Administrative Detention in the Occupied Palestinian Territories - Questions of Legality

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Administrative detention is one of the numerous measures used by the Israeli occupier to keep the Palestinian population of the OPT in check.

Is the use of administrative detention a result of security constraints? Is it carried out for preventive purposes within the framework of the ongoing battle against terror when there is no other way to counter the threats to security? - As the Israeli government insists.

Does the use of administrative detention comport with the provisions of international human rights law (specifically the ICCPR) and the Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment? - As the Israeli government states.

Does it comply with international human rights law (specifically article 78 of the Fourth Geneva Convention? - As the Israeli authorities maintain.[1]

I'll attempt to answer these questions.

Administrative Detention in the OPT - Law and Practice

The law of administrative detention presently in force is included in articles 284 – 294 of the criminal code named "Order Concerning Security Provisions (consolidated version) (Judea and Samaria) (N.1651), 2009" (further referred to as "the code").

Administrative detention is a convenient tool in the hands of the occupier, due to its flexibility and the ease of invoking an administrative detention order, which requires the mere signature of a military commander, who signs it, for "security reasons", on the request of the General Security Service (further referred to as "the GSS") supported by the "secret material" prepared by it.

An order can be issued for 6 months and renewed indefinitely, allowing for long term imprisonment without charge or trial. All that is necessary to finalize the order is a short "judicial review" by a military judge authorized to confirm, shorten or cancel it (art. 287 of the code). The said review takes place *in camera*. In the first part, an exception is made allowing the detainee's presence based on art. 291 of the code. The prosecutor asks the judge to confirm the order based on the "secret material". He hands it to the judge along with the detention order signed by a military commander. The "secret material", which is not disclosed to the detainee and his lawyer (art. 290(c) of the code), consists of summaries of intelligence hearsay information, such as reports by collaborators, transcripts of electronic recordings, briefings and opinions of GSS

officials. It is a far cry from evidence acceptable in criminal proceedings. However art. 290(a) + (b) of the code allows "to deviate from the rules of evidence". The detainee and his lawyer may ask some questions. They also make some rather random statements. No witnesses are heard. In the second part of the judicial review that takes place *in camera* without exceptions, the judge reads the "secret material". It provides a "reasonable and sufficient ground" for the judge to decide, in most cases, that the detention order was issued lawfully, the person in question is a "security threat" and "security considerations oblige that he should be held in detention".

The detainee learns very little, if anything, about the reasons for his detention. He receives his detention order and hears the rather standard argument of the prosecution. From both, he can learn that he is a security danger, in most cases because of his "terror supporting" activities. In some cases the organization labeled "terrorist" is mentioned, and in very few cases he is alleged to intend or plan to perform or have been involved in a "terrorist" or "military" activity.

He does not know what facts are attributed to him. He is unable to defend himself. He argues on the basis of intuition and guess work. He will never be told whether he hit the target or not. He will never know why his detention order has been confirmed, nor will he know how many years he will spend in prison. This will be revealed to him only *post factum*, on the day of his release. This ignorance of the term of detention combined with his inability to defend himself, may amount, particularly with the progress of time, to mental torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[2]

The administrative detainee is not the only victim of the administrative detention secret proceedings. The practically unlimited confidentiality granted to the GSS excludes transparency, forgoes accountability, makes scrutiny impossible, breeds fallacies and blocks access to information. The judicial review takes place *in camera*, and by the same token, publication of its briefings and judicial decisions is forbidden. Nobody has access to the files and other GSS documents. No information is accessible to anybody including journalists, academics, and human rights organizations and - I'll venture to add - to government officials, even those who publish official statements such as the one mentioned above. The only exception is when information is released by the GSS. The public's right to know and all the democratic rights dependent on it are grossly violated.
Some exceptions to the rule apply to the lawyers who represent administrative detainees. They get information from their clients. They participate in the "open" sessions of the judicial review and accumulate willy-nilly some knowledge of the mechanisms at work. They can gain some knowledge and understanding from bits and pieces of information they are exposed to.

Administrative Detention in the OPT and International Law

Administrative detention law and practice in the OPT don't fit the demands of international law, be it IHL or IHR.

