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Targeted Killing in the History of Israel, the United States and International Law

Current debates among critics of targeted killing suggest that the extraterritorial killing of designated terrorists has a tenuous relationship to law at best. This has led many to the conclusion that what is needed is to infuse more law and legal work into the practice; to ask the states engaging in targeted killing to articulate the legal framework in which they are conducted, perhaps even make decision-making in relation to such killings subject to judicial review. Numerous law scholars have also taken up the task of explaining the proper limits of such practices, whether the sources of those limits are found in constitutional law, international human rights law, the norms on the use of force or the law of armed conflict. This questionable relation to law has prompted yet other critics to conceptualise targeted killing in terms of sovereignty or exception, rather than law.

Contesting an assumption shared by these different responses, this book argues that targeted killing is steeped in law from the outset and that law, particularly international law, has both *shaped* and *been shaped* by this practice. In both Israel and the United States – the two states that have pioneered this practice – targeted killing did not emerge despite, or even necessarily in opposition to, law. In any case, it emerged through extensive legal work. Indeed, both the concept and the practice of targeted killing depend entirely on the ability to distinguish between *legal* 'targeted killing' and *extra-legal* 'political assassination'. This book offers a history of this ability. It allows us to see how targeted killing has emerged through a much longer and mutually productive relationship with law, particularly international law, than the contemporary debate and the prevailing focus on 9/11 and the second Intifada, suggests.[1]

[1] This association of targeted killing with 9/11 and the second intifada can be noticed inter alia in a dedicated encyclopaedia of international law: Georg Nolte, 'Targeted Killing' in Rudiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* – online edition (Oxford University Press 2008) www.mpepil.com accessed 20 May 2015. Susanne Krasmann has argued for a mutually productive relationship between targeted killing

It must be stressed at this point that discriminate state killings by executive sanction are not at all new, and neither are Israel and the United States the only states practising it. What is new and distinctive about Israeli and American targeted killing is the framework in which these killings appear as legal, legitimate and necessary as a matter of both domestic and international law. By studying the development of a legal authority for targeted killing in the Israeli and the US contexts, we will learn about how this practice was emancipated from the sphere of secretive political assassinations and took the form of officially acknowledged targeted killing.

Targeted killing is intimately embedded in both Israeli and US statecraft and in the problematic relationship between sovereign authority and lawful violence underpinning the modern state system. This argument involves interweaving three central aspects for the emergence of targeted killing. The first aspect concerns fundamental questions of the law and politics of protection in the era of the liberal rule of law. Two incisive critics of the liberal rule of law, Walter Benjamin and Carl Schmitt, are the primary resources in this attempt to understand the centrality of state protection, but also the constant turn to law and to lawyers in the history of targeted killing. The second aspect concerns the particular histories of state protection, terrorism and assassination of Israel and the United States. This is because of the importance of understanding the historical trajectories and wider political developments of which targeted killing forms a part. The third aspect concerns iterative processes of the articulation of problems and threats; the provision of answers, definitions and interpretations; and the shaping and gaining in importance of practices over time. This final aspect is to account for the legal and political practices both constituting and constituted by targeted killing.

History, Practice, International Law

It will be clear from what has been said so far that this book represents both a turn to history and a turn to practice in the study of targeted killing. Robert W. Gordon argues that for lawyers the past is primarily a source of authority and legitimacy. 'History reassures us that what we do now flows continuously out of our past, out of precedents, traditions,

and international law (Susanne Krasmann, 'Targeted Killing and Its Law: On a Mutually Constitutive Relationship' 25 (2012) Leiden Journal of International Law 665).

fidelity to statutory and Constitutional texts and meanings'.[2] Indeed, frequent references to how today's drone strikes against terrorist suspects in Pakistan, Yemen or Somalia, for example, are no different from the deliberate US downing of the aircraft carrying Japanese Admiral Yamamoto in the Second World War play just such a role.[3] So too do references to the fact that attacks actually must be 'targeted' if they are to comply with the law of armed conflict and that targeted killing therefore represents a step forward as far as law of war compliance is concerned.[4] Indeed, such a reassuring progressivism may play an even more important role for the inherently repulsive act of intentional state death dealing.

