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Targeted Killing and Its Law: On a Mutually Constitutive Relationship

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Abstract
Although initially perceived as illegal and illegitimate, targeted killing has gained legal approval and greater acceptance as a tactic in the US fight against terrorism. Rather than being accomplished extra-legally or gradually normalized as an exception to the rule, as critics proclaim, targeted killing becomes inscribed into a law that was, and is, prepared to accept it as a practice. Conceiving of law as a practice renders the mutually constitutive relationship between targeted killing and the law visible. As a practice, law is indissoluble from the forms of knowledge both that enact it and that its enactment invokes. Targeted killing could assert itself as a security dispositif that displaces and relocates political notions underlying and defining international law.

Key words
dispositif; governmental knowledge; law as practice; targeted killing

1. Targeting the subject

On 1 May 2011, President Obama announced the death of Osama bin Laden. The al Qaeda leader and chief architect of the terror attacks of 11 September 2001 had been killed in his compound in Pakistan in an operation carried out by a team of US Navy SEALs. 'Justice has been done,' the president declared in a public speech at the White House:

> The death of bin Laden marks the most significant achievement to date in our nation's effort to defeat Al Qaeda. But his death does not mark the end of our effort. There's no doubt that Al Qaeda will continue to pursue attacks against us. We must and we will remain vigilant at home and abroad.[1]

The president's statement strikingly echoes some characteristic as well as controversial features of the juridical debate on targeted killing, which has become a crucial tactic in the US fight against terrorism. First, since targeted killing is accomplished in the name of national security, it does not appear to be a form of political assassination, but, instead, figures as a military concern. Second, targeted killing operations

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1 M. Mazzetti, H. Cooper, and P. Baker, 'Bin Laden Is Dead, Obama Says', *New York Times*, 1 May 2011, available at www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?_r=1&pagewanted=1&hp.

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are supposed to respond to an enduring and potentially catastrophic threat that can be named but remains uncertain. Third, notable is the president's rhetoric of justice, which stands at odds with the administration's concern to present itself as acting lawfully.[2] As one legal scholar observes:

> What is truly distinctive about the bin Laden case is not the absence of legal explanation (after all, military forces rarely provide a public legal account when they use force against a particular target in an armed conflict), but instead that the Executive has been so unusually forthcoming about its views on the legal aspects of the bin Laden operation.[3]

The rhetoric of justice, evoking associations of punishment or revenge, places targeted killing on the edge of the rule of law. It may be taken as an indicator of the president's confidence about the operation's acceptance, but also that targeted killing still is in the process of being inscribed into the law. As a matter of fact, official statements immediately after the incident held that the operation was prepared 'to take bin Laden alive, if he didn't present any threat'.[4] Justice in this sense would mean that the operation was not in fact an act of targeted killing, but an attempt to detain bin Laden with the use of lethal force as a last resort. According to an early account in the media, however, the possibility of an aerial bombardment, which would certainly have killed bin Laden as long as he had been correctly located, had also been considered in the run-up to the strike. It was finally rejected because it would have required excessive bombing that might have not only caused too much 'collateral damage', but, significantly, failed to provide physical evidence of the world's most wanted terrorist.[5] Instead, an official statement referred to the operation as a 'surgical raid',[6] which is a telling description given that the presumed precision of targeted killing operations points to their deliberateness, and the fundamental issue here is the legitimacy of states, or state-authorized agencies, to intentionally kill citizens.[7]

Until recently, targeted killing was widely perceived as illegitimate and illegal, if not 'unlegalizable' in David Dyzenhaus's sense of an incontestable norm that deems a certain act in itself to be 'morally wrong'.[8] State-sponsored killing is generally

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2 President Obama pointedly dissociated the administration's commitment to legality from the previous White House position, for example, when outlining the new national security policy in a speech at the White House on 21 May 2009: 'Now let me be clear: we are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability', available at www.whitehouse.gov/video/President-Obama-Our-Security-Our-Values#transcript.

3 M. Lederman, 'The U.S. Perspective on the Legal Basis for the bin Laden Operation', 24 May 2011, available at www.opiniojuris.org.

4 Press Briefing by Press Secretary Jay Carney at the White House, 4 May 2011, available at www.whitehouse.gov/the-press-office/2011/05/04/press-briefing-press-secretary-jay-carney-542011.

5 M. Mazzetti, H. Cooper, and P. Baker, 'Behind the Hunt for Bin Laden', *New York Times*, 2 May 2011, available at www.nytimes.com/2011/05/03/world/asia/03intel.html.

6 White House Press Briefing by Senior Administration Officials on the Killing of Osama bin Laden on 2 May 2011, available at www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-senior-administration-officials-killing-osama-bin-laden.

7 Deliberation alludes to the fact that the killing is the aim of the operation, which involves intention and premeditation; see, on these three defining moments, N. Melzer, *Targeted Killing in International Law* (2008), 4.

8 D. Dyzenhaus, 'The Compulsion of Legality', in V. V. Ramraj (ed.), *Emergencies and the Limits of Legality* (2008), 33, at 52–6.

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considered to be a last resort. Hence, the UN Charter grants states a very limited right to use force in relation to another state, by and large only for self-defence.[9] Furthermore, the elimination of world leaders is internationally outlawed in the face of an otherwise uncontrollable circumstance where, in theory, any government could designate an enemy as a legitimate target.[10] And, even if targeted killing operations are approved as an instrument of law enforcement, states are faced with the alternative options of detention and prosecution on the grounds of international human rights law and, in particular, the targeted subject's right to life.[11]

Targeted killing has been criticized as extra-judicial or arbitrary execution, assassination, or a pure act of revenge.[12] While maintaining a critical stance towards the Israeli practice, the United States, from the 1990s onwards, nonetheless gradually moved towards openly adopting targeted killing as a tactic in the fight against terrorism.[13] Although remaining controversial, targeted killing, particularly in the aftermath of 9/11, received increasing political and, most notably, legal approval.[14] Rather than being accomplished extra-legally or as a normalized exception to the rule, as critics proclaim, targeted killing becomes inscribed into a law already prepared to accept it as a practice. This paper argues that targeted killing can be deciphered as a security dispositif – that is, as an ensemble of heterogeneous forms of knowledge and practices that become strategically interlinked in the governance of security problems and thereby establish certain regimes of visibility and frameworks of thinking.[15] The notion of dispositifs allows us to grasp how targeted killing both presents itself as being a suitable response to an allegedly urgent security problem and, as a particular technology, deploys its own rationalities and dynamics of action.[16] With their logic of pre-emptive and focused strikes, targeted killing

9 Arts. 2(4) and 51 of the UN Charter.

10 See D. Byman, 'Do Targeted Killings Work?', (2006) 85 FA 95, at 106–7; for a further problematization, see J. Waldron, 'Can Targeted Killing Work as a Neutral Principle?', (2011) New York University School of Law, Public Law & Legal Theory Research Paper Series No. 11–20, draft 16 March 2011, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1788226.

