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Distinction Matters: Rethinking the Protection of Civilian Objects in Non-International Armed Conflicts

*Noam Zamir**

Under treaty law all civilian objects are protected in international armed conflicts (IAC) whereas it is only certain civilian objects that enjoy protection under treaty law in non-international armed conflicts (NIAC). However, it is commonly argued that all civilian objects are protected in NIAC under customary law. This article examines the reasons for the differences in the protection of civilian objects under treaty law and the argument that customary law now provides equal protection for all civilian objects under both IAC and NIAC. The article argues that this equal protection may hinder the ability of states to maintain law and order under their domestic law in NIAC in situations where they may need to destroy property which belongs to armed opposition groups. The article advances the argument that the law regarding targeting should be that all civilian objects are protected in NIAC but, unlike the protection of civilian objects in IAC, this protection does not bar a state from destroying in its territory objects which were considered to be illegal under domestic law before the commencement of the NIAC, in accordance with international human rights law as lex specialis.

Keywords: international humanitarian law (IHL), civilian objects, law enforcement

1. Introduction

The protection of civilian objects is undoubtedly one of the hallmarks of international humanitarian law (IHL).[1] Although under treaty law there are only certain civilian objects which enjoy protection in non-international armed conflicts (NIAC) whereas in international armed conflicts (IAC) all civilian objects are protected under customary law, it is widely argued that all civilian objects are protected under customary law, even under NIAC. This article examines the reasons why states have granted less protection to civilian objects in NIAC and the argument that customary law now provides equal protection to civilian objects under both IAC and NIAC. It focuses on the issue of the protection of civilian objects belonging to armed opposition groups, and argues that the ability of states to maintain law and order in their territories may be hindered

* Doctoral Candidate in Law, University of Cambridge (Trinity College); nzz22@cam.ac.uk.
The idea that the customary protection of civilian objects in non-international armed conflict (NIAC) might be problematic as a result of the issue of attacks on drug farms was brought to my attention during my BCL studies by Dapo Akande in his excellent course on international humanitarian law (IHL) at Oxford University. For that, and for developing my knowledge and interest in IHL in general, I would like to express my deep gratitude to him. I would like to extend my gratitude also to Orna Ben Nafatali, James Crawford, Eden Sarid and Greg Simms for their invaluable comments and suggestions. Finally, I would like to thank the anonymous referees of the *Israel Law Review* and the participants of the 8th Annual Minerva/ICRC Conference on International Humanitarian Law for their very helpful comments. All views expressed herein and all errors remain those of the author.
[1] For example, *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion [1996] ICJ Rep 226, [78] ('The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects …').

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by granting protection to civilian objects in NIAC that is tantamount to a blanket prohibition on destroying all civilian objects belonging to armed opposition groups.

The article is structured along the following lines. Section 2 describes briefly the distinction between IAC and NIAC. Section 3 focuses on the treaty-based differences between the protection of civilian objects in IAC and NIAC in the Additional Protocols of 1977[2] and the ICC Statute,[3] and considers the reasons that led to these differences. Section 4 examines the argument that customary law has developed to include a blanket prohibition on targeting all civilian objects in NIAC. Section 5 discusses issues that may arise in granting protection to all civilian objects in NIAC, particularly those concerning the destruction of property considered illegal under domestic law. It argues that these problems highlight that providing full protection to all civilian objects in NIAC may hinder the ability of states in maintaining law and order. The destruction of drug farms will be used to illustrate the argument. Section 6 offers some concluding thoughts.

2. The Distinction between International and Non-International Armed Conflict

Before moving to the main issues of this article, it is important to understand the differences between IAC and NIAC, and whether the distinction between the two types of armed conflict is still relevant today.

Before the formulation of the 1949 Geneva Conventions,[4] the laws of war applied only between states.[5] Thus, with the exception of insurgency and belligerency,[6] states considered internal armed conflicts to be internal affairs regulated under domestic law.[7] The legal justification for the

[2] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I or AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II or AP II).

[3] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).

[4] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV).

[5] Rogier Bartels, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts' (2009) 91 *International Review of the Red Cross* 35, 44–48; Antonio Cassese, 'Civil War and International Law' in Antonio Cassese, *The Human Dimension of International Law: Selected Papers* (Oxford University Press 2008) 110, 113–14.

[6] It is beyond the scope of this article to examine this issue in depth. For discussion see Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010) 7–23.

[7] Lassa Francis Lawrence Oppenheim, *International Law: A Treatise, Vol II: War and Neutrality* (1906) 67; see also François Bugnion, '*Jus ad Bellum*, *Jus in Bello* and Non-International Armed Conflicts' (2003) 6 *Yearbook of International Humanitarian Law* 167, 176. See also discussion with regard to different domestic regulation of hostilities via instructions and agreements in internal armed conflicts in the nineteenth and early twentieth centuries in Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 20–29.

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distinction between inter-state war and internal armed conflict was based on the principle of sovereignty and the notion that states had a right to quell rebellions without foreign intervention.[8]

With the adoption of the 1949 Geneva Conventions, internal conflicts started to be regulated by international law and the distinction between the laws of IAC and the laws of NIAC was created. In general, according to Common Article 2 of the Geneva Conventions, the laws of IAC are the laws that apply in armed conflicts between states. For states that are party to Additional Protocol I of the Geneva Conventions,[9] Article 1(4) provides that the laws of IAC apply also between states and national liberation movements. In accordance with Common Article 3 of the Geneva Conventions, it is the laws of NIAC that apply in armed conflicts between states and non-state groups, as well as in armed conflicts among non-state groups.[10]

The main reason for the distinction between IAC and NIAC was the aspiration of states to extend some humanitarian protection to internal wars while maintaining their right to prosecute rebels under their domestic laws without foreign intervention.[11] Thus, the treaty-based laws of NIAC are much narrower than the laws of IAC: the 1949 Geneva Conventions, the Hague Regulations and Additional Protocol I apply only to IAC. On the other hand, the treaty rules applicable specifically to NIAC are Common Article 3 of the Geneva Conventions, the provisions of Additional Protocol II[12] and Article 8(2)(c) and (e) of the ICC Statute.[13]

Nonetheless, given the adaptation of various treaties that apply without distinction to all situations of armed conflict[14] and, more importantly, the development of customary international law

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[8] ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, Appeals Chamber, 2 October 1995, [96].

[9] n 2.

[10] See also the widely cited definition of NIAC in *Tadić* (n 8) [70] (defining NIAC as 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State').

[11] See also Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 32, 37 (maintaining that '[t]he main reason for the persistence of the distinction is the view by states, or some of them, that equating non-international and international armed conflicts would undermine state sovereignty and, in particular, national unity and security'); David Whippman, 'Redefining Combatants: Comment on Richard Arneson's *Just Warfare Theory and Noncombatant Immunity*' (2006) 39 *Cornell International Law Journal* 699, 701 ('States have insisted that non-state actors fighting against a state be treated as either rebels or criminals, and that is why we have different rules for internal armed conflicts and international armed conflicts. Only soldiers fighting for the state in an international armed conflict are deemed to have the combatant's privilege, which is essentially a way of saying that it is not illegal for them to participate in hostilities. They have a right to use force – to use violence against enemy soldiers and enemy forces').

[12] n 2.

[13] n 3. Presumably it was conceived that states would rely on their domestic laws in order to regulate various aspects, which are not explicitly regulated in common art 3 and AP II, regarding conduct of hostilities and treatment of captured members of the armed non-state groups.

