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## Administrative Detention

### **ON ADMINISTRATIVE DETENTION**

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Administrative detention is a procedure that allows the Israeli military to hold prisoners indefinitely on secret information without charging them or allowing them to stand trial. Although administrative detention is used almost exclusively to detain Palestinians from the occupied Palestinian territory (OPT), which includes the West Bank, East Jerusalem and the Gaza Strip, Israeli citizens and foreign nationals can also be held as administrative detainees by Israel (over the years, only 9 Israeli settlers have been held in administrative detention). Israel uses three separate laws to hold individuals without trial:

- Article 285 of Military Order 1651, which is part of the military legislation applying in the West Bank;
- Internment of Unlawful Combatants Law (Unlawful Combatants Law), which has been used against residents of the Gaza Strip since 2005;
- Emergency Powers (Detentions) Law, which applies to Israeli citizens.

Since the beginning of the Israeli occupation in 1967, Israeli forces have arrested more than 800,000 Palestinians, constitute almost 20% of the total Palestinian population in the occupied Palestinian territories. With the majority of these detainees being men, about 40% of male Palestinians in the occupied territories have been arrested. Palestinians have been subjected to administrative detention since the beginning of the Israeli Occupation in 1967 and before that time, under the British Mandate. The frequency of the use of administrative detention has fluctuated throughout Israel's occupation and has been steadily rising since the outbreak of the second intifada in September 2000.

On the eve of the second intifada, Israel held 12 Palestinians in administrative detention. Only two years later, in late 2002-early 2003, there were over one thousand Palestinians in administrative detention. Between 2005 and 2007, the average monthly number of Palestinian administrative detainees held by Israel remained stable at approximately 765. Since then, as the situation on the ground stabilized and violence tapered off, the number of administrative detainees has generally decreased every year. As of July 2017, there were at least 449 Palestinian are being held without charge or trial, nine of whom are members of the Palestinian Legislative Council.

### **ISSUANCE OF ADMINISTRATIVE DETENTION ORDERS**

The issuance of an administrative detention order falls within the powers of the Israeli military commander of the area as well as within the powers of the Minister of the Israeli security detainees in Jerusalem. Israeli law grants the military commander the power to make any modifications to military

orders relating to administrative detention for military necessity, without taking into account any international standards related to the rights of detainees. The origins of Israeli military laws related to the orders of administrative detention can be traced back to Mandatory Emergency Law Act of 1945.

The Israeli military commander bases his decision on **secret information**, which cannot be accessed by the detainee nor his lawyer in order to preserve the integrity of the sources of this information. The Israeli Supreme Court has in several cases said that the evidence cannot be accessed by the detainee nor his lawyer without taking into consideration the right of the detainee to fair trial procedures, which constitutes a violation of the right of administrative detainees to know the reason for his or her arrest. These procedures constitute a violation of Article 9(2) of the International Covenant on Civil and Political Rights that recognizes the right of an individual who is arrested to “be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” The procedures are also a violation of Article 9 (1) of the same convention, which affirms that “No one shall be subjected to arbitrary arrest or detention” and states that “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

Palestinians are regularly charged in Israeli military courts that do not guarantee them the right to a fair trial and do not comply with the legal and international standards that preserve their right to equality before the law and fair trial guarantees. Since administrative detention is without an actual trial, the review of administrative detention files is done by a judicial control court before a military judge and not a committee. In the past, the Court used to invite an intelligence delegate when examining each file in order to view the secret evidence in detail. However, this procedure was changed during the re-occupation of the Israeli occupation forces to cities in the West Bank in 2002. Currently, the decision on whether to invite the intelligence delegate or not is up to the judge, which means that in most cases, the judge takes his or her decision only by familiarizing him or herself with a summary of the evidence, without reading the entire contents of the secret material, without discussing it with the intelligence delegate, and without examining the information’s authenticity.

A review of administrative detention orders takes place under closed hearings, which does not allow the public or family members of the detainee to be present. Only the detainee, his or her lawyer, the judge, the military prosecutor, and a representative of the intelligence in some cases are allowed to be inside the court, which constitutes a denial of the detainee’s right to a public trial. Article 14(1) of the ICCP assures “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

Most male administrative detainees are currently held in Ofer, Negev and Megiddo, and female administrative detainees are held in Hasharon prison. The Israeli Supreme Court has allowed the authorities to issue administrative detention orders, without specifying the place of the detention, despite the fact that according to Israeli military orders and the Emergency Law of 1979, administrative detainees must be put in separate detention section. The Supreme Court's decision of December 2002 was made in order to facilitate the detention of Palestinians and in order to place administrative detainees in any detention centre without the obligation to hold them in private centers such as, Negev prison.

