Vanderbilt Journal of Transnational Law

Volume 46
Issue 4 *October 2013*

Article 3

2013

Constraining Targeting in Noninternational Armed Conflicts

Peter Margulies

Constraining Targeting in Noninternational Armed Conflicts: Safe Conduct for Combatants Conducting Informal Dispute Resolution

*Peter Margulies**

TABLE OF CONTENTS

* Professor of Law, Roger Williams University School of Law; B.A., Colgate; J.D., Columbia. I thank Gary Corn, David Glazier, Chris Jenks, Mike Lewis, Mike Newton, and participants at the *Vanderbilt Journal of Transnational Law* Symposium on the responsibilities of non-state actors and the National Security Law Conference at South Texas College of Law for helpful conversations and comments on a previous draft.

I. INTRODUCTION

An American drone pilot thousands of miles away from Afghanistan sees a tempting target on his computer screen. Thanks to the Predator drone's video capabilities,[1] the pilot is treated to the spectacle of a known Taliban commander and over a dozen other armed men greeting a dozen tribesmen, who are also armed to the teeth. Everyone depicted on-screen has a gun. The pilot fires the Predator's missile. Shortly thereafter, he confirms the deaths of thirty Taliban fighters and associated forces.

While the facts above, particularly the presence of the known Taliban commander, tend to show that the strike was consistent with the laws of armed conflict (LOAC), this Article argues that international law should require more. Suppose, for example, that the Taliban commander and the tribesmen, while currently fighting the United States and President Hamid Karzai's regime installed in Afghanistan after the post–September 11 U.S. intervention, were conducting a *jirga*—a meeting with elders—to decide whether they should make peace with the Karzai regime. Or suppose that the commander was conducting a jirga with villagers to determine property rights. If the villagers left before the strike, the strike against the Taliban fighters would similarly be legal under LOAC. However, a strike would devalue the jirga, a time-honored means of dispute resolution[2] in a country that has seen its fill of war for more than three decades.

The scenarios just described are not purely hypothetical. Some evidence suggests that informal negotiators have been either targeted or become collateral damage in U.S. drone strikes.[3] This evidence

---

1. For a discussion of drones' technical capabilities, see Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT'L L.J. 293, 296–98 (2012). *Cf.* Michael W. Lewis & Emily Crawford, *Drones and Distinction: How IHL Encouraged the Use of Drones*, 44 GEO. J. INT'L L. 1127, 1133–34 (2013).

2. *See* Christina Jones-Pauly & Neamat Nojumi, *Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan*, 52 AM. J. COMP. L. 825, 836 (2004) ("The core of the unofficial or 'informal' legal system is what is known . . . as the local Jirga . . . .").

3. *See* Robert F. Worth, Mark Mazzetti & Scott Shane, *Hazards of Drone Strikes Face Rare Public Scrutiny*, N.Y. TIMES, Feb. 6, 2013, at A1 (discussing the death of a cleric who opposed Al Qaeda in an air strike that apparently targeted three Al Qaeda members with whom the cleric was meeting and the death of Adnan Qadhi, an Al Qaeda member who had recently acted as a mediator between the Yemeni government and other militants); David Zucchino, *Study Slams Drone Use in Pakistan*, L.A. TIMES, Sept. 25, 2012, at A3 (reporting on a strike in Afghanistan on March 17, 2011, that killed forty-two people attending a jirga to settle a dispute about a chromite mine; according to a report by programs at Stanford and NYU law schools, only four

might be unreliable. However, if it is accurate, even in part, that should be a concern even for those who support the broad outlines of the U.S. targeting strategy.[4] Responding to this concern, this Article argues that informal negotiators from an armed non-state group should receive an "implied safe conduct," not only shielding them from targeting but also imposing an affirmative duty on a state party to a noninternational armed conflict (NIAC) to ensure their safety.[5]

The expansion of implied safe conduct suggested here reflects what can be called a "stewardship model" for third-party states, such as the United States, that participate in NIACs in host countries, such as Afghanistan, Pakistan, Somalia, or Yemen. A stewardship model, which this author has also advanced in another recent piece dealing with the interaction of American and international law,[6] seeks to reconcile LOAC and international human rights law in order to promote the preservation of indigenous governance and the transition to civil order in the host state.[7] Preserving informal

---

known members of the Taliban attended; according to the United States, all of those killed were militants).

4. *See* Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm (speaking to the current legal challenges faced by the Obama Administration, including the legal issues surrounding targeting); *cf.* Peter Margulies, *The Fog of War Reform: Structure and Change in the Law of Armed Conflict After Sept. 11*, 95 MARQ. L. REV. 1417, 1471–77 (2012) (citing public remarks by former State Department Legal Adviser Harold Koh and others); Nicholas Rostow, *The Laws of War and the Killing of Suspected Terrorists: False Starts, Rabbit Holes, and Dead Ends*, 63 RUTGERS L. REV. 1215, 1222–28 (2011) (praising Koh's view that the 9/11 attacks triggered the United States' right of self-defense and targeting in foreign countries, while criticizing opponents of U.S. policy on targeted killing as imposing unworkable standards). *Compare* John C. Dehn & Kevin Jon Heller, *Debate: Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 189–91 (2011) (supporting the targeting of al-Aulaqi), *with id.* at 183,'196 (arguing that targeted killings are generally impermissible).

5. The concerns that drive this approach harmonize with recent work by Ganesh Sitaraman on counterinsurgency. *See generally* GANESH SITARAMAN, THE COUNTERINSURGENTS' CONSTITUTION: LAW IN THE AGE OF SMALL WARS (2013). This Article is more specific than Sitaraman's work on targeting, and also suggests a different approach, one that avoids across-the-board constraints on commanders' discretion.

6. *See generally* Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. (forthcoming 2014), *available at* http://ssrn.com/abstract=2215255 (presenting a new stewardship theory as it applies to the Obama Administration and immigration law).

7. The interaction of LOAC and human rights law has become a pressing issue in the wake of two recent decisions by the European Court of Human Rights. *See* Al-Jedda v. United Kingdom, 2011 Eur. Ct. H.R. 1092 (holding that, absent express derogation, the state violated human rights law by detaining an individual in Iraq in the course of its role as part of the UN-sponsored force); Al-Skeini v. United Kingdom, 2011 Eur. Ct. H.R. 1093 (holding that the state's control of territory in Iraq pursuant to a UN Security Council resolution imposed a duty to observe the European Convention on Human Rights, including provisions on the right to life and the investigation of

dispute-resolution processes is one component of stewardship. Discounting the need for this preservation may increase kill rates in the short term but will leave a host state unstable in the long term, undermining the rationale for the third-party state's intervention.

Stewardship duties are hardly unknown in LOAC. The law of occupation, which typically kicks in after the conclusion of an armed conflict, has been described as a framework of "temporary trusteeship."[8] The trusteeship of occupation must preserve the laws of the occupied state; this Article argues that informal dispute-resolution processes such as jirgas and *shuras*[9] are part of that law.

The stewardship approach builds on this analogy to occupation law. As *lex ferenda*, not *lex lata*, it emerges from a backdrop of respect for negotiation and cultural dispute-resolution processes. Negotiators have historically received protection under LOAC and international law.[10] Typically, that protection has taken one of two forms. Protection can entail an express, affirmative, and specific grant of safe conduct to particular individuals. Alternatively, it can entail a treaty-based grant that has arguably ripened into customary international law (CIL) for particular classes of individuals, vehicles, or vessels, such as International Committee of the Red Cross (ICRC) personnel, medical transports, and alien merchants.[11]

However, logic and policy support extending implied safe conducts to informal negotiators who distinguish themselves through a symbol that reflects their activities and thereby provides targeters with adequate guidance. First, the traditional approach is rooted in

---

incidents involving the use of lethal force against civilians); *cf.* James Farrant, *Is the Extra-Territorial Application of the Human Rights Act Really Justified?*, 9 INT'L CRIM. L. REV. 833 (2009) (discussing previous decisions in each case that considered the interaction of LOAC and human rights); Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT'L L. 69, 79–83 (2009) (discussing a House of Lords' decision in *Al-Jedda*, suggesting that human rights law may require the introduction of procedural safeguards for detention, even when such safeguards are not required under LOAC principles); Barbara Miltner, *Revisiting Extraterritoriality After Al-Skeini: The ECHR and Its Lessons*, 33 MICH. J. INT'L L. 693, 697–99 (2012) (discussing the Al-Jedda and Al-Skeini cases).

8. *See* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 585–86 (2006) (discussing the authority and responsibilities of an occupying power under a temporary trusteeship).

9. Shuras are councils that resemble jirgas but often operate on a broader scale. *See infra* notes 44–47 and accompanying text.

10. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (describing safe conduct and diplomatic immunity within the history of the Alien Tort Statute); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1666–67 (2013) (same); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 525 (2007) (discussing the congressional protection of safe conducts during the founding era following the enactment of the U.S. Constitution).

11. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 874–75 (2006) (discussing express and implied safe conducts).

the Westphalian regime of the nation-state.[12] It fails to do justice to the more complex, asymmetric warfare of the twenty-first century in which powerful and sophisticated states like the United States face off against non-state actors who often invoke traditional cultural norms to gain traction with the civilian population in weak states, such as Pakistan and Afghanistan.[13] Failing to extend safe conducts beyond consensual grants could prolong modern NIACs, posing tension with the rationale for LOAC.

The implied–safe conduct approach also gathers support from analogy to human rights concepts such as cultural property. Indigenous dispute-resolution processes lack the concrete nature of artifacts and other cultural property expressly protected by international law. However, they are at least as important to the communities they serve. Moreover, like the connections to ancestral land protected in cases such as *Moiwana Village v. Suriname*,[14] once ties to dispute-resolution processes are broken, restoring those ties is an arduous and sometimes futile endeavor.

Stewardship and the implied–safe conduct concept improve on the leading approaches for dealing with targeting issues. Many scholars accept what this Article will refer to as the "preemptive model," which views LOAC as *lex specialis*—a body of law with specific rules that "preempts the field," rendering other sources of law inoperative or inapplicable.[15] The preemptive model rejects constraints on targeting beyond distinction, proportionality, and precaution, unless customary or treaty law requires these safeguards, as it does for diplomats and medical transports. [16] The preemptive model does not preclude

---

12. A number of scholars have discussed the limits of the view that states are the sole sources of international law. *See* M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711 (2008) (distinguishing between the application of international humanitarian law to state actors and non-state actors); Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107 (2012); *cf.* Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977 (2011) (arguing that international law has often allowed space for non-state actors, albeit without systematic acknowledgment of this fact).

13. *See, e.g.*, U.S. ARMY, COUNTERINSURGENCY FIELD MANUAL § 1-1-39 (2006) [hereinafter COIN MANUAL], *available at* http://www.fas.org/irp/doddir/army/fm3-24.pdf (providing general background information on insurgencies, including different approaches to mobilization such as the cultural approach).

14. *See* Moiwana Village v. Suriname, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 43 (June 15, 2005) (explaining how the members of Moiwana village were unable to return to their ancestral lands after being displaced by the armed forces of Suriname).

15. *See* Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SECURTY J. 31, 53–54 (2011) (noting that *lex specialis* can prevail over *lex generalis* when in conflict).

16. *See, e.g.*, Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT'L L. 192, 202, 206 (1995) (noting that medical vessels are specially exempt from attack).

heightened safeguards but generally places them within the realm of prudential measures adopted at the option of the attacking state through rules of engagement (ROE).[17]

The "rival approach," which will be called the "protective conception," aims to more broadly constrain targeting. The protective school requires across-the-board constraints on targeting beyond the requirements of the *jus in bello* principles of distinction and proportionality.[18] For example, the protective approach requires a quantum of care in the avoidance of civilian casualties that goes beyond reasonableness, approaching strict liability.[19]

Both the preemptive and protective models have faults.[20] The preemptory model risks giving in to the myopia that occasionally afflicts commanders who, in the fog of war, can make decisions that

---

17. For an informed and insightful discussion of the tactical directive that governs members of the International Security Assistance Force (ISAF) in Afghanistan, see Chris Jenks, *Agency of Risk: The Competing Balance Between Protecting Military Forces and the Civilian Population During Counterinsurgency Operations in Afghanistan*, *in* COUNTERINSURGENCY LAW: NEW DIRECTIONS IN ASYMMETRIC WARFARE 108, 114–18 (William C. Banks ed., 2013).

