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A FUNCTIONAL APPROACH TO TARGETING AND DETENTION

*Monica Hakimi**

The international law governing when states may target to kill or preventively detain nonstate actors is in disarray. This Article puts much of the blame on the method that international law uses to answer that question. The method establishes different standards in four regulatory domains: (1) law enforcement, (2) emergency, (3) armed conflict for civilians, and (4) armed conflict for combatants. Because the legal standards vary, so too may substantive outcomes; decisionmakers must select the correct domain before determining whether targeting or detention is lawful. This Article argues that the "domain method" is practically unworkable and theoretically dubious. Practically, the method breeds uncertainty and subverts the discursive process by which international law adapts to new circumstances and holds decisionmakers accountable. Theoretically, it presupposes that the domain choice, rather than shared substantive considerations embedded in the domains, drives legal outcomes. This Article argues, to the contrary, that all targeting and detention law is and ought to be rooted in a common set of core principles. Decisionmakers should look to those principles to assess when states may target or detain nonstate actors. Doing so would address the practical problems of the domain method. It would narrow the uncertainty about when targeting and detention are lawful, lead to a more coherent legal discourse, and equip decisionmakers to develop the law and hold one another accountable.

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INTRODUCTION

The international law governing when states may target to kill[1] or preventively detain[2] nonstate actors is in disarray. Much of the blame lies with the method that international law uses to answer that question. The method establishes distinct standards in four regulatory domains: (1) law enforcement, (2) emergency, (3) armed conflict for civilians, and (4) armed conflict for combatants. Because the standards vary, so too may substantive outcomes. Decisionmakers must select the correct domain before determining whether targeting or detention is lawful.

That method—which I call the "domain method"—creates two serious problems. One is uncertainty.[3] Many modern situations do not fit comfortably

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1. Targeting involves the intentional and extrajudicial use of lethal force against specific persons or objects. Not all anticipated killings are targeted killings. A state that attacks person *X* knowing that *Y* might die does not target *Y*. The legality of the attack depends on (1) whether *X* was targetable, and at least in some contexts (2) whether the cost of *Y*'s death was proportional to the benefit of *X*'s. This Article addresses only the first question. On the second, see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 57(2)(a)(iii), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. *See also infra* note 18.

2. Preventive detention involves incapacitating someone who poses a threat without any determination (by a court or prosecutor) that he has committed a crime. This definition excludes detention on criminal charges or as criminal punishment, even if the detention serves a preventive function. It includes detention that simultaneously serves a preventive and some other function.

3. *See* 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 (2011) (detention); Charles Garraway, *'To Kill or Not to Kill?'—Dilemmas on the Use of Force*, 14 J. CONFLICT & SECURITY L. 499 (2009) (targeting); Marco

in any domain, leading to intractable disputes about which one governs. For example, legal analysts disagreed on whether the U.S. operation targeting Osama bin Laden fell within the combatant or the law enforcement domain. The operation was lawful under one but probably not under the other.[4]

Some uncertainty reflects substantive disagreements and is inevitable, given the decentralized nature of the international legal system. But the domain method inhibits decisionmakers from resolving uncertainties even when they *agree* on substance. In several contexts, decisionmakers with different policy perspectives have been groping toward similar "hybrids"—outcomes that are more permissive than those associated with one domain but more restrictive than those associated with another. For instance, many decisionmakers seem to appreciate that, when targeting terrorism suspects abroad, states have more authority than in law enforcement settings but less than against combatants.[5] Such hybrids are not grounded in any domain, so they cannot effectively be justified using the domain method. The method discredits them in favor of the available but contested extremes. Separately, the method discourages decisionmakers from agreeing on outcomes in one case because of perceived slippery-slope implications for others. For example, the U.S. government and Human Rights Watch agree that the United States may lawfully target certain al-Qaeda suspects in Yemen.[6] Instead of embracing that agreement and trying to develop shared parameters for counterterrorism operations, each pushes for its preferred domain. Each seeks to avoid the overly expansive or narrow implications of the alternative.[7]

Breeding uncertainty is troubling in its own right, but it also points to a more serious problem: the domain method stifles legal discourse. Decisionmakers now justify their preferred outcomes by invoking legal categories that are often inapposite to the facts. Thus, instead of assessing the bin Laden operation on the merits, analysts debated which domain governed.[8] Those who disagree on the domain talk past one another, applying different standards to assess the same or similar conduct. That enfeebled discourse is problematic because international law—and especially the law

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Sassòli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT'L REV. RED CROSS 599 (2010) (both).

4. *See infra* notes 150, 208–210 and accompanying text.

5. *See infra* notes 202–210 and accompanying text.

6. *See infra* notes 44–49 and accompanying text.

7. *See id.*

8. *See, e.g.*, Kevin Jon Heller, *Quick Thoughts on UBL's Killing—And a Response to Lewis*, OPINIO JURIS (May 4, 2011, 12:02 AM), http://www.opiniojuris.org/2011/05/04/quick-thoughts-on-ubls-killing-and-a-response-to-lewis/; Alon Margalit, *The Bin Laden Killing: Clarifying the Normative Framework(s) Governing the 'War on Terror'?*, EJIL: TALK! (Oct. 12, 2011), http://www.ejiltalk.org/the-bin-laden-killing-clarifying-the-normative-frameworks-governing-the-war-on-terror/; Marko Milanovic, *Was the Killing of Osama bin Laden Lawful?*, EJIL: TALK! (May 2, 2011), http://www.ejiltalk.org/was-the-killing-of-osama-bin-laden-lawful/; Marko Milanovic, *When to Kill and When to Capture?*, EJIL: TALK! (May 6, 2011), http://www.ejiltalk.org/when-to-kill-and-when-to-capture/.

on targeting and detention—functions discursively.[9] When the international legal process works well, it provides a common language for decisionmakers to justify positions and respond to counterarguments. Decisionmakers here include a broad range of actors—for example, states, intergovernmental organizations, courts, and treaty bodies—but their authority to prescribe or apply the law, and thus the weight of their pronouncements, varies.[10] Eventually, enough decisionmakers might converge on particular outcomes and resolve substantive uncertainties. Yet even when decisionmakers disagree on substance, the discursive process helps to constrain their discretion. The more persuasively an actor defends its position, the less pressure it confronts to alter its conduct. Conversely, the more compelling the counterarguments, the more an actor must change its behavior or refine its position to avoid condemnation. This discourse is (for better or worse) the principal mechanism for developing and enforcing international law.[11] By undermining it, the domain method frustrates targeting and detention law from adapting to modern challenges and holding decisionmakers accountable.

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9. *See, e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 118 (1995) ("[T]he interpretation, elaboration, application, and, ultimately, enforcement of international rules is accomplished through a process of (mostly verbal) interchange among the interested parties."); IAN JOHNSTONE, THE POWER OF DELIBERATION 22–27 (2011) ("[I]nternational law operates largely through a process of justificatory discourse."); MALCOLM SHAW, INTERNATIONAL LAW 7 (6th ed. 2008) (explaining that international law provides a "mutually understandable vocabulary book" even as it is subject to self-interested argumentation); W. Michael Reisman, Professor of Law, Yale Law Sch., International Lawmaking: A Process of Communication, Harold D. Lasswell Memorial Lecture Before the American Society of International Law (Apr. 24, 1981), *in* 75 AM. SOC'Y INT'L L. PROC. 101, 105 (1981) ("[L]awmaking . . . is a process of communication."); *cf.* JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 14 (2005) (recognizing "pervasive use of international legal rhetoric" but dismissing its efficacy in shaping behavior).

10. For a more detailed description of the process, see Reisman, *supra* note 9.

11. Scholars disagree on the extent to which the discourse shapes behavior and on the reasons why. *Compare* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7 (1995) (arguing that norms "arrived at discursively in accordance with . . . the right process" may exert a "compliance pull" on states), *with* GOLDSMITH & POSNER, *supra* note 9, at 167–84 (arguing that discourse does not meaningfully shape behavior), *and* ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 98 (2008) (positing that discourse "increase[s] the relevance and force of reputational sanctions . . . [and] promote[s] compliance"), *and* Harold Hongju Koh, Address, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 644–45 (1998) (describing iterative process of "interaction, interpretation, internalization, and obedience"), *and* JOHNSTONE, *supra* note 9, at 7 ("The justificatory discourse is consequential in that it generates pressure on states to behave in accordance with the law . . . . "), *and* Reisman, *supra* note 9, at 108–20 (explaining that discourse shapes behavior by communicating that certain norms are authoritative and controlling), *and* BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 357–60 (2009) (explaining that international legal obligations may mobilize domestic actors to pressure states to comply). My argument does not depend on any particular theory of compliance. The discourse is most of what international law does, no matter to what extent or why it shapes state behavior.

This Article argues for retiring the domain method and replacing it with a new functional approach.[12] It demonstrates that a set of common principles—which I label *liberty–security*, *mitigation*, and *mistake*—animate all of the law on targeting and detention. Briefly, the liberty–security principle posits that, in order for targeting or detention to be justifiable, the security benefits must outweigh the costs to individual liberty. The mitigation principle requires states to try to lessen those costs by pursuing reasonable, less intrusive alternatives to contain a threat. The mistake principle demands that states exercise due diligence to reduce mistakes. Together, the functional principles establish an overarching framework on targeting and detention—one rooted in existing law but not dependent on the domains.

Decisionmakers should use those principles rather than the domains to specify when states may target or detain nonstate actors. Because the principles already animate the law, using them is unlikely to destabilize settled outcomes. Where outcomes are contested, however, the functional approach corrects the problems of the domain method. First, it empowers decisionmakers to develop the law incrementally. Decisionmakers can prescribe an outcome for one scenario by converging on middle-ground hybrids and without risking the slippery slope. Second, the functional approach helps to hold decisionmakers accountable. Though substantive disputes will often reproduce themselves in terms of liberty–security, mitigation, and mistake,[13] that change in discourse matters. Positions that are substantively indefensible become more difficult to justify and, therefore, less appealing to advance.

The method that I propose breaks with existing legal literature on targeting and detention. Though international lawyers already question certain aspects of the domain method, all proposals for clarification or reform either apply that method or assume its compartmentalized structure.[14] This Article

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12. The approach is "functional" in that it defines the authority to target or detain in terms of the substantive considerations that the law is intended to serve, not by reference to formal categories.

13. *Cf.* Yuval Shany, *Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror*, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 13, 13 (Orna Ben-Naftali ed., 2011) (arguing that "ideological struggles . . . over the choice of" domain may reappear if domains change).

14. The specific proposals vary. Some argue for classifying certain cases into one or another domain. *See, e.g.*, Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461 (2008) (counterterrorism measures in law enforcement domain); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SECURITY J. 5, 16 (2010) [hereinafter Schmitt, *Interpretive Guidance*] (members of armed groups in combatant domain). Other proposals advance new domains. *See, e.g.*, Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1 (2004) (domain for conflicts between states and extraterritorial nonstate actors); Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 453 (2007) (domain for conflicts against "transnational terrorist networks typified by al-Qaeda"). Still others suggest outcomes for a particular domain or category of cases. *See, e.g.*, INT'L COMM. OF THE RED CROSS [hereinafter ICRC], INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 17–19 (2009) [hereinafter DPH STUDY] (targeting civilians); David Kretzmer, *Targeted Killings of*

rejects the domain method as practically unworkable and theoretically dubious. Practically, the domain method breeds uncertainty and undermines the discursive legal process. Theoretically, it presupposes that outcomes are determined primarily by the domain choice, rather than by shared substantive considerations embedded in the domains. This Article argues otherwise. It demonstrates that three core principles animate targeting and detention law across contexts but require different outcomes depending on the facts.

The Article proceeds as follows. Part I argues that, in many contexts, the domain method is unworkable at best and corrosive to the legal process at worst. Rather than resolve when states may target or detain people, the domain method undermines resolution. Part II presents my functional alternative. Parts III and IV demonstrate that, compared to the domain method, the functional approach better explains the existing law on targeting and detention. Further, it better holds decisionmakers accountable and equips them to develop the law.

Two brief clarifications about the scope of my argument are appropriate before I proceed. First, this Article addresses the targeting and detention of *nonstate actors*. It leaves open the question of whether to replace the domain method for *state* agents.[15] The domain method serves certain functions when applied to state agents that are not replicated when applied to nonstate

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Suspected Terrorists: Extra-Judicial Execution or Legitimate Means of Defence?, 16 EUR. J. INT'L L. 171 (2005) (targeting transnational terrorism suspects). Significantly, even lawyers who question aspects of the domain method work within it. *See, e.g.*, Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 2, 26 (2004) (arguing for applying multiple domains during armed conflicts but accepting that, in any particular scenario, one must trump).

15. International law already regulates targeting and detention differently when used against state agents than when used against nonstate actors. *Compare* Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III] (providing that the Convention applies in full during interstate conflicts), *and* Additional Protocol I, *supra* note 1, art. 1(3)–(4), 1125 U.N.T.S. at 7 (same), *with* Geneva Convention III, *supra*, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38 (sparsely regulating conflicts against nonstate actors), *and* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 609, 611 [hereinafter Additional Protocol II] (regulating a subset of such conflicts). Maintaining the distinction between state and nonstate actors is an imperfect solution. First, differentiating between each kind of actor may be difficult in practice. Nonstate actors become state agents when sufficiently controlled by the state. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement, ¶ 131 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (standard of overall control); RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS (Adopted Draft 2001), *reprinted in* Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, ¶ 76, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter DRAFT ARTICLES ON STATE RESPONSIBILITY] (standard of effective control). Thus, differentiating between state and nonstate actors sometimes triggers a choice-of-law question similar to the ones that I seek to avoid. Second, maintaining that distinction means that some nonstate actors would receive better treatment than their state analogs—an outcome that many deem problematic. For more on this second point, see *infra* note 181.

actors.[16] Moreover, for state agents, the two methods usually produce the same outcomes.[17] Switching methods thus may not be worth the trouble.

Second, discarding the domain method for targeting and detention does not require discarding it for other legal questions. The method may be effective elsewhere even if not here. Although this Article asks whether to retire the domain method on all issues, it does not answer that more sweeping question.[18]

I. THE FAILURE OF THE DOMAIN METHOD

The domain method is a product of history. Before World War II ("WWII"), international law focused mostly on interstate relations. Governmental abuses of nonstate actors were generally not of international concern.[19] That sensibility shaped international humanitarian law ("IHL")—the wartime regime that was internationally codified in the nineteenth century. IHL initially regulated targeting and detention only in interstate wars ("international conflicts"),[20] not in wars against nonstate actors ("noninternational conflicts").[21] IHL was designed for conflicts in which lawful combatants—state agents licensed to fight—distinguished

16. *See infra* Section II.B.

17. *See infra* Sections III.A, IV.A. The most significant differences are that my method would prohibit states from targeting combatants who are known not to pose a threat or who may reasonably be captured. For arguments supporting comparable reforms, see NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 279–99 (2008), and Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 115 (2010).

18. Persistent differences between human rights law and humanitarian law may justify maintaining the domain method on other issues, but many of those differences are exaggerated. For example, international law directly criminalizes some conduct only during armed conflicts. *See* Rome Statute of the International Criminal Court art. 8(2)(c)–(f), July 17, 1998, 2187 U.N.T.S. 90, 97–98. It indirectly criminalizes much of the same conduct at other times. *See* Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341, 342 (2010) (collecting state obligations to criminalize private conduct). Similarly, some experts claim that only humanitarian law permits states to kill innocents as proportional "collateral" damage. *See, e.g.*, Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 (2000). However, human rights law sometimes permits the same. *See, e.g.*, Özkan v. Turkey, App. No. 21689/93, ¶¶ 305–306 (Eur. Ct. H.R. Apr. 6, 2004) (killing innocents lawful because proportional to the threat); Andronicou v. Cyprus, 1997-VI Eur. Ct. H.R. 2059, 2107 (same); Isayeva v. Russia, 41 Eur. H.R. Rep. 791, 832 (2005) (finding that human rights law requires state to "minimis[e][] incidental loss of civilian life").

19. *See generally* A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE (2001) (providing history).

20. IHL now classifies as "international" one kind of conflict involving nonstate actors: conflicts between states and national liberation movements. Additional Protocol I, *supra* note 1, art. 1, 1125 U.N.T.S. at 7.

21. For a more detailed history, see Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict*, 22 EUR. J. INT'L L. 219, 222–24 (2011). The Lieber Code, which the United States adopted for its (noninternational) Civil War, heavily influenced the development of IHL. Nevertheless, IHL was codified only for international conflicts.

themselves from civilians.[22] It regulates targeting and detention differently for each category of person.

The post-WWII development of human rights law ("HRL") radically "shift[ed] the fulcrum of the [international] system from the protection of sovereigns to the protection of people."[23] HRL has always shared certain precepts with IHL; both seek to protect human dignity.[24] But the two regimes developed independently and for distinct contexts.[25] HRL was meant to regulate not interstate wars but everyday relations between a government and its people. By default, its norms have been crafted for domestic law enforcement settings. More lenient norms may apply during national emergencies.

Although HRL has developed mostly for law enforcement settings, its fundamental promise—that everyone be protected from undue intrusions—resonates more broadly. That promise butts up against the compartmentalized prescriptions on targeting and detention. As discussed, international law regulates targeting and detention differently in (1) wartime settings involving lawful combatants, (2) wartime settings involving civilians, (3) law enforcement settings, and (4) national emergencies.[26] The outcomes associated with each domain were designed for its particular setting—though, as we shall see, outcomes in some domains remain underdeveloped.[27] The predicament is that, because of its splintered origins, the international law on targeting and detention specifies outcomes for only some contexts. Modern sensibilities demand that it regulate *all* contexts.

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22. *See* Convention Respecting the Laws and Customs of War on Land annex arts. 1–2, Oct. 18, 1907, 36 Stat. 2277, 2295–96 [hereinafter Hague IV]. IHL grants combatant status to a small subset of nonstate actors. *Id.* (nonstate actors participating in *levée en masse*); Additional Protocol I, *supra* note 1, arts. 1, 43–44, 1125 U.N.T.S. at 7, 23–24 (nonstate actors participating in national liberation movements). Such nonstate combatants are rare in practice; I do not resolve whether they should be treated like other nonstate actors (and included in my study) or like other lawful combatants (and excluded).

23. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 872 (1990).

24. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, ¶ 183 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) ("The general principle of respect for human dignity is . . . the very *raison d'être* of international humanitarian law and human rights law.").

25. *See* JEAN PICTET, HUMANITARIAN LAW AND PROTECTION OF WAR VICTIMS 15 (1975); Meron, *supra* note 18, at 240.

26. The IHL domains also apply during occupations. *See* Geneva Convention III, *supra* note 15, art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136. Some literature posits that other domains do or should exist. *See, e.g.*, William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741 (2005) (armed conflict domain governed by HRL); Sloane, *supra* note 14, at 484–85 (domain for conflicts against networks like al-Qaeda); Kenneth Anderson, *Predators over Pakistan*, WKLY. STANDARD, Mar. 8, 2010, at 20, 26 (domain for use-of-force operations taken in self-defense). Those domains are not now in the mainstream, but to the extent they exist, identifying the applicable domain is all the more complicated.

27. *See, e.g.*, *infra* Section I.B.3 (emergency generally); *infra* Section III.B.1 (civilian targeting); *infra* Section IV.A (civilian and emergency detention).

The longstanding method for updating that law has been the domain method. The method's basic premise is that the domains operate independently and sometimes incompatibly.[28] After all, the law on targeting and detention *is* compartmentalized, and outcomes across domains typically *do* vary. The domain choice presumably determines the outcome. Building on that premise, the method makes four moves. First, decisionmakers must identify the correct domain before assessing state conduct. Second, decisionmakers should fill regulatory gaps by expanding an existing domain's scope of application.[29] Third, extending a domain means requiring in the new context the outcome that was designed for its original context. Fourth, to the extent a domain is underdeveloped, its outcomes must be derived internally. No overarching framework exists for developing the law within domains.[30]

That method is embedded in the international legal doctrine, which presents a dizzying set of questions for identifying the applicable domain: Does an armed conflict exist? If so, does the IHL domain for combatants or civilians apply? Does the relevant IHL domain trump HRL? Does HRL even apply when the state acts extraterritorially? If HRL applies, does its law enforcement or emergency domain apply? Though the domain method requires answering those questions before assessing state conduct, it lacks effective tools for determining the correct answers. Inevitably, it leads to disputes about which domain governs—disputes that, because the system is decentralized, no actor has unilateral authority to resolve. To be clear, my argument is not that the applicable domain is always indeterminate or contested. My argument is that the domain method does little, if any, work to identify that domain; the method neither guides nor constrains decisionmakers. Instead, it undermines the discursive process by which the law might adapt to new challenges or hold decisionmakers accountable.

