

**Beiträge zum Internationalen und
Europäischen Strafrecht**

**Studies in International and
European Criminal Law and Procedure**

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**The Legality of Targeted Killings
in View of Direct Participation
in Hostilities**

By

Josef Alkatout



Duncker & Humblot · Berlin

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In memory of
my great grandfather, combatant during the First World War
my grandfather, combatant during the Second World War
my father, civilian during the Palestine War

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Josef Alkatout

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Abbreviations and Terminology

ABDI	Anuario brasileiro de direito internacional
ACLU	American Civil Liberties Union
Add.	Addendum
ADH	Académie de droit international humanitaire et de droits humains
AFL Rev	Air Force Law Review
AI	Amnesty International
AJIL	American Journal of International Law
ALR	Albany Law Review
Ann. Am. Acad. Polit. Soc. Sci.	Annals of the American Academy of Political and Social Science
AP	Additional Protocol to the Geneva Conventions
AppC	Appeals Chamber
AppJ	Appeal(s) Judgment(s)
Art(s).	Article(s)
ASIL (Proceedings)	American Society of International Law (Proceedings)
ASM	Acta Societatis Martensis
AUC	Autodefensas Unidas de Colombia
AUILR	American University International Law Review
AUIntLawJl	Australian International Law Journal
AUJ INT'L L & POL'Y	American University Journal of International Law and Policy
AYBIL	Australian Yearbook of International Law
BMJ	Bundesministerium der Justiz (Germany)
Bofax	Periodical publication issued by the Institute for International Law of Peace and Armed Conflict of Bochum University
Brill	Brill Nijhoff Imprint
BWV	Berliner Wissenschafts-Verlag
BYIL	British Yearbook of International Law
CA	Common Article
CaH	Crime(s) against Humanity
CAR	Central African Republic
CardLRev	Cardozo Law Review

CDDH	CoE Steering Committee for Human Rights
cf.	conferre
CFR	Council on Foreign Relations
Ch(s).	Chapter(s)
CILJ	Cornell International Law Journal
CJIL	Chicago Journal of International Law
CLR	Canberra Law Review
CNA	Computer network attack
CoE	Council of Europe
ColumbiaUP	Columbia University Press
CornellUP	Cornell University Press
Creighton L Rev	Creighton Law Review
CSS	Center for Security Studies
CUDIH	Centre Universitaire de Droit International Humanitaire, Geneva
CUP	Cambridge University Press
CWILJ	California Western International Law Journal
CWRJIL	Case Western Reserve Journal of International Law
DCAF	Geneva Centre for the Democratic Control of Armed Forces
D.D.C.	United States District Court for the District of Columbia
DDR	U.N. Disarmament, Demobilization and Reintegration Resource Center
Dep.	Department
DJCIL	Duke Journal of Comparative & International Law
DJILP	Denver Journal of International Law and Policy
DoA	Department of the Army (U.S.)
DoD	Department of Defense (U.S.)
DoJ	Department of Justice (U.S.)
DPIH	Direct participation in hostilities
DRC	Democratic Republic of the Congo
e. c.	e contrario
ECHR	European Court of Human Rights
ed.	Edition
e. g.	exempli gratia
EIA	Ethics & International Affairs
EILR	Emory International Law Review
EJIL	European Journal of International Law
EO(s)	Executive Order(s) (U.S. President)
EP	European Parliament