18. The principles of distinction and proportionality are inscribed in treaty law and are also viewed as CIL. *See* Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, pt. IV, art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (stating the duty of conflicting parties to distinguish between civilian populations and combatants); *id.* art. 51(5)(b) (prohibiting attacks causing harm to civilians that are "excessive," given the "concrete and direct military advantage anticipated").

19. *See* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 154–55 (1977) (arguing that the principle of proportionality provides insufficient protection; instead, an attacker must "minimize [harm to civilians] . . . accepting costs to himself"); Avishai Margalit & Michael Walzer, *Israel: Civilians and Combatants*, N.Y. REV. BOOKS, May 14, 2009, *available at* http://www.nybooks.com/articles/archives/2009/may/14/israel-civilians-combatants/ (discussing protections afforded to civilians in the context of Israel); David Luban, *Risk Taking and Force Protection*, *in* READING WALZER (Itzhak Benbaji & Naomi Sussman eds., Routledge, forthcoming 2013), *available at* http://ssrn.com/abstract=1855263 (analyzing Walzer's argument in *Just and Unjust Wars* concerning minimizing harm to civilians); *cf.* Paul W. Kahn, *The Paradox of Riskless Warfare*, 22(3) PHIL. & PUB. POL'Y Q. 2, 4 (Summer 2002) ("Without the imposition of mutual risk, warfare is not war at all."). Sitaraman seconds this narrowing of proportionality's leeway for commanders. *See* SITARAMAN, *supra* note 5, at 49–50 (arguing that the evaluation of compliance with proportionality should consider the "backlash" generated by otherwise legal strikes). Stewardship rejects this general narrowing impulse as unworkable. *See* Peter Margulies, *Valor's Vices: Against a State Duty to Risk Forces in Armed Conflict*, *in* COUNTERINSURGENCY LAW, *supra* note 17, at 87, 90–94 (discussing the soundness of protective theorists' vision).

20. *Cf.* Christopher Greenwood, *Human Rights and Humanitarian Law – Conflict or Convergence?*, 43 CASE W. RES. J. INT'L L. 491, 500 (2010) (rejecting the "'ne'er the twain shall meet' theory" in which "[h]uman rights are for peacetime; humanitarian law applies in war"); Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1373–85 (2012) (noting the flaws of the "rigid domain" approach that pegs protections afforded prospective targets or detainees to the classification of the situation as either an armed conflict or a law enforcement).

prolong conflicts.[21] On the other hand, the protective model places unrealistic burdens on commanders to avoid collateral damage. Going beyond the reasonableness standard that has marked compliance with the principle of proportionality, the protective concept subjects commanders to hindsight bias.[22] The quest for perfection at the heart of the protective vision is incompatible with the exigencies of armed conflict. Insisting on such a rigid standard will have one of two ill effects: it will either impair commanders' war-fighting capabilities or yield wholesale disregard of LOAC norms. [23] The stewardship approach, including expanding implied safe conducts, is a third way, which incentivizes greater accuracy where the stakes are highest while rejecting across-the-board restrictions on targeting that place undue burdens on command discretion.

This Article proceeds in four Parts. Part II discusses informal dispute resolution and notes the importance of informal dispute resolution in certain societies where third-party counterinsurgencies are ongoing.[24] Part III provides evidence that targeting by the United States has had an adverse impact on informal dispute resolution, although it concedes that the exact nature and extent of that impact is unclear. Part IV outlines the stewardship model and the legal support for an implied–safe conduct theory. It then sketches the theory's operation. This Part also includes discussion of the consequences of the implied–safe conduct approach for two new types of war fighting: drone signature strikes and autonomous systems in which computers make certain decisions without *ex ante* human review. Part V discusses some objections, including the concern that the implied–safe conduct approach, like the protective model, unduly constrains commanders' decisions.

---

21. *See* Margulies, *The Fog of War Reform*, *supra* note 4, at 1445–56 (discussing the temporal judgment of commanders and how they may be biased toward short-term benefits).

22. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, *in* BEHAVIORAL LAW AND ECONOMICS 95, 95 (Cass R. Sunstein ed., 2000) (noting that maxims such as "hindsight . . . is '20/20'" indicate that "[l]earning how the story ends . . . [distorts] our perception of what could have been predicted"); Neal J. Roese, *Twisted Pair: Counterfactual Thinking and the Hindsight Bias*, *in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 258, 260–61 (Derek J. Koehler & Nigel Harvey eds., 2004) ("Hindsight bias is . . . the tendency to believe that an event was predictable before it occurred, even though for the perceiver it was not.").

23. *See* Margulies, *Valor's Vices*, *supra* note 19, at 96–97 (describing how commanders will be unsure how much extra risk to undertake in protecting civilians and may violate ethical norms and international humanitarian law).

24. *See generally* SITARAMAN, *supra* note 5 (describing the relationship between counterinsurgency and legal operations).

II. INFORMAL DISPUTE-RESOLUTION PROCESSES

Informal dispute-resolution procedures like the shura and jirga serve vital purposes in Afghanistan, Pakistan, and elsewhere in the region. They are an integral part of the culture.[25] Because of their unique role, these institutions can assist in transitions from societies that breed terrorist threats to societies that discourage such threats. Appreciating the role of such institutions in transitions also requires understanding their function.

The U.S. Army's Counterinsurgency Manual (the Manual) revealed an appreciation for the role played by culture and governance. The Manual directed commanders to consider the vital realm of culture, which it defined as a "system of shared beliefs, values, customs, behaviors . . . that members of a society use to cope with their world and with one another."[26] Culture, the Manual noted, is a kind of "operational code."[27] The Manual also took care to note the importance of "social capital," [28] manifested in "networks of reciprocity and exchange." [29] Moreover, the Manual reminded commanders of the importance of promoting "better governance," including operation of the local justice system. [30] In the clearest reference to alternative dispute resolution, the Manual opined that commanders should encourage "local council[s]."[31]

The people and processes entailed in local dispute resolution merit further inquiry. The jirga is a "group of impartial men in the community known for their wisdom and ability to make decisions."[32] Rather than resort to adversarial practices, such as cross-examination, that typify Western courts, the jirga aims for restorative justice. In this forum, the decision makers employ inquisitorial procedures, investigating a case through direct dealings with the parties—a model much closer to arbitration or mediation. [33]

---

25. *See* Jones-Pauly & Nojumi, *supra* note 2, at 836 (describing the jirga as the core of the unofficial legal system).

26. *See* COIN MANUAL, *supra* note 13, § 3-37.

27. *Id.* § 3-38.

28. *See id.* § 3-61 (noting that counterinsurgents may identify those with social capital and how they attract followers).

29. *Id.*

30. *See id.* § 5-44 (listing justice and public administration as activities related to good governance).

31. *See id.* at tbl.5-5 (describing creation and participation in a local council by community leaders as part of better governance).

32. *See* Kara Jensen, Note, *Obstacles to Accessing the State Justice System in Rural Afghanistan*, 18 IND. J. GLOBAL LEG. STUD. 929, 934 (2011); *cf.* Jones-Pauly & Nojumi, *supra* note 2, at 836 ("[M]embers of the local jirga need not have professional qualifications. They require instead a local reputation of respect, ability, and honesty . . . .").

33. *See* SITARAMAN, *supra* note 5, at 193, 203–04 (describing how jirgas settle disputes through arbitration and mediation rather than through adjudication).

Restorative justice aims to avoid creating "winners and losers."[34] For the many rural villages where the jirga has long played a role in governance, disputants must continue to live side by side. Given the salience of tribal and clan loyalties, rugged terrain, and the dangers of transportation in regions where bandits and kidnappers thrive, moving elsewhere is often impracticable.[35] Creating winners and losers would be dysfunctional, fomenting increased bitterness that would extend disputes instead of resolving them.[36]

Jirgas and other traditional dispute mechanisms have been a convenient fallback strategy when central government power proved wanting. In societies where the central government could assert comprehensive power, state law-enforcement authority could keep the peace despite grumbling among private parties. However, even before the Russian invasion of 1979, the Afghan central government had proven to be corrupt and ineffectual in extending its authority to rural areas.[37] Devastating backlogs paralyzed state courts.[38] The central government turned to tribunals consisting of village elders to ease the backlogs.[39] In this more informal setting, expeditious settlement of disputes was possible. This was an important selling point of the informal systems. Disputes needed to be settled quickly, making the slow pace of formal mechanisms inappropriate. Often, disputes involved issues fundamental to subsistence, including land or livestock.[40] No professional class, such as lawyers, existed in rural areas to manage disputes while the populace went about its business.[41] Without the speed of informal processes, life would become unsustainable.[42]

Importantly for the current status of jirgas in NIACs, warlords or local commanders may also assume roles in jirgas.[43] Such

---

34. *See id.* at 193 (highlighting that the goals of these councils are primarily peacemaking and reconciliation).

35. *See id.* at 204 (observing that both sides in rural Afghanistan must view a resolution as meeting their needs, since the "commitment to honor commands that a family take revenge for a violation, even if retribution involves a blood feud or could take generations to fulfill").

36. *Id.*

37. *See* Jones-Pauly & Nojumi, *supra* note 2, at 833 (describing the failures of the establishment of Primary Courts at the rural district level).

38. *Id.*

39. *Id.*

40. *See id.* at 838 (explaining how jirgas settle land disputes in a nontribal setting).

41. *See id.* at 833, 836 (highlighting the lack of qualified personnel for the Primary Courts in rural districts).

42. *See* SITARAMAN, *supra* note 5, at 204 (noting that the Soviet Invasion and decades of warfare eradicated many state government institutions, leaving many Afghans to rely on shuras or jirgas to settle "pressing land and water issues").

43. *See* Jones-Pauly & Nojumi, *supra* note 2, at 836 ("Depending on the scope of the dispute and its relevance to the well-being of the community, important leaders, including (in recent times) warlords or local commanders, participate in the *Jirga* . . . .").

individuals are a power base in the community, and including them bolsters a jirga's legitimacy. Excluding them would make the jirgas less effective, pushing the population back to the rituals of revenge and blood feud that cause needless suffering. Moreover, warlords and commanders with interests in the community will sometimes be parties to a dispute. Suppose a member of a warlord's militia steals livestock from a local farmer. The warlord's participation will be essential to resolution of the controversy. Because warlords and commanders are part of the community, they are necessarily a part of informal dispute resolution.

The village shura is a variant of the jirga with comparable historic roots.[44] Often shuras brought together elders, warlords, or commanders from a range of villages or tribes.[45] After Afghanistan's conflict with Russia, state institutions lost the limited power they had enjoyed prior to the invasion, while the influence of local warlords and Islamic clergy who had taken a lead role in fighting the Russians grew.[46] Afghans regarded the shuras as both more legitimate and more efficient, since the parties lived alongside the decision makers and since institutions like shuras were more accessible than geographically remote state processes.[47] In Afghanistan, the Taliban has exploited the weakness of state institutions, advancing their own informal tribunals as a more efficacious and fair option.[48]

This extensive pedigree and accessibility to the population make jirgas and shuras useful instruments of transitional justice.[49]

---

44. *See* Jarat Chopra & Tanja Hohe, *Participatory Intervention*, 10 GLOBAL GOVERNANCE 289, 293–94 (2004) (describing a shura as an "indigenous means of local decisionmaking . . . composed of elders, religious authorities, or other . . . well-respected community members . . . [with] good negotiation skills").

