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Coalition Warfare: Challenges and Opportunities

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When planning for coalition warfare, the military lawyer is concerned with achieving effective interoperability under applicable international and domestic law. In the modern context of "coalitions of the willing," this essentially means achieving a harmonization of rules of engagement (ROE) with the lead nation, having regard to the specific taskings and missions the coalition partners have assumed. Usually (but not always) the lead nation in conducting serious global operations in the contemporary environment is the United States. As is well known, the United States has asserted formally that it is not prepared to sign and ratify a number of treaties applicable in the context of armed conflict[1] and has been consistently critical of the "progressive" nature of a number of assertive statements of customary law heralded by some.[2] Therein lays the obvious, but "ostensible" challenge, for coalition military partners in trying to ensure operational effectiveness when operating under potentially divergent legal regimes. The word "ostensible" is emphasized, because at the working officer level of coalition warfare, there is much

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more commonality of approach than what one might expect notwithstanding the stridency of statements sometimes made as to national divergence under the law.

It is a theme of this article that coalition operations are frequently successful due to the pragmatic approach taken to interpreting the law by coalition partners. This is not to suggest any subversion of the law, but rather reflects choices made by coalition partners to intelligently accommodate differing legal approaches among them for the common good. This success is also due to the nature of the law itself, which is generally cast in terms of "standards" as opposed to "bright line" rules and thus is more usually predicated upon the invocation of "values" by the military decision-maker. Within this interdependent world, such values are more convergent and synonymous with those of society at large than what many outside of the military may think.

Modes of Analysis—Formalism

There are, of course, a number of ways in which to assess the issue of coalition interoperability under the law. At the immediate or formalist level, one can merely compare treaties ratified by coalition partners and statements of customary law made by such partners to determine who is able to do what in the course of a campaign and to orchestrate missions accordingly. Of course, this assumes the absence of a single consensus standard to which all will comply, which in terms of coalitions of the willing, is a relatively safe assumption.[3]

From this formalist position, we are faced with some obvious direct inconsistency issues under international law. The Ottawa Land Mines Convention[4] is the classic example of such inconsistency, especially Article 1(c) which provides that "Each State Party undertakes never under any circumstances: to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention."[5] US allies such as Australia, Canada, Germany, Japan, New Zealand and the United Kingdom[6] have all signed and ratified this treaty. Having regard to the literal wording of the obligations imposed, mission taskings by such signatories could not, for example, contemplate the tactical level carriage of US forces or refueling of US assets where such forces or assets are carrying and/or contemplate the use of anti-personnel landmines.[7] Additionally, a number of US allies have assumed obligations under the International Criminal Court Statute[8] and under the 1980 Conventional Weapons Convention and its five Protocols.[9] The United States is not a party to the International Criminal Court treaty nor to two of the five Conventional Weapons Convention Protocols.[10] Again, these disparities have their own dynamics regarding tactical level mission taskings.

Such dissonance is also found in differing interpretations of customary international law. The potential dichotomy between the definitions "war sustaining" under the US Commander's Handbook on the Law of Naval Operations[11] and "effective contribution to direct military action" under the San Remo Manual on International Law Applicable to Armed Conflicts at Sea[12] is one such obvious area.

Similarly, those who have ratified Additional Protocol I[13] are bound by a number of provisions that the United States is not. For example, Article 56 with its prohibition on attacking dams, dikes and nuclear electrical generating stations is one where the United States has stressed its opposition as a ground for non-ratification.[14] Similarly divisive is the issue of belligerent reprisal. Article 51(6) of Additional Protocol I expressly prohibits attacks on civilians. Such a constraint does not, however, apply to US forces under US formulations as to the residual scope of this right pursuant to customary international law.[15] Such differences in obligation are real and are necessarily reflected in default statements of national ROE and "red card" directives to coalition commanders.[16]

Under the formalist paradigm, all of this would seem to render the chance of effective interoperability very difficult, if not impossible. But of course this has not been the case. In recent years, coalition forces have participated with the United States in numerous operations without any serious compromise to mission effectiveness. Coalition operations during Operations Desert Shield and Desert Storm, during operations in Somalia, in East Timor, in Afghanistan and during Operation Iraqi Freedom are, in fact, a testament to coalition effectiveness under the law. Why is this so? The answer to this question lies not in a formalist paradigm of the law, but rather resides in a realist critique of formalism.