ETA	Euskadi Ta Askatasuna
et al.	et alii
etc.	et cetera
et seq.	et sequens
et seqq.	et sequentia
EU	European Union
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
FAZ	Frankfurter Allgemeine Zeitung
FCO	Foreign and Commonwealth Office of the U.K.
fn(s).	footnote(s)
FPM	Front Page Magazine
FPRI	Foreign Policy Research Institute, Philadelphia
FR	Federal Register (U.S.)
FS	Festschrift
GA	Goldthammer's Archiv für Strafrecht
GBA	Generalbundesanwalt beim Bundesgerichtshof (Federal Attorney General of Germany)
GC(s)	Geneva Convention(s)
GIISA = SWP	German Institute for International and Security Affairs = Stiftung Wissenschaft und Politik
GJICL	Georgia Journal of International and Comparative Law
GJIL	Georgetown Journal of International Law
GLJ	Georgetown Law Journal
Globe	Global Business & Development Law Journal
GoJIL	Goettingen Journal of International Law
Hague Annex	Annex to the 4 th Hague Convention of 1907
Harvard ILJ	Harvard International Law Journal
Harvard NSJ	Harvard National Security Journal
HLJ	Hastings Law Journal
HLS	Harvard Law School
HPCR	Program on Humanitarian Policy and Conflict Research (Harvard University)
H.R.	U.S. House of Representatives and all bills originating from it
HRC	Human Rights Council
HRW	Human Rights Watch
HUP	Harvard University Press
HuV-I = JILPAC	Humanitäres Völkerrecht-Informationsschriften (Journal of International Law of Peace and Armed Con- flict)

IAC	International armed conflict
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICC Statute	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICoC-PSP	International Code of Conduct for Private Security Service Providers
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
i. e.	id est
IHL	International Humanitarian Law
IHRL	International human rights law
IHL	International Institute of Humanitarian Law
IIL	Institute of International Law
IMT	International Military Tribunal of Nuremberg
Int Crim Law Rev	International Criminal Law Review
IRA	Irish Republican Army
IRLCT	International Review of Law, Computers & Technology
IRRC	International Review of the Red Cross
IS	Islamic State
ISAF	International Security Assistance Force
ISIL YB IHL RL	ISIL Yearbook of International Humanitarian Law and Refugee Law
IsrLR	Israel Law Review
IUHEID	Institut Universitaire de Hautes Études Internationales et du Développement, Geneva
IYHR	Israel Yearbook on Human Rights
IYHRDP	International Yearbook on Human Rights and Drug Policy
JACL	Journal of Armed Conflict Law
JAP	Journal of Applied Philosophy
JCSL	Journal of Conflict & Security Law
JFK	John F. Kennedy
JICJ	Journal of International Criminal Justice
JIHLS	Journal of International Humanitarian Legal Studies
JILPAC = HuV-I	Journal of International Law of Peace and Armed Conflict = Humanitäres Völkerrecht-Informationsschriften
JLIS	Journal of Law, Information and Science

JLPG	Journal of Law, Policy and Globalization
JME	Journal of Military Ethics
JNSLP	Journal of National Security Law & Policy
JPL	Journal of Politics and Law
JPost	Jerusalem Post
JTLP	Journal of Transnational Law & Policy
KJ	Kritische Justiz
L.A. Times	Los Angeles Times
Law & Prac Int'l Cts & Tribunals	The Law and Practice of International Courts and Tribunals
LFJL	Lawyers for Justice in Libya
LJIL	Leiden Journal of International Law
ME Sec. and Pol. Studies	Mideast Security and Policy Studies
MEQ	Middle East Quarterly
Mil L Rev	Military Law Review
Mil Rev	Military Review
MJIL	Melbourne Journal of International Law
MLR	Minnesota Law Review
mn.	marginal number
MoD	Ministry of Defense (U.K.)
MoJ	Ministry of Justice (Israel)
MSILR	Michigan State International Law Review
n/a	not applicable
NATO	North Atlantic Treaty Organization
NIAC	Non-international armed conflict
NILR	Netherlands International Law Review
NJ	The National Journal
No.	Number
North Carol Law Rev	North Carolina Law Review
NRO	National Review Online
NTC	Libyan National Transition Council
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NYRB	New York Review of Books
NYT	New York Times
NYU JILP	New York University Journal of International Law & Politics
NYU JLL	New York University Journal of Law & Liberty
NYU School of Law	New York University School of Law
NZZ	Neue Zürcher Zeitung (Switzerland)

