

JUST WAR THEORY AND ITS APPLICABILITY
TO TARGETED KILLING

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by

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

ABSTRACT

JUST WAR THEORY AND ITS APPLICABILITY TO TARGETED KILLING, by MAJ Matthew B. Holmes, 76 pages.

The Central Intelligence Agency is involved in a targeted killing program which the United States Government employs in its war on global terrorism. This program identifies terrorists and those facilitating terrorist activities and initiates lethal strikes against these individuals. These lethal missions are covert operations which must first pass a rigorous legal review and require a Presidential finding in order to be initiated. Although these programs are legal according to the laws of the United States Government there has been debate as to whether these actions are just and ethical. The purpose of this thesis is to investigate whether Just War Theory legitimizes the use of the Central Intelligence Agency's targeted killing program in the Global War on Terrorism. First, this paper identifies the basic tenets of both Just War Theory and covert operations. Second, the paper employs the case study of the targeted killing attack on Abu Ali al-Harithi to determine whether or not targeted killing meets the Just War Theory of *jus in bello*. The thesis finishes by stating that the Just War Theory legitimizes the use of the targeted killing program and finds it in compliance with the requirements of *jus in bello*.

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ACRONYMS

AQAM	Al-Qaida and its Associated Movements
CIA	Central Intelligence Agency
DOD	Department of Defense
GWOT	Global War on Terrorism
USG	United States Government

CHAPTER 1

INTRODUCTION

When a decision must be made that affects national security, there are a slew of ethical and moral guidelines and philosophies to fall back upon in order to follow the most just path. The informed decision maker must first understand the difference between ethics and morals in order to decide which framework or criteria best applies. Morals are those beliefs in right and wrong that define an individual's personal character. Ethics are a code of behavior expected of the individual by a group (Rachels and Rachels 2010, 15-16). Ethics also stress a social system in which the individual's morals are applied. Whereas a person's ethics might change considering the situation (professional ethics, religious ethics, family ethics), morals tend to be unchanging (Rachels and Rachels 2010, 15-16).

One of the most respected and long lived methods to gauge if ethical decisions are made in wars and armed conflicts is Just War Theory. It has informed the ethical nature of wars for hundreds of years, guiding kings and presidents alike. As the United States finds itself faced with the menace of international terrorism, it is imperative to seek an ethical framework in order to guide the policy and national security decisions being made. Just War Theory, although only one of several long held philosophies concerning the starting and waging of war, has benefited from centuries of philosophical review and development, and has served as the basis for the laws and policies that govern how modern nations enter into conflict and wage war.

The purpose of this study is to use the lens of Just War Theory to examine one tool in the United States Government's (USG) arsenal against terrorism -targeted killing.

It can be argued that targeted killing is a tool of both violence and peace, of war and the avoidance of war. The use of targeted killing, an ethically ambiguous topic in and of itself, becomes more so when it is conducted by the Central Intelligence Agency (CIA), an organization that does not fall under the legal restrictions of the Geneva Conventions or the ethical tenets of the Law of Land Warfare, itself derived from Just War Theory. Because the CIA acts outside of the traditional ethical restraints that govern the Department of Defense (DOD), it is unclear if the ethical framework of Just War Theory, which provides the basis for these ethical restraints, is applicable.

This thesis will explore the ethical framework of Just War Theory and attempt to evaluate its tenets in the context of the CIA's targeted killing program in order to determine whether Just War Theory applies in this situation and legitimizes the use of the targeted killing option. The specific research question that this thesis will seek to answer is: Does Just War Theory legitimize the use of targeted killing by the CIA in the war on global terrorism?

Background

The GWOT has forced the USG to adopt an entirely new way to wage war. This war has been waged not against an established nation-state, but against transnational organizations such as Al-Qaida. Al-Qaida has no embassy, no recognized government, and no legitimate political representation anywhere in the world. In other words, there is no nation for the United States to declare war against. This fact has engendered a slew of legal and philosophical debates concerning the use of America's military and governmental options of violence. One particular set of guiding principles that tends to reappear in these debates is the long held ethical philosophy of Just War Theory.

The theory of Just War has been applied since approximately the late fourth to early fifth century as a moral guideline when one nation decides to use war as a way to further its own political aims. The theory was built on a framework that had heads of government pitting their countries against each other on a wide range of battlefields. However, the war that is being waged against terrorism does not resemble this model, which begs the question of whether Just War Theory can be applied to the GWOT and the nontraditional means used in this conflict, such as targeted killing.

This paper seeks to examine the CIA's program of targeted killing in terms of Just War Theory. This theory is a widely accepted philosophical framework for the waging of war and the furtherance of political objectives through the use of violence. Although there are several philosophies that apply to the waging of war, Just War Theory has been the most readily examined throughout history and its tenets of *jus ad bellum*, *jus in bello*, and *jus post bellum* provide a coherent framework against which to evaluate new case studies. The body of knowledge and scholarly writing concerning Just War Theory is far reaching and topical in today's war on global terrorism. It is a very applicable tool for evaluating actions against an ethical framework which helps to determine if the action is ethical or not. Although there is no formula or universal standard of right and wrong, there are established philosophies which can give an individual assistance in determining the morality of complicated issues. In this case, it will be used to determine whether or not the actions being conducted by agencies of the USG, such as targeted killing, are considered just and right in terms of this cornerstone of philosophical thinking.

Assumptions

This research paper will be built upon certain assumptions that necessitate explanation. First, the assumption must be made that all CIA targeted killing operations discussed within this research are conducted in accordance with the laws of the USG as well as in line with the legal review process of the CIA. The legality of targeted killing operations has been called into question by a multitude of authors and articles. It is not the intent of this paper to take the legal issue into question. Instead this research will focus solely on how these operations can be evaluated through the lens of an accepted ethical framework.

The second assumption that this paper will bear in mind throughout its development is closely tied to the legal review mentioned above. This assumption is that before execution, all targeted killing operations have first benefited from an exhaustive targeting process that validates and ensures the identity of the target, the crimes that he or she are guilty of committing, and the most viable time and place for the operation to occur. Targeted killing missions are not undertaken lightly by their planners nor the agents and operatives who carry them out. A long line of analysts, senior officials, and governmental leaders must be satisfied first that there is no doubt that either an act injurious to the United States has been conducted by the person in question or that the target's activities represent an imminent threat to the USG. These determinations form the crux of a rigorous legal review.

The next assumption in this study concerns the CIA, which is the only civilian organization, according to open source information, which conducts targeted killing operations. The Law of Land Warfare and the Geneva Conventions both find their roots

within the tenets of Just War Theory. This doctrine of military ethics guided the creation and enforcement of laws that bind how modern armies and governments begin, wage, and end warfare. The DOD is itself bound by these tenets and cannot legally conduct operations that venture outside of their purview. Therefore, it is assumed that if the DOD conducts a targeted killing that has been declared legal under the Law of Land Warfare and the Geneva Conventions, and these laws were themselves built upon the framework of Just War Theory, then any legal targeted killing conducted by the DOD is naturally legitimized by Just War Theory. The more intriguing question of the applicability of Just War Theory begins to emerge when study moves outside of the clear cut lines of the DOD and examines those agencies that are not legally constrained by the Law of Land Warfare and the Geneva Conventions, specifically the CIA.

The CIA has been tasked with the implementation of counterterrorism policy through violence, a task normally reserved only for the DOD, yet it is not formally constrained by the same laws and ethical philosophies that constrain the DOD. If the CIA can use violence in the international theater, which is the same mission as the DOD, yet is not inhibited by the same ethical restrictions, what mechanism can be used to determine whether the agency's operations and actions are right or wrong?

Definition of Terms

Like any field of study, philosophy uses its own litany of terms and definitions. In addition this paper also encompasses the world of covert action, which possesses its own unique lexicon. Listed below are the reoccurring terms that must be defined and understood for this research endeavor.

The first term explains the range of activities under which targeted killing and other secretly executed actions fall, covert action. Covert operations are a military, intelligence or law enforcement operation that is carried out clandestinely. Their main goal is to fulfill their stated objectives without any parties knowing who sponsored or carried out the operation (Daugherty 2004, 25). There are many subsets of activities that fall under this overarching definition, but the one activity that this paper focuses on is targeted killing.

A targeted killing is “the targeting and killing, by a government or its agents, of a civilian or ‘unlawful combatant’ taking a direct part in hostilities in the context of an armed conflict who is not in that government’s custody and cannot be reasonably apprehended” (Solis 2010, 538). It must be stressed that a targeted killing operation, by this definition, is conducted by a government’s representative against an unlawful combatant. The government’s agent who conducts this kind of operation may be a civilian and is not required to be a member of the United States Armed Forces. Also, as stated in the definition, the targets of these operations are unlawful combatants. These are men or women who do not follow the internationally approved laws that govern armed conflict and therefore do not enjoy any of the rights or protections that these laws afford.

The last portion of the definition that bears special significance is the fact that these individuals cannot be readily apprehended by the government that they have acted against. The ideal goal of any operation would be the apprehension of the targeted individual so that they could be tried and judged by a legitimate court system. However, in combat and conflict this is not always an option. Many times the target is elusive and, due to tactical restrictions, there is no way to safely and successfully place government

agents in a situation where they can subdue, apprehend, and extract the target. In these situations, the killing of the target is one of the only options at the disposal of the government.

Although targeted killing is the focus of this research paper, the term assassination will be discussed throughout this paper as well, if only to contrast and explain what targeted killing is not. An assassination is, ~~to~~ “murder (a usually prominent person) by a sudden and/or secret attack, often for political reasons” (Gross 2010, 5-6). The primary word that must be highlighted in this definition is murder. An assassination is a murder conducted to serve an individual or group’s goals. The end goal of targeted killing is the elimination of a national threat that has been determined to have conducted crimes against the USG. Assassination, in contrast, is simply murder and is illegal under the laws of the United States. According to Executive Order 12333, assassination cannot be conducted legally by any agent or representative of the United States (Daugherty 2004, 25). The contrast between these two terms and their associated activities will be discussed at greater length throughout this paper.

Now that the definition of targeted killing has been explored, the ethical framework that it will be held against can be examined. The first term to understand is that of Just War Theory itself. Just War Theory is, ~~a~~ “doctrine of military ethics of Roman philosophical and Catholic origin, studied by moral theologians, ethicists, and international policy makers, which holds that a conflict can and ought to meet the criteria of philosophical, religious or political justice, provided that it follows certain conditions” (Elshtain 1992, 11).

