

TARGETING OBJECTS OF ECONOMIC INTEREST
IN CONTEMPORARY WARFARE

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I. INTRODUCTION

September 2014: American warplanes strafe oil refineries in the eastern provinces of Syria attempting to curtail the supply of funding for the Islamic State terrorist organization commonly referred to as ISIS.¹ United States Central Command recently went on record and said oil sales on the black market produce up to two million dollars per day for ISIS operations.² Coalition forces combating ISIS have learned this is a valuable economic resource. So, the question is, what are the legal options for targeting sources of revenue through military operations?

This Note posits an analysis in three sections. First, the Background examines the history behind targeting principles as they pertain to military operations, both under United States military operating procedure and International Law.³ This Note then makes the argument that the United States applies a broader interpretation to what military objects are, when compared to their international counterparts.⁴ Finally, this Note acknowledges the likelihood that objects, such as oil depots, may be lawful targets of military attack when applying the United States approach, but may not be under international law.⁵

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¹ Helen Cooper and Anne Barnard, *Warplanes Blast Militants' Refineries in Syria, Targeting a Source of Cash*, N.Y. TIMES (Sept. 25, 2014), http://www.nytimes.com/2014/09/26/world/middleeast/isis-revenue-sources-remain-crucial-target-us-says.html?_r=0.

² *Id.*

³ *See infra* notes 6–30 and accompanying text.

⁴ *See infra* notes 33–72 and accompanying text.

⁵ *See infra* notes 73–78 and accompanying text.

II. BACKGROUND

The St. Petersburg Declaration of 1868 espoused the rule that only military objects are the lawful target of attacks.⁶ The drafters of the St. Petersburg Declaration deemed it unnecessary to attack economic objects of the enemy since every enemy can be defeated by dismantling its military forces.⁷ It was argued that even the most economically strong military force could no longer resist once its military forces have been dismembered.⁸ This principle has remained partially intact since 1868, but modern international law has stretched the legality of attacks to include civilian objects used for a military purpose, such as economic objects.⁹

Distinguishing between combatants and noncombatants (civilians) is the most important and basic rule under customary international law.¹⁰ The “Basic rule,” Article 48 of the 1977 Protocol I Additional to the 1949 Geneva Conventions for the Protection of War Victims (“API”), states: “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”¹¹ Although the term “military objectives” was coined in the 1923 Rules of Air Warfare, a binding definition for this term was not crafted until 1977 in Article 52(2) of API.¹² The binding definition of Article 52(2) provides:

⁶ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297.

⁷ Marco Sassòli, *Legitimate Targets of Attacks Under International Humanitarian Law*, Harvard Program on Humanitarian Policy and Conflict Research, 3 (Jan. 27-29, 2003) <http://www.hpcrresearch.org/sites/default/files/publications/Session1.pdf>.

⁸ *Id.*

⁹ ICRC, *Rule 10. Civilians Objects’ Loss of Protection from Attack*, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter2_rule10 (last visited Jan. 12, 2015).

¹⁰ Yoram Dinstein, *Legitimate Military Objectives Under the Current Jus in Bello*, 78 NAVAL WAR C. INT’L L. STUD., 139, 139 (2002).

¹¹ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of International armed conflict, art. 48, Aug. 6, 1977, 1125 U.N.T.S. 17512 [hereinafter API].

¹² Dinstein, *supra* note 10, at 140.

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹³

As discussed by legal scholars, the definition of 52(2) is not controversial; the controversy is in interpretation and application.¹⁴ Critics of 52(2) believe the language is abstract and generic.¹⁵ As a result of the ambiguity, “the definition is so sweeping that it can cover practically anything.”¹⁶ One possible solution: provide a list of specific military objectives “if only on an illustrative, non-exhaustive basis.”¹⁷ Despite critics advocating for a more sound definition, the inherent plasticity permits decision makers to adapt their military operations in accordance with unanticipated events.¹⁸

The United States has agreed to the definition of Article 52(2) with one sweeping difference.¹⁹ The United States application of Article 52(2) replaces the use of “military action” with “war fighting or war sustaining capability.”²⁰ As a result of this not so subtle difference, military commanders, per *The Commanders Handbook on the Law of Naval Operations* (“Handbook”), are provided more latitude in analyzing whether or not an object may be a lawful target.²¹ The Handbook states,

¹³ API, *supra* note 11, at 27.

