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**TARGETED KILLING IN INTERNATIONAL LAW**  
with special attention to the use of unmanned aerial vehicles

**Theses of the PhD Dissertation**



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## Table of content

I. Summary of the research task.....	3
II. Description of the examinations and analyses performed and of processing methods .....	3
III. Summary of scientific results, their utilization or possibilities of utilization .....	4
IV. List of publications written on the topic of the dissertation.....	8

## **I. Summary of the research task**

The topic of my dissertation is targeted killing in international law with special attention to the use of armed unmanned aerial vehicles or drones. By the start of the research, targeted killing was a tool for states that were almost exclusively used in the fight against terrorism since the early 2000s. This situation however has changed in January 2020, when the United States with the help of a combat drone targeted and killed Quassem Soleimani, an Iranian general on the territory of a third state, namely Iraq. With this, targeted killing stepped outside the framework of counterterrorism, and it opened the gate for a more extensive state policy.

The dissertation has set its research task as the examination of these state policies and practices through the lens of international law.

## **II. Description of the examinations and analyses performed and of processing methods**

Accordingly, the dissertation has set the goal of defining targeted killing as a state policy and differentiating it from other state practices. Due to this definition the dissertation was able to work with a very well determined set of cases, which were the basis of the work. After defining targeted killings, it was necessary to examine the state practice connected to the phenomenon, which is of extreme importance in light of the international law perspective of the dissertation. The dissertation also looked at the relationship between the development of armed drones and targeted killings.

The first issue when it comes to the legality of targeted killings were the *jus ad bellum* examination of these practices, more precisely the analysis of the special justifications for the use of force under international law. By the nature of things, it was therefore imperative to tackle the issue of the prohibition on the use of force and the exceptions thereto and of course state practice related to these norms. The *jus ad bellum* analysis was necessary in light of the definition set above, which focused on extraterritorial targeted killings, and the interstate use of force.

The next point of examination was the human right to life, which is of tremendous importance to targeted killing operations. The violation of the right to life may occur in times of armed conflict and outside of it. For the former international humanitarian law applies as *lex specialis*, while for the latter general international human rights law will be applicable in broad terms.

Accordingly, the dissertation first examined the possible violation of the right to life through targeted killing operations in the absence of an armed conflict, for which the substantive part of the right to life, and the extraterritorial protection of human rights needed to be analyzed.

In turn, the dissertation looked upon the issue of armed conflicts and their relationship with targeted killing operations. First, the classification of armed conflicts was required, then a careful assessment of different rules on the conduct of hostilities and targetability were in order.

Last, but not least, as a novelty of the dissertation, it produced a detailed analysis on the possibility of judicial review of targeted killing practices. Among others, the dissertation looked at international options for judicial oversight for instance before the International Court of Justice, the International Criminal Court and permanent human rights judicial bodies. Besides these, the dissertation assessed national judicial reviews of targeted killings, which took place in a number of states, for example in the United States, Israel, the United Kingdom, Germany and others.

As for the methods of processing, the dissertation stands on the basis of positivism and relied heavily on the interpretation of international judicial decisions, with special attention to selected national judicial reviews, since these can be helpful for the identification of customary international law norms, through state practice and *opinio juris*. The dissertation used—besides primarily sources—

–secondary sources as well, such as monographs, and articles published in scientific journals and volumes of essays. The dissertation used descriptive, analytical, critical and constructive methods to assess these materials and sources, which were on occasion supplemented by comparative methods, therefore it can be argued that the dissertation has used the whole spectrum of the analytical toolbox the public law.

### **III. Summary of scientific results, their utilization or possibilities of utilization**

In the following, I will briefly summarize the results of the research based on chapter VIII and the English Summary of the dissertation.

