Some Considerations Concerning the Role of the Ius ad Bellum in Targeting

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Part III Special Issues in Targeting

Chapter 5
Some Considerations Concerning the Role of the *Ius ad Bellum* in Targeting

Terry D. Gill

Abstract This contribution examines the influence of the *ius ad bellum* upon the targeting process. Specifically, it will examine how the rules of international law relating to the permissibility of the use of force can and do influence the targeting of both objects and persons which constitute military objectives under international humanitarian law and can, alongside other relevant rules and principles of international law and policy considerations, additionally influence the geographical and temporal scope of the targeting process.

Keywords *Ius ad bellum* · *Ius in bello* · Necessity · Proportionality · Immediacy military objective · Neutrality law · Non-intervention · Territorial scope of armed conflict temporal scope of armed conflict

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5.1 Introduction

The general relationship between the *ius ad bellum* and the *ius in bello* has been discussed extensively in the legal and ethical literature stretching back at least to the writings of Grotius and his immediate predecessors. These two bodies of law have distinct functions, with the *ius ad bellum* determining which reasons and purposes justify the recourse to armed force, while the *ius in bello* is primarily concerned with the actual conduct of hostilities, humane treatment of captured, and incapacitated combatants, and the protection of non-combatants and civilian objects from the effects of war to the maximum extent feasible once force has been resorted to.

The contemporary *ius ad bellum* consists of the prohibition of the use of force in international relations and provides for the recognized exceptions to this prohibition and the legal conditions pertaining to them. These exceptions are the use of force in the context of the UN Collective Security System and the right of self-defence. Any use of force outside national borders must be based on one or both of these recognized legal bases in order for it to be lawful under the UN Charter and customary rules of international law relating to the resort to force. Notwithstanding a certain degree of criticism of their separation and the tendency at times towards conflation of the two as a consequence of real or perceived considerations of morality or expediency, they are generally accepted as constituting distinct legal spheres or regimes, both historically and presently in practice and legal opinion. The separation of the two bodies of law is predicated upon the assumption that while any use of trans-boundary force must have a legal justification, the actual use of force must comply with the rules relating to the conduct of hostilities and humane treatment of persons irrespective of whether force has been lawfully resorted to.[1] This contribution is based on the assumption that the two branches of law are indeed separate, with their own distinct functions, rules, and

[1]The distinction between the *ius ad bellum* and the *ius in bello* can be traced back as far as late Mediaeval and Renaissance legal scholars and moral philosophers. Vitoria and Grotius, for example, argued that both sides in a conflict could believe they had a just cause and that a just war must also be waged with a degree of moderation. See e.g. de Vitoria 1991, pp. 314–326. By the eighteenth century the *ius ad bellum* and the *ius in bello* were viewed as separate bodies of law by such writers as Rousseau and Vattel. Some just war theorists question the morality of the distinction, but by and large most writers (including myself) and treaties accept it as a given. Nevertheless, there are always possible conflations on the basis of either perceived morality or expediency. Examples of such conflation, and in my view misapplication of *ad bellum* considerations, to justify ignoring *in bello* limitations include the arguments raised to justify area bombing of cities in WWII, the misapplication of IHL in relation to the treatment of suspected terrorists and the International Court of Justice's (ICJ's) controversial statement relating to the possible use of nuclear weapons in cases of 'extreme self-defence', after having concluded on the basis of a rather oversimplified reading of IHL that virtually any use of nuclear weapons would be incompatible with IHL. See Advisory Opinion, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports* 1996, 66, pp. 262–263.

spheres of application. It does not purport to question or discuss this division at any length. Still less does it question the full applicability of the *ius in bello* (nowadays referred to as international humanitarian law, the law of armed conflict (or simply as IHL/LOAC) to all parties to an armed conflict, irrespective of their justifications for resorting to force under the contemporary *ad bellum* rules contained in the UN Charter and customary international law.

However, separation does not mean that once force is resorted to *ad bellum* considerations cease to influence questions relating to the employment of such force.[2] Aside from the obvious point that any use of force will have to conform to the rules laid down in both regimes or branches of the law to be fully legal under international law, it has been argued, and will be argued here, that *ad bellum* considerations, alongside the rules of humanitarian law, influence the actual employment of force. In particular, it will influence against what (or in some cases whom), where, and when (for how long) force may be employed. Put differently, it will impact upon the targeting process and in many cases pose limitations upon whether a military objective, which could otherwise be lawfully targeted under IHL/LOAC, may in fact be engaged as a consequence of *ad bellum* requirements. It should be pointed out that it is not a question of *ad bellum* considerations overriding or supplanting those of an *in bello* nature, but rather that even if a particular person or object constitutes a lawful military objective under IHL/LOAC, it may nevertheless be unlawful to engage the target under the law governing the use of force. This could be as a result of the scope of a UN mandate to use force for a particular purpose, or because the *ad bellum* self-defence prerequisites of necessity and proportionality restrict or preclude the targeting of a specific military objective or category of potential military objectives, such as leadership targets, industrial installations, or infrastructure, under the prevailing circumstances.[3]

The *ad bellum* conditions that most influence whether a particular military objective may be engaged are necessity, proportionality, and immediacy regarding the permissibility of the use of force. Necessity within the context of the exercise of self-defence relates to whether an armed attack has occurred or is imminent and to the lack of feasible alternatives to the use of force in self-defence. With regard to the exercise of force pursuant to a UN mandate, necessity would relate to the scope of the mandate and whether force is required to carry it out. Proportionality in relation to self-defence concerns the scale of the unlawful attack and what is required to ward off, or if need be, overcome the attack and forestall repetition of attack from the same source in the proximate future. When pertaining to the

[2]One of the (few) writers who has devoted attention to the impact of *ad bellum* considerations on the actual application of force in armed conflict is Greenwood 1983, pp. 221–234; Greenwood 1989, pp. 273–288.