¹⁴ *Expert Meeting “Targeting Military Objectives,”* U. Centre Int’l Humanitarian L. i (May 12, 2005), http://www.geneva-academy.ch/docs/expert-meetings/2005/1rapport_objectif_militaire.pdf [hereinafter *Targeting Military Objectives*].

¹⁵ Dinstein, *supra* note 10, at 141.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ AGNIESZKA JACHEC-NEALE, *THE CONCEPT OF MILITARY OBJECTIVES IN INTERNATIONAL LAW AND TARGETING PRACTICES*, 142 (2015).

¹⁹ Dinstein, *supra* note 10, at 141.

²⁰ *Targeting Military Objectives*, *supra* note 14, at 4.

²¹ US Navy, Marine Corps and Coast Guard, *The Commander’s Handbook on the Law of Naval Operations*, Department of Navy, Office of the Chief of Naval Operations, Headquarters, US Marine Corps, Department of Transportation, US Coastal Guard, NWP 1-14M, MCWP

“[e]conomic objects of the enemy that indirectly or effectively support and sustain the enemy’s war-fighting capability may also be attacked.”²² A report on U.S. practices revealed that the common practice of the United States is to give a broad reading to the definition of article 52(2).²³ The United States’s reading would include war-sustaining economic facilities as military objectives.²⁴ The foundation for this logic *may* have its roots in the American Civil War.²⁵ During the Civil War, targeting and destroying the Confederacy’s raw cotton supply was commonplace.²⁶ Cotton fields were considered a legitimate target for attack because they provided economic support to the Confederacy.²⁷

Beyond the Handbook, the President of the United States has also approved the use of “war-sustaining” capability “in the Military Commission Instructions.”²⁸ Over the last several decades, the term “war-sustaining capability” has been used more frequently in official documents.²⁹ The year 1990 marked the introduction of this concept through the Handbook.³⁰ By 2010, official documents including the term “war-sustaining capability” had reached seven, and the term was no longer limited to naval operations.³¹ It is unclear whether the United States’ official position is that of “war-sustaining capability.”³²

5-12.1, COMDTPUB P5800.7A, §§ 8.2-8.2.5, (2007) *available at* <https://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/>.

²² *Id.* § 8.2.5.

²³ ICRC, *United States of America: Practice Relating to Rule 8. Definition of Military Objectives*, https://www.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule8_sectiong (last visited Jan. 12, 2015).

²⁴ *Id.*

²⁵ See ICRC, *Practice Relating to Rule 8. Definition of Military Objectives*, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule8_sectiong (last visited Jan. 12, 2015).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Targeting Military Objectives*, *supra* note 14, at 5.

²⁹ JACHEC-NEALE, *supra* note 18, at 104.

³⁰ *Id.*

³¹ *Id.*

³² *Targeting Military Objectives*, *supra* note 14, at 5.

III. ARGUMENT

As a result of history, most notably WWII, drafters of 1977 Protocol I Additional to the 1949 Geneva Conventions for the Protection of War Victims (“API”) were looking to make drastic changes to targeting principles.³³ Targeting practices during WWII had few limitations; as long as an object made a contribution to the war effort, it could be attacked.³⁴ Because of this loose approach to targeting, drafters of API attempted to use language that would limit the purview of targeting.³⁵

Under Article 52(2) of API, economic targets that gain their value through export may not be legal targets because their contribution to the military action is too remote.³⁶ However, experts have agreed that under both Article 52(2) and the slippery definition of war-sustaining effort, oil facilities would be deemed lawful targets if the armed forces were directly using them (i.e., using the production to fuel their vehicles).³⁷ According to the Department of Defense’s 1993 report to Congress, direct use can be determined when the object is used for a military purpose.³⁸ The denotation of purpose is important in this context; purpose refers to the intended use.³⁹ Accordingly, an argument could be made that ISIS is using oil depots for a military purpose.⁴⁰ The military

³³ *Expert Meeting “Targeting Military Objectives,”* U. Centre Int’l Humanitarian L. i, 6 (May 12, 2005), http://www.geneva-academy.ch/docs/expert-meetings/2005/1rapport_objectif_militaire.pdf [hereinafter *Targeting Military Objectives*].