In my understanding of the notion of targeted killing, I use Nils Melzer's definition with one crucial addition for the purpose of reflecting the extraterritorial nature of the contemporary targeted killing policies. In line with the above, targeted killings are the extraterritorial use of lethal force, with the intent, deliberation, and premeditation to kill individually selected persons. The use of force is attributable to the state and the targeted person is not in the physical custody of the attacker, and there is no binding judicial decision authorizing the killing of the individual. These definitional elements make it possible to differentiate among several other notions frequently used to describe these state policies, such as extrajudicial killings and assassinations. These notions define *ab ovo* illegal actions, which makes them imperfect for the illustration of potentially legal operations. Other notions such as preventive killings and the death penalty would also not be precise, because of the primary aim of prevention by the former and the binding judicial decision basis of the latter. This does not mean that targeted killings cannot have a special, yet secondary preventive aim.

My main conclusions regarding the state practice of targeted killings are that the use of armed drones is deeply connected to modern-day targeted killing operations, since they are their most typical instrument. It needs to be emphasized however that these platforms have not emerged from the ashes of 11 September 2001, rather they have already been developed earlier for counterterrorism purposes, moreover the technology has been used for more than 100 years for military objectives. States nevertheless have been using targeted killings as means and methods of war or even counterterrorism long before the drone technology has emerged. Modern-day targeted killings are special not because this is a new phenomenon altogether, rather since they are committed in a form of comprehensive state policy. Several states have been keen to find legal justification for their use of force, all of which focus on some form of self-defense and a state of armed conflict in which targeted killings may be permissible. Unfortunately, these legal justifications usually involve an overly broad concept of use of force and targetability. It seems more troubling that other states do not articulate their legal position on these state policies in an unambiguous fashion. This might have something to do with the nature of the targeted killing programs, namely that they are customarily connected to counterterrorism operations, which means that the international community has a common goal in combating terrorist groups. Nonetheless, when it comes to targeted killings not connected to terrorism, e.g., the drone strike on Quassem Soleimani by the U.S., states tend to remain vague and divided on the issue.

The legality of every targeted killing operation stands on two legs. Based on the policies' extraterritorial nature, a *jus ad bellum* investigation is required to ascertain whether the interstate use of force was justified. Second, it must be examined whether the targeted person's right to life has been violated by the targeted killing operation, meaning that it constituted an arbitrary deprivation of the right to life.

Modern international law stands on the premise that interstate use of force is prohibited and only in a handful of situations a state may use force lawfully against another state. The prohibition on the use of force constitutes a peremptory norm of international law. In my understanding however

the *jus cogens* norm should be understood as the prohibition on non-consensual, non-self-defensive and non-authorized use of force by a universal international organization (that is currently United Nations). Otherwise, there would be serious concerns regarding the structure of the norm considered as peremptory.

International law recognizes three 'exceptions' to the prohibition on the use of force, namely consent, self-defense and the authorization by the Security Council. In principle, all of the exceptions might be used to justify a particular targeted killing, however in state practice only two of these justifications occur.

A considerable number of targeted killings take place with the consent of the state in which the operations materialize. For instance, Afghanistan, Yemen, Somalia, Pakistan and Iraq all have consented to the targeted killing operations of the U.S. at some point. Some commentators nonetheless questioned the legality of such consent at least in the case of Pakistan, Somalia, and Yemen. Research shows however that in the fight against terrorism neither effective control, nor an effective government is required for a legal consent, and even tacit or passive consent may grant the possibility of use of force.

The Security Council has not yet issued an authorization to conduct targeted killings. Some resolutions adopted in the framework of counterterrorism has been argued to legitimize the use of targeted killings, such as 1368 (2001) 1373 (2001) and 2249 (2015). These resolutions however cannot be accepted as legitimizing the use of force, rather we should look at them as excellent examples of constructive ambiguity in international law, in which everyone got what they aimed for. In case of 2249 (2015) the United States and its allies can argue that they have authorization to use force, while Russia and its allies can argue that the resolution maintained and reinforced the status quo.