45. *Id.*; *see also* BARNETT R. RUBIN, AFGHANISTAN FROM THE COLD WAR THROUGH THE WAR ON TERROR 118 (2013) (discussing the "national commanders' shura" held in 1990 at the end of the period of Russian intervention in Afghanistan). Sometimes the terms shura and jirga have been mixed; for example, after the Taliban were deposed, the new government, with the support of the United States, convened a *loya jirga* or grand assembly to reach consensus on the country's future governance. *See id.* at 128 (discussing the proceedings of the loya jirga); *cf.* Carol J. Riphenburg, *Ethnicity and Civil Society in Contemporary Afghanistan*, 59(1) MIDDLE E. J. 31, 39 (2005) (discussing the 2002 "Emergency Loya Jirga").

46. *See* SITARAMAN, *supra* note 5, at 204 ("Due to decades of continuous war . . . state institutions grew weaker, even nonexistent . . . . At the same time, however, local military commanders displaced the power of landowners and tribal elders and the Islamic clergy (*ulema*) likewise grew in influence.").

47. *See id.* at 203 (noting that "[45] percent of rural Afghans prefer *shuras* or *jirgas*").

48. *See* Barnett R. Rubin, *Saving Afghanistan*, 86 FOREIGN AFF. 57, 60 (Jan.–Feb. 2007) ("[L]ocals are increasingly turning to Taliban-run courts, which are seen as more effective and fair than the corrupt official system.").

49. *Cf.* Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 INT'L SECURITY 85, 103–05 (Fall 2004) (discussing the perils and promises that come alongside transitional administrations). The precise dynamics of transitional justice are subject to continued debate. For example, transitional justice in Iraq has sparked controversy. *Compare* MICHAEL NEWTON &

Transitions rely on three crucial factors: institutional repertoire, inclusion, and redress.[50] An institutional repertoire frowns on rigid adherence to one mode of institution as heralding democracy. Rather, the repertoire must be flexible, building on indigenous and local traditions.[51] A rigid focus on alien institutions may be counterproductive, given the lag time involved in importing those institutions and standing them up in a functional way. Transitions must also be inclusive; if one faction feels that it lacks a stake in a successful transition, then it will have no incentive to cooperate in transition efforts. Reliance on jirgas and shuras can build on local, indigenous institutions and avoid those obstacles. Because jirgas and shuras have such an extensive pedigree, they are more trusted than foreign institutions.[52]

Such local institutions can be a positive force even when one side in the conflict seeks to co-opt them. In Afghanistan, Pakistan, and Syria, for example, violent non-state actors have used such alternative dispute mechanisms to consolidate their hold on power and brand themselves as providing good governance. It seems likely that judges from the Taliban, for example, view the decisions they make in a judicial role as also serving the Taliban's broader political ambitions. However, this mixed intent or self-interested agenda does not wholly compromise the virtues of such institutions. Gatherings where the people offer arguments can be liberating in ways that a particular authority cannot predict or control.[53] Procedures for

---

MICHAEL SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 220–27 (2008) (offering praise for Iraq's effort to hold its former dictator responsible for mass killings and other abuses), *with* Danielle Tarin, Note, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT'L L. 467, 491–98 (2005) (noting concerns about the impartiality of the tribunal and the "undue influence" of certain factions over the appointment of the tribunal's members). A full assessment of that debate is beyond the scope of this Article.

50. *See generally* Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is and Is Not*, *in* TRANSITIONS TO DEMOCRACY: COMPARATIVE PERSPECTIVES FROM SOUTHERN EUROPE, LATIN AMERICA AND EASTERN EUROPE 3, 8–13 (Geoffrey Pridham ed., 1995) (discussing "procedures" and "principles" that are important for a well-functioning democracy). I have discussed transitions in earlier work. *See* Peter Margulies, *Making "Regime Change" Multilateral: The War on Terror and Transitions to Democracy*, 32 U. DENV. J. INT'L L. & POL'Y 389, 419–20 (2004) (proposing a "multilateral approach" to implementing democratic transitions based on "institutional repertoire, inclusion, and redress"); *cf.* Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 3–7 (1999) (proposing that the "changed country conditions" analysis in asylum adjudications might benefit from using the key elements identified in transitions scholarship, i.e., "institutional repertoire, inclusion, and redress").

51. *See* SITARAMAN, *supra* note 5, at 14–15 (discussing the concept of "organic" transitions).

52. *See id.* at 193 ("The *shura* and *jirga* are seen as accessible, fair, and trusted, less corrupt than state courts, linked with local values [and] effective . . . .").

53. *See* Roberts & Sivakumaran, *supra* note 12, at 126–29 (arguing that procedures can have meaning even if their observance in a particular tribunal is not perfectly uniform).

arguing the merits, even in a more informal way, can ripen into democratic habits. Those habits can eventually result in rebellion against those who seek to bend the tribunals to private agendas.

The importance of traditional dispute resolution is heightened when the prime counterinsurgency player is a third-party state.[54] A third-party state assists another state—a "host" state—with a NIAC on the host-state's territory or uses force on the host-state's territory against a non-state actor that the host state is either unable or unwilling to control.[55] Occasions for mistrust multiply when third-party states become involved. In many situations, the third-party state will have cultural perspectives that are markedly different from those of the insurgents. In most NIACs involving terrorist groups, for example, third-party states have been Western, while non-state actors on the other side have been Middle Eastern or South Asian.[56] This lineup of opposing forces presents ample opportunities for cultural misunderstandings.

Foreign elites that seek to impose justice from outside often trigger suspicion. Those elites often have ideas that do not take into account the preferences of the people.[57] Indeed, foreign elites may be overly invested in distrusted factions, such as the Tajiks that supported the Karzai regime in Afghanistan and elicited resistance among the more populous Pashtuns. [58] Unfortunately, officials supervising third-party state interventions often fail to realize that transitions can occur most readily through the use of indigenous institutions and can flounder if indigenous institutions are ignored or undermined.

---

54. *See* SITARAMAN, *supra* note 5, at 18 (discussing the unique problems that confront a nondomestic counterinsurgent).

55. *See* Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 499–503 (2012) (exploring the "unwilling or unable" test based on the law of neutrality); *cf.* Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT'L L.J. 1, 25–36 (2011) (consulting neutrality law to define an "enemy" who can be targeted or detained); Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEX. INT'L L.J. 75, 97–103 (2011) (cautioning that neutrality law does not provide a useful guide for the detention of non-state actors in NIACs).

56. *Cf.* RUBIN, *supra* note 45, at 150 (highlighting the fact that "Afghanistan had been through twenty-three years of many-sided civil strife marked by overt and covert involvement of regional and global powers").

57. *See* Leonard Wantchekon, *The Paradox of "Warlord" Democracy: A Theoretical Investigation*, 98 AM. POL. SCI. REV. 17, 28–30 (Feb. 2004) (discussing the roles of "elites" in French-colonial Africa and Latin America).

58. *See* RUBIN, *supra* note 45, at 150 (discussing the role of ethnic Tajiks, Uzbeks, and Hazaras in the Northern Alliance, which the United States used after September 11 to topple the Taliban, whose support came from Kandahar and other areas in the Pashtun-dominated south).

III. FLAWS IN TARGETING: DISPUTE RESOLUTION AS A CASUALTY OF WAR

The importance of the jirga and shura, and of informal dispute resolution generally, has not always been accounted for by targeting decisions. In Iraq and Afghanistan, the counterinsurgency (COIN) approach developed by General David Petraeus and embodied in the Manual moved the U.S. military toward the position outlined in the previous section.[59] That move accounted for much of the success of the United States in Iraq from 2006 through 2011, after the poor decisions that had plagued earlier U.S. efforts.[60] Success in recent years in Afghanistan has been more elusive, but where it has occurred, much credit goes to the same COIN strategy. That said, the history of targeting in Afghanistan and Pakistan from September 11 to the present is checkered, with at least some incidents occurring after COIN's ascendancy that have struck a discordant note.

A major part of the problem in the immediate aftermath of September 11 was the U.S. decision to opt for a quick victory against the Taliban by supporting the Northern Alliance, a group of warlords who were not members of the Afghan Pashtun majority. Some of these commanders used U.S. support as a cover for drug trafficking, "land grabs[,] . . . political intimidation, and ethnic cleansing."[61] Perhaps because the United States perceived these commanders as the only militarily powerful rivals to the Taliban, U.S. officials during this period tolerated the commanders' assertion of dominance over areas from which they were supposed to withdraw after the arrival of international security forces.[62]

Some targeting decisions relied on faulty information from informants with private agendas. For example, the scholar Anand Gopal writes about a tribal elder, Hajji Burget Khan of Kandahar, who was killed during a U.S. raid in 2002.[63] Gopal attributes the raid, which also caused injuries to the elder's son that left him a paraplegic,

---

59. *See* Jenks, *supra* note 17, at 113–14 (discussing strategies contained in the Manual).

60. *See generally* FRED KAPLAN, THE INSURGENTS: DAVID PETRAEUS AND THE PLOT TO CHANGE THE AMERICAN WAY OF WAR (2013).

61. RUBIN, *supra* note 45, at 229. This cynical view does not reflect a broader anti-U.S. bias; Rubin served for years as an adviser to U.S. administrations of both parties. *See* Bruce Jones, *Foreword to* BARNETT R. RUBIN, AFGHANISTAN FROM THE COLD WAR THROUGH THE WAR ON TERROR, at ix–x (2013) (detailing Rubin's affiliations throughout his work on the subject).

62. *See* RUBIN, *supra* note 45, at 229 (noting how the United States "declined to press [militia allies]" to leave areas occupied by ISAF despite originally agreeing to such withdrawals).

63. Anand Gopal, *The Taliban in Kandahar*, *in* TALIBANISTAN: NEGOTIATING THE BORDERS BETWEEN TERROR, POLITICS, AND RELIGION 1, 26. (Peter Bergen & Katherine Tiedemann eds., 2013).

to Afghan allies of the United States who saw Khan as a "rival."[64] Khan's killing radicalized a substantial portion of his tribe, which viewed the United States as acting on behalf of Khan's foes in internecine squabbles.[65] Experts have described how the United States, acting on bad information, "actively helped" their warlord allies kill the warlords' adversaries.[66] Many of those targeted had already voiced their wish to seek temporary, provisional arrangements with the Karzai regime.[67] One former Taliban commander in this group was Hajji Pay Mohammad who was killed by local authorities after he had agreed to end his role in hostilities.[68] Targeting based on these tangled agendas was pervasive in some provinces in which commanders allied with the United States attacked respected elders with no connection to the Taliban.[69] Another former Taliban commander who refused to relinquish his vehicle to the commander supported by the United States was severely beaten by that commander's minions.[70]

Evidence of faulty targeting by both the United States and its allies on the ground derives not merely from lethal attacks but also from the pattern of arrests and detentions of suspected terrorists. In *Hamdi v. Rumsfeld*,[71] the Supreme Court noted the possibility of false positives in post–September 11 detention decisions.[72] While a substantial number of detainees were actively involved in terrorism,[73]

---

64. *See id.* at 27 (believing the most likely explanation to be that "the commanders with whom U.S. forces had allied had seen Khan as a rival"); *cf.* Anatol Lieven, *Afghanistan: The Way to Peace*, N.Y. REV. BOOKS, Apr. 4, 2013, at 24, 26 (supporting Gopal's analysis).

65. *See* Gopal, *supra* note 63, at 26–27 ("The killing of [Khan] is often cited as the single most important destabilizing factor in Maiwand district . . . . Three Taliban commanders from the region interviewed for this report all mentioned the killings as one of the main factors that led them to join the insurgency.").

66. *See* Lieven, *supra* note 64, at 26 (tying the resurgence of the Taliban in southern and eastern Afghanistan to the United States' practice of "restor[ing] [] warlords to local power and . . . in many cases actively help[ing] them to eliminate local rivals").

67. *See id.* (discussing the persecution and assassination of Taliban figures who expressed their desire to reconcile with the Karzai administration).