The longest administrative detention was for eight years, where a Palestinian detainee was put in detention for that period of time without charge or fair trial. In the past, if an administrative detention order was made for a period of six months, the order was to be reviewed by a military judge twice during this period, and there was a right to appeal the decision made by the judge. However, since April 2002, the order is only reviewed once with the right to appeal.

A detainee is brought before a judge within eight days from the issuance of an administrative detention order while under Israeli law it must be within 48 hours. This period of time falls within the powers of the military commander, which means that he can make any adjustments to the period whenever he/she wants, as happened in April 2002 when the period was extended for 18 days. It is noteworthy that both the military judge and the prosecutor serve in the Israeli army, work in the same legal unit in the Israeli army, and are appointed by the same hierarchy. There is a number of Israeli prosecutors who have worked and are currently working as judges in courts where administrative detention orders are taken.

Palestinians wishing to visit their relatives detained in Israeli prisons must apply for a permit from the Israeli security services. The permit is an entry permit to the occupying State, which prevents citizens of the West Bank and the Gaza Strip from entering the occupying state without obtaining a special permit. The Israeli occupation illegal transfer of prisoners has given the occupying state the power to determine who gets an entry permit to these areas and who does not. Given the permanent closure imposed on the Palestinian territories, the occupation has deprived thousands of Palestinian families from visiting and communicating with their children, who are being held in detention. Although the administrative detainee has the right to receive two visits from his family under Israeli law, many administrative detainees are barred from receiving family visits and are subject to the same controls that the Israeli authorities had issued in 1996, relating to family visits of Palestinian prisoners in Israeli prisons. The judge only allows for family visits by family members, including fathers, mothers, husbands, wives, grandfathers, grandmothers, sons, daughters, sisters and brothers. Visits are generally limited to family members who are under the age of 16 and above the age of 64.

## **ADMINISTRATIVE DETENTION UNDER INTERNATIONAL LAW**

Although **international human rights law** permits some limited use of administrative detention in emergency situations, the authorities are required to follow basic rules for detention, including a fair hearing at which the detainee can challenge the reasons for his or her detention. Moreover, to use such detention, there must be a public emergency that threatens the life of the nation, and detention can only be ordered on an individual, case-by-case basis without discrimination of any kind. (International Covenant on Civil and Political Rights, Article 9).

Administrative detention is the most extreme measure that international humanitarian law allows an occupying power to use against residents of occupied territory. As such, states are not allowed to use it in a sweeping manner. To the contrary, administrative detention may be used against protected persons in occupied territory only for "imperative reasons of security" (Fourth Geneva Convention, Art.78). Israeli authorities claim that under Article 78 of the Fourth Geneva Convention related to the Protection of Civilians in Time of War (1949), the occupying power has the right to detain persons subject to its authority under administrative detention. Article 78 states that "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment." Thus, the ways in which the administrative detention carried out by the occupation authorities differs in form and substance from those in the Geneva Convention. The conditions and procedures that the occupation authority is using in administrative detention violate International Conventions and other international standards for the right to a fair trial.

In practice, Israel routinely uses administrative detention in violation of the strict parameters established by international law. Tellingly, Israel has claimed to be under a continuous state of emergency sufficient to justify the use of administrative detention since its inception in 1948. In addition, administrative detention is frequently used – in direct contravention to international law – for collective and criminal punishment rather than for the prevention of future threat. For example, administrative detention orders are regularly issued against individuals suspected of committing an offense after an unsuccessful criminal investigation or a failure to obtain a confession in interrogation.

It is clear that the Geneva convention speaks of administrative detention only in emergency situations and as an inevitable necessity, and that the possibility of imposing house arrest, if possible, should be a priority as it is less harmful to the person. However, the practice of administrative detention in the occupied territory shows that the Israeli military commander orders to issue administrative detention is not only based on urgent cases or circumstances. The current number of administrative detainees shows that the occupation is using this policy against many Palestinians and is using it as a form of collective punishment. In the first years of the intifada, the number of administrative detainees increased to 8,000 detainees, and the occupation continued using this policy even after the signing of the Oslo agreements with the Palestinian Authority, where dozens of Palestinians, residents of Area A, were put in administrative detention for a period exceeded two years.

In practice, Israel's administrative detention regime violates numerous other international standards as well. For example, administrative detainees from the West Bank are deported from the occupied territory and interned inside Israel, in direct violation of Fourth Geneva Convention prohibitions (Articles 49 and 76). Further, administrative detainees are often denied regular family visits in accordance with international law standards, and Israel regularly fails to separate administrative detainees from the regular prison population as required by law. Moreover, in the case of child detainees, Israel regularly fails to take into account the best interests of the child as required under international law.

