STATE OF ISRAEL
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The Legal Framework for the Use of Administrative Detention as a Means of Combating Terrorism

The surge in terrorism in Israel over the past few years has forced the State of Israel to take appropriate measures to protect itself and its residents, including the need to use administrative detention as a preventative measure. The Supreme Court has frequently pointed out the severity of the measure of administrative detention and thus its implementation is carried out with the greatest of caution in order to ensure the procedural requirements, as they are set out in the law, are properly adhered to. An examination of administrative detention, its background and legitimacy in international law, will demonstrate the necessity of the use of this legal process in ensuring the safety and security of the State of Israel and its people.

The Authority for Administrative Detention as Provided for in International Law

The legal process employed by Israel for administrative detention is provided for in two legal instruments: The *Administrative Detention Order (Temporary Provisions) 1988*, applies to the areas of the West Bank and Gaza under Israeli control. The *Emergency Powers (Detention) Law 1979*, applies in Israel to those living outside of the administered areas. The measures implemented by Israel, conform with Article 78 of the *IV Geneva Convention 1949*, which authorizes the use of administrative detention in occupied territories where:

> *If the Occupying Power considers it necessary for imperative reasons of security to take safety measures concerning protected persons [that is, residents of the occupied territories], it may, at the most, subject them to assigned residence or internment [administrative detention].*
>
> *Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it should be subject*

> *to periodic review, if possible every six months, by a competent body set up by the said Power.*

The State is doing all it can to protect its citizens and ensure the security of the region, but at the same time it fully complies with the rule of law, on both an international and a domestic level. As it was held in the case of **Ajuri v. IDF Commander** [HCJ 7015/02]:

> *The State seeks to act within the framework of the lawful possibilities available to it under the international law to which it is subject and in accordance with its internal law…. Indeed, the State of Israel is fighting a difficult war against terror. It is a war carried out within the law and with the tools that the law makes available.* [Per Chief Justice Barak]

Administrative Detention in Contrast to Criminal Proceedings

Contrary to some arguments, administrative detention is not the result of the government's inability to "deal appropriately" with evidence. The measure is resorted to as a consequence of certain extreme circumstances, which were recognized and provided for in the *IV Geneva Convention*. The official commentary of the International Committee of the Red Cross (1958), to the Convention, explains that even when ordinary criminal procedures are not possible against certain suspects, the state:

> *…may for reasons of its own, consider them dangerous to its own security and is consequently entitled to restrict their freedom of action.*

It is clear that the drafters of the Convention were aware that in certain circumstances, situations will arise in which the normal criminal procedures will not suffice. Of course in these circumstances, special standards of judicial supervision must apply to ensure that the power to use this measure is not abused. Administrative detention is resorted to only in cases where there is corroborating evidence that an individual is engaged in illegal acts which endanger the security of the state and the lives of civilians. It is only used in circumstances where the usual judicial procedures are inadequate because of a danger to sources of information or a need to safeguard classified information which cannot be revealed in open court.

The courts are aware of the effect of administrative detention on the principle of due process and will consequently always examine the possibility that normal criminal proceedings should be instituted instead of administrative proceedings. Supreme Court Justice Levine in the case of **Ben Horin** [HC 4/94], stated the test that should be applied by the court in determining whether administrative detention is appropriate:

> *Does the person against whom [an order for administrative detention has been made], present a substantial danger to the security of the state and public safety, is there a prima facie evidential basis for these fears...would it not be more appropriate to*

> *adopt, if at all, normal [criminal] proceedings against him in a proper trial...?*

Only after such a test has been applied, will the courts determine whether the circumstances dictate that a criminal trial is appropriate or that the administrative detention order is lawful.

Detention as a Means of Prevention

In accordance with the official interpretation of Article 78 of the *IV Geneva Convention* by the International Commission of the Red Cross, as cited above, administrative detention is used as a preventative measure and is not intended as a punishment for violations already committed (to distinguish it from criminal proceedings). It is not used, as some have argued, as a means to incarcerate those who have recently been freed from jail, when there is no real evidence with which to convict. In a recent appeal against a detention order before a military court, the judge ruled, regarding the petitioner's allegation that her detention was for acts she had already committed and served prison sentences for:

> *the past of the petitioner cannot be used in itself, as a ground upon which an administrative detention order may be made*. [ADA 48/97]