68. Martine van Bijlert, *The Taliban in Zabul and Uruzgan*, *in* TALIBANISTAN: NEGOTIATING THE BORDERS BETWEEN TERROR, POLITICS, AND RELIGION 94, 105 (Peter Bergen & Katherine Tiedemann eds., 2013).

69. *See id.* at 106 ("This was a pattern . . . repeated in varying degrees all over the country, where those newly back in power [after the Taliban's fall] reverted to their pre-Taliban days of asserting dominance, exacting revenge, and marginalizing rivals.").

70. *Id.*

71. 542 U.S. 507 (2004).

72. *See id.* at 530 (agreeing with the contentions of amici that "the risk of erroneous deprivation of . . . liberty . . . is very real" and "[t]he nature of humanitarian relief work and journalism present a significant risk of mistaken military detentions").

73. *See, e.g.*, Uthman v. Obama, 637 F.3d 400, 402 (D.C. Cir. 2011) (applying the "functional standard" and finding that "more likely than not [the defendant] was part of al Qaeda," the court overturned the lower court's grant of habeas corpus); *see also* BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 72–102 (2008) (discussing the origins of the detainee population in

a significant portion in the years immediately following September 11 were tribal elders or others with no evident connection to Al Qaeda or the Taliban.[74] For example, one former Taliban commander, Mullah Rahmatullah Sangaryar, was delivered to U.S. forces even though he had previously made peace with the Afghan government.[75] Many believed that Sangaryar's delivery to the United States, which detained him at Guantanamo until 2007, was driven by the local U.S.-supported commander's anger that Sangaryar had surrendered to a fellow tribe member, not to the commander himself.[76] With such a message sent about the consequences of surrender, it should not be surprising that some—but not all—of those abused rejoined the Taliban insurgency.[77]

Problems with targeting persisted beyond the immediate aftermath of September 11. One report on drone strikes prepared by clinics at major U.S. law schools[78] cited "convincing evidence" that a March 17, 2011 strike in Datta Khel in Pakistan's Federally Administered Tribal Areas (FATA) targeted an outdoor bus depot where tribal leaders had convened a jirga.[79] While one may dispute

---

Guantanamo); *cf.* Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 770 n.6 (2011) (discussing the number of people detained in Iraq and Afghanistan); Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?* 3 J. OF NAT'L SECURITY L. POL'Y 1, 17–23 (2009) (discussing approaches to administrative detention); John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 218 (2011) (analyzing the legal ambiguities surrounding detention in NIACs).

74. *See* PETER MARGULIES, LAW'S DETOUR: JUSTICE DISPLACED IN THE BUSH ADMINISTRATION 34–35 (2010) ("Particularly in the first four years of Guantanamo, the government detained hundreds of people whose connections to terrorism were attenuated or nonexistent.").

75. *See* van Bijlert, *supra* note 68, at 106 ("Other examples of former Taliban being targeted despite having laid down their weapons included . . . the detention and handover to U.S. forces of Mullah Rahmatullah Sangaryar (reportedly out of spite that he surrendered his weapons to tribesman Gul Agha Sherzai and not to Jan Mohammad).").

76. *Id.*

77. *Id.*

78. *See* INT'L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC, STANFORD LAW SCH. & GLOBAL JUSTICE CLINIC, N.Y.U. SCH. OF LAW, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN 57–60 (2012) [hereinafter LIVING UNDER DRONES], *available at* http://www.livingunderdrones.org/download-report/ (discussing the events surrounding the March 17, 2011, U.S. drone strike in Pakistan); *see also* Zucchino, *supra* note 3 (reporting on LIVING UNDER DRONES).

79. LIVING UNDER DRONES, *supra* note 78, at 37. The Columbia Law School Human Rights Clinic has mentioned this incident in a report based on extensive fact gathering, including interviews with U.S. personnel. *See* COLUMBIA LAW SCH. HUMAN RIGHTS CLINIC & CTR. FOR CIVILIANS IN CONFLICT, THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS 34 (2012), *available at* web.law.columbia.edu/human-rights-institute/counterterrorism/drone-strikes/civilian-impact-drone-strikes-unexamined-costs-unanswered-questions. *See generally* Lesley Wexler, *International Humanitarian Law Transparency*, (2013) *available at*

the law school study's negative perspective on drone strikes generally,[80] the authors marshal a convincing array of sources to corroborate their account of this particular attack.[81]

The Manual, while attentive to cultural issues, did not deal adequately with concerns about damage to informal dispute resolution. The Manual did not specifically address the interaction of targeting and alternative dispute resolution. It was also confusing in its description of targeting. LOAC scholars write about *targeting* as a term of art connoting the use of lethal force.[82] However, the Manual muddied this time-honored formulation. Instead, it referred generically to *targeting* as a focus on particular tasks which might involve force or other tactics. Reflecting this generic use of the term, the Manual distinguished between "lethal" and "nonlethal"

---

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321703 (discussing the role of international law and civil society in encouraging transparency regarding casualties of air strikes); Lisa Grow Sun & RonNell Andersen Jones, *Disaggregating Disasters*, 60 UCLA L. REV. 884, 904 (2013) (acknowledging the risks of transparency such as undue disclosure of intelligence sources and methods).

80. The authors of the Stanford-NYU report did not themselves venture into FATA, and it is impossible to ascertain whether the incidents described were representative of drone strikes, generally, or whether some descriptions of particular incidents were wholly accurate or instead relied on distorted or selective accounts.

81. *See* LIVING UNDER DRONES, *supra* note 78, at 57–62 (noting evidence from eyewitnesses, relatives of victims, and journalists, as well as contrasting statements from unnamed U.S. sources).

82. The literature on targeting is vast, permitting citation of only a small sampling of views. *Compare* Kenneth Anderson, *Efficiency* In Bello *and* Ad Bellum*: Making the Use of Force Too Easy?*, *in* TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 374, 391–96 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) (rejecting the argument that the sophisticated technology behind drones that makes targeted killing easier also undermines practical checks on the willingness to wage war), *and* Robert M. Chesney, *Who May Be Killed? Anwar Al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3, 45–47 (2011) (suggesting that targeted killing under certain conditions is consistent with LOAC), *and* Jens David Ohlin, *Targeting Co-Belligerents*, *in* TARGETED KILLINGS, *supra*, at 60, 75 (analyzing competing schools of thought on targeting), *and* Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 270–76 (2010) (asserting that targeted killing is legal under international law as long as the targeting force observes the principles of distinction and proportionality), *with* Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (arguing that targeted killing in a state that is not a site of narrowly defined armed conflict violates international law), *and* Craig Martin, *Going Medieval: Targeted Killing, Self-Defense and the* Jus Ad Bellum *Regime*, *in* TARGETED KILLINGS, *supra*, at 223, 245–46 (same), *and* Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, (Notre Dame L. Sch., Legal Stud. Research Paper No. 09-43), *available at* http://ssrn.com/ abstract=1501144 (same); *cf.* Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. 1165 (forthcoming 2013), *available at* http://ssrn.com/abstract=2049532 (suggesting additional guidelines to regulate targeted killings).

targeting.[83] For commanders used to the standard LOAC usage, this broader usage could have been confounding.[84]

The Manual's failures in terminology were matched by its gaps in substantive coverage. According to the Manual, "non-lethal targets [include] community leaders and those insurgents who should be engaged through outreach, negotiation, meetings, and other interaction."[85] However, the Manual did not expressly urge commanders to refrain from targeting local alternative-dispute-resolution bodies. It also included a rudimentary discussion of the LOAC principles of distinction and proportionality.[86] Although this discussion was entirely accurate, it said nothing about using care to avoid targeting indigenous dispute-resolution processes. Furthermore, the Manual did not discuss how to treat situations where an adversary's combatants play a role in such alternative-dispute-resolution efforts. Hence, a more specific analysis is in order.[87]

---

83. See COIN MANUAL, *supra* note 12, at ch. 5, § 103 (addressing the best options for lethal and nonlethal targets).

84. I may overestimate the degree of confusion caused by the Manual's "targeting" terminology. One could also view the term *targeting* as a useful signal to field commanders of the importance of social, cultural, legal, and political processes. I am indebted to Chris Jenks for this observation.

85. *See* COIN MANUAL, *supra* note 13, at tbls.5–8.

86. *Id.* at ch. 7, §§ 30–37.

87. President Obama's speech on national security on May 23, 2013, may also indicate a shift in targeting tactics. In conjunction with the speech, the White House released an unclassified summary of new guidance intended to minimize civilian casualties, entitled, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities.* The White House, Office of the Press Secretary, U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), *available at* http://www.lawfareblog.com/2013/05/white-house-fact-sheet-on-use-of-force-away-from-hot-battlefields/. The exact geographic parameters of the guidance are not wholly clear, although current U.S. operations in Afghanistan are clearly excluded. The guidance allows targeting only to "prevent or stop attacks against U.S. persons." *Id.* The guidance also requires "[n]ear certainty that non-combatants . . . will not be injured or killed." *Id.* In addition, targeters must reasonably believe that capture is not feasible, the host government of the target "cannot or will not effectively address the threat to U.S. persons," and no "reasonable alternatives exist to effectively address the threat." *Id.* For a thoughtful response to the President's speech and accompanying policy guidance, see Robert Chesney, *Does the Armed-Conflict Model Matter in Practice Anymore?*, LAWFARE (May 24, 2013, 7:06 PM), http://www.lawfareblog.com/2013/05/does-the-armed-conflict-model-matter-in-practice-anymore/. President Obama's speech and guidance consider policy and tactics, but do not purport to address the underlying legal issues discussed in this Article.

IV. STEWARDSHIP IN INTERNATIONAL LAW AND IMPLIED SAFE CONDUCT FOR DISPUTE RESOLUTION

To address this gap between policy and results, this Article turns to a stewardship conception of the relationship between LOAC and international human rights. On this view, a third-party state in a NIAC has a duty of stewardship to the people of the host state. Stewardship, which admittedly is a *lex ferenda* concept, emerges from a current phenomenon in international law: the clash between LOAC and international human rights law. While champions of the preemptive model view LOAC as *lex specialis*, and hence supreme,[88] and champions of the protective approach defer to human rights norms, stewardship views both the preemptive and protective approaches as too stark. A more granular adjustment of LOAC and human rights will often be necessary—one that incorporates elements of both bodies of law without ceding the field to either.[89] The venerable principle of complementarity, which historically has governed the relationship of international and municipal law, provides a model for this reconciliation project.[90] The evolution of stewardship entails the preservation of popular traditions and processes.

A. *Harmonizing Obligations Under International Law*

A general stewardship obligation is hardly unknown to international law. Consider the law of occupation, which some have referred to as imposing a duty of temporary trusteeship on the occupying power.[91] Trusteeship calls to mind the same impulse as

---

88. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) ("The test of what is an arbitrary deprivation of life . . . falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."); Schmitt, *Investigating Violations of International Law in Armed Conflict*, *supra* note 15, at 53–54 (noting that the principle of *lex specialis* prevails over the principle of *lex generalis* when in conflict).

89. In other recent work, I have carved out a space for stewardship in a related sense: as a right that federal officials have under American law to act interstitially without express congressional authorization when action is necessary to comply with international law and protect either American citizens or "intending Americans." *See* Margulies, *Taking Care of Immigration Law*, *supra* note 6; *cf.* Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 106–11, 142–45 (2009) (arguing that U.S. courts in post–September 11 cases have shown limited deference to the executive branch).

90. *See* Michael A. Newton, *A Synthesis of Community Based Justice and Complementarity*, *in* INTERNATIONAL CRIMINAL JUSTICE AND 'LOCAL OWNERSHIP': ASSESSING THE IMPACT OF JUSTICE INTERVENTIONS (Carsten Stahn ed., forthcoming 2013), *available at* http://ssrn.com/abstract=2081904 ("'[J]ustice' is most legitimate and . . . effective when it is most responsive to the demands of the local population.").

