

Military Targeting in the Context of Self-Defence Actions

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Abstract

For self-defence actions to be lawful, they must be directed at military targets. The absolute prohibition on non-military targeting under the *jus in bello* is well known, but the *jus ad bellum* also limits the target selection of states conducting defensive operations. Restrictions on targeting form a key aspect of the customary international law criteria of necessity and proportionality. In most situations, the *jus in bello* will be the starting point for the definition of a military targeting rule. Yet it has been argued that there may be circumstances when the *jus ad bellum* and the *jus in bello* do not temporally or substantively overlap in situations of self-defence. In order to address any possible gaps in civilian protection, and to bring conceptual clarity to one particular dimension of the relationship between the two regimes, this article explores the independent sources of a military targeting rule. The aim is not to displace the *jus in bello* as the ‘lead’ regime on how targeting decisions must be made, or to undermine the traditional separation between the two ‘war law’ regimes. Rather, conceptual light is shed on a sometimes assumed, but generally neglected dimension of the *jus ad bellum*’s necessity and proportionality criteria that may, in limited circumstances, have significance for our understanding of human protection during war.

Key-words

targeting; *jus ad bellum*; self-defence; necessity; proportionality; *jus in bello*; civilians

1. Introduction

In the 2003 *Oil Platforms* case, the International Court of Justice (ICJ) stated that:

[I]n order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it...[that] were of such a nature as to be qualified as ‘armed attacks’ within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force...The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a *legitimate military target* open to attack in the exercise of self-defence.¹

The Court therefore explicitly identified a requirement, determinative in relation to the lawfulness of measures taken in self-defence, that such actions must be directed against military targets only. Indeed, it has also taken this position a number of times elsewhere, at least implicitly.²

In itself, this is hardly a controversial stance on the part of the ICJ, and was largely ignored in the scholarly assessment of the *Oil Platforms* decision.³ When making or

¹ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 6 November 2003, ICJ, Merits, p. 161, para. 51 (emphasis added) (hereinafter ‘*Oil Platforms*’).

² See *Ibid.*, paras. 74-76; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, ICJ, Merits, p. 14, para. 237 (hereinafter ‘*Nicaragua*’); *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ICJ, Advisory Opinion, p. 226, para. 30 (hereinafter ‘*Nuclear Weapons*’); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, ICJ, Merits, p. 168, para. 147 (hereinafter ‘*Armed Activities*’). For discussion, see *infra* note 30 and accompanying text.

³ Although, see J.A. Green, ‘The *Oil Platforms* Case: An Error in Judgment?’, 9 *Journal of Conflict and Security Law* (2004) p. 357, at pp. 380-381.

responding to claims of self-defence, states in the UN era have fairly consistently referred to an obligation that such actions must be directed at military targets.⁴ The requirement that neither civilians nor civilian objects can be targeted in the context of self-defence actions is clear. However, what is rather less clear is the *source* of this obligation: the ICJ has not been

⁴ A few examples can demonstrate this trend throughout the UN era. In the context of French action against Tunisia in 1958, avowedly undertaken in self-defence, France indicated that it saw itself as being required to target only military installations and personnel in Tunisia (*see* Security Council, Official Records, 818th meeting, 2 June 1958, UN Doc. S/PV.819, at p. 13). Conversely, the action of El Salvador in Honduras in 1969 was generally accepted by states as constituting lawful self-defence *until* El Salvador began the indiscriminate bombing of Honduran cities (*see, e.g.*, the view taken by the United States, illustrated in the *New York Times*, 18 July 1969, p. 8). Honduras argued that these attacks were not lawful actions of self-defence on the basis that they were targeted at civilian objects (Letter dated 15 July 1969 from the charge d'affaires a.i of Honduras addressed to the Secretary General, 15 July 1969, UN Doc. S/9329). In 1981, one of these reasons advanced by third party states for their condemnation of Israel's attack upon the Iraqi Osiraq nuclear reactor was that this did not constitute a valid military target (*see, e.g.*, the views of Syria, Security Council, Official Records, 2284th meeting, 16 June 1981, UN Doc. S/PV.2284, p. 22; and Cuba, Security Council, Official Records, 2285th meeting, 16 June 1981, UN Doc. S/PV.2285, p. 11). Israel, in contrast, stressed that this *was* a military target, and that civilian casualties were avoided so far as possible in the attack (Security Council, Official Records, 2280th meeting, 12 June 1981, UN Doc. S/PV.2280, at p. 56). From either perspective, it is clear that the issue of military targeting was seen as being directly relevant to the lawfulness of the (purported) self-defence action. With regard to its 2001 intervention into Afghanistan, the United States made it clear that it only targeted military objectives and, further, that all care was taken to ensure the minimum loss of civilian life (*see, e.g.*, President Bush's address at the UN, General Assembly, Official Records, 44th plenary meeting, 10 November 2001, UN Doc. A/56/PV.44, particularly at p. 9). Similarly, in 2009, Israel stressed that it would only target Hamas objects in the exercise of self-defence, referring to a sole military focus on 'the terrorists and their infrastructure' (Identical letters dated 4 January 2009 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, 6 January 2009, UN Doc. S/2009/6).

explicit regarding the legal basis of the military targeting requirement in the context of self-defence, and when states refer to it they rarely do more than note that the obligation exists.⁵

There is, of course, a well-known, clear and absolute prohibition on non-military targeting under International Humanitarian Law (IHL).⁶ Unsurprisingly, the general assumption in the literature is therefore that this *jus in bello* criterion applies in the context of any and all *jus ad bellum* determinations concerning self-defence, and that this is the end of the matter. For example, Momtaz states that the targeting requirement for self-defence identified by the ICJ in the above cited passage from *Oil Platforms* “comes from...the cardinal principles...of humanitarian law”.⁷ He then explains the Court’s lack of elucidation as to the *jus in bello* source of this norm on the basis that “the customary nature of these rules [was] no longer the subject of any controversy, [and so] the Court did not find it necessary to recall them in the *Oil Platforms* case.”⁸ In other words, Momtaz indicates that the source of targeting restrictions in self-defence actions is the *jus in bello*, and that this fact is self-evident.

While not taking issue with the importance – perhaps even primacy – of the *jus in bello*, we argue in this article that IHL is not the end of the story with regard to targeting in the context of self-defence. The *jus ad bellum* too limits the target selection of states

⁵ When reviewing the state practice it is very difficult, if not impossible, to determine whether the states in question were appealing a military targeting criterion as a requirement of the *jus ad bellum*, or whether this obligation in the context of self-defence actions is merely due to the duty to comply with the prohibition on non-military targeting in the *jus in bello*. In none of the examples cited in *supra* note 4 did the state(s) in question identify the source of the targeting restrictions involved in executing the right of self-defence.

⁶ See Section 2, *infra*.

⁷ D. Momtaz, ‘Did the Court Miss an Opportunity to Denounce the Erosion of the Principle Prohibiting the Use of Force?’, 29 *Yale Journal of International Law* (2004) p. 307, at p. 309, footnotes omitted.

⁸ *Ibid.*

conducting defensive operations.⁹ Restrictions on targeting form a key aspect of the customary international law *jus ad bellum* criteria of necessity and proportionality. The *jus ad bellum* and *jus in bello* therefore have parallel obligations in relation to targeting. In the majority cases, these will apply concurrently and with identical substantive content.