This book does not turn to history as a source of authority or legitimacy but, instead, to make comprehensible shifting perceptions of the legality of the extraterritorial killing of designated terrorists. The importance of specifically studying legal practice in dealing with cases on the edge of the legal has recently been stressed by Fleur Johns.[5] Referring specifically to targeted killing, Johns suggests that somewhat less attention might be focused on explaining the proper limits of targeted killing,

> more attention might, instead, be directed towards those normative practices that already regulate critical decision-making surrounding targeted killing . . . to ask how those existing norms have developed and what sort of knowledge practices, experiences and tendencies they appear to be fostering.[6]

The insistence of Fleur Johns that it matters that international lawyers disavow or downplay their role in constituting seemingly exogenous phenomena – in this case targeted killing – and the role of those phenomena, legally construed, in constituting international law leads us further to an important dimension of the way in which international law is treated in this study: *international law in history* and the *history of international law*.[7]

Suggested by Matthew Craven, *international law in history* and the *history of international law* are two different ways of conceiving the

[2] Robert W. Gordon, 'Foreword: The Arrival of Critical Historicism' 49 (1997) Stanford Law Review 1023.

[3] See, for example, US Attorney General Eric Holder, 'Attorney General Eric Holder Speaks at Northwestern University School of Law' (2012) www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law accessed 10 May 2015.

[4] Michael N. Schmitt, 'Review of Nils Melzer's Targeted Killing in International Law' 103 (2009) American Journal of International Law 813.

[5] Fleur Johns, *Non-legality in International Law: Unruly Law* (Cambridge University Press 2013).

[6] *Ibid.* p. 9f. [7] *Ibid.* p. 24.

relationship between international law and history.[8] Investigating the emergence of targeted killing in Israel and the United States in Chapters 2 and 3, I take up the perspective of *international law in history*. While stressing the importance of international law in social and political developments, this perspective may be used in describing how international law or international lawyers have been engaged, or involved themselves, in the creation of history in a wider sense, that is, outside the disciplinary history.[9] Moreover, the perspective of international law in history allows me to suspend a priori understandings of the oppositions between domestic and international law, law and politics, legal validity and political practice by, instead, proceeding bottom up – by studying interpretations, definitions, concepts and categories as produced by actors in the field.[10] This, in turn, provides a sense of historical motion and political struggle in the study of key aspects of targeted killing and the war on terrorism such as the 'constitutional structure' of the law of belligerent occupation, pre-emptive or preventive self-defence, 'unlawful combatants' and the concept of civilians taking a direct part in hostilities.

When we subsequently turn to investigate the effect on international law of the emergence and contemporary debate over targeted killing in Chapter 4, the perspective is shifted from *international law in history* to the *history of international law*. Craven sees in *history of international law* the seeking of trajectories or teleologies within the discipline of international law itself.[11] The particular concern here is the struggle over international law's sanctioning of lethal force in the debate on targeted killing.

Treating law in this empirical way is not a sign of *disinterest*, but of acute *interest* in its inherent normativity. Indeed, the understanding of international law as 'a bridge between the social past and the social future through the social present'[12] gives serious pause for thought when studying a

[8] Matthew Craven, in fact, considers three ways of conceiving this relationship – 'international law in history', 'history of international law' and 'history in international law' – but I shall only make use of the first two in this investigation. Matthew Craven, 'Introduction: International Law and Its Histories' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* (Leiden: Martinus Nijhoff Publishers 2007) 1–25 at 7.

[9] *Ibid.*; cf. Thomas Skouteris, 'Engaging History in International Law' in José María Beneyto (ed.), *New Approaches to International Law* (The Hague: T.M.C. Asser Press 2012) p. 104.

[10] Nikolas M. Rajkovic, Tanja Aalberts and Thomas Gammeltoft-Hansen, *The Power of Legality: Practices of International Law and Their Politics* (Cambridge University Press forthcoming 2016).

[11] Craven, 'Introduction: International Law and Its Histories' p. 6.

[12] Philip Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge University Press 2002) p. 317.

development that would appear to lock terrorism and counterterrorism in something that looks more and more like a self-fulfilling prophecy.[13] Moreover, it is precisely the normativity of law that makes it important to study the legal practices through which targeted killing emerged, in both a historical and political context. It is important to recognise the circumstances, knowledge practices and patterns of reasoning through which such an exceptional legal authority can emerge, but also to study the connections between the way in which international law is practiced in specific domestic jurisdictions and the development of international law as such.

