Administrative detention in the light of the 4th Geneva Convention

Presented by Adv. Tamar Pelleg-Sryck

Military Order No. 1591 empowers the "military commander" to detain a person for up to 6 months. The order further enables extending the administrative detention for additional periods of up to 6 months, again and again, indefinitely. Detention for more than a year is very common.

Sections 1 and 3 of the administrative detention order are similar in their wording to article 78 of the 4th Geneva Convention 1949 dealing with internment. Section 1 states that military commander is empowered to issue (an individual) administrative detention order if he has reasonable grounds to assume that the security of the region and the public require that a person be put under arrest. Section 3 adds that the military commander may not use this power unless he considers it "necessary for imperative reasons of security". Indeed, Israel's official position is that its practice of administrative detention in the occupied Palestinian territories (oPt) – *at present, namely the West Bank* – complies with the rules of the Geneva Convention. **Regrettably, however, this is not so: neither in practice nor in the theory, delineated by the High Court of Justice (HCJ).**

Note, as an aside, that Gaza residents do not enjoy this "privilege". The law which applies to them is the Incarceration of Unlawful Combatants Law, outside the scope of my short presentation.

I will now discuss the issues of disparity which I consider to be of prime importance.
1. The Geneva Convention forbids the transfer of protected persons from the occupied territory to the territory of the occupying power (article 49) and orders that protected persons in custody shall be held inside the occupied territory (article 76). However, like other inmates, most of the administrative detainees are held inside Israel, at the Ketziot and Megido detention facilities (the exception to this is the Ofer facility, located in the oPt).
While consistent with the ruling of the HCJ (HCJ 253/88), this practice is in violation of article 76 of the 4th Geneva Convention, which requires that "protected persons

[…] be detained in the occupied territory". And this is not the only HCJ ruling which differs from the Geneva Convention.

2. Under the Geneva Convention, internment is an **exceptional** security measure. The HCJ has agreed it should be so. Presently, however, in violation of this principle, there are close to 800 administrative detainees, many of whom are already serving 1 or 2 years, and a few already 3 or 4 years. Previously, the number of detainees has occasionally been much higher.

3. Who may be administratively detained? To whom does the law apply?
With respect to article 78, dealing with internment, the Jean Pictet's official commentary to the Geneva Convention states as follows:
"Unlike the articles which come before it, **article 78 relates to people who have not been guilty of any infringement** of the penal provisions enacted by the Occupying Power, **but that Power may, for reasons of its own, consider them dangerous to its security** and is consequently entitled to restrict their freedom of action" (p. 368).

If this principle had been applied, the number of Palestinian administrative detainees would have been roughly a dozen, no more. However, the Israeli practice and theory (delineated by the HCJ) are different. The HCJ has determined that administrative detention may be imposed when a person is considered dangerous on the basis of **secret,** classified**,** material collected by the Israel Security Agency (ISA) that attests to his **illegal activity**. **The absence of permissible evidence** precludes bringing the person to trial. For such lack of evidence, hundreds become administrative detainees.

The Geneva Convention never mentions "secret" or "privileged" material, which is at the heart of the administrative detention in the oPt.
Consequently, the vast majority of the 800 or so administrative detainees are held without trial, in breach of the Convention, although they could have been indicted. Leaving aside "dangerous" intentions (mens rea), there are hardly any actions which Israel perceives as "dangerous to security" which do not appear in the oPt penal code, which allows the military prosecution to indict alleged offenders. Nonetheless, numerous detainees have not been indicted; evidently, administrative detention is more convenient.

4. Judicial review takes place within 8 days from the date of detention. Afterwards the detainee has the right to appeal. A single military judge performs the “judicial review”.

Article 43 of Geneva Convention speaks about the right of an internee”to have such action reconsidered […] by an appropriate court or an administrative board." According to the official commentary, it means that **the decision should never be left to one individual. It must be a joint decision**. This offers a **better guarantee of fair treatment to the protected person**. The experience of lawyers on this score, clearly affirms this.

The fact that the military administration calls the military judge “the court” does not make him one. The proceedings before him greatly differ from those of a court. A judge performing a judicial review of a detention order is presented with a summary of the ever-classified information obtained through either ISA informants or electronic devices, together with an ISA opinion about the organization to which the detainee allegedly adheres and about the situation in the region. Sometimes, he is also presented with statistical data based on profiling.

All of these are intended to prove the danger emanating from the detainee. They are all kept secret and withheld from the detainee and his lawyer. No witnesses are heard. No primary documents are brought before the judge. No one in fact expects that the judicial review to follow due process. The HCJ has pronounced, with regret, that classified secret material is in the very nature, at the root of the administrative detention. The administrative detainee is thus left defenseless.

5. Let us consider several articles of Section IV of the Geneva Convention on the treatment of internees. Article 81, on maintenance, stipulates that "Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance. The detaining power shall provide for the support of those dependent on the internees, if such dependents are without adequate means of support or are unable to earn a living". However, this right has not even been contemplated by Israel. During their hearings, many detainees complain about the desperate economic

situation of their families for whom are the sole providers, but their complaints are ever left unheeded.

Article 85, on accommodation, stipulates that: "The Detaining Power is bound […] to ensure that the protected persons shall, from the outset of their internment be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigors of the climate […]".However prison conditions are a far cry from the ones required, thus, internees, including administrative detainees, are kept in tents in the harsh climate of the Keziot prison.

Article 94, on recreation, study, sports and games, stipulates that: "The detaining power shall encourage intellectual, educational and recreational pursuits." However these are neither encouraged nor provided on request; there are neither space nor resources.

Article 97, on Personal property and financial resources, stipulates that: "Internees shall be permitted to retain articles of personal use. Monies, cheques […] and valuables in their possession may not be taken from them [...]. However, these are forbidden, and disciplinary measures are taken if such items are found.

The Israeli authorities and the HCJ address the problem of administrative detention and detainees in their typical manner of dealing with other issues pertaining to the occupation and the occupied, i.e. protected persons. The rulings of the HCJ constitute self-made rules which are permissive of what experts worldwide hold to be flagrant violations of international humanitarian and human rights law.