However, there are three reasons to seek greater conceptual clarity in this area. First, it is at least arguable, as will be explored below, that the *applicability* of the *jus ad bellum* rules of self-defence and the *jus in bello* rules on targeting do not always overlap. In other words, perhaps not all instances of self-defence actions will trigger IHL and vice versa. This is disputable, and depends on one's reading of the triggers for both the *jus in bello* and the right of self-defence. Even if one accepts that the *jus in bello* can be triggered where the *jus ad bellum* is not, such a scenario would be unproblematic in relation to the military targeting requirement because the absolute IHL prohibition on civilian targeting would apply. However, to the extent that the reverse situation is possible – i.e., where the right to use force in self-defence is triggered but the protections of IHL are not – we argue that the *jus ad bellum* necessity and proportionality criteria will likely fill any 'gap' in the applicability of the *jus in bello*, thus maximising the possibility of seamless civilian protection from targeting.

Secondly, it may also be the case that the *content* of the norms flowing from the *jus in bello* and *jus ad bellum* are not identical with regard to targeting; meaning that not only

⁹ Broadly speaking, it is perfectly possible – indeed, uncontroversial – for different branches of international law to regulate the same subject matter. As the ICJ stated with regard to the relationship between IHL and human rights law, “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ, Advisory Opinion, p. 135, para. 106 (hereinafter ‘*Wall*').

applicability, but also specific *application* has the potential to diverge between the two regimes. Here, the *jus ad bellum* and *jus in bello* must be read as acting in conjunction, as cumulative requirements, again maximising humanitarian protection.

Finally, the traditional ‘separation principle’ requires that the rules of the *jus ad bellum* and those of the *jus in bello* are adequately distinguished, so as to ensure that all parties enjoy the protections of IHL irrespective of any legal determination as to the rights and wrongs of the initial use of force or outbreak of hostilities. In this paper we do not take a general position on the precise relationship between the two regimes. We are of the view, however, that as long as the separation principle is broadly maintained (and, if eroded, it surely continues to hold currency) it is useful to seek clarity with respect to the precise nature of the military targeting obligation under both regimes. While the wider relationship between the two branches of ‘war law’ is not our primary focus, we argue that clarifying both the overlap and potential for variance between the targeting rules of the *jus in bello* and those of the *jus ad bellum* will tend to reinforce the separation principle.

2. Military Targeting under the *Jus in Bello*

Before we turn to targeting in the specific context of self-defence actions, this section briefly sets out the well-established rule on targeting under the *jus in bello*. This basic rule is that civilians and civilian objects must not be the object of attack. The prohibition is established in Additional Protocol I (AP I) to the Geneva Conventions¹⁰ and is an uncontroversial principle of customary international law.¹¹ Indeed, the basic rule¹² was arguably binding in

¹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 (hereafter ‘AP I’), Articles 48, 51(2), and 52(2).

¹¹ Rule 1 of the influential International Committee of the Red Cross (ICRC) customary IHL study – J-M Henckaert and L. Doswald-Beck (eds.), *Customary International Humanitarian Law: Volume I, Rules* (Cambridge University Press, Cambridge, 2005) – states that “[t]he parties to the conflict must at all times

custom for decades before the adoption of AP I in 1977, as evidenced by, among other sources, prohibitions on attacking undefended towns and villages in the 1907 Hague Regulations¹³ and the 1923 Hague Rules of Aerial Warfare.¹⁴ The corollary of the basic rule is that only military objectives can be lawfully targeted.

Of course, the rule is more easily stated than applied at times. Military objectives, according to Article 52(2) of AP I:

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.

While there are core civilian and military ‘realms’, there are also grey zones. For example, the application of the notion of ‘direct participation in hostilities’, particularly in the context of counterinsurgency warfare, remains controversial.¹⁵ It is also the case, of course, that

distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.” The accompanying commentary to the rule indicates that “[n]o official contrary practice was found with respect to either international or non-international armed conflicts.”

¹² The prohibition on direct civilian targeting is so fundamental within the *jus in bello* that Article 48 of AP I, *supra* note 10, explicitly labels it “the basic rule”.

¹³ Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 1907, Article 25.

¹⁴ Hague Rules of Aerial Warfare 1923, Articles 22 and 24. For a discussion on the Hague Rules as evidence of custom, see R. Nelson and C.P.M. Waters, ‘The Allied Bombing of German Cities during the Second World War from a Canadian Perspective’, 14 *Journal of the History of International Law* (2012) p. 87.

¹⁵ See N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross, Geneva, 2009); and some of the critiques of the ICRC’s interpretation, such as K. Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance’, 42 *International Law and Politics* (2010) p. 641, at p. 644.

although civilians are protected from direct attacks, they may suffer by way of ‘collateral’ or ‘incidental’ damage in an attack against a military objective, if the civilian suffering is not disproportionate to the military advantage gained.¹⁶

There is an extensive literature and jurisprudence with respect to the grey zones in IHL targeting law and there has also been, especially in the last decade, a good deal of operational guidance for commanders on targeting law in the form of national military manuals and guidance from the International Committee of the Red Cross (ICRC).¹⁷ For present purposes we need not delve further into the detailed rules on the matter, beyond recognising that a developed – if still incomplete – body of law and scholarship exists in IHL concerning military targeting. It is enough to note here that the *jus in bello* requirement itself is unambiguous and absolute: civilians and civilian objects can never be targeted.

3. Military Targeting under the *Jus ad Bellum* Rules Governing Self-Defence

Article 51 of the UN Charter – the starting point for any consideration of the law governing self-defence – makes no mention of the need for a forcible defensive action to be directed at military objectives.¹⁸ However, as is well known, Article 51 does not tell the whole story with regard to the law governing self-defence: in this particular area of international law

¹⁶ See AP I, *supra* note 10, Article 51(5)(b).

¹⁷ See, e.g., the ICRC’s *Interpretive Guidance*: Meltzer, *supra* note 15.

¹⁸ Article 51 states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

custom plays an equally significant role.¹⁹ It is, therefore, through customary international law that the *jus ad bellum* regulates targeting. This is not to say that there is a stand-alone customary *jus ad bellum* ‘targeting criterion’.²⁰ There is no *opinio juris* to support this; states simply do not refer to such a requirement.²¹ Instead, the *jus ad bellum* regulates the choice of targets available by way of the obligation for self-defence actions to be both necessary and proportional.²²

The modern *jus ad bellum* criteria of necessity and proportionality have their roots in a much-quoted 1841 letter by Daniel Webster, the then US Secretary of State, concerning the 1837 sinking of the steamship *Caroline*.²³ Military targeting was an aspect of Webster’s famous *Caroline* formulation for self-defence, a fact that has since been commonly

¹⁹ As the ICJ made clear in the *Nicaragua* case: “There can be no doubt that the issues of the use of force and collective self-defence...are issues which are regulated both by customary international law and by treaties, in particular by the United Nations Charter.” *Nicaragua*, *supra* note 2, at para. 34.

²⁰ One possible reading of the ICJ’s statement in paragraph 51 of the *Oil Platforms* case is that the Court was identifying a stand-alone *jus ad bellum* targeting requirement: the defending state “must...show that its actions were necessary and proportional to the armed attack made on it, *and* that the platforms were a legitimate military target open to attack in the exercise of self-defence.” *Oil Platforms*, *supra* note 1, para. 51 (emphasis added). *See* Green, *supra* note 3, at p. 380.

²¹ Indeed, states tend not to identify the source of the targeting obligation that they apply in the context of self-defence actions at all, *see supra* note 5 and accompanying text.

²² The requirement that all self-defence actions are governed by the criteria of necessity and proportionality is today essentially accepted by all states and scholars, *see* C. Gray, *International Law and the Use of Force* (Oxford University Press, Oxford, 3rd edn, 2008) p. 148. These criteria therefore provide uncontroversial sources for a targeting requirement within the *jus ad bellum*.