Sovereignty, Protection, Liberal Legality

Kenneth Anderson has written about how the 'overpowering', 'strategic', and 'moral and humanitarian' logic of targeted killing will lead to the proliferation of this practice in both space and time:

> Just as crucial programs of Predator-centered targeted killings are under way now in Afghanistan and, accompanied by increasing international controversy, in Pakistan, such programs will be an essential element in U.S. counterterrorism operations in the future – against targets having little or nothing to do with today's iteration of the war on terror. Future administrations, even if they naturally prefer to couch the matter in softer terms, will likely follow the same path. Even if the whole notion seems to some disturbingly close to arbitrary killing, not open combat, it is often the most expedient – and, despite the civilian casualties that do occur, the most discriminatingly humanitarian manner to neutralize a terrorist without unduly jeopardizing either civilians or U.S. forces.[14]

The future of targeted killing and of drone warfare has captured the imagination of not just international lawyers but national security and human rights lawyers, political geographers and international relations specialists, as well as the broader public. At the same time, the focus on *protection* in targeted killing points us to the past; it points us way back

[13] The notion of a self-fulfilling prophecy in the context of terrorism and counterterrorism is taken from Joseba Zulaika, *Terrorism: The Self-fulfilling Prophecy* (The University of Chicago Press 2009). On 'blowback' caused by the American targeted killing campaign see Michael J. Boyle, 'The Costs and Consequences of Drone Warfare' 89 (2013) International Affairs 1; Leila Hudson, Colin S. Owens and David J. Callen, 'Drone Warfare in Yemen: Fostering Emirates Through Counterterrorism?' 14 (2012) Middle East Policy 142.

[14] Kenneth Anderson, 'Targeted Killing in U.S. Counterterrorism Strategy and Law' in Benjamin Wittes (ed.), *Legislating the War on Terror: An Agenda for Reform* (Washington DC: Brookings Institution Press 2009) 346–400 at 347.

in the thinking and practicing of sovereignty. In fact, it brings us all the way back to Hobbes' *Leviathan*, a book that inaugurates a tradition that makes protection the defining characteristic of sovereignty. As formulated by Anne Orford,

> Hobbes sought to argue that the creation of a political order depended upon the establishment of a common power with the capacity to protect its subjects. According to Hobbes, the lawful authority is recognisable as the one who achieves protection in the broad sense of bringing into being a condition in which the safety of the people can be achieved. This was the 'office', or in other words the responsibility of the sovereign.[15]

Roberto Esposito has stressed Hobbes' importance for protection-centric thinking on sovereignty. For Esposito, Hobbes' state of nature, in which all lived in continual fear and danger of violent death, is not simply the necessary counter-pole justifying political authority. For him it is a daunting image of human co-existence, or, as he prefers it, of men given over to one another in community. The 'immunisation' or protection of community in Hobbes' *Leviathan* proceeds through the institution of a commonwealth with a sovereign that is granted responsibility for protecting life.

Esposito likens the way in which conflict is neutralised in Hobbes with the practice of vaccinating the individual body. As is well known, this is a procedure in which a fragment of the pathogen from which the body needs to be protected is introduced into the body in order to block and contradict 'natural development'.[16] In Hobbes' schema this takes the form of the subjugation of the individual subject to a juridical order in which the subject is deprived of his or her right to self-defence through delegation to a sovereign that henceforth exercises it for the subject. Thus, 'the state of nature is not overcome once and for all by the civil, but it resurfaces again in the same figure of the sovereign, because it is the only one to have preserved natural right in a context in which all the others have given it up'.[17] From Esposito's account we also learn that state protection proceeds by presupposing the threat that makes it necessary, but also by

[15] Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press 2011) p. 57.
[16] Roberto Esposito, *Biós: Biopolitics and Philosophy* (Timothy Campbell tr, Minneapolis: University of Minnesota Press 2008) p. 46.
[17] Roberto Esposito, *Communitas: The Origin and Destiny of Community* (Timothy Campbell tr, Stanford University Press 2010) p. 30.

functioning through the use of what it opposes. State protection entails violence against violence in order to control violence.[18]

Jens Bartelson has stressed that due to its contingency and mutability this *double bind* between authority and force survived the transition from just war theology to secular statecraft and remains a powerful structuring principle for the legitimate exercise of force up until today.[19] This book gives careful attention to the double bind between authority and force emerging from the law of targeted killing, the consequences of which we can observe in the day-to-day reports of the killing of designated terrorists in Pakistan, Yemen, Somalia and Gaza, for example, in the name of protecting the population.