The terms “ethical framework” and “moral philosophy” will be used throughout this paper and merit a moment of explanation. A moral philosophy is a method of thinking which seeks to find the right and wrong of a situation, the simple good or bad that characterizes a decision (Rachels and Rachels 2010, 109). Ethics as a whole are the application of morality in the light of a specific profession or field of study (Rachels and Rachels 2010, 115). In short, a moral philosophy seeks to find if a situation is right or wrong whereas an ethical framework asks the same question but in light of a specified viewpoint. In this paper, Just War Theory is treated as both a philosophy and a framework, as it seeks to find the morality of a situation by dealing specifically with the justness of conflict and war.

Just War Theory is divided into three sections of study. These three sections are *jus ad bellum*, *jus in bello*, and *jus post bellum*, and they each focus on, respectively, the rightness of starting a war, fighting a war, and ending a war. This paper will focus almost exclusively on the *jus in bello* portion of Just War Theory.

Jus in bello directs how combatants are to act during war. This ethical tenet is what keeps the conflict from becoming a brutal massacre regardless of military objective. It protects the sanctity of the lives of innocents and allows war to be waged without the destruction of a civilization. It is comprised of the three major factors of distinction, proportionality, and military necessity. Distinction states that all violence and acts of war should be directed against enemy combatants and not towards non-combatants. Proportionality states that an attack against a military target or objective cannot incur an undue amount of civilian casualties or destruction in relation to the anticipated military advantage. The tenet of military necessity is directed to limit excessive or unnecessary

death and destruction. It instructs the warfighter to use the minimum amount of force needed to accomplish the military objective (Elshtain 1992, 42-45).

This paper will also discuss the use of the Unmanned Aerial Vehicle (UAV), currently the most widely used weapon of targeted killing by the USG. A UAV is also sometimes referred to as a Remotely Piloted Vehicle (RPV). A UAV is a powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload (Federation of American Scientists Intelligence Resource Program 2011).

Limitations

The limitation of this thesis will be the security classification of the information used to create it. All research and information contained in this paper will be of an unclassified nature. Any information regarding specific targeted killing operations, the methods used to plan and execute these missions, and the specific individuals against whom these missions are planned and conducted will be gathered from open source avenues or unclassified interviews. There will be no classified chapters or addendums to this paper.

Scope

Although Just War Theory will be reviewed as a whole, this thesis will focus primarily on the *jus in bello* portion of the philosophy. *Jus in bello* speaks to the actual waging of war, which also directly encompasses the means by which combat is conducted. This paper's focus on *jus in bello* does not seek to diminish the importance of

jus ad bellum or *jus pos bellum*, but instead seeks to narrow this examination to the portion of the philosophy under which targeted killing most naturally resides.

As previously stated, this research paper will only address legally sanctioned targeted killing operations authorized by the USG and conducted by the CIA.

Significance of Study

Although a great deal has already been written about targeted killing and its execution and effectiveness, very little has been written about the moral considerations of these operations. The significance of this paper is to fill that gap and to further explore the ethics involved in the conduct of these operations by the USG.

In addition to understanding the ethics behind these operations, this paper will serve to present an ethical framework that decision and policy makers can reference when making the choice whether or not to approve a targeted killing operation.

Summary and Conclusions

The study of philosophy is no easy feat and as this paper explores the intricacies of Just War Theory, it will become more and more evident that the ramifications of ethical concepts are far reaching and substantial. However, it is of the utmost importance that a strong ethical study of the CIA's targeted killing program be conducted by the USG and her emissaries and agents. This paper will seek to answer the question of whether the most widely accepted and academically legitimized philosophy on the waging of war legitimizes actions being conducted by the USG in protection of its interests. As stated earlier, this paper does not intend to examine the legality of these actions but instead press beyond the legal. Although an action may be legal it may not

always be right. This research paper will seek to understand if Just War Theory legitimizes targeted killing operations or if these actions lie beyond Just War Theory's ability to guide and inform.

Chapter 2 of this investigation will examine the multitude of academic work that has been conducted on modern Just War Theory and what has already been confirmed as within its purview. Also, the scholastic debate on the combative status of terrorists will be examined in order to fully understand the definition of an unlawful combatant. At the conclusion of chapter 2 the reader will have a much richer understanding of Just War Theory as it pertains to the political and military landscape of the twentieth and twenty-first centuries as well as its already established place in the arena of global terrorism.

Chapter 3 will explain the research methodology that the thesis will follow as well as the plan for amassing and analyzing the research collected throughout the course of this project.

Within chapter 4 the tenets of *jus ad bellum* and *jus in bello* will be applied and tested against the practice of targeted killing conducted by the CIA. A selected case study will be examined and placed under the scrutiny of *jus in bello* in order to determine whether or not it passes the Just War Theory requirements. At the end of this chapter the reader will see if modern targeted killing operations fit within the tenets of Just War Theory and *jus in bello* specifically.

Finally, chapter 5 will examine all the information referred to above and answer the research question directly based on recent actions as well as scholastic review. Upon answering the question the paper will make recommendations to both scholars and

government agents on how Just War Theory can be applied to the targeted killing process and what further questions would need to be examined in order to facilitate that use.

CHAPTER 2

LITERATURE REVIEW

This thesis is primarily founded in both the basic tenets of Just War Theory and intelligence operations, more specifically targeted killing. A full explanation of these concepts and their current applicability to the GWOT is critical for the success of this paper.

Origin of Just War Theory

The origin of Just War Theory can be traced back to the writings of St. Augustine of Hippo (354-430) (Bellamy 2006, 25). Augustine was one of the first philosophers who did not perceive the base elements of man, such as his lust for violence and war, as “splendid virtues.” Instead, he held all men accountable for their actions and preached restraint in the conduct of war (Ramsey 1961, 8). Augustine preached from his pulpit and opined in his writings that it was man’s duty to acknowledge his faults and urges and strive to control them on both the individual and group level. In many ways, St. Augustine was not fully original in his thinking as concepts of justice in warfare had existed even as far back as the ancient Greeks. However, Augustine was able to amass differing concepts coupled with his own strict beliefs of right and wrong and present a moral framework that was understandable and applicable (Bellamy 2006, 27). This framework became the genesis of Just War Theory, a belief which acknowledged that wars would be fought and blood would be spilt, but stated that there was a way to determine if these actions were necessary and if so, to limit their consequences.

Augustine's greatest contribution to the Just War tradition was his establishment of the three primary sections of the theory; *jus ad bellum*, *jus in bello*, and *jus post bellum*. *Jus ad bellum* and *jus in bello* have been discussed at the highest level of political and academic leadership as well as by some of the most prominent philosophical thinkers in history. These two concepts provide moral guidance on the two issues most often faced by policy makers: under what condition is it moral to go to war (*jus ad bellum*) and how the violence inherent in warfare can be controlled (*jus in bello*) (Patterson 2007, 2).

Jus Ad Bellum

Jus ad bellum can be summed up in a very simple statement set forth by Thomas Aquinas (1225-1274 A.D.). If a war is begun justly it is done so by sovereign *authority* acting on a *just cause* with *right intent* (Patterson 2007, 35). Aquinas, a student of Augustine's writing, broke down the basic elements of Augustine's work and codified it into the trinity of *jus ad bellum*. Each element of Aquinas's statement is of critical importance to the understanding of *jus ad bellum* as a whole.

The order of requirements that Aquinas states is important, the first being sovereign authority. A sovereign authority is "a duly constituted authority with respect to the waging of war" (Evans 2005, 13). A war cannot be considered just unless it has been declared by a leader or leading body formally placed into power by the population it governs and internationally recognized as possessing the inherent authority to do so (Evans 2005, 13).

The concept of "just cause" is one that is very robust in its meaning and interpretation. According to Just War Theory, a cause is just if "the justice of the cause is sufficiently great as to warrant warfare and does not negate countervailing values of

equal or greater weight” (Evans 2005, 12). The key term in this definition is “justice.” A just war cannot be fought for revenge or to exact some kind of repercussions onto a group, state, or political element, but instead must be fought to right a wrong and bring a state of fairness and justice into order.

Although there is a fine line at times between revenge and justice, the distinction does exist and is of paramount importance in Just War Theory. Michael Price, a writer for the American Psychological Association, wrote on this topic and successfully explains the nuanced difference between revenge and justice.

Although revenge resembles some conceptions of justice, vengeance is usually depicted as more injurious and punitive as opposed to being harmonious and restorative. Whereas justice implies actions undertaken and supported by a legitimate judicial system grounded upon a foundation of ethics and morals of the authorities, revenge implies actions undertaken by an individual or narrowly defined group outside the boundaries of judicial or ethical conduct whose goal is to force a wrongdoer to suffer the same or greater pain than that which was originally inflicted to a party. (Price 2009)

As Mr. Price shows, although an action driven by revenge may achieve a measure of justice, that justice is tainted by the intent and is in fact injurious to both parties. This discussion in many ways follows the same lines as one examining the morality of torture. Although the act of torture may result in actionable intelligence which results in a beneficial outcome that outcome, is tainted by the extreme measures that were taken in order to procure it. Furthermore, the act of torture not only causes mental and psychological damage to the receiver, but also has a detrimental effect on the emotional well-being of the one torturing.

Furthermore, just wars are only fought for the stated causes and not for hidden reasons (Evans 2005, 12). Throughout history many sovereign authorities have gone to war claiming that their intent was to bring justice, when in fact their hidden agenda was

to secure power for themselves. This is the true meaning of “right intent.” Augustine further clarified what right intent is by identifying four criteria that would all have to be met in order for that action to be considered just; a war fought in self-defense, a war fought to secure reparations for previous wrongs or to reacquire property wrongfully taken, a war directly ordered by God, and a war fought to maintain religious orthodoxy (Bellamy 2006, 28). It is important to note that in Augustine’s time, sovereigns were considered God’s representatives on earth and therefore their dictates must be in line with God’s will. Today, the division between Church and State allows a more secular interpretation of the philosophy to exist.

War is an awful and terrible activity whose consequences can be felt for years. *Jus ad bellum*, however, recognizes that there are worse things than fighting a war, situations and scenarios that left unchecked would cause even more suffering in the long run. *Jus ad bellum* recognizes causes in line with a nation’s collective moral values, which are worth employing violence for. These values can include self-defense, the security of one’s home and the defense of human life (Patterson 2007, 35). These concepts will be examined further in this research when the concept of the GWOT as a just war is discussed.

