a workable tool and the best solution in the effort to prevent excessive civilian casualties. Its purpose and importance find support in international charters and treaties, ICJ decisions, and in state practice. Proportionality now claims further support from NATO's Operation Allied Force against Serbia. For proportionality to be most effective, however, nations must focus on a case-by-case analysis of military advantage. The current trend of accepting a cumulative analysis of military advantage, within a broader combination of both cumulative and case-by-case analyses, fails to meet the standards set forth by the Protocol. This combination deprives civilians of the most protection during wartime. As modern warfare continues to exact tolls on civilians, it is imperative that nations continue to look to the doctrine for guidance and explore ways for which it can be improved. Contrary to Cicero's belief, there are laws in time of war. As evidenced by the conflict in Kosovo, one of the most important continues to be the doctrine of proportionality.

See id.; see also Peter Paret, Clausewitz, in MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE 186, 202-03 (1986) (articulating the views of Carl von Clausewitz, the Prussian general, on the tactics and problems of war). Clausewitz often spoke of the constant friction in warfare, which he characterized as the "uncertainties, errors, accidents, technical difficulties, the unforeseen, and .... their effect on decisions, morale, and actions" that frequently exist in military operations. Id. at 202. Clausewitz wrote that "[f]riction is the only concept that more or less corresponds to the factors that distinguish real war from war on paper .... and brings about effects that cannot be measured .... Friction .... is the force that makes the apparently easy so difficult." Id.