The extraterritorial dimension of targeted killing will be studied through the particular histories of state protection, terrorism and assassination of Israel and the United States in the chapters that follow. The international legal issues raised by this extraterritorial dimension are a key concern, particularly in the chapter on the United States. Two other aspects of central importance for the question of contemporary state protection should be mentioned at this point: changes in the subject of protection, from Hobbes through to today, and the consequences of the rise of the liberal rule of law.

Esposito notes how during the course of the modern state the body politic ceased to be the juridico-politico metaphor that it was in works such as Hobbes' *Leviathan* and that it would effectively 'eclipse itself simply because it is "realized" in the actual body of the people'.[20] This realisation had as its effect the inversion of the relation of domination between power and life through which 'life – its reproductive protection – became the ultimate criterion for legitimizing power'.[21] We should note here that Esposito both draws on the influential account of Michel Foucault and is cautiously at odds with it. In his works from the mid-1970s, Michel Foucault argued that at the beginning of the second half of the eighteenth century a rearticulation of sovereign power took place, a rearticulation that he refers to as a shift towards 'biopolitics', which he explains as a form of power that takes the security and welfare of populations as its

[18] Roberto Esposito, *Immunitas: The Protection and Negation of Life* (Zakiya Hanafi tr, Cambridge: Polity Press 2011) p. 29.
[19] Jens Bartelson, 'Double Binds: Sovereignty and the Just War Tradition' in Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments: the Past, Present and Future of a Contested Concept* (Cambridge University Press 2010) 81–95.
[20] Esposito, *Immunitas: The Protection and Negation of Life* p. 15. [21] *Ibid.*

object.[22] Esposito is entirely in agreement with Foucault on the significance of these developments. The only point at which Esposito parts with Foucault is that he finds that the contrasting distinction that Foucault sometimes makes between sovereignty and biopolitics underappreciates the protective character of sovereignty. If sovereignty is understood in the way suggested by Esposito, it becomes the first and most influential form that the biopolitical regime takes. As Esposito states: 'Sovereignty isn't before or after biopolitics, but cuts across the entire horizon, furnishing the most powerful response to the modern problem of the self-preservation of life'.[23]

Another significant aspect is the decline of absolutism and the ascent of the liberal rule of law. Hobbes' positing of protection as the supreme end of the state leads him to grant the sovereign the right to be the judge of the hindrances and disturbances of peace, as well as the means necessary for its recovery:

> And because the end of this institution, is the peace and defence of them all; and whosoever has right to the end, has right to the means; it belongeth of right, to whatsoever man, or assembly that hath the sovereignty, to be judge both of the means of peace and defence; and also of the hindrances, and disturbances of the same; and to do whatsoever he shall think necessary to be done, both beforehand, for the preserving of peace and security, by prevention of discord at home, and hostility from abroad; and, when peace and security are lost, for the recovery of the same.[24]

Such formulations led Carl Schmitt to categorise Hobbes, in his 1934 *On the Three Types of Juristic Thought,* as a 'classic case of decisionist thinking'. Schmitt writes about Hobbes:

> All *Recht,* all norms and statutes, all interpretations of laws, and all orders are for him essentially decisions of the sovereign, and the sovereign is not a legitimate monarch or established authority, but . . . whoever establishes peace, security, and order is sovereign and has all authority.[25]

[22] See, in particular, Michel Foucault, '*Society Must be Defended*': *Lectures at the Collège de France 1975–76* (David Macey tr, New York: Picador 2003); Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–78* (Graham Burchell tr, New York: Palgrave Macmillan 2007); Michel Foucault, *The History of Sexuality: An Introduction* (Robert Hurley tr, New York: Pantheon 1978) but also a vast body of literature influenced by Foucault and usefully mapped in Thomas Lemke, *Biopolitics: An Advanced Introduction* (Eric Frederick Trump tr, New York University Press 2011).

[23] Esposito, *Biós: Biopolitics and Philosophy* p. 57.

[24] Thomas Hobbes, *Leviathan* (Oxford University Press 1996) p. 118.

[25] Carl Schmitt, *On the Three Types of Juristic Thought* (Joseph W. Bendersky tr, London and Westport CT: Praeger Publishers 2004) p. 61.