As *jus ad bellum* has been debated and examined over the centuries, more criteria have been added in order to further differentiate the requirements that must be met in order for a war to be started justly and in a moral fashion. Added to the trio of sovereign authority, just cause, and right intent were the concepts of likelihood of success, proportionality of ends, last resort, and comparative justice (Patterson 2007, 2). All seven requirements for the modern *jus ad bellum* concept will be examined in greater detail

further in this chapter when the GWOT is evaluated as a just war. Despite all the reflections on *jus ad bellum* and debates as to the meaning of each particular tenet, the true heart of the matter can still be found in the teachings of St. Augustine, which state simply that the main difference between a war began justly and war unjustly founded is that a just war attempts both to restore peace and to repair an injury received (Bellamy 2006, 27).

Jus In Bello

The second primary tenet of Just War Theory is *jus in bello*. *Jus in bello* is the justice of waging war or how the violence of war is limited and judiciously applied in order to meet political and military aims. *Jus in bello* actually finds its roots in the medieval chivalric code (Johnson 1981, 47). Knights and nobility of the time identified a need to restrict their combat only to each other and to attempt to limit the involvement of outside personnel, or noncombatants. This was considered a part of the knight's *jus in duellum*, or justice in private combat (Johnson 1981, 47).

Throughout the years Just War Theory borrowed from the duellum concept and chivalric code to create the *jus in bello* tenets of noncombatants and fairness in combat (Johnson 1981, 48). Primarily attributed to the sixteenth and seventeenth century philosophers Francisco de Vitoria and Francisco Suarez, *jus in bello* directly examines the justice of conduct in war (Regan 1996, 18). It is interesting to note the progression of *jus in bello* as not only a moral philosophy, but as the genesis of policy and law. History reveals the inclusion of *jus in bello* precepts in Gustavus Adolphus's *Swedish Discipline* used in the Thirty Years War, the Union Army's *General Order No. 100* in the American

Civil War, and the contemporary Law of Land Warfare used in today's army (Johnson 1984, 14).

Jus in bello deals specifically with the means of war. These means include, but are not limited to, the weapons that are used, the effects these weapons cause, and the tactics and strategies through which combat is waged. *Jus in bello* demands five requirements be met while conducting warfare. First, the means must be necessary. Second, the means must be proportional, or more specifically, "the damage must not be greater than the damage prevented or the offense being avenged" (Yoder 1996, 156). Proportionality must be observed at all levels (battles, wars, campaigns) and in every way that a means of combat is used (tactics, weapons, strategies). Third, the means must be discriminating. Fourth, the means must respect the immunity of the innocent and noncombatants. Lastly, the means must not be forbidden by law or treaties (Yoder 1996, 156-160). *Jus in bello* will be discussed to a greater degree in chapter 4 of this paper.

Jus Pos Bellum

Jus pos bellum is also a very important portion of Just War Theory, but one that will not be discussed to any great extent in this research. This portion of the philosophy discusses the most moral ways to end a war and what responsibilities a warring party has when conflict has ceased (Bellamy 2006, 121).

Laws Rooted in Philosophy

It has been stated several times already in this thesis that Just War Theory has provided the basis for both the Geneva Conventions and the Law of Land Warfare. A moment should be taken to further explain this assertion.

The Geneva Conventions are comprised of four separate conventions which deal specifically with the conduct of war and the maintaining of humanitarian principles in combat (Kellenberger 2009). The First Geneva Convention (for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field) was written in 1864, the Second Convention (for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea) in 1906, the Third Convention (relative to the Treatment of Prisoners of War) in 1929, and the final Fourth Convention (relative to the Protection of Civilian Persons in Time of War) was written in 1949 (Kellenberger 2009). The First Convention was written by Henry Dunant, a social activist and writer, and directly resulted in the creation of the International Red Cross. Henry Dunant was heavily influenced by Just War theorists such as John Calvin. Later conventions were written as the devastation of World Wars I and II ripped across the globe. A need for institutionalizing humanitarian restrictions and ethical concerns in warfare was identified and Just War Theory became the model on which these conventions were based (Lang 2002).

The Law of Land Warfare followed a similar route in its development. This body of regulations governs the use of violence and the conduct of war by the Armed Forces of the United States of America. The genesis of the Law of Land Warfare can be found in the Lieber Code of 1863 (Lang 2002). This code, also known as Instructions for the Government of Armies of the United States in the Field, General Order No. 100, was signed into law by then President of the United States Abraham Lincoln. It was named after the jurist and philosopher Francis Lieber, who wrote it based on Lincoln's guidance to provide the Union Army a clear regulation that governed what actions were allowed on

the battlefield as well as the imperatives for the ethical treatment of the enemy when necessary (Lang 2009). It is assumed that Lieber was well versed in Just War Theory, as the articles of General Order No. 100 consistently follow the principles of Augustinian just war doctrine (Rockwood 2005, 23). The Lieber Code also heavily influenced what is now the Uniform Code of Military Justice, the body of laws which govern all DOD uniformed personnel (Rockwood 2005, 24).

Why Is Just War Theory the Best Philosophy to Use?

This thesis makes repeated reference to the validity of Just War Theory and its usefulness in examining conflict and warfare. The basis of its utility lies in the fact that it serves as a bridge, an intellectual compromise between other foundational moral philosophies. Although each philosophy is well respected and valid in some respects, it is arguably only Just War Theory that successfully spans the ethical spectrum. The following section will briefly examine the moral philosophies of Realism, Utilitarianism, Militarism, and Pacifism and display why Just War Theory is the preferred method for evaluating the ethics of warfare.

The first philosophy, Realism, is one that can be called the opposite of Just War Theory, for it calls for no ethical considerations or limitations in times of war. Briefly put, the Realist feels that there is no place for ethics in war or in the decisions that lead to declaring war (Sagan 2004, 77). Tracing their lineage through history from Thucydides, Hobbes, and Clausewitz, Realists believe that power must be exercised with a calculating cruelty, which guarantees the success of one's own army or nation. A common expression in realist literature is that in life, as in war, "the strong do what they can and the weak do what they must" (Sagan 2004, 77). This belief that it is sometimes necessary

to be cruel in order to maintain peace and stability in a harsh and brutal world is reflected in the concept of Realpolitik, the Realist notion of how the governors should lead the governed. According to Realists, the use of a weapon or tactic, no matter how savage or destructive, when used to protect one's own people and borders from loss is the logically strategic decision. As Clausewitz, an unabashed Realist once stated, "If one side uses force without compunction, undeterred by the bloodshed it involves, while the other side refrains, the first will gain the upper hand" (Clausewitz 1976, 75-76). Although this philosophy does stand on firm moral ground in many ways, it does not provide a well-rounded approach to the morality of war. Within Realism there is no respect for noncombatants, no examination of just cause, and no avenue to insure that the violence exercised in combat is proportionate or precise.

Another philosophy commonly used to examine the ethicality of war is Utilitarianism. Utilitarianism states that actions are to be judged only by their consequences and nothing else. In other words, the ends truly justify the means. In judging these consequences, the only determining factor is the amount of happiness or unhappiness that is created with all else being irrelevant and with each person's degree of happiness counting the same (Rachels and Rachels 2010, 109). Utilitarianism has been criticized over the years for ignoring the worth of the individual and instead focusing on the welfare of the population at large (Bagaric and Clarke 2007, 29). However, when a leader is faced with a decision whose consequences have global impact, it is unrealistic to assume that he or she can include every individual interest into the equation. In this regard, Utilitarianism provides an apt tool for determining morality. A more modern application of the Utilitarianism theory is the use of torture or "advanced questioning" of

suspected terrorists. In their work on torture, authors Mirko Bagaric and Julie Clarke state, “In the face of extreme situations, we are quite ready to accept that one should, or even must, sacrifice oneself or others for the good of the whole. The need to make such decisions is of course regrettable, but more regrettable still would be not making them and thereby increasing net human pain” (Bagaric and Clarke 2007, 31).

This brings to mind the fact that the “unhappiness” of a regrettable decision also factors into the equation demanded by utilitarianism. John Connery wrote that although the regret and distaste that may be associated with a violent act may increase with the amount of violence, one cannot solely use that regret and distaste as “independent moral yardsticks” (Connery 1960, 92). In other words, although an act may cause a great deal of pain, and the more the act is committed the more pain and distaste it creates, if the act is accomplished for the greater good then the pain and distaste in and of themselves cannot be the sole reason to start or stop the action.

Utilitarianism presents a more mild philosophy than Realism but still does not possess the depth that Just War Theory does. Whereas Utilitarianism demands that the burden of the morality be concentrated on the outcome, Just War Theory demands that equal amounts of examination be given to both the act and the outcome. There is no pass given to a horrific means in Just War Theory if the consequence of that means is beneficial to some or many.

The third doctrine in the study of military ethics is closely related to Utilitarianism in so much that it concentrates more on the consequences than the act. This philosophy is Militarism (Coppeters and Fution 2002, 5). Militarists are aware of war's horrors but are convinced that these horrors are much more than compensated for by the

gains of war. This philosophy creates a sense of "we" in the individuals that make up an army. As opposed to the Realists, the militarists see that ethics are present in war, but that the true moral imperative exists in the preservation of the Nation, Unit, and Team. This is perhaps the most effective method for a combat leader to legitimize harsh military action (Coppieters and Fution 2002, 6). A Militarist leader can motivate soldiers by placing in them the belief that the moral action is one that defends his or her way of life while bringing the conflict to a speedy and successful end.

Militarism presents a less aggressive option to Realism, yet still does not fully allow contemplation of a broad range of ethical considerations present on the battlefield. There are too many times in combat when the right decision may be one that puts the unit in greater danger, such as refusing to kill a noncombatant who may alert the enemy to their presence. Just War Theory requires that ethical scrutiny and limitations be placed on all actions no matter who may benefit from the outcome.

The last moral philosophy to be examined here is the absolute polar opposite to the first. Pacifism, as opposed to Realism, espouses that war is morally wrong in any and all situations and encourages all people to reject not only combat, but also armed conflict and violence in general (Coppieters and Fution 2002, 1-2). If Pacifism was used to evaluate wars then it would make no difference if a state of injustice existed or if mass casualties would result from military inaction, the philosophy would still demand the cessation of all activities violent in nature. This ignores the need for conflict to guarantee national security and individual safety. Again, Just War Theory provides a better ethical framework to evaluate acts of violence because although it condones the use of

aggression in certain situations, it respects the need for peace and only resorts to violence if there are no other options.

