S t a t e o f I s r a e l
M i n i s t r y o f J u s t i c e
The Human Rights and Foreign Relations Department

Date: 19 Elul 5769
8 September 2009
Re: 3760

Ms. Yael Stein, Attorney
Director of Research
B'Tselem – The Israeli Information Center
for Human Rights in the Occupied Territories
P.O. Box 53132, 8 Hata'asiya Street (Fourth Floor)
Jerusalem 91531

Dear Madam,

Re: **Draft of Report on Administrative Detention**

Our comments regarding the above-referenced draft report are as follows:

Administrative detentions

1. First, it should be mentioned that the use of administrative detention is derived from security constraints and is carried out for preemptive purposes in the framework of the ongoing war against terrorism, in cases where it is impossible to otherwise hinder the security threat. The use of administrative detention comports with the provisions of international law mentioned in the draft report: both with respect to international human rights law, specifically the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and with respect to international humanitarian law, specifically Article 78 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 (hereafter: "the Fourth Geneva Convention").

2. Procedurally, the detainee's right to appeal (section 5) and the requirement of judicial review (sections 1(b) and 4(a)) are anchored in the Order Regarding Administrative Detention. This, while under Article 78 of the Fourth Geneva Convention judicial review is not specifically required. The maximum period of administrative detention under the Order is six months, and every extension is subject to judicial review; in

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practice, therefore, judicial review is held once every six months. All in accordance with the requirements of the said Article 78.

3. Substantively, while the accepted interpretation of Article 78 permits a person to be held in administrative detention in a wide variety of cases, including for reasons relating to the person's activity, knowledge, or traits – and even his/her age, in certain situations – Israel's practice in this context is much more restricted, where a person is held in administrative detention only when he poses an individual threat, contrary to what the draft report contends.

4. Therefore, in the course of judicial review, the court examines all the evidentiary material relating to the detainee, including the extent to which the material is up-to-date. In this context, the contention that the similar wording of court documents indicates a lack of exercise of judicial discretion is utterly rejected, as these are court documents that are intended to conform to the language of the relevant order; accordingly, their language is similar. Since administrative detention is an anticipative measure – contrary to criminal punishment, which refers to past occurrences – where the existing evidence do not indicate that the detainee poses a threat at the present time, he is released.

5. Accordingly, in practice, in the vast majority of cases, the duration of an administrative detention does not exceed two years (and in many instances, less than that; actually, there are currently only 36 administrative detainees who have been held in administrative detention for a (consecutive) period of more than two years). This length of time, which is shorter than the period of incarceration that, most likely, would have been imposed on the detainee had he been prosecuted in a regular criminal proceeding, proves that the decision to use the measure of administrative detention is based solely on the inability to reveal evidence. Only in exceptional cases is the detainee held for a longer period, and this, as stated, only when the evidentiary material supports it.

6. Furthermore, Israel takes many measures to reduce, to the extent possible, the use of administrative detention. Administrative detention is used as a measure of last resort when no other alternative exists to remove persons engaged in terrorism, where significant evidence indicates that the person in question poses a real and imminent security threat to the security of the area and the public. In seeking to ensure that all efforts are made to exhaust the criminal-proceeding framework, every detainee undergoes, shortly following his arrest, a criminal investigation either by the Israel

Police or by the Israel Security Agency (ISA), aimed at obtaining admissible evidence. The results of the criminal interrogation are forwarded to the military prosecution in the area to examine the possibility of filing an indictment. Only in cases in which the prosecution concludes that it is impossible to prosecute the detainee on criminal charges is an examination made to determine whether the administrative detention channel can be implemented.

7. The Military Advocate General's Office monitors all of the administrative detention procedures, and examines the need for administrative detention in light of the threat that the person poses and the evidentiary material that exists in the matter. In relevant cases, the matter is also brought to senior officials in the Ministry of Justice and in the State Attorney's Office for examination. All these actions precede the judicial review itself.

8. Moreover, in the framework of judicial review itself, and contrary to the contention made in the draft report, there is substantial review of the procedure, thus for example, in 2008, 2,277 orders were heard, of these, in 1,028 orders (45 percent) the detention period was reduced and some 154 orders (6.7 percent) were cancelled. In addition, of the 527 appeals that were accepted regarding administrative detention in 2008, 273 were appeals filed by the defense. Furthermore, in recent years, several fundamental decisions were made, among them establishing the possibility of holding a hearing before an expanded judicial panel on essential questions, as well as authorizing the military courts to approve orders in a limited manner while restricting the authority of the military commander to repeat the use of this means. In addition to the supervision in the framework of the military judicial system, there is additional supervision and review in the form of petitions to the High Court of Justice, which are frequently filed against decisions of the Military Court of Appeals.

9. Also, contrary to the information presented in the draft report, the judicial review must be carried out by a judge holding a rank of captain, at least.[1] In the past two years, a senior judge holding the rank of lieutenant colonel coordinates the judicial review in the court of first instance.

