FIVE QUESTIONS ON ADMINISTRATIVE DETENTION AND ADMINISTRATIVE CONTROL ORDERS IN THE OCCUPIED TERRITORIES:

By what authority?

For what purpose?

Against whom?

How many?

What's the problem with it?

Suspicions that have not been proven in a fair trial could well be baseless. A person is presumed innocent until his or her guilt is proven beyond a reasonable doubt. The use of administrative detention and control orders are among the hallmarks of totalitarianism; giving the state power to arrest or impose draconian restrictions on freedom of movement – without the need to prove guilt in a fair and proper judicial proceeding – opens the door wide not just to incorrect decisions, but also to the abuse of authority.

By what authority and for what purpose?

Administrative detention order

Military legislation in force in the Occupied Territories allows for the detention of an individual by administrative order – without indictment or trial – for up to six months. This order can be repeatedly extended for six-month periods, with no maximum term. This means that an individual can be incarcerated for years (indeed, this has happened more than once) without due process, without the suspicions being put to the test of a fair trial, and without the fundamental right of defending oneself against these suspicions.

Administrative detentions in the West Bank are now based on Paragraphs 284-294 of the Order Regarding Security Provisions [consolidated version] (Judea and Samaria) (No. 1651) (a military order that constitutes legislation in the Occupied Territories). This order empowers military commanders in the West Bank to issue an administrative detention order when there are "reasonable grounds to assume that the security of an area or public security requires that an individual be held in detention". Although the order requires that an administrative detainee be brought before a military judge to authorize the detention (within eight days from the day of arrest), this is not a legal proceeding for determining the guilt of the suspect, as will be explained below, but "judicial review" in which most of the evidence related to the suspicion is not made known to the detainee or his attorney, nor is the

detainee given a suitable opportunity to defend himself. The decision of the judge can be appealed in the Military Appeals Court. Although administrative detainees who have exhausted all military avenues of appeal can turn to the High Court of Justice, experience indicates that the Supreme Court generally does not intervene in these decisions.

Under international law applicable to the Occupied Territories, there is an absolute prohibition on arbitrary detention. Due to the grave human rights implications of administrative detention and the clear danger of its abuse, international law sets strict limits on its use. It must, for example, be confined to exceptional and particularly extreme cases, and is only intended for "preventive" purposes – to avert an immediate and severe security danger of the individual detained, and may under no circumstances be used for punitive purposes.

Israeli law also permits the use of administrative detention within Israel. This power, derived from draconian Mandatory statutes, was anchored in the Emergency Powers (Detention) Law in 1979. This law is valid only when a state of emergency has been officially declared, but such a declaration has been in force ever since Israel was established. Under Israeli law, the Minister of Defense is authorized to order an individual's detention for six months if the Minister has "reasonable grounds to presume that the security of the state or public security require the detention". Unlike the situation in the Occupied Territories, Israeli law mandates that a detainee be brought before a civil judge (the District Court President) within 48 hours, and that the need for continuing the detention be reviewed every three months. The District Court decision can be appealed in the Supreme Court.

Administrative Control Order

According to the law in force in the Territories, a military commander is authorized to issue administrative orders that prohibit an individual from entering a specified area or that confine him to a defined area without any criminal proceeding against him. These orders – which are also supposed to constitute "preventive" and not "punitive" measures – are set out in the Order Regarding Security Provisions and in the Defense (Emergency) Regulations.

The Order Regarding Security Provisions bestows broad powers upon the military commander in the Occupied Territories, allowing him to issue "control orders" and other special supervision orders under circumstances in which he believes that these are "required for decisive security reasons". For example, the military commander (the GOC Central Command in the West Bank,) can prohibit someone from entering a specific area, demand that he remain in a defined area, impose house arrest on him, or other orders.

The decision by a military commander to issue a restraining order or a supervision order can be brought to the Military Appeals Committee. Here, too, however, the proceedings are generally based on classified material that the suspect is not allowed to see.

Against whom and how many: Use of administrative detentions and restraining orders

Since 1967, thousands of Palestinians have been held in administrative detention for varying lengths of time, ranging from several months to several years. The greatest number of administrative detentions was recorded during the years of the first Intifada. During the second Intifada, the number of administrative detainees reached a thousand in some months. After the end of this Intifada, the numbers dropped, but they fluctuate from year to year. The year 2011 saw an average of 250 administrative detainees each month. In recent years, the terms of detention of most detainees ranged from three months to three years. In December 2011, for example, according to Prisons Service data provided to B'Tselem, there were 309 administrative detainees, of whom sixty were in detention between 12 and 18 months, another fifteen were in detention between 18 and 24 months, and one detainee was held in detention without trial for over five years.

Israelis in the Territories are also held in administrative detention, though relatively infrequently. According to B'Tselem data, nine Israelis, all residents of settlements, had been detained over the years and as a rule kept in detention for up to six months.

