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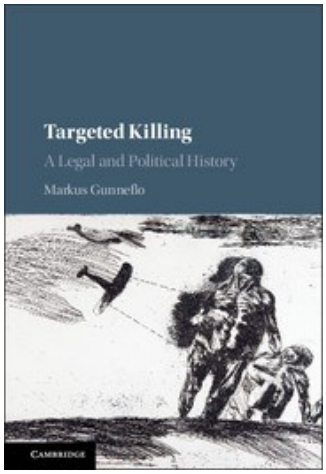
GUNNEFLO BOOK SYMPOSIUM

Gunneflo Book Symposium: Part 3

Nahed Samour: Targeted Killing, Revisiting Hobbes: No Protection, No Obedience

NAHED SAMOUR — 22 March, 2017



Markus Gunneflo's book shows how the normalization of targeted killing emerged through extensive legal work. Offering a meticulous account of history and practice, the book highlights the law and politics of protection in the dispute on killing to protect. Hobbes crafted his state sovereignty in *Leviathan* "with no other design than to set before men's eyes the mutual relation between protection and obedience".[1] Targeted killing is a response to the call for state protection, in international as much as domestic law. It produces unequal distribution of rights and protection, and unequal distribution of suspicion, with no security for anyone. Gunneflo demonstrates how the pervasiveness of law in targeted killing and the compulsion to legality aims at producing a legal authority to engage in targeted killing (p 14). This legal authority is best captured in Walter Benjamin's words: "Only the state has the right to use force (and every use of the force stands in need of a

particular law)."[2] With Benjamin, Gunneflo opens and ends his book, showing us how the state has ultimate, unfettered powers of law-preserving and law-making to decide whether killings may or may not be carried out, eventually accepting no authority outside itself and therefore aiming for state impunity. The legalizing debate elevates targeted killing as a privilege of the state over the non-state and demonstrates that the state can provide for any law, if need be. In the following, I engage with Gunneflo through three points: First, legalizing as lawlessness, second, separating the individual from the conflict and, finally, subjects of targeted killing: the paradox of inclusion into law and exclusion of protection. In doing so, I argue that for those suffering from the everyday possibility of targeted killing and its massive consequences, not being protected by international or domestic law consequently means that they will not be obedient to either.

1. **When is Legalizing Essentially Lawlessness?**

Why legalize a practice that is being performed anyway? Gunneflo offers a convincing account of how the practice of targeted killing desperately seeks the legal authority of a state to sanction "violence against violence in order to control violence" (p 7). Cautiously following Koskenniemi's "fall of international law",[3] Gunneflo traces how in the accounts of proliferation of international law, indeed the pervasiveness of international law, targeted killing is part of that 'fall' (p 238). Pervasiveness and deformalization (Koskenniemi), the use of vague categories, by the legal-military complex, the devaluation of law from principle to pragmatism, is perfectly exemplified in the legalizing debate. InIndistinction and imprecision is the new terminology of international law, willingly risking basic principles and the unjustified violation of Geneva Conventions.

While the state as legal authority productively blurs lines, creates new indistinguishable categories, adapts to new realities, Gunneflo is unimpressed by the attempts of international lawyers, of eagerly demonstrating how international law is a science following the rules of logics and formalism as well as the dynamics of war, while shrugging shoulders at the fragile relationship between law and fact (p 42).

Gunneflo shows how repeated attempts to reconcile the controversies

around assassinations and aiming to ease possible tensions between international human rights and international humanitarian law lack legal clarity. Gunneflo's book is an intervention in the normalizing debates of international law, irritated by and irritating the debates that cling on to specific definitions of "imminent threat", "direct participation in hostile activities", etc. – only to prove repeatedly that the legal-military complex is precisely wrong when law hits the application button.

With these blurred lines, and the impossibility of attaching law to fact, legalization resembles lawlessness. This compulsion to legality triggers a particular cycle of legality in times of crisis: one in which "the political constitution asserts itself under the guise of the legal constitution", and the rule of law is reduced to a '"thin veneer of legality" such that it serves to cloak what is in substance arbitrary executive power'.[4] Yet, the legalizing project can nevertheless claim that "the sovereign state is able to adopt the simple and clear position that the law is on its side" (p 195). International law, as seen through targeted killing, underlines once more that law is war's best friend.

