Intelligence about Noncombatants: The Ethics of Intelligence and the Just War Principle of Noncombatant Immunity

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This paper has two reciprocal themes: the relevance of intelligence collection and analysis for the Just War principle of noncombatant immunity, and the relevance of the principle for intelligence. As an academic philosopher who specializes in Just War Theory, my acquaintance with national security intelligence stems wholly from open sources. In pursuing the latter theme, I focus on publicly released documents—for instance, Fixing Intel: A Blueprint for Making Intelligence Relevant in Afghanistan. Population-centric intelligence is emphasized in the new U.S. counterinsurgency field manual, Counterinsurgency (COIN FM). And a main purpose of the law of armed conflict (i.e., the law of war or international humanitarian law) is to protect noncombatants. Uniting these two concerns, I consider especially the subject of population-centric intelligence to protect noncombatants. Ideals matter, and it matters whether the ideal of noncombatant immunity is incorporated in U.S. intelligence policy. (This paper was completed on 3 June 2010.)

Just War Theory

To begin with, I want to make some brief remarks about Just War Theory. Traditional Just War principles should be generalized, so that they are applicable to military actions of all sorts—for example, armed humanitarian interventions and counterinsurgency operations. Correlatively, they should be generalized, so that they are applicable to responsible agents of all sorts—for instance, agents responsible for armed humanitarian interventions and agents responsible for counterinsurgency operations. For the sake of illustration, I consider current U.S. military operations in Afghanistan and Pakistan.
Customarily, Just War principles governing the resort to war (i.e., the *jus ad bellum* principles) are distinguished from Just War principles governing the conduct of military operations (i.e., the *jus in bello* principles). For example, the just cause principle is a *jus ad bellum* principle, and the noncombatant immunity principle is a *jus in bello* principle.

In his Nobel Peace Prize acceptance speech, President Barack Obama endorsed Just War Theory and stated that new forms of armed conflict “will require us to think in new ways about the notions of just war and the imperatives of a just peace.” In mentioning the history of Just War Theory, he acknowledged the noncombatant immunity principle:

> And over time, as codes of law sought to control violence within groups, so did philosophers and clerics and statesmen seek to regulate the destructive power of war. The concept of a “just war” emerged, suggesting that war is justified only when certain conditions were met: if it is waged as a last resort or in self-defense; if the force used is proportional; and if, whenever possible, civilians are spared from violence.

Indeed, by including the noncombatant immunity principle among the Just War principles, the goal of Just War Theory is to spare noncombatants from violence, whenever possible. More exactly, the goal is to spare noncombatants (1) from intentional violence; (2) from foreseen but unintentional violence that is disproportionate; and (3) even, as much as possible, from proportionate violence. I discuss these three elements of the principle in a later section.

In the U.S. Catholic Bishops’ Pastoral Letter on War and Peace, there is a key point about the Just War tradition: “Just-war teaching has evolved, however, as an effort to prevent war.” Additionally, Just War teaching has evolved as an effort to prevent unjust actions during the conduct of military operations. Of course, the noncombatant immunity principle and the other *jus in bello* principles may be used retrospectively to make moral judgments about past military operations. However, it is most important that they be used prospectively to make moral judgments about future military operations or military operations that are presently occurring. The purpose is to prevent injustice.

For Just War principles are deontological principles, and so they should function primarily as agent-centered moral constraints on military actions. Their fundamental purpose should be both to morally constrain agents from resorting to war unjustly and to morally
constrain agents from conducting military operations unjustly. In particular, the *jus in bello* principles should morally constrain those agents who are responsible for planning or leading military operations from requiring or allowing their combatants to perform unjust military actions.

But what is meant by “morally constrain”? This phrase can be elucidated in terms of a conception of moral presumption and burden of proof. When responsible agents deliberate about whether to use military force, they should make the moral presumption that they must not. To override this moral presumption, they have the burden of proving that apposite Just War principles are satisfied. To fulfill this burden of proof, there has to be sufficient information. To apply Just War principles to particular cases correctly, pertinent epistemic questions have to be answered adequately—in particular, questions involving the collection and analysis of information.

**Intelligence and Noncombatant Immunity**

In light of these introductory remarks about Just War Theory, let me introduce the theme of the relevance of intelligence for the noncombatant immunity principle. Because of the secretiveness of armed conflicts and preparations for armed conflicts, sometimes pertinent epistemic questions have to be answered in the real world partly by means of intelligence collection and analysis. For instance, if the just cause principle is to be applied to a looming crisis correctly, it is not enough for leaders of a state to assert that there is a just cause for war. To establish that truly there is a just cause for war, there is a need for sufficient information, information that has to be properly collected and analyzed, sometimes partly by means of the work of intelligence personnel. Because of this epistemic requirement of sufficient information, it should be recognized that sometimes intelligence collection and analysis can prove crucial to the process of determining whether Just War principles are satisfied.

In particular, agents responsible for the conduct of military operations—for instance, commanders of counterinsurgency operations—have the burden of proving that the *jus in bello* principles are satisfied. For example, they have the burden of proving that the principle of noncombatant immunity is satisfied. To fulfill this burden of proof, there is a need for sufficient information. Because of the fog of war, a fog that shrouds battle zones and target sites, it is essential to realize that sometimes intelligence collection and analysis can prove
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crucial to the process of determining whether the noncombatant immunity principle is satisfied.

Having introduced the theme of the relevance of intelligence for the noncombatant immunity principle, let me now introduce the reciprocal theme—namely, the relevance of the principle for intelligence.

