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## Targeting “Islamic State” Oil Facilities

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# Targeting “Islamic State” Oil Facilities

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## I. INTRODUCTION

In June 2014 a radical jihadist group, the Islamic State in Iraq and al Sham (ISIS), which had evolved from Al Qaeda in Iraq (AQI), launched an offensive seizing Tikrit and Mosul.<sup>1</sup> ISIS subsequently gained control of significant portions of Western and Central Iraq. It is unlikely ISIS could have accomplished this feat without the significant support of the Sunni population in these areas, highlighting the ethnic divide that has come to define Iraq in

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1. *Iraq Crisis: Militant ‘Seize Tikrit’ after Taking Mosul*, BBC NEWS (June 11, 2014), <http://www.bbc.com/news/world-middle-east-27800319>. See also MICHAEL W. S. RYAN, DECODING AL-QAEDA’S STRATEGY: THE DEEP BATTLE AGAINST AMERICA 204–05 (2013) (Al-Sham is the Arabic word for the Levant, which includes “Syria, Lebanon, Jordan, Israel, the Palestinian Territories, and the Sinai . . .”).

the post 2003 period.<sup>2</sup> As this jihadist group advanced into Iraq it demonstrated unforgiving, radical and systemic criminal behavior, including the execution of prisoners, the murder of ethnic minorities and the forcing of women into sexual slavery.<sup>3</sup> The quick defeat of Iraqi conventional security forces at the hands of a non-State actor portrayed in the media as “terrorists,” immediately propelled this group to the forefront of the attention of Western governments. In reality, ISIS had already achieved significant success in Syria and Iraq in carving out territory that it sought to govern as part of its goal to create a caliphate. This resurgence in Iraq included seizing control of Fallujah in early 2014.<sup>4</sup> In the previous year ISIS demonstrated it was capable of carrying out coordinated attacks on Iraqi prisons, resulting in the escape of at least 500 of its experienced fighters.<sup>5</sup>

Adopting a new name, the “Islamic State,”<sup>6</sup> this jihadist group is reported to apply a governance structure of “four high councils, each of which oversees a different area: shura, or policy; Shariah, or law; internal security; and military.”<sup>7</sup> The State-like aspirations of the group are also reflected in the call by Abu Bakr al-Baghdadi, its self-styled caliph, for judges, doctors, engineers and administrative specialists to help run the new cali-

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2. PATRICK COCKBURN, *THE JIHADIS RETURN: ISIS AND THE NEW SUNNI UPRISING* 60–63 (2014) (outlining the alienation of the Sunni population by the Iraqi government).

3. Dominic Evans & Maggie Fick, *U.N. Accuses Islamic State of Executions, Rape, Forced Child Recruitment in Iraq*, REUTERS (July 20, 2014), <http://www.reuters.com/article/2014/07/20/us-iraq-security-idUSKBN0FN27N20140720>.

4. *Iraqi PM Says He Won't Order Assault on Fallujah*, CBS NEWS (Jan. 12, 2014), <http://www.cbsnews.com/news/iraqi-pm-says-he-wont-order-assault-on-fallujah/>.

5. COCKBURN, *supra* note 2, at 61; *Iraq Jailbreaks: Hundreds Escape in Taji and Abu Ghraib*, BBC NEWS (July 22, 2013), <http://www.bbc.co.uk/news/world-middle-east-23403564>.

6. Western States largely avoid using the term “Islamic State,” presumably in order not to assign that organization any legitimacy.

7. Jess Bravin, *Probe Into War Crimes Targets Islamic State Militants*, WALL STREET JOURNAL (Sept. 4, 2014), [http://online.wsj.com/news/article\\_email/probe-into-war-crimes-targets-islamic-state-militants-1409864371-IMyQjAxMTA0MDAwNDEwNDQyWj?tesla=y](http://online.wsj.com/news/article_email/probe-into-war-crimes-targets-islamic-state-militants-1409864371-IMyQjAxMTA0MDAwNDEwNDQyWj?tesla=y). See also Ben Hubbard & Eric Schmitt, *Military Skill and Terrorist Technique Fuel Success of ISIS*, NEW YORK TIMES (Aug. 27, 2014) <http://www.nytimes.com/2014/08/28/world/middleeast/army-know-how-seen-as-factor-in-isis-successes.html> (The governance structure includes “12 walis, or local rulers; a three-man war cabinet; and eight others who manage portfolios like finance, prisoners and recruitment.”).