11 See, e.g., the International Covenant on Civil and Political Rights, which enshrines the right to life (Arts. 6, 1) and key procedural safeguards (Art. 9), UN Doc. A/6316 (1966).

12 See, e.g., on extra-judicial execution, Amnesty International, 'United States of America: An Extrajudicial Execution by the CIA?', AMR 51/079/2005, 18 May 2005, available at www.amnesty.org/en/library/asset/AMR51/079/2005/en/bcffa8d8-d4ea-11dd-8a23-d58a49c0d652/amr510792005en.html; on revenge, see C. Tomuschat, 'Gezielte Tötungen (Targeted Killings): Zugleich ein Kommentar zum Gutachten des Internationalen Gerichtshofs vom 9. Juli 2004', (2004) 52 *Vereinte Nationen* 136.

13 See O. Kessler and W. Werner, 'Extrajudicial Killing as Risk Management', (2008) 39 SD 289, at 290; Byman, *supra* note 10, at 96, 101.

14 Melzer, *supra* note 7.

15 Foucault decoupled security from the paradigm of sovereignty and, instead, linked it to the notion of governmentality. Government, in this neologism, is understood in a broad sense of techniques and procedures that conduct human behaviour. Analytics of governmentality aim at scrutinizing the rationality of governmental practices and their truth effects. Rather than a concern of the state, a matter of national security, or of policing, security, within this perspective, first of all is a form of future-oriented management of contingencies. 'Dispositifs' of security then employ certain rationalities and technologies of government that are concerned with the management of distributions and circulations; see M. Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–78* (2007), 45–9. Obviously, the politico-legal discourse on targeted killing refers to security matters in the traditional sense. With the conception of targeted killing as a dispositif, by contrast, focus is on a security technology that itself shapes state formation.

16 M. Foucault, 'Le jeu de Michel Foucualt', in *Dits et écrits*, Vol. 3 (1994), 298; M. Foucault, 'The Confession of the Flesh', in C. Gordon (ed.), *Michel Foucault: Power/Knowledge: Selected Interviews and Other Writings* (1980), 194.

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operations relate to and at the same time redefine the register of established concepts that underlie international law, namely 'state', 'war', and 'enmity'. International law, as a form of knowledge accommodating targeted killing as a mode of dealing with certain security matters, in turn encourages the establishment of a new security dispositif. Targeted killing itself thereby surfaces as a new phenomenon, namely as a military tactic of air strikes on a foreign territory employed in the fight against terrorism. It thus manages to present itself as a legitimate security technology and to gradually discard its historical association with the practice of political assassination. This will be illuminated in the following section 2. Targeted killing, then, is not external to the law. On the contrary, as a military tactic, it also carries legal claims about, for example, justified forms of killing individuals. Conceiving of law, in Foucauldian terms, as a practice that is indissoluble from the forms of knowledge both that enact it and that its enactment invokes allows us to trace the mechanisms of targeted killing's asserting itself as a legal practice. Precisely because law relies upon knowledge, it is susceptible to security concerns and shows itself to be prepared to accommodate targeted killing in legal terms. International law, as a consequence, is itself in transition. This account of law will be developed subsequently (section 3). If there is a conception of 'the political' in Foucault's writings to be discerned, it consists of inquiring how things and sites, as subjects of problematization and governmental knowledge, are being constituted and thus rendered accessible to intervention. The identification of threats provides a space for transforming the unknown into new forms of knowledge (section 4). Once it entered the public stage, targeted killing, as a state practice of resorting to the use of lethal force, incited the legal debate. Legal reasoning, however, couching the practice in legal terms and producing a normative reality of its own, contributes to targeted killing's legalization. Targeted killing and its law, in this sense, are mutually constitutive (section 5).[17]

2. Targeted killing goes public within a new security dispositif

As a practice, state-sponsored targeted killing is not a new phenomenon. It can be seen as the continuation of a long history of assassinations of political leaders – a practice that, precisely due to its political nature, lies between legality and illegality. It has largely been entrusted to secret-service agents or military undercover units and is expected to be accomplished in a more or less clandestine manner.[18] The matter of the 'reason of state' becomes manifest here,[19] as the legitimacy of state-sponsored killing depends upon the sovereign state's defining it as such. This prerogative, to be sure, is a mutually conceded one. It forms part of the modern conception of the sovereign state itself.

17 Taking the juridical discourse on targeted killing as subject of study, the following considerations do not claim to provide a comprehensive overview of the legal arguments, but analyse some of these exemplarily.

18 See Melzer, *supra* note 7, at 9.

19 See Foucault, *supra* note 15, at 262.

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As regards the US context, 'assassination' is prohibited according to Executive Order 12.333. As a consequence of criticism of the CIA's active involvement in assassination plots that arose in the mid-1970s, this executive order was finally signed in 1981 by President Reagan and still remains in effect today. Although leaving the term itself rather unspecified and thus with considerable scope for interpretation, it does not prohibit the targeted killing per se of terror suspects.[20] Being framed as a military tactic, however, targeted killing rids itself of its historical association with the clandestine practice of assassinating political leaders and opponents. A brief look at some of the key discursive incidents on the subject may give an idea of how the term itself came to represent a kind of new phenomenon. One decisive incident was Israel's public admission in 2000 of employing targeted killing as a tactic in the Palestinian territories. According to the Human Rights Council,[21] this governmental statement made the term itself official for the first time, even though the practice of killing significant opponents was part of the conflict as far back as Israel's independence.[22] As regards the US policy, the Human Rights Council continues: 'The first credibly reported CIA drone killing occurred on November 2002, when a Predator drone fired a missile at a car in Yemen killing . . . an al-Qaeda leader allegedly responsible for the *USS Cole* bombing.'[23] It was, however, already during the presidency of Bill Clinton that missiles had been launched against al-Qaeda members in Afghanistan. In the aftermath of the embassy bombings in Kenya and Tanzania in 1998, a presidential finding authorized the use of lethal force in the name of self-defence.[24] Yet, the subsequent strikes in response to terrorist acts, if they became public at all, were criticized as 'armed reprisals', which, for obvious reasons, 'are almost universally regarded . . . as having been outlawed in contemporary international law'.[25]

The Bush administration did not yet turn targeted killing into an official programme, but it set the conditions for one when the president, in 2002, famously claimed the right of preventive or pre-emptive self-defence to be an essential and

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20 A. R. Pearlman, 'Legality of Lethality: Paradigm Choice and Targeted Killings in Counterterrorism Operations', 23 March 2010, available at www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1583985. Para. 2.11 of Executive Order 12.333, as amended until 2008, simply reduces to the statement of a 'prohibition', without providing any specified definition of assassination: 'No person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in assassination.' The executive order, originally issued by President Ford, was designated to ban '*political* assassination'. T. J. Harder, 'Time to Repeal the Assassination Ban of Executive Order 12333: A Small Step in Clarifying Current Law', (2002) 172 Mil. LR 1; J. Ulrich, 'The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War against Terrorism', (2005) 45 Virg. JIL 1029. Whereas the more ample definition may be understood as prohibiting any assassination, equally it leaves more space for the question of what conduct would 'escape the scope of the ban'; Melzer, *supra* note 7, at 46.