[3]See Greenwood 1989, pp. 275–279, where he lists several of these categories (limitation on the type of target, geographical and temporal limitations) as well as others.

execution of a UN mandate, proportionality relates to whether the force employed is reasonable and necessary in relation to the scope of the mandate without exceeding its terms. Immediacy refers to the duty of a State to undertake defensive measures within a reasonable timeframe, taking all relevant circumstances into account, in order to distinguish defensive measures from punitive reprisals.[4]

In addition to restricting whether a specific target or category of military objectives might be lawfully engaged, *ad bellum* considerations will, alongside factors arising from IHL/LOAC and other relevant areas of international law, impact upon the geographical and temporal scope of where and when targets may be lawfully engaged. In relation to the geographical scope, *ad bellum* issues could limit the targeting of otherwise lawful military objectives under IHL/LOAC *within* the territory of the targeted State, due to the *ad bellum* elements of necessity or proportionality. This could occur in situations where targeting a specific military objective that is geographically removed from where an attack is in progress, would not contribute to warding off, or would be disproportionate in relation to, a relatively small-scale armed attack or imminent threat of such an attack, or one which was otherwise limited and local in scope. It could also limit or preclude the possibility of striking an otherwise lawful military objective on a *third State's* territory, alongside constraints arising from neutrality law and general international law rules, such as respect for territorial sovereignty and non-intervention. In temporal terms, *ad bellum* considerations could limit the time span in which lawful military objectives under IHL/LOAC might be targeted if, for example, other feasible options to using force became available that remove the necessity of continuing to conduct hostilities. This would be the case even if an armistice or ceasefire had not yet been implemented and targeting military objectives would still be lawful viewed from the perspective of IHL/LOAC.

It should be stressed again that the impact of *ad bellum* considerations in no way affects or weakens the equal applicability of IHL/LOAC to all parties to an armed conflict. Consequently, they cannot widen the scope of permissible targets under IHL/LOAC or any other body of the law. In other words, the fact that one party may have an undisputed legal basis to use force, while it is crystal clear that the other is engaged in the unlawful use of force that rises to the level of aggression, will not give the 'defending side' latitude to target persons or objects that may not be lawfully targeted under IHL/LOAC. Nor will the fact that one side has a right to use force under the *ius ad bellum* and the other does not give the defending side the freedom to employ means and methods of combat which are prohibited, or otherwise violate any other rule of IHL/LOAC in relation to either the conduct of hostilities or the treatment of persons. However, it is fair to say that the greater the scale of violation of the *ius ad bellum* by one side, the more latitude the *ius ad bellum* will give the 'defending side' to lawfully employ force to overcome

[4]For definitions of necessity, proportionality and immediacy *ad bellum,* see *inter alia*, Dinstein 2011, pp. 231–234; Gill 2010, pp. 195–197.

the unlawful use of force *within* the scope and confines of IHL/LOAC, including those relating to targeting. In other words, the larger the scale an unlawful attack is, the greater the scope of targeting military objectives under IHL/LOAC will be.

The above-mentioned influence of the *ius ad bellum* upon targeting will be given further consideration and illustration throughout this contribution. In the next section, the impact of *ad bellum* considerations upon the type of persons and objects that may be lawfully be targeted will be discussed. In the third section, the effect of *ad bellum*, and other relevant legal factors, upon the geographical scope of permissible targets will receive attention. In the fourth, the impact of *ad bellum* requirements upon the temporal scope of targeting military objectives will be treated. In the closing fifth section, these will be brought together to show how the two bodies of law form part of an overall system, and some brief consideration will be given to the possibility that policy considerations could pose restraints upon the targeting of lawful military objectives additional to those arising from legal constraints under both the law governing the use of force and the law of armed conflict.

Finally, it should be pointed out that this contribution does not pretend to treat the influence on and relationship between the two bodies of law in depth. It is limited to a brief illustration of a few ways in which the law governing the use of force can influence certain aspects of the targeting process. As such, it is primarily intended as a means to provoke further examination and discussion of this topic. It does not purport to comprehensively deal with, or definitively address, every aspect of the relationship between the two bodies of law, or even how this relationship may affect all parts of the targeting process.

5.2 The Potential Impact of *Ad Bellum* Considerations upon the Nature of the Target or upon Certain Categories of Targets: Who or What May Be Targeted?

