

# **Targeting War Sustaining Activities**

International Humanitarian Law Workshop  
Yale Law School  
October 1, 2016

# **Additional Protocol I, Article 52(2)**

“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.”

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Is the rule in Article 52(2) part of customary international law?

## 2. NIAC Question:

Is the rule in Article 52(2) applicable to non-international armed conflict under customary international law?

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# Threshold Questions

“[T]his Administration has carefully reviewed the rules governing targeting operations [against al-Qaeda] to ensure that these operations are conducted consistently with law of war principles, including: First, the principle of distinction, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack.”

- Harold Hongju Koh, Legal Adviser, Department of State, The Obama Administration and International Law, Annual Meeting of the American Society of International Law, Washington D.C., March 25, 2010

# Threshold Questions

“In particular, I’d like to spend a few minutes walking through some of the targeting rules that the United States regards as customary international law applicable to all parties in a NIAC:

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Insofar as objects are concerned, military objectives are 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.**”

- Brian Egan, International Law, Legal Adviser, Department of State, Legal Diplomacy, and the Counter-ISIL Campaign, Annual Meeting of the American Society of International Law, Washington D.C., April 4, 2016

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Insofar as objects are concerned, military objectives are 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. **The United States has interpreted this definition to include objects that make an effective contribution to the enemy’s war-fighting or war-sustaining capabilities.”**

- Brian Egan, International Law, Legal Adviser, Department of State, Legal Diplomacy, and the Counter-ISIL Campaign, Annual Meeting of the American Society of International Law, Washington D.C., April 4, 2016

# **(Indirect) Military Objects**

“War-fighting” capabilities—e.g., petroleum used to fuel military vehicles

“War-sustaining” capabilities—e.g., petroleum used to generate revenue to fund armed forces

# Military Objects

“The crux of the issue is related to revenues from exports of oil which is not put to military use by the enemy. The majority of the Group of Experts took the position that the connection between revenues from such exports and military action is **too remote**. Consequently, it rejected the war-sustaining argument.”

- HPCR Manual on International Law Applicable to Air and Missile Warfare, 2002

“Advocates of this approach would, as an illustration, argue that it is lawful to launch cyber attacks against the enemy State’s oil export industry if the war effort depended on the revenue from oil sales. The majority of the International Group of Experts rejected this position on the ground that the connection between war-sustaining activities and military action was **too remote**.”

- Tallinn Manual on the International Law Applicable to Cyber Warfare, 2013

# BOTHE, PARTSCH & SOLF

“With respect to persons, the ICRC attempted to distinguish civilians who (1) participate directly in combat operations, (2) those who are linked “to the military effort without being the direct cause of damage inflicted on the adversary on the military level”, and (3) those linked to “the war effort” which States generally demand of all persons under their sovereignty. Only the first class of civilians were to be the object of attack. Presumably, the objects used in the activities mentioned in the second clause are legitimate objects of attack. These are referred to in this Commentary as linked to the military phase of a Party’s overall war effort. See ICRC, Conf. Gvt. Experts, 1971, Doc. vol. III, pp. 27-28. See Carnahan, Protecting Civilians under the Draft Geneva Protocol: A Preliminary Inquiry 18 Air Force Law Review 47-48 (1976) for an analysis of this definition. The author points out that the test of effective contribution to military action, would again justify the destruction of raw cotton by the Union during the American Civil War, not because raw cotton had any value as an implement of war, but because “in the circumstances ruling at the time” it was the Confederacy’s chief export and thus the ultimate source of all Confederate weapons and military supplies. Claims for the destruction of British-owned cotton were disallowed by an Anglo-American arbitration tribunal (Report of the US Agent, 6 Papers relating to the Treaty of Washington, pp. 52–57 (1874)).”

# State Practice & Opinio Juris

1. French, Russian, U.K., U.S. operations against ISIL oil revenues (2015-present)
2. NATO operations against Taliban narcotics revenues (2008-2014)
3. Ethiopian operation against electrical power station in Eritrean-Ethiopian War (1998-2000)
4. NATO operations in Kosovo intervention (1999)
5. Coalition operations in Persian Gulf War (1990-1991)
6. State and U.N. actions during Iran-Iraq War (1980-1988)

# Limiting Principles

1. Definite military advantage
2. War-sustaining objects vs. individuals engaged in war-sustaining function
3. The “great staple”
4. Proportionality analysis

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1. Definite military advantage

Not: indeterminate, speculative, or remote

2. War-sustaining objects vs. individuals engaged in war-sustaining function

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Not: Direct participation in hostilities

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indispensable and principal source

4. Proportionality analysis

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4. Proportionality analysis

“concrete and direct military advantage anticipated”

vs.

“a definite military advantage”

# POTUS



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