In his Nobel Peace Prize acceptance speech, President Obama recognized the following problem: "More and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government." There is a related problem that he did not express explicitly in this speech, although the problem is implicit there, because of his endorsement of Just War Theory: more and more, we all confront difficult questions about how to prevent the slaughter of civilians by our own military operations. Roughly speaking, a main aim of my paper is to address the following difficult moral question: Are we morally obligated by the noncombatant immunity principle to strive to prevent our own slaughter of noncombatants by means of intelligence about them?

According to the law of armed conflict, we are legally obligated to strive to prevent our own slaughter of noncombatants by means of intelligence about them. Additional Protocol I (1977) to the Geneva Conventions (1949) includes the legal obligation that, in the conduct of a military operation, responsible agents must "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects." Let me add that, under some (if not all) circumstances, the feasible means of verification include feasible means of intelligence collection and analysis. (Although not a signatory to Additional Protocol I, the United States accepts much of it as part of customary international law.)

In considering Additional Protocol I, David Kretzmer maintained that

the [legal] duty of commanders to take precautions before attack requires them to acquire adequate intelligence information on potential targets that will allow them to assess both whether they are indeed military objects and whether collateral damage to civilians or civilian objects is likely.

For those who accept the Just War principle of noncombatant immunity, this is not only a legal duty but also a moral obligation. Moreover, since this moral obligation holds of commanders of military
operations, it also holds of subordinates in the chain of command. In particular, it is morally obligatory for subordinate intelligence personnel to strive to acquire adequate information that will allow their commanders to assess both whether potential targets are indeed military objects and whether collateral damage to civilians or civilian objects is likely.

In other words, when we conduct a military operation, our intelligence personnel are morally obligated by the noncombatant immunity principle to strive to prevent our own slaughter of noncombatants by means of intelligence about them.

A Noncombatant Immunity Principle

In this section, I discuss the relevance of intelligence collection and analysis for the Just War principle of noncombatant immunity. In writings about Just War Theory, there is a labyrinth of argumentation about the idea of noncombatant immunity. Different Just War theorists understand or formulate noncombatant immunity principles differently, and they answer differently such questions as the following: How are noncombatants distinguished from combatants? Does the term noncombatant have a different meaning than the term civilian? What is the difference between intentionally harming noncombatants and knowingly but not intentionally harming them? For the sake of brevity, I have to set aside these and other questions about the idea of noncombatant immunity. In what follows, it is assumed that they can be answered adequately. For simplicity, I interpret the term civilian in various quotations as meaning "noncombatant." For the sake of brevity, I draw upon Michael Walzer's understanding of the principle in his magnum opus Just and Unjust Wars.

The version of the noncombatant immunity principle that I am presupposing here can be understood as having three elements. First, it morally prohibits combatants from intentionally harming noncombatants. Accordingly, one of its three elements is:

The intentionality element. In the conduct of a military operation, combatants must not intentionally harm noncombatants.

Moreover, the noncombatant immunity principle is commonly understood as morally permitting combatants to cause foreseen but unintended harms to noncombatants, but only if those harms are not disproportionate. This qualification that harms to noncombatants
must not be disproportionate is integral to the principle. Accordingly, the second of its three elements is:

*The proportionality element.* In the conduct of a military operation, the foreseen but unintended harms to noncombatants must be out-weighed by the prospective benefits of the military operation.

Usually, traditional versions of the noncombatant immunity principle have only these two elements.

A distinctive feature of Walzer's version of the noncombatant immunity principle is his inclusion of a qualification about risk acceptance: "If saving civilian lives means risking soldier's lives, the risk must be accepted." Accordingly, the last of the three elements of the version of the noncombatant immunity principle that I am presupposing is:

*The risk acceptance element.* In the conduct of a military operation, combatants must accept some risk, in order to minimize (as much as possible) foreseen but unintended harms to noncombatants.

In later sections, I discuss the question of whether these three elements are embodied sufficiently in the law of armed conflict. I suggest that, under some circumstances, the noncombatant immunity principle might not be satisfied sufficiently merely by formal compliance with Additional Protocol I to the Geneva Conventions.

Agents responsible for the conduct of military operations have the burden of proving that this noncombatant immunity principle is satisfied. Indeed, the principle should be used retrospectively to make moral judgments about past military operations. More importantly, it should be used prospectively to make moral judgments about future military operations, or military operations that are presently occurring, for its most essential purpose should be to morally constrain combatants from unjustly harming noncombatants.

More exactly, agents responsible for the conduct of military operations have the burden of proving that all three of the elements of the noncombatant immunity principle are satisfied. To fulfill this burden of proof, there has to be sufficient information. To apply the noncombatant immunity principle to particular cases correctly, pertinent epistemic questions have to be answered adequately—in particular, questions involving the collection and analysis of information.

Therefore, correlative to the three elements of the noncombatant immunity principle, there are three epistemic questions. First, correlative to the intentionality element, there is the following epistemic question: When responsible agents plan a future military operation
or reexamine an ongoing military operation, are they warranted in expecting that their combatants will not intentionally harm noncombatants? Second, correlative to the proportionality element, there is this epistemic question: When responsible agents plan a future military operation or reexamine an ongoing military operation, are they warranted in expecting that the benefits of achieving their military objective will outweigh foreseen but unintended harms to noncombatants? Third, correlative to the risk acceptance element, there is the following epistemic question: When responsible agents plan a future military operation or reexamine an ongoing military operation, are they warranted in expecting that the risk accepted by their combatants would (as much as possible) minimize foreseen but unintended harms to noncombatants? To fulfill the burden of proving that the noncombatant immunity principle is satisfied, these three epistemic questions have to be answered adequately.

Under some circumstances, in order to answer these epistemic questions adequately during the fog of the conduct of a military operation, there is a need for intelligence collection and analysis. Under some circumstances, intelligence personnel can help to answer such questions as the following: Are there noncombatants in battle zones or at target sites? What foreseeable but unintended harms to noncombatants are likely? Would such harms be disproportionate? How might they be minimized?