The 4th Geneva Convention allows, in art.78, for "internment" "for imperative reasons of security". However, according to Pictet, "their exceptional character must be preserved…" The numbers of administrative detainees in the OPT have been much too high to consider them exceptional. [3]
Moreover: the applicability of the provisions to the OPT is questionable, considering art. 6 of the Geneva Convention that stipulates that art.78 is among those articles the application of which "shall cease one year after the general close of military operations". According to Pictet, "as hostilities have ceased, stringent measures against the civilian population will no longer be justified… [Which] applies to the clauses relating to internment…"[4]

Israel does not fare any better with international human rights law. IHR's basic document, the Universal Declaration of Human Rights, stipulates in art. 9 that "No one shall be subjected to arbitrary arrest, detention or exile".

This concise statement was elaborated on in art. 9 of the Covenant on Civil and Political Rights. It adds *inter alia,* that "Anyone who is arrested shall be informed of the reasons for his arrest and shall be promptly informed of any charges against him" and that "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

The Human Rights Committee, the monitoring body of the ICCPR, has confirmed that art. 9 of the Covenant allows resorting to preventive detention provided that it is not arbitrary. In examining Israel's implementation of the Covenant, the committee held that "[it] is concerned about the frequent use of various forms of administrative detention, particularly for the Palestinians from the Occupied Territories, entailing restriction on access to the council and to the disclosure of full reasons of the detention. These features limit the effectiveness of judicial review, thus… derogating from art. 9 more extensively than what in the Committee's view is permissible pursuant to article 4".[5]

Nevertheless the Supreme Court has lately ruled again, that reliance on inadmissible evidence and on privileged material for reasons of state security lies at the heart of administrative detention".[6]

<u>Administrative detention and terrorism</u>

As mentioned before, the grounds of administrative detention, as communicated to the detainee, are often in some way connected with terrorism. Mostly, the detainee is told that he "supports terror" or is active in a "terrorist organization". In the same context we should consider the official version of Israel that "…the use of administrative detention is derived from security constraints and carried out for preemptive purposes in the framework of the ongoing war against terrorism".[7]

Nevertheless, strange as it is, the term "terror" and its derivatives do not appear in the OPT's military legislation. Terror has no legal meaning in the West Bank. People get detained for legally non existent reasons. Legally meaningless terms are produced as causes for the danger that emanates from them and therefore justifies their detention. Should we conclude that the detention orders are void? Why hasn't terrorism been defined? Was it by negligence or necessity, so that the term can be used broadly, to include any opposition to the occupation? An attempt to answer these questions would necessitate discussion that is beyond the frame of this intervention.

However, the Israeli Ministry of Justice, undisturbed by facts and law, insists on the "ongoing war against terrorism" in order to justify the use of administrative detention, its proceedings and scope. The above statement reflects the official position of Israel concerning the so called "Israeli - Palestinian conflict". To justify its behavior in the OPT, Israel draws an equation between Al Qaeda as perceived in the West and the Palestinians. This equation is basically wrong both legally and politically.

Illegal occupation and legal resistance

Israel should be reminded that the legal source of its limited authority as the occupier is art. 43 of the Hague Regulations that says: "*The occupant shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting , unless absolutely prevented, the laws in force in the country*".

In accordance with the argument presented by Israeli scholars Ben Naftali, Gross and Michaeli,[8] I'll argue that in conformity with art. 43, the occupation, in order to be legal, has to agree with three basic legal principles:

1. The inalienability of sovereignty and the right to self determination that are vested in the people under occupation;
2. The occupying power is entrusted with the management of public order and civil life, and the people under occupation are the beneficiaries of this trust;
3. Occupation should be temporary. It may be neither permanent nor indefinite.

However, as we all know, that is not the case in the OPT. Israeli rule does not fit what becomes a temporary trustee. The acts (legislative, administrative and judicial) of the military commander are those of the lord of the land who has come to stay. His priority is the ongoing expansion of the settlements. He has issued over a thousand laws to ordain the functions of his administration and judiciary. The aim of these laws, as said in their preamble, is to ensure "public order and security of the region", i.e., of the occupying army and of the alien settlers, and not of the "beneficiaries of the trust", the Palestinians. The latter are considered, by and large, "security threats".

Israel's obvious and conscious aim is to expand and reinforce its rule in the OPT. That is why it limits, prevents and annihilates autonomous Palestinian initiatives that may lead to the realization of the inalienable right to self determination and sovereignty. Such policy is in violation of international legal standards.