[14] For example, Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (entered into force 26 March 1975) 1015 UNTS 163 (BWC), art 1; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (entered into force 29 April 1997) 1974 UNTS 317 (CWC), art 1; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) (as amended on 3 May 1996) 1125 UNTS 609, art 1.2; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (entered into force 1 March 1999) 2056 UNTS 211, art 1; Protocol on Explosive Remnants of War (entered into force 12 November 2006) UN

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which now provides for a broader set of rules governing NIAC,[15] the distinction between international and non-international armed conflict is much less significant today. Still, some differences between IAC and NIAC remain, even under customary law. For example, the laws of NIAC do not establish a detailed basis for detention and procedural safeguards during internment,[16] and prisoner of war (POW) status and the law of occupation apply only in IAC.[17]

3. THE PROTECTION OF CIVILIAN OBJECTS UNDER TREATY LAW

The idea that property which is not used for military means should be protected is deeply rooted in the laws of IAC. Thus, for example, before the adoption of the 1949 Geneva Conventions and the 1977 Additional Protocols, the 1907 Hague Regulations prohibited '[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war'.[18] The 1949 Geneva Convention IV states that in cases of occupation, the destruction of property is prohibited unless 'rendered absolutely necessary by military operations'.[19]

The protection of property in the conduct of hostilities was finally further elaborated in Additional Protocol I, which stipulated that *all* civilian objects are protected from attacks.[20] The term 'civilian objects' was defined in the Protocol by way of exclusion. According to Article 52, a civilian object is any object which is not a 'military objective'.[21] The International Committee of the Red Cross (ICRC) Commentary to the Additional Protocols states that this exclusionary method 'is justified by the fact that there are far more civilian objects than military objectives'.[22] Attacks are defined as 'acts of violence against the adversary, whether in offence or in defence'.[23] Thus, 'not only

Doc CCW/MSP/2003/2 (2003), art 1(3); Convention on Cluster Munitions (entered into force 1 August 2010) UNTS No 47713, art 1.

[15] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009) (ICRC Study) (finding that most of the rules applicable in IAC are also applicable in NIAC under customary law).

[16] See International Committee of the Red Cross, 'Strengthening Legal Protection for Victims of Armed Conflicts', October 2011, 31IC/11/5.1.1, 7–8.

[17] GC III (n 4) art 4; AP I (n 2) art 44 (regarding POW status); SCSL, *Prosecutor v Sesay, Kallon and Gbao*, Judgment, SCSL-04-15-T, Trial Chamber, 2 March 2009, [982]; Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 33–34 (regarding the applicability of the law of occupation solely to IAC).

[18] Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910), *Martens Nouveau Recueil* (ser 3) 461, art 23(g). See also art 25 ('The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited').

[19] GC IV (n 4) art 53.

[20] AP I (n 2) arts 48 and 52(2).

[21] ibid art 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').

[22] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross and Martinus Nijhoff 1987) 634.

[23] AP I (n 2) art 49.

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massive air attacks or artillery barrages, but also small-scale attacks (like a sniper firing a single bullet)' would fall within this definition of attacks.[24]

Accordingly, in IAC, based on Additional Protocol I[25] and customary law,[26] all property of the adversary that is not a 'military objective' is considered to fall within the category of civilian objects which are protected from attack. In NIAC, on the other hand, only limited civilian objects, such as cultural objects and objects indispensable to the survival of the civilian population, are explicitly protected under Additional Protocol II.[27]

Interestingly, the ICRC proposed granting protection to all civilian objects in NIAC also under Additional Protocol II (draft Article 24),[28] but the delegates of the Diplomatic Conference decided to reject this draft article and to protect only a limited number of objects. There were various reasons for this decision. The first was the fear that the introduction of a definition of 'military objective' would implicitly acknowledge that attacks by non-state groups against a state's armed forces are legitimate acts of warfare.[29] Thus, for example, the US delegate stated that he was against the proposed draft article for the protection of civilian objects because the article might imply 'that rebels were allowed to choose their objectives'.[30] The second reason was what the delegates broadly referred to as 'sovereignty' concerns. Unfortunately, the state delegates did not elaborate sufficiently on how protecting civilian objects might infringe their sovereignty, but it is possible to

[24] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004) 84.
[25] See AP I (n 2) art 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').
[26] For example, *Nuclear Weapons* (n 1) [78]–[79]; ICRC Study (n 15) r 7. See also sources stated in n 44.
[27] AP II (n 2) art 14 (protection of objects indispensable to the survival of the civilian population), art 15 (protection of works and installations containing dangerous forces) and art 16 (protection of cultural objects and places of worship).
[28] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–77), Vol I, Pt Three, 40, draft art 24 ('1. In order to ensure respect for the civilian population, the parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives. 2. Constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects. This rule shall, in particular, apply to the planning, deciding or launching of an attack').
[29] Nevertheless, the term 'military objective' was slipped into AP II in art 15. See, in general, Frits Kalshoven, 'Bombardment: From "Brussels 1874" to "Sarajevo 2003"' in José Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff 2009) 103, 113.
[30] Official Records (n 28) Vol VII, 132, para 63. The Iraqi representative also explicitly supported the US position (ibid 133, para 69). See also the description of Waldemar A Solf, member of the US delegation to the 1974–77 Diplomatic Conference, in which he provides an imaginary dialogue which represents a composite of remarks made informally over the years of the Diplomatic Conference: Waldemar A Solf, 'Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict' (1983) 13 *Georgia Journal of International and Comparative Law* 291, 292 ('My government knows that needlessly attacking *innocent* civilians tends to strengthen dissident movements and we will take strong measures against such misbehaviour by our armed forces. But to prescribe an international norm prohibiting attacks against civilians and civilian objects implicitly suggests that it is permitted to attack security personnel and objects. In our country, at least, killing a policeman is, and must remain, a serious offense').

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read between the lines in order to acquire a better understanding of these concerns. For example, the delegation from Pakistan – whose proposal to delete several articles in the draft of Additional Protocol II, including draft Article 24, was adopted by the other delegates – stated that the Protocol's articles 'should not appear to affect the sovereignty of any State Party or the responsibility of its Government to *maintain law and order* and defend national unity'.[31]

The Canadian delegation, while referring to a related issue of the protection of objects indispensable for the survival of the civilian population (draft Article 27), stated:[32]

> [The] delegation's proposal that article 27 should be deleted (CDDH/III/36) arose from its conviction that, if draft Protocol II was to represent an important evolution of humanitarian law, the effect its provisions would have on the sovereignty of States must be carefully weighed. In view of the fact that both parties to a non-international armed conflict were generally fighting on their own national territory, it would perhaps be inappropriate to suggest to them that they could not deal with *certain objects as they saw fit***.** As the Canadian proposal might appear to run counter to the aims of the Conference, he wished to make it clear that his delegation was not in favour of attacks on the types of object in question. However, the situation in non-international armed conflicts was often very different from that obtaining in international conflicts and it would be inappropriate to overburden draft Protocol II with provisions that were merely copies of those in draft Protocol I.

The Canadian delegate further emphasised that 'there was no question of authorizing the destruction of civilian objects', and was 'in favour of reducing acts of violence but with due regard for the internal law of States'.[33] The US delegate agreed with the Canadian representative that the wording of draft Article 27 'amounted to interference in the internal affairs of States … [and that those] provisions should be modified for they were too broad'.[34] Nevertheless, it should be stated that draft Article 27 was finally adopted by consensus with minor modifications.[35] Finally, New Zealand, while explaining its reasons for supporting the deletion of draft Article 24, stated that 'in so far as Article 24 had the purpose also of protecting civilian objects, the New Zealand delegation entertained doubts whether such a provision *was likely to be realistic* in relation to all conflicts of the kind covered by Protocol II'.[36]

We can see that states' objections to granting protection to all civilian objects in Additional Protocol II did not stem from the belief that civilian objects should have no protection at all, but from a reluctance to legitimise attacks by non-state groups on military objectives of the state and from concerns for the ability of states to maintain law and order. What can we say about these concerns today with hindsight of almost 40 years?

