Administrative Detention in the Occupied Palestinian Territory

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INTRODUCTION TO ADMINISTRATIVE DETENTION

Administrative detention is a procedure under which detainees are held without charge or trial. No charges are filed, and there is no intention of bringing the detainee to trial. In accordance with the detention order, a detainee is given a specific term of detention. On or before the expiry of the term, the detention order is frequently renewed. This process can be continued indefinitely.

Administrative detention has been commonly used by repressive regimes to circumvent the legal process and to hinder access by political dissidents to the protection that they should be entitled to under the law. Places where it has been used to a particular extent include the North of Ireland, South Africa (under apartheid), the United States, and Israel.

The possibility of becoming an administrative detainee is an ever-present threat in the daily lives of all Palestinians and severely impacts the lives of Palestinians living in the occupied Palestinian territory (OPT). Over the years, Israel has held Palestinians in prolonged detention without trying them or informing them of the suspicions against them. While detainees may appeal the detention, neither they nor their attorneys are allowed to see the evidence. Israel has therefore made a mockery out of the entire system of procedural safeguards in both domestic and international law regarding the right to freedom.

Administrative detention in the OPT is ordered by a military commander and grounded on “security reasons.” Detainees are held without trial and without being told the evidence against them. In most cases, they are simply informed that there is ‘secret evidence’ against them and that they are being held for security reasons.

The security reasons are broad enough to include peaceful political subversion and virtually any act of resistance against the Israeli colonial occupation. The definitions of crimes in Israeli legislation are additional sites where ambiguity can be manipulated, often resulting in increased sentences and imprisonment for Palestinians. For example, participation in a demonstration is deemed a disruption of public order. Firing in the air during a wedding, as a form of celebration, constitutes a danger to Israel’s national security, despite the fact that it occurs in areas ostensibly under the sole jurisdiction of the Palestinian Authority (Area A).
Carrying or placing a Palestinian flag is a crime under Israeli military regulations. Even pouring coffee for a member of a declared illegal association can be seen as support for a terrorist organization. Palestinian national security forces are also seen as an illegal association.

ADMINISTRATIVE DETENTION IN NUMBERS

During the period of March 2002 to October 2002, Israeli Occupation Forces (IOF) arrested over 15,000 Palestinians during mass arrest campaigns, rounding up males in cities and villages between the ages of 15 to 45. In October 2002, there were over 1,050 Palestinians in administrative detention. By the beginning of March 2003, Israel held more than one thousand Palestinians in administrative detention.

In 2007, Israel held a monthly average of 830 administrative detainees, which was one hundred higher than in 2006. Furthermore, during the Palestinian Legislative Council (PLC) elections of 2006, Israel placed dozens of candidates from the Islamic ‘Change and Reform Party’ in administrative detention, some of whom are still imprisoned to this day. Over the years, only nine Israeli citizens from illegal settlements in the West Bank have reportedly been detained for periods up to six months.

On 17 April 2012, approximately 1,200 Palestinian prisoners started hunger strikes and an additional 2,300 refused meals from the IPS in protest of prison conditions, administrative detention and restrictions on family visitation. After 28 days of hunger strike, the prisoners were able to strike an agreement with the IPS that ended the strike, including a provision that new administrative detention orders or renewals of administrative detention orders for the Palestinians currently in administrative detention would be limited, unless the secret files, upon which the administrative detention is based, contained “very serious” information. However, the Israeli security forces reneged on their agreement to release administrative detainees who were on hunger strike, causing several to go on individual hunger strikes, including Thaer Halahleh, Bilal Diab and Akram Rikhawi.

As of 1 February 2014 there were 175 administrative detainees in Israeli prisons and detention centers, including 9 members of the PLC.

ADMINISTRATIVE DETENTION: A LEGAL PERSPECTIVE

International humanitarian law, comprised primarily of the Geneva Conventions of 1949 and their Additional Protocols, as well as international human rights law, provide the international legal standards that are to be applied to administrative detention in armed conflict and other situations of violence. International law permits administrative detention under specific, narrowly defined circumstances. In accordance with the International Covenant on Civil and Political Rights (ICCPR) there must be a public emergency that threatens the life of the nation. Furthermore, administrative detention can only be
ordered on an individual case-by-case basis, without discrimination of any kind. A State’s collective, non-individual detention of a whole category of persons can in no way be considered a proportional response, regardless of what the circumstances of the emergency concerned might be.