The Judge determined that for the purposes of a lawful detention, he would have to be satisfied that there existed:

> *..evidence, which shows as a near certainty, that failure to detain, would lead to substantial harm to the security of the area or its inhabitants. In other words, that there exists evidence that shows that the activities and behavior of the petitioner, in the period prior to her detention - or to be more precise, since her release from imprisonment until the present detention - endangered the security of the area and its inhabitants.* [ibid]

It is clear therefore, that an administrative detention order will never be lawful where it is made on the basis of the non-violent exercise of a person's right to freedom of expression and association. As Supreme Court Justice Levine stated in an appeal on an administrative detention order in 1988:

> *The appellant as a free man in a state founded on the principles of democracy, is free to express his opinions, and is free to conduct his business and dealings for as long as there is nothing in them which is very likely to endanger the security of the state and its vital interests. Therefore, the appellant cannot be deprived of his freedom because of his opinions.*. [HC16/88].

The Supreme Court, in the judgment of **Anonymous v. The Minister of Defense** [7048/98], held that the Minister of Defense did not have the authority to place a person in administrative detention when that person does not pose a threat to national

security and is being held as a “bargaining chip” for the sole purpose of providing leverage for the exchange of kidnapped IDF soldiers.

The Steps in the Legal Procedure of Administrative Detention

In 1991 when Israel ratified the *United Nations International Covenant on Civil and Political Rights*, in light of the constant and continuing threat of terrorism, it derogated from the provisions of Article 9 which deals with the matter of arrest and detention. Nevertheless, in spite of the derogation to which it was entitled under Article 4, Israel has adhered to all of its provisions, ensuring that no one is subjected to arbitrary detention, that deprivation of liberty is always based on the grounds and procedures established by law and that a detainee always has access to a court empowered to rule without delay on the lawfulness of his detention.

Israel's detention procedure in the territories adheres to and in several respects surpasses the protections to the rights of detainees as provided in Article 78 of the *IV Geneva Convention* and in Articles 4 and 9 of the *International Covenant on Civil and Political Rights*. Before a detention order is issued (in the West Bank or Gaza Strip), military legal counsel must confirm that the information on which it is based has been corroborated by a reliable source. In many cases two or more such sources are required. A military commander may issue a detention order for a period of no more than six months. Significantly, no time limit is prescribed by Article 78, which calls only for periodic review. Under Israel's procedure, an order may be renewed, but like any new order, it is subject to appeal.

All recipients of detention orders are granted the right to legal representation of their choice as well as the opportunity to appeal their detention order at two judicial levels. As part of the appeals process, the court may hear evidence presented by security personnel out of the presence of the detainee or his attorney. However, the detainee is always informed of the general reasons for the order against him. At the appeal hearing, the detainee and his lawyer may respond to the allegations, call witnesses and ask questions regarding the security information. Typically the appeal from the time of filing until the judge's decision takes no more than a few weeks.

In addition to the right of a first appeal to an appeal judge, which fully satisfies the requirements of Article 78, a detainee may further petition to Israel's Supreme Court sitting as the High Court of Justice. Israel was the first and remains the only country in the world to have opened its highest court to non-citizens petitioning against administrative orders.

The procedural aspects of administrative detention guarantee respect for due process. For example, in the case of **Hazbun and Abu Sulkan v IDF Commander of Judea and Samaria** [HC 30/89], the Supreme Court was asked to review two separate decisions of the Military Appeals Judges. In each case, the Military Appeals judge had held a hearing and subsequently decided to uphold the detention order against the petitioner, although in one case the judge had reduced the period of detention. Counsel for the petitioners based their appeal on the procedural claim that the appeals judges had recorded their decisions on standard forms and failed to explain the reasons why one order was confirmed and the other shortened. In finding for the

petitioners, the Supreme Court quoted the opinion of the President of the Court from another similar decision:

> *The denial of liberty not on the basis of a decision of a judicial authority is, by its very nature, a far-reaching and highly severe step, which the law permits only when circumstances exist in which it is necessary for imperative grounds of security.*
>
> *Proper discretion, which must be employed prior to issuance of the order, relates also to the question of whether the decision on the detention reflects in each concrete case the appropriate balance between a security necessity for which no other reasonable solution can be found, and the fundamental principle according to which a person's liberty must be respected. These considerations are also those examined by the judge during the appeal, in light of the arguments of the parties, usually relying on a set of facts, on information regarding the detainee and its meaning and on the weightiness of the security dangers in question in the specific case* [per Chief Justice Shamgar, HC 253/88].