**Ethics and Intelligence in the COIN FM**

In the preceding section, I discussed the relevance of intelligence for the noncombatant immunity principle. In the remainder of this paper, I discuss the relevance of the principle for intelligence. In pursuing the latter theme, I focus on publicly released documents, starting with the new U.S. counterinsurgency field manual (COIN FM).

In the COIN FM, the three elements of the noncombatant immunity principle are stated explicitly. The intentionality element is stated bluntly and emphatically: "It is wrong to harm innocents, regardless of their citizenship."

The proportionality element is clearly present in the following sentence:

As long as their use of force is proportional to the gain to be achieved and discriminates between combatants and noncombatants, Soldiers and Marines may take actions where they knowingly risk, but do not intend, harm to noncombatants.
Note that these two sentences from the COIN FM can be read as expressing a traditional version of the noncombatant immunity principle.

Additionally, the risk acceptance element is expressly stated: "Combat, including counterinsurgency and other forms of unconventional warfare, often obligates Soldiers and Marines to accept some risk to minimize harm to noncombatants."21

These quotations about noncombatant immunity are from chapter 7 of the COIN FM, "Leadership and Ethics for Counterinsurgency." There is a separate chapter about intelligence—namely, chapter 3, "Intelligence in Counterinsurgency." In the latter chapter, two main themes are introduced pithily, as follows: "Counterinsurgency (COIN) is an intelligence-driven endeavor,"22 and "Intelligence in COIN is about people."23 In the lengthy section about intelligence preparation of the battlefield (IPB), there are discussions of many topics about people—for example, their social structure, values, attitudes and perceptions, and belief systems. The topic of the relation between insurgents and the civilian population is stressed, especially the issue of popular support. In a subsequent section about intelligence, surveillance, and reconnaissance (ISR) operations, one of the important factors listed is "a focus on the local population."24

But this chapter about intelligence does not address explicitly the topic of civilian casualties caused by COIN operations. In the subsection "Physical Security," there is the following requirement: When the armed forces of the host nation (HN) "threaten the security of civilians," commanders of COIN operations should determine "whether the population is safe from harm."25 However, what is not stated in the chapter is the possibility that COIN operations themselves might threaten the security of civilians. Absent from the chapter is a requirement that commanders of COIN operations should determine, by means of intelligence collection and analysis, whether the population is safe from harm caused by the very COIN operations that they command.26

However, something like this requirement does occur elsewhere in the COIN FM. In chapter 5—"Executing Counterinsurgency Operations"—there is the section "Targeting." Two passages are especially relevant. Among the types of areas where targets can be engaged are "populated areas where insurgents commonly operate."27 Hence intelligence personnel are required to determine "expected effects of engaging the targets (which will guide actions to mitigate negative effects)."28 Although not expressly stated, these negative
effects obviously include civilian casualties. This implicit intelligence requirement to mitigate negative effects to civilians would be more effective if it were explained more fully.

In appendix E—"Airpower in Counterinsurgency"—there is a fuller explanation of a specific requirement to mitigate the negative effects of air power: "Bombing, even with the most precise weapons, can cause unintended civilian casualties."29 But "counterinsurgents must take care to minimize civilian casualties."30 And such "adverse effects" can be mitigated, "[g]iven timely, accurate intelligence."31 Some prudential reasons for not using air strikes indiscriminately are that they can "erode popular support and fuel insurgent propaganda."32 But moral reasons are not provided.

Let me summarize my remarks about the COIN FM. The chapter on leadership and ethics expresses the three elements of the noncombatant immunity principle. However, the moral content of this chapter is not integrated sufficiently with the empirical and practical content of the other chapters (and the appendices). Specifically, the chapter on intelligence needs to include a requirement that intelligence personnel should strive to collect and analyze sufficient information for determining whether intended targets are genuinely military targets and whether disproportionate harms to civilians are likely. Furthermore, it ought to be explained that this requirement is not only prudential and legal but also moral.

Counterinsurgency Operations in Afghanistan

For the sake of illustration, I consider current U.S. and NATO counterinsurgency operations in Afghanistan. With the aim of limiting noncombatant casualties, General Stanley McChrystal issued a Tactical Directive to U.S. and NATO forces in Afghanistan.33 Apparently, this directive is informed by a concept of noncombatant immunity.34

First, it might be read as involving the intentionality element: "I expect leaders at all levels to scrutinize and limit the use of force like close air support (CAS) against residential compounds and other locations likely to produce civilian casualties in accordance with this guidance."35

Second, it involves, or appears to involve, the proportionality element: "Commanders must weigh the gain of using CAS against the cost of civilian casualties, which in the long run make mission success more difficult and turn the Afghan people against us."36
Third, it involves, or appears to involve, the risk acceptance element: "I recognize that the carefully controlled and disciplined employment of force entails risks to our troops—and we must work to mitigate that risk wherever possible."³⁷

A crucial purpose for limiting the use of force in Afghanistan in order to minimize civilian casualties is stated in the Tactical Directive as follows: "We must avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people."³⁸ Therefore, rather than moral reasoning, it might be hypothesized that leaders at all levels are enjoined by the Tactical Directive to engage primarily in prudential reasoning. However, although declaring that this crucial purpose is "an overarching operational issue," the Tactical Directive also admits that it is "a legal and a moral issue."³⁹

Let me suggest that, using statements such as the ones that I have quoted from the chapter on leadership and ethics in the COIN FM, moral issues about harming noncombatants should be made more explicit in the Tactical Directive. Leaders of current U.S. and NATO counterinsurgency operations in Afghanistan at all levels ought to embrace the three elements of the noncombatant immunity principle.

