Examination: Module I
- A Legal and Moral Review of the Central Intelligence Agency Operatives in the War on Terrorism.
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1. Introduction and research problem

Since 9/11, we have seen a significant increase and development of means and methods of combating international terrorism. The U.S. use of armed drones to carry out lethal attacks against people with ties to the Taliban forces and al-Qaeda members has been subject to many debates in the academic world.\(^1\) Behind many of these attacks is the American, Central Intelligence Agency (CIA).\(^2\) Blum and Heymann (2010) argue in their book *Laws, Outlaws and Terrorists* on the legal aspects of targeted killing. The authors are of the opinion that targeted killing operations highlights – more than any other counterterrorism tactic - the tension which exists in contemporary terrorism, namely whether terrorism should be addressed as a crime or be treated as a war.\(^3\) The legal implications vary depending on which juridical lens one decides to look thru. As I’ve pointed out, targeted killing has been reviewed by several scholars; however, the role of CIA has been under less scrutiny from the academic community.

International law makes a fundamental distinction between soldiers and civilians involved in or affected by conflict. This distinction then determines the individual’s legal status in the international legal order. For example, members of the armed forces of the state are combatants. They are thus allowed to participate directly in the hostilities – albeit within the limits imposed by international law- that may accompany an armed conflict.\(^4\) I argue that contemporary actions of CIA blur the distinction between civilians and combatants in a conflict and thus create a problematic situation in the international legal order that acquires our attention.

In this paper, I, therefore, intend to examine whether the CIA operatives can be considered as legitimate practitioners of violence in a conflict situation, thus looking thru a lens where terrorism is treated as an act of war. This paper does not purport to evaluate and review the legality of

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3 Blum & Heymann 2010: 69

4 Ipsen 2008: 79-80
targeted killing as a mean of warfare or a tool for criminal enforcement but rather the CIA agent’s status from an international law perspective, specifically humanitarian law. I further intend to examine the role of CIA operatives from a moral perspective. Using the framework set up by *Just War Theory* I intend to examine whether a CIA operative is regarded as a combatant or a civilian from a moral standpoint. The research question of this paper is:

1. **Should CIA operatives be considered as combatants or civilians in an armed conflict?**

In order to provide an answer to the main question of this paper, from a legal perspective and moral perspective, I find it necessary to break it down into three operational sub-questions.

1. What constitute a combatant in international humanitarian law?
2. What constitute a civilian in international humanitarian law?
3. How are combatants and civilians perceived according to just war theory?
2. Discussion

The discussion is divided into two main sections, whereas the first section concerns the legal perspective and the second, the moral perspective.

2.1 Legal framework

2.1.1 Sovereignty and armed forces

Stephen D. Krasner (1999) discusses in his book, *Sovereignty: Organized Hypocrisy*, four types of sovereignty: domestic sovereignty, which refers to, the organization of public authority within a state and to the level of effective control exercised by those holding authority; interdependency sovereignty refers to the ability of public authorities to exercise control over cross-border movements; international legal sovereignty implies a recognition of states or other entities; and finally, Westphalian sovereignty refers to the excluding of external actors from domestic authority structures. Interlinked to Krasner’s notion of international legal sovereignty is the criteria’s set forth in the Montevideo Convention on Rights and Duties of States (1933). Article 1, of the convention stipulates:

The state as a person of international law should possess the following qualifications:

a) A permanent population;

b) a defined territory;

c) government; and

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5 Krasner 1999: 9
d) capacity to enter into relations with the other states.  

Article 3 of the same convention further concludes that “[…] Even before recognition the state has the right to defend its integrity and independence […]”. The task of protecting and preserving a state’s territorial integrity and national security is usually connected with the state’s armed forces, ergo its national military. President George W. Bush found that the attacks which took place on the 11 September, 2001 placed U.S in a state of armed conflict. Only two months after the attack, in an order establishing military commissions to try terrorists, the President found that:

International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that require the use of United States Armed Forces.