Realist Critique

The theme of this essay is that effective legal interoperability is possible, indeed very common, despite the impression of grave differences of view. This is not a unique observation. Colonel David Graham, JAGC, US Army (Ret.) has previously addressed this theme[17] and has put forward a number of explanations for why this may be so. Firstly, he offered the proposition that while US allies had ratified these treaties, they had submitted a number of agreed-upon reservations or declarations that effectively achieved a common understanding of application.[18] Secondly, Colonel Graham highlighted the extensive consultation and sharing of military law manuals that has happened in more recent times, which have prompted a greater socialization of concepts.[19] Finally, he stressed the operational significance of multilateral ROE development on operations occurring since 1977, which has driven a convergence of legal principle.[20]

The insightful observations of Colonel Graham are fully supported in this article. It is the third ground in particular which, it is submitted, has been decisive in forging successful legal compatibility. The investigation of this phenomenon is the principal focus of this article. Firstly, however, it is useful to examine the initial ground proffered by Colonel Graham, namely the issue of collective reservations/declarations. There is no doubt that the language used in such reservations/declarations by many nations when ratifying Additional Protocol I is very similar, if not identical. A cursory review of the tenor of declarations made to operative provisions of the Protocol does evidence a certain symmetry of language and intent with respect to issues like the definition of military advantage concerning attacks to be assessed as a "whole,"[21] to the incorporation of the lives of one's own military members in the proportionality equation,[22] and to the definition of "deployment" for ascertaining combatant status.[23] This necessarily allows for a common understanding and confidence when applying potentially ambiguous operative provisions in the specific contexts contemplated in the course of combined/coalition operations.

The second ground put forward relates to the increasing declassification and sharing of military manuals, such publication having had the effect of engendering a convergence of thinking. There is ample normative evidence that official publications which distill national interpretations of the law do have significant impact upon international thinking. The US Commanders Handbook on The Law of Naval Operations[24] and public release of Standing ROE for US Forces in the mid-1990s,[25] have had a tremendous proselytizing effect on the development of manuals and ROE doctrine in other countries. Partly because of the simple availability of such resources, and partly because of the accomplished line of reasoning employed, the tenor and substance of the positions reached in these sources has consciously and subconsciously influenced the operational legal thinking of others. Indeed, the very phrases of the US ROE are repeated in numerous iterations of coalition ROE that have been relied upon and have even found their way into the UN Model ROE for Peacekeeping Forces.[26]

Finally, it is in the last category of Colonel Graham's three grounds, the question of ROE development through multilateral operations, where the most effective tool for convergence of legal principle is found.

The Psychology of Mission Accomplishment

The psychology of coalition ROE development in active, combined operations is something that is little explored in the literature.[27] As a normative experience, it is evident that this process is one that engenders an irresistible quality of intellectual facilitation. The methodology of coalition ROE harmonization appeals to the

pragmatic, mission accomplishment goals of the military psyche. The process of intense consultation between military partners generates a compulsive mindset and fosters cooperative and creative legal engagement to achieve nationally agreed-upon strategic outcomes. Obvious legal prohibitions, such as those contained in the Ottawa Convention concerning anti-personnel land mines for example, plainly constitute "show stoppers," but the law is not commonly that stark. The modern law of armed conflict is generally more concerned with attaining specific standards, than imposing bright line rules. Thus, the perennial issues of deciding upon questions of "military advantage"[28] and quantifying "proportionality"[29] anticipate a calibrated discretion, which in turn allows for realistic acuity between coalition force ROE.

