

PALESTINIAN PRISONERS IN ISRAELI JAILS:

THEIR **LEGAL STATUS** AND **THEIR RIGHTS**

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Introduction

The status of prisoners of war is a very complicated issue in international humanitarian law. Many people think - wrongly - that all of the Palestinian prisoners in Israeli jails are to be considered as prisoners of war. International humanitarian law, in particular the Third Geneva Convention of 1949 and its protocols, gives a very precise definition of "prisoner of war" which is not applicable to the majority of the Palestinians detained by the occupying power, Israel.

To understand this issue; we can divide the subject into two parts:

Reference to prison names and locations and the number of prisoners - male, female and children should be mentioned. We can refer here to Israel's violation of article 76 of Fourth Geneva Convention which states that "protected persons" accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.

I: Legal status of Palestinians prisoners in international humanitarian law

In this section we should analyse different issues to see who the prisoners of war are.

Who's considered as a "combatant" during an armed conflict?¹

We should analyse article 4 of the Third Geneva Convention and all the categories mentioned by the article to see upon whom the definition of "prisoner of war" could be applied in the case of Palestinian prisoners.

Article 4 of the Third Geneva Convention states:

"A. Prisoners of war... are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

¹ Manooher Mofidi and Amy E. Eckert, Unlawful combatants or Prisoners of War: The law and politics of Labels, 36 Cornell International Law Journal 59, 2003-2004, pp. 59-92

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own

territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

We can notice after detailed analysis that applying the definition given by Article 4 of the Third Geneva Convention on Prisoners of War, that ***the majority Palestinian prisoners cannot be considered as prisoners of war***. It might be that this definition might apply to any Palestinian captured in Gaza by the occupation power since Hamas won control of the territory in the 2006 election.

However, the First Protocol to the Geneva Convention, which was signed in 1977 and which is applicable to wars of national liberation, contains a wider definition of the terms “revolutionaries” and “prisoners of war”. *Under Article 43² and 44³ of the Protocol, some Palestinian detainees can be considered prisoners of war:*

² Art 43. Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

³ Art 44. Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the

We should bear in mind that Israel is not a signatory to the Protocol, which was signed by almost 150 countries around the world. This means that Article 43 might not be used in the case of Palestinian prisoners or it should be applied as part of customary rule as many authors suggested. Applying the definition given in Article 4 of the Fourth Geneva Convention⁴, the majority of Palestinian prisoners should be treated by the occupying forces under ***the rules applicable to the treatment of civilians in time of war:***

Art 4: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

We could also quote other articles applicable to civilians, such as 41, 42, 43, 68 and 78.

Doubtful prisoners of war status

It will be advisable to deal with article 5/2 of the Third Geneva Convention which states that "...Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4",

launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

⁴ Art. 4. " Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals...."

such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."⁵

Definition of civilian

As we argue that the majority of prisoners should be treated as civilians and thus should be protected by the Fourth Geneva Convention, the definition of "civilian" according to the Geneva Convention, in particular article 50 of the First additional protocol, will be very important to understand this issue and in particular the rights which the prisoner should enjoy⁶.

Unlawful combatant created by the judicial system of the occupying power

Israel passed the Incarceration of Unlawful Combatants Law in 2002. An "unlawful combatant" is defined by Israeli law as "a person who participated, whether directly or indirectly, in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel regarding whom the conditions stipulated in international humanitarian law for granting prisoner-of-war status do not apply."⁷

The definition of "unlawful combatant," stands in total contradiction to the rules of international humanitarian law. Combatants, as defined in Article 4 of the Third Geneva Convention, are legitimate targets, but if they are taken prisoner, their prisoner-of-war status grants them protection and rights. According to this convention, among other things, prisoners of war must not be punished⁸.

As we mentioned before, the Third Geneva Convention does not apply to a person who does not fall under the definition of "combatant"; rather, such a person is considered a "civilian" protected under the Fourth Geneva Convention⁹.

⁵ Yasmin Naqvi, Doubtful prisoners of war status, *International review of the Red Cross*, Vol 84, Number 847, pp. 571-595

⁶ Article 50 -- Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

⁷ Jason Callen, Unlawful Combatants and the Geneva Conventions, 44 *Virginia Journal of International Law*, 1025, 2003-2004, pp. 1025-1072

⁸ Thomas J. Bogar, Unlawful Combatant or innocent civilian? A call to change the current means for determining the status of prisoners in the global war on terror, 21 *Florida Journal of International Law* 92, 2009, pp. 29-92

⁹ W Thomas Mallison and Sally V. Mallison, The juridical status of irregular combatant under international humanitarian law of armed conflict, 9 *Case W. Res. Journal of International law*, 39 1977, pp. 39-78

Administrative detention of Palestinians

An overview of the military system (military order, military courts) which governs the Occupied Palestinian Territories would help to understand better this issue regarding administrative detention.

Article 78 of the Fourth Geneva Convention allows the occupation power to use administrative detention as a preventative measure in cases where a person poses an immediate danger to state security or public order; it should be used sparingly, and only when absolutely necessary for security. The legal sources for the standards for limiting the use of administrative detention in international humanitarian law can be found, among other places, in Article 75 of the First Protocol¹⁰, 42¹¹ and 78¹² of the Fourth Geneva Convention, considered as reflecting customary international law.

¹⁰ Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) murder;
- (ii) torture of all kinds, whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defense;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

Israel uses administrative detention extensively, detaining hundreds of Palestinian residents of the Territories every year. Many administrative detainees are held by Israel for long periods with no real evaluation of the reliability of the classified material used against them.