Having discussed this Tactical Directive, I want to add some comments about a related document: Fixing Intel: A Blueprint for Making Intelligence Relevant in Afghanistan. Although released by the Center for a New American Security, this document's "contents should be considered as a directive by the senior author," Major General Michael T. Flynn, the chief intelligence officer in Afghanistan.⁴⁰ In brief, Fixing Intel is a tactical directive to intelligence personnel.

In accordance with the chapter about intelligence in the COIN FM, this intelligence directive is about people. Indeed, it recognizes the importance of enemy-centric intelligence—for instance, to locate Taliban leaders and IEDs (improvised explosive devices).⁴¹ But it stresses the greater importance of population-centric intelligence—that is, intelligence about "the population, the economy, the government, and other aspects of the dynamic environment we are trying to shape, secure, and successfully leave behind."⁴² However, similar to the intelligence chapter in the COIN FM, the intelligence directive does not address explicitly the subject of intelligence about civilian casualties. (It contains only one reference to the issue of collateral damage: "the accidental killing of civilians.")⁴³ Accordingly, as I recommended about the COIN FM intelligence chapter, this intelligence
directive needs to include a requirement that intelligence personnel should strive to collect and analyze sufficient intelligence for determining whether intended targets are genuinely military targets and whether disproportionate harms to civilians are likely.

In other words, the intelligence directive needs to say roughly this: When we conduct a military operation, our intelligence personnel are morally obligated by the noncombatant immunity principle to strive to prevent our own slaughter of noncombatants by means of intelligence about them.

**Noncombatant Immunity and Intelligence Policy**

In review, my paper has two reciprocal themes: the relevance of intelligence for the noncombatant immunity principle and the relevance of the principle for intelligence. Since I am acquainted with intelligence only through open sources, I have focused on publicly released documents: President Obama’s Nobel Peace Prize acceptance speech, the COIN FM, General McChrystal’s Tactical Directive, and General Flynn’s intelligence directive.

The chapter on leadership and ethics in the COIN FM expresses the three elements of the noncombatant immunity principle. A main recommendation of my paper is that the chapter on intelligence in the COIN FM and General Flynn’s intelligence directive—and also other U.S. documents about U.S. intelligence policy—should express the moral requirement that intelligence personnel must strive to satisfy the three elements of the noncombatant immunity principle. But why should it matter whether such a moral requirement is expressed in words, if in fact it is observed in practice?

Ideals matter, and it matters whether ideals are conveyed by words. For a luminous example, the words of General Assembly Resolution 217A (III) (10 December 1948), the *Universal Declaration of Human Rights*, have mattered enormously. In the newly released *National Security Strategy* (2010), there is the following declaration: “America’s commitment to democracy, human rights, and the rule of law are essential sources of our strength and influence in the world.” My recommendation is that America ought to convey a commitment to such ideals by including words about the noncombatant immunity principle in statements of intelligence policy.

Moreover, by endorsing the noncombatant immunity principle in intelligence policy documents, the United States would encourage compliance with it by a wide range of different sorts of intelligence
personnel. General McChrystal's Tactical Directive featured U.S. and NATO air strikes. But civilian casualties are caused by other sorts of actors, including "American and NATO troops firing from passing convoys and military checkpoints," U.S. Special Operations forces, CIA drone strikes in Pakistan, military actions by private military contractors, and military actions by the armed forces of host nations (e.g., the Afghan National Security Forces).

For instance, the Pakistan "military has inflicted heavy casualties on civilians in past years, but recently has been more careful to avoid them." But a recent Pakistan air strike in a region of Pakistan near the Afghan border "killed as many as 75 civilians." To account for why "the planes missed their target by at least 600 yards," an anonymous Pakistan government official admitted: "It seems likely the result of a faulty intelligence." By expressing in U.S. intelligence documents the moral requirement that U.S. intelligence personnel must strive to satisfy the three elements of the noncombatant immunity principle, the United States would encourage compliance by Pakistan.

Moral requirements are universalizable. When any responsible agent conducts a military operation, that agent's intelligence personnel are morally obligated by the noncombatant immunity principle to strive to prevent the slaughter of noncombatants by means of intelligence about them.

The Law of Armed Conflict

Of course, commitment to the law of armed conflict (LOAC) has been clearly and forcefully expressed in some U.S. documents about U.S. intelligence policy. For instance, in a publication prepared for the U.S. Joint Chiefs of Staff—Joint Tactics, Techniques, and Procedures for Intelligence Support to Targeting (henceforth JP 2-01.1)—there is such a declaration: "The Armed Forces of the United States will comply with the LOAC in the conduct of military operations during all armed conflicts." Note also that, in his Nobel Peace Prize acceptance speech, President Obama "reaffirmed America’s commitment to abide by the Geneva Conventions." Among the "four general principles" of the LOAC stated in JP 2-01.1, the legal principles about "discrimination" and "proportionality" embody respectively the intentionality and proportionality elements of the noncombatant immunity principle. (But I do not find the risk acceptance element in JP 2-01.1.) Nevertheless, my view is that, under some circumstances, the noncombatant immunity principle cannot
be satisfied sufficiently merely by formal compliance with the law of armed conflict. Let me explain.

The quotations from JP 2-01.1 are in appendix F, "Law of Armed Conflict and Rules of Engagement Consideration in Targeting." The main text of JP 2-01.1 is almost entirely devoted to enemy-centric intelligence. In contrast to General Flynn's tactical directive, JP 2-01.1 does not stress the greater importance of population-centric intelligence. The new counterinsurgency doctrine in the COIN FM is, in the words of Sarah Sewall, "paradigm shattering." Antedating the COIN FM, JP 2-01.1 represents the shattered paradigm. During the process of validating targets, JP 2-01.1 requires that the following question be answered. "What is the relative potential for collateral damage or collateral effects to include casualties?" In answering this question, judge advocates provide legal advice about whether proposed attacks on targets would formally comply with the law of armed conflict.