21 P. Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings', UN Doc. A/HRC/14/24/Add.6, 28 May 2010, at 4, available at www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf.

22 See S. R. David, 'Fatal Choices: Israel's Policy of Targeted Killing', (2002) *Mideast Security and Policy Studies No. 51*, 1, at 3.

23 Alston, *supra* note 21, at 4.

24 See Ulrich, *supra* note 20, at 1039; G. Blum and P. Heymann, 'Law and Policy of Targeted Killing', (2010) 1 *Harvard National Security Journal* 145, at 150, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1631342.

25 A. Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method', (2009) 22 LJIL 651, at 670.

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'enduring' part of the national security strategy.[26] The administration followed two legal references that were immediately provided after 9/11: first, the Congress's approval 'to use all necessary and appropriate force' in the fight against terrorism;[27] second, the two UN Security Council Resolutions that recognized the right to self-defence pursuant to Article 51 of the UN Charter and expressed 'its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism'.[28] Although not automatically authorizing drone attacks, these decisions provided a suitable framework for the US government to consider the terrorist acts as constituting 'an "armed attack" . . ., triggering application of the laws of armed conflict'.[29]

It was only with President Barack Obama's 'drone program'[30] that targeted killing operations were systematically and more openly employed in the fight against terrorism. Since Obama entered office, there has reportedly been a conspicuous increase of aerial strikes, mainly in Pakistan. Targeted killing became a subject of public knowledge and thus publicly visible.[31] As a security technology assigned to the context of military operations, the term itself then came to represent a rather new phenomenon of (mainly drone-launched) air strikes on a foreign territory – which, of course, does not preclude intelligence continuing to play a crucial role in the fight against terrorism and accomplishing respective missions.[32] Yet, within the '*theatre* of war', as this telling phrase indicates, the practice of killing political opponents takes an entirely different shape. The exercise of sovereign power sees itself authorized to address corresponding bodies of law, notably around 'self-defence' and 'armed conflict'. It is with these legal references that a justification of targeted killing operations apparently ceases to be required, according to US State Department Legal Advisor Harald S. Koh:

> Some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes unlawful extrajudicial killing. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force.[33]

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26 See C. J. Tams, 'The Use of Force against Terrorists', (2009) 20 EJIL 359, at 389–90. Both terms were used interchangeably by the Bush administration, although legally they are not. Addressing the question of legitimate anticipatory self-defence, they denote actions taken in the face of imminent threats of armed attack that, in a temporal sense, differ in the degree of remoteness or immediacy, respectively. However, as will be demonstrated later on, it is precisely the criterion of imminence that has come under dispute recently and particularly in the legal debate on targeted killing.

27 Authorization for the Use of Military Force (AUMF), Pub L. 107–40, 115 Stat. 224 (2001).

28 UNSC Res. 1368 (12 September 2001) UN Doc S/RES/1368; UNSC Res 1373 (28 September 2001) UN Doc. S/RES/1373.

29 R. J. Vogel, 'Drone Warfare and the Law of Armed Conflict', (2010) 39 Denver JILP 101, at 108.

30 J. Mayer, 'The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?', *New Yorker*, 26 October 2009, available at www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

31 See, in particular, the website www.counterterrorism.newamerica.net/drones.

32 See K. Anderson, 'Targeted Killing in U.S. Counterterrorism Strategy and Law', a Working Paper of the Series on Counterterrorism and American Statutory Law, a joint project of the Brookings Institution, the Georgetown University Law Centre, and the Hoover Institution, 11 May 2009, at 28, available at www.ssrn.com/abstract=1415070; Alston, *supra* note 21, at 7.

33 Statement at the Annual Meeting of the American Society of International Law on 25 March 2010, available at www.state.gov/s/l/releases/remarks/139119.htm.

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At the very same moment as targeted killing entered the public stage, it became legalizable. It did so as a security dispositif by locating itself within the legal discourse and at the same time relocating elementary conceptions of existing international law.

It was the identification of a new dimension of threats that, in the first instance, paved the way for targeted killing's surfacing on the political and legal stage. With the ability to utilize weapons of mass destruction or to display the capacity to invent such weapons, contemporary terrorism has been perceived as competing with the destructive power of states and, at the same time,[34] being organized in transnationally operating networks, as an unforeseeable threat. The rationale of facing this threat no longer consists of deterring the attack by a known enemy state, but of pre-empting 'the danger before it is known' and before it has a chance to even emerge.[35] If international law was prepared to accommodate targeted killing in legal terms, this was also the case because radical uncertainty, in the sense of the unforeseeable and possible, had already been introduced into legal reasoning.[36] The precautionary logic constitutes a crucial feature of the new security dispositif – and a condition of possibility for targeted killing to be embraced by international law.

As a dispositif, targeted killing entails the claim of its being an appropriate response to the new dimension of threats. Its promise is that a limited, or 'surgical', intervention brings about the greatest effects. The rationale is to intercept, or pre-empt, any preparatory terrorist action and thereby figure out the source of the problem – in the present context, leaders and core figures of a terrorist organization – in order to disrupt the whole matter. Terror networks, through this lens, then, appear to be the mirror image of this dispositif. Rather than merely being a response to the presumed problem, targeted killing asserts that this kind of organization would in fact be its very structure. It thus relocates the legal notions of war and self-defence, once clearly attributable to 'the political space of sovereignty',[37] within an entirely new constellation. What is at stake is no longer the idea of a confrontation between states, but rather the concerted acts of individuals.