2. **Revisiting the Individualization in International Law: Separating the Individual from the Conflict**

Gunnneflo is right to doubt the "Individualization of Enmity" (p 194-206): "Combatants are killed not as individuals, but because they are enrolled by a state that authorizes their violence" (p 194) and because of a "collectivizing individualism" (p 200): people are targeted because they are racialized, because of their religion and/or ideology. Also, the individual does not even emerge, if the method through which individuals are identified and targeted is done through reliance on "networks" rather than proof of individual culpability. One is targeted for one's identity or association, not for one's acts. Targeters have relied upon "network diagrams" in which the targeted individual is not necessarily the most powerful, or even culpable, member of an organization, but may occupy a "low-level" role such as that of courier, in which he links other key individuals to one another.

I would argue that the legalizing project is also aimed at cutting the individual from the conflict one lives in. The relationship between the individual and the conflict therefore needs to be investigated. Is the

authorization of force not in fact made against a nation or a people via a collectivized individual? Targeted killing has the same effect as a show trial, punishing, killing one as a lesson of deterrence for all. The combatant-civilian distinction by now has become so fuzzy, that if you target one, you effectively target all. If international law is to "channel interpretative conflict into peaceful avenues",[5] targeted killing is not. It is a convenient instrument that exposes the inability or unwillingness of the perpetrating states to grapple with the underlying causes of conflict. It is not employed to end conflict but to continue and eventually intensify conflict. With little to no boots on the ground, which would cause political opposition, the conflict is kept out of the sight and out of the mind of the targeters' constituencies. Legalizing targeted killing takes away any incentive to confront the causes of underlying conflicts. In fact, confronting the conflict is rarely the intention of targeted killing in the first place. It is a convenient practice and distraction to not deal with any of the central struggles in this world.

Connecting Hobbes with the legalizing debate also shows that there can only be protection where there is pervasive control. Thus, the Israeli Supreme Court is eager to show its control over the occupied Palestinian territory, and the USA over "an American Homeland which is the Planet" (p 82). The right to protect and to control translates into a right to carry out survaillance, monitor, gather and save intelligence, over the "individual target" but also about its entire environment, family, neighbourhood, work place, etc. Targeted killing becomes a concrete show of ultimate power that goes way beyond the individual, but extends to the human in all social settings. In fact, the target is the people in conflict. The right to protect and give life is also the right to take life, and this lesson of biopolitics is never one that aims at the individual.

3. **Inside the Law, Outside of Protection: What about the Subjects of Targeted Killing?**

As "enemy, criminal and risk", subjects of targeted killing belong outside the law's protection (p 14, 194). Gunneflo underlines the paradox of "the inclusion of the terrorist enemy in the law of armed conflict as a legitimate target and the simultaneous exclusion from practically all of its protection." (p 202) He traces the reasoning of the

legal-military complex to argue against any form of protection: The respect for due-process-guarantees for the targets can be neglected, unimpressed by the centrality of this right in liberal democracies, unimpressed by "the encounter of the enemy and the rights-bearer" (p 194), who is not only denied to participate in hostilities but also in due process. Exclusion here also means defencelessness. The legalizing project's motto is: Not rule of law, but rule by law. The rule of law has only been applied when it is convenient for states, this counts for the present war on terror as much as for colonial rule. This goes hand in hand with highlighting that lives of those who are ostensibly saved through targeted killing are presented as more valuable (dialectics of othering). Protection cannot even be sought in the much-celebrated principle of proportionality in cases of military necessity. This paradox of inclusion into the law and exclusion of protection can be illustrated by the Israeli law that posits that non-Israeli residents in the Gaza strip are legally denied from seeking recourse to Israeli courts and demand compensation. The law treating the "Gaza Strip as Enemy Territory" was announced alongside the commencement of Operation "Protective Edge" on 7 July 2014. It applied retroactively from the completion of the disengagement plan from the Gaza Strip in 2005. It states:

> **Section 5B(a)(1) of the Civil Wrongs Law stipulates that *the state will not be liable in torts for damages caused to a non Israeli resident* residing in a territory located outside Israel which was declared by a government order as Enemy Territory, unless he resides lawfully in Israel.[6]**

The law further states that this regulation does not affect the obligation of the State of Israel to examine claims concerning violations of armed conflicts in the framework of combat activities. In brief, the law explicitly reduces the state's obligation to an obligation to examine and, if need be, investigate, but explicitly excludes liability. The result is that "a suit of the enemy should not be adhered to."[7] There is absolutely no distinction here between combatant or civilian: total exclusion through total law.