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28. *See, e.g.*, ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 19, ICRC Doc. 31IC/11/5.1.2 (Oct. 2011) ("[T]he logic and criteria governing the use of lethal force under IHL and [HRL] do not coincide . . . ."); Marko Milanović, *A Norm Conflict Perspective on the Relationship Between International Humanitarian Law and Human Rights Law*, 14 J. CONFLICT & SECURITY L. 459, 466 (2009) ("[A] norm conflict will not only be unavoidable, but also unresolvable."); Nancie Prud'homme, Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISR. L. REV. 356, 361 (2007) (asserting that the domains are "often paradoxical and at odds with" one another).

29. *See infra* Section I.B.1 (on extending to noninternational conflicts IHL for international conflicts); *infra* Section I.B.2 (on extending to noninternational conflicts law enforcement HRL); *infra* Section I.B.3 (on applying law enforcement HRL extraterritorially).

30. International lawyers have begun to question the second and third of those moves. *See, e.g.*, Kretzmer, *supra* note 14 (proposing hybrid); Sloane, *supra* note 14 (proposing new domain); *infra* notes 115–118 and accompanying text (modifying a domain's ordinary outcomes). Nevertheless, the domain method overwhelmingly dominates the literature and practice. For a recent overview of the method and evidence of its problems, see ANDREA BIANCHI & YASMIN NAQVI, INTERNATIONAL HUMANITARIAN LAW AND TERRORISM 374–89 (2011).

A. *Armed Conflict?*

The domain method's starting point is the armed conflict test.[31] An armed conflict triggers IHL, which historically displaced HRL.[32] Now, IHL and HRL may apply concurrently during armed conflicts,[33] but states presumably have more authority to target and detain if both regimes apply than if only HRL applies.[34]

The test for identifying noninternational armed conflicts is notoriously deficient.[35] Most decisionmakers consider three factors: (1) the participants' levels of organization; (2) their ambitions and perceptions of the situation; and (3) the scale, duration, and intensity of their violence.[36] However, nonstate actors commit violence all the time; their organizational structures, intentions, and levels of violence vary widely.[37] Though some situations

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31. *See, e.g.*, RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 7 (2002); Kenneth Watkin, *Humanitarian Law and 21st-Century Conflict: Three Block Wars, Terrorism, and Complex Security Situations*, *in* TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 1, 42 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006).

32. *See* Heike Krieger, *A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 265, 266 (2006) ("For several decades, it was generally considered that human rights law is not applicable in situations of armed conflict.").

33. *See* Legality of the Threat or Use of Nuclear Weapons (*Nuclear Weapons Case*), Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); Michael J. Dennis, *Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict*, 40 ISR. L. REV. 453, 455 (2007) ("The majority of states . . . appear to accept the view that the provisions of the international human rights treaties may continue to apply *domestically* during an internal armed conflict."); Meron, *supra* note 18, at 267–73 (reviewing practice).

34. *See, e.g.*, Kenneth Roth, *The Law of War in the War on Terror: Washington's Abuse of "Enemy Combatants"*, 83 FOREIGN AFF. 2, 2–3 (2004) ("The rules that bind governments are much looser during wartime than in times of peace.").

35. *See* LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 32 (2002) ("There is, as yet, no universally accepted definition . . . ."); Kretzmer, *supra* note 14, at 195 ("The scope and level of violence required . . . has never been clearly defined."); Jakob Kellenberger, President, ICRC, Sixty Years of the Geneva Conventions: Learning from the Past to Better Face the Future, Address at the Ceremony to Celebrate the 60th Anniversary of the Geneva Conventions (Aug. 12, 2009), http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-president-120809.htm ("[T]here is no clear, universally-accepted legal definition of what [a noninternational] conflict actually is.").

36. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-94-4-T, Judgement, ¶ 625 (Sept. 2, 1998) (explaining that violence must meet certain level of intensity); Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("[A]n armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups."); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 628 n.9 (1982) (explaining that Additional Protocol II excludes riots "not directed by a leader and hav[ing] no concerted intent" but includes "military operations carried out by armed forces or organized armed groups").

37. *See* Jennifer M. Hazen, *Understanding Gangs as Armed Groups*, 92 INT'L REV. RED CROSS 369 (2010) (examining variation); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42

clearly pass or fail the armed conflict test, many fall somewhere in between; or at least, their proper classification is not evident from those three factors.

Consider the U.S. fight against al-Qaeda. The United States claims to be engaged in a global armed conflict—one without inherent geographic limits and fought wherever al-Qaeda members are located.[38] That claim is plausible under the armed conflict test.[39] Al-Qaeda has a centralized leadership (factor 1), each side understands itself to be at war (factor 2), and high-intensity violence between the two sides continues (factor 3). The armed conflict test also supports a narrower construction: that any conflict exists only in hot zones of combat.[40] The three factors do not resolve which claim is correct—whether IHL governs worldwide or only on hot battlefields. The factors are similarly ineffective in other contexts. For example, drug cartels in Mexico and Brazil are well organized (factor 1), undermine the state security apparatus (factor 2), and commit large-scale, horrific violence (factor 3).[41] But most states[42] and international lawyers[43] resist classifying

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N.Y.U. J. INT'L L. & POL. 641, 674 (2010) [hereinafter Watkin, *Direct Participation*] ("Groups fighting State authorities include a diverse range of organizations that reflect the broad scope of potential insurgent activity.").

38. *See* John B. Bellinger, III, Legal Adviser to the U.S. Sec'y of State, Legal Issues in the War on Terrorism, Speech at the London School of Economics (Oct. 31, 2006) [hereinafter Bellinger, LSE Speech], *transcribed as* Development, 8 GER. L.J. 735, 739 (2007); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Keynote Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) [hereinafter Koh, ASIL Speech], http://www.state.gov/s/l/releases/remarks/139119.htm.

39. *See, e.g.*, Robert 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, 37–41 (2010) [hereinafter Chesney, *Who May be Killed?*]; Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 9 (2003).

40. *See, e.g.*, Declaration of Prof. Mary Ellen O'Connell at 7, Al-Aulaqi v. Obama, No. 10-cv-01469 (JDB) (D.D.C. Dec. 7, 2010); Balendra, *supra* note 14. Even if one limits IHL to hot battlefields, the parameters of the battlefield may be undefined. *See* Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1 (2010).

41. On Mexico, see generally COLLEEN W. COOK, CONG. RESEARCH SERV., RL 34215, MEXICO'S DRUG CARTELS (2007); Sara A. Carter, *100,000 Foot Soldiers in Cartels: Numbers Rival Mexican Army*, WASH. TIMES, Mar. 3, 2009, at A1; and Alfredo Corchado, *Drug Cartels Taking Over Government Roles in Parts of Mexico*, DALL. MORNING NEWS, May 2, 2011, 2011 WLNR 8659328. On Brazil, see generally Jon Lee Anderson, *Gangland: Who Controls the Streets of Rio de Janeiro?*, NEW YORKER, Oct. 5, 2009, at 46. On both, see generally MAX G. MANWARING, A CONTEMPORARY CHALLENGE TO STATE SOVEREIGNTY: GANGS AND OTHER ILLICIT TRANSNATIONAL CRIMINAL ORGANIZATIONS IN CENTRAL AMERICA, EL SALVADOR, MEXICO, JAMAICA, AND BRAZIL (2007), *available at* http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=837.

42. States often deny a conflict to downplay the seriousness of the situation and try to limit insurgents' access to international actors. *See* OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 360 (2006).

43. *See, e.g.*, Patrick Gallahue, *Mexico's "War on Drugs"—Real or Rhetorical Armed Conflict?*, 24 J. INT'L L. PEACE & ARMED CONFLICT 39 (2011) (arguing against armed conflict classification); Pierre Hauck & Sven Peterke, *Organized Crime and Gang Violence in National and International Law*, 92 INT'L REV. RED CROSS 407 (2010) (arguing that organized

such situations as armed conflicts. Conflicts trigger IHL and, presumably, wartime authority.

In some contexts, the armed conflict test not only fails to resolve whether a conflict exists but also inhibits decisionmakers from manifesting their substantive agreement. In late 2010, Human Rights Watch sent President Obama an open letter questioning U.S. targeting operations in places like Yemen.[44] The letter rejected the U.S. claim of a global armed conflict and asserted that the United States may target people either under IHL "on a genuine battlefield, or [under HRL] in a law enforcement action."[45] It gave the impression that, outside of hot battlefields, Human Rights Watch and the United States fundamentally disagreed about the scope of U.S. targeting authority.[46] After all, HRL is typically less permissive than IHL. Yet Human Rights Watch later conceded that U.S. operations in Yemen might be lawful, even if they would be unlawful in an ordinary law enforcement setting.[47] It clarified that, "in the places we are talking about," the choice of domain might be immaterial.[48]

Instead of refining that agreement and trying to specify the parameters for U.S. counterterrorism operations, each side pushes for its preferred domain. Each worries about a different slippery slope. In the fight against terrorism, the armed conflict test treats all settings that are not hot battlefields the same. Human Rights Watch resists applying IHL in Yemen because doing so suggests that IHL applies worldwide. Meanwhile, the United States invokes IHL even though it does not intend to exercise full IHL authority worldwide.[49] The domain method denies the United States

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gang violence should rarely pass armed conflict test); Roth, *supra* note 34, at 3 ("[O]rganized crime or drug trafficking, although methodical and bloody, are generally understood to fall under law enforcement rules . . . ."). *But see* Carina Bergal, Note, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INT'L L.J. 1042 (2011).

44. Letter from Kenneth Roth, President, Human Rights Watch, to President Barack Obama (Dec. 7, 2010) [hereinafter Roth Letter], *available at* http://www.hrw.org/en/news/2010/12/07/letter-obama-targeted-killings.

45. *Id.* at 2.

46. *See id.*; *see also* Letter from Anthony D. Romero, Exec. Dir., Am. Civil Liberties Union, to President Barack Obama 1 (Apr. 28, 2010), *available at* http://www.aclu.org/files/assets/2010-4-28-ACLULettertoPresidentObama.pdf (contesting targeting in Yemen because "[t]he entire world is not a war zone"); Roth, *supra* note 34, at 4 (protesting "dangerous . . . implications" of wartime model).

47. *See* Robert Chesney, *Malinowski on IHL Away from the Battlefield and on the Meaning of Imminence*, LAWFARE (Dec. 14, 2010, 3:01 PM) [hereinafter *Malinowski Comment*], www.lawfareblog.com/2010/12/malinowski-on-ihl-away-from-the-battlefield-and-on-the-meaning-of-imminence/ (quoting Tom Malinowski).

48. *Id.*

49. *See* Bellinger, LSE Speech, *supra* note 38, at 739 ("I am not suggesting that . . . the United States is free to use military force against al Qaida in any state where an al Qaida terrorist may seek shelter."); John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Strengthening our Security by Adhering to our Values and Laws, Speech at the Harvard Law School Program on Law and Security (Sept. 16, 2011) [hereinafter Brennan Speech], *available at* http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-

any basis for asserting more than its law enforcement authority in *some* nonbattlefield settings.[50] The two sides debate whether IHL or HRL governs, instead of developing the substantive law.

B. *What Follows?*

Even assuming an armed conflict, the correct domain will be unclear. Recall that, historically, IHL did not regulate targeting and detention in noninternational conflicts.[51] IHL treaties have since been updated, but in most noninternational conflicts, they still provide only sparse protections from targeting and detention.[52] States refuse to afford insurgents combatant status because that status confers the license to fight.[53] Nevertheless, most states appreciate that minimally regulating noninternational conflicts is no longer tenable.[54] Two visions exist for filling the gaps. One applies by analogy (and mostly as a matter of custom) IHL for international conflicts.[55] The

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brennan-strengthening-our-security-adhering-our-values-an (explaining preference for exercising more limited authority when feasible).

50. The United States recently suggested that the *jus ad bellum* limits when it may use military force against al-Qaeda suspects abroad. *See* Brennan Speech, *supra* note 49. Professor Anderson has likewise suggested that the *jus ad bellum*—not IHL or HRL—governs certain counterterrorism operations. *See* Anderson, *supra* note 26. However, the majority position is that the *jus ad bellum*, which focuses on protecting state sovereignty, does not displace IHL or HRL, which focuses on protecting individuals. *See* DRAFT ARTICLES ON STATE RESPONSIBILITY, *supra* note 15, at 74; Geoffrey S. Corn, Self-Defense Targeting: Conflict Classification or Willful Blindness? (Oct. 22, 2011) (working paper), *available at* http://ssrn.com/abstract=1947838.

51. *See supra* note 21 and accompanying text.

52. *See* Additional Protocol II, *supra* note 15, arts. 1, 13, 1125 U.N.T.S. 611, 615 (immunizing civilians in some noninternational conflicts); Geneva Convention III, *supra* note 15, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38 (protecting people who are wounded, sick, or "taking no active part in the hostilities").

53. Kretzmer, *supra* note 14, at 197 ("States were, and still are, unwilling to grant the *status* of combatants to insurgents and other non-state actors . . . ."); *cf.* Additional Protocol I, *supra* note 1, arts. 2, 43–44, 1125 U.N.T.S. at 7–8, 23–24 (extending combatant protections only to members of nonstate groups who are fighting for national liberation).

54. *See generally* ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxv (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIL STUDY] (collecting state practice and *opinio juris* on the "expanded . . . rules applicable to noninternational armed conflicts"); *see also* Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("Why . . . refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State?").

55. *See* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 189 (2005) ("The gaps . . . have . . . largely been filled through State practice, which has led to the creation of rules parallel to those [applicable in international conflicts], but applicable as customary law to non-international armed conflicts."). Additional Protocol II, *supra* note 15, also extends IHL for international conflicts, making minor adjustments for the noninternational element. *See* Sivakumaran, *supra* note 21,

second applies HRL. Each vision finds support in the international practice, but neither offers coherent criteria for identifying the applicable domain.

1. Quasi-Combatant or Civilian?

Regulating noninternational conflicts by analogy to international conflicts makes some intuitive sense; it might save decisionmakers from recreating the wheel. But the analogy is deeply imperfect. In international conflicts, IHL establishes different domains for lawful combatants and civilians. Lawful combatants are, with rare exception, members of state armed forces who must and generally do wear uniforms or other identifying insignia.[56] States may not prosecute combatants for participating in hostilities and must afford them prisoner-of-war ("POW") status when captured. In exchange, combatants are targetable, unless they are *hors de combat* (i.e., surrendered, detained, sick, or wounded),[57] and they are detainable without legal process.[58] All noncombatants are civilians.[59] Civilians generally are immune from targeting and detention.[60] They lose their targeting immunity when they directly participate in hostilities and their detention immunity when they pose an imperative security threat.[61] Yet that loss of immunity is the exception, not the norm.

The combatant–civilian distinction translates awkwardly for noninternational conflicts, because insurgents do not fit neatly into either domain.[62] They receive none of the benefits of combatant status.[63] Moreover, they often blend in with the general population; treating them as combatants

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at 227 (explaining that Additional Protocol II "took as its starting point the law of international armed conflict").

56. Geneva Convention III, *supra* note 15, art. 4, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40; Additional Protocol I, *supra* note 1, arts. 43–44, 1125 U.N.T.S. at 23–24. On the exceptions, see Geneva Convention III, *supra* note 15, art. 4(A)(6), 6 U.S.T. at 3322, 75 U.N.T.S. at 140, and Additional Protocol I, *supra* note 1, art. 1(4), 1125 U.N.T.S. at 7.

57. CIL STUDY, *supra* note 54, at 3 ("Attacks may only be directed against combatants .... This rule has to be read in conjunction with the prohibition to attack persons recognised to be *hors de combat* ....").

58. Geneva Convention III, *supra* note 15, arts. 21, 118, 6 U.S.T. at 3334–36, 3406, 75 U.N.T.S. at 152–54, 224.

59. Additional Protocol I, *supra* note 1, art. 50, 1125 U.N.T.S. at 26.

60. *Id.* art. 52(1), 1125 U.N.T.S. at 27 (targeting); Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 34, 42, 78, Aug. 12, 1949, 6 U.S.T. 3516, 3540, 75 U.N.T.S. 287, 310 [hereinafter Geneva Convention IV] (detention).

61. *See* Geneva Convention IV, *supra* note 60, arts. 42, 78, 6 U.S.T. at 3566–67, 75 U.N.T.S. at 336–37 (detention); Additional Protocol I, note 1, art. 51(3), 1125 U.N.T.S. at 26–27 (targeting).

62. Henckaerts, *supra* note 55, at 190 ("[I]n non-international armed conflicts practice is ambiguous as to whether ... members of armed opposition groups are considered members of armed forces or civilians.").

63. MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 208 (1999) ("[T]he law of non-international armed conflicts ... foresees no combatant status [and] does not define combatants ....").

exacerbates the risk that states will target or detain innocents by mistake.[64] However, most insurgents are also unlike civilians. Under the armed conflict paradigm, they comprise a party to the conflict, not part of the protected population. And because they are not licensed to fight, they presumably should receive no more protections than lawful combatants do.[65]

Decisionmakers therefore disagree on whether to classify insurgents as civilians or "quasi-combatants"—i.e., people who are targetable and detainable like lawful combatants without the benefits of combatant status.[66] The latter position dominates.[67] Still, no shared criteria define quasi-combatants or, therefore, delineate when the combatant domain applies. Some decisionmakers and IHL experts use a broad membership rule like the one for lawful combatants: anyone who belongs to the armed nonstate group is a quasi-combatant.[68] Canadian Brigadier General Kenneth Watkin defends that rule on the ground that nonstate groups are sometimes "organized, and

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64. *See, e.g.*, Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 269 (2003) ("This militarization of the civilian population is, indeed, a characteristic feature of non-international conflicts . . . render[ing] it ever harder to distinguish between civilians and combatants."); Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SECURITY J. 45, 53 (2010) (observing that "[n]ew warfare" is "characterized by fighting in highly populated areas with a blurring of the lines between military forces and civilian persons and objects").

65. *See, e.g.*, Ryan Goodman, Editorial Comment, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 56 (2009) ("[I]f the law permits states to subject *lawful* combatants to measure *Y*, the law a fortiori permits states to subject *unlawful* combatants to that same measure.").

66. International lawyers use different terms for this category of person—for example, unlawful combatants, unprivileged belligerents, insurgents, and people who directly participate in hostilities. *See* Blank & Guiora, *supra* note 64, at 64 & n.54, 65. Moreover, the term "quasi-combatant" has been used differently than I define it in the text. *See* J.M. Spaight, *Non-Combatants and Air Attack*, 9 AIR L. REV. 372, 375 (1938) (labeling as "quasi-combatants" armament workers who are "civilians and at the same time engaged in activities as harmful to an enemy as those of the armed forces").

67. *See, e.g.*, ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1453 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOLS]; DPH STUDY, *supra* note 14, at 22; Ben-Naftali & Michaeli, *supra* note 64, at 271; Schmitt, *Interpretive Guidance*, *supra* note 14, at 16. *But see, e.g.*, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (*Targeted Killing Case*) 2006 (2) Isr. L. Rep. 459, 490–95 (Isr.) (classifying as civilians); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum: Study on Targeted Killings*, ¶ 58, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Alston, *Study on Targeted Killings*] (same); Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism"*, 22 LAW & INEQUALITY 195, 207–08 (2004) (reviewing support for minority position).

68. *See, e.g.*, Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); Brief for Appellees at 18, Al-Bihani v. Obama, No. 09-5051 (D.C. Cir. July 17, 2010); COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 67, at 1453; Schmitt, *Interpretive Guidance*, *supra* note 14, at 35; Watkin, *Direct Participation*, *supra* note 37, at 675–78.

in a number of ways act like regular armed forces."[69] The International Committee of the Red Cross ("ICRC") defines quasi-combatants more narrowly, to include only people who continuously and directly participate in the hostilities on behalf of the group.[70] Each definition presents a different domain problem. Watkin's definition is too permissive when applied to loosely organized groups; the combatant domain would apply to people who, though belonging to the group, are more like civilians.[71] The ICRC definition is too restrictive when applied to tight-knit groups; the civilian domain would apply to people who, though not continuously fighting, are more like combatants.[72] The domain method does not identify which domain problem to tolerate.