phate.<sup>8</sup> With what was perceived to be a sudden emergence of the Islamic State spanning both Iraq and Syria, most of the initial legal analysis concentrated on whether the United States and its coalition partners, acting in support of the Iraqi government, could lawfully carry out air strikes in Syria as well as Iraq as a matter of *jus ad bellum*. However, the commencement of aerial attacks on the night of September 22 in Syria introduced new legal issues relating to the actual conduct of hostilities. These include questions regarding the criteria being applied to justify strikes on oil production facilities under *jus in bello* (or international humanitarian law, IHL), which are traditionally attacked as part of a strategic air campaign.<sup>9</sup>

Two weeks after the commencement of the campaign a number of mobile oil refineries were hit.<sup>10</sup> The onset of this bombing campaign was noteworthy for two reasons. First, for a group widely called “terrorists,” evoking thoughts of a small cellular horizontally organized armed group, this State action confirmed that the Islamic State is a very different enemy. Like much of Al Qaeda and its Associated Movements (AQAM), the Islamic State presents a much more significant challenge than terrorism, which is often equated to criminal activity.<sup>11</sup> The Islamic State, and other groups such as Al Shabaab and Boko Haram are as much insurgent groups as they are terrorist ones. The emergence of Islamic State as a military force capable of controlling territory confirms the Al Qaeda doctrinal embrace of classic guerrilla theory, which envisages the development of more conventional forces in addition to its guerrilla elements.<sup>12</sup> The conduct of the Islamic State military campaign and the taking on of governance responsibilities requires access to significant economic means. Like many non-State

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8. Ed Adamczyk, *ISIS Leader to World's Muslims: 'Build Islamic State'* UPI (June 1, 2014), [www.upi.com/Top\\_News/World-News/2014/07/01/ISIS-leader-to-worlds-Muslims-Build-Islamic-State/8971404235322/](http://www.upi.com/Top_News/World-News/2014/07/01/ISIS-leader-to-worlds-Muslims-Build-Islamic-State/8971404235322/).

9. Kenneth Watkin, *Targeting in Air Warfare*, 44 ISRAEL YEAR BOOK ON HUMAN RIGHTS 1, 5–16 (2014) (for a discussion of air power theory and the conduct of strategic air campaigns).

10. Keith Johnson, *Has the US Turned off the Islamic State's Oil Spigot*, FOREIGN POLICY (Oct. 7, 2014), [http://www.foreignpolicy.com/articles/2014/10/07/has\\_the\\_us\\_turned\\_off\\_the\\_islamic\\_states\\_oil\\_spigot\\_isis\\_syria](http://www.foreignpolicy.com/articles/2014/10/07/has_the_us_turned_off_the_islamic_states_oil_spigot_isis_syria).

11. ABDEL BARI ATWAN, AFTER BIN LADEN: AL QAEDA, THE NEXT GENERATION 15 (2012).

12. NORMAN CIGAR, AL-QA'DA'S DOCTRINE FOR INSURGENCY 20–22 (2009) and RYAN, *supra* note 1, at 204–30 (where he notes “[l]ike Naji, al-Qurashi, al-Muqrin, and other Al Qaeda strategists, al-Suri subscribes to a classic three-stage guerrilla war strategy loosely following the Maoist model.”).

actors,<sup>13</sup> the financial support for the Islamic State is derived from illegal activity, including the smuggling of oil.<sup>14</sup> That a non-State “terrorist” actor can present a target set similar to States, complete with a war-sustaining, albeit illegal, industry leads to the second issue—which economic targets can lawfully be attacked by Coalition air strikes? It is this latter issue that is a particular focus of this article.

## II. WAR-SUSTAINING TARGETS

The strikes conducted by Coalition aircraft have included a number of obvious targets such as enemy leaders and fighters, command posts, logistics facilities, and military vehicles. Standing out as different were, in the words of the Pentagon Press Secretary, the “12 ISIL-controlled modular oil refineries located in remote areas of eastern Syria.”<sup>15</sup> These oil facilities were first attacked on the night of September 24 by the military forces of the United States, the Kingdom of Saudi Arabia and the United Arab Emirates. The targets were rendered inoperable, but not completely destroyed with the hope that they might be brought back into production in the future by Syrian opposition groups. The rationale for the attacks was that “[t]hese small-scale refineries provide fuel to run ISIS operations, money to finance their continued attacks throughout Iraq and Syria, and they are an economic asset to support future operations.”<sup>16</sup> It is the war-sustaining basis for these attacks that points to their strategic nature.