³⁴ *Id.* at 5.

³⁵ *Id.*

³⁶ *Id.* at 6.

³⁷ *Id.*

³⁸ ICRC, *Practice Relating to Rule 10. Civilian Objects’ Loss of Protection from Attack*, https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter2_rule10_sectiona (last visited Mar. 9, 2015).

³⁹ ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 629-633 (Yves Sandoz et al. eds., Martinus Nijhoff Publishers 1987), available at http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf [hereinafter COMMENTARY].

⁴⁰ See Helen Cooper and Anne Barnard, *Warplanes Blast Militants’ Refineries in Syria, Targeting a Source of Cash*, N.Y. TIMES (Sept. 25, 2014), http://www.nytimes.com/2014/09/26/world/middleeast/isis-revenue-sources-remain-crucial-target-us-says.html?_r=0; US Navy,

purpose, or intended use, is to get money to fund its armed activity, which is achieved from the oil production.⁴¹ Therefore, targeting ISIS controlled oil fields, and potentially other economic sources, would be legal in order to curtail its supply of funding.⁴²

The problem becomes whether export commodities, such as crude oil, make an effective contribution to war-sustaining efforts “in a world of economic privatization and global financial interconnectedness.”⁴³ This is a problem because the benefit received from oil production is indirect.⁴⁴ However, the connection between a lawful target of attack and a nation’s war-sustaining effort may be indirect, direct, or discrete.⁴⁵ This connection may change over time and the object’s overt connection or use is not determinative on the lawfulness of the targeting.⁴⁶ Exports are considered potential objects to be targeted because their connection to a war-sustaining effort may progress from indirect to direct.⁴⁷

The legitimacy of attacks depend on the intelligence gathered; which draws the connection between economic objects and an armed group’s stream of revenue.⁴⁸ Few states recognize the idea that economic objects indirectly contributing to military action constitute a legitimate target.⁴⁹ However, Ecuador has

Marine Corps and Coast Guard, *The Commander’s Handbook on the Law of Naval Operations*, Department of Navy, Office of the Chief of Naval Operations, Headquarters, US Marine Corps, Department of Transportation, US Coastal Guard, NWP 1-14M, MCWP 5-12.1, COMDTPUB P5800.7A, §§ 8.2-8.2.5, (2007) available at <https://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/> [hereinafter the *Handbook*]; ICRC, *Practice Relating to Rule 8. Definition of Military Objectives*, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule8_sectiong (last visited Jan. 12, 2015); *supra* notes 36-39 and accompanying text.

⁴¹ See *supra* notes 36–40 and accompanying text.

⁴² See *supra* notes 36–41 and accompanying text.

⁴³ *Targeting Military Objectives*, *supra* note 33.

⁴⁴ See *id.*

⁴⁵ *Id.* at 4 (citing the OPERATIONAL LAW HANDBOOK).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 5–12.

⁴⁹ AGNIESZKA JACHEC-NEALE, *THE CONCEPT OF MILITARY OBJECTIVES IN INTERNATIONAL LAW AND TARGETING PRACTICES*, 105 (2015).

adopted, verbatim, the U.S. definition of military object.⁵⁰ Official documents from Australia, New Zealand, and Sweden have also adopted the idea that economic targets indirectly contributing to military operations are legitimate military objectives, so long as their total or partial destruction would offer a definite military advantage.⁵¹