If targeted killing could re-emerge as a new phenomenon and legitimate subject of legal debate, gradually losing resemblance to the classical forms of political assassination, this induced a distinctive kind of politico-legal question. The fight against terrorism, namely, is to be assigned to the legal sphere of either warfare or crime control. This decision makes a considerable difference as regards both the rights of state authorities to exercise lethal force and the due-process guarantees of the impacted individuals.[38] It is, however, only the traditional notion of sovereign

34 P. W. Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (2008).

35 O. Kessler, 'Is Risk Changing the Politics of Legal Argumentation?', (2008) 21 LJIL 863, at 864; see also C. Daase and O. Kessler, 'Knowns and Unknowns in the "War on Terror": Uncertainty and the Political Construction of Danger', (2007) 38 SD 411.

36 See Kessler and Werner, *supra* note 13, at 290.

37 P. W. Kahn, 'Imagining Warfare, or I know It When I See It', paper presented at the International Legal Theory Colloquium, NYU School of Law, Spring 2011, at 17, available at www.iilj.org/courses/documents/2011Colloquium.Kahn.pdf.

38 See, extensively on this issue, R. Chesney and J. Goldsmith, 'Terrorism and the Convergence of Criminal and Military Detention Models', (2008) 60 *Stanford Law Review* 1079; Blum and Heymann, *supra* note 24.

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states that suggests a clear distinction be made between foreign and internal affairs, military and criminal cases, war- and peacetime, in accordance with bodies of law. Reluctance to accept targeted killing as a legitimate measure, even when basically assenting to 'the morality of killing in the context of war',[39] within this framework seems quite rational – that is to say, once targeted killing is regarded as being an instrument of ordinary law enforcement.[40] Those clear distinctions, however, have always been an idealization. Wartime, which is thought of as an exception to the norm, intrudes into everyday life through both memories and anticipation.[41] The presence of past wars in public debates is as much a testimony to this phenomenon as current political invocations to prepare for the next attack. There is also continuity between war- and peacetime that is reinforced by technologies and institutions.[42] The convertibility of military into civilian techniques, and vice versa, is to mention just one facet: the possible double use of drones in war- and in peacetimes another. It is only the awareness of boundaries being blurred that is a rather recent phenomenon.[43] And, in fact, to the extent that targeted killing replaces the notion of assassination, the targets themselves are no longer civilian political leaders, but terrorists[44] – a term that comes to be located within the juridical debate beyond the distinction of soldier or civilian. If targeted killing today in the fight against terrorism appears to be an appropriate security technology, embedded within international law, this acceptance in turn is evidence of a new security dispositif's becoming the norm.

Within a Foucauldian perspective, talk about a new security dispositif does not imply that one dispositif would replace the other altogether, but rather that established notions and practices become relocated and linked to new ones. Sovereign power thus in no way loses its significance, but sees itself confronted with new challenges and obligations, and endowed with new momentums of authorization. Targeted killing, in this sense, itself shapes state formation,[45] namely our understanding of sovereignty, of the rule of law, and of what is a legal and an illegal practice. Rather than asking whether international law competes with the sovereignty of states, focus, within this perspective, is on how sovereignty transforms and constitutes itself anew by enforcing international law; how distinctions are being made, for example, between national and international legal matters or between laws of war and ordinary law enforcement; and what kinds of concept underlie legal norms and are being inscribed into the law.

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39 D. Statman, 'Targeted Killing: Theoretical Inquiries', (2004) 5 *Law, Liberty, Equality* 179, at 181.

40 D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', (2005) 16 EJIL 171; Kessler and Werner, *supra* note 13.

41 M. L. Dudziak, 'Law, War, and the History of Time', (2010) 98 CLR 1669.

42 See M. Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975–76* (2003), at 16.

43 Chesney and Goldsmith, *supra* note 38; D. Kennedy, *Of War and Law* (2006); N. Werber, 'Zur Genealogie des Nicht-Kriegs: Ein Epochenwandel in der gesellschaftlichen Selbstbeschreibung', in H. Münkler, M. Bohlender, and S. Meurer (eds.), *Handeln unter Risiko. Gestaltungsansätze zwischen Wagnis und Vorsorge* (2010), 83.

44 V. J. Proulx, 'If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists', (2005) 56 *Hastings Law Journal* 801, at 875.

45 The state, according to Foucault, is always in a state of formation: 'it is nothing else but the mobile effect of a regime of multiple governmentalities': M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–79* (2008), at 77.

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3. A Foucauldian perspective on law

Foucault did not elaborate on a comprehensive theory of law – a fact that critics have attributed to his allegedly underestimating law's political and social relevance. Some statements by Foucault may have provoked this interpretation, among them his assertion that law historically 'recedes' with,[46] or is being 'colonized' by,[47] forms of knowledge that are addressed at governing people and populations. It is, though, precisely this analytical perspective that allows us to capture the mutually productive relationship between targeted killing and the law. In contrast to a widely shared critique, then, Foucault did not read law merely as a negative instrument of constraint. He referred, instead, to a particular mode of juridical power that operates in terms of repressive effects.[48] Moreover, rather than losing significance coextensively with the ancient sovereign power, law enters new alliances, particularly with certain knowledge practices and attendant expertise.[49] This linkage proves to be relevant in the present context, considering not only the interchange between the legal and political discourse on targeted killing, but notably the relationship between law and security.

According to Foucault, social phenomena cannot be isolated from and are only decipherable within the practices, procedures, and forms of knowledge that allow them to surface as such.[50] In this sense, 'all phenomena are singular, every historical or social fact is a singularity'.[51] Hence, they need to be studied within their historically and locally specific contexts, so as to account for both the subject's singularity and the conditions of its emergence. It is against this background that a crucial question to be posed is how targeted killing could emerge on the political stage as a subject of legal debate. Furthermore, this analytical perspective on power and knowledge intrinsically being interlinked highlights that our access to reality always entails a productive moment. Modes of thinking, or what Foucault calls rationalities, render reality conceivable and thus manageable.[52] They implicate certain ways of seeing things, and they induce truth effects whilst translating into practices and technologies of government. These do not merely address and describe their subject; they constitute or produce it.[53]

Law is to be approached accordingly.[54] It cannot be extracted from the forms of knowledge that enact it, and it is in this sense that law is only conceivable as

46 Foucault, *supra* note 15, at 99.
47 Foucault, *supra* note 42, at 38–9.
48 V. Tadros, 'Between Governance and Discipline: The Law and Michel Foucault', (1998) 18 *Oxford Journal of Legal Studies* 75; see, for further references on that critique, S. Krasmann, 'The Right of Government: Torture and the Rule of Law', in U. Bröckling, S. Krasmann, and T. Lemke (eds.), *Governmentality: Current Issues and Future Challenges* (2010), 115, at 118.
49 Foucault, *supra* note 42.
50 M. Foucault, 'Questions of Method', in G. Burchell, C. Gordon, and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality* (1991), 73.
51 P. Veyne, *Foucault: His Thought, His Character* (2010), 11.
52 See C. Gordon, 'Afterword', in M. Foucault (ed.), *Power/Knowledge: Selected Interviews and Other Writings* (1980), 229, at 248.
53 Foucault, *supra* note 15.
54 M. Valverde, 'Specters of Foucault in Law and Society Scholarship', (2010) 6 *Annual Review of Law and Social Science* 45.