2.1.2 International or non-international conflict?

The humanitarian law separates between two types of armed conflict, international and non-international. Basically, all treaties of humanitarian law are applicable in the events of international armed conflict. The traditional interpretation of international armed conflict is that there must be an official declaration of war between two or more states. However there has been a remarkable shift and development of the humanitarian law and most of its regulations is today, applicable in international armed conflicts which are not considered to be a war within the traditional notion. In conflicts which are characterized as non-international conflicts the scope

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6 Montevideo Convention on the Rights and Duties of States (1933), Article 1
7 Montevideo Convention on the Rights and Duties of States (1933), Article 3
8 Looking specifically at U.S. this is mentioned in Mason, Chuck R. Securing America’s Borders: The Role of the Military, Report for Congress, February 25, 2013
9 Military Order of November 2013, Federal Register. 57833, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism
10 Engdahl, Ola (2012) ”Internationell humanitär rätt” in Folkträten i ett nötskal, p. 218 (2nd ed.)
of applicable humanitarian law is limited and the content is not as detailed as its counterpart.\textsuperscript{13} John C. Yoo and James C. Ho\textsuperscript{14} conclude that the laws of war applies to the conflict with al-Qaeda, however, they do not privilege all of its contents.\textsuperscript{15} Hence, it is assumable that this chain of thought also applies to other transnational terrorist networks involved in the U.S. war against terrorism. The discussion that follows will thus take its departure from the framework applicable in conflicts which are characterized as international armed conflicts.

2.1.3 Combatant

International humanitarian law is based on the assumption that a distinction is made between civilians and combatants. In addition to these two main categories of individuals, there are, in the armed forces, also individuals who do not have a combat role, such as certain service personnel. These are referred to in the humanitarian law as civilians accompanying the armed forces.\textsuperscript{16} Other particularly regulated categories of individuals are spies and mercenaries.\textsuperscript{17}

The armed forces of the parties to a conflict are composed of combatants and non-combatants.\textsuperscript{18} Soldiers involved in the armed forces of a party are legitimate targets during an ongoing conflict and the liquidation of those forces is considered to be one of the objectives with military action.\textsuperscript{19} The consequence with a classification as a combatant thus means that an individual do not get punished for participating in hostilities, however, the individual might still be prosecuted for war crimes, but involvement in the armed conflict alone does not entail any criminal liability.\textsuperscript{20} When an individual is classified as a combatant it follows from this category a privilege, which means that the individual will achieve a status as a prisoner of war if captured, thus benefiting from

\begin{itemize}
\item \textsuperscript{13} Beckman 2006: 174
\item \textsuperscript{14} John C. Yoo is Professor in Law at University of California and served as Deputy Assistant Attorney General at U.S. State Department 2001-2003; James C. Ho was at the time writing the article, Chief Counsel, Subcommittee on the Constitution, Civil Rights, and Property Rights, U.S. Senate Judiciary Committee.
\item \textsuperscript{15} Yoo, John C.; Ho, James C (2003) International law and the war against terrorism, p. 8-9
\item \textsuperscript{16} Also referred to as non-combatants.
\item \textsuperscript{17} Engdahl 2012: 223
\item \textsuperscript{18} Ipsen, Knut (2008) “Combatants and non-combatants” in The handbook of international humanitarian law, 2nd edition, Fleck, Dieter (ed)
\item \textsuperscript{19} Byers, Michael (2005) War Law, p. 127
\item \textsuperscript{20} Engdahl 2012: 223
\end{itemize}
certain protections. The Geneva Convention (III), Article 4A(2) stipulates the criterion’s which a combatant must meet to achieve status as a prisoner of war:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.\(^{21}\)

The criteria’s stipulated in the above article has been modified in article 43(1), additional protocol (I) to the Geneva Convention and states the following:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.\(^{22}\)

Knut Ipsen\(^{23}\) argues that the above article establishes a standard term for determining the definition of armed forces and includes all combatant forces which are listed, in addition to the older relevant, conventions.\(^{24}\) Ian Henderson\(^{25}\) notes that prior to 1977 and the development of additional Protocol I to the Geneva Conventions, there was no explicit definition of the term combatant in any legal treatise, in spite of the fact that there was a common usage of the term. He goes on to point out that according to Hague Convention (IV), article 2, there is another classification of individuals namely, belligerents which is commonly referred to under Levée en masse: \(^{26}\)