While the concern about legitimising hostile acts of non-state groups is understandable, it has little relevance today. Since it is not disputed that IHL permits non-state groups to target soldiers

[31] Official Records (n 28) Vol VII, 61, para 11 (emphasis added).
[32] ibid Vol XIV, 149–50, para 41 (emphasis added).
[33] ibid 153, para 10.
[34] ibid 152, para 7.
[35] ibid Vol VII, 137 (as art 14 in the final version of AP II).
[36] ibid 140 (emphasis added).

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of the opposing state, it is nonsensical to claim that targeting soldiers is not prohibited under IHL but targeting military objectives is. Moreover, even if IHL permits the targeting of soldiers and military objectives, states may still prosecute the members of non-state groups under their own national criminal codes for participating in the hostilities as NIAC does not include POW status. On the other hand, as explained in more detail below, the concern that granting protection to all civilian objects in NIAC may hinder the ability of states in maintaining law and order does, in fact, have a legal basis.

Finally, although international criminal law is not the focus of this article, it is also important to note that under the ICC Statute an attack on any civilian object is considered a war crime in IAC,[37] whereas in NIAC only an attack on a listed type of civilian object is considered a war crime.[38] Scholars have offered various explanations for this difference in the protection of civilian objects under the ICC Statute. It has been argued that the reason for this difference was based on doubts 'as to whether a general protection for civilian objects (in contrast to the civilian *population*) was a part of the customary international humanitarian law regulating internal armed conflict'.[39] In the same vein, the US delegation to the Rome Conference claimed that differences between Article 8(2)(b) and (e) reflect agreement among most delegates that 'customary international law has developed to a more limited extent with respect to internal armed conflicts'.[40] On the other hand, other scholars have stressed that 'Article 8, far from being a faithful snapshot, is but a mere artist's sketch of war crimes in general international law'.[41] Moreover, it has been highlighted that Article 10 of the ICC Statute explicitly states that Part 2 of the Statute (on 'Jurisdiction, Admissibility and Applicable Law') 'shall [not] be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'.[42] Finally, in general, it should be remembered that an act may still be prohibited by IHL

[37] See ICC Statute (n 3) art 8(2)(b)(ii) ('intentionally directing attacks against civilian objects, that is, objects which are not military objectives').
[38] The following objects are protected against intentional attack: (i) 'buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law' (ibid art 8(2)(e)(ii)); (ii) 'installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict' (ibid art 8(2)(e)(iii)); (iii) 'buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected' (ibid art 8(2)(e)(iv)).
[39] Lindsay Moir, 'Conduct of Hostilities – War Crimes' in Doria, Gasser and Bassiouni (n 29) 487, 508; Andreas Zimmermann, 'Article 8: War Crimes, Para 2(c)–(f)' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos 1999) para 306 (stating that the prohibition against directing attacks against civilian objects was not included in the part on war crimes in NIAC in the ICC Statute because it was not included in AP II and 'accordingly the customary law nature of such a prohibition in internal armed conflict seemed to be doubtful').
[40] David J Scheffer, 'The United States and the International Criminal Court' (1999) 93 *The American Journal of International Law* 12, 16.
[41] Georges Abi-Saab, 'The Concept of "War Crimes"' in Wang Tieya and Sienho Yee (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge 2001) 99, 118 (cited with approval in Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press 2008) 144).
[42] ICC Statute (n 3) art 10; Abi-Saab, ibid.

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even if it is not a war crime.[43] Thus, it could be argued that even if the ICC Statute may suggest that attacking civilian objects is not criminalised under customary law, it cannot be inferred from the ICC Statute that the protection of civilian objects in NIAC is not established under IHL.

4. The Protection of Civilian Objects under Customary Law

Despite the difference in the level of protection of civilian objects in IAC and NIAC under treaty law, it is widely argued that the customary protection of all civilian objects in IAC is also applicable in NIAC.[44] On the other hand, there is only limited support for the argument that the scope of protection of civilians in NIAC is not as broad as the scope of protection in IAC.[45] While it is beyond the scope of this article to offer a full examination of state practice and *opinio juris* relating to the scope of protection of civilian objects, it is noteworthy to examine briefly the grounds for the argument that customary law in NIAC provides a blanket prohibition on targeting all civilian objects.

The International Criminal Tribunal for the former Yugoslavia (ICTY) most famously advanced the argument that civilian objects are equally protected in NIAC under customary law in the *Tadić* case.[46] The Tribunal's analysis of state practice in the context of civilian objects referred only to the following examples: the Spanish Civil War;[47] the resolution of the Assembly of the League of Nations concerning both the Spanish conflict and the Chinese-Japanese war;[48] the commitment of the Prime Minister of the Democratic Republic of the Congo, issued in 1964, regarding the conduct of hostilities of the governmental forces in the civil war;[49] and the 'Operational Code of Conduct for Nigerian Armed Forces' issued in July 1967 by the Head of the Federal Military

[43] Marco Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges' (2007) 10 *Yearbook of International Humanitarian Law* 45, 54–55; Sivakumaran (n 7) 81.

[44] For example, *Tadić* (n 8) [127]; ICTY, *Prosecutor v Strugar*, Judgment, IT-01-42-T, Trial Chamber, 31 January 2005, [223]–[226]; ICRC Study (n 15) r 7; International Institute of Humanitarian Law (IIHL), *The Manual on the Law of Non-International Armed Conflict with Commentary* (IIHL 2006) 18–20; Michael N Schmitt, 'Targeting Narcoinsurgents in Afghanistan: The Limits of International Humanitarian Law' (2009) 12 *Yearbook of International Humanitarian Law* 301, 314 ('There is general consensus that the practice [of attacking civilian objects] is prohibited during non-international armed conflict'); Sivakumaran (n 7) 342–47.

[45] For example, ICC, *Prosecutor v Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09, Pre-Trial Chamber, 8 February 2010, [85] ('The Majority notes that, while international humanitarian law offers protection to all civilians in both international armed conflict and armed conflict not of an international character, the same cannot be said of all civilian objects, in respect of which protection differs according to the nature of the conflict'); Françoise Hampson, 'Study on Human Rights Protection during Situations of Armed Conflicts, Internal Disturbances and Tensions', Council of Europe Steering Committee for Human Rights, 18 March 2001, DH-DEV(2002)1, para 54 ('It is unclear to what extent there is something akin to the concept of a military objective in non-international conflicts'); Akande (n 11) 37 (noting that it is questionable whether the prohibition on attacking all civilian objects is part of customary law in NIAC).

[46] *Tadić* (n 8) [127].

[47] ibid [100].

[48] ibid [101].

[49] ibid [105] ('the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives').

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Government of Nigeria to repress the rebellion in Biafra.[50] Obviously, these examples are not only limited, they also arose before the introduction of Additional Protocol II in 1977 when states clearly rejected the grant of equal protection to civilian objects in NIAC, as discussed above. The analysis of further case law of the ICTY shows that despite the use of strong words (such as 'it is indisputable') in order to advance the argument that customary law provides protection to all civilian objects in NIAC,[51] other ICTY cases have not provided any clearer analysis of state practice.[52]

While other case law and scholarly discussion has typically not provided any clearer analysis of state practice to support the argument that customary law provides protection to all civilian objects in NIAC,[53] the ICRC study of customary IHL, which advances this argument, is admittedly more persuasive.[54] The Study relies mainly on the inclusion of this protection in more recent treaty law, such as the Amended Protocol II to the Convention on Certain Conventional Weapons,[55] and various military manuals.[56] Nevertheless, although the ICRC Study is useful in showing that many states do not formally distinguish between the protection of civilian objects in IAC and NIAC, it has been argued that it has failed to demonstrate how states actually behave in armed conflict.[57]

The proposition that customary law now extends protection to all civilian objects in NIAC – although brought into doubt by the absence of study of state practice which shows how states actually treat civilian objects in NIAC – is supported by significant scholarly writing and some case law. Nevertheless, as the next section shows, it may prove to be untenable in light of the rights and duties of states in maintaining law and order.