Under IHL/LOAC a military objective is defined as a person or object which is not protected and is consequently subject to attack. Objects refer to those things that make an effective contribution to military action based upon their nature, use, purpose, or location, and whose destruction, capture or neutralization would confer a definite military advantage under the prevailing circumstances ruling at the time.[5] This can qualify a wide array of objects as military objectives, such as certain types of 'dual use' industrial and infrastructure targets. Examples that have been targeted frequently in both past and recent armed conflicts include oil storage facilities, electrical power stations and the electrical distribution grid, airfields, port installations, rail lines, communications facilities, and bridges and highways. The question of whether they may be targeted (in principle) under IHL/LOAC is

[5]Additional Protocol I of 1977 [hereinafter API], Article 52(2).

dependent upon the two-pronged test contained in the definition: first, does the object make an effective contribution to military action; and second, would engaging the target confer a definite military advantage. It is generally accepted that the first part of the definition would not automatically render a particular potential target a lawful military objective if it would not confer a definite military advantage.[6] But this is often seen as simply precluding the most obvious potential targets.[7] If, for example a bridge is, has recently been, or is likely to be used for military purposes, it is generally accepted that it would constitute a lawful military objective on the basis of use or purpose simply because its destruction, capture or neutralization would confer at least *some* definite military advantage. At a minimum, it would force the adversary to improvise another route and consequently delay or prevent the movement of its forces to or from a particular location. The fact that the bridge might be far removed from the 'zone of operations' does not rule this out, of course subject to other *in bello* considerations (in particular, the taking of precautions in attack and determining whether it can be attacked without causing excessive injury to civilians or damage to civilian objects in relation to the anticipated military advantage). Likewise certain objects, such as military headquarters, a ministry of Defence or a military installation like a barracks or air or naval base, would almost automatically qualify as military objectives by their nature, subject to the same *in bello* requirements.

With regard to persons, it is generally recognized under IHL/LOAC that any member of an adversary's armed forces who is not *hors de combat* (with the exception of medical and religious personnel) may be lawfully targeted (taking the aforementioned *in bello* conditions into account). In non-international armed conflicts this would, in principle, include members of an organized armed group (with a combat function).[8] In most States, it would also include certain members of the

[6]See ICRC Commentary to Article 52, p. 637. See also ICRC Customary IHL Database, Rule 8 available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule8.

[7]See, e.g. the discussion of targeting of industrial and infrastructure targets in the Desert Storm (Iraq, 1991) and Allied Force (Kosovo, 1999) air campaigns in Rogers 2004, pp. 71–78. For a recent and thorough treatment of targeting within IHL, see Boothby 2012. Dinstein sees certain infrastructure targets such as bridges as military objectives by nature in Dinstein 2004, pp. 92–93. Irrespective of whether one agrees or disagrees with all the positions taken by the authors of any of these works from an IHL perspective, it is worth pointing out (as an observation rather than a criticism) that none of them discuss whether or how *ad bellum* considerations might impact upon targeting. That illustrates how many authorities tend to view targeting exclusively from the perspective of the law of armed conflict.

[8]The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities was published by the ICRC in 2009. Melzer 2009. There is a degree of controversy within IHL/LOAC regarding certain positions taken in the ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities. In particular, the possible restrictions on targeting of individuals on the basis of 'restrictive military necessity' and the targeting of members of armed groups in non-international armed conflicts are debated. I take no position here regarding these controversies as they do not directly relate to the question of whether or how *ad bellum* considerations could impact upon targeting. For examples of critiques, see Watkin 2009–2010, Schmitt 2009–2010, Boothby 2009–2010 and Parks 2009–2010.

government, such as heads of State or government, ministers of defence, and others who played a key role in exercising command over the armed forces in a real sense, rather than in a strictly titular or ceremonial capacity. As such, their elimination or incapacitation would almost always confer some degree of definite military advantage. This would be more than 'potential' or 'indeterminate' in most cases, since it is obvious that degrading the command function of an adversary will almost always confer a definite military advantage, and, in some instances, a very substantial advantage.[9] Consequently, in many, if not all, cases, attacking such objects and persons would be in conformity with IHL/LOAC, provided the other *in bello* prerequisites of precautionary measures and avoidance of excessive harm to civilians and civilian objects were respected.

Now we will turn to how the question of whether and how *ad bellum* considerations could, and in some cases would, influence whether objects and persons could not be lawfully targeted, even though they may constitute lawful military objectives under IHL/LOAC. This will use three possible scenarios as an illustration.

First, suppose the UN Security Council had issued a mandate to use all necessary force for a particular purpose and objective. This could be, for example, the use of force to protect civilians in a particular State from (imminent) threat of attack by that State's armed forces, or by a warring faction within that State. It cannot be ruled out that under certain circumstances attacks on the command and communications function or the logistical system of the force in question would provide a definite military advantage by decreasing the targeted force's capacity to carry out attacks upon the civilian population at some point in the future. As such, striking these functions and capabilities might well qualify as a lawful military objective under IHL/LOAC. But attacking such targets would, in principle, only be permissible under such a mandate if the targeted objects or persons were actually engaged in, or likely and able in the immediate future to engage in, or to provide a direct contribution to, such attacks, or had engaged in systematic attacks upon civilians in the recent past and continued to pose a direct threat of repeated attack in the proximate future. In the absence of credible evidence that any of these situations transpired, striking such targets would not fall within the given mandate and would be unnecessary to achieve the purpose of the mandate even though doing so might contribute to weakening the capacity of the designated force to conduct operations, including potential attacks upon the civilian population at some