According to Adalah: The Legal Center for Arab Minority Rights in Israel, Israel has sought to justify its policy of administrative detention by the remarkable claim that it has been under a “state of emergency since 1948” and is therefore justified in suspending or derogating” from certain rights, including the right not to be arbitrarily detained.” Moreover, administrative detention should not be used as a substitute for criminal prosecution where there is insufficient evidence to obtain a conviction. Israel’s use of administrative detention deliberately infringes these restrictions.

**International Law**

In 1967, Israel occupied the West Bank, including East Jerusalem (both were under Jordanian control at the time) and the Gaza Strip (which was under Egyptian administration), which have come to be known as the OPT. Israel also occupied the Golan Heights and the Sinai Peninsula at the same time. Israel thus became a “belligerent power” and subject to international humanitarian law in regards to the occupation of these territories.

Humanitarian law regulates how such territories should be governed, the conduct of the occupying power, and the treatment of the civilian population (“protected persons”) during occupation. The key international humanitarian legal instruments that regulate administrative detention in the occupied Palestinian territory are:

- The Fourth Geneva Convention (1949);
- Additional Protocol I to the Geneva Convention (1977);
- Regulations annexed to the Hague Convention No. IV (Hague Regulations)

An international consensus exists among States and the International Committee of the Red Cross (ICRC) that the Fourth Geneva Convention and the Hague Regulations of 1907 apply to all of the territories occupied by Israel after the 1967 war. The United Nations Security Council and the International Court of Justice (ICJ) have confirmed the applicability of the Fourth Geneva Convention to the OPT, including East Jerusalem, in ICJ Advisory Opinions and at least 25 Security Council Resolutions. International humanitarian law does not allow for any derogation from the law on the basis of any military security or national rationales. This is because all instruments of international humanitarian law already give due consideration to military imperatives and reconcile military necessity with the demands of humanity.
International human rights law and customary international law also have relevance when considering the nature and scope of permissible administrative detention.

**The Law in Israel**

In Israel, administrative detention is authorized under the Emergency Powers Law Detentions (1979 Emergency Law). The Emergency Law only applies once a state of emergency has been declared by the Knesset. Such a state of emergency has been in existence since the founding of the State of Israel in 1948. The Emergency Law allows the Minister of Defense to order detention for up to six months, with the authority to keep renewing the order every six months, indefinitely. The detainee must be brought before a judge within 48 hours of arrest and be periodically reviewed every three months by the president of the District Court.

**The Law in the West Bank**

In the West Bank, administrative detention is authorized under Military Order 1651. This order authorizes the military commanders in the area to detain an individual for up to six months if they have “reasonable grounds to presume that the security of the area or public security require detention.” Commanders can extend detentions for additional periods of up to six months if “on the eve of the expiration of the detention order,” they have “reasonable grounds to believe ... that the security of the area or public security still require the holding of the detainee.” Military Order 1651 does not define a maximum cumulative period of administrative detention. The terms “security of the area” and “public security” are not defined, their interpretation being left to the military commanders. If a Military Commander deems it necessary to impose a detention order, he may do so for up to six months after which he can extend the original order for a further six months. There is no limit on the amount of times an administrative detention order can be extended. This in effect allows for indefinite arbitrary detention.