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize

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\(^{21}\) Article 4A(2) Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

\(^{22}\) Article 43(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

\(^{23}\) Prof. Dr. Dr. h.c. mult. Knut Ipsen currently active at Ruhr-Universität Bochum, Formerly President of the German Red Cross

\(^{24}\) Ipsen 2008: 86, Possibly referring to Regulations, Article 1, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907

\(^{25}\) Ian Henderson is currently the Director Military Law Centre and Deputy Director Asia-Pacific Centre for Military Law, where he is responsible for legal training of Australian military lawyers

themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.27

This category of individuals is now included in the modern notion of the term “armed forces”.28 A State's armed forces are often accompanied by individuals who perform various service tasks and thus not actively participating in any hostilities.29 Geneva Convention (III), article 4A(4), list some examples of persons that might accompany the armed forces of a state:

Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany […].30

These individuals are to be considered as non-combatants and if captured they should benefit from the privileges that accompany a prisoner of war status. Also, a soldier who has been injured and thus prevented from continued service and active participation in hostilities (Hors de combat) shall be classified as a non-combatant.31 The Geneva Convention (I); (II); and (III) all stipulate specific regulations regarding individuals belonging to medical and religious personnel which are included in the party’s armed forces. If these individuals fall into the force of the opposing party, they shall be detained only in so far as necessary, to assist prisoners of war. This category of personnel shall not be considered as prisoners of war. However, they shall receive the same legal protection that accompanies this status.32

There are two categories of individuals that have a very limited protection in humanitarian law. It concerns, firstly, spies. A spy is a person, who secretly or under false pretences collect or seek information in the territory controlled by the adversary with the intention of forwarding this information to the opponent. However, military personnel who, without disguise, enter the

27 Regulations, Article 2, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907
28 Ipsen 2008:87
29 Ipsen 2008: 99; Linderfalk 2013: 225
31 Byers 2005: 127
32 See, Article, 28 & 30, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; Article, 36 & 37, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949; and Article, 33, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
territory of the adversary to collect intelligence should not be considered as spies. Persons who fall into the hands of the adversary while engaged in espionage, and thusly classified as a spy shall be liable to punishment. The second category which falls within the scope of a limited protection in humanitarian law is mercenaries. The definition of a mercenary is stipulated in article, 47(2) of Additional Protocol (I) to the Geneva Convention:

A mercenary is any person who:
(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

If an individual is classified as a mercenary, then this person belongs to a category which does not privilege the status of either combatant or prisoner of war. In the following chapter, we will examine the legal framework regarding civilians in humanitarian law.

2.1.4 Civilian

The definition of a civilian is stipulated in article 50(1), additional protocol (1), Geneva Convention:

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33 Article 46(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
34 Article 29-31, Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.
35 Article 47(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
36 Article 47(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.37

There is no obligation for civilians to identify themselves as such in order to make a claim on the protection to which they are entitled. There is instead a duty of combatants to distinguish themselves from the civilian population by wearing uniforms or at least a permanent sign which is visible from a distance and by carrying their weapons openly.38 If civilians would directly engage in hostilities then this is regulated by article 51, Additional Protocol (I), Geneva Convention. In accordance with article 51, civilians shall be protected from attacks as long as they are not participating directly in the hostilities.39

Civilian shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.40

The distinction which is normally made between civilians and combatants need not be made between combatants and civilians who are participating directly in the hostilities.41

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37 Article 50(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
39 See, Article 51, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
40 Article 51(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
41 Engdahl 2012:226
2.2 Legal analysis