Under IHL the authority to strike at military objects is generally broader than attacking persons. In the context of the Islamic State, attacks can be directed against members of its organized armed group, or civilians who are “taking a direct part in hostilities,”<sup>17</sup> while objects qualify as military

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13. JUAN C. ZARATE, *TREASURY’S WAR: UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE* 23 (2013) (“terrorist groups around the world have been known to use all forms of criminal activity to raise money, including drug trafficking, extortion, kidnapping, human trafficking, all forms of fraudulent schemes and counterfeiting.”).

14. Keith Johnson, *The Islamic State is the Newest Petrostate*, *FOREIGN POLICY* (July 28, 2014), [http://www.foreignpolicy.com/articles/2014/07/28/baghdadis\\_hillbillies\\_isis\\_iraq\\_syria\\_oil\\_terrorism\\_islamic\\_state](http://www.foreignpolicy.com/articles/2014/07/28/baghdadis_hillbillies_isis_iraq_syria_oil_terrorism_islamic_state).

15. U.S. Department of Defense Press Briefing by Pentagon Press Secretary Navy Rear Adm. John Kirby (Sept. 25, 2014), <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5506>.

16. *Id.*

17. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), June 8, 1977,

objectives if they “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.”<sup>18</sup> As Leslie Green noted, such military objectives could include “economic targets that indirectly but effectively support enemy operations.”<sup>19</sup> Rule 23 of the 2009 *HPCR Manual on International Law Applicable to Air and Missile Warfare* reflects this broader target set for objects. It notes that normally civilian “[o]bjects which may qualify as military objectives . . . include, but are not limited to, factories, lines and means of communications (such as airfields, railway lines, roads, bridges and tunnels); energy producing facilities; oil storage depots; transmission facilities and equipment.”<sup>20</sup> Where disagreement exists is on the breadth of targets that can be struck.

In its *Military Commissions Act of 2009*, the United States has adopted criteria that permit an attack on objects that by “their nature, location, purpose, or use, effectively contribute to *the war-fighting or war-sustaining capability* of an opposing force.”<sup>21</sup> This approach seems to have been first referred to in the 1997 United States *Commander’s Handbook on the Law of Naval Operations*,<sup>22</sup> and appears to be based historically on a Civil War era rationale that destroying raw Confederate cotton was justified because its sale provided funds for the purchase of arms and ammunition.<sup>23</sup> This approach can be

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1125 U.N.T.S. 3 [hereinafter AP I]. See also INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereinafter the *Interpretive Guidance*].

18. AP I, *supra* note 17, art. 52(2).

19. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 191 (2d ed. 2000).

20. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE* r. 23 (2013) [hereinafter *LAW OF AIR WARFARE MANUAL*], available at <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>.

21. Military Commission Act of 2009, Pub. L. No. 111-84, § 950p(a)(1), 123 Stat. 2190 (codified at 10 U.S.C 47A (2006)) (emphasis added).

22. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* (1997), reprinted in *ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* ¶ 8.1.1 A. R. Thomas & James C. Duncan eds., 1999 (Vol. 73, U.S. Naval War College International Law Studies).

23. YORAM DINSTEN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 95 (2d ed. 2010); Michael N. Schmitt, *Targeting Narcinsurgents in Afghanistan: The Limits Of International Humanitarian Law*, 12 YEAR BOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 19 (2009).

contrasted with the wording in Article 52(2) of *Additional Protocol I*, of which 89% of States are parties, including Saudi Arabia and the United Arab Emirates.<sup>24</sup> The Article contains a more narrowly phrased requirement that an object make an effective contribution to “military action.”<sup>25</sup> The question remains whether the customary law basis for targeting such military objectives is broader than that found in this treaty law.