Targeting under Article 52(2) is more restrictive than the U.S. approach, which permits targeting on the basis of an indirect relation.⁵² By way of example, under Article 52(2), an attack on an organization's taxation system (i.e., the Internal Revenue Service) would be unlawful, whereas under the U.S. approach it may not be.⁵³ The taxation system of an organization can loosely be seen as a necessary economic function in order to finance the war-sustaining efforts of an armed group.⁵⁴ Though indirect, under the U.S. definition, if the partial or total destruction of the taxation system would offer a definite military advantage, the taxation system may be a lawful target.⁵⁵

The U.S. approach to defining military objects reflects the idea that an object may have an indirect, direct, or discrete connection to war-sustaining efforts.⁵⁶ Article 52(2) addresses the differing levels of connection between military action and the object under review; however, Article 52(2) requires a more direct connection in order to be a legitimate target.⁵⁷ Although some experts may view the term war-sustaining as a slippery slope, this approach provides competent decision makers more latitude when assessing whether or not an object is a lawful target of attack.⁵⁸ The drafters may have envisioned the need for this latitude because

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Targeting Military Objectives*, *supra* note 33, at 4–6.

⁵³ *Id.* at 6–7.

⁵⁴ *See id.* at 5–6.

⁵⁵ *See id.*

⁵⁶ Janina Dill, *The American Way of Bombing and International Law: Two Logics of Warfare in Tension*, in *THE AMERICAN WAY OF BOMBING* 131, 136 (Matthew Evangelista & Henry Shue eds., Cornell Univ. Press 2014).

⁵⁷ *Id.* at 135.

⁵⁸ *See* JACHEC-NEALE, *supra* note 49; *Targeting Military Objectives*, *supra* note 33, at 6.

they understood the elasticity needed in assessing a battlefield environment.⁵⁹

The U.S. concept of war-sustaining capability did not emerge until U.S. involvement in the Iraq-Iran war, during which ships carrying oil in the Persian Gulf were often under attack by both Iraqi and Iranian forces.⁶⁰ However, this did not become commonplace until Iraq attacked Iranian tankers and the Kharg Island oil production terminal, which supplied both Iranian civilians and military.⁶¹ As a result, Iran intensified its targeting of Iraqi oil tankers, threatened to do the same to any Persian Gulf State supporting Iraq, and Iraq announced that it would attack any ship going to or from Iran's ports.⁶² In 1987, the U.S. Navy became involved in the "tanker war" by reflagging and escorting Kuwaiti ships and shortly thereafter the United States launched attacks against oil platforms in Iran.⁶³ Ironically, in the same year referenced in the Handbook, economic targets were now seen as contributing to the war-sustaining capability of the enemy.⁶⁴

Since 1987, the war-sustaining formula has also found its way into other U.S. doctrinal and operational law resources.⁶⁵ Albeit inconsistent, the references can be found in resources published by all four branches of the U.S. military and the Department of Defense.⁶⁶ However, the discussion does not stop with U.S. policy as the war-sustaining formula has become more popular in the international arena as well.⁶⁷

The Kosovo air campaign underwent a never before seen review of targeting.⁶⁸ The targeting review process took place at

⁵⁹ See JACHEC-NEALE, *supra* note 49; *Targeting Military Objectives*, *supra* note 33, at 6.

⁶⁰ JACHEC-NEALE, *supra* note 49, at 99.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 100.

⁶⁵ *Id.*

⁶⁶ *Id.* at 100–104.

⁶⁷ *Id.* at 105.

⁶⁸ James A. Burger, *International humanitarian law and the Kosovo crisis: Lessons learned or to be learned*, INT'L REV. OF THE RED CROSS, No. 837 (Mar. 31, 2000) <https://www.icrc.org/eng/resources/documents/misc/57jqcs.htm>.