[9]In both the Desert Storm (1991) and Iraqi Freedom (2003) aerial campaigns, 'leadership targeting' was engaged in on a systematic basis. This may well be permissible under IHL/LOAC provided the persons targeted are in fact either members of the armed forces or have a real command function over them. This should not be confused with assassination of persons by means of perfidious or treacherous attack which has long been prohibited under the law of armed conflict. See Boothby 2012, pp. 528–529. However, as pointed out above, it may not be permissible from an *ad bellum* perspective. Whether it was allowed in the context of those conflicts falls outside the scope of this contribution and is a determination I leave to the reader to make on the basis of the general considerations put forward here.

unknown and indeterminate point in the future. Consequently, unless there was a clear case of an ongoing, concrete and permanent threat to the lives and safety of the civilian population that could not be averted by other means, engaging such targets would not be permissible under the mandate, even if they were lawful military objectives under IHL/LOAC.

Second, suppose that State A sent troops across a frontier to occupy a relatively small disputed territory that had hitherto been under the jurisdiction of State B. This might be an island or a parcel of land territory, over which there had been a long-standing dispute as to which State actually had the best title to sovereignty. By crossing an international border or demarcation line and taking control of the contested territory, State A would not only be engaging in a violation of the prohibition of the use of force (in this case to resolve a territorial dispute), but also in a localized armed attack. This is because even if one takes the view that an armed attack must be of a significant gravity to trigger the right of self-defence, most States and legal authorities would consider such action as justifying counter force in self-defence to repel the attack and put an end to the (attempted) unlawful occupation of the disputed territory.[10] Hence, State B would have the right to exercise self-defence to achieve the recovery of the contested territory and, if necessary, to prevent renewed attempts by State A to re-enter the territory (the latter would depend upon whether State A continued to take concrete measures to maintain or regain control over the disputed territory once its initial attack had been repelled and actually had the capacity to pose an ongoing threat). State B would therefore have the right to engage in military operations which were necessary and proportionate to regain control and prevent direct threat of repetition.

This would not rule out attacks upon State A's overall military capability, transportation infrastructure (roads, bridges, etc.) and command capability if the war escalated. However, as long as the attack remained localized and relatively limited in scope, such targets would in most cases not constitute necessary objectives in terms of self-defence outside the immediate area in dispute. Moreover, they would likely be disproportionate in relation to the scale of the attack. Therefore, it would not be permissible to strike at these targets, even if their destruction or neutralization would confer a definite military advantage in IHL/LOAC terms and they were military objectives because of their nature, purpose or use. This would certainly

[10]Crossing a border, armistice line or other international demarcation can constitute a violation of the prohibition to use force and forcible attempts to expel the existing administering Power are also generally seen as armed attacks. See UNGA Res, 2625 (XXV) Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 24/10/1970: Principle 1 relating to the duty to refrain from the threat or use of force. This was the reason why the forcible attempts to resolve territorial claims by Argentina *vis à vis* the Falklands/Malvinas, by Iraq, with regard to the invasion of Iran and later of Kuwait, and between Ethiopia and Eritrea have consistently been seen as violations of this prohibition and as providing a basis for the exercise of self-defence. See Eritrea-Ethiopia Claims Commission, Partial Award, *jus ad bellum*-Ethiopia's Claims 1–8 (19 December 2005). For a critical appraisal, see Ponti 2009 p. 267.

apply to attacks upon the political and military leadership of State A, or its strategic war-making capacity, such as its industrial installations and its overall military capacity (say its entire air force), unless the war escalated due to a massive response by State A to State B's self-defence actions aimed at regaining the disputed territory. Consequently, the categories of permissible targets would, in part, depend upon the scale of the unlawful attack; as long as the scale was restricted, the category of permissible targets would correspondingly be limited.

Third, suppose a group of State A's nationals (either civilian or military) had been taken hostage by an armed group located in State B, say by the latter crossing the border in a raid, taking them hostage, and removing them to State B's territory. Let us further assume that the armed group (Group X), while not under the direct control or substantial influence of State B, nevertheless operated openly and without hindrance by State B. This might be because of ideological sympathy, political instability inside State B, or the lack of capacity to suppress the group. In any case, there are no concrete indications that State B is in any way involved in the hostage-taking, even though it undertakes no measures to put an end to the situation. After negotiations aimed at ending the illegal situation have failed and with indications that the hostages are in imminent danger of being harmed, State A carries out a rescue operation aimed at freeing the hostages and removing them safely back to its territory.

This would be justified in *ad bellum* terms as a lawful act of self-defence (or for those who do not accept self-defence as a ground for the rescue of nationals, perhaps under the banner of 'state of necessity', or as a separate legal right).[11] Regardless of the legal basis, the conditions of necessity and proportionality *ad bellum* would limit the choice of permissible targets to those that were necessary and proportionate to achieve the purpose of rescue of the hostages. Consequently, neither Group X as a whole, nor State B's military forces would constitute lawful targets unless they intervened, or were clearly likely and capable of intervening, to interfere with the rescue operation. Only if Group X conducted such illegal incursions across the frontier on a regular and systematic basis would it be lawful to treat such a series of actions as a single phased larger scale armed attack. This, in turn, would justify a larger scale response aimed at weakening Group X's ability to continue such attacks, and thereby validate targeting its military capacity as such. Moreover, so long as State B remained outside the conflict, targeting its political leadership, military assets and personnel, and economic and communications infrastructure would in no way contribute to ending Group X's activities. As such, it would either be disproportionate or constitute an unnecessary punitive measure that would likely escalate the situation, and thus impermissible under the law of self-defence, even if some or all such potential targets constituted lawful military objectives under the law of armed conflict.

