

# Detention in the context of counterterrorism and armed conflict: Continuities and new challenges

**Lawrence Hill-Cawthorne**

Lawrence Hill-Cawthorne is Associate Professor at the School of Law, University of Reading, UK.

Email: [l.hill-cawthorne@reading.ac.uk](mailto:l.hill-cawthorne@reading.ac.uk).

## Abstract

*This article explores recent practices of States in relation to counterterrorism and armed conflict detention. Recent cases in the courts of the UK and US are drawn on to demonstrate the continued defence by those States of their administrative detention practices. Furthermore, the practice of other States in adopting new administrative detention laws as part of their counterterrorism strategies is explored. Finally, two examples of contemporary controversies are then considered to show where much of the debate is likely to be focused in the coming years, namely the use of other administrative measures short of detention, particularly assigned residence, and detentions carried out by armed groups that are supported by foreign States.*

**Keywords:** counterterrorism, administrative detention, international humanitarian law.

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## Introduction

In the wake of 9/11, counterterrorism and armed conflict came to be seen as inseparable, both operationally, in the sense that the US's and others' operations against al-Qaeda were part of the broader invasion and occupation of Afghanistan, and legally, in the sense that States sought to justify their counterterrorism policies on the basis that they fell within an armed conflict and were subject to international humanitarian law (IHL). This phenomenon, of course, played out particularly publicly in the context of administrative detention or internment,<sup>1</sup> where debates raged over the appropriate regulatory framework. Whilst some saw this in terms of a stark "criminal law *versus* military detention" binary,<sup>2</sup> others emphasized the possibility of adhering to a human rights framework whilst engaging in administrative detention.<sup>3</sup> Still others raised concerns with the emerging idea of entrenching permanent, formalized models of administrative counterterrorism detention.<sup>4</sup>

The US and UK, amongst others, were particular advocates of an administrative detention regime in the context of counterterrorism.<sup>5</sup> Soon after 9/11, the UK derogated in part from Article 5 of the European Convention on Human Rights (ECHR) and adopted its infamous 2001 Anti-Terrorism, Crime and Security Act.<sup>6</sup> Part 4 of the 2001 Act introduced a domestic system of indefinite administrative detention for those certified as "international terrorists" by the Home Secretary, with appeal to, and six-monthly periodic reviews by, the Special Immigration Appeals Commission (in place of ordinary judicial review). In many ways, this system of administrative detention looked a great deal like that provided for under the Fourth Geneva Convention in respect of civilians

- 1 That is, detention ordered by the executive, usually for the purposes of preventing an alleged security threat from materializing, outside of any criminal justice framework and often without traditional judicial oversight.
- 2 Avril McDonald, "Terrorism, Counter-Terrorism and the *Jus in Bello*", in Michael N. Schmitt and Gian Luca Beruto (eds), *Terrorism and International Law: Challenges and Responses*, International Institute of Humanitarian Law, San Remo, 2002; Robert Chesney and Jack Goldsmith, "Terrorism and the Convergence of Criminal and Military Detention Models", *Stanford Law Review*, Vol. 60, No. 4, 2008, p. 1079.
- 3 See, e.g., albeit with different consequences, Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, Oxford, 2011, Chapter 9; Diane Webber, *Preventive Detention of Terror Suspects: A New Legal Framework*, Routledge, Abingdon, 2016; Monica Hakimi, "International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide", *Yale Journal of International Law*, Vol. 33, No. 2, 2008, p. 369.
- 4 Deborah Pearlstein, "We're All Experts Now: A Security Case Against Security Detention", *Case Western Reserve Journal of International Law*, Vol. 40, 2009, p. 577.
- 5 Whilst UK and US practice exemplifies this approach, that practice took place in a global context of emerging counterterrorism policy (including under the auspices of the UN Security Council) that was conspicuously silent on the need for compliance with human rights law: Manfred Nowak and Anne Charbord, "Key Trends in the Fight Against Terrorism and Key Aspects of International Human Rights Law", in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism*, Edward Elgar, Cheltenham, 2018.
- 6 In the preceding few years, the new Blair Government had already introduced some of the most far-reaching counterterrorism legislation in Europe, particularly in the field of police powers and the criminal law: see Adam Tomkins, "Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001", *Public Law*, Summer, 2002, p. 205.

during an international armed conflict.<sup>7</sup> The derogation, and Part 4 of the 2001 Act, were held to be incompatible with the ECHR by the UK House of Lords and European Court of Human Rights (ECtHR), resulting in the replacement of the administrative detention regime with a new system of control orders under the 2005 Prevention of Terrorism Act.<sup>8</sup>

Regarding its detention operations in Afghanistan and Iraq, during the international and non-international armed conflicts in both States, the UK adopted internment regimes that, unsurprisingly, were again clearly grounded in those applicable under international humanitarian law in international armed conflicts. Over the intervening two decades, challenges have been brought before UK domestic courts (and the ECtHR) by detainees that had been captured and detained in those conflicts through various causes of action, including judicial review,<sup>9</sup> human rights claims,<sup>10</sup> *habeas corpus*<sup>11</sup> and actions in tort.<sup>12</sup> The UK has sought to rebut these claims, with varying degrees of success, by invoking a range of different arguments depending on the nature of the claims, from procedural arguments concerning crown act of State,<sup>13</sup> foreign act of State, and State immunity,<sup>14</sup> to substantive arguments concerning the relationship between the ECHR and IHL.<sup>15</sup>

The conflation between counterterrorism and armed conflict was especially evident in the practice of the US. As is well known, Congress adopted the Authorization for the Use of Military Force (AUMF) after 9/11, which authorized the president

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>16</sup>

7 For a detailed consideration of the content of the IHL internment regimes applicable in international armed conflicts, see Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, Oxford, 2016, Chapter 2.

8 United Kingdom, *A and Others v. Secretary of State for the Home Department; X and Another v. Secretary of State for the Home Department*, Judgment, [2004] UKHL 56; ECtHR, *A and Others v. UK*, Judgment (Grand Chamber), Appl. No. 3455/05, 19 February 2009. Control orders themselves were subsequently replaced with “terrorism prevention and investigation measures” in 2012. On this UK practice, see D. Webber, above note 3, pp. 97–109.

9 *R (on the Application of Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

10 *R (on the Application of Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58.

11 *Rahmatullah v. Secretary of State for Foreign and Commonwealth Affairs* [2012] UKSC 48.

12 *Belhaj v. Straw* [2017] UKSC 3.

13 *Rahmatullah v. Ministry of Defence* [2017] UKSC 1.

14 *Belhaj v. Straw* [2017] UKSC 3.

15 *Hassan v. UK*, Judgment (Grand Chamber), Appl. No. 29750/09, 16 September 2014; *Al-Waheed v. Ministry of Defence; Mohammed v. Ministry of Defence* [2017] UKSC 2.

16 Public Law 107–40, 115 Stat. 224, section 2(a).

The AUMF has been invoked by the US government as the basis for military operations in multiple jurisdictions.<sup>17</sup> Curtis Bradley and Jack Goldsmith have commented that the AUMF has been transformed “from an authorization to use force against the 9/11 perpetrators who planned an attack from Afghanistan into a protean foundation for indefinite war against an assortment of terrorist organizations in numerous countries”.<sup>18</sup>

The US Supreme Court confirmed that the “necessary and appropriate force” authorized by the AUMF provided domestic legal authority to detain,<sup>19</sup> with Congress largely codifying the Obama Administration’s definition of the scope of this authority as covering persons who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks” as well as persons who were

part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.<sup>20</sup>

This standard is seen as grounded in “longstanding law-of-war principles”, premised on a right to detain until the relevant hostilities have ended.<sup>21</sup> Whereas the Supreme Court extended the right of *habeas corpus* under the Suspension Clause of the US Constitution to Guantanamo detainees,<sup>22</sup> the extent of such judicial review and the evidential and procedural standards applied by the District of Columbia (DC) Circuit Court make it very difficult for detainees effectively to challenge their detention.<sup>23</sup> In addition, the DC Circuit has upheld the government’s refusal to extend the right of *habeas* review to those detained in Afghanistan (“an active theatre of war”), even if they were captured elsewhere and transferred there.<sup>24</sup>

This post-9/11 detention practice of the US and UK was marked by a desire to limit or exclude counterterrorism and armed conflict detention from ordinary law and ordinary legal processes. The last decade has seen a general winding down of detention operations in practice by these two States in the context of transnational terrorism. However, the next two sections below will demonstrate that the general approach of isolating counterterrorism detention from ordinary legal processes has continued to be pursued by both the UK and US in their

17 Tess Bridgeman, Ryan Goodman, Stephen Pomper and Steve Vladeck, “Principles for a 2021 Authorization for Use of Military Force”, *Just Security*, 5 March 2021, available at: <https://www.justsecurity.org/74273/principles-for-a-2021-authorization-for-use-of-military-force/> (all internet references were accessed in August 2021).

18 Curtis A. Bradley and Jack L. Goldsmith, “Obama’s AUMF Legacy”, *American Journal of International Law*, Vol. 110, No. 4, 2016, p. 628.

19 *Hamdi et al. v. Rumsfeld, Secretary of Defense et al.*, 542 U.S. 507 (2004).

20 National Defense Authorization Act (NDAA) 2012, Public Law 112–81, 125 Stat. 1298, section 1021.

21 *Hamdi*, above note 19, p. 521.

22 *Boumediene v. Rumsfeld*, 553 U.S. 723 (2008).