²³ Letter dated 27 July 1842, from Daniel Webster to Lord Ashburton, XXX *British and Foreign State Papers* (1841-1842) pp. 193-194, extract taken from Webster’s earlier letter to Henry S. Fox dated 24 April 1841, XXIX *British and Foreign State Papers* (1840-1841) pp. 1137-1138.

overlooked.²⁴ Webster explicitly took the view that lawful self-defence actions were required to “discriminat[e]...between the innocent and the guilty.”²⁵ As such, the idea of military targeting as an aspect of necessity and proportionality stretches back to the very roots of the customary international law governing self-defence.

Far more recently, in the 2003 *Oil Platforms* decision, the ICJ noted that under the modern law governing self-defence “[o]ne aspect of these criteria [necessity and proportionality] is the nature of the target of the force used avowedly in self-defence.”²⁶ At least one reading of this statement is that the Court viewed non-military targeting as contrary to the customary criteria regulating self-defence. The view that a restriction in the choice of targets is inherent within the *jus ad bellum* necessity and proportionality criteria can also be inferred from other ICJ decisions.²⁷

²⁴ For discussion of targeting in the context of the *Caroline* formula, see J.A. Green, ‘Docking the *Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense’, 14 *Cardozo Journal of International and Comparative Law* (2006) p. 429, at pp. 476-477.

²⁵ Letter dated 27 July 1842, *supra* note 23, p. 1138. It is worth noting here that Webster did qualify this requirement somewhat; he did not go so far as to claim that self-defence actions must in all cases be directed against military targets.

²⁶ See *Oil Platforms*, *supra* note 1, paras. 74-76 (quoted from para. 74).

²⁷ Having said this, in each instance the relevant passages are far from explicit in this regard. In the *Nuclear Weapons* advisory opinion, in the context of its examination of whether international law relating to the protection of the environment acted as a bar to the use of nuclear weapons, the Court stated, explicitly in reference to self-defence, that “[s]tates must take environmental considerations into account when assessing what is necessary and proportionate *in the pursuit of legitimate military objectives*.” *Nuclear Weapons*, *supra* note 2, at para. 30 (emphasis added). It has been suggested that paragraph 27 of the *Nicaragua* case can be read as indication that the Court viewed targeting as a key element of the proportionality criterion (see A. Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter* (Bruylant, Brussels, 2000) p. 170; and *Nicaragua*, *supra* note 2, para. 237). Similarly, it has been argued that the targeting requirement inherent in the necessity and proportionality criteria explains the Court’s reasoning in

When one considers the requirements of necessity and proportionality, it quickly becomes apparent that non-military targeting is liable to fall foul of one (or, more usually, *both*) of these customary criteria. For example, it seems highly unlikely that an attack against non-military targets could amount to a *necessary* action in self-defence.²⁸ The necessity criterion requires that a defending state only resorts to using force where no reasonable alternative means of abating the armed attack against it exists.²⁹ On this basis, Corten has argued that “if the target has no military role, its destruction cannot prove effective and therefore necessary in repelling the attack.”³⁰ This will certainly be correct in most instances.

Similarly, military targeting is inherent in the proportionality requirement.³¹ The *jus ad bellum* proportionality criterion requires that a use of force in the exercise of the right of

paragraph 147 of the *Armed Activities* merits decision (see O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart, Oxford, 2010) p. 488; and *Armed Activities*, *supra* note 2, para. 147).

²⁸ See Corten, *supra* note 27, p. 488; Green, *supra* note 3, p. 381; S.L. Jansen, ‘Terms of the Debate: Defining Self-Defence’, *International Studies Society – Belgrade* (2012); J. Kittrich, *The Right of Individual Self-Defense in Public International Law* (Logos Verlag, Berlin, 2008) pp. 89-90; E. Kwakwa, ‘South Africa’s May 1986 Military Incursions into Neighbouring African States’, *12 Yale Journal of International Law* (1987) p. 421, at p. 440; and T. Ruys, *‘Armed Attack’ and Article 51 of the UN Charter* (Oxford University Press, Oxford, 2010) pp. 108-110.

²⁹ J.A. Green, *The International Court of Justice and Self-Defence in International Law* (Hart, Oxford, 2009) pp. 76-86.

³⁰ Corten, *supra* note 27, p. 488.

³¹ See Constantinou, *supra* note 27, p. 170; J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, Cambridge, 2004) pp. 168-173; C. Greenwood, ‘Self-Defence and the Conduct of International Armed Conflict’, in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff, Dordrecht, 1989) p. 273, at pp. 278-279; J.M. Lehmann, ‘All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the *Jus in Bello* and *Jus ad Bellum*’, *17 Journal of Conflict and Security Law* (2012) p. 117, at p. 133 and 135; K.

self-defence must be measured not against the ‘scale’ of the attack suffered per se, but against the defensive necessity created by that attack. In other words, the proportionality criterion does not merely require a numerical equivalence of scale or means between the attack and the response, but, rather, that the force employed must not be excessive with regard to the goal of abating or repelling the armed attack being responded to.³² This is evident from the *Caroline* formulation itself, which set out the proportionality criterion as requiring that the defending state’s response must involve “nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”³³

Again, it is unlikely that a direct attack on a civilian target will be anything other than ‘excessive’ when measured against the state’s defensive need. After all, it is the abatement of the attack, and not retribution, which determines the lawfulness of defensive action under the proportionality criterion. Unless a target is a military one it is, by definition, not the source of the armed attack. It will therefore be extremely unlikely that attacking a civilian target will be ‘proportional’ when balanced against the goal of stopping that attack. The proportionality criterion for self-defence will, therefore, almost always “exclude...attacks on civilians”.³⁴ The *Nicaragua* case further support this conclusion, in that the United States mining of, and

Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Hart, Oxford, 2011) pp. 62-80; J. Quigley, ‘The Afghanistan War and Self-Defense’, 37 *Valparaiso University Law Review* (2002-2003) p. 541, at p. 552; and Ruys, *supra* note 28, p. 108, at footnote 297.

³² See, e.g., Green, *supra* note 29, pp. 66-96; R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994) p. 232; and R. Wedgwood, ‘Proportionality and Necessity in American National Security Decision Making’, 86 *Proceedings of the American Society of International Law* (1992) p. 58, at p. 59.

³³ Letter dated 27 July 1842, *supra* note 23, p. 1138.

³⁴ Okimoto, *supra* note 31, p. 65.

attacks upon, the Nicaraguan ports was seen by the ICJ as being disproportional, *inter alia*, because these were not military targets.³⁵

While states do not generally refer to the ‘source’ of the targeting obligations incumbent upon them in the context of self-defence,³⁶ there is some support from state practice demonstrating that the *jus ad bellum* criteria of necessity and proportionality impose their own restrictions on target selection. For example, in the context of its interventions in Zambia, Zimbabwe and Botswana in 1986, which were purportedly actions in self-defence, South Africa stressed that it was only targeting African National Congress bases, and not the civilian populations of the three states concerned.³⁷ As such, it saw these bases as justifiable targets to be attacked in self-defence. The interventions were widely condemned and one of the reasons why other states found them to be unlawful was that the targets of the operation were not of a military nature, despite South Africa’s assertions to the contrary.³⁸ Notably, the representative of Tanzania at the Security Council explicitly argued that the attacks did not qualify as the lawful exercise self-defence because the targets were not military ones, seemingly on the basis that it was neither necessary nor proportional to attack them under the *jus ad bellum*.³⁹

³⁵ *Nicaragua*, *supra* note 2, para. 237. *See* Constantinou, *supra* note 27, p. 170; Okimoto, *supra* note 31, p. 62; and Ruys, *supra* note 28, p. 108 (footnote 297). Admittedly, this interpretation of ICJ’s reasoning in the merits decision is not entirely conclusive, given that the Court was far from explicit in this regard; it is, however, the most logical reading of this part of the judgment.