Although the differing philosophies exist on their own merits and claim years of examination and intellectual contribution, Just War Theory has continued to stand out among them because of the broad range of situations it informs.

Covert Intelligence Operations

Coupled with the requirement to understand moral philosophies and Just War Theory is the need to understand the kind of missions conducted by the United States Intelligence Community. Intelligence operations are divided into two primary categories; covert and clandestine. Although both of these mission types serve to further intelligences goals and provide policy makers with critical information, due to the fact that targeted killing falls into the former of the two categories this paper will focus exclusively on covert operations.

Covert actions are those taken where the sponsor of the action is kept secret although the effects of the operation itself may very well be publically known. This allows the sponsor nation a measure of plausible deniability, a precious commodity in international politics and affairs. There are several types of covert action, all of which serve to influence foreign governments, persons, or events in support of the sponsoring government's aims and goals (Richelson 2008, 3). These types include propaganda, paramilitary or political actions, support of individuals or organizations, economic operations, disinformation, and targeted killing (Richelson 2008, 3). This paper focuses on targeted killing.

The CIA has sole authority to conduct covert action within the USG, but must first secure Presidential permission or authorization before conducting these kinds of actions. The Hughes-Ryan Amendment to the 1991 Intelligence Authorization Act requires that the CIA secure a “Presidential Finding” authorizing the use of covert action. This ensures Presidential oversight of all activities conducted by the CIA as a representative of the USG. The responsibility to conduct covert action has also resulted in the CIA receiving the strictest oversight of any USG agency (Daugherty 2004, 25).

As stated in chapter 1, covert actions are also active and influence oriented, designed to somehow change or elicit a behavior from the target of the operation. Targeted killing fits squarely into this category, based on its lethal nature as well as the requirement for a Presidential finding prior to execution of the mission. This is an important distinction for this thesis because it will fit into the requirements of *jus ad bellum* and *jus in bello* later on in this examination.

An example of a classic covert action is the CIA executed Operation Cyclone. This operation involved the funding of the Afghan mujahedeen from 1979 to 1989 (Coll 2005, 147). Threatened by the Soviet invasion of Afghanistan, President Carter immediately authorized the CIA to begin funding the anti-Soviet mujahedeen in order to influence what he viewed as communist influence in a key area of the world. This operation, like all covert actions, began first with a Presidential finding for covert action, in this case initiated by President Carter and continued by President Reagan. The CIA began the program with a budget of \$20-\$30 million per year and expanded to \$630 million by 1987 (Coll 2005, 148). The program relied heavily on using the Pakistani Inter-Services Intelligence (ISI) as an intermediary for funds distribution, passage of

weapons, military training and financial support to Afghan resistance groups (Rizvi 2004, 19). Operation Cyclone is an excellent illustration of covert action as it was executed to influence a foreign power, required a Presidential finding, and attempted to hide the sponsor of the act by working through third party intermediaries.

On the other hand, clandestine intelligence actions are not meant to influence anyone and are defined by the obscuration of the activity itself. As General James R. Clapper, Jr., the former Under Secretary of Defense for Intelligence testified before the Senate Armed Services Committee in 2007, the term clandestine is not defined by statute, but is characterized by activities that are conducted in secret and can constitute ~~“passive”~~ intelligence information gathering (Cummings 2007, CRS5). By contrast, covert action is considered ~~“active”~~ and is aimed at eliciting change in the target. General Clapper went on to testify that military services only conduct those activities which can be categorized as clandestine, further separating those kinds of intelligence operations that the CIA is licensed to conduct and those conducted by the DOD. Furthermore, General Clapper noted that clandestine operations can be conducted in support of covert actions (Cummings 2007, CRS5).

Covert operations provide the USG a ~~“third option”~~ in international affairs; the first being to do nothing militarily and the second being deploying a full military presence (Lowenthal 2009, 165). The CIA is the sole agency within the USG legally allowed to carry out covert action. This authority stems from the National Security Act of 1947 and was reinforced with President Ronald Reagan’s Executive Order 12333 signed on 4 December 1981. The concept of sole authority has been recently revisited in US

code through the 1991 Intelligence Authorization Act and in Title 50 of the United States Code, Section 413(e) (Daugherty 2004, 25).

As covert action is conducted by representatives of the USG, it deserves the scrutiny that all actions of the government are placed under. In terms of targeted killing, if the population at large is not privy to the intelligence that identifies a target and that eventually leads to the execution of a targeted killing mission, it is incumbent on the officials executing the planning and implementation of these actions to determine if what is being done is right and just as well as legal. For that, an ethical framework is required.

Targeted Killing

Targeted killing is a form of covert action that has rapidly expanded in use in the current GWOT. Targeted killing is —~~the~~targeting and killing, by a government or its agents, of a civilian or ~~un~~unlawful combatant” taking a direct part in hostilities in the context of an armed conflict who is not in that government’s custody and cannot be reasonably apprehended” (Solis 2010, 540). A further in-depth discussion of what exactly an unlawful combatant is will occur later in this thesis. However, it is important to note that the target of a targeted killing is one taking part in an armed conflict or terrorism but not necessarily through the direct bearing or using of arms. Many of these targets are individuals supporting terrorist networks and their hostile operations, or planning terrorist operations. By their close association with terrorist activities, these individuals have effectively lost their immunity otherwise afforded through the Geneva Conventions (Solid 2010, 541). The GWOT has placed a special emphasis on all intelligence actions dealing with the identification of terrorists or terrorist supporters as well as their capture or killing. Targeted killing is just one tool being used in this global conflict.

The use of targeted killing has sparked controversy throughout the international community. Supporters laud it as a critical tool in the transnational war on terror while its detractors term it state sponsored extrajudicial killing. A variety of legal issues have been brought up in domestic and international courts alike. This paper does not seek to address any of the questions regarding the legality of targeted killing that have been brought up in these arenas. Experts in law will be the final decision makers on that count. As of this writing, targeted killing is a legal process and a tool of covert action used by the USG in the GWOT.

One topic that has been brought up in international debate is the comparison between targeted killing and assassination. As discussed in the definition previously given, the purpose of targeted killing is the elimination of a military threat, someone who poses a clear danger in terms of armed conflict or terrorism. The goal of an assassination is much different. As defined in Black's Law Dictionary, the most widely used law dictionary in the United States, assassination is "the act of deliberately killing someone, especially a public figure, usually for hire or for political reason" (Lotrionte 2003, 74). The fact that political change and not military aims is the primary end state of an assassination is very important and places it on a much different level than targeted killing.

Just War Theory has been reevaluated throughout history whenever a new development in conflict, weaponry, or tactics is instituted. In more recent times it was reevaluated during the First and Second World Wars, the advent of nuclear and atomic weapons, and more importantly for this research, during the rise in transnational terrorism. The question asked in almost all situations by scholars and laymen alike is

does Just War Theory apply in this situation and if so how? Chapter 4 of this paper will strive to answer this in terms of the CIA's program of targeted killing in support of GWOT, but before that can be accomplished it is important to understand how scholars have answered this question at a macro level in terms of the GWOT as a whole.

The CIA's Targeted Killing Drone Program

During the GWOT the world media has reported a marked increase in the amount of targeted killing operations allegedly conducted by the CIA. Based on these reports, this program has been successful in dispatching terrorist suspects whom the United States and its allies could not safely capture. A large part of the success of this program relied upon the means of its execution; the Predator Drone (Stone 2003, 17).

The drone reportedly used by the CIA is the MQ-1 Predator built by California's General Atomics Aeronautical (Williams 2010, 872). This system proved itself as a covert reconnaissance platform in Serbia among other places in the 1990s. However, it has been reported that the CIA has adopted the MQ-9 Reaper as its drone of choice (Williams 2010, 872). Unfortunately, because offensive use of the drones is classified, CIA officials have only openly reported their appreciation for the intelligence and reconnaissance-gathering abilities of the aircraft but have not openly discussed their offensive capabilities nor the actual aircraft used by the agency (Grier 2009).

It was not decided to arm the Predator until 2000. It was at this time that Cofer Black, then the head of the CIA's Counter Terrorism Center and Richard Clarke, the Chief Counter Terrorism Advisor for the National Security Council, decided that an airborne targeted killing platform would be an effective tool in the US counter-terrorism program (Williams 2010, 872). These men, frustrated by repeated circumstances where

targets were identified but were unable to be engaged because weapons assets were too far away, identified a need for a more timely option.

The arming of the same platform that was used to identify targets was the next logical step. In February 2001 General Atomics released their updated and armed Predator, which sported a laser turret in the nose for precision targeting and Hellfire AGM-114 laser guided missiles on its wings (Williams 2010, 872).

The advent of this weapons system broke new ground for the CIA, however not everyone saw this as a positive situation. Just prior to 9/11, George Tenet, the Director of the CIA at the time, questioned the legal and ethical ramifications that this kind of technology would raise. He expressed concern over the kind of power this weapon would give a nation and stated that it would be “~~a~~ terrible mistake” for “~~the~~ Director of Central Intelligence to fire a weapon like this” (Mayer 2009). However, these concerns were never fully addressed and were lost in the chaos that followed the terrorist attacks in September of 2001 as targeted killing missions became more and more prevalent with drones being the primary weapon of choice for these engagements (Williams 2010, 872). In fact, in 2009 then Director of Central Intelligence Leon Panetta told the Pacific Council on International Policy in Los Angeles, “~~V~~ery frankly, it's the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership” (CNN 2007).

It was in the flurry of activity and analysis following the 9/11 attacks that the program received its first big push into the fight against global terrorism. Within days after the attacks, President Bush had signed a secret Memorandum of Notification, giving the CIA the right to kill members of Al-Qaida and their confederates virtually anywhere in the world (Mayer 2009). Congress endorsed this policy, passing a bill called the

Authorization for Use of Military Force. Bush's legal advisers modeled their rationale on Israel's position against terrorism, arguing that the U.S. government had the right to use lethal force against suspected terrorists in "anticipatory" self-defense. By classifying terrorism as an act of war, rather than as a crime, the Bush Administration reasoned that it was no longer bound by legal constraints requiring the government to give suspected terrorists due process (Mayer 2009).

In her 2009 investigative report on the CIA's targeted killing program, Jane Mayer of *The New Yorker* wrote,

The U.S. government runs two drone programs. The military's version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based.