Administrative detention is not to be used as a means of punishment, but rather only as a step for preventing future danger; this is anchored in Israeli case law. An administrative detention order is illegal if issued for any other goal, even if that goal is security-related, and is certainly illegal if issued as an attempt to bear upon the detainee to **collaborate** or as punishment for his refusal to

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- (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
 - (e) anyone charged with an offence shall have the right to be tried in his presence;
 - (f) no one shall be compelled to testify against himself or to confess guilt;
 - (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
 - (i) anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and
 - (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

- (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
- (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

¹¹ ARTICLE 42

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

¹² ARTICLE 78

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.

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 shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

do so. International humanitarian law is also unequivocal regarding the question of collaboration, and views any such attempt as a grave violation of the Fourth Geneva Convention, articles 31, 51 and 147.

In sum, Israeli use of administrative detention is in contradiction with international humanitarian law. We could make reference to many cases from the military court relating to administrative detention. See various reports published by Israeli NGOs attached to this document¹³.

During our research we should refute the appellation made by Israel when they create another category of "Palestinian prisoners whose hands are stained with blood" (a term used by the Israeli government) and those whose hands are not. The occupying power has no right to make this appellation and the Fourth Geneva Convention does not distinguish between prisoners whose "hands are stained with blood" and those whose hands are not. As the author will find when studying the definition of combatant, the latter has the right to kill the enemy as long as they respect the Geneva Convention, which distinguishes between military targets and civilian targets.

As we explained earlier, there are two categories of prisoners. The first is the Palestinian prisoner of war; the second is the Palestinian prisoner of the occupying power who is considered to be a civilian. Now we are going to analyse the rights of prisoners and Israeli violations of their rights.

II. Israel's violation of Palestinian prisoners' rights

Under this second part the author could analyse the rights of Palestinians prisoners of war (Third Geneva Convention) and the rights of Palestinian prisoners under occupation considered as civilians (Fourth Geneva Convention) . At the same time as the author will recall these rights he should be able to provide examples of each violation of these rights by the occupation power, citing cases from the military courts or from NGOs' reports¹⁴.

¹³ http://www.btselem.org/publications/summaries/199706_prisoners_of_peace Prisoners of Peace: Administrative Detention During the Oslo Process, June 1997. http://www.btselem.org/download/200910_without_trial_eng.pdf Without Trial: Administrative Detention of Palestinians by Israel and the Internment of Unlawful Combatants Law, October 2009. Homoked Center for Defence of the individual, Annual report 2007 http://www.hamoked.org/items/13200_eng.pdf

¹⁴ http://www.dci-palestine.org/sites/default/files/un_sp_-_detention_-_west_bank_-_jan_2012.pdf : In their own Words: A report on the situation facing Palestinian children detained in the Israeli military court system Reporting period: 1 July to 31 December 2011 Submitted: 21 January 2012, Defense for Children International – Palestine Section. Cordula Droega, Transferred of detainees: Legal framework, non refoulement and contemporary challenges, International review of the Red Cross, Vol. 90, Number 871, Sept 2008, pp. 669-701

The rights of Palestinian prisoners of war

The Third Geneva Convention provides all the rights relating to Palestinian prisoners of war. We can mention the following articles as example: articles 13-14, human treatment without distinction between prisoners (Third Geneva Convention). Article 20 and 75 of first additional Protocol. Prisoners of war have the right not to be arrested arbitrarily, to have a fair trial in a fair

and neutral court to judge the prisoners identified in articles 82-108 of the Third Geneva Convention.

Palestinian prisoners' rights

Articles 27, 31-32, 33-34 of the Fourth Geneva Convention include the rights of prisoners not to be arrested arbitrarily, to have a fair trial, and to have a fair and neutral court to judge the prisoners as stated in Articles 64-79, 117 and 126 of the Fourth Geneva Convention.

Special rights of women and child prisoners

We can refer to articles 25¹⁵, 29¹⁶ and 108¹⁷, of the Third Geneva Convention. Articles 24¹⁸, 27¹⁹, 50²⁰ of the Fourth Geneva Convention. Articles 75/5²¹, 76²², 77²³, 78²⁴ of the first additional protocol²⁵.

¹⁵ Article 25: “ ...In any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them....”.

¹⁶ article 29: “...Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them....”.

¹⁷ Art 108.Sentences pronounced on prisoners of war after a conviction has become duly enforceable, shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

A woman prisoner of war on whom such a sentence has been pronounced shall be confined in separate quarters and shall be under the supervision of women.

¹⁸ Art.24. The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

¹⁹ Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

²⁰ Art. 50. The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it.

Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

A special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.

The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.

²¹ Article 75/5: ...” Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units...”.

²² Art 76. Protection of women

1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.

3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

²³ Art 77. Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

²⁴ Art 78. Evacuation of children

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country

Liberation of the prisoners

We can refer to different articles of the Third Geneva Convention, article 21, 109, and article 118²⁶, which stipulated that prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. Article 118 should have been applied after the occupying power pulled out of Gaza which Israel has never respected as many other rights.

We can propose some other measures such as an exchange of prisoners like the one which happened between Hamas and Israel as a means to release prisoners.

We can encourage the initiative made by different NGOs and the Arab League to solicit the General Assembly of the United Nations to request an advisory opinion from the International Court of Justice on the legal status of Palestinian prisoners.

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except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require...”

²⁵ Philip Veerman and Adir Waldman, “When can children and adolescents be detained separately from adults? The case of Palestinian children deprived of their liberty in Israeli military jails and prisons”, *The International Journal of Children Rights*, 4: 147-160, 1996.

Veerman, Philip; Waldman, Adir, *When Can Children and Adolescents Be Detained Separately from Adults*; 4 *Int'l J. Child. Rts.* 147 (1996)

²⁶ ARTICLE 118

Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.