³⁶ *See supra* note 5 and accompanying text.

³⁷ For example, South Africa stressed that “[i]n the actions of 19 May the greatest care was taken not to involve local citizens.” *See* Security Council, Official Records, 2684th meeting, 22 May 1986, UN. Doc. S/PV.2684, p. 26.

³⁸ Kwakwa, *supra* note 28, p. 440.

³⁹ UN Doc. S/PV.2684, *supra* note 37, p. 45.

4. The Potential for Variance

In this section, we examine the manner in which the *jus in bello* rule on military targeting co-exists with the broadly equivalent *jus ad bellum* targeting obligation flowing from the necessity and proportionality criteria. In particular, we consider the potential for variance between the targeting rules derived from the *jus in bello* and *jus ad bellum* respectively. We first examine the possibility of divergence in terms of their *applicability*, and then turn to possible variance in the context of their *content*.

It should be kept in mind that in the majority of self-defence actions, the targeting rules of the *jus in bello* and *jus ad bellum* will apply in tandem and with synchronicity: both regimes will be applicable, and their content – in terms of the targeting restrictions placed on the defending state – will be substantively identical. Nonetheless, as explored below, it is arguable that normative gaps may exist in some circumstances. Relatedly, it is also worth noting that we subscribe to the ‘concurrent application’ principle with regard to the relationship between the two branches of war law.⁴⁰ This principle holds that the legal requirements of the *jus ad bellum* and *jus in bello* must – as a general matter of normative interaction – be concurrently applied and are *cumulative*. As the ICJ has confirmed:

...a use of force that [meets the requirements] under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in

⁴⁰ See C. Greenwood, ‘*Jus ad Bellum* and *Jus in Bello* in the *Nuclear Weapons* Advisory Opinion’, in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, Cambridge, 1999) p. 247, at p. 258; Lehmann, *supra* note 31, p. 129; and K. Okimoto, ‘The Cumulative Requirements of *Jus ad Bellum* and *Jus in Bello* in the Context of Self-Defense’, 11 *Chinese Journal of International Law* (2012) p. 45, at pp. 56-59.

armed conflict which comprise in particular the principles and rules of humanitarian law.⁴¹

However, while there can never be *jus ad bellum* permissiveness for a self-defensive action that is non-compliant with the applicable *jus in bello* rules, this is not necessarily the same as saying that the *jus in bello* is *always* applicable in self-defence actions, or that the content of the two regimes regarding targeting will *always* be identical. We entirely agree with Daniel Bethlehem's assertion that "any use of force in self-defence would be subject to applicable *jus in bello* principles governing the conduct of military operations".⁴² Our focus in this section is precisely on possible instances where the *jus in bello* rules may *not* be applicable, or instances where the substantive obligations of one of the war law regimes may provide more expansive civilian protection than the other.

4.1. Variance in Applicability

An 'armed attack' under Article 51 of the UN Charter (triggering self-defence) will generally, and uncontroversially, also constitute an 'armed conflict' in IHL terms (triggering the protections of the *jus in bello*).⁴³ Similarly, the existence of an international armed conflict under the *jus in bello* will generally imply that an armed attack has occurred. For the most part, then, the protections of IHL and the right of self-defence will be simultaneously triggered.

⁴¹ *Nuclear Weapons*, *supra* note 2, at para. 42.

⁴² D. Bethlehem, 'Self-Defense Against and Imminent or Actual Armed Attack by Nonstate Actors', 106 *American Journal of International Law* (2012) p. 770, at p. 774. *See also* D. Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in the *Jus ad Bellum*', 24 *European Journal of International Law* (2013) p. 235, at p.240.

⁴³ As Okimoto notes, "[t]he relationship between the law of self-defence and IHL only arises when an 'armed attack' and an 'armed conflict' exist at the same time." Okimoto, *supra* note 31, p. 45.

Where the triggers for the two regimes overlap, IHL will naturally be the legal regime to which the parties and others will first look with respect to the targeting requirement. The *jus in bello* has an established and self-contained ‘credibility’ on military targeting issues. Indeed, IHL has been found to be the *lex specialis* on lawful conduct during combat operations, albeit that this has usually been in contradistinction to human rights law.⁴⁴ It is in IHL that a military targeting requirement is clearly defined and formalised through the (widely ratified) conventional and customary sources outlined in section 2.⁴⁵

Furthermore, IHL has taken military realities into account in coming to its rules, balancing the principle of military necessity with the principles of distinction and humanity to arrive at practical protections for civilians. The following definition of ‘military necessity’ in the Lieber Code is reflected in more modern statements of the principle as well: “those measures which are indispensable for securing the ends of the war, *and which are lawful*

⁴⁴ See, e.g., Wall, *supra* note 9, at para. 106. See generally, M. Sassòli and L.M. Olson, ‘The Legal Relationship between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflict’, 90 *International Review of the Red Cross* (2008) p. 599. There is every reason to conclude that the determination that IHL is *lex specialis* in the context of the conduct of hostilities holds equally true with regard to its interrelationship with the *jus ad bellum*. Of course, labelling one branch of the law – in this case IHL – as *lex specialis* does not, by most interpretations, wholly exclude the more general law from consideration, nor does it necessarily mean that the special and general law are in direct conflict or would lead to different results. See A. Lindroos, ‘Addressing Norm Conflicts in a Fragmented System: The Doctrine of *Lex Specialis*’, 74 *Nordic Journal of International Law* (2005) p. 27, in general, but particularly at pp. 42-47.

⁴⁵ Y. Dinstein, ‘The Principle of Distinction and Cyber War in International Armed Conflicts’, 17 *Journal of Conflict and Security Law* (2012) p. 261 (stating that the principle of distinction “lies at the root of International Humanitarian Law”).

*according to the modern law and usages of war.*⁴⁶ This practical balancing act extends not just to the pre-selection of targets but also the manner in which those targets can be attacked. Thus, for example, there are precautions that must be taken prior to and during an attack to protect civilians where possible.⁴⁷ The default position is, therefore, that the *jus in bello* obligation can and should be the ‘first port of call’ in relation to targeting.

Some commentators have suggested that IHL will *always* apply when self-defence, or any other justification for the use of force, is at issue. On this understanding, the *jus ad bellum* criteria of necessity and proportionality will usually have either a purely buttressing function or no function at all, at least with regard to the selection of the target.⁴⁸ It has been the ICRC’s long-standing view that there is no minimum threshold, in terms of the force used, for IHL to apply in the inter-state context. For the ICRC, IHL is triggered by any use of force by one state against another. This position relies on a strict reading of common Article 2 of the Geneva Conventions, which states:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of *any other armed conflict* which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.⁴⁹

The reference to declared war in the preceding paragraph is essentially irrelevant nowadays, but it is well-established that the drafters of the Geneva Conventions were intent on avoiding gaps in protection by one state or another denying they were in a state of war. Jean Pictet’s commentary on Article 2 states:

⁴⁶ *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, 24 April 1863, at <<http://www.icrc.org/ihl/INTRO/110>>, visited on 7 May 2014 (emphasis added).