91. Roberts, *supra* note 8, at 585; *cf.* Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law*, HARV. PROGRAM ON CONFLICT RESOL.,

stewardship: the commitment to preserving norms and institutions.[92] Under the trusteeship created by occupation, an occupying country must preserve the "laws" of the occupied nation.[93] Informal dispute mechanisms could be considered provisions of procedural law. Third-party states may not be occupiers in the legal sense.[94] The importance of trusteeship in occupation law demonstrates, however, that international law has long imposed duties on armed forces that are comparable to the duties suggested here.

Stewardship regarding informal dispute resolution emerges out of tension between LOAC and human rights. Many scholars have noted the fragmentation of international law into conflicting principles and doctrine.[95] International law frequently requires the careful calibration of two conflicting rules or bodies of law. For example, recent decisions by the European tribunals assumed that human rights principles incorporated the interpretation of both United Nations Security Council resolutions[96] and LOAC.[97] The

---

Winter 2006, at 23–25, *available at* http://www.peacebuildinginitiative.org/index.cfm?fuseaction=document.showDocumentByID&nodeID=1&DocumentID=120 (discussing the relationship between the law of occupation and the law governing conflict with transnational armed groups such as Al Qaeda).

92. *See* David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 854–56 (2003) (giving examples of expected trustee actions under occupation law).

93. *Id.* This obligation may not require preserving laws that, as in Nazi Germany, violate fundamental human rights. However, it does apply in most other situations. *See also* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 12–14 (2d ed. 1993) (discussing the occupying power's duty to preserve the existing laws governing the occupied territory).

94. The targeting decisions discussed in this Article will often take place during an armed conflict, before the third-party state can assert the control that is necessary to trigger the law of occupation. Moreover, in some situations a third-party state will operate with the consent of the host state, making the law of occupation inapplicable.

95. *See* Rep. of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 (finalized by Martti Koskeniemmi) (reporting on the difficulties of fragmented international law); Harlan Grant Cohen, *Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1049, 1064–65 (2012) (suggesting the plausibility of "find[ing] different [international] communities with different internalized rules").

96. *See* Al-Jedda v. United Kingdom, 2011 Eur. Ct. H.R. 1092 (reading the Security Council as authorizing the United Kingdom to participate in the multinational force occupying Iraq after Saddam Hussein and as barring indefinite administrative detention of suspected terrorists, since the European Convention on Human Rights enumerated types of detention permitted and did not include the detention engaged in by the member state in Iraq); *see also* Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council, 2008 E.C.R. I-6411 (holding that European regulations implementing Security Council resolutions on the freezing of alleged sources of terrorist financing required procedural safeguards such as notice of the specific charges and an opportunity to review adverse evidence); *cf.* Harlan Grant Cohen, *From Fragmentation to Constitutionalization*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 381, 393 (2012) (asserting that the *Kadi* decision viewed due process as a "potential *jus cogens* norm . . . concerning United Nations Security Council sanctions against individuals"); Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1, 56–57 (2011) (discussing the procedural

tribunals in each case narrowly interpreted the source of authority that appeared to clash with human rights law.[98]

Although the European courts that have sought to reconcile different sources of international law may have gotten the balance wrong, the overall project of harmonizing principles is sound. A preemptive approach that elbowed out any non-LOAC sources of law would, on the surface, have the virtue of lending clarity to the decisions of battlefield commanders. It would also preserve flexibility since commanders would always have the option of adopting more restrictive ROE. If prudential considerations dictate more restrictive ROE, the champions of the preemptive view would say, that option is always available. However, the preemptive model's champions would maintain, reading those restrictions into law confuses policy with binding norms.

The preemptive model's champions forget that prudential concerns are among the central pillars of both LOAC specifically and international law more generally. Consider the prohibition on perfidy, which is based in part on fears that the failure to discourage deceptive tenders of surrender would encourage receiving forces to disregard offers of surrender, even when those offers were made in good faith.[99] Similarly, the bar on abuse of captives derives in part from the concern that commanders who know their soldiers will be treated humanely upon capture are less likely to create needless suffering by fighting on beyond the needs of strategy.[100] Consider also the separation of *jus ad bellum* and *jus in bello*, based in part on concerns that holding foot soldiers responsible for senior commanders' decisions to wage aggressive war would unnecessarily prolong conflicts. [101] Pragmatic concerns of this type are integral to

---

safeguards adopted by the United Nations regarding the administration of resolutions combatting terrorism).

97. Al-Skeini v. United Kingdom, 2011 Eur. Ct. H.R. at 41–42 (reading LOAC rules on investigations of allegedly unlawful killings by state forces during occupation in tandem with the overarching human right to life).

98. *Id.*; Al-Jedda v. United Kingdom, 2011 Eur. Ct. H.R. 1092.

99. *See* Margulies, *The Fog of War Reform*, *supra* note 4, at 1429–30 ("LOAC prohibit perfidy precisely because it produces doubt . . . about the sincerity of a defeated force's attempt to surrender, and thereby discourages a victorious force from honoring that attempt."); *cf.* Sean Watts, *Law-of-War Perfidy* 25–26 (Draft, July 29, 2013), *available at* http://ssrn.com/abstract=2220380 (explaining the prohibition on perfidy, in part, on grounds that "enemies had to be assured that honoring law-of-war rights and duties would not result in tactical or operational disadvantage").

100. *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 8–9 (2010) (discussing the reluctance to surrender during the World War II battle for Iwo Jima).

101. *See* Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 48–49 (2009) (introducing current perspectives on *jus ad bellum* and *jus in bello* principles of war); *cf.* Eyal Benvenisti, *Rethinking the Divide Between* Jus ad Bellum *and* Jus in Bello *in Warfare Against Nonstate Actors*, 34 YALE J. INT'L L. 541, 543–44

determining what counts as a war crime. Adding concern about informal dispute resolution is, viewed in this light, part of a continuum rather than a radical departure. Here, too, as has been discussed, disregard of such processes may needlessly prolong a conflict or make the conflict more volatile.[102] Considering such concerns is not alien to LOAC; it is crucial to LOAC's development.

Moreover, prudence has also informed the workings of the principle of complementarity as a referee for clashes between domestic law and international criminal law (ICL). The principle of complementarity is a vital element in the structure of ICL. That principle holds that a state's own criminal processes are a first resort and that international tribunals are complementary to national jurisdiction. Tribunals often invoke complementarity to defer to a state's decisions about prosecution of its own officials for war crimes.[103]

Stewardship in this context echoes complementarity under ICL because stewardship does not merely refer to state obligations under human rights law. Because stewardship does not require wholesale restrictions on state targeting rights under LOAC, it recognizes legitimate state interests in ways that the protective paradigm does not. As a practical matter, therefore, stewardship also preserves the third-party state's stake in following human rights law. Stewardship concedes that the powerful nations that often occupy roles as third-party states in NIACs have other options available to them besides compliance if human rights law becomes unduly restrictive.[104] European states displeased at what is perceived as unduly intrusive decisions by EU tribunals have explored one option: restricting the charter and mandate of those tribunals.[105] In the United States, the

---

(2009) (asserting that the larger role of non-state actors has reduced the value of separation).

102. *See supra* notes 98–99 and accompanying text.

103. *See* Rome Statute of the International Criminal Court, July 17, 1998, pmbl. ¶ 10, art. 1, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998) (noting that the ICC was established as "complementary to national criminal jurisdictions"); *id.*, art. 17(1), (2) (classifying a case as inadmissible in the ICC when a state with jurisdiction is currently engaged in or has engaged in a bona fide investigation or prosecution); Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Application of the Government of Kenya Challenging Admissibility, ¶ 19 (Sept. 20, 2011), http://www.worldcourts.com/icc/eng/decisions/2011.09.20_Prosecutor_v_Muthaura2.pdf (noting that "complementarity is a core guiding principle for the relationship between States and the Court").

104. *See* MICHAEL J. GLENNON, THE FOG OF LAW: PRAGMATISM, SECURITY, AND INTERNATIONAL LAW 20 (2010) (recommending a "broader and more flexible interpretive method," in part because an unduly strict approach would give states an incentive to engage in wholesale disregard of international law).

105. *See* Conference Report, Council of Europe, High Level Conference on the Future of the European Court of Human Rights Brighton Declaration (Apr. 19–20, 2012), http://hub.coe.int/20120419-brighton-declaration (requiring the ECHR to display greater deference to executive decisions).

Supreme Court will defer to a clear statement from Congress expressing an intent to violate international law.[106] A stewardship approach that tailors restrictions on states to avoid undue restrictions on legitimate-state-targeting prerogatives also preserves international law by blunting state efforts to neutralize or evade international norms.

This pragmatic rationale shapes operation of the principle of complementarity under ICL. As the International Criminal Court (ICC) has noted, complementarity "strikes a balance" that harmonizes state interests and international law.[107] Preserving a measure of discretion for state decisions acknowledges the importance of sovereignty, which since Westphalia has been a central building block of international law. Acknowledging sovereignty promotes a healthy partnership with international institutions. Abandoning complementarity would endanger that partnership; as the ICC conceded, "Without [complementarity] . . . there would have been no agreement" possible among states party to the Rome Statute.[108]

Complementarity under ICL also illustrates the important, albeit controversial, role of indigenous and informal dispute resolution. One influential court decision has argued that informal means of dispute resolution, as well as more formal proceedings, should trigger complementarity.[109] A South African tribunal held that truth and reconciliation commissions (TRCs) and restorative justice can be an adequate substitute under the South African Constitution for more formal modes of accountability.[110] The

---

106. *See* Whitney v. Robertson, 124 U.S. 190, 195 (1888) ("[I]f the power to determine these matters is vested in congress, it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad."). As one example of legislation clashing with international law, consider that in Title 50 of the U.S. Code, Congress has implicitly authorized covert action that may violate the sovereignty of other states. *See* Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SECURITY L. & POL'Y 539, 622–23 (2012) (examining the authorization of covert action under international law).

107. *Prosecutor v. Muthaura*, No. ICC-01/09-02/11 at ¶ 19.

108. *Id.* (internal citation omitted).

109. *See Azanian People's Org. v. The President of the Republic of South Africa* 1996 (4) SA 672 (CC) at paras. 24–30 (S. Afr.) (explaining that "lawmakers of the Constitution should not lightly be presumed to authorize any law which might constitute a breach of the obligations of the state in terms of international law").

110. *Id*; *see also* Pumla Gobodo-Madikizela, *Radical Forgiveness: Transforming Traumatic Memory Beyond Hannah Arendt*, *in* JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA 37, 37 (Francois Du Bois & Antje Du Bois-Pedain eds., 2008) (arguing that forgiveness for heinous acts is possible after a public process); Leila Nadya Sadat, *Exile, Amnesty, and International Law*, 81 NOTRE DAME L. REV. 955, 984–94 (2006) (discussing TRCs and amnesties, while critiquing failures to prosecute perpetrators of human rights abuses); *id.* at 1028 (certain amnesties may serve interests of justice and may receive a margin of "appreciation" or deference under

restorative model stressed collective deliberation, achievement of insight, and apology in face-to-face exchanges between victim and perpetrator. As the South African court explained, local processes such as public acknowledgments of guilt and face-to-face apologies to victims can enhance the net stake of all constituencies in reform efforts, thus easing the transition from tyranny.[111]

Scholars have also praised this informal turn, asserting that intrusion by international bodies can frustrate reform by discrediting local efforts. [112] International bodies can proceed hastily and heedlessly, eroding indigenous change.[113] Ultimately, change emerges from indigenous institutions informed by international guidance. Informal local efforts, including TRCs, should be viewed as within a state's options under the ICL complementarity regime.

Just as ICL should defer to national investigation and prosecution of war crimes, the law of war in third-party NIACs should defer to processes built into national law through custom and acquiescence. Preservation of those processes, including popular means of dispute resolution, should trump the discretion that a third-party state would otherwise enjoy under conventional LOAC principles. A counterinsurgency that ignores or disrespects those processes will not enjoy the support of the people. It therefore will be doomed to failure.