The issue of "law choice" theory is not new. Answering international relations school critics of international law's alleged "legalistic-moralistic" inertia in the early 1950s, the well known international lawyer, Myres McDougal, emphasized the dynamic nature of international law and spoke of a choice between "effective and ineffective" law.[30] He observed that:

> The process of decision-making is indeed, as every lawyer knows, one of continual redefinition of doctrine in its application to ever-changing facts and claims. A conception of law which focuses upon doctrine to the exclusion of the pattern of practices by which it is given meaning and made effective, is therefore, not the most conducive to understanding.[31]

McDougal concluded that "A realistic conception of law, must, accordingly, conjoin formal authority and effective control and include not only doctrine but also the pattern of practices of both formal and effective decision makers."[32] This thesis of "effective law" shares much with the subsequent Hammerskjold approach to innovative and pragmatic legal resolution[33] and is anchored very heavily within a defined societal value set.

This thinking also draws on the concept of the law of armed conflict as "soft power," a process articulated masterfully by Professor Schmitt.[34] Professor Schmitt examined the decision-making calculus resident within US attitudes concerning treaty ratification and offered a number of hypotheses concerning law as a policy choice. Professor Schmitt sought to identify the causative impact of American decision making, both with respect to those treaties that are ratified, and more intriguingly, those that are not. Hence, he made the significant point that:

> Law can even shape war for those not party to a particular normative standard. For instance, Additional Protocol I, which the United States has not ratified, prohibits most attacks on dams, dikes, and nuclear electrical generating stations. Despite U.S. opposition to this particular provision, there have been no U.S. attacks on any of these

> target sets since the Vietnam War; should it conduct such an attack it would be condemned. . . . Apprehension over condemnation certainly influences the policy choice of whether to engage in such strikes. . . . [I]t would be hard to imagine . . . U.S. forces in a coalition intentionally conducting an operation that would violate Protocol I . . . if any significant coalition partners were parties to the treaty. The realities of coalition-building and maintenance would simply not allow it.[35]

The point artfully made by Professor Schmitt discloses two underlying precepts. The first is that US views on the scope of action legally available as a consequence of not ratifying Additional Protocol I is often contextualized in an operational environment in a manner that accommodates coalition harmony. Just because the United States retains the full legal capacity to attack the types of objects prohibited by the Protocol to others does not mean that it will necessarily undertake such attacks. Policy imperatives regarding coalition cohesion plainly inform decisions concerning attack profiles.

Secondly, the assessment made by Professor Schmitt acknowledges the role of "values" when assessing the relative cost exchange for attacking particular targets or deciding upon requisite levels of collateral damage or incidental injury. The law of armed conflict requires that a military commander exercise his/her judgment as to whether the significance of attacking a particular military objective is worth the "cost." There is actually a wide level of discretion available to the commander under the law provided that such judgments are "reasonable and made in good faith." In the modern context of volunteer military and naval forces, it is likely that military commanders will reflect the very values of the population at large when assessing amorphous standards like "concrete and direct military advantage anticipated." One is often struck with how civilian audiences will go through a target evaluation process and arrive at strikingly similar legal solutions concerning the proportionality equation as would a seasoned military audience. Indeed, the political ramifications of such methodologies tend to be more prescient within military decision-making evolutions than that found within civilian thinking.

It is also evident that within professional military audiences of different nations there tends to be a broad consensus as to the values placed upon the military significance of certain targets and the costs deemed acceptable in terms of incidental civilian injury and collateral damage to property when attacking (or not) those targets. This has been a product of the increasing frequency of multilateral coalition operations over recent years, in conjunction with the dramatic increase of UN peace operations that have operated under common sets of ROE. Similarly, it is also the product of the increasing socialization process brought about by international professional military education. Venues such as the US Naval War College have been hosting officers from around the world for almost

50 years and have been inculcating the teaching program with the promotion of democratic liberal values. These values find precise expression in the targeting decisions made by senior commanders who are driven by both the goals of mission achievement under extant ROE and the increasingly homogenous cultural imperatives of modern societies.