The right to self-defense is also significant, for all states involved in targeted killing policies in one way or another claim self-defense as a justification to use force. My research showed however that the U.S. and the U.K. tend to extend the right to self-defense way broader than it is permissible under international law. This is especially relevant in two issues, namely preventive use of force and self-defense against non-state actors. For instance, the U.S. advocates a right to preventive self-defense wrapped in the disguise of 'imminence', which has no basis in international law. When it comes to self-defense against non-state actors both the U.K. and the U.S. adopts a direct right to self-defense against these organizations, in contravention of accepted international law principles which require attribution of the actions of the non-state actors to a state. At the end of the day, this means that although targeted killing operations may be conducted lawfully under *jus ad bellum*, most states violate these rules in many cases due to the overly extensive understanding of the right to self-defense. The only state which will most likely not violate the prohibition on the use of force with its targeted killing program is Israel since there is no other state against which the violation would occur at least in terms of the UN Charter and the customary prohibition on the use of force.

The second issue that needs to be addressed is the already mentioned problem of arbitrary deprivation of life in case of targeted killing operations. On the international level, targeted killing operations are generally governed by human rights law, except for times of armed conflict. In these circumstances, human rights law is supplemented and for some extent overridden by the *lex specialis* international humanitarian law. But even in these special cases, there can be situations that are still primarily governed by human rights law. These are those which are not connected to the conduct of hostilities or armed activities of the armed groups parties to the conflict.

Contrary to the views of the Human Rights Committee, I do not share the sentiment that an operation's human rights legality is dependent upon a lawful use of force on the interstate level, since that would hardly be adequate in the current state of international law. I believe that all states are bound by their negative obligations stemming from treaty law and customary international law even outside their respective territories, therefore a targeted killing operation is conducted lawfully, when it does not constitute an arbitrary deprivation of life.

My most important conclusion regarding this test is that targeted killing practices as they stand today would likely be unlawful from a human rights perspective. For example, the U.S. drone program operates based on a so-called 'kill list', which designates targetable persons. In the absence of an armed conflict scenario, without showing that the targeted person poses an imminent threat to life, no intentional lethal use of force may be used against him/her, and even then, the use of force must be absolutely necessary and proportional. This does not mean that no targeted killing operation may take place outside of an armed conflict, but they must be evaluated individually according to the above illustrated test and moreover a very strict policy should be used for collateral damages, which would give the innocent bystanders a fair chance of survival.

Since human rights law obligations bind states even outside their own territory, the issues of jurisdiction considering various human rights treaties may only have relevance before judicial or quasi-judicial bodies evaluating targeted killing operations.

Most targeted killing operations, however, take place in times of armed conflict. These conflicts are usually non-international armed conflicts, between various organized armed groups and states, but the Soleimani strike is a great example that targeted killing operations can occur even in an international armed conflict setting.

For a targeted killing policy to be lawful under the law of armed conflict, it must adhere to the principles of IHL and the special rules of the legal régime as well. First, all targeted killing operations must be necessary for a military purpose and at the same time not prohibited by IHL. Second, a distinction should be made between civilians and combatants and functional members of an organized armed group having a continuous combat function, where the former can only be targeted if and for such time as they directly participate in hostilities. Third, the military advantage likely to occur with the operation must outweigh the collateral damage likely to be caused by the same operation. Fourth, no unnecessary suffering should be inflicted. While it can be argued that a targeted killing operation would generally meet the first and the fourth condition, the targetability issues could cloud the overall legality of the operations. My research found that state practice in the last couple of year was keen to accept the notion of continuous combat function for the purpose of unbroken targetability of functional members of organized armed groups. However, I found no supporting practice for other newly advocated positions such as the absolute necessity requirement before the use lethal force for military objectives in armed conflict, except for policy considerations or national legal principles to the same effect.

Targeted killings operate in a sort of accountability vacuum, which means that both states and individuals engaged in these operations have so far evaded responsibility for illegal conduct—at least for the most part. Conversely, in principle there is a possibility of establishing responsibility for unlawful targeted killings on the international and national level before a judicial forum.