Those arguing for the need to legalize targeted killing, under the conditions of transparency and accountability know that a law like this provides neither transparency nor accountability. There is no transparency, given that the Israeli Military Advocate General as part of the Israeli military is both executing authority and the investigative authority: neither independent nor impartial, and can therefore not ensure accountability. And there is no accountability, as possible crimes committed by Israeli forces against Palestinian civilians are *unpunishable*, and the perpetrators are not to be prosecuted according to the Israeli legislature.

To document the expansive nature of targeted killing and the utmost restriction of protection, providing attention on the lack of transparency is left to human rights circles, UN, and journalists and photographers to help making their findings public.

Even when civilians killed in a targeted killing action hold foreign nationality, the discretionary power of diplomatic protection has not yielded any protection: not one state has stepped into the shoes of its injured nationals affected by targeted killing (see the 2014 case of German nationals, Al-Kilani).

Neither transparency, nor accountability is the business of any nation-state involved in targeted killing, either as perpetrators or targeted-plus-bystanders. The claim of the legalizing project that there are means to differentiate between legitimate and illegitimate killing, sound hollow if no means are taken to effectively investigate, and to accept responsibility. But Gunneflo is right, as long as there is a legal authority to shield against accountability, we can call that law.

This account is not to be understood as pressing for legal remedies for the family members, assisting victims' quest for the truth and their right to effective remedies. This would count as another example of a pyrrhic victory, as only if you could compensate victims, targeted killing would indeed be lawful. Even in those efforts where lawyers before courts used international law to stop targeted killing, these efforts ended up being part of a legalizing scheme, ending, for example, in President of the Supreme Court of Israel Aharon Barak rejecting the category of unlawful combatants, only to come up with

an equally expansive notion of "civilians taking a direct part in hostilities" (p 206).

As a crime, targeted killing would nevertheless need to be accompanied by legal remedies and compensation for family members and proprietors. Targeted killing in its legalized fashion shows that there is no protection to be sought from further atrocities of procedural non-recognition after the bomb hits its target.

Legalization and judicialization, going back to Israeli Supreme Court cases from 1948 onwards, structurally consolidate the non-protection of "some peoples" rights and do not place any significant limits on government surveillance, monitoring, spying and targeting. More fundamentally, what Gunnneflo does is to ask difficult questions about the legalizing project and the role of Israel and the United States pioneering in it, with their legal-military complex undermining international and domestic law worldwide. We are witnessing the far-reaching consequences of these attitudes on a regular basis in the larger Middle East and South Asia, with American denial about its role creating boomerang effects of violence all over.

If targeted killing has become essential to the existence of the State of Israel (by containing restless indigenous resistance) and to US-American freedom (in the sense of global control), then this shows that the domestic and global "war on terror" are intimately intertwined. Markus Gunneflo's book *Targeted Killing* presents an urgent, excellent opportunity to understand and contest these practices and developments. If "Gaza can be allowed to form the paradigm for the future of the international law of force" (p 239) (thus becoming a metaphor), Gaza might stand for legal governance that produces the increasing visibility-in-exclusion which the author has so masterfully described.

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[1] Thomas Hobbes, *Leviathan* (OUP 1996) 475.

[2] Walter Benjamin, '*The Right to Use Force*' in M Bullock and M Jennings (eds), *Walter Benjamin: Selected Writings* 1913-1926 (R Livingstone (tr), HUP 1996) 231.

[3] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* 1870-1960 (CUP 2001) 465-480.

[4] Gunneflo (p 233) quotes David Dyzenhaus, '*The compulsion to Legality*' in VV Vamraj (ed), *Emergencies and the Limits of Legality* (CUP 2008) 33-59.

[5] Martti Koskenniemi, '*What is International Law For?*' in M Evans, *International Law* (2n ed, OUP 2006) 62.

[6] Declaration of the Gaza Strip as "Enemy Territory" according to the Civil Wrongs (State Liability) Law, 5712-1952 [emphasis added].

[7] Declaration of the Gaza Strip as "Enemy Territory" according to the Civil Wrongs (State Liability) Law, 5712-1952.

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