Meanwhile, the imperative to define quasi-combatants for all noninternational conflicts obscures areas of agreement. Each side of the debate advocates for *its* definition to avoid the alternative's slippery slope—the too-permissive or too-restrictive application. Yet the two sides agree on quite a bit. Whatever their formulations may suggest, advocates of the broad membership rule typically acknowledge that people who marginally associate with the group or participate only in a nonmilitary faction should be excluded.[73] Their disagreement with the ICRC seems to boil down to this: may states presumptively target and detain people who are integrated into the armed faction but do not regularly and directly participate in hostilities? That question is considerably narrower than how to define quasi-combatants for all noninternational conflicts. The civilian–combatant frame distracts decisionmakers from identifying and refining their agreement and circumscribing their disagreement.[74]

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69. Watkin, *Direct Participation*, *supra* note 37, at 678.

70. DPH STUDY, *supra* note 14, at 33; *see also* Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, 88 INT'L REV. RED CROSS 881, 891 (2006) ("'[A]rmed groups' are narrowly defined to include only those members who regularly do the actual fighting.").

71. *See* DPH STUDY, *supra* note 14, at 33 ("[T]here may be various degrees of affiliation with such groups that do not necessarily amount to 'membership' within the meaning of IHL."); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145, 158 (2010) ("A mere membership test in the case of Hamas or some other Palestinian organizations would have been especially prone to over-inclusive application, as alongside their military wings, these organizations also have broad political, social, economic, and cultural operations.").

72. *See, e.g.*, Watkin, *Direct Participation*, *supra* note 37, at 678.

73. For example, Watkin defines quasi-combatants as people who belong to "armed forces . . . under a command responsible for the conduct of its subordinates." *Direct Participation*, *supra* note 37, at 691. Belonging to a group's armed forces suggests participation in its military faction. Operating under its command structure suggests more than a marginal association. *See also* Schmitt, *Interpretive Guidance*, *supra* note 14, at 22 ("Within mixed groups, membership in the armed faction is often clear-cut . . . .").

74. The frame probably also undermines efforts to specify the law for civilians. Decisionmakers will not resolve when civilians are targetable unless they know who qualifies as a civilian. And the broader the civilian domain, the more decisionmakers dispute its content. An outcome that works for one civilian is too permissive or restrictive for another. For example, the Israeli Supreme Court has classified as civilians everyone (including terrorists) in the Pal-

2. Humanitarian or Human Rights Law?

No matter which IHL domain is more relevant, decisionmakers must determine how it interacts with HRL.[75] Applying IHL and HRL concurrently is straightforward when they lead to comparable outcomes.[76] But on targeting and detention, IHL is understood to be more permissive.

The dominant theory for addressing that tension posits that the more specific norm—the *lex specialis*—trumps.[77] The theory does not resolve when a norm is the *lex specialis*.[78] Decisionmakers widely accept that IHL provides the *lex specialis* on targeting and detention during international conflicts, because IHL was specifically crafted for interstate wars.[79] However, neither regime is directly on point during noninternational conflicts.[80] Nonstate fighters are unlike enemy states in that they lack the legal or practical benefits of statehood. The relationship between a state and individuals is the central focus not of IHL but of HRL. Yet ordinary HRL is tailored to

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estinian territories. Having defined the domain broadly, it rejected the revolving door as too restrictive. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (*Targeted Killing Case*) 2006 (2) Isr. L. Rep. 459, 490–95, 496–501 (Isr.). Commentators object that, whatever its difficulties for civilian-terrorists, the door is critical for *other* civilians. *See* Kristen E. Eichensehr, Comment, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873 (2007). For more on this debate, see *infra* Section III.B.1.

75. At this level of generality, the international practice is incoherent. *See, e.g.*, Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 29, *transmitted by Note of the High Commissioner for Human Rights*, U.N. Doc. E/CN.4/2005/103 (Feb. 7, 2005) (by Robert K. Goldman) ("Human rights treaty bodies have no common approach . . . ."); Sassòli & Olson, *supra* note 3, at 603 ("In confrontations with rebel groups, some states let human rights prevail, some apply by analogy the rules of humanitarian law governing international armed conflicts and some a mix of the two.").

76. In this event, each regime may complement or inform the other. *See, e.g.*, Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, ¶¶ 465–497 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (using HRL norms on mistreatment to specify IHL).

77. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (*Israeli Wall Case*), Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9); Legality of the Threat or Use of Nuclear Weapons (*Nuclear Weapons Case*), Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8). A few scholars reject the *lex specialis* theory and argue for applying the more protective regime, which usually means HRL. *See, e.g.*, Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 225–28 (2004); Alexander Orakhelashvili, *The Interaction Between Human Rights and Humanitarian Law: A Case of Fragmentation?*, N.Y.U. INT'L L. & JUST. COLLOQUIUM, 39 (Feb. 26, 2007), http://iilj.org/courses/documents/Orakhelashvili.pdf.

78. For a more extensive discussion, see Prud'homme, *supra* note 28, at 381–86.

79. *See, e.g.*, *Nuclear Weapons Case*, 1996 I.C.J. 226, ¶ 25; Coard v. United States, Case 10.951, ¶ 42, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999); Human Rights Comm., Fourth Periodic Report: United States ¶¶ 506–07 (Dec. 30, 2011), available at http://www.state.gov/j/drl/rls/179781.htm#artl.

80. *See* Abresch, *supra* note 26; Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SECURITY L. 245, 261–64 (2010).

law enforcement settings, instead of war. The *lex specialis* theory tees up but does not answer the domain question.

Worse yet, the theory reinforces the domain method's mandate to select among the available domains. *Lex specialis* posits that either IHL or HRL must trump. Decisionmakers sometimes disagree on those options even when they appear to agree on some hybrid.[81] Hybrids are not well grounded in any domain because they deviate from the ordinary outcomes in each. The domain method and its *lex specialis* theory discredit the hybrids in favor of the available but more contested extremes.

3. Law Enforcement, Emergency, or Neither?

Absent an armed conflict, IHL does not apply, so its relationship with HRL is not at issue. Decisionmakers must look only to HRL, which usually means the law enforcement domain. However, HRL limits that domain in two respects.

First, HRL permits states to derogate from certain obligations, including on targeting and detention, during national emergencies.[82] The emergency test is, like the armed conflict one, deeply deficient.[83] Distinguishing emergencies from either low-level conflicts or periods of normalcy has proven untenable in practice.[84] Human rights organs sometimes assert that emergencies must be "exceptional and temporary."[85] Yet those organs usually defer to states on whether an emergency exists.[86] Several states have claimed

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81. *See infra* Sections III.B, IV.B.2.

82. American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123, 152 [hereinafter IACHR] (derogation on detention); International Covenant on Civil and Political Rights art. 4, Dec. 19, 1966, 999 U.N.T.S. 171, 174 [hereinafter ICCPR] (same); Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221, 232–34 [hereinafter ECHR] (derogation on detention and targeting). The African Charter on Human and Peoples' Rights has no derogation clause but probably achieves analogous results by permitting states to limit rights for "collective security." African Charter on Human and Peoples' Rights art. 27(2), June 27, 1981, 1520 U.N.T.S. 217, 251 [hereinafter ACHPR].

83. *See* LOUISE DOSWELD-BECK, HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM 86–89 (2011) (reviewing jurisprudence of human rights bodies and concluding same).

84. GROSS & NÍ AOLÁIN, *supra* note 42, at 265–304, 346–49.

85. Human Rights Comm., General Comment 29: States of Emergency (Article 4), ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter General Comment 29]; *see also* The Greek Case, 1969 Y.B. Eur. Conv. on H.R. at 72 (Eur. Comm'n on H.R.) (noting that public emergencies must be "actual or imminent" and "exceptional"); Special Rapporteur Appointed Pursuant to Economic and Social Council Resolution 1985/37, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency: Tenth Annual Report and List of States Which, Since 1 January 1985, Have Proclaimed, Extended or Terminated a State of Emergency*, ¶¶ 49–101, U.N. Doc. E/CN.4/Sub.2/1997/19 (June 23, 1997) (asserting that emergencies must address an "exceptional threat" and be time limited). *But see* A. v. United Kingdom, App. No. 3455/05, 49 Eur. H.R. Rep. 625, 709 (2009) (rejecting any temporal limit).

86. GROSS & NÍ AOLÁIN, *supra* note 42, at 265–304, 346–49. *But see, e.g.*, Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Israel*, ¶ 7, U.N. Doc.

what Oren Gross and Fionnuala Ní Aoláin call "permanent emergencies"—situations characterized by persistent but low levels of violence.[87]

Decisionmakers disagree on the scope of application of the emergency domain in part because it appears to afford states more authority to intrude on individual liberties. States use the domain to claim expansive authority.[88] Human rights organs resist the domain[89] because they worry that it affords states too much authority.[90] In fact, applying the emergency domain rarely alters the nature of a state's obligations. States may need more authority to target or detain during emergencies than in law enforcement settings, but both domains permit states more authority if—and only if—that authority is necessary.[91] Because both domains use a necessity standard, the domain choice matters much less than is ordinarily presumed.[92] If anything, having an emergency domain breeds confusion and invites debate.

HRL's second limitation is geographic. Though HRL has developed for domestic law enforcement settings, decisionmakers increasingly apply it extraterritorially. The extent to which it applies extraterritorially is contested. At one extreme, the United States has suggested that HRL never applies outside a state's national territory.[93] At the other, some actors assert that HRL regulates all extraterritorial conduct just as it regulates a state's

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CCPR/C/ISR/CO/3 (Sept. 3, 2010) [hereinafter *HRC Israel Observations*] (expressing skepticism on longstanding emergency).

87. GROSS & NÍ AOLÁIN, *supra* note 42, at 171, 342–45.

88. *See, e.g.*, Office of the High Comm'r for Human Rights, *Administration of Justice, Rule of Law and Democracy: Question of Human Rights and States of Emergency: List of States Which Have Proclaimed or Continued a State of Emergency: Rep. of the Office of the High Commissioner for Human Rights Submitted in Accordance with Commission of Human Rights Decision 1998/108*, U.N. Doc. E/CN.4/Sub.2/2005/6 (July 7, 2005) [hereinafter *OHCHR Report on States of Emergency*] (listing declarations of emergency).

89. *See, e.g.*, General Comment 29, *supra* note 85.

90. *See* Declaration of Minimum Humanitarian Standards, in letter dated Jan. 5, 1995 from the Permanent Representative of Norway and the Chargé d'Affaires of the Permanent Mission of Finland addressed to the Commission on Human Rights, at 2, U.N. Doc. E/CN.4/1995/116 (Jan. 31, 1995) ("Noting that international law relating to human rights and humanitarian law . . . does not adequately protect human beings in situations of . . . emergency . . . ."); *see also* THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 136 (1987) (explaining that, in emergencies short of armed conflicts, derogating "results in a denial of elementary protections").

91. *See infra* notes 115, 133, 229–236 and accompanying text.

92. For a similar argument, see Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 320 (2007).

93. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodic Reports of States Parties Due in 2003: United States of America*, ¶ 130, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005); *cf.* Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: The United Kingdom of Great Britain and Northern Ireland: Information Received from the United Kingdom of Great Britain and Northern Ireland on the Implementation of the Concluding Observations of the Human Rights Committee (CCPR/C/GBR/CO/6)*, ¶ 24, U.N. Doc. CCPR/C/GBR/CO/6/Add.1 (Nov. 3, 2009) ("[T]he Covenant could only have effect outside the territory of the UK in very exceptional circumstances.").

internal conduct: "[A] State party [may not] perpetrate violations . . . on the territory of another State, which violations it could not perpetrate on its own territory."[94] Most of the practice falls somewhere in between, applying HRL extraterritorially on the basis of state control. The more control a state has, the greater the likelihood that HRL governs.[95]

The literature overwhelmingly assumes that, when regulating a state's extraterritorial intrusions, HRL requires what it would domestically; law enforcement HRL either governs or does not.[96] Both options may be inapt. The norms that govern internally will sometimes be too restrictive when applied extraterritorially. States acting extraterritorially typically lack the tools and institutions that, back home, enable them to respect human rights while satisfying other legitimate interests. As Christian Tomuschat explained while serving on the United Nations ("UN") Human Rights Committee, HRL's territorial limitations accommodate "objective difficulties which might impede the implementation of [HRL] in specific situations."[97] At the same time, *not* applying HRL might permit states to escape international

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94. Saldías de López v. Uruguay, Commc'n No. 52/1979, ¶ 12.3, U.N. Doc. CCPR/C/13/D/52/1979 (Human Rights Comm. July 29, 1981), *reprinted in* HUMAN RIGHTS COMMITTEE SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL (SECOND TO SIXTEENTH SESSIONS), at 88, 91, U.N. Doc. CCPR/C/OP/1, U.N. Sales No. E.84.XIV.2 (1985) [hereinafter 1 HUMAN RIGHTS COMM. DECISIONS]; *see also* Issa v. Turkey, App. No. 31821/96, 41 Eur. H.R. Rep. 567, 588 (2004) (same); Celiberti de Casariego v. Uruguay, Commc'n No. 56/1979, ¶ 10.3, U.N. Doc. CCPR/C/13/D/56/1979 (Human Rights Comm. July 29, 1981), *reprinted in* 1 HUMAN RIGHTS COMM. DECISIONS, *supra*, at 92, 94 (same).

95. HRL probably applies when a state controls foreign territory. *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 216 (Dec. 19); Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333, 352, 355–56. It also may apply when a state has physical custody over someone. *See, e.g.*, Al-Saadoon v. United Kingdom, App. No. 61498/08, 51 Eur. H.R. Rep. 212 (2010); Human Rights Comm., General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). The practice is more conflicted on what other forms of extraterritorial control trigger HRL. *See* Droege, *supra* note 92, at 325–330 (summarizing practice).

96. *See, e.g.*, *Banković*, 2001-XII Eur. Ct. H.R. at 353 (asking about "the scope and reach of the entire Convention system of human rights protection"); *Celiberti de Casariego*, at ¶ 10.3; NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 205 (2010). Some of the practice under HRL distinguishes obligations of result from obligations of conduct. Obligations not to kill or detain arbitrarily are considered obligations of result. States violate these obligations by failing to achieve the specified results—i.e., by killing or detaining arbitrarily. Such obligations presumably require the same result everywhere. In contrast, obligations of conduct require states to take measures toward some end, without necessarily achieving that end. For example, a state might have to take measures to protect someone from third-party harm without guaranteeing her protection. The requisite measures for satisfying obligations of conduct typically depend on the circumstances, so those taken extraterritorially might differ from those required domestically. *Compare, e.g.*, Al-Jedda v. United Kingdom, App. No. 27021/08, 53 Eur. H.R. Rep. 789, 843–48 (2011) (applying obligation not to detain as it applies domestically), *with, e.g.*, Al-Skeini v. United Kingdom, App. No. 55721/07, ¶¶ 164–167 (Eur. Ct. H.R. July 7, 2011) (underscoring that, because the obligation to investigate is an obligation of conduct, requisite measures depend on extraterritorial circumstances).

97. *Celiberti de Casariego*, U.N. Doc. CCPR/C/13/D/56/1979 (Tomuschat, concurring).

regulation altogether. "Never," Tomuschat said, "was it envisaged . . . to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against . . . [people] living abroad."[98] Hybrid outcomes that accommodate the extraterritorial element without letting states completely off the hook would better balance the interests for and against extraterritorial regulation, making resolution more likely.[99] But such outcomes are unavailable using the domain method. Instead, the domain method focuses decisionmakers on the two extremes: apply law enforcement HRL as is or do not apply it at all.

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The domain method requires selecting a domain before assessing state conduct, but it does not meaningfully guide domain decisions or resolve domain disputes. The correct domain is often ambiguous. Worse yet, focusing on the domain question undermines substantive resolution. Agreeing in one case might risk slippery-slope implications for other cases. Or it might require a hybrid that is inaccessible using the domains.

II. PRECURSOR TO FUNCTIONALISM

A. *The Theoretical Shift*

The domain method is not only unworkable in practice but also dubious in theory. As I demonstrate below, the method's basic premise—that the domains operate independently and sometimes incompatibly—is mistaken. Rather, the same core principles animate targeting and detention law in all domains. Those principles are straightforward,[100] but they explain settled outcomes better than the domains do. They account for the variance within each domain and the consistencies across domains. Indeed, the principles capture areas of substantive agreement, even when the domain or outcome is contested.

The *liberty–security principle* identifies the outer bounds of permissible state action. The security benefits of targeting or detaining someone must be proportional to or outweigh the costs to individual liberty. IHL and HRL both seek to protect people from state harm, but both balance that individual liberty interest against an interest in preserving or establishing group security.

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98. *Id.*

99. *Cf.* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2011) (demonstrating that the tension between universality and efficacy distorts decisions on whether law enforcement HRL applies extraterritorially).

100. Not surprisingly, the same or similar principles inform when states may intrude on individual liberties in other areas of HRL and in many constitutional traditions. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (reviewing the use of balancing tests in U.S. constitutional law); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 73–76 (2008) (reviewing European, Commonwealth, Israeli, and international practice).

States may—and in some contexts must—intrude on individual liberties to protect innocents and establish order.[101] The liberty–security principle captures that balance. The greater the threat and the less intrusive the deprivation of liberty, the more expansive the state's coercive authority.

Of course, the cost or benefit of containing a threat may itself vary. Preventing an attack on a military base is more crucial when a state's entire security apparatus is at risk than when its authority is uncontested. Targeting or detention might be proportional in one context but not another. As a general rule, targeting satisfies the liberty–security principle if the person poses an active, serious threat to bodily integrity. In that event, the benefit of a targeting operation (protecting life or limb) is proportional to its cost (taking life). Because detention intrudes less on individual liberty, a state initially has broader authority to detain than to target. As the duration of detention increases, however, so do its liberty costs. Detaining someone who poses only a moderate threat may be lawful in the short term but become disproportionate over time.

The *mitigation principle* further restricts the authority to target or detain by requiring states to mitigate the liberty costs. States must try to contain a threat using reasonable, less intrusive alternatives to targeting or detention. Reasonableness here depends primarily on two factors. One is state control. The greater a state's control, the more varied its toolbox and the more comfortably it can contain a threat without resorting to targeting or detention.[102] The second factor is the relative efficacy of the alternatives. This factor requires some judgment about the risks and merits of each option. A measure might be a reasonable alternative even if it is not guaranteed to be equally effective. For example, a state might have to capture instead of kill someone,

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101. This balance is evident not only in the prescriptions on targeting and detention but also in the law's more general precepts. In IHL, the twin tenets of military necessity and humanity permit states to intrude on individual liberties when necessary—but only when necessary—to achieve a military victory and thereby terminate the enemy's threat. *See* Declaration Renouncing the Use in Time of War of Explosive Projectiles under 400 Grammes Weight, Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474 [hereinafter St. Petersburg Declaration], *translated in* THE LAWS OF ARMED CONFLICTS 91 (Dietrich Schindler & Jiri Toman eds., 4th rev. ed. 2004); U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. FM 27–10, THE LAW OF LAND WARFARE paras. 3–4 (1956). In HRL, the same balance appears in the tension between obligations to respect and protect. Obligations to respect require states not to intrude on individual liberties. Obligations to protect require such intrusions when necessary to protect other people from serious harm. *See* Hakimi, *State Bystander Responsibility*, *supra* note 18, at 354–55.

102. A similar insight animates the domain method's shift from the law enforcement to an emergency or armed conflict domain. *See, e.g.*, ICCPR, *supra* note 82, art. 4, 999 U.N.T.S. at 174 (permitting derogation when "life of the nation" is threatened); ICRC, *Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report*, at 56 (Oct. 23–25, 2005) [hereinafter ICRC, *Third Expert Meeting*], *available at* http://www.icrc.org/eng/assets/files/other/2005-09-report-dph-2005-icrc.pdf ("[I]n armed conflict, the government was by definition not in total control of the situation."); Sassòli & Olson, *supra* note 3, at 614 ("[C]ontrol over the place where the attack takes place is . . . a factor causing human rights to prevail over humanitarian law."). This insight also informs the extraterritorial application of HRL. *See supra* note 95 and accompanying text.

even though capture always presents a marginal risk of escape. But states need not pursue measures that are unsuitable for or realistically might compromise the security mission. Similarly, they need not take measures that are unlikely to mitigate the liberty costs.