## **ADMINISTRATIVE DETENTION IN THE WEST BANK: MILITARY ORDER 1651**

In the occupied Palestinian West Bank, the Israeli army is authorized to issue administrative detention orders against Palestinian civilians on the basis of article 285 of **Military Order 1651**. This article empowers military commanders to detain an individual for up to six-month renewable periods if they have “reasonable grounds to presume that the security of the area or public security requires the detention”. No definition of “security of the area” or “public security” is given. On or just before the expiry date, the detention order is frequently renewed; there is no explicit limit to the maximum amount of time an individual may be administratively detained, leaving room for indefinite legal detention.

Administrative detention orders are issued either at the time of arrest or at some later date and are often based on “secret information” collected by the Israeli Security Agency (under the second amendment of the administrative detention order (Amendment No. 2) 1988 (No. 1254 in the West Bank and No. 966 in the Gaza Strip), which basically determines the “risk” of the prisoner. In the vast majority of administrative detention cases, neither the detainee nor his lawyer is ever informed of the reasons for the detention or given access to the “secret information”.

A Palestinian detainee subjected to an administrative detention order must be brought before a military court in a closed hearing within eight days of his or her arrest, where a single military judge can uphold, shorten or cancel the detention order. In most cases, however, administrative detention

orders are confirmed for the same periods as those requested by the military commander. While the detainee can appeal the decision at the judicial review, in practice, the vast majority of appeals are rejected. By comparison, administrative detention under Israeli domestic law requires a detainee to be brought before a judge within 48 hours, and orders can be given only up to three month periods.

In practice, Palestinians can be detained for months, if not years, under administrative detention orders, without ever being informed about the reasons or length of their detention. Detainees are routinely informed of the extension of their detention on the day that the former order expires. Under the existing administrative detention procedures, Palestinians have no effective means by which to challenge their administrative detention.

## **ADMINISTRATIVE DETENTION IN THE GAZA STRIP: UNLAWFUL COMBATANT LAW**

In the Gaza Strip, Israel uses the Unlawful Combatants Law to hold Palestinians for an unlimited period of time, without effective judicial review. The law was approved by the Israeli Knesset in 2002 in order to enable the state to continue holding Lebanese “bargaining chip” detainees after the Israeli Supreme Court ruled the practice illegal. Although all Lebanese detainees were released in 2004, the law was not revoked. Instead, starting in 2005 after Israel's unilateral “disengagement” from the Gaza Strip and the accompanying end of the application of Israeli military orders there, it began to be used to detain residents of the Strip.

The law 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,” and who is not entitled to prisoner of war status under international humanitarian law.

The Unlawful Combatants Law allows for the sweeping and swift detention without trial of large numbers of foreign citizens and Palestinians resident of the Gaza Strip. To date, the law has been used to detain 54 individuals, including 15 Lebanese nationals and 39 Gazans, most of whom were detained during Israel's winter 2008-2009 military action against Gaza codenamed “Operation Cast Lead” and have since been released. As of April 2012, Israel was holding 1 Gazan under this law.

Detainees under the law may be held for 96 hours before the issuance of a permanent detention order, or up to seven days if the government declares the “existence of wide-scale hostilities”. Judicial review of an order in a closed hearing must take place within 14 days of its issuance; if it is approved, the detainee must be brought before a judge once every six months. If the court finds that his release will not harm state security, the judge shall cancel the order.

In practice, the Unlawful Combatants Law contains fewer protections for detainees than even the few that are granted under administrative detention orders in the West Bank. For example, judicial review is conducted less often; the legality of the detention does not require the existence of a state of emergency; and, the detention “is carried out pursuant to an order issued by the chief of staff or by an officer holding the rank of major general”. In addition, the law establishes two troubling presumptions that shift the burden of proof to the detainee: first, the release of an individual identified as an “unlawful combatant” will harm national security unless proven otherwise; second, the organization to which the detainee belongs carries out hostilities, if the Israeli Minister of Defense has made such a determination, unless proven otherwise. This practice patently violates the accused’s right to a presumption of innocence in any criminal proceeding, and results in a system of

indefinite detention justified by mere speculation and stacked heavily against the detainee.

## **ADDAMEER'S POSITION ON ADMINISTRATIVE DETENTION**

- The government of Israel should release all administrative detainees;
- In the meantime, administrative detainees must be granted their rights in accordance with international law;
- The government of Israel should immediately cease using the Incarceration of Unlawful Combatants Law and take action to repeal it;
- EU member states should raise cases of administrative detainees with the Israeli government under the EU-Israel political dialogue.

### **Relevant Addameer publications**

- [Administrative Detention in the Occupied Palestinian Territory - A Legal Analysis Report](#), June 2016
  - [Administrative Detention in the Occupied Palestinian Territory - Between Law and Practice](#), December 2010
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