Schmitt is often referred to as the Hobbes of the twentieth century and his work reveals the significant tensions created by a Hobbesian emphasis on protection in the era of the liberal rule of law. This is because liberal legality shuns this kind of sovereign decisionism, in which the sovereign is granted the right to be the judge of the hindrances and disturbances of peace as well as the means necessary for its recovery, insisting that all aspects of public authority are subject to law. Schmitt was very aware that liberalism's contribution to modern politics was the rule of law as a precondition for the exercise of public authority, but he continuously maintained the position that, despite all efforts, liberalism can only change the modalities – not the centrality and force – of the politics of protection. To cut a long story short, this is where legal practice enters the picture.

As has already been mentioned, this book turns to two iconic thinkers of this dynamic: Schmitt himself, but also one of Schmitt's contemporaries in Weimar Germany, the German-Jewish critic Walter Benjamin. Benjamin's description of the indistinct relationship between 'lawmaking' and 'law-preserving' violence and Schmitt's lesser-known concept of 'apocryphal' sovereignty both describe the tensions created by a protection-centric conception of the state in the era of the liberal rule of law. Both thinkers conceptualise the seeming paradox that even in situations of emergency it is 'highly unlikely that any liberal democratic state would claim an authority openly to act outside of the law'.[26] And still, 'they do seem to be able to procure, or at least to claim, a legal authority to exercise the power that past governments claimed under the rubric of prerogative'.[27] Benjamin will be the primary reference point in this regard in the chapter on Israel (Chapter 3), and Schmitt the same in the chapter on the United States (Chapter 4).

The reason for turning to Schmitt and Benjamin – in an investigation that admittedly takes us quite far away from Weimar Germany, as far as both space and time is concerned – is not to validate timeless, and a-contextual truths about sovereignty, law or state protection. This deserves to be mentioned because both Schmitt and Benjamin have been subject to de-historicised theory – 'a mode of inquiry that [plunder] the past for its insights but often [neglect] its historical character and efface the salient (though by no means insurmountable) differences between

[26] David Dyzenhaus, 'Emergency, Liberalism, and the State' 9 (2011) Perspectives on Politics 69 at 70.
[27] *Ibid.* p. 71.

past and present'.[28] In keeping with what was referred to earlier as a bottom up approach, the reason for turning to Schmitt and Benjamin is instead to analyse, clarify, make visible and thus to intensify the struggles that take place around power in the history of targeted killing.[29] This is possible because although there are important differences between the circumstances and situations that Schmitt and Benjamin faced and the circumstances and situations to which we will turn in this book, there are also similarities. The most obvious is that of responding to political crisis – times in which there is a sense that even the monopoly of violence of the state is at stake – *within* the framework provided by the liberal constitutional state. For the reason of these similarities, it is indeed possible to think of the philosophical and legal theoretical texts used in this study not as external theoretical resources imposed on the history of targeted killing but as part of the *relevant historical context*.[30] It is even possible to imagine that although the context, outlook and ambition of their work differ in significant ways, Schmitt, Benjamin and some of the protagonists of this history of targeted killing are positing essentially the same question: how is protection achieved in an era that accepts no outside to *legal* authority.

Against this background we are prepared to give a more nuanced answer to the question: why focus on Israel and the United States when plenty of other states kill people determined to be terrorists and a threat to the public? The fact that Israel and the United States have both been committed to engaging terrorism more or less openly by military means in application of the law of armed conflict is crucial. As Wouter Werner argues, this sets Israel and the United States apart from states that are denying any involvement in targeted killing, states that are not articulating a legal justification for them or are justifying lethal force as an exceptional measure of law enforcement.[31] What makes Israel and the United States

[28] Peter E. Gordon and John P. McCormick, 'Introduction: Weimar Thought: Continuity and Crisis' in Peter E. Gordon and John P. McCormick (eds.), *Weimar Thought: A Contested Legacy* (Princeton University Press 2013) 1–11 at 2.

[29] This is the way Anne Orford conceives of the place for political theory in the writings of Michel Foucault in 'In Praise of Description' 25 (2012) Leiden Journal of International Law 609 at 622. It is also reflective of her own use of the writings of Thomas Hobbes and Carl Schmitt in her study of the responsibility to protect concept (Orford, *International Authority and the Responsibility to Protect*).

[30] Anne Orford, 'On International Legal Method' 1 (2013) London Review of International Law 166 at 174.

[31] Wouter Werner, 'The Changing Face of Enmity: Carl Schmitt's International Theory and the Evolution of the Legal Concept of War' 2 (2010) International Theory 351 at 354f.