[11]For a treatment of the various views of the legality of rescue of nationals, either within the context of self-defence, or on other possible grounds, see Gill and Ducheine 2010, pp. 217–219 and accompanying notes.

All of the above examples point to the fact that even if certain categories of likely and potential targets constituted lawful military objectives under IHL/LOAC, the targeting of them could violate constraints imposed under the law governing the use of force (i.e., the *ius ad bellum*), taking into account the relevant circumstances. It is clear that if the scope of the use of force is restricted to a particular purpose, it will impact upon the nature of the targets that may be lawfully engaged if such action does not contribute to the achievement of that lawful purpose. Likewise, if the circumstances widen the scope of the permissible use of force, this will correspondingly expand the list of persons and objects constituting lawful military objectives under IHL/LOAC.

5.3 The Impact of *Ad Bellum* Considerations upon the Geographical Scope of Operations: Where May Targets Be Engaged?

We now turn to how *ad bellum* considerations, viewed together with other relevant areas or branches of international law, such as neutrality law and legal principles relating to respect for State sovereignty and non-intervention, can impact upon, and in some cases limit, *where* targeting can take place. The latter bodies of law will receive only passing attention in so far as they directly relate to the *ad bellum* requirements of necessity and proportionality, although they may pose additional constraints in their own right that go beyond the scope of this contribution.

The starting point for this examination is to set out a number of fairly broad issues of a general nature. I will also attempt to illustrate how these would apply in a limited number of potential scenarios. These will serve purely as possibilities and should not be considered as more than illustrative examples.

Our first general issue is related to the examples in the previous section. The smaller the scale of an armed attack, or the more restricted the mandate for using force for a particular purpose or within a specific geographical region, the narrower the geographical scope of targeting is likely to be. A relatively small-scale and localized armed attack will not, as a rule, permit the targeting of persons or objects that are not situated in the area in which the incident occurred, or reasonably proximate to it. An exception would be if there were clear indications that potential targets (say military assets) located outside the area of attack were likely to become directly involved in continuing or expanding the attack, or are being used (or would be used) to resist the lawful use of force in self-defence. Engaging targets which were geographically removed from the ‘zone of operations’ would not be in conformity with the *ad bellum* considerations of necessity and proportionality, even if such objects or persons might constitute lawful military

objectives under IHL/LOAC, unless they were directly supporting military action.[12] The same applies, in principle, to the exercise of a mandate which has been given for a defined purpose, or within a given geographical area. If the mandate, for example, allowed 'all necessary means' to be employed to ensure the safety of civilians or humanitarian relief personnel against direct threats, the geographical scope of using such force as was necessary to implement it would, as a rule, be restricted to the area where the immediate threats manifested themselves. By the same token, if a UN, or UN-mandated, force is authorized to use force in a specifically named geographical region, it follows that, barring exceptional circumstances, the mandate only applies within that region.

Our second consideration of a general nature is that the territory of third States is inviolable, barring exceptional circumstances that would necessitate conducting attacks on targets located there. This flows from the *ad bellum* requirements of necessity and proportionality, as well as (in some cases) neutrality law and/or general principles and rules of international law relating to respect for territorial sovereignty, non-intervention, and other related rules relevant to the circumstances.[13] As a rule, within the context of an international armed conflict, IHL/LOAC applies in the territory of belligerent States and in international sea and airspace to the extent operations are conducted there.[14]

However, this does not always signify that such operations, including in particular targeting, may be conducted anywhere within these confines, much less on a third State's territory, simply because elements of the adversary's armed forces might be present there. If the scale of the conflict is geographically restricted, although hostilities might be intensive within that particular area, attacking targets located well outside the actual 'zone of operations' would likely be both unnecessary and disproportionate in most circumstances and would only exacerbate the conflict. If elements of one belligerent's armed forces were located on a third State's territory, those forces could only be targeted if they provided a direct contribution to military operations involving the conduct of hostilities directed against the other party from that third State's territory. For example, if a State had forces stationed on a third State's territory on the basis of prior agreement, it would be unlawful in the other party to an armed conflict which was taking place elsewhere to target the visiting State's forces unless those forces made a direct contribution to operations where the armed conflict was taking place.

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[12]Greenwood 1989, pp. 276–278.

[13]Neutrality law is still valid under the UN Charter, albeit with certain modifications in relation to the duty of neutrals to not violate sanctions imposed under Article 41 of the Charter, and has been systematically relied upon by States since the Charter came into force, both in relation to military action mandated under the Charter to restore international peace and security and in relation to uses of force under the guise of self-defence. Other principles of general international law relating to territorial inviolability, exclusive jurisdiction over a State's territory and non-intervention likewise do not cease to be operative in relation to third States which are not directly involved in an unlawful use of force. For a treatment of neutrality law, see Bothe 2013, p. 549.