10. Regarding the presence of a representative of the ISA during court hearings, it should be noted that it is the practice of the military courts, at all levels, that in cases in which claims are raised by the defense concerning intelligence information, and the

answers provided by the prosecution are not deemed satisfactory by the Court, the Court summons an ISA representative to appear at the proceedings and provide clarification and answers as necessary.

11. As also noted in the draft report, the Supreme Court, in its rulings over the years, has emphasized the exceptionality of the means of administrative detention, and the need to use it only when the circumstances absolutely require so.[2] Needless to mention that the Military Advocate General's Office strictly complies with Supreme Court's rulings and the principles outlined therein, and that the possibility of transferring a detainee from administrative detention procedures to criminal procedures is constantly considered – even for a lesser offense than the one for which the person was initially detained. Indeed, this is accomplished in many cases, upon the finding of evidence that can be revealed in court for the purpose of the criminal prosecution.

12. The Supreme Court addressed the use of privileged evidence in administrative detention proceedings, stating:

> "[R]eliance on inadmissible administrative evidence and on privileged material for reasons of state security lies at the heart of administrative detention, since had there been sufficient admissible evidence that could have been shown to the detainee and brought before the court, in general the measure of holding a criminal trial should be chosen […] There is no doubt that a proceeding that is held ex parte for the sake of presenting privileged evidence to the court has many deficiencies. But the security position in which we find ourselves in view of the persistent hostilities against the security of the State of Israel requires the use of tools of this kind when making a detention order under the Internment of Unlawful Combatants Law, the Emergency Powers (Detentions) Law or the security legislation in areas under military control[…]"3

13. It should also be noted that the steady decline in the number of administrative detainees, a decline that is mentioned in the draft report as well, also testifies to the efforts made by law-enforcement authorities to minimize the use of administrative

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[1] Section 4(a) of the Order Regarding Administrative Detention (Temporary Provision) [Consolidated Version] (Judea and Samaria) (No. 1591), 5767 – 2007.

[2] HCJ 11006/04, *Kadri v. Commander of IDF Forces in Judea and Samaria*, Tak-El 2004 (4) 3109; Ad. D.A 7/94, *Ben Yosef v. The State of Israel*, Tak-El 94 (3) 1582; HCJ 554/81, *Beransa v. OC Central Command*, IsrSC 36 (4) 247; HCJ 3239/02, *Marab v. Commander of IDF Forces in Judea and Samaria*, IsrSC 57 (2) 349; HCJ 11026/05, *A. v. Commander of IDF Forces*, Tak-El 2005 (4) 3190.

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

detention, efforts that are, of course, contingent on the security situation in Judea and Samaria. Moreover, the small number of administrative detainees which currently constitutes 4.83 percent (364) of all the security related detainees, of which there are now 7,522, clearly indicates the limited use of administrative detention and the clear preference for criminal prosecutions in matters relating to terrorist activity.

14. Regarding the use of administrative detention in the case of minors, it should be noted that such occurrences are extremely unusual, and are taken only in extreme cases and under close supervision of the Military Advocate General's Office. Regarding the holding of minors in administrative detention, it must be noted that minors are held in a detention facility operated by the Israeli Prisons Service, and that separation of minors from adult detainees is required by the directives and is fully implemented - the draft report does not contend otherwise. Indeed, at detention facilities operated by the IDF (including facilities in which detainees are held prior to the hearing in their case), it is not always possible to ensure complete separation between adults and minors, but this lack of separation lasts for only an extremely short period of time.

Unlawful combatants

15. As is known, in recent years Israel has been engaged in an armed conflict with various terrorist organizations, which wage substantial warfare against Israel from within foreign territory, which is not under Israel's effective control. A clear example of this is the Hamas organization, which operates from within the territory of the Gaza Strip, which has been under its complete control since June 2007, and from which it constantly launches missiles and rockets at the southern part of Israel, and against which IDF forces operated during December-January (Operation "Cast Lead").

16. The campaign against these terrorist organizations constitute an armed conflict for all intents and purposes, in which the adversary routinely and flagrantly breaches international humanitarian law, by intentionally directing its attacks solely against civilian objects, with the declared intention of injuring mainly Israeli citizens and residents, and also by having their combatants operate in the midst of the civilian population, without distinguishing themselves from it, and making active use of the civilian population as a "human shield."

17. For these reasons alone, it is clear that terrorists who are apprehended by IDF forces in the framework of the hostilities **are not entitled to prisoner-of-war status**. However, this does not mean that Israel may not hold them as long as the hostilities

actions continue, for the purpose of preventing them from returning to the "cycle of hostilities." Although this authority is not explicitly enshrined in the conventions that comprise international humanitarian law, it derives directly from the right of a party to a conflict to use force against the combatants of the adversary to remove them from the "cycle of hostilities."

18. The Internment of Unlawful Combatants Law (hereafter: "the IUC Law") is intended to anchor this basic principle of international humanitarian law in Israeli domestic law, by providing a procedure for the holding of enemy combatants and stipulating their basic rights. Thus, contrary to claims made in the draft report with regard to the purpose and intent of the Law, the Supreme Court affirmed that: "The law was therefore not intended to allow detainees to be held as 'bargaining chips.' The purpose of the law is to remove from the cycle of hostilities someone who belongs to a terrorist organization or who takes part in hostilities against the State of Israel."