The *mistake principle* is about the margin of error. States must try to verify that (1) the specific person being targeted or detained (2) poses a sufficiently serious threat (3) that cannot reasonably be contained less intrusively. In other words, states must exercise due diligence to avoid mistakes and establish a reasonable and honest belief that their conduct is lawful. That diligence is generally less when a state acts in the heat of the moment than when it acts with time for deliberation. Agents responding to events as they unfold must act quickly and on the basis of imperfect information. With time, they have more opportunity to ensure the accuracy of their assessments and consider the alternatives.

B. *The Methodological Shift*

Decisionmakers should use the functional principles instead of the domains to determine when states may target or detain nonstate actors. Doing so would facilitate the discursive legal process.[103] Currently, decisionmakers justify outcomes with domains that may be inapposite for the facts. When no domain is directly on point, decisionmakers easily select the one that suits their interests, exploiting its overly broad or narrow implications and talking past those who adopt a different domain. That dynamic is exacerbated because IHL and HRL have distinct epistemic communities.[104] Both within states and internationally, the actors that engage with and specialize in each regime differ. Each community dabbles in the other regime but ultimately is committed to and speaks the language of its own.[105] Neither effectively constrains the other.[106] By contrast, the functional principles provide a common framework for justifying and debating outcomes. Using

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103. *Cf.* Seana Valentine Shiffrin, Essay, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1217 (2010) (arguing that amorphous standards might induce moral deliberation because "[r]ather than applying a rule by rote, citizens must ask themselves, for example, . . . whether they are behaving reasonably").

104. *See* Peter M. Haas, *Knowledge, Power, and International Policy Coordination—Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (defining epistemic community as a "network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area").

105. *See generally* Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 20 EUR. J. INT'L L. 7, 9 (2009) (explaining that "the creation of special regimes of knowledge and expertise" leads to "struggle[s] between competing expert vocabularies, each equipped with a specific bias").

106. *Cf.* GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Zenon Bankowski ed., Anne Bankoska & Ruth Adler trans., 1993) (explaining that different epistemic communities need a shared language to communicate effectively).

those principles would better hold decisionmakers accountable.[107] Extreme positions would be more difficult to defend on the merits than by reference to opaque categories. Compromise positions would be more appealing. A position that garners broad support is less likely to elicit condemnation and more likely to be treated as legitimate.

To be sure, the functional approach does not yield single correct outcomes. It focuses decisionmakers on the right questions and suggests comparative answers—i.e., that targeting or detention is more lawful in one scenario than in another. Nevertheless, using the functional approach should lead to more certainty. First, it would remove current impediments to agreement.[108] Second, it might motivate decisionmakers to retreat from hardline positions and support more defensible compromises.[109] Third, it would occasionally narrow the range of plausible outcomes. Outcomes that are prominent in the literature and justifiable using the domains are sometimes indefensible on the merits.[110]

Some readers will resist my argument. Advantages that I claim for my functional approach are typically associated with more formal rules and categories. The relative rigidity of formalism is said to constrain discretion and ensure more certainty. Further, formalism might better satisfy the substantive interests at stake. Certain decisionmakers—like states—might systematically reach undesirable outcomes when applying malleable standards. Formal rules help protect against that result.[111] Those arguments for formalism may be compelling in theory, but they are not grounds for maintaining the domains. Only the combatant domain functions anything like a formal rule, and it does so only when applied to lawful combatants. Someone's combatant status is usually evident from his uniform and dispositive on the outcome. Efforts to extend the domain to a category of nonstate actors (i.e., quasi-combatants) have not achieved comparably determinate results.[112]

All other domains define the authority to target and detain using flexible standards.[113] Most of those standards are undeveloped and, if anything, less

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107. *Cf.* Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34–36 (1986) (explaining that balancing tests foster accountability by engaging decisionmakers in "a communicative practice of open and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit"); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 67 (1992) ("[R]ules favor the judicial abdication of responsibility, while standards make the judge face up to his choices . . . .").

108. *See supra* Part I.

109. *See, e.g.*, *infra* Section III.B.2.

110. *See, e.g.*, *infra* notes 177–181 and accompanying text.

111. *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES (1993) (discussing benefits of formalism).

112. *See supra* Sections I.A–I.B.2.

113. *See* ICCPR, *supra* note 82, arts. 6, 9, 999 U.N.T.S. at 174–76 (no arbitrary deprivations in law enforcement HRL); *id.* art. 4, 999 U.N.T.S. at 174 (no unnecessary deprivations during emergencies); Geneva Convention IV, *supra* note 60, art. 34, 6 U.S.T. at 3540, 75 U.N.T.S. at 310 (no unnecessary detention of civilians); *cf.* Additional Protocol I, *supra* note

precise than my principles.[114] Law enforcement standards are to some extent different. Ordinary HRL has a rich common law developed by states, U.N. organs, courts, treaty bodies, and other actors. On the continuum between hard rules and mushy standards, law enforcement standards have moved closer to rules; or at least, they are more specific than my principles. Thus, one might wonder whether, to the extent those standards apply, they would better limit discretion and curb abuse

They probably would not. First, decisionmakers sometimes evade law enforcement standards by shopping into other domains. Doing so affords them at least as much discretion as my principles. Second, and despite what the domain method presupposes, law enforcement standards do not mandate particular results. Rather, most decisionmakers apply the standards differently, depending on the facts.[115] For example, the European Court of Human Rights has repeatedly applied law enforcement standards to assess Russia's response to Chechen terrorism; it has applied those standards leniently. Recognizing that the situation "called for exceptional measures," *Isayeva v. Russia* suggested that Chechen fighters were targetable, even absent the sort of imminent threat that HRL ordinarily requires.[116] *Khatsiyeva v. Russia* left open the question of whether Russia could lawfully target nonfighters "for mere failure to comply with official safety instructions"[117]—an outcome that would be unthinkable in a law enforcement setting. Finally, the recent decision in *Finogenov v. Russia* expressly recognized that law enforcement standards apply more loosely when the facts so require—in this case, because Russia was pressed for time and lacked situational control.[118] The idea

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1, art. 51(3), 1125 U.N.T.S. at 26 (no targeting of civilians unless they are directly participating in hostilities).

114. *See infra* Section III.B.1 (civilian targeting); Section IV.A.2 (emergency and civilian detention); *cf. infra* Section IV.A.2 (law enforcement detention).

115. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons (*Nuclear Weapons Case*), Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) (reading HRL to incorporate IHL during conflicts); Fals Borda v. Colombia, Commc'n No. 46/1979, ¶¶ 12.3, 13.2, 13.4, U.N. Doc. CCPR/C/16/D/46/1979 (Human Rights Comm. July 27, 1982), *reprinted in* 1 HUMAN RIGHTS COMM. DECISIONS, *supra* note 94, at 139, 143–44 (applying HRL to permit pure security detention during insurgency); Inter-Am. Comm'n on Human Rights, *Report on Terrorism and Human Rights*, ¶¶ 21–22, OEA/Ser.L/V/II.116 (Oct. 22, 2002) (interpreting HRL to permit targeting when necessary to maintain order); Malinowski Comment, *supra* note 47 (interpreting HRL more permissively for certain extraterritorial operations than for domestic operations). *But see* Al-Jedda v. United Kingdom, App. No. 27021/08, 53 Eur. H.R. Rep. 789, 843–48 (2011) (requiring HRL's ordinary outcomes for military detention in Iraq).

116. App. No. 57950/00, 41 Eur. H.R. Rep. 791, 833 (2005); *cf.* Khatsiyeva v. Russia, App. No. 5108/02, ¶¶ 134–137 (Eur. Ct. H.R. July 7, 2008) (leaving open whether officers could lawfully target someone on the ground that he was armed, absent evidence that he posed an imminent threat).

117. *Khatsiyeva*, at ¶ 139.

118. Eur. Ct. H.R., App. No. 18299, ¶ 211 (2011) ("[T]he Court may occasionally depart from that rigorous standard of 'absolute necessity' . . . [because] its application may be simply impossible where . . . the authorities had to act under tremendous time pressure and where their control of the situation was minimal."); *id.* at ¶ 213 (granting Russia a margin of appreciation on measures to contain threat).

that law enforcement standards constrain decisionmakers or mandate particular outcomes is at best dubious. Third, outcomes for law enforcement settings tend to be settled not because of the domain per se but because the domain usually operates against a background of shared expectations.[119] Decisionmakers widely agree on when states may target or detain people in law enforcement settings. Using a functional approach is unlikely to change those expectations. Rather, decisionmakers likely would apply the functional principles as they now apply the (also flexible) law enforcement standards.

Still, formalists may object that my principles appear less administrable than the domains. Legal categories are often imperfect at the margins but administratively useful because they lessen the burden of deciding each case on its facts. The domains do not serve that function. In all but the combatant domain, targeting and detention require an individualized assessment of the facts. Of course, decisionmakers have ways to alleviate that burden: they rely on precedents, make rebuttable presumptions, issue policy directives for officers in the field, and so on. Neither method precludes decisionmakers from treating factually similar cases alike. But because each domain accommodates a range of plausible outcomes, depending on the facts, selecting a domain does not obviate the need for fact-specific review.

The combatant domain is again different. It alleviates that burden by permitting targeting and detention on the basis of someone's status. Yet here again the combatant domain fails to achieve comparable benefits when extended to nonstate actors. Because nonstate fighters rarely identify themselves as such, most cases still require an individualized assessment of the facts.[120] Consider the U.S. experience with al-Qaeda and the Taliban. U.S. law permits the government to detain members of those groups on the basis of their membership.[121] However, because membership is inconspicuous, assessing someone's detention requires reviewing the specific facts of his case.[122] Applying the combatant domain does not lessen that administrative burden. It

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119. *Cf.* Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 716–18, 763 (2008) (explaining that elastic principles may shed their indeterminacy by developing shared meanings through the discursive process); W. Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, *in* 1 ESSAYS IN HONOUR OF JUDGE TASLIM OLWALE ELIAS 135 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992) (explaining that the legal effect of formal rules depends on the extent to which they reflect communal expectations).

120. Admittedly, extending the combatant domain to quasi-combatants who identify themselves would lessen this administrative burden. But the functional approach can achieve comparable benefits. For example, decisionmakers might presume that people in uniform pose a threat, absent evidence to the contrary. *See infra* notes 126, 178–181 and accompanying text.

121. *See, e.g.*, Awad v. Obama, 608 F.3d 1, 11–12 (D.C. Cir. 2010).

122. *See, e.g.*, *id.* at 9–10; Al-Bihani v. Obama, 590 F.3d 866, 870–75 (D.C. Cir. 2010); Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010) ("[I]t is impossible to provide an exhaustive list of criteria for determining whether an individual is 'part of' al Qaida. That determination must be made on a case-by-case basis by using a functional rather than a formal approach . . . .").

simply focuses the factual review on the indicia of membership, instead of on the more relevant questions of liberty–security, mitigation, and mistake.

Ideally, one might prefer to reform rather than discard the domain method. One might create new domains or better delineate existing domains, and in each, define the authority to target or detain in more rule-like terms. For those options to work, decisionmakers must agree both on how to classify situations and on the correct outcomes.[123] As long as widespread disagreements persist, efforts to fix the domain method will be contentious and fail. Meanwhile, focusing on the domains, rather than on the relevant substantive considerations, will continue to frustrate the discursive legal process.

III. TARGETING

Having presented the general contours of my approach, I turn to its specifics. In this Part of the Article, I demonstrate that the functional principles (1) animate the existing law on targeting and (2) equip decisionmakers to develop and enforce that law.

A. *Explaining Targeting Law*

1. Liberty–Security

Targeting law is fairly settled when a situation clearly falls in the combatant or law enforcement domain.[124] In both domains, the liberty–security principle defines who is potentially targetable: people who pose an active, serious threat of deadly force. Combatants presumptively pose that threat.[125] IHL licenses them to kill and presumes that they are organized in war for

123. Moreover, they periodically would have to update the domains. An approach that makes sense today might become obsolete or ill-suited for new realities; nonstate threats are multifarious and ever-changing. *Compare* Sloane, *supra* note 14 (advocating new domain for conflicts against networks like al-Qaeda), *with* Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT'L L. 429, 435 (2010) (explaining that such networks may no longer pose the primary terrorism threat to the West).

124. I examine the combatant domain, even though it almost never applies by its terms to nonstate actors, because many consider it relevant to developing the law for nonstate actors. Unlike in the combatant and law enforcement domains, the law on targeting civilians is heavily contested. *See infra* Section III.B.1. Further, the emergency domain has no independent content. Under most HRL treaties, targeting obligations are nonderogable. *See* IACHR, *supra* note 82, art. 27, 1144 U.N.T.S. at 152; ICCPR, *supra* note 82, art. 4, 999 U.N.T.S. at 174; *see also* ACHPR, *supra* note 82 (containing no derogation provision). Law enforcement HRL applies, unless the situation amounts to an armed conflict, and IHL provides the *lex specialis*. The ECHR achieves the same result with a different formula: states may derogate only to the extent consistent with IHL. *See* ECHR, *supra* note 82, art. 15(2), 213 U.N.T.S. at 232.

125. *See, e.g.*, Blum, *supra* note 17, at 126 ("All soldiers who are not injured or captured are presumed to be 'seeking to kill[]' . . . ."); Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflicts*, 1 J. INT'L HUMANITARIAN LEGAL STUD. 52, 77 (2010) ("[A]pplication of deadly force is justified based on status . . . which itself is based on a conclusive presumption that operational opponents pose a constant threat of deadly force . . . .").

that purpose. However, those who demonstrably do *not* pose a sufficient threat, because they are *hors de combat*, are not targetable.[126]

In law enforcement settings, HRL prohibits targeted killings that are disproportionate to their intended ends.[127] A targeted killing is disproportionate unless the target poses a threat of death or serious bodily injury.[128] If he poses a lesser threat[129] or no longer poses a threat,[130] the benefit of incapacitating him does not justify depriving him of life. He is not targetable.

2. Mitigation

Even when the threat is serious, a state must use reasonable nonlethal measures to contain it. Measures that are reasonable in law enforcement settings—where states exercise considerable control[131]—are almost always

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126. Additional Protocol I, *supra* note 1, art. 41, 1125 U.N.T.S. at 22; *see also id.* art. 8(a)–(b), 1125 U.N.T.S. at 10 (defining the wounded, sick, and shipwrecked as those who "refrain from any act of hostility"). Readers may wonder why combatants have immunity only if they are *hors de combat* and not if they otherwise do not pose a serious threat. Part of the answer lies in the mistake principle. All combatants fighting on the same side wear identical insignia and mingle with one another. Distinguishing harmless combatants from the vast majority who pose a threat is often infeasible. *See* Schmitt, *Interpretive Guidance*, *supra* note 14, at 24 ("[M]ost attacks will be launched against groups of individuals or in time-sensitive situations in which distinction based on function will prove highly difficult."); Ariel Zemach, *The Unpleasant Responsibilities of International Human Rights Law*, 38 DENV. J. INT'L L. & POL'Y 421, 432 (2010) ("The principle of military necessity was relaxed to allow the killing of combatants at all times *because* of this lack of capacity to determine, with regard to each enemy soldier, whether and to what extent he actually contributes to the enemy's war effort."). *But cf.* Blum, *supra* note 17, at 148–49 (arguing that distinguishing among combatants is now practicable, given sophisticated technologies). Requiring states to distinguish among combatants might also divert attention from the more critical task of distinguishing combatants, who generally pose a threat, from civilians, who generally do not.

127. *See, e.g.*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, at 110–11, U.N. Doc. A/CONF.144/28/Rev.1, U.N. Sales No. 91.IV.2 (1991) [hereinafter *U.N. Basic Principles*]; Alston, *Study on Targeted Killings*, *supra* note 67, ¶ 32; Nachova v. Bulgaria, 2005–VII Eur. Ct. H.R. 1, 25 ("[A]ny use of force must be . . . strictly proportionate in the circumstances.").

128. *See, e.g.*, U.N. Basic Principles, *supra* note 127, ¶ 9; *Nachova*, 2005–VII Eur. Ct. H.R. at 26; Alejandre v. Cuba, Case No. 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OAS/Ser.L/V/II.104, doc. 3 rev. ¶¶ 43–45 (1999).

129. *See, e.g.*, Petrov v. Bulgaria, App. No. 63106/00, ¶¶ 48–50 (Eur. Ct. H.R. Sept. 10, 2010); Solomou v. Turkey, App. No. 36832/97, ¶¶ 75–78 (Eur. Ct. H.R. Sept. 24, 2008); *Nachova*, 2005–VII Eur. Ct. H.R. at 28–29.

130. *See, e.g.*, Leach v. Jamaica, Commc'n No. 546/1993, ¶ 9.5, U.N. Doc. CCPR/C/57/D/546/1993 (Human Rights Comm. July 18, 1996); Zambrano Vélez v. Ecuador, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 166, ¶ 108 (July 4, 2007).

131. HRL strongly presumes that states have sufficient control within their territories to perform the basic functions of government while respecting human rights. *See, e.g.*, Issa v. Turkey, App. No. 31821/96, 41 Eur. H.R. Rep. 567, 587 (2004) ("[J]urisdiction is presumed to be exercised normally throughout the state's territory."); Assanidze v. Georgia, 2004–II Eur. Ct. H.R. 221, 259 (noting a "presumption of competence" within the state).

too burdensome during active combat.[132] HRL presumes that states usually can contain threats without resorting to deadly force; it permits such force only when necessary. HRL's necessity standard is commonly understood to prohibit targeting unless *no* alternative for containing the threat exists.[133] In fact, decisionmakers apply the standard more loosely—and consistently with my mitigation principle. States need not pursue every available or even every feasible alternative.[134] They must pursue only those that are reasonable for a police operation.

For example, in *Bubbins v. United Kingdom*, a seemingly armed intruder refused to vacate an apartment.[135] His unpredictable behavior weakened the officers' control over the situation, but they still had measures that were paradigmatic of a law enforcement setting. The officers comfortably secured a perimeter around the apartment, used flood lighting to enhance their visibility, directed neighbors to stay indoors, and encouraged the suspect to surrender. Nevertheless, they did not pursue every feasible measure to avoid the suspect's death. In particular, they did not use a trained negotiator to broker an end to the siege.[136] Eventually, one of the officers targeted the suspect on the mistaken belief that he was about to shoot. The European Court of Human Rights found that the government had acted lawfully; the court treated as inconsequential the failure to use a trained negotiator.[137]

The mitigation principle helps explain that outcome. First, the police officers properly tried to capture the suspect and targeted him only when they thought that he was about to shoot. Absent that sort of imminent threat, law enforcement HRL generally assumes that states may reasonably capture suspects.[138] Second, the officers acted lawfully, even without a trained negotiator,

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132. *See infra* notes 148–159 and accompanying text.

133. *See, e.g.*, Montero Aranguren v. Venezuela, Preliminary Objection, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 67 (July 5, 2006) ("[F]orce or coercive means can only be used once all other methods of control have been exhausted and failed."); Alston, *Study on Targeted Killings*, *supra* note 67, ¶ 32 (targeting lawful only if "there is no other means . . . of preventing [a] threat to life"); MELZER, *supra* note 17, at 59 ("[T]he use of lethal force is held to be permitted only as a last resort, when no non-lethal means are available . . . ."); *see also* Giuliani v. Italy, App. No. 23458/02, ¶ 214 (Eur. Ct. H.R. Mar. 24, 2011) ("[W]here different means are available to achieve the same aim, the means which entails the least danger to the lives of others must be chosen.").

134. *See, e.g.*, Erdoğan v. Turkey, App. No. 57049/00, ¶ 99 (Eur. Ct. H.R. May 15, 2007) (explaining that "it is not necessary to speculate on . . . the possibility [of using] non-lethal methods"); Andronicou v. Cyprus, 1997–VI Eur. Ct. H.R. 2059, 2102 (finding targeting lawful without considering "the merits of alternative tactics").