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practice. Even if we only think of the law in ideal terms, as being designated to contain governmental interference, for example, or to provide citizens' rights, it is already a practice and a form of enacting the law. To enforce the law is always a form of enactment, since it involves a productive moment of bringing certain forms of knowledge into play and of rendering legal norms meaningful in the first place. Law is susceptible to certain forms of knowledge and rationalities in a way that these constitute it and shape legal claims. Rather than on the application of norms, legal reasoning is on the production of norms.

Legality, within this account of law, then, is not only due to a normative authority that, based in our political culture, is external to law, nor is it something that is just inherent in law, epitomized by the principles that constitute law's 'inner morality'.[55] Rather, the enforcement of law and its attendant reasoning produce their own – legal – truth effects. Independently of the purported intentions of the interlocutors, the juridical discourse on targeted killing leads to, in the first instance, conceiving of and receiving the subject in legal terms.

When targeted killing surfaced on the political stage, appropriate laws appeared to be already at hand. 'There are more than enough rules for governing drone warfare', reads the conclusion of a legal reasoning on targeted killing.[56] Yet, accommodating the practice in legal terms means that international law itself is undergoing a transformation. The notion of dispositifs is useful in analysing such processes of transformation. It enables us to grasp the minute displacements of established legal concepts that,[57] while undergoing a transformation, at the same time prove to be faithful to their previous readings. The displacement of some core features of the traditional conception of the modern state reframes the reading of existing law. Hence, to give just one example for such a rereading of international law: legal scholars raised the argument that neither the characterization of an international armed conflict holds – 'since al Qaeda is not a state and has no government and is therefore incapable of fighting as a party to an inter-state conflict'[58] – nor that of an internal conflict. Instead, the notion of dealing with a non-international conflict,[59] which, in view of its global nature, purportedly 'closely resembles' an international armed conflict, serves to provide 'a fuller and more comprehensive set of rules'.[60] Established norms and rules of international law are preserved formally, but filled with a radically different meaning so as to eventually integrate the figure of a terrorist network into its conventional understanding. Legal requirements are thus meant to hold for a drone programme that is accomplished both by military agencies in war zones and by military and intelligence agencies targeting terror suspects beyond these zones,[61] since the addressed is no longer a state, but a terrorist network.

55 See D. Dyzenhaus, 'Positivism and the Pesky Sovereign', (2011) 22 EJIL 363, at 367–8.
56 Vogel, *supra* note 29, at 137.
57 J. Bussolini, 'What Is a Dispositive?', (2010) 10 *Foucault Studies* 85.
58 Vogel, *supra* note 29, at 111.
59 The Obama administration adopted this conception in accordance with the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 US 557, 630, 633 (2006), quoted in Vogel, *supra* note 29, at 113.
60 Vogel, *supra* note 29, at 113.
61 Mayer, *supra* note 30.

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However, to conceive of law as a practice does not imply that law would be susceptible to *any* form of knowledge. Not only is its reading itself based on a genealogy of practices established over a longer period.[62] Most notably, the respective forms of knowledge are also embedded in varying procedures and strategic configurations. If law is subject to an endless deference of meaning,[63] this is not the case in the sense of arbitrary but historically contingent practices, but in the sense of historically contingent practices. Knowledge, then, is not merely an interpretive scheme of law. Rather than merely on meaning, focus is on practices that, while materializing and producing attendant truth effects, shape the distinctions we make between legal and illegal measures. What is more, as regards anticipatory techniques to prevent future harm, this perspective allows for our scrutinizing the division made between what is presumably known and what is yet to be known, and between what is presumably unknown and has yet to be rendered intelligible. This prospect, as will be seen in the following, is crucial for a rereading of existing law. It was the identification of a new order of threat since the terror attacks of 9/11 that brought about a turning point in the reading of international law. The identification of threats in general provides a space for transforming the unknowable into new forms of knowledge. The indeterminateness itself of legal norms proves to be a tool for introducing a new reading of law.

4. Uncertain threats, governed by law

While abandoning the rhetoric of war, the Obama administration, in fact, sees itself in an armed conflict with al Qaeda and thereby continues to draw on the same statutory authorizations as the previous White House.[64] This becomes evident, for example, when US State Department Legal Adviser Harald S. Koh outlines the legal basis of targeted killing operations:

> As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.[65]

Self-defence may be understood as a reaction to an armed attack, but, at the same time, it aims to prevent the next strike. In this sense, it involves an anticipatory moment. Yet, the assumption of an ongoing catastrophic threat, which, within the legal discourse on targeted killing, tends to be presented as an undisputed fact,[66] contradicts the conventional reading of the right to self-defence that, in a temporal

62 See J. Law, 'Seeing Like a Survey', (2009) 3 *Cultural Sociology* 239, at 240–1.
63 J. Derrida, 'Before the Law', in J. Derrida and D. Attridge (eds.), *Acts of Literature* (1992), 181.
64 See Anderson, *supra* note 32, at 19; Vogel, *supra* note 29, at 107–8.
65 *Supra* note 33.
66 See, for further references, P. Alston, 'The CIA and Targeted Killing beyond Borders', (2011) New York University School of Law, Public Law & Legal Theory Research Paper Series No. 11–64, at 6, available at http://ssrn.com/abstract=1928963.