23 Stephen I. Vladeck, “The D.C. Circuit After *Boumediene*”, *Seton Hall Law Review*, Vol. 41, No. 4, 2011, p. 1451.

24 *Maqaleh v. Gates*, 605 F.3d 84 (2010).

ongoing defence of their practices. The consequence has been the further entrenching of a counterterrorism detention policy that follows closely the kind of detention associated with international armed conflict, excluding normal procedural standards and typical judicial control.<sup>25</sup>

This ongoing practice of the UK and US is not only important as a precedent for those States, should they rely again on detention as a counterterrorism tool in the future, but also as a precedent for other States, which may view these positions of the UK and US as giving legitimacy to their own practices. Indeed, the fourth section of this article will demonstrate that a number of other States do still rely on existing and newly adopted administrative detention regimes as part of their counterterrorism strategy. Together, the next three sections of the article will seek to show that, despite suggestions to the contrary,<sup>26</sup> States still advocate and rely on administrative detention in the context of counterterrorism that mirrors that applicable under IHL in international armed conflicts. Thus, the post-9/11 practice of relying on extraordinary wartime detention powers as an analogy for counterterrorism detention, instead of the criminal justice system, has become normalized. Alongside this continuity in practice, the last section of this article then concludes by suggesting some of the new detention-related issues in the context of counterterrorism that are likely to dominate debates in this area in the coming years.

## Recent US practice on Guantanamo and the Due Process Clause

A series of recent Guantanamo cases going through the DC Circuit Court demonstrates the continued defence by the US of their IHL-inspired model of counterterrorism detention. These cases have been brought by petitioners seeking the application of the Due Process Clause of the Fifth Amendment to the US Constitution in their *habeas corpus* claims. The Supreme Court in *Boumediene* required detainees to be given a “meaningful”<sup>27</sup> review. This led the DC Circuit

25 And this particular practice around detention forms part of and contributes to a broader context of increasingly aggressive counterterrorism strategy: M. Nowak and A. Charbord, above note 5, p. 25 (“... enhanced interrogation, secret detention and extraordinary rendition have given way to bulk surveillance and increased use of armed drones; and the moment that governments start criminalizing preparatory acts of terrorism has moved forward in time, with recent measures that target ‘extremism’ in the absence of any link to violence”).

26 See, e.g., Karen J. Greenberg, “Drones Strikes and the Law: From Bush-Era Detention to Obama-Era Targeted Killing”, in David Cortright, Rachel Fairhurst and Kristen Wall (eds), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications*, University of Chicago Press, Chicago, IL, 2015, pp. 74–75 (viewing the rise of armed drones as, in some respects, replacing detention in the context of US counterterrorism); John R. Crook, “President Obama Outlines Shifts in U.S. Counterterrorism Policy”, *American Journal of International Law*, Vol. 107, No. 3, 2013, pp. 674 and 678 (on the Obama Administration’s plan to bring “law of war detention to an end”, to be replaced with “prosecuting terrorists”).

27 *Boumediene*, above note 22, p. 783 (“[h]abeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive’s power to detain.”).

to develop specific evidential and procedural principles to apply in the Guantanamo *habeas* litigation (though with inconsistencies and frequent disagreements between judges).<sup>28</sup> However, application of the Due Process Clause would bring those processes more in line with those well-established rules applicable, *inter alia*, to pre-trial criminal detention.<sup>29</sup> Importantly, the Due Process Clause is also invoked by a number of the petitioners to support their challenge of the long duration of their detention under the AUMF, which, as indefinite detention for the duration of hostilities, reflects the analogy drawn by the US to the internment regime applicable to prisoners of war under the Third Geneva Convention.<sup>30</sup>

Three recent and ongoing cases raise this constitutional question. In the first, *Qassim v. Trump*, the DC Circuit Court in 2019 overturned the District Court's finding that earlier Circuit Court jurisprudence in *Kiyemba v. Obama*<sup>31</sup> categorically barred the application of the Due Process Clause to Guantanamo detainees, holding instead that the only issue before the Court in *Kiyemba* concerned the substantive question of whether detainees unlawfully held had a substantive right to release in the US.<sup>32</sup> The question over the application of the procedural rights under the Due Process Clause to the *habeas* hearings remained unresolved and was remanded back to the District Court.<sup>33</sup> The particular claim by the petitioner in *Qassim* was that the Due Process Clause required that he and his counsel be given access to the classified material informing the government's decision to detain, including exculpatory evidence.<sup>34</sup>

In the second case, *Al-Hela v. Trump*, a different panel of the DC Circuit held in 2020 that previous Supreme Court and Circuit Court precedent *did* establish that the Due Process Clause, including the procedural rights therein, does not extend "to aliens without property or presence in the sovereign territory of the United States".<sup>35</sup> In taking this categorical approach, the Court rejected the

28 Benjamin Wittes, Robert Chesney and Rabia Benhamin, *The Emerging Law of Detention: the Guantanamo Habeas Cases as Lawmaking*, Brookings Institute, Washington, DC, 2010, available at: <https://www.brookings.edu/wp-content/uploads/2016/06/Chesney-Full-Text-Update32913.pdf>, p. 3.

29 Joshua Alexander Geltzer, "Of Suspension, Due Process and Guantanamo: The Reach of the Fifth Amendment After *Boumediene* and the Relationship between *Habeas Corpus* and Due Process", *Journal of Constitutional Law*, Vol. 14, 2012, p. 719 and pp. 725–734 (citing admissibility of evidence obtained through coercion, standard of proof, right to exclude and present certain evidence, and right of cross-examination of witnesses as potential questions for which the applicability of the Due Process Clause might be dispositive).

30 Jonathan Hafetz, "Upcoming Cases Provide Opportunities to Reassess the Application of the Due Process Clause at Guantanamo", *Just Security*, 3 March 2021, available at: <https://www.justsecurity.org/75106/due-process-at-guantanamo/> ("[m]ost important, application of the Due Process Clause to Guantanamo would provide judges with the opportunity to address the question they have not yet answered and which, after two decades of detention, is plainly the most appropriate and salient one: whether a detainee poses such a grave threat to U.S. security that he must continue to be imprisoned").

31 *Kiyemba v. Obama*, 555 F.3d 1022 (2009).

32 *Qassim v. Trump*, 927 F.3d 522 (2019).

33 *Ibid.*, pp. 528–529.

34 *Ibid.*, p. 530. The Circuit Court wanted the established disclosure procedures to be tested first before asking whether any withholding of evidence engaged constitutional requirements.

35 *Al-Hela v. Trump*, 972 F.3d 120 (2020), p. 148. This judgement has recently been vacated and the petition for rehearing *en banc* granted by the DC Circuit Court: United States Court of Appeals for the District of Columbia Circuit, *Al-Hela v. Biden*, No. 19-5079, Order, 23 April 2021.

petitioner's argument for applying to the Due Process Clause the functional test that was established in *Boumediene* for the purposes of determining the reach of constitutional provisions.<sup>36</sup> The petitioner's particular procedural claims in this case again concerned the withholding of evidence from himself and his counsel, as well as the reliance by the government on hearsay, which he claimed violated both the Suspension Clause and the Due Process Clause. In addition to rejecting the application of the Due Process Clause entirely, the Circuit Court held that the use of hearsay, as well as the withholding of evidence from detainees and their counsel (and the hearing of it by the court *ex parte*), were not, as such, incompatible with the Supreme Court's requirement of a "meaningful" *habeas* review.<sup>37</sup>

Importantly, *Al-Hela's* substantive challenges regarding the basis and duration of his detention were also rejected by the Court. First, in accordance with previous case law, the Court confirmed that the petitioner's detention was authorized by the AUMF on the basis of a "preponderance of the evidence" standard.<sup>38</sup> Second, it rejected the claim that the long duration of his detention (since 2004) and the US's apparently unending war on terror meant that Justice O'Connor's prescient point in *Hamdi* regarding the possibility of an unravelling of the argument that the AUMF authorizes detention for the duration of the hostilities was now being realized.<sup>39</sup> The Circuit Court held that the AUMF imposes no

time limit on the President's authority to detain enemy combatants ... The government maintains that the War on Terror is an ongoing conflict involving combat operations by the United States and its allies abroad. Courts lack the authority or the competence to decide when hostilities have come to an end. "The 'termination' of hostilities is 'a political act.'"<sup>40</sup>

The petitioner had also attempted to challenge his indefinite detention as incompatible with the substantive rights under the Due Process Clause, but this failed as a result of the Court's findings regarding the scope of the Clause.<sup>41</sup>

In the third case, *Ali v. Trump/Biden*, a petition for *certiorari* was refused in May 2021 by the Supreme Court following the DC Circuit Court's denial of the

36 *Al-Hela v Trump, ibid.*, p. 142. *Boumediene* had established "at least" three factors for determining the extra-territorial reach of the Suspension Clause: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ": *Boumediene*, above note 22, p. 766.

37 *Al-Hela*, above note 35, pp. 135–138.

38 *Ibid.*, pp. 130–135.

39 *Hamdi*, above note 19, p. 521 ("[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [that the AUMF authorizes detention for the duration of hostilities based on 'longstanding law-of-war principles'] may unravel").

40 *Al-Hela*, above note 35, p. 135 ("[s]o long as the record establishes the United States military is involved in combat against Al Qaeda, the Taliban, or associated forces, we have no warrant to second guess fundamental war and peace decisions by the political branches").