5. LAW ENFORCEMENT AND CIVILIAN OBJECTS IN NIAC

It is indisputable that the authority of states to maintain law and order in their territories does not stop during armed conflicts. However, it is submitted that the ability of states involved in NIAC

[50] ibid [106] (according to the Tribunal, the 'Operational Code of Conduct' stated that 'the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations').
[51] See, eg, ICTY, *Prosecutor v Kordić and Čerkez*, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, IT-95-14/2, Trial Chamber, 9 March 1999, [31] ('It is indisputable that … the prohibition of indiscriminate attacks or attacks on civilian objects are generally accepted obligations … there is no possible doubt as to the customary status of these specific provisions as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts').
[52] ibid; and see ICTY cases cited at n 44.
[53] Sivakumaran's excellent book on the laws of NIAC is a notable exception: Sivakumaran (n 7) 342–43 (analysing state practice and declarations of non-state groups on the protection of civilian objects).
[54] ICRC Study (n 15) r 7.
[55] 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 (with Protocols I, II and III) (entered into force 2 December 1983) 1342 UNTS 137.
[56] It should be noted that the ICRC Study (n 15) refers also to a limited amount of national legislation, case law and codes of conduct.
[57] See John B Bellinger and William J Haynes, 'A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law' (2007) 89 *International Review of the Red Cross* 443, 445.

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against non-state groups in their territories to maintain law and order could be hindered if the laws of NIAC provide a blanket prohibition on targeting any object that is not a military objective.[58] This is because it is not clear under what legal grounds states may destroy property which was built illegally or is being used for illegal activity under the domestic law of their territories ('illegal property') when this property is not considered a military objective and it belongs to the non-state groups that are engaged in the NIAC against the state.[59]

Illegal property of non-state armed groups can take different forms, such as a radio station working without a licence or residential houses built without permission. At least in principle, arguing that this illegal property is immune from attack under IHL when it belongs to armed opposition groups may create considerable difficulties for territorial states in enforcing their domestic laws in some situations. For example, in peace time a government may send its police forces to shut down a radio station which is operating without a licence. However, it is conceivable that in situations of NIAC between governmental forces and armed opposition groups, sending police officers to shut down a radio station which belongs to the armed opposition groups may be too difficult, and the state therefore may wish to destroy the radio station by military means such as air strike. However, if all civilian objects are protected in NIAC as well, then it is questionable whether a government may use force to destroy a radio station belonging to an armed opposition group, as the use of force in contravention of international law cannot be justified simply on the basis that it is legal under the domestic law of the state,[60] and it is often argued that radio stations which only disseminate propaganda are, in general, not considered a military objective.[61]

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[58] While it is admitted that NIAC also includes transnational armed conflicts between states and non-state groups (ie armed conflicts which take place outside the territory of the fighting state) because of the identity of the parties involved (see, in general, Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford University Press 2010)), it is important to stress that this section does not deal with the issue of destruction of civilian objects in transnational armed conflicts as it is not relevant to the territorial state's need to enforce law and order in its territory.

[59] It is necessary to say a word on the meaning of 'belonging' in this context. Obviously, in practice, non-state groups often do not have ownership certificates over their property. This is even more true when it comes to drug farms, which are discussed below. For the purposes of this article, the meaning of property belonging to a non-state group should be understood as property which is being utilised mainly by the members of the non-state group or is being used to support, financially or morally, any of the various activities of the group. Borderline cases, such as property which is only taxed by the non-state group or is used occasionally by the group, are not discussed in this article as they deserve a more extensive platform for discussion.

[60] See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supp No 10, UN Doc A/56/10, November 2001, art 3 ('The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law').

[61] For example, ICTY, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia', 13 June 2000, para 47 (stating that 'whether the media constitutes a legitimate target group is a debatable issue … If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target'). See also the discussion in Marco Sassòli and Lindsey Cameron, 'The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*' in Natalino Ronzitti and Gabriella Venturini (eds) *The Law of Air Warfare: Contemporary Issues* (Eleven International 2006) 35, 53–57.

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In order to develop the discussion and examine whether there is a legal justification to destroy illegal property which belongs to armed opposition groups, even if all civilian objects are protected in NIAC under customary law, I shall focus on the issue of the destruction of drug farms belonging to non-state groups – an issue that has become particularly relevant in light of the ongoing NIAC in Afghanistan and Colombia.

States often destroy illegal drug farms, whether they are plantations growing opium, coca or marijuana.[62] These actions are part of a state's discretion to maintain law and order in its territory and under certain conditions are legal under international human rights law (IHRL).[63] States that are involved in ongoing NIAC have also destroyed drug farms operated by criminal groups as well as those of opposing armed non-state groups. For example, Colombia has been destroying drug farms operated by various groups, including coca farms operated by the Revolutionary Armed Forces of Columbia (FARC).[64] Similarly, in Afghanistan, the US and the International Security Assistance Force (ISAF) have been assisting the Afghani government in destroying opium plantations belonging to various groups, including the Taliban.[65] However, the legal basis of these operations is far from clear. Should the action of destroying these farms be examined within the framework of IHL or domestic law (subject to IHRL)? If the destruction of these farms must be evaluated in accordance with IHL and there is a blanket prohibition on targeting property which is not a military objective, can these farms be regarded as military objectives? If they cannot be so regarded, can their destruction under IHL still be justified? These and other questions will be assessed in the following sub-sections.

What is already clear at this stage is that any interpretation of law that results in a comprehensive prohibition on destroying illegal property in the state's territory does not only hinder the sovereign right of states to maintain law and order; it is also unrealistic. States never intended that the laws of NIAC would inhibit their sovereign right to maintain law and order. Moreover, it is nonsensical to reward the most violent criminal groups in a state by granting their property protection that is not enjoyed by other less violent groups that are not involved in the NIAC. Finally, it is doubtful whether any state is willing to accept that rebellious non-state groups

[62] On these enforcement operations see, in general, Bureau for International Narcotics and Law Enforcement Affairs in US Department of State, 'International Narcotics Control Strategy Report, Vol 1: Drug and Chemical Control', March 2013, http://www.state.gov/documents/organization/204265.pdf.

[63] Dapo Akande, 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?' [2010] *Inter Alia* 73, 78 ('In domestic law, where a seizure is made of illegal drugs, one would indeed expect law enforcement to destroy that property. The only applicable restraints would be the restraints imposed by human rights law … These human rights restraints will require that the deprivation of property not be arbitrary and that it be in the public interest').

[64] On the part of FARC in the drug market in Colombia see, eg, United Nations Regional Information Centre, 'The Guerrilla Groups in Colombia', http://www.unric.org/en/colombia/27013-the-guerrilla-groups-in-colombia1%20of; Helen Murphy and Luis Jaime Acosta, 'FARC Controls 60 Percent of Drug Trade – Colombia's Police Chief', *Global Post*, 22 April 2013, http://www.globalpost.com/dispatch/news/thomson-reuters/130422/farc-controls-60-percent-drug-trade-colombias-police-chief.

[65] On the policy of the US and ISAF of targeting drug farms in Afghanistan, see Akande (n 63), Schmitt (n 44) and Edward C Linneweber, 'To Target, or Not to Target: Why 'Tis Nobler to Thwart the Afghan Narcotics Trade with Nonlethal Means' (2011) 207 *Military Law Review* 155, 177.