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sense, depends on the identification of an imminent threat: the threat is either manifest or at least 'immediately' emerging.[67] It is, moreover, the premeditated nature of targeted killing operations itself that contests this reading.[68] The question of legitimate killing, then, poses in a twofold manner, taking both the controversial reading of the anticipated threat into account and the fact that this supposedly emanates from an individual target. Traditionally, soldiers may be legitimately killed due to their belonging to the other side's army. Apart from whether they actually pose a danger, during armed conflict, 'they are potentially lethal agents of that hostile party'.[69] They represent an anonymous, 'institutionalized danger'.[70] The 'high-profile terrorist' whose name appears on a special target list, by contrast, poses an individualized threat.[71] Within this constellation, legal scholars contend that the legitimacy of killing an individual terrorist hinges on the subject's alleged role within the organization.[72] Both the moral and the juridical problems, therefore, consist of how to verify that a terrorist suspect's activities in facilitating and planning attacks, which have not yet proved harmful, in fact contribute to an intolerable threat in a way that justifies his killing.[73] Rather than merely as a temporal matter, urgency here presents itself as a question of rendering the 'unknowable threat' intelligible and thus manageable.[74]

Any form of averting dangers entails uncertainty, and therefore a productive or speculative moment. It requires dealing with an unknown and, at the same time, presumably threatening future. Preventing harm thereby aims at having certain facts not eventuate at all.[75] Danger is to be anticipated, even if difficult to conjecture. This

67 Whereas the Caroline doctrine provided for self-defence in the case that the threat to national security 'is reasonably believed to be imminent', Art. 51 of the UN Charter authorizes self-defence only 'if an armed attack occurs'; see A. N. Guiora, 'Anticipatory Self-Defence and International Law: A Re-Evaluation', (2008) 13 JCSL 3, at 9–10. See, for varying contemporary interpretations of the legality of self-defence operations taking either the presence of an armed attack or the immediacy of a threat as a precondition, C. Downes, 'Targeted Killings in an Age of Terror: The Legality of the Yemen Strike', (2004) 9 JCSL 277, at 288; T. D. Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-Emption, Prevention and Immediacy', (2006) 11 JCSL 361, at 367; Tams, *supra* note 26, at 370.

68 M. E. O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009', (2010) Notre Dame Law School, Legal Studies Research Paper No. 09–43, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144.

69 Blum and Heymann, *supra* note 24, at 146.

70 Kessler and Werner, *supra* note 13, at 298.

71 See Alston, *supra* note 66, at 31.

72 Statman, *supra* note 39.

73 G. Nolte, 'Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order', (2004) 5 *Theoretical Inquiries in Law* 111. This is not to say that prediction is impossible. A relatively certain anticipation of future events may be derived from the identification of familiar patterns of terrorist action and appropriate narratives; see E. Rijsdijk, 'The Politics of Hard Knowledge: Uncertainty, Intelligence Failures, and the "Last Minute Genocide" of Srebrenica', (2011) 37 RIS 2221. The problem, however, starts with the use of intelligence as a justification for the exercise of lethal force. This is true, even though 'acts' of participating in activities of a terrorist group or of facilitating actions of recruitment and training for terrorism, etc., which are rather ancillary or preparatory acts, have been criminalized after 9/11; see, on the problem of intelligence's being taken for granted within the legal discourse, Alston, *supra* note 21, at 13; see, on the problem of a precautionary logic tending to be accepted by the judiciary, F. Gelev, 'Checks and Balances of Risk Management: Precautionary Logic and the Judiciary', (2011) 37 RIS 2237.

74 B. Massumi, 'Fear (the Spectrum Said)', (2005) 13 *Positions* 31, at 35.

75 'If we wait for threats to fully materialize, we will have waited too long,' President Bush paradigmatically asserts when explaining the role pre-emptive war would play in the future of American foreign policy and national defence on 1 June 2002: 'President Bush Delivers Graduation Speech at West Point',

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is all the more the case the more abstract the threat and the greater the expected harm is. Indications of dangers or threats have to be taken seriously, while these threats at the same time are difficult to dispute, precisely because they escape determination. This is where the qualitative dimension comes into play: the identification of a catastrophic threat is based on the '*ontological* premise' that it may manifest at any time without notice under an entirely new signature while causing intolerable harm.[76] Yet, these processes of identification and definition, and of targeting, or focusing on, something are not merely questions of gathering knowledge about the addressed. They are also forms of creating knowledge that point to the one addressing the phenomenon in question.[77] Hence, only once we accept the identification of a threat does it then require dividing the known from what is unknown and what is to be known.[78] The unknown threat has to be approached and assessed in order to render it accessible to governmental intervention.[79]

This is the critical moment of law's susceptibility. It is, paradoxically, the state of uncertainty that enables security matters to be embraced by law. Law, on the one hand, relies on indeterminateness,[80] so as to be open to interpretation and applicable to concrete cases and varying constellations. On the other hand, it is this indeterminateness of the norm that provides the space for security matters to embed themselves in the law. The law sees itself confronted with the 'veridiction'[81] of a threat that can neither be ignored nor simply be disputed. The empirical norm thus tends to play off against the conventional understanding of the legal rule, which, in this case, concerns the question of self-defence in the face of an imminent threat.

If President Bush's launch of a fight against terrorism as an enduring threat has been reinforced by the Obama administration and therefore continues to be effective to the present day, this persistence is apparently driven by both actual evidence, namely the experience of a horrendous attack, and the presumption of a catastrophic threat that eludes determination. The problem with the 'unknown unknowns', as Donald Rumsfeld infamously identified the new dimension of threats

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available at http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/print/20020601–3.html. President Obama's revised strategic guidance, released in January 2012, reads like this: 'For the foreseeable future, the United States will continue to take an active approach to countering these threats by monitoring the activities of non-state threats worldwide, working with allies and partners to establish control over ungoverned territories, and directly striking the most dangerous groups and individuals when necessary', available at www.defense.gov/news/Defense_Strategic_Guidance.pdf.

76 B. Massumi, 'Potential Politics and the Primacy of Preemption', (2007) 10 *Theory and Event*, para. 13 (emphasis added). I prefer the notion of threats instead of risks here. Being defined by uncertainty, catastrophic threats are no longer risks that are deemed to be (statistically) calculable. Their anticipation rather relies upon imaginative techniques that are able to address the unexpected; see S. Opitz, 'Conflicting Temporalities: Law in Times of Risk', (2011) 4 *Behemoth* 59; B. Anderson, 'Preemption, Precaution, Preparedness: Anticipatory Action and Future Geographies', (2010) 34 *Progress in Human Geography* 1; similarly, O. Kessler, 'The Same As It Never Was? Uncertainty and the Changing Contours of International Law', (2011) 37 RIS 2163, at 2168, though still referring to the notion of risk.

77 S. Weber, *Targets of Opportunity: On the Militarization of Thinking* (2005).

78 See Kessler and Werner, *supra* note 13, at 290.

79 C. Aradau and R. V. Munster, 'Governing Terrorism through Risk: Taking Precautions, (Un)Knowing the Future', (2007) 13 EJIR 89.