The program is classified as covert, and the intelligence agency declines to provide any information to the public about where it operates, how it selects targets, who is in charge, or how many people have been killed. (Mayer 2009)

This quote is particularly apt in displaying the delineation between the DOD and the CIA's program. These are obviously two very separate programs with different aims and authorizing systems. Due to the classified nature of the missions it is difficult to determine which attacks are launched by the DOD and which are the CIA's. This forces the researcher to rely upon open source research conducted by such organizations as the New America Foundation and the Conflict Monitoring Center.

Since 2004 the majority of attacks being conducted by the CIA and their drones in the targeted killing program have been in Pakistan. These attacks, which started in 2004, have spike dramatically in recent years (O'Connell 2010, 4). This is due to President Obama thoroughly embracing the concept of targeting and executing missions through drones (Anderson 2010, 26). President Obama inherited a program which President Bush

had only recently authorized to expand its targeting to the second and third tier command levels of Al-Qaida and the Taliban (Conflict Monitoring Center 2011, 3). Prior to this expansion, the Bush administration had limited the CIA's program to only top level terrorist leadership. It was expected that President Obama would review and change US policy on drone attacks; he not only maintained it, but also further intensified the targeting campaign and now the CIA has an even wider spectrum of terrorist targets to conduct operations against (Conflict Monitoring Center 2011, 4). President Obama found in the drone's precision, advanced targeting technology, and constant over watch a way to truly ~~take~~ "take the fight to al Qaeda" (Anderson 2010, 26).

This covert program came into the light a bit in February 2009 when the CIA first publically acknowledged that the drone program that it oversees in Pakistan exists and, according to then CIA Director Leon Panetta, was very successful and would continue for the foreseeable future (Kronstadt 2010, 44). This program, although highly debated and controversial, has been credited with eliminating several high ranking terrorist leaders.

Counterterrorism officials credit drones with having killed more than a dozen senior Al Qaeda leaders and their allies in the past year, eliminating more than half of the C.I.A.'s twenty most wanted ~~high~~ "high value" targets. In addition to Baitullah Mehsud, the list includes Nazimuddin Zalalov, a former lieutenant of Osama bin Laden; Ilyas Kashmiri, Al Qaeda's chief of paramilitary operations in Pakistan; Saad bin Laden, Osama's eldest son; Abu Sulayman al-Jazairi, an Algerian Al Qaeda planner who is believed to have helped train operatives for attacks in Europe and the United States; and Osama al-Kini and Sheikh Ahmed Salim Swedan, Al Qaeda operatives who are thought to have played central roles in the 1998 bombings of American embassies in East Africa. (Mayer 2009)

Furthermore, it has recently been reported that CIA ~~Stealth Drones,~~ "the RQ-170 Sentinel, was used to monitor the activities in and around the compound inhabited by Osama bin Laden and his supporters (Fox News 2011). These highly advanced drone aircraft were able to provide detailed reconnaissance and targeting information to the CIA

and the USG that directly resulted in the attack on the compound and the eventual killing of bin Laden. It is clear that the targeted killing and related drone programs of the CIA have proven to be effective in their treatment of suspected terrorists and will likely continue to be used as long as the GWOT itself continues.

Is the GWOT a Just War?

As discussed previously, *jus ad bellum* and *jus in bello* are two of the three primary categorizations in Just War Theory. Targeted killing is a means of conflict and will be examined later in terms of *jus in bello*. However, the GWOT itself is a conflict that was entered into by the United States and thus must be discussed in terms of *jus ad bellum* and its dictates of sovereign authority, just cause, and right intent as well as likelihood of success, proportionality of ends, last resort, and comparative justice. If the GWOT cannot be considered a just war, than examining how *jus in bello* applies to its means is a moot point.

The first point of sovereign authority can be easily answered as having been met. The Presidents of the United States who have been directly involved in this conflict were lawfully elected by the people of the United States in accordance with the laws of a sovereign government. There have been no legal challenges to the rightful authority of Presidents Bush or Obama that would nullify their claim to being the duly elected leaders of the United States.

It is also critical to note that the entity that war is being waged against does not have to be led by a sovereign authority itself according to the Just War Theory. This figures into the debate because Al-Qaida and Allied Movements (AQAM) is not a government with a sovereign authority; therefore the United States cannot declare war

against it. It is important to understand that the philosophy of Just War Theory was developed well before the Treaty of Westphalia and the advent of nationally recognized nation-states. Just War Theory uses the term “armed conflict,” which must exist between two groups. Treaties and declarations of war between governments do not define or fully encapsulate the “war” and violence that Just War Theory was designed to limit. The nature of the violence, its intensity, and the duration of the conflict is what truly makes the determination if a state of conflict exists between two cultural entities (Cullen 2007, 3).

The second criterion, just cause, is a more complex concept and therefore requires a more in-depth examination. A just cause is one that seems to correct an injustice (Bellamy 2006, 22). In terms of the GWOT, the injustice exists in the deaths of American citizens both in the attacks of 11 September 2001 as well as in numerous other AQAM-sponsored attacks throughout the world. As long as the true mission of the conflict remains the pursuit of justice and not one of revenge then the dictate of right intent is met as well. Unfortunately, the true intent in a man’s heart may only be known to him alone despite his or his nation’s actions.

In addition to the injustice of the terrorist acts on 11 September 2001 is the threat that these attacks announced to the population of the United States and its leaders. This interpretation of injustice specifically deals with preemption. It is clear that the sovereign nation of Afghanistan was not involved in direct conflict with the United States at the time of the terrorist attacks in New York, Washington, and Pennsylvania. However, according to modern interpretations of *jus ad bellum* and just cause, as well as the Bush administration, Afghanistan presented a serious and imminent threat to the people of the

United States. According to this interpretation, a threat of this kind grants the sovereign authority the right to declare war in order to prevent further attacks and loss of life (Fotion 2005, 34).

Always closely linked to just cause is right intent. The two are closely intertwined and a just war cannot exist without both falling within moral guidelines. In terms of the GWOT, the intent of the United States was to alleviate the threat of attacks by Al-Qaida affiliated organizations. This intent can be interpreted as being in line with Michael Walzer's "supreme emergency doctrine" (Van der Linden 2007, 58). This doctrine states that a war can be justly fought if the intent is to counter an imminent catastrophe. The USG, following the attacks on the World Trade Center, perceived organized radical Islam as a very real and catastrophic threat should AQAM decide to launch another attack on the same scale as New York. Add to this fear the potential for a weapon of mass destruction and it is evident that the USG's intent was to protect against such an emergency.

Likelihood of success in conflict is another concept inherent in modern *jus ad bellum*. Simply stated, this tenet tells policy makers that they may only enter into a war if the chances of winning that war and achieving whatever goal triggered the conflict in the first place are greater than defeat (Fotion 2005, 35). This is a difficult standard to measure in any kind of quantitative manner. There is no chart or reference table that lays out which odds are better or more reasonable than others. It demands interpretation by the policy makers and military leaders alike. In terms of the GWOT, the USG deemed that between its Intelligence Community and the DOD there resides enough capability to find and kill or capture individuals and organizations involved in terrorist activities.

The proportionality principle of *jus ad bellum* dictates that a nation should not involve itself in an armed conflict if the benefits are not proportional to the costs. Much like the likelihood of success tenet and many of the concepts of Just War Theory, this concept cannot be answered by a formula or simple checklist. It demands sober and informed consideration by the sovereign authority and his or her advisors. In this case, will the costs in men and material that would be lost in a global war on terrorism be worth the capture and or killing of violent extremists? The USG and the sovereign authority of the President determined that halting the spread of AQAM and bringing its members to some kind of justice was worth the price that would be paid in blood and treasure.

The next tenet of *jus ad bellum*'s modern interpretation is that of last resort. This concept has suffered from a vagueness of definition since its inclusion in modern Just War Theory. What truly makes an option a last resort? To alleviate some confusion and make the concept more applicable to modern day use philosophers tend to re-term this tenet as the "last reasonable resort" (Fotion 2005, 35). In other words, if a sovereign authority has done all it is reasonably expected to do in order to avoid a war then war itself becomes its last viable option. In terms of the GWOT the United States exhausted all other reasonable options when it called for the nations harboring terrorists to present those individuals for trial and judgment by the international community. In addition, representatives of the United States Department of State worked through diplomatic channels to further bring about a peaceful solution to no avail. Without definitive success through diplomatic avenues, the USG viewed military intervention its only remaining reasonable option against global terrorism.

Although not one of the primary tenets of *jus ad bellum*, self-defense figures prominently in Just War Theory as a whole and must be addressed when speaking of last resort. Just War Theory clearly states that conflict and warfare are not the primary means of international relations. This concept was even codified in the United Nations Charter, Article 2(4) which states that the use of aggressive force by a state in its international relations is outlawed. However, and most importantly to this argument, in Article 51 of this same charter it states that an exception to the use of violence exists in cases of self-defense (Cullen 2007, 2). As *jus ad bellum* requires so too does this charter require that this violence must be necessary, proportionate, and not designed to be punitive in neither nature nor serve as a reprisal (Cullen 2007, 2). In terms of modern events, the attacks by AQAM upon the United States and its representatives overseas constitute a real and immediate threat. According to Just War Theory and legitimized through the United Nation's own charter, the United States is entitled to protect itself through the use of force.

Of all the tenets of *jus ad bellum* used to legitimize the GWOT, this concept of self-defense seems to be the most criticized and actively shows the rift between some philosophers as to the justness of the GWOT. For instance, David Rodin, a Senior Research Fellow at the University of Oxford and a leading authority on the ethics of war and conflict, has continually debated that the GWOT was not just in its inception and not in line with *jus ad bellum* (Rodin 2004, 63). Mr. Rodin has written several works that detail how he views the requirements of *jus ad bellum* and how these requirements have not been met in the GWOT, particularly in the vein of self-defense. To summarize his viewpoints Mr. Rodin writes,

Self-defense is partly grounded in the normative relationship between the defender and the end of her action, but it is also importantly grounded in the fact that the end she is seeking to protect is a good or a value sufficient to merit harmful acts in its defense. This gives rise to the three most significant limitations on the right of self-defense: proportionality, necessity, and imminence. These say roughly that an act of self-defense is only justified if the harm inflicted in the course of defense is not greater than the harm it seeks to avert (proportionality); that there was no less-harmful way to achieve the same result (necessity); and that the harm one seeks to avert is truly imminent. (Rodin 2004, 64)

Another established philosopher who has taken issue with the ethical basis of the GWOT is Dr. Jeff McMahan. Dr. McMahan has a Ph.D. in Philosophy from Cambridge University where he also held a high level professorship in the Philosophy department. Dr. McMahan has written on the ethicality of most modern topics such as the GWOT, cloning, and euthanasia. In relation to the GWOT, Dr. McMahan writes that the self-defense argument is not strong enough to condone the amount of harm that has been a result of the GWOT (McMahan 2004, 255). He further details that the harm the USG averted by conducting the GWOT is not proportional to the actual death and destruction that have been a result of the conflict when he wrote,

Typical instances of killing in self-defense involve this same mode of shifting harm. In order to avert harm to herself, the agent who engages in self-defense intentionally affects a person in a way that she believes will, if successful, kill that person. Her action offends against both the presumption against doing harm and the presumption against intentional harming. It is, therefore, a case in which the presumption against shifting harm is strong. How, then, can we be so confident about the permissibility of killing in self-defense? (McMahan 2004, 255)

Mr. Rodin and Dr. McMahan subscribe to the belief, like much of the contradictory literature written by philosophers who are not in favor of the GWOT, that GWOT is not in compliance with these requirements for self-defense and that the US had other options that could have been used before resorting to the violent measures seen in effect today (Rodin 2004, 65). This schism only further highlights the debate that resulted

by the GWOT and the measures taken by the USG in its fight. In most ways though, it is right and good that so much debate and analysis has surrounded a topic that affects nations and the populations therein.