The *Commentary* to the *Air and Missile Warfare Manual* identified this as a controversial issue, referencing the example of attacks on “export oil production intended for Neutrals since the profits finance the war effort.”<sup>26</sup> Unlike the situation of “oil or petrol dedicated to military use,” 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 . . . .”<sup>27</sup>

Interestingly, the crux of the issue was identified as being “revenues from exports of oil which is not put to military use by the enemy.”<sup>28</sup> This raises the question of whether tracking the proceeds of the oil sales can provide some support for targeting war-sustaining activities if all, or at least a substantial part, of the money goes towards directly supporting military operations, as opposed to governance-related activities. However, tracing those proceeds may be very difficult to do.<sup>29</sup> Further, given the role being assumed by the Islamic State of governing territory it may prove challenging to make a sufficient connection between the money gained and military action to justify strikes on that basis. In this respect, non-State actors frequently engage in broader humanitarian and charitable activities. For example, this can be seen with the Pakistani terrorist group, Lashkar-e-Taiba (LeT),<sup>30</sup> and Hezbollah,<sup>31</sup> although it can sometimes be difficult to separate

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24. For a current list of the State Parties to AP I, see the International Committee of the Red Cross website, available at [https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=470](https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470) (last visited Oct. 15, 2014) (there are 174 States Parties to AP I).

25. AP I, *supra* note 17, art. 52(2).

26. LAW OF AIR WARFARE MANUAL *supra* note 20, cmt. accompanying r. 24, ¶ 2.

27. *Id.*

28. *Id.*

29. Johnson, *supra* note 10 (“Treasury officials concede that targeting small-scale smuggled oil is harder than tracking illicit terror financing.”).

30. STEPHEN TANKEL, STORMING THE WORLD STAGE: THE STORY OF LASHKAR-E-TAIBA 67–102, 115–17 (2013) (The LeT, which carried out the 2008 Mumbai attack was under the organizational control of the Markaz al-Dawa wal-Irshad (MDI), or as it was to be called the Jamaat-ul-Dawa or JuD. That organization provides extensive educational, medical and missionary services in Pakistan.).

the charitable activities of these non-State actors from their military activities.<sup>32</sup> When a governance role is assumed it is inevitable that financial resources will be used for purposes additional to the conduct of military operations.

If the goal of the attacks is to stop refined oil from being supplied to Islamic State military forces, then it appears to logically fit within the scope of “war-fighting.” That part of the U.S. test has been recognized as being basically the same as “military action.”<sup>33</sup> If these attacks, however, are intended to stop the sale of smuggled oil, the proceeds of which provide “fuel” for Islamic State activities, only part of which includes military action, the military objective determination is potentially much more controversial.

On one level the terrorist nature of the Islamic State combined with the illegal nature of oil smuggling makes it emotively easier to apply the broader war-sustaining rationale for conducting such strikes. Criminal involvement in the smuggling of oil in the region was, however, an endemic problem long before the rise of the Islamic State.<sup>34</sup> It was reported that in 2006 “Iraqi police seized 400,000 barrels of crude oil that was being smuggled into Syria, often relying on forged documents and facilitated by the complicity of government officials in both countries.”<sup>35</sup> Further, in November 2007 “authorities arrested Saadi Ibrahim, whom they described as ‘a major oil smuggler’ and AQI financier.”<sup>36</sup>

Certain methods for the conduct of economic warfare are permitted during international armed conflict, which generally do not require the use

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31. MATTHEW LEVITT, *HEZBOLLAH: THE GLOBAL FOOTPRINT OF LEBANON’S PART OF GOD* 14 (2013) (providing an outline of the Hezbollah governance structure that includes five administrative bodies organized around thematic responsibilities: “political, military (jihad), parliamentary, executive and judicial activities.”).

32. *Id.* at 297–98 (The operations of Hezbollah’s Unit 3800 in Iraq, which supported Iraqi Shi’a military groups, was reported to involve the establishment of charitable organizations to assist in recruiting.).

33. Horace B. Robertson Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, in *LAW OF MILITARY OPERATIONS LIBER AMICORUM* PROFESSOR JACK GRUNAWALT 197, 206 (Michael N. Schmitt, ed., 1998) (Vol. 72, U.S. Naval War College International Law Studies); DINSTEN, *supra* note 23, at 95.

34. PAUL WILLIAMS, *CRIMINALS, MILITIA, AND INSURGENTS: ORGANIZED CRIME IN IRAQ* 63–93 (2009)

35. *Id.* at 73.