⁴⁷ AP I, *supra* note 10, Articles 57 and 58.

⁴⁸ Lehmann, *supra* note 31, at p. 130 (noting this possibility but not subscribing to it).

⁴⁹ Geneva Conventions 1949, common Article 2 (emphasis added).

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims.⁵⁰

Often seen as the ‘guardian’ of the Geneva Conventions, ICRC views on IHL are authoritative, albeit not definitive, as the debates over the ICRC’s positions on customary international law and direct participation in hostilities reveal.⁵¹ At the very least they are taken seriously by states and other actors in the international system.

The ICRC position that there is no ‘threshold trigger’ for IHL finds support in both scholarship and jurisprudence. For example, Yoram Dinstein posits that IHL “is brought to bear upon the conduct of hostilities between sovereign States, even if these hostilities fall short of war, namely constitute a mere incident.”⁵² While indicating that “protracted

⁵⁰ J.S. Pictet (ed.), *Commentary to the Third Geneva Convention* (International Committee of the Red Cross, Geneva, 1960), p. 23. For a recent reaffirmation of Pictet’s view by the ICRC, see *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report Prepared by the ICRC (October 2011), <<http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>>, visited on 7 May 2014, at pp. 7-8.

⁵¹ See, e.g., the United States’ response to the ICRC’s customary IHL study: ‘Joint Letter from John Bellinger and William Haynes to Jakob Kellenberger on Customary International Law Study’, 46 *International Legal Materials* (2007) p. 514.

⁵² Y. Dinstein, *Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, Cambridge, 2nd edn, 2010), pp. 28-29. See also, E. David, *Principes de droit des conflits armés* (Bruylant, Brussels, 2002), p. 109: «tout affrontement armé entre forces des Etats parties aux CG de 1949 (et éventuellement au 1er PA de 1977) relève de ces instruments, quelle que soit l’ampleur de cet affrontement: une escarmouche, un incident de frontière entre les forces armées des Parties suffisent à provoquer l’application des Conventions (et du 1er Protocole, s’il lie les Etats) à cette situation».

violence” is required for an armed conflict to exist in the context of non-international armed conflict, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) was famously clear in the *Tadić* decision that an “[international] armed conflict exists *whenever* there is a resort to armed force between States”.⁵³

By contrast, other commentators have suggested that there are limited hostile actions that do not trigger IHL. Mary Ellen O’Connell and Ania Kritvus have argued, for example, that the ICRC’s position is laudably motivated by the desire to maximise the scope of IHL protection, but does not accurately reflect state practice. As they put it, “[m]ost States do not regard an isolated incident or limited exchange of fire, as an armed conflict, bringing into operation the full panoply of the Geneva Conventions.”⁵⁴ Similarly, Christopher Greenwood, referring to the shooting down and capture of an American pilot by Syrian forces in the 1980s and the subsequent United States position that the pilot was entitled to prisoner of war status, suggests:

It is not clear, however, that countries always take such a broad view of what constitutes an armed conflict; many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts. It may well be, therefore, that only when fighting reaches a certain level of intensity which exceeds that of isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply.⁵⁵

The British *Manual of the Law of Armed Conflict* also appears to support this position:

⁵³ *The Prosecutor v. Dusko Tadić*, 2 October 1995, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, para. 70 (emphasis added) (hereinafter ‘*Tadić*’).

⁵⁴ M.E. O’Connell and A. Kritvus, ‘United Nations Peacekeeping and the Meaning of Armed Conflict’, in M.E. O’Connell (ed.), *What is War? An Investigation in the Wake on 9/11* (Brill, Leiden, 2012) p. 109, at p. 115.

⁵⁵ C. Greenwood, ‘Scope of Application of Humanitarian Law’, in D. Fleck (ed.), *Handbook of International Humanitarian Law* (Oxford University Press, Oxford, 2nd edn, 2008) p. 45, at p. 48.

These definitions [those of the ICRC and the Appeals Chamber in *Tadić*] do not deal with the threshold for an armed conflict. Whether any particular intervention crosses the threshold so as to become an armed conflict will depend on all the surrounding circumstances. For example, the replacing of border guards with soldiers, or an accidental border incursion by members of the armed forces would not, in itself, amount to an armed conflict, nor would the accidental bombing of another country.⁵⁶

Other more recent incidents that have generated debate as to whether IHL has been triggered include the 2007 capture of British sailors by Iran – with no shots fired by either side – over a maritime border incident, the 2012 Syrian mortar attack on Akcakala before Turkey’s armed response and, in 2014, Russian action in Ukraine in the earliest days of the Crimea dispute.⁵⁷ While the general view of the present authors is that the *Tadić* definition probably represents the *lex lata* (and certainly represents desirable *lex ferenda*), some uncertainty remains as to whether there exists a threshold trigger for the application of IHL to international armed conflict.

At the same time as the threshold for IHL is contested terrain, the *jus ad bellum* trigger for self-defence also presents uncertainties. Article 51 of the UN Charter provides for the right of self-defence in the face of ‘armed attack’: the right is therefore triggered by the

⁵⁶ *The Joint Service Manual of the Law of Armed Conflict* (2004 edn),

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf, visited on 7 May 2014, at 29.

⁵⁷ For a defence of the ‘low threshold’ test with reference to recent international incidents, see L. Blank, ‘The Continuing Importance of a Low Threshold for LOAC Application in International Armed Conflict’, 19 March 2014, <http://justsecurity.org/2014/03/19/guest-post-continuing-importance-threshold-loac-application-international-armed-conflict/>.

occurrence⁵⁸ of an armed attack. Nothing in Article 51 (or the Charter more generally) identifies exactly what an ‘armed attack’ *is*, however. The term ‘armed attack’ used in Article 51 differs from the phrase ‘use of force’ in Article 2(4), suggesting that the two concepts are not the same.⁵⁹ Indeed, the majority interpretation of the notion of an ‘armed attack’ is that this equates to a qualitatively *grave* use of force.⁶⁰ As the ICJ famously phrased this in the *Nicaragua* case, an armed attack is commonly seen as “the most grave form of the use of force”,⁶¹ to be contrasted with “less grave forms”, which do not trigger self-defence. On balance, state practice also seems to support this interpretation of the criterion.⁶²

However, some commentators have argued that the concepts of ‘armed attack’ and ‘use of force’ are identical. In other words, some hold that *any* use of force will trigger the right of self-defence, and that it is the requirements of necessity and proportionality – rather than some illusory gravity threshold – that minimise the resort to, and implications of, defensive forcible action.⁶³

⁵⁸ Leaving entirely to one side the entrenched debates on anticipatory/pre-emptive self-defence. For a good overview of these debates see J.N. Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Aldershot, Ashgate, 2005) pp. 111-149.

⁵⁹ See Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, Cambridge, 5th edn, 2011), p. 194; and L. Moir, *Reappraising the Resort to Force* (Hart, Oxford, 2010), p. 22.

⁶⁰ See, e.g., I. Brownlie, *International Law and the Use of Force by States* (Oxford, Oxford University Press, 1963), pp. 278-279; Corten, *supra* note 27, p. 403; Constantinou, *supra* note 27, p. 57; and Gray, *supra* note 22, pp. 147-148.

⁶¹ *Nicaragua*, *supra* note 2, at para. 191.

⁶² For a detailed assessment of this state practice, see Green, *supra* note 29, pp. 112-129.