OHCHR	United Nations Office of the High Commissioner for Human Rights
OPT	Occupied Palestinian Territories
OUP	Oxford University Press
p.	Page
para.	Paragraph
PD Magazine	Public Diplomacy Magazine
PMSC	Private military and security company
PrepCom	Preparatory Committee ICC
PrepCommis	Preparatory Commission ICC
PRIO	International Peace Institute, Oslo
PTC	Pre-Trial Chamber (ICC)
Publ.	Publication / published
q. v.	quod vide
RDPMDG	Revue de droit pénal militaire et de droit de la guerre (Military Law and Law of War Review)
Res.	Resolution
RSDIE	Révue Suisse de droit international et européen
SC	Security Council (U.N.)
scil.	scilicet
SCSL	Special Court for Sierra Leone
SCT	Studies in Conflict & Terrorism
SDI	Security Dialogue
Sec(s).	Section(s)
Ser.	Series
SF Chronicle	San Francisco Chronicle
SG	Secretary-General (U.N.)
SHLR	Seton Hall Law Review
SLS	Sydney Law School
s. p.	sine pagina
SWP = GIISA	Stiftung Wissenschaft und Politik (German Institute for International and Security Affairs)
SZ	Süddeutsche Zeitung
taz	die tageszeitung
TC	Trial Chamber
TIL	Theoretical Inquiries in Law
TJ	Trial Judgment
TLCP	Transnational Law & Contemporary Problems
TLR	Tilburg Law Review
TMA1	Tribunal militaire d'appel Suisse

UAI	Union académique internationale
U Ill L Rev	University of Illinois Law Review
U.K.	United Kingdom of Great Britain and Northern Ireland
U.N.	United Nations
U.N.T.S.	United Nations Treaty Series
U Pa J Const L	University of Pennsylvania Journal of Constitutional Law
U Pa J Int'l L	University of Pennsylvania Journal of International Law
U Rich L Rev	University of Richmond Law Review
U.S.	United States of America
U.S.NWC(R)	United States Naval War College (Review)
Vand J Transnat'l L	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
VJIL	Virginia Journal of International Law
VLR	Virginia Law Review
VN	Vereinte Nationen (journal)
Vol(s).	Volume(s)
VS	Verlag für Sozialwissenschaften
VStGB	Völkerstrafgesetzbuch (German Code of Crimes against International Law)
VULR	Valparaiso University Law Review
Wash. & Lee L. Rev	Washington & Lee Law Review
WLR	Widener Law Review
Wm Mitchell L Rev	William Mitchell Law Review
WPost	Washington Post
WSJ	The Wall Street Journal
WTimes	Washington Times
Yb.	Yearbook
YIHL	Yearbook of International Humanitarian Law
YJIL	Yale Journal of International Law
YLJ	Yale Law Journal
YPA	Yugoslav People's Army
ZFAS	Zeitschrift für Außen- und Sicherheitspolitik
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik
ZStrR	Schweizerische Zeitschrift für Strafrecht

A. Introduction

“Kill him now”, the gypsy urged.

“That is to assassinate.”

“Even better”, the gypsy said very softly. “Less danger. Go on. Kill him now.”

(*Hemingway, For Whom the Bells Tolls*)

Targeted killings¹ have been undertaken by states and non-state actors² during times of war and of peace “for centuries”.³ During peace time, targeted killings may be lawful in exceptional circumstances, such as infliction of the death penalty after a regular trial or in cases requiring self-defense or defense of someone else in imminent danger.⁴ Otherwise, they are prohibited by national legislation⁵ and by international human rights law.⁶ This

¹ For different kinds of killings in armed conflicts, see *Watkin*, in: Wipman/Evangelista, with a paper entitled “Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict”. For a definition of targeted killings, see *infra* Ch. A. III.

² *Heintze*, in: Heintschel von Heinegg/Epping, at 163, defines a non-state actor as “any actor other than a sovereign state.”