36. *Id.* at 232.

of force. These include conducting naval<sup>37</sup> and aerial blockades,<sup>38</sup> and the visit and search of ships,<sup>39</sup> as well as the inspection and interception of aircraft.<sup>40</sup> Similarly, in the current conflict, better border enforcement by States adjacent to Syria might provide a possible solution, although at the present time that option does not appear to be a fully effective one.<sup>41</sup>

However, under IHL, the fact that the Islamic State may have adopted, coerced, or partnered with those carrying out existing smuggling activity does not make the participants in this criminal activity automatically part of the jihadist group. Neither does the failure to carry out effective law enforcement provide a justification for air attacks. This is not a new issue. Regarding suicide bombers making their way into Iraq during the post 2003 insurgency, General Stanley McChrystal noted in his memoir that the “supply lines of material, money recruiters, handlers, and, most importantly, volunteers, stretched to Riyadh and Aleppo, Tunis and Hamburg.”<sup>42</sup> It is questionable how much of this activity, while undoubtedly mostly illegal, or the persons engaged in it, would have constituted lawful military objectives justifying the conduct of air strikes.

To date strikes appear to have focused primarily on the oil production facilities rather than the distribution network. If, however, the targeting is extended to other parts of the oil smuggling network, the issue of the broader collateral effect on the civilian population would arise. Consideration must be given to the extent of civilian involvement in what is fundamentally a criminal activity. It is reported that Islamic State-related smuggling extends to villages on both sides of the Syrian/Turkish border, where

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37. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, 176–80 (Louise Doswald-Beck, ed., 1995) [hereinafter the SAN REMO MANUAL]; 1 Jacob Turkel et al., The Public Commission to Examine the Maritime Incident of 31 May 2010, ¶¶ 29–36 (2011), available at <http://turkel-committee.gov.il/files/worddocs//8707200211english.pdf>.

38. LAW OF AIR WARFARE MANUAL, *supra* note 20, at 287–300.

39. SAN REMO MANUAL, *supra* note 37, at 195–205.

40. LAW OF AIR WARFARE MANUAL, *supra* note 20, at 272–86.

41. Fehim Taştekin, *Turkish Villages Smuggle IS Oil through Makeshift Pipelines*, AL-MONITOR: THE PULSE OF THE MIDDLE EAST (Sept. 15, 2014), <http://www.al-monitor.com/pulse/originals/2014/09/turkey-syria-iraq-illegal-oil-pipeline.html> (“At the end of March, soldiers that had until then been watching the goings on from a hilltop about 100 meters from the river began digging up the pipes from the fields and cutting the ones that lay visible in the streets. Checkpoints were established to prevent the diesel from leaving Hacıpasa. But the smugglers always found ways to bypass the gendarmerie, the latest being shipping the fuel in barrels.”).

42. STANLEY MCCRYSTAL, MY SHARE OF THE TASK: A MEMOIRE 168 (2013).

local inhabitants use small diameter irrigation piping buried under fields and crisscrossed through backyards to illegally transport oil from tankers on the Syrian side.<sup>43</sup> In this context, it is unclear where the war-sustaining line would be drawn, and whether the bombing campaign could ultimately be extended to the wider tanker/pipeline distribution network.

There has been considerable resistance amongst international law scholars towards recognizing a war-sustaining approach. The concern has been that such an approach might ultimately lead to indiscriminate attacks, and the type of wide ranging aerial assaults with extensive civilian casualties, which were so controversial during World War II.<sup>44</sup>

A similar issue has arisen elsewhere in the post 9/11 operational environment. Michael Schmitt has noted that NATO contemplated attacking drug production facilities and drug traffickers in Afghanistan because the Taliban obtained funds by taxing such activity, as well as by providing security.<sup>45</sup> As he indicates "the targeting of drug-related objects would generally be permissible under IHL for those who characterize 'war-sustaining' entities as military objectives."<sup>46</sup> However, a 2009 Report to the Committee on Foreign Relations in the United States Senate indicates the authorization to use lethal force in this context in Afghanistan caused some countries to question "whether the killing of traffickers and destroying drug labs complied with international law."<sup>47</sup> Filters were said to have been put in place to ensure "the alliance remains within the bounds of the law."<sup>48</sup>

The issue remains regarding the degree of remoteness between the object being attacked and its connection to military action, as well as identifying the military advantage to be gained from the strike. Too remote a connection from an international humanitarian law perspective makes the destruction of the target, as well as the collateral killing or injury of civilians in or around the target difficult to justify.

