# Legal Q&A: Administrative Detention and Hunger-Strike Protests

**On April 17, 2017, Palestinian Prisoners' Day, over 1,000 Palestinian prisoners launched a hunger strike in protest against their severe conditions of incarceration and other violations of their human rights. Among the issues they raised were limitations placed on family visits, inadequate medical care, use of solitary confinement and lastly, administrative detention.**

**Although the hunger strike has now ended after 40 days, the significant human rights issue of the continuing use of administrative detention against Palestinians has not ended. This issue was evident in previous mass hunger strikes, and has also been at the core of the vast majority of individual hunger strikes.**

**Physicians for Human Rights – Israel (PHRI) and Lawyers for Palestinian Human Rights (LPHR) have prepared this Legal Q&A so as to provide essential information on administrative detention and the legal landscape governing the treatment of detainees who carry out hunger strikes in last resort protest.**

## What is administrative detention?

Administrative detention allows for the detention of individuals without criminal charge or trial by virtue of an administrative order as opposed to a judicial decision following ordinary judicial proceedings.

## Is administrative detention permitted under international law?

Administrative detention is permitted under international human rights law and international humanitarian law, but only in very exceptional cases of emergency when there is no other possibility to prevent the danger posed by the detainee.

International law sets a very high threshold for the use of administrative detention in recognition that it is an extreme measure that violates the basic right to liberty and fundamental due process rights. The UN Human Rights Committee has authoritatively stated that administrative detention poses 'severe risks of arbitrary deprivation of liberty' (General Comment 35, Para 15).

PHYSICIANS FOR HUMAN RIGHTS ISRAEL
רופאים לזכויות אדם בישראל
أطباء لحقوق الإنسان إسرائيل

LAWYERS FOR PALESTINIAN HUMAN RIGHTS

## Is Israel's use of administrative detention consistent with international law standards?

Israeli, Palestinian and international human rights organisations have long had serious concerns that Israel is utilising administrative detention against Palestinians resident in the occupied Palestinian territory in breach of international law and basic due process standards.

Israel has used administrative detention against thousands of persons over the years, contrary to the requirement under international law that administrative detention is permissible only in very exceptional cases of emergency when there is no other possibility to prevent the danger posed by the detainee. The latest figures, from March 2017, indicate that Israel is holding 688 Palestinians in administrative detention.

The majority of Palestinian administrative detainees are held under individual detention orders issued pursuant to Article 285 of Military Order 1651 which forms part of the Israeli military legislation in force against Palestinians in the occupied West Bank. Under the order, military commanders are empowered to detain an individual for a maximum period of six months where detention is reasonably believed to be a means of safeguarding regional or public security. The order can be continuously extended for additional periods of up to six months indefinitely.

Israeli military law allows for the right to a review of every administrative detention order, initially before a military judge and ultimately to the Supreme Court. However, in practice, this does not amount to the right enshrined in international standards to challenge the lawfulness of the decision to detain. In the vast majority of cases, neither the lawyer nor the detainee is informed of the details of the evidence against him/her since the court is authorised to choose how much information to disclose on grounds of security.

Palestinian administrative detainees are held in prisons within Israel and the Ofer military prison in the occupied West Bank. The transfer of Palestinian detainees outside the occupied Palestinian territory constitutes a breach of Article 49 of the Fourth Geneva Convention, prohibiting the transfer of protected persons from occupied territory.

In May 2016, the UN Committee Against Torture reviewed Israel's compliance with the Convention against Torture and recommended to Israel that it "urgently take the measures necessary to end the practice of administrative detention and ensure that all persons who are currently held in administrative detention are afforded all basic legal safeguards" (art. 23).

## What is the connection between administrative detention, hunger-strike protests by detainees, and Israel's recent force feeding law?

Although ending administrative detention is just one of the demands of the recent hunger strikers, it has been at the centre of the vast majority of individual hunger strikes over the last few years. For those kept in administrative detention who have been on a hunger-strike, launching it has been their sole non-violent tool remaining after all other means of protest have failed.