One of the most basic rules in armed conflict is the principle of distinction. Thus it is important to separate between and determine the status on those individuals engaged or involved in a conflict. After reviewing the legal framework applicable in international armed conflict and specifically those rules regulating either civilians or members of the armed forces, it is clear that CIA operatives who control armed drones to perform targeted killings does not fulfill the criteria’s to be considered as neither mercenaries nor spies.\(^\text{42}\) However a CIA agent which is engaged in the activities usually connected with the agency’s work might be considered as a spy if captured and thereby losing its protection in accordance with international humanitarian law. CIA has responsibility for the clandestine collection of foreign intelligence to assist the President and senior U.S. government officials in making decisions relating to national security.\(^\text{43}\) It must be considered that the United States has not ratified the Additional Protocol (I) to the Geneva Convention, however, its contents are counted as customary law and thus it obtains a legally binding character.\(^\text{44}\) A CIA operative is neither placed *hors de combat*, nor a civilian that accompany the armed forces and perform various service tasks.\(^\text{45}\) The CIA operatives take an active part in the hostilities when controlling the armed and unmanned drones to conduct targeted killings. As a result, they should not be considered as non-combatants and consequently not benefit from those privileges that accompany such a status.

The International Committee of the Red Cross (ICRC) has, in an attempt to codify customary international humanitarian law, defined the notion of armed forces. In its essence, their definition includes all persons who fight on behalf of a party to the conflict and who subordinate themselves to its command.\(^\text{46}\) This implies that the armed forces are not limited to military forces. However the CIA operative does not fulfill the criteria’s stipulated in article 4A(2) and should not be

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\(^{42}\) See, Article 46(2) & 47(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

\(^{43}\) See, Section 102, National Security Act of 1947; Also see, Central Intelligence Act of 1949; CIA and its assignments is further described at their website, [https://www.cia.gov/about-cia/todays-cia/what-we-do](https://www.cia.gov/about-cia/todays-cia/what-we-do), access 2013-10-20

\(^{44}\) CRS. Report for Congress RL32419 (2008) p. 8

\(^{45}\) See, Article 4 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

\(^{46}\) See, ICRC website, [http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule4](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule4), access 2013-10-15
deemed as a combatant. This is a view shared by Professor David W. Glazier who made a statement in connection to the U.S. armed forces, challenging the essence of the definition developed by ICRC in a hearing with a sub-committee to the U.S. House of representatives:

There is no question that uniformed military personnel, whether regular, reserve, or national guard in federal service are lawful combatants entitled to “fly” drone strikes in a recognized armed conflict. But CIA personnel are civilians, not combatants, and do not enjoy any legal right to participate in hostilities on our behalf.

If one is to take this standpoint and thereby deeming a CIA operative as a civilian then the regulations set forth in article 50, additional protocol (1), Geneva Convention should be applied. According to Dr. Hans-Peter Gasser there is only one situation in which civilians have the right to take up arms and to engage in hostilities under the same conditions as members of armed forces; the *Levée en masse*. In this situation civilians may also be targeted, and if captured, they shall be treated as prisoners of war. Although article 51, in the above mentioned convention, concludes that if a civilian actively participate in the hostilities then the protection established by the convention is cancelled. Though the individual should still be perceived as a civilian but there is no obligation to separate between the combatant and a civilian who participate in the hostilities. According to the *Galic* judgement, to take direct part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to personnel or material of the enemy armed forces. Combatants and other individuals directly engaged in hostilities are considered to be legitimate military targets.

CIA operatives could thus be considered as civilians who take direct part in hostilities. The consequence is that those individuals who conduct the attacks become legitimate targets during

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47 See, Article 4A(2) Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
48 David W. Glazier is a Professor of Law at Loyola Law School Los Angeles
50 See, Article 50, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
51 Dr. Hans-Peter Gasser was formerly Director, International Agreements and Policy, Federal Ministry of Defence, Bonn; Honorary President, International Society for Military Law and the Law of War.
52 Gasser 2008:239
53 See, Article 51, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
the conflict. They also lack the immunity from domestic laws which combatants privilege in situations of armed conflict. This further implies that the CIA operative can be held liable to prosecution under the law of any jurisdiction where attacks occurs for any injuries, deaths, or property damage they cause. Their direct participation in the hostilities is not prohibited nor does it constitutes a war crime, and they cannot be held liable in that regard. After concluding the status of CIA operatives in accordance with international humanitarian law, thus applying a legal perspective. The next section of this paper will examine the moral perspective on the research problem.
2.3 Moral framework