41 *Ibid.*, p. 140 ("[w]e need not assess whether Al Hela has articulated a cognizable due process right because longstanding precedent forecloses any argument that 'substantive' due process extends to Guantanamo Bay").

petitioner's *habeas* application in 2020.<sup>42</sup> As in *Al-Hela*, the petitioner in *Ali* invoked both the substantive and procedural aspects of the Due Process Clause to challenge his detention. Although the Circuit Court, following *Qassim* and in contrast to *Al-Hela*, considered the District Court's categorical rejection of the application of the Due Process Clause to Guantanamo to be "misplaced"<sup>43</sup> given the Supreme Court's more nuanced references in *Boumediene* to the different elements that might feed into a "meaningful" review,<sup>44</sup> for the same reasons it also did not accept what it saw as the petitioner's "wholesale" application of the Due Process Clause to Guantanamo.<sup>45</sup> Holding that it need not resolve the constitutional question,<sup>46</sup> the Court assessed each of the petitioner's substantive and procedural challenges and took the view that the Due Process Clause, even if it did apply, would be of no help to him.

Of particular interest here is what the Court said about the length of Ali's detention. First, the Court held that substantive due process does not as such prohibit the very lengthy detention that he has faced, particularly in light of the Periodic Review Board's findings that he continues to pose a threat.<sup>47</sup> Second, the Court dismissed Ali's procedural due process claim that his extended detention meant that the government now needed to show by clear and convincing evidence that he continues to pose specific threats.<sup>48</sup> Ali invoked the Supreme Court's *Rasul* case to argue that the government should now be held by a stricter standard in light of the long duration of his detention.<sup>49</sup> The Court held, however, that previous case law had acknowledged the possibility of very lengthy detention under the AUMF without considering that this affected the standard to be applied in review.<sup>50</sup> It went on to note:

42 *Ali v. Biden*, \_\_\_ S Ct \_\_\_ (17 May 2021); *Ali v. Trump*, 959 F.3d 364 (2020).

43 *Ali*, above note 42, p. 368.

44 *Boumediene*, above note 22, p. 783.

45 *Ali*, above note 42, pp. 368–369 (“[i]n sum, *Boumediene* and *Qassim* teach that the determination of what constitutional procedural protections govern the adjudication of habeas corpus petitions from Guantanamo detainees should be analyzed on an issue-by-issue basis, applying *Boumediene*'s functional approach. The type of sweeping and global application asserted by *Ali* fails to account for the unique context and balancing of interests that *Boumediene* requires when reviewing the detention of foreign nationals captured during ongoing hostilities.”).

46 Though see *Ali*, above note 42, Concurring Opinion of Randolph J (arguing that the Court should have confirmed that the Due Process Clause does not extend to Guantanamo, on the basis of his survey of Supreme Court and DC Circuit precedent).

47 *Ali*, above note 42, pp. 369–371. It should be noted that the unclassified summary of the most recent full Periodic Review Board review (totalling 111 words) simply reiterated *Ali*'s prior roles, stating that the detainee had not submitted any evidence to suggest he no longer posed a security threat: Periodic Review Board, *Unclassified Summary of Final Determination for Detainee ISN 685*, 28 February 2019, available at: [https://www.prs.mil/Portals/60/Documents/ISN685/SubsequentReview1/20190228\\_U\\_ISN\\_685\\_FINAL\\_DETERMINATION\\_PUBLIC.pdf](https://www.prs.mil/Portals/60/Documents/ISN685/SubsequentReview1/20190228_U_ISN_685_FINAL_DETERMINATION_PUBLIC.pdf). The government's unclassified submissions in his most recent file review similarly reiterated his prior roles: Periodic Review Board, *Government's Unclassified Summary for Detainee ISN AG-685*, 14 November 2020, available at: [https://www.prs.mil/Portals/60/Documents/ISN685/FileReview8/201214\\_U\\_FOUO\\_ISN685\\_FR8\\_Detainee%20Summary\\_UPR.pdf](https://www.prs.mil/Portals/60/Documents/ISN685/FileReview8/201214_U_FOUO_ISN685_FR8_Detainee%20Summary_UPR.pdf).

48 *Ali*, above note 42, p. 372.

49 *Rasul v. Bush*, 542 U.S. 466, 488 (2004) (“as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker”).

50 *Ali*, above note 42, pp. 372–373.



Indeed, Ali agrees that, if the hostilities covered by the AUMF were a more traditional type of war that continued for this same length of time, there would be no substantive due process objection to continued detention ... Yet, Ali cites no authority suggesting that the form of hostilities that enemy combatants undertake changes the law of war's authorization of their continued detention, especially when, as here, the government has found that the threat Ali poses continues.<sup>51</sup>

Thus, in both *Al-Hela* and *Ali*, the Circuit Court rejected the claims that the long duration and indefinite nature of the petitioners' detention as such rendered it unconstitutional (whether under the Suspension Clause or the Due Process Clause). In *Al-Hela*, the Court focused on domestic constitutional considerations around separation of powers, viewing the termination of hostilities as a "political" act, to be determined unilaterally by the executive. In *Ali*, on the other hand, it is clear from the above quote that the Court considers such lengthy detention to be consistent with international humanitarian law, suggesting that IHL indicates no difference here based on the nature of the conflict. In its recent brief opposing Ali's petition for *certiorari* to the Supreme Court, the Biden Administration reiterates this argument:

Neither precedent nor common sense suggests that the government's detention authority should dissipate simply because hostilities are protracted ... The risk that a combatant will return to the battlefield lasts as long as active hostilities remain ongoing—and petitioner has not disputed that they remain ongoing here ... An individualized determination of dangerousness has never been a prerequisite to the detention of enemy combatants.<sup>52</sup>

Yet the position under IHL does, in fact, differ in this regard depending on the nature of the conflict. Whilst it is true that in international armed conflicts there is a presumption of internment of combatants for the duration of hostilities,<sup>53</sup> there is no such presumption applicable in non-international armed conflicts.<sup>54</sup> And this is for good reasons. As I have shown elsewhere, the principles that inform this presumption *vis-à-vis* members of State armed forces in international armed conflicts do not apply to non-State armed groups, such that analogies to the internment regime for combatants/prisoners of war are inappropriate.<sup>55</sup> Indeed, given that the precise contours of armed groups and their membership are often undefined,<sup>56</sup> with States relying on functional criteria for determining whether

51 *Ibid.*, p. 373.

52 *Ali v. Biden*, Supreme Court of the United States, No. 20-888, Brief for the Respondents in Opposition, April 2021, pp. 21–22. Similarly, see *Awad v. Obama*, 608 F.3d 1 (2010), p. 11.

53 Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Arts 21 and 118.

54 L. Hill-Cawthorne, above note 7, pp. 95–98 (demonstrating that the prohibition of arbitrary deprivation of liberty that is based in Article 3 common to the four Geneva Conventions necessarily requires release where the (individualized) security reasons justifying internment cease to exist).

55 *Ibid.*, pp. 230–234.

56 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross (ICRC), Geneva, 2009, p. 33.

someone is a member of an armed group,<sup>57</sup> presuming that detention of those with this “status” is necessary for the duration of hostilities is insufficiently nuanced.<sup>58</sup> Just as membership of an armed group will often be based on functional, as opposed to formal, criteria, so leaving that armed group also will be.<sup>59</sup> In the context of the US’s ongoing war on terror, the need to assess the necessity of continued detention on the basis of an individualized threat determination, as opposed to presuming necessity on the basis of “status” for the duration of hostilities, is all the more pressing given the extremely vague contours of the relevant conflict and the parties thereto, a point long recognized.<sup>60</sup> It is this limitation that continues to be the core problem with *habeas* reviews of Guantanamo detainees, as it conditions the court’s power to order release on the executive’s determination of whether the conflict has ended. The Periodic Review Board process, though it does in theory assess whether detention continues to be necessary for security, results in only a recommendation to the Secretary of Defense,<sup>61</sup> with Congress in recent years heavily limiting the ability to transfer detainees out of Guantanamo.<sup>62</sup>

These recent cases suggest that, notwithstanding the passage of nearly twenty years since the opening of the detention facility at Guantanamo Bay to house detainees captured in the US’s war on terror, there remain fundamental continuities in the legal approach taken by the courts and by the government regarding detainees. First, the infamous and heavily criticized notion of a “war on terror” continues to inform the legal framework governing Guantanamo detainees and was invoked explicitly by the DC Circuit in *Al-Hela*.<sup>63</sup> Second, the presumption of indefinite administrative detention for the duration of hostilities remains the core part of the US’s detention policy, even as the idea of ongoing hostilities against a defined enemy has long dissipated. Third, attempts to bring the *habeas* proceedings closer in evidentiary and procedural standards to more ordinary judicial proceedings through extension of the Due Process Clause continue to be rebuffed. Indeed, the Biden Administration’s brief on this point in *Ali* opposing the petition for *certiorari* to the Supreme Court takes an almost identical position to the Trump Administration in earlier iterations of the case.<sup>64</sup>

57 In the context of detentions under the AUMF, see *Gherebi v. Obama*, 609 F. Supp. 2d 43 (2009), pp. 68–70. In the context of targeting, see the ICRC’s functional approach in N. Melzer, *ibid.*, pp. 32–34.

58 For a good outline of some of the issues with both individualized and status-based approaches to detention in conflicts with non-State groups, see John B. Bellinger III and Vijay M. Padmanabhan, “Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law”, *American Journal of International Law*, Vol. 105, No. 2, 2011, p. 201 and pp. 220–221.