On 30 July 2015, the Israeli parliament passed a law allowing the force feeding of prisoners on hunger strike. Under the law, force feeding an inmate will need to be approved by a judge, according to a set of criteria that include factors unrelated to the prisoner's well-being. The law was proposed and passed against a context of Palestinians held in Israeli jails using hunger strikes to protest against the policy of detention without charge or trial.

## What is the stance of international bodies on Israel's force feeding law?

Israel's recent force feeding law is inconsistent with Malta Declaration on Hunger Strikers adopted by the World Medical Association (WMA), which are ethical guidelines for medical professionals contending with hunger strikes. The Malta Declaration absolutely prohibits the participation of doctors in force feeding and considers it to amount to inhuman and degrading treatment. The WMA directly addressed the Israeli Prime Minister in June 2015, asking him to reconsider the bill (before it was enacted into legislation) and confirming that "It is a degrading treatment, inhumane and may amount to torture. Worse still, it is the most unsuitable approach to save lives."

The International Committee of the Red Cross (ICRC) publicly stated in response to the law that "The ICRC is opposed to forced feeding or forced treatment."

The UN Committee Against Torture recommended to Israel in its report of May 2016 that "persons deprived of liberty, competent to take informed decisions, who engage in hunger strikes' should never be 'subjected to feeding or other medical treatment against their will." They strikingly found that such action may constitute a criminal offence by stating that it "may amount to torture or ill-treatment" (para 27).

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, addressed the Israeli government in 2014 and stated that "In the context of the draft amendment to the Prisons Act to engage to force-feeding detainees, we would like to recall that acts or threats of forced feeding or other types of physical or psychological coercion against individuals who have opted for the extreme recourse of a hunger strike may constitute a cruel, inhuman or degrading treatment or even torture."

The Istanbul Protocol — the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — a non-binding document written by independent experts and published by Office of the UN High Commissioner for Human Rights, reinforces in Article 64 the importance of doctors receiving consent for treatment.

## What is the Israeli High Court's position on the force feeding of detainees?

In September 2016, the Israeli High Court (HCJ) decided that the force feeding law enacted by Israel's parliament in July 2015 was constitutional. This controversial law authorises courts to permit the force feeding of hunger strikers by doctors treating them and bases the final decision on factors that are unrelated to medical considerations. These include 'concern for human life' (although this phrasing doesn't expressly say of the hunger striker specifically) as well as 'tangible concern of severe harm to national security, inasmuch as relevant evidence has been presented'. Moreover, the law ignores due process, and permits the inclusion of secret evidence, whilst denying any possibility of compensation.

Despite appeals by PHRI, the Israeli Medical Association and other major human rights organizations, the HCJ chose to draw on the minority of Israeli ethicists and physicians that condoned force feeding as set in the context of the current law. The HCJ Judge acknowledged that force feeding can be used as a tool of oppression in some countries, but then proceeded to state: *"… I am confident that we can start from the assumption that in the Israeli legal system the likelihood of this isn't great*". This sense of confidence however is not compatible with prior declarations made about the law by international bodies.

## How does the Israeli High Court's position on force feeding of detainees compare with the European Court of Human Rights' position?

While Israel does not fall within the jurisdiction of the European Court on Human Rights, it is instructive to consider its approach to force feeding which is in contrast with the Israeli High Court.

The European Court of Human Rights (Court) has considered the issue of force feeding in a set of cases. In the 2005 case of *Nevmerzhitsky v Ukraine*, the Court stated that force feeding includes elements of degradation, which under certain circumstances constitute a violation of Article 3 of the European Convention on Human Rights (Convention) which prohibits torture and inhuman and degrading treatment.