This still leaves an unresolved issue: the sovereign rights recognized by ICL's principle of complementarity may not apply to NIACs where a host state has consented to third-party state involvement.[114] However, a host state cannot consent to *all* actions by

---

international law). The South African Constitution incorporates many norms of international human rights law.

111. See *Azanian People's Org.*, 1996 (4) SA 672 (CC) at ¶¶ 17–19 ("[B]ut for a mechanism providing for amnesty, the 'historic bridge' [from apartheid to equal rights] might never have been erected.").

112. *See* MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 148 (2007) (praising restorative-justice mechanisms that promote a "forgiveness process characterized by truth telling, redefinition of the identity of the belligerents, justice, and call for a new relationship" (quoting WILLIAM J. LONG & PETER BRECKE, WAR AND RECONCILIATION: REASON AND EMOTION IN CONFLICT RESOLUTION 3 (2003) (internal quotation marks omitted))); Newton, *supra* note 90, at 13 ("[P]ermitting external actors to supersede the established set of domestic punishments and cultural traditions would be a modern form of legal colonialism.").

113. *See* DRUMBL, *supra* note 112, at 70 (recognizing that "local justice institutions" may employ diverging justice approaches that "more accurately reflect [the] sociolegal norms of the places most immediately afflicted"); Michael A. Newton, *The Quest for Constructive Complementarity*, *in* 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 304, 332–33 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011) (warning of the "presumption of supranational superiority" in which transnational tribunals like the ICC override domestic decisions, thereby sending the wrong message about the development of domestic capabilities).

114. *See* Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 34–35 (2013) (discussing the scope of consent).

a third-party state.[115] International law limits the latter to actions that would be permissible by the host state.[116] Here, international law should provide protection for informal indigenous dispute resolution.

B. *Cultural Property and Self-Determination*

The International Covenant on Civil and Political Rights (ICCPR) declares that "[a]ll peoples have the right of self-determination."[117] People exercising that right may "freely pursue their economic, social, and cultural development."[118] The development contemplated by this Article includes not merely the opportunity for political autonomy, which the ICCPR also guarantees, but the opportunity to preserve and develop customs, traditions, and institutions that make that right to political autonomy meaningful. Those processes and institutions are a form of collectively held property that each generation holds in trust for those to come. As the Manual noted, such processes are a form of social capital that a society relies on to both survive and flourish.[119]

The preservation of such capital is arguably more essential to self-determination than tangible forms of property. Human rights law today would view forms of direct expropriation as triggering a duty of compensation.[120] In situations of armed conflict, it may well be necessary for forces of one party to take control of property, at least temporarily, or even to destroy it—for example, when armed forces of an adversary have taken cover in a civilian dwelling.[121] Land,

---

115. *See id.* (recognizing the limitations on consent in relation to third-party states).

116. *See id.* ("As a result, international law should not permit consent to serve as a standalone basis for force when the host state's consent exceeds what it could do under its own laws.").

117. International Covenant on Civil and Political Rights art. 1(1), Dec. 16, 1966, 999 U.N.T.S. 171, S. TREATY DOC. NO. 95-20.

118. *Id.*

119. *See* COIN MANUAL, *supra* note 13, at ch. 3, § 61 (defining "social capital" as the power of individuals and groups to use the social networks of reciprocity and exchange to accomplish their goals, and identifying patron–client relationships as an important form of social capital in many nonwestern societies).

120. *See* Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 485–88 (2008) (identifying human rights as a goal of the regimes that address regulatory takings).

121. A force taking fire from an adversary concealed in a dwelling will have the right to destroy the dwelling, if they can do so in compliance with the principles of distinction, proportionality, and precaution. Forces fired upon can also mount an attack on forces concealed within the dwelling, and assume temporary control of the dwelling once they have captured or killed those forces, or caused them to retreat. Conducting hostilities would be impossible without the right to take such measures in the exigency of battle.

however, has cultural meanings that transcend monetary concerns.[122] Processes and institutions have such meanings to an even greater degree.[123] Moreover, the damage done by undermining such processes and institutions may be far more difficult to remedy than damage done to tangible property.

Dispute-resolution processes can be conceptualized as a form of collectively held cultural property. Many sources recognize a right to property. For example, the Universal Declaration of Human Rights bars the arbitrary deprivation of property.[124] International law has also increasingly recognized property's cultural dimension. Article 15 of the International Covenant on Economic, Social, and Cultural Rights holds that all persons have the "right . . . [t]o take part in cultural life."[125] Third-party states do not have a duty to create such processes.[126] However, they should preserve processes that already exist.

Two important human rights decisions have affirmed the interdependence of property and culture. The African Commission on Human Rights' *Social and Economic Rights Action Center* (SER) decision reinforced the "traditional place" accorded cooperative economic development.[127] The *SER* tribunal held that Nigeria, acting in concert with the Shell Petroleum Development Corporation, had violated the African Charter by using intimidation and brutality in

---

122. *See* Moiwana Village v. Suriname, Judgment on the Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 86(6), 101 (June 15, 2005) (finding that a N'djuka community's connection to its traditional land is of vital spiritual, cultural, and material importance, and holding that the state of Suriname violated the community's right to property enshrined in the American Convention on Human Rights).

123. *Cf.* Mark A. Drumbl, *Policy Through Complementarity: The Atrocity Trial As Justice*, *in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY 197, 212 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011) (criticizing the rigid view of ICL as revealing a lack of "legal imagination" and discouraging "modalities [that] deviate from the core structure and precepts of ideal-type criminal trials . . . regardless of the public respect for, possibilities of, or broader socio-transitional status of such modalities").

124. Universal Declaration of Human Rights, G.A. Res. 217 (III) art. 17(2), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

125. International Covenant on Economic, Social and Cultural Rights art. 15(1)(a), Dec. 16, 1966, 993 U.N.T.S. 3.

126. This Article does not endorse the wholesale imposition of affirmative duties on states in the economic and cultural realms. Judicial framing of such affirmative obligations can have unintended consequences, including distortion of state priorities. *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 148–52 (2d ed. 2009); *but see* Kim Lane Scheppele, *Amartya Sen's Vision for Human Rights – and Why He Needs the Law*, 27 AM. U. INT'L L. REV. 17, 28–30 (2012) (expressing a greater willingness to consider the judicial imposition of affirmative duties).

127. *See* Social and Economic Rights Action Center v. Nigeria, Comm. 155/96, 15th Ann. Activity Rep't, ¶ 56 (African Comm'n on Hum. & People's Rts. 2001) (suggesting that "[t]he drafters of the [African] Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society").

forcing a community to leave its ancestral home to make way for an oil facility.[128]

The Inter-American Court of Human Rights' decision in *Moiwana Village*[129] is an even more compelling precedent on the property–culture relation. The *Moiwana Village* court described the adverse effect on cultural life of a massacre by state forces that killed forty members of a community, the N'djuka, and caused survivors of the massacre to flee the village where they had lived for decades.[130] The court noted that the "community's relationship to its traditional land is of vital spiritual, cultural, and material importance."[131] Citing the confluence of property and cultural norms, the court observed that the displaced community exemplified the "unique and enduring ties that bind indigenous communities to their ancestral territory."[132] It also quoted approvingly from an expert witness who had opined that the relationship with this particular land is a "fundamental aspect of . . . [the N'djuka's] identity and sense of well being."[133] The expert observed that "[w]ithout regular commune with these lands . . . [the N'djuka] are unable to practice and enjoy their cultural and religious traditions."[134] The court found that units of the Suriname army that had perpetrated the massacre were guilty of a range of violations of the American Convention on Human Rights.[135] These violations included Article 5—the right to humane treatment—and Article 21—the right to property.[136]

Informal dispute-resolution processes and practices, such as the jirga and religious courts, comprise a cultural legacy that law should respect just as strongly as it protects real property. Practices and rituals of this kind give life to a community, allowing further economic, social, and cultural development. Conducting hostilities in a manner that jeopardizes this legacy is a recipe for continued

---

128. *See id.* ¶ 55 (setting forth the alleged violations of Article 21 of the African Charter by Nigeria).

129. *See generally* Moiwana Village v. Suriname, Judgment on the Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 86(6), 101 (June 15, 2005) (finding that a N'djuka community's connection to its traditional land is of vital spiritual, cultural, and material importance, and holding that the state of Suriname violated the community's right to property enshrined in the American Convention on Human Rights).

130. *See id.* ¶¶ 86(15)–86(20), 101–03 (discussing the effect of Suriname's 1986 conflict on the N'djuka).

131. *Id.* ¶ 86(6).

132. *See id.* ¶¶ 131–34 (finding that the Moiwana community members, as N'djuka tribal people, possess an "'all-encompassing relationship' to their traditional lands" and therefore may be considered the "legitimate owners of their traditional lands").

133. *Id.* ¶ 132.

134. *Id.*

135. *See id.* ¶¶ 103, 121, 135, 163–64 (noting the specific violations of the American Convention on Human Rights).

136. *Id.*

instability. Such tactics therefore violate the stewardship duties of a third-party state. Cultural arguments may be most compelling in cases involving ethnic, religious, or other minorities, such as the *Moiwana Village* survivors who face the threat of internal persecution.[137] However, one can extend this argument to the case of third-party states in NIACs. All conflicts of this kind, such as those involving U.S. intervention in Afghanistan, Pakistan, Yemen, and Somalia, array the third-party state against non-state actors of a different nationality and often entail differences in ethnicity, culture, and religion. As the Manual concedes, forces of the third-party state may not attach the proper importance to cultural differences. The law can and should step in to bridge the gap.

C. *Operationalizing Stewardship: Implied Safe Conduct*

Recognition of an implied safe conduct for individuals engaged in informal dispute resolution can ensure that this stewardship obligation is met. Safe conducts are a venerable aspect of both international law generally and LOAC specifically. [138] Their constructive or implied creation has historically been subject to rigorous limits. The duty of stewardship urged here would broaden the ambit of implied safe conducts. Understanding that expansion first requires some understanding of the current place of safe conducts in protecting dispute resolution and limiting targeting.

Safe conduct grants are among the oldest features of CIL.[139] They extend to a range of individuals, including plenipotentiaries,[140] merchants, and others. In his analysis of the rationale for these rules, Blackstone explained that they were practical in nature, identifying

---

137. *See* Willem van Genugten, *Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems*, 104 AM. J. INT'L L. 29, 41–42, 57–58 (2010) (analyzing whether the 2007 United Nations Declaration on the Rights of Indigenous Peoples might be instrumental in helping to solve the human rights problems faced by the indigenous peoples of Africa); Alexandra Xanthaki, *Indigenous Rights in International Law Over the Last 10 Years and Future Developments*, 10 MELB. J. INT'L L. 27, 30, 33–34 (2009) (discussing trends in the jurisprudence on indigenous rights); Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1745–46 (2012) (analyzing the risks and benefits of an antidiscrimination approach); *cf.* Kirsty Gover, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Review Essay), 12 MELB. J. INT'L L. 419, 420, 430–31 (2011) (assessing Karen Engle's similarly titled book that argues that stress on cultural rights has been counterproductive because it has displaced political arguments based on self-determination).

138. *See* Lee, *supra* note 11, at 844–45, 871–72 (finding "violation of safe conducts" discussed within William Blackstone's *Commentaries*).

139. *See id.* (highlighting the inclusion of safe conduct grants within Blackstone's list of "three specific offenses against the law of nations").