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should be able to have special protection for their illegal property under the protection of civilian objects in NIAC.

5.1. Destroying Drug Farms as Part of Law Enforcement Operations under Domestic Law, Subject to IHRL

It could be argued that states have no legal obstacle in destroying drug farms that are not considered military objectives in their territories during NIAC because it is accepted that states may still conduct law enforcement operations, which are regulated solely under domestic law (subject to IHRL).[66] In order to better understand this argument, we need first to understand a crucial point about the differences between IHRL and IHL.

Despite the intuitive understanding, IHRL does not *always* provide more protection for civilians and civilian property than does IHL.[67] True, when it comes to targeting individuals, for example, states enjoy more freedom to use force under the platform of IHL. While under IHRL states may use force against individuals only in the limited circumstances of self-defence or when other less violent means are ineffective,[68] under IHL states may target fighters and individuals who participate in hostilities without the need to use other less violent means beforehand to stop them.[69] However, there are aspects in which a state is more restricted under IHL than under IHRL when it comes to its use of force against individuals and property. For example, in the use of tear gas states enjoy more freedom under the framework of IHRL. While under IHRL states may use tear gas in law enforcement operations, under IHL they are prohibited from using tear gas or any other type of gas in their conduct of hostilities.[70]

Under the framework of IHL states are also more restricted, in some ways, when it comes to the destruction of civilian property. Under IHRL a state may destroy civilian illegal property as long as it is carried out with due process and in accordance with domestic law. The state may use

[66] For example, Schmitt (n 44) 319 ('Even if drugs, drug-related facilities and drug transports fail to qualify as military objectives under IHL, they are not necessarily immune from attack; after all, they are used for illegal purposes. The government of Afghanistan may clearly destroy them as an element of crime fighting, and the forces of other states may assist the Afghans in performing their domestic law enforcement duties'). See also Robin Geiß, 'Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties' (2009) 91 *International Review of the Red Cross* 127, 141 ('… the mere existence of an already high level of violence does not automatically transform each and every law enforcement operation into an involvement in a non-international armed conflict governed by IHL. After all, even a government already undisputedly involved in a non-international armed conflict may still carry out regular law enforcement operations unrelated to the armed conflict that are subject merely to human rights law').

[67] Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40(2) *Israel Law Review* 310, 350–51. See also discussion on this point in the context of occupation in Aeyal M Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 *European Journal of International Law* 1.

[68] Jelena Pejić, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 80, 110–15.

[69] David Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 *Israel Law Review* 8, 24–25.

[70] CWC (n 14) arts I(5) and II(9)(d). See discussion in Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2010) 82.

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police forces, as in cases of demolition of illegal constructions; it may also use heavily armed units and military forces, as in Afghanistan and Colombia against drug farms.[71] Under IHL, on the other hand, in IAC and arguably in NIAC (under customary law), the state may destroy property only when it is a military objective.[72]

Thus, assuming that there is a blanket prohibition on the targeting of civilian objects in NIAC, despite an ongoing NIAC, as much as states may use tear gas to disperse demonstrations, they may still destroy drug farms or other property in law enforcement operations regulated under domestic law, subject to IHRL.[73] This interpretation of law is supported by some state practice. In Colombia, for example, the state occasionally destroys drug farms that belong to FARC.[74] NATO has stated that in response to a request by Afghanistan, it will assist the Afghani government in destroying drug farms in Afghanistan.[75] This could be interpreted as a clear understanding on the part of NATO members that the act of destroying drug farms, even when they belong to a party to a NIAC, is lawful when carried out under domestic law, subject to IHRL.[76]

While this state practice indicates that states believe that they have a right to destroy drugs farms belonging to opposing non-state groups in their territories despite the ongoing NIAC, it does not provide any solid legal justification for this behaviour. Indeed, it has already been suggested that Colombia's policy of destroying drug farms violates the customary rule of protection

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[71] For example, Jan Römer, *Killing in a Gray Area between Humanitarian Law and Human Rights: How Can the National Police of Colombia Overcome the Uncertainty of Which Branch of International Law to Apply?* (Springer 2010) 27 (stating with regard to Colombia that '[t]he police patrol the country's airspace in armed planes and helicopters, such as Black Hawks, which are equipped with machine guns and missiles in case of counter attacks by the guerrilla movement, as well as equipment to fumigate coca and poppy plantations'); Chris Harper, 'Marines, ANA in Marjah Shift Focus to Counternarcotics', *ISAF News*, 4 July 2012, http://www.isaf.nato.int/article/news/marines-ana-in-marjah-shift-focus-to-counternarcotics.html (describing a joint counter narcotic operation of Marines, the Afghan National Army (ANA) and Afghan police forces). See also 'ISAF Joint Command Morning Operational Update', *ISAF News*, 19 June 2012, http://www.isaf.nato.int/article/isaf-releases/isaf-joint-command-morning-operational-update-5.html ('Afghan and coalition forces conducted an operation to dismantle narcotics facilities in Northern Musa Qal'ah district, Helmand province').

[72] See Sections 3 and 4.

[73] Chris De Cock, 'Counter-Insurgency Operations in Afghanistan. What about the '*Jus ad Bellum*' and the '*Jus in Bello*': Is the Law Still Accurate?' (2010) 13 *Yearbook of International Humanitarian Law* 97, 111 ('It suffices to state that counter narcotic operations are subject to domestic and international human rights law as a law enforcement operation'); Akande (n 63) 78 (making this argument with regard to the destruction of poppy farms in Afghanistan: '[T]here is another way of looking at the destruction of civilian property. This is the view that the destruction is permissible, not specifically by IHL, but is part of law enforcement in Afghanistan').

[74] See, in general, Morgane Landel, 'Are Aerial Fumigations in the Context of the War in Colombia a Violation of the Rules of International Humanitarian Law' (2010) 19 *Transnational Law & Contemporary Problems* 491. See also Römer (n 71) 120.

[75] NATO Secretary-General, Press Conference at Budapest (Hungary), 10 October 2008, cited in 'NATO Steps up Counter-Narcotics Efforts in Afghanistan', *NATO News*, 10 October 2008, http://www.nato.int/docu/update/2008/10-october/e1010b.html ('Based on the request of the Afghan government, consistent with the appropriate United Nations Security Council resolutions, under the existing operational plan, ISAF can act in concert with the Afghans against facilities and facilitators supporting the insurgency, in the context of counternarcotics, subject to authorization of respective nations').

[76] Akande (n 63) 78 ('NATO's website makes it clear that action by ISAF forces to destroy narcotics facilities can be undertaken only upon request of the Afghan Government. Thus, it could be argued that such destruction is simply assistance given by ISAF to the enforcement of Afghan criminal law').

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of civilian objects.[77] As state practice is not in itself a stamp of legality, nor can it be a substitute for proper legal analysis, it is only regrettable that these instances of state practice are not accompanied by proper legal analysis of IHL and IHRL on this topic. Accordingly, we must continue to examine whether destroying drug farms that belong to non-state groups engaged in a NIAC may be justified as law enforcement operations.

At this stage we should bear in mind two points. First, as explained above, IHRL does not simply impose more limitations on the state in some respects (such as targeting) but it also leaves more freedom to use force (such as in the destruction of illegal civilian property and the use of tear gas). Second, states should not be able to invoke the concept of a 'law enforcement operation' as a pretext for choosing which set of laws to apply as this would undermine the basic idea that IHL is to apply whenever there is an armed conflict, which reflects a factual situation of hostilities and is not contingent on any formal acceptance by states.[78] Thus, we need to find an objective way, which is not solely contingent on state discretion, to differentiate between law enforcement operations and operations conducted under the framework of IHL. Although there is no accepted test for making this differentiation, the common method of examining whether an operation should be regulated and examined under IHL or IHRL is by assessing the nexus of this operation to the armed conflict.