59 See, e.g., *Basardh v. Obama*, 612 F. Supp. 2d 30 (2009).

60 J. B. Bellinger and V. M. Padmanabhan, above note 58, pp. 228–233.

61 NDAA 2012, above note 20, section 1023(b). See some points of criticism of the Periodic Review Board process in Dru Brenner-Beck, “Eighteen Years of Detention at Guantánamo Bay: Compliance with International Law or the Specter of Tyranny”, *American University International Law Review*, Vol. 35, No. 4, 2020, p. 671 and pp. 724–726.

62 Benjamin R. Farley, “A Path for Renewing Guantanamo Closure”, *Just Security*, 17 November 2020, available at: <https://www.justsecurity.org/73311/a-path-for-renewing-guantanamo-closure/>.

63 *Al-Hela*, above note 35, p. 135.

64 *Ali v. Biden*, Brief for the Respondents in Opposition, above note 52; also see *Ali v. Trump*, Court of Appeals for the District of Columbia Circuit, No. 18-5297, Brief for Respondents, July 2019. The

This is not to suggest that there has been no progress. On the contrary, the Supreme Court ensured at least some process for Guantanamo detainees in the first decade, and the vast majority of detainees have now been transferred out of Guantanamo.<sup>65</sup> In addition, there has been some push to bring those captured in more recent years as part of the US's war on terror before ordinary criminal courts.<sup>66</sup> Yet the continued refusal to bring Guantanamo detainees within a more ordinary legal framework, and the continued use of inappropriate analogies to the IHL internment regime applicable to combatants in international armed conflicts, shows the extent to which this precedent is now firmly entrenched in US counterterrorism policy. In addition, whilst the US's own counterterrorism detention practices have wound down, this precedent risks serving a legitimizing function for similar practices that continue in other States, as will be seen later in the article.

## Recent UK practice in litigation concerning overseas detention operations

In UK practice too we can see core continuities with the past in the approach taken in recent cases, again creating certain worrying precedents for other States. Whereas much of the litigation in the US has concerned *habeas* petitions by Guantanamo detainees, the litigation in the UK has largely come from detainees held in Iraq and Afghanistan in the form of public law (principally Human Rights Act) and private law actions. The purpose of this section is not to review these cases, which have received significant coverage elsewhere. Instead, two points will be made. First, the UK government, like the US government in its "war on terror", has continued to argue that its detentions in the context of Iraq and Afghanistan are to be judged not against any ordinary law regime but against international humanitarian law. Second, the jurisprudence of the UK Supreme Court in this area has created a real risk that the internment regimes applicable in international armed conflicts could be applied in situations outside armed conflict (international or non-international), which stricter human rights standards should regulate.

On the first point, the UK government has sought to exclude both its domestic law on *habeas corpus* and its obligations under the ECHR from detainees held in Afghanistan and Iraq. With respect to *habeas corpus*, the UK government, like the US government, has argued that UK courts do not have

Trump Administration's filings before the Circuit Court argued that, should the Court feel it necessary to rule on the constitutional question, it should find against the petitioner: *ibid.*, pp. 29–39.

65 As of November 2020, forty people remain detained at Guantanamo: B. R. Farley, above note 62.

66 See, e.g., Luke Hartig, "Prosecuting the ISIS 'Beatles': A Testament to Dedicated US Government Professionalism", *Just Security*, 9 October 2020, available at: <https://www.justsecurity.org/72764/prosecuting-the-isis-beatles-a-testament-to-dedicated-us-government-professionalism/>; Bruce K. Miller, "No Virtue in Passivity: The Supreme Court and Ali Al-Marri", *Western New England Law Review*, Vol. 33, 2011, p. 697 (on the Obama Administration's desire to prosecute both the so-called Christmas Day 2009 bomber and Khalid Sheikh Mohammad before civilian courts).

jurisdiction to hear *habeas* petitions from military detainees in Iraq and Afghanistan.<sup>67</sup> Unlike the US courts, however, which have rejected *habeas* petitions from those held in conflict zones,<sup>68</sup> the UK Supreme Court has held that there is nothing preventing the extension of *habeas corpus* to detainees overseas that are within the control of the UK.<sup>69</sup> The UK Supreme Court approaches this question differently to the US Supreme Court, asking not whether there is sufficient territorial control by the State to justify the extension of the writ, but rather whether the individual is within the (actual or potential) control of the State.<sup>70</sup> This is important for those detained abroad by the UK in any situation, whether or not there is an armed conflict.

With respect to the ECHR, as is well known, the UK in *Hassan v. UK* successfully argued for the first time before the ECtHR that Article 5 of the ECHR was modified in an international armed conflict by IHL.<sup>71</sup> The UK then sought to extend this argument to non-international armed conflicts in its domestic litigation in relation to detention operations in Afghanistan.<sup>72</sup> This was rejected by the High Court and Court of Appeal.<sup>73</sup> A majority of the UK Supreme Court agreed with the government that the grounds and procedures (taken from the Fourth Geneva Convention) acceptable to the Strasbourg Court in *Hassan* for the purposes of complying with Article 5 of the ECHR in international armed conflicts would also be acceptable in the case of the non-international armed conflict in Afghanistan. However, they did so, not on the basis of IHL, but rather relevant Security Council resolutions, which they viewed as providing a sufficient legal basis for detention.<sup>74</sup>

The UK Ministry of Defence has subsequently amended its detention policy in light of Lord Sumption's judgement in *Al-Waheed/Mohammed*, in which he held on the facts that the detention review procedures in Afghanistan did not comply with Article 5(4) of the ECHR even after reading down what that provision required.<sup>75</sup> Thus, in 2020 the Ministry of Defence's detention policy was revised so as to create a new Detention Review Authority, which is separate from and outside the chain of command of the authority ordering detention and which has the power to order release following initial and periodic (six-monthly) reviews.<sup>76</sup> Though certainly helping to address some of the concerns with the previous

67 *Al-Waheed*, above note 15, para. 100 (Lord Sumption).

68 *Maqaleh*, above note 24.

69 *Al-Waheed*, above note 15, paras 99–103 (Lord Sumption); *Rahmatullah*, above note 11.

70 Tatyana Eatwell, "Selling the Pass: Habeas Corpus, Diplomatic Relations and the Protection of Liberty and Security of Persons Detained Abroad", *International & Comparative Law Quarterly*, Vol. 62, No. 3, 2013, p. 727 and pp. 737–738.

71 *Hassan*, above note 15.

72 *Al-Waheed*, above note 15, para. 241 (Lord Reed).

73 *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB); *Serdar Mohammed et al. v. Secretary of State for Defence* [2015] EWCA Civ 843.

74 *Al-Waheed*, above note 15, para. 30 (Lord Sumption).

75 *Ibid.*, paras 104–109 (Lord Sumption) (holding that the procedures applied by the UK failed to meet the requirements of impartiality and fair procedure set out by the ECtHR in *Hassan*).

76 Ministry of Defence, *Joint Doctrine Publication 1–10: Captured Persons*, 4th ed., Development, Concept, and Doctrines Centre, 2020, paras 1B.9–1B.40.

process, the new policy states that the Detention Review Authority may consist of a single person, which is not compatible with IHL.<sup>77</sup>

The revised policy applies to all those detained by the UK on preventive, security grounds (other than prisoners of war) in any armed conflict, whether international or non-international. However, the reasoning of Lord Sumption in *Al-Waheed* appears not to be limited to armed conflicts. Instead, in order to overcome the very different context of the *Hassan* and *Al-Waheed* cases (namely, that in the former the Court was able to draw on the rules under the Fourth Geneva Convention on civilian internment in international armed conflicts, which was not possible in the latter given the dearth of rules for non-international armed conflicts), Lord Sumption appeared to read the *Hassan* judgement as setting out a general minimum content for Article 5 of the ECHR, for which derogation is not necessary:

It is in my opinion clear that [the Grand Chamber] regarded the duty of review imposed by articles 43 and 78 of the Fourth Convention as representing a model minimum standard of review required to prevent the detention from being treated as arbitrary. They were adopting that standard not just for cases to which those articles directly applied, but generally.<sup>78</sup>

This is a long way from the Grand Chamber's clear statement that:

[i]t can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.<sup>79</sup>

Lord Sumption's approach creates a real risk that the limited procedural protections for civilian internees under the Fourth Geneva Convention will be viewed as the generally applicable standards that are sufficient to meet Article 5(4) of the ECHR in any circumstance, including outside armed conflict. The analogy to the approach of the US government and federal courts in interpreting the US's detention authority under the AUMF by reference to what is permitted under the law of international armed conflict is clear. I have argued elsewhere that the philosophy of IHL, with its presumption of necessity, should make us very cautious about any attempt to extend it (whether in respect of non-international armed conflicts or situations outside armed conflicts altogether) in a way that might be seen as automatically modifying international human rights law.<sup>80</sup> The preference should instead be to require States to derogate from the latter and thereby demonstrate an actual necessity to depart from ordinarily applicable legal standards. Once again, this risks creating a precedent that may influence other States in extending the

77 On the need for a review body to consist of more than one person in the context of civilian internment review under the Fourth Geneva Convention, see L. Hill-Cawthorne, above note 7, p. 53.

78 *Al-Waheed*, above note 15, para. 66 (Lord Sumption).

79 *Hassan*, above note 15, para. 104.