80 J. Waldron, 'Vagueness and the Guidance of Action', (2010), available at http://ssrn.com/abstract=1699963.

81 Foucault, *supra* note 45, at 31–5; Foucault, *supra* note 50, at 79.

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in the wake of the 9/11 terrorist acts, is that an absence of any evidence of threats is not evidence of absence of threats.[82] It is particularly within the rationality of pre-emption that a critical link can be drawn between an individual target and a general threat, since the presumption of an unknown threat causing intolerable harm is irrefutable, while the suggestion is that there is an 'overwhelming reason to believe that al Qaeda intends further attacks'.[83] The crucial criterion the legal discourse has brought into play, thereby circumventing the notoriously difficult one of imminence,[84] is the 'gravity of the threat' international terrorism poses, as Daniel Statman suggests: 'A war of terror does not mean that all citizens are under actual attack all the time, but that such attacks are frequent enough and devastating enough to make life unbearable.'[85] Targeted killing is inscribed into the law in so far as a temporal criterion (imminence) is converted into a qualitative one (gravity). The target, as the one who may be lawfully killed, thus at the same time sees itself included in and excluded from the law. If targeted killing was thought to be unlegalizable – not in the face of a superior norm, as Dyzenhaus has it,[86] but rather given that the principle of the use of force as a last resort is indeterminable in advance precisely because it is always bound to a singular situation requiring an individual decision – here, the reverse has been proved. The unknowable threat that, by definition, only materializes in a radically singular, namely unforeseeable, constellation has been rendered accessible to governmental intervention through a novel legal determination.

The new security dispositif that becomes inscribed into international law to assist with targeted killing operations, appearing to be the appropriate solution to the problem of transnational terrorism, can now be characterized as follows: it rests not only upon a precautionary principle that aims at forestalling intolerable harm, but also on the notion of terror networks that relocates the traditional concept of a confrontation between states. As a focus of intervention, the territorial dimension fades away in favour of the alleged core figures of the network. If the new security dispositif thus paves the way for compliance with the *jus ad bellum* requirements, the effort to achieve compliance with the *jus in bello* principles, as we will see, indeed invokes the law and constitutes legal knowledge, and thus contributes to targeted killing's legalization.

5. Legal reasoning and law-making

The legal debate on targeted killing, particularly that referring to the US practice, has increased immensely during the last decade and even more so very recently,

82 'Press Conference by US Secretary of Defence Donald Rumsfeld', NATO HQ, Brussels, 6 June 2002, available at www.nato.int/docu/speech/2002/s020606g.htm.
83 R. Chesney, 'Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force', (2011) 13 YIHL 3, at 20.
84 See Pearlman, *supra* note 20, at 8.
85 Statman, *supra* note 39, at 183–4.
86 Dyzenhaus, *supra* note 8.

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obviously due to a 'compulsion of legality'.[87] Once this state practice of resorting to the use of lethal force has been recognized as systematically taking place, it needs to be dealt with in legal terms. Whether this is done in supportive or critical terms, the assertion of targeted killing as a legal practice commences at this point. This is due to the fact that the law, once invoked, launches its own claims.

To insist on disclosing 'the full legal basis for targeted killings'; on criteria, legal procedures, and 'access to reliable information' in order to render governmental action controllable; or on legal principles to be applied in order to estimate the necessity and proportionality of a concrete intervention at stake,[88] not only involves accepting targeted killing as a legitimate subject of debate in the first place. It requires distinctions to be made between, for example, a legitimate and an illegitimate target. It invokes the production of knowledge and the establishment of pertinent rules. Indeterminate categories are to be determined and thus established as a new reading of positive law. The introduction of international human rights standards into the debate, for example, clearly allows limits to be set in employing the pre-emptive tactic. As Wouter Werner has shown with regard to the Israeli High Court of Justice's decision on the legality of targeted killing operations,[89] this may well lead, for example, to recognizing the enemy as being not 'outlaws' but, instead, combatants who are to be granted basic human rights. Subsequently, procedural rules may be established that restrict the practice and provide criteria for assessing the legality of concrete operations.[90] At the same time, however, targeted killing is recognized as a legitimate tactic in the fight against terrorism and is being determined and implemented legally.[91]

When framed within the 'theatre of war', targeted killing categorically seems to be justifiable under the legal principles of necessity, proportionality, discrimination, and the avoidance of unnecessary suffering. This is true as long as one presupposes in general terms, as the juridical discourse usually does, both a well-considered proceeding along those principles[92] and, accordingly, that targeted killing, by its very nature, is a 'calculated, precise use of lethal force'.[93] Procedural rules, like the 'proportionality test', that are essentially concerned with determination, namely with specifying criteria of intervention for the concrete case or constellation, certainly provide reliability by systematically inciting and provoking justifications. Their

87 Ibid.

88 Alston, *supra* note 21, at 26–7.

89 HCJ 769/02 The Public Committee against Torture in Israel vs. The Government of Israel – Judgment of 14 December 2006, available at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm, quoted in W. G. Werner, 'The Changing Face of Enmity: Carl Schmitt's International Theory and the Evolution of the Legal Concept of War', (2010) 2 *International Theory* 351, at 369.

90 Ibid., at 374.

91 See, on international human rights law serving as a framework both of critique and of assessing the legality of targeted killing operations, also Anderson, *supra* note 32. The Israeli practice of 'knocking on the roof', for example, is a tactic of forewarning civilians in advance of a drone strike that aims to evade or minimize civilian casualties. Thus, complying with the requirement of the Israeli High Court decision, it is, as Karin Loevy has shown, also a legal response to the tactics of the enemy, 'Knocking on the Roof and the Dynamic of Compulsion' (2009), paper presented at the book launch of V. Ramraj, *Emergency and the Limits of Legality* (2008).

92 See, exemplarily, Ulrich, *supra* note 20, at 1050–4.

93 Ibid., at 1053; similarly, Vogel, *supra* note 29, at 124.

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application therefore, we may say, contributes to clarifying a controversial normative interpretation, but it will never predict or determine how deliberation and justification translate into operational action. The application of procedural rules does not only notoriously remain 'indeterminate',[94] but also produces its own truth effects. The question of proportionality, for example, is intrinsically a relational one. The damage that targeting causes is to be related to the anticipated military advantage and to the expected casualties of non-targeted operations. Even if there are 'substantial grounds to believe' that such an operation will 'encounter significant armed resistance',[95] this is a presumption that, above all, entails a virtual dimension: the alternate option will never be realized. According to a Foucauldian perspective, decisions always articulate within an epistemic regime and thus 'eventualize' on the political stage.[96] There is, in this sense, no mere decision and no mere meaning; and, conversely, there is no content of a norm, and no norm, independent of its enforcement.[97] To relate this observation to our problem at hand means that, rather than the legal principles' guiding a decision, it is the decision on how to proceed that constitutes the meaning of the legal principle in question. The legal reasoning, in turn, produces a normative reality of its own, as we are now able to imagine, comprehend, and assess a procedure and couch it in legal terms.