It should be pointed out that on many occasions the courts have either reduced the period of detention or cancelled the order where there was a question about the necessity for such a measure.

The Use of Secret Evidence and Question of Full Disclosure

There have been individuals and organizations that have criticized the aspect of the detention procedure which allows judges to examine security evidence never revealed to the detainee or his legal counsel. Although it would be preferable to bring a detainee to trial in open court with full disclosure of evidence supporting the charges, the disclosure of this evidence could in many instances, alert other members of a terrorist cell, enabling them to increase the effectiveness of their attacks, evade capture or relocate their weapons. Moreover, the court's decision to prevent the public viewing of this evidence protects intelligence sources from attack and allows the gathering of information to continue unhampered. In the case of **Anonymous v. The State of Israel**, Supreme Court Justice Strassberg-Cohen restates the test to be applied with regard to secret evidence:

> *Does the material need to remain confidential because revealing it would harm state security? If not, then it should be revealed wholly or partially to the petitioner.* [HC 3514/97].

Use of Administrative and Preventative Detention in Other Democracies

It is important to recognize that some Western democracies have in past years enacted or used laws which provide for administrative detention. Since 1970, England, Canada and Italy have utilized detention domestically to combat terrorism and large scale threats to lives. For example, the Canadian War Measures Act (R.S.C. 1970

c.W-2), allowed the Federal cabinet to authorize measures deemed necessary for the security, defense, peace, order and welfare of Canada. It included the powers of, "arrest, detention, exclusion and deportation." This Act was employed in order to quell terrorism by French-Canadian separatists. In total, some 450 French-Canadian citizens were arrested and detained incommunicado. Most were never charged with any crime.

The *Terrorism Act* enacted in England in 2000 replaced the previous measures relating to administrative detention which were enacted during the late 1970's. Under its policy of "internment", the British government imposed large-scale administrative detention of security suspects in Northern Ireland in terms of the *Northern Ireland (Emergency Provisions) Act* 1972 and the *Prevention of Terrorism Act* of 1974, which were subject to various amendments over the years until the coming into effect of the *Terrorism Act* of 2000.

According to section 41 of the *Terrorism Act, " A constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist."* A 'terrorist' for the purpose of this section is defined as someone who has committed a long list of offences as set out in this law or, is or has been concerned in the commission, preparation or instigation of acts of terrorism. A person may be held in administrative detention up to 48 hours. This period can be extended for up to five days in an application made to a judicial authority by a police officer of at least the rank of superintendent.

In light of the events of September 11, 2001, England further enacted the *Anti-Terrorism, Crime & Security Act* of 2001. This Act, read together with the *Immigration Act* of 1971, allows for the deportation and the administrative detention of a person once the Secretary of State has issued a certificate, when under the reasonable belief that the person's presence in the country is a risk to national security and he suspects that the person is a terrorist. The powers given to the various authorities under this act are very similar to the *USA Patriot Act* of 2001, which was enacted after the September 11 terror attack.

Conclusion: The Balance Between Human Rights and State Security

Whilst it is true that Israel has derogated from Article 9 of the *ICCPR*, Israel in effect, continues to honor all of its provisions together with those of the *Universal Declaration of Human Rights*. The measures taken in the West Bank and Gaza Strip, are provided for under Art 78 of the *IV Geneva Convention*, and in addition to the safeguards provided for there, Israel is careful to ensure that additional checks and balances exist to prevent abuses.

Israel strives to strike a delicate balance between protection of human rights and maintenance of public order and state security under very difficult circumstances. The choice of security measures takes place against a backdrop of terrorist violence directed at the general population of Israel. The issue of human rights remains at the forefront of the court's reasoning, even during these difficult times when the country is plagued by terrorism. The consideration given to human rights is evident from the

recent Supreme Court judgement of **Ajuri v. IDF Commander** [HCJ 7015/02], in which the President of the Supreme Court states that:

> *Indeed, the position of the State of Israel is a difficult one. Also our role as judges is not easy. We are doing all we can to balance properly between human rights and the security of the area. In this balance, human rights cannot receive complete protection, as if there was no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle. Our work, as judges, is hard. But we cannot escape this difficulty, nor do we wish to do so.*

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