The concept of nexus has more than one interpretation. The international ad hoc criminal tribunals have used the concept of nexus in a broad way as a precondition for the qualification of an act as a war crime.[79] The ICRC, in its interpretive guide for direct participation in hostilities, has used the requirement of nexus in a narrow way as a precondition for qualifying an act as direct participation in hostilities.[80] According to the ICRC interpretation of the requirement of nexus, '[i]n order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another'.[81]

[77] See Landel (n 74).

[78] Jean S Pictet (ed), *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (International Committee of the Red Cross 1958) 20 ('There is no need for a formal declaration of war, or for recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient'); Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008), 72 ('… armed conflict is not a technical, legal concept but a recognition of the fact of hostilities').

[79] See ICTY, *Prosecutor v Kunarac and Others*, Judgment, IT-96-23, Appeals Chamber, 12 June 2002, [58] ('What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed'); see also ibid paras [59]–[60]; ICTR, *Prosecutor v Rutaganda*, Judgment, ICTR-96-3, Appeals Chamber, 26 May 2003, [570].

[80] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross 2009) 58–64.

[81] ibid 58.

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If we accept the ICRC interpretation of nexus, it is clear that in an ongoing NIAC the destruction of a drug farm of a group that has no connection with the NIAC should be regulated in accordance with domestic law (subject to IHRL) because this operation is not designed to support or cause a detriment to any of the parties to the NIAC. However, can we reach the same conclusion when the state destroys a drug farm that belongs to the non-state group which is a party to the armed conflict?

Admittedly, we can argue that the destruction of drug farms belonging to non-state groups which are parties to a NIAC is a law enforcement operation with no nexus to the NIAC because it is not '*specifically designed to directly cause* the required threshold of harm in support of a party to the conflict and to the detriment of another' but is generally designed to maintain law and order. However, such arguments can be extremely flimsy in some circumstances and can raise normative difficulties, as well as issues of policy.

In Colombia, for example, where FARC holds a large share of the drug farms, law enforcement operations can cause direct damage to FARC as a party to the NIAC. Arguing that these operations were specifically designed to cause damage to FARC as a drug producer and not as a party to the conflict may prove to be somewhat artificial. Moreover, in general, if a state explicitly announces that it is going to destroy the non-state group's drug farms in order to harm the financial ability of the organisation and to weaken its fighting ability, it may even be more difficult to argue that this action should be classified as a law enforcement operation. Similarly, even if the state has not explicitly formulated any policy but simply destroys drug farms that belong to the non-state group while ignoring drug farms belonging to other groups, could we still claim that these operations against property should be considered as law enforcement operations? These arguments may not only be condemned as detached and artificial but may also undermine the protection that IHL was meant to bestow upon the parties to the conflict by allowing the state to choose between applying IHL or IHRL according to its own convenience.

Finally, it could be argued that the platform of law enforcement operations is inadequate in some situations when the effective control of the territorial state over the territory of the armed opposition groups is in question. This argument is built on the understanding that while it is generally accepted that IHRL applies when a state has effective control over a territory or a said individual in need of protection,[82] it is still a controversial question as to whether IHRL in general and the right to life in particular are applicable in operations (such as air strikes) which do not involve control over the relevant territory or the targeted individual/object.[83]

[82] See discussion in Matthew Happold, 'International Humanitarian Law and Human Rights Law' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello, and Jus post Bellum* (Edward Elgar 2013) 444, 453–63.

[83] See, in general, Droege (n 67) 325–35. See also Marco Sassòli and Laura M Olson, 'The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 *International Review of the Red Cross* 599, 614 ('For government forces acting on their own territory, control over the place where the attack takes place is not a requirement for human rights to apply, but simply a factor causing human rights to prevail over humanitarian law. The latter was designed to regulate hostilities against forces on or beyond the front line – that is, in a

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Thus, it is submitted that the argument that destruction of illegal property of a non-state group that is a party to NIAC can be justified as a law enforcement operation is not a suitable ground for providing a *comprehensive* solution to the need of territorial states to destroy this property. Therefore, we need to examine other justifications for destroying drug farms belonging to non-state groups.

5.2. Destroying Drug Farms under the Framework of IHL

Even if the destruction of a drug farm belonging to a non-state group cannot be considered a law enforcement operation, it could be argued that such destruction should be regarded as the destruction of a military objective and is therefore lawful under IHL.[84] The way of achieving this result is by interpreting the definition of military objective to include economic targets.

The ICRC, for example, states that '[e]conomic targets that effectively support military operations are also cited as an example of military objectives, provided their attack offers a definite military advantage'.[85] While the ICRC cites mainly examples that could be regarded as military objectives regardless of their economic aspect (such as industrial installations producing material for armed forces),[86] it also cites the military manual of New Zealand that justifies the destruction of cotton during the American Civil War 'since the sale of cotton provided funds for almost all Confederate arms and ammunition'.[87] The inclusion of economic targets as military objectives is

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place not under the control of those who attack them, whereas law enforcement concerns persons under the jurisdiction of the enforcers').

While it is beyond the scope of this article to assess this issue in depth, it is submitted that IHRL may be applicable even in limited air strikes outside the territory of the state. Any other position would mean that a state is prohibited by IHRL from torturing an individual but could still kill the individual in a targeted killing because IHRL would be applicable only in the former scenario as a result of the control of the state over the said individual. The position of wide applicability of IHRL to extraterritorial use of force is supported by various scholars (eg Droege (n 67) 335; Claus Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 245 *Journal of Conflict & Security Law* 245, 259, fn 49; David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 *European Journal of International Law* 171; Lubell (n 58) 222–27). But see Happold (n 82) 458 ('Arguments have also been made that international human rights law applies more widely, to all extraterritorial uses of force … However, although it has some support in the jurisprudence of the International Court of Justice and the American Commission on Human Rights and in legal doctrine, the current case law of the European Court of Human Rights argues the contrary'). For discussion regarding the responsibility of a state for human rights violations committed on a part of its territory which is not under its effective control, see ECtHR, *Ilaşcu and Others v Moldova and Russia*, App no 48787/99, 8 July 2004, para 333.

[84] It should be stressed that there are additional rules that may affect the legality of a given attack from the perspective of IHL. For example, even a military objective could be protected if the attack would result in collateral damage which is excessive in relation to the concrete and direct military advantage anticipated (see AP I (n 2) art 51(5)(b)). However, because of the limited scope of this article, this section will not discuss these further rules. For discussion see Dinstein (n 70) 121–45.

[85] ICRC Study (n 15) 32.

[86] See discussion in Christine Byron, 'International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage' (2010) 13 *Yearbook of International Humanitarian Law* 175, 186–88.

[87] New Zealand Defence Force, Directorate of Legal Services, *Interim Law of Armed Conflict Manual*, DM 112, November 1992, para 516(5), cited in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary*

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also famously advanced by the US in arguing that '[e]conomic targets of the enemy that indirectly but effectively support and sustain the enemy's war fighting capabilities' may also be attacked.[88]

Thus, while this line of argument cannot justify the destruction of all illegal property such as radio stations, it could justify the policy of destroying drug farms. For example, since coca plantations constitute a significant part of FARC income,[89] Colombia could argue that these drug farms are military objectives.[90] However, it is submitted that this argument is not a sufficient basis for the destruction of illegal property. First, the inclusion of economic targets could transform the whole economy into a military objective; this is too broad and general and should be rejected.[91] It would be ill-advised to adopt such a broad interpretation of military objectives in IAC and NIAC simply to resolve the issue of the destruction of illegal property in NIAC. Second, even if we adopt the inclusion of economic targets as military objectives, it still would not provide for the destruction of illegal drug farms in cases where they constitute only a negligible part of the income of the non-state group or when the income from these farms supports other activities of the non-state group, such as social activities.[92] Moreover, as stated above, the inclusion of economic targets as military objectives would not justify the destruction of other illegal property which does not have economic purposes. Thus, it is submitted that IHL does not provide a sufficient legal basis for destroying illegal property of non-state groups in NIAC.