The Court found that in deciding whether an action falls within Article 3 of the Convention and constitutes degrading treatment, it needs to reach a certain level of severity, and that the intention and objective behind the force-feeding must also be considered. In this case, it held force-feeding is not prohibited, as long as it upholds three cumulative conditions: medical necessity, compliance with procedural guarantees for the decision to force-feed, and that the conducting of force feeding is in a manner that is not degrading or inhuman.

In a similar case, *Ciorap v Moldova* (2007), the Court repeated the conditions introduced in *Nvevmerzhitsky* and ruled that as the force-feeding was carried out without medical urgency and that it appeared aimed at breaking the strike "it cannot be said that the authorities acted in the applicant's best interests in subjecting him to force-feeding, which of itself raises an issue under Article 3 of the Convention."

The Court in *Rappaz v Switzerland (2013)* ruled that force feeding – if it did take place - would not have exceeded the minimum threshold of severity required by Article 3 of the Convention, particularly in light of the safeguards put in place by the authorities, including the way in which decisions "had been accompanied by ample reasons and had been given following adversarial proceedings."

Cases falling under the Israel's force feeding law, where additional considerations unrelated to medical necessity are among the deciding factors to force-feed, and where due process guarantees are also lacking, would not meet the conditions set out by the European Court on Human Rights. These would likely therefore be defined as contrary to Article 3 of the European Convention on Human Rights, prohibiting torture, inhuman or degrading treatment or punishment.

## How does recent Israeli court decisions interpret the rights of hunger strikers?

Recent Israeli court decisions have displayed security-prone reasoning in terms of the approach to the rights of administrative detainees undergoing hunger strikes. The recent case of Bilal Kayed, who was represented by PHRI, showcases a worrying trend in Israeli case law whereby considerations of security appear to override basic respect for an individual's fundamental human rights as well as local law.

In 2002, Bilal Kayed, a 35 year old Palestinian from Nablus, was arrested and sentenced to 14 and a half years in prison. On the day of his release on 13 June 2016, a six month administrative detention order was issued against him and he was returned to solitary confinement, without charge or trial. This decision was made during a closed hearing session in which Mr. Kayed and

his legal representatives were not allowed to be present and as such could not challenge the credibility of the information. Having exhausted all available judicial remedies, Mr. Kayed began a hunger strike on 15 June 2016 in protest of his administrative detention.

On 11 August 2016, an Israeli District court ruled that Mr. Kayed, represented by PHRI, would not be granted a visit by an external independent physician and that he would remain shackled to his bed. In relation to the visit of an independent physician, the District Court stated the request was made in bad faith because Mr. Kayed had been seen to by an Israeli Prison Service doctor, doctors in Barzilay hospital and an ICRC representative. In relation to shackling, the District Court stated this was necessary as Mr Kayed may escape or be abducted, and that he posed a clear and concrete threat to state security. At the time of the District Court's decision, Mr. Kayed was in critical condition and he was experiencing numbness throughout the body, blurred vision, hair loss, and pain in the chest, kidney, jaw and eyes.

On 22 August 2016, the HCJ heard an appeal of this decision. The HCJ avoided adopting a principled position regarding shackling in such a situation as Mr. Kayed's. The HCJ rather stated that as the shackling situation for Mr. Kayed had been altered, with one limb freed, and as he had been moved to a different ward and his medical situation had changed, the matter should be decided anew by the District Court. In regard to obtaining a second medical opinion by an independent physician, the HCJ again chose to avoid making a principled decision. The HCJ rather stated that the medical records must first be provided before a decision is made, although they implied that there is little room for a second medical opinion in such circumstances by arguing that the medical journey and health consequences of hunger striking are well known.

The Israeli courts consistently refused to address arguments made by PHRI lawyers that Mr Kayed's treatment, in light of his deteriorating medical condition, amounted to inhuman and degrading treatment. Significant weight was put on security information which could not be disclosed and therefore challenged. In contrast, it appeared little relative consideration was given to whether or not such treatment violated fundamental human rights and medical ethics.