[14]See Kleffner 2013, pp. 56–59.

To use a hypothetical example based upon the context of the Vietnam War, US forces stationed in Germany would not have been lawful targets for a North Vietnamese airstrike (NVA) (assuming for the sake of the argument the NVA had possessed the means to conduct such a strike) unless those forces were directly contributing to the ongoing hostilities in South East Asia. This would have been an impermissible expansion of the scope of the conflict in *ad bellum* terms, as well as an attack on a neutral State's territory (Germany was not a party to the Vietnam conflict and was a neutral State in that regard, despite being a member of NATO).

If B52 bombers stationed on US bases in Germany had been used to conduct airstrikes on Vietnam, this would change the situation in our hypothetical example, since they would have directly contributed to operations in the theatre of war. Had Germany permitted the launch of such airstrikes from its territory, it would have forfeited its right to territorial inviolability under neutrality law. Likewise, the targeting of a North Vietnamese warship (or a US warship) in the North Atlantic by the opposing party, unless it had engaged in a hostile act or threatened such action, would not have been permissible, simply because there would have been no necessity to do so from an *ad bellum* perspective. Moreover, carrying out such an attack would have been disproportionate in *ad bellum* terms, despite the fact that such a vessel undoubtedly constitutes a lawful military objective under the law of naval warfare, which is part of IHL/LOAC. Although this point does not relate to respect for third State's territory or neutrality, it does serve as an additional illustration of the geographical restrictions upon targeting that arise from *ad bellum* considerations in a more general sense.

While neutrality law is not applicable in a non-international armed conflict, similar constraints would flow from other principles of general international law, alongside the previously mentioned *ad bellum* requirements of necessity and proportionality. Suppose a significant number of FARC fighters crossed the border into one of the neighbouring countries and buried themselves deep in the Amazonian jungles to escape capture. Assume that they continue with the illegal narcotics trade, but take no further part in the armed conflict in Colombia. Even if they were fugitives from justice inside Colombia and continued to call themselves 'FARC', no military operations by the Colombian armed forces against them would be justified. Only if they continued to mount attacks from their jungle sanctuary and the government of the State where they were located refused to, or was clearly unable to, put an end to such attacks, would a cross-border incursion by the Colombian armed forces targeting the source of the ongoing attack be justified.

A similar situation would arise if indications of some degree of contact and cooperation existed between the FARC and another guerrilla group located in a neighbouring State with a similar ideology and *modus operandi*. In such a circumstance, the Colombian armed forces would only be justified in targeting that second group if that group actually engaged in attacks, or provided direct support for attacks by the FARC that were directed against Colombia, and if no other means to counter that threat were available. This flows not only from the conditions relating to the exercise of self-defence (in particular, the principle of necessity *ad bellum*),

but also from principles pertaining to respect for any State's sovereignty, and other rules of general international law.

The logical alternative for Colombia would be to demand remedial action by the State where the guerrilla group was located to halt and prevent further attacks by the 'FARC affiliate'. There is a clear duty of every State to prevent such action being undertaken from its territory. If the State failed to respond appropriately, or was clearly unable to prevent such attacks, this could justify a Colombian incursion targeting the guerrilla group, if and only if, that group was engaged in attacks itself, or provided direct and significant support for the FARC attacks being conducted from the third State's territory.[15] However, at the risk of stating the obvious, this is an *exceptional* situation, and by no means a *carte blanche* to conduct targeting anywhere an adversary's forces might be located, particularly if that happens to be on another State's territory. The fact that the targeting might otherwise conform to all rules governing the conduct of attacks under IHL/LOAC, simply means it does not violate the law of armed conflict. It does not signify that the attack is legal under international law in a broader sense.

In short, the scope of permissible targets can be limited in a geographical sense by the principles of necessity and proportionality *ad bellum* (alongside other relevant legal considerations), whether these are based on the scope and purpose of a mandate to use force for a particular objective or within a given geographical area, or from the right of self-defence. In relation to the latter, it is fair to say that the greater the magnitude of the attack, the wider the geographical scope of conducting self-defence action, including the targeting of lawful military objectives under IHL/LOAC will be, and *vice versa*.

Moreover, the territory of third States is inviolable unless a number of exceptional conditions are met. These include whether the adversary's forces located on a third State's territory actually (continue to) conduct operations constituting participation in ongoing hostilities, initiate a new attack or pose an immediate and manifest threat of a new attack, *and* whether exercising self-defence is the only feasible means available to justify violating another State's sovereignty and repel or forestall further attack from that source.

Even if this is the case, without clear indications that the third State is substantially involved with, or in control of, the force that is operating from its territory, the geographical scope of targets that may be engaged in self-defence will be limited to what is strictly necessary and proportionate (again in *ad bellum* terms)

[15]This duty has been stressed in numerous arbitral awards and judicial decisions including the *Island of Palmas* arbitral award, PCA, 4 April 1928, RIAA, Vol. II, p. 829 at 839; the *Corfu Channel* case, ICJ Rep. 1949, 4, at 32. Necessity as part of self-defence relates to the question whether the State possessing sovereignty over territory where an organized armed group is operating from autonomously in fact possesses the will and means to enforce this duty to preclude its territory being used as a base of operations to conduct attacks upon other States. Only if it fails to uphold this duty, does a necessity of self-defence potentially arise.

to halt such action and forestall repeated attack from the same source in the proximate future.[16] This would preclude engaging the third State's armed forces, or other military objectives other than the adversary's forces within the third State, unless providing direct support to the attack originating from its territory, or likely to resist the exercise of self-defence by the defending State.