This is also noticeable in the case of the Osama bin Laden killing. As regards the initial strategy of justification, the question of resistance typically is difficult to establish *ex post* in legal terms. Such situations are fraught with so many possible instances of ambiguous behaviour and risk, and the identification of actual behaviour as probably dangerous and suspicious may change the whole outcome of the event.[98] But, once the public found itself with little alternative but to assume that the prospect of capturing the subject formed part of the initial order, it also had to assume that the intention was to use lethal force as a last resort. And, once the public accepts the general presumption that the United States is at war with the terrorist organization, legal reasoning about the operation itself follows and constitutes a rationale shaping the perception of similar future actions and the exercise of governmental force in general.[99] Part of this rationale is the assumption, as the president immediately pointed out in his speech, that the threat of al Qaeda has not been extinguished with bin Laden. The identification of a threat that emanates from a network may give rise to the question of whether the killing of one particular

94 A. Cohen and Y. Shany, 'A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case', (2007) 5 JICJ 310, at 314.

95 M. Ramsden, 'Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki', (2011) 16 JCSL 385, at 402.

96 See Foucault, *supra* note 50, at 77.

97 P. Macherey, 'Towards a Natural History of Norms', in T. Armstrong (ed.), *Michel Foucault Philosopher* (1992), 176. As Martti Koskenniemi has pointed out: 'rules are no more important than the purposes for which they are enacted', M. Koskenniemi, '"By Their Acts You Shall Know Them . . ." (And Not by Their Legal Theories)', (2006) 7 *German Law Journal* 155, at 170.

98 K. Anderson, 'Should John Brennan or Eric Holder Simply Have Quoted Harald Koh?', 5 May 2011, available at www.opiniojuris.org/2011/05/05/should-john-brennan-or-eric-holder-simply-have-quoted-harold-koh.

99 See, e.g., Human Rights First's pondering about the event: 'While the legality of lethal force is a closer question outside of armed conflict than in it, the totality of circumstances make it difficult to claim that the killing was arbitrary, even if bin Laden was not actively resisting or fleeing', available at www.humanrightsfirst.org/2011/05/05/was-killing-osama-bin-laden-legal.

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target, forming part of a Hydra, makes any sense at all.[100] Yet, it equally nourishes the idea that the fight against terrorism, precisely because of its elusiveness, is an enduring one, which is exactly the position the United States takes while considering itself in an armed conflict with the terrorist organization. Targeting and destroying parts of a network, then, do not destroy the entire network, but rather verify that it exists and is at work. The target, in this sense, is constituted by being targeted.[101] Within the rationale of the security dispositif, there continue to be threats and new targets. Hence, at work is a transformation of laws through practice, rather than their amendment.

Giorgio Agamben maintains that a legal norm, because abstract, does not stipulate its application.[102] 'Just as between language and world . . . there is no internal nexus' between them. The norm, in this sense, exists independent of 'reality'. This, according to Agamben, allows for the norm in the 'state of exception' both to be applied with the effect of 'ceasing to apply'[103] – 'the rule, suspending itself, gives rise to the exception'[104] – and to be suspended without being abolished. Although forming part of and, in fact, being the effect of applying the law, the state of exception, in Agamben's view, disconnects from the norm. Within a perspective on law as practice, by contrast, there is no such difference between norm and reality. Even to ignore a pertinent norm constitutes an act that has a meaning, namely that the norm is not being enforced. It affects the norm. Targeted killing operations, in this sense, can never be extra-legal.[105] On the contrary, provided that illegal practices come up systematically, they eventually will effectuate the transformation of the law. Equally, the exception from the norm not only suspends the norm, transforming it, momentarily or permanently, into a mere symbol without meaning and force, but at the same time also impinges upon the validity of that norm. Moreover, focus on the exception within the present context falls short of capturing a rather gradual transitional process that both resists a binary deciphering of either legal or illegal and is not a matter of suspending a norm. As practices deploying particular forms of knowledge, targeted killing and its law mutually constitute each other, thus re-enforcing a new security dispositif. The appropriate research question therefore is how positive law changes its framework of reference. Targeted killing, once perceived as illegal, now appears to be a legal practice on the grounds of a new understanding of international law's own elementary concepts. The crux of the 'compulsion of legality' is that legality itself is a shifting reference.

Seen this way, the United States does not establish targeted killing as a legal practice on the grounds of its internationally 'possessing' exceptional power. Rather the reverse; it is able to employ targeted killing as a military tactic, precisely because

100 See, for a nuanced argumentation considering the degree of organization of a terrorist network, Byman, *supra* note 10.
101 See S. Weber, *supra* note 77, at 101.
102 G. Agamben, *State of Exception* (2005), 40.
103 Ibid.
104 G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998), 18.
105 See, on this concept, O. Gross und F. N. Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006).

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this is accepted by the legal discourse. As a practice, targeted killing, in turn, reshapes our understanding of basic concepts of international law. Any dissenting voice will now be heard with more difficulty, since targeted killing is a no longer an isolated practice but, within the now establishing security dispositif, appears to be appropriate and rational. To counter the legal discourse, then, would require to interrupt it, rather than to respond to it, and to move on to its political implications that are rather tacitly involved in the talk about threats and security, and in the dispute about targeted killing operations' legality.

6. Conclusion

Analysing targeted killing that has asserted itself as a tactic in the US fight against terrorism within a Foucauldian perspective challenges common normative approaches in legal theory towards this phenomenon. Identifying the tactic as residing between the alternatives of either being accomplished illegally or being legal misses some important points – first of all, that there is a process at work. While presenting itself as a military tactic employed in the name of defending a threatened population, targeted killing today appears to be a new phenomenon that discarded its historical association with political assassination. As a security dispositif, second, it displaces some of the established co-ordinates of international law that are able to formally stick to established legal principles. The identification of a new dimension of threats thereby marked the turning point for a new reading of international law, as it provided a space for transforming the unknowable threat into new forms of knowledge. Third, legal reasoning that tries, whether in supportive or critical terms, to make sense of the current incoherence in international law contributes to the legal acceptance of targeted killing. This is because legal reasoning, couching the issue in legal terms, constitutes a normative reality of its own. There is, then, finally, no superior normativity the law could be measured against and therefore nothing principally unlegalizable. Instead, the normative authority resides in the law itself. It is, though, neither a quality of law as such nor merely something society attributes to the law. It lies in the very moment of law's enactment, whereas its significance depends upon the knowledge and claims thus brought into play.

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