As for international judicial review, the procedure before the International Court of Justice is dependent upon the political will of the parties of a legal dispute, therefore review of targeted killing operations before this forum is extremely unlikely, save for the possibility of an advisory opinion procedure similar to the one given in the case of nuclear weapons. When it comes to the

International Criminal Court (ICC), once again in principle a number of war crimes and perhaps even crimes against humanity and the crime of aggression can be committed within the framework of a targeted killing operation, although the political will of the permanent members of the Security Council and the unwillingness of states to cooperate with this judicial body might preclude it from effectively tackling the issue. For this the ICC will have plenty of opportunity for instance through the ongoing investigation of the crimes committed in Afghanistan since 2003 and in Palestine since 2014. Various human rights forums, such as the European Court of Human Rights (ECtHR) and the Inter-American Commission of Human Rights (IACoHR) may also have jurisdiction to hear cases of alleged targeted killings by the U.K. and U.S. respectively. As for the ECtHR, it needs to be emphasized that the court so far has operated on a primarily territorial extraterritorial jurisdictional basis, which was supplemented by a physical control based personal jurisdiction model. Considering the *Bankovic* precedent it was highly unlikely that the ECtHR would find jurisdiction for a targeted killing operation conducted by an armed drone, however recent case-law suggests that at least in times of armed conflict it would rule in favor of a limited jurisdiction for procedural obligations (*ex post* investigation) and the ECtHR as delivered a decision on a Russian targeted killing committed by a poisonous substance accepting the jurisdiction of the state. On the other hand, the IACoHR operates on a personal jurisdictional model governed by for instance the *Alejandro* precedent, which would be sufficient for a procedure against the U.S. although with non-binding results. Based on the lack of many cases so far and the rather unlikely nature of a successful and binding decision by any international court in the near future (perhaps with the exception of the ICC and the ECtHR), one must turn to national judicial reviews.

National judicial reviews can be assigned to two distinct groups: direct and indirect judicial review. Direct review can occur in a state which conducts targeted killings, and the judicial oversight is aimed at the legality of that policy. Indirect reviews are those which do not meet both abovementioned criteria.

Direct judicial reviews have taken place so far in Israel and the U.S. The Israeli targeted killing case(s) are frequently cited and very well analyzed in the literature; however, little is known about the implementation of the judgment itself. Research shows that although Israel seems to uphold the operational requirements stemming from the judgement, the accountability and judicial review side of the obligations are seriously lacking in practice and the applicability of the overall judgment seems to be relegated to being used only against individuals directly participating in hostilities. Nevertheless, Israel's was the first national judgment ever to be delivered on the merits of targeted killing operations. In the United States, several cases have been brought before various courts all of which were decided in the preliminary objections phase. U.S. courts heavily rely on notions such as the political question doctrine and other national instruments precluding jurisdiction, for example state secrets. It is highly unlikely that U.S. courts would change the existing case-law on the issue any time soon.

A significant number of cases have been brought before other national courts mostly in Europe questioning various aspects of targeted killings, more precisely drone strikes in the form of indirect judicial review. For example, in the U.K. a case was dismissed also on preliminary objections related to the U.S. targeted killing policy on very similar grounds to the American political question doctrine. In Germany however, a court in Cologne has addressed the merits of the relationship of Germany and the U.S. targeted killing activities in Yemen and Somalia. In the Yemeni case, the court extensively dealt with international law issues, and at the end ruled that the state should work towards (*himmirten auf*) the U.S. using the Ramstein military base in accordance with international law. This judgment was later overruled by the *Bundesverwaltungsgericht*, stating that Germany has done everything it needed to do to make sure that the U.S. policy is sound in terms of international law. In Pakistan another court issued a judgment on the 'merits' of U.S. targeted killing operations, in

which the court required as *ultima ratio* the shooting down of American drones. The judgment was never implemented. In other states, such as Italy and the Netherlands other cases are still pending, all are related to the U.S. drone program one way or another.