Finally, it goes without saying that only persons and objects that constitute lawful military objectives under IHL/LOAC can be lawfully targeted within the above-mentioned restrictions of an *ad bellum* nature (including other relevant bodies of international law referred to previously). This is because the law of armed conflict is part of a broader legal system of which it forms only one component, albeit an important one. That legal system includes the law governing the use of force, rules relating to respect for State sovereignty and non-intervention, and, where relevant, neutrality law. This general conclusion applies across the board regarding the scope of permissible targeting, but has particular relevance to the geographical scope of targeting.

5.4 The Impact of *Ad Bellum* Considerations upon the Temporal Scope of Permissible Targeting: When May Targets Be Lawfully Engaged?

The law regulating the use of force (*ius ad bellum)* not only has influence on the type and location of targets that may be engaged, it also can impact on when (or how long) targeting may be carried out. There are no strictly defined temporal limits to the applicability of the law of armed conflict. As a rule, it applies in the context of an international armed conflict until one side is completely defeated, an armistice is concluded, or a general close of hostilities occurs. In relation to a non-international armed conflict, it generally remains applicable until a peace agreement is concluded, one side is defeated, or the qualitative threshold for the existence of an armed conflict is no longer met in terms of organization and intensity or duration, of the hostilities between the parties.[17]

However, these temporal limits on the applicability of IHL/LOAC must be seen in combination with other relevant legal factors, particularly those arising from the law governing the use of force. These considerations will, in principle, only pertain to trans-boundary uses of force, since the *ius ad bellum* has no direct bearing on uses of force that take place wholly within the confines of a State. While, in some cases, the Security Council may take action relating to wholly internal conflicts that have no spillover effects beyond a particular State, this latter point will not receive attention here as it is unlikely to have any significant impact on the

[16]Ducheine and Pouw 2012 p. 40.

[17]Kleffner 2013, pp. 60–70.

temporal scope of targeting under the *ius ad bellum*, beyond stating the obvious fact that if a ceasefire is implemented between warring factions, targeting may not occur thereafter, unless one side violates the terms of the agreement. This, however, is not related to the *ius ad bellum,* but to the fact that a ceasefire ends the right to engage in hostilities. In contrast, *ad bellum* requirements can impact upon the scope of permissible targeting as it pertains to trans-boundary force. This could occur in a number of situations, including where no ceasefire or armistice has come into force and no general close of hostilities has been otherwise acknowledged. We will have a look at how the *ad bellum* criteria can influence this aspect of targeting using several illustrative examples.[18]

The first and perhaps most important point to bear in mind is that any use of force in the context of self-defence is premised upon the principle of necessity. This means that self-defence is only permissible as long as an armed attack is either in progress or is clearly imminent and there are no other feasible alternatives to the taking of action in self-defence to halt the attack or forestall repeated attack in the reasonably proximate future. Hence, once the necessity to exercise self-defence ceases, there is no longer any right to target military objectives, even if doing so would be completely in conformity with IHL/LOAC. This applies to the existence of an armed attack, or a clear and unequivocal threat of attack in the reasonably proximate future, as well as to the existence of feasible alternatives to exercising self-defence. The latter could consist of adequate measures of law enforcement to forestall attacks by organized armed groups operating across an international border in situations where self-defence is invoked against attacks conducted by an autonomous armed group.[19] It could also take the form of negotiations leading to a peaceful resolution of the conflict, or it could entail any other non-forceful alternative which adequately terminates the need to resort to force.

The second consideration is that the scale of the attack, or series of attacks, will usually influence the temporal scope of permissible measures in self-defence. Just as this is the case with the other two categories addressed previously (what may be targeted and where may targeting take place), the smaller the scale of the armed attack, the shorter the scope of permissible self-defence action normally will be, and *vice versa*. This is linked to the first point relating to the existence of necessity to take action. It is evident that a small-scale armed attack will necessitate action to thwart the attack that normally will be limited in duration to a short period. This works the other way around as well. A large-scale invasion will necessitate a substantial armed response in the form of a war of self-defence—a war that, depending on the relative strength of the adversaries, could last months or even years until the parties conclude or accept an armistice, or hostilities cease. During that period, the targeting of military objectives under IHL/LOAC would likewise be lawful under the law regulating the use of force in self-defence.

[18]Greenwood 1989, pp. 275–276; Dinstein 2011, p. 232. For a fuller treatment of how long self-defence remains operative, see Gill 2015, pp. 737–751.

[19]Gill et al. 2013.

A third and final factor is the principle of immediacy, in the sense that an act of self-defence must be carried out within a reasonable timeframe following an armed attack, taking all relevant circumstances into account. These can include allowing for sufficient time to determine the author of the attack when this is not clear; deploying forces to the area under attack, or, in some cases, diplomatic contacts aimed at resolving the situation; and awaiting action by third States to assist in the exercise of self-defence. The key point is that action in self-defence must not be unduly delayed beyond what is reasonable under the circumstances. Action taken within this reasonable timeframe would be lawful, while action taken outside it would not.