There is a potential problem about this target validation process. In the intelligence chapter of the COIN FM, there is a key assertion about the perceptions of the population living in the host nation: "It is important to know how the population perceives the insurgents, the host nation, and U.S. forces." As I have already remarked, different Just War theorists understand or formulate noncombatant immunity principles differently. Similarly, U.S. judge advocates might interpret the ideas of discrimination and proportionality differently than the population perceives those ideas. In conducting a counterinsurgency operation, the U.S. goal is to win hearts and minds and not simply to defeat the enemy. Ideally, U.S. interpretations of the ideas of discrimination and proportionality should be as concordant as possible with the perceptions of those ideas by the population. Consequently, among the questions that intelligence personnel should strive to answer are the following: Does the population perceive U.S. forces as violating the law of armed conflict? How does the population perceive the idea of discrimination? In particular, how does the population perceive the distinction between combatants and noncombatants? How does the population perceive the idea of proportionality?

**Intelligence about Intentionality**

To illustrate the sorts of intelligence that might serve to answer such questions, I examine in this section and the next section a piece of
Relevant to the idea of proportionality, Perlez and Zubair Shah report, in the aforementioned article about U.S. drone strikes in Pakistan, that

two of the government supporters said they knew of civilians, including friends, who had been killed by being in the wrong place at the wrong time. But, they said, they are prepared to sacrifice the civilians if it means North Waziristan will be rid of the militants, in particular the Arabs. ⁶⁸

Evidently, these two government supporters perceive the idea of proportionality. How do militants perceive the idea of proportionality? How do Pakistanis whose relatives have been killed by U.S. drone strikes perceive the idea of proportionality? Another main point is that, in the conduct of a U.S. military operation, U.S. intelligence personnel should collect and analyze information about the affected population’s perceptions of the idea of proportionality.

Different Just War theorists understand the idea of proportionality differently. ⁶⁹ Similarly, U.S. judge advocates might interpret the idea of proportionality differently than the population perceives it. For the sake of brevity, I contrast two ways of understanding the element of proportionality in the noncombatant immunity principle, target value proportionality and war goal proportionality. According to the target value interpretation, the prospective benefits of a military operation are limited to tactical military gains—for instance, the value of destroying a military target. According to the war goal interpretation, the prospective benefits of a military operation are evaluated by relating such tactical military gains as the value of destroying a military target to the comprehensive goal of the military operation. (I assume here that the question of whether a means for achieving a goal is proportionate is distinguishable from the question of whether that goal is just.)

I read the above block quotation as implying that the two government supporters perceive the idea of proportionality as war goal proportionality. Their perceptions of the benefits of U.S. drone strikes are not limited to such tactical military gains as the number of militants killed. Instead, they evaluate the benefits in relation to their comprehensive goal of ridding North Waziristan “of the militants, in particular the Arabs.” The phrase “they are prepared to sacrifice the civilians” implies that they perceive that, under some circumstances, the prospective benefits of a U.S. drone strike could outweigh the foreseen but unintended harms to noncombatants.

By contrast, it might be hypothesized that, when U.S. judge advocates weigh foreseen but unintended harms to noncombatants
open source intelligence, an article in the *New York Times*, “Drones Batter Al Qaeda and Its Allies within Pakistan” (4 April 2010). In the tribal area of North Waziristan in Pakistan, the reporters Jane Perlez and Pir Zubair Shah interviewed both militants and government supporters. Relevant to the idea of discrimination, they report a comment by a militant: “Civilians are worried because there is hardly a house without a fighter.”\(^{61}\) Apparently, some of the Pakistani people perceive a distinction between a combatant inhabiting a house and the noncombatants inhabiting it. This distinction might be perceived even when the other inhabitants of a house are feeding and sheltering (and even sympathetic with) a combatant inhabiting it.

U.S. judge advocates might have a different interpretation of the idea of discrimination, for in JP 2-01.1 there is this assertion: “Even a traditionally civilian object such as a house can be a military target if it is occupied and used by military forces.”\(^{62}\) Laudably, this assertion is immediately qualified as follows. “In the absence of credible intelligence to the contrary, a "presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, schools).”\(^{63}\) This qualification echoes Article 52 (3) of Additional Protocol I to the Geneva Conventions, which contains the word *presumed* (but does not mention credible intelligence).\(^{64}\) Although not a signatory to Additional Protocol I, the United States apparently recognizes Article 52 (3) as part of customary international law.

Accordingly, noting these words *presumption* and *presumed*, there is a burden of proving by means of credible intelligence that a house is a legitimate target. But what are the standards of credibility? How much intelligence and which sorts of intelligence need to be collected and analyzed in order to rebut the presumption that a house is only a civilian dwelling? Such questions are not answered in JP 2-01.1. Conceivably, U.S. perceptions about how they should be answered are different from the perceptions of Pakistanis about how they should be answered. To win the hearts and minds of the Pakistani people, U.S. perceptions of the idea of discrimination should be as concordant as possible with Pakistani perceptions of that idea.

In Additional Protocol I to the Geneva Conventions, there is a related provision: “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”\(^{65}\) In other words, noting the word *considered*, it must be *presumed* that the person is a civilian. “Protocol I of 1977 expands protection of civilians
considerably,” comments Ingrid Detter de Lupis, “especially by a paramount presumption that anyone who is not proved to be a combatant has civilian status.” In the conduct of a military operation, responsible agents have the legal burden of proving that a person suspected of being a combatant actually is a combatant. Under some battlefield circumstances, intelligence personnel can help to satisfy this legal burden of proof. Similarly, the intentionality element of the noncombatant immunity morally requires that, in case of doubt whether persons are noncombatants, agents responsible for the conduct of a military operation must morally presume that they are.