Complete data about the extent of administrative detention from the B'Tselem website

What's the problem: Severe harm to human rights and the rule of law

Secret evidence – severe harm to the right to due process

Administrative detention, which allows for denial of a person's freedom for months without trial, constitutes a severe infringement of fundamental human rights, above all the right to liberty and dignity.

Although administrative detainees are brought before a judge and there is judicial review over their detention, because most of the material justifying the detention order is secret – not revealed to either the suspect or his attorney – the detainee actually has no real opportunity to defend himself or refute the suspicions against him. In a great many cases, the detainee is not even told the details of the specific charges against him. As a result, judicial review cannot function as a sufficient guarantee of the necessity of the detention, and even the fairest of judges cannot administer justice. Judicial review in this situation lacks the minimal guarantees required of a proper judicial proceeding.

Furthermore, the first judicial review of the detention takes place eight days after the arrest, under military law in force in the Occupied Territories, rather than 24 hours, as in a regular criminal proceeding in Israel (or even after 48 hours, as in an administrative detention within Israel).

Prohibiting or limiting the movements of an individual by administrative order without trial and based on classified material constitutes a stringent measure of enforcement that harms a spectrum of rights, including freedom of movement, the right to due process, the freedom of occupation, the right to personal liberty, the freedom of expression, the right to human dignity, and more.

These two measures – administrative detentions and administrative restraining orders – are convenient tools for incarcerating an individual or constraining his movement when the authorities lack admissible evidence or are unwilling to reveal their evidence – to prove a person's guilt.

Administrative control orders resemble administrative detention in that they can also be issued without indicting someone or opening a criminal investigation against him. Like administrative detention, these orders are also generally based on classified evidence that is not revealed to the suspect or his attorney. Thus, even if the individual is formally given an opportunity to present his arguments or objections to the decision, he cannot relate substantively to the charges to suspicions against him.

This is also true of petitions to the High Court of Justice – the security forces are not required to reveal the evidence to the appellant and may present their arguments *ex parte* – not in the presence of the appellant or his attorney.

The use of classified evidence gravely damages the right to due process and deepens inequality between the state and the individual in a legal proceeding. Harm is wrought not only to the individual's right to self-defense, but also to the public's interest in monitoring the actions of the authorities. Classified evidence enables the state to engage in actions for which they are not accountable, similar to the actions of a secret police.

Thus harm is inflicted upon the rule of law, transparency, and representativeness in a way that undermines the legitimacy of governance itself. Finally, using secret evidence opens the door to abuse and the arbitrariness of the authorities, which constitutes a serious danger to the fundamental principles upon which Israeli democracy should rest. As Justice Landau noted, "The arguments of the other side can be refuted only when they are known; one cannot debate with the sphinx".

International Law

Article 78 of the Fourth Geneva Convention, which deals with the protection of civilians during a war and applies to the West Bank, 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, in accordance with this article, this extreme measure can be used only in exceptional cases – for vital security needs related to the dangerousness of this individual detainee.

International Human Rights Law, which also applies to the Territories, mandates that due process must be given to all whose liberty has been curtailed – even in an extreme and temporary state of emergency. The prohibition on arbitrary arrest is absolute in international law and in force at all times; due process constitutes a vital guarantee to prevent arbitrary arrests.

The widespread and routine use of administrative detention made by Israel in the Occupied Territories, with its denial of the minimal guarantees of due process, does not meet these standards.

Furthermore, the fact that a detainee in the Territories can be held for eight days under administrative arrest until he is brought before a judge contravenes fundamental principles of international law, opening the door to false arrest, unsupervised incarceration and detainee abuse. It also violates the obligation of the State under international law to ensure oversight of the detention of individuals to prevent torture.

Article 49 of the Geneva Convention prohibits "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power". Israel, which incarcerates administrative detainees in its territory, thereby violates the provisions of this Convention.

"But it's not punishment – it's a preventive measure"

Even if the declared purpose of the administrative detentions and orders is preventive – to grapple with the possible danger of an individual to public security, and not to punish him for past action – this dangerousness is generally learned from the secret suspicions of criminal activity.

It should be kept in mind that suspicions that have not been put through the stringent test of a fair trial might be disproved; hence a "suspect" should not be presumed guilty. Administrative detention and control orders are among the hallmarks of totalitarianism; giving the state power to make arrests or impose draconian restrictions – without the need to prove guilt in a fair and proper trial, opens the door wide not just to error, but to the abuse of authority.

Appendices:

Regulations 108-110 of the Defense Regulations: Restriction and Supervision Orders
http://www.acri.org.il/he/wp-content/uploads/2012/01/hagbala1.pdf (Hebrew)

Order Regarding Security Provisions: Restraining Orders and Supervision
http://nolegalfrontiers.org/en/military-orders/mil01/67-security-provisions-chapter9-271-315

Order concerning Administrative Detention, No. 1226 (on the website of Moked: Center for the Defense of the Individual)
http://www.hamoked.org.il/items/3760.pdf

The Association for Civil Rights in Israel – position paper on the use of administrative detention
http://www.acri.org.il/he/?p=1434