In today's society there is an elaborate and comprehensive international regulatory framework for war, specifically, international humanitarian law which content is partly treated in the previous section of this paper. The content of this legal framework borrow many of its elements from the just war theory tradition and its content overlaps, largely, with just war theory, even if the content is far from identical. Just war theory and the international humanitarian law relate to each other like morality and national legislation. National legislation is largely a codification of basic moral rules.\(^5\)

Just war theory intends to establish the conditions that are used to separate the just from the unjust wars.\(^6\) Thus, it is the theoretical basis for the moral dimension of war. Which meaning implies that a war can be morally justified, tough, even if the war is justified, the means and methods of waging a war are limited by moral considerations.\(^7\) Just war theory can be divided into three parts; these parts are; *jus ad bellum*, which concerns the justice of resorting to war in the first place; *jus in bello*, which concerns the justice of conduct within war, after it has begun; and *jus post bellum*, which concerns the justice of peace agreements and the termination of the war.\(^8\)

According to just war theory a resort to war - *jus ad bellum* - need to meet six requirements for it to be regarded as justified.\(^9\) The first requirement, (1) *just cause*, is by some regarded as the most important rule. A just cause is a justification for going to war, that is to say, a moral motivation for such an act.\(^10\) The justifications most commonly used as a just cause includes: self-defense against external attack; to defend others from such an act of aggression; and punishment for a grievous wrongdoing which remains uncorrected.\(^11\) The second criteria, (2) *legitimate authority*, refers to the need for war to be initiated by any person or group having legal

\(^{55}\) Lee, Steven P. (2012) *Ethics and War*, p. 32  
\(^{56}\) Lee 2012: 29  
\(^{58}\) Lee (2012); Kinsella & Craig (2007)  
\(^{59}\) Lee 2012: 70  
\(^{60}\) Lee 2012: 73  
authority within a larger organization, regardless of whether that person or group has a moral legitimacy as ruler.62 A rightful intention (3) refers to need for a correct intention for going to war. In accordance with this criterion, a war should be fought with a morally acceptable intention. War must be waged only for its just cause, thus, the only legitimate purpose of war is to secure and stabilize the original just cause for going to war.63 The proportionality (4) criterion implies that before the war starts, one must weigh the universal goods that are expected to result from the war, such as securing the just cause, against the universal evils which the war is expected to result in, for example, war casualties.64 The fifth criterion set forth are a last resort (5), which requires that all peaceful alternatives that counts as reasonable for resolving the conflict have been exhausted before initiating a war.65 The sixth and final requirement is that there must be a reasonable chance of success (6). A war must be such that odds for success are not minimal, unless the war is for the very survival of the members of the state or group making the fight. Thus, there may be no initiation of war if it can be foreseen that this course of action will not achieve any measurable impact on the situation.66 According to just war theory, all six criteria must be met before a declaration of war can be justified.67

The part of jus in bello regulates the justice in a war situation, namely, it stipulates those moral rules which governs the correct behavior in ongoing hostilities.68 The responsibility to comply with these moral rules is usually closely connected to combatants. According to Steven P. Lee,69 there are three basic in bello rules: the principle of discrimination, proportionality and due care.70 The principle of discrimination requires that combatants discriminate between combatants and civilians when conducting their attacks.71 Soldiers are entitled to use force against those who are engaged in harm. Thus, when conducting their attacks, soldiers must separate between the civilians and those legitimate military targets which are engaged in rights-violating harm. The

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62 Lee 2012: 83; Orend 2008: 8
63 Lee 2012: 83; Orend 2008: 8
64 Orend 2008: 9; Lee 2012: 91
65 Orend 2008: 8; Lee 2012: 96
66 Lee 2012: 97; Orend 2008: 9
67 Orend 2008: 9
68 Orend 2008: 9-10
69 Steven P. Lee is Professor in Humanities at Hobart and Smith Colleges in Geneva, New York
70 Lee 2012: 154
71 Lee 2012: 157
civilians are morally immune from direct and intentional targeting.\textsuperscript{72} The principle of proportionality requires that the amount of harm created by a certain military attack or engagement not stands disproportionately in relation to the contribution of the attack to victory in the overall war. Thus, one must weigh the moral wrong of the specific attack against the military advantage it achieves.\textsuperscript{73} The last rule, the principle of due care, requires that combatants take all possible measures to minimize the potential damage which their attacks might cause. The aim of due care is to keep the civilian harm as low as possible.\textsuperscript{74}