⁶³ See, e.g., ‘The Chatham House Principles of International Law on the Use of Force by States in Self-Defence’ 55 *International and Comparative Law Quarterly* (2006) p. 963 (principles produced based by Chatham House following consultations with thirteen eminent international legal scholars in the United Kingdom), at p. 966; and

Even for the majority who accept that an attack must be of a certain gravity to trigger self-defence, this begs the question ‘how grave is “most grave”?’ The *Oil Platforms* case serves to illustrate this problem. In the case, the majority reiterated, verbatim, the *Nicaragua* “most grave” definition of an armed attack.⁶⁴ Yet, in the same decision, the Court held that a stand-alone attack on a single military vessel may be enough to constitute a use of force of sufficient gravity to qualify as an armed attack: “[t]he Court does not exclude the possibility that the mining of a single military vessel may be sufficient to bring into play the inherent right of self-defence.”⁶⁵ On the face of it, at least, it is difficult to view an attack against a single vessel as one of the “most grave form[s] of the use of force”. The ICJ has thus appeared unsure of the definition of an armed attack, even within the same decision.

Many writers therefore accept but downplay the gravity threshold for self-defence, arguing that the ‘gap’ between a ‘use of force’ and an ‘armed attack’ exists but can, depending on context, sometimes be rather small.⁶⁶ A useful illustration from state practice is the mercenary intervention in Seychelles in 1981, which was apparently directed by South Africa. This attack involved a relatively small number of mercenary soldiers⁶⁷ and, prima facie, would be difficult to equate to the gravest uses of force. However, the attack was certainly viewed as an ‘armed attack’ by other states,⁶⁸ perhaps because of the fact that –

T. Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, Manchester, 2005), p. 138.

⁶⁴ *Oil Platforms*, *supra* note 1, at para. 51.

⁶⁵ *Ibid.*, at para. 72.

⁶⁶ Dinstein, *supra* note 59, pp. 207-212; and Ruys, *supra* note 28, pp. 139-157.

⁶⁷ Security Council, Official Records, 2314th meeting, 15 December 1981, UN Doc. S/PV.2314, pp. 4-5.

⁶⁸ See, e.g., the view taken by France, *ibid.*, p. 26. Indeed, there was unanimous condonation of Seychelles’ forcible response. See generally, UN Doc. S/PV.2314, *ibid.*; Security Council, Official Records, 2359th meeting, 20 May 1982, UN Doc. S/PV.2359; Security Council, Official Records, 2361st meeting, 21 May 1982,

despite its small scale – the attack had detrimental implications for the infrastructure of Seychelles.⁶⁹

The uncertainty surrounding the triggers for both the protections of IHL and the right of self-defence mean that there is at least the potential for a lack of exact overlap in applicability of their respective targeting requirements in both directions. Indeed, the paradigmatic ‘isolated incident’ – let us take the hypothetical example of an attack on a single vessel at sea – can be seen as triggering either or both legal regimes (or, potentially, neither), depending on where one identifies the respective thresholds for ‘armed conflict’ and ‘armed attack’.

If one subscribes to what are probably the majority positions with regard to both the *jus in bello* and *jus ad bellum* triggers – coupling the ‘low’ *Tadić* threshold for IHL with the ‘high’ *Nicaragua* threshold for self-defence – it is not only possible, but perfectly likely, that IHL will apply even though the right of self-defence has not been triggered. On this reading, any use of force triggers the targeting protections of IHL, meaning that the hypothetical attack on our single vessel would qualify as an ‘armed conflict’. In contrast, it would be rather difficult to view this isolated attack as constituting “the most grave form of the use of force”; the rules governing self-defence would therefore not kick in.

Given that this interpretation of the scenario would mean that the force used would not qualify as an instance giving rise to self-defence at all, it is of course technically beyond the scope of this paper. More importantly, the lack of overlap in applicability between the

UN Doc. S/PV.2361; Security Council, Official Records, 2365th meeting, 24 May 1982, UN Doc. S/PV.2365; and Security Council, Official Records, 2367th meeting, 25 May 1982, UN Doc. S/PV.2367.

⁶⁹ Report of the Security Council Commission of Inquiry established under Resolution 496 (1981), 15 March 1982, UN Doc S/14905/Rev.1 (1st Report), especially at p. 44.

two regimes in this reading is entirely unproblematic, because the detailed targeting norms of IHL would apply.

However, if one were to conversely adopt the *minority* understandings of the respective triggers – downplaying (or denying) the ‘gap’ between a ‘use of force’ and an ‘armed attack’, and combining this with the view that some form of intensity threshold exists for ‘armed conflict’ – it is possible that self-defence may be triggered *without* the simultaneous applicability of IHL. Returning to our single vessel example, we have already seen that the ICJ has viewed an attack on a single vessel as potentially equating to an armed attack. If this is accepted – and it *is* by many who argue for a more permissive reading of the law governing self-defence – then the attack on our hypothetical single vessel could in fact trigger the inherent *jus ad bellum* right. At the same time, if we accept Greenwood’s argument that “isolated incidents, such as border clashes and *naval incidents*, are not [necessarily] treated as armed conflicts” by states,⁷⁰ this could lead to the conclusion that the *jus in bello* was inapplicable to our scenario.

To the extent that one is willing to accept that it is possible for self-defence to be triggered where IHL is not, it is important to be clear that the targeting protections offered by the *jus ad bellum* necessity and proportionality criteria will generally act to ensure that civilians could nonetheless not be directly targeted. Although lacking IHL’s independent, detailed guidelines on the matter, it is extremely unlikely to be either necessary or proportional to target a civilian object in response to an attack on a single vessel, even if IHL has not yet been triggered.

Ultimately, a majority of scholars (and states) would agree that there exists a gravity threshold for armed attack, but no such threshold for international armed conflict; indeed, this is a view that we share. To reiterate what we said at the beginning of this sub-section, in the

⁷⁰ Greenwood, *supra* note 55, p. 48 (emphasis added).

majority of instances when self-defence is triggered, so too will be the targeting obligations of IHL. Indeed, IHL will in many cases be triggered well before we even enter the realm of self-defence. However, in the interests of conceptual clarity and to ensure that humanitarian protection is as seamless as possible, we note that credible arguments can be made to indicate a possible variance in the applicability of targeting norms in the context of self-defence. As Keiichiro Okimoto puts it:

In short, an armed attack often amounts to an international armed conflict...However, the two thresholds can be at variance...For this reason, it is best not to expect a quick and simple answer that an armed attack always amounts to an international armed conflict and vice versa.⁷¹

We highlight this precisely to show that, if there is a gap, the *jus ad bellum* will generally be able to ‘step in’ to maximise civilian protection.

4.2. Variance in Content

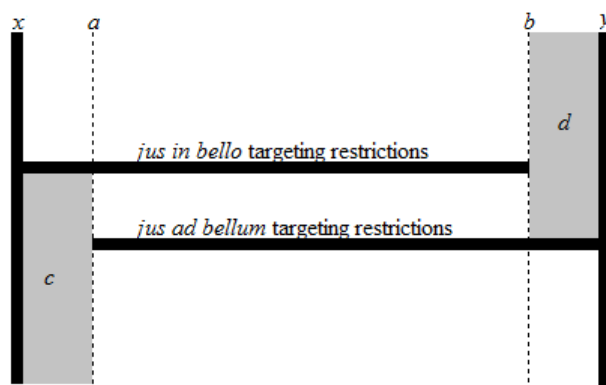
It would be convenient to merely assume that the substantive targeting requirements of the *jus ad bellum* and *jus in bello* will be identical in all self-defence cases. In most instances there will indeed be substantive congruence, but, as will be shown below, there will not always be a total overlap in rule content. Uncritically asserting exact overlap in the content of the regimes – convenient as that may be – has the natural effect of moving the perception of the joint protection offered to the less restrictive end of the scale. If it is assumed that *ad bellum/in bello* targeting requirements are the same, then all a state need do is show that it is in compliance with one branch, and it can rest its case. Stressing the possibility for variance

⁷¹ Okimoto, *supra* note 31, pp. 50-51.

between the targeting requirements therefore highlights that protection remains in place at the margins.⁷²

Figure 1 highlights the substantive relationship between the two regimes with regard to military targeting. It should be noted that the figure does not ‘measure’ anything per se (such as the ‘scale’ or ‘intensity’ of violence of any given self-defence action, for example); nor does it represent the threshold triggers for IHL and armed attack respectively (the possible variance between which having been discussed in the previous sub-section). Rather, *Figure 1* is employed to act as a visual representation of the possible lack of direct overlap between the substantive content of the targeting protections in the *jus ad bellum* and *jus in bello*.