A few examples will suffice to illustrate these considerations. In border skirmishes, aerial or naval incidents, and the like, self-defence will be limited in duration to repelling the attack, or clear threat of repeated attack, in the immediate future. There are many instances of such clashes, or potential threats of such clashes, in past and recent practice. Examples range from the situation on the Indian/Pakistan 'line of control' in Kashmir, through the Middle East, to the recurrent armed incidents between North and South Sudan. Likewise, the various disputes between China and its neighbours relating to sovereignty over islands and maritime space surrounding them could very possibly lead to such incidents. To the extent armed incidents occur, the scope of the right of self-defence is limited temporally to what is required under the circumstances to address the specific localized attack. Even if there are a series of such incidents spread over an extended period of time, it is not normally necessary to treat them as a single ongoing attack, rather than as discrete incidents, unless they are closely connected temporally and geographically and have the same author (e.g., the recurring incidents on the Indo-Pakistani 'line of control' in Kashmir are considered to constitute separate incidents and not one ongoing armed conflict). Consequently, the scope for permissible targeting will be correspondingly limited as well.

By contrast, larger scale unlawful uses of force, in the form of a closely related series of attacks by the same source over a period of time or a single large-scale use of force, will allow for a longer resort to force in self-defence, including obviously, the targeting of the attacking party's military objectives. The two World Wars, the Korean War, the Iran–Iraq War (1989), and the Desert Shield/Storm Kuwait conflict (1990–1991) are examples of hostilities conducted (partly) on the basis of self-defence over a longer period of time ranging from weeks to years. One area of controversy is whether the ongoing use of force by the US in self-defence against various armed groups sharing a common ideology and *modus operandi* in the Middle East and the Horn of Africa over a period of more than a decade remains a lawful response. The answer to this depends to a large extent on whether one sees this as a single act of self-defence in relation to the initial attack of '9-11' against the same actor, as a series of separate responses to ongoing and/or discrete threats, or, in some cases, as an overextension of reliance upon self-defence. However, that would require a separate chapter, if not an entire book, and cannot be answered here.

5.5 Concluding Remarks

Our examination of the impact of the *ius ad bellum* upon targeting leads us to a number of conclusions. First, while the determination of who or what constitutes a lawful military objective and the manner in which targeting must be conducted is wholly a matter which falls within IHL/LOAC in so far as that body of law is applicable, the question of whether the targeting may take place is not regulated exclusively by that body of the law. Other legal considerations that affect targeting include those of the law governing the use of force (*ius ad bellum*) and, in some cases, additional relevant legal rules and principles. These factors must equally be taken into account in determining whether specific types of targets may be attacked, where targeting may take place, and when and how long targeting is permissible, in addition to whether they constitute lawful military objectives under IHL/LOAC.

These requirements will generally be factored in at the strategic level of operations, but it would be a mistake for an 'operator' to conclude that they are wholly outside his/her realm of attention. It is quite possible that such considerations can impact targeting at the operational and even the tactical level. It would therefore be a mistake, and one with potentially far-reaching consequences, for military personnel involved in the planning and conduct of operations to be unaware of the influence of *ad bellum* requirements upon targeting and, where necessary, to (proactively) factor such considerations into the targeting process. This applies to virtually all levels of command and all branches of the armed forces, whether engaged in land, aerial, or naval operations. At the least, they must be aware of why there may be compelling legal reasons for not engaging certain targets on the basis of their nature, location or due to geographical or temporal constraints on permissible targeting that would otherwise constitute a lawful military objective in strictly IHL/LOAC terms. Consequently, not only policy-makers and senior officials, but all levels of command must be sensitive to of *ad bellum* influences upon the targeting process and must receive clear instructions on how these can affect what may be targeted and where and when targeting is permissible.

Second, it should also be pointed out that policy (and operational) considerations may act as an additional restraint above what the law (both *ad bellum* and *in bello*) strictly requires. That is, after all, the whole point of issuing Rules of Engagement, which often go well beyond what is required in a strictly legal sense in terms of restricting or prohibiting targeting.[20] A clear example of how such policy considerations affected targeting issues was in the Korean War. Chinese 'volunteers' massively intervened in the conflict. This led to the ensuing dispute between the UN Commander, General Mac Arthur and President Truman as to whether targets located in China, such as bridges and access routes in Manchuria should be attacked. While these could have been lawfully targeted from both an *ad*

[20]See Boddens Hosang on the influence of ROE upon targeting, Chap. 8 in this volume.

bellum and *in bello* perspective, considering the scale of the intervention and the potential targets' use and contribution to military action, it was deemed (rightly by most) unwise to do so from a policy perspective, in view of the very likely repercussions this could have had.[21]

Finally, it must be stressed again that international law is not just a collection of rules pertaining to one particular body or branch of it, or a collection of sets of rules in different legal 'boxes' which operate in isolation. It forms an interlocking system of rights and obligations, all of which must be taken into account, in particular when an activity such as targeting of persons or objects is concerned. Any use of force is subject to a whole range of legal (and other) considerations, including those discussed here.

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[21]This led to General Mac Arthur being relieved of his command by President Truman. For an account, see Manchester 1978, p. 751.

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