135. App. No. 50196/99, 41 Eur. H.R. Rep. 458 (2005).

136. *Id.* at 466, 484–85.

137. *Id.* at 485–86.

138. HRL is sometimes interpreted to prohibit targeting absent this kind of imminent threat. *See, e.g.*, Kretzmer, *supra* note 14, at 183. Yet some practice suggests that targeting is permissible in law enforcement settings, even absent an imminent threat, if capture is infeasible. *See U.N. Basic Principles*, *supra* note 127, ¶ 9 (permitting targeting when someone is fleeing arrest without explicit imminence requirement); *see also* Baboeram-Adhin v. Suriname, Commc'n Nos. 146/1983 and 148 to 154/1983, ¶ 14.3 (Human Rights Comm. Apr. 4, 1985), *reprinted in* 2 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL

because they took other measures to reduce the risk of death. They took reasonable measures—though not all feasible measures—to mitigate the liberty costs. Third, the police could have saved the suspect had several officers stormed the apartment without deadly force. But officers generally need not jeopardize their own lives to protect a suspect's.[139] Doing so risks equalizing or even increasing—but not mitigating—the liberty costs. Fourth, the police could have substantially lowered the risk of death by permitting the suspect to flee and then looking for him after the fact. Yet officers need not take mitigating measures that compromise a legitimate police operation. The European Court of Human Rights more squarely addressed that issue in *Brady v. United Kingdom*.[140] In *Brady*, the government knew about a robbery in advance, so it could have avoided the risk of death by arresting the robbers before the crime or not arresting them at all.[141] The court determined that those options were reasonably forgone because pursuing them might have undermined the criminal case.[142]

To be sure, decisionmakers sometimes disagree on whether the police must pursue a particular alternative.[143] *Bubbins* and *Brady* are in tension with *McCann v. United Kingdom*.[144] There, the government suspected that three members of the Irish Republican Army ("IRA") were planning a terrorist attack in Gibraltar. Like in *Brady*, the government tried to catch the suspects in the act.[145] It permitted the suspects to enter Gibraltar and then killed them on the mistaken belief that they were about to detonate a bomb. The European Court of Human Rights condemned the killing, in part because the government could have contained the threat by preventing the

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PROTOCOL, at 172, 175, U.N. Doc. CCPR/C/OP/2, U.N. Sales No. E.89.XIV.1 (1990) (underscoring that the state "failed to submit any evidence proving that [victims] were shot while trying to escape").

139. *See Bubbins*, 41 Eur. H.R. Rep. at 483; Brady v. United Kingdom, App. No. 55151/00 (Eur. Ct. H.R. Apr. 3, 2001).

140. App. No. 55151/00 (Eur. Ct. H.R. Apr. 3, 2001).

141. The *Brady* court asserted that arresting the suspects before the robbery still would have put the suspects' lives in danger. *Id.* That explanation is insufficient. First, the police did not suspect that the robbers were armed until arriving at the scene of the crime. Second, even if both scenarios presented a risk of death, that risk might be considerably higher during the robbery than beforehand.

142. *Id.* ("[T]he decision not to arrest the men until they attempted to enter the premises cannot be regarded as unreasonable . . . . [Otherwise] there would have been no possibility of bringing criminal charges or a prosecution."); *see also* Romijn v. Netherlands, App. No. 62006/00 (Eur. Ct. H.R. Mar. 3, 2005) (explaining that storming an apartment without warning was lawful because the victim was suspected of serious offenses and might have hidden or destroyed evidence).

143. *See infra* notes 144–147 and accompanying text. *Compare* Andronicou v. Cyprus, 1997-VI Eur. Ct. H.R. 2059, 2102–04 (majority opinion) (finding that state lawfully forwent mitigating measures), *with id.* at 2118–19 (Jungwiert, J., concurring in part and dissenting in part).

144. 324 Eur. Ct. H.R. (ser. A) (1995). On the tension, see Juliet Chevalier-Watts, *A Rock and a Hard Place: Has the European Court of Human Rights Permitted Discrepancies to Evolve in Their Scrutiny of Right to Life Cases?*, 14 INT'L J. HUM. RTS. 300 (2010).

145. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 59.

suspects from entering Gibraltar.[146] The dissenting judges took a position more in line with *Brady*: the government reasonably admitted the suspects into Gibraltar, because otherwise "there might not [have been] sufficient evidence to warrant their detention and trial."[147] Though decisionmakers occasionally disagree about the reasonableness of forgoing particular alternatives, *that* is the HRL inquiry. States need not exhaust all available alternatives to targeting.

The mitigation principle appears to be inconsistent with the combatant domain because states may target combatants as an option of first resort. However, all of IHL rests on the tenets of military necessity and humanity. Those tenets mirror the mitigation principle. They provide that states may inflict human suffering only to the extent necessary for the military mission.[148] The combatant domain then specifies those tenets for situations involving combatants. The domain is designed for active combat, where all combatants not *hors de combat* are presumptively armed and ready to kill. It presumes that state agents have little situational control and few, if any, mitigating measures.[149] States reasonably forgo any nonlethal measure that might contain the combatant's threat.[150]

Even in law enforcement settings, officers may target people who appear armed and ready to kill.[151] The combatant domain is different because it permits targeting when the state *knows* that it may easily capture someone. Such cases are extremely rare in international conflicts.[152] A combatant who appears unarmed and alone might be involved in a ruse, or his compatriots might be just around the corner. The combatant domain declines to muddy its otherwise rule-like prescription—targetable unless *hors de combat*—for the exceptional case in which an officer knows that he can capture a combatant without putting himself at serious risk or undermining his mission.

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146. *Id.* at 61.

147. *Id.* at 67–68 (Ryssdal et al., jointly dissenting).

148. *See supra* note 101.

149. *See* ICRC, *Third Expert Meeting*, *supra* note 102, at 56 ("[I]n armed conflict, the government was by definition not in total control of the situation."); Marco Sassòli, *The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts*, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 34, 86 (Orna Ben-Naftali ed., 2011) [hereinafter Sassòli, *New Conflicts*] ("IHL was made for hostilities . . . in a place that is not under the control of those who attack . . . .").

150. *Cf.* ICRC, *Fifth Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report*, at 17 (Feb. 5–6, 2008) [hereinafter *Fifth DPH Report*] ("In the harsh realities of combat or serious crime, where hesitation could easily cost someone's life, neither soldiers nor police officers should be asked to second guess their judgments as to the necessity of deadly force.").

151. *See, e.g.*, Oláh v. Hungary, App. No. 56558/00 (Eur. Ct. H.R. Sept. 14, 2004) (finding targeting lawful, even though suspect was unarmed, because policeman believed his life was in danger); Brady v. United Kingdom, App. No. 55151/00 (Eur. Ct. H.R. Apr. 3, 2001) (finding targeting lawful because officer "honestly believed that it was necessary to shoot [victim] in order to protect himself").

152. *See* DPH STUDY, *supra* note 14, at 80–81.

The ICRC recently proposed applying the mitigation principle on a case-by-case basis instead of categorically.[153] The proposal is controversial,[154] in part because it is so poorly articulated and defended.[155] The proposal uses necessity language, which (like in HRL) suggests that states must capture combatants whenever possible.[156] In fact, the ICRC seems to intend a standard more compatible with my mitigation principle. The ICRC recognizes that, under its proposal, states would almost never have to capture combatants in international conflicts.[157] The ICRC's examples of when capture would be required all suppose that the state has substantial control and can incapacitate the combatant without serious risk to its agents or mission.[158] I take no position on whether, for combatants who are *state* agents, the mitigation principle should apply categorically or on a case-by-case basis.[159] The point here is that the traditional prescription and the ICRC proposal both try to specify the mitigation principle for situations involving combatants.

3. Mistake

Before pulling the trigger, states must try to avoid mistakes. They must exercise due diligence to verify that the targeting is lawful. IHL assumes no serious risk of mistake once someone is properly classified as a combatant. Combatants are generally identifiable and targetable. The risk of mistake increases, however, when someone's status is ambiguous. In that event, the state must initially treat the person as a civilian.[160] It may target him only after establishing an honest and reasonable belief that he is targetable.[161]

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153. *Id.* at 77–82.

154. *Id.* at 78 n.212; *see also* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 783–85 (2010) (describing disagreement).

155. *See* Garraway, *supra* note 3, at 506–08; *Fifth DPH Report*, *supra* note 150, at 19 ("[S]everal experts criticized that it was not clear from the Interpretive Guidance how the [proposal] should apply in operational practice."). Objectors have contested both the necessity language and the failure to recognize a margin of error. *See, e.g.*, Dapo Akande, *Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities*, 59 INT'L & COMP. L.Q. 180, 191–92 (2010); Parks, *supra* note 154, at 814–16. My method addresses both concerns.

156. *See* DPH STUDY, *supra* note 14, at 80 ("[N]o more death, injury, or destruction [may] be caused than is actually necessary . . . .").

157. *Id.* at 80–81.

158. *See id.*

159. *See supra* notes 15–17 and accompanying text.

160. Additional Protocol I, *supra* note 1, art. 50(1), 1125 U.N.T.S. at 26 ("In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."); *see also* Prosecutor v. Galic, Case No. IT-98-29-T, Judgement, ¶ 50 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) ("A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status.").

161. *See* Additional Protocol I, *supra* note 1, art. 57(2)(a)(i), 1125 U.N.T.S. at 29 (requiring states to "do everything feasible to verify" the accuracy of their targets); COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 67, at 682 (explaining that states must act with "common

What the state must do to establish that belief depends on the circumstances. A prominent IHL treatise explains that, though states must prioritize "the collection, collation, evaluation and dissemination of timely target intelligence," they ultimately are "judged on the basis of a reasonable and honest reaction to the facts and circumstances known to them from information available at the time."[162] States must do more to verify their targets when acting with the luxury of time than in the heat of the moment.[163] A state conducting a time-sensitive operation has little opportunity to collect and assess more targeting information, so IHL permits it more room for error.

The requirements under HRL are almost identical. Before shooting, a state must exercise due diligence to verify that the person is targetable.[164] Here again, the state must do more when acting with time for deliberation than when responding to events as they unfold. That distinction is evident in *McCann*. The *McCann* court held that the agents who shot the suspects acted lawfully because those agents reasonably believed that the suspects were about to detonate a bomb.[165] The court generally declined "with detached reflection [to] substitute its own assessment of the situation for that of the officers who were required to react in the heat of the moment."[166] By contrast, the agents who planned the operation acted unlawfully. Those agents "had prior warning of the impending terrorist action and thus had ample opportunity to plan their reaction" with more caution.[167]

B. *Developing and Enforcing Targeting Law*

The combatant and law enforcement domains are tailored for different contexts but animated by the same principles. Targeting is lawful if (1) the

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sense and good faith"); A.P.V. Rogers, *Zero-Casualty Warfare*, 82 INT'L REV. RED CROSS 165, 181 (2000) ("Target verification requires reasonable care to be exercised."); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1387–90 (2008) (reviewing practice).

162. BOTHE ET AL., *supra* note 36, at 363.

163. *See* Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445, 451 (2005); Waxman, *Detention as Targeting*, *supra* note 161, at 1411.

164. *See, e.g.*, Oláh v. Hungary, App. No. 56558/00 (Eur. Ct. H.R. Sept. 14, 2004); Brady v. United Kingdom, App. No. 55151/00 (Eur. Ct. H.R. Apr. 3, 2001); Andronicou v. Cyprus, 1997-VI Eur. Ct. H.R. 2059, 2106–08; McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 58–59 (1995). Part of this assessment is to ensure that the correct person is targeted. *See, e.g.*, Gül v. Turkey, App. No. 22676/93, ¶ 82 (Eur. Ct. H.R. Dec. 14, 2000); Zambrano Vélez v. Ecuador, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 166, ¶ 85 (July 4, 2007).

165. *McCann*, 325 Eur. Ct. H.R. (ser. A) at 81.

166. *Andronicou*, 1997-VI Eur. Ct. H.R. at 2107; *see also, e.g.*, *Erdoğan*, at ¶ 99 ("[I]t is not necessary to speculate on . . . the possibility [of using] nonlethal methods . . . [because] police officers had to act rapidly . . . .").

167. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 57; *see also* Golubeva v. Russia, App. No. 1062/03, ¶ 106 (Eur. Ct. H.R. Mar. 17, 2009) (reasoning that the operation was unlawfully planned because "police had plenty of time to prepare the arrest operation carefully" and "circumstances no longer required the taking of immediate or spontaneous decisions").

person poses a threat of deadly force, (2) the state pursues reasonable alternatives for containing that threat, and (3) the state exercises due diligence to prevent mistakes. Decisionmakers should use those principles to develop and enforce the law when the domain or outcome is contested.

1. Targeting Noncombatants

Consider situations of internal strife, for which the domain method is especially incoherent. Three domains are potentially in play—law enforcement, civilian, and combatant. None has a defined scope of application.[168] Moreover, whenever the civilian domain applies, its outcomes are contested. Decisionmakers disagree[169] on how to interpret article 51(3) of Additional Protocol I to the Geneva Conventions, which provides that civilians are targetable "for such time as they take a direct part in hostilities."[170]

The functional approach provides a substantive framework for developing the law, while avoiding the tangled domain question. For starters, the liberty–security principle captures expectations on when conduct poses a sufficient threat to justify taking someone's life. Under the direct participation standard, the conduct must cause the enemy some temporally and geographically proximate harm.[171] Killing a soldier constitutes direct participation; working in a munitions factory does not. Many scenarios are less clear-cut and thus contested,[172] but the direct participation standard is—like my liberty–security principle—fact-dependent. To determine whether conduct is sufficiently proximate, decisionmakers assess it against certain well-versed examples, taking into account the specific "location and attire, and other information available at the time."[173]

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168. *See supra* Sections I.B.1–3.

169. *See* CIL STUDY, *supra* note 54, at 23 ("[A] clear and uniform definition of direct participation in hostilities has not been developed . . . ."); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 700 (2010) [hereinafter Schmitt, *Deconstructing Direct Participation*] ("There are few IHL topics as timely or contentious as direct participation in hostilities.").

170. Additional Protocol I, *supra* note 1, art. 51(3), 1125 U.N.T.S. at 26.

171. *See* COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 67, at 619; BOTHE ET AL., *supra* note 36, at 301.

172. On current disagreements, compare DPH STUDY, *supra* note 14, at 16, with 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, 743 (2010). On areas of agreement, see BOTHE ET AL., *supra* note 36, at 303, and Ryan Goodman, Rita E. Hauser Professor of Human Rights and Humanitarian Law, Harvard Law Sch., The Second Annual Solf-Warren Lecture in International and Operational Law, Lecture Before the Fifty-Seventh Graduate Course at the Judge Advocate General's Legal Center and School (Apr. 1, 2009), *in* 201 MIL. L. REV. 237, 244 (2009).

173. U.S. DEP'T OF THE NAVY ET AL., THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 8.2.2 (July 2007); *see also* Prosecutor v. Strugar, Case No. IT-01-42-A, Judgement, ¶ 178 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008) ("Such an enquiry must be undertaken on a case-by-case basis, having regard to the individual circumstances . . . ."). The ICRC has proposed a general definition of "direct participation" to replace the case-by-case approach described in the text. DPH STUDY, *supra* note 14, at 16. The pro-

Despite those similarities, the liberty–security principle identifies more sharply the policy consideration at issue: not whether the person's conduct is directly linked to hostilities, but whether killing him is proportional to the threat he poses.[174] That distinction sometimes matters. For example, IHL experts have difficulty explaining why civilians who attack other civilians should be targetable.[175] Attacking civilians is not directly participating *in the hostilities* because it is not aimed at the enemy side. The liberty–security principle explains that the civilian attacker is targetable because killing him is proportional to his attack. Similarly, the principle explains why people are not targetable merely on the basis of past participation.[176] Their threat must be active.

More critically, the liberty–security principle provides guidance on two ongoing debates. First, it suggests that members of an armed nonstate group are targetable only when they themselves pose a sufficient threat.[177] Though someone's association with the group is evidence of a threat, its probative value depends on the nature of the group and his affiliation.[178] Recall that even those who advocate a broad membership rule implicitly exclude people

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posal is contested. One problem is that whether conduct poses a sufficient threat sometimes depends on its context. For example, though making weapons in a factory does not reveal a sufficient threat, making an improvised explosive device ("IED") might. *See* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 833 n.180 (2010) (explaining that experts disagree on the IED example).

174. *See, e.g.*, BOTHE ET AL., *supra* note 36, at 301 ("[W]hile participating directly in hostilities they present an immediate threat to the adverse Party . . . ."); Ben-Naftali & Michaeli, *supra* note 64, at 269 ("[A] civilian who takes part in hostilities . . . present[s] an immediate threat to the adverse Party . . . ."). Professor Schmitt has argued that "the reason civilians lose protection while directly participating is because they have chosen to be part of the conflict; it is not because they represent a threat." Schmitt, *Interpretive Guidance*, *supra* note 14, at 37. That explanation is insufficient even for Professor Schmitt. Schmitt appreciates that civilians who attack other civilians should "somehow" be treated as direct participants, even when their conduct is not part of the conflict. *See* Schmitt, *Deconstructing Direct Participation*, *supra* note 169, at 720–22.

175. *See, e.g.*, DPH STUDY, *supra* note 14, at 16, 76; Schmitt, *Deconstructing Direct Participation*, *supra* note 169, at 720–22.

176. IHL experts generally agree that someone's past participation does not by itself justify targeting him. *See, e.g.*, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (*Targeted Killing Case*) 2006 (2) Isr. L. Rep. 459, 502–04 (Isr.); Ben-Naftali & Michaeli, *supra* note 64, at 269; Schmitt, *Interpretive Guidance*, *supra* note 14, at 38.

177. *See supra* notes 66–74 and accompanying text.

178. For similar approaches, see *Targeted Killing Case*, 2006 (2) Isr. L. Rep. at 501–04, and Prosecutor v. Halilović, Case No. IT-01-48-T, Judgement, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005). Membership is evidence of a threat because armed groups are generally more dangerous than lone actors. *See* Kenneth Watkin, *Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict*, *in* NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 137, 147–48 (David Wippman & Matthew Evangelista eds., 2005). The same idea is built into the armed conflict test. *See* COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 67, at 1352 (explaining that organization suggests the capacity to "plan[] and carry[] out sustained and concerted military operations," as opposed to mere banditry or common crimes).

who loosely affiliate with the group or participate only in a nonmilitary faction.[179] By contrast, someone's association with the group is strong evidence of a threat when it reveals that he is integrated into the military element. Further, his association might increase the likelihood, for purposes of the mistake principle, that the state will reasonably but mistakenly target him.[180] It does not justify targeting him if the state believes that he does not pose a serious threat.[181]

Second, the liberty–security principle directs the debate on the so-called revolving door. The debate asks whether civilians are targetable only while in the act of directly participating (thus the revolving door)[182] or until they stop participating altogether.[183] At their core, arguments for the door sound in my liberty–security and mistake principles. Those who support the door argue that civilians who are *not* actively participating in dangerous conduct do not threaten the enemy.[184] Further, such civilians may blend in with the general population, increasing the risk of mistake.[185] However, the door is too broad a remedy. It would immunize someone from attack, even when the state has good reason to believe that he poses a serious threat that cannot otherwise be contained. My approach accommodates the door's underlying interests while rejecting its remedy. Significantly, rejecting both the broad membership rule for quasi-combatants and the revolving door for civilians eliminates the need to identify the IHL domain, *even using the domain method.* Civilians and quasi-combatants are both targetable if they pose a sufficiently serious threat.

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179. *See supra* note 73 and accompanying text.

180. For the reasons why, see *supra* note 126.

181. Some readers may object that members of nonstate groups will have more protections than lawful combatants do. *See* MICHAEL N. SCHMITT ET. AL., INT'L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 5 (2006); Watkin, *Direct Participation*, *supra* note 37, at 672. *But cf.* MARK OSIEL, THE END OF RECIPROCITY 11 (2009) (detailing "the widespread and growing ambivalence that exists about the practical utility and moral defensibility of reciprocity" in IHL). As discussed, analogizing to lawful combatants does not work. Under IHL, members of nonstate groups have neither combatant status nor the legal and practical benefits of statehood. Moreover, because nonstate groups often have inchoate organizational structures, a broad membership rule casts too broad a net. *See supra* Sections I.B.1–2. The counterargument—that states purposefully afford nonstate fighters only minimal protections under IHL—undervalues the simultaneous development of HRL. *See* W. Michael Reisman, Remarks, *Application of Humanitarian Law in Noninternational Armed Conflicts*, 85 AM. SOC'Y INT'L L. PROC. 83, 85 (1991).