Figure 1



In the majority of instances, self-defence actions will fall between points *a* and *b* on *Figure 1*, and thus will be regulated by the targeting rules of *both* the *jus ad bellum* and *jus in bello* (with, as we have previously noted, the *jus in bello* rules providing the more detailed roadmap). However, in some cases, actions may fall into one of the marginal shaded areas, *c* or *d*, meaning that targeting practice is only restricted by obligations stemming from one of the two regimes.

⁷² *Ibid.*, p. 66.

The principle of concurrent application must be applied to situations falling into these areas where there may not be substantive overlap between the two regimes. It will be recalled that this principle necessitates that the requirements of *both* branches of war law must be met before an action can be considered to be lawful. This interaction ensures the maximisation of humanitarian protection: the “*jus ad bellum* and *jus in bello* are one set of rules regulating the use of force by States and other actors and, therefore, a use of force can be lawful only if it complies with both *jus ad bellum* and *jus in bello*.”⁷³ As such, an action in self-defence will *only* be lawful if it complies with all legal restrictions on targeting between points *x* and *y*. It is also perhaps worth making explicit, as an aside, that in the infinite whiteness beyond both points *x* and *y*, human rights law will continue to provide its own protections.

To highlight instances that could fall into shaded area *c*: while the *jus in bello* prohibition on targeting civilians and civilian objects is absolute, this is not technically the case for the parallel *jus ad bellum* targeting restrictions flowing from the necessity and proportionality criteria. As was discussed in section 3, military targeting is inherent in the necessity and proportionality requirements for self-defence, and in the vast majority of instances the targeting of civilians will fall foul of one or both of these *jus ad bellum* criteria. However, it is important to note that the prohibition on civilian targeting in the *jus ad bellum* is not absolute. Necessity and proportionality are both relative criteria, to be assessed by reference to the defensive need of the state exercising its inherent right.

In the *Nuclear Weapons* advisory opinion, the ICJ felt that it could not “conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at

⁷³ Okimoto, *supra* note 40, at p. 46.

stake.”⁷⁴ On this logic, it is at least possible that in extreme situations of defensive need, attacking a civilian target may be a genuine measure of last resort to abate or deter an enemy attack, and that such a measure would not be excessive in relation to, say, the survival of the state. An attack against a civilian target in such a situation would therefore meet the *jus ad bellum* necessity and proportionality criteria.⁷⁵ However, because the *jus in bello* prohibition is *not* relative but absolute, this would nonetheless mean that any direct attack on a civilian target would remain unlawful (even where the defending state faced the most extreme defensive necessity). As Kretzmer states:

When the aim of forcible measures is to halt and repel an ongoing armed attack, the [*jus ad bellum*] test of proportionality is a clear means-end test. *Anything* necessary to achieve this aim *that is compatible with the norms of the jus in bello* will be proportionate for the purposes of the *jus ad bellum*.⁷⁶

It should also be stressed, in any event, that instances falling into area *c* are going to be rare.

Instances that fall into shaded area *d* are perhaps more likely to occur. The *jus in bello* targeting prohibition is ‘absolute’ in the sense that civilians can never be directly targeted. However, as is well known, this prohibition does not cover harm to civilians inflicted through the targeting of military objects (including ‘dual use’ objects), so long as the military advantage of the attack will outweigh the harm to civilians: this is the IHL principle of proportionality.⁷⁷ In instances where civilians may be at risk of harm because of lawful,

⁷⁴ *Nuclear Weapons*, *supra* note 2, at para. 105.

⁷⁵ Okimoto, *supra* note 31, p. 79; and Okimoto, *supra* note 40, p. 58 and p. 69.

⁷⁶ Kretzmer, *supra* note 42, pp. 269-270 (emphasis added). *See also* Quigley, *supra* note 31, pp. 552.

⁷⁷ *See* AP I, *supra* note 10, Article 51(5)(b).

proportional *military* targeting in the IHL sense, the *jus ad bellum* criteria of necessity and proportionality may well require more protection for civilians than do the *jus in bello* rules.⁷⁸

Judith Gardam gives the example of an electricity grid that, as a dual use object, meets the definition of a military target under IHL (meaning that it is beyond the reach of the absolute *jus in bello* prohibition on civilian targeting). The destruction of the grid may not be excessive when the potential resultant civilian harm is weighed against military advantage of the attack (*jus in bello* proportionality), but it may nonetheless be excessive when that civilian harm is weighed against the defensive goal of abating the attack on the state (*jus ad bellum* proportionality).⁷⁹

To highlight this with actual examples, it has been argued that the targeting of certain dual use objects by Israel in Lebanon in 2006 met the requirements of the *jus in bello* but violated the *jus ad bellum*, because the impact on civilians was *unnecessary* for the purposes of Israeli self-defence.⁸⁰ Similarly, the Persian Gulf conflict of 1990-1991 has been viewed as an instance where state criticism of the destruction of Iraqi infrastructure – and its effect on civilians – was based on the fact that this harm was *disproportionate* to the defence of Kuwait, rather than that the targets were civilian objects per se or that the attacks on infrastructure were disproportionate in an IHL sense (that is, in relation to the military advantage gained in individual instances).⁸¹

⁷⁸ See, e.g., Greenwood, *supra* note 31, pp. 278-279; Kretzmer, *supra* note 42, p. 240 and p. 278; and Lehmann, *supra* note 31, p. 138.

⁷⁹ Gardam, *supra* note 31, p. 169.

⁸⁰ Kittrich, *supra* note 28, pp. 89-90. See also E. Cannizzaro, 'Contextualising Proportionality: *Jus ad Bellum* and *Jus in Bello* in the Lebanese War', 88 *International Review of the Red Cross* (2006) p. 779, at p. 784 (though interestingly, he makes this point with regard to proportionality, rather than necessity).

⁸¹ Gardam, *supra* note 31, p. 172.

It is ultimately the case that the principle of concurrent application means that “[i]f the targets do not meet the requirements of IHL, they must not be attacked...even if the targets qualify as targets that can be attacked in accordance with the law of self-defence.”⁸² Similarly, the (less commonly noted) reverse situation also holds true: even if a target can be lawfully targeted under the *jus in bello* – because it qualifies as a military target and the risk to civilians posed by attacking it is proportional to the military advantage of so doing – the action must nonetheless comply with the *jus ad bellum* necessity and proportionality criteria, which may, in some instances, be stricter.⁸³

5. Implications for the ‘Separation’ Principle

Overshadowing the discussions in the previous section concerning possible variance in the applicability and content of the targeting rules for the two regimes is a wider concern about the potential erosion of the conceptual distinction between the *jus ad bellum* and *jus in bello*. It is commonly accepted that there must be a fundamental separation between the two war law regimes.⁸⁴ This means that the “*jus ad bellum* and *jus in bello* are separate areas of international law that do not affect the application of each other”⁸⁵ and that “even when a

⁸² Okimoto, *supra* note 40, p. 67.