Challenges to Coalition Warfare

While there is much greater commonality to ROE development than what one may imagine, that isn't to deny the very real challenges that pervade this process. At the tactical level, it is self-evidently difficult to frame appropriate ROE in circumstances where government policy as to the existing law is either unarticulated or has been subject to several reversals. While governments may prefer the policy flexibility of leaving their options open as to what they perceive to be customary international law, this has an obviously deleterious consequence for planning for both the subject nation and coalition partners.

The other challenge to coalition interoperability is overt political intervention in the ROE process by governments. Although to be fair, unlike the Vietnam era, the contemporary practice of governments has been to allow the military full reign for the execution of the campaign under the law and to interject political involvement once calculations concerning compliance with the law have been undertaken. Hence, approval may be required for an attack even though it fulfills the proportionality test, but nonetheless anticipates a significant loss of life. Such "intervention" is plainly appropriate and reflects the realities of the political dimension of undertaking modern armed conflict.[36]

Ironically, the greatest potential challenge to coalition operations may come from the application of domestic law to the ROE process. It is somewhat of a paradox that military lawyers of different countries can speak easily about applicable legal concepts and yet when those same lawyers speak to national legal colleagues of other government departments who may have a stake in ROE development, such conversations are at cross-purposes.

The Rome Statute of the International Criminal Court[37] has also brought into focus the challenge of aligning criminal law standards reflected in that treaty with more traditional standards contained within domestic law. Issues such as "intent" and "recklessness" and their translation into an operational context are obvious points of potential difficulty. Similarly, the use of lethal force to protect mission essential property and the application of domestic law self-defense criteria to operations against deadly enemies in the jungles and deserts of the world where military

forces operate in the twilight zone between war and peace are two other areas where there is potential for dichotomous answers.

The issue of dealing with domestic legal conundrums when striving for coalition interoperability is not unique. It may be time to revisit the concept of "transnational law" that was originally championed by those such as Professor Jessup in the 1920s as a more reliable way to advance international law's reforming promise.[38] It is a theme that, in a modified way, has been picked up more recently by Anne-Marie Slaughter and her liberalist, international relations critique of the modern legal method and may well be a profitable avenue of focus for those of us keen to reconcile public international law rights and responsibilities with domestic law.[39] Professor Slaughter advocates a recasting of international law to assimilate public and private law, across and between territorial boundaries of liberal States, to conceive of a more effective body of resulting law that is defined not by "subject or source but rather in terms of purpose and effect."[40]

Conclusion

Professor Louis Henkin famously observed that "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[41] It remains a trite but powerfully correct statement. Despite some clear differences of opinion on some aspects of the law of armed conflict, and despite some very real challenges under both domestic and international law, the process of ensuring legal interoperability for ROE development and mission fulfillment between coalition partners is not as grave as one might imagine. It is incumbent upon professional military lawyers to continue to use their best creative endeavors to seek solutions to otherwise intractable legal problems. This is essential not only to ensure the success of the mission, which is always the paramount obligation, but to also instill greater strength into the intricate mosaic that is international law.

Notes

1. At the time of this writing the United States had not ratified the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [Protocol I], June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000); the Rome Statute of the International Criminal Court, July 17, 1998, 37 INTERNATIONAL LEGAL MATERIALS 999; nor the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 INTERNATIONAL LEGAL MATERIALS 1507.

2. See generally critical commentary on the International Committee of the Red Cross (ICRC) customary law study by David Rivkin and Lee Casey, *Rule of Law: Friend or Foe*, THE WALL STREET JOURNAL, Apr. 11, 2005, *available at* http://www.defenddemocracy.org/research_topics/.

3. This conundrum may even apply in the circumstances of a standing alliance such as NATO. *See* Michael Kelly, *Legal Factors in Military Planning for Coalition Warfare and Military Interoperability*, 2 AUSTRALIAN ARMY JOURNAL 161, 162–3 (2005).