182. *See, e.g.*, DPH STUDY, *supra* note 14, at 70 ("The 'revolving door' of civilian protection is an integral part, not a malfunction, of IHL."); Ben-Naftali & Michaeli, *supra* note 64, at 269.

183. *See, e.g.*, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (*Targeted Killing Case*) 2006 (2) Isr. L. Rep. 459, 502–04 (Isr.); Boothby, *supra* note 172, at 758–66 (discussing U.S., Canadian, and Israeli positions); Schmitt, *Interpretive Guidance*, *supra* note 14, at 38; Watkin, *Direct Participation*, *supra* note 37, at 688–92.

184. *See* Ben-Naftali & Michaeli, *supra* note 64, at 269.

185. *See* DPH STUDY, *supra* note 14, at 45.

For the mitigation principle, no domain requires states to pursue nonlethal measures against someone who appears armed and ready to kill.[186] The combatant domain goes further. It conclusively determines that states reasonably forgo nonlethal measures, unless a combatant is *hors de combat.* That conclusion is unwarranted in internal conflicts. Counterinsurgency operations vary widely, from those that resemble ordinary police missions to those involving high-intensity combat. The mitigation principle differentiates among such operations, instead of regulating all of them under either a law enforcement or armed conflict paradigm.

Already, much of the practice is consistent with the mitigation principle, suggesting that states with considerable control should try to capture instead of target insurgents. The U.S. Counterinsurgency Field Manual explains that, in internal conflicts, states may more effectively satisfy their military interests by "using lesser means of force when such use is likely to achieve the desired effects."[187] "As an insurgency ends" and the state exercises more control, "a capture is better than a kill."[188] The Field Manual articulates good counterinsurgency strategy, not the U.S. position on a state's legal obligations. States need not adopt that strategy. But where they establish the kind of control envisioned in the Field Manual, they more likely have reasonable alternatives for containing a threat.

Other practice suggests that trying to capture insurgents is not just good policy; it may be legally required of states that have considerable situational control. Consider a few examples:[189]

- In *Guerrero v. Colombia*, the Colombian police raided a home where they thought a guerilla group was holding a kidnapped official.[190] The police did not find the official but waited for the suspects to return and then killed them all.[191] The Human Rights Committee condemned the killings under HRL. The committee underscored that the police seemed in control of the situation and positioned to capture the suspects.[192]
- The Israeli Supreme Court determined in its *Targeted Killing Case* that Palestinian terrorists are civilians who directly participate in hostilities

186. On the combatant and law enforcement domains, see *supra* Section III.A.2. Civilians who are armed and ready to kill are, under almost all definitions, directly participating.

187. U.S. DEP'T OF THE ARMY, FM 3–24, ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 1–25 (2006); *see also id.* at 2–2 ("[E]xcessive use of military force can frequently undermine policy objectives . . . .").

188. *Id.* app. A at A-8.

189. In addition to the examples in the text, see those in Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831, 909–13 (2010).

190. Commc'n No. 45/1979, U.N. Doc. CCPR/C/15/D/45/1979 (Human Rights Comm. Mar. 31, 1982), *reprinted in* 1 HUMAN RIGHTS COMM. DECISIONS, *supra* note 94, at 112.

191. *Id.* at 116.

192. *Id.* at 117.

without the revolving door.[193] The court then invoked Israeli domestic law to prohibit targeting "if it is possible to act . . . by means of a less harmful measure."[194] Less harmful measures are "likely to be practical," the court explained, "where the army controls the territory where the operation is being carried out."[195]

- Recall the ICRC proposal on mitigation. Though the proposal is intended for all conflicts, it focuses on[196] and is less controversial in situations involving nonstate actors.[197] The proposal explains that whether a capture would be required turns largely on whether the state "control[s] the circumstances and area in which its military operations are conducted."[198]

- Finally, several practitioners and commentators now argue that—as a legal or practical matter—HRL provides the *lex specialis* for operations that occur during armed conflicts but that are more police- than military-like.[199]

That practice cannot effectively be justified using the domain method, because the practice is inconsistent with the ordinary outcomes in each domain. If insurgents are quasi-combatants and the combatant domain applies, states may target them, no matter the alternatives. The same is true if insurgents are civilians who directly participate without the revolving door. Civilians who directly participate *with* the door are not targetable, even if a state lacks control or any alternative for incapacitating their threat. Finally, HRL usually prohibits targeting absent an imminent threat.[200] The *Targeted Killing Case* and the ICRC proposal envision more expansive targeting authority. The mitigation principle empowers decisionmakers to justify and refine a practice that, though in the mainstream, has no "home" in the domain method.

Finally, states must try to lessen mistakes.[201] If someone is not actively engaged in dangerous conduct, a state must have other reliable intelligence

193. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (*Targeted Killing Case*) 2006 (2) Isr. L. Rep. 459, 490–95 (Isr.).

194. *Id.* at 503.

195. *Id.* at 504.

196. *See* DPH STUDY, *supra* note 14, at 80–81.

197. Akande, *supra* note 155, at 191–92 (protesting the proposal by focusing on international conflicts); Parks, *supra* note 154, at 783–828 (same); *see also Fifth DPH Report*, *supra* note 150, at 24–31 (explaining that several experts suggested limiting the proposal to situations involving nonstate actors).

198. DPH STUDY, *supra* note 14, at 80.

199. *See, e.g.*, Droege, *supra* note 92, at 347; Sassòli & Olson, *supra* note 3, at 614; Dale Stephens, *Counterinsurgency and Stability Operations: A New Approach to Legal Interpretation*, *in* THE WAR IN IRAQ: A LEGAL ANALYSIS 289, 311 (Raul A. "Pete" Pedrozo ed., Naval War Coll., Int'l Law Studies Ser. Vol. 86, 2010); Watkin, *Controlling the Use of Force*, *supra* note 14, at 26–27.

200. *See supra* note 138 and accompanying text.

201. For a similar approach, see HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (*Targeted Killing Case*) 2006 (2) Isr. L. Rep. 459, 502–04 (Isr.).

of his threat. Again, someone's association with an armed group is evidence of a threat and increases the likelihood that the state will reasonably but mistakenly target him. However, when the threat is latent, the state will usually have time to evaluate its intelligence and consider its alternatives. Its margin of error should be narrower.

2. Targeting Terrorists

The functional approach is also preferable for defining the authority to target suspected terrorists. Counterterrorism operations occur in a range of settings, not only in those that resemble the law enforcement or armed conflict paradigm. The domain method cannot accommodate that variation. It supposes that either law enforcement HRL or IHL governs.

That binary is out of step with the practice. Increasingly, decisionmakers recognize that the authority to target terrorists turns on considerations tangential to the armed conflict test.[202] Although the United States claims a global armed conflict, it underscores that its targeting decisions actually "depend upon considerations specific to each case,"[203] and that its "unqualified preference" is to capture rather than target terrorists.[204] Other states have not endorsed the armed conflict claim.[205] But most states implicitly acknowledge that the United States has more than its ordinary law enforcement authority in some nonbattlefield settings.[206] For instance, most states applauded the U.S. operation targeting Osama bin Laden, even though Abbottabad was not in any meaningful sense an active theater of combat.[207]

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202. *See, e.g.*, *Targeted Killing Case*, 2006 (2) Isr. L. Rep. at 480–83; Malinowski Comment, *supra* note 47; MELZER, *supra* note 17, at 9 ("[T]argeted killing is in the process of escaping the shadowy realm of half-legality and non-accountability, and of gradually gaining legitimacy as a method of counter-terrorism and 'surgical' warfare."); *see also, e.g.*, Blum & Heymann, *supra* note 71; Kretzmer, *supra* note 14; Afsheen Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201. *But see* Complaint at ¶ 4, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-1469) ("Outside of armed conflict . . . international law prohibit[s] targeted killing except as a last resort to protect against concrete, specific, and imminent threats . . . ."); Alston, *Study on Targeted Killings*, *supra* note 67, ¶ 31 ("The legality of a killing outside the context of armed conflict is governed by human rights standards . . . .").

203. Koh, ASIL Speech, *supra* note 38; *see also* Bellinger, LSE Speech, *supra* note 38, at 739.

204. Brennan Speech, *supra* note 49.

205. *See, e.g.*, Alston, *Study on Targeted Killings*, *supra* note 67, ¶ 54; ANTHONY DWORKIN, BEYOND THE "WAR ON TERROR": TOWARDS A NEW TRANSATLANTIC FRAMEWORK FOR COUNTERTERRORISM (Eur. Council on Foreign Relations, Policy Brief No. 13, 2009), *available at* http://ecfr.eu/page/-/documents/ECFR_counterterrorism_brief.pdf.

206. *See, e.g.*, Brennan Speech, *supra* note 49 ("In practice, the U.S. approach to targeting . . . is far more aligned with our allies' approach than many assume."); *infra* note 207 and accompanying text.

207. *Bin Laden Death Can Bring Peace: Malaysia*, AGENCE FRANCE-PRESSE, May, 2, 2011, *available at* 5/2/11 AGFRP 08:57:54 (Westlaw); *Bin Laden Death Is "Justice," Says U.N. Leader*, AGENCE FRANCE-PRESSE, May 3, 2011, *available at* 5/2/11 AGFRP 16:07:53 (Westlaw); *China Calls bin Laden Death "Positive Development"*, AGENCE FRANCE-PRESSE,

According to reports of the operation, bin Laden was neither in a hostile position when killed[208] nor encouraged to surrender,[209] as law enforcement HRL usually requires.[210]

The functional approach equips decisionmakers to develop the law consistently with their shared expectations. The bin Laden operation probably satisfied the liberty–security principle. Bin Laden controlled al-Qaeda and participated in planning attacks that caused large-scale human casualties. The analysis would differ for someone with no leadership position or special expertise. Al-Qaeda has a loose and unstable organizational structure, so many "members" have only tenuous connections to the group or are extremely unlikely to cause the United States harm. They are not targetable merely because they are, in some sense, members.[211]

May 3, 2011, *available at* 5/3/11 AGFRP 01:19:04 (Westlaw); *NATO Urges Pakistan Progress in Anti-Terror Fight*, AGENCE FRANCE-PRESSE, May 4, 2011, *available at* 5/4/11 AGFRP 14:04:27 (Westlaw) (quoting remarks of NATO Secretary General that "I think it has been justified to carry out this operation against [bin Laden]"); *Russia Hails bin Laden Killing, Vows to Boost Cooperation*, AGENCE FRANCE-PRESSE, May 2, 2011, *available at* 5/2/11 AGFRP 09:04:49 (Westlaw); Valentina Pop, *EU Cheers Killing of Osama bin Laden*, EUOBSERVER, May 2, 2011, http://www.euobserver.com/24/32248; Frank Zeller, *Japan Welcomes bin Laden Death as Progress*, AGENCE FRANCE-PRESSE, May, 2, 2011, *available at* 5/2/11 AGFRP 9:36:14 (Westlaw); *see also* Margalit, *supra* note 8 ("States hailed the American operation, did not question its legality, and thus signaled that they saw no violation of international law.").

208. Nicholas Schmidle, *Getting bin Laden: What Happened That Night in Abbottabad*, NEW YORKER, Aug. 8, 2011, at 34, 43 (describing bin Laden as "froze[n]" and "unarmed").

209. *See id.* ("There was never any question of detaining or capturing him—it wasn't a split-second decision. No one wanted detainees." (internal quotation marks omitted)); Ken Dilanian & Brian Bennett, *Osama bin Laden's Surrender Wasn't a Likely Outcome in the Raid, Officials Say*, L.A. TIMES, May 3, 2011, http://articles.latimes.com/2011/may/03/world/la-fg-bin-laden-us-20110504 (reporting that U.S. agents intended to kill bin Laden absent his unambiguous surrender).

210. *See supra* note 138 and accompanying text; *see also* U.N. Office of the High Comm'r for Human Rights, Osama bin Laden: Statement by the UN Special Rapporteurs on Summary Executions and on Human Rights and Counterterrorism (May 6, 2001), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E [hereinafter OHCHR Statement] (asserting that, to assess operation under HRL, "it will be particularly important to know if the planning . . . allowed an effort to capture Bin Laden"); Corn, *supra* note 50, at 8 (asserting that "the nature of [such operations] make them inconsistent with peacetime law enforcement legal principles"); Margalit, *supra* note 8 (explaining that HRL would permit targeting "[o]nly if an imminent danger to the life or physical integrity of the attacking team or other individuals arose from Bin Laden during the raid"). Early reports mistakenly indicated that U.S. agents *had* tried to capture bin Laden; some commentators relied on those reports to conclude that the operation was consistent with law enforcement HRL. *See* Mark Leon Goldberg, *Was bin Laden's Killing Legal? One Top UN Expert Says So*, UN DISPATCH (May 4, 2011), http://www.undispatch.com/was-bin-ladens-killing-legal-one-top-un-expert-says-so; Mary Ellen O'Connell, *The bin Laden Aftermath: Abbottabad and International Law*, FOREIGN POLICY, May 4, 2011, http://afpak.foreignpolicy.com/posts/2011/05/04/the_bin_laden_aftermath_abbottabad_and_international_law.

211. The United States asserts that it may lawfully target anyone who belongs to al-Qaeda. *See* Koh, ASIL Speech, *supra* note 38 ("[I]ndividuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law."). But outside battlefield settings, the United States tends to underscore the target's particular threat. *See*

The mitigation principle differentiates among the many settings in which counterterrorism operations occur. It generally requires states to capture instead of target suspected terrorists.[212] A state threatened by suspects outside its jurisdiction usually must work with the territorial state.[213] However, forgoing a capture is sometimes reasonable. For example, no domain requires states to try to capture someone when doing so would seriously endanger state agents or undermine the operation. Thus, states probably may target terrorists who are armed, assembled, and likely to resist any exercise of governmental authority.[214] Similarly, deciding not to work with the territorial state may be reasonable if that state is unwilling or unable to contain a threat.[215] The relevant question for the bin Laden operation is whether the United States reasonably forwent working with Pakistan because of Pakistan's incompetence, duplicity, or corruption.[216] That question is more relevant and more likely to elicit a consensus than

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Brief for Respondent at ¶¶ 6–9, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-1469); Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIO JURIS (May 19, 2011 6:00 AM), http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/; Eric Holder, Speech at Northwestern University School of Law, May 5, 2012, *available at* http://www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/ (focusing on "senior operational leader[s] of al Qaida or associated forces").

212. *Compare, e.g.*, Brennan Speech, *supra* note 49 (preferring capture under IHL), *with, e.g.*, OHCHR Statement, *supra* note 210 (same under HRL).

213. *See* Presidential Decision Directive NSC/39: U.S. Policy on Counterterrorism (June 21, 1995), *as reprinted in Security in Cyberspace: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. Governmental Affairs*, 104th Cong. 272 (1996) ("We shall work closely with other governments to carry out our counterterrorism policy . . . ."); Kretzmer, *supra* note 14, at 179; Steven R. Ratner, *Predator and Prey: Seizing and Killing Suspected Terrorists Abroad*, 15 J. POL. PHIL. 251, 272–75 (2007); Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-Terrorism and International Law*, GROTIUS CTR., ¶¶ 6–12, 30 (Apr. 1, 2010) [hereinafter *Leiden Recommendations*], http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf.

214. *See* Doswald-Beck, *supra* note 70, at 885; *cf.* Isayeva v. Russia, App. No. 57950/00, 41 Eur. H.R. Rep. 791, 832–33 (2005) (suggesting that states need not try to arrest members of rebel group who are armed and assembled); Finogenov v. Russia, App. No. 18299/03, ¶ 213 (Eur. Ct. H.R. Dec. 20, 2011) (affording state discretion on mitigating measures where state lacked control and "terrorists were armed, well-trained and devoted to their cause").

215. I do not address whether an operation conducted without the territorial state's consent would violate that state's sovereignty or the *ad bellum* prohibition on the use of force. No consensus position exists on precisely when a state may use force against nonstate actors in another state. *See* Kreß, *supra* note 80, at 248. But many decisionmakers are coalescing around an unable-or-unwilling standard. *See, e.g.*, *Leiden Recommendations*, *supra* note 213, ¶¶ 32, 42; Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT'L L. (forthcoming 2012); Christian Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359 (2009). Interpreting the mitigation principle to require the same would reduce current tensions between the *jus ad bellum* on the one hand, and IHL and HRL on the other hand.

216. *See* Jane Perlez, *Pakistan Army Under Scrutiny After U.S. Raid*, N.Y. TIMES, May 5, 2011, at A1 (discussing doubts about Pakistan's willingness and ability to contain bin Laden).

whether a U.S.–Qaeda conflict takes place throughout Pakistan.[217] If the United States reasonably forwent working with Pakistan, then it should not be constrained to its law enforcement authorities.[218] It had less capacity to control the situation in Abbottabad than, for example, the U.K. police had in *Bubbins*—the case in which the police shot a supposed intruder who refused to vacate an apartment.

The bin Laden operation probably also satisfied the mistake principle. The United States reportedly spent months evaluating its intelligence and options for containing bin Laden's threat.[219] Though it undoubtedly exercises less diligence in other operations, the United States declines to describe its verification process. The mistake principle emphasizes that the process for avoiding mistakes is relevant to an operation's legality.[220] Moreover, because drone technology permits the United States a better opportunity to evaluate its intelligence and consider the alternatives, it should be permitted less error when planning an operation with such technology than when responding to events as they unfold.[221]

To be sure, decisionmakers might still disagree about how to specify the law for counterterrorism operations. Even if they do, the functional approach would help constrain their discretion. The domain method pushes the United States toward a legal position that is more extreme than its practice. Recall that the United States asserts a global conflict not because it intends to target al-Qaeda suspects worldwide but because it views the alternative—applying HRL in *all* nonbattlefield settings—as too limiting. Meanwhile, objectors lack effective tools for holding the United States

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217. *Compare* sources at *supra* note 207 (showing international consensus on bin Laden operation), *with, e.g.*, John B. Bellinger III, *Bin Laden Killing: The Legal Basis*, COUNCIL ON FOREIGN REL. (May 2, 2011), http://www.cfr.org/terrorism/bin-laden-killing-legal-basis/p24866 (global conflict covering Pakistan); Marko Milanovic, *When to Kill and When to Capture*, EJIL: TALK! (May 6, 2011), www.ejiltalk.org/when-to-kill-and-when-to-capture/ (no conflict in Abbottabad); O'Connell, *supra* note 210 (no conflict in Pakistan); Steve Ratner, Comment to *Was the Killing of Osama Bin Laden Lawful?*, EJIL: TALK! (May 4, 2011 20:10), http://www.ejiltalk.org/was-the-killing-of-osama-bin-laden-lawful/#comments [hereinafter Ratner, bin Laden Comment] (conflict throughout Pakistan).

218. *Cf.* MELZER, *supra* note 17, at 424 ("Particularly when targeting individuals outside their territorial jurisdiction . . . [s]tates are still reluctant to acknowledge their obligation to respect the law enforcement paradigm.").

219. *See* Infographic, *How Osama bin Laden was Located and Killed*, N.Y. TIMES, May 8, 2011, http://www.nytimes.com/interactive/2011/05/02/world/asia/abbottabad-map-of-where-osama-bin-laden-was-killed.html.

220. *See, e.g.*, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Israel (*Targeted Killing Case*) 2006 (2) Isr. L. Rep. 459, 502 (Isr.) ("Properly verified information should exist with regard to the identity and activity of [the suspect] . . . ."); Alston, *Study on Targeted Killings*, *supra* note 67, ¶ 93 (requesting information on verification measures); Blum & Heymann, *supra* note 71, at 205 ("Any targeted killing operation must therefore include mechanisms . . . that would ensure an accurate identification."); Roth Letter, *supra* note 44 (requesting information on verification measures).