Based on the above, it can be argued that targeted killing policies can be conducted lawfully under international law even in the absence of an armed conflict, although the reality is that those states which are involved in these operations follow such wide policies for the conduct of these strikes in terms of self-defense and targetability, that it is very improbable that at the end of the day, most of the operations could be considered legal.

Judicial review of targeted killing operations is extremely important for the purpose of overcoming the accountability vacuum these policies have operated in for more than two decades. International judicial review is a possibility—however remote—to find solutions to these issues. National reviews, although rare, can—as the German case shows—highlight various issues of targeted killings. First, they can be used to better understand the underlying legal *régimes* governing targeted killing operations in international and domestic legal settings as well, and they can also contribute to the identification and articulation of customary international law norms as state practice or *opinio juris*. Moreover, they can be an effective tool to combat illegal targeted killing policies by precluding the states from using these practices or by hindering the cooperation between essential partners in these operations.

#### IV. List of publications written on the topic of the dissertation

Within the topic of the dissertation, I have published the following works either independently or with a co-author:

1. KIS KELEMEN Bence: Human Shielding, Subjective Intent and Harm to the Enemy. *Conflict & Security Law* 25. (2020) 537-564. o.
2. KIS KELEMEN Bence: Emberi jogok a gázai kerítés árnyékában – Elemzés az Izraeli Legfelső Bíróságnak a tömegtüntetésekre alkalmazandó joganyaggal kapcsolatos döntéséről. *Fundamentum* 23. (2019) 95-108. o.
3. KIS KELEMEN Bence: Humanitárius intervenció? Az Egyesült Államok 2017-2018-as szíriai légicsapásainak *ius ad bellum* elemzése. In KIS KELEMEN Bence – MOHAY Ágoston – PÁNOVICS Attila (eds.): *Ünnepi tanulmánykötet Brubács János 80. születésnapja tiszteletére*. PTE ÁJK, 2019. 135-155. o.
4. KIS KELEMEN Bence: A célzott likvidálás az emberi jogok nemzetközi rendszerének tükrében. *Fundamentum*, 2018/1. sz. 30-40. o.
5. KIS KELEMEN Bence: Az élő pajzs és a humanitárius nemzetközi jog, avagy átütheti-e a katonai szükségesség a humanitás elvének pajzsát? In BÉLI Gábor – KIS KELEMEN Bence – MOHAY Ágoston – SZALAYNÉ SÁNDOR Erzsébet (eds.): *Emlékkötet Herczegh Géza születésének 90. évfordulója alkalmából*. Publikon Kiadó, 2018. 147-164. o.
6. KIS KELEMEN Bence: Célzott likvidálás – fogalmi dilemmák. In MÁRTON Mónika (eds.): *Studia Iuvenum Iurisperitorum* 9. PTE ÁJK. 2018. 265-282. o.
7. KIS KELEMEN Bence: Drónok háborúja (1.) A dróntámadások *ius ad bellum* jogszerűségi vizsgálata. *Honvédségi Szemle*, 2018/1. sz. 70-82. o.
8. KIS KELEMEN Bence: Drónok háborúja (2.) A dróntámadások jogszerűségének vizsgálata a humanitárius nemzetközi jog és az emberi jogok tükrében. *Honvédségi Szemle*, 2018/2. sz. 16-29. o.
9. KIS KELEMEN Bence: Targeted killing, armed drones and the international law of use of force. *Scientific Proceedings of Guram Tanartkiladze Tbilisi Teaching University* 8. (2018) 15-26. o.
10. KIS KELEMEN Bence: Targeted Killings and Human Rights Law. *Hungarian Yearbook of International Law and European Law* 6. (2018) 245-259. o.



11. DAKA Marija – KIS KELEMEN Bence: Extraterritorialitás az emberi jogi bíróságok gyakorlatában. *Jura*, 2017/1. sz. 207-218. o.
12. KIS KELEMEN Bence: Gondolatok a *jus ad bellum* köréből a célzott likvidálás tükrében. *Közjogi Szemle*, 2017/3. sz. 76-83. o.