5.3. Destroying Drug Farms under the Framework of IHL as *Lex Generalis* and IHRL as *Lex Specialis*

Another way of justifying the destruction of drug farms belonging to non-state groups in an ongoing NIAC, while accepting that these activities cannot be considered law enforcement operations, is to focus on the co-applicability of IHL and IHRL in armed conflicts.

International Humanitarian Law, Vol II: Practice – Part 1 (International Committee of the Red Cross and Cambridge University Press 2005) para 573.

[88] Brian Bill and Jeremy Marsh, *Operational Law Handbook* (International and Operational Law Department 2010) 146. See also Oceans Law and Policy Department, 'Annotated Supplement to the Commander's Handbook on the Law of Naval Operations', 1997, NWP 1-14M/MCWP S-2.1/COMDTPUB P5800.1, para 8.1.1 (reaffirmed in Department of Defense, 'Military Commission Instruction No 2', 30 April 2003, para 5(D), stating that objects may be targeted when they 'effectively contribute to the opposing force's war-fighting or war-sustaining capability').

[89] See n 64.

[90] De Cock (n 73) 111 (while rejecting this argument, De Cock stated that 'it has been asserted that narcotic dealers and facilities can also be subject to military action since the financial profits of this trafficking supports the insurgency').

[91] Indeed, the US interpretation of military objective, which includes economic targets, has been rejected by various scholars: eg De Cock, ibid 112; Dinstein (n 70) 95–96; Akande (n 63) 77–78; Byron (n 86) 188.

[92] Indeed, some armed groups have civil branches with social functions. See, eg, the social services provided by Hezbollah in Lebanon: Jonathan Masters and Zachary Laub, 'Hezbollah (a.k.a. Hizbollah, Hizbu'llah)', *Council on Foreign Relations* (*CFR*), 3 January 2014, http://www.cfr.org/lebanon/hezbollah-k-hizbollah-hizbullah/p9155 (stating that 'Hezbollah maintains an extensive security apparatus, political organization, and social services network in Lebanon, where the group is often described as a "state within the state"'); 'Lebanon: The Many Hands and Faces of Hezbollah', *Integrated Regional Information Networks*, 29 March 2006, http://www.irinnews.org/report/26242/lebanon-the-many-hands-and-faces-of-hezbollah ('Most experts believe that Hezbollah's social and health programmes are worth hundreds of millions of dollars annually').

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Despite the views of a few important dissenters,[93] international case law[94] confirms the commonly accepted position that IHRL applies also during armed conflict.[95] Although opinions diverge on the exact relationship between these two branches of law, it is often argued that during armed conflict IHRL applies as *lex generalis* while IHL applies as *lex specialis*.[96] Nevertheless, it has been suggested that IHRL should apply as *lex specialis* in NIAC in various areas such as detention[97] and, to some extent, targeting.[98] Thus, while accepting that the destruction of illegal property belonging to non-state groups cannot be considered a law enforcement operation in every case, it could be argued that the targeting of illegal property in NIAC between territorial states and armed opposition groups should be evaluated under IHRL as *lex specialis*.[99]

While this argument does not suffer from the same problems as those associated with the argument of law enforcement operations, it is far from being a perfect solution. First, as explained

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[93] 'Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights', 21 October 2005, Annex I: Territorial Scope of Application of the Covenant; Bill Bowring, 'Fragmentation, *Lex Specialis* and the Tensions in the Jurisprudence of the European Court of Human Rights' (2009) 14 *Journal of Conflict & Security Law* 485.

[94] *Nuclear Weapons* (n 1) [24]–[25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [106]; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*), Judgment [2005] ICJ Rep 116, [216].

[95] For example, Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 *International Review of the Red Cross* 501, 501 ('there is today no question that human rights law comes to complement humanitarian law in situations of armed conflict'); Basic Principles for the Protection of Civilian Populations in Armed Conflicts, UNGA Res 2675(XXV), 9 December 1970 ('[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict').

[96] *Nuclear Weapons* (n 1) [25]; *Wall* (n 94) [106]; Inter-American Commission on Human Rights, 'Report on Terrorism and Human Rights', 22 October 2002, OEA/Ser L/V/II 116, paras 57–62; Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation on States Parties to the Covenant', 26 May 2004, CCPR/C/21/Rev.1/Add.13, [11]; Dinstein (n 70) 19–26.

[97] For example, Human Rights First, 'Fixing Bagram: Strengthening Detention Reforms to Align with US Strategic Priorities', November 2009, 4, http://www.humanrightsfirst.org/wp-content/uploads/pdf/Fixing-Bagram-110409.pdf ('Detention is an essential element of armed conflict, but the grounds and procedures for detention must be consistent with international humanitarian law and the applicable standards of international human rights law. Common Article 3 and Additional Protocol II (AP II) do not provide procedural guidelines to govern reviews of detention in non-international armed conflicts. Thus it is necessary to refer to human rights law for guidance').

[98] Louise Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?' (2006) 88 *International Review of the Red Cross* 881, 903–04 ('Specific, clear and well-established rules of IHL can be considered to be *lex specialis*. However, where there is any kind of doubt, or where the rules are too general to provide all the answers, then human rights law will fill the gap, provided that this law is not incompatible with the overall fundamental aim and purpose of IHL. It is submitted that the human rights law relating to the right to life is suitable to supplement and interpret IHL rules relating to the use of force for non-international conflicts and occupation, as well as the law relating to civilians taking a "direct part in hostilities"').

[99] This argument, that the doctrinal solution to the need to destroy drug farms lies in the connection between IHL and IHRL, is implicitly referred to by Akande in his article on the destruction of drug farms in Afghanistan: see Akande (n 63) 78–79 ('Given that international (human rights) law would permit destruction by a government of civilian property in peacetime for the purpose of law enforcement, it would be surprising to have a blanket prohibition in time of internal armed conflict. This gives reason to be cautious about accepting that there is blanket prohibition of targeting civilian property in the customary IHL applicable to non-international armed conflicts. Of course this raises questions about the relationship between IHL and human rights law. However, it would be odd for a government to find itself more restrained by international law in time of internal armed conflict than it would be absent such an armed conflict').