³ *Malette-Piasecki*, at 265; *Jensen*, in: Banks, at 85, and with an example of the year 1793 at 91; *Häußler*, at 196; *Russell*, in: Finkelstein/Ohlin/Altman, at 253 (“[t]argeted killing is not new”, with further examples from the two World Wars).

⁴ ECHR *McCann* case, paras. 192 et seqq.; *Ambos/Alkatout*, at 359; interview with the then German federal minister of the interior Otto Schily (*Stark/Mascolo/Neukirch*, s.p.). Concerning self-defense on behalf of a state, cf. *Cassese* (2005), at 354 et seqq.; *Kinacioglu*, at 36 et seqq.

⁵ According to *Plaw*, at 27, the U.S. is the only country that adopted an explicit prohibition of assassinations carried out *per procurationem* of its government during peace time via EO 13470 (2008) of the U.S. President concerning U.S. intelligence activities. The Order was preceded by the similar EOs No. 11905 (1976), 12036 (1978), 12139 (1979), 12333 (1981), 13284 (2003) and 13355 (2004). With regard to these EOs, see *Hosmer*, at 10 et seqq.; *Banks/Raven-Hansen*, at 669 et seqq.; *Yoo*, at C-5; *R. Turner*, at 788 et seq.; *Harder*, at 2. (“EO 12,333 does not make assassination illegal; assassination is and was already illegal according to both federal and international law”). By introducing almost identical bills in the House of Representatives, Congress members Bob Barr and Terry Everett tried several times to nullify the Orders but did not succeed, see Terrorist Elimination Acts of 2003 (H.R. 356), 2001 (H.R. 19), 1999 (H.R. 1403) and 1998 (H.R. 4861).

⁶ *Alston*, Harvard NSJ, at 298; *Solis* (2010), at 542; *Wuschka*, at 905; *Kretzmer* (2009), at 25 (“Take away LOAC and it is extremely difficult, if not impossible, to

study is concerned with the legality of targeted killings in *hostilities*, thus during armed conflict only.⁷ It will be shown in the following that such killings are legal under certain circumstances.⁸

Following this logic, the topic of *ius ad bellum*,⁹ or rather *ius contra bellum*,¹⁰ will not be discussed here. This is also because, even in cases where the *ius ad bellum*'s right to (collective) self-defense¹¹ based on Art. 51 of the U.N.-Charter¹² is correctly exercised, the admissibility of a targeted killing remains controversial as this concerns the law of armed conflict (*ius in bello*).¹³ An attack either leads to a situation of armed con-

make out a case that such killings could be lawful under international law"); *Arnold*, at 322 ("lawfulness of targeted killings under IHRL is questionable"); *Cerone*, at 51 ("These rules [of international human rights law], of course, take circumstances into account, but generally do not permit targeted killing"). An institutionalized targeted killing policy during peace time is therefore in any case illegal (*Rudolf/Schaller*, at 6). Also with regard to targeted killings "outside the context of armed conflict", see *Silva*, at 15; *Tesón*, in: Finkelstein/Ohlin/Altman, at 405 et seq. – On an international level, the prohibition is anchored in Art. 6 (1) of the ICCPR which reads as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

⁷ At least two detailed studies have already analyzed the legality of targeted killings during peace time and under the international human rights law (*Melzer* [2008]; *Otto*).

⁸ *May*, at 58 ("In the IHL framework, there is no reason to rule out all targeted killings"); *Blank* (forthcoming, 2015), ninth page ("[t]argeted strikes within the context of an armed conflict are, on the surface, uncontroversial"); *Falk*, at 300 ("targeted killing cannot always be defined in a clear-cut manner as either lawful or unlawful").

⁹ For a discussion of targeted killings including *ius ad bellum* issues, see *Paust* (2010), at 237 et seq.; *Martin*, in: Finkelstein/Ohlin/Altman, at 226 et seq.; *Gazzini*, at 25 et seq. For a fair *ius ad bellum*, see *C. Henderson*, at 529 et seq.; *Sperotto*, at 1044 et seq.