The final part of just war theory, \textit{jus post bellum}, refers to the third and final stage of the war. It aims to regulate the cessation of hostilities and facilitate the transition from a state of war to a state of peace.\textsuperscript{75} Thus, it concerns the requirements of justice after the cessation of the hostilities, and involves such matters as peace settlements and treaties, reparations and reconstructions, and the like.\textsuperscript{76}

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\textsuperscript{72} Orend 2008: 10; When using the term ”\textit{engaged in harm}”, Orend refers to Michael Walzer who is viewed as one of the most prominent researchers in the field of contemporary just war theory.
\textsuperscript{73} Lee 2012: 156
\textsuperscript{74} Lee 2012: 157
\textsuperscript{75} Orend 2008: 11
\textsuperscript{76} Lee 2012: 276
\end{flushleft}
2.4 Moral analysis

After reviewing the moral framework that is just war theory, it is clear that the *jus in bello* rule of discrimination is of most relevance when analyzing if a CIA operative should be considered as a combatant or civilian according to just war theory. The following analysis will, therefore, be based on this principle.

The principle of discrimination is closely linked to the notion of civilian immunity, for the immunity to have effect it is necessary to separate between civilians and combatants. However, Kinsella and Carr recognize the significant challenge that terrorism pose to the application of *jus in bello* principles, namely the principle of discrimination.\(^77\) Michael Green\(^78\) argues that the principle of discrimination is a remnant from earlier, pre-democratic forms of political structures, whereas the majority of the population lacked political authority. In a democracy, the population share the political authority and furthermore the responsibility of a specific national policy, even if that policy may include war. Green continues with the criticism and argues that the pain which war might generate should also be shared among the population, therefore, making no distinction between combatants and civilians.\(^79\) According to this standpoint, the CIA operative would be regarded as a legitimate target only because of his or her participation in a democratic structure. However, it does not specify whether he or she is a combatant or a civilian.

What makes someone a legitimate target to attack in war is the moral responsibility for the war. For example, if a civilian strongly supports the policy of its national government which is currently engaged in waging a full-scale war, then this individual should be considered as guilty and thus share a moral responsibility for the war. On the other hand, there is the hapless conscript, an individual who is forced on to the battlefield and in some cases unwillingly to participate at all. This person is not responsible for the war and should, therefore, be considered as non-guilty, in other words, morally non-responsible.\(^80\) The principle of discrimination allows attacks on the hapless conscript but gives immunity to the war-mongering civilian, the advocates

\(^78\) Michael Green is Professor of Law, College of William and Mary. Ph.D. (Philosophy), Yale University 1990.
\(^79\) Blum, Gabriella (2013) *The dispensable lives of soldiers*, p. 136
\(^80\) Lee 2012: 167-168
of this standpoint argue that this is neither fair nor morally correct. However the notion that one can be considered as a legitimate target in conflict based on one’s political support or sympathy is dismissed by James Turner Johnson:

In moral terms, in war, it is the enemy’s engagement in activity that aims to do me harm that gives me the right to do harm to him. That is, it is actions, not hostile sympathies or simple membership of a group with which one’s own is in conflict, that justifies the use of force.

Johnson’s view implies that it can be both combatants and civilians engaged in an activity that aims to do harm. The CIA operative must be considered as engaging in harm when he or she is conducting lethal attacks by using armed drones, tough, it is still not clear whether to consider him or her as a combatant or a civilian.

Lee notes that there might be circumstances where civilians make more contribution to the fight than some combatants. He, therefore, suggests a referral to individuals who have threat liability as threat liable and those who is lacking it as non-threat liable. A threat liable individual is a person who directly participates in hostilities. A non-threat liable individual is a person who is participating in the larger war effort by supporting those who perform the actual fighting.