80 Lawrence Hill-Cawthorne, "The Role of Necessity in International Humanitarian and Human Rights Law", *Israel Law Review*, Vol. 47, No. 2, 2014, p. 225.

detention regimes under IHL to, *inter alia*, counterterrorism detention outside armed conflict. It is to those other States, which continue to use administrative detention for counterterrorism purposes, that we now turn in the next section.

## Recent examples of administrative detention laws

Whereas the US and UK have wound down their post-9/11 detention operations in recent years, administrative detention remains a key part of many other States' counterterrorism tools. In particular, in the context of counterterrorism, we have recently seen a number of States adopt new domestic laws permitting administrative detention, other States applying or expanding existing domestic laws permitting administrative detention, and others relying on extended forms of pre-trial detention in terrorism cases that in practice are sometimes indistinguishable from administrative detention. This section briefly explores examples of each in order to demonstrate the continuing reliance of many States on administrative detention regimes in counterterrorism. Together with the previous sections, which showed the continued defence of administrative detention for counterterrorism purposes by the US and UK, these examples confirm that such forms of detention remain a prominent part of counterterrorism policy around the world.

As an example of a State recently adopting a new domestic statute permitting administrative detention, we can look to Malaysia, which has a long history of domestic preventive detention laws.<sup>81</sup> In particular, its controversial Internal Security Act 1960 (ISA) provided for indefinite administrative detention and remained in force until its repeal in 2012. However, shortly after the repeal of the ISA, Malaysia adopted its new Prevention of Terrorism Act in 2015 (POTA),<sup>82</sup> which reintroduced the power of (effectively indefinite) administrative detention outside the criminal justice system,<sup>83</sup> and which in some respects is more draconian than that under the ISA.<sup>84</sup> Under the POTA, introduced in response to the threat posed by Islamic State and returning Malaysian fighters, a person suspected of engaging in or supporting terrorist acts involving listed terrorist organizations abroad can be detained for up to sixty days initially.<sup>85</sup> An Inquiry Officer (appointed by the Minister) then advises a Prevention of Terrorism Board (POTB), which comprises members with legal experience

81 M. Ehteshamul Bari and Safia Naz, *The Use of Preventive Detention Laws in Malaysia: A Case for Reform*, Springer, Singapore, 2020.

82 Prevention of Terrorism Act – Act 769 (2015) (POTA).

83 Malaysia also has various criminal law powers that are frequently used to detain persons before charge who are suspected of terrorism. For example, under the Security Offences (Special Measures) Act – Act 747 (2012) (SOSMA), those suspected of specific “security offences” can be detained before charge for an extended twenty-eight-day period (as opposed to the usual fourteen days): SOSMA, *ibid.*, section 4.

84 Safia Naz and M. Ehteshamul Bari, “The Enactment of the Prevention of Terrorism Act, 2015 in Pursuance of the Constitution of Malaysia: Reincarnation of the Notorious Internal Security Act, 1960?”, *Suffolk Transnational Law Review*, Vol. 41, No. 1, 2018, p. 1.

85 POTA, above note 82, section 4.

appointed by the King.<sup>86</sup> The POTB may make a detention order of up to two years where it is satisfied that the individual “has been or is engaged in the commission or support of terrorist acts involving listed terrorist organizations in a foreign country or any part of a foreign country” and where “it is satisfied that it is necessary in the interest of the security of Malaysia”.<sup>87</sup> Detention orders can then be extended by the POTB for further periods of up to two years at a time with no limit on the number of renewals.<sup>88</sup> There are no stipulated procedures or due process standards governing the POTB’s decision-making and no right of access to a lawyer. The detainee can make representations to an Advisory Board, provided for under the Malaysian Constitution, but members are again appointed by the King and its recommendations are not binding.<sup>89</sup> The 2015 Act also contains an ouster clause excluding the jurisdiction of any court to review on the decisions of the POTB.<sup>90</sup>

The POTA, as well as other domestic laws providing for extended detention in terrorism cases, continue to be relied upon by the government, and in August 2020 it was reported that 1032 individuals were detained without trial in Malaysia under national security laws.<sup>91</sup> Human rights non-governmental organizations have been highly critical of Malaysia’s counterterrorism statutes, given the stark departure from ordinarily-applicable human rights standards on the right to liberty and judicial review of detention.<sup>92</sup> The POTA reflects an administrative detention regime in the strictest of senses, permitting indefinite detention on the basis of security threat, outside the criminal justice system, ordered and fully overseen by the executive with no recourse to substantive judicial review. It is very similar to the internment regime provided under the Fourth Geneva Convention for international armed conflicts, though the lack of independent review capable of ordering release means it would not comply even with that regime were it applicable.<sup>93</sup>

Sri Lanka is an example of a State that continues to rely upon (and has extended) long-established domestic administrative detentions laws as part of its ongoing counterterrorism strategy. The Prevention of Terrorism Act of 1979 (PTA), adopted in the context of the government’s conflict with separatist insurgencies including the Liberation Tigers of Tamil Eelam (LTTE), provides a

86 *Ibid.*, section 8.

87 *Ibid.*, section 13(1)(b).

88 *Ibid.*, section 17.

89 *Ibid.*, section 13(9). On the inadequacies of the Advisory Board, see S. Naz and M. E. Bari, above note 84, pp. 13–14.

90 *Ibid.*, section 19.

91 U.S. Department of State, *2020 Country Reports on Human Rights Practices: Malaysia*, 30 March 2021, available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/malaysia/>, section 1.D.

92 Human Rights Watch (HRW), *Malaysia: Repeal Abusive Security Law: SOSMA Denies Right to Fair Trial*, 31 October 2019, available at: <https://www.hrw.org/news/2019/10/31/malaysia-repeal-abusive-security-law>; Amnesty International, *Malaysia: New Anti-Terrorism Law a Shocking Onslaught Against Human Rights*, 7 April 2015, available at: <https://www.amnesty.org/en/latest/news/2015/04/malaysia-new-anti-terrorism-law-a-shocking-onslaught-against-human-rights/>.

93 L. Hill-Cawthorne, above note 7, pp. 54–55.

very similar administrative detention regime to that under the POTA in Malaysia. Under the PTA, detention is permitted for up to eighteen months, “[w]here the Minister has reason to believe or suspect that [the individual] is connected with or concerned in any unlawful activity”, with administrative, as opposed to judicial, review.<sup>94</sup> Notwithstanding the end of the conflict with the LTTE in 2009, successive governments have continued to detain persons under the PTA. For example, “[a]ccording to police, authorities arrested 2,299 individuals, primarily under the PTA, in the aftermath of the April 2019 Easter Sunday attacks. As of December [2020], 135 suspects remained in custody, but no charges were filed against them.”<sup>95</sup>

The same administrative detention regime applicable during Sri Lanka’s long civil war thus continues to be applied as part of its post-conflict counterterrorism policy. Moreover, notwithstanding assurances from the government, including to the European Union and United Nations (UN) Human Rights Committee, that it would repeal the PTA,<sup>96</sup> in March and April 2021, respectively, the Sri Lankan government adopted two sets of Regulations under the PTA expanding extraordinary powers of detention.<sup>97</sup> Whilst the second regulation proscribes eleven Islamist organizations, with extended criminal penalties for individuals associated with them,<sup>98</sup> under the first, any person “who causes or intends to cause commission of acts of violence or religious, racial or communal disharmony” may be referred by a Magistrate to a “rehabilitation programme” in a “reintegration centre” for up to two years, with the power of release resting with the Minister of Defence.<sup>99</sup> The International Commission of Jurists has criticized these regulations as likely being used to (further) target minority religious and ethnic communities with administrative detention.<sup>100</sup> In June 2021, the European Parliament adopted a resolution condemning Sri Lanka’s continued reliance on the PTA and its adoption of these new regulations

94 Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, section 9; L. Hill-Cawthorne, above note 7, pp. 167–168.

95 U.S. Department of State, *2020 Country Reports on Human Rights Practices: Sri Lanka*, 30 March 2021, available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/sri-lanka/>, section I.D.

96 UN Human Rights Committee, Sixth Periodic Report Submitted by Sri Lanka under Article 40 of the Covenant, due in 2017, CCPR/C/LKA/6, 25 April 2019, paras 49–52.

97 Prevention of Terrorism (Deradicalization from Holding Violent Extremist Religious Ideology) Regulation No. 01 of 2021; Prevention of Terrorism (Proscription of Extremist Organizations) Regulation No. 02 of 2021.

98 The offences listed under the regulations have been criticized as “ill-defined” and open to abuse: International Commission of Jurists, *Sri Lanka: New Anti-Terror Regulations Aimed at Organizations Further Undermine the Rule of Law*, 15 April 2021, available at: <https://www.icj.org/sri-lanka-new-anti-terror-regulations-aimed-at-organizations-further-undermine-the-rule-of-law/>.