The last requirement in Just War Theory's determination if a war was begun justly or not is the concept of comparative justice. Comparative justice is a concept which recognizes that in a state of conflict each side has sense of justness that they strive for. Jus ad bellum requires that in order to begin a just war one side must have a greater claim to justice than the other (Johnson 2006, 178). Using a historical example other than the GWOT, this concept of comparative justice was used to legitimize actions taken against the Soviet Union due to the fact that American democracy was seen as more just than the "evil" Communist system employed by the Soviets (Johnson 2006, 178). In context of the more modern GWOT, the justness of the American stand against global terrorism has been viewed as more just than the desires of extremist Islam and the violent groups which carry out its aims, mainly Al-Qaida.

Now that the reader has been familiarized with the concepts of Just War Theory and intelligence operations this paper will examine how these two concepts apply to targeted killing and the GWOT.

CHAPTER 3

METHODOLOGY

The stated purpose of this paper is to answer the question of whether Just War Theory legitimizes the use of a targeted killing program by the CIA in the war on terrorism. While asking the primary question two significant secondary questions arise: (1) how have the *jus ad bellum* and *jus in bello* portions of Just War Theory been interpreted and evolved since the terrorist attacks of 11 September 2001; and (2) how do these modern interpretations align with the targeted killing program being conducted by the CIA?

This thesis will be a qualitative research paper. The study of moral philosophy and Just War Theory does not lend itself well to the kind of data and information required for a quantitative study. This paper will draw heavily upon scholarly writing and case study analysis, two research techniques grounded in qualitative research methodology. This paper seeks to collect information and conduct applied research in order to broaden the fields of philosophy and intelligence ethics. It will do so from an interpretive and constructivist viewpoint with the primary goal of fully understanding Just War Theory and its applicability to the current real world practice of targeted killing.

The interpretive perspective suggests that reality is socially constructed, meaning that all people participate and create it and, therefore, there are no single, set interpretations to any event or idea (Merriam 2009, 8-9). This viewpoint is particularly applicable to the study of philosophy, which naturally allows for a multitude of opinions based on the individual's own set of morals and ethics. The constructivist viewpoint will be used due to its close relation to the interpretive style of research. In constructivism, the

researcher does not necessary find knowledge, but instead constructs it out of historical and cultural norms, subjective meanings, and the vast spectrum of views and experiences that make up human society (Merriam 2009, 9). Again, this seems particularly apt when dealing with a topic such as philosophy and the study of ethics and morality.

Open source historical analysis will be conducted to identify a case study that can be considered the best example of a CIA targeted killing strike. Due to the highly classified nature of these operations, the case study cannot be formally recognized by the CIA as a targeted killing mission conducted by its organization. However, outside organizations such as the Counterterrorism Strategy Initiative, New America Foundation, and the Conflict Monitoring Center, have conducted open source research into targeted killing operations and can evaluate with a reliable degree of accuracy which operations were conducted by the CIA and which were not. Data collected by news agencies and scholarly journals will also be applied to the material to present the most well-rounded and holistic example of a CIA executed targeted killing operation.

The researcher will then use the trove of scholarly writings that deal with Just War Theory, GWOT, and the CIA's targeted killing program to analyze the program and determine the applicability and legitimacy of this moral philosophy to the program being conducted by the CIA today.

Once the research process has been completed, the researcher will compare the findings on the topic from the philosophical scholars and contrast it to the actual events of the determined case study. Each tenet of Just War Theory's *jus ad bellum* and *jus in bello* will be considered and placed in the context of the case study as well as the opinions of the academic world writ large. This final analysis will determine whether or

not the practice of targeted killing by the CIA can be deemed justifiable in terms of Just War Theory.

A strength of the research for this thesis lies in its focus on the modern evolution of Just War thinking, especially the *jus in bello* portion of the philosophy, and how that has been interpreted in the context of 21st century issues facing the nation. The just war community has amassed a trove of information dealing with modern applications of this philosophy to the amorphous topic of terrorists and the national reaction to their activities. The examination of this topic in the thesis provides the reader a holistic view of the current state of the discussion and the significance of the discourse.

The weakness of the research lies in the fact that the CIA's targeted killing process is a highly classified program. The lack of primary research data in this area is apparent, but necessary to keep this paper at an unclassified level. Therefore, this paper is clearly limited in that any targeted killing program discussed in the research is based on secondary research of unclassified sources, and largely in theoretical terms.

CHAPTER 4

APPLYING *JUS IN BELLO* TO TARGETED KILLING

In chapter 2 of this thesis the paper discussed the state of the GWOT as a just or unjust war. The establishment of the GWOT as a just war was needed in order to discuss the means of the war, means such as targeted killing. If a war is not just then the means of that war are unjust as well. However, even just wars can be fought with unjust means. In this chapter the research will examine one means of the GWOT and determine whether or not it meets the standards of *jus in bello*.

It has already been established in chapter 2 of this thesis that many philosophers have argued and shown that the GWOT is in fact a just war, therefore meeting the *jus ad bellum* requirements and allowing this paper to profitably examine the requirements that *jus in bello* places on the waging of war. To quickly review, *jus in bello* (justice in war) determines whether or not actions taken during a just war are in and of themselves ethical and right. The primary tenets of *jus in bello* are necessity, proportionality, discrimination, respect for noncombatant status, and legality of action. Each of these five qualities will be discussed below in terms of Just War Theory and a real world case study of a CIA targeted killing mission.

The Al-Harithi Case Study

Philosophers have found that explaining and evaluating complex moral quandaries is best accomplished when the philosophy can be framed in an actual situation where this philosophy can be seen in –action.” An excellent example of this is Walzer’s theory of the Domestic Example. In this theory, Walzer uses the expected actions of an

individual protecting his own home, family, and rights to explain and examine the actions of nations while evaluating their own reactions to outside attacks (Walzer 1992, 56). One effective way to discuss the applicability of Just War Theory to the CIA's targeted killing program is to relate it to an actual case study and observe whether or not the tenets of Just War Theory are germane in this example.

The example of the CIA's targeted killing program used for this examination is the 3 November 2002 strike that killed Abu Ali al-Harithi. Al-Harithi was considered a primary suspect in the USS Cole attack, which resulted in the death of 17 US sailors (Williams 2010, 872). In addition to participating in the attack on the Cole, Al-Harithi was identified as being one of Osama bin Laden's bodyguards (Mollo 2003, 26).

This strike was conducted by a United States drone operated by CIA agents based in Djibouti (O'Connell 2010, 3). These agents piloted the drone and launched a Hellfire missile into a passenger vehicle that was identified as having Al-Harithi as a passenger as well as five other individuals. These five other individuals consisted of four men belonging to the Aden-Abyan Islamic Army, which was a terrorist group with ties to Al-Qaida (O'Connell 2010, 3).

One of the men among the other five passengers was an Arab-American from Buffalo, New York whom the FBI had identified as a recruiter for Al-Qaida (Mollo 2003, 27). This attack marked the first instance in the GWOT where the US targeted and killed one of its own citizens. This caused an enormous amount of controversy once it was reported, as well as debate among the international legal community. This paper recognizes the importance of this event but does not seek to determine whether or not the

killing of an American was legal or ethical. It is the strike itself and the targeting of Al-Harithi that is examined in this thesis.

The 2002 targeted killing attack on Al-Harithi executed by a CIA piloted Predator drone marked the beginning of a program which continues to be an integral part of the USG's strategy against AQAM and global terrorism. This example will be explained in much greater detail in chapter 4 as it is used as a primary case study upon which to evaluate the targeted killing program as a whole. Assuming that other targeted killing operations follow the same procedures and exercise the same due diligence in their targeting requirements, then examination of this event can suggest whether the targeted killing program as a whole is ethical or not in the eyes of Just War Theory.

It must be noted that the CIA has not officially claimed responsibility for this attack and there is no unclassified information available which details the particulars of how this attack was planned and executed. Assuming though that this attack was an actual targeted killing mission conducted by the CIA, it provides an excellent example against which the ethical framework of Just War Theory can be applied and, in particular, the *jus in bello* criteria discussed as being met or not being met.

Necessity

The first of the tenets of *jus in bello* is that of necessity. Necessity states that military actions and means will only be conducted in a conflict if there is no other way to accomplish a particular military goal. Also, an attack should be "reasonably expected to create a concrete and direct military advance" (Radsan 2010, 2).

In this particular case study, the question that must be asked is whether or not the killing of Al-Harithi by a targeted killing strike carried out by a Predator drone was

necessary. Was there no other way that could have been used to bring about a greater sense of justice in this case? Was a targeted killing strike the only option available to the CIA and USG?

This case study offers a unique perspective on this aspect of the examination because there were previous attempts to capture Al-Harithi, which attempted to avoid the use of a targeted killing option. In December 2000, a Yemeni Special Forces unit acting on intelligence produced by a joint US/Yemeni intelligence team attempted to first capture Al-Harithi. The mission was unsuccessful and resulted in the death of 18 Yemeni soldiers (Mollo 2003, 26). After this dismal result the Yemeni and USG ruled out attempting another capture mission due to the danger it posed to their respective operatives.

If the option to conduct a targeted killing is removed and the ability to safely secure and capture a target is taken away, then the potential consequence that remains is that the terrorist is allowed to kill or facilitate those that kill. In this case, there seems to exist a clear necessity to pursue the targeted killing option in order to protect the lives of allied military and noncombatants alike (Cullen 2007, 6).