4. *Supra* note 1.

5. *Id.*

6. Australia ratified the Ottawa Convention on January 14, 1999; Canada on December 3, 1997; Germany on July 23, 1998; Japan on September 30, 1998; New Zealand on January 27, 1999; and the United Kingdom on July 31, 1998.

7. Kelly, *supra* note 3, at 169.

8. *Supra* note 1.

9. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, and Protocol I on Non-Detectable Fragments; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices; Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Oct. 10, 1980, 1342 U.N.T.S. 137; Protocol IV on Blinding Laser Weapons, Oct. 13, 1995, 35 INTERNATIONAL LAW MATERIALS 1218; and Protocol V on Explosive Remnants of War, Nov. 28, 2003, (not yet in force).

10. The United States has not ratified Protocol IV (Blinding Laser Weapons) nor Protocol V (Explosive Remnants of War).

11. *See* ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 7.4 n.88 (A. R. Thomas and James Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies) [hereinafter ANNOTATED SUPPLEMENT], which states:

> Although war-sustaining commerce is not subject to precise definition, commerce that indirectly but effectively supports and sustains the belligerent's war-fighting capability properly falls within the scope of the term. . . . Examples of war-sustaining commerce include *imports* of raw materials used for the production of armaments and *exports* of products the proceeds of which are used by the belligerent to purchase arms and armaments. (Emphasis added.)

12. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 60.11 (Louise Doswald-Beck ed., 1995) where, after discussing the US formulation of "war-fighting/war-sustaining" outlined above, states:

> [T]he Round Table accepted the view that the descriptive phrase "integration into the enemy's war-fighting/war-sustaining effort" was too broad to use for the residual category. The phrase chosen to describe the residual category of merchant vessels which were legitimate military objectives was merchant vessels which make an effective contribution to military action by, for example, carrying military materials.

13. *Supra* note 1.

14. Michael N. Schmitt, *The Law of Armed Conflict as Soft Power: Optimizing Strategic Choice*, *in* INTERNATIONAL LAW ACROSS THE SPECTRUM OF CONFLICT: ESSAYS IN HONOUR OF PROFESSOR L.C. GREEN ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 455, 459 (Michael N. Schmitt ed., 2000) (Vol. 75, US Naval War College International Law Studies).

15. See ANNOTATED SUPPLEMENT, *supra* note 11, ¶ 6.2.3, n.36, which provides that:

> Reprisals may lawfully be taken against enemy individuals who have not yet fallen into the hands of the forces making the reprisals. Under customary international law,

members of the enemy civilian population are legitimate objects of reprisals. The United States nonetheless considers reprisal actions against civilians not otherwise legitimate objects of attack to be inappropriate in most circumstances. For nations party to [Additional Protocol I], enemy civilians and the enemy civilian population are prohibited objects of reprisal. The United States has found this new prohibition to be militarily unacceptable. . . .

16. Kelly, *supra* note 3, at 165.
17. David E. Graham, *Coalition Operations – Commentary*, *in* LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN 377 (Andru E. Wall ed., 2002) (Vol. 78, US Naval War College International Law Studies).
18. *Id.* at 378.
19. *Id.*
20. *Id.* at 378–9.
21. Australia:

> In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the "military advantage" are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack.

United Kingdom:

> In relation to paragraph 5(b) of Article 51 and paragraph (2)(a)(iii) of Article 57, that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

Canada:

> It is the understanding of the Government of Canada in relation to sub-paragraphs 5(b) of Article 51, paragraph 2 of Article 52, and clause 2(a)(iii) of Article 57 that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack.

Italy:

> In relation to paragraph 5(b) of Article 51 and paragraph 2(a)(iii) of Article 57, the Italian Government understands that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

Germany:

> In applying the rule of proportionality in Article 51 and Article 57, "military advantage" is understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

The complete text of all reservations and declarations is available at http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P#res.