¹⁰ Expression used by *Schaller* (2011), at 95. See also *Münkler*, NZZ (2014), at 15 ("International law has transformed itself from a war regulating to a war preventing framework" [translation by the author]).

¹¹ *Blank*, Wm Mitchell L Rev, at 1658, calls *ius ad bellum* the law of self-defense. On "targeted killing and "the self-defense justification" see *Martin*, in: Finkelstein/Ohlin/Altman, at 232 et seq.; *Russell*, in: Finkelstein/Ohlin/Altman, at 261 et seq.

¹² Art. 51 of the U.N.-Charter reads as follows: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence (...)."

¹³ *Tomuschat*, at 138; *Heller*, at 91 ("the targeted killing's compliance with Article 51 [of the U.N. Charter] says nothing about whether that killing violates the targeted individual's right to life"). With regard to the distinction between *ius ad bellum* and *ius in bello*, see only *Blank* (2009), at 378 et seq.; *Westhusing*, at 128 et seq. – The *ius in bello* is also called the "theory of justice in war" (*Margalit/Walzer*, at 2).

flict where IHL is applicable or it does not; in the case of the latter, the protection of international human rights law takes effect.¹⁴ In sum, a targeted killing cannot be based on the right of a state's self-defense alone.¹⁵

I. Aim of this Study

From a humanistic point of view, each dead individual is a loss, be it a combatant or a civilian. Thus nothing in this study shall ethically justify killings. The following will treat what is *legally* allowed under the *de lege lata*, acknowledging that there might be room for amelioration of international law,¹⁶ and even if this may go against purely humanistic considerations. This study attempts to provide an interpretation of the legal framework aiming to assist with political, military and moral decision-making.

II. Historical Development of Asymmetric Warfare, Immediate Participation in Hostilities and Targeted Killings

Napoleon's army in Spain already faced problems regarding how to react to attacks from "irregular resistance fighters".¹⁷ However, throughout his-

¹⁴ For more details on the complex interplay between IHL and international human rights law, see *infra* Ch. A. IV. 3.

¹⁵ Schaller (2011), at 96.

¹⁶ The current law is insufficient according to the then ICRC President Jakob Kellenberger (Interview with Kocher, s.p.); Hankel (2011), for instance at 7, and the state of Israel (cited in IRIN, s.p.). Thereto see also Kretzmer (2005), at 201 et seq. The *de lege lata* is seen appropriate to deal with targeted killings by Schaller (2007), at 6; Pejic, in: Schmitt/Pejic, at 342; Thürer, in: Melzer, s.p. (first page). See also Krishnan, who asks on the title page the following question with respect to targeted killings: "Do we need a new Geneva Convention?" (translation by the author); Chiesa/Greenawalt, at 1389 ("the evolution of targeted killing as a distinct and significant method of warfare puts pressure on IHL, testing how the core legal requirements of necessity and discrimination apply to operations whose mechanics depart significantly from the types of combat that have traditionally informed IHL"). Münkler, Zeit (2014), at 4, expects IHL to be amended in the future to take into account the new "hybrid" nature of armed conflicts. On the lack of necessity to create new law despite asymmetric armed conflicts, see Tigroudja, in: Tomuschat/Lagrange/Oeter, at 274; Wiczorek, at 125. The application of current IHL does not privilege alleged terrorists, according to Vöneky, in: Walter et al., at 949.

¹⁷ Oeter, in: Fischer-Lescano et al., at 503. See also Solis (2010), at 209 ("unlawful combatants are as old as warfare") and Parameswaran, at 96 et seq. ("already in the 19th century 'irregular fighters' were a common phenomenon") and at 35 ("the issue of partisans – as the oldest form of irregular resistance – seems negligible") – both translated by the author. Schmitt, Harvard NSJ, at 7, states that strong civilian participation in hostilities is not a new phenomenon.