In conclusion, the intentionality element morally prohibits combatants from intentionally harming noncombatants. Correlative to that element, there is an epistemic question: When responsible agents plan a future military operation or reexamine an ongoing military operation, are they warranted in expecting that their combatants will not intentionally harm noncombatants? Under some circumstances, intelligence personnel can help to answer this question. To answer the question appropriately, it is important to know how the affected population perceives the intentionality element. It is important to know how the population perceives the distinction between combatants and noncombatants. To win hearts and minds, U.S. perceptions of civilian status should be as concordant as possible with the affected population’s perceptions of civilian status. A main point is that, in the conduct of a U.S. military operation, U.S. intelligence personnel should collect and analyze information about the affected population’s perceptions of discrimination.

Intelligence about Proportionality

The proportionality element of the noncombatant immunity principle morally requires that, in the conduct of a military operation, the foreseen but unintended harms to noncombatants must be outweighed by the prospective benefits of the military operation. How, for instance, do the people of Afghanistan perceive the idea of proportionality? In another New York Times article, it is reported that “the persistence of deadly convoy and checkpoint shootings has led to growing resentment among Afghans fearful of Western troops and angry at what they see as the impunity with which the troops operate.” From such news reports, it might be conjectured that the Afghan people have flawed (or no) perceptions of the idea of proportionality. But such a conjecture might be mistaken.
against the prospective benefits of a military operation, they interpret the idea of proportionality as target value proportionality. Conceivably, in order to determine formal compliance with the LOAC principle of proportionality, they might even employ a quantitative methodology of cost/benefit analysis. Clearly, under this hypothesis, their perceptions of the idea of proportionality would be greatly discordant with the perceptions of it by the two Pakistanis.

Arguably, however, the United States interprets the idea of proportionality as war goal proportionality. What is the goal of U.S. military operations in Afghanistan and Pakistan? On 27 March 2009, President Obama announced “a comprehensive, new strategy for Afghanistan and Pakistan.”70 “As President,” he said, “my greatest responsibility is to protect the American people.”71 Moreover, “we have a clear and focused goal: to disrupt, dismantle and defeat al Qaeda in Pakistan and Afghanistan, and to prevent their return to either country in the future.”72 In terms of these two passages, my suggested answer is that the primary goal of these U.S. military operations is to combat Al-Qaeda in Pakistan and Afghanistan and to prevent their return to either country in the future in order to protect the American people.73 Briefly, the primary goal is to protect the American people.

Apparently, however, the goal of the two Pakistanis is to protect the people of Pakistan. Their goal is to rid North Waziristan of the militants in order to protect the Pakistani people there. Immediately after the above block quotation, there are two other sentences about proportionality: “On balance, the drones may have killed 100, 200, 500 civilians’ said one of the men. ‘If you look at the other guys, the Arabs and the kidnappings and the targeted killings, I would go for the drones.’”74 Apparently, what this man is balancing (or weighing) is foreseen but unintended harms to noncombatants against prospective benefits of U.S. drone strikes for the Pakistani people. Even if both the United States and the Pakistani people were to agree that “proportionality” means war goal proportionality, their respective perceptions of proportionality in particular cases could still be discordant because of disagreement about war goals.

Ideally, however, in order to win the hearts and minds of the Pakistani people, U.S. perceptions of the idea of proportionality should be as concordant as possible with Pakistani perceptions of it. Perhaps greater concordance is feasible. In a different speech, President Obama announced a secondary goal: to “reverse the Taliban’s momentum and deny it the ability to overthrow the government.”75 He
also warned that “the people and governments of both Afghanistan and Pakistan are endangered.” In short, a secondary goal for U.S. military operations is to combat the Taliban insurgency in order to protect the people of Afghanistan and Pakistan.

In conclusion, correlative to the proportionality element of the noncombatant immunity principle, there is an epistemic question: When responsible agents plan a future military operation or reexamine an ongoing military operation, are they warranted in expecting that the benefits of achieving their military objective will outweigh foreseen but unintended harms to noncombatants? Under some circumstances, intelligence personnel can help to answer this question. To answer the question appropriately, it is important to know how the affected population perceives the proportionality element. It is important to know how the population weighs (or balances) harms against benefits. The noncombatant immunity principle morally requires that, in the conduct of a U.S. military operation, U.S. intelligence personnel should collect and analyze information about the population’s perceptions of the idea of proportionality.

**Intelligence about Risk Acceptance**

Having examined the intentionality and proportionality elements of the noncombatant immunity principle, I examine in this section the risk acceptance element—namely, the moral requirement that, in the conduct of a military operation, combatants must accept some risk in order to minimize (as much as possible) foreseen but unintended harms to noncombatants. Correlative to the risk acceptance element, there is an epistemic question. When responsible agents plan a future military operation or reexamine an ongoing military operation, are they warranted in expecting that the risk accepted by their combatants would (as much as possible) minimize foreseen but unintended harms to noncombatants? A main point is that, in the conduct of a U.S. military operation, U.S. intelligence personnel should collect and analyze information about the affected population’s perceptions of risk acceptance.