⁸³ See C. Greenwood, ‘International Humanitarian Law (Laws of War)’, in F. Kalshoven (ed.), *The Centennial of the First International Peace Conference: Reports and Conclusions* (Kluwer, Dordrecht, 2000) p. 161, at p. 184.

⁸⁴ For example, AP I, *supra* note 10, preamble, states that the Geneva Conventions and their protocols must be “fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict...”

⁸⁵ Okimoto, *supra* note 40, p. 46.

lawful party and an unlawful party are distinguished in terms of *jus ad bellum*, *jus in bello* applies equally to them during armed conflict.”⁸⁶

Traditional supporters of this clear *ad bellum/in bello* distinction have long thought it dangerous to admit of any overlap between the categories.⁸⁷ The concern has been from the perspective of protecting victims of armed conflict: the justness or lawfulness of the cause should have no impact on the way and extent to which law controls the means and methods of warfare employed by aggressor and victim (even if one can tell them apart definitively, which is not always the case).⁸⁸ Viewed from this perspective, reserving a military targeting requirement to the *jus in bello* has the advantage of avoiding any further, unnecessary blurring of the categories; IHL retains its primacy in respect of protection as soon as the very first shot is fired, and certainty and predictability in the law prevails. As a corollary to this, our discussions as to the *jus ad bellum*'s role in targeting could be seen as potentially dangerous.

However, it is worth noting that several writers have criticised the notion that the *jus ad bellum* and *jus in bello* categories can or should be watertight. Alexander Orakhelashvili, taking a positivist approach, suggests that aggressors as defined under the *jus ad bellum* (following the 1928 Pact of Paris on the outlawry of war) do not have all the same rights and privileges of other belligerents under the *jus in bello*.⁸⁹ While he limits his analysis of

⁸⁶ *Ibid.*

⁸⁷ See, e.g., J. Moussa, 'Can *Jus ad Bellum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law', 90 *International Review of the Red Cross* (2008) p. 963. More generally, see M. Waltzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books, New York, 4th edn, 2006), pp. 21-22.

⁸⁸ Lehmann, *supra* note 31, p. 128.

⁸⁹ A. Orakhelashvili, 'Overlap and Convergence: The Interaction Between *Jus ad Bellum* and *Jus in Bello*', 12 *Journal of Conflict and Security Law* (2007) p. 157.

“aggressor discrimination” to states and not states’ nationals (and therefore does not challenge the equal application of the principle of distinction in targeting), he demonstrates through jurisprudence and treaty law that with respect to occupation and neutrality, among other things, aggressors are not on an equal footing with victims in a *jus in bello* framework.⁹⁰ Others have approached the issue from an ethical perspective. Serena Sharma, for example, has argued that the overly ‘juristic’ distinction between the categories is untenable as it excludes morality from the equation. In her view, the party that has justness of cause should have more freedom of action in terms of the *jus in bello*.⁹¹

Ultimately, however, the aim of this article is not to settle the question of the interaction between *jus ad bellum* and *jus in bello*, but to highlight and examine the military targeting requirement in the context of self-defence. While our own view is that the *ad bellum* and *in bello* categories are logically separate, and that this separation is probably for the best in terms of maximising human protection, it must be recognised that the interaction between the two categories is not *necessarily* a bad thing, at least in the military targeting context under discussion. After all, the two branches of war law do not, and should not, operate entirely in a vacuum; they deal with a common subject matter.⁹² If the military targeting requirement (which is defined in the first instance in IHL) seeps into the *jus ad bellum*, then perhaps there is no harm done. The necessity and proportionality criteria do not, for example, prospectively tell us how to *define* a military target. IHL can do this, and this definition will inform the way that we apply the *jus ad bellum* principles even in rare cases

⁹⁰ For example, he argues that aggressor states do not have the same rights to inspect neutral shipping as victim states. *Ibid.*

⁹¹ S.K. Sharma, ‘Reconsidering the *Jus ad Bellum/Jus in Bello* Distinction’, in C. Stahn and J. K. Kleffner (eds.), *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (Cambridge University Press, Cambridge, 2008) p. 9. *See also*, J. McMahan, ‘The Ethics of Killing in War’, 34 *Philosophia* (2006) p. 23.

⁹² Lehmann, *supra* note 31, p. 129 (stating that the regimes “cannot be completely separated intellectually”).

where IHL may be inapplicable. The respective rules are reaffirmed rather than weakened. Highlighting cumulative application and content (and possible variance) helps to reaffirm that IHL-defined modalities on military targeting remain the first port of call whenever ‘war law’ is implicated. Far from being the loser in any interaction of the categories, as is the usual fear, the *jus in bello* may emerge stronger overall.⁹³

It is worth being explicit here that concurrent application, cumulative effect and cross-regime contextualisation are not the same things as ‘mixing’ the regimes together in the sense commonly feared.⁹⁴ Thus, while we elucidate the important role that the *jus ad bellum* can have in regulating targeting in part so as to *maintain* some formal separation between the regimes, our main goal has been to demonstrate the conceptual and practical interaction between the two limbs of war law with regard to targeting. That interaction reaffirms the primacy of the *jus in bello* in relation to military targeting, but also further strengthens and underpins it.

6. Conclusion

A shorthand way of explaining to law students the difference between the *jus ad bellum* and the *jus in bello* is to say that the former deals with the question of *when* force is used and the latter with *how* force is used.⁹⁵ However, we have argued in this paper that the *jus ad bellum* also speaks to how armed force is employed in terms of an obligation to target military

⁹³ More generally on the possibility of *jus in bello* expanding at the expense of the *jus ad bellum*, see I. Oosterdahl, ‘Dangerous Liason? The Disappearing Dichotomy between *Jus ad Bellum* and *in Bello*’, 78 *Nordic Journal of International Law* (2009) p. 553.

⁹⁴ Okimoto, *supra* note 40, p. 59.

⁹⁵ C.P.M. Waters and J.A. Green, ‘International Law: Military Force and Armed Conflict’, in G. Kassimeris and J. Buckley (eds.), *The Ashgate Research Companion to Modern Warfare* (Ashgate, Farnham, 2010) p. 289, at p. 292.

personnel or objects in self-defence. In most situations, IHL will be the natural starting point for the definition of a military targeting rule and setting down the modalities of target decision-making and attack. Nonetheless, it has been argued by some that there may be circumstances when the *jus ad bellum* and the *jus in bello* do not temporally or substantively overlap in situations of self-defence.

In order to address any potential gaps in civilian protection where the two regimes do not perfectly overlap, and in order to bring conceptual clarity to one particular dimension of the sometimes murky relationship between the two regimes, we have explored the independent sources of a military targeting rule under the *jus ad bellum*. We have sought to show that the ICJ's indication in *Oil Platforms* that self-defence actions can only be lawful if directed at military targets is reflective of these independent sources and not merely an unimportant aside. We stress that our aim here is not to displace IHL as the 'lead' regime regulating targeting decisions, or to suggest that the traditional separation between the two 'war law' regimes is untenable or undesirable. Rather, we have attempted to shed conceptual light on a sometimes assumed, but generally neglected dimension of the *jus ad bellum*'s necessity and proportionality criteria that may, in limited circumstances, have practical significance for human protection.