22. For example, New Zealand declared: "In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57 . . . the term "military advantage" involves a variety of considerations, including the security of attacking forces." A similar declaration was made by Australia. While not a party to Additional Protocol I, the United States has included in The Commander's Handbook on the Law of Naval Operations (*supra* note 11, ¶ 8.1.1) the following

commentary: "Military advantage may involve a variety of considerations, including the security of the attacking force."

23. Australia:

> It is the understanding of Australia that in relation to Article 44, the situation described in the second sentence of paragraph 3 can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1. Australia will interpret the word "deployment" in paragraph 3(b) of the Article as meaning any movement towards a place from which an attack is to be launched. It will interpret the words "visible to the adversary" in the same paragraph as including visible with the aid of binoculars, or by infra-red or image intensification devices.

United Kingdom:

> In relation to Article 44, that the situation described in the second sentence of paragraph 3 of the Article can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1, and that the Government of the United Kingdom will interpret the word "deployment" in paragraph 3(b) of the Article as meaning "any movement towards a place from which an attack is to be launched."

Canada:

> It is the understanding of the Government of Canada that:
>
> > a. the situation described in the second sentence of paragraph 3 of Article 44 can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1; and
> >
> > b. the word "deployment" in paragraph 3 of Article 44 includes any movement towards a place from which an attack is to be launched.

Germany:

> The criteria contained in the second sentence of Article 44, paragraph 3, of Additional Protocol I for distinction between combatants and the civilian population are understood by the Federal Republic of Germany to apply only in occupied territories and in the other armed conflicts described in Article 1, paragraph 4. The term "military deployment" is interpreted to mean any movements towards the place from which an attack is to be launched.

Ireland:

> It is the understanding of Ireland that:
>
> > a. The situation described in the second sentence of paragraph 3 of Article 44 can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1: and
> >
> > b. The word "deployment" in paragraph 3 of Article 44 includes any movement towards a place from which an attack is to be launched.

Spain:

> It is understood that the criteria mentioned in sub-paragraph b of Article 44(3) on the distinction between combatants and civilians can be applied only in occupied territories. The Spanish Government also interprets the expression "military deployment" to mean any movement towards a place from which or against which an attack is going to be launched.

The complete text of all reservations and declarations is available at http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P#res.

24. *Supra* note 11.

25. Chairman, Joint Chiefs of Staff, Standing Rules of Engagement for U.S. Forces, CJCS Inst. 3121.01 (series).
26. Department of Peacekeeping Operations, Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations, May 2002.
27. In the broader context of national security decision making, an insightful analysis of the psychological foundation for such thinking can be found in YEHADA BEN-MEIR, NATIONAL SECURITY DECISIONMAKING: THE ISRAELI CASE (1986).
28. See, e.g., ANNOTATED SUPPLEMENT, *supra* note 11, ¶ 8.1.1, where, in describing "military advantage" in the context of determining the efficacy of an attack, it is stated:

> Only military objectives may be attacked. Military objectives are combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking force.

29. See *id.* ¶ 8.1.2.1, where proportionality is described as follows: "It is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack."
30. Myers S. McDougal, *Law and Power*, 46 AMERICAN JOURNAL OF INTERNATIONAL LAW 102, 113 (1952).
31. *Id.* at 110.
32. *Id.*
33. Oscar Schachter, *Dag Hammarskjold and the Relation of Law to Politics*, 56 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (1962).
34. *See* Schmitt, *supra* note 14.
35. *Id.* at 459.
36. See DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 117 (2004), who comments upon the "CNN effect" and consequential political significance of proportionality determinations.
37. *Supra* note 1.
38. Phillip C. Jessup, *The Functional Approach as Applied to International Law, in* PROCEEDINGS OF THE THIRD CONFERENCE OF TEACHERS OF INTERNATIONAL LAW 134, 137 (1928).
39. *See* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW 503 (1995).
40. *Id.* at 516.
41. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).