Is the risk acceptance element embodied in the law of armed conflict? Even when the legal requirements of discrimination and proportionality are satisfied, Article 57 (2) of Additional Protocol I of the Geneva Conventions legally requires that “all feasible precautions” be taken, with the aim of “avoiding” or “minimizing” civilian deaths. Under some circumstances, intelligence personnel can
help to answer practical questions about such precautions. Similarly, the noncombatant immunity principle requires that, even when the intentionality and proportionality elements are satisfied, the risk acceptance element must also be satisfied. In light of this similarity, it might be surmised that the legal concept of feasible precaution embodies the moral element of risk acceptance. However, my view is that, under some circumstances, the risk acceptance element cannot be satisfied sufficiently merely by formal compliance with this legal requirement of feasible precaution.

For the sake of illustration, let us consider the subject of civilian deaths in Afghanistan resulting from shootings by U.S., NATO, and Afghan military forces from convoys and at checkpoints. During 2009, there were thirty-six such civilian deaths. These shootings are termed “escalation of force” or “force protection” incidents. In comparison, the total number of “recorded deaths” during 2009 for which those military forces were responsible is 596. Comparing the numbers 36 and 596, it might be contended that 36 is not a disproportionate number of civilian deaths from force protection incidents. Nevertheless, such incidents “have emerged as a particular flash point with the Afghan public and government.” Apparently, the population perceives them as wrongful.

In a 2009 UN report about the protection of civilians in the Afghan armed conflict, there is the following definition:

*Force Protection Incidents:* situations where civilians fail to heed *warnings* from military personnel when approaching or overtaking military convoys or failing to follow *instructions* at checkpoints. Force protection incidents can also occur when individuals are *perceived* as too close to military bases or installations and there is a failure to follow *warnings* from military personnel.

What U.S. military personnel perceive as warnings might be discordant with what Afghan civilians perceive as warnings. What U.S. military personnel perceive as instructions might be discordant with what Afghan civilians perceive as instructions. What U.S. military personnel perceive as too close might be discordant with what Afghan civilians perceive as too close. To circumvent undue escalations of force, U.S. intelligence personnel should collect and analyze information about the population’s perceptions of warning, instruction, and proximity.

Regard, for instance, a recent force protection incident involving a NATO military convoy in eastern Afghanistan: To compel an
oncoming vehicle to stop, an attempt was made to flag the vehicle to stop, lights were flashed, warning shots were fired, and shots were fired to disable the vehicle—but ultimately shots were fired into the vehicle, killing its four civilian passengers.\(^8^3\)

U.S. judge advocates might interpret the use of armed force in this force protection incident as formally complying with the legal requirement of feasible precaution. But what are the standards of feasibility? When are precautions to protect the civilian population not feasible? In the chapter on leadership and ethics in the COIN FM, there is a norm of force protection: “combatants are not required to take so much risk that they fail in their missions or forfeit their lives.”\(^8^4\) Based on such a force protection norm, U.S. judge advocates might construe Article 57 (2) of Additional Protocol I as implying that, in the conduct of a U.S. military operation, there is no legal requirement to take civilian protection precautions that seriously jeopardize mission success or the lives of U.S. combatants.

By contrast, the use of armed force in the force protection incident might fail to satisfy the element of risk acceptance. In the COIN FM, there also is a norm of risk acceptance, as I have already noted.\(^8^5\) This norm is illustrated strikingly in the COIN FM by the following case, entitled “Defusing a Confrontation”:

[On 3 April 2004, a] small unit of American soldiers was walking along a street in Na-jaf [en route to meeting with a religious leader] when hundreds of Iraqis poured out of the buildings on either side. Fists waving, throats taut, they pressed in on the Americans, who glanced at one another in terror. . . . The Iraqis were shrieking, frantic with rage. . . . [It appeared that a shot would] come from somewhere, the Americans [would] open fire, and the world [would] witness the My Lai massacre of the Iraq War. At that moment, an American officer stepped through the crowd holding his rifle high over his head with the barrel pointed to the ground. Against the backdrop of the seething crowd, it was a striking gesture. . . . “Take a knee,” the officer said. . . . The Soldiers looked at him as if he were crazy. Then, one after another, swaying in their bulky body armor and gear, they knelt before the boiling crowd and pointed their guns at the ground. The Iraqis fell silent, and their anger subsided. The officer ordered the men to withdraw [and continue on their patrol]. (Dan Baum, “Battle Lessons, What the Generals Don’t Know,” \textit{New Yorker}, 17 January 2005).\(^8^6\)

In light of this case, my suggestion is that there is need to rethink the COIN FM force protection norm.
The risk acceptance element morally requires that combatants must accept *some* risk. Noting the indefinite term *some*, it is reasonable to ask: How much risk must combatants accept? "It is best," Walzer answered, "to say simply that civilians have a right that 'due care' be taken." But how much care is due? Controversially, my answer is (in part) that, under some circumstances, combatants must take so much care that they risk their lives. In Walzer’s words, "If saving civilian lives means risking soldier’s lives, the risk must be accepted." Sometimes, in order to minimize (as much as possible) foreseen but unintended harms to noncombatants, combatants must accept some risk of failing in their mission or forfeiting their lives. Should there be general standards of risk acceptance? For lack of space, I cannot explore this difficult question here.

For another illustration, let me sketch hypothetically some planning for a U.S. military operation in Afghanistan. A credible intelligence report confirms that a high-level Taliban leader is hiding in a safe house nestled in the center of a village. The credible intelligence report also confirms that the noncombatants in the village have been coerced by threats of violence to allow the Taliban leader to hide in the safe house. In other words, they are unwilling civilian shields. In effect, then, the U.S. military operation would be both a counter-insurgency operation and an operation of civilian rescue. In such a rescue operation, U.S. combatants might accept some risk that some of them would be killed.