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43. Taştekin, *supra* note 41.

44. Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 192, 199 (1995). *But see* Robertson, *supra* note 33, at 210 (where this is suggested to be an exaggerated claim).

45. Schmitt, *supra* note 23, at 6.

46. *Id.* at 19.

47. REPORT TO THE SENATE COMM. ON FOREIGN RELATIONS, 111TH CONG., 1ST SESS., AFGHANISTAN'S NARCO WAR: BREAKING THE LINK BETWEEN DRUG TRAFFICKERS AND INSURGENTS at 16 (2009), available at [http://fas.org/irp/congress/2009\\_rpt/afghan.pdf](http://fas.org/irp/congress/2009_rpt/afghan.pdf).

48. *Id.*

It might be argued that attacking war-sustaining targets is not much different than striking pirate infrastructure, and that the destruction of an Islamic State oil facility, operating as part of a criminal enterprise, is not as problematic as might otherwise appear. This can be seen from the May 15, 2012 European Union Naval Force aerial attack against pirate infrastructure in Somalia.<sup>49</sup> That attack does not appear to have been carried out as part of an armed conflict, which means it would have been a law enforcement action, governed by human rights law.<sup>50</sup> The anti-piracy strike, however, was conducted in such a manner as to avoid civilian casualties. Given the present operational environment in both Iraq and Syria, conditions similar to the unique situation that presented itself in Somalia are unlikely to be readily replicated.

### III. WHAT DOES “ISIS-CONTROLLED” MEAN?

Several issues remain. What exactly is meant by reference to “ISIS-controlled” oil production facilities? Are such facilities civilian-operated, or run by members of the Islamic State organized armed group? What criteria are being applied to identify persons as members of that group? And, can the attacks be carried out in circumstances where civilian casualties will not result? Resolving these questions is important not only with respect to the targeting of oil facilities, but also regarding air strikes more generally against the Islamic State forces operating in both Syria and Iraq.

Not everyone who supports the Islamic State will be a member of its organized armed group, or a civilian taking a direct part in hostilities. This could mean that engineers, even those specifically recruited by the Islamic State, cannot be targeted. Further, any attack on the oil production facilities would have to consider whether the persons operating them are civilians whose collateral death or injury must be calculated into a proportionality assessment. The *Law of Air Warfare Commentary* indicates that experts “were divided as to whether civilians who are physically within a military objective (e.g., civilian employees working in a munitions factory) count for the purposes of the application of the principle of proportionality.”<sup>51</sup> However,

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49. *EU Naval Force Delivers Blow against Somali Pirates on Shoreline* EU NAVFOR SOMALIA (May 15, 2012), <http://eunavfor.eu/eu-naval-force-delivers-blow-against-somali-pirates-on-shoreline/>.

50. Eliav Lieblich, *Quasi-Hostile Acts: The Limits on Forcible Disruption Operations under International Law*, 32 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 101, 104 (2014).

51. LAW OF AIR WARFARE MANUAL, *supra* note 20, cmt. accompanying r. 14, ¶ 14.

“the majority of the Group of Experts felt that the principle of proportionality applies to such civilians as in all other cases.”<sup>52</sup> To suggest they are other than protected civilians would make their status virtually of no meaning.<sup>53</sup> While an attack may still occur due to the importance of the target, there remains a requirement to avoid or minimize collateral civilian casualties or damage.<sup>54</sup> This obligatory attack precaution would necessitate consideration of the workers’ status as civilians, and may result in altered timing, a change in tactics, or different armaments being used in an attack.

Many of these questions go right to the heart of targeting issues for which, unfortunately, there is not a universal international consensus, namely, the meaning of fundamental international humanitarian law concepts such as membership in organized armed groups and “taking a direct part in hostilities.”<sup>55</sup> In 2009, the International Committee of the Red Cross issued its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*,<sup>56</sup> which has attained a significant degree of acceptance amongst international lawyers in its recognition that persons may be targeted as members in an organized armed group.<sup>57</sup> There has been a distinct lack of agreement, however, on a number of other issues, including what support activity falls within the concept of group membership, or qualifies as “direct participation in hostilities.”<sup>58</sup> Attacks on the Islamic State oil facilities might be easier to justify if the persons running them were members of an organized armed group. The challenge is that running an oil production facility is not the type of combat support, or combat service support activity (i.e., storing and transporting oil, lubricants and fuel) that States might normally consider as qualifying for armed group membership, or meeting the direct participation test.<sup>59</sup> In this respect,

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52. *Id.*

53. See Watkin, *supra* note 9, at 28–29 (for a discussion of this issue.). See also DINSTEN, *supra* note 23, at 136.

54. AP I, *supra* note 17, art. 57(2)(a)(ii).

55. AP I, *supra* note 17, art. 51(3).

56. *Interpretive Guidance*, *supra* note 17.