According to this argument one can easily categorize the CIA operative in the first category, namely as a threat-liable individual. Though, there is still a question regarding whether to consider the operative as a combatant or a civilian. The threat liability and its contrary does not decide who becomes a combatant or a civilian, rather it determines who is a legitimate target in conflict. The threat liable are usually combatants, but may include civilians, and its opposite, the non-threat liable are mostly civilians, but may include combatants.

As noted above, it can be easily concluded that the CIA operative is a threat liable individual. Lee suggests a category of civilians which he describes as “civilians who pick up the gun and participate in the fighting without being members of the military”. The CIA operative is not a member of the U.S military and the operative do participate in hostilities thru the usage of armed drones to conduct lethal

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81 Lee 2012: 167-168; Lee is referring to Michael Green and George Orwell
82 At the time of writing his article (2000), James Turner Johnson was Professor of Religion and Associate Member, Graduate Program in Political Science, State University of New Jersey.
84 Lee 2012: 181
85 Lee 2012: 181-182
86 Lee 2012: 181
87 Lee 2012: 184
attacks following the policy of targeted killings. A CIA operative should thus be included in the above mentioned definition and therefore be considered as a civilian who participate in hostilities without being a member of the military. This is not to say that one should disregard other moral categories in which the CIA operative might be included. One might consider the development of a hybrid category in which they would fit. However, this is something that exceeds the intention of this paper and will, therefore, not be discussed any further.
3. Conclusion

In this paper, I have been reviewing the legal and moral perspective on whether a CIA operative should be regarded as a combatant or a civilian.

The legal conclusion is that the CIA operative should be considered as a civilian who is taking direct part in hostilities. When the Israeli High Court of Justice (2005) were reviewing the Israeli government’s policy of targeted killings in Gaza and West Bank they classified terrorists as civilians taking direct part in hostilities.\(^88\) It is noteworthy how this classification seems to include individuals other than terrorists, in fact

The moral review generated a similar conclusion on which status or classification one should assign the CIA operative. The CIA operative should, from the moral perspective, be regarded as a civilian who participate in hostilities or engage in harm while a conflict is ongoing without being part of the military. The implications are that, by participating in hostilities, the CIA operative becomes a legitimate target for attack in a war situation. Other CIA agent’s, not engaged in harm or participating in the hostilities, might be targeted because of a lacking distinction between the one who is conducting the actual attacks. Thus, they contribute to the eroding and devaluation of the principle of discrimination, commonly referred to as the principle of distinction. This is a disturbing development, both from a moral and legal standpoint. I choose to end this paper with a quote from Gabriella Blum.\(^89\)

> There is a growing “civilianization” of the armed forces making the principle of discrimination conceptually more difficult to defend and pragmatically more difficult to follow.\(^90\)

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\(^88\) The Public Committee Against Torture in Israel v. The Government of Israel (2005), HCJ 769/02

\(^89\) Gabriella Blum is Rita E. Hauser Professor of Human Rights and International Humanitarian Law at Harvard Law School.

\(^90\) Blum 2013: 148
References

Bibliography

- Blum, Gabriella (2013) The dispensable lives of soldiers
- Greenwood, Christopher (2008) “Historical development and legal basis” in The handbook of international humanitarian law, Fleck, Dieter (ed.)
- Lee, Steven P. (2012) Ethics and War
- Yoo, John & Hoo, James C. (2003) International Law and the War on Terrorism

Empirical material

- Central Intelligence Act of 1949
- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949
• Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.
• Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907
• Military Order of November 2013, Federal Register. 57833, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism
• Montevideo Convention on the Rights and Duties of States (1933)
• National Security Act of 1947
• Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
• Statement of David W Glazier, Hearing on Rise of Drones II: Examining the Legality of Unmanned Targeting, United States House of Representatives, Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs, April 28 2010
• The Public Committee Against Torture in Israel v. The Government of Israel (2005), HCJ 769/02

Internet links