Another factor that figures into the necessity of this targeted killing mission was the imminent threat that Al-Harithi represented. At the time of his death, Al-Harithi was reportedly on his way to conduct an attack or at the very least preparing for another attack. This claim was further supported by reports of secondary detonations from weapons and explosives in the vehicle that was targeted by the CIA drone (Landay 2002).

Another argument in favor of targeted killing's necessity is the need to remove the terrorist organizations' leadership in order for the terrorist nodes to be rendered

ineffective. Roger Herbert argued in 1992 that, “A terrorist organization’s only strategic asset is the terrorist himself. Attrition therefore, is a necessary alternative in a war against terrorism”. Attriting terrorists, however, will inevitably resemble assassination” (Herbert 1992, 84).

It must be noted that Herbert states that this program would “assemble” assassination. As shown in chapter 2, there are similarities and dissimilarities between assassination and targeted killing that are of key importance.

Following in line with Herbert’s logic, Hoover fellow Bruce Berkowitz commented in 2002 that targeted killing would be necessary to defeat an organization as flexible and fluid as Al-Qaida. He wrote, “To defeat such networked organizations, our military forces will need to move quickly, find the critical cells in a network, and destroy them. This inevitably will mean identifying specific individuals and killing them” (Berkowitz 2002).

The necessity requirement in *jus in bello* appears to have been met in the case of Al-Harithi. All other reasonable options were examined and deemed insufficient or carried too great a risk to governmental operatives. Also, the immediate and long term threat that Al-Harithi represented was to such a high degree that his elimination was necessary to protect lives that would otherwise have been lost in his future terrorist activities.

Proportionality

The next *jus in bello* requirement is that of proportionality. Proportionality is, much like other concepts in Just War Theory, relatively simple to define but complicated to apply. Proportionality is the requirement that attacks of any kind be proportional to the

military value of the target (Cook 2004, 34). This concept serves to avoid devastating situations where overwhelming violence, such as an artillery barrage, is used to accomplish a proportionally smaller military objective, such as eliminating a single sniper.

Proportionality is an incredibly difficult concept to apply in real world situations. As the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia expressed in its report to the International Criminal Tribunal for the former Yugoslavia (ICTY),

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and the undesirable collateral effects...it is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective. (ICTY 2000)

As stated in the ICTY's quote above, it is challenging to compare "apples and oranges" in terms of proportionality. There is no formula, no reference table, and no sliding scale that can equate the lives of one group against the lives of another. How then can proportionality be measured?

There are two factors which hold true in instances where proportionality is called into question and which can assist in the evaluation and measurement of proportionality. The first is that proportionality is measured in speculation (Kretzmer 2005, 201). Prior to an attack, there is no concrete way of knowing whether the military consequences will weigh or outweigh the loss of life (both explicit and incidental) that will result from the strike. Second, "proportionality must be judged on the information available at the time of the attack, and not on the actual results" (Kretzmer 2005, 201). Intelligence operators

exhaust all available assets when planning and executing a targeted strike. However, despite all their best efforts there is a chance that additional lives will be lost which were not intended in the operation. Therefore, it is the information that the strike was launched with that must be called into question and not the actual results of the strike that can be judged.

Bringing this back to the case of Al-Harithi, it must be determined whether the United States used a proportionate level of violence when it executed the targeted killing mission against Al-Harithi and the other occupants in his vehicle. Al-Harithi was reportedly responsible for deaths on the USS Cole as well as those speculated that would be lost in future attacks. Also, intelligence identified Al-Harithi and informed the CIA when he would be targetable for the strike with the least amount of collateral deaths. It appears that the two factors discussed above were met and, in these terms, the strike deemed properly proportionate.

One last aspect of the proportionality argument is whether or not the targeting of one or a few individuals at a time is better than the casualties that would exist in a conventional war. As one commentator wrote, “Targeted killing can also be morally superior to waging all-out war... Indeed, the idea of proportionality in the law of war suggests that the means able to achieve an objective with the least destruction... is always to be preferred” (Lowry 2003). The use of the Predator drone in the Al-Harithi case and the precise targeting that it allowed appears to meet the proportionality criterion as well.

Discrimination

The next requirement of *jus in bello* to be examined in terms of the Al-Harithi strike is that of discrimination. Discrimination in the context of *jus in bello* is not meant

in a negative context a la racial discrimination, but simply in the manner of distinguishing between groups on the basis of some characteristic that separates one from another (Cook 2004, 33). During conflict and times of war –characteristic” usually boils down to the basic question of whether an individual falls under the combatant or noncombatant status. Discrimination forbids purposefully targeting noncombatants but does not mean that a just war cannot conduct missions that might unintentionally harm them (Courtney 2002, 126). The requirement to recognize an individual’s noncombatant status will be discussed later in this chapter.

A combatant is someone actively engaged in hostile actions against an opposing force or is a member of the opponent group’s uniformed armed forces. A combatant loses his or her immunity from direct attack because of a choice, a choice to actively engage in hostile acts. This choosing allows individuals to be legitimate targets of hostile action (Cook 2004, 33).

In guerilla warfare and the modern war on terrorism, the question of discrimination becomes very difficult to differentiate. In these kinds of conflicts aggressors go to great lengths to disguise their combatant status by blending in with the noncombatant population. They do not wear uniforms or insignias to openly identify them to friend and foe alike. In these cases one must exercise every available targeting option in order to insure that only correct and viable targets are engaged.

In many ways, the use of a Predator drone by the CIA can be viewed as greatly increasing the chances of distinction and meeting this portion of *jus in bello* to a greater degree. Take for instance an example of a US Soldier and Predator drone operating in the same area attempting to identify the same target (Radsan 2010, 4). The Soldier on the

ground has dozens of factors interfering with his ability to find, fix, and engage a potentially hostile target to include environmental factors and the psychological and physical stressors of operating in a combat environment. The Predator and its pilot do not suffer these same limitations. The drone allows the pilot and the team of intelligence experts to constantly observe an area using the latest in reconnaissance equipment as well as enjoying the input from intelligence analysts at all times. When the Predator and its team have identified a target, they have successfully made the distinction between this individual and the rest of the population through exhausting more options than the average Soldier on the ground has at his or her disposal.

In his comments to the Annual Meeting of the American Society of International Law, Harold Koh, the Obama Administration's Legal Adviser to the State Department and the senior legal adviser to Secretary of State Hillary Clinton, commented on the use of Predator drones in attacks in support of the GWOT. Although he does not mention the CIA specifically in his statements, it is clear that he is alluding to the practice of targeting killing when he states, "In US operations against Al-Qaida and its associated forces--including lethal operations conducted with the use of unmanned aerial vehicles--great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum" (Koh 2010).

Again, this philosophical concept must be placed against the real world case of Al-Harithi. It was reported that the CIA exercised every available option it had in order to discriminate between Al-Harithi and other personnel in his area (McManus 2003). Although the CIA was unable to positively identify the other occupants in the vehicle

with Al-Harithi at the time of the strike CIA operators did wait until the group that Al-Harithi was with separated into men in one vehicle and women in the other. Hundreds of man hours were spent following Al-Harithi and collecting intelligence that positively identified him and linked him to terrorist activities.

This level of targeting was made possible by the fact that the Predator drone was able to track Al-Harithi's movements for weeks, a capability that only the drone system possessed at the time. This kind of surveillance makes designating and distinguishing the target from other collateral personnel possible. The measure of discrimination required by *jus in bello* was met in the case of Al-Harithi, thus meeting another criterion of Just War Theory.

Recognition and Respect of the Noncombatant

The next prerequisite of Just War Theory that must be met is the recognition and respect of the noncombatant status. This status seeks to protect innocent civilians and combatants who through wounds or surrender are unable to continue offensive actions.

This condition is of particular importance because of the controversy that has surrounded the labels assigned to terrorists. Many have argued that terrorists do not meet the definition of a combatant and therefore cannot be targeted justifiably under Just War Theory. Others, including the USG, have been accused of morphing and stretching the doctrine of Just War Theory in order to place terrorists outside of the protection of the noncombatant status. This section will seek to explain the noncombatant protection and detail whether or not those engaged in terrorist activities are privy to the noncombatant status.

It is interesting to show how the noncombatant status has been examined and refined throughout history. Francisco Suarez (1548-1617) was a Spanish Jesuit priest as well as a Just War Theory philosopher and theologian (Courtney 2002, 86). His work is interestingly applicable in this context because he spent a good deal of his life writing on the concept of the noncombatant status. Suarez writes that if a noncombatant is killed *per accidens* (incidentally) during an act that is necessary to the pursuit of victory, it is justifiable. In other words, if one assumes that at least one of the six men in the car with Al-Harithi were innocent of terrorist activities their death could be considered justifiable if the attack on Al-Harithi was necessary for the success of the mission (Courtney 2002, 93).

A contemporary of Suarez, Hugo Grotius, also wrote a good deal on the status of the noncombatant which rings true even in our modern application. Grotius (1583-1646) is sometimes referred to as the father of international law (Courtney 2002, 94). Grotius labored to build international law that worked to protect those innocent of the horrors of war and establish a formal noncombatant status. However, just as Suarez stated that there were exceptions to the sanctity of the noncombatant; Grotius also sought to clearly define every situation where the noncombatant status would be called into question.

Most relevant to this thesis is his delineation between the combatant and the accomplice (Courtney 2002, 107). Although accomplices do not commit the same level of aggression that combatants do, the fact that they aid and facilitate these acts makes them as guilty as those who commit them. In this case, the noncombatant loses this status and assumes that of the accomplice, making them, according to Grotius, a viable target (Courtney 2002, 107). This loss of status also serves to justify the targeting and killing of

individuals even though they may not be actively involved in hostile acts at the moment of the targeted killing strike. In short, it is a person's status, not their actions that allow them to be killed (Kretzmer 2005, 190-191).