In the particular circumstances of a particular case, particular moral judgments have to be made about risk acceptance. Consequently, at critical moments of decision on the battlefield, it is sometimes practically necessary to rely on the considered judgments of local commanders, as the COIN FM case evidences. General Flynn’s intelligence directive emphasizes intelligence collection and analysis "at the grassroots level." At the grassroots level, intelligence personnel should strive to provide essential intelligence about risk acceptance. For example, sometimes U.S. perceptions of the morally requisite amount of risk might be discordant with the population’s perception of the morally requisite amount of risk. How does the population perceive risk acceptance? Does the population perceive the United States as taking all of the precautions that are feasible? Does the population perceive U.S. combatants as risking mission failure or life forfeiture for the sake of civilian protection? The non-combatant immunity principle morally obligates intelligence personnel to strive to answer such questions.
Conclusion

The COIN FM and General Flynn’s intelligence directive stress the importance of population-centric intelligence, and a main purpose of the law of armed conflict is to protect civilians. Combining these two concerns, I have focused in this paper on the subject of population-centric intelligence in order to protect civilians. For the sake of illustration, I have featured intelligence about the affected population’s perceptions. A core thesis is that, in the conduct of war, the noncombatant immunity principle morally obligates intelligence personnel to strive to acquire intelligence essential for civilian protection. Although I have mainly considered current U.S. military operations in Afghanistan and Pakistan, this moral obligation holds for all forms of armed conflict. Because ideals matter, and it matters whether ideals are conveyed by words, the moral obligation should be clearly and forcefully expressed in U.S. policy statements about intelligence.

Notes


5. An earlier draft of this paper was presented on 12 March 2010, at the Fifth International Conference on Ethics and National Security Intelligence at Georgetown University in Washington, DC. On 18 March 2011, a presentation based on this paper was made at the 2011 Annual Convention of the International Studies Association in Montreal. I wish to express my great indebtedness to members of the audiences for their very perceptive and instructive comments.


8. Ibid.


11. Obama, “Remarks by the President at the Acceptance of the Nobel Peace Prize.”


13. Concerning Additional Protocol I, consult Ian Henderson, The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I (Leiden, Netherlands: Martinus Nijhoff, 2009). Henderson argues that a military commander is legally “required to come to a reasonable belief about whether the object meets the [legal] criteria for being a military objective” (Ibid., 9, 245). Let me add that, under some circumstances, the reasonableness of this belief can stem partly from intelligence.


17. Ibid., 156.


20. Ibid., chap. 7, para. 23, emphasis added.


22. Ibid., chap. 3, para. 1.

23. Ibid., chap. 3, para. 2.

24. Ibid., chap. 3, para. 121.

25. Ibid., chap. 3, para. 67.

26. On the other hand, a U.S. publication about joint intelligence preparation of the operational environment (JIPOE) directs JIPOE analysts to “determine the extent to which the population is safe from harm,” not only from the host nation but also from U.S. (or multinational) forces. See U.S. Department of Defense, *Joint Intelligence Preparation of the Operational Environment*, Joint Publication 2-01.3, Joint Chiefs of Staff (16 June 2009), IV-7.


28. Ibid., chap. 5, para. 108.

29. Ibid., appendix E, para. 5.

30. Ibid.

31. Ibid., para. 6.

32. Ibid.


36. Ibid.

37. Ibid.

38. Ibid.

39. Ibid.


41. Ibid., 23.

42. Ibid., 10. By contrast, the intel that Flynn wants to fix is illustrated by the U.S. Department of Defense, *Joint Intelligence*, Joint Publication 2-0, Joint Chiefs of Staff (22 June 2007). This publication is almost entirely concerned with enemy-centric intelligence.


51. Ibid.
52. Ibid.
55. Obama, “Remarks by the President at the Acceptance of the Nobel Peace Prize.”
58. Joint Tactics, Techniques, and Procedures for Intelligence Support to Targeting, III-8. I have edited this quotation by removing a comma after the word effects.
60. Counterinsurgency, chap. 3, para. 77.
63. Ibid., emphasis added.
64. Protocol Additional to the Geneva Conventions of 12 August 1949, art. 52 (3).
65. Ibid., art. 50 (1), emphasis added.
68. Perlez and Zubair Shah, “Drones Batter Al Qaeda.”
71. Ibid.
72. Ibid.
73. I discuss this primary goal and also secondary goals in John W. Lango, “Is There a Just Cause for Current U.S. Military Operations in Afghanistan?,” International Journal of Applied Philosophy 24 (Spring 2010).
74. Perlez and Zubair Shah, “Drones Batter Al Qaeda.”
76. Ibid., para. 18.
78. Protocol Additional to the Geneva Conventions of 12 August 1949, art. 57 (2). For a discussion of this legal requirement, see Henderson, The Contemporary Law of Targeting, 157–96. Henderson claims that there is an obligation to obtain “knowledge of the presence of civilians or civilian objects” (Ibid., 172), but he does not consider the role of intelligence. The requirement of precautions in JP 2-01.1 appears to be weaker than the Article 57 requirement: see Joint Tactics, Techniques, and Procedures for
Intelligence Support to Targeting, appendix F, section 5 ("Precautions in Attack"), F-3–F-4.

80. Ibid., 16.
81. Oppel, "Tighter Rules."
84. Counterinsurgency, chap. 7, para. 23.
85. Ibid., chap. 7, para. 21.
86. Ibid., chap. 7, between para. 13 and para. 14. With one exception, I have exactly reproduced the original. The exception is that I have altered the date of the event, which the COIN FM incorrectly dates as "3 April 2005." What is printed in the COIN FM is a quotation from the cited New Yorker article. The deletions and the insertions in brackets were made by the authors of the COIN FM.
87. Walzer, Just and Unjust Wars, 156.
88. Ibid.
89. Flynn, Pottinger, and Batchelor, Fixing Intel, 17.

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