NATO headquarters and involved both member states and individual non-member states participating in the campaign.⁶⁹ Insofar as targeting was concerned, the parties understood military and political objectives were better served by limiting civilian damage.⁷⁰ In furtherance of this understanding, the parties were in agreement that civilian facilities used for a military purpose cannot be protected from attack simply because the civilian factor is present.⁷¹ The decision to target dual-use facilities was a difficult task during the air campaign, but it was reasoned that when a civilian object was put to military use, the object becomes a dual-use object and loses its protected status under the law.⁷²

During Operation Allied Forces, war planners understood targeting Yugoslav oil refineries created an economic setback for Yugoslavia.⁷³ However, it was decided that the capabilities of the Yugoslav military within Kosovo were not affected by doing so.⁷⁴ Serbs within Kosovo simply drew on local oil supplies.⁷⁵ Because of the economic setback to the Yugoslav infrastructure, eliminating oil refineries had a direct impact on the economic state of Yugoslavia.⁷⁶ However, since Yugoslavia had other means of revenue, dismantling their oil supply was not as crippling as it may potentially be on an organization such as the Islamic State terrorist group (“ISIS”).⁷⁷ When sales from oil production constitute one of the main revenue sources for an armed group, curtailing this supply may offer a definite military advantage.⁷⁸

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Burger, *supra* note 68, at 12; Marco Sassòli, *Legitimate Targets of Attacks Under International Humanitarian Law*, Harvard Program on Humanitarian Policy and Conflict Research, 7 (Jan. 27-29, 2003), <http://www.hpcrresearch.org/sites/default/files/publications/Session1.pdf>.

⁷³ Earl H. Tilford, Jr., Operation Allied Force and the Role of Air Power, *PARAMETERS*, Winter 1999-2000, at 29, *available at* <http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/99winter/tilford.htm>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ Tilford, *supra* note 73.

More recently, President Obama has authorized targeted airstrikes within Iraq and Syria as part of a comprehensive strategy to defeat ISIS.⁷⁹ The United Nations Security Council has also passed a resolution authorizing the targeting of ISIS revenue sources, to include ISIS controlled oil fields.⁸⁰ Even though decision makers are giving authorization to conduct such attacks, what is the legal justification? The simple answer may be that the destruction of these sites is justified because their purpose is to provide oil to ISIS.⁸¹ The legitimacy of these attacks depends on the accuracy of the intelligence gathered, which draws the connection between ISIS controlled oil and their stream of revenue.⁸²

IV. CONCLUSION

Recent targeting application has diverged from the strict letter of the law found in international law and international practice, which may be attributed to precision strike capabilities.⁸³ With the advent of more accurate and strategic targeting abilities, military forces are less likely to run afoul with collateral damage.⁸⁴

The U.S. war-sustaining approach appears to be gaining traction when it comes to targeting economic objects, specifically, the targeting of oil production facilities.⁸⁵ Part of the reason this has remained an uncontested issues is because there is often little concern for collateral damage when targeting oil production facilities.⁸⁶ Depending on which approach is taken, the legal

⁷⁹ *Operation Inherent Resolve: Targeted Operations Against ISIL Terrorists*, U.S. DEPARTMENT OF DEFENSE, http://www.defense.gov/home/features/2014/0814_iraq/ (last visited May 9, 2015).

⁸⁰ Jackie Northam, *U.N. Security Council Passes Resolution Targeting ISIS Revenue*, NPR (Feb. 15, 2015), <http://www.npr.org/2015/02/15/386544373/u-n-security-council-passes-resolution-targeting-isis-revenue>.

⁸¹ Kenneth Watkin, *Targeting "Islamic State" Oil Facilities*, 90 NAVAL WAR C. INT'L L. STUD., 499 (2014).

⁸² *Id.* at 512.

⁸³ Kenneth Watkin, *Targeting "Islamic State" Oil Facilities*, 90 NAVAL WAR C. INT'L L. STUD., 499, 512 (2014).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

assessment may change.⁸⁷ However, the underlying requirement does not change; the partial or total destruction of the target must offer a definite military advantage.⁸⁸ Objects fall within the purview of a lawful target much easier under the U.S. definition of military object.

⁸⁷ ICRC, *Practice Relating to Rule 8. Definition of Military Objectives Rule 10. Civilians Objects' Loss of Protection from Attack*, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule8 (last visited Jan. 12, 2015).

⁸⁸ *Id.*