A more modern view of this distinction between noncombatant and those playing a role in aggressive acts can be found in the work of Professor of Philosophy Daniel Statman (University of Haifa, Jerusalem). Dr. Statman states that,

Targeted killing expresses the appropriate respect for life during wartime. . . . In Targeted Killing, human beings are not killed because they are the enemy but because they bear special responsibility or play a special role in the enemy's aggression. This is particularly true in war against terrorism, where those targeted are personally responsible for atrocities against innocent lives. (Statman 2002)

The United States has acknowledged the fact that terrorists do not meet the normal definitions of a combatant as detailed in traditional Just War Theory. In response, the USG has adopted the term —~~il~~legal combatant.” This term justifies the targeting of individual terrorists as military actions in accordance with the laws of war (Mollo 2003, 40). The term —~~il~~legal combatant” encapsulates civilian terrorists, i.e., individuals conducting or facilitating terrorist acts who are not uniformed in any nation's military service. According to this definition, these individuals have lost their noncombatant status and can be legally targeted by the USG. However, the creation and use of this terminology has not gone without some measure of conflict. Many of the term's detractors have claimed that this simply allows the US to target individuals who would otherwise be considered criminals and subject to criminal law proceedings.

It is further interesting to note that the term —~~il~~legal combatant” did not originate with the war on terrorism, but instead dates back to World War II when four German

soldiers landed on the coast of the United States and “infiltrated” New York City dressed as American citizens (Kretzmer 2005, 190).

Dr. Michael N. Schmitt, the Dean and Professor of International Law at the George C. Marshall European Center for Security Studies, opines that the best way to determine if a terrorist group, and therefore the individuals populating that group, present a threat can be determined by four factors: past practices of the terrorist organization; what articulated goals the group has which suggested long-term conflict; if recent events have affected the group’s activities, and whether intelligence shows that there are activities underway which may support a terrorist operation (Kretzmer 2005, 194).

This is also a proper point to discuss the principle of double effect. This philosophical principle states that when an act will result in both a good and evil outcome, the act can still be accomplished if certain criteria are met. Michael Walzer, the preeminent modern Just War philosopher, details this specifically when he states that the act may be accomplished if two criteria are first met (Walzer 1992, 153). First, the intention of the actor is good and only aimed at the acceptable “good” effect. If he primarily works for the “evil” effect, this point is not met. Second, the good effect must be sufficiently good to compensate for the evil effect. There must exist enough moral worth in the good effect to override whatever evil exists in the other consequence (Walzer 1992, 153).

For this examination, the killing of Al-Harithi resulted in two effects. The first was the death of six humans and the second was the elimination of a threat to American interests. As long as the United States and the CIA as its representative acted primarily to protect the US and its citizens, and that the good that would result from this act was

greater than the loss of six lives, then the principle of double effect justifies this act and places it in line with Just War Theory.

Legality

The final tenet of *jus in bello* which must be observed and met in order for a means or strategy to be considered justified by Just War Theory is that of legality. In this context, legality simply requires that an action not be deemed illegal by international law or treaties. Although simply put, this question is rarely simply answered. As stated in chapter 1 it is not the intent of this paper to challenge the legal aspects of targeted killing. A task of that magnitude requires a greater understanding of international law than this paper claims to possess. However, it is important to note two points.

First, the USG does not consider the practice of targeted killing to be illegal within its own domestic code. Many detractors of targeted killing point to Executive Order No. 12333 which limits the activities in which the Intelligence Community can engage, specifically assassination. In order to comply with the terms of this executive order the CIA has implemented a laborious approval process. The goal of this process is to insure that these kinds of operations are targeted killing in nature and not illegal assassinations. Furthermore, these operations comply with all oversight restrictions and must be accompanied by a Presidential finding as well as reporting to the Intelligence Committees in the legislative before execution (Cullen 2007, 6).

Secondly, international laws, including the products of *jus in bello*, the Geneva Conventions, do not determine this kind of action to be against law or treaty. Application of the laws of war is triggered if it can be determined that two forces are locked in ~~armed~~ conflict.” It is important to note that it is this ~~armed~~ conflict” that must exist and

not the more easily defined “war.” During the Hamden v. Rumsfeld trial it was determined by the US Supreme Court that the actions between the USG and AQAM were properly characterized as an “armed conflict” (Cullen 2007, 6). As long as the United States follows the requirements of the Geneva Conventions during this “armed conflict” it can be considered in compliance with international law.

In terms of the Al-Harithi case study, the heart of the matter is whether the United States and the CIA were operating legally within Yemen’s borders. In this case, the government of Yemen was fully aware of the CIA’s activities within its borders and in fact encouraged the mission (Sharp 2011, 10). It is reported that Yemeni President Ali Abdallah Salih provided intelligence assistance to the small group of US Special Forces and CIA operatives who were pursuing Al-Harithi within Yemen (Sharp 2011, 10). It is clear that in this situation the legality of the US operating within another sovereign nation’s borders was not an issue and was in full compliance with this last requirement for *jus in bello*.

A Contradictory Viewpoint

Although the Al-Harithi case study has been informative regarding how the targeted killing program falls in line with Just War Theory that is not to say that the program is infallible or in constant compliance with the tenets of *jus in bello*. Many scholars and policy makers alike have been opposed to the CIA’s program and have made claims as to its illegality and immorality.

One claim against the program has been that it causes more collateral damage than necessary, a blatant violation of the proportionality and discrimination tenets of *jus in bello*. The majority of this criticism has been directed at the CIA’s targeted killing

program in Pakistan. It has been reported that the ratio between intended targets and collateral deaths from 2004 to 2009 was 20 leaders eliminated with 750 to 1000 collateral deaths. In other words, the US is reportedly killing approximately 50 noncombatants for every combatant target eliminated (O'Connell 2010, 1).

Others claim that CIA operatives, being civilians and not uniformed members of the DOD, have no right to engage in combative activities. According to the Geneva Conventions, specifically Additional Protocol I of 1977 to the 1949 Geneva Conventions, only uniformed members of a legitimate armed force may engage in lawful combative actions when it states in Article 43(2), "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Geneva Convention) are combatants, that is to say, they have the right to participate directly in hostilities" (UNTS 1979, 609).

Michael Walzer, the preeminent modern Just War Theory philosopher and author of the book "Just and Unjust Wars" has publically declared his own uneasiness with the CIA's program,

Under what code does the C.I.A. operate? he asks. "I don't know. The military operates under a legal code, and it has judicial mechanisms." He said of the C.I.A.'s drone program, "There should be a limited, finite group of people who are targets, and that list should be publicly defensible and available. Instead, it's not being publicly defended. People are being killed, and we generally require some public justification when we go about killing people." (Mayer 2009)

Daniel Byman, the director of Georgetown University's Center for Peace and Security Studies, argues that, when possible "it's almost always better to arrest terrorists than to kill them. You get intelligence then. Dead men tell no tales" (Mayer 2009).

All of these issues further display the amount of debate and examination that the program has been put under. It is clear that although many have found justness in the CIA's targeted killing program, it is not ethically infallible and merits further discussion.

Conclusion

As seen through the lens of the Al-Harithi case study, the CIA's targeted killing program can be adequately examined through the ethical framework of Just War Theory. Each requirement of the *jus in bello* structure (necessity, proportionality, discrimination, respect and recognition of the noncombatant, and legality) has been used to evaluate the conduct of the CIA and consider its ethical legitimacy. Although ethical shortcomings have been identified with the program, specifically in the field of proportionality, it appears that each category can be considered in compliance with *jus in bello* and the tenets of Just War Theory. This compliance, and recommendations for future researchers, will be discussed in greater depth in the next chapter.

CHAPTER 5

CONCLUSION

A Contentious Question

Any issue that involves philosophical questions is difficult to answer and requires a great depth of understanding of both the philosophy surrounding the issue and the issue itself. Targeted killing and its place in Just War Theory can be viewed as a prime example of how muddy and difficult a question of ethics and morality can be. All issues of legality aside, for those issues alone represent a massive amount of writing and debate, the targeted killing program has sparked a huge amount of fevered argument both in favor of the program and against. Each side represents an impressive array of soldiers and statesmen, philosophers and laymen alike. No matter how many arguments might exist, however, the program continues to prosecute targets and violently eliminate individuals deemed by the USG to be a threat worthy of elimination.

Conclusion

The question that this paper sought to answer is whether the CIA's existing targeted killing program is ethically legitimate in light of the framework of the historically credible Just War Theory. The tenets of Just War Theory were discussed, such as *jus ad bellum* and *jus in bello*, as well as what constitutes a covert operation. After discussing the GWOT in terms of *jus ad bellum* and identifying the GWOT as a just war, this paper went on to make important distinctions between targeted killing and assassination while providing background on the CIA's targeted killing program. Next, this thesis identified a qualitative research methodology that would make use of the 2002

Al-Harithi Predator strike case study upon which to examine the five requirements of *jus in bello*. This examination constituted chapter 4 of this research with each requirement (necessity, proportionality, discrimination, recognition and respect of the noncombatant, and legality) being examined in turn.

As each factor of *jus in bello* was examined separately, the preponderance of the literature and research supported the application of Just War Theory to the targeted killing program and provided legitimization to the use of this option in the GWOT. Although one might have a “gut feeling” about the morality of killing an individual in the manner that the CIA does in its targeted killing program, this research supports the morality of it and supports the applicability of Just War Theory as a tool for ethical deliberation.

Recommendation

It is the recommendation of this thesis that ethical debate and examination of any government sponsored program, especially one that involves life and death, continue. It is the responsibility of the government to not only do what is right but to do what is considered right by the population that the government leads. The people of the US value not only the morality of their actions but also the self-view of how ethical they are as a nation.

It would also be encouraging for the CIA to allow the people of the US a small glimpse into the mechanisms and requirements that go on before a targeted killing mission is conducted. Although there may not be a philosopher present at the time of mission execution, there are a slew of highly professional individuals concerned with doing the right thing at the right time in service to their country. This level of dedication

and precise targeting gives one a sense of ease when considering that these men and women make decisions which will result in a loss of life at the hands of the USG.

It is clear that this program is a well-entrenched option used by the USG in the current GWOT. According to the Conflict Monitoring Center, the CIA's targeted killing program, as carried out by drones, was constantly employed in 2010.

The CIA carried out 132 drone attacks in the year 2010, exceeding the combined number of such attacks made in six years (from 2004 to 2009), i.e., 96. A total of 938 people were killed in 2010. The deadliest month was September in which 147 people were killed in 23 drone attacks. 17th December was the deadliest day of the year when 54 people were killed in Khyber Agency. (Conflict Monitoring Center 2011, 3)

If these numbers are indicative of the future of this program then it is clear that employment of the CIA's drones will most assuredly continue. It is incumbent upon statesman and philosophers alike though to continue their own campaigns, both in favor and against the program, in order to ensure that evaluation is also a constant part of this process. Although some may debate how ethical this program is, this paper shows that informed debate on the topic can be achieved through the use of Just War Theory.

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