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above, the applicability of IHRL in general and therefore as *lex specialis* could be contested in some situations when the territorial state has lost its effective control over the territory of the armed opposition groups.[100] Second, it could be argued that the use of IHRL as *lex specialis* in an ongoing armed conflict – arguably to derogate from the protection granted by IHL – is inconsistent with either the humanitarian goal of IHL or with IHRL, its main treaties clearly rejecting the idea that they could be used to justify the derogation of rights granted by other treaties.[101] Third, closely following the same rationale of the point above, it may expose the principle of the protection of civilian objects to abuse by allowing the state the discretion to claim that a specific object is illegal and therefore can be destroyed. This claim, while certainly hindering the protection of civilian objects, will not necessarily violate IHRL. For example, it is possible that a state could begin to destroy drug farms in accordance with IHRL (that is, with due process and not arbitrarily) only after the commencement of the armed conflict simply in order to weaken the non-state group. Fourth, it would further upset the already unbalanced reality of many NIACs where the state has much greater legal power to use force.[102]

Notwithstanding the theoretical problems in relying on IHRL as *lex specialis* for setting the limits on domestic law for targeting illegal civilian objects, if the protection of civilian objects has indeed progressed beyond the limited protection granted by Additional Protocol II, it is submitted that reliance on IHRL as *lex specialis* could be useful for the following reasons. First, it expresses the clear intention of states and their understanding that the illegal property of armed non-state groups should not enjoy higher protection under IHL than it does under IHRL. Thus, it does not derogate from IHL protection because states never intended that IHL would protect drug farms and other illegal property belonging to non-state groups in their domestic territory. Second, in comparison with the other alternatives, it is the lesser evil: (i) it accepts that, in NIAC, civilian property has become more protected under customary law than its original protection under treaty law; (ii) it avoids the adoption of superficial or flimsy nexus definitions that may be used when one attempts to classify the destruction of illegal property of non-state groups as law enforcement operations; (iii) unlike the argument that the destruction of illegal property of non-state groups is a law enforcement operation, it maintains that IHL is still relevant in the assessment of the legality of such destruction and therefore it might reduce the objections with regard to the application

[100] See discussion between nn 81–83.
[101] For example, International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 4(1) ('In time of public emergency … States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law') and art 5(2) ('There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent').
[102] For example, since there is no POW status in NIAC (see n 19), unlike members of non-state groups, the members of the armed forces of the state are not exposed to the risk of being prosecuted for participating in hostilities.

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of IHRL to situations where the control of the territorial state over a specific territory is disputed;[103] (iv) it avoids the need to interpret the term 'military objective' too widely.

Nevertheless, in order to further address the concerns raised above with regard to the humanitarian purpose of IHL and the risk of reducing the scope of its protection, it is suggested that the *lex specialis* status of IHRL and the treatment of illegal property should be cemented with a rule that establishes that illegal property should be defined in light of the domestic law that existed before the commencement of the NIAC. Thus, if drug farms were not illegal before the commencement of the conflict, the state would not be able to rely on a new law in order to justify its attacks on those drug farms under IHRL, and the drug farms would remain protected under the framework of IHL so long they are not military objectives. By adopting this rule, we can utilise the co-applicability of IHL and IHRL in order to balance the sovereign right of states to maintain law and order with the need to prevent the enactment of specific laws with the sole goal of allowing states to destroy the property of non-state groups, which otherwise would have been protected under IHL, under the framework of IHRL.

Despite the fact that more thought is welcomed on the reasoning which could justify the destruction of illegal property in NIAC, this section shows that accepting that states can and should be able to destroy illegal property of opposing non-state groups in NIAC under the framework of IHL (even if it is via the framework of IHRL as *lex specialis*) is tantamount to admitting that civilian objects in IAC and NIAC do not enjoy similar protection. In IAC, even if a state that is a party to the conflict has drug farms, the opposing state has no authority to destroy these farms unless they are military objectives. The difference in the level of protection stems from the differences between these two types of armed conflict. In NIAC the actors are not only states, and the territorial state is not only trying to quell a rebellion but also has a right to maintain law and order in its territory.[104] The law, if it aspires to be realistic and respected, must reflect the differences between the two types of armed conflict.

6. CONCLUSION

Although under treaty law not all civilian objects are protected in NIAC, the view that the rule of protection to all civilian objects is now part of customary law in NIAC, while based on problematic grounds, has become the prevalent opinion among IHL scholars and jurists.

The development of customary law on the protection of civilian objects, in terms of *lex ferenda*, is clearly positive. First, it could hardly be disputed that schools, dwellings, farms and

[103] It is beyond the scope of this article to discuss the concept of *lex specialis* in depth. It is sufficient to state that the application of IHRL as *lex specialis* in a specific case does not deny the general applicability of IHL. As *lex generalis*, IHL remains in the background and must be taken into account in interpreting the *lex specialis*. For further discussion regarding this model of *lex specialis,* see Sassòli and Olson (n 83) 603–05. See further discussion on the relationship between *lex specialis* and *lex generalis* in the context of IHL in Heike Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 *Journal of Conflict & Security Law* 265, 268–76.

[104] Nevertheless, it is admitted that NIAC also include transnational armed conflicts (see n 58).

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other civilian objects should be protected even if they do not qualify as objects ‘indispensable to the survival of the civilian population’ (Article 14 AP II), places of ‘works and installations containing dangerous forces’ (Article 15 AP II) or ‘cultural objects and of places of worship’ (Article 16 AP II). Second, granting protection to all civilian objects in NIAC narrows the highly criticised gap of protection that civilians enjoy in IHL under IAC and NIAC.[105] Third, protecting civilian objects is inherently connected with the basic idea of protecting the life and wellbeing of individuals. Thus, providing comprehensive protection to civilian objects in NIAC is necessary in order to complete the protection that civilians already enjoy in NIAC.[106] Fourth, one of the basic principles of IHL is that parties to a given conflict should act based only on military necessity.[107] Granting equal protection to civilian objects in NIAC means that only military objectives may be targeted in NIAC and it therefore also enhances the idea of military necessity in NIAC.

Nevertheless, as we saw above, granting equal protection to civilian objects in NIAC and in IAC may prevent states from destroying illegal property in their jurisdiction in accordance with their domestic law and IHRL. Such a result would not only hinder the sovereign right of states to maintain law and order, and would most likely be condemned as unrealistic, it would also harm the legitimate expectations of individuals who expect their state to provide them with safe environments which respect the rule of law. Thus, it is clear that the law regarding the protection of civilian objects in NIAC should be different from the law in IAC and not provide a blanket prohibition on targeting all civilian objects. This point reminds us that the distinction between IAC and NIAC is not an outdated distinction based on states’ self-interest, but is actually built on the understanding that there are inherent differences between hostilities between states and hostilities between states and non-state groups, and that the law should reflect these differences.

Thus, it is suggested that the law should be that all civilian objects are protected in NIAC but, unlike the protection of civilian objects in IAC, this protection does not bar a state from destroying in its territory objects which have been considered illegal under domestic law before the commencement of the NIAC, in accordance with IHRL.

While it is clear that there is no perfect solution that will allow states involved in NIAC to destroy their opponents’ illegal property without some normative and policy difficulties, it is also clear that such a solution is needed. If the protection of civilian objects has indeed progressed beyond the limited protection granted by Additional Protocol II, it is important to explain how states may continue to destroy illegal property in their territories, when necessary, even in situations of NIAC.

[105] Emily Crawford, ‘Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts’ (2007) 20 *Leiden Journal of International Law* 441; Yves Sandoz, ‘Foreword’ in ICRC Study (n 15) xxii (‘For the average person this [distinction] is completely absurd. Indeed, how can one claim the right to employ against one’s own population means of warfare which one has prohibited for use against an invader?’).
[106] The civilian population and individual civilians are already protected in NIAC under both treaty law (AP II (n 2) art 13) and customary law (ICRC Study (n 15) r 1).
[107] For example, Dinstein (n 70) 4–8.

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The examination of different theoretical approaches to how territorial states may still target civilian objects considered illegal by them, even if there is wide customary protection of civilian objects in NIAC, revealed that each of these approaches may have negative effects on the cohesion of IHL and the protection it provides. Thus, this article ends with an invitation to scholars, IGOs and NGOs to embark on two different journeys: first, additional research of state practice on how states involved in NIAC deal with the destruction of civilian objects used for illegal activities (such as, but not exclusively, drug production) is needed in order to see if customary law in NIAC indeed grants civilian objects protection regardless of their legal/illegal use. Second, assuming that customary law protects civilian objects in NIAC more comprehensively than does treaty law, we need to provide a stronger legal basis to explain how states that are involved in an ongoing NIAC may deal with the need to destroy illegal property of the opposing non-state groups.

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