19. It should be emphasized that the IUC Law requires that judicial review be conducted periodically also with respect to persons held pursuant to the Law (although these requirements do not exist with respect to prisoners of war).

20. The contention raised in the draft report – whereby the state prefers using internment under the IUC Law to detention pursuant to the Administrative Detention Law, for the reason that the former provides greater freedom of action than the latter – is unfounded. First, as the Supreme Court recently held, each of the laws is intended for a different "population". Second, the statement that, in the case of internment under the IUC Law, "the judicial review is less frequent," is baseless. Regarding the caution and proportionality implemented in this procedure, one might note that the majority of those detained during Operation "Cast Lead" have been released, although their detention was approved by the court. The necessity in continued detention in constantly examined – and the IDF, in consultation with the ISA and the State Attorney's Office, found it appropriate to eventually cancel the internment orders. All but those of two – found to pose a significant risk.

21. The legality of the Law and its conformity to the relevant standards of international humanitarian law were confirmed by the Supreme Court (Cr. Ap. 6659/06, *A. and B. v. State of Israel*). In this case, the court discussed, *inter alia*, the argument that the Law creates a "third incarceration track," as claimed in the draft report. On this point, the Honorable President Beinisch held:

> "The appellants argued before us that the detention provisions provided in the law de facto create a third category of detention, which is neither criminal arrest nor administrative detention, and which is not recognized at all by Israeli law or international law. We cannot accept this argument.[…] It should be noted that the actual power provided in the law for the administrative detention of a 'civilian' who is an 'unlawful combatant' on account of the threat that he represents to the security of the state is not contrary to the provisions of international humanitarian law.".[4]

22. The argument that the amendment recently made to the IUC Law "likens the internment powers enshrined in the Law to those in administrative detention orders" is absolutely mistaken, as all the procedural restrictions specified in the IUC Law will continue to apply also where a "large-scale combat action" is declared.

23. It should also be noted that, in the framework of the said amendment, the District Court is empowered to appoint, for a detainee who is not represented by counsel, an attorney from the Public Defender's Office, and to postpone the judicial review until the detainee and his attorney have time to meet and consult (section 6(c)). Simultaneously, proceedings under the IUC Law were added to the list of instances in which a person is entitled to representation by the Public Defender's Office, which are specified in section 18(a) of the *Public Defenders Office Law* 1995-5755,

24. It would not be superfluous to state that the said right, for legal representation at the expense of the adversary side to an armed conflict, does not exist in international humanitarian law – whether regarding prisoners of war or any other detainee – and is granted, as an expression of the profound commitment of Israel to due process and transparency, to the extent possible, in the matter of all detainees.

25. Finally, it should be mentioned that, following further examination made with the relevant officials in the IDF, the IDF Spokesperson's response of 4 August 2009 to your letter regarding the number of persons being held under the IUC Law did not list two persons: a Lebanese citizen, with respect to whom an IUC order was issued on 7 July 2003, and who was released on 29 January 2004, and a Canadian citizen, with respect to whom an IUC order was issued on 21 October 2002, and who was released on 29 January 2004.

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[4] Pars. 15-16.

26. Regarding specific cases referred to in the draft report:

a. Mohammed Haraz – As to Haraz 's claim that "the ISA interrogators told me that I am wanted for 12 years and summons for interrogation was never delivered to me..", we wish to refer to the Military Court's ruling in A.D *Judea and Samaria* 3179/09: " It would not be superfluous to mention that there is no basis for the laches claim raised by the defense since as mentioned by the prosecutor, attempts to arrest the defendant were made but those were hindered by him and therefore a…claim can not be made."

b. Wa'el al Atamna – Regarding the claim that the aforementioned was arrested due to membership in Hamas, we would mention, as noted by the State in Ad.D A. 1510/09, "Atamna was not told that he is a Hamas activist although it is possible that that was the tenor since most of the detainees at the time were Hamas activists". Regarding the claim that the prosecution argued that the aforementioned was a member of the Democratic Front and that the ISA representative did not know that Atamna was receiving a salary from the Palestinian Authority, we wish to mention that Atamna's claims were thoroughly examined by the Supreme Court in Ad.D A 1510/09 and were rejected. Therefore, Atamna's right to due process was upheld as was also held by the Honorable Judge Hayut in her ruling: "[..] It appears that the flaws in the internment procedure concerning the appellant do not justify the nullification of the order in this case, since those were fully restored at in the course of the judicial review and the appellant right to due process was upheld."

c. Osama Haggag Musa Zare'e – Hearings were held before the District Court with regard to the aforementioned, whereas in the second judicial review procedure, the Honorable Judge Mudrik examined the privileged evidentiary material and unequivocally determined that current assessments by the security authorities are based on solid grounds and therefore there is no justification for his interference in the validity or duration of the internment order."

Sincerely yours,

Hila Tene-Gilad, Adv.

Acting Director (Human Rights and Liaison with International Organisations)