221. *See also* Radsan & Murphy, *supra* note 202, at 7 ("[B]ecause of superior sources of intelligence and because the drone operator is not at risk of attack . . . the CIA must . . . identify its targets with a very high level of certainty.").

accountable. Just as the wartime paradigm is ineffective in legitimizing U.S. operations, the law enforcement paradigm is ineffective in constraining those operations. The United States easily dismisses law enforcement HRL as inapplicable.

The functional approach would pressure the United States to defend its practice on the merits and respond persuasively to counterarguments. Extreme positions—like the U.S. claim that it may target any al-Qaeda member no matter his specific threat—would be considerably more difficult to defend. Moderate positions would be newly available. Instead of invoking IHL, the United States might propose a hybrid that satisfies its security interests *and* better legitimizes its operations internationally. It clearly seeks to do both. As President Obama's chief counterterrorism advisor recently explained, "The more our views and our allies' views on these questions converge, without constraining our flexibility, the safer we will be as a country."[222]

IV. SECURITY DETENTION

A. *Explaining Detention Law*

The law on security detention is less developed than the law on targeting. Each domain regulates security detention but leaves key questions unanswered.[223] Still, the functional principles explain existing law better than the domains do. Like for targeting, the principles account for the variation within each domain and the consistencies across domains.

1. Liberty–Security

All domains condition security detention on its necessity, which means that detainees must actually pose a threat. Combatants presumptively do.[224] Those who demonstrably do not pose a threat are not detainable. Under the Third Geneva Convention, states must repatriate combatants who are unlikely to return to battle because of serious illness or injury.[225] Conversely, civilians

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222. Brennan Speech, *supra* note 49; *see also* John B. Bellinger III, Editorial, *Obama's Drone Danger*, WASH. POST, Oct. 3, 2011, at A17 ("If the Obama administration wants to avoid losing the tacit support (and potentially the operational and intelligence assistance) of its allies for drone strikes . . . it should try to ensure that they understand and agree with the U.S. policy and legal justification.").

223. *See, e.g.*, ICRC, *supra* note 28, at 18 (uncertainity on detention in noninternational conflicts); Bruce Oswald, *The Law on Military Occupation: Answering the Challenges of Detention During Contemporary Peace Operations?*, 8 MELB. J. INT'L L. 311 (2007) (same for peacekeeping operations); *infra* Section IV.B.1 (same for counterterrorism operations).

224. *See* Geneva Convention III, *supra* note 15, arts. 21, 118, 6 U.S.T. at 3334–36, 3406, 75 U.N.T.S. at 152–54, 224; St. Petersburg Declaration, *supra* note 101, 18 Martens Nouveau Recueil (ser. 1) 474.

225. Geneva Convention III, *supra* note 15, arts. 109–110, 6 U.S.T. at 3400–02, 75 U.N.T.S. at 218–20. Where no prospect for recovery exists—because the combatant's injury or illness is incurable, or his mental or physical fitness has been "gravely diminished"—the detaining state must send him home. *Id.* at art. 110; *see also* CHRISTIANE SHIELDS DELESSERT,

presumptively do *not* pose a threat and generally are not detainable. However, the Fourth Geneva Convention permits their detention when "absolutely necessary" for reasons of security.[226] For detention to be necessary, the detainee himself must pose a threat.[227] He must be released if his threat passes.[228]

To the extent that HRL permits security detention, it too requires that detention be necessary. Most HRL instruments prohibit arbitrary detentions.[229] Detention is arbitrary if it is unnecessary to satisfy a legitimate governmental purpose.[230] Protecting people from harm is undoubtedly legitimate, and states lawfully use varied forms of security detention.[231] But for reasons I discuss below, law enforcement HRL strongly discourages or prohibits what I term "pure security detention"—preventive security detention uncoupled from other proceedings (e.g., a criminal investigation, deportation, or medical evaluation).[232]

The emergency domain is on its face more permissive. Most HRL treaties permit states to derogate from their detention obligations during public emergencies.[233] Yet the treaties permit derogation only to the extent neces-

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RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES 112 (1977) ("The detention of a soldier whose mental and physical fitness has been gravely and perhaps permanently impaired is clearly no longer a military necessity."). Where the combatant might recover, the detaining state may send him to a neutral country to reduce the risk that he will return to battle and again pose a threat. Geneva Convention III, *supra* note 15, arts. 109–110, 6 U.S.T. at 3400–02, 75 U.N.T.S. at 218–20.

226. Geneva Convention IV, *supra* note 60, arts. 42, 6 U.S.T. at 3540, 3544, 3566–68, 75 U.N.T.S. at 310, 314, 336–38; *see also id.* at arts. 34, 78.

227. *See* Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 381 (2005) ("A civilian can be interned in international armed conflict only on the basis of an individual decision taken in every specific case."); *cf.* Goodman, *supra* note 65, at 54 ("Having political sympathy for or affiliation with the enemy power is wholly insufficient . . . ."); Laura M. Olson, *Guantánamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards?*, 42 CASE W. RES. J. INT'L L. 197, 205–06 (2009) (having valuable intelligence insufficient).

228. *See* Geneva Convention IV, *supra* note 60, art. 132, 6 U.S.T. at 3606–08, 75 U.N.T.S. at 376–78; *see also id.* art. 43, 6 U.S.T. at 3544–46, 75 U.N.T.S. at 314–16 (requiring periodic review "with a view to the favourable amendment of the initial decision, if circumstances permit").

229. *See* ACHPR, *supra* note 82, art. 6, 1520 U.N.T.S. at 247; IACHR, *supra* note 82, art. 7(2)–(3), 1144 U.N.T.S. at 147; ICCPR, *supra* note 82, art. 9(1), 999 U.N.T.S. at 175. Instead of prohibiting arbitrary detentions, the ECHR lists when detention is lawful. *See* ECHR, *supra* note 82, art. 5(1), 213 U.N.T.S. at 226.

230. *See, e.g.*, Shafiq v. Australia, Commc'n No. 1324/2004, ¶ 7.2, U.N. Doc. CCPR/C/88/D/1324/2004 (Human Rights Comm. Oct. 31, 2006) (explaining that detention is "arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought").

231. *See infra* notes 243–246 and accompanying text.

232. *See infra* notes 243–247 and accompanying text.

233. IACHR, *supra* note 82, art. 27, 1144 U.N.T.S. at 152; ICCPR, *supra* note 82, art. 4, 999 U.N.T.S. at 174; ECHR, *supra* note 82, art. 15, 213 U.N.T.S. at 232–34; *cf.* ACHPR, *supra* note 82, art. 27, 1520 U.N.T.S. at 251 (containing no derogation provision but limiting all rights for reasons of "collective security").

sary.[234] Thus, both during emergencies and in law enforcement settings, states may use security detention only if necessary. Necessity must be assessed case-specifically.[235] Security detainees must actually pose a threat.[236]

Although all domains require an active threat, none defines the threat threshold. In keeping with the liberty–security principle, that threshold is consistently lower for detention than for targeting. The differential threshold does not arise for combatants because, unless they are *hors de combat*, they presumptively pass the threshold for both. Civilians are targetable only when they directly participate in hostilities.[237] They are detainable even when they indirectly participate or otherwise pose an imperative security threat.[238] Similarly, HRL permits security detention in varied scenarios where targeting would be unlawful.[239]

The liberty–security principle also suggests that the threat threshold should rise with time. As the liberty costs increase, the benefits of containing the threat must be more substantial to remain proportional.[240] Admittedly, lifting the threshold finds only tenuous support in existing law. All domains try to limit the duration of detention,[241] but none does so by expressly requiring a more serious threat over time.

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234. IACHR, *supra* note 82, art. 27, 1144 U.N.T.S. at 152; ICCPR, *supra* note 82, art. 4, 999 U.N.T.S. at 174; ECHR, *supra* note 82, art. 15, 213 U.N.T.S. at 232–34.

235. *See generally* Khudoyorov v. Russia, App. No. 6847/02, 45 Eur. H.R. Rep. 144, 183 (2006) (requiring individualized assessment rather than general policy for pretrial detention); *Shafiq*, at ¶ 7.2 (finding immigration detention arbitrary because based on general policy instead of individualized assessment); *infra* note 263 and accompanying text (requiring individualized review during emergencies).

236. *See, e.g.*, Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Second Periodic Report: Addendum: Israel*, ¶¶ 125–128, U.N. Doc. CCPR/C/ISR/2001/2 (2001) (agreeing that detainees must pose threat); Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Israel*, ¶ 21, U.N. Doc. CCPR/C/79/Add.93 (1998) (condemning detention of people "not personally threaten[ing to] State security"). Where security detention is coupled with other proceedings, it may serve multiple functions simultaneously. For example, immigration detention might both incapacitate a threat and prevent flight pending deportation. The detainee need not pose a threat if his detention otherwise serves a legitimate governmental purpose. *See, e.g.*, Conka v. Belgium, 2002-I Eur. Ct. H.R. 93, 97 (immigration detention justifiable without finding of dangerousness).

237. Additional Protocol I, *supra* note 1, art. 51(3), 1125 U.N.T.S. at 26.

238. *See* Goodman, *supra* note 65, at 53–55; *see also* ICRC, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 257 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY GENEVA CONVENTION IV] ("It is . . . left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies [detention].").

239. *See infra* notes 243–245 and accompanying text.

240. *See, e.g.*, *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 465–66 (D.D.C. 2005); Ilijkov v. Bulgaria, App. No. 33977/96, ¶¶ 80–81 (Eur. Ct. H.R. July 26, 2001) (explaining that, even when criminal offense is sufficiently serious to justify initial detention, it may not justify prolonged detention).

241. *See* Geneva Convention III, *supra* note 15, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224 (release combatants at end of hostilities); Geneva Convention IV, *supra* note 60, arts. 132–133, 6 U.S.T. at 3606–08, 75 U.N.T.S. at 376–78 (release civilians at end of hostilities or

2. Mitigation

The necessity of security detention depends not only on the person's threat but also on the alternatives for containing that threat. Law enforcement HRL again assumes that states have considerable control and effective alternatives for addressing everyday violence. States presumptively should prosecute and punish people, rather than detain them without trial. Though criminal and security detention both deprive people of liberty, the criminal process is almost always accompanied by more robust procedural and substantive protections. In addition to lessening mistakes, those protections help to ensure that people deprived of their liberty are treated fairly.[242]

Though HRL prefers criminal to security detention, it permits security detention when the criminal option is unsuitable for containing a threat. States regularly use security detention while investigating a case but before filing criminal charges. Such detention is lawful, even if the state lacks sufficient evidence to file charges and never does.[243] Similarly, states may coucouple security with immigration detention.[244] And they may detain people who seriously threaten the public because of mental or infectious illness.[245] In each of those scenarios, the criminal process is inapt for addressing the threat. States theoretically could release and monitor people rather than detain them, but that option is onerous and sometimes ineffective.[246] HRL determines that states reasonably forgo that option in favor of security detention.

HRL is considerably more skeptical of pure security detention because it seems like an end run around the criminal process.[247] HRL permits such

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when no longer necessary); Fals Borda v. Colombia, Commc'n No. 46/1979, ¶¶ 13.4, 14, U.N. Doc. CCPR/C/16/D/46/1979 (Human Rights Comm. July 27, 1982), *reprinted in* 1 HUMAN RIGHTS COMM. DECISIONS, *supra* note 94, at 139, 144–45 (condemning security detention because of duration); Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee: Cameroon*, ¶ 22, U.N. Doc. CCPR/C/79/Add.33 (Apr. 18, 1994) (asserting that security detention must be time-limited).

242. *See* Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346–47 (1957).

243. *See, e.g.*, Tepe v. Turkey, App. No. 31247/96, ¶ 59 (Eur. Ct. H.R. Dec. 21, 2004) (explaining that ECHR "does not even presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant was in custody"); Brogan v. United Kingdom, 145 Eur. Ct. H.R. (ser. A) 11, 29–30 (1988).

244. *See, e.g.*, Ahani v. Canada, Commc'n No. 1051/2002, ¶ 4.9, U.N. Doc. CCPR/C/80/D/1051/2002 (Human Rights Comm. June 15, 2004); Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, 1862–65.

245. *See e.g.*, ECHR, *supra* note 82, art. 5(1)(e), 213 U.N.T.S. at 226.

246. *Cf.* Vijay M. Padmanabhan, Introductory Note, *Human Rights Committee & the European Court of Human Rights—Treatment of Terrorism Suspects*, 48 I.L.M. 567, 569 (2009) (discussing difficulties with control orders in United Kingdom).

247. *See, e.g.*, *HRC Israel Observations*, *supra* note 86, ¶ 7 ("Administrative detention infringes detainees' rights to a fair trial . . . .").

detention only in exceptional cases[248] or during emergencies.[249] That authority is even narrower under the European system. The European Court of Human Rights has determined that states may use pure security detention *only* during emergencies.[250] In practice, however, the distinction between the universal and European systems has been insignificant. Universal HRL rarely permits pure security detention outside of emergencies, and European HRL affords states broad discretion to declare an emergency.[251]

Perhaps because HRL is so skeptical of pure security detention, it provides little guidance on when such detention is lawful.[252] What guidance we have indicates that pure security detention may be lawful when mitigating measures—especially the criminal process—are unsuitable. For example, in *Schweizer v. Uruguay*, the Human Rights Committee explained that "administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner . . . ."[253] The European Court of Human Rights provided slightly more guidance in *Lawless v. Ireland*[254]:

> [T]he ordinary criminal courts . . . could not suffice to restore peace and order; . . . the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups was meeting with

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248. *See e.g.*, Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees: Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment: Report on the Practice of Administrative Detention*, ¶ 19, U.N. Doc. E/CN.4/Sub.2/1990/29 (July 24, 1990) (by Louis Joinet) ("Governments might at the very least be expected to use [administrative detentions] only in truly exceptional cases . . . ."); Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee: Morocco*, ¶ 21, U.N. Doc. CCPR/C/79/Add.44 (Nov. 23, 1994) (recommending "that measures of administrative detention . . . be restricted to very limited and exceptional cases"); Int'l Comm'n of Jurists, *Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism*, at 11–12 (Mar. 2006).

249. *See supra* note 233 and accompanying text.

250. *See, e.g.*, A. v. United Kingdom, App. No. 3455/05, 49 Eur. H.R. Rep. 625, 707 (2009). The court's interpretation is not compelled by the ECHR text. ECHR, *supra* note 82, art. 5(1)(c) (permitting detention when reasonably necessary to prevent someone from committing offense).

251. *See A.*, 49 Eur. H.R. Rep. at 707 (explaining that, on derogation, "a wide margin of appreciation should be left to the national authorities").

252. Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369 (2008) [hereinafter Hakimi, *Detaining Terrorism Suspects*] (discussing lack of guidance). The European Court of Human Rights regularly appraises the use of pure security detention during emergencies, but its recent jurisprudence focuses on the process of review without addressing the substantive authority to detain. *See, e.g.*, Demir v. Turkey, 1998-VI Eur. Ct. H.R. 2640, 2656–59; Askoy v. Turkey, 1996–VI Eur. Ct. H.R. 2260, 2279–84; Brannigan v. United Kingdom, 258 Eur. Ct. H.R. (ser. A) 29, 50–51 (1993).

253. Commc'n No. 66/1980, ¶ 18.1, U.N. Doc. CCPR/C/17/D/66/1980 (Human Rights Comm. Oct. 12, 1982).

254. 3 Eur. Ct. H.R. (ser. A) at 27 (1961).

> great difficulties[; and] . . . these groups operated mainly in Northern Ireland . . . .[255]

To be clear, the *Lawless* court did not determine that the criminal process was ineffective against Lawless himself. It determined that the criminal process was inapt for the IRA threat more generally.[256]

IHL permits pure security detention for much the same reason.[257] During periods of organized high-intensity violence, states have little situational control. Amassing the evidence and resources to prosecute everyone who has committed a crime would be enormously burdensome and detract from the more pressing mission of restoring order. IHL decides that, in war, states need not devote their intelligence and security resources primarily to criminal prosecutions and convictions. In fact, IHL arguably *prefers* security detention. Criminals might be punished with long-term sentences or death, but security detainees must be released when their threat passes—presumptively, before or at the end of hostilities.[258]

3. Mistake

Detention differs from targeting in that states may meaningfully correct mistakes after acting to contain the threat. Once someone is in custody, states must verify that security detention is lawful. Here again, the combatant domain assumes no serious risk of mistake when people are properly classified as combatants.[259] But unlike for targeting, IHL nowhere defines the standard for detaining someone whose status is ambiguous. The closest analog appears in article 5 of the Third Geneva Convention: in cases of uncertainty about whether someone who has committed a belligerent act is a POW, the state must treat him as one until his proper status is determined by

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255. *Id.* at 58.

256. 3 Eur. Ct. H.R. (ser. A) at 27; *see also* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 80 (1978) ("Being confronted with a massive wave of violence and intimidation . . . [the governments] were reasonably entitled to consider that normal legislation offered insufficient resources . . . .").

257. *Cf.* COMMENTARY GENEVA CONVENTION IV, *supra* note 238, at 258 (explaining that security detention is justified only "if security cannot be safeguarded by other, less severe means").

258. Geneva Convention III, *supra* note 15, arts. 21, 118, 6 U.S.T. at 3334–36, 3406, 75 U.N.T.S. at 152–54, 224; *see* Geneva Convention IV, *supra* note 60, arts. 42–43, 6 U.S.T. at 3544–46, 75 U.N.T.S. at 314–16. In noninternational conflicts, detention may extend beyond the cessation of hostilities if it remains necessary for reasons of security. *See* COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 67, at 1360.

259. *Cf.* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1099 (2008) ("[E]rroneous detentions were rare when the traditional scheme was applied to captured soldiers who wore uniforms and were usually keen to obtain POW status.").

a "competent tribunal."[260] States might use a similar process to verify that people are detainable.[261]

All other domains specifically mandate a prompt, meaningful, and independent process for lessening mistakes. HRL usually requires states to review detentions through the criminal process, with all its procedural and substantive controls. It implicitly permits more mistakes with security detention, but it still requires meaningful review. Under HRL, states must notify security detainees of the reasons for detention and afford them the opportunity for prompt and independent judicial review.[262] Moreover, although most HRL instruments permit states to derogate from their detention obligations, human rights organs consistently find that states either may not derogate from or must provide an adequate substitute for the review process.[263] The Fourth Geneva Convention likewise requires states to afford civilian-detainees notice, prompt review "by an appropriate court or administrative board," and the option of appealing that body's initial decision.[264]

Though the law enforcement, emergency, and civilian domains all require meaningful review, none defines the standard of certainty or specific contours of the review process. The adequacy of the process almost certainly depends

260. Geneva Convention III, *supra* note 15, art. 5, 6 U.S.T. at 3322–24, 75 U.N.T.S. at 140–42.

261. *See* Enemy Prisoners of War, Related Personnel, Civilian Internees, and Other Detainees, Army Reg. 190-8 § 1-6(e)(10)(c) (Oct. 1, 1997) (permitting article 5 tribunals to determine that a detainee is an "[i]nnocent civilian who should be immediately returned to his home or released"); Sean D. Murphy, *Evolving Geneva Convention Paradigms in the "War on Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants"*, 75 GEO. WASH. L. REV. 1105, 1131 (2007) (arguing that article 5's spirit extends to detention question). *Cf.* Boumediene v. Bush, 553 U.S. 723, 793–95 (2008) (affording Guantánamo detainees judicial review on detention question); Brief for Respondents-Appellants at 10–12, Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265) (detailing administrative review of detentions in Afghanistan).

262. ACHPR, *supra* note 82, art. 7(1)(a), 1520 U.N.T.S. at 247; IACHR, *supra* note 82, art. 7(6), 1144 U.N.T.S. at 147; ICCPR, *supra* note 82, art. 9(4), 999 U.N.T.S. at 176; ECHR, *supra* note 82, art. 5(3)–(4), 213 U.N.T.S. at 226. In addition, HRL requires that any detention be grounded in law, meaning that states must prescribe in advance the permissible bases for detention and then follow their own laws. ACHPR, *supra* note 82, arts. 6, 7(2), 1520 U.N.T.S. at 247; IACHR, *supra* note 82, art. 7(2)–(3), 1144 U.N.T.S. at 147; ICCPR, *supra* note 82, art. 9(1)–(2), 999 U.N.T.S. at 175; ECHR, *supra* note 82, art. 5, 213 U.N.T.S. at 226.