57. *Id.* at 34.

58. WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* 141–64 (2012) (for an analysis of direct participation in hostilities and the *Interpretive Guidance*).

59. Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice*, in *NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY* 181, 189 (Kenneth Watkin & Andrew Norris, eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies) (where it is noted “combat support and combat service support functions if performed for a regularly constituted armed force and carrying arms openly, exercising command over the group or

without further information, it is difficult to see the personnel running the facilities as other than the equivalent of factory workers. Civilians involved in war-sustaining activities may not be directly attacked, although they can be collaterally injured, or killed.<sup>60</sup> The time is long past where those workers could be considered as a category of “quasi-combatants” who may be attacked.<sup>61</sup> It could be that the personnel at the refinery might also qualify as fighters because of other military functions they perform for the Islamic State. Consistent with the principle of distinction the obligation remains on the attacking State to establish whether the workers and those in the vicinity of the oil production facilities have protected civilian status.<sup>62</sup>

This raises the question of how much intelligence is required to reliably establish that civilians are in or around a selected target so that an appropriate proportionality assessment can be completed. The *Additional Protocol I* requirement is that everything “feasible” shall be done to verify that objectives being attacked are not civilians, or civilian objects. That obligation applies to both planners and those who decide on an attack.<sup>63</sup> In this conflict reliance has been placed “mainly on satellites, drones and surveillance flights to pinpoint targets, assess the damage afterward and determine whether civilians were killed.”<sup>64</sup>

The recent attacks in Iraq and Syria have not been carried out with a “near certainty” standard that no civilians will be killed or injured, which has been allocated to drone strikes in other situations.<sup>65</sup> This policy-based standard was uniquely applied to the tightly controlled and resource intensive U.S. drone program.<sup>66</sup> A near certainty of no civilian casualties has never been the standard required under IHL, although restrictions placed on the use of force in the context of counterinsurgency operations in Af-

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one of its units, or conducting planning related to the conduct of hostilities” can be considered as membership in an armed group).

60. Schmitt, *supra* note 23, at 19.

61. DINSTEIN, *supra* note 23, at 136–37.

62. AP I, *supra* note 17, arts. 51(2) & 52(1) (neither civilians, nor civilian objects shall be the object of an attack).

63. AP I, *supra* note 17, art. 57(2).

64. Ken Dilanian, *U.S.-led Airstrikes Launched Amid Significant Intelligence Gaps*, CTV NEWS (Oct. 1, 2014), <http://www.ctvnews.ca/world/u-s-led-airstrikes-launched-amid-significant-intelligence-gaps-1.2033338>.

65. *Id.*

66. Barak Obama, President of the United States, Remarks by the President at National Defense University (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

ghanistan,<sup>67</sup> and during the 2011 air campaign in Libya may have altered public perceptions of what collateral civilian casualties are justifiable during an armed conflict.<sup>68</sup> The international criminal law standard is that the person must intentionally launch “an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be *clearly excessive* in relation to the concrete and direct overall military advantage anticipated.”<sup>69</sup> As with human rights-based uses of force<sup>70</sup> the mental element required is one of the person having a reasonable belief that the use of force (i.e., attack) is lawful.<sup>71</sup> However, States remain free to impose more stringent standards in their Rules of Engagement, which is what appears to have been done by the United States regarding its drone policy.

For a public accustomed to watching video feeds from drones, where “eyes in the sky” obtain an extensive pattern of life assessment prior to an air strike, these attacks on the oil production facilities and the provision of close air support in other situations are likely to require a readjustment of expectations. When there is doubt an objective must be considered to be civilian or used for civilian purposes.<sup>72</sup> However, complete certainty is unlikely to be obtained in this type of armed conflict and at crucial points the “fog of war” will impact decision-making.<sup>73</sup> This has led to a suggestion

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67. NATO/ISAF Headquarters, *Tactical Directive* (July 6, 2009), available at [http://www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf).