99 Regulations No. 01 of 2021, *ibid.*, sections 2, 3 and 4.

100 International Commission of Jurists, *Sri Lanka: “De-Radicalization” Regulations Should be Immediately Withdrawn*, 18 March 2021, available at: <https://www.icj.org/sri-lank-de-radicalization-regulations-should-be-immediately-withdrawn/>; HRW, *Sri Lanka: “Religious Disharmony” Order Threatens Minorities*, 16 March 2021, available at: <https://www.hrw.org/news/2021/03/16/sri-lanka-religious-disharmony-order-threatens-minorities>.



as incompatible with the right to liberty and the due process guarantees in Article 9 of the International Covenant on Civil and Political Rights (ICCPR).<sup>101</sup>

Israel also continues to rely on established administrative detention laws as part of its counterterrorism strategy. Separate, though similar, laws exist for Israel and the Occupied Palestinian Territories (OPT). In respect of the OPT, a military order grants commanders the power to order detention initially for up to six months (renewable indefinitely) where they reasonably believe such detention to be necessary “for reasons to do with regional security or public security”.<sup>102</sup> In respect of Israel, the Emergency Powers (Detention) Law of 1979 similarly permits the Minister of Defence to order detention for up to six months (again renewable indefinitely) where they reasonably believe such detention to be necessary for “reasons of state security or public security”.<sup>103</sup> Under the 2002 Incarceration of Unlawful Combatants Law, which has been used as the basis for administratively detaining residents of Gaza, the Chief of the General Staff of the Israel Defence Forces may order the detention of a person where they reasonably believe them to be an “unlawful combatant” whose detention is necessary for State security.<sup>104</sup> The law creates a rebuttable presumption that a person who is a member of or participated in acts of a group engaging in hostile acts against Israel is someone whose release would harm State security so long as hostilities with that group are ongoing.<sup>105</sup> Moreover, the Minister of Defence is given the power to identify groups engaging in “hostile acts” against Israel for these purposes.<sup>106</sup> There is a clear analogy here to the shortcomings in the Guantanamo *habeas* reviews, discussed above, which treat as dispositive the government’s position that hostilities are ongoing in its “war on terror”. Unlike in the case of Malaysia and Sri Lanka, under each of these administrative detention regimes, though with some differences, initial and periodic review is by a court as opposed to administrative body.<sup>107</sup> Nevertheless, these judicial reviews have been criticized as showing deference to the military and applying draconian procedures.<sup>108</sup>

101 European Parliament Resolution of 10 June 2021 on the situation in Sri Lanka, in particular the arrests under the Prevention of Terrorism Act, 2021/2748(RSP). Sri Lanka informed the Human Rights Council in 2015 that all of its previous derogations from the ICCPR had ceased: Sri Lanka, Notification of 19 November 2015, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en).

102 Order Regarding Security Provisions (No. 1651), 5770-2009, section 285(A).

103 Emergency Powers (Detention) Law (EPDL), 5739-1979, section 2(A).

104 Incarceration of Unlawful Combatants Law, 5762-2002, section 3(A). Section 2 defines an “unlawful combatant” as: “a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him”.

105 *Ibid.*, section 7.

106 *Ibid.*, section 8.

107 See Order, above note 102, section 287; EPDL, above note 103, section 4; 2002 Law, above note 104, section 5.

108 B’Tselem, *Administrative Detention*, 11 November 2017, available at: [https://www.btselem.org/administrative\\_detention](https://www.btselem.org/administrative_detention); Shiri Krebs, “Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court”, *Vanderbilt Journal of Transnational Law*, Vol. 45, No. 3, 2012, p. 639; HRW, *Gaza: “Unlawful Combatants Law” Violates Rights*, 1 March 2017, available at: <https://www.hrw.org/news/2017/03/01/gaza-unlawful-combatants-law-violates-rights>.

Israel continues to rely on these various administrative detention laws as a tool in counterterrorism,<sup>109</sup> and its “serial derogation” from Article 9 of the ICCPR (introduced on ratification in 1991) remains in effect.<sup>110</sup> Administrative detention by Palestinian authorities on the basis of vague laws also continues to be emphasized as cause for concern by monitoring bodies.<sup>111</sup> Furthermore, in addition to its existing administrative detention laws, Israel recently consolidated and expanded its counterterrorism legislation in a 2016 statute that, *inter alia*, creates harsher sentences for those convicted of terrorism-related offences and normalizes the powers of the government previously exercised under long-standing emergency legislation to designate groups as terrorist organizations.<sup>112</sup>

France historically has adopted a very different approach to counterterrorism detention than Israel and the other States discussed above, relying principally on ordinary criminal law.<sup>113</sup> However, over the last decade especially, it has adopted a number of specialized laws that enhance counterterrorism powers and, to an extent, represent a shift towards preventive, administrative measures (albeit stopping short of administrative detention).<sup>114</sup> In response to the 2015 Paris attacks, the government declared a state of emergency that lasted for two years, during which it formally derogated from the ICCPR and ECHR, including Articles 9 and 5, respectively.<sup>115</sup> Following the 2016 Bastille Day attack in Nice, France adopted a broad new counterterrorism law that, *inter alia*, expanded police powers and extended the right of house arrest from one month to three; a proposal to introduce preventive detention of terrorism suspects without judicial oversight was, however, rejected.<sup>116</sup> This law, and a second adopted in 2017, made permanent a number of the emergency powers, including

109 According to B’Tselem, a total of 376 Palestinians were held by the Israeli Prison Service in administrative detention in September 2020: B’Tselem, *Statistics on Administrative Detention*, 28 April 2021, available at: [https://www.btselem.org/administrative\\_detention/statistics](https://www.btselem.org/administrative_detention/statistics).

110 See derogation of Israel, 3 October 1991, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en). On “serial derogations”, see Laurence R. Helfer, “Rethinking Derogation from Human Rights Treaties”, *American Journal of International Law*, Vol. 115, No. 1, 2021, p. 20.

111 UN Human Rights Council, Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem: Report of the High Commissioner for Human Rights, 21 February 2018, UN Doc. A/HRC/37/42, p. 7.

112 The Counter-Terrorism Law, 5776-2016; Elena Chachko, “Israel’s New Counterterrorism Law”, *Lawfare*, 13 July 2016, available at: <https://www.lawfareblog.com/israels-new-counterterrorism-law>.

113 Nadav Morag, “International Counterterrorism Laws and Practices: Israel and France in Comparison”, *International Criminal Justice Review*, Vol. 28, No. 2, 2018, p. 162.

114 UN Human Rights Council, Visit to France: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/40/52/Add.4, 8 May 2019, paras 19–22.

115 See French derogation dated 23 November 2015, withdrawn 20 July 2018, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en); see French derogation dated 24 November 2015, withdrawn on 6 November 2017, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations>.

116 HRW, *France: Prolonged Emergency State Threatens Rights*, 22 July 2016, available at: <https://www.hrw.org/news/2016/07/22/france-prolonged-emergency-state-threatens-rights>.

enhanced police powers and powers of assigned residence, introduced following the 2015 Paris attacks.<sup>117</sup>

Moreover, the long-standing concept of *détention provisoire* continues to be relied upon, whereby persons under investigation for serious crimes, including terrorism-related offences, can be detained initially for up to one year (with the possibility of extension up to a total of four years for the most serious crimes), on the order of a *juge des libertés et de la détention*.<sup>118</sup> This system of pre-trial detention has been criticized on many grounds.<sup>119</sup> It has been observed that the 2015 Paris attacks contributed to an increased reliance on lengthier pre-trial detention, including for suspected foreign terrorist fighters, for whom detention pending investigation is now the norm.<sup>120</sup> It is important to note in this context that France has one of the highest populations of pre-trial detainees in Europe,<sup>121</sup> as well as one of the highest populations of detainees held for terrorism-related offences.<sup>122</sup> Criticisms against other States have also been made for the use of lengthy pre-trial detention in terrorism- and security-related cases.<sup>123</sup>

The above examples of Malaysia, Sri Lanka and Israel demonstrate the continued reliance on administrative detention regimes in the context of counterterrorism. Like the post-9/11 detention practices of the UK and US, which were shown in earlier sections to still be defended by those States, these regimes

- 117 Mirja Gutheil *et al.*, “EU and Member States’ Policies and Laws on Persons Suspected of Terrorism-Related Crimes”, Study for European Parliament, Directorate General for Internal Policies (Policy Department C: Citizens’ Rights and Constitutional Affairs), PE 596.832, December 2017, pp. 78 and 81. The UN Special Rapporteur on the promotion and protection of fundamental rights while countering terrorism stated that the 2017 law, “situated within the broad array of counter-terrorism powers already available to the state, constitutes a de facto state of qualified emergency in ordinary French law”: Human Rights Council, above note 114, para. 23.
- 118 D. Webber, above note 3, pp. 163–164.
- 119 Particular cases of *détention provisoire* have been criticized as incompatible with the ECHR: *Tomasi v. France*, Appl. No. 12850/87, 27 August 1992. See also Sharon Weill, “French Foreign Fighters: The Engagement of Administrative and Criminal Justice in France”, *International Review of the Red Cross*, Vol. 100, 2018, pp. 211 and 229 (“[i]n practice, the decision on pre-trial detention is taken by the liberty and detention judge, in the nearby office of the investigative judge, behind closed doors, with the presence of defence lawyers. No public access to these procedures or to the decisions is available. In practice it is very rare for the detention and liberty judge not to follow the request of the investigative judge.”).
- 120 Sharon Weill, *Terror in Courts, French Counter-Terrorism: Administrative and Penal Avenues*, Report for the Official Visit of the UN Special Rapporteur on Counter-Terrorism and Human Rights, May 2018, p. 30.
- 121 Marcelo F. Aebi and Mélanie M. Tiago, *SPACE I - 2020 – Council of Europe Annual Penal Statistics: Prison Populations*, Council of Europe, Strasbourg, 2021, p. 49.
- 122 Rajan Basra and Peter R. Neumann, *Prisons and Terrorism: Extremist Offender Management in 10 European Countries*, International Centre for the Study of Radicalisation, Department of War Studies, King’s College London, London, 2020, p. 7.
- 123 See, e.g., U.S. Department of State, *2020 Country Reports on Human Rights Practices: India*, 30 March 2021, available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/india/>, section 1.D (on India’s Unlawful Activities Prevention Act 1967, which permits pre-charge detention for up to 180 days); *Alpay v. Turkey*, Application No. 16538/17, Judgment, 20 March 2018, paras 96 and 97 (noting criticism of Turkey’s reliance on lengthy pre-trial detention during its state of emergency following the 2016 coup attempt by the Council of Europe Commissioner for Human Rights and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression).