140. *See* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 733 (1988) (referring to the term *plenipotentiary* as denoting a type of special ambassador or state representative).

values and practices whose "preservation" enabled "intercourse and commerce between one nation and another."[141] Blackstone noted that they come in two varieties, express and implied, neither of which matches the broader conception offered here.[142]

Express safe conducts are privileges articulated in documents issued to a specific individual to pass safely through another state's territory.[143] Such grants are given to an individual whose safety would otherwise be threatened by such travel, for example, an accused criminal or an "enemy."[144] An implied safe conduct is not the result of express documentation received by a specific individual.[145] Instead, it can result from positive municipal legislation regarding a class of persons.[146] At least one prominent scholar has also argued that a "general" implied safe conduct can also be derived from the law of nations.[147] According to this analysis, the Magna Carta's extension of safe conduct to foreign merchants was grounded in "ancient and rightful customs," which can be read as a medieval allusion to CIL.[148] Protection of merchants also served as a pragmatic encouragement of dispute resolution and a limit on the acrimony caused by armed conflict.[149]

Other individuals or instrumentalities that either temper conflict or provide no military advantage to either party have received safe conduct through treaty or custom. The Second Geneva Convention and Additional Protocol I list vessels specifically immune from both capture and attack.[150] These include hospital ships, other medical transports, and small craft used for rescue operations.[151] The ICRC commissioned ships to feed allied POWs during World War II, and the parties to the conflict expressly gave these vessels safe conduct.[152]

---

141. Lee, *supra* note 11, at 871–72.

142. Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 480 (2011).

143. *Id.*

144. *See id.* at 479 ("A safe conduct privileged a person who otherwise could not travel safely within a nation's territory.").

145. *See id.* at 480 (noting that implied safe conducts do not require personalized documentation).

146. *Id.*

147. *See* Lee, *supra* note 11, at 874–75 (discussing the idea of implied safe conducts and the law of nations).

148. *Id.*

149. Enlightenment publicists viewed commerce between nations as part of the *douceur* or sweetness of life that tempered monarchs' warlike urges. *See* CHARLES-LOUIS DE MONTESQUIEU, THE SPIRIT OF THE LAWS 389 (Anne M. Cohler et al. eds., 1989) ("[I]n this way commerce was able to avoid violence and maintain itself everywhere."); ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 73–74 (1977) (discussing Montesquieu's views on the relationship between commerce and war).

150. Doswald-Beck, *supra* note 16, at 206.

151. *Id.*

152. *See* Francois Bugnion, *The International Committee of the Red Cross and the Development of International Law*, 5 CHI. J. INT'L L. 191, 205 (2004) (recognizing

The Hague Convention No. XI of 1907 protects vessels charged with religious, nonmilitary, scientific, or philanthropic missions, as well as small coastal fishing crafts.[153] The latter have also been regarded as protected under CIL.[154] Small coastal fishing vessels generally are viewed as helping indigenous civilians who engage in fishing for their subsistence.[155] Targeting such vessels would endanger civilian lives and health, while achieving no strategic objective. One could also view the targeting of such vessels as deepening the acrimony that characterizes armed conflicts, making such conflicts harder to resolve.

In addition, LOAC confers safe conduct on a negotiator for one side, called a *parlementaire*, who unilaterally seeks to communicate with the other side under a flag of truce.[156] The parlementaire "has a right to inviolability" for the duration of his mission.[157] The other party to the conflict is not necessarily required to enter into communications.[158] However, the logic of safe conduct that the parlementaire acquires to extend the offer of communication presumably continues until the other side has both communicated its refusal to parlay and given the parlementaire a reasonable opportunity to retreat to safety.

---

the use of the red cross emblem to designate vessels with safe conduct). Of course, the ICRC is not a negotiator—its mission is humanitarian in nature. Nevertheless, as a practical matter, the service to humanity offered by the ICRC also, in the long run, reduces acrimony between the parties to an armed conflict and therefore tends, as with negotiators, to reduce its duration and likelihood of recurrence.

153. *See* Doswald-Beck, *supra* note 16, at 202 (listing vessels specifically exempt from attack).

154. *See* The Paquete Habana, 175 U.S. 677, 707 (1900) ("[C]ustomary law establishes an exception of immunity in favor of coast fishing vessels."). Some scholars have expressed skepticism about the creation of CIL norms, which may not entail the consent of states that would be bound by those norms. *See* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 45–47 (2005); Jack Goldsmith & Jeremy Rabkin, *A Treaty the Senate Should Sink*, WASH. POST, July 2, 2007, at A19 (arguing that ratifying the Convention on the Law of the Sea will impair U.S.-sovereign interests).

155. *Cf.* Ronald S. McClain, *The Coastal Fishing Vessel Exemption from Capture and Targeting: An Example and Analysis of the Origin and Evolution of Customary International Law*, 45 NAVAL L. REV. 77, 81 (1998) (stating that Louis XVI of France in 1779 explained the protection of coastal fishing as emerging from a "desire to soften the calamities of war").

156. *See* Hague Convention IV, Respecting the Laws and Customs of War on Land, Regulations Concerning the Laws and Customs of War on Land (Annex), art. 32, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (entered into force Jan. 26, 1910) [hereinafter Hague Convention IV] (defining *parlementaire* and providing the right of inviolability).

157. *Id.*

158. *See id.* at art. 33 ("The commander to whom a parlementaire is sent is not in all cases obliged to receive him.").

D. *Implied Safe Conduct and Indigenous Dispute Resolution*

An implied safe conduct for informal indigenous dispute resolution would limit targeting. However, it would avoid across-the-board curbs. To grasp the impact of this change, this Article starts with the two fundamental norms relevant to targeting: the principles of distinction and proportionality.

The principle of distinction holds that a state may only target combatants or military objectives.[159] Permissible targets include not only uniformed forces but also nominal civilians who directly participate in hostilities (DPH).[160] The principle of proportionality limits the collateral damage that targeting military objectives may cause to civilian and nonmilitary assets; such damage must be proportionate compared with the military objective achieved.[161]

Implied safe conduct would preclude targeting of anyone involved in indigenous alternative dispute resolution for the duration of the dispute-resolution process as well as time spent traveling to and from the physical site of the process. To further explore the contours of the proposed rule, consider recent guidelines from the ICRC that define who may be targeted as a DPH.[162] According to the

---

159. *See* Additional Protocol I, *supra* note 18, at art. 48 (noting the obligation to distinguish between civilians and combatants); STEPHEN L. CARTER, THE VIOLENCE OF PEACE: AMERICA'S WARS IN THE AGE OF OBAMA 58 (2011) (noting that the principle of distinction forbids the targeting of noncombatants); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 8 (2d ed. 2010) (writing that the ICJ has supported the distinction between combatants and noncombatants); INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT § 1.2.2 (Michael N. Schmitt, Charles H.B. Garraway & Yoram Dinstein, Drafting Committee 2006) [hereinafter MANUAL] (describing the principle of distinction as the foundation of LOAC).

160. *See id.* (seeking to protect citizens not "actively (directly) participating in armed conflict").

161. *See* Additional Protocol I, *supra* note 18, at art. 51(5)(b) (barring attacks that cause collateral damage to civilians that is "excessive in relation to the concrete and direct military advantage anticipated"); *cf.* MANUAL, *supra* note 159, at § 2.1.1.4.1 (explaining that the rule of proportionality is derived from the principle of distinction). While the United States has declined to ratify Additional Protocol I because of concerns about other provisions, it considers the provisions dealing with the principles of distinction and proportionality to be CIL that binds both states and individuals. *See* Michael J. Matheson, Remarks, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 420 (1987) (noting that the United States considers itself legally bound by the Additional Protocol I rules that reflect CIL); *cf.* Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT'L L.J. 323, 344–47 (2009) (discussing the political agendas that contributed to the enactment of Additional Protocol I).

162. *See* NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 33–36 (2009) [hereinafter ICRC Guidance], *available at* http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC_002_0990.pdf (providing definitions of *armed forces*, *state armed forces*, and *organized armed groups*).

ICRC, some civilians are so deeply and persistently engaged in hostilities that they assume a continuous combat function (CCF) and so can be targeted at any time.[163] In contrast, other civilians do not undertake a CCF and are therefore targetable only for the precise time that they are participating in hostilities through activities such as targeting others, deploying for the purpose of targeting, or directly supporting targeting efforts by, for example, transporting others to a site where an attack is to occur.[164]

The ICRC adopted narrow definitions of both *DPH* and *CCF* that immunized most non-state participants.[165] For example, the ICRC said that a bomb maker for a terrorist group could not be targeted as he assembled the explosive device since others would have to deploy it.[166] Even if the bomb maker's work met this restrictive test, he would be protected from targeting once he finished making the bomb, until he started work on the next one.[167]

Scholars criticized this test as artificial and as providing terrorist groups with an unfair advantage.[168] According to the critics, the ICRC's narrow test for CCF created a "revolving door" through which violent non-state actors, such as bomb makers for terrorist

---

163. A CCF is a useful concept, although it has prompted some confusion about whether targeting of persons in a CCF role is based on such persons' conduct or their status. *See* Geoffrey Corn, *Two Sides of the Combatant COIN: Untangling Direct Participation in Hostilities from Belligerent Status in Noninternational Armed Conflicts*, *in* COUNTERINSURGENCY LAW: NEW DIRECTIONS IN ASYMMETRIC WARFARE 58, 65–71 (William C. Banks ed., 2013) (arguing that certain non-state actors in a NIAC can be targeted because of their status as belligerents fighting for a party to the conflict and that the CCF label may needlessly complicate this targetability).

164. *See* ICRC Guidance, *supra* note 162, at 66 (providing examples of conduct that may be considered "direct participation in hostilities").

165. *See* Margulies, *The Fog of War Reform*, *supra* note 4, at 1469 (analyzing the narrow definition of *CCF* relative to a restrictive causation requirement).

166. *See* ICRC Guidance, *supra* note 162, at 54 (asserting that the "assembly and storing of an improvised explosive device (IED) . . . do not cause . . . harm directly").

167. *See id.* (distinguishing direct and indirect participation); *cf.* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 731 (2010) (criticizing the narrow view of causation in the ICRC Guidance).

168. *See* Eric Talbot Jensen, *Direct Participation in Hostilities: A Concept Broad Enough for Today's Targeting Decisions*, *in* NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE 85, 94 (William C. Banks ed., 2011) ("[A] restrictive definition of 'direct participation' does not allow sufficient coverage of the range of activities involved in fighting terrorist organizations."); Schmitt, *supra* note 167, at 699 (criticizing the ICRC's approach as failing "to fully appreciate the operational complexity of modern warfare"); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 643–44 (2010) (criticizing the ICRC's guidance as exacerbating asymmetries favoring violent non-state actors over states); *cf.* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 142–43 (2010) (discussing the debate).

groups, could escape targeting.[169] Scholars critical of this move have noted that uniformed state forces, in contrast, are *always* targetable, even while they sleep. This created an asymmetry that the ICRC's critics view as inherently destabilizing, and one which compounded the advantage already enjoyed by non-state actors who refused to distinguish themselves as combatants through the wearing of insignia and the open carrying of arms.

While the ICRC's critics have the better argument regarding the bomb maker, who is arguably engaged in a CCF,[170] there are stronger arguments that combatants engaged in informal dispute resolution should *not* be considered as DPH while engaged in that activity. Moreover, and perhaps more controversially, under the implied–safe conduct theory advanced in this Article, even an individual who is otherwise in a CCF would be immune for the time that the activity consumes. Suppose a commander for an extremist non-state actor devotes time to presiding over a religious court. While such a commander may have a CCF that would justify his being targeted at any time, an interlude of participation in an informal dispute-resolution session should suspend this CCF period.

However, to avoid putting targeters in an impossible position, participants in dispute resolution should have a reciprocal duty to distinguish themselves. Dispute-resolution participants should use a symbol, like the white flag of truce used by parlementaires[171] or the emblem designated in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[172] This marking will give the attacking force a reasonable opportunity to avoid targeting participants in dispute resolution. A dispute-resolution emblem, like other markings in LOAC, is also a confidence-building measure. The party using the emblem gives up something valuable in an armed conflict—the location of the person or group claiming protection. Locational data aids targeting by the other side in the event that those claiming protection abuse the protection granted in order to gain a tactical advantage.[173] Providing that locational data

---

169. *See* Watkin, *supra* note 168, at 643–44 (indicating that individuals who fall short of the CCF, yet provide support, may gain protection as civilians); Bill Boothby, *"And for such time as": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741, 753–55 (2010) (explaining the "revolving door of protection" as a "natural consequence" of treaty provisions that protect civilian status).