68. Peter Olson, Legal Advisor to NATO, Letter to Judge Kirsch, Chair, International Commission of Inquiry on Libya, OLA(2012)006, 4 (Jan. 23, 2012) [http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2012\\_05/20120514\\_120514-NATO\\_1st\\_ICIL\\_response.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2012_05/20120514_120514-NATO_1st_ICIL_response.pdf) (“Not one of the targets struck, involving over 7700 weapons, was approved for attack, or in fact attacked, if either those designating and approving the target or the pilot executing it had any evidence or other reason to believe that civilians would be injured or killed by a strike.”).

69. Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 (emphasis added).

70. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) 97, at 173, ¶ 200 & at 179 ¶ 5 (1995).

71. *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, ¶¶ 50, 51 & 55 (Int’l Crim. Trib. for the former Yugoslavia Dec. 5, 2003).

72. AP I, *supra* note 17, arts. 50(1) & 52(3). *But see* 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 35–36 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (for a discussion of various State approaches to doubt, including the United States rejection of the doubt rule as customary law).

73. Michael Bothe, *Targeting*, in 78 LEGAL AND ETHICAL LESSONS OF NATO’S KOSOVO CAMPAIGN 173, 183 (Andrew E. Wall, ed., 2002) (Vol. 78, U.S. Naval War College International Law Studies) (“the targeting decision is certainly one which has to be taken

that any doubt regarding civilian status of an object being attacked must be a reasonable one<sup>74</sup> and that “there is an obligation of due diligence and acting in good faith.”<sup>75</sup>

#### IV. THE EASY ANSWER AND HARDER QUESTIONS

The answer may simply be that the destruction of the facilities is justified solely on the basis that they supply oil to Islamic State military forces. The fact that they may be an economic asset supporting non-military operations does not give a legal rationale for the attack. Intelligence linking the refined oil with military action would assist in providing a legal basis for the strikes.<sup>76</sup> The intelligence could also help determine the military advantage to be gained from the attacks,<sup>77</sup> which is a crucial component of the proportionality assessment concerning the lawfulness of any collateral civilian casualties or damage caused by the strikes.<sup>78</sup> Focusing on this link to military action would also likely mean that actual smuggling networks would not be targeted.

It is also possible, however, that the yardsticks are moving closer toward the U.S. war-sustaining approach. There may be pressure for change in how the law is interpreted, as it is not clear that a decade ago anyone would have considered using military forces to attack pirate infrastructure in Somalia. It may even be that the ability to use precision strikes against oil production facilities in a context where there are likely very few truly strategic targets, and limited potential for collateral casualties lessen concerns about the air campaign degenerating into indiscriminate attacks. However, those concerns would not completely disappear, since the potential remains in the future for strategic air campaigns to be conducted in inter-State conflict, or by States against better well-established non-State actors such as Hezbollah.

The question is where to draw the line regarding remoteness. How strong does the link between the objects struck and military activity have to

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in a context of uncertainty. It is unrealistic to require absolute certainty concerning the military importance of a specific object before it can be lawfully attacked, but not requiring absolute certainty is not the same as permitting disregard of the facts.”)

74. LAW OF AIR WARFARE MANUAL, *supra* note 20, cmt. accompanying r. 12(b), ¶ 4.

75. DINSTEIN, *supra* note 23, at 139.

76. AP I, *supra* note 17, art. 52(2).

77. *Id.*

78. AP I, *supra* note 17, art. 57(2)(iii).

be so that attacks, which are likely to collaterally kill or injure civilians, can be justified? What must always be kept in mind is that these attacks can be precedent setting even against "terrorists." The fact that these groups carry out unconscionable criminal acts does not change the status of any civilians who fall under their control, or who may even support them for a variety of reasons. The Islamic State, as bad as it is, may be viewed as providing a better level of personal safety for the Sunni population. Targeting under international humanitarian law requires that attacks only be directed against lawful military objectives, whether they are objects or persons. Historically, this is an issue that stands at the edge of a very steep and slippery slope that has led directly to considerable humanitarian suffering. What will be interesting to see is how this issue progresses as more States, which may seek closer fealty to narrowly worded treaty texts than broader interpretations of customary international humanitarian law that allow war-sustaining attacks, engage in the air campaign against the Islamic State.