263. *See, e.g.*, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 41 (Oct. 6, 1987); Special Rapporteur on the Promotion & Prot. of Human Rights & Fundamental Freedoms While Countering Terrorism, Special Rapporteur on Torture & Other Cruel, Inhuman, or Degrading Treatment or Punishment, Working Grp. on Arbitrary Detention & Working Grp. on Enforced or Involuntary Disappearances, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, ¶ 292(b), Human Rights Council, U.N. Doc. A/HRC/13/42 (May 20, 2010) (by Martin Schenin et al.); Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260, 2284; Castillo Petruzzi v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 110 (May 30, 1999).

264. Geneva Convention IV, *supra* note 60, art. 43, 6 U.S.T. at 3544–46, 75 U.N.T.S. at 314–16; *see also* COMMENTARY GENEVA CONVENTION IV, *supra* note 238, at 260.

on its context. For example, though HRL requires a judicial process, IHL permits an administrative one.[265] That distinction is sometimes justified by the practical realities of war.[266] In wartime, the judicial system might be closed, geographically removed from detainees, or overwhelmed by the caseload. A state exercises due diligence when it uses a streamlined administrative process. The same process would be unduly cursory during periods of stability.

Because states must lessen mistakes after the initial decision to detain, extended detention may be unlawful even if the state could have targeted the person at the time of capture.[267] An honest and reasonable belief that someone is targetable would make him detainable—but only initially. With time, the state must take steps to verify that detention is justified. The standard of certainty effectively increases.[268]

B. *Developing and Enforcing Detention Law*

1. Detaining Terrorists

Though all domains regulate pure security detention, decisionmakers still debate when states may use it to incapacitate suspected terrorists. The domain method frames the debate around the emergency and armed conflict tests. The law enforcement domain discourages or prohibits such detention; all other domains permit it.

That frame is at best distracting. The two tests are nebulous in situations involving terrorism, and in practice, many states respond to terrorist violence by invoking an emergency.[269] Further, the choice of domain ultimately does not determine the outcome. Each domain potentially permits pure security detention as a counterterrorism tool but leaves important

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265. COMMENTARY GENEVA CONVENTION IV, *supra* note 238, at 260.

266. *See* Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 434–35 (2009); Sassòli & Olson, *supra* note 3, at 622.

267. The conventional wisdom is that "it would be absurd to accept an interpretation of IHL that results in a state's possessing the legal authority to kill actor *X* on purpose but lacking the legal authority to detain actor *X*." Goodman, *supra* note 65, at 55. That wisdom is consistent with the liberty–security principle to the extent that it is applied to the initial decision to detain. But it fails to account for the narrowed detention authority over time. For an argument similar to mine, see Waxman, *supra* note 161, at 1408–10.

268. *See* Boumediene v. Bush, 553 U.S. 723, 793–95 (2008) (requiring more robust judicial review after initial period); CrimA 6659/06 A v. Israel 47 I.L.M. 768, 779–80 [2007] (Isr.) (requiring clear and convincing evidence for long-term detention); Lind v. Russia, App. No. 25664/05, 50 Eur. H.R. Rep. 92, 105 (2007) ("[A]fter a certain lapse of time [reasonable suspicion] no longer suffices.").

269. *See, e.g.*, Demir v. Turkey, 1998–VI Eur. Ct. H.R. 2640 (discussing derogation); Brannigan v. United Kingdom, 258 Eur. Ct. H.R. (ser. A) 29, 50–51 (1993) (same); *OHCHR Report on States of Emergency*, *supra* note 88 (listing declarations of emergency). *Cf.* Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto, Note by the Secretary-General, at 25, 27–28, U.N. Doc. CCPR/C/2/Rev.4 (Aug. 24, 1994) (reservations for counterterrorism detention).

questions unanswered. The combatant domain permits such detention if terrorists are clearly identified. It does not define the authority to detain when—as is often the case—someone's association with a terrorist group security is ambiguous.[270] The civilian and emergency domains both permit pure security detention if necessary, but neither specifies when detention might be necessary.[271] Outside of Europe, even law enforcement HRL is equivocal.[272] The UN Working Group on Arbitrary Detention recognized in 2003 that terrorism sometimes justifies "exceptional measures that limit certain guarantees, including those relating to detention."[273] In 2009, the same group asserted (without explanation) that security detention against suspected terrorists "is inadmissible."[274]

For example, consider the systems of security detention in Malaysia and the United Kingdom. Under Malaysian law, the government may detain people when necessary to prevent them "from acting in any manner prejudicial to the security of Malaysia . . . or to economic life thereof."[275] Security detention may last for renewable two-year periods with little process.[276] According to one report, security detention has replaced the criminal justice system in national security cases, broadly defined.[277] U.K. law is more restrained. The government may detain terrorism suspects for up to twenty-eight days without filing criminal charges.[278] It investigates and, if possible, prosecutes all security detainees.[279] After two days, it entitles them to judicial review.[280] Using the domain method, the situations in Malaysia and the United Kingdom are comparable. Both countries experience episodic terrorism. If those conditions trigger an emergency, security detention is governed by an unspecified necessity standard. Absent an emergency, such detention is suspect but, under universal HRL, still potentially lawful.

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270. *See supra* notes 259–261 and accompanying text.

271. *See supra* notes 238, 252–256 and accompanying text.

272. *See supra* note 252 and accompanying text.

273. Working Grp. on Arbitrary Detention, *Civil and Political Rights, Including the Questions of Torture and Detention: Rep. of the Working Group on Arbitrary Detention*, ¶ 70, U.N. Doc. E/CN.4/2004/3 (Dec. 15, 2003) (by Leïla Zerroügui).

274. Working Grp. on Arbitrary Detention, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Rep. of the Working Group on Arbitrary Detention*, ¶ 54(b), U.N. Doc. A/HRC/10/21 (Feb. 16, 2009) (by Manuela Carmena Castrillo).

275. Internal Security Act, 1960, c. 2, § 8(1) (Malay.).

276. *See id.* §§ 8(1), 8(7), 8B(1), 11–13.

277. Int'l Comm'n of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, at 107 (2009).

278. Terrorism Act, 2006, c. 11, § 23 (U.K.).

279. *Id.* c. 11, § 24; *see also Government Reply to the Nineteenth Report from the Joint Committee on Human Rights Session,* Counterterrorism Policy and Human Rights: 28 Days, Intercept and Post-Charge Questioning, H.L. Paper 157, H.C. 394, at 1 (Sept. 2007) http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf ("The purpose of the extended detention time is to secure sufficient evidence for use in criminal proceedings.").

280. Terrorism Act, 2000, c. 11, § 41 & sch. 8, part III.

The functional approach better guides decisionmakers and equips them to develop the law. The functional principles support a proposal on counterterrorism detention that I have advanced in other work.[281] The proposal's basic parameters are as follows: First, as with targeting, membership in a terrorism group may be evidence of a threat but does not alone justify security detention.[282] Second, the authority to detain should narrow with time. Extended security detention should be permitted only when the detainee poses a very serious threat (liberty–security principle) and the state has verified, using a fairly high standard of certainty and an independent review process, that detention is justifiable (mistake principle). Third, states ordinarily should incapacitate terrorism suspects through the criminal process (mitigation and mistake principles).[283] But postponing or forgoing the criminal process is sometimes reasonable. For example, states might use security detention as the United Kingdom does, to facilitate prosecutions when the ordinary criminal timeline is too onerous.[284] Alternatively, they might forgo the criminal process when terrorism is recurrent and intransigent, or suspects take harbor in territories with weak or uncooperative law enforcement.

Under that framework, the Malaysian system is clearly more troubling than the one in the United Kingdom. Malaysia permits longer detentions for insufficiently serious conduct, circumvents the criminal justice system, and lacks a meaningful process for lessening mistakes. Protesting the Malaysian system on those grounds would more effectively pressure the government to

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281. Hakimi, *Detaining Terrorism Suspects*, *supra* note 252, at 407–15.

282. The combatant, civilian, and law enforcement domains all treat associational status as at least relevant to the threat inquiry. *See* International Convention for the Suppression of Terrorist Bombings arts. 2(3), 4, Dec. 15, 1997, S. TREATY DOC. No. 106-6, at 5, 2149 U.N.T.S. 256, 286 [hereinafter Terrorist Bombing Convention] (requiring states to prosecute accomplices and coconspirators); Geneva Convention III, *supra* note 15, art. 4, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40 (making membership determinative for combatants); COMMENTARY GENEVA CONVENTION IV, *supra* note 238, at 258 (explaining that civilian detentions may be warranted where a state "has serious and legitimate reason to think that [civilians] are members of organizations whose object is to cause disturbances"). For a decision treating membership as relevant but not dispositive during an armed conflict, see CrimA 6659/06, A v. Israel 47 I.L.M. 768, 777–79 [2007] (Isr.). For a decision treating membership as dispositive, see Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010). The problem with the latter approach is evident in the U.S. case law: the criteria for membership are so amorphous that identifying members is highly speculative and, at least in some cases, not especially relevant to containing a threat. *See id.* ("Whether a detainee would pose a threat to U.S. interests if released is not at issue . . . ."); Robert M. Chesney, *Who May be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769 (2011) (reviewing U.S. practice).

283. *See, e.g.*, Terrorist Bombing Convention, *supra* note 282, art. 8(1), 2149 U.N.T.S. at 288 (requiring states to prosecute people who participate in international terrorism); Brennan Speech, *supra* note 49 (expressing "strong preference" for criminal detention); *see also* Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT'L L. 549 (2011) (detailing U.S. transition in Iraq from system dominated by security detention to one supporting criminal prosecutions).

284. *See* Terrorism Act, 2006, c. 11, § 23 (U.K.); *see also* CODE DE PROCÉDURE PÉNALE arts. 63, 706-88 (Fr.); JACK STRAW, FOREIGN AND COMMONWEALTH OFFICE, COUNTER-TERRORISM LEGISLATION AND PRACTICE: A SURVEY OF SELECTED COUNTRIES 26 (2005) (discussing practice in Spain).

defend or alter its conduct than would invoking a contested domain or underspecified standard.

2. Detaining During Occupations or Territorial Administrations

The functional framework is also preferable for defining the authority to detain during occupations and international territorial administrations ("ITAs"). By definition, an occupation exists—and IHL applies—when a hostile state exercises authority over foreign territory.[285] That definition excludes ITAs like the ones in Kosovo and East Timor. ITAs are typically established by intergovernmental organizations, not by states.[286] Moreover, ITAs usually lack the hostility inherent in an occupation; they operate with either the territorial state's consent or the UN Security Council's authorization.[287] For those and other reasons,[288] decisionmakers generally do not treat ITAs as occupations.[289] They instinctively apply law enforcement HRL.[290]

Applying IHL to occupations and law enforcement HRL to ITAs suggests that each has disparate authorities.[291] Yet the two scenarios have much in common.[292] Occupiers and ITA administrators both exercise governmental authority over foreign territory. Each might inherit a state apparatus that functions well or requires substantial (re)building. And each might confront a local population that is welcoming or violently resistant. No reason exists for an occupier overseeing a functioning apparatus and peaceful population

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285. *See* Hague IV, *supra* note 22, annex art. 42, 36 Stat. at 2306.

286. IHL and HRL do not necessarily bind international organizations. *See, e.g.*, Michael Bothe, *Peacekeeping and International Humanitarian Law: Friends or Foes?*, 3 INT'L PEACEKEEPING 91 (1996); Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, 1 Y.B. INT'L HUMANITARIAN L. 3 (1998). Nevertheless, most international organizations try to act consistently with those regimes. *See, e.g.*, U.N. Secretary-General, *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999).

287. *See* Tristan Ferraro, *The Applicability of the Law of Occupation to Peace Forces*, *in* INTERNATIONAL HUMANITARIAN LAW HUMAN RIGHTS AND PEACE OPERATIONS 133, 136–38 (Gian Luca Beruto ed., 2008).

288. *See* Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT'L L. 695, 702–04 (2005) [hereinafter Ratner, *Challenges of Convergence*] (discussing bureaucratic reasons); Sassòli, *New Conflicts*, *supra* note 149, at 44 (explaining that applying IHL suggests that ITA forces are lawful targets).

289. *See* David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 852 & n. 48 (2003).

290. *See, e.g.*, On the Authority of the Interim Administration in Kosovo, United Nations Interim Administration Mission in Kosovo [UNMIK] Reg. No. 1999/1 ¶ 2 (1999); On the Authority of the Transitional Administration in East Timor, United Nations Transitional Administration in East Timor [UNTAET] Reg. No. 1999/1 ¶ 2 (1999).

291. IHL permits occupying powers to use security detention when necessary. Geneva Convention IV, *supra* note 60, art. 78, 6 U.S.T. at 3566–68, 75 U.N.T.S. at 336–38. Law enforcement HRL also uses a necessity standard, but its standard is usually interpreted more narrowly. *See supra* notes 242–251 and accompanying text.

292. Ratner, *Challenges of Convergence*, *supra* note 288.

to have more detention authority than an ITA administrator confronting an inoperative apparatus or violent resistance. Thus, some decisionmakers are advancing hybrid outcomes for both entities.[293] The functional approach enables decisionmakers to justify and refine those outcomes.

Moreover, using the functional principles might expose issues on which different decisionmakers agree. For example, the North Atlantic Treaty Organization ("NATO") was criticized in human rights circles for using security detention during the ITA in Kosovo.[294] Critics claimed that NATO violated law enforcement HRL. NATO quickly dismissed the criticism by suggesting that HRL did not apply.[295] Yet despite that domain dispute, NATO and its objectors appeared to agree that the authority to detain should depend on the efficacy of the alternative—there, containing violence through the local justice system.[296] The mitigation principle would have highlighted that agreement.

The functional approach also would have held NATO accountable in a way that invoking law enforcement HRL did not. Whereas NATO easily dismissed HRL as inapplicable, using the functional approach would have pressured NATO to justify its conduct on the merits. As the security situation in Kosovo improved and the local justice system became more reliable,

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293. For evidence that ITA administrators exercise more detention authority than law enforcement HRL usually permits, see OMBUDSPERSON INST. IN KOSOVO, SPECIAL REP. NO. 3, THE CONFORMITY OF DEPRIVATIONS OF LIBERTY UNDER 'EXECUTIVE ORDERS' WITH RECOGNISED INTERNATIONAL STANDARDS ¶¶ 2, 5, 16 (2001), *available at* http://www.ombudspersonkosovo.org/new/repository/docs/E4010629a.pdf (Kosovo), and SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TERRITORIAL ADMINISTRATION, AND STATE-BUILDING 117–18 (2004) (East Timor). *But cf.* Al-Jedda v. United Kingdom, App. No. 27021/08, 53 Eur. H.R. Rep. 789, 843–48 (2011) (applying law enforcement HRL to military detention in Iraq). For evidence that occupiers may have less detention authority than IHL permits, see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (*Israeli Wall Case*), Advisory Opinion, 2004 I.C.J. 136, ¶¶ 105–113, 127–34 (July 9); EXPERT MEETING ON THE RIGHT TO LIFE IN ARMED CONFLICTS AND SITUATIONS OF OCCUPATIONS 5–6, 23 (Univ. Ctr. for Int'l Humanitarian Law 2005).

294. *See, e.g.*, Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Kosovo (Serbia)*, ¶ 17, U.N. Doc. CCPR/C/UNK/CO/1 (Aug. 14, 2006); Comm'r for Human Rights, Council of Eur., *Kosovo: The Human Rights Situation and the Fate of Persons Displaced from Their Homes*, ¶¶ 76–82, CommDH(2002)11 (Oct. 16, 2002) (by Alvaro Gil-Robles) [hereinafter *COE Report*]; Amnesty Int'l, *Federal Republic of Yugoslavia (Kosovo): International Officials Flout International Law*, at 2, AI Index EUR 70/008/2002 (Aug. 31, 2002) [hereinafter *Amnesty 2002 Report*].

295. *See* Amnesty Int'l, *Serbia and Montenegro (Kosovo): The Legacy of Past Human Rights Abuses*, at 14, AI Index EUR/70/009/2004 (Apr. 2004) (quoting NATO as asserting that the "authority to detain [was] a *military* decision, not a *judicial* one").

296. *Amnesty 2002 Report*, *supra* note 294, at 18 (arguing that security detention was no longer justifiable, given "the establishment of a functioning judicial system"); *id.* at 12 (acknowledging that NATO justified security detention "as a last resort," if civilian authorities were unable or unwilling to take responsibility for the matter); *COE Report*, *supra* note 294, ¶¶ 99–101 (acknowledging that security detention may be lawful if local justice system is essentially unavailable).

security detention would have been less defensible.[297] Moreover, NATO would have had good reason to participate in that discourse. Using the domain method, it could dismiss the human rights criticism but it still had difficulty making the affirmative case that it acted lawfully. The law enforcement domain was inapt, but so were the others. The functional approach would have empowered NATO to try to legitimize its conduct and silence the critics.

CONCLUSION

This Article rejects the domain method for determining when states may target or detain nonstate actors. The domain method presupposes that the domains operate independently—that no overarching framework explains or informs the law across domains. This Article argues, to the contrary, that all targeting and detention law is and should be rooted in three core principles: liberty–security, mitigation, and mistake. A functional approach using those principles would help cure the practical problems of the domain method. It would enable decisionmakers to develop the law incrementally. Using the functional approach, they might converge on areas of agreement by crafting novel outcomes and without risking a slippery slope. Moreover, the functional approach would better hold decisionmakers accountable. Decisions would have to be justified on the merits, instead of by *ipse dixit* reference to a contested domain or underspecified standard.

To be sure, the functional approach would not guarantee particular outcomes or even that outcomes would eventually be settled. Neither does the domain method. The international system is decentralized and operates mostly discursively, with coercive enforcement being relatively rare. As such, legal positions that lack broad policy support are unlikely to be effective in practice.[298] Any scheme for assessing targeting and detention must account for that reality. If nothing else, it must provide a common language with which decisionmakers own up to their positions, debate their differences, find areas of agreement, and condemn those who stray from shared expectations.

Though the functional approach is intended to assess the targeting and detention of nonstate actors, it might benefit other areas of law as well. I conclude by crystalizing four questions that have emerged from this study and warrant further research. First, should decisionmakers use the functional approach to assess the targeting and detention of *state* agents? As discussed, the combatant domain carries certain benefits when applied to state

297. *Cf.* Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 60 (2001) (explaining need to establish "a coherent judicial and legal system for an entire territory virtually from scratch").

298. *See* W. Michael Reisman, *On the Causes of Uncertainty and Volatility in International Law*, *in* THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW 33, 37 (Tomer Broude & Yuval Shany eds., 2008) ("[M]eaningful common interest is the critical political component in the effectiveness of legal arrangements.").

agents.[299] Nevertheless, its irrebuttable presumptions may no longer be justifiable, given developments in military technology and in how interstate wars are fought.[300] Second, might this functional approach resolve current tensions between IHL and HRL on the one hand, and the *jus ad bellum* on the other hand?[301] Operations that are lawful under the *jus ad bellum* may not fall squarely in any IHL or HRL domain. The functional approach arguably equips decisionmakers to protect the interests that underlie IHL and HRL, without unduly restricting states' rights under the *jus ad bellum*. Third, would a functional approach be useful in assessing *other* liberty-restricting measures? For example, HRL requires states to respect peoples' freedom of expression.[302] That obligation might require something different in domestic law enforcement settings than during extraterritorial missions or peacekeeping operations. Finally, should the domain method be discarded altogether? IHL and HRL have been converging for decades,[303] and many suggest that the norms on targeting and detention are the primary sticking points between regimes.[304] With that tension addressed, to what extent is the IHL–HRL distinction still relevant and justifiable?[305]

299. *See supra* Section II.B.

300. *See supra* notes 15–17, 126, 153–159 and accompanying text.

301. *See supra* notes 50, 215.

302. *See* ICCPR, *supra* note 82, art. 19, 999 U.N.T.S. at 178.

303. *See* Meron, *supra* note 18, at 243–47.

304. *See, e.g.*, Sassòli & Olson, *supra* note 3, at 600–01.

305. For initial thoughts, see *supra* note 18.