170. *See* Margulies, *The Fog of War Reform*, *supra* note 4 at 1469–70 (arguing that a bomb maker could use the "revolving door of protection" even if he satisfied the ICRC's causation definition).

171. *See* Hague Convention IV, *supra* note 156, at art. 32 (indicating that flag bearers who accompany parlementaires also benefit from inviolability).

172. *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for Execution of the Convention art. 16, May 14, 1954, 249 U.N.T.S. 240 (describing the blue and white emblem of the Convention).

173. *Cf.* Michael W. Lewis & Emily Crawford, *Drones and Distinction: How IHL Encouraged the Rise of Drones*, GEO. J. INT'L L. text accompanying notes 37–44

therefore gives the person or group claiming protection a significant incentive to act in good faith.

Even with the requirement that those claiming protection distinguish themselves, the approach outlined here may impair targeting. However, it will also improve good will and ultimately lessen the time spent in hostilities. That goal is central to LOAC.[174] Rather than leave the question to the tactical domain of ROE, the law should affirmatively protect court-based commanders.[175]

Moreover, implied safe conduct would go beyond a bar on targeting and would also substantially revise the proportionality principle's permission for the targeter to cause collateral damage. Implied safe conduct would treat commanders and their subordinates in the activities described above as the equivalent of diplomats, plenipotentiaries, or ICRC personnel and assets—persons that a third-party state has an affirmative duty to protect from its own forces and the forces of an allied host state. Because of this affirmative duty, a third-party state could not target other military objectives if such targeting would result in collateral damage to commanders or their subordinates involved in indigenous dispute resolution.

E. *Challenges Posed by New Targeting Techniques and Technology*

The implied–safe conduct approach creates special challenges in two areas that have recently attracted attention: signature strikes and autonomous systems. Each will be discussed in turn.

(forthcoming 2013), *available at* http://ssrn.com/abstract=2241770 (discussing the importance of symbols and other means that clearly separate military targets from civilian persons and property).

174. *See* Margulies, *The Fog of War*, *supra* note 4, at 1423–29 (discussing LOAC norms).

175. One could argue that granting even limited immunity to commanders who do part-time duty in religious courts gives those tribunals a patina of legitimacy and therefore aids insurgents' struggle against the host government that a third-party state is seeking to assist. However, this argument does not fully consider how legitimacy is gained and lost in NIACs. While refraining from targeting commanders in religious courts may provide some incremental increase in legitimacy, the inverse proposition is manifestly inaccurate: Targeting those commanders during their service in religious courts does not *reduce* their legitimacy. Rather, by showing disdain for the "social capital" of indigenous communities, such targeting decreases the legitimacy of the host government and the third-party state. *Cf.* COIN MANUAL, *supra* note 13, at ch. 3, § 61 (noting the importance of preserving social capital). The host government can enhance its own legitimacy only by standing up its own dispute-resolution processes. As COIN doctrine suggests, the third-party state has an important role to play in supporting and protecting those efforts.

1. Signature Strikes

The implied–safe conduct approach has ramifications for the use of so-called signature strikes. Signature strikes are strikes in which a drone operator targets individuals or a group without knowledge of some or all of the targets' identities. Instead of knowing a particular individual's history and course of conduct, the operator looks for a behavioral "signature."[176] For example, if a group of young, adult men not in uniform is massing together in the early morning hours in the FATA, each bearing arms, and heading in the direction of a village known to be under the control of the host-state's government, the drone operator may determine that the men are members of Al Qaeda, the Taliban, or an associated force such as the Haqqani Network. Based on this determination, the operator will target the group.

There is nothing inherently unlawful in the use of signature strikes. After all, in traditional conflicts among states, groups were regularly targeted when the targeter had no knowledge of their specific identities.[177] Such targeting complies with the principle of distinction, which simply requires a reasonable belief on the part of the targeter that the target is part of the opposing force engaged in a CCF or is at the time of the strike a civilian who is DPH.[178] In such conflicts, other indicia of combatancy, such as wearing an enemy uniform, provided enough identifying information to justify targeting under LOAC.[179] In principle, the same rule applies to men not wearing uniforms in the service of Al Qaeda or an associated force. Requiring exact knowledge of each target's identity would create a perverse incentive, rewarding those who ignore the law of war's

176. *See* DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 41 (2012) (reporting on the "targeting of groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren't necessarily known"); Kevin Jon Heller, *'One Hell of a Killing Machine': Signature Strikes and International Law*, 11 J. INT'L CRIM. JUSTICE 89, 98–99 (2013), *available at* http://ssrn.com/abstract=2169089 (conceding that strikes based on certain conduct, such as participation in a terrorist training camp, would be consistent with LOAC, while asserting that targeting "military-age males" present in an area identified as a training camp would violate the principle of distinction absent further evidence that targets were DPH). For reasons discussed in this Article, I believe Heller's reading of the principle of distinction is unduly strict. The implied–safe conduct approach, which I concede is *lex ferenda*, would require greater care in certain contexts than the principle of distinction currently mandates.

177. *See* Geoffrey S. Corn et al., *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT'L L. STUD. 536, 562–63 (2013) (discussing status-based targeting in traditional armed conflicts).

178. *See id.* (explaining that during an armed conflict "the collective nature of the enemy belligerent forces justifies a conclusive presumption that all individuals falling within that status represent a threat").

179. *See id.* (recognizing the broad nature of this status-based attack authority).

traditional requirement that fighters wear identifying insignia and carry arms openly.[180]

However, the lack of precise knowledge of a target's identity can heighten the risk of false positives—people targeted even though they actually are *not* a part of an opposing force. Consider the scene described above of young, armed men congregating. That group could be assembling to go to a jirga at the village, carrying arms only for protection against bandits. Other explanations are possible as well. However, requiring that participants in a jirga distinguish themselves will reduce the risk of false positives. Nevertheless, particular situations may still be ambiguous, imposing a duty on the drone pilot to obtain more information.

2. Autonomous Systems

This caution is also in order for the use of autonomous systems. Autonomous systems are computerized targeting systems that do their work without real-time human guidance.[181] The United States has already installed autonomous systems in certain narrow applications, such as on naval vessels vulnerable to incoming ordnance.[182] Critics have charged that the deployment of autonomous systems against people is inherently a violation of the law of war because autonomous systems are incapable of the fine-grained discrimination that is expected from human beings. An implied safe conduct for informal dispute resolution would require some adjustments in the deployment of autonomous systems.

Without adjustments, the autonomous system could spawn false positives as readily as a drone. If a human drone operator could be fooled by the group of young, armed men described above, a computerized targeter could also be deceived. Commanders would have to guard against mistakes by ensuring that the autonomous

---

180. *Cf.* Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT'L L. 279, 289–93 (2010) (critiquing the flawed incentives created by the UN report that condemned the state without acknowledging the wrongdoing of the terrorist group that concealed military objectives in civilian areas).

181. *See* Kenneth Anderson & Matthew Waxman, *Law and Ethics for Autonomous Weapons Systems: Why a Ban Won't Work and How the Laws of War Can*, HOOVER INST. JEAN PERKINS TASK FORCE ON NAT'L SECURITY & L. 1 (2013), *available at* http://media.hoover.org/sites/default/files/documents/Anderson-Waxman_LawAndEthics_5R_FINAL.pdf (defining autonomous weapon systems as ones that "can select and engage targets without further intervention by a human operator"); Michael N. Schmitt & Jeffrey S. Thurnher, *"Out of the Loop": Autonomous Weapons Systems and the Law of Armed Conflict*, 4 HARV. NAT'L SECURITY J. 231, 235 (2013), *available at* http://ssrn.com/abstract=2212188 (autonomous weapons have the "capability to identify, target and attack a person or object without human interface").

182. *See* Schmitt & Thurnher, *supra* note 181, at 235 (providing that the United States has operated "two 'human-supervised' autonomous systems for many years – the Aegis at sea, and the Patriot on land").

system was programmed to recognize distinguishing markings for participation in indigenous dispute resolution. They would also have to program the system to recognize ambiguity and to seek more information or request human guidance in ambiguous situations. This does not mean that autonomous systems could not be used, but it would highlight the need for care in implementation.

V. POTENTIAL OBJECTIONS

As with any proposal for change, there are a legion of objections. One can argue that the implied–safe conduct proposal will prompt hindsight bias against commanders and thereby chill legitimate targeting. This is a powerful concern.

In certain situations, the proposal will require that commanders make very fine-grained decisions. The clearest example is a decision about who is "about to surrender." In armed conflict, commanders in a difficult position may well contemplate surrender or cease-fire along with other options. However, the history of armed conflict teaches that some of the heaviest fighting occurs just before a truce, as adversaries jockey for position.[183] Handling an adversary with kid gloves during this period could be a recipe for unilateral concessions, selling short one's own position. It would be unfair, according to this argument, to subject commanders to this kind of dilemma.

On balance, however, this is not a persuasive argument in the COIN context. It is true that non-state actors may seek to maximize their military advantage just before a truce or even use a truce to rebuild their forces. However, state forces under this proposal would not be helpless to resist such efforts. They could continue to target non-state forces actively engaged in hostilities or visibly preparing for them by massing near a military objective. The implied–safe conduct proposal would simply require reasonable efforts to spare a commander whose forces were docile upon receipt of reasonably reliable information, including an adversary's use of distinguishing markings, that the commander was about to agree to a truce. That requirement will necessarily cut into the discretion provided commanders, but not enough to undermine the effectiveness of state forces.

Another objection is that a rule that those participating in alternative dispute resolution are not DPH while they are engaged in this pursuit would be sufficient. However, that view is also misguided. Even though a state cannot target a civilian who is not

183. *See* Donald W. Boose, Jr., *Fighting While Talking: The Korean War Truce Talks*, 14(3) OAH MAGAZINE OF HISTORY 25, 27 (2000) (noting the threats by U.S. officials in negotiations during the Korean War to escalate the conflict unless China and North Korea accepted the UN's offer).

DPH, that civilian can still end up as permissible collateral damage under the proportionality principle. That does not provide sufficient protection for the cultural and social work that alternative dispute resolution represents. Greater protection is necessary.

VI. CONCLUSION

The clash between LOAC and human rights law has played out in many arenas recently. It is tempting to resolve the tension with an either-or approach. The preemptive model chooses LOAC. The protective view prioritizes human rights. Neither has the nuance to do justice to the complexities of today's NIACs involving third-party states, host states, and non-state actors. The stewardship view advanced here aims to bridge the gap, requiring greater care in targeting when a third-party state might adversely affect indigenous informal dispute resolution.

On the view expressed here, human rights law protects informal dispute resolution as a precious form of cultural property. Preserving this form of property can aid a transition from a regime of chaos or rebellion to one of accommodation between the host state and its people. Protection of informal dispute-resolution processes like jirgas can help achieve this goal without the wholesale constraints on targeting favored by the protective view.

Stewardship achieves this objective through expansion of the venerable concept of implied safe conduct. Typically, safe conducts have rested on the consent of both parties. However, safe conducts can also be created by the operation of customary or treaty law. The modest change of expanding implied safe conducts when an adversary uses distinguishing markings connoting resort to indigenous dispute resolution can produce significant benefits.

As is always the case, those benefits are not cost free. Commanders may be constrained in some situations, particularly when the protection outlined here precludes targeting commanders of opposing forces or significant groups of armed enemy combatants participating in informal dispute resolution. Defenders of the preemptive view might prefer to leave the option of greater protection where it currently resides, with the discretion of commanders. However, that regime has also created costs, such as bitterness among local communities when targeters fail to exercise sufficient care. A rule requiring protection when prospective targets or civilians in the immediate vicinity use distinguishing markings will alleviate the acrimony that such strikes cause, while preserving much of the discretion that commanders require in an armed conflict.

***