are very similar to the extraordinary internment regimes applicable in international armed conflicts under IHL. Importantly, the adoption and use of these administrative detention powers are in a context where States are expanding their counterterrorism powers more generally, including through their criminal law, as demonstrated by the recent legislation in Sri Lanka, Israel and France. It has been remarked that there has also been a recent trend of extended derogations from the ECHR in the context of emergency measures that include intrusions into liberty (in the form of both lengthy pre-charge detention and house arrest) and reduced judicial oversight.<sup>124</sup>

## Going forward

The previous sections have shown that administrative detention remains a key part of many States' counterterrorism policies, and that even the UK and US, which have wound down their post-9/11 detention practices, continue to defend administrative detention regimes that sit outside the ordinary legal framework. This aspect of the contemporary practice reflects a fundamental continuity over the past two decades in counterterrorism policy. However, there are other aspects of contemporary detention-related practices in the context of counterterrorism that, though not novel, raise new challenges. It is here that much of the debate will no doubt be located over the next few years. It is on two such examples of recent practices that this section focuses. First, the growing phenomenon of other administrative, liberty-restricting measures will be explored, in particular house arrest or "assigned residence". Second, the legal controversies posed by detentions by non-State armed groups supported by States will be considered.

### Assigned residence

The use of administrative measures short of detention that make an impact on the right to liberty and freedom of movement has become especially prominent in light of the recent phenomenon of foreign terrorist fighters.<sup>125</sup> Thus, a recent feature of counterterrorism laws across Europe is the inclusion of administrative measures, often termed "control orders", that restrict a person's movement to different degrees, measures that have long been in use in the UK.<sup>126</sup> This trend has been

124 Triestino Mariniello, "Prolonged Emergency and Derogation of Human Rights: Why the European Court should Raise its Immunity System", *German Law Journal*, Vol. 20, No. 1, 2019, p. 46 (using the examples of France's derogation following the 2015 Paris attack, Ukraine's derogation in 2015 in response to Russian intervention in the East, and Turkey's derogation following the attempted 2016 coup).

125 Domestic approaches to the phenomenon of foreign terrorist fighters have been impacted by UN Security Council Resolution 2178 (2014): see Sandra Krähenmann, "Foreign Fighters, Terrorism and Counter-Terrorism", in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, Cheltenham, 2020, pp. 239–255.

126 See generally Bérénice Boutin, "Administrative Measures in Counter-Terrorism and the Protection of Human Rights", *Security and Human Rights*, Vol. 27, Nos 1–2, 2016, p. 128.

noted with concern given the tendency for such measures to apply at increasingly pre-emptive points in time and to fall outside ordinary criminal justice processes and safeguards.<sup>127</sup>

Of particular interest here is the use of assigned residence as an administrative measure in the context of counterterrorism, given the very fine line between this measure and detention in the strict sense. Indeed, assigned residence, like administrative detention, is provided for under IHL in international armed conflicts for civilians that pose a security threat, and it is viewed and regulated by IHL as equivalent to internment.<sup>128</sup> It is therefore especially noteworthy that, alongside the continuing reliance on administrative detention by certain States, assigned residence is also growing in prominence in counterterrorism practices. In September 2020, for example, Switzerland adopted its new Federal Law on Police Measures to Combat Terrorism,<sup>129</sup> which was approved by a national referendum in June 2021.<sup>130</sup> Amongst the new administrative measures provided for under the law is assigned residence where an existing control order (e.g. one imposing a curfew or banning contact with specific individuals) is breached and where “there are concrete and current indications” that the person poses “a considerable threat to the life or bodily integrity of third parties” which cannot be prevented by other means.<sup>131</sup> Assigned residence can be ordered initially for three months and can be renewed for two further periods of three months each.<sup>132</sup> Whilst this should normally be in the home of the individual concerned, exceptionally they can be assigned to a different location or institution.<sup>133</sup> Authorization for initial assigned residence orders and their renewal is by a court (the Tribunal cantonal des mesures de contrainte in Bern).<sup>134</sup>

The law makes it possible to obtain certain exemptions from assigned residence, and it permits limiting of contact with the outside world only to the extent necessary.<sup>135</sup> However, it is possible for “assigned residence” under the new law to look identical to administrative detention in a detention facility.

127 Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe*, EUR 01/5342/2017, 2017, p. 48. Note, however, the importance also of not unreflectively relying on the criminal law in such cases, as this has led to States adopting new and expansive criminal laws to try to get around some of the evidential problems faced in prosecuting these kinds of cases: Jonathan Horowitz, “The Challenge of Foreign Assistance for Anti-ISIS Detention Operations”, *Just Security*, 23 July 2018, available at: <https://www.justsecurity.org/59644/challenge-foreign-assistance-anti-isis-detention-operations/>.

128 See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Arts 42, 43 and 78.

129 *Loi fédérale sur les mesures policières de lutte contre le terrorisme (MPT)*, FF 2020 7499, 25 September 2020.

130 The Federal Council, *Federal Act on Police Measures to Combat Terrorism (PMCT)*, 13 June 2021, available at: <https://www.admin.ch/gov/en/start/documentation/votes/20210613/federal-act-on-police-measures-to-combat-terrorism.html>.

131 *Loi fédérale*, above note 129, section 23o(1).

132 *Ibid.*, section 23o(5).

133 *Ibid.*, section 23o(2).

134 *Ibid.*, section 23p(1).

135 *Ibid.*, sections 23o(3) and (4).

Indeed, the provision for assigned residence has been heavily criticized as being incompatible with Articles 5 and 6 of the ECHR.<sup>136</sup>

Other States too have recently adopted new counterterrorism statutes that provide for assigned residence (albeit to different degrees). In France, for example, where the return of foreign terrorist fighters is equally a concern,<sup>137</sup> the 2017 Law on Strengthening Internal Security and the Fight Against Terrorism (SILT) introduced a number of administrative control measures into French law following the end of the state of emergency.<sup>138</sup> This includes a power of the Minister of the Interior to order anyone whose behaviour is considered to pose a serious security threat, and who is in regular contact with those supporting or participating in terrorism, not to go beyond the perimeters of a specified geographical area, which cannot be smaller than their town or city.<sup>139</sup> Any such order is initially for up to three months, renewable up to a total of twelve months. Though less restrictive of liberty than the new assigned residence orders under Swiss law, these orders under SILT have been criticized on the basis of the vague language regarding to whom they apply and the barriers to effectively challenging such orders before the Conseil d'État.<sup>140</sup>

Other States continue to rely on existing assigned residence powers as a counterterrorism tool. This is the case, for example, with Tunisia in its ongoing state of emergency that was declared following the November 2015 attack (claimed by Islamic State) on the Presidential Guard in Tunis. Those placed in assigned residence (which in some cases appears in practice to be house arrest) include returning foreign terrorist fighters and members of domestic terrorist groups.<sup>141</sup>

These laws and practices regarding assigned residence share the same idea as that underpinning the use of administrative detention, i.e. that special laws restricting liberty and freedom of movement, sitting outside ordinary legal processes and instead mirroring similar measures available under IHL, are necessary counterterrorism tools. The recent laws in Switzerland and France provide another example of such extraordinary powers being incorporated into permanent domestic legislation. Assigned residence, and other administrative

136 Gloria Gaggioli and Ilya Sobol, "Counter-Terrorism Control Orders Come to Switzerland: Is Assigned Residence for 'Potential Terrorists' Compatible with Art. 5?", *EJIL:Talk! – Blog of the European Journal of International Law*, 6 June 2020, available at: <https://www.ejiltalk.org/counter-terrorism-control-orders-come-to-switzerland-is-assigned-residence-for-potential-terrorists-compatible-with-art-5-echr/>; *Mandats de la Rapporteuse spécial sur la promotion et la protection des droits de l'homme et des libertés fondamentales dans la lutte antiterroriste; de la Rapporteuse spéciale sur les exécutions extrajudiciaires, sommaires ou arbitraires; du Rapporteur spécial sur la promotion et la protection du droit à la liberté d'opinion et d'expression; du Rapporteur spécial sur la liberté de religion ou de conviction; et du Rapporteur spécial sur la torture et autres peines ou traitements cruels, inhumains ou dégradants*, OL CHE 1/2020, 26 May 2020.

137 Human Rights Council, above note 114, para. 12.

138 *Loi No 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme*, JORF No. 0255, 31 October 2017.

139 *Ibid.*, Art. 3.

140 Amnesty International, *Punished Without Trial: The Use of Administrative Control Measures in the Context of Counter-Terrorism in France*, EUR 21/9349/2018, pp. 9–17.

141 UN Human Rights Council, Visit to Tunisia: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms whilst countering terrorism, 12 December 2018, UN Doc. A/HRC/40/52/Add.1, paras 41–43; Amnesty International, "We Want an End to the Fear": *Abuses Under Tunisia's State of Emergency*, MDE 30/4911/2017, pp. 38–40.

measures short of traditional detention, will probably continue to play a prominent role in the future, and their compatibility particularly with human rights law will be an ongoing controversy.