In June 1999, the procedure governing administrative detention orders was modified by Military Order 1466 which provided that a detainee must be brought before a military judge within 10 days of his or her arrest. These modifications also authorized the military judge to approve administrative detention orders as issued, cancel them altogether or decrease the duration of the order. In March 2002, during the Second Intifada, another amendment was issued, extending the period a detainee can be held without seeing a judge to 18 days. By the end of 2002, the limit returned to 8 days, but ISA representatives were no longer required to come to court and present the secret evidence. Military Order 1651, which currently authorizes administrative detention, reduced the period of time an administrative detainee can be held without seeing a judge to 4 days, though a temporary order included in Order 1651 (Chapter I, Article B) currently allows a detainee to be prevented from seeing a judge for 8 days (Chapter I, Article B 287).
The Law in the Gaza Strip

Until the Israeli military’s withdrawal from the Gaza Strip in 2005, administrative detention was authorized in Gaza under Military Order 941 (1988) and was similar in its operation to the administrative detention order in operation in the West Bank. After the withdrawal, the Israeli government argued that it is no longer an Occupying Power in the Gaza Strip and that it is not bound by international law relating to the duties and obligations of occupying powers. There is consensus among the international community, however, that despite the withdrawal of Israeli military troops in 2005, there are ongoing as well as new methods of Israeli military and administrative control in the Gaza Strip, which amount to “effectual control” of the area. Therefore, the withdrawal of Israeli troops alone does not mean that Gaza is no longer occupied by Israel. It is important to note that facts on the ground define the legal situation. Israel maintains its effective control over the Gaza Strip by different means, such as control over air space, sea space and international borders. Israel also continues to exercise control, although indirectly, over Palestinian movement in the Rafah crossing – the only exit outside of Gaza to countries other than Israel – namely Egypt. Furthermore, Israel continues to exercise control over the movement of Palestinians, as well as goods, in the Kerem Shalom, Erez, Karni, and Sufa crossings. Even during the period between the Israeli withdrawal in September 2005 and the Israeli military operation dubbed “Operation Summer Rains” in 2006, there has been a consensus amongst the international community that Israel, regardless of the applicability of the laws of occupation, continues to be legally responsible for protected persons that live in the Gaza Strip under general provisions of international humanitarian law.

In March 2002, the Knesset enacted the Incarceration of Unlawful Combatants Law (2002). This law provides for the indefinite administrative detention of foreign nationals and creates a third category of person the unlawful combatant” with an unclear definition that includes not only persons who participate in hostilities” against Israel, but also any members of forces that carry out such hostilities of that force. The usage of the “unlawful combatant” designation runs contrary to the distinction in international humanitarian law between combatants and civilians. It affords detainees neither the protection of the Third Geneva Convention as combatants held as prisoners of war, nor the protection of the Fourth Geneva Convention as civilians. Neither of these Conventions prevents the state from prosecuting suspects for crimes they allegedly committed either as combatants or civilians.

Israel’s Position towards International Law

Although Israel has stated that it generally applies the humanitarian provisions of the Fourth Geneva Convention in the Occupied Territory (without specifying exactly which provisions it is referring to) (a de facto application) it denies that it is legally obliged to do so (a de jure application). Israel bases this argument on a narrow interpretation of Article 2 of the Convention. Israel argues that the Convention
only applies between two High Contracting Parties, one of which has sovereignty over the territory occupied by the other. Israel posits that Jordan and Egypt were not acting as sovereigns over the Occupied Territory prior to 1967 (being more in the position of administrators) and that there is no other relevant High Contracting Party, therefore the Convention does not apply.

The ICJ rejected this argument, noting that both Jordan and Egypt were High Contracting Parties to the Covenant in 1967 and that Article 2 does not impose any qualification of sovereignty when referring to the territory of a High Contracting Party.

Israel's argument also ignores Article 4 of the Convention, which is intended to protect the rights of people who find themselves “in the hands of a Party to the conflict or occupying Power of which they are not nationals,” regardless of the competing claims to sovereignty over the territory. Rejecting Israel's argument, the ICJ concluded that,

“This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.”

Finally, the ICJ noted that the Israeli Supreme Court has itself acknowledged the application of the Convention in relation to military action undertaken by the IOF in the Rafah refugee camp in the Gaza Strip.

ADMINISTRATIVE DETENTION IN PRACTICE

Administrative detention orders in the Occupied Palestinian Territory are issued by military commanders for between one to six months and can be renewed indefinitely.

Procedure

Under Israeli military regulations the system of administrative detention is implemented as follows:

1. Palestinians are usually arrested by the Israeli military. Large numbers of Israeli soldiers often forcibly enter the home for an arrest, usually breaking down doors and destroying personal property. Arrests also commonly take place at checkpoints and at demonstrations. In some cases,
police dogs are used to enter the home, terrifying the occupants. Soldiers also verbally and physically threaten the occupants of the house.