## Are measures which amount to punishment of hunger strikers allowed by international norms?

Mr. Kayed's shackling, like the recent treatment of hunger strikers in the mass hunger strike, indicate that political considerations are at play in preventing hunger strikes as a form of legitimate protest, and these practices operate in contravention of medical and humanitarian needs. During the recent mass hunger strike the Israeli Prison Service had taken various punitive actions against the hunger-strikers, including placing prisoners in solitary confinement and

preventing them from meeting with lawyers. These measures stand in direct contradiction of the 2016 Concluding Observations of the UN Committee Against Torture, which has called on Israel to "guarantee that persons deprived of liberty who engage in hunger strikes are never subjected to ill-treatment or punished for engaging in a hunger strike" (para. 27).

## Is there a new practice being developed by Israeli Courts to suspend administrative detention orders and, if so, is it problematic?

Whilst Israeli courts have the power to cancel orders of Administrative Detention, in the overwhelming, majority of cases the judicial authorities tend not to challenge the security reasoning proffered. In a few recent individual hunger strike cases, when detainees have reached a critical medical state in which they pose no danger, courts have 'suspended' administrative detention orders, most likely with the implicit support of the Israeli Security Agency and others, much as applies to other medical emergencies in Israeli law.

The Israeli courts have only resorted to the suspension of Administrative Detention when hunger strikers are facing death and their health has dramatically deteriorated. This intervention appears to be calibrated to allow Israeli courts the discretion to deal with the hunger strikers on a case by case basis without generally challenging Israel's overuse of the administration detention procedure.

Although a court order to suspend administrative detention allows for hunger-strikers to be admitted to hospital and provides time for the physical recovery of the detainee, once recovered, the detainee may technically be placed back under administrative detention in the future, as occurred with the high profile case of Mohammad Allam in 2015.

## What are other developments regarding Israeli policy on hunger strikers?

In September 2016, Israel's Ministry of Public Security and the Israel Prison Service announced a plan to create a separate hospital within the Ayalon prison in Ramleh. In announcing the plan, Israel's Public Security Minister, Gilad Erdan, expressed shock at the reality of the current situation, whereby *"The Israel Prison Service has no means of treating an inmate who goes on a hunger strike"*. It is unclear where the plan currently stands, however Erdan argued that, if the development of a hospital within the prison did go ahead, it would help 'counteract' those prisoners who "*try to receive early parole by going on hunger strikes*." PHRI have serious concerns that placing a hospital within the premises of a prison would harm the patient-doctor relationship, including the objective of gaining the trust of the hunger striker, the principle of clinical independence, as well as potentially enabling a range of activities that may contravene medical ethics and international law.

In relation to the just concluded 40 day mass hunger strike, there were unconfirmed reports in the Israeli media in early May 2017 that a directive had been issued to hospitals that requires physicians who refuse to force-treat hunger strikers to find doctors willing to replace them. Widespread reports in the Israeli media also suggested that the Israeli government was considering importing foreign doctors to force-feed, as the Israeli Medical Association had taken a firm stance against force-feeding. PHRI expressed it's concern about these actions to the World Medical Association, and requested that it instruct doctors worldwide not to cooperate with a call to travel to Israel to provide such treatment.

Bearing in mind the rising numbers of administrative detainees, it seemsthat Israel has no intention of addressing one of the key root causes of mass and individual hunger-strikes (the other root causes are not addressed in this Q&A). Rather, Israel concerningly appears intent on removing obstacles to potential force feeding of detainees which would be in apparent serious breach of international human rights law and relevant medical ethics guidelines.

---

LPHR and PHRI gives special thanks to Angelina Nicolaou, Alamara Bettum and Beth Jamal for their excellent work preparing this Q&A.

- Tareq Shrourou, Director of LPHR, contact@lphr.org.uk

- Dana Moss, International Advocacy Coordinator, PHRI, dana@phr.org.il