## Detainees held by armed groups

A second significant issue now confronting many States involved in overseas counterterrorism operations and armed conflict concerns the disposition of detainees held by partner armed groups. This question has, of course, arisen particularly in the context of detainees held by the Syrian Democratic Forces (SDF) in the North East, which have received support from and worked with many of the States in the Global Coalition to Defeat ISIS.<sup>142</sup> Particularly since the fall of Baghouz in March 2019, the SDF has detained tens of thousands of suspected Islamic State fighters and their families, with the total figure in March 2021 standing at over 63,000.<sup>143</sup> The question of how now to deal with these detainees has arisen, particularly in light of the reluctance of many States to accept the repatriation of their nationals that are being held by the SDF, creating a real risk of indefinite administrative detention or flawed trials by Syrian Democratic Council and Iraqi courts.<sup>144</sup>

In addition to questions concerning the legality of detentions by armed groups and the legitimacy of refusals by national States to accept the return of foreign terrorist fighters,<sup>145</sup> the context of support for and partnering with armed groups by States raises legal questions regarding the responsibility of such States for those detentions (including treatment of detainees) by armed groups. Rules from multiple sources of international law create obligations on States in relation to the conduct of others.<sup>146</sup> Under international humanitarian law, a widely shared reading of Article 1 common to the four Geneva Conventions places obligations on all States not to aid or assist in violations of IHL by others and to

142 Rights & Security International, *Europe's Guantanamo: The Indefinite Detention of European Women and Children in North East Syria*, Susak Press, 2020, reprinted 2021, available at: [https://www.rightsandsecurity.org/assets/downloads/Europes-guantanamo-THE\\_REPORT.pdf](https://www.rightsandsecurity.org/assets/downloads/Europes-guantanamo-THE_REPORT.pdf), para. 82 (“[m]embers of the Global Coalition have provided, and some continue to provide, military support to the SDF, including through the provision of fighter aircraft. Some members are also providing ongoing training to Iraqi and Kurdish security personnel, though it is unclear whether this is also provided to the SDF.”).

143 HRW, *Thousands of Foreigners Unlawfully Held in NE Syria*, 23 March 2021, available at: <https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria> (“[r]oughly 20,000 are from Syria, 31,000 from neighboring Iraq, and nearly 12,000 others—8,000 children and 4,000 women—are from almost 60 other countries.”).

144 Roger Lu Phillips, “A Tribunal for ISIS Fighters – A National Security and Human Rights Emergency”, *Just Security*, 30 March 2021, available at: <https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/>.

145 See, e.g., Dan E. Stigall, “The Syrian Detention Conundrum: International and Comparative Legal Complexities”, *Harvard National Security Journal*, Vol. 11, No. 1, 2020, p. 54; Andrew Clapham, “Detention by Armed Groups under International Law”, *International Law Studies*, Vol. 93, 2017, p. 1; Maria Gavrilova, “Administrative Detention by Non-State Armed Groups: Legal Basis and Procedural Safeguards”, *Israel Law Review*, Vol. 53, No. 1, 2020, p. 35.

146 For a good overview of relevant rules in respect of military operations, see Bérénice Boutin, “Responsibility in Connection with the Conduct of Military Partners”, *Military Law and Law of War Review*, Vol. 56, 2017–2018, p. 57.

do all that they can to bring such violations to an end.<sup>147</sup> Under the law on State responsibility, States must not knowingly aid or assist other States in the commission of internationally wrongful acts,<sup>148</sup> and some have argued in favour of extending this rule to include assistance to non-State actors.<sup>149</sup> In addition, where there is a serious breach of a peremptory norm of international law,<sup>150</sup> States must do all that they can to bring that violation to an end.<sup>151</sup> Also, under international human rights law, States' positive obligations require that they protect individuals within their jurisdiction from rights violations by non-State actors,<sup>152</sup> with some treaty bodies taking a very expansive approach as to when an individual falls within a State's jurisdiction.<sup>153</sup>

In light of this background normative context, States cannot expect to outsource parts of their overseas counterterrorism operations with impunity to non-State groups operating in the region.<sup>154</sup> Where those non-State groups engage in detention, the States supporting them may well be in a strong position to promote compliance with international law, which is particularly important for those rules above that contain due diligence obligations. Indeed, it has been reported that a number of States involved in the Coalition have a presence of some kind in the detention camps run by the SDF.<sup>155</sup> In addition to the risks of indefinite detention without due process for detainees held by the SDF, there is also clear evidence of very poor conditions of detention, abuse of detainees, and disappearances.<sup>156</sup> This is no doubt, in part, a consequence of the total lack of planning for detention operations; given the need to avoid such humanitarian crises and given that the international responsibility of supporting States could be engaged by such breaches committed by their non-State partners, advance

147 See, e.g., ICRC, *Commentary to the First Geneva Convention*, Cambridge University Press, Cambridge, 2016, para. 154; Oona A. Hathaway *et al.*, "Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors", *Texas Law Review*, Vol. 95, 2017, p. 539.

148 See International Law Commission (ILC), *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), Report of the ILC on the Work of its Fifty-Third Session, UN GAOR 56th Session Suppl. No. 10, A/56/10, Art. 16; Helmut Philipp Aust, *Complicity and the Law on State Responsibility*, Cambridge University Press, Cambridge, 2011.

149 See, e.g., Miles Jackson, *Complicity in International Law*, Oxford University Press, Oxford, 2015, p. 214.

150 A number of core rules of IHL would probably qualify for this status: ILC, above note 148, Commentary to Art. 40, para. 5.

151 ILC, above note 148, Art. 41.

152 See, e.g., Laurens Lavrysen, *Human Rights in a Positive State*, Intersentia, Cambridge, 2016.

153 Of particular relevance, see UN Committee on the Rights of the Child, *L.H. et al. v. France*, Communications Nos. 79/2019 and 109/2019, CRC/C/85/D/79/2019–CRC/C/85/D/109/2019 (finding that France exercises jurisdiction over children with French nationality held by the SDF in North East Syria). See also African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, Pretoria University Law Press, Pretoria, 2015, para. 14 (stating that extra-territorial jurisdiction under the African Charter can arise in cases of "effective authority, power, or control over ... the perpetrator" and where "the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life").

154 See this point being made in the recent report by the International Commission of Inquiry into arbitrary detentions and other abuses committed by the parties to the conflicts in Syria: UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/46/55, 11 March 2021, para. 83.

155 Rights & Security International, above note 142, paras 84–85.

156 *Ibid.*, paras 39–81.



planning is essential.<sup>157</sup> In light of the increasingly prominent role once again of foreign State support for armed groups in conflicts around the world, as seen across the Middle East, Africa and Ukraine, these same issues are likely to continue to arise in future conflicts and overseas counterterrorism operations.<sup>158</sup>

## Concluding remarks

This article has demonstrated the continued prominence of administrative detention as a counterterrorism tool. In the years following 9/11, administrative detention constituted a key part of the “war paradigm” that informed many States’ counterterrorism practices. For some, this has continued, and for the US and UK, which in recent years have moved away from counterterrorism detention, the IHL-inspired model of administrative detention, sitting outside ordinary legal processes, continues to be defended and constitutes a precedent for other States. However, the continued conflation between IHL and counterterrorism does not stop there. As the previous section showed, many States have recently relied upon and even expanded their administrative measures short of detention for counterterrorism purposes, including assigned residence, a measure provided for under IHL as equivalent to administrative detention. These other administrative measures, along with the controversies arising from detentions by armed groups (often with the support of States) will probably dominate much of the work in this area in the coming years.

To end, two final points are worth emphasizing. First, as has been shown above, the recent practice explored in this article sits in a context of new domestic statutes that render permanent many powers, including those having an impact on the right to liberty, previously exercised under emergency counterterrorism legislation.<sup>159</sup> This facilitates the gradual incursion of extraordinary powers, such as those provided for under IHL of administrative detention and assigned residence, into everyday counterterrorism practices. Second, we should remember that this relationship between IHL and counterterrorism runs in both directions. Whereas the focus here has been on the use of IHL powers in counterterrorism, post-9/11 counterterrorism practices also served as testing grounds for readings of IHL (and international human rights law) that create even more freedom for States, putting pressure on these legal regimes and their capacity effectively to regulate future conflicts.<sup>160</sup>

157 Dan E. Stigall, “Battlefield Detention, Counterterrorism, and Future Conflicts”, *Articles of War*, 24 March 2021, available at: <https://lieber.westpoint.edu/battlefield-detention-counterterrorism-future-conflicts/>.

158 James Kenneth Wither, “Outsourcing Warfare: Proxy Forces in Contemporary Armed Conflicts”, *Security & Defence Quarterly*, Vol. 31, No. 4, 2020, p. 17.

159 Myriam Feinberg, “States of Emergency in France and Israel – Terrorism, ‘Permanent Emergencies’, and Democracy”, *Zeitschrift für Politikwissenschaft*, Vol. 28, 2018, pp. 495–506.

160 Lisa Hajjar, “The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US ‘War on Terror’”, *Law & Social Inquiry*, Vol. 44, No. 4, 2019, p. 922; Rebecca Sanders, *Plausible Legality: Legal Culture and the Political Imperative in the Global War on Terror*, Oxford University Press, Oxford, 2018.