2. A Palestinian can then be detained for up to eight days without being informed of the reason for his or her detention and without being brought before a judge. Between April and June 2002, during Israel's mass arrest campaign in the OPT, this period of time was increased by the Israeli Military Order 1500 to 18 days. This is in breach of international law.

3. During or following the eight days of detention, a detainee is either (a) sent to an interrogation center, (b) charged with an offense, (c) given an administrative detention order; or (d) released.

4. Once an administrative detention order has been issued by the military commander, the detainee must be brought before a judge for a judicial review within eight days. Occasionally, the matter will be dealt with at the first hearing and the order approved or varied.

5. At the judicial review, secret evidence is submitted by the Israeli Security Agency (ISA). Neither the detainee nor his or her lawyer is permitted to see the secret evidence. This is in breach of international law.

6. The hearing is not open to the public. This is in breach of international law.

7. The military judge may approve, shorten or cancel the order. In practice, the order is usually approved without change.

8. Previously, administrative detention orders had to be reviewed after three months. However, in April 2002, this requirement was abolished. Upon the initial judgment, the case can be appealed to the Military Court of Appeals, and then, if necessary to the Israeli High Court of Justice.

9. At the end of the initial detention period the order can be renewed for another period of up to six months. There is no limitation on the number of times the initial detention period can be renewed. Each time an administrative detention order is renewed the detainee is given a new “hearing.”

As a result of the possibility of indefinite renewal of administrative detention orders, detainees do not know when they will be released and/or why they are being detained. In some cases, administrative detention orders are renewed at the prison’s gate. In many of the legal cases pursued by Addameer, administrative detainees spent years in prison after being sentenced for committing violations, in accordance with military orders. When the period ended, however, rather than be released they were
placed under administrative detention under the pretext that they still posed a threat to ‘security’. Palestinian detainees have spent up to eight years in prison without charge or trial under administrative detention orders.

**Lawyers**

Lawyers who represent Palestinians in Israeli military and civil courts face obstacles that systematically erode the right of Palestinian detainees to legal representation. Defense attorneys must contend with military orders, Israeli laws and prison procedures that curtail their ability to provide adequate counsel to their clients. A lawyer's citizenship or residency status dictates his or her ability to represent Palestinian clients. This is a breach of international law.

The military prosecutor is usually the only source of information about the evidence in administrative detention cases; however, the defense lawyer cannot cross-examine the prosecutor as a witness. Instead, the prosecutor answers all of the defense lawyer's questions without being sworn in and has the right not to answer questions. A typical examination during a hearing to extend an administrative detention order goes as follows:

- Q. Is any of the evidence open?
  - A. No.
- Q. What is my client accused of?
  - A. Activities to help terrorism.
- Q. How did he help terrorism?
  - A. He’s in an organization.
- Q. Which organization?
  - A. That is part of the secret evidence.
- Q. Who else is in the organization with him?
  - A. That is part of the secret evidence.
It is rare for the defense to call witnesses as the evidence against the detainee is not known. In the circumstances, the only evidence that the defense can use is the good character of the detainee and his or her family life.

CONCLUSION

Addameer Prisoner Support and Human Rights Association contends that the practice of administrative detention in Israel and the occupied Palestinian territory contravenes fundamental human rights. Israel uses administrative detention in a highly arbitrary manner without putting even the most basic safeguards in place, leading to other, grave human rights violations, such as inhuman and degrading treatment and torture.

Addameer accordingly demands that all administrative detainees held on account of their political views or their activities carried out in resistance to the occupation be released promptly and unconditionally. Fair trial standards must be respected for all political detainees, including those accused of committing acts that are considered crimes according to international law. Addameer further demands that the occupying power adhere to international law and that restrictions on the use of administrative detention be imposed. Addameer insists that the judicial review of administrative detention orders must meet the minimum international standards for due process. The authorities must provide detainees with prompt and detailed information as to the reason for their detention, and with a meaningful opportunity to defend themselves.