Administrative detention is one of the tools used to achieve this illegal aim. It is integrated in the totality of the illegal occupation. Those who oppose the occupation are not terrorists by any proper standards. Their resistance is sanctioned by international law. They resist *"alien occupation … in the exercise of their right of self determination as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations"*.[9]

While dealing with specific violations of human rights in the OPT, as human rights activists, we should remember that they are instrumental to the continuation of the illegal occupation and will not recede unless the occupation regime passes away. Therefore, we should demand abolition of the occupation at all human rights and political fora.[10]

Addendum: Involving the Palestinian National Authority (PNA)

Some rights-violating measures are applied by Israel indirectly. Be it due to the coordination between Israel and the PNA or by Israeli permission, encouragement or dictate. Palestinians are arrested, imprisoned, interrogated and tortured by Palestinian security forces. The Israeli press gives some information. More, including condemnation, can be found on the website of the Palestinian Center for Human Rights (PCHR). Two headlines there say:
"Political arrests continue in the West Bank" (15 September 2010, Ref. 81/2010)
"Arbitrary arrests continue in the West Bank and Detainees Held under Severe Conditions and Subjected to Torture and Ill-Treatment" (11 October Ref. 96/2010)

In a comprehensive statement, very critical of Israel, delivered at a press conference in Jerusalem on 11 February, UN High Commissioner for Human Rights, Navi Pillay devoted the following lines to the PNA:

> In the West Bank, I was encouraged by the strong statements of the commitment to the promotion and protection of human rights made by officials at the highest level. Prime Minister Salam Fayad noted his government's readiness to enter into a full memorandum of understanding with my office. Ministers confirmed the willingness of the Palestinian National Authority to ensure access to detention facilities and their desire to work on a national human rights plan of action. They are already working towards implementing Obligations under international human rights law with a view to subsequent ratification of international human rights treaties once statehood is achieved.
> I am encouraged to learn that the latest draft of the new penal code includes provisions for abolishing the death penalty and protecting women from violence. The minister of justice noted the efforts to include more women in the judiciary.

However, I did express my concern to Palestinian National Authority officials relating to recent reports about arbitrary detention and ill treatment in detention, and emphasized the need to respect and protect the role of a vibrant civil society and the Independent Commission for Human Rights."

I believe that prompt fulfillment of the expected changes will be part of the successful Palestinian road to independence.

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[1] As an example of the Israeli position see: Response of the Ministry of Justice of 8 September 2009 to a report on administrative detention in the West Bank by HaMoked and B'Tselem, **Without Trial: Administrative detention of Palestinians by Israel and the Internment of Unlawful Combatants Law**, October 2009, pp. 73.

[2] The point of affinity regarding Israel and the Occupied Territories was made by the UN Human Rights Committee in 1998 and 2003.

[3] The cumulative number of administrative detainees, arrested during different periods of time since the beginning of the occupation, amounts to tens of thousands. The number keeps fluctuating according to the needs and plans of the occupier. It peaked during the first intifada, exceeding 2,500 in the years 1988 – 1991, and again following the invasion of major cities in the West Bank in 2002 when it exceeded 1,000. In the years following the Oslo accords it decreased reaching 12 in 2000. And so it has since June 2010 due to the "security" coordination between Israel and the PNA.

[4] Jean Pictet: **The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War**: (Geneva ICRC, 1957, PP. 367 -8, 63).

[5] Concluding Observations of the Human Rights Committee: Israel. 21/08/2003. CCPR/CO/78/ISR)
See also: B'Tselem, **Prisoners of Peace: Administrative Detention during Oslo Process**, May 1997, B'Tselem and HaMoked ; **Without Trial: Administrative Detention of Palestinians by Israel and the Internment of Unlawful Combatants Law**, October 2009.

[6] CrimA 6659/06, **A and B v. State of Israel**, par 43.

[7] See supra, note 1.

[8] Orna Ben-Naftali, Aeyal Gross & Keren Michaeli, **Illegal Occupation: Framing the Occupied Palestinian Territory**, Berkley Journal of International Law. V. 23. p. 551. 2005.

[9] Art.1.4, Protocol 1 to the Geneva Conventions of 2 August 1949.

[10] Raja Shehadeh, **Occupiers Law, Israel and